Neutral Citation Number: [2017] EWHC 3374 (Comm)

Case No: CL-2013-000683

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 December 2017

Before:

THE HON. MR. JUSTICE PICKEN

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Between:

(1) KAZAKHSTAN KAGAZY PLC
(2) KAZAKHSTAN KAGAZY JSC
(3) PRIME ESTATE ACTIVITIES KAZAKHSTAN LLP
(4) PEAK AKZHAL LLP
(5) ~~PEAK AKSENGER LLP~~
(6) ASTANA-CONTRACT JSC
(7) PARAGON DEVELOPMENT LLP

Claimants

- and -

(1) BAGLAN ABDULLAYEVICH ZHUNUS (formerly BAGLAN ABDULLAYEVICH ZHUNUSSOV)
(2) MAKSAT ASKARULY ARIP
(3) SHYNAR DIKHANBAYEVA

Defendants

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Robert Howe QC, Jonathan Miller and **Daniel Saoul** (instructed by **Allen & Overy LLP**) for the **Claimants**

Andrew Twigger QC, Anna Dilnot and **Adam Woolnough** (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Defendants**

Hearing dates: 25, 26, 27 and 28 April, 2, 3, 8, 9, 10, 11, 15, 16, 17, 22, 23, 24, 25 and 26 May, 12, 13, 14, 15, 16, 19, 20, 26, 27, 28 and 29 June, 3, 4, 5, 6, 17, 18, 19 and 20 July 2017
Judgment supplied in draft to the parties: 11 December 2017

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Approved Judgment

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

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THE HON. MR. JUSTICE PICKEN:

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Introduction

1. This case has been very hard fought, culminating in a trial which spanned some thirteen weeks and which entailed written submissions (opening and closing) running, in total, to almost 1,100 pages (not including all the appendices). It involves very serious allegations of fraud made by the claimant corporate group against three of its former directors (two of whom were also previously substantial shareholders). The Claimants allege that the Defendants (I include in this description all three of the Defendants despite the fact that, as I shall come on to explain, the Claimants have settled with the First Defendant) have misappropriated company assets by way of several complex and elaborate frauds involving construction projects and land acquisitions, which have caused the Claimants to suffer losses of in excess of US$ 250 million. The Defendants strenuously deny these allegations, maintaining that they have at all times acted in good faith. The Defendants have also raised a limitation defence.

2. The dispute involves Kazakh parties (or in the case of one of the Claimants, KK Plc, an Isle of Man company operating in Kazakhstan), is concerned with events which took place in Kazakhstan and is subject to Kazakhstan law. Mr Andrew Twigger QC (leading Ms Anna Dilnot and Mr Adam Woolnough) drew attention to these aspects (as well as a timing point) during the course of his opening submissions, suggesting that the Court *"is being asked to travel to a distant time and place"* and, specifically, *"to look at a large number of complex transactions conducted many years ago in the unfamiliar environment of an emerging country"*. Memorably described by Mr Robert Howe QC (leading Mr Jonathan Miller and Mr Daniel Saoul) as the 'Star Wars' defence, this, Mr Twigger submitted, makes it necessary to adopt a cautious approach which avoids viewing transactions carried out in Kazakhstan prior to 2010 in the same way as commerce is conducted in London in 2017. I bear this point in mind when considering the evidence in this case, together with Mr Howe's inter-galactic inspired riposte (although whether acts before 2010 do properly qualify as *"a long time ago"* or whether Kazakhstan, or anywhere else, counts as *"a galaxy far, far away"* are not issues which, thankfully, I am required to resolve). What matters for present purposes is simply the point that the case, like so many which become before the Commercial Court, is truly international in nature; indeed, it is litigation which, in truth, has nothing to do with this jurisdiction other than the fact that it has been commenced here.

3. As is common with fraud cases, there was a substantial dispute as to the underlying facts. In addition, both sides levelled accusations of dishonesty against the other, including accusations of deliberate destruction/deletion of documents (alleged by both sides), and intimidation by way of threats of physical violence (again, alleged by both sides). There were, therefore, a great number of factual and evidential issues to be resolved. I shall in this judgment try to deal with the main points rather than every point since to do that would make the judgment even longer than it is. Similarly, although I confirm that I have considered every submission which has been made and have taken into account all the evidence which was deployed before me, in what follows my aim is not to address everything but to focus on what seems to me to matter

most and to seek to set out sufficient detail to enable the reader (including, most importantly, the parties) to see what I have decided and why I have decided it.

An outline of the Claimants' case

4. I start with an outline of the Claimants' case. Inevitably much of what follows is tendentious but it is important to give a flavour at the outset of what it is that is alleged by the Claimants in these proceedings. I shall come on to do something similar in relation to the case which the Defendants put forward in response to the Claimants' case.

5. The Claimant group of companies (the 'KK Group') is in the business of logistics, recycling, paper and packaging in Kazakhstan, and is, according to its website "*the largest paper packaging and recycling group in Kazakhstan and Central Asia*". The First Claimant ('KK Plc') is a company registered in the Isle of Man which was listed on the main board of the London Stock Exchange following an IPO which took place in July 2007. The Second Claimant ('KK JSC') is a Kazakh company ultimately owned by KK Plc. The Third to Seventh Claimants are Kazakh entities and subsidiaries of KK JSC, which I shall refer to as 'PEAK', 'Peak Akzhal', 'Peak Aksenger', 'Astana-Contract' and 'Paragon' respectively. Peak Aksenger's claim was discontinued on 15 April 2016, for the reasons which I shall come on to describe.

6. The Defendants are all former directors of the KK Group. Prior to this, the First Defendant, Mr Baglan Zhunus, and the Second Defendant, Mr Maksat Arip, had been close business associates. Between 1999 and 2000, they had worked together as directors of a telecommunications company in Kazakhstan called Spectrum LLP, before moving on to work as directors of KazTransCom, another telecommunications company, between 2000 and 2003. In 2003 Mr Zhunus and Mr Arip joined the KK Group, then owned by an organisation called Seimar Holdings which was looking to sell the business, Mr Zhunus becoming Chairman of KK JSC's Board (a position which he held between 2003 and July 2009) and Mr Arip becoming a director and KK JSC's Chief Executive Officer (between 2003 and April 2008). The following year, in 2004, Mr Zhunus and Mr Arip bought the KK Group, each acquiring a 50% shareholding in KK JSC through Kagazy Invest LLP, a holding company which Mr Zhunus and Mr Arip both owned. The year after that, in 2005, another of their companies, Holding Invest LLP, was introduced into the top of the structure. Subsequently, on 5 March 2007, Mr Zhunus became Chairman of the Board of KK Plc from the date when that company was incorporated, 5 March 2007, until April 2008. He was also indirectly the beneficial owner of 50% of the shares in KK Plc until its entry into the IPO to which I have referred in July 2007 and which involved KK Plc being introduced into the KK Group structure and Kagazy Invest and Holding Invest being removed from it.

7. After the IPO, which raised US$ 273.5 million, Mr Zhunus was then the owner of a 28.6% shareholding until September 2009, at which stage both he and Mr Arip (who was Chief Executive Officer of KK Plc from its incorporation until April 2008 and also an indirect beneficial owner of 50% of KK Plc's shares until the IPO and thereafter beneficial owner of a 23.9% shareholding until September 2009) sold their shares and left Kazakhstan for Dubai, along with the

Third Defendant, Ms Shynar Dikhanbayeva, who had started with KK JSC as its Finance Director from the time when the company was incorporated in 2001 and who had become a Board member in April 2008 and then acting Chairman from around 5 September 2008.

8. In Dubai, Mr Zhunus, Mr Arip and Ms Dikhanbayeva worked on what was referred to internally, during their time in the KK Group, as "the oil business" and involved another Isle of Man company known as Exillon Energy Plc ('Exillon'), owned in the main by Mr Zhunus and Mr Arip until October 2009, but which had previously operated through a Kazakh business called Caspian Minerals. This "oil business" was concerned with the exploitation of oil assets in Siberia. Mr Arip served as Exillon's Chairman from 17 November 2009 until April 2011, with Ms Dikhanbayeva working for the company in a senior role under not only Mr Arip but also a Mr Alessandro Manghi, a previous Chairman of KK Plc and by this stage Exillon's CEO, a position which he held until his resignation in April 2011 when Mr Arip also resigned as Chairman.

9. The circumstances in which Mr Zhunus and Mr Arip came to leave the KK Group were that in June 2009 Mr Arip contacted Mr Tomas Werner, suggesting that he might like to acquire an ownership interest in KK Plc. Mr Werner was a businessman based in London who had previously dealt with both Mr Zhunus and Mr Arip when he worked for HSBC as a private banker. Indeed, Mr Arip was one of his clients in that role both at HSBC and after he left HSBC to set up his own wealth management firm, Werner Capital, in April 2008. Specifically, at a meeting in London, Mr Arip provided Mr Werner with a copy of KK Plc's IPO Prospectus together with audited accounts prepared by BDO for the period ending 31 December 2008, explaining that the KK Group needed to restructure its debt, having run into financial trouble as a result of the global financial crisis, and that he and Mr Zhunus wished to concentrate on their oil business rather than take responsibility for the restructuring required. Mr Werner was interested and so the following month visited Kazakhstan. The month after that, in August 2009, Mr Arip introduced Mr Werner to Mr Vladimir Gerasimov, somebody whom Mr Arip had in mind might work with Mr Werner as his 'local partner' dealing with operational matters whilst Mr Werner would focus on the KK Group's financial needs. Mr Werner decided to go ahead later the same month, with Mr Werner ultimately purchasing not Mr Arip's shareholding in KK Plc (as he had originally thought would happen) but the shareholding which Mr Zhunus held. So it was that on 2 September 2009 Mr Werner's acquisition vehicle, Theta Investment Holdings Limited, agreed to pay a minimum of US$ 2.5 million in consideration for Mr Zhunus's shareholding, and Mr Gerasimov acquired Mr Arip's interest through another corporate vehicle.

10. Having made the purchase, Mr Werner arrived in Kazakhstan very shortly afterwards. Mr Arip had by this time already left and Mr Manghi, then serving as KK Plc's Chairman (as well as Head of Investor Relations) indicated that he, too, planned on leaving to work in Dubai on the venture involving Exillon along with other KK Group personnel (including KK Plc's Legal Director and other senior employees). Mr Werner decided that he needed help and so appointed SP Angel to assist him in what needed to be done. SP Angel started the following

month, in October 2009, by which time the KK Group was facing a number of pressing financial problems. These included falling cash levels which resulted in defaults on loans and threats by lenders to enforce against the KK Group's assets. In late October 2009, Mr Werner and SP Angel decided to instruct PwC to produce a report *"to understand the flow of funds expended on investments in land, machinery and company acquisitions…"*. PwC reported back on 3 December 2009, identifying three categories of *"questionable transactions"*, noting in particular: that significant sums had been spent on developing the Aksenger Industrial Park and Akzhal Logistics Park, a significant portion of these costs lacked detailed supporting documents, creating a risk that some of the funds could have been misused or not spent effectively; that the general contractor, Arka-Stroy, had a common director (Mr Bek Esimbekov, sometimes referred to as Mr Bek Yesimbekov) with PEAK which was commissioning the work; that the Astana Contract Group had been acquired by the KK Group for substantially more than its book value; and that land had been bought for substantial sums from companies connected to the prior management. These are matters which I shall have to explore in some detail later when addressing the question of time-bar, specifically as to what Mr Werner should be taken as having found out when he received this report.

11. Meanwhile, Mr Werner and SP Angel carried on trying to deal with the financial problems which were besetting the KK Group, whilst also trying to run the operational business. These efforts were made all the harder because Mr Gerasimov suddenly wished to dispose of his shareholding. He did so through SP Angel acquiring his shareholding as a stopgap in November 2009. In any event, work continued apace to steady the KK Group's finances. This proved a lengthy and challenging process. Over three years of negotiations, from December 2009 until December 2012, the KK Group was able to finalise the restructuring of all of its issued bonds and most of its loans. In conjunction with this, after declaring losses of US$ 250 million in 2009 and US$ 50 million in 2010, the KK Group made a small profit of US$ 2 million in 2011.

12. Subsequently, the Claimants maintain, in 2012, and not before, concerns about the past activities of the Defendants developed. Specifically, a shareholder in the KK Group, called Phoenicia Capital LLC (which had invested in 2011 and was owned by an American, Mr John Khabbaz) was considering commencing derivative proceedings against Mr Arip and others in New York in relation to what Mr Khabbaz considered to be their fraudulent conduct. Mr Werner took legal advice and was told, he says, that there was insufficient evidence of fraud to sustain a claim. In September 2012 Phoenicia issued derivative proceedings against Mr Zhunus and Mr Arip in New York, advancing a claim which is broadly based on what in these proceedings has been described as the 'PEAK Claim', although without the same focus as that claim in these proceedings has on the role played by Arka-Stroy. In response to certain motions to dismiss, Phoenicia's claim was withdrawn in mid-2013.

13. Throughout this period, again the Claimants maintain, their own investigations continued. Those investigations were made more challenging by what the Claimants say was a lack of relevant documentation and attempts at concealment by the Defendants in conjunction with certain KK Group

employees who had remained behind in Kazakhstan after others had left for Dubai. In late 2012, Mr Werner and his relatively new colleague, Ms Viktoriya Gorobtsova, discussed discreetly engaging a construction firm to investigate the nature of the works done at the sites known as Akzhal-1, Akzhal-2 and Aksenger (related to what is now described as the 'PEAK Claim'). Ms Gorobtsova knew Mr Gafurov, who with his father ran a construction company with suitable experience. Mr Gafurov and his father visited the three sites in December 2012, and Mr Gafurov returned in January 2013 to carry out a more detailed review and analyse relevant paperwork. At the end of January 2013 Mr Gafurov produced a report, which he discussed with Mr Werner, concluding that the amounts paid for the work at Akzhal-1 appeared inflated, with little or no work at all having been completed at Akzhal-2 and Aksenger. Contemporaneous documents purporting to certify certain works (the 'Acts of Acceptance') appeared to be seriously inaccurate, recording, for example, earthworks of a scale of which there was no evidence and which it was highly improbable had been carried out. Mr Gafurov's report also noted the consistent involvement of Arka-Stroy as general contractor. His view was that it seemed likely that a fraud had taken place.

14. At this point, the Claimants insist, Arka-Stroy's role and relationship to the Defendants remained unknown. Their position is that this was only discovered when, after Mr Gafurov had delivered his findings, Ms Gorobtsova approached Mr Kuzmenko, the KK Group's Head of IT, for his assistance in searching for any information related to Arka-Stroy. Mr Kuzmenko thought that Arka-Stroy's accounting (or 1C) database might have been backed up on to the KK Group's computer servers. He enlisted another IT department employee, Mr Rasul Khasanov, to assist in the search which resulted in the discovery of Arka-Stroy's 1C database on the KK Group's systems, effectively containing its accounting history. Other databases of entities owned or controlled by the Defendants, and implicated in the frauds as set out further below, were also discovered. Mr Khasanov then helped to extract relevant data from the Arka-Stroy database, preparing a list of significant transactions which Arka-Stroy had been involved in. This quickly revealed that it had engaged in numerous payments to entities which Mr Kuzmenko and Mr Khasanov knew had been managed by Ms Dikhanbayeva.

15. As a result, as at March 2013, the Claimants say, but not before, they had critical evidence that Arka-Stroy had been very substantially overpaid for the work it had done and also that the Defendants had, through Arka-Stroy, received the benefits of those overpayments. A few months later, the Claimants issued these proceedings and, as I shall come on to explain in a moment, obtained a worldwide freezing injunction which remains in place. The Claim Form was issued on 2 August 2013. This, and the Particulars of Claim, were subsequently amended on a number of occasions. At the time of trial, the Claimants' claims related to three alleged fraudulent schemes. The first of the frauds alleged by the Claimants - the PEAK Claim - entails the case that, between 2005 and 2009, the Defendants dishonestly caused KK JSC, PEAK and Peak Akzhal to make payments in the total net amount of US$ 109.1 million (I should say that the parties used various US Dollar amounts to indicate the size of the payments which were made in Tenge/KZT and I have adopted these but almost certainly

there is an inconsistency in exchange rates used and so the US Dollar figures are to be regarded as approximate) to a purportedly independent construction company, Arka-Stroy LLP ('Arka-Stroy'), for the development of a logistics centre and industrial park on three sites in Kazakhstan (referred to as Akzhal-1, Akzhal-2, and Aksenger). It is alleged that only a minimal amount of construction work was actually done, that Arka-Stroy was secretly controlled by the Defendants and that a total net amount of around US$ 52.9 million was paid on to 16 entities associated with the Defendants. The Claimants say that all the monies paid to Arka-Stroy (the entire US$ 109.1 million) have been misappropriated and/or constitute a loss suffered by the Claimants as a result of breaches of duty by the Defendants. In the alternative, if the Claimants are required to give credit for the limited amount of construction work done by or on behalf of Arka-Stroy, the Claimants say that the quantum of such credit should be no more than between US$ 6.5 million and US$ 16.4 million, so giving a net loss of between US$ 92.7 million and US$ 102.6 million. The Claimants further allege that, as a result of these losses, KK JSC, PEAK and Peak Akzhal have been unable to repay the commercial borrowing which was the original source of the misappropriated funds, and have therefore become liable to their banks and bondholders for interest, default interest and penalties in the sum of around US$ 78 million, which is claimed as damages.

16. The second of the frauds alleged by the Claimants - the Astana 2 Claim – entails the allegation that, in 2008 and 2009, the Defendants committed a similar fraud (Mr Howe described it as a *"re-run of the PEAK Fraud on a slightly smaller scale"*) involving payments purportedly made by Astana Contract for construction work in relation to a project to build a logistics centre with Class A warehouses outside Astana (the capital of Kazakhstan, some 600 miles from Almaty). This breaks down into three parts. First, Astana-Contract paid GS Construction LLP ('GS'), purportedly an independent contractor but, the Claimants allege, in fact, connected with the Defendants, US$ 18.6 million, of which GS returned US$ 11.9 million, giving a net payment to GS of US$ 6.72 million with GS carrying out only minimal works in exchange. Secondly, Astana-Contract paid TransEnergoServiceStroy ('TESS') US$ 4.45 million to design a transport and logistics centre, which it did not do, instead sub-sub-contracting the work for a fraction (just over 10%) of the price it received from Astana-Contract, giving a net amount extracted, so the Claimants allege, from the Claimants of approximately US$ 3.9 million. Thirdly and lastly, the Claimants say that Astana-Contract paid NSA Contract LLP ('NSA') US$ 11.014 million for the delivery of goods which were never supplied, NSA returning US$ 750,000 of this to Astana-Contract but paying the majority of the remainder (US$ 9.72 million) to another entity allegedly connected with the Defendants, Ada-Trade LLP ('Ada-Trade'), which shared a director with Arka-Stroy. The Claimants say that Ada-Trade then channelled back (directly and indirectly) just under US$ 7.5 million of this to KK JSC, and paid on approximately US$ 2.17 million to Holding Invest, which it is common ground was Mr Zhunus's and Mr Arip's entity. The net loss on this element of the fraud was, therefore, so it is alleged, US$ 2.83 million. The Claimants' Astana 2 Claim, therefore, entails a claim, in total, for a loss of US$ 13.45 million. In addition, as with the PEAK Claim, the Claimants allege that, as a result of these losses, Astana-Contract and Paragon have become liable for interest, default

interest and penalties in the sum of around US$ 10 million, which is claimed as damages.

17. A third claim – the Land Plots Claim – was added by amendment in 2015 and involves the allegation that the Defendants used nominee companies to acquire land plots cheaply from farmers in Kazakhstan which were then re-sold to KK JSC, ostensibly for development, at highly inflated prices. Specifically, the Claimants say that, at the instigation of the Defendants, KK JSC paid out a net total of US$ 52.097 million to three entities associated with the Defendants (Commerce Business Centre or 'CBC', Bolzhal and Holding Invest), purportedly in payment for the purchase of fourteen land plots. These three entities then paid on US$ 44.29 million to seven further entities associated with the Defendants, each of which was also a recipient of money in the context of the PEAK Claim. There are no records as to what happened to this money, but it is the Claimants' case that the entire amount paid by KK JSC to the three entities connected with the Defendants, US$ 52.097 million, has been misappropriated, on the basis that there was no sound commercial reason for the purchase of the land plots. In the alternative, in the event that KK JSC is required to give credit for the limited value of the land plots which it acquired, the Claimants' case is that they are, in any case, entitled to the difference between the amounts which KK JSC paid out purportedly in payment for purchase of the land plots, and the price at which the land was originally bought from the farmers at the Defendants' initiative.

18. It is the Claimants' position that there are a number of significant similarities and telling overlaps between these three claims, including: the use of what Mr Howe described as 'Connected Entities', a number of which appear in two or indeed all three of the claims, used as 'funnels' to siphon off substantial sums of money from the KK Group; the use of relatives, employees or other people known to the Defendants to act as nominal directors or shareholders of the 'Connected Entities' as a device to obscure the connections between those entities and the Defendants; the existence of elaborate webs of payments into the KK Group, out of the KK Group and between the 'Connected Entities' for which there is no proper or innocent explanation; and a lack of proper documentation to sit behind (and explain or justify) the various payments. Mr Howe suggested that, although each of the three claims can be considered independently of the others, *"the crossover and cross-fertilisation and the common features of all three of them provides a further powerful evidential demonstration that the defendants are indeed involved in all three of them"*.

19. Lastly and by way of completeness, I should add, before coming on to deal with the defences which have been raised, that previously Peak Aksenger advanced a claim which was referred to as 'the Astana 1 claim'. In essence, this claim entailed the allegation that the Defendants caused Peak Aksenger to purchase Astana-Contract and its subsidiaries for some US$ 39.3 million more than they were worth; this was said to be a preparatory step to the Astana 2 aspect. HHJ Mackie QC decided that there was no good arguable case in relation to the Astana 1 claim ([2013] EWHC 3618), and it was discontinued in April 2016. As a result, Peak Aksenger is no longer a claimant in these proceedings.

An outline of the defences raised

20. Mr Zhunus served his Defence on 27 January 2014. In summary, he asserted that his role in the KK Group was essentially a non-executive and not a managerial one, that he was not responsible for the relevant transactions, that he at all times acted honestly and in what he believed to be the best interests of the KK Group, and that he did not receive any illicit payments. Mr Arip and Ms Dikhanbayeva served a joint Defence on 6 February 2015. In summary, they largely admitted that they were involved in the decisions to enter into the relevant transactions but asserted that those were commercial decisions taken in what was perceived to be the best interests of the KK Group at the time and not in furtherance of any fraudulent scheme. They denied that there was any fraud or that they personally benefited from the transactions.

21. This denial was maintained before me at trial. Specifically, Mr Arip and Ms Dikhanbayeva pointed to the fact that the Claimants' case in relation to the alleged PEAK Claim is that *all* sums paid to Arka-Stroy (less only those sums which can be shown to have been returned to the KK Group) were misappropriated by the Defendants, the contention, therefore, being that a total of US$ 109.1 million is due. Mr Twigger highlighted, however, that the Claimants do not allege how US$ 49.1 million of this total sum is supposed to have been misappropriated by the Defendants. The submission is made that it can be demonstrated that Arka-Stroy paid monies to a wide variety of entities in respect of whom there is no pleaded case of any connection with Mr Arip and Ms Dikhanbayeva. Accordingly, Mr Twigger suggested, there is simply no case to answer in respect of this US$ 49.1 million. As to the balance, Mr Arip and Ms Dikhanbayeva pointed out that US$ 37 million was paid to eleven entities which, on the Claimants' case, were connected with the Defendants and that US$ 23 million was paid to five other entities also alleged to be *"related to or associated with the First and Second Defendants"*. As to the US$ 37 million, Mr Arip and Ms Dikhanbayeva question how the Court is in any position to make findings about net figures, many of which result from a large number of debits and credits between Arka-Stroy and the various entities. Mr Twigger also highlighted how, in relation to many of the payments made by Arka-Stroy to the eleven entities alleged to have been connected to the Defendants, it has been possible to see what the entity has then done with the money and in many cases it can be seen that the money was used for a legitimate purpose. In relation to the US$ 23 million paid to the other five entities, Mr Twigger submitted that there is no evidence that these entities have any connection with Mr Arip and Ms Dikhanbayeva whatsoever. It is equally unclear, Mr Twigger suggested, how the Claimants say (if they say) that the relevant monies paid for the land plots which are the subject of the Land Plots Claim found their way to Mr Arip and Ms Dikhanbayeva in circumstances where it is possible to identify the entities to which CBC and Bolzhal (the companies from whom KK JSC purchased the land plots) paid the money received.

22. Similarly, Mr Twigger contended, the Astana 2 Claim is without merit given that Mr Arip and Ms Dikhanbayeva (and Mr Zhunus) were not directors of Astana-Contract or Paragon at the relevant time and did not cause either of these companies to enter into the relevant contracts. Furthermore, he suggested, there

is no evidence that the contractors to whom Astana-Contract made payments had any connection with the Defendants, nor that any of the payments found their way to Mr Arip or Ms Dikhanbayeva. Moreover, Mr Twigger emphasised, whereas Mr Arip's and Ms Dikhanbayeva's quantity surveying expert's conclusion was that substantial work was carried out at the site in Astana, the Claimants' equivalent expert had been instructed not to consider this claim at all. Mr Twigger submitted that, in such circumstances, the case that *"such works as were done were minimal and only preparatory"* is not tenable.

23. A further defence, that of time-bar, has also been raised by Mr Arip and Ms Dikhanbayeva. This involves the contention that the claims brought by the Claimants are all time-barred under the law of Kazakhstan, which has a three-year limitation period. Specifically, Mr Arip and Ms Dikhanbayeva allege that the claims are time-barred on the basis that the Claimants were aware or ought to have become aware of the material facts more than three years before this action was commenced. Mr Arip's and Ms Dikhanbayeva's position is that Mr Werner has pretended that he had insufficient awareness of the Claimants' claims until the discovery of the Arka-Stroy 1C database in 2013 and that the true position is that Mr Werner knew about all of the necessary elements of the claims at a much earlier stage. Mr Arip and Ms Dikhanbayeva rely, in particular, upon the report produced in December 2009 by PwC Russia, contending that, combined with other information available to Mr Werner, this would have enabled the Claimants to launch the Claims much earlier than they did and well before the expiry of the applicable three-year time-bar. Mr Arip and Ms Dikhanbayeva suggest that the reason why the Claimants did not pursue the allegations which they now make was because they were concerned about the impact this would have on their attempts to restructure the KK Group.

Procedural history

24. I have mentioned previously that this case has been hard fought. Consistent with this, there has been a considerable amount of interlocutory skirmishing in this case, both at first instance and before the Court of Appeal. It is necessary to set out a brief summary of some of the procedural events in these proceedings to date because I refer to these events later in this judgment.

25. Things started on 2 August 2013, when HHJ Mackie QC granted a worldwide freezing injunction in the sum of £100 million in favour of the Claimants against Mr Zhunus and Mr Arip and in support of the Claimants' fraud claims against them. On the same day, the Claim Form was issued and permission was given to serve Mr Arip and Ms Dikhanbayeva out of the jurisdiction. On 13 August 2013, Particulars of Claim were served. The following month, on 2 September 2013, Mr Arip applied to set aside the injunction on the grounds of material non-disclosure and no good arguable case on the merits in two respects, first because the claims of all the Claimants except KK Plc were time-barred, second because one particular fraud claim known as 'Astana 1' did not have sufficient merit and third, because the First Claimant's loss on its claim was merely reflective of that suffered by the other Claimants. Those applications were heard over three days following which HHJ Mackie QC delivered a lengthy reserved judgment. He held that the Claimants (other than KK Plc, for which the application of the reflective loss principle prevented its case from being a good

arguable one) had a good arguable case, which was not prevented from being so due to limitation (i.e. that they were not time-barred) but that there was no good arguable case to support the Astana 1 Claim. He also held that there was no material non-disclosure or, if there was any at all, it was not such as to lead to a discharge of the Injunction. He therefore continued the injunction in the reduced sum of £72 million (i.e. excluding the sums claimed in Astana 1). Both sides appealed and in a judgment given by the Court of Appeal on 2 April 2014, Mr Arip's appeal and KK Plc's cross-appeal (on reflective loss) were both dismissed.

26. Subsequently, all three of the Defendants sought summary dismissal of the claims under Part 24 on the basis that there was no real prospect of the Claimants avoiding being time-barred under Kazakh law. In the alternative, they sought the discharge of the Injunction on the basis that there is no good arguable case that the Claims are not time-barred and/or because of deliberate and material non-disclosure. They relied on a number of documents disclosed to them by SP Angel in support of these applications. These applications were dismissed by HHJ Waksman QC for the reasons set out in a judgment dated 27 October 2015. A few months after this, the Claimants settled their claim against Mr Zhunus in February 2016 with the consequence that the claim against him has been stayed. The remaining Defendants subsequently issued a Contribution Notice against Mr Zhunus. Mr Arip also applied for a worldwide freezing injunction against Mr Zhunus. Leggatt J refused to give permission to bring a claim for contribution, and also refused to grant a freezing injunction. However, his decision was overturned by the Court of Appeal, which granted permission to file and serve a contribution notice ([2016] EWCA Civ 1036). Subsequently, on 17 February 2017, I directed that for all purposes connected with the Contribution Notice, Mr Zhunus would be bound by all findings made by the Court based on the evidence heard at the trial. Mr Zhunus was not represented at trial, nor did he participate in the trial any other way.

Factual witnesses

27. It is appropriate at this stage to give my impressions regarding the factual witnesses who gave evidence before me. There were many such witnesses: seven on behalf of the Claimants, and no fewer than eleven on behalf of the Defendants, including Mr Arip and Ms Dikhanbayeva themselves. This was in addition to the expert evidence which was given by a further ten witnesses. Counsel for both the Claimants and Mr Arip and Ms Dikhanbayeva each made criticisms of certain witnesses, Mr Howe for the Claimants labelling Mr Arip and Ms Dikhanbayeva and each of the factual witnesses whom they called as *"wholly unreliable"* and (with the single exception of a Mr Kosarev, who was very elderly) *"demonstrably dishonest"*. Mr Howe submitted, quite bluntly, that Mr Arip and Ms Dikhanbayeva simply lied in the evidence which they gave in order to cover up the frauds of which they were accused. For his part, Mr Twigger for Mr Arip and Ms Dikhanbayeva accused Mr Tomas Werner, the Claimants' principal witness and the driving force behind the Claimant, of fabricating evidence, specifically in relation to the extent to which he knew about the Defendants' activities at given times. I shall need to consider these submissions in some considerable detail, particularly the criticisms which have

been levelled at Mr Werner, Mr Arip and Ms Dikhanbayeva in view of the importance of each of these people's credibility to the outcome of these proceedings. This section is, for that reason, somewhat longer than might normally be the case.

The Claimants' factual witnesses

28. I start with the Claimants' witnesses. In the order in which they were called, these were: Hugh McGregor, Tomas Werner, Viktoriya Gorobtsova, Yevgeniy Kuzmenko, Karim Khashimov, Berik Nagashibaev and Ilkham Gafurov (who gave his evidence via video link). I start with Mr Werner rather than Mr McGregor but shall otherwise deal with the witnesses in this order. Before coming on to consider Mr Arip's and Ms Dikhanbayeva's witnesses, I shall then consider Mr Twigger's submissions concerning certain witnesses who were not called by the Claimants.

Mr Tomas Werner

29. As I have previously explained, Mr Werner has, since late 2009, been a shareholder in, and CEO of, KK Plc and also CEO of KK JSC. Mr Twigger, quite accurately, described him as the driving force behind these proceedings. He, correctly, also characterised Mr Werner's evidence as being of central importance to the issues regarding limitation since his evidence before me addressed primarily his relationship with the Defendants (in particular, Mr Arip) and the discovery of the (alleged) frauds (albeit in addition to what might be described as the architecture of the PEAK and Astana 2 Claims). Mr Werner's evidence principally went to the issue of limitation.

30. Mr Werner stands most to benefit from the present claims succeeding since, not only does he currently own around 30% of the shares in KK Plc, but he also stands to receive 5% of the net proceeds of this litigation under certain success fee arrangements which he (together with Mr McGregor and Ms Gorobtsova) have entered into. Even on a conservative estimate and taking the calculations set out in Mr Howe's written closing submissions, this is likely in Mr Werner's case to amount to something in the region of US$ 3.5 million. Mr Twigger's submission is that, given this incentivisation, the evidence which Mr Werner gave should be treated with some circumspection. I agree with Mr Twigger about this. It does not follow, however, that Mr Werner should necessarily be regarded as somebody who would be prepared to give evidence which he knew to be false. On the contrary, in circumstances where Mr Werner, Mr McGregor and Ms Gorobtsova would inevitably have found themselves giving evidence in any event, given their continuing roles within the KK Group, it would hardly be right to view the only reason why they gave evidence at trial as being their hope that they will be paid the success fees to which victory would entitle them.

31. Mr Twigger went on to suggest that the fact that, as he put it, Mr Werner was incentivised by the success fee agreement into which he has entered ought to lead the Court to conclude that he is willing to do whatever it takes to help the Claimants succeed in these proceedings, including by giving evidence which is unreliable at best. Again, I cannot accept that this necessarily follows, however. Mr Werner insisted that "*doing the right thing*" is his motivation for bringing

(through the Claimants) this claim, and I accept Mr Werner's evidence about this: I reject the suggestion that Mr Werner was willing to mislead the Court because he stood to benefit from the success fee. It seems to me that, ultimately, I must make an assessment of the evidence given by Mr Werner (and by Mr McGregor and Ms Gorobtsova) which takes into account a range of matters not limited to the fact that a success fee is potentially payable.

32. In short, when evaluating the evidence given by Mr Werner (and every other witness, including the witnesses called by Mr Arip and Ms Dikhanbayeva), I must have regard to the contemporary documents and to what were described by Robert Goff LJ (as he then was) in ***The 'Ocean Frost'*** [1985] 1 Lloyd's Rep. 1 as *"the overall probabilities"* in the following passage of his judgment at page 57:

"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

Subsequently, Lord Goff (as he had by then become) endorsed this approach in ***Grace Shipping v. Sharp & Co*** [1987] 1 Lloyd's Law Rep. 207 at pages 215-6:

"And it is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities."

Lord Goff went on to remark that:

"That observation is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence."

In evaluating Mr Werner's evidence (and, indeed, the evidence given by all the other witnesses, including Mr Arip's and Ms Dikhanbayeva's witnesses), this is the approach which I have adopted.

33. It is right, however, also to have regard to other matters, not only matters which bear on the question of motivation such as (at least potentially) the success fee issue. First, Mr Twigger submitted that Werner became a shareholder of KK Plc knowing that it was in severe financial difficulty but thinking that it would somehow 'turn to gold' and that he would make his fortune. Mr Twigger

suggested that Mr Werner went to considerable lengths to cling on to that dream, including paying sums which the KK Group could ill afford in order to buy out SP Angel for US$ 750,000 and subsequently Mr Khabbaz, for around US$ 8 million. The realisation, Mr Twigger suggested, that the dream would never come true has left Mr Werner with a sense of considerable resentment towards Mr Arip. I consider that there is some force in this suggestion.

34. Secondly, Mr Twigger highlighted the manner in which evidence came to be given. It was Mr Twigger's submission that Mr Werner displayed an untrustworthiness and evasiveness, specifically, so Mr Twigger suggested, in often laughing or smiling when answering questions about serious matters to which he failed to give convincing answers, and in adopting an argumentative approach when being asked reasonable questions during the course of cross-examination. I am not persuaded by Mr Twigger's criticism in these respects. There is, of course, a danger in placing too much reliance on, for example, demeanour since different people react differently to the task of giving evidence in court. It was certainly clear to me that Mr Werner was very much alive to the need to ensure that the evidence which he gave did not harm the Claimants' case on limitation and that he understood the importance of his own evidence in this regard. He was, at times, indeed, seemingly reluctant to give straightforward answers to questions put to him. As a result, at times he appeared somewhat cagey and there were certainly inconsistencies between what he was prepared to admit that he knew at particular times and what the documentary evidence suggested that he knew. Some of these contradictions may be ascribed to misremembering caused by the natural passage of time since it is obviously not always easy to recall after the event what was known at a particular point in the past. Another possibility, however, is that Mr Werner set out to mislead the Court. Although I am not persuaded that this is what he set out to do, I am nonetheless clear that, because of the importance of this case for Mr Werner and perhaps because also of a desire to avoid criticism concerning his previous actions, Mr Werner was determined in his evidence to say nothing which might be used as indicating that he knew more than he was at trial prepared to admit. This is not quite the same thing as setting out to give evidence which was untruthful, although I recognise that adopting such an approach was not what a witness in Mr Werner's position ought to be doing. However, I reject Mr Twigger's suggestion that, as he put it, as an *"attempt to salvage some part of his ambitions"*, Mr Werner sought to fabricate evidence which he gave before the Court – at least when he came to give evidence at trial. I am very clear nonetheless that it is important that I should not accept what Mr Werner had to say in evidence without adopting considerable care to evaluate its reliability by reference to the contemporaneous documents or inherent probability.

35. Mr Twigger relied on several examples of what he suggested amounted to Mr Werner engaging in fabrication at the pre-trial stage, specifically when seeking injunctive relief at the outset of these proceedings. He pointed out, for example, that Mr Werner's first affidavit contained a fabricated account of how the Arka-Stroy 1C database came to be discovered. Specifically, Mr Werner claimed in paragraph 63 of this affidavit that he had approached somebody, whom he described as 'X' but which was a reference to Mr Kuzmenko, in late February or early March 2013, and that after he had given assurances to X/Mr Kuzmenko

about his future, X/Mr Kuzmenko told him that Mr Werner ought to dismiss 'Y' (a reference to Mr Khasanov). During cross-examination, Mr Werner conceded that he himself had had no such conversation with Mr Kuzmenko at all and that it was Ms Gorobtsova who had had the conversation and who had given the relevant assurances to Mr Kuzmenko. His explanation was that he wanted to protect Ms Gorobtsova and so did not wish to identify her as the person who had had the conversation which he described in paragraph 63. Although Mr Twigger was understandably critical of this as an excuse, not least because it would have been open to Mr Werner to have protected Ms Gorobtstova by describing her with another letter (almost certainly as Z), I am not persuaded that this is, in and of itself, a reason to conclude that Mr Werner is a witness in whom the Court can have no confidence. It is unlikely that it will ever be justifiable to give evidence, whether orally or in a witness statement or affidavit, which is knowingly misleading. In my view, there was no justification in the present context, but I nonetheless accept that Mr Werner's explanation was genuine. In short, whilst I agree with Mr Twigger that this incident should make me cautious in accepting everything which Mr Werner had to say at face value, it would be a mistake to treat Mr Werner as a witness who is inherently unreliable.

36. I am not swayed from this view by the second 1C database example relied upon by Mr Twigger. This concerns the next two paragraphs of Mr Werner's first affidavit, paragraphs 64 and 65, in which Mr Werner described, after the exchange with Mr Kuzmenko (as is now known, Ms Gorobtsova's exchange rather than Mr Werner's) calling Mr Khasanov into a meeting and telling him that he knew that he had been co-operating with the former shareholders and giving him an ultimatum to take sides with the KK Group or leave (paragraph 64), and how subsequently, on 4 March 2013, Mr Khasanov provided *him* (Mr Werner) with copies of relevant 1C databases (paragraph 65). Mr Twigger's position was that this is evidence which can be shown to be wrong in a number of respects. First, Mr Twigger made the point that Mr Khasanov's evidence at trial was inconsistent with Mr Werner co-opting Mr Khasanov as he stated in paragraph 64 of his first affidavit since, on the contrary, it was Mr Kuzmenko who had first approached Mr Khasanov to assist in looking for the Arka-Stroy 1C database, which he managed to find in just a few minutes. Secondly, as Mr Twigger pointed out, both Mr Kuzmenko and Mr Khasanov confirmed in evidence that, by the time that the relevant meeting between Mr Werner and Mr Khasanov took place, at the Esentai Tower on 18 March 2013, Mr Khasanov had already found and provided the Arka-Stroy 1C database to Mr Werner. Thirdly, when asked about paragraph 65 by Mr Twigger, Mr Werner gave evidence that he himself did not receive the 1C databases, suggesting that when he used the word *"I"* in his written evidence he should not be taken as meaning him as opposed to the KK Group. Mr Twigger submitted that this again demonstrated a willingness on the part of Mr Werner to give evidence which he knew to be untrue, specifically in this instance evidence which, deployed in support of an injunction application, would give the impression that he had needed to exert pressure on KK Group employees before they would co-operate in searching for the Arka-Stroy 1C database, so suggesting that it was not readily discoverable. I agree with Mr Twigger that, in the circumstances, a cautious approach needs to be adopted to the evidence which Mr Werner gave.

37. This brings me on, however, to another submission which was made by Mr Twigger concerning Mr Werner specifically and the Claimants (and their witnesses) more generally. It was Mr Twigger's submission that Mr Werner has not been candid with the Court about the existence of documents created or received by him which are (or may have been) relevant to Mr Arip's and Ms Dikhanbayeva's limitation defence. Mr Twigger referred, in particular, in this context to Mr Werner's authorising of the deletion of various email accounts since these proceedings were commenced. Mr Twigger also observed that many of the documents relevant to limitation which were before the Court at trial had not been disclosed by the Claimants but by Phoenicia and SP Angel. He suggested, indeed, that, had the Court been reliant on Mr Werner and the Claimants for documents, the true position on limitation would, as he put it, *"have remained buried to this day"*.

38. There is, in my view, little merit in Mr Twigger's criticisms in this regard. They are, indeed, as I shall come on to explain, criticisms which might be regarded as somewhat rich in circumstances where it seems to me that there is very considerable force in Mr Howe's observation that the disclosure process in this case has been *"uncommonly one-sided"*. It is striking that Mr Arip's and Ms Dikhanbayeva's standard disclosure consisted of only 5,434 documents - a figure which came down to under 3,000 once it was appreciated that individually-scanned pages of a single larger document were being treated as individual documents. This compares to the 44,000 documents which have been disclosed by the Claimants after a review of approaching 300,000 documents. It is striking also that neither Mr Arip nor Ms Dikhanbayeva disclosed any emails from or to themselves as part of the standard disclosure process. The Claimants obtained emails involving them not from Mr Arip and Ms Dikhanbayeva but from Mr Zhunus after they had reached their settlement with him. Nor, Mr Howe pointed out, did either Mr Arip or Ms Dikhanbayeva search a single desktop computer, laptop, hard drive, tablet or mobile phone as part of standard disclosure. This was only done when the Claimants made an application requiring such searches to be undertaken and, even then, only a fairly modest (some 750) number of additional documents came to be disclosed. Furthermore, and directly relevant to the criticism concerning deletion of emails by the Claimants, Mr Howe pointed out that Mr Arip's own solicitors, Cleary Gottlieb LLP ('Cleary Gottlieb'), have referred to Mr Arip deleting *"large numbers of emails"* as a matter apparently of routine.

39. Mr Twigger made the submission, specifically in relation to Mr Howe's *"uncommonly one-sided"* submission, that Mr Arip and Ms Dikhanbayeva can only disclose what is within their control. He elaborated on this submission by pointing out that Cleary Gottlieb reviewed all emails in Mr Arip's two email accounts and Ms Dikhanbayeva's email account within the relevant date range that had not been previously reviewed. There was no deliberate concealment, Mr Twigger explained, highlighting how Mr Arip explained at trial that, during the disclosure process, he provided Cleary Gottlieb with the access details to his email account so that they could review the contents, and that he identified in detail all of the electronic devices that were in his control or had been at any material time and gave all electronic devices still in his control to Cleary Gottlieb to be searched (including old mobile phones which he had given to

family members after he had purchased newer models). As to deletion of emails by Mr Arip, Mr Twigger made the point that this took place before commencement of these proceedings and not after, and that the deletion was, indeed, routine because it entailed Mr Arip merely deleting emails from his 'arip.co.uk' account when the limit on the relevant mailbox was reached.

40. Whilst I take on board these various points, it is nonetheless difficult to view too favourably the position concerning the Defendants' disclosure given the significant disparity between the amount of disclosure given by the Claimants, on the one hand, and Mr Arip and Ms Dikhanbayeva, on the other. Mr Twigger is, no doubt, right that Mr Arip and Ms Dikhanbayeva can only give disclosure of documents which are in their control. What is surprising is that there are so few such documents. Returning, however, to the disclosure which was given by the Claimants, Mr Twigger made the point, not unreasonably, that there was a delay between the Claimants obtaining injunctive relief in late July 2013, in fact from the time when litigation must have been in contemplation which must have been several months before the injunction was obtained, and a formal instruction being given within the KK Group to preserve electronic documents. That instruction was, somewhat surprisingly, not given until June 2015, which was two months after Allen & Overy LLP ('Allen & Overy') took over from Zaiwalla & Co ('Zaiwalla'). Plainly, this is regrettable. It is not something which should have happened. The fact, however, is that this particular error was made not by Mr Werner or, for that matter, Mr McGregor (and the KK Group) but by the solicitors formerly instructed by the Claimants. Specifically, although it was suggested to Mr McGregor in particular, during the course of cross-examination, that he was at fault as regards the giving of a retention notice, he was not employed by the KK Group until some nine months or so after Zaiwalla had been instructed to act. In my view, when he started at the KK Group, Mr McGregor was entitled to take it that Zaiwalla had given the relevant notice. Although Mr Twigger suggested that he ought to have checked whether this was the case, I consider this an unfair criticism. I appreciate that he was the General Counsel of the KK Group, but to suggest that he should have checked whether a retention notice had been issued in circumstances where an experienced firm of solicitors were acting for the KK Group is, in my view, not realistic. As Mr Twigger reminded me, I asked Mr McGregor during the course of cross-examination why it took almost 2 years for the relevant notice to be issued. Mr McGregor's suggestion was that there was a lot going on when he arrived in his new job at the KK Group. He explained that there had not been *"a quiet day really and it was something that was eventually considered at the commencement of - just after Allen & Overy had come on board and we had changed law firms"*. Mr McGregor likened the circumstances in which he joined the KK Group as being akin to "*parachuting into a battle*" since he was dealing with Financial Police raids and "*aggressive*" enforcement proceedings by various banks. I can understand why, in such circumstances, he assumed steps had already been taken before he joined the KK Group and simply gave no thought to the question of whether a retention notice had been issued.

41. Coming to Mr Werner, his evidence was that, prior to December 2012, he routinely deleted emails but that he would have kept those which were important. The significance of December 2012 is that Mr Werner initially

identified that as the time when litigation was first in contemplation, but in evidence three days later he explained that litigation was in contemplation in September 2012. Furthermore, Allen & Overy had previously, when dealing with the question of litigation privilege, identified the relevant date when litigation had been in contemplation as having been July 2012. Ultimately it does not seem to me that much turns on these date differences, however, in circumstances where it was Mr Werner's evidence that, even when he did delete emails, he confined that deletion to emails which were not important. I accept that evidence, despite Mr Twigger's ability to point to certain examples of documents which Mr Arip and Ms Dikhanbayeva have been able to obtain from third parties and which are exchanges to which Mr Werner was a party. A particular example of this is a document dated 24 April 2012 setting out workings on *"impaired receivables"*, which Mr Werner accepted in evidence must have been on his computer since, several months later, in December 2012, he forwarded a version of it to Mr Khabbaz of Phoenicia Capital, a former shareholder in KK Plc which pursued a derivative action in New York in late 2012. Mr Werner was unable to explain why this document (and the email forwarding it to Mr Khabbaz on 17 December 2012) had not been disclosed, having earlier explained (more than once) that disclosure was not something with which he had been involved. The documentation concerned (both the email and its forwarded attachment) had been obtained by Mr Arip and Ms Dikhanbayeva from Phoenicia Capital rather than from the Claimants. Why that should be the case is not clear. I am unwilling, however, to conclude that it was the result of any deliberate decision on the part of the Claimants to suppress relevant documents relating, in particular, to the limitation issue.

Mr Hugh McGregor

42. Mr Hugh McGregor is a solicitor who joined the KK Group as its General Counsel on 7 August 2013. This was after the material events relating to this claim had occurred, and indeed, was after the proceedings had been issued (but before the claim was amended to include the Land Plots Claim). My impression of Mr McGregor is that he was a generally straightforward witness.

43. Mr Twigger submitted that Mr McGregor was not an untruthful witness but that his evidence was not impartial. He highlighted, in particular, how what he described as *"large tracts"* of his witness statements consisted of commentary and argument on matters in relation to which he had no first-hand knowledge. He emphasised also that, whether as a current employee of the KK Group and a colleague of Mr Werner or because he and Mr Werner are friends, Mr McGregor is not somebody who can properly be regarded as independent. In this context, Mr Twigger pointed (as he had done in relation to Mr Werner) to the fact that Mr McGregor stands to benefit from payment of a not insubstantial success fee in the event that the claimants are successful in these proceedings. Mr McGregor was cross-examined about this, specifically as to the circumstances in which the remuneration committee of KK Plc awarded various individuals, including Mr McGregor, a percentage (2% in Mr McGregor's case) of the *"net proceeds"* of this litigation and as to the nature of the arrangements. Mr McGregor explained that under the arrangements, as they currently stand, he and the other success fee beneficiaries (Mr Werner, Ms Gorobtsova, and Sir Tony Baldry, a former

chairman of KK Plc) are entitled to differing percentages of the *"net proceeds"* of the litigation, *"net proceeds"* meaning sums recovered by the Claimants in relation to the PEAK and Land Plots Claims after deduction of the Claimants' net costs (costs incurred less costs recovered) and the investment of Harbour, the litigation funder. Mr McGregor explained (Mr Twigger suggested somewhat cryptically) that there were a number of *"financial hurdles"* which had to be passed before he and the other success fee beneficiaries would receive any of the litigation proceeds, including a payment to the Claimants' creditors (which he believed to be subject to a cap of circa US$ 20 million), and payments due under the funding arrangements with Harbour. Mr Twigger suggested that Mr McGregor clearly in his evidence wanted to downplay the fact that his 2% success fee could amount to a sum of several million dollars, if the claims succeed.

44. Mr Howe explained that the amount which Mr McGregor would receive would be a more modest US$ 1.4 million. On any view, however, it is in Mr McGregor's (and Mr Werner's and Ms Gorobtsova's) interests if the Claimants were to succeed against Mr Arip and Ms Dikhanbayeva in this action. I have not lost sight of this when considering Mr McGregor's evidence, but my overall view remains that he gave evidence which was not only honest (as Mr Twigger accepted) but which was also, at least in general terms, reliable.

Ms Viktoriya Gorobtsova

45. Ms Viktoriya Gorobtsova joined KK JSC in May 2012 as an assistant to Mr Werner. She was just 23 at that time with only a short period of prior work experience in marketing with KPMG in Kazakhstan. She is now the CEO of the KK Group's operating subsidiary, Kagazy Recycling LLP. The Claimants say she played an instrumental part in relation to what they would characterise as the discovery of the frauds in 2013, and it was clear to me that she did, indeed, play a key part in the investigations which took place in late 2012/early 2013. She gave evidence in relation to these investigations, as well as the circumstances prevailing in the KK Group at this time. Ms Gorobtsova's evidence was that, within a few months of joining the KK Group, by around August 2012, through general "*chit-chatting*" and "*gossips*" with KK employees, whose trust she had gained, she learnt that some employees believed the former shareholders to be "*fraudsters*". She discussed this with Mr Werner, who had his own suspicions but "*no real evidence*". She explained how, in November/December 2012, she and Mr Werner decided to instruct a friend of Ms Gorobtsova, a Mr Gafurov, who worked in the construction business, to carry out an investigation into the construction works which had been carried out at the various sites. Mr Gafurov produced a report which reached the conclusion that the former management of the KK Group had executed "*a large scale fraud*". Ms Gorobtsova also gave evidence as to her own subsequent investigations into Arka-Stroy, which led to the discovery of the 1C database for Arka-Stroy. Under cross-examination, Ms Gorobtsova gave straightforward and candid evidence, and my overall impression of her was that she is clearly an intelligent and highly capable person. I found her an impressive witness.

46. Mr Twigger, however, questioned her partiality. He drew attention, in particular, to the fact that she is in a personal relationship with Mr Werner,

something which Mr Werner only revealed in his most recent statement. This, combined with the fact that (like Mr Werner and Mr McGregor) Ms Gorobtsova stands personally to gain in the event that the claims succeed, through the 2% success fee which has been awarded to her, Mr Twigger submitted, calls into question her reliability as a witness. In this context, Mr Twigger drew attention to the fact that Ms Gorobtsova has only recently been awarded this success fee by Mr Werner exercising a discretion to make such awards vested in him by the KK Group, suggesting that it cannot be a coincidence that award of it came only shortly before Ms Gorobtsova served a supplemental witness statement for the purposes of trial, having initially not served a trial statement. Although, as with Mr Werner and Mr McGregor, it is appropriate that I should bear in mind that Ms Gorobtsova stands to benefit, not insubstantially, from the Claimants meeting with success in these proceedings, and so to approach her evidence on the basis that it is not wholly impartial, I am not persuaded that I should proceed on the basis that what Ms Gorobtsova had to say is, for this reason, questionable. Nor do I consider that her relationship with Mr Werner makes her necessarily an unreliable witness. I agree that I should not accept Ms Gorobtsova's evidence without question. I do not, however, start from the premise that she was an unreliable witness. In fact, the evidence which she gave is, to some extent, supportive of the *Defendants'* position in that she explained how it was possible to gather information about the frauds alleged by the Claimants with relative ease.

Mr Yevgeniy Kuzmenko

47. Mr Kuzmenko has been employed by the KK Group in the IT department since 2005 and has been the Senior IT Manager in the KK Group since September 2009. He gave evidence to the effect that, as part of his duties between 2005 and 2009, he was asked to provide IT support to a number of companies (including Arka-Stroy) which he understood at that time to be part of the KK Group. He also described the instructions which he received from Ms Dikhanbayeva and persons connected with the Defendants to delete data from the KK Group's systems prior to their departure, and gave evidence relating to his involvement in the investigations undertaken by Ms Gorobtsova in 2013, and his part in the discovery of the 1C databases.

48. Mr Howe submitted that Mr Kuzmenko gave evidence which was reliable, consistent with the documents and inherently plausible. Mr Twigger, perhaps unsurprisingly, adopted a different stance. He submitted that, in certain important respects, Mr Kuzmenko's evidence was unreliable, suggesting that he was motivated by financial incentives in the form of a salary increase. Mr Twigger pointed, in particular, to certain inaccuracies in his evidence which he suggested were *"indisputable"*. All in all, however, my view of Mr Kuzmenko was that he was a careful witness who was doing his best to assist the Court. I certainly did not get the impression that he was intending in his evidence to be misleading.

49. Specifically, Mr Twigger pointed to the fact that in his witness statement he had referred to having installed the 1C databases of CBC and Bolzhal in 2006, yet that cannot have been the case since, as he acknowledged during the course of cross-examination, this was a timescale which pre-dated the registration of

those companies. As he explained, however, and as is hardly surprising given that he was giving his evidence over a decade later, it was *"difficult for me to remember the exact dates"* since it *"was a long time ago"* and these were *"normal routine works and jobs"*. He was perfectly willing to accept that *"I may be wrong. I may be slightly mistaken with specific dates"*. It seems to me that this was a sign of an honest witness. Mr Twigger also pointed to the fact that in his fourth witness statement Mr Kuzmenko stated that Ms Gorobtsova approached him in February 2013 about looking for the Arka-Stroy 1C database and that, prior to this, he had no knowledge or suspicion of the fraudulent activity which is alleged in the current proceedings, yet during the course of her evidence Ms Gorobtsova referred to having picked up on gossip within the KK Group after she started work there in May 2012 to the effect that former shareholders *"were fraudsters"* and identified Mr Kuzmenko as one of the people who was saying this. Mr Twigger submitted that, in the circumstances, the Court should infer that in his fourth witness statement Mr Kuzmenko was seeking to support the impression created by the Claimants that the present claims could not have been advanced prior to the discovery of the Arka-Stroy 1C database, when actually he harboured suspicions (at a minimum) much earlier. I am, however, not persuaded by this submission. It is not a point which was put to Mr Kuzmenko during the course of cross-examination. Furthermore, reviewing the evidence which Ms Gorobtsova gave, during the course of her cross-examination, it is perfectly possible that she was mistaken in thinking that Mr Kuzmenko told her that the former shareholders *"were fraudsters"*. She explained that it was not a case of *"lots of people"* telling her that this was the position *"but people that I used to communicate with a lot"*. True it is that she mentioned Mr Kuzmenko. She, however, went on to refer to others, such as a Mr Berdibekov, an engineer, and *"some accountants from the group"*, explaining that *"in the kitchen when we were having lunch together we were just discussing like - we used to have very nice times, expensive cars and helicopters and lots of money. But they all knew that money was taken from the bank, so it could not - it could have not possibly been nice times, because money was taken from the banks, so something was obviously happening, in the opinion of those people"*. This was not the most precise evidence. I can quite see, in the circumstances, that Ms Gorobtsova may have been mistaken in recalling Mr Kuzmenko as being one of the people who told her that the former shareholders *"were fraudsters"*.

50. Mr Twigger went on to refer to Mr Kuzmenko's account of the difficulty encountered in locating the Arka-Stroy 1C database. He submitted that Mr Kuzmenko was wrong to suggest that there was anything like the difficulty which he described. He contrasted the evidence which was given by Mr Khasanov on the topic, pointing out that that evidence was supported by certain screenshots showing the location of particular databases (including the Arka-Stroy 1C database). Mr Kuzmenko, so Mr Twigger submitted, was, therefore, wrong to suggest that Mr Khasanov had to scan through lots of databases individually and open each of them to find out to which company the database related. The explanation for this, in my view, is that, as Mr Kuzmenko explained at the outset of his cross-examination, although he was head of the KK Group's IT Department, his expertise was not the same as that of Mr Khasanov, who was the manager of what he described as *"the developers department"* and (unlike

Mr Kuzmenko) *"the programmer"*. Mr Kuzmenko went on to acknowledge, in frank terms, that, whilst he could himself have located the Arka-Stroy 1C database, *"it would have taken me much more time"*. If Mr Kuzmenko was somewhat insistent in response to Mr Twigger's questions on the topic of accessibility, I am clear that it was not because he was trying to be obstructive. On the contrary, my impression was that he was doing his best to describe the technical position from his perspective. I reject the suggestion, or implication, that he was endeavouring to make the process undertaken by Mr Khasanov sound more complicated than it was. Had that been his objective in giving his evidence, then, he would not have acknowledged as readily as he did that, once asked to look for the Arka-Stroy 1C database, Mr Khasanov had *"found it very quickly"*. I am in no doubt, in the circumstances, that the suggestion made by Mr Twigger that Mr Kuzmenko's evidence on this issue was so unreliable as to render all parts of his evidence, which are not supported by contemporaneous documents, unreliable is unrealistic and should not be accepted.

Mr Karim Khashimov and Mr Berik Nagashibaev

51. Mr Khashimov and Mr Nagashibaev are security guards within the Security Department of the KK Group, who gave evidence relevant to the Land Plots Claim. Their evidence was that they visited and spoke to a number of the farmers who sold the relevant land plots, and that the farmers, who apparently continued to live in modest circumstances, told them that they had received significantly lower sums than those stated in the various sale and purchase contracts which were entered into regarding the land plots. Mr Khashimov gave the principal written witness statement, with Mr Nagashibaev providing a short witness statement confirming he agreed with the witness statement of Mr Khashimov. For this reason, Mr Khashimov gave evidence first, for some 40 minutes, following which Mr Nagashibaev gave evidence but to a much lesser extent, in that he was simply asked to confirm his agreement with Mr Khashimov's oral evidence (which he did), and made one or two comments of his own.

52. Mr Twigger submitted in opening that the evidence of the farmers (given via Mr Khashimov and Mr Nagashibaev) was *"entirely hearsay"* and *"implausible"*, remarking on the absence of transparency as to what the farmers were actually asked or whether they were, in fact, people who sold the land which they claimed once to have owned. Mr Twigger described the security guards as having *"stuck to their script"*. He was right about this and right also to remind me that, when Mr Nagashibaev's cross-examination proved to be somewhat curtailed, he launched into a speech in which he insisted that he respected older people and *"could not have done anything else"*. Although it was not entirely clear what was meant by this, I took it that what Mr Nagashibaev was trying to say was that neither he nor Mr Khashimov was in a position to question what they were being told by the farmers. This was a curious point, however, to have made and leads me to suspect that Mr Nagashibaev was, perhaps, rather overstating the position. I tend to agree with Mr Twigger, therefore, that there is something of a question mark over the way in which the elderly farmers would have perceived being asked to sign a statement presented to them by two physically intimidating security guards. I

agree also that it was not altogether satisfactory that the taking of the farmers' evidence should have been left to two security guards who had no experience, still less any relevant qualification, to gather evidence for use in court proceedings. I consider that Mr Twigger was right to observe that such evidence ought to have been obtained by the Claimants' solicitors in more conventional ways. Although, in the circumstances, especially since Mr Twigger did not seek to impugn the honesty of Mr Khashimov and Mr Nagashibaev, I decline the invitation to place no weight on their evidence, I consider it right nonetheless to approach the evidence with some circumspection.

Mr Ilkham Gafurov

53. The last of the Claimants' witnesses was Mr Ilkham Gafurov. He gave evidence in relation to his involvement in valuing the construction work connected with the PEAK and Astana 2 Claims. Mr Gafurov is a Kazakhstan national who studied in England before joining his father's construction company in Kazakhstan in 2010. As I have mentioned, he produced a report in early 2013 concluding that the work done on the construction sites in issue in these proceedings were worth far less than the amount paid by the KK Group, and that the former management of the KK Group had executed "*a large scale fraud*". He gave evidence in which he explained the investigations he undertook in order to produce this report. I found him to be an impressive and patently honest witness, who provided careful and considered evidence. Although Mr Twigger sought to highlight the fact that at the time when he carried out the work about which he gave evidence he was a recent graduate in his early 20s who lacked substantial experience in the construction profession, he nonetheless relied on the fact Mr Gafurov's evidence was that what he found was *"pretty obvious",* in support of the Defendants' case that what Mr Gafurov did could (and should) have been done much earlier than it was.

The absentees

54. Mr Twigger made a number of submissions concerning the fact that certain witnesses were not called by the Claimants. His central submission focused on the absence of any evidence from a witness who was there at the time that the alleged frauds were committed by the Defendants, the sole exception in this regard being Mr Kuzmenko, who (as somebody involved with IT) would have had very limited relevant knowledge about the matters relating to the alleged frauds. Mr Twigger highlighted how the KK Group had around a thousand employees in 2007/2008. These included Mr Tulegenov (a director of KK JSC and PEAK who was closely involved with the PEAK and Astana construction projects as well as the acquisition of the Land Plots), Ms Kogutyuk (a senior manager and subsequently the CEO of KK JSC who was responsible for creating many of the documents at issue and who remained employed well into Mr Werner's tenure at the KK Group), Ms Yelgeldieva (a key member of the Finance Department who assisted Mr Werner and Mr Gafurov with their investigations), Ms Zhambuzova (a key member of the Legal Department) and Ms Zhondelbaeva (who had acted as an accountant for both the Claimants and Arka-Stroy). Mr Twigger pointed to others also who were outside the KK Group and fully involved in relevant events, such as Mr Mackay, Mr Facey and Mr

Fraser of SP Angel, Mr Ferguson of the auditors, BDO, Mr McAllister of PwC and Mr Khabbaz.

55. There is no reason to think, Mr Twigger submitted, that these individuals could not have given evidence if approached by the Claimants. In these circumstances, it was his submission that the Court should draw adverse inferences from the fact that witnesses such as these were not called by the Claimants. Mr Twigger relied, for these purposes, on the well-known decision of the Court of Appeal in ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR 323 at 340 where Brooke LJ identified the relevant principles as being the following:

> *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
>
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
>
> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

56. As to the KK Group absentees, Mr Twigger made the point that Mr Tulegenov has previously co-operated with the Claimants; indeed, that he has previously signed a witness statement. Mr Twigger observed that, had he attended to give evidence, he could have been cross-examined about his knowledge of the three principal allegations, including, for example, his role in relation to Arka-Stroy and the relationship between Arka-Stroy and the KK Group, his involvement in the PEAK and Astana 2 construction projects and his oversight and involvement in the land plots transactions. The submission was made that, in such circumstances, it is appropriate to infer that Mr Tulegenov would not have supported the case now advanced by the Claimants. Mr Twigger submitted, similarly, that other witnesses, such as Ms Yelgeldieva who was not only employed in various finance roles within the KK Group from 2003 until 2014 but also assisted the Claimants in preparing the Lawsuit Narrative to which I shall later refer and Mr Gafurov in preparing his report, could have attended to give supportive evidence. The same, Mr Twigger suggested, applies to Ms Kogutyuk, who between 2003 and 2013 was employed first as a lawyer and later as the CEO of KK JSC and was responsible for drafting the KK Group's complaint about the former shareholders to the Financial Police in March 2011.

57. There are, however, certain difficulties with these submissions. The Claimants in this case are alleging fraud which is said to have been committed in the most complex of fashions. This is not, therefore, a straightforward case in which it can safely be said that a particular witness ought obviously to have been called at trial. The position is more involved than that. As regards Mr Tulegenov in particular, as Mr Twigger fairly acknowledged, the Claimants' case entails Mr Tulegenov himself being at the heart of the alleged frauds. The same obviously applies also to Mr Zhunus, another person whom Mr Twigger submitted ought to have been called as a witness, particularly given that, under the settlement agreement reached between Mr Zhunus and the Claimants, Mr Zhunus was contractually obliged to give truthful evidence if the Claimants required it. As I myself pointed out during the course of opening submissions, however, it is not open to a party to call a witness to give evidence which that party will say is not only wrong but deliberately so. In this respect, the following passage in the judgment of Mustill LJ (as he then was) in ***The 'Filiatra Legacy'*** [1991] 2 Lloyd's Rep. 337 at page 361 explains the position:

"In one category are the situations where a party says that his own witness is giving mistaken albeit honest evidence and where he seeks to establish this either by calling direct evidence to contradict what his witness has said or by arguing that, when the evidence is regarded as a whole, a mistake is to be inferred. We believe that this is a common occurrence in civil litigation and unobjectionable in principle, provided that care is taken to avoid surprise and hence injustice. We adopt the reasoning of the British Columbia Court of Appeal in Cariboo v Carson Truck Lines 32 D.L.R. (2d) 36 (1961), and in the English cases there cited.

From this must be distinguished the situations where a party wishes to assert that the evidence given in chief by a witness whom he has called is not only wrong, but is wrong on purpose. The most obvious instance is one where the witness has turned coat and has deliberately failed to come up to proof. Here the position seems clear. The party cannot cross-examine his own witness by reference to his proof of evidence or other previous statement unless and until the court has ruled that he is hostile. Nor may he call evidence to establish the general bad character of his witness. (See Ewer v Ambrose (1825) 3 B. & C. 246; The Criminal Procedure Act, 1865, s.3, applied by the Civil Evidence Act, 1968.)"

In the present case, therefore, for the Claimants to have called Mr Zhunus and Mr Tulegenov as witnesses would inevitably have entailed Mr Howe having to put to each of them that their denials of the frauds alleged by the Claimants (in the case of Mr Zhunus, a denial made in the Defence served on his behalf and accompanied by a statement of truth) were false. For this reason, I cannot accept that there is anything in Mr Twigger's submission.

58. Furthermore, as regards Mr Zhunus and the point about the contractual provision to give evidence contained in the settlement agreement, I agree with Mr Howe that, the Claimants having settled with Mr Zhunus, they were under no obligation to have required Mr Zhunus to give evidence at trial. In truth, as Mr Twigger observed, the issue is not so much whether it is appropriate for the Court to draw any inference that Mr Zhunus would not have supported the

Claimants' case if called as a witness since presumably involvement in any fraud would have been denied, but whether the Claimants were somehow obliged to have prosecuted their case against him to trial in order to establish their case against Mr Arip and Ms Dikhanbayeva. This, in circumstances where many of the entities through which Mr Arip is alleged to have misappropriated money were either jointly controlled by Mr Zhunus or were controlled solely by him (or one of his relatives). I agree with Mr Howe, however, that it does not matter whether Mr Zhunus is proceeded against or not since there is no issue that under Kazakh law the principle of joint and several liability for joint wrongdoers, which is familiar to English lawyers, also exists.

59. Turning to other witnesses who did not attend to give evidence, specifically the SP Angel personnel Mr Mackay, Mr Facey and Mr Fraser, Mr Twigger submitted that these people would have had material evidence to give on a wide range of the issues relating to limitation between October 2009 until, at least, early 2011. He made the point that it was Mr Werner who engaged SP Angel and who worked closely with them throughout the material years. Clearly, Mr Mackay and Mr Fraser (who apparently remain employed by SP Angel), as well as Mr Facey, could potentially have given relevant evidence. Had they done so, then, as Mr Twigger submitted, they could have been cross-examined in relation to their level of awareness of the fraud allegations which are levelled in these proceedings by the Claimants against Mr Arip and Ms Dikhanbayeva. In my view, however, it does not follow that, simply because these witnesses were not called by the Claimants as witnesses at trial, it is appropriate to draw the inference that they would not have supported the Claimants' case had they given evidence. That is a possibility, of course, but I am reluctant to conclude that it is anything more than that. In those circumstances, whilst obviously in the absence of evidence from SP Angel personnel I cannot assume that, had such evidence been adduced, it would have supported the Claimants' case, nor, in my view, should I infer the opposite.

The Defendants' factual witnesses

60. I come on now to deal with the witnesses called by Mr Arip and Ms Dikhanbayeva at trial. Besides Mr Arip and Ms Dikhanbayeva themselves, there were the following further witnesses: Mr Alessandro Manghi; Mr Vladimir Gerasimov; Mr Nikolay Kosarev; Mr Alexander Sannikov; Mr Nurlan Sharipov; Mr Igor Zhangurov; Mr Erzhan Jumadilov; Mr Mamed Mamedov; Mr Rasul Khasanov; and Mr Vladislav Belochkin. Mr Howe submitted that Mr Arip and Ms Dikhanbayeva were revealed by the evidence which they gave to have been profoundly dishonest and willing to lie on oath repeatedly. He suggested that (with the exception of Mr Kosarev) Mr Arip's and Ms Dikhanbayeva's other factual witnesses gave evidence which was, at best, unreliable and, at worst, knowingly false. Mr Howe highlighted, in particular, how in the case of one of the witnesses, Mr Jumadilov, a land broker, his response, when confronted with his own dishonesty, was the disconcertingly nonchalant *"C'est la vie"*. Mr Twigger saw things somewhat differently. He highlighted how, he suggested in contrast to the approach adopted by the Claimants, the witnesses called by Mr Arip and Ms Dikhanbayeva were able to give evidence which spanned the entire relevant period and covered a range of

seniority, department and subject area. His submission was that each of these witnesses gave evidence which was both honest and truthful. He drew attention in this regard to the fact that none of the Defendants' witnesses was employed by, or otherwise financially connected to, the Defendants. The fact that two of the witnesses, Mr Manghi and Mr Gerasimov, remain on friendly terms with Mr Arip is, Mr Twigger suggested, neither here nor there since these witnesses were plainly neutral and independent.

61. This, then, is the context in which I come on now to consider each of Mr Arip's and Ms Dikhanbayeva's witnesses in turn, beginning with Mr Arip.

Mr Arip

62. Mr Arip, the Second Defendant, was cross-examined over the course of four days. He gave his evidence in English, in which he is fluent. Mr Arip could be described as an international businessman. Kazakh by birth, he is now resident in Switzerland, previous to which he was resident in Dubai. He holds citizenship of Cyprus and St Kitts and Nevis, having renounced his Kazakh citizenship, purportedly because having non-Kazakh citizenship makes it easier for him to conduct business internationally. He has a Bachelor's degree in law and a Master's degree in business administration, both from universities in Kazakhstan. He has held senior management positions in at least four companies (including the KK Group). However, his evidence at trial was that, currently, he was not "*really doing anything*", due to the effect of the freezing order made in relation to these proceedings.

63. At the risk of stating the obvious, Mr Arip's evidence was of critical importance since at the heart of this case is the allegation made by the Claimants that Mr Arip (together with Ms Dikhanbayeva) is a thoroughly dishonest individual. Mr Howe submitted in his opening submissions that Mr Arip had repeatedly changed his position in his written evidence to fit the available documents, and that a typical stance taken by him (and Ms Dikhanbayeva) was to make outright denials if they felt they could get away with it (for example, regarding Mr Arip's connection to CBC and Bolzhal), and then, when it became clear that they could not, to manufacture carefully constructed explanations designed to try to fit the available documents. These points were repeated by Mr Howe in the course of Mr Arip's lengthy cross-examination. Mr Howe submitted that nothing Mr Arip or Ms Dikhanbayeva said in their statements or orally could be relied upon, save where it was an admission against their interests or where the evidence was unequivocally corroborated by a contemporaneous document. He urged the Court to adopt the approach that, on any given issue, the presumption must be that they were lying to conceal their fraud.

64. By contrast, Mr Twigger's position was that Mr Arip had given his evidence in a candid manner and that he had assisted the Court wherever his recollection would allow. Mr Twigger observed that it was unsurprising that Mr Arip was unable to answer certain questions about the details of several transactions or companies, particularly given that (as Mr Manghi explained when he came to give evidence) Mr Arip managed by delegation, setting objectives, strategy and tactics and then leaving his managers to execute matters with minimal interference. Mr Twigger went on to observe that, as a successful businessman

who has been involved in other business ventures since leaving the KK Group some eight years ago, it would be unrealistic to expect him to have a good memory of all of the relevant details. He stressed that, where Mr Arip had made mistakes in witness statements, he had corrected those mistakes in subsequent witness statements and was quite prepared to acknowledge further errors when these were put to him during cross-examination. Mr Twigger furthermore characterised criticism that Mr Arip had not dealt with matters in his witness statements as being *"unreal"* given that he had had to face, Mr Twigger suggested, allegations by the Claimants which were somewhat broad.

65. Having reflected on the matter with considerable care, I find it impossible to agree with Mr Twigger's characterisation of Mr Arip. My overwhelming impression is that Mr Arip was not an honest witness; indeed, that he was a thoroughly dishonest witness. During his cross-examination, Mr Arip often came across as evasive. He sought to avoid answering difficult questions about documents which contradicted his evidence, employing a number of different tactics in this regard as I shall explain in a moment. When pressed to provide a response to the specific questions put to him, he was, on a number of occasions, unable to provide any, and certainly any adequate, explanation for various transactions, or for documents which contradicted his evidence. I am quite satisfied that Mr Arip was intent, when giving evidence, to present a thoroughly misleading picture to the Court in order to try to cover up his role in the alleged frauds.

66. It became immediately apparent in the course of Mr Arip's cross-examination that some parts of his written evidence, whilst not necessarily untrue, were misleading in that they omitted certain pertinent facts. For example, Mr Arip stated in his fourteenth witness statement that he joined the KK Group as General Director of KK JSC in October 2003. Later in that statement, Mr Arip stated that he had seen documents which showed that the KK Group had entered into contracts with Arka-Stroy in September 2003, "*before I was even a shareholder in the Kagazy Group*". However, Mr Arip admitted in cross-examination that he had, in fact, first become involved in the KK Group in February 2003, as shown from a board resolution dated 12 February 2003 appointing him as "*board chairman*". In other words, although Mr Arip's statement that the KK Group entered into contracts with Arka-Stroy before he became a *shareholder* was not actually untrue, it was, on any view, misleading in that it gave the impression that Mr Arip had no involvement at all in the KK Group before that date, and so that Arka-Stroy had become involved with the KK Group independently of him. Similarly, in that same witness statement, Mr Arip stated that Arka-Stroy's offices were located at the Beis Club, only to accept in cross-examination that he had failed to mention in this statement that Arka-Stroy had also occupied space at KK JSC's offices. Again, this was relevant to the issue of whether Arka-Stroy was an independent third party contractor or a creature controlled by the Defendants.

67. It seems to me that Mr Arip's written evidence missed out relevant facts in order to give a misleading impression of what actually happened. This was economy with the truth which can have been no accident. Furthermore, Mr Arip often appeared evasive when answering questions. At times, he gave very long-

winded answers to what were really very straightforward questions. For example, Mr Howe referred him in cross-examination to an email from Mr Makovac, the Managing Director of Arka-Stroy, in which he stated that, for the work on the logistics centre, he needed more employees (an administrator, two project managers, and a driver with a car). Mr Howe asked why Mr Makovac was asking Mr Arip (who, on Mr Arip's case, was, in effect, the client of Arka-Stroy) for extra employees. Mr Arip's response was that Mr Makovac was asking for an approval of the budget from the KK Group and he then proceeded to give a long-winded explanation of the budgeting systems in place, and the difficulties with budgeting in the financial climate which prevailed at that time. The giving of long and elaborate answers to simple questions was, in my view, a technique which was adopted by Mr Arip in order to avoid having to answer the question in a straightforward fashion.

68. Another strategy deployed by Mr Arip when facing Mr Howe's questions was to feign a lack of understanding as to what the question was. This was what might be described as wilful misunderstanding. Mr Arip is an intelligent man. He understands English well and I am in no doubt that he understood what Mr Howe was putting to him. Mr Howe was admirably clear in formulating his questions (as also, I should observe in the interests of fairness, was Mr Twigger when he was cross-examining the Claimants' witnesses). For example, Mr Howe referred to a diagram prepared by the Claimants' forensic accountant, and asked Mr Arip about a payment shown on that chart of US$ 1.9 million made by KK JSC to Holding Invest, US$ 1.8 million of which was then transferred to Trading Company (a company owned by Mr Arip's mother-in-law), which then sent it on to a company called Sunclub LLP. Mr Arip first stated that he had already explained in his written evidence that Holding Invest had received money from Bolzhal for the sale of its office building. Mr Howe pointed out that he had not been asking about a payment from Bolzhal but a payment from KK JSC. Mr Arip then stated that the diagram was incomplete and that this payment was probably financial aid from Bolzhal. I then again pointed out to Mr Arip that he was not being asked about Bolzhal but a separate payment from KK JSC to Holding Invest. He then suggested that this payment related to lease termination payments, because KK JSC had been occupying office space owned by Holding Invest. Mr Howe explained that the forensic accountants had identified the payments relating to that lease, but that this particular payment (amounting to US$ 1.9 million) was not one of them. Mr Arip's response to this was that he could not remember what this payment related to. A misunderstanding on Mr Arip's part concerning the questions which were put to him could have been attributable to nerves or to unfamiliarity with the case. That was not the position with Mr Arip, however. I repeat that Mr Arip is an intelligent man who has been deeply involved in the detail of these proceedings for some time. Indeed, he attended much of the thirteen week trial, showing his heavy involvement in the case. This was deliberate misunderstanding of questions designed to avoid having to answer them.

69. Another illustration of Mr Arip's deeply unsatisfactory approach to the giving of his evidence was his attitude to unsigned contracts. Whenever Mr Arip was faced with a contract or agreement which was not signed, his response tended to be that it was meaningless and did not prove anything because it was

unsigned. Even when it was put to him that these unsigned contracts, at the very least, showed that someone within the KK Group's legal team had been instructed to draw up contracts relating to these payments, Mr Arip's response was that such contracts could just be draft templates and, as such, did not show anything. This was a deeply unimpressive position to adopt. It smacked of obstructiveness and an unwillingness to be open. For example, Mr Arip was shown an (unsigned) agreement on 6 June 2005 between Kagazy Gofrotara (represented by Mr Arip) and Arka-Stroy (represented by Mr Esimbekov). Mr Howe put to Mr Arip that this document showed that Mr Esimbekov was acting as a director of Arka-Stroy at that time. Mr Arip denied that it showed this on the basis that the document was unsigned. When Mr Howe put to Mr Arip that it did, at a minimum, show that someone had drawn up a document stating that Mr Esimbekov was a director, Mr Arip was not even willing to agree this, observing only, unrealistically and frankly disingenuously, that "*a lot of documents would be drafts and they will simply use the same template, so we can't really say that it is certain that he was a director*". Mr Arip took the same approach when confronted with financial assistance or debt transfer agreements between companies alleged to be connected with him. For example, when presented with an (unsigned) financial assistance agreement between HW & Ltd ('HW') (which received payments from Arka-Stroy) and Holding Invest (which Mr Arip accepted was controlled by him and Mr Zhunus), and asked why someone would have drafted such an agreement, his response was that he thought that this transaction had not happened and that the document "*could be a template which people use a lot*". Mr Arip was also asked about a draft debt transfer agreement between Lotos, Arka-Stroy, Trading Company, and HW, which actually featured a comment bubble stating that "*Since there was no basis for the origin of the debt, we decided to specify the reconciliation Report…*". Mr Howe suggested that this comment demonstrated the bogus nature of the contract, yet Mr Arip's response was that, the agreement could not be bogus because the transaction which the report provided for had not come to fruition and actually happened. For my part, however, I did not find Mr Arip's explanation that any unsigned contract which contradicted his evidence must simply be an incorrect draft or a template to be satisfactory. My clear view is that he took this stance simply in order to avoid having to answer questions about these documents.

70. Another tack taken by Mr Arip when faced with certain contracts for financial assistance or other payments (even when signed), or documents referring to such payments, was that these payments may have never actually occurred and that this should be checked against the available bank statements. For example, Mr Howe referred to a resolution of Lotos (a company alleged to be controlled by Mr Arip) to pledge money to Alliance Bank to guarantee the liabilities of Kagazy Processing. He suggested to Mr Arip that this showed that Lotos was treated as a KK Group company. Mr Arip's response was that he did not know anything about this arrangement and that the Alliance Bank ledgers should be checked to see whether this payment actually occurred. This, in my view, was nothing more than a pretence. It is inconceivable that somebody in Mr Arip's position would not have known about the arrangement. Mr Arip took a similar approach on a number of other occasions.

71. It is telling also that when, in due course, Mr Howe presented Mr Arip with details of transactions compiled from bank statements, his response was to say that he had not had a chance to prepare a response. I had the impression that what he meant by this, but was obviously unable to say in terms, was that he needed time in which to think what he could say to explain away the obvious. Thus, Mr Howe handed up a table prepared by the Claimants' forensic accounting expert, compiled from Trading Company's bank statements, which showed payments to Lotos, Ada Trade, and Kontakt Service Plus (which the Claimants alleged were connected to the Defendants), as well as a number of KK Group companies. Mr Howe put to Mr Arip that payments were being made to these companies because they were all controlled by Mr Arip. Mr Arip's response was that these payments came from his separate oil business (Barnard Commercial S.A ("Barnard").) and so had nothing to do with the KK Group. He also stated that he did not know exactly what all of the transactions related to, and that he was not in a position to answer questions in such detail about transactions which had happened eight years previously. He insisted that, as he had never seen the table before, he had had no chance to check the underlying contractual documentation. He nonetheless asserted, in the most general terms, that there would have been valid business reasons for the payments. Again, I found Mr Arip's response in this regard to be highly unsatisfactory. He ought to have been able to address Mr Howe's point without needing to delve into the detail of the various payments. The truth is that Mr Arip was unable to provide an answer to what was being put to him because there was no answer which he could sensibly give. His refuge, in the circumstances, to not having had the opportunity to consider the details contained in the document which Mr Howe showed him, was unimpressive to say the least.

72. A further tactic deployed by Mr Arip was to deny knowledge of a particular payment or transaction, and to suggest that Ms Dikhanbayeva should instead be asked about this "*because she was more involved in the financial matters*". Mr Arip was clearly trying to avoid having to answer such questions, and to give the impression that he was not really involved in directing these payments. I found Mr Arip's approach in this regard, again, to be deeply unsatisfactory. To hide behind his purported ignorance of the detail and direct Mr Howe to Ms Dikhanbayeva demonstrated a deep-rooted unwillingness to be open with the Court which bordered on disdain. Mr Arip must have known about the payments since I am quite clear that he was orchestrating them.

73. It is worth mentioning also that at various points during Mr Arip's evidence he asked to make further comments on documents or questions which had been put to him previously. This did not involve the sort of clarification in which witnesses sometimes engage. On the contrary, I had the distinct impression that Mr Arip used such opportunities to put forward explanations which he had contrived after having had time during breaks in the proceedings to think about matters further. For example, on the morning of the second day of Mr Arip's cross-examination, he was asked about an employment contract between Arka-Stroy and its Managing Director, Mr Makovac, dated 1 July 2005, which Mr Arip had signed on behalf of Arka-Stroy, and an email which Mr Makovac had sent to Mr Arip in October 2006. This email set out a draft agreement for the termination of Mr Makovac's employment contract, which provided that Mr

Arip was to sign as the *"Representative of the Employer"* (i.e. Arka-Stroy). Mr Howe put to Mr Arip that this (as well as various other documents) demonstrated that Mr Arip was controlling Arka-Stroy. Mr Arip's initial response was that this termination agreement might have related to a separate consultancy agreement between Mr Makovac and Holding Invest because, as well as being the Managing Director of Arka-Stroy, Mr Makovac was also assisting Holding Invest. Mr Howe described this as "*a startling suggestion which had never previously been made*". He was right about this. Mr Howe put to Mr Arip that the termination agreement must have referred to the employment contract between Mr Makovac and Arka-Stroy because it referred to a specific clause in that employment contract dealing with early termination provisions, suggesting that Mr Arip had simply invented the idea that there was any additional consultancy arrangement. Mr Howe was plainly right about this also. Indeed, Mr Arip had no answer to the point. He was driven to saying "*I don't want to speculate, my Lord, I don't want to be – I'm sorry, I just don't know. So I'm not going to deal with that point*". There matters rested until in the afternoon of that same day Mr Arip said that he wanted to make an additional point in relation to the termination agreement with Mr Makovac. This was that he wanted to make it clear that he had never signed it. Then, the following morning and so after a break, Mr Arip again explained that he wanted to make a further point. This was that the reason why Mr Makovac had referred to him (Mr Arip) as an employee was that he was using "*casual language*", adding that respect and sub-ordination is very important culturally in Kazakhstan with the result that people use different language and do things differently. This was evidence which was simply not credible. More than this, it was evidence which Mr Arip persisted in giving despite the fact that he knew it to be wholly false. Mr Howe submitted that, on the topic of Mr Makovac's departure, Mr Arip's evidence "*completely foundered*". There can be no doubt about this. Mr Arip was clearly aware that his initial evidence had not been convincing. He made matters much worse, in terms of his credibility, by his subsequent efforts to appear plausible since each time he tried by putting forward another explanation his willingness to give misleading evidence became all the more obvious.

Ms Dikhanbayeva

74. Ms Dikhanbayeva's cross-examination took place over the course of three days, with additional cross-examination on a fourth day on a point arising from a letter from Mr Arip's and Ms Dikhanbayeva's solicitors relating to something she had said during the previous day's cross-examination. She only speaks some English, and so she gave her evidence in Russian. As with many other witnesses, the Court had the benefit of simultaneous translation of her evidence.

75. Ms Dikhanbayeva is a certified accountant and a member of the Kazakhstan Professional Accounting Association. Between 1997 and 2001, she worked for the Seimar Investment Group which previously owned KK JSC before KK JSC was sold to Mr Zhunus and Mr Arip in 2004. Ms Dikhanbayeva left Seimar Investment Group in 2001 (at which point she was the financial director) to become the senior financial director at KK JSC, in charge of the finance department. She subsequently became a member of the board of directors of KK JSC in April 2008, and became chairman of the board in September 2008. In

July 2009, she left the KK Group to become chief financial officer of Exillon, an oil and gas production company, which, as I have mentioned, is the venture to which all the Defendants moved after leaving the KK Group (formerly named Caspian Minerals Plc).

76. Mr Twigger submitted that Ms Dikhanbayeva was, as he put it, *"equally keen"* to assist the Court by providing a full and frank account of what she could recall. He went on to describe her as *"a thorough witness who was keen to look at the details of the transactions"*. Again, these are characterisations with which I find it difficult to concur. I agree, instead, with Mr Howe when he submitted that, like Mr Arip, Ms Dikhanbayeva gave untruthful evidence in order to cover up her involvement in the alleged frauds. I agree also with his submission that she repeatedly gave long, evasive answers, often seeking to give pre-prepared speeches to pre-empt aspects of her evidence which she appeared to appreciate presented difficulties. The truth is that Ms Dikhanbayeva repeatedly came up with highly improbable and plainly invented explanations for the documents which contradicted her evidence. She was a deeply unsatisfactory witness who chose to give evidence which she must have known was untrue.

77. Like Mr Arip, Ms Dikhanbayeva is intelligent. Although initially she came across as less evasive than Mr Arip, it became clear that this was not actually the case as she adopted a default position which typically involved her dealing with questions which she found difficult by asserting that the documents to which the questions related were incorrect or by maintaining that a particular transaction recorded in the document did not come about. For example, Ms Dikhanbayeva was referred to four separate documents which showed Mr Zhekebatyrov (a relative of Mr Zhunus, who owned a number of the companies alleged by the Claimants in these proceedings to have received misappropriated funds) to be the director of Kagazy Gofrotara LLP in 2006. Her response was that he did not become the director until later when the company's operations had ceased and it was about to be liquidated, and so the documents which she had been shown were incorrect. Ms Dikhanbayeva was also asked about letters dated 15 February 2006, sent from Ms Yelgeldieva, KK JSC's Chief Accountant, to Alliance Bank, asking it to install "*an additional service (second signature) per Bank-Client system*" and to "*reinstall the Bank-Client system to other computers*" for a number of companies which it is accepted were in the KK Group, as well as other disputed connected entities including HW, TEW, Kontakt Service Plus and Arka-Stroy. Ms Dikhanbayeva's response was that "*this letter is simply impossible and the bank cannot accept it*", before going on to explain that the bank would require further authorisation to occur before it could accept such a request and denying, therefore, that this correspondence showed that these entities were treated as being part of the KK Group.

78. Although there was a certain attraction to the (apparently) straightforward manner in which Ms Dikhanbayeva, on occasion, gave evidence, her repeated assertions that a substantial number of the documents on which the Claimants rely were simply incorrect cannot have represented her genuine belief. As for her evasiveness, an example concerns the evidence which she gave during her examination-in-chief when she corrected part of her sixth witness statement, in which she had said that she had no knowledge of Mr Zhekebatyrov's

relationship with Arka-Stroy. She explained that she now recalled that Mr Zhekebatyrov and Vladimir Khan were the founders and legal owners of Arka-Stroy. Ms Dikhanbayeva accepted that she knew Mr Zhekebatyrov and that he was also employed by KK JSC. She insisted, however, that she had only found out that Mr Zhekebatyrov was an owner of Arka-Stroy in around late 2006 when, in the course of IPO preparations, the auditors had asked some questions about Arka-Stroy because of the large contract it had with the KK Group. She said that she had discussed Mr Zhekebatyrov's Arka-Stroy connection with the auditors, BDO, at that time, and that representatives of BDO had met representatives of Arka-Stroy and the KK Group to discuss this, but that BDO had eventually been satisfied because Mr Zhekebatyrov owned only 50% of Arka-Stroy and because they received a letter from Ms Dikhanbayeva confirming that KK JSC was not a related party of Arka-Stroy. She claimed that she had forgotten about all of this and that she had only remembered it when recently discussing the case with Mr Arip, saying that she had become "*emotional*" and remembered these events. Mr Howe put to her that it was not credible that she had had specific discussions with the auditors about this connection, and that the issue of Arka-Stroy's connections with the KK Group had been a central issue in these proceedings since 2013. She had no satisfactory answer to this point. The fact is that there was no good answer. Ms Dikhanbayeva cannot have forgotten about Mr Zhekebatyrov's connection with Arka-Stroy. I am clear that she must have deliberately omitted mention of it in her earlier witness statements in order to give the impression that Arka-Stroy was a separate entity to the KK Group.

79. Another illustration of Ms Dikhanbayeva's unacceptable approach to the giving of evidence relates to the questions which were put to her by Mr Howe concerning the connections between the KK Group, CBC and Bolzhal. CBC and Bolzhal are alleged by the Claimants to have received misappropriated funds from Arka-Stroy in the context of the PEAK Claim, as well as being the entities from which the KK Group purchased the land plots in the context of the Land Plots Claim. In her witness statements Ms Dikhanbayeva's evidence was that CBC and Bolzhal were "*both owned by nominees*", and that the original nominees were her then husband (Mr Esperov for CBC) and a relative of his (Mr Shabadanov for Bolzhal), who had been put in place "*to secure the interests of KK JSC in the future sale and purchase transactions with these companies*". She maintained, however, that, for the purposes of the land plots transactions, CBC and Bolzhal were "*managed by the real estate brokers who took care of those transactions*". Asked about this in cross-examination, she insisted that "*[t]hose companies were used for acquisition of land plots and they were controlled by land brokers ... we used those companies, but it doesn't mean that we controlled their other operations*" and that "*[e]ven with my husband as the nominal director of the company, it didn't mean that I controlled anything there*". This was, however, evidence which simply made no sense given that Mr Esperov and Mr Shabadanov were merely nominees and given also that Ms Dikhanbayeva also accepted that she controlled Bolzhal and CBC for the purposes of acquiring the Exillon assets from around October 2008. The notion that Ms Dikhanbayeva could control those companies for some purposes but not for the purposes of the land plots transactions is fanciful. Ms Dikhanbayeva tried to get round this difficulty by suggesting that by the time that Bolzhal and

CBC started to become involved in the Exillon transaction, in October 2008, those companies had served their purpose in relation to the land plots. The difficulty with this, however, is that, as Mr Howe was able to demonstrate, there are a number of documents which point pretty clearly to the land plots transactions between KK JSC and Bolzhal and CBC still being ongoing during the time when Ms Dikhanbayeva had taken over control of CBC and Bolzhal. For example, as I shall explain later, master agreements for the sale and purchase of the land were concluded on 23 January 2009 and there are, in addition, minutes of a KK JSC board meeting on the same date approving the entry into these contracts. When these documents were put to her by Mr Howe, Ms Dikhanbayeva's response was that all that was happening, and all that these documents were concerned with, was what she described as "*registration*". I cannot accept that this was the position, however. Aside from the fact that this was never mentioned by Ms Dikhanbayeva in any of her witness statements, the documents themselves are plainly dealing with the acquisition of land plots and not merely matters of registration in circumstances where there has already been acquisition. Furthermore, as Ms Dikhanbayeva herself accepted in the course of cross-examination, by January 2009 the price to be paid for the land plots had not been finalised. Even on her own evidence, therefore, it can hardly be said that the land transactions had been finalised by October 2008. My conclusion, in the circumstances, is that Ms Dikhanbayeva was controlling CBC and Bolzhal at a time when the land plot transactions between KK JSC and CBC and Bolzhal had, at the very least, still not been completed. Mr Howe put to her that she had found it necessary to come up with a story about CBC and Bolzhal being controlled by different people for different purposes because the reality was that CBC and Bolzhal were being managed by Ms Dikhanbayeva on the directions of Mr Arip in relation to the land plot transactions in the same way as they were in relation to the acquisition of Exillon assets. She denied that this was the position, but I reject her evidence in this regard. It was unrealistic and implausible.

80. Ms Dikhanbayeva gave similarly unrealistic and implausible evidence when confronted with a number of documents showing that she was giving instructions for documents to be drawn up relating to financial assistance or debt transfer between various KK Group entities and entities which the Claimants allege are connected to the Defendants. A clear example of this is an email sent by Ms Dikhanbayeva on 5 January 2007 in which she asked Ms Kogutyuk to prepare nine *"claim assignment agreements dated December 29, 2006"*, including a transfer of a debt of KZT 183,646,033.54 owed by HW to KK JSC which was to be transferred to Arka-Stroy as a *"new creditor"*. A signed agreement relating to the transfer of this amount of debt clearly demonstrates that this instruction was carried out. Not unsurprisingly, Mr Howe suggested to Ms Dikhanbayeva that this appeared to be an entirely internal process with no discussions apparently taking place involving the directors of the various (allegedly) non-KK Group entities such as Arka-Stroy and HW. Mr Howe suggested that the reason for this was that all the companies involved were, in effect, shell companies being managed by Ms Dikhanbayeva on the instructions of Mr Arip. Ms Dikhanbayeva denied this, saying that, as the KK Group was expecting an audit, she had looked at the accounts and seen outstanding amounts and asked the directors of the various KK Group entities to provide an

explanation, and then the decision was taken to assign the various claims. She said that the KK Group directors would have obtained consent from the directors of the non-KK Group entities, and that this decision was taken before the New Year but because of the holiday period her email had come a little later, once everyone was back in the office. She stated that there was a trading relationship between HW and Arka-Stroy, which was why debts could be assigned between them. I found this explanation wholly unconvincing, however. If the various debt transfers, including the particular one to which I have referred, were genuinely transactions involving entities which were not part of the KK Group, then, it is difficult to see how they could have come about without detailed discussions taking place with the allegedly independent entities. There is nonetheless not a shred of evidence to suggest that any such discussions took place. The clear impression which I derived from Ms Dikhanbayeva's evidence is that she simply moved monies (or more accurately debts) between various entities without having to engage with anybody else. The fact that she was able to do so is a clear demonstration of the entities amongst which the debts were moved being members of the KK Group.

81. Furthermore, Ms Dikhanbayeva's response to questions put to her about emails she had sent after she left the KK Group was particularly unimpressive. Mr Howe referred to two emails from Ms Dikhanbayeva to a member of the finance team on 26 and 27 August 2009, after, in fact she had left the KK Group. The email sent on 26 August 2009 timed at 10.23 pm stated as follows:

Dear Gulnara,

Please repay debts to Kazakhstan Kagazy LLP in the first half of 2009 as follows:

Ada Trade LLP	*149,800,000*	*assign to Holding Invest*	
Bolzhal LTD LLP	*1,648,762,000*	*assign to Holding Invest*	
KAGAZY PROCESSING LLP	*177,261,935*	*assign to Holding Invest*	
Holding Invest LLP	*631,824,624*	*Plus the above assignments*	*Assign to MEGA EXPOS*
RENISTROY-DF LLP	*100,000,000*	*To be closed with documents*	
MEGA EXPOS LLP	*188,541,688*	*Plus the amount of assignment to Holding Invest*	*To be closed with documents*

As for Kagazy recycling [sic], the following debts shall be covered:

	Debit	***Credit***
Kagazy Invest LLP		

Main contract		*37,423,232.07*
Holding Invest LLP		
VPP agreement dated 24/02/2009	*32,159,525.65*	

Lotos LLP		
Contract dated 01/11/2006	*226,877,094.00*	*to be covered by money transfer*

Please ask the lawyers to draft assignment agreements and the accountants to pass entries into [1C]. … ."

Mr Howe suggested that this email demonstrated that Ms Dikhanbayeva was clearly managing these companies since otherwise she would not have been able to give instructions for their debts to be assigned. Ms Dikhanbayeva denied this. She stated that, at this time, although she was living in Dubai, the KK Group was in the middle of an audit and, because this was the first time that the KK Group *"local accountants"* had been through an audit without her, they sent her some calculations to check, and she had realised some transactions were not covered. She explained that she had sent the email late at night and had made some 'cut and paste' errors (for example, the reference to Holding Invest should have been to Kagazy Processing). She added that the transactions set out in this email had never happened, and that she had corrected her mistake the next day. Mr Howe, however, then referred to an email which Ms Dikhanbayeva sent the next day at 6.40 pm, giving the following instructions:

"*Gulnara*

As the auditors are raising questions, the following will need to be done:

1. Ada Trade LLP – 149,800.000 is to effect supply of [interpreter's translation] sand, crushed stone and other materials for construction works at the industrial park.

2. Bolzhal LTD LLP – 1,648,762,000 it is necessary to increase the value of the land plots.

3. KAGAZY PROCESSING LLP – 177,261,935 to be written off as bad debts as of August

4. Lotos LLP – 226,877,094 to be written off as bad debts as of August

5. RENISTROY-DF LLP 100,000,000 and MEGA EXPOS LLP 188,541,668 PLUS Holding Invest's 550,000,000 – will be construction works. If we don't show them, we won't be able to capitalize interest.

6. Let Holding Invest charge the rent for the entire space of the building (Holding Invest will remove the rent charged to CM LLP)"

Mr Howe put to Ms Dikhanbayeva that this email showed that Ms Dikhanbayeva was engaging in the creation of false documents in order to

justify various transactions which had taken place and to deceive the auditors. Ms Dikhanbayeva denied this, saying that her reference to Ada Trade was to a genuine contract with Ada Trade for the delivery of sand and other things. I am clear, however, that the instruction in Ms Dikhanbayeva's previous email, that the lawyers should be instructed to draw up contracts and the accountants to make entries in the 1C accounting database, involved Ms Dikhanbayeva giving instructions concerning the creation of false documents and accounting records rather than dealing with genuine transactions. This reinforced me in my assessment that Ms Dikhanbayeva was not a witness of truth.

Mr Alessandro Manghi

82. Mr Manghi is a former director and Chairman of KK Plc (having replaced Mr Zhunus in that role in 2008). Prior to becoming Chairman, he held other senior posts within the KK Group, dating back to 2005. He left KK Plc in January 2010 shortly after the Defendants' departure from the KK Group in order to continue working with the Defendants on their subsequent project involving Exillon. He was CEO of Exillon from 2009 to 2011. Mr Manghi is a chartered accountant and a former auditor with PwC. He met Mr Arip in the late 1990s/early 2000s, whilst working as a Senior Investment Manager for the Kazakhstan Post Privatisation Fund; Mr Arip was then the General Director of Spectrum LLP which was one of Mr Manghi's investee companies. He met Ms Dikhanbayeva in 2006 whilst working for the KK Group. He described his relationship with Mr Arip and Ms Dikhanbayeva as that of "*friend and colleague*". Mr Manghi gave evidence relating to Arka-Stroy, the Land Plots Claim and events in 2009 which are relevant to limitation. Mr Twigger's submission was that Mr Manghi was a careful witness whose evidence the Court could have confidence in. He submitted, in particular, that Mr Manghi's account of a meeting which he had with Mr Mackay and Mr Werner in the Rixos Hotel in December 2014 should be preferred to the account given by Mr Werner.

83. Mr Howe submitted that Mr Manghi was an unsatisfactory witness, whose impartiality was open to severe doubt. Mr Howe referred, in particular, to Mr Manghi's professional connections with the Defendants, suggesting that the professional backgrounds were *"inextricably linked"*. Although I am not altogether convinced by this as a freestanding point since it is often the case that witnesses will be called in commercial litigation such as this who are closely connected to one or other (or both) of the parties, I was nonetheless reminded by Mr Howe that at one point during the course of his evidence Mr Manghi referred to Cleary Gottlieb, Mr Arip's and Ms Dikhanbayeva's solicitors, as "*our lawyers*". It seems to me that this did betray the fact that Mr Manghi aligned himself very firmly with Mr Arip and Ms Dikhanbayeva and was not in any real sense an independent witness. This impression was underlined by the fact that, in giving his evidence, Mr Manghi adopted an argumentative approach in relation to some of the matters which were explored with him. A particular example concerns Mr Manghi's refusal to accept that CBC and Bolzhal were related parties of the KK Group given that Mr Esperov and Mr Shabadanov were merely nominees and that CBC and Bolzhal were engaging in very substantial transactions with KK JSC (the main operational holding company of the KK Group) and that, as such, they should have been disclosed in the KK

Group 2007 and 2008 Annual Reports. When first asked about this by Mr Howe, Mr Manghi was insistent that he *"wasn't aware of dealings between those companies and KK at the time"*. Mr Howe explained that what Mr Manghi was being asked was whether, had the question of related parties been raised with him, he would have considered that Bolzhal and CBC ought to be regarded as related parties. Mr Manghi's response was to obfuscate, suggesting that *"it is a complicated question, sometimes, determining whether something is a related party or not"* albeit that he appeared to accept that *"on the face of it, it looks like it"*. He then went on, however, to quibble, apparently taking the view that *"Maybe they are not related parties if they are acting as nominees"*. He maintained that whether a party is a related party is not a straightforward question. Mr Howe expressed some bafflement at Mr Manghi's stance. I could understand why. In truth, Mr Manghi's evidence on this point made little sense. It did not reflect well on him and suggested, in my view, an unwillingness to be entirely straightforward with the evidence which he was giving.

84. My unease in relation to this aspect of Mr Manghi's evidence was only heightened by evidence which he gave when shown by Mr Howe an email which he sent to Ms Gulnara Musagalieva, KK JSC's Deputy Finance Director, on 12 November 2009. The email listed some questions about a spreadsheet which Mr Manghi had been sent. The second of the questions posed was: "*The payment to Arka-Stroy is a related party transaction, I thought we had stopped using this company years ago and had wound it up*." Mr Howe suggested that Mr Manghi was here acknowledging that Arka-Stroy was, indeed, a related party. Mr Manghi's response was to dispute this and to assert that *"that statement was actually a mistake"*. He went on to say that *"this isn't the complete email chain, there were some other emails after this, which I haven't seen in the disclosure"*. He suggested that *"the subsequent emails might help my explanation"*. There are, however, no such emails in existence. Asked by Mr Howe what was the *"mistake"*, Mr Manghi then launched into what Mr Howe suggested was a pre-prepared speech. He began by explaining that he sent the email *"late at night"* and that it was one of *"over 50 emails"* which he sent that night, during which he *"received well over 100"*. He explained that he *"was extremely busy"*. He went on to say that *"Basically I saw the name Arka-Stroy on the list and it seemed like a familiar name, but I couldn't place it at that point in time. And that's why just assumed: well, this must be one of those former group companies, it is a related party transaction"*. It seemed to him at the time, he added, that Arka-Stroy was *"one of the former Kagazy Invest subsidiaries that had been left out of the group after the restructuring"*. The subsidiary which he had in mind was, apparently, so he explained, Kazvtorsyrye LLP ('Kazvtorsyrye'). He was, as he put it, *"just mixed up"*. Mr Howe challenged him in relation to this explanation, pointing out that in his email he had been very specific in saying that Arka-Stroy was a related party. Mr Manghi maintained, however, that when he sent the email he was very tired and had simply made a mistake. Pressed still further by Mr Howe, he denied that he was making up an excuse, adding that not only was he tired but also that he is mildly dyslexic. This was unconvincing evidence which became even more unconvincing after Mr Howe took Mr Manghi to the spreadsheet which Mr Manghi had been sent and on which he had commented in the email. Mr Howe put to Mr Manghi that it was clear from the spreadsheet what Arka-Stroy was.

Also, given that Arka-Stroy was one of the biggest counterparties for the Kagazy Group, it is unlikely that Mr Manghi would have become confused. Mr Manghi struggled to provide a satisfactory answer to this. I am driven, in the circumstances, to conclude that Mr Manghi's evidence on this issue was made up. Furthermore, I agree with Mr Howe that Mr Manghi was obviously ready with his wholly implausible *"mistake"* explanation, and this does not reflect well on his credibility.

85. Turning, lastly, to Mr Manghi's account of a meeting which he says that he had with Mr Werner and Mr Mackay of SP Angel in December 2009, evidence which is relevant to the limitation issue, although Mr Twigger submitted that what Mr Manghi had to say about this meeting was obviously right, I was rather less convinced that that is the position. According to Mr Manghi, the meeting took place at the Rixos Hotel and entailed Mr Werner and Mr Mackay telling him that they thought that most of the US$ 70 million paid to Arka-Stroy had not been spent on the Aksenger development but had instead been misappropriated or stolen by the former shareholders, Mr Zhunus and Mr Arip. Mr Manghi also stated that Mr Werner and Mr Mackay suggested that he should cancel the Exillon IPO, which was due to take place at the end of that week. Mr Werner denied that this particular meeting, or any discussion of this kind, took place. I find it difficult to accept Mr Manghi's account. First, as Mr Howe pointed out, it is striking that Mr Manghi made no mention of the meeting until he came to make his fifth witness statement in September 2016. This is despite the fact that limitation has been in issue in this case since September 2013 and notwithstanding also that, again as highlighted by Mr Howe, the limitation issue was heavily relied upon by Mr Arip when seeking to discharge the freezing order (both at first instance and on appeal), something which was done deploying witness statements provided by Mr Manghi. It is difficult to see why, in the circumstances, Mr Manghi would not have mentioned the meeting, and what he alleges was discussed at the meeting, at an earlier stage if what he had to say at trial was the truth. The fact that the allegation was made in the Defence which was, Mr Howe would say, belatedly served in February 2015, makes it all the more curious that Mr Manghi should not have mentioned it in a witness statement until much later. Mr Manghi's explanation, when asked by Mr Howe, was that he had failed to mention the matter previously because, at that meeting, he had been made to feel like a fool who was unknowingly playing a part in a massive fraud. He added that he had felt "*traumatised*" and "*ashamed*"; he did not, therefore, like talking about the meeting and had "*locked away*" his memories of it. I found these explanations wholly unconvincing, however. First, if what he says happened did actually happen, then, it is inconceivable that Mr Manghi, at the time KK Plc's Chairman and an experienced businessman, would not have taken steps to investigate the allegations which had been made. Secondly, at a minimum, given his role as Chairman, Mr Manghi would have been duty-bound to have raised the matter with his board and, at the very least, the KK Group's lawyers. The fact that he did neither of these things, even on his account, causes me to be very sceptical about the veracity of his evidence on the point. He suggested that the reason why he took no such steps is that, soon after the meeting, he decided that Mr Werner must have made up the allegations in order to put pressure on him to waive his notice period (as he put it, to *"tenderise"* him). That explanation does not, however, in my view, ring

true. Nor, thirdly, does Mr Manghi's evidence that he was traumatised and emotional. I repeat that Mr Manghi was an experienced businessman. I simply cannot accept, in the circumstances, that, if the meeting took place as he now describes it, somebody in his position would have reacted as he would now have it. Fourthly, again as Mr Howe pointed out, Mr Manghi did, as a matter of fact, mention a meeting with Mr Werner at about the time of the meeting which he claims to have had with Mr Werner and Mr Mackay. This was in an email which he sent to Ms Kogutyuk on 21 December 2009. The email, however, said nothing at all about a meeting attended also by Mr Mackay and contained a description of what was discussed which bears no relationship with the account which Mr Manghi gives in relation to the meeting alleged to have taken place at the Rixos Hotel.

86. For all these reasons, I treat the evidence of Mr Manghi with some caution and, indeed, scepticism.

Mr Vladimir Gerasimov

87. Mr Gerasimov is a businessman who was associated with companies implicated in the PEAK and Astana 2 Claims, including in particular Regul Telecom ('Regul'), a company which he ran and which was a sister company to GS. Mr Twigger submitted that Mr Gerasimov's evidence constituted important independent contemporaneous evidence which undermined the Claimants' case that there was a host of companies connected to the Defendants which were misappropriating money. He highlighted, in particular, that Regul is a successful company in its own right and that its association with GS was significant given that GS is a large construction company. He drew attention also to Mr Gerasimov's evidence as to how Regul and GS became involved in the KK Group's construction projects and how he thereafter became a shareholder of KK Plc for a short period of time. Mr Twigger emphasised that, in view of Mr Gerasimov's background, it is most unlikely that he acted, in effect, as a 'front man' for Mr Arip.

88. I did not find Mr Gerasimov to be a very satisfactory witness. He was grudging and far from forthcoming. The reason, I am clear, is that he is a good friend of Mr Arip and has been for quite a long time. His wife was also employed by companies within the KK Group, specifically Kagazy Invest and Trading Company. She was also employed by Lotos which, significantly, when Mr Howe showed him an employment contract involving his wife, Mr Gerasimov did not dispute was a company also within the KK Group. Indeed, Mr Howe expressly clarified that Lotos was *"one of the companies you thought she was working for when she was working for the Kagazy Group"* to which Mr Gerasimov's simple response was *"Yes, I understand, I have got you"*.

89. Mr Gerasimov is clearly very closely linked to Mr Arip. This is not in and of itself a reason to conclude that Mr Gerasimov gave untruthful evidence. As Mr Twigger submitted, the fact that there is a friendly and sociable relationship between two businessmen does not establish grounds to allege (as Mr Werner has) that Mr Gerasimov was *"from the outset a willing collaborator with [the Defendants] in defrauding the KK Group"*. However, taken together with

certain specific evidence which he gave, I feel driven to conclude that his evidence was not independent as Mr Twigger suggested.

90. In this regard Mr Howe highlighted, in particular, how in his witness statement he had described GS winning a tender to carry out construction work for Astana-Contract in relation to a transport and logistics centre, with Regul as GS's sub-contractor in relation to the supply of equipment, with the contracts being entered into in December 2008 and January 2009, and with Regul receiving in the first part of 2009 a large sum of money from GS which it had itself received from Astana-Contract as a prepayment for construction work. Mr Gerasimov went on to state that, as Astana-Contract was waiting for the Development Bank of Kazakhstan ('DBK') to approve the construction specifications before the project could commence, this sum was sitting idly in Regul's bank account and that, since there was an atmosphere of panic in the markets at this time due to the financial crisis, he was concerned that, if anything happened to this money, Regul would be accountable to Astana-Contract. Accordingly, he went on to explain, having discussed these concerns with Astana-Contract, Astana-Contract proposed that Regul should transfer the money to Astana-Contract's parent company, KK JSC, as temporary financial assistance, to be repaid in two or three months, and that they should execute a contract for temporary returnable financial assistance. When Mr Howe asked him about this matter in cross-examination, he was shown a table which set out the relevant money flows between Astana-Contract, GS, Regul and KK JSC in the period from December 2008 to 20 October 2009. It was put to him that, whereas in his witness statement he had referred to one pre-payment having been made by GS to Regul, the table demonstrated that there were at least five payments spread out over a period of time starting in January 2009 and continuing through to March 2009. He clarified that he had meant to refer to what he described as *"a combination of payments"*. In his witness statement, however, he had referred to *"a pre-payment"*, so suggesting that there was, indeed, a single payment. He refused to accept that there was *"any contradiction"* between what he stated in his witness statement and the reality which is that there was more than one pre-payment. As far as he was concerned, it was simply a matter of how his witness statement had been drafted. This, however, was a somewhat glib response. It was, in any event, not a response which he was able to deploy in relation to the second point which Mr Howe put to him arising out of the table. This was that on two occasions, far from any monies sitting idly in Regul's bank account, the funds passed from Astana-Contract to GS to Regul to KK JSC immediately. The first occasion which was put to Mr Gerasimov by Mr Howe involved KZT 480 million or so being paid by Astana-Contract to GS on 20 January 2009 before being passed on by GS to Regul on 6 February 2009 and then paid to KK JSC that same day. Mr Twigger made the point in closing that actually this was not the first payment which GS had made to Regul, however, since the first was made on 5 January 2009 and was in the sum of KZT 411 million, and the first payment by Regul to KK JSC was not made until 6 February 2009. Although Mr Twigger is right about this, it is nonetheless not an answer to the second instance which was put to Mr Gerasimov. That entailed a larger sum, KZT 840 million, being paid by Astana-Contract to GS on 4 March 2009 and then being transferred to Regul by GS six days later, on 10 March 2009, when (again the same day) the money was sent to KK JSC. Mr Gerasimov's explanation was to

insist that this happened to *"mitigate risks, possible risks"*. As Mr Howe pointed out, however, his position made no sense since it is impossible to see how there could be any concern relating to monies which had spent virtually no time sitting in Regul's bank account given that they had only just been received from GS.

91. Mr Gerasimov's difficulties in cross-examination did not stop there, however, because the table also indicated that Regul retained more than KZT 400 million of what it had received from GS for a number of months starting on 10 March 2009 and ending in September 2009 without making a transfer to KK JSC. Mr Gerasimov suggested that this was *"to ensure works to be performed"*, adding that *"this is the money that was not exposed to high risks, according to our opinion, and we had to pay for the works performed so we kept the money"*. Mr Howe, not unsurprisingly, made the point that this had not been mentioned in his witness statement, to which Mr Gerasimov's response was that in his witness statement he *"didn't focus on such tiny details"*. I agree with Mr Howe that retention of such a large sum of money hardly amounts to merely a tiny detail. That Mr Gerasimov's evidence on this matter is not evidence which I can accept was further confirmed by his inability to explain why, although he had stated in his witness statement that the monies were repaid by KK JSC to Regul which then paid them to GS which then, in turn, repaid them to Astana-Contract following cancellation of the contracts in September or possibly October 2009 (and anyway, as Mr Gerasimov put it when asked by Mr Howe, in the autumn), the table demonstrated that repayments started to be made as early as March 2009 with other repayments coming in May 2009 and in August 2009. Mr Gerasimov stated that he did not know why these repayments were made, suggesting that he would need to look at the underlying documents. This was unimpressive evidence. It is quite clear to me that the evidence contained in Mr Gerasimov's witness statement concerning these arrangements cannot have been true.

92. The unreliability of Mr Gerasimov's evidence was further underlined by certain evidence which he went on to give concerning Ada-Trade, a company which made two interest-free loans to the Exillon Group, totalling in excess of US$ 5.7 million in 2009. These were loans which were recorded in the Exillon IPO prospectus as involving amounts *"owed to Ada Trade"* which were *"expected to be re-assigned to Maksat Arip and repaid before the end of 2009"*, making it difficult to see how Ada Trade really could have been anything other than Mr Arip's own company. Nonetheless and although it was Mr Arip's evidence coming into trial (albeit that this was not apparently something which he was initially able to recall) that Ada-Trade was, as he put it, "*Mr Gerasimov's company*", Mr Gerasimov insisted (at least initially when first asked by Mr Howe in cross-examination) that the *"director and owner"* of Ada-Trade was a Mr Kuat Kozhamberdiev, at the time somebody in only his late teens who worked as a junior lawyer within the KK Group. Asked directly by Mr Howe whether Ada-Trade was his company, Mr Gerasimov's response was: *"I was a partner of Kuat Kozhamberdiev, but unfortunately we didn't formalise my involvement, my participation. So in fact I was his partner, but legally, de jure, I wasn't a owner of the company"*. He then agreed with Mr Howe that he was, in fact, an owner of Ada-Trade. There then followed a series of exchanges in which Mr Howe sought to explore with Mr Gerasimov how it was that Ada-

Trade, a company owned by somebody as young as Mr Kozhamberdiev, was able to afford to make so substantial a loan to Mr Arip. Mr Gerasimov's evidence was that, according to Mr Kozhamberdiev, *"the company did have that money"*. Mr Howe then asked how he came to meet Mr Kozhamberdiev. Mr Gerasimov explained that it was in late 2008 that he met him at the KK Group's offices and that, although he did not know that he was employed as a lawyer, he did know that he was employed by the KK Group. He apparently regarded him as *"quite an interesting, promising partner"* because he *"already had an operational business that was dealing in supply of materials to various customers including Kazakhstan Kagazy"*. Again, this was unimpressive evidence given, in my view, by somebody who was being very far from straightforward with the Court.

93. In the circumstances, I find it impossible to conclude that Mr Gerasimov gave evidence which was independent. I am quite clear, on the contrary, that Mr Gerasimov was a witness whose loyalty to Mr Arip (and Ms Dikhanbaeva) meant that he was prepared to give evidence which was, quite simply, dishonest. The fact that, as Mr Twigger pointed out, when Mr Arip left the KK Group, he introduced Mr Gerasimov to Mr Werner as someone who was experienced in running the operational side of the business and Mr Werner then worked with Mr Gerasimov until Mr Gerasimov shortly afterwards chose to leave does not, in my view, justify the conclusion urged upon me by Mr Twigger, namely that Mr Gerasimov is to be viewed as having loyalties both to Mr Arip and to Mr Werner. Mr Gerasimov's longstanding relationship with Mr Arip considerably outweighs his relatively short-lived working relationship with Mr Werner.

Mr Nikolay Kosarev

94. Mr Kosarev worked as Chief Engineer at PTIpischeprom, a company sub-contracted by Arka-Stroy to carry out construction work at the Akzhal-1 site (related to the PEAK Fraud). His evidence related to the nature of the work carried out at Akzhal-1 and Akzhal-2. There was some uncertainty over whether Mr Kosarev had confirmed that work was carried out on the Akzhal-2 site as well as the Akzhal-1 site. Although, at one point, he stated that Akzhal-2 was out of scope, he later stated that he did not recall that the area to the north was known as Akzhal-1 and the area to the south, Akzhal-2. He did state that PTIpischeprom only worked on a site known as *"logistics park"*, which included 14 warehouses, rail tracks, car roads and related infrastructure, which appeared to be mainly a description of Akzhal-1. However, when shown a map of the site and asked about it in re-examination, he stated that earthworks were also carried out from the road at the north of site all the way to the railway at the south, which Mr Arip and Ms Dikhanbayeva assert was a reference to Akzhal-2.

95. Mr Kosarev is an elderly man who was plainly straightforward and honest. In this regard, he was, I regret to say, an exception amongst Mr Arip's and Ms Dikhanbayeva's witnesses.

Mr Alexander Sannikov

96. Mr Sannikov gave evidence relating to the nature of the relationship and dealings between the KK Group and Arka-Stroy. He maintained that they were independent companies and, unsurprisingly, Mr Twigger submitted that I should accept this evidence. As I shall now briefly explain, I cannot do so.

97. Mr Sannikov's evidence was that the first time that he had heard of Arka-Stroy was when he met Mr Zholshybek Sartbayev in around Spring 2006 and Mr Sartbayev introduced himself as the owner of that company. Mr Saoul put to Mr Sannikov in cross-examination that, given that he was the Finance Director of PEAK at this time (he had started in this role in February 2006) and given that PEAK and Arka-Stroy had entered into a construction contract relating to the Akzhal site for a price as high as KZT 3,364,266,404 (approximately US$ 26.05 million) on 2 November 2005, this is evidence which simply could not be true. Mr Sannikov's somewhat blithe response was to claim that he *"wasn't related to construction"*. The difficulty with this, as was pointed out to him, is that he quite obviously was involved in construction-related matters. In her witness statement, Ms Dikhanbayeva described him as having responsibility for dealing with the financial aspects of construction projects and in his witness statement he had referred to monthly meetings of the budget committee of the KK Group having involved Arka-Stroy representatives attending to report on construction progress. Mr Saoul put to him that he was trying to give the impression that he had not previously heard of Arka-Stroy in order to support Mr Arip's and Ms Dikhanbayeva's case that it was an unrelated company. His answer was that he did *"not support any of the parties"* and had merely provided *"an unbiased witness statement"*. It was then put to him that he must have known about Arka-Stroy given his role as Finance Director of PEAK from February 2006 onwards in view of what Mr Saoul described as the *"absolutely enormous financial flows passing from PEAK to Arka-Stroy"*. Mr Sannikov's thoroughly unsatisfactory response was to say that he *"can't answer that"* because *"now I can't remember that period of time"*. Mr Sannikov was here being evasive.

98. Mr Sannikov's evasiveness continued during the course of his cross-examination. For example, he was asked about his evidence in his witness statement that he began to do some work for Arka-Stroy in his free time and became Arka-Stroy's Finance Director in Spring/Summer 2006 in order that Arka-Stroy could pay him for what he was doing. Mr Saoul pointed out that his employment contract with Arka-Stroy (which was, it should be noted in passing, located on the KK Group's systems) stated that he would work normal working hours (eight-hour days with a break of one hour based on a five-day working week). Mr Sannikov nonetheless still insisted that he only carried out work for Arka-Stroy in his evenings and weekends given his commitments at PEAK, somewhat unconvincingly suggesting that the contract was *"a standard template of an employment contract necessary for the accounting office to accrue salary"* and adding that he *"was free to choose my own working schedule because I was delivering to all my commitments"*. He was then pressed as to why it is the case that there is no documentation involving Mr Sartbayev, the person at Arka-Stroy with whom Mr Sannikov insisted he had all his dealings. Mr Saoul put to Mr Sannikov that the reason he was unable to produce, for example, a single email with Mr Sartbayev, and why no other witness had in their witness statement referred to Mr Sartbayev, was because Mr Sartbayev

was not the owner of Arka-Stroy as Mr Sannikov claimed. Mr Saoul drew attention, in particular, to the fact that the employment contract described Arka-Stroy as being represented by Mr Makovac rather than by Mr Sartbayev. Mr Sannikov's response was to say that Mr Makovac *"was a director and he was working on a project, whereas Mr Sartbayev was most likely the owner and overall manager of the firm"*. This was evidence which, in my view, was most contrived. It is clear that Mr Sannikov was trying to give the impression that Arka-Stroy was separate and apart from the KK Group by referring to Mr Sartbayev as Arka-Stroy's owner when he knew full well that this was simply not the case.

99. I am quite clear that Mr Sannikov set out, in giving his evidence, to mislead. This is why he went out of his way to explain that he never communicated with Mr Sartbayev by email. He thought that if he made this point, then, it would explain the absence of any email correspondence. As Mr Saoul pointed out, however, during the course of cross-examination, it is unrealistic to suppose that there would not be at least some email correspondence. It is equally unrealistic to suppose that, if Mr Sartbayev really did play the role which Mr Sannikov maintained, there would not be some reference to him in at least some type of document, yet there is no reference anywhere to Mr Sartbayev. Mr Sannikov sought to suggest that the reason why there is no reference to Mr Sartbayev in the employment contract or in any other document was that Mr Sartbayev was a government official and that there is (or at least was at the time) a practice within Kazakhstan of companies owned by government officials being recorded as the property of other persons. Whether or not there is (or was) such a practice, it is still highly surprising that there should be no reference at all to Mr Sartbayev in any documentation. Mr Sannikov, in my view, simply made up his evidence concerning Mr Sartbayev's alleged role. He did so, I am quite clear, in order to assist the Defendants' case. This does him no credit whatsoever.

100. The unreliability of Mr Sannikov as a witness was also demonstrated by the evidence which he gave in response to Mr Saoul's questions concerning an email exchange which he had with the head of the KK Group's Human Resources Department. Specifically, in answer to a request for information about *"the Company"* finances, which apparently was needed for a *"legal audit"*, Mr Sannikov responded the next day, 17 January 2007, to Olga Kan at the KK Group (copying in both Ms Dikhanbayeva and Mr Sharipov), explaining that he had not yet provided the information requested because:

"*Yesterday, I was solving the issue on debts of PEAK, ArkaStroy and Trading House by issuing invoices; in the afternoon, I was preparing documents and data for Baurzhan to solve the issue on financing ArkaStroy via Nurbank, that is why I could not provide the need information to you*".

When shown this email, Mr Sannikov was keen to explain that the reference to *"solving the issue on debts"* was a VAT-related matter and had nothing to do with what Mr Saoul suggested to Mr Sannikov was *"manipulating debts between these three companies, all of which you were responsible for"*. Mr Sannikov disputed this, explaining that *"I couldn't channel funds around because I didn't have the right of signature"* and that he *"was not authorised to make bank money transfers"*. In my view, however, that was not really an

answer to the point which was being made to Mr Sannikov by Mr Saoul. In his email Mr Sannikov was quite clearly describing work which he was doing not only on behalf of PEAK and Trading House (both members of the KK Group) but on behalf also of Arka-Stroy. This was work which he was describing to another employee of the KK Group. He quite clearly was treating all of the work described as being for companies within the KK Group. If there were any doubt about this and the role which Mr Sannikov was at this time playing, it is removed altogether by how Mr Sannikov chose to sign off the email. He did so describing himself as "*…A Sannikov, financial director of PEAK LLP and Arka-Stroy LLP*". Mr Saoul put to him that this represents conclusive evidence that he was performing a joint role, yet Mr Sannikov would not accept that this was the case. His explanation was this:

"Again, at PEAK I was a logistics officer. I was responsible for logistics only. At Arka-Stroy I was mostly an adviser to structure accounting processes and report on information flows. My signature here, financial director of PEAK and Arka-Stroy, means that probably this email was addressed to that lady, whoever she is, I don't remember now. So hence I showed - I meant to show that I was very busy and overloaded with her repeated requests for information. I was never hiding that I was employed by Arka-Stroy."

This was not an answer to the point which was being put to him. It is perfectly obvious that Mr Sannikov was, as Mr Saoul suggested, carrying out work for PEAK and Arka-Stroy simultaneously in what was a joint role performed for companies which were each within the KK Group.

101. That this was the position, despite Mr Sannikov's insistence before me that the opposite was the case, is furthermore borne out, in my view, by the evidence in his witness statement that he did not consider that there was a conflict of interest in his working for both Arka-Stroy and PEAK at the same time. Mr Saoul put to Mr Sannikov in cross-examination that the reason why he did not think that there was any conflict was *"because they were part of the same company"*. He denied this, repeating that he *"worked at PEAK involved in the division and project related to logistics, exclusively"* and *"wasn't involved in construction matters at PEAK"*. He went on to say that *"At Arka-Stroy I was an adviser on budgeting and structuring accounting processes for construction projects, so I didn't know there was any conflict of interest possible"*. Mr Saoul pointed out to him, however, that in his witness statement he had referred to budget committee meetings of the KK Group at which there had been presentations on financial aspects of the construction project with Arka-Stroy. Mr Saoul queried whether Mr Sannikov's position was that he attended such meetings as a representative of Arka-Stroy. Mr Sannikov's answer was that he *"attended those meetings mainly as a PEAK employee"*, adding that *"Because mainly those meetings involved our whole team, where we reported on budgets and Arka-Stroy was engaged on an ad hoc basis from time to time. Not always. Only if any matters were discussed, I was able to address them provided I was asked to"*. This answer appeared, therefore, to confirm that Mr Sannikov *did* work on financial matters for PEAK which were construction-related. However, when Mr Saoul sought confirmation to that effect, Mr Sannikov's wholly unpersuasive response was to deny this. Mr Sannikov's denial became all the

more implausible when he was taken by Mr Saoul to the minutes of one of the budget committee meetings held on 11 September 2006, specifically the reference in those minutes (which were approved by Mr Sannikov amongst others) to Arka-Stroy being a "*subsidiary*" of Kagazy Invest (the holding company of the KK Group at that time).

102. For these reasons, I do not feel able to place reliance on Mr Sannikov's evidence.

Mr Nurlan Sharipov

103. Nor do I feel able to place reliance on the evidence which was given by Mr Sharipov, who was formerly the General Director of PEAK and who likewise gave evidence in support of the Defendants' case that the relationship between the KK Group and Arka-Stroy was genuinely independent and so in rebuttal of what Mr Twigger described as the Claimants' case *"that Arka-Stroy was a complicit, Trojan horse, established for nothing more than to extract funds from the KK Group"*.

104. It was Mr Twigger's submission that Mr Sharipov's evidence should be accepted. This is, however, a submission with which I struggle, not least given the attitude which Mr Sharipov was wont to adopt when confronted with documents by Mr Saoul which, at least on their face, were at odds with the evidence he was giving. This is exemplified by his response to being asked about an email which he sent to a number of people in May 2006 relating to the conduct of an audit of subsidiaries of Kagazy Invest. The attachment to that email was a formal order on Kagazy Invest notepaper dated 28 April 2006 which listed a number of companies to which the audit was planned to relate. Those companies included Arka-Stroy. When asked why this should have been the case, Mr Sharipov's response was to say that he *"didn't originate that letter, I simply forwarded that, as you can see"*. Regardless of whether that is right or wrong, what is important is that Mr Sharipov did not take issue with Arka-Stroy's characterisation as a subsidiary (or subordinate) of Kagazy Invest. More than this, as Mr Saoul pointed out, one of the people to whom Mr Sharipov sent his email forwarding the order was Mr Makovac at Arka-Stroy. Mr Sharipov could not explain why otherwise he would have sent his email to Mr Makovac.

105. Mr Sharipov was also asked, like Mr Sannikov, about Arka-Stroy attending the KK Group's budget committee meetings. Mr Saoul took him, in particular, to the minutes of the meeting held on 11 July 2006 to which I have previously referred. Mr Sharipov explained at some length that he had *"initiated this procedure of inviting representatives"* to such meetings. He explained, in particular, as follows:

"Some of those budget committee meetings saw me explaining some of these facts regarding what pertained to my operations which was dependent on Arka-Stroy's deliverables in the future. So if Arka-Stroy delayed with construction we would incur other extra costs and I would fail to deliver on my commitments to my management. That is why, when I could not explain the causes behind some delays or the reasons for increases in construction costs, I would invite representatives of Arka-Stroy so that they could deliver a first-hand

explanation. As far as I remember a representative of Arka-Stroy would always come at the very end of these meetings, that was weekly, and he would explain what was going on on the construction site, explaining the causes behind delays and other related causes to effect the timeline of construction as well as the quality of it."

Whilst this explanation made a degree of sense, what Mr Sharipov struggled to explain was how it was that Arka-Stroy should find itself described in the minutes as one of the *"subsidiaries"* of Kagazy Invest.

106. There were other examples in his cross-examination which caused me to doubt Mr Sharipov's reliability as a witness. Perhaps the best example concerns an email which was sent to a large number of KK Group employees from an address described as *"n.sharipov@office.com"* on 22 January 2008 and whose subject matter was *"changes in email addresses for PEAK and Arkastroy"*. That email stated:

"*Dear colleagues!*

As the servers of the two companies PEAK and Arkastroy have been merged, as of today the email addresses of all our employees in the new merged company have been changed. The name of every employee remains unchanged, but the domain name changes after @ from megalogistic.kz to peak.kz and arkastroy.kz to peak.kz …"

Mr Saoul put to Mr Sharipov that this email was referring to a merger between PEAK and Arka-Stroy. Mr Sharipov did not accept this, making a number of points. The first was that the email address was not his. He then went on to make various other points, including to suggest that at the time that the email was sent he had ceased to work at PEAK, only to accept when challenged on this by Mr Saoul that he did not, in fact, leave until later. Pressed on the reference in the email to *"the new merged company"* (or to *"our company"* depending on the translation), his response, again, was to say that he did not *"see any Arka-Stroy address here and I see some doubtful addresses of people who were never employed with PEAK"*. Mr Saoul then directed Mr Sharipov to another email from the same email address which was sent to Mr Sannikov and Mr Nikolay Guber, a KK employee, in December 2007, in response to an email from Mr Guber to Mr Sharipov and a number of other KK employees regarding a budget committee meeting. That email stated:

"*Nikolay, what do you mean by PEAK (stage I)? The former Arkastroy? Or something else? For us PEAK (logistics) and PEAK (operation) have always been presented as one project… Please clarify*".

Mr Saoul put to Mr Sharipov that this (in particular, the reference to the *"former Arka-Stroy"*) was further clear evidence of the merger between PEAK and Arka-Stroy. Mr Sharipov first sought to explain this email, saying that PEAK was having problems with Arka-Stroy at this time and so he had probably been referring to construction work formerly under the responsibility of Arka-Stroy. Specifically, when the wording of the email was put to him, Mr Sharipov's immediate response was to say *"Yes, that is what I say"*. However, when asked

to confirm that he accepted that he sent this email, he then stated that he had not sent it because the email address was not his. The following exchange then ensued:

"Q. I'm confused. You gave us a long answer trying to explain what you meant when you sent this email, but now you have just suggested that you don't recognise this email address?

A. No, I just didn't pay attention to the very top line. My apologies.

Q. And so the point you are making is if you have been fortunate enough to see the email address on this document you would have given a different answer to the one that you just gave to the court; is that what you are saying?

A. No, the answer would be the same. Again, I cannot have any factual statement on a document which originated from an address that is not mine, so I cannot state the fact that it is my email. I may not recollect all the details. It may be my email and I could have asked this particular question.

Q. Yes. You weren't surprised by the text when I showed you the email in the first place, were you? You weren't shocked at what you had said?

A. I wasn't.

Q. The reason you weren't shocked is because, as all the documents we have just looked at show, you knew perfectly well that Arka-Stroy was part of the KK Group?

A. No, it is wrong."

Mr Sharipov was here being both argumentative and evasive. It was clear that he changed his tack at this point because he did not initially notice the email address and so was not alive to the argument that he could deny having sent the message. The fact that he appeared to recognise the content of the email as being something for which he was responsible, when first dealing with Mr Saoul's question, makes it perfectly clear that he sent the email, and so that his efforts to disclaim responsibility for weight and other messages sent from the relevant email address were as opportunistic as they were contrived.

107. I need not, in the circumstances, take up further time in dealing with Mr Sharipov's evidence. The fact that he was willing to adopt the misleading approach which he did in relation to these exchanges can only lead to one conclusion: he was not a reliable witness.

Mr Igor Zhangurov

108. Mr Zhangurov was formerly engaged part-time by Arka-Stroy to provide it with IT support. His evidence related to Arka-Stroy's alleged independence. Mr Twigger's position was that Mr Zhangurov gave what he described as *"unvarnished evidence"* which supported Mr Arip's and Ms Dikhanbayeva's position that Arka-Stroy was an independent business. Although I would be reluctant to conclude that Mr Zhangurov was a witness who set out to give

misleading evidence, nonetheless I found his attitude to the various documents which were put to him by Mr Miller not only to be somewhat tiresome but also somewhat suspicious. I have the impression that Mr Zhangurov sometimes was casting doubt on the authenticity of documents in order to avoid having to answer questions about them. In such circumstances, I must inevitably conclude that he was not an entirely straightforward or reliable witness.

109. I shall come on shortly to give an example of this approach to documents. First, however, it is worth mentioning that it emerged during Mr Zhangurov's evidence that, although it is pretty clear that it was Mr Zhangurov who worked for Arka-Stroy, the person who was Arka-Stroy's official employee was not him but his wife, Tatyana Zhangurova, who actually worked in the IT team at PEAK. He went on to explain that, whilst his wife *"was receiving her salary, because she was officially formally recorded as an employee"* he *"was the person who performed the actual work"*. Apparently, she never attended at Arka-Stroy to do any work at all. Instead, she attended *"Only when she was actually employed and then dismissed"*, the latter requiring attendance in order *"to undergo a number of formal procedures"*. His evidence was that he requested this arrangement with Arka-Stroy because he already had two other jobs and needed to avoid "*possible questions*", explaining that "*companies that could be considered partners or competitors dealing in one and the same trade, such companies typically don't want to share a person*". This was somewhat cryptic.

110. Turning to Mr Zhangurov's approach to documents, an example was when Mr Zhangurov was shown an on-screen copy of an email from Mr Sharipov (from his PEAK email address) early on in his cross-examination. Mr Miller asked Mr Zhangurov to note how Mr Sharipov had described himself, only for Mr Zhangurov immediately to say that "*to figure out that this is a real, genuine email from Nurlan Sharipov, I have got to look into the technical metadata of the email, what server was used, when it was sent out, when it was received. Now I can just see a paper. I can type a dozen of papers like this without any sophisticated technical means, just in Microsoft Word ... So I doubt that this document is genuine*". Mr Zhangurov's immediate suggestion that this email may have been fabricated was surprising to say the least. It suggested a disinclination to be open in the evidence which he was giving. Mr Miller responded by suggesting that Mr Zhangurov had only queried the authenticity of the email because Mr Sharipov's email signature gave his address at PEAK as 30 Prigorodnaya Street (the offices where Arka-Stroy was also based). Mr Zhangurov denied this, but I had the impression that Mr Miller was right to make the suggestion that he did. That impression was strengthened when Mr Miller put to Mr Zhangurov another email which was sent the same day as the *"Dear colleagues!"* email from the *"n.sharipov@office.com"* address which Mr Sharipov denied ever having used. The email which Mr Miller asked about was headed *"notification on changes in email addresses"*. The sender of the email was identified as *"Tatyana Zhangurova <t.zhangurova@office.com>"*. The recipients were described as being *"All Arkastroy <all_arkastroy@office.com>"* and *"All MTS <all_megalogistic@office.com>"*. The email read as follows:

"Attention all employees!

As two companies are merged as PEAK, from today the email addresses of all our employees have been changed. The name of every employee remains unchanged, but the domain name changes after @ from megalogistic.kz to peak.kz and arkastroy.kz to peak.kz. The old addresses megalogistic.kz and arkastroy.kz will work until 31 January 2008. Please advise your partners about the new email addresses."

Mr Miller not unreasonably pointed out, in the first instance, that the email appeared to have been written by Mr Zhangurov's wife. Mr Zhangurov's immediate response was this:

"Again, who said that? To confirm the authenticity of this document, certain technical conditions are required. If they were merging the servers, then the IT people of the company was doing the merger, the combination, most likely knew the account passwords of the system administrator, of myself, represented by Tatiana, by the name of Tatiana Zhangurova, so they do anything on my behalf, so to speak, because I did not delete my account when I left the company. And again, I doubt the authenticity of this document."

Mr Zhangurov confirmed in answer to Mr Miller's next question that as far as he was concerned the document which Mr Miller had shown him had been made by *"An interested party. Interested in presenting this document and producing it"*. He was saying, in other words, that the email had been fabricated. This was unimpressive evidence.

Mr Erzhan Jumadilov

111. Mr Jumadilov's evidence is that he worked as a real estate broker between 2005 and 2009. Mr Twigger described him as a sophisticated businessman, who was able to explain the details of his (and the other real estate brokers') role in the land plots transactions, including how the land plots were paid for and how he was paid for his services. He suggested that, in the circumstances, the Claimants' suggestion that his evidence represented pure invention should be rejected. He highlighted, in particular, how Mr Jumadilov was able to recall details, which it is hardly likely he could have simply made up. In my view, however, that is exactly what they were.

112. Mr Jumadilov accepted that there were no documents whatsoever to support his evidence. As Mr Twigger reminded me, it was his evidence that there had been documents but that they had been "*destroyed in the course of time*". The difficulty with this is that there is not a single document to support the evidence which was given by Mr Jumadilov. This is not, therefore, a case where the documentary picture is fragmented but there are at least some documents supportive of what is said to have happened. On the contrary, there are no documents at all. This is surprising, to say the least, since it might be expected that there would be some reference somewhere (however fleeting) to the transactions having taken place. I can also hardly lose sight of the explanations which Mr Jumadilov gave as to why, for example, there is no tax documentation demonstrating that he was operating in the land broking business at the relevant time. His first explanation was that he was "*attentive to paying taxes*" because he had previously worked in the Ministry of Finance Tax Directorate, only then

to explain that he had not submitted any tax returns for his own earnings relating to his land broking business because "*it was my side earnings and I didn't have to recognize it in any documents or statements*", adding that he would have declared these earnings as part of Bolzhal's and CBC's tax returns (despite the fact that he was not a shareholder in either of those companies). Similarly, when asked whether he had a website or any advertising for his real estate business, his answer was bordering on the bizarre (or at least puzzling):

"*I used to have a small bakery and I did advertise that business. We used to make the best bread in the city. I had two or three professionals working for that. But I didn't advertise my real estate business*".

This seemed to me to suggest that Mr Jumadilov had no real land broking business at all.

113. I am quite clear that Mr Jumadilov was not a reliable witness. An illustration of a somewhat curious approach to business ethics, as Mr Howe pointed out, was that, contrary to what was contained in his witness statements, Mr Jumadilov explained when he came to give oral evidence that his commission was not set as a percentage in advance but instead that he agreed with KK JSC a price which it would pay for the land and that he would then seek to negotiate a lower acquisition price with the farmers, with the difference being his commission. He confirmed to Mr Howe that this was not the subject of any written agreement with KK JSC, albeit that he appeared to suggest that there were *"verbal agreements"*. Earlier, however, he had acknowledged that there was *"nothing definitive"* agreed as to the rate of commission which he would receive and that it was *"an approximate agreement"* of *"Approximately 5%"*. As Mr Howe submitted, this seems to be a very uncommercial way for KK JSC to have done business. The fact that what Mr Jumadilov had to say contradicted his written evidence suggests, I also agree with Mr Howe, that his evidence on the point was manufactured. He also somewhat breezily agreed with Mr Howe that not only did the land plot transactions involve the making of fake agreements (as he acknowledged in his witness statements) but also fake VAT claims in respect of services which were not provided. He agreed that this was dishonest but explained that *"there was no other option"* since the *"farmers required money in cash from us"* as at the time *"no one trusted banks"*. He confirmed that he did not, as Mr Howe framed it in a question put to him, *"mind being dishonest in order to achieve"* his *"business ends"*. He explained that dishonest behaviour *"is a common practice all over the world"*. Asked specifically about his conduct, he agreed that *"those actions are to some extent dishonest"*, before adding *"But when you have no other way out, no other option, no other choice, you resort to this"*.

114. A similar attitude was displayed by Mr Jumadilov when confronted with evidence of his own dishonesty in relation to the alleged purchase of an office building from Holding Invest using the KK Group's funds. He stated in his first witness statement that he and some business associates purchased an office block from Holding Invest (a company owned by Mr Arip and Mr Zhunus), in an attempt to explain a payment of approximately KZT 605 million/US$ 5 million from Bolzhal to Holding Invest. Mr Jumadilov stated in cross-examination that he had decided to use money which the KK Group had

provided to Bolzhal for the purposes of the land plots purchases to finance this transaction for his own benefit, saying that this money was *"idle"* and that his friends were wealthy businessmen who agreed to pay him back. Mr Jumadilov stated that the decision to purchase the office building entailed a completely different venture to transactions with the KK Group and that he did not know that Holding Invest was owned by Mr Arip and Mr Zhunus. This was wholly implausible. What matters for present purposes, nonetheless, is that he accepted in cross-examination that to use KK JSC's money in this way was an improper use of funds. His response to Mr Howe was simply "*C'est la vie*", before going on to agree that he was prepared to act dishonestly if there was money in it for him.

115. In the circumstances, it is impossible to approach Mr Jumadilov on the basis that he was anything other than an unreliable witness.

Mr Mamed Mamedov

116. Another witness to give evidence in relation to the land plots transactions was Mr Mamedov, the owner of a land plot which he sold to CBC. Mr Mamedov's evidence in his witness statement was that he and his family owned a plot of agricultural land located in Almaty, with a total area of 33.12 hectares. In 2007, he explained, he was approached by a woman called Saule (the land broker dealing with him) who suggested that he should sell the plot. Saule helped him register the land into his own name, he signed the sale and purchase agreement and Saule paid him the price of US$ 1,800 per sotka (one hundred square metres of land). This is equivalent to a total price of US$ 5.9 million for the 33.12 hectare plot. To put this sum into context, the Claimants made the point in their opening submissions that the average monthly wage in Kazakhstan at the time (2007-2009) was approximately KZT 60,000, equivalent to approximately US$ 460. His written evidence was that the purchase documents stated a lower price than that had been agreed in order that he would incur less tax.

117. During cross-examination, Mr Mamedov's evidence underwent a certain amount of revision. He explained, in particular, that the land had belonged to him jointly with nine other relatives. He also said that the price he had given of US$ 1,800 per sotka was an estimated amount because he had been paid in installments, in dollars, and could not remember the precise amount paid, or how many installments there had been. His evidence was surprisingly vague in this regard. He stated that he wanted to be paid in cash so he could have "*real money*" to share with his relatives. Mr Mamedov stated that his share of the land plot was 5.6 hectares, which means that, if he was paid US$ 1,800 per sotka, his share would have been over US$ 1 million. He stated that he spent his share of the money on a car, some refurbishment in his home, a house for his daughter and that he shared it with relatives. He stated that the money was spent within a couple of months. He still lives in the house in the village where he has lived all his life. Somewhat implausibly, given the amount of money involved, Mr Mamedov also said that, if he had been the only owner of the land plot, he would not have sold it but continued to farm it (apparently, his relatives convinced him to sell).

118. It was in relation to the tax position, however, that Mr Mamedov's oral evidence was most markedly different from his written evidence. Although in his witness statement he had explained that the purchase documents stated a lower price than what had actually been agreed in order that he would incur less taxes, his evidence during cross-examination was that he did not pay any taxes in relation to the land sale. He explained that Saule had told him that she would pay all the taxes, adding that he thought that maybe he had been paid the purchase price after the deduction of the 10% tax. It was not clear from his evidence whether he and his relatives or Saule and those she represented would get the benefit of the reduction in tax payable. Mr Miller put to Mr Mamedov that the reason why his oral evidence was different to his written evidence was because the statement was prepared on Mr Mamedov's behalf with very limited input from him. That plainly was the case, as demonstrated by the fact that Mr Mamedov could only estimate the amounts which he was paid and could not explain with any clarity the position as to tax.

119. Mr Twigger submitted that Mr Mamedov was a *"helpful and animated witness who was able to provide colour as to how his share of the purchase price was shared among his family"*. All in all, however, I do not consider that I can place a great deal of reliance on Mr Mamedov's evidence.

Mr Rasul Khasanov

120. Mr Rasul Khasanov worked in the IT department of the KK Group between October 2009 and October 2013. He worked as the head of programming and his role included administering 1C accounting databases. His evidence related primarily to the discovery of the (alleged) PEAK Fraud and the presence of the Arka-Stroy 1C database on the KK Group's servers. He was involved in administering the 1C database of Caspian Minerals (the predecessor entity to Exillon, the oil business venture owned and run by the Defendants) when he worked for that company before joining the KK Group. It was Mr Twigger's submission that Mr Khasanov was *"an impressive witness who knew a great deal about the IT matters about which he was questioned"*. I do not doubt, for one moment, his IT expertise. Indeed, as I have previously indicated when dealing with Mr Kuzmenko's account of the difficulty encountered in locating the Arka-Stroy 1C database, it is clear that Mr Khasanov's expertise as a computer programmer meant that he was able to locate the Arka-Stroy 1C database much more quickly than Mr Kuzmenko would have been able to do it. It does not follow, however, that he is a witness whose reliability is beyond question since, as Mr Howe pointed out, despite his denials, it is clear that he has close links to the Defendants.

121. Mr Khasanov disputed Mr Werner's account of a meeting which they had on 18 March 2013. Mr Khasanov's evidence is that he located the Arka-Stroy databases before this meeting, when asked to do so by his colleague, Mr Kuzmenko. He claimed that it was straightforward to find the Arka-Stroy 1C database because it was not concealed, and could be accessed by anyone in the IT and finance departments. He stated that, on 18 March 2013, Mr Kuzmenko told him that the executives of the KK Group were looking to replace him because of his association with the former shareholders (he provided IT support to a company of Nazim Dikhanbayeva, Ms Dikhanbayeva's sister) and that Mr

Werner wanted to meet with him. A meeting with Mr Werner took place that same evening, with Mr Kuzmenko and Ms Gorobtsova (acting as translator) also present. Mr Khasanov's evidence is that Mr Werner told him that he had 24 hours to decide if he wanted to remain with the company and be part of his 'team', and Mr Khasanov confirmed immediately that he did. Mr Khasanov's evidence was that, the following day, he received a 1.5-fold increase in his pay, although he denied that he had asked for this.

122. A supplemental witness statement from Mr Khasanov appeared halfway through the trial, and after the Claimants' witnesses had given evidence. This exhibited three screenshots taken from his KK computer in September 2013, purportedly showing the location of the Arka-Stroy 1C database which he provided to Ms Dikhanbayeva in September 2013 shortly after these proceedings were commenced. The Claimants' position was that the fact that Mr Khasanov produced this further witness statement demonstrates his close ties to the Defendants. In this supplemental witness statement, Mr Khasanov stated that, after he provided his first witness statement for the Defendants in these proceedings, he was concerned about what Mr Werner's response to this would be when he found out and so sent a letter resigning from his role at the KK Group on 10 October 2013. His evidence was that, on that day, he was sick from nervous stress and exhaustion, and that he was therefore off work. He went on to explain that, on the evening of 11 October 2013, two KK employees, Mr Kuzmenko and Alexander Solokov, the head of security at Kagazy Recycling, came to the apartment where he lives with his parents, and demanded that his father open the door. He stated that he had taken a sedative and so was unable to come out, but that he woke up and overheard the end of this conversation. His parents subsequently told him that the KK employees had demanded that he return a hard drive (which he disputes taking), and that they hurled threats and abuse at his father. Mr Kuzmenko disputed this account in his second witness statement, saying that he did visit Mr Khasanov's apartment with Mr Solokov that evening, and that he spoke to Mr Khasanov's father and mentioned the hard drive to him, but that he behaved respectfully at all times, and made no threats or abuse. Mr Khasanov filed a police report relating to this incident the following day on 12 October 2013. However, this report contradicted the evidence given in his witness statement in these proceedings in a number of ways. For example, the police report stated that the KK Group employees had forced their way into his parents' home and threatened him with physical violence. When asked in cross-examination why his witness statement did not refer to this forced entry, he admitted that they had not actually "*penetrated or trespassed*" in his apartment and that what he had meant by this was that they were very rude and insistent. In addition, Mr Khasanov's witness statement stated that he did not actually see or speak to the KK Group employees, and yet the police report stated that they threatened him with violence. When asked about this discrepancy, Mr Khasanov stated that the KK Group employees had said to his father that there would be "*consequences*" if he did not return the database, which he interpreted as a threat of violence. Mr Howe put to Mr Khasanov that the police report showed that he was willing to tell lies and do so in official documents. Mr Khasanov denied this, however, explaining that he was in a panicked mental state at this time and had had to take steps to protect himself and his family. I have some sympathy with this as an explanation, but

the fact remains that Mr Khasanov did exaggerate his account of events when making the report to the police and his willingness to do that is bound to call into question his reliability generally.

123. Overall, I consider that Mr Khasanov's reliability as a witness is compromised by the fact that he has clear ties to Ms Dikhanbayeva, as illustrated by his relationship with her sister and his secret provision of the screenshots from the KK system for use in proceedings against his employer, the KK Group, in circumstances where he had, just a few months before, pledged his loyalty to Mr Werner.

Mr Vladislav Belochkin

124. Mr Belochkin is an IT engineer who worked at the KK Group between March 2008 and September 2009, and who then left to work for the Defendants' subsequent project, Exillon. He dealt with IT arrangements at both the KK Group and Exillon, including denying the deletion and transfer of data from the KK Group's servers. Mr Twigger submitted that Mr Belochkin was a witness with *"no axe to grind"* and (unlike Mr Kuzmenko) not somebody who has had any financial incentive to support the Defendants' case. He went on to observe that his evidence was *"unremarkable and straightforward"*. I am not so sure about this since I bear in mind Mr Howe's point that Mr Belochkin has clearly worked closely with the Defendants for number of years, both at the KK Group and subsequently at Caspian Minerals/Exillon. I bear in mind also the curiosity that Mr Belochkin, as Mr Howe put it, re-appeared in Kazakhstan from Dubai in August 2013, just a few days after these proceedings had been commenced. This was ostensibly, so Mr Belochkin explained, in order to make arrangements for his forthcoming wedding. However, it is common ground that during this time he contacted Mr Khasanov, on a Saturday, to ask for the passwords to the IT system of Nazim Dikhanbayeva's company. His evidence was that he asked for the passwords for Nazim Dikhanbayeva's company systems because there had been an IT failure and she had asked for his help in relation to that. I am doubtful about this explanation, however.

The expert witnesses

125. I propose to address the various expert witnesses in rather shorter order. There were six areas of expertise in relation to which evidence was given: forensic accountancy; audit; Kazakh law; land valuation; real estate practice in Kazakhstan; and quantity surveying. Overall, with the notable exception of Mr Arip's and Ms Dikhanbayeva's expert on real estate practice, Ms Nurgul Kusainova, on whose evidence Mr Twigger ultimately felt unable to place any reliance for reasons which I shall come on to explain, all of the expert witnesses, in my view, sought (albeit with varying degrees of success) to assist the Court by giving their expert opinion on the maters which they were asked to address.

Forensic accountancy

126. The forensic accountancy experts (for the Claimants, Mr Philip Crooks, a partner in the Forensic and Investigation Services Department at Grant Thornton with over 35 years' experience in accounting, auditing and

investigations, and for Mr Arip and Ms Dikhanbayeva, Mr Ian Thompson, a Managing Director in the Forensic and Litigation Consulting segment of FTI Consulting, who has worked in financial investigations, audit and corporate finance for 17 years) provided invaluable assistance in relation to the identification of monies passing between the KK Group and the so-called (at least by Mr Howe) 'Connected Entities'. Mr Thompson, in particular, provided a detailed analysis of the relevant money flows in certain appendices which, as Mr Twigger reminded me, were relied upon extensively by both sides at trial. I am quite clear that both Mr Thompson and Mr Crooks were experts in which the Court can have confidence in relation to the forensic accountancy expert evidence which they gave.

Audit

127. The second area in respect of which there was expert evidence concerned auditing, specifically whether the Claimants were required to provide their auditors, BDO, with the report prepared by PwC Russia in late 2009 and, assuming that BDO did not in fact receive the PwC Russia report, what difference it would have made had they received it.

128. The Claimants' expert on this issue was (again) Mr Crooks, who was UK Head of Audit at Grant Thornton between 2006 and 2012, whilst Mr Arip and Ms Dikhanbayeva produced evidence from Mr Nigel Grummitt, a partner at Mazars, where he has been the Global Head of the Forensic and Investigations Services team since 2006. Mr Grummitt explained that he qualified as a chartered accountant in 1985 and that in 1995 he joined a predecessor firm to Mazars, initially as an audit manager, before becoming involved in forensic investigations work as well as audit work, indeed for some years splitting his practice between the two. He has focused solely on the forensic investigations side since 2012.

129. I did not find the evidence which was given on the audit issues by either Mr Crooks or by Mr Grummitt to have been entirely satisfactory. Whereas the forensic accountancy issues required analysis of accounting databases and documentation, and so largely factual matters, the audit issues required the experts to provide their opinions on the information in the PwC Russia report and how auditors might have responded to that report. The audit issues were, therefore, by their nature, more likely to be influenced by each expert's own personal views. It may be for this reason that Mr Crooks came across as less independent and impartial when giving evidence on the audit issues than he did in relation to the forensic accountancy issues. Although Mr Howe suggested that Mr Crooks sought at all times to assist the Court and was ready to make appropriate concessions, he sometimes failed to answer questions which were put to him by Mr Twigger. Nor did I find it helpful that, as Mr Twigger highlighted, Mr Crooks sought to distinguish between information which might be described as (merely) *"useful"* and information which was *"needed"*, his view being that the PwC Russia report fell into the former category. I agree with Mr Twigger that Mr Crooks appeared on occasion to have some difficulty in getting out of his mind the possibility (perhaps, in his view, rather more than that) that BDO (although they had not actually been shown the PwC Russia report) had been made aware of the contents of the PwC Russia report, despite

Mr Twigger repeatedly asking him to assume for the purposes of the questions which he was being asked that BDO had neither seen the PwC Russia report nor been made aware of its contents. The following exchange demonstrates this point:

"Q. Your conclusion, as I understand it, is that although the PwC report would no doubt have been useful, BDO did not actually need it, essentially because it covered risks about which BDO was already aware and all the PwC report would have done was corroborate BDO's earlier assessment of those risks; is that a fair summary of your conclusion?

A. Yes there are a number of influences on that conclusion. They could have been made aware of the contents of the report through management informing them. As I said, they were aware, through their discussions with PwC, that PwC were undertaking this exercise and therefore there are a number of reasons why BDO may have assumed that this was not information that they needed."

Ultimately, however, after lengthy exploration by Mr Twigger with Mr Crooks, there was an acceptance by Mr Crooks that, if BDO had not already been made aware of the PwC Russia report and assuming that it contained material information, it ought to have been provided to BDO as part of the audit process. He did so in the following exchanges which are worth setting out because they show Mr Crooks' difficulty in proceeding on the basis of the assumption which Mr Twigger had from the outset invited him to consider:

"Q. If you were auditing the accounts of a company like this, wouldn't you consider that it was important to know that a reputable firm like PwC had written a detailed report describing a number of transactions as 'questionable'?

A. Well I would know as auditor, because I had met with them in these circumstances and given them information and because the PwC report refers to representations being given by the group's auditors, so I would be aware of the information that I had given to PwC. So I was certainly aware of the exercise going on, and I was in a position to ask for a report and I accept, under the terms of the question that you have made very clear early on, but they wouldn't know the conclusions of the report. But I'm not clear what this report would have told them that they would not have known otherwise.

Q. Yes. Can we please assume for the rest of my questions that they don't know that BDO do not know that PwC are doing a report like this. They don't know the report exists at all?

A. Right, sorry. I misunderstood your point. I thought you were saying not any conclusions. So apologies if I misunderstood.

Q. Well, they may know about some of the transactions that are referred to on it. So it is impossible to say assume that they don't know anything that is in the PwC report. But they don't know that there is a report going on into cash flows and they don't know that there are conclusions being reached about them. And they certainly don't know that PwC is reaching conclusions that some of the transactions are questionable

A. Okay.

Q. If you were the audit partner at BDO and you learnt - suppose you completed your audit of the 2009 year and afterwards you discovered that there was a report like the one that PwC prepared that you hadn't been told about; you would be furious, wouldn't you?

A. No, not necessarily. I might - well, if I became aware of it, the first thing I would do is ask for a copy of it, and my reaction would depend on my knowledge and whether this report would give me anything new by way of something I wasn't aware of.

Q. All right. So if the PwC report contained information which was material, which related to the 2009 year, and which BDO did not know, would that change your conclusion about whether the report was relevant audit information?

A. When you say 'material', can you clarify; do you mean material to 2009 accounts?

Q. Yes?

A. So hypothetically I'm being asked whether, ignoring the facts of the case, that if a report which had got reference to material transactions of which I was not aware, had not been made - I have not been made aware of by management, would that be relevant audit information? It is difficult to see how, in that hypothetical situation, which has been built up as material and I didn't know about it and hence it was therefore deemed to be relevant audit information, but I would be anything other than of the view that I should have seen it.

Q. Yes. So you agree?

A. In that hypothetical situation, yes."

Although it is possible that Mr Crooks simply did not understand that he was being asked hypothetical questions, it is difficult to see that this really can have been the case since the exchange set out above was the culmination of a long series of questions which began with Mr Twigger very clearly explaining that he wanted Mr Crooks to assume that BDO had neither seen the PwC Russia report nor been made aware of its contents. In the circumstances, I was less than impressed by the approach adopted by Mr Crooks in this respect.

130. Mr Grummitt's evidence was, however, also not entirely satisfactory since quite inappropriately at one point in one of his reports he suggested that Mr Werner had acted in bad faith. When asked about this by Mr Howe, he tried to explain that, based on his experience as an auditor, it was *"hard to see how"* certain representations made by Mr Werner had been made in good faith. When I put to him that it was no part of his expert role to state such an opinion, he accepted this and apologised for having *"overstated my position"*. I tend to agree with Mr Howe, however, that Mr Grummitt's willingness to express the opinion which he did suggested a certain lack of objectivity. Importantly, Mr Howe

highlighted also how, in a report prepared in October 2013 in support of the Defendants' application to have the freezing injunction obtained by the Claimants overturned, Mr Grummitt had stated that, in his opinion, *"the areas of KK Plc's activities covered by the PwC report should have been addressed as part of BDO's routine audit procedures… not only because they are material to KK Plc's FY2009 financial statements, they are financial transactions which in my experience fall to be audited in the ordinary course"* and so that *"the issues identified by PwC should, if genuine, also have become apparent to BDO"*, yet this was not something which he included in his reports prepared for trial. I agree with Mr Howe that this omission is odd, and the more so since, when asked about it in cross-examination, Mr Grummitt confirmed that what he had previously stated was *"still my view"*.

Kazakh law

131. The key areas covered by the Kazakh law experts were the causes of action under Kazakh law (as to which there was no material dispute) and limitation, including the ingredients required for the limitation period to start running, as well as whether it is possible to extend (or, more accurately, restore) the limitation period under Kazakh law. The Claimants' expert, Mr Sergei Vataev, has practised law in Kazakhstan since 1992, and is currently a partner with Dechert LLP in Kazakhstan, where he heads the dispute resolution practice. He speaks both Russian and English and gave his evidence in English. Mr Arip's and Ms Dikhanbayeva's expert, Professor Maidan Suleimenov, is an academic and Director of the Private Law Research Institute, which he founded in 1995 and which is now incorporated in the Caspian Social University. The Institute conducts scientific research in the area of civil and international private law and is also involved in the drafting of legislation governing economic relations. Since Kazakhstan became independent in 1990, he has been involved in the development of Kazakh laws and the drafting of legislation and he was involved in drafting the Civil Code of Kazakhstan, including specific provisions of that Code which were in issue in these proceedings. He gave his evidence in Russian.

132. It was Mr Howe's submission that both experts gave their honest professional opinions. Mr Twigger submitted, however, that Mr Vataev was not a satisfactory witness, suggesting that he was prone to arguing the Claimants' case and taking untenable positions which he apparently thought would advance their cause. I agree with Mr Twigger about this. I did not find Mr Vataev to be an entirely satisfactory expert witness. I agree, in particular, that Mr Vataev gave the impression of wishing to find and make arguments which supported the Claimants' case rather than simply giving his own impartial view on the issues. He came across to me as a lawyer who was intent on projecting a case (the Claimants' case) rather than as an independent expert with an overriding duty to assist the Court. Putting the point slightly differently, he gave the appearance of being the practising lawyer that (in contrast to Professor Suleimenov) he is. He appeared, at times, reluctant to give answers which he recognised were unhelpful to the Claimants, and some of the points made by him in support of his overall opinion had every appearance of being simply arguments rather than any considered opinion held by him. An example of this concerns the evidence which he gave regarding Article 185 and whether it

applies not only to individuals but also to companies. Professor Suleimenov's evidence was that Article 185 is limited to individuals and does not extend to companies, whereas Mr Vataev's position was that it is a provision which applies to both. Mr Vataev explained specifically that, since Article 185 does not expressly state that it has no application to companies, it should be treated as though it does apply to companies. When I explored with him what he was saying his answer was instructive because it revealed that what he was really doing was no more than identifying a possible argument. He had this to say:

"… But as long as there is a certain safety valve for one person, one type of person, it possibly may be applied to another. One of the arguments I'm putting in one of my reports is application by analogy. If there is a legislative gap and I would say that there probably is a gap, then the court would be allowed to - I don't know what were the motives and grounds on which some of the courts arrived to the possibility to extend the stated formulation to legal entities. But there are decisions, standing, valid, enforced, and that is - I agree that it is exceptional, it is very rare. I don't know what is the rejection rate. Maybe it is just one of 10,000 of plaintiffs enjoys that exception, or more, maybe one of the million. But what I am talking about in my reports is that there were instances, and they were based on something. They were based on law."

I then asked Mr Vataev the following (admittedly not very elegant) question:

"Can I just ask, I mean, we are all mostly in this courtroom lawyers, and lawyers think up arguments, that is what they do. But ultimately lawyers - well, in my case, actually, I have to come to decisions. But lawyers give advice. Are you identifying a possible argument here, or is it your view, your actual opinion, considered opinion, that there is an ability for a company to overcome a limitation defence?"

The response was this:

"It is my opinion that a company may rely on this article and request the restoration of the statute of limitation period. Whether it will be successful or not, I would probably - I would refrain from giving the probability here. But in principle, it is possible, in my view. In certain circumstances, legal entity should be able to rely - in particular that example that I'm bringing, this legal coma, it would be - I think it would be against the basic fundamental principles of the Civil Code to deny justice in such a situation."

133. I found Professor Suleimenov, in contrast, to be a careful and impartial expert witness who was clearly providing his genuine and honest opinion on the issues put to him. The majority of his evidence was well-reasoned and supported by Kazakh court decisions or relevant commentary. In particular, his experience with drafting the Kazakh Civil Code gave him a useful insight into the purpose behind this legislation. I have not, however, accepted all his evidence without question. For example, as I shall come on to explain, I was not convinced by his argument that the identity of a wrongdoer need not be identified for limitation to start running in tortious claims, whereas it is (generally) necessary for the wrongdoer to be identified in claims involving violations of the Joint Stock

Companies law by company officers, as I found his reasoning to be somewhat illogical.

Land valuation

134. The land valuation experts were, in the case of the Claimants, Mr Robert Mayhew (a consultant at Veritas Brown, Cushman & Wakefield's alliance partner in Kazakhstan and Georgia), and in the case of Mr Arip and Ms Dikhanbayeva, Mr Oleg Kuznetsov (a director of Almaty Expert Examination and Appraisal Centre, a Kazakh property appraisal firm). Their primary task was to value the land plots which the KK Group acquired and which are the subject of the Land Plots Claim. In truth, I found neither Mr Mayhew nor Mr Kuznetsov to be entirely satisfactory.

135. I agree with Mr Twigger that Mr Mayhew was argumentative and somewhat entrenched in his approach to the evidence which he gave. He also had very little experience of the Kazakh real estate market, having never visited Kazakhstan before he came to be instructed in these proceedings and having, in any event, only spent *"something like 5% of my time ... involved with Kazakhstan"* when he worked for Jones Lang Lasalle between 2007 and 2010. Indeed, he agreed with Mr Twigger, when he pressed, that the number of occasions when he had valued specific land plots on a sales comparison basis was, if not minimal as was put to him, then, was *"limited, compared to the development sites that I have done"*. He was insistent, however, that he was able to draw upon his *"experience having worked in that region for many years and having been directly involved and overseeing valuations in Kazakhstan and Almaty at the time"*. In my assessment, Mr Mayhew's experience was, indeed, somewhat limited and it is obviously appropriate, in the circumstances, that I should factor this into my consideration of the evidence which he gave.

136. It was not only Mr Mayhew's experience, however, which was open to question since Mr Kuznetsov's expertise in land valuation in any country at all was distinctly suspect. In his report, he had referred to having *"been in the valuation business in Kazakhstan for more than 10 years"*. However, in the curriculum vitae attached to that report the focus was on other matters. So, for example, next to *"Qualifications"* this appeared:

"Qualified forensic expert in the following subjects: 8.1 Road Accident Forensic Examination; 8.2 Road Trace Forensic Examination; 8.3 Motor Vehicle Forensic Examination; 10.3 Forensic Examination of Car Damage, Repair Costs and Residual Value.

State license to perform forensic examination activities on the subjects specified above. State license to perform activities related to evaluation of property, intellectual property and intangible assets.

Candidate of Engineering Sciences.

Doctor of Jurisprudence."

Next to *"Patents and diplomas"* various qualifications were set out, including the following:

"I completed qualification training in valuation activities at the Moscow Institute of Road traffic (MIRT), the American Society of Appraisers – 'Successfully completed the Appraisal Partnership Technical Assistance Program', Herndon, VA and Washington, DC; at the Institute of Professional Appraisers of Kazakhstan in 'International Appraisal Standards, Practical Application', Almaty, 'Appraisal of Hi-Tech Businesses', Almaty, etc."

Then, alongside *"Additional information"*, this was stated:

"Upon completion of the post-graduate studies in 1989, I defended a thesis on the subject 'Analysis of Motor Vehicle's Collision with a Fixed Obstacle', and by the decision of the Board at the Moscow Institute of Road Traffic, I was awarded the degree of the Candidate of Engineering Sciences.

…

In 2010, I defended a doctoral dissertation on the subject: 'Theoretical and Legal Problems of Forensic Examination and Forensic Examination Activities in the Republic of Kazakhstan before the specialised board at the Al-Farabi Kazakh National University."

Mr Miller explored these matters with Mr Kuznetsov. He was insistent that his *"CV has it pretty clear, that I have two state licenses and there are two specialisations, as a forensic expert and as a valuer"* and that, despite the lack of specific reference to land valuation in his curriculum vitae, he had expertise in this type of valuation. He highlighted, in particular, the reference to *"evaluation of property, intellectual property and intangible assets"* although significantly, in doing so, he added in an additional reference to *"property valuation, real estate"* which does not, in fact, appear in his curriculum vitae. I was left with the overriding impression that Mr Kuznetsov was not, whatever he might say, an expert in land valuation.

137. The position, therefore, reached in relation to land valuation evidence is that in the case of Mr Mayhew I had before me an expert in land valuation who lacked particular experience of Kazakhstan, whilst in the case of Mr Kuznetsov I had an expert who had experience of Kazakhstan but who had very limited experience of land valuation. This was not an altogether satisfactory state of affairs.

Real estate practice

138. Mr Mayhew was also the Claimants' expert in relation to real estate practice in Kazakhstan. For reasons which I have already explained, I am doubtful that Mr Mayhew was really in a position to assist me greatly, or at all, on this issue. Nor, however, as it turned out, was Ms Kusainova. Indeed, as I have indicated, Mr Twigger ultimately decided that he was in no position to rely upon the evidence which she gave. The truth is that Ms Kusainova was a deeply unsatisfactory witness who had no apparent idea as to what is expected of an expert witness in

this Court. Mr Howe submitted, indeed, that she was demonstrably dishonest. This is an assessment with which I agree. Not only did she freely admit during the course of her evidence, in effect anyway, that she assisted in bribery and tax evasion activities in the context of land acquisitions in Kazakhstan, but most notably she lied more than once when giving her evidence concerning her attendance at the Ritz-Carlton in Almaty as Mr Jumadilov was giving evidence by video-link earlier in the proceedings. That she was in attendance on that occasion is not disputed; indeed, not only were representatives of the Claimants there but so were the Defendants' own lawyers. It is difficult to see, in such circumstances, how Ms Kusainova could have thought that she would be able to get away with denying being in attendance at the Ritz-Carlton. She came over, however, as an ebullient and very confident individual as she was giving her evidence, and I can only assume that she thought that her firm denials would be accepted without more. She was, of course, wrong about this. Ms Kusainova's willingness to lie made her entirely unsuitable as an expert witness.

139. Furthermore, it was, in any event, far from clear to me that Ms Kusainova, who described her real estate work as a *"hobby"* which she pursued alongside other employment, had any relevant expertise at all. That other employment was previously in the civil service, specifically the Land Relations Department, and more recently involved working as Commercial Director in a company which is involved in electronic document archiving. It was, indeed, somewhat startling that Ms Kusainova freely admitted that, when she worked for the Land Relations Department, she used inside information for the purposes of her real estate business. Specifically, she said this:

"You know in Kazakhstan government agencies - almost all the employees of government agencies do that, that is site work, since they have the information. So public officials have a really low salary in Kazakhstan and we need to work additionally, and in the government agency we have the information on sellers and on buyers and we can use it when we need additional money, and it is still the case with the public sector, with government agencies in Kazakhstan; this is the system in our country."

Quantity surveying

140. The quantity surveying expert evidence was concerned with attributing values to the works done at Akzhal-1, Akzhal-2 and Aksenger, although Mr Arip's and Ms Dikhanbayeva's expert also valued the works done at Astana. The Claimants' quantity surveying expert was Mr Tim Tapper, who is a director of Turner & Townsend Contract Services. For Mr Arip and Ms Dikhanbayeva, Mr Steven Jackson, a director of Base Quantum Ltd, gave expert evidence.

141. Mr Howe criticised Mr Jackson and Mr Twigger criticised Mr Tapper, although neither suggested that the experts did anything other than their best to assist the Court. Indeed, Mr Twigger expressly acknowledged that Mr Tapper was, as he put it, *"a straightforward witness who did his best in his oral evidence to assist the Court and made appropriate concessions where justified"*. Mr Twigger's position was that nonetheless Mr Tapper lacked relevant Kazakhstan-related experience and also that there were flaws in the methodology which he employed. Those flaws, Mr Twigger submitted, led Mr Tapper to arrive at

valuations which were too low. Mr Howe, for his part, suggested that Mr Jackson used a methodology which resulted in him arriving at valuation figures which were too high, even though Mr Howe observed that Mr Jackson's valuation in respect of Akzhal and Aksenger was still appreciably lower (some KZT 4 billion or approximately US$ 30 million) than the amounts which Arka-Stroy received pursuant to the (alleged) PEAK fraud.

142. I shall have to deal with the evidence which was given by Mr Tapper and Mr Jackson when dealing with the parties' substantive submissions. For present purposes, all that really matters is that I should record that, consistent with Mr Howe's and Mr Twigger's respective positions, I consider that both experts were doing their best to assist the Court in the evidence which they gave.

Kazakh law applicable to the claims

143. As I have previously mentioned, although these proceedings are before the Commercial Court, the claims which have been brought are all subject to Kazakh law rather than the law of England and Wales. Not altogether unsurprisingly, Mr Vataev and Professor Suleimenov were able to agree about most matters. Indeed, with the exception of the law concerning limitation which I shall I address separately later, as far as I could detect the only area of disagreement between the Kazakh law experts is whether it is possible to bring concurrent claims in contract (including a claim under what is known as the JSC Law) and in tort.

144. Professor Suleimenov's position on this issue is that it is not possible to bring concurrent claims since there is a rule which *"is usually called a prohibition on the conflict of claims"* and Kazakh law *"does not provide for the filing of alternative claims"*. Mr Vataev disagreed with this, explaining that *"there is no prohibition against the competition of claims under Kazakhstan law in general and in relation to company officers' breaches of duty in particular"*, so that Kazakh law *"does not prohibit alternative claims within the same lawsuit, even if the satisfaction of one of the claims excuse satisfaction of the other claim"*. Mr Vataev agreed in cross-examination that a Kazakh court would not hold a defendant liable in both contract (including a company director under the JSC law) and in tort or, for that matter, both in tort and in unjust enrichment. However, Mr Vataev was not in the relevant exchanges asked whether a Kazakh court would permit the *bringing* of alternative claims, something which in his reports Mr Vataev had made clear he considered is permissible. It seems to me that this distinction is important. In short, I consider that Mr Vataev's view is to be preferred since I struggle to see why it should not be open to a claimant under Kazakh law to pursue claims in the alternative, although I recognise that I approach the matter from an English law perspective which has no difficulty with the bringing of alternative claims. Ultimately, however, since the question is really a matter of procedure rather than substantive law and since the Claimants have chosen to bring their claims before the Commercial Court rather than before a Kazakh court, it is a matter for this Court (as the *lex fori*) applying its own procedural law whether alternative claims should be permitted to be brought. Plainly, viewed as an English procedural matter, the answer must be in the affirmative.

The claims which are brought

145. Coming on to deal with the undisputed aspects of Kazakh law which arise, I can take as my guide the helpful (and, for the reason just stated, largely uncontroversial) summary contained in Mr Twigger's written closing submissions. As there pointed out, the Claimants' case raises three main categories of wrongdoing: (i) alleged breaches of the duties which Mr Arip and Ms Dikhanbayeva owed to KK JSC as directors pursuant to the Law on Joint Stock Companies (the 'JSC Law'), specifically Articles 62 and 63; (ii) what under English law would be regarded as tort claims brought under Articles 917 and 932 of the Kazakh Civil Code (the 'KCC') for harm caused by allegedly unlawful acts committed by Mr Arip and Ms Dikhanbayeva; and (iii) unjust enrichment-type claims against Mr Arip and Ms Dikhanbayeva under Articles 953 to 960 of the KCC.

146. As Mr Twigger pointed out, again uncontroversially as far as I could detect, in respect of Mr Arip and insofar as KK JSC's claims are concerned, it is only the claims under the JSC Law which are of any real relevance. This is because, if KK JSC were to find itself unable to establish breach by Mr Arip of his duties owed to KK JSC as a director, it is difficult (Mr Twigger would say impossible) to see how KK JSC would be in a position make out its tortious liability or unjust enrichment cases. Those other cases (the tort and unjust enrichment cases) are, therefore, more directly relevant not in relation to KK JSC's claims against Mr Arip but in relation to the claims which the other Claimants (not including Peak Aksenger which is no longer a claimant in these proceedings) have brought against Mr Arip. In addition, although KK Plc formally also claims against Mr Arip and Ms Dikhanbayeva under the JSC Law in relation to their activities as officers of KK JSC (no claim is now pursued by KK Plc in relation to Mr Arip's and Ms Dikhanbayeva's activities as officers of KK Plc) and there was (at least coming into trial) a dispute over whether Mr Arip and Ms Dikhanbayeva could be liable to KK Plc as well as KK JSC on the basis that Article 63 of the JSC Law refers to company officers being *"liable to the company and the shareholders"* and KK Plc is an indirect shareholder of KK JSC. When the matter was explored in cross-examination, Mr Vataev ultimately agreed with Mr Twigger that Article 62 permitted claims to be brought by what he described as the *"immediate shareholder"* and that *"indirect, ultimate owners ... if they are not shareholders, they would be able to claim only ... under the general provisions of the civil law on torts"*. In short, Mr Vataev accepted that only direct shareholders could bring a claim, and so the claim brought by KK Plc against Mr Arip (and, for that matter, Ms Dikhanbayeva) under the JSC Law, is not a claim which is viable.

147. As for Ms Dikhanbayeva, the only claims under the JSC Law which can be advanced against her are claims which relate to the time when she was a director of KK JSC. This was between April 2008 and July 2009. The position, therefore, is that KK JSC is entitled to pursue a claim against Ms Dikhanbayeva under Articles 62 and 63 of the JSC Law in respect of the April 2008-July 2009 period, but not in relation to any other period when KK JSC is confined to its claims under Articles 917 and 932 of the KCC, and each of the other Claimants can

only ever put forward claims against Ms Dikhanbayeva under Articles 917 and 932 of the KCC.

The claims under the JSC Law

148. The duties owed by company officers under Kazakh law are set out in Article 62 of the JSC Law. Entitled *"Principles of the Functioning of the Company Officers"*, this provides (in translation) as follows:

"The company officers shall:

1) perform the duties entrusted to them in good faith and use the methods which respond to the interests of the company and shareholders to the maximum possible extent;

2) not use the company's property or allow it to be used in contradiction with the company's charter and the decisions of the general shareholders' meeting and board of directors, or for personal gain, and commit no abuses during the execution of transactions with their affiliate;

3) ensure the integrity of the accounting and financial reporting systems, as well as independent audit;

4) supervise the disclosure and presentation of information on the company's activities in accordance with the requirements of the legislation of the Republic of Kazakhstan;

5) keep confidential the information on the company's activities, including for three years after the termination of their employment with the company, and was the company's internal documents provide otherwise."

These are duties which are hardly unfamiliar.

149. Article 63, part of which I have already quoted, then goes on to state (under the heading *"Responsibility of the Company Officers"*) as follows:

"1. The company officers shall be liable to the company and the shareholders for the damage caused through their actions (omissions), in accordance with the legislation of the Republic of Kazakhstan, including the damage incurred as a result of:

1) provision of misleading or knowingly false information;

2) violation of the procedure for provision of information prescribed by this Law.

2. The company may, under the decision of the general shareholders' meeting, file an action with a court against the officer seeking compensation for the harm or damage is caused by the latter to the company.

…".

As demonstrated by the *"as a result of"* wording in Article 63.1, there is a causation requirement which means that, before an officer of a company can be held liable, there has to be a causative connection (Mr Vataev and Professor Suleimenov agreed that a *"direct causal link"* is required) between the officer's wrongdoing and the damage alleged. Mr Vataev's evidence (as reflected in the joint memorandum which he prepared with Professor Suleimenov) was that *"Despite the claimant's obligation to prove the causal link between the unlawful actions and the harm suffered, in practice, the defendant bears the burden of proving the fact that the losses stemming from the transaction have not actually been caused by his violation of duty"*.

150. As Mr Howe pointed out, these provisions have been applied previously in this jurisdiction, in particular by Teare J in ***JSC BTA Bank v Mukhtar Ablyazov & Others*** [2013] EWHC 510 (Comm) and by Henderson J (as he then was) in ***JSC BTA Bank v Mukhtar Ablyazov*** [2013] EWHC 3691 (Ch).

The claims in tort under Articles 917 and 932 of the KCC

151. Article 917 of the KCC (*"General Basis Of Liability For Causing Harm"*) states (in part) as follows:

"1. Harm (property and (or) non-property), caused by illegal actions (inaction) to the property or non-property rights and benefits of citizens and legal entities shall be compensated by the person, who caused the damage, in full."

Article 932 (*"Liability For Jointly Caused Damage"*) then provides:

"The persons who jointly caused damage shall be liable to the injured party jointly and severally.

Based on the application of the injured party and in his/her interests, the court may hold the persons who jointly caused harm, severally liable."

152. It is under these provisions that the Claimants advance their tort claims. As Mr Twigger sought to emphasise and as was not disputed by Mr Howe, however, it is important to bear in mind that the case which is advanced by the Claimants is a fraud case and not, therefore, a case in mere negligence.

The unjust enrichment claims under Articles 953 to 960 of the KCC

153. The Claimants' unjust enrichment claims are brought in reliance on Article 953 to 960 of the KCC. Articles 953, 955 and 956, in particular, are in the following terms:

"Article 953. Obligation to Return Unjust Enrichment

1. Person (buyer) who without the legislation or transaction basis received or saved property (unjustly enriched) for the account of another person (the victim), shall return to the latter unjustly acquired or saved property, except the cases provided by Article 960 of this Code.

...

Article 954. Correlation Of Requirements For The Return Of Unjust Enrichment With Other Requirements On The Protection Of Civil Rights

Unless otherwise provided by this code and other legislative acts, and followed from the nature of appropriate relations, the rules of this chapter shall also apply to the requirements:

1) on the return of the executed, under an invalid transaction;

2) on the recovery of the property by the owner from the illegal possession of another person;

3) one party to another party in the obligation of return of the executed in connection with this obligation;

4) for compensation of damages, including the harm, caused by the inequitable conduct of the enriched person.

Article 955. Return Of Unjust Enrichment In Kind

1. Property, comprising the unjust enrichment of the purchaser, must be returned to the victim in kind.

2. The purchaser is responsible for all to the injured, including a random shortage or deterioration of unjustly acquired or saved property, which occurred after he (she) knew or should have known of unjust enrichment. Up to this point, he (she) is responsible only for intent and gross negligence.

Article 956. Compensation of value for unjust enrichment

1. In the case, if it is impossible to return in kind unjustly received or saved property, the purchaser must compensate the victim for the real value of the property at the time of purchase it, as well as to compensate for losses, caused by the subsequent change the value of the property, if the purchaser has not reimbursed the cost immediately after he (she) has known of the unjust enrichment.

…".

154. Mr Vataev and Professor Suleimenov were agreed that a claim in unjust enrichment does not require it to be established that there has been a *"violation by the unjustly enriched person"* since the claim is *"based on the fact of unjust enrichment, irrespective of the actions of the enriched person"*. In the present case, Mr Twigger submitted, correctly in my assessment, that the unjust enrichment claims do not really add anything to the claims in tort.

Proving fraud

155. There was no issue between Mr Howe and Mr Twigger that, although claims in these proceedings are brought under Kazakh law, since the Claimants' case entails the Defendants being accused of having, in effect, defrauded the Claimants, there needs to be proper particularisation. As Millett LJ (as he then

was) put it in ***Paragon Finance plc v DB Thakerar & Co*** [1999] 1 All ER 400 at page 407: *"It is well established that fraud must be distinctly alleged and as distinctly proved …"*. Furthermore, dishonesty ought not to be inferred from facts which have not been pleaded (***Elena Baturina v Alexander Chistyakov*** [2017] EWHC 1049 (Comm)) or from facts which have been pleaded but are consistent with honesty (***Three Rivers District Council v Bank of England (No 3)*** [2001] 2 All ER 513 per Lord Millett at [186]).

156. Additionally, as Mr Twigger reminded me, although fraud need only be proved to the civil standard of probability, in practice more convincing evidence will often be required to establish fraud than other types of allegation (see *Clerk & Lindsell on Torts, 21st Ed.*, paragraph 18-04). The rationale behind this approach was explained by Lord Nicholls in this well-known passage in ***In re H (Minors)*** [1996] AC 563 at pages 586-7:

"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence …".

Similarly in ***Foodco UK LLP v Henry Boot Developments Ltd*** [2010] EWHC 358 (Ch) Lewison J (as he then was) explained:

"The burden of proof lies on the [Claimants] to establish their case. They must persuade me that it is more probable than not that [the Defendants] made fraudulent misrepresentations. Although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people act dishonestly rather than carelessly. On the other hand inherent improbabilities must be assessed in the light of the actual circumstances of the case …".

157. Mr Howe readily acknowledged that this is the position, acknowledging that, since fraud is generally less likely than negligence, generally more cogent evidence will be required to prove fraud than is required to prove negligence. He stressed, however, that Lord Nicholls recognised (at least implicitly) that context matters in this regard, hence Lord Nicholls' reference to *"to whatever extent is appropriate in the particular case"*. He submitted that this was recognised in the subsequent decision of the House of Lords in ***In re B (Children)*** [2009] 1 AC 11. He placed particular reliance on what Lord Hoffmann had to say at [15] after citing the passage from Lord Nicholls' judgment in ***In re H (Minors)*** and emphasising (through the use of italics) the *"to whatever extent is appropriate in the particular case"* wording:

"*I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the*

assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

Mr Howe also highlighted the following passages in Lady Hale's judgment:

"*72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.*

73. In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."

It was Mr Howe's submission that context, therefore, matters in that allegations of dishonesty should not be treated in isolation. Mr Howe summarised his submission by suggesting that *"context is everything"*. Although this might be putting things a bit too high, there is nonetheless force in the proposition that context needs to be taken into account.

158. It seems to me that it must be right that, once it has been demonstrated that a particular defendant has been dishonest in relation to evidence given on an important aspect of the case which that defendant is having to face, and so the Court is in a position where it is able to reach the view that the defendant is not an honest person, then, the likelihood of that defendant having behaved dishonestly more generally is bound to be greater than would otherwise have been the case. Mr Howe submitted that the relevant context in the present case consists of the lies which, he suggested (and I have decided) were told by Mr

Arip and Ms Dikhanbayeva in their evidence to the Court on central matters, combined with what he characterised as often elaborate false explanations put forward when confronted with documents which contradicted their version of events. Mr Howe submitted that, in the circumstances, far from it being improbable that Mr Arip and Ms Dikhanbayeva committed the frauds alleged by the Claimants, it was highly probable that this was the case. I agree with Mr Howe about this as well.

159. It is also to be borne in mind that it is perfectly legitimate for the Court to proceed by way of inference from circumstantial evidence. This was made clear in ***JSC BTA Bank v Ablyazov*** [2012] EWCA Civ 1411 at [52] where, albeit dealing with a committal application, Rix LJ explained the appropriate approach to circumstantial evidence as follows:

"*It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape. That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case: R v. Hillie (2007) 233 ALR 63 (HCA), cited in Archbold 2012 at para 10-3. Or, as Lord Simon of Glaisdale put it in R v. Kilbourne [1973] AC 729 at 758, "Circumstantial evidence…works by cumulatively, in geometrical progression, eliminating other possibilities". The matter is well put in Shepherd v. The Queen (1990) 170 CLR 573 (HCA) at 579/580 (but also passim):*

'… the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact – every piece of evidence – relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.'"

160. This brings me to another matter which featured very heavily in Mr Twigger's closing submissions. This is that, as he put it, the Claimants are not able to show that the sums which are alleged to have been misappropriated went into the Defendants' pockets. He suggested, in particular, that the Claimants had been unable to show that *"a single tenge, dollar or euro"* of their money was received by Mr Zhunus or Mr Arip, and that there was not even an allegation as regards Ms Dikhanbayeva that she herself received any money. Mr Twigger summarised the Claimants' case as entailing the proposition that there are a number of entities which have a variety of connections to either or both of Mr Zhunus and Mr Arip, monies have disappeared into those entities and, therefore, it is to be inferred that all the money paid to those entities was stolen by Mr Zhunus and Mr Arip with Ms Dikhanbayeva's assistance. Mr Twigger submitted that this is not sufficient to justify a finding of liability.

161. Mr Twigger introduced this submission by taking me to the Re-Re-Amended Particulars of Claim and highlighting certain passages which he suggested involved the claimants alleging that there had been misappropriation on the part of Mr Zhunus and Mr Arip. He suggested that, in the circumstances, it was not open to the Claimants to advance a case at trial which did not require them to establish that monies were actually received by Mr Zhunus and Mr Arip. As I pointed out to Mr Twigger, however, as he took me through various passages, on a close analysis of the Re-Re-Amended Particulars of Claim, it does not seem that the case as pleaded was as restricted as Mr Twigger sought to suggest. So, for example, paragraph 37 contains the allegation relating to PEAK that:

"No such sums were ever used for such purpose; instead the money intended for such development was misappropriated and/or dissipated by the First and Second Defendants (or at their direction) and/or funded, directly or indirectly, payments to Arka-Stroy made by the Second and/or Third and/or Fourth Claimants".

I put to Mr Twigger that the reference to dissipation seems apt to cover the type of case which was put forward by the Claimants at trial, in other words a case which does not depend on it being established that Mr Arip and Ms Dikhanbayeva themselves received the monies. That is, indeed, in my view, the position.

162. Mr Twigger went on, however, to submit that, regardless of his pleading point, the case as advanced by the Claimants (and Mr Howe on their behalf) was simply not good enough to justify a conclusion that Mr Arip and Ms Dikhanbayeva were guilty of fraudulent conduct. Specifically, he submitted that, unless misappropriation can be established, then, the Claimants' case must fail. Without being able to show, as Mr Twigger put it, *"where the money actually went"* and in circumstances where *"in many cases it went back to the KK Group"*, his submission was that the case cannot succeed. I disagree with Mr Twigger about this, however, since I am quite clear that he cannot be right as a matter of principle. In my view, it is enough for the Claimants to show that the money went into various entities associated with the Defendants, never to be seen again. This is because if the Defendants brought about a situation where payments were made by the KK Group to entities which were controlled by them in circumstances where it was not known by the KK Group that the entities were controlled by the Defendants, this must, it seems to me, amount to wrongdoing on the part of the Defendants (whether under the JSC Law, if applicable, or under Articles 917 and 932 of the KCC).

163. That this must be right, and so that it is unnecessary for the Claimants to have to prove that the monies which were paid to the 'Connected Entities' (or, as Mr Howe described them, the "*money funnels*"), is supported by ***RBG Resources Plc (in liquidation) v Rastogi & Others*** [2004] EWHC 1089 (Ch), a case in which Hart J was considering an allegedly fraudulent scheme which was designed to extract several hundred million US dollars from financiers and which involved the invention of a very large number of bogus metal and other mineral trading transactions implemented by the creation of a worldwide network of trading counterparties which were controlled by the claimant's former directors who fabricated trading transactions. The claimant's argument

was that, since the trades were bogus, the former directors were liable on the basis that they had orchestrated a fraudulent scheme in breach of their fiduciary duties. The former directors maintained that, as far as they were concerned, all the transactions between the company and the counterparties were arms length transactions with trading entities which were independent of the company and independent of each other. They were adamant that they knew nothing of these matters and were certainly not themselves responsible for controlling the affairs of the counterparties in question. Faced with these conflicting arguments on the claimant's application for summary judgment against the former partners, Hart J described his approach to the case in the following way at [13]:

"I accept that the fraud alleged by RBG was both massive and complex. Its proof, however, seems to me to depend on RBG being able to establish the truth of one central proposition, namely that the counterparties were not independent of RBG or of each other but were in fact controlled by VR and AJ. Unless VR and AJ can show a realistic prospect of demonstrating at trial that that was not the case, it seems to me that RBG is entitled to judgment against them, at least so far as liability is concerned. RBG seeks in its evidence to go further and to assert that not only were the counterparties so controlled but that all the transactions into which they entered with RBG were, as it is put in the evidence, 'bogus'. This does not appear to me to be a necessary element of RBG's claim to hold the defendants liable for breach of fiduciary duty. Whether or not the transactions were 'bogus' in the sense of being merely the product of the generation of a transactional paper trail, the mere fact that they were presented by the defendants to RBG's auditors and its financiers as being transactions with apparently independent counterparties will be sufficient to establish breach by the defendants of their fiduciary duties as directors of RBG."

Hart J went on to explain in the following paragraph that it followed that *"the ability of the defendants to show a realistic prospect of success on the 'control' issue should be determinative of this application so far as liability is concerned"*. His conclusion was that the defendants failed to show such a prospect, and accordingly he awarded summary judgment against them.

164. It seems to me that the ***RBG*** case is similar to the present case. Specifically, I agree with Mr Howe that, if the Claimants can establish that, contrary to the Defendants' repeated denials and explanations, the Defendants did, in fact, control the so-called 'Connected Entities' which feature in the three fraud claims advanced by the Claimants, the Claimants' case is substantially proved. In short, if the Defendants have been lying about their connections with the various entities, this inevitably calls into question why such lies have been maintained.

165. Mr Twigger, however, sought to suggest otherwise on the basis that the ***RBG*** case involved a breach of what he described as the *"self-dealing rule, the no conflict rule, the no profit rule"* which, he suggested in effect, entails *"strict liability"*. I do not see that this is a legitimate point of distinction, however, since, in my view, what Hart J was really doing in the passage relied upon by Mr Howe (and set out above) was describing the appropriate approach to adopt when a defendant is to be regarded as having lied about his connections to counterparties to which the claimant has made payments under the impression

(brought about by the defendant) that those counterparties are independent of the defendant. The fact that in the ***RBG*** case lies were told of this nature meant that Hart J felt able to conclude that there was breach of fiduciary duty under English law does not mean that a similar approach to the telling of lies by Mr Arip and Ms Dikhanbayeva when facing claims under Kazakh law ought not to be adopted. As Mr Howe put it immediately after quoting from the ***RBG*** case:

"This perhaps an obvious factual point: if the Connected Entities were not used by the Ds to perpetrate a massive fraud, why would they lie so insistently about their control of them, in the face of the thousands of documents before the Court? As previously mentioned, there is nothing inherently wrong in a business being integrated – there is no reason why the KK Group could not, entirely legitimately, have developed a construction arm, for example, or incorporate wholly-owned corporate vehicles for the purpose of buying land. But the Ds are determined to distance themselves from all of these entities, and indeed misrepresented the position to investors (in the IPO Prospectus) and auditors. The only reason for this is because, as the Ds know, these entities were vessels for fraud."

There is, furthermore, another point to bear in mind: this is that certain of the claims brought against Mr Arip and Ms Dikhanbayeva are claims under the JSC Law which bear a marked similarity to the type of breach of fiduciary duty claims levelled by the claimant against its former directors in the ***RBG*** case. In relation to the claims under the JSC Law, therefore, Mr Twigger's suggested point of distinction simply does not arise.

The PEAK Claim

Introduction

166. I come on, then, to deal with the PEAK Claim. To a degree by way of recap but also by way of amplification, the PEAK Claim arises in connection with proposed construction works at three sites in Almaty, Kazakhstan which were owned by the KK Group. Two of these, Akzhal-1 and Akzhal-2, form part of what was supposed to be a logistics park. Specifically, Akzhal-1 is an area amounting to ten hectares in which it is not in dispute that work was carried out since there are now 14 warehouses served by a small railway terminal linked to the nearby mainline, none of which was there before. Next to this area is a much bigger area of land, amounting to some 50 hectares, which is known as Akzhal-2 and where the intention was that there would also be warehousing but where to this day there is none. Not far from these two sites is the third of the sites to which the PEAK Claim relates, namely the Aksenger site which is even bigger again, consisting of some 476 hectares and comparable in size to almost double the City of London or two thirds the size of Gibraltar. This was intended to be developed into an industrial park but that did not happen. Indeed, it is the Claimants' position (disputed by Mr Arip and Ms Dikhanbayeva) that there is virtually no evidence that any meaningful construction work was done on the Aksenger site, beyond the building of a small guardhouse, a temporary road and a stretch of railway track which is not connected to the mainline which passes nearby. The PEAK Claim involves the Claimants (specifically KK JSC, PEAK and Peak Akzhal) claiming back everything which was paid in connection with

this construction work. This amounts, in net terms, to US$ 109.1 million, although the Claimants' position is that they are entitled to be paid certain very substantial interest and penalties paid on top of this amounting to a further approximately US$ 78.2 million, so making the total value of the PEAK Claim something approaching US$ 200 million. I shall come on to deal with interest and penalties later since my present focus is on the primary claim.

167. I should explain at the outset that there was no issue between the forensic accountancy experts (Mr Crooks and Mr Thompson) that the Claimants did, in fact, part with the US$ 109.1 million which forms the basis of the PEAK Claim. Details of how this figure is arrived at were contained in a diagram prepared by Mr Crooks (the Claimants' expert) and described as Appendix 13B. This shows that of the US$ 109.1 million which was paid to Arka-Stroy by the Claimants: KZT 4.781 billion (US$ 36.9 million) was paid by Arka-Stroy to entities alleged by the Claimants to be owned or controlled by the Defendants; KZT 2.974 billion (US$ 23 million) was paid to entities described as the 'Kazakh LLPs' (also described elsewhere as 'the Construction LLPs') which the Claimants allege were also owned or controlled by the Defendants; and KZT 636.1 million (US$ 5 million) was paid to additional parties alleged by the Claimants to be owned or controlled by the Defendants. The balance, which was not paid out by Arka-Stroy, amounts to US$ 49.1 million. As I have previously mentioned, it is the Claimants' case that they are entitled to be paid that amount of money in full since, Mr Howe submitted, the Claimants only paid the money to Arka-Stroy *"on false pretences"* (not knowing that Arka-Stroy was not independent of the Defendants but, so the Claimants allege, a company which was owned or controlled by the Defendants) *"and then what happened to the money after that is, for the purposes of the completion of the cause of action, neither here nor there"*. As Mr Howe went on to put it, *"...if the defendants have, as the claimants say they have, set up potentially a Potemkin Village exercise which consists of a few warehouses, but under the cover of which very large sums of money were paid away on fake construction projects, then once it is paid away it doesn't much matter whether it was wasted digging a ditch at the bottom part of Aksenger or putting together a few rusting railway lines that end up in the bushes"* since *"it is lost to the claimants either way"*. Warming to his theme, he added that *"Similarly, it doesn't matter once it reaches the companies, the controlled companies, whether it is spent on utilities, spent on a Ferrari, or sent overseas in the form of a foreign exchange payment or all the many other numerous payments that you see that these companies engaged in"* because the *"point is that the defendants treated the money as their own and disposed of it as they wished, and the claimant lost it"*.

168. In the alternative, if (contrary to his primary position) the Claimants are required to give credit for any construction work which was carried out, Mr Howe's submission was that any such credit ought to be very modest indeed since, whatever the possible cost of the works done at Akzhal-2 and Aksenger, they are of no value whatsoever to the Claimants. Mr Howe illustrated this submission with the observation that incomplete and redundant sections of railway at Aksenger, for example, serve no useful purpose and, accordingly, can hardly be described as having any value. In those circumstances, he submitted that it would be quite wrong to require the Claimants to give any credit in

relation to work carried out at Akzhal-2 and Aksenger. Mr Howe's position was any credit ought, accordingly, only to relate to the works done at Akzhal-1 where there is now an operational logistics facility. In the further alternative, the Claimants' position is that, if any greater credit is to be given which seeks to reflect the costs of the work carried out across all three sites (Akzhal-1, Akzhal-2 and Aksenger), then, on the basis of the evidence given by the quantity surveying experts (Mr Tapper and Mr Jackson), that credit ought to be very modest (something between US$ 6.5 million and US$ 16.4 million), and so reducing the size of the principal claim, before taking account of interest and penalties, only a little to between US$ 92.7 million and US$ 102.6 million. Mr Howe explained that these figures were based on the valuations arrived at by Mr Tapper, whose valuations of the work done at between US$ 22 million and US$ 29 million need to be reduced by between US$ 13 million and US$ 16 million to reflect the fact that work in this valuation range appears to have been carried out by other contractors which the Claimants paid directly since Mr Tapper's view was that something like half of the work done, viewed by value, is properly attributable to contractors other than Arka-Stroy. Mr Howe highlighted in this context that even Mr Jackson's valuation of the works done at just over US$ 80 million is significantly less than the US$ 109.1 million which was paid to Arka-Stroy, suggesting that this would need to be reduced to about US$ 40 million to take account of Mr Tapper's point concerning other contractors carrying out work.

169. Mr Arip and Ms Dikhanbayeva deny liability. They make the point to which I have previously referred, namely that the case cannot succeed because the Claimants are not in a position to show that the monies alleged to have been misappropriated ended up with Mr Arip and Ms Dikhanbayeva. As Mr Twigger rather pithily (but entirely accurately) put it, the Claimants have *"bet the house on establishing liability, almost exclusively, by means of establishing 'connections' between Ds and various entities/individuals and then asking the Court to make a generalised inference that such connections demonstrate misappropriation of every Tenge paid to Arka-Stroy. On Cs' case, the existence of a connection (of whatever nature) equates to and is sufficient to establish the misappropriation of approximately $109.1 million without the need to analyse individual transactions or payments to ascertain whether they were genuine commercial payments and/or payments for the benefit of Cs"*.

170. I have already explained, however, that, in my view, if the Claimants can establish the connections between the so-called 'Connected Entities' and the Defendants, that is sufficient for their purposes. I, therefore, see no merit in Mr Twigger's submission that, in relation to the US$ 49.1 million of the overall US$ 109.1 million left after taking account of the monies identified in Appendix 13B as having been paid by Arka-Stroy to the 'Connected Entities' (assuming that these were, indeed, owned or controlled by the Defendants), there is nothing to indicate that that money was ever paid to the Defendants or to any individual or entity connected with the Defendants. If Arka-Stroy was owned or controlled by the Defendants, that is sufficient for the Claimants' purposes, and the same applies to the 'Connected Entities' which received monies from Arka-Stroy. It does not matter, therefore, whether Arka-Stroy paid the monies to the 'Connected Entities' or kept the monies itself. This is subject only to a further

point made by Mr Twigger, which was that *"for the most part"* the monies which Arka-Stroy paid on to other parties, amounting to some US$ 60 million, was *"used for the benefit of the KK Group (including for construction), paid to third parties with no alleged connection to Defendants, or returned to the KK Group"*. This is a reference to the US$ 36.9 million which was paid to the entities listed in Appendix 13B and the US$ 23 million which was paid to the Kazakh LLPs/Construction LLPs identified in the box at the bottom right of Appendix 13B.

171. It follows that the question of whether Arka-Stroy and the other entities concerned (as identified in Appendix 13B) were owned or controlled by the Defendants is of critical importance. It was Mr Twigger's submission that the evidence did not show that Arka-Stroy was owned or controlled by the Defendants but, on the contrary, was a genuine commercial enterprise which carried out genuine development and construction work, and that substantial development and construction work was carried out at Akzhal 1, 2 and Aksenger. Nor, Mr Twigger maintained, did the evidence justify a conclusion that the other entities (save for Holding Invest, Kagazy Invest, Kagazy Processing and Kagazy Gofrotara) were owned or controlled by the Defendants and that the Defendants caused monies to be paid to Arka-Stroy and then on to those entities for their own benefit.

Arka-Stroy

172. It was Mr Howe's submission that the position in relation to Arka-Stroy is very clear: it was a company which was wholly controlled by the Defendants, indeed that it was effectively run and managed from the KK Group's offices with Mr Arip effectively acting as its Chief Executive Officer by approving the employment of key personnel and supervising its activities and with Ms Dikhanbayeva assisting Mr Arip with a whole host of administrative activities.

173. Mr Howe understandably in this context highlighted how Mr Arip's evidence concerning Arka-Stroy had evolved over time. In his first witness statement made in September 2013, Mr Arip had stated as follows in paragraph 25:

"Mr Werner's assertion that the 'KK Group got very little in return for the very large sums paid to Arka-Stroy' is not true. As I have explained, Arka-Stroy performed significant work on both the Akzhal Logistics Centre and the Aksenger Industrial Park before the KK Group suspended these projects. The money that the KK Group paid to Arka-Stroy went towards labour, materials and other construction-related expenditures, as reflected in the numerous invoices that the Claimants have submitted in connection with these proceedings. Though Mr Werner alleges that Arka-Stroy was in reality under the full direction and control of the Defendants, he does not state what this allegation is based on. It is quite untrue. I had no direct or indirect interest in Arka-Stroy and exercised no control over it."

Three years later in September 2016, at paragraph 145 of his fourteenth witness statement, Mr Arip had this to say:

"I want to make it clear that I had not heard of Arka-Stroy before I joined the Kagazy Group. I had no direct or indirect interest of any kind in Arka-Stroy and I did not have any control over it. I did not secretly operate it."

In his sixteenth witness statement, however, made in March this year, shortly before the trial started, Mr Arip stated this in paragraphs 16 and 17:

"I have reviewed documents related to Arka-Stroy further. These documents include documents where Arka-Stroy is called an 'affiliated' entity of the Kagazy Group, or referred to as part of the Kagazy Group and approvals for items like Arka-Stroy's budgets and salaries.

As I explained in paragraph 25 of my first witness statement dated 2 September 2013 in response to Mr Werner's allegations that Arka-Stroy was 'in reality an entity under the full direction and control of the Defendants', I did not have any direct or indirect interest in Arka-Stroy and I exercised no control over it. In the light of the documents now available to me, I wish to clarify my first statement. I was never a shareholder of Arka-Stroy, nor did I have any management position or any financial interest in it. Nevertheless, as I describe below, and as I explained in my Fourteenth Witness Statement, the Kagazy Group engaged closely with Arka-Stroy and monitored what it was doing."

Mr Arip went on in that witness statement to describe there being *"good business reasons for the Kagazy Group and Arka-Stroy to cooperate closely"* (paragraph 22), explaining that the *"banks wanted a high level of information about costs and the structure of the projects before they would allow the Kagazy Group to draw money from"* loans which the KK Group had taken out to fund its development activities. Mr Arip described the banks as wanting *"to control the flows of cash to the general contractor which was Arka-Stroy and Arka-Stroy's sub-contractors"*. He went on to explain as follows in the next two paragraphs:

"This meant that close corporation with Arka-Stroy was essential. Without it, it would not have been possible to comply with the banks' processes and fund the work. It was necessary to provide a constant stream of information to the banks and the process was bureaucratic. To satisfy these requirements the Kagazy Group needed a high level of cooperation from Arka-Stroy and a high level of visibility of matters like its arrangements with sub- contractors.

This all resulted in a situation where the Kagazy Group worked closely with Arka-Stroy and helped it in many areas including legal and finance, since Arka-Stroy did not have the capacity itself and a lot of information was needed from it to provide to the banks. The Kagazy Group had all these resources and had to help a lot to get Arka-Stroy to a level that will allow the various requirements to be met so information could be provided to the banks and the funding for the projects could be accessed."

The fact that Mr Arip should only seek to explain this so late in the day, whilst maintaining his denial that he owned or controlled Arka-Stroy, was explained by Mr Arip in cross-examination as being the result of his wishing to *"address very specific allegations"* which had been made by the Claimants at particular

stages and not dealing with matters in any more general way. This was not, however, a satisfactory or open way to approach the giving of evidence, particularly as Mr Arip would obviously have known from the very outset of these proceedings that the Claimants were focusing on his involvement with Arka-Stroy.

174. Mr Twigger sought to emphasise that Arka-Stroy was first established on 11 July 2002 (it is not entirely clear by whom) before Mr Arip had any involvement with the KK Group. He stressed also that Mr Arip's evidence in cross-examination was that he *"did not introduce Arka-Stroy to Kagazy"* and *"didn't even know about the existence of Arka-Stroy"* when he joined the KK Group. He went on to say that *"most likely"* the first time that he became aware of Arka-Stroy was when it was awarded the contract to build a warehouse for the KK Group's waste paper division. It is not, however, essential for the Claimants to have to establish that the Defendants (and Mr Arip, in particular) set up Arka-Stroy as a vehicle for the frauds which are now in these proceedings alleged since what matters is what the Defendants (and Mr Arip in particular) did as regards Arka-Stroy after encountering the company.

175. Mr Twigger went on to make the point that Arka-Stroy carried out substantial work for the KK Group prior to Mr Arip becoming a shareholder in the KK Group and prior to the Akzhal 1 project. I have touched on this aspect previously when referring to how, in the witness statement where he made the point that the KK Group had entered into various contracts with Arka-Stroy at a time before he became a shareholder, Mr Arip had neglected to mention that by this stage he had been made *"board chairman"*. That happened in February 2003, the month before the first of the contracts relied upon by Mr Twigger was entered into. Mr Twigger submitted that, given the short timescale, it is unlikely that Mr Arip would have been involved in the decision to enter into that contract with Arka-Stroy. I am not sure, however, that I can agree with this since it does not seem to me to follow. The contract was entered into a month after Mr Arip's appointment. In those circumstances, especially since there is nothing to indicate that the contract was one of any particular complexity requiring lengthy negotiations (in fact, the only reference to the contract is in a list of contracts without any detail being supplied), it would not, in my view, be safe to conclude that Mr Arip must necessarily have had nothing to do with the contract being entered into. In any event, what matters, as it seems to me, is that Mr Arip was at this juncture quite obviously involved with the KK Group, even if it was his evidence that between February and October 2003 the KK Group was really run by Mr Alexandr Shilov as this was something of a *"transition period"* for Mr Arip as he was still working with his previous company. Mr Twigger referred, in similar vein, to two service agreements which were entered into between KK JSC and Arka-Stroy on 1 and 20 August 2003, each concerning cleaning and beautification services for the KK Group's paper plant in Abay Village. Specifically, Mr Twigger highlighted that these contracts were signed by Mr Arip at a time when he was *"only"* a director of KK JSC and not also a shareholder in that company (something he was not to become until early the following year via Kagazy Invest). However, the fact that Mr Arip was signing contracts demonstrates that he was involved in this period.

176. It is quite clear that it was Mr Arip's arrival at the KK Group that led to the KK Group's increasing involvement with Arka-Stroy. As to this, it is significant that the contracts to which I have referred were signed for Arka-Stroy by a Mr S.M. Zhanpeisov. Mr Howe put it to Mr Arip that this person was an employee of the KK Group at that time and that Mr Arip would have known this because he had signed his employment contract. In fact, Mr Arip explained that he did no such thing since the signature on the employment contract appearing next to his typed name was not his. He insisted that he had no knowledge of Mr Zhanpeisov and pointed out, by reference to certain employment records which he was shown by Mr Howe, that these showed that Mr Zhanpeisov had been dismissed from the KK Group on 1 August 2003 and that he was not re-engaged until 5 January 2004. The fact that Mr Zhanpeisov had written to Mr Arip on 25 March 2003 seeking employment as (at least as per the agreed translation) *"Head of administration and supply department"* was, according to Mr Arip, explained by the fact that every potential employee will write to the chairman of the board of the company where he or she is desirous of working. A person in that position will, therefore, receive many such letters. This explains, Mr Arip insisted, why he had no recollection of Mr Zhanpeisov. He went on to explain that, at the time, people working in the KK Group had *"their own businesses in parallel and many of the businesses worked with Kagazy"*. He speculated that this is the reason why these two service agreements had been entered into.

177. I had the impression, however, that Mr Arip was ready for Mr Howe's questions on this matter and that he was not being straightforward in what he had to say in his answers. That impression was reinforced when, after being shown a lease agreement entered into between KK JSC and Arka-Stroy on 1 September 2003 relating to a temporary lease of premises at KK JSC's factory, Mr Arip explained that he did not remember who Mr Zhanpeisov was because *"all these contracts, I was basically signing more or less mechanically"*. He then quickly pointed out that, although the lease agreement described itself as having been signed by the *"Chairman of the Board"*, in fact it was signed by somebody else, Mr Ikmet Muhanov. That excuse was not something he was, however, able to give in relation to the document which he was then shown, namely a contract entered into on 2 September 2003 between KK JSC and Arka-Stroy whereby Arka-Stroy agreed to provide interior design services for an office development. That contract was described as having been signed by Mr Zhanpeisov on behalf of Arka-Stroy and by Mr Arip on behalf of KK JSC, and Mr Arip accepted that the signature was, indeed, his. He immediately added, however, that he did not remember signing the document which was *"not a big contract"*. He was then asked by Mr Howe why Arka-Stroy would have been providing interior design services. His answer was that he did not know because he was not involved in the relevant discussions. Interestingly, though, he then added this:

"Arka-Stroy, so Mr Zhanpeisov and his partners, I think his partners in those days was [sic] Kanat Zhekbatryov, Vladimir Khan, and later ... on they had another partner, Mr Sartbayev, who basically took Arka-Stroy on quite a different level".

This rather indicated that Mr Arip knew not only about Arka-Stroy (and in some detail), but specifically about Mr Zhanpeisov. It appears that he realised right away that he had, perhaps, said too much because he then hastily added:

"So all the guys, they are construction engineers. So I don't know who is Zhanpeisov, but I know that Mr Khan, he had a degree, he was a businessman. He had a degree and MBA. Kanat Zhekebatyrov – so I know Kanat. I don't know Zhanpeisov, but I do know Kanat, and Kanat was a construction engineer as well himself."

Mr Howe pursued the matter with him further, including by reference to a further contract entered into with Arka-Stroy on 4 September 2003 dealing with waste paper, but was met with an insistence that he did not know Mr Zhanpeisov. I am clear that Mr Arip was simply not telling the truth about this. As demonstrated by the initial unguarded answer which he gave, Mr Arip clearly knew not only about Mr Khan (a director of Arka-Stroy at the time and, as Mr Arip agreed, an employee of the KK Group) but also about Mr Zhanpeisov.

178. The same applies, quite obviously in the circumstances, to Mr Zhekebatryov, Mr Khan's fellow Arka-Stroy shareholder at the relevant time. As Mr Howe pointed out, Mr Zhekebatyrov, a relative of Mr Zhunus, was in 2006 the owner of PEAK and is somebody who, as a KK Group employee, has held a variety of roles including Head of KK JSC's Head of Procurement, Head of Capital Construction, an employee of Holding Invest, the owner of Kagazy Processing and Kagazy Gofrotara, CEO of Kagazy Invest, the founder and CEO of Kontakt Service Plus, the director of Trading Company and the owner/director of HW and TEW. Despite this, as Mr Howe observed, Mr Arip made no mention of Mr Zhekebatyrov being Mr Khan's partner in Arka-Stroy. Mr Twigger rightly pointed out that Mr Arip clarified later in his cross-examination that he was only able to say that Arka-Stroy was owned by Mr Khan and Mr Zhekebatyrov after reading the documents in the trial bundle, and that he did not know that this was the position when he was dealing with Arka-Stroy since, as far as he was concerned, when he was in contact with Arka-Stroy in relation specifically to a contract entered into between KK JSC and Arka-Stroy on 23 April 2005 relating to the construction of foundations for an office at KK JSC's paper factory, the *"main person"* he dealt with was Mr Sartbayev. This does not, however, explain why Mr Arip did not refer to Mr Zhekebatyrov and his involvement in Arka-Stroy in any of his witness statements. This omission was obviously deliberate and intended to suggest that Mr Arip's knowledge of, and involvement with, Arka-Stroy was somewhat less than actually was the case. When asked by Mr Howe, Mr Arip confirmed that Mr Zhekebatyrov was, in fact, at the time (from 1 August 2003) employed by KK JSC as Head of Capital Construction, albeit that Mr Arip suggested that this was a *"pretty minor"* role, not least because *"we didn't have much of a construction going on"*. It is difficult to see why, if he was intending to be straightforward in the evidence which he gave, certainly in the lead-up to trial, Mr Arip would not have made mention of this. The fact that he did not do so causes me to doubt, once again, his credibility.

179. Mr Twigger drew attention in closing to the fact that Mr Arip described Mr Zhekebatyrov as somebody who always had his own businesses. He added that

Mr Arip freely acknowledged that Mr Zhekebatyrov had, on occasion (he agreed with Mr Howe that it happened *"regularly"*), acted as Mr Zhunus' and Mr Arip's nominee for Kagazy Invest and Holding Invest (indeed, temporarily holding their shares when the KK Group restructuring took place). Mr Twigger's suggestion was that, since Mr Arip was willing to accept this, there was no reason to doubt his denial that Mr Zhekebatyrov acted as his nominee in respect of Arka-Stroy. I do not consider that this follows, however, since a blanket denial that Mr Zhekebatyrov *ever* acted as Mr Arip's nominee would have been wholly unrealistic. The fact, therefore, that Mr Arip was prepared to acknowledge Mr Zhekebatyrov's nominee role in relation to other entities which he accepts owning or controlling seems to me to be of only very limited significance. Moreover, as Mr Howe pointed out, it can hardly be overlooked that, if Mr Zhekebatyrov was prepared to act as a nominee and Mr Arip was prepared to use him as a nominee, in relation to some companies, then, this rather suggests that they would be prepared to do so in relation to Arka-Stroy as well. It is clear to me that Mr Zhekebatyrov was, as Mr Howe put to Mr Arip, somebody who acted as a nominee in relation to Arka-Stroy in the same way as he did in relation to other companies for Mr Arip. Mr Howe memorably observed that Mr Zhekebatyrov occupied so many roles *"it is a wonder he could remember what he was supposed to be doing everyday"*, later even more memorably describing him as *"one of the sort of Swiss army knives of people who is variously deployed, as I said, originally, a form of human rubber stamp to stamp off on various documents in relation to these entities"*. I agree with these characterisations.

180. There is also the position of Mr Bek Esimbekov to consider. He became Arka-Stroy's 100% shareholder in January 2007, acquiring each of Mr Zhekebatyrov's and Mr Khan's 50% shareholdings. As Mr Howe put it, Mr Esimbekov is another person *"who appears all over the place"*. Specifically, he occupied various roles within the KK Group at various times, such as PEAK's General Manager from 2008, Chief Executive Officer of Peak Akzhal and President of Astana-Contract. He was also the owner/manager of Trading Company before Mr Arip's mother-in-law acquired that company, and the owner/manager also of Lotos. The latter is demonstrated, for example, by a document described as *"Decision No. 4 of the sole shareholder in Lotos LTD LLP"* dated 29 December 2006 which describes Mr Esimbekov as the sole shareholder of Lotos and goes on to record his decision to sell to KK JSC various plots of land. Mr Arip insisted in evidence that Lotos was not one of his companies but belonged to Mr Esimbekov, explaining that he was *"a very sophisticated person"* and that he (Mr Arip) *"was not in a position to control everyone in the company"*. This is a matter to which I shall return but, for reasons which I shall develop later, I am satisfied, however, that Lotos was, indeed, Mr Arip's company and that Mr Esimbekov acted as his nominee in relation to it. It is telling in this regard that in his fourteenth witness statement Mr Arip's denial that he owned or had any interest in Lotos was accompanied by the claim that he did not know if that company was owned by Mr Esimbekov. This is impossible to square with Mr Arip's evidence in cross-examination that Lotos was Mr Esimbekov's company. Mr Arip resorted to saying that he *"had just forgotten and made a mistake"*. He went on to justify this on the basis that events took place some time ago and *"it was difficult for me to recognise and*

remember many companies". This was a poor excuse made, in my view, to try and distance Mr Arip from Mr Esimbekov and so from Lotos. That Mr Esimbekov acted on behalf of Mr Arip in relation to Arka-Stroy as well is apparent from the fact that as early as June 2005 Mr Esimbekov was representing Arka-Stroy when, on 6 June 2005, he signed a termination agreement with Kagazy Gofrotara on Arka-Stroy's behalf. This was just a matter of weeks after, on 22 April 2005, he had given his approval along with others on behalf of KK JSC to the agreement entered into the following day between Arka-Stroy and KK JSC. When asked about this by Mr Howe, Mr Arip stated that he did not know that Mr Esimbekov was a director of Arka-Stroy. This is despite the fact that it was Mr Arip who counter-signed the 6 June 2005 contract on behalf of Kagazy Gofrotara purporting to act as a director. It should be borne in mind in this context that Mr Arip and Mr Esimbekov (and Ms Dikhanbayeva) worked together at KazTransCom before joining the KK Group. Mr Esimbekov and Mr Arip were, therefore, hardly strangers. In these circumstances, it is difficult to accept that Mr Arip did not know in what capacity Mr Esimbekov was acting or purporting to act when entering into this contract. Mr Twigger referred to a different contract which was also entered into on 6 June 2005. This was a contract entered into between KK JSC and Arka-Stroy and was in respect of the design and commissioning of an office building. As Mr Twigger pointed out, this contract was signed by Mr Zhekebatyrov on behalf of Arka-Stroy rather than by Mr Esimbekov. Mr Twigger complained that, in the circumstances, it was wrong to have suggested to Mr Arip, based on the termination agreement entered into on the same day, that Mr Esimbekov was acting as a director of Arka-Stroy at that time. I do not agree with this. It does not matter that other contracts signed by other people (whether Mr Zhekebatyrov or, as in the cases of a third contract also entered into on 6 June 2005 and another contract concluded on 24 June 2005, a Mr Uteuliev) can also be seen to have been entered into with Arka-Stroy at this time since all that matters is that Mr Arip cannot have been as ignorant as to what Mr Esimbekov was doing as regards Arka-Stroy as he suggested.

181. If there were any remaining uncertainty over the role played by Mr Esimbekov, this is removed when a note which Mr Esimbekov sent to Mr Sergey Tulegenov on 24 November 2010 (a note which Mr Tulegenov forwarded on to Mr Zhunus) is considered. In that note, which came after Mr Tulegenov had indicated that he was leaving KK JSC, Mr Esimbekov was very clear as to what had been expected of him. He wrote this:

"As a result of your announcement to leave the company JSC Kazakhstan Kazazy [sic], I consider it necessary to contact you regarding some personal matter. As you know, I have been working in this company since July 2003. During this time I had a chance to work in various sections and take part in various activities of the company. Quite often, as a company's confidant, I was involved in execution of instructions of a very specific nature. During this time I never received any complaints from the management.

At present, when the company's shareholders are completely different people and you made a decision to move to a new place, I can't help but worry about

some issues still unresolved, the issues which the former shareholders guarantee to resolve via you as well.

First, during all this time several companies were registered in my name, as a legal owner, and I was registered as a director in a few other companies. Certain financial transactions and operations were executed via these companies. The nature of these transactions may be deemed 'dubious' and not entirely legal. In addition, when I agree to register these companies in my name I was firmly promised that there would be no problems as the companies would be definitely closed. When in March 2009 the shareholders announced their decision to move their offices abroad, I asked to take these companies or to close them. In return I received assurances that within three months all companies would be closed and I would even receive documentation confirming their liquidation. However, as it became known to us now, nearly 2 years later, nothing has been done to that effect. …".

Mr Esimbekov was clearly describing his role as a nominee for the former management of the KK Group, including accordingly Mr Arip. The position is really very clear indeed. In the circumstances, Mr Arip's continued insistence that he did not know what role Mr Esimbekov was playing is simply untenable.

182. Next, there is Mr Shabadanov, who became a director of Arka-Stroy (appointed by *"Resolution of Sole Member"* signed by Mr Esimbekov) on 3 November 2009. In addition to what Mr Howe described, with more than a touch of sarcasm, as his *"happy and fortuitous involvement in Arka-Stroy"*, Mr Shabadanov also happened to be a relative of Ms Dikhanbayeva's former husband and somebody who worked as Mr Arip's driver. He was also, as Mr Arip acknowledged and as I shall come on to explain, Mr Arip's nominee owner of Bolzhal. It is quite obvious that Mr Shabadanov must have been playing a similarly nominal role for Mr Arip in relation to Arka-Stroy.

183. Matters do not stop there, however, since there is also Mr Sartbayev to consider. It is striking that the first time that there was any mention of Arka-Stroy's owner being Mr Sartbayev was when Mr Sannikov produced his witness statement in September 2016 in which he stated that the first time that he had heard of Arka-Stroy was when he met Mr Sartbayev in around Spring 2006 and Mr Sartbayev introduced himself as the owner of that company. As I have made clear, I regard that evidence as having been made up. There is not a single document supporting what Mr Sannikov had to say in this respect. Nor, tellingly, did Mr Arip say anything in any of his witness statements about Mr Sartbayev being Arka-Stroy's owner. It is inconceivable that Mr Arip would not have referred to this at a much earlier stage in the proceedings had what Mr Sannikov had to say been truthful. The fact that he did not do so is, therefore, significant. It was highly surprising, in the circumstances, that relatively early on in his cross-examination Mr Arip should choose to mention, almost in passing, that *"later on"* Mr Sartbayev *"basically took Arka-Stroy on quite a different level"*. Mr Howe initially let that pass but returned to the topic after the short adjournment. He put to Mr Arip that he must have had some idea of who owned Arka-Stroy. This resulted in this lengthy response from Mr Arip:

"Yes, but I come to this - and it was quite clear, not just some idea, it was very clear to me. Because what happened when Arka-Stroy, when we had the tender – when Arka-Stroy had been doing all kind of small jobs on Kagazy, I simply did not bother who owns it and what it is doing. But during the big tender for construction of the cardboard factory, it was a big factory, it was like 30,000 or 40,000 square metres, a lot of infrastructure, a lot of investment, it was probably the first significant construction of Kagazy Group.

So during that period, we have the tender. And Arka-Stroy was one of the bidders. We have some other bidders, but Arka-Stroy did not want to tender, because tender was won by the Dutch company called Bemaco. And I'm sure it is not new information for claimants, because there is this factory standing there and the name Bemaco is on the wall of the factory. So they won this tender.

Arka-Stroy gave a much lower price than Bemaco but we didn't give this tender despite that because we thought - we had our reservations in terms of whether Arka-Stroy is actually capable of winning this tender.

So during that moment I had a meeting with Mr Sartbayev and he was owner of Arka-Stroy, so he probably had some other minor partners like Khan and Kanat Zhekebatryov. But for me the main person was Mr Sartbayev. Basically I explained to him that we are very happy with the price and job you did before is a good one. Also I understood from him that he owned some other construction businesses, Kastrovanov is basically his companies [sic], but I said we are going ahead with Bemaco and that is - so from that moment on what I actually knew, owners of Arka-Stroy."

Mr Howe suggested to Mr Arip that this was *"a tall story"* and that he *"had no discussion with the owners of Arka-Stroy, because you are the owner of Arka-Stroy"*. Mr Arip denied this and went on to explain that the reason why he had not previously mentioned about Mr Sartbayev was that he thought that *"it is really the first time you ask me about that"*. He clarified later that he *"didn't explain because I thought the whole situation around Sartbayev was explained better by Mr Sannikov, who actually knew him better"*. Just as I am clear that Mr Sannikov made up what he had to say concerning Mr Sartbayev, so I am equally clear that Mr Arip made up this evidence also. It is fanciful to suppose that Mr Arip would have chosen to say nothing about Mr Sartbayev at an earlier stage if what he ultimately came to say during his cross-examination was even remotely true.

184. It follows also that I cannot accept Mr Arip's evidence that, as far as he was concerned, it was Mr Sartbayev who acted on behalf of Arka-Stroy in deciding to employ Mr Makovac. That plainly cannot be the case. This is a matter which I have previously touched upon when dealing with the employment contract dated 1 July 2005 entered into between Arka-Stroy and Mr Makovac. It will be recalled that that employment contract was signed on Arka-Stroy's behalf not by Mr Sartbayev but by Mr Arip himself. I have also previously considered the email which Mr Makovac sent to Mr Arip in October 2006 and rejected Mr Arip's suggestion that this related not to Mr Makovac's employment with Arka-Stroy but to a role assisting Holding Invest. In short, Mr Arip told lies about these matters. The position is clear beyond peradventure. It was Mr Arip who

decided to hire Mr Makovac for Arka-Stroy. I do not accept that Mr Arip was merely acting in an advisory role which entailed him assisting Arka-Stroy to recruit Mr Makovac. It was also Mr Arip to whom Mr Makovac typically reported, as demonstrated, for example, by an email which he sent to Mr Arip on 26 July 2005 enclosing *"a draft proposal of the organisational principles for the Arka Stroi company"* and offering to discuss it with Mr Arip. That Mr Makovac regarded himself, and was treated by others, as being, in effect, part of the KK Group was abundantly clear from the evidence in this case.

185. Another example concerning Mr Makovac specifically is the email to which I have previously referred in which Mr Makovac looked to Mr Arip to be provided with more employees to work on the logistics centre. Yet another example is an email which Mr Makovac sent on 6 October 2005 to Svetlana Zykova at the KK Group in which he essentially asked for *"the payment of salaries for Arka Stroi [sic]"*. Mr Arip suggested that the explanation why Mr Makovac sometimes asked him or the KK Group to approve the expenditure of Arka-Stroy, was that "*because I have to pay for that at the end of the day, it has to be approved by me"*. This explanation, however, makes little sense if, as Mr Arip would have it, Mr Sartbayev was Arka-Stroy's owner and so Mr Makovac's superior (rather than Mr Arip). Mr Twigger also sought to explain away other documents such as Ms Dikhanbayeva's subsequent agreement to meet a request by Mr Makovac for urgent funding of KZT 20 million for excavation work and prepayments for haulage (transporting warehouses from Slovenia) on the basis that this represented what Mr Twigger described as *"flexibility"*. The reality, it seems to me, is that this was simply another example of Mr Makovac (and Arka-Stroy) looking to the KK Group to do what a parent will often do for its subsidiary. In the same way, it is to be noted that in a document on which Mr Twigger placed some reliance (albeit only in a footnote and on a different point) namely something entitled *"Weekly Coordinating Meeting of ARKA-STROY LLP"* dated 3 October 2005 and on the KK Group's notepaper, there is reference to a meeting chaired by Mr Makovac, in which there is reference to the *"legal department"* preparing *"all contracts for Arka-Stroy within 2 days after receiving the relevant internal memorandum"*. This must be a reference to the KK Group's legal department since there is no indication that Arka-Stroy itself had a legal department. It follows, therefore, that what was contemplated here was that the KK Group would prepare legal contracts for its sub-contractor. That seems a most unlikely scenario to me. Even more intriguingly, the document goes on to state that it "*has been decided that each contract shall be approved by the signature of the following three persons: Messrs Tulegenov, Dikhanbayeva, and Maccovac [sic]"*. It is impossible to see why the first of these two people should be approving contracts on Arka-Stroy's behalf unless the company was part of the KK Group. The document then ends with a reference to *"Notifying new employees of Arka-Stroy LLP on their movement to the company"* with the relevant *"Responsible Person"* identified as somebody called Svetlana, namely Svetlana Zykova who was an administrator within the KK Group. Again, it is not easy to see why new Arka-Stroy employees would receive notification from an employee of the KK Group unless Arka-Stroy was itself a member of the KK Group.

186. These are documents which are only consistent with Arka-Stroy being treated as part of the KK Group. Nor are they isolated examples of documentation pointing towards the conclusion that this is how Arka-Stroy was, indeed, regarded at the time. Other examples include documents where Arka-Stroy personnel are described as though they are employed by the KK Group. I have in mind, for instance, a note which was put together for Alliance Bank by Ms Tatiana Mikhailovna Kazinets where she is described as PEAK's Chief Accountant yet in other documents (including, perhaps most notably, various Acceptance Acts) she is described as Arka-Stroy's Chief Accountant. Another example concerns Mr Tulegenov who, despite being a senior employee within the KK Group, was also described as Arka-Stroy's Deputy Director. Mr Sharipov was asked, in particular, in cross-examination about a letter which he wrote to Mr Tulegenov on 28 October 2007 concerning *"the formation of a commission for the acceptance inspection of the completed construction of water pipeline and sewerage utility networks at the construction site of the PEAK Logistics Centre"*. This letter was addressed to Mr Tulegenov in his capacity as Arka-Stroy's Deputy Director. Mr Saoul suggested that it was a letter which had been *"created for appearances really"*. Mr Sharipov denied this, insisting that it was a *"document reflecting a relationship between two different legal entities"*. Interestingly, however, the exchanges then continued in this way:

"Q. It was well known, wasn't it, Mr Sharipov, that Mr Tulegenov was working for Arka-Stroy at this time?

A. As far as I know, he was in charge of quality across the group.

Q. When you say, 'Across the group', you mean across the KK Group?

A. Right.

Q. Including Arka-Stroy?

A. No. He was in charge of quality, to make sure that the construction quality is where it was required to be. Hence I informed him to be prepared that I would be checking that facility.

Q. The reason why he was at Arka-Stroy was because he was in charge of quality on behalf of the KK Group?

A. He was in charge of quality on the construction side, right.

Q. On behalf of the KK Group?

A. Right.

Q. And included within that were his responsibilities for Arka-Stroy? I just want to be clear about this.

A. Yes. He was in charge of controlling quality with Arka-Stroy."

Mr Sharipov was here confirming, in effect, that Arka-Stroy was, indeed, treated as part of the KK Group. So, too, Ms Svetlana Zhondelbaeva was listed as Arka-Stroy's *"Employee responsible for budget settlements"* in registration documents, whilst also working as an accountant at Prime Estates and Peak Akzhal. This is clearly also why, to take a further and final example since it is not necessary to rehearse every instance, Mr Sannikov described himself in the email which, as I have previously mentioned, he sent to Olga Kan at the KK Group (copying in both Ms Dikhanbayeva and Mr Sharipov) on 17 January 2007 as *"Financial Director at PEAK LLP and Arka-Stroy LLP"*.

187. Quite clearly, things went much further than the merely *"close commercial relationship"* which Mr Twigger suggested was all that there was between the KK Group (specifically KK JSC and PEAK) and Arka-Stroy. An illustration of this is a letter which Ms Yelgeldiyeva, KK JSC's Chief Accountant, sent to Alliance Bank on 15 February 2006. That letter requested the preparation and installation of *"an additional service (second signature) per Bank-Client system for the following companies"* and then listed a whole series of companies within the KK Group. Amongst that list, at the end, was Arka-Stroy. This type of document points, conclusively as I see it, to the inevitable conclusion that Arka-Stroy was treated at the time as part of the KK Group. So, too, does an Excel spreadsheet which, as Mr Howe put it, comes from the *"other end of the spectrum"* in that it relates to accounting entries compiled, it seems, by the KK Group Finance Department for the period from January 2009 to October 2009. As he submitted, whoever made the various entries in that spreadsheet, in order to monitor account balances, regarded Arka-Stroy as part of the KK Group and, as such, an entity whose accounts were able to be adjusted as an internal group matter.

188. These are only examples. I mention them merely to illustrate the type of documents which exist. I do not, in the circumstances, propose to list every document which establishes the correctness of Mr Howe's submissions on this topic. Suffice to say that I have considered all the evidence and am quite clear that those submissions are, indeed, correct. In addition to the matters which I have already addressed, the other evidence which I have taken into account includes the many corporate documents which are only really consistent with Arka-Stroy being part of the KK Group. By way of illustration, as I have previously explained by reference to the evidence which was given by Mr Sharipov, in the minutes of the regular budget review meetings which took place, Arka-Stroy was identified as a subsidiary of Kagazy Invest. Futhermore, Arka-Stroy was referred to as a subordinate company of Kagazy Invest in an Order dated 28 April 2006 regarding tighter internal controls, and Arka-Stroy was identified as a subsidiary of Kagazy Invest in Regulations of the Legal Department of Kagazy Invest. In addition, resolutions regarding Arka-Stroy's budget were passed in KK JSC's board meetings; and Arka-Stroy was described as a KK Group subsidiary in regulations relating to the KK Group bonus system. Moreover, there is the fact also that Arka-Stroy can be seen in the evidence to have featured in numerous multi-party agreements involving entities within the KK Group and other companies alleged by the Claimants in these proceedings to be 'Connected Entities'. Again, I do not propose to set out every example of such contracts but they include: a debt assignment agreement between Trade

House (PEAK Akzhal), Arka-Stroy and Lotos; an assignment agreement between Trading Company, Trade House (PEAK Akzhal) and Arka-Stroy; an assignment agreement between Trade House (PEAK), Arka-Stroy and Kontakt Service Plus; an assignment agreement between KK JSC, Arka-Stroy and HW: an assignment agreement between KK JSC, Arka-Stroy and TEW; and an agreement between Trading Company and Arka-Stroy for (unlimited) financial assistance; a draft debt transfer agreement between Lotos, Trading Company, Arka-Stroy and HW which included what Mr Howe suggested was a *"revealing comment bubble"* referring to there having been *"no basis for the origin of the debt…"*. Mr Howe submitted, and I agree, that what these agreements appear to demonstrate is that the various entities entering into them were being treated in a manner which is inconsistent with any of them having any independence of the type which Mr Twigger suggests Arka-Stroy enjoyed. On the contrary, it seems to me that Mr Howe was right when he submitted that the agreements effectively amounted to *"accounting entries"* which involved the shuffling around of monies between members of a single group of companies. It will be recalled that this is a topic which I addressed when describing what I characterised as Ms Dikhanbayeva's *"unrealistic and implausible evidence"* when she was shown various documents relating to an instruction which she had given concerning the drawing up of financial assistance or debt transfer documentation. I am quite clear that agreements of this sort could only be concluded (despite her denials) by Ms Dikhanbayeva at Mr Arip's behest if every company was a member of the KK Group. Mr Howe was right when he submitted that not only does the absence of any evidence that there were ever negotiations with the various entities point strongly towards a conclusion that these were not genuine agreements, but there is also no logical commercial reason why these various entities, if genuinely independent, would be willing to enter into arrangements involving, for instance, the swapping of a debt owed to them by a substantial (and known) KK Group entity for a debt owed by a company which is unknown to them.

189. In addition, but importantly, there is also the evidence concerning the merger between PEAK and Arka-Stroy in 2008 which I have already addressed in some detail. Mr Twigger's submission was that too much store had been placed in this regard on what he described as *"two isolated emails, both in similar terms"*. He suggested that the wording of these emails is obscure and says nothing about a merger between the two companies (as opposed to changes in email addresses). He relied, in addition, on what Mr Sharipov had to say in cross-examination, which was to deny that there had been a merger between PEAK and Arka-Stroy in 2008 and, indeed, that at that time *"there was a conflict between PEAK and Arka-Stroy which resulted from the fact that Arka-Stroy had left quite a lot of elements undelivered on their construction and they had to fix those"* with *"pretty much daily disputes and scandals with Arka-Stroy at the time"*. Mr Twigger observed that that evidence is not consistent with Arka-Stroy being a member of the KK Group or some sort of 'captive' entity. The difficulty with this evidence from Mr Sharipov is, however, that I did not find it to be evidence which was even remotely credible. I reject it, in fact, as being evidence which was made up. As for the emails themselves, in my view, they are both quite clear and only consistent with a merger of the two companies (not merely their two computer systems) having taken place. I am clear, in short, that the

evidence concerning the merger provides significant support for the Claimants' case that Arka-Stroy was owned or controlled by the Defendants.

190. Mr Twigger made a number of other submissions in support of his overall proposition that Arka-Stroy was (and only ever was) an independent entity and not a part of the KK Group. I have dealt with a number of these already and so in what follows I shall endeavour not to repeat myself. First, I have already mentioned that he referred to a number of contracts which Arka-Stroy entered into at a time when, albeit that Mr Arip had become President of KK JSC's Management Board (in February 2003), he had yet to become a shareholder. As Mr Howe observed, however, the contracts concerned were (as, indeed, Mr Arip, on occasion, himself stated) relatively minor. This is confirmed by a document which Mr Makovac drew up entitled *"List of facilities completed by ArkaStroy LLP during 2005"*, which included work done with a value of KZT 800 million as follows: waste paper recycling shop for Kagazy Processing (earthworks, levelling, reinforced concrete foundations, installation of metal framework, water supply etc.); construction of production warehouses (foundations and metal framework); paper stock preparation room (earthworks, foundations, installation of walls and roof framing); paper manufacturing shop (internal water supply, waste removal, ventilation networks and floor installation); and construction of the administration building (foundations, framework, roof, landscaping, site improvements, paving and reinforced concrete barrier). Although the fact that this work was carried out demonstrates that Arka-Stroy was obviously already 'in business' in the autumn of 2005 when Mr Makovac joined and, furthermore, that Arka-Stroy was engaged in construction-related work, the fact remains that the contract which it entered into on 15 August 2005 with KK JSC which had a value of KZT 2,191,375,600 (approximately US$ 16.97 million), the first of the so-called PEAK contracts, and the contracts which followed were of a completely different order.

191. Indeed, it is worth pausing here to consider what were the contracts which were entered into between KK JSC and Arka-Stroy and under which KK JSC came to pay the substantial monies to Arka-Stroy and which led to the bringing of the PEAK Claim. I have just mentioned the first of these contracts which was concluded on 15 August 2005. This was concerned with Akzhal 1. It should be appreciated that, as a result of an addendum dated 1 February 2006 (and signed by Mr Arip on behalf of KK JSC), the contract price was subsequently substantially increased to KZT 3,117,885,039 (US$ 24.15 million). The August 2005 contract did not stand alone, however, since that contract was followed by a further contract, also concerned with Akzhal 1 (at least originally), concluded on 2 November 2005 between Peak Akzhal and Arka-Stroy with a price of KZT 3,364,266,404 (approximately US$ 26.05 million). This was, in turn, followed by a contract dated 1 March 2006, again between Peak Akzhal and Arka-Stroy, where the agreed price was KZT 1,531,936,250 (approximately US$ 11.07 million). Some four months after that, another contract was entered into, on 6 July 2006, this time between PEAK (then called Megalogistics Terminal Services LLP) and Arka-Stroy and concerned not with Akzhal 1 but (at least originally) with Akzhal 2, with a contractual value of KZT 1,023,000,000 (approximately US$ 7.92 million) which was increased shortly afterwards, through an addendum dated 1 August 2006, to KZT 6,185,948,905

(approximately US$ 47.91 million). A final contract was concluded between KK JSC and Arka-Stroy on 28 March 2008 for a price of KZT 2,472,812,005 (approximately US$ 19.15 million). Although it is right to acknowledge that Mr Arip and Ms Dikhanbayeva quibble over whether this was signed by Mr Arip and suggest that it was not even drafted until November 2009 by which time they had left Kazakhstan for Dubai, it is tolerably clear that Arka-Stroy was paid under this further contract, albeit apparently by referencing a different contract altogether (one described as being dated 11 January 2008) which was not actually entered into. Specifically, Mr Arip's and Ms Dikhanbayeva's forensic accountancy expert, Mr Thompson, has identified 12 payments from KK JSC to Arka-Stroy amounting to KZT 2,229,648,589 made between November 2008 and January 2009.

192. It is worth also taking a moment to consider what Ms Dikhanbayeva had to say about these contracts. According to her, the August 2005 contract was initially for work on Akzhal-1 but was, in fact, used for Akzhal-2 and the addendum entered into in February 2006 was to increase the price to allow for the additional work required at Akzhal-2. The November 2005 contract, Ms Dikhanbayeva explained, was for work at Akzhal-1 and, as such, replaced the August 2005 contract. It included, she added, the price of the Akzhal-1 metal warehouses, although these were subsequently bought directly from Loging for approximately US$ 6.8 million. As for the March 2006 contract, this was also in relation to Akzhal-1, the intention being that this contract would replace the November 2005 contract and that the Akzhal-1 metal warehouses would not be included in the new contract since these were now the subject of a separate contract with Loging, but Ms Dikhanbayeva stated that it was ultimately decided to leave the November 2005 contract alone. The July 2006 contract, she went on to explain, was supposed to be for work at Akzhal-2 and the increase in the August 2006 addendum was to cover the cost of Akzhal-2 metal warehouses, but in the end the Akzhal-2 warehouses became the subject of a separate contract with Seybold and this contract was not used at all in relation to Akzhal-2. Instead, according to Ms Dikhanbayeva, the contract was used for the purposes of Aksenger and described in that context as having been a *"Supplemental Agreement No.3"* to the July 2006 contract. This further agreement has not, however, been located.

193. This was curious evidence which it was not at all easy to follow, still less accept. What matters, however, is that, taken together, these were major contracts worth as much as US$ 160 million to Arka-Stroy, a company with only a very modest track record which entailed nothing like the level of experience which might be expected in a company securing such large contracts. It is, furthermore, instructive in this context that, in an effort to explain that Arka-Stroy was already significantly involved in the construction business when it entered into the 2005 contracts, the Defendants should rely on the document to which I have previously referred dated 3 October 2005 on the KK Group's notepaper which is entitled *"Weekly Coordinating Meeting of ARKA-STROY LLP"* since, on analysis, there is very little in that document to indicate what work Arka-Stroy was doing at the time. It is certainly impossible to see how this is a document which evidences any significant construction work having been carried out by Arka-Stroy. Indeed, it is worth mentioning in passing that the fact that the

document is on the KK Group's notepaper itself rather supports the proposition that Arka-Stroy was not an independent company. It should be borne in mind also that the contract entered into by Arka-Stroy with Kagazy Gofrotara on 6 June 2005, the contract which Mr Twigger pointed out was signed by Mr Uteuliev rather than by Mr Esimbekov, although substantial (KZT1.16 billion), never, in fact, happened. I agree with Mr Howe, in the circumstances, that there is very little evidence to demonstrate any substantial construction activity on the part of Arka-Stroy or to justify the conclusion that the company had a substantial independent management, such as to justify the scale of the contracts that it subsequently entered into with KK JSC from August 2005 onwards.

194. It should be noted also that, in setting out details of what Mr Makovac did at Arka-Stroy after his arrival in late 2005, Mr Twigger highlighted the fact that by November of that year Arka-Stroy had 15 employees and was described by Mr Makovac to the Karasay District Head of Department for Employment as a *"standalone enterprise whose core line of business was the design and construction of production buildings"*. It seems to me that, if anything, this assists Mr Howe's submission since, if Arka-Stroy had only reached the position where it had as few as 15 employees in this timescale, it is difficult to see how it can really be the case that beforehand it was a company which could have been engaged in any particularly substantial work. I might add that I tend also to think that the description which Mr Makovac used in describing the business to local officialdom somewhat hints at a business which was only at that stage really getting going. The same applies to the further point made by Mr Twigger concerning Mr Makovac's attempts to recruit a production engineer from abroad, also described in the letter to the Karasay District Head of Department for Employment. Mr Makovac was plainly making efforts to boost the company's workforce precisely because it had hitherto been somewhat lacking. It is also interesting in this context that the opening paragraph of the letter reads as follows:

"The initial registration of the company was carried out in 2002. In 2005, in connection with a change in the location, corresponding amendments were introduced to the registration documents. The date of re-registration at the Department of Justice of Almaty Region was 22/08/2005, number 325-1907-05-TOO."

Again, although it is fair to say that not all the underlying material which might be relevant to this point appears to be available, this suggests to me that it was only in August 2005, and therefore just after the first of the PEAK contracts was entered into, that Arka-Stroy really became, at least in any significant sense, commercially active.

195. It was also suggested by Mr Twigger that in early 2006 Arka-Stroy issued a tender in relation to the development of the Akzhal and Aksenger projects in view of, among other things, the proposed positioning of the Almaty ring-road in the Almaty transportation development strategy. A perusal of the relevant document relied upon demonstrates, however, that it was not really a tender at all but, as indeed the *"Document Scope"* itself put it, a *"Rough description of the project frame, to be used for initial feasibility calculations and price proposals"*. It is not a document which demonstrates any real work carried out

by Arka-Stroy and is rather more consistent with Arka-Stroy at that stage being little more than a start-up. Mr Twigger went on to point to various other matters. He referred, for example, to Mr Makovac assisting the KK Group management, including Mr Arip and Ms Dikhanbayeva, from early 2006 onwards by providing information pursuant to their requests to enable the KK Group to obtain financing and relevant permits for the project. He highlighted also how, starting in March 2006, Arka-Stroy developed procedures for the selection and management of sub-contractors and produced minutes of its tender committee, and how shortly after that Arka-Stroy began holding regular meetings with its sub-contractors, in particular the designers PTIpishcheprom and Intereng Almaty. This, together with work done creating business plans and marketing material, Mr Twigger suggested, establishes that the Akzhal projects were genuine and that they were *"not some fictional device to commit fraud"*. As Mr Howe pointed out, however, it has never been the Claimants' case that no construction work was carried out; on the contrary, it is self-evident that work was done on the Akzal-1 site since there are, quite clearly, warehouses which have been built there. The Claimants' position is that, although work was carried out, it was not carried out in sufficient quantities to justify the amount of money which the KK Group parted with. Clearly also it would not have been possible to justify the very large sums of money being paid out by the KK Group without having some sort of construction activity to show for it. I agree with Mr Howe that, in the circumstances, the fact that Mr Twigger was able to point to the types of activities which he identified only takes matters so far. In my view, it is not far enough. I am quite clear, indeed, considering the totality of the evidence and bearing in mind lies which Mr Arip and others such as Mr Sannikov and Mr Sharipov (as well as Ms Dikhanbayeva, of course) told when giving evidence, that the suggestion that Arka-Stroy was a genuinely independent construction company, as opposed to a company controlled by the Defendants, is fanciful.

The US$ 49.1 million which Arka-Stroy did not pay out

196. I shall come on to deal with the payments which Arka-Stroy made out of the US$ 109.1 million (net) which it received from the Claimants. Two initial (but important) points made by Mr Twigger need, however, to be addressed at the outset. The first of these points concerns Mr Twigger's submission that, in relation to US$ 49.1 million of the US$ 109.1 million net total paid to Arka-Stroy between August 2005 and July 2009, there is no evidence that any onward payment came to be made by Arka-Stroy to any entity connected with the Defendants or that the money was used for the Defendants' personal benefit.

197. I have touched on this already, but there is no issue that US$ 36.9 million net was paid by Arka-Stroy to Holding Invest (US$ 4 million), Kagazy Invest (US$ 5.5 million), Bolzhal (US$ 2.7 million), CBC (US$ 0.2 million), Kagazy Processing (US$ 7.4 million), Kagazy Gofrotara (US$ 1.6 million), Lotos (US$ 6.6 million), Trading Company (US$ 4.5 million), TEW (US$ 3 million), HW (US$ 0.7 million), Kontakt Service Plus (US$ 0.7 million), that a further US$ 23 million net was paid to the so-called 'Kazakh LLPs' or 'Construction LLPs', namely Ritek, Mouli-Group, Biznes-Privat, TESS and Bedel-Stroy, and that the remaining US$ 49.1 million was retained by Arka-Stroy.

198. As to that US$ 49.1 million, Mr Twigger suggested that the Claimants' own forensic accountancy expert, Mr Crooks, effectively conceded that he had no basis for saying that the US$ 49.1 million had been misappropriated by Mr Arip and Ms Dikhanbayeva since he confirmed that he had not engaged in a *"specific transaction-by-transaction"* exercise and that the analysis which he had performed involved a *"bucket approach, in the sense we analysed the amounts going into the bucket, if I can use that non-technical term, and we looked at the payments going out of the bucket, to see where the majority of the income or cash flows came from and where the cash flows went to"*. Accordingly, Mr Twigger contended, the most (if anything) that the Claimants could hope to recover in respect of the PEAK Claim is approximately US$ 60 million (US$ 109.1 million less US$ 49.1 million). However, I reject this contention. As I have previously explained, what matters is that the Claimants parted with the monies which they did in ignorance of the fact that the recipient of those monies, Arka-Stroy, was a company which was controlled by the Defendants. I agree with Mr Howe that it is not for the Claimants to have to explain what Arka-Stroy did with each and every tenge it received from them. This is not to say that credit should not be given for genuine construction work which was carried out, and nor do I mean to suggest that, where money has been repaid to the KK Group, this should simply be ignored, the issue which I come on now to address.

199. I shall come back to the first of these points but as to the second matter, which applies not only to the US$ 49.1 million retained by Arka-Stroy but also to any monies paid to the 'Connected Entities', Mr Twigger's submission was that, in formulating the PEAK Claim, the Claimants have given no credit at all for money which was paid to Arka-Stroy and retained by that company, or which was paid to the 'Connected Entities' by Arka-Stroy, and then paid back to the KK Group by those entities. His point was that there cannot be said to be misappropriation where there has been repayment by such entities, and that this must all the more be the case if those entities are properly to be regarded as having been owned or controlled by the Defendants since, if that is right, the repayment ought likewise to be treated as having been made by or on behalf of the Defendants themselves. The difficulty with this submission, however, is that Mr Crooks made it clear in the report which he prepared in March this year that he was not blind to this point and had carried out an analysis of what might be described as the 'state of accounts' between the Claimants and the 'Connected Entities' which involved looking at transactions other than those which form the subject matter of the PEAK Claim. It is worthwhile setting out what Mr Crooks had to say in his report *in extenso*:

"10.1 In my 'onward-tracing' work in Section 9, I identified some transactions that took place directly between the End-Recipients and KK Group entities which are not included [in] the cash flows described in the RAPOC ... Consequently, I have carried out the further analysis described in this section.

10.2 I present below the findings of my analysis of direct transactions between the KK Group and 42 specific FS Entities and End-Recipients (the 'Direct Transactions'). The detailed methodology I used for this work is explained in Appendix 10, paragraph 10.50. I collectively refer

to the 42 entities as the 'Relevant Counterparties' for the purposes of this report.

10.3 The aim of this analysis was to identify and quantify all 'new', Direct Transactions between the KK Group and the 42 Relevant Counterparties in the available period, as these potentially could have some relevance to the quantum of the claim, depending on their circumstances. The Relevant Counterparties are listed in Table 129, Appendix 10. To be clear, I report here on 'new' transactions only, i.e. not those already accounted for in the RAPOC.

10.4 As there is a large amount of available Cash Data in this matter for a variety of different entities, for reasons of proportionality and efficiency, my Direct Transactions analysis used the available 1C Cash Ledger Reports of the ten KK Group companies. The scope of my Direct Transactions analysis is thereby limited as are any conclusions that can be drawn from it. I have not sought to 'four way match' the transactions identified or further investigate the context of these transactions. This analysis does, however, provide an insight into the transactional relationships which may assist in assessing whether further analysis may be beneficial to quantify any potential impact on the claim.

10.5 I note that this section generally assumes that the status of the relevant entities in terms of being part of the KK group, or not, is consistent throughout the period."

Mr Crooks went on to say this:

"10.6 As shown in Table 87 below, we identified 3,394 direct transactions between KK Group entities and the Relevant Counterparties, totalling a net payment from the KK Group of KZT 13.004 billion (approximately US$ 100.70 million) to those Relevant Counterparties. Note that all transactions shown in this section are from the KK Group perspective: all net payments from the KK Group are denoted as positive values and all receipts into the KK Group are denoted as negative values."

Then, after setting out Table 87 and, indeed, Table 88, Mr Crooks continued:

"10.7 All transactions shown in the two tables above (and discussed in the rest of this section) are 'additional' or 'new', i.e. we have eliminated transactions that are already included in the RAPOC. For clarity, the above two tables show separately any new transactions that we have already identified in other areas of this report, i.e. in the Completeness testing and the Onward Tracing/End-Recipient analysis.

10.8 In overview, the net 'new' direct cashflows between the KK Group and the Relevant Counterparties amount to a net outflow from the KK Group of approximately US$ 100.70 million or KZT 13.004 billion. For an assessment of any possible effect on the claim, a detailed examination transaction-by-transaction would be required, which is not within the

scope of my work. The majority of my work in this report is necessarily focused on the frauds as pleaded."

In the pages which follow, Mr Crooks set out in detail the results of his analysis. He concluded in paragraph 10.28 by saying this:

"I found 3,394 new Direct transactions between the KK Group and Relevant Counterparties. In the absence of a detailed examination of all 3,394 transactions, all I can say here is that the KK Group position as a whole shows a very considerable net payment out to the Relevant Counterparties of US$ 100.70 million (KZT 13.004 billion)."

200. Mr Howe submitted that the analysis performed by Mr Crooks was entirely appropriate. I agree. It was clearly unrealistic to expect him (or any other expert) to do what Mr Twigger suggested, which was to review the payment narratives in relation to all 3,394 transactions. Mr Crooks was clear, both in his report and when he was cross-examined, that the exercise he engaged in was intended to provide him with some *"comfort"* since he *"needed to be comfortable that ... the KK Group was still in the net payment position"*. Far from closing his eyes, therefore, to the point which was given such emphasis by Mr Twigger, namely that payments made by Arka-Stroy to 'Connected Entities' may have found their way back to the KK Group, Mr Crooks had this point very much in mind. As he put it, he *"wanted some comfort that in fact all of the payments that we had been looking at on, let's say, appendix 13B didn't find their way back to the KK Group"*. The fact that Mr Twigger was able to pick Mr Crooks up on aspects of the analysis which he carried out (including, for example, the fact that he included transactions involving Arka-Stroy when his intention *"was to identify cash flows outside of payments going to Arka-Stroy"*) does not, in my view, alter the core fact that what Mr Crooks did demonstrates that there clearly was a substantial balance in favour of the KK Group. Mr Howe speculated, indeed, in his reply submissions that the claim advanced against the Defendants *"could, on another analysis, have been very much bigger than it is"*.

201. It does not assist Mr Twigger, in such circumstances, to alight upon Mr Crooks' acceptance in cross-examination, for example, that there *"may be explanations"* for any given payment since, as Mr Crooks pointed out, *"in the same way there will be explanations for the other exceptions that drove us to think about doing this exercise"*. As he explained earlier in his cross-examination when he was asked about the payments to and from Arka-Stroy, his primary focus was not on payment narratives but on cashflows, and he only looked at narratives when considering whether an adjustment to the claim was required. In the circumstances, I take the view that Mr Twigger's criticisms concerning the work carried out by Mr Crooks were unwarranted.

202. I was unconvinced by Mr Twigger's reliance, in particular, on the exercise carried out by Mr Thompson in a report produced in April this year which entailed an analysis of what payments were made to certain of the (alleged) 'Connected Entities' and what funds were returned to the KK Group by those entities both before and after 30 May 2007, reaching the conclusion that of the KZT 22,313,564,410 paid by Arka-Stroy to the entities concerned, KZT 3,306,690,748 was repaid to the KK Group. Mr Howe objected to Mr Twigger's

reliance on Mr Thompson's approach, making the point that Mr Arip and Ms Dikhanbayeva have not pleaded any positive case that the size of the PEAK Claim should be reduced to account for particular repayments and highlighting in this context that such a case would need to have been set out in the defence in order to enable both sides' experts to have engaged with it fully. I have some sympathy with this objection. There is, however, a more substantive point which can be made. This is that the difficulty with the approach adopted by Mr Thompson is that it represents little more than a snapshot and says nothing about the overall accounting position between the Claimants and the 'Connected Entities'. As Mr Howe put it, Mr Thompson has focused on a *"little slice of payments"* and has not looked at the broader picture. Mr Crooks' exercise has, in contrast, involved looking at that broader picture, albeit in order to provide him with *"comfort"* rather than precision. The more precise analysis performed by Mr Thompson, if it is to have any meaningful value, would need to have been performed much more widely. As Mr Howe put it, *"we know that quite apart from the very large number of transactions that we have considered in these proceedings and form part of the pleaded case, there were numerous other transactions taking place off stage, as it were, between the connected entities and the claimants"*. Those transactions were, again as Mr Howe put it, *"scattered here and there, what appear to be agreements for purchases of corrugated board and other things of that nature"*. In such circumstances, it is quite clear to me that the approach adopted by Mr Thompson, and relied upon so heavily by Mr Twigger when seeking to criticise Mr Crooks, is as flawed as it is unhelpful.

The monies paid out by Arka-Stroy

203. Having considered the position of Arka-Stroy and the appropriate treatment of the payments which the KK Group made to that company, it is now necessary to explore in a little detail the onward payments which were made by Arka-Stroy to other entities. In the case of the PEAK Claim, these other entities are (in addition to Arka-Stroy): Holding Invest, Kagazy Invest, Bolzhal, CBC, Lotos, Kontakt Service Plus, Kagazy Processing, Kagazy Gofrotara, TEW, Trading Company, HW, Bedel-Stroy, TESS, Biznes-Privat, Mouli-Group and Ritek. Mr Howe labelled these each as the 'Connected Entities' and, as I have mentioned, the last five in particular as the 'Kazakh LLPs' although Mr Twigger preferred to call them the 'Construction LLPs'. I repeat that the relevant payments which were made by Arka-Stroy comprised US$ 23 million to the 'Kazakh/Construction LLPs' and US$ 36.9 million to the other (alleged) 'Connected Entities'.

204. It should be noted right away that, except for Kagazy Invest, Kontakt Service Plus, Kagazy Processing, Kagazy Gofrotara, HW and TESS, all of these entities also feature in the Land Plots Claim. As for the Astana 2 Claim, the entities involved there are Holding Invest, TESS and another company, Ada Trade. The extent of the overlap is apparent from looking at Appendix 13B (in relation to the PEAK Claim) alongside the diagrammatical portrayals which Mr Crooks prepared as regards the Astana 2 Claim and the Land Plots Claim, namely Appendices 15.2A/15.3A and Appendix 14B respectively. Specifically, taking some of the examples cited by Mr Howe, it could be seen from Appendix 13B

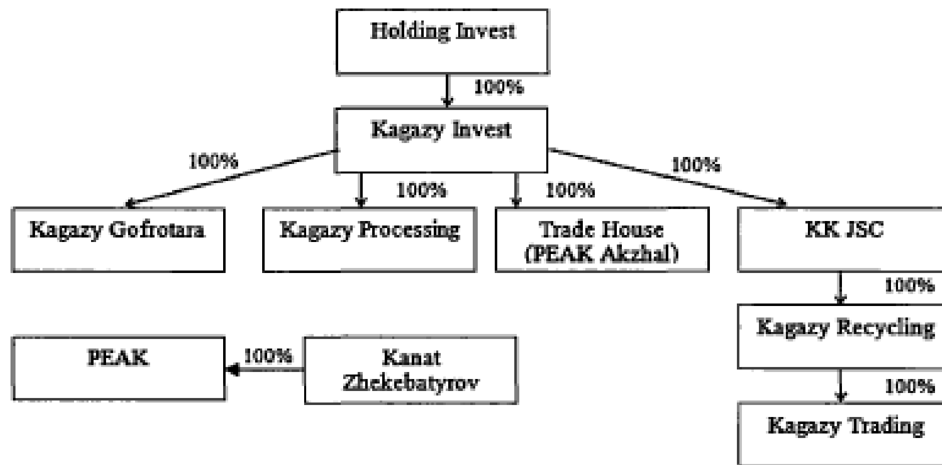
that, in relation to the PEAK Claim, Bolzhal and CBC received funds from Arka-Stroy whereas Appendix 14B shows that in relation to the Land Plots Claim these companies were two of the three entities (along with Holding Invest) which were recipients of the funds which came from KK JSC. Similarly, again in relation to the Land Plots Claim, as Appendix 14B illustrates, Biznes-Privat, TESS, Mouli-Group, Ritek and TEW received most of the sums transferred which Bolzhal and CBC had received from KK JSC, adding up to approximately US$ 37.1 million, whilst also, as Appendix 13B shows, receiving (again between them) something in the region of US$ 23 million from Arka-Stroy in relation to the PEAK Claim. Then there is Lotos which features in Appendix 13B as receiving US$ 6.6 million from Arka-Stroy in relation to the PEAK Claim and also in Appendix 14B (the Land Plots Claim) where a payment of some US$ 1.3 million from TEW (a recipient of the monies from CBC which had itself obtained them from KK JSC) can be seen albeit that the self-same day Lotos transferred the money to Biznes-Privat. Lastly, although it is worth stressing again that these are only examples, Appendix 13B (the PEAK Claim again) reveals that Trading Company received approximately US$ 4.5 million from Arka-Stroy in relation to the PEAK Fraud, together with an additional US$ 1.8 million from Holding Invest which that company had received from KK JSC. Although these are merely illustrations, they demonstrate very clearly the extent to which Appendices 13B, 14B, 15.2A and 15.3A are largely dealing with the same entities, and so that there are significant overlaps between all three of the claims which are brought in these proceedings. It is particularly striking that the entities to which Arka-Stroy paid some of the most substantial amounts of money as shown in Appendix 13B (in the context of the PEAK Claim) appear also in Appendix 14B and so in the context of the Land Plots Claim. Why this should be the case is not easy to fathom if Mr Arip and Ms Dikhanbayeva are right and Arka-Stroy was a legitimate and independent construction company. I agree with Mr Howe that this cannot have simply been a coincidence and, furthermore, that this matters because, if it was indeed not a coincidence, this provides significant support for the proposition that Mr Arip's and Ms Dikhanbayeva's insistence that they did not commit the frauds which are alleged by the Claimants should not be accepted.

205. It is against this background and taking into account what I have already had to say concerning the evidence which was given by Mr Arip and Ms Dikhanbayeva and the witnesses whom they called that I now come on to address the position in relation to each of the (alleged) 'Connected Entities' and the 'Kazakh/Construction LLPs' or at least those which feature in the PEAK Claim (as portrayed in Appendix 13B). As will appear, in some cases the issue is not whether the particular entity was owned or controlled by the Defendants but whether payments made to that entity are properly to be regarded as *bona fide*.

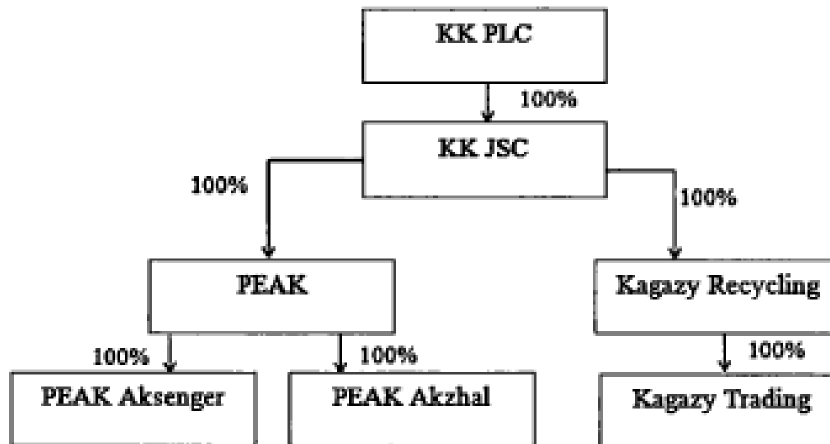
Holding Invest

206. That is the position in relation to Holding Invest since it is common ground that this company was jointly owned by Mr Zhunus and Mr Arip. It is also common ground that Kagazy Invest was a wholly-owned subsidiary of Holding Invest. These were both originally holding companies, through which Mr Zhunus and Mr Arip owned the KK Group. Indeed, as at December 2006, prior to the IPO

which took place the following June, Ms Dikhanbayeva explained in one of her witness statements that the KK Group structure looked like this:



In about December 2006, as part of the preparation for the IPO which took place in July 2007, Ms Dikhanbayeva went on to explain, Holding Invest, Kagazy Invest, Kagazy Processing and Kagazy Gofrotara were all removed from the KK Group, with the result that the KK Group structure at that stage looked like this:



207. Mr Howe emphasised that Holding Invest, Kagazy Invest, Kagazy Processing and Kagazy Gofrotara continued throughout to be owned by Mr Zhunus and Mr Arip. This is significant, he submitted, insofar as it can be demonstrated that monies were paid to those companies after they had left the KK Group but also, he suggested, insofar as monies were paid to such companies before they left the KK Group since it does not necessarily follow that payments made before departure should be treated as what Mr Howe described as a *"credit to the group"*. This is because, he explained, this will depend on whether the monies left the KK Group with the company which received those monies from Arka-Stroy. If the monies did leave when they should have stayed within the KK Group, then that, Mr Howe submitted, ought not to have happened. As he put

it, it is not legitimate to move monies out of subsidiaries into parent companies before then hiving off the parent companies.

208. It seems to me that Mr Howe was right about this. This matters because of the submissions which were made by Mr Twigger in relation to Holding Invest (and, indeed, Kagazy Invest, Kagazy Processing and Gofotara). Thus, having drawn attention to the fact that it is the Claimants' case that Holding Invest received net payments of KZT 519 million/US$ 4 million from Arka-Stroy and that, because Holding Invest was jointly owned by Mr Zhunus and Mr Arip, they received the benefit of those payments, Mr Twigger went on to justify the payments by making a series of points. He began by acknowledging that between January 2006 and December 2008, KZT 16.65 billion was paid from Arka-Stroy to Holding Invest and KZT 16.13 billion was paid from Holding Invest to Arka-Stroy, resulting in a net amount of KZT 519,214,035 being paid from Arka-Stroy to Holding Invest. He pointed out, uncontroversially as I understand it and based on certain tables which Mr Thompson produced showing the various money transfers, that the KZT 16 billion did not derive from the KK Group but from two loans drawn down from Alliance Bank, and that that amount was repaid to Alliance Bank with interest by Holding Invest via Arka-Stroy. As to the net amount of KZT 519,214,035 which forms the basis of Claimants' claim, Mr Twigger went on to explain that, prior to 30 May 2007, KZT 122.85 million was received by Holding Invest, and that Holding Invest paid approximately KZT 22.65 million out of that sum to KK JSC as the return of financial aid with approximately KZT 55.73 million being paid as financial aid to Kagazy Invest as the main group operating company. Accordingly, Mr Twigger submitted, approximately KZT 78.38 million was paid back to the KK Group. As to the balance, KZT 44.33 million, this was paid for utilities, construction, bank commission and interest payments. Looking at the position after 30 May 2007, Mr Twigger pointed out that, ignoring the KZT 16 billion repayment to Alliance Bank (via Arka-Stroy), around KZT 475 million was received by Holding Invest after 30 May 2007 and that out of that KZT 241 million was paid to Caspian Minerals LLP as financial aid, KZT 515,032 was paid as financial aid to KK JSC, KZT 100,000 was paid to Kagazy Invest as financial aid, and the remainder (KZT 233.21 million) was paid for utilities (and other services), rent, a *"recreational resort account"*, commissions, currency purchases and taxes. It was Mr Twigger's submission, in these circumstances, that the only onwards payment which the Claimants could even conceivably allege had been used for the Defendants' benefit (as opposed to the KK Group's benefit) is the payment which was made to Caspian Minerals which Mr Arip has never disputed was owned by him jointly with Mr Zhunus. Mr Twigger observed, however, that Mr Arip had not been cross-examined about this and, furthermore, that it could not be known whether the payment involved a misappropriation without first knowing what the state of account was, at that stage, as between the Claimants and Holding Invest as at 31 May 2007. In addition, Mr Twigger suggested, it is highly unlikely that after 31 May 2007 there was complete separation between the activities of Holding Invest and the KK Group so as to mean that payments made by Holding Invest ought to be regarded as being for the benefit of Mr Zhunus and Mr Arip rather than the KK Group.

209. There are, however, a number of difficulties with these submissions. First, as Mr Twigger himself recognised, his submissions were made without knowing what the 'state of account' was as between the Claimants and Holding Invest as at 31 May 2007. As I have explained, however, the only reliable 'state of account' evidence before me is that which was given by Mr Crooks. That evidence does not assist Mr Arip and Ms Dikhanbayeva for reasons which I have previously given.

210. Secondly, Mr Twigger's submissions take no account of the explanation which Mr Arip and Ms Dikhanbayeva themselves gave for the bulk of the relevant funds (the KZT 16 billion) going back and forth between Arka-Stroy and Holding Invest in so short a space of time, namely that it was because of an entirely separate (albeit ultimately abortive) construction project that Holding Invest was trying to carry out with Arka-Stroy. Specifically, in his first witness statement Mr Arip stated as follows at paragraphs 31 to 35:

> *"31. The transfers from Arka-Stroy to the other two former KK Group entities (Holding Invest LLP and Kagazy Invest LLP) were related to a project that Baglan and I invested in near Astana. We purchased approximately 300 hectares of land and intended to develop it into a business and logistics park among the lines of what the KK Group was planning for Almaty. Given its high quality work on the KK Group projects, we planned to use Arka-Stroy as the general contractor for our Astana project as well.*
>
> *32. In order to fund this project, we sought financing from Alliance Bank, which required Arka-Stroy to produce in advance detailed technical documentation to support the proposed budget. Based in large part upon the information produced by Arka-Stroy, Alliance Bank agreed to loan KZT 6 billion (approximately US$ 46.5 million) to fund this project, which Holding Invest LLP drew down and transferred to an account of Arka-Stroy about 29 June 2007. I note that it was necessary for Holding Invest LLP to immediately draw down the entire amount of the loan in order to ensure that these proceeds would be available for the project. Due to the immaturity of the Kazakh banking sector and the relative instability of the banks, a guarantee that the funds will be made available in future would not have been sufficient.*
>
> *33. After drawing down the Alliance Bank loan, it became clear that the estimated budget of KZT 6 billion would not be sufficient to complete the project. Alliance Bank indicated that in order to obtain further financing we would have to return the current loan and reapply for a new loan, with revised technical documentation supporting any newly proposed budget. Accordingly, Arka-Stroy transferred the original loan amount of KZT 6 billion back to Holding Invest LLP (plus interest), and Holding Invest LLP then returned those funds to Alliance Bank. Alliance Bank also required that we pay a variety of fees, fines and costs related to the issuance of the loan and its early repayment. Because we believed that Arka-Stroy was responsible for failing to correctly estimate the cost of the project, we insisted that it ultimately bear all costs of the loan repayment and other losses we incurred as a result of the project being put on hold, and it did*

so by transferring funds to Holding Invest LLP and Kagazy Invest LLP during the following months.

34. In September 2007, we submitted a revised loan proposal for the project based upon the technical documentation produced by Arka-Stroy, and we were able to secure from Alliance Bank a KZT 10 billion loan (approximately $77.4 million), which Holding Invest LLP drew down and transferred to an account of Arka-Stroy that it could only access as and when approved by Alliance Bank. However, the project was delayed as a result of Arka-Stroy's failure to obtain certain government approvals for the initial phases of the project. In addition, due to the brewing financial crisis, Alliance Bank advised us that it intended to unilaterally increase the interest rate under the loan (as it was contractually entitled to do), which would cause a substantial increase in the overall or cost of the project. In light of these problems, as well as other factors, including growing concern over the increasingly difficult economic environment generally, we ultimately decided to cancel the project. We therefore retrieved the KZT 10 billion from Arka-Stroy (with interest), and transferred it back to the bank on about 10 October 2007. As before, Alliance Bank demanded that we pay substantial fees, fines and costs in connection with this transaction. We again took the position that it was Arka-Stroy's responsibility to pay these amounts and other related losses that we sustained. Arka-Stroy initially objected to this but eventually agreed to make a series of payments to compensate us.

35. As the foregoing demonstrates, Arka-Stroy's transfers to Holding Invest LLP and Kagazy Invest LLP exceeded incoming payments from these entities due primarily to interest and fees related to the Alliance Bank loans. There is nothing at all improper about this and, obviously, none of this excess benefited me in any way. In fact, we suffered significant losses as a result of the failed Astana project."

211. I acknowledge that Mr Twigger was able to make the point that no claim has been made in relation to the KZT 16 billion and no loss sustained by the KK Group given that the money was repaid. However, it is striking that an explanation has been given by Mr Arip and Ms Dikhanbayeva which found no mention in Mr Twigger's closing submissions. I am quite clear why that was the case. It was because Mr Twigger appreciated that the explanation was unsustainable since, when asked about the matter in cross-examination, Mr Arip struggled to give an adequate explanation. It is quite clear that what Mr Arip described in relation to the construction project was made up. Not only is there not a single document to support his evidence that there was such a project, but I agree also with Mr Howe that it is inconceivable that such very large sums would have been drawn down only for Arka-Stroy and Holding Invest to supposedly realise within days that the project had to be abandoned because it was not ready to proceed. I agree also that, as Mr Howe put it, it is stretching credulity well beyond breaking point to suggest that this happened not just once, but twice, within a short space of time. In the circumstances, it is hardly surprising that in his closing submissions Mr Twigger felt obliged to ignore Mr Arip's explanation concerning the net balance paid to Holding Invest by Arka-

Stroy in the sum of KZT 519,214,035 and instead sought to focus on an analysis of the various payments which passed between Arka-Stroy and Holding Invest which took no account of Mr Arip's explanation.

Kagazy Invest, Kagazy Processing and Kagazy Gofrotara

212. Similar difficulties beset Mr Twigger's submissions concerning Kagazy Invest which again involve the Court being invited to take a narrow approach to the various money transfers which are portrayed in Mr Thompson's useful tables.

213. The Claimants' case is that Kagazy Invest received net payments of KZT 710.4 million/US$ 5.5 million from Arka-Stroy and, as with Holding Invest, that Mr Arip and Ms Dikhanbayeva benefitted from those sums by virtue of the fact that Kagazy Invest was the direct subsidiary of Holding Invest, which itself was owned by Mr Zhunus and Mr Arip. Mr Twigger's submission was that, whilst it is correct that Kagazy Invest received a net payment of KZT 710,407,631 from Arka-Stroy between May 2006 and November 2008, there was no misappropriation since, as far as the Defendants were concerned, Kagazy Invest had received this amount from Arka-Stroy because Arka-Stroy had itself received a similar amount of money from Kagazy Processing and Kagazy Gofrotara in 2005 and the KZT 710.4 million represented repayment of the amounts due from Arka-Stroy to Kagazy Processing/Gofrotara together with repayment of sums due from Kagazy Processing/Gofrotara to Kagazy Invest. For reasons previously given, however, this is not an answer to the claim.

214. Since it is apparent that the claims are linked, I should say that the Claimants' case is that Kagazy Processing received net payments of KZT 957.2 million/US$ 7.4 million from Arka-Stroy and that the Defendants benefitted from those sums by virtue of the fact that they were the indirect owners of Kagazy Invest. In fact, as Mr Crooks accepted, KZT 957.2 million is not the correct net amount paid by Arka-Stroy to Kagazy Processing since the correct figure is KZT 814,657,954. In relation to Kagazy Gofrotara, the Claimants say that this company received a total net sum of KZT 208.2 million/US$ 1.6 million from Arka-Stroy.

215. It is worthwhile illustrating the degree to which Mr Arip and Ms Dikhanbayeva sought to contrive complex explanations on this topic. Ms Dikhanbayeva had this to say in paragraphs 175 to 180 of her sixth witness statement:

> *"175. In 2005 the KK Group decided to proceed with two new projects: the production of sanitary tissue projects at Kagazy Processing and the production of corrugated board products at Kagazy Gofrotara. Kagazy Processing bought equipment for the new business and required new buildings to locate and operate the equipment. Kagazy Gofrotara considered building a new plant to produce corrugated packaging. It bought European equipment, which was more powerful than the machines it already owned, and needed a new building for this equipment.*
>
> *176. Arka-Stroy was selected as one of the contractors to build the new buildings for Kagazy Processing and Kagazy Gofrotara. Arka-Stroy was*

to commence the development of the project design documents and budget estimates. Each of Kagazy Processing and Kagazy Gofrotara entered into a contract with Arka-Stroy. …

177. *Kagazy Gofrotara paid KZT 647,900,000, and Kagazy Processing paid KZT 218,500,000, to Arka-Stroy in 2006. In addition to that Kagazy Gofrotara and Kagazy Processing paid some advance payments to Arka-Stroy under these contracts in 2005. [The] Claimants do not take into account these 2005 payments to Arka-Stroy from Kagazy Gofrotara and Kagazy Processing.*

178. *I explained in paragraph 52 above that in the course of pre-IPO restructuring Kagazy Gofrotara and Kagazy Processing were removed from the KK Group, but their assets were transferred to Kagazy Recycling that continued the construction projects. As a result, Kagazy Gofrotara and Kagazy Processing cancelled their contracts with Arka-Stroy and it repaid the advance payments back to Kagazy Gofrotara (KZT 856,100,000) and Kagazy Processing (KZT 1,175,700,000).*

179. *Arka-Stroy received money from 2 entities (Kagazy Processing and Kagazy Gofrotara), but returned money to 3 entities (Kagazy Processing, Kagazy Gofrotara and Kagazy Invest). Kagazy Invest was the parent company of Kagazy Processing and Kagazy Gofrotara and had provided financial aid to those companies. Kagazy Gofrotara and Kagazy Processing asked Arka-Stroy to pay certain amounts to Kagazy Invest as repayment of the financial aid instead of returning them to Kagazy Gofrotara and Kagazy Processing. Therefore, the payments of KZT 710.9 million from Arka-Stroy to Kagazy Invest is the financial aid returned to Kagazy Invest by its two subsidiaries – Kagazy Processing and Kagazy Gofrotara. All the relevant transactions were documented by contracts.*

180. *Thus, the payments from Arka-Stroy to Kagazy Gofrotara, Kagazy Processing and to Kagazy Invest, that the Claimants complain about related to the refund of the advance payments that Arka-Stroy received in connection with the above projects, including the sums of advance payments made to Arka-Stroy in 2005 that the Claimants had not taken into account. Kagazy Processing and Kagazy Gofrotara used the funds refunded by Arka-Stroy to repay their bank loans."*

She expanded on her theme in her eighth witness statement at paragraphs 14 to 16:

*"14. I have already described the reasons for the payments from Arka-Stroy to Kagazy Processing LLP ('Kagazy Processing'), Kagazy Invest LLP ('Kagazy Invest') and Kagazy Gofrotara LLP ('*Kagazy Gofrotara*'). I have also now reviewed section 3 the Expert Report of Ian Aird Thompson dated 6 March 2017.*

15. *It appears that Arka-Stroy paid back to Kagazy Processing more than it received from it. I do not know why. Anyway, Kagazy Processing and*

Kagazy Gofrotara used the advance payments that it received back from Arka-Stroy to pay to Kagazy Recycling LLP ('Kagazy Recycling') and to repay their loans to Alliance Bank and Kazkommertsbank. In particular, Kagazy Processing paid KZT 516,577,043 to Kagazy Recycling and Kagazy Gofrotara paid KZT 138,010,722 to Kagazy Recycling. Kagazy Processing repaid its loan from Alliance Bank by paying KZT 2,787,218,284.80 on 5 November 2007 (in addition to the payment of KZT 220,106,759.72 received from Arka-Stroy, this payment included other funds, particular those received from Kagazy Recycling for the fixed assets that Kagazy Processing transferred during the restructuring) and KZT 3,316,306.81 on 6 November 2007. Kagazy Gofrotara repaid its loans from Kazkommertsbank by paying KZT 83,935,066.17 on 8 February 2007.

16. I have already said that Kagazy Gofrotara and Kagazy Processing paid some advance payments to Arka-Stroy under construction contracts in 2005, but the Claimants did not take them into account. Mr Thompson has identified additional payments that Kagazy Processing and Kagazy Gofrotara made to Arka-Stroy in 2005 (net KZT 142,539,384 and KZT 489,0640,63). These net amounts roughly correspond to the KZT 710,407,632 paid to Kagazy Invest as return of financial assistance that Kagazy Invest provided to Kagazy Processing and Kagazy Gofrotara at an earlier time."

216. I agree with Mr Howe that Ms Dikhanbayeva's explanation makes little sense not least because, as was put to Ms Dikhanbayeva in cross-examination, if what was happening in relation to the KZT 710.4 million paid to Kagazy Invest really did entail repayment of a debt due to it from Kagazy Processing/Gofrotara as she maintained, then, it is odd that the amount paid did not match the sum which was owed to Kagazy Invest by Kagazy Processing/Gofrotara. Ms Dikhanbayeva's explanation was that there were other transactions between the three KK Group companies which had to be taken into account but which would not be apparent only from a review of the 1C databases. Mr Twigger submitted that that explanation was credible and should, in the absence of contradictory evidence, be accepted. I do not agree, however. Ms Dikhanbayeva was a witness who was prepared to give evidence which was untrue. I see no reason, in such circumstances, to give her the benefit of the doubt on this issue. The more so, since Mr Howe was right to observe that the explanation given both by her and by Mr Arip bears little resemblance to the pattern of transactions described in Mr Thompson's tables. Indeed, and despite also Mr Twigger's attempt to justify what Ms Dikhanbayeva had to say in answer to Mr Howe's questions on this issue, this is a point which Mr Thompson himself acknowledged after he had been asked by Mr Howe in cross-examination to read what Ms Dikhanbayeva had had to say by way of explanation in her sixth and eighth witness statements. After Mr Thompson had read the relevant passages, the following exchange ensued:

"Q. Thank you. Now just in general terms, based on that description, would you agree with me that what you might expect to see, when you come on to look at the payment flows, is something that conforms to approximately this sequence

of events: the sequence of events described is that in about June 2005 Kagazy Gorfratara [sic], possibly also Kagazy Processing, enter into a contract with Arka-Stroy for things to be done?

A. Mm-hm.

Q. Then in the course of restructuring prior to the IPO, at the end of May those two companies are removed from the group?

A. Yes.

Q. As a result of which refunds then occur, it is said, to three companies rather than two, which is Kagazy Gofratara [sic], Kagazy Processing and Kagazy Invest. So you have the payments by the two companies before the IPO on respective contracts. The contracts are then unwound or cancelled and the payments go back?

A. Yes.

Q. So what you might expect to see in the payment records, therefore, is a payment or two, or perhaps a little batch of payment shortly after the entry into the contract, around 2005, by the two companies, KG and KP?

A. yes.

Q. I am shortening it to make things a bit easier.

A. I understand.

Q. And then a pause and then cancellation followed by refunds in the financial flows back to the three companies, assuming that it is appropriate to pay back to the three companies?

A. Yes.

Q. That is what you might expect to see?

A. That sounds reasonable."

Mr Thompson was then taken to his tables, after which the following exchange took place:

"Q. … As you can see, the payments from Arka-Stroy start in about February 2007, if I have got this right, and then they continue over the following months right the way through, in fact ultimately the last payment from Arka-Stroy is in November 2008. And all of these payments seem to be described as a mixture. They are provisional financial aid under a contract dated 2006 and provisional financial aid. Now, just looking at that long list of payments, of the payments going to Kagazy Invest, it doesn't appear, does it, to fit the description of what is said to have occurred in the witness statements we have just been looking at?

A. Not obviously, no."

Mr Thompson was then taken to other tables in which he had (again most helpfully) set out details of payments between, respectively, Arka-Stroy and Kagazy Processing and Arka-Stroy and Kagazy Gofrotara. Again, it was put to him that his analysis as set out in those tables did not accord with the explanation which Ms Dikhanbayeva had given. He agreed.

217. In the circumstances, I have no hesitation in rejecting the evidence which was given by Mr Arip and Ms Dikhanbayeva on this point. This was untruthful evidence which necessarily made it very difficult for Mr Twigger to meet the case advanced by Mr Howe. Mr Twigger nonetheless made a number of other points. He submitted, for example, that Mr Thompson's analysis showed that KZT 99.047 million of the KZT 710.4 million was used for operating expenses and that this was mainly before 31 May 2007, although the fact that payments for operating expenses continued beyond 30 May 2007 is, Mr Twigger suggested, inconsistent with the payments being misappropriations since payment of operating expenses by Kagazy Invest in the aftermath of the restructuring and IPO must have been of benefit to the KK Group. He highlighted also how KZT 119.111 million was used to purchase land from an unconnected company (Kaisar LLC) in February 2007, with nothing to suggest that this payment was not for the benefit of the KK Group, and how Kagazy Invest paid KZT 31,315,789 to KK JSC between February and October 2007 and KZT 13,368,000 to Kagazy Recycling in November 2008. He also drew attention to the fact that, while Kagazy Invest paid a total of KZT 469.956 million as financial aid to among others KK JSC, Holding Invest and Kagazy Processing, the payments made to Holding Invest and Kagazy Processing after 30 May 2007 only amounted to approximately KZT 35.835 million. He, lastly, observed that, whilst of the sums paid from Arka-Stroy to the (alleged) 'Connected Entities' KZT 451,009,772 was paid to Kagazy Invest via Kagazy Processing, Holding Invest and Kontakt Service Plus, that sum was paid over prior to 31 May 2007, with only KZT 100,000 being paid to Kagazy Invest by those entities after 31 May 2007. For reasons previously given, however, specifically given the exercise carried out by Mr Crooks, this is not an answer to the claim.

218. In any event, the answer to all of these points is that, looking at Mr Thompson's tables, it is clear that a net amount of some KZT 990 million was paid by Arka-Stroy to Kagazy Invest, Kagazy Processing and Kagazy Gofrotara after 31 May 2007. Specifically, table 8 of Appendix 7, which sets out overall details of payments, gives a cumulative total as at 7 May 2007 (the last entry before 31 May 2007) which identifies a net cumulative total paid by Kagazy Invest, Kagazy Processing and Kagazy Gofrotara of KZT 315,706,074.43. After taking account of 'financial assistance' provided by Arka-Stroy as at 22 May 2007 (the last entry before 31 May 2007) amounting to KZT 568,301,583.48, Mr Thompson confirmed to Mr Howe that Kagazy Invest, Kagazy Processing and Kagazy Gofrotara are to be regarded as having received a net payment of the difference between these two sums, namely KZT 252,595 million. As at 28 November 2008 (the last date in the table) the equivalent figure for the KZT 315,706,074.43 becomes KZT 533,769,403.29, meaning that between the end of May 2007 and the end of November 2008 Arka-Stroy paid Kagazy Invest, Kagazy Processing and Kagazy Gofrotara KZT 849,475 million. As for

'financial assistance', the KZT 568,301,583.48 becomes KZT 710,407,631.86 as at 23 July 2009 (the last date given), meaning there had between the end of May 2007 and the end of July 2009 been an additional KZT 142 million or so provided by Arka-Stroy to Kagazy Invest, Kagazy Processing and Kagazy Gofrotara. This means, in turn, as Mr Thompson agreed, that between those two dates Arka-Stroy had paid Kagazy Invest, Kagazy Processing and Kagazy Gofrotara a total of approximately KZT 990 million. In short, there seems little doubt that Mr Twigger's submission that the bulk of the payments came before 31 May 2007 simply cannot be right. This makes Mr Arip's and Ms Dikhanbayeva's position in relation to Kagazy Invest, Kagazy Processing and Kagazy Gofrotara untenable.

Bolzhal and CBC

219. I turn now to Bolzhal and CBC. In terms of the amounts involved in relation to the PEAK Claim, they were relatively modest: in relation to Bolzhal, the Claimants' case is that it was paid a total net sum of KZT 358.3 million/US$ 2.8 million by Arka-Stroy, although it is accepted that of that amount KZT 335.3 million/US$ 2.6 million was paid to KK JSC a few days later and that KZT 18 million/US$ 139,400 was paid to AO Almaty Investment Management; and in relation to CBC, the Claimants allege that a total net sum of KZT 27.8 million/US$ 0.2 million was paid to it by Arka-Stroy but that, as with Bolzhal, this sum was paid on to KK JSC a few days later. It is the Land Plots Claim in relation to which more significant amounts are concerned.

220. Mr Twigger suggested that the explanation as to why the relevant payments and repayments came to be made as they were, on four dates between 21 November 2008 and 2 July 2009, with Arka-Stroy paying sums to Bolzhal and CBC and three of those payments then immediately being passed on to KK JSC with the fourth going to AO Almaty Investment Management on the day of receipt, *"does not much matter"* given that KK JSC received *"the money in question"*. This is too simplistic an assessment. Furthermore, it is also wrong in view of the analysis performed by Mr Crooks. In any event, the connections between Bolzhal and CBC matter in view of the evidence which Mr Arip and Ms Dikhanbayeva gave concerning Bolzhal and CBC since I am quite clear that that evidence entailed them telling outright lies. Specifically, lies Mr Arip maintained for more than a year when Mr Arip repeatedly and categorically denied that he ever had any interest in either of the companies or any control over them, only ultimately to acknowledge that this was not right.

221. Thus, Mr Arip stated as follows in his first witness statement at paragraph 27:

"With respect to the remaining US$ 26.0 million, even though I do not have access to many of the documents that I would need to provide a full response to the Claimants' allegations, I can at least say the following. First, with respect to the US$ 14.2 million that the Claimants alleged was transferred to Bolzhal Ltd LLP, Commerce Business Centre LLP, Lotos LLP, Kontakt Service Plus LLP, T.E.W. & Ltd LLP, Trading Company LLP and HW & Ltd, I emphatically deny receiving any of that money. I have never had any interest in these companies, I have never received any payments from these companies, and I have never exercised any control, direct or indirect, over these companies."

This witness statement was made by him on 2 September 2013. It was followed by a second witness statement made on 10 October 2013, in paragraph 16 of which Mr Arip stated that Bolzhal and CBC were *"at all relevant times under Shynar's control"*, and by a ninth witness statement made on 3 December 2014 in which Mr Arip at paragraph 26 described the companies as being *"Shynar's companies"*. Just under two years later, however, in the witness statement which he prepared for the purposes of trial in September 2016, his fourteenth witness statement, Mr Arip stated that he had made *"a mistake"* in his previous statements when he had described Bolzhal and CBC as being companies which he did not own or control since, in fact, he and Mr Zhunus *"used"* them *"for the purpose of buying the assets which became Exillon"*. As Mr Howe submitted, it is not at all easy to understand how Mr Arip really could have made a *"mistake"* in relation to a matter which he ought to have had no difficulty in recalling and in circumstances where he had apparently made the *"mistake"* on no fewer than three occasions and in circumstances also where he had made another witness statement in January 2015 in certain proceedings involving Alliance Bank in which he referred, in terms, when dealing with the acquisition of the Exillon assets, to having carried out that transaction using *"a number of companies incorporated in Kazakhstan"*, including Bolzhal and CBC. When asked about this in cross-examination, Mr Arip was unable to give a satisfactory explanation. To my mind, he knew very well that there was none which could be given, and so decided simply to maintain his claim that he had made a *"mistake"*, however implausible that claim appeared.

222. Ms Dikhanbayeva's evidence, although more elaborate, was barely more impressive. In the witness statement which she made for the purposes of the trial, Ms Dikhanbayeva explained that Bolzhal and CBC were *"both owned by nominees"*. Although she did not say for whom they were nominees, as I have previously mentioned when addressing Ms Dikhanbayeva's qualities as a witness, she did nonetheless state that CBC's nominee was her then husband, Mr Esperov, and that Mr Shabadanov, a relative of Mr Esperov, acted as Bolzhal's nominee. She went on to explain that, as she put it, *"for the purposes of the land plots transactions"*, these two companies were *"managed by the real estate brokers who took care of those transactions"*, whereas *"...for the purposes of the acquisition of the assets of Exillon in October to December 2008"*, they were *"managed by [her] on the instructions of Mr Arip"*. She added that in July 2009 she became the *"legal owner"* of the companies and that she remained this until December 2009, when she sold them. During this period, she added, Bolzhal had a bank account at Eurasian Bank which was *"managed by accountants who took care of running the companies"*. Mr Howe observed during the course of closing that this was a *"classic example of the defendants together concocting a story to explain the emerging evidence in relation to the ownership"* of Bolzhal and CBC. I agree. I agree also with his assessment that, in so doing, Mr Arip and Ms Dikhanbateva have ended up *"in the completely implausible position"* that Ms Dikhanbayeva was managing Bolzhal and CBC for Mr Arip, who ultimately was obliged to admit that they were indirectly owned and controlled by him, but not for the purposes of the land plot transactions in relation to which Bolzhal and CBC are, according to Mr Arip and Ms Dikhanbayeva, to be regarded as having been beneficially owned or managed on behalf of KK JSC. This is an impossible scenario. It cannot really

have been the case that Bolzhal and CBC could have ended up in a situation where they were simultaneously owned and controlled both by KK JSC (through the land brokers) *and* by Mr Arip (through Ms Dikhanbayeva). In circumstances where, even on Ms Dikhanbayeva's account, Mr Esperov and Mr Shabadanov were at all material times (including during the period of the land plot purchases) the nominal shareholders and directors of CBC and Bolzhal respectively, it is an irresistible inference that, throughout, these people looked to Ms Dikhanbayeva and Mr Arip, and nobody else, to be told what to do. As I have previously observed, the notion that Ms Dikhanbayeva could control those companies for some purposes but not for the purposes of the land plots transactions is fanciful.

223. The more so, given that Ms Dikhanbayeva also accepted that *she* controlled Bolzhal and CBC for the purposes of acquiring the Exillon assets from around October 2008. Ms Dikhanbayeva's suggestion that by the time that Bolzhal and CBC started to become involved in the Exillon transaction, in October 2008, those companies had served their purpose in relation to the land plots, was quite obviously a lie designed, as Mr Howe put it, *"to produce a discontinuity in the time"* despite the fact that there are a number of documents demonstrating that the land plots transactions between KK JSC and Bolzhal and CBC were still ongoing during the time when Ms Dikhanbayeva had taken over control of CBC and Bolzhal. These include master agreements for the sale and purchase of the land which were concluded on 23 January 2009 and which I have previously mentioned. There are also, again as I have previously mentioned, minutes of a KK JSC board meeting on 23 January 2009 approving the entry into these contracts. There is, additionally, a similar agreement entered into between Bolzhal and KK JSC on 23 February 2009 in respect of a sixth land plot. Ms Dikhanbayeva's suggestion that these documents were concerned simply with "*registration*" was clearly something which she made up since the documents very plainly were dealing with land plot acquisition and not merely matters of registration which were being dealt with post-acquisition. Nor does the *"registration"* explanation sit at all happily with the fact that Ms Dikhanbayeva herself accepted in the course of cross-examination that by January 2009 the price to be paid for the land plots had not been finalised. Given that the prices had still not been finalised in the early part of 2009, it is impossible to see how it can really have been the case that the land plots had already been acquired before that time. In fact, the position is even more stark as the prices were not finalised until rather later on in 2009 since, although Ms Dikhanbayeva's evidence was that the prices were finalised in various supplemental agreements entered into on 7 April 2009, those agreements were actually drawn up in September 2009 and backdated in order to explain why so much more money had been paid to Bolzhal than had been specified in the purchase agreements which were then in place. Ms Dikhanbayeva accepted that this was the case, in her eighth witness statement which she made shortly before trial, explaining that she had looked at the agreements and noted that they bore a land registration stamp dated 11 September 2009. What she did not go on to explain was that the backdating was carried out on her instructions, specifically as a result of the email which she sent on 27 August 2009 which began with the words *"If the auditors are raising questions, the following will need to be done"* and then referred at point 2 to it being *"necessary to increase the value of the land plots"*.

I have previously explained that this email entailed Ms Dikhanbayeva giving instructions to create false documentation. That plainly was the case. The fact that Ms Dikhanbayeva should nonetheless deny that this was the case serves merely to underline that her evidence concerning the extent to which she and Mr Arip controlled Bolzhal and CBC consisted very largely of invention. The reality is that the 27 August 2009 email completely undoes the version of events described by Ms Dikhanbayeva. I am quite sure, taking account of all the evidence, that at all material times Bolzhal and CBC were owned and controlled by Mr Arip and Ms Dikhanbayeva.

Lotos

224. Coming on to deal with Lotos, the Claimants' case is that this company was paid a total net sum of KZT 852.9 million/US$ 6.6 million. As to this, although Mr Twigger pointed out that Mr Thompson had only been able to reconcile receipts amounting to KZT 384,816,151 in Lotos' bank statements, he did find Arka-Stroy's bank statements show a net payment of KZT 852,911,541 to Lotos with the payments being made between May 2006 and August 2007. Mr Thompson's tables show that approximately KZT 350 million was paid by Lotos to Holding Invest, Kagazy Processing (before May 2007 and when they were part of the KK Group) and KK JSC with further payments amounting to KZT 226,221,775 also being made to KK JSC between May 2007 and September 2008 apparently in respect of the supply of paper. It was Mr Twigger's submission that, in the circumstances, since there was nothing to indicate that Lotos was involved in any misappropriation from the KK Group, the case advanced by the Claimants that Lotos was controlled by Mr Arip is *"of little significance"*. I do not agree for reasons previously given, specifically in view of the exercise performed by Mr Crooks. Furthermore, the significance is quite clear: as I have previously mentioned, in his fourteenth witness statement in September 2016, Mr Arip denied that he owned or had any interest in Lotos and stated that he did not know if it was a company which was owned by Mr Esimbekov, yet when Mr Howe put to him in cross-examination that documentation exists where Mr Esimbekov is described as acting on behalf of Lotos, specifically a contract dated 29 December 2006 under which Lotos sold certain land at the Aksenger site to KK JSC, Mr Arip's response was that *"Lotos was his business"*, so making it abundantly clear that Mr Arip knew full well that Mr Esimbekov was involved with Lotos.

225. Leaving aside the fact that it is the Claimants' position that Lotos was not, in truth, Mr Esimbekov's company (as opposed to Mr Arip's company), it is striking that Mr Arip should have stated what he did in his witness statement only then to give the evidence which he did when first asked about Lotos by Mr Howe in cross-examination. This was another area where he claimed simply to have made a *"mistake"* but I do not accept that this was the case at all. On the contrary, it is quite obvious that Mr Arip decided in his witness statement to give the impression that he knew nothing when that was not the position. He then clearly recognised when being asked about Mr Esimbekov in cross-examination that he could no longer maintain that he knew nothing and had to admit to knowing something. There was no mistake here. Indeed, it is significant that the following day, when Mr Arip was shown the relevant sale contract dated

29 December 2006, he accepted that, in buying the land, Lotos was acting as KK JSC's nominee, explaining that Lotos (Mr Arip actually used the word *"he"* referring to Mr Esimbekov) *"bought and sold at the same time, basically"*. Again, it is most odd that Mr Arip should have such a level of recall having declared in his witness statement that, in effect, he knew nothing. The exchange which followed is also illuminating:

"Q. You have also given evidence today, indeed yesterday, that Lotos was in fact Yesimbekov's company and carrying out various trades and trading activities with, amongst others, KK JSC?

A. Yes.

Q. So it is your evidence, is it, that Lotos can simultaneously be a trading company, owned and controlled by Mr Yesimbekov, and at the same time a nominee, acting through its nominee, Mr Yesimbekov, for KK JSC?

A. Yes, and I said for these transactions specifically Bek Yesimbekov was acting as a nominee. I don't know if that was the right way to characterise him, because he was working in group of companies and he was responsible himself for the acquisition of the land plots. It was basically his job.

Q. It makes no sense, does it, Mr Arip, for Lotos to be acting both at the same time as Mr Yesimbekov's trading company, buying and selling goods, and as we can see assigning debts, and acting as a nominee for the KK JSC group?

A. I think specifically during that transaction we realised that the only way - because it was early time when we started to buy the land, so we realised that there is a restriction on the direct acquisition. So Bek just came up with the idea that he could use Lotos and he did it, and that is it. So I don't see why it is kind of contradicts to the idea that Bek Yesimbekov could use the same company for his own benefits.

Q. The reality is, Mr Arip, that Lotos was acting as your nominee on these transactions, in the way as CBC and Bolzhal were acting as your nominees in subsequent land plot transactions?

A. That is right, yes. For this transaction, yes."

Again, Mr Arip was here giving very specific evidence concerning Lotos. This is evidence which he ought to have given much earlier.

226. Mr Twigger suggested that the mere fact that Lotos (and Mr Esimbekov) acted in a nominee capacity on one occasion does not justify a conclusion that this was the position more generally. This submission would have more resonance, however, were it not for the fact that this evidence did not stand alone but needs to be considered alongside other evidence which, in truth, points compellingly to the conclusion that Lotos was a company which was owned and controlled by Mr Arip. Taken together with Mr Arip's pre-trial insistence that he knew nothing about Mr Esimbekov owning or controlling Lotos, evidence which Mr Arip must have known was simply not true, the proposition that Lotos was, as

Mr Arip insisted, Mr Esimbekov's *"own business"* is simply not sustainable. It should not be forgotten in this context that Mr Arip and Mr Esimbekov (and Ms Dikhanbayeva) worked together at KazTransCom before joining the KK Group. They knew each other well. Mr Esimbekov was also somebody who at various times served as the General Director of PEAK, the President of Astana-Contract and the owner of Trading Company. He was also, as I have explained when dealing with the position of Arka-Stroy, the owner and director of that company. There is, in addition, the note which Mr Esimbekov sent to Mr Tulegenov on 24 November 2010 and to which I have previously referred. In that note, it will be recalled, Mr Esimbekov described how *"several companies were registered in my name, as a legal owner, and I was registered as a director in a few other companies"* and how the *"nature of these transactions may be deemed 'dubious' and not entirely legal"*. This is all evidence which wholly undermines Mr Arip's insistence that Lotos was simply Mr Esimbekov's *"own business"*. So, too, does an email which Mr Esimbekov sent to a lawyer at KK JSC on 28 November 2008, in response to a request for information concerning Lotos' involvement in the sale of the land to KK JSC to which the contract dated 29 December 2006 related. Mr Esimbekov responded by saying that he remembered *"nothing on this subject; my role in this matter was only to have the papers signed by the notary"*. In the circumstances, it seems somewhat unlikely that Mr Esimbekov *"just came up with the idea that he could use Lotos"* as Mr Arip described it when asked by Mr Howe. In both this email and his note to Mr Tulegenov, Mr Esimbekov was describing a role which is simply impossible to square with Mr Arip's description of him as the independent owner of an independent company. Clearly he was nothing of the sort, and nor was Lotos.

227. As for Ms Dikhanbayeva's evidence concerning Lotos, she was taken by Mr Howe to various contracts or drafts of contracts which were clearly generated on the KK Group's systems and which were described as being between Lotos and various of the other (alleged) 'Connected Entities'. As an example, the first such contract which Mr Howe showed Ms Dikhanbayeva, is a contract dated 20 March 2006 between Lotos and Biznes-Privat. Mr Howe asked Ms Dikhanbayeva why that document would be within the KK Group if these two companies were not connected with the KK Group. Ms Dikhanbayeva's answer was that she did not remember. She went on:

"I do not know why or who compiled the contract. I can just assume that maybe Yesimbekov contacted a lawyer from Kagazy to help him draft the contract. Because Lotos belongs to Yesimbekov and he ran the company, that is why. You could ask a lawyer to do it. But I cannot really explain."

In my view, this was fanciful evidence. If Lotos really was an independent company, it would have made no sense at all for Mr Esimbekov not to instruct an independent lawyer but instead to approach a lawyer within the KK Group.

228. Another example of a document which provides strong support for the proposition that Lotos was treated, in effect, as part of the KK Group is a document dated 31 July 2008 and described as a *"Decision of the Sole Member of Lotos LTD LLP"*. Signed by Mr Esimbekov (the sole member) the document records a decision as follows:

"1. As ensuring fulfilment of the obligations of Kagazy Processing LLP to Alliance Bank JSC under the Bank Loan Agreement No. 072 K/08 dated July 30, 2008, to pledge the money to Alliance Bank JSC on savings account No. 057948416 (KZT) in the Branch of Alliance Bank JSC in Almaty under Agreement No. 02-843 of the bank fixed-time deposit under the deposit 'Invest-Contribution' dated 31.07.2008 in the amount of KZT 2,800,000,000.00 ...

2. In case if Kagazy Processing LLP fails to fulfil and/or improperly fulfils its obligations under the Bank Loan Agreement No. 072 K/08 dated July 30, 2008, to provide Alliance Bank JSC with the right to acceptance-free money debiting, deposited on the savings account No. 057948416 (KZT) in the Branch of Alliance Bank JSC in Almaty under Agreement No. 02-843 of the bank fixed-time deposit under the deposit 'Invest-Contribution' dated 31.07.2008 in the amount of KZT 2,800,000,000.00 ...".

Mr Howe put to Ms Dikhanbayeva that, if Lotos really had been an independent company, it is difficult to see why Lotos would be prepared to provide security for Kagazy Processing in this way. He also asked where Lotos would have been able to find so large a sum of money if it was nothing more than Mr Esimbekov's company. She was unable to answer these questions in a very meaningful way, although interestingly she appeared to acknowledge that the *"money must have been received by them [Lotos] from somewhere"*. She added, *"Most probably Lotos didn't run any risk. Most probably Lotos had been asked to be involved in that transaction"*, before denying that this document demonstrated that Lotos was *"just another shell company being used by Mr Arip and/or Mr Zhunus and managed by* [Ms Dikhanbayeva], *on their instructions, to move money around"*.

229. This was unconvincing evidence. So, too, was the evidence which Ms Dikhanbayeva gave when Mr Howe showed her an email which her sister, Nazym Dikhanbayeva, described as *"Internal Auditor of JSC Kazakhstan Kagazy"*, sent to Mr Nikolay Dolmatov, KK JSC's Administrative Director, on 18 January 2011. In that email, Ms Dikhanbayeva's sister asked, *"Could you please assign a specialist to prepare draft documents for the replacement of the Director of Lotos LLP effective from 05.01.2011?"*. Mr Howe asked why, if Lotos was independent of the KK Group, such a request would have been made. Although by this stage Ms Dikhanbayeva was herself no longer in Kazakhstan and so would not have been involved with this specific request, it is instructive to note her answer:

"Well, firstly, I would like to say that I didn't say that my sister was involved with Lotos. I don't own Lotos, so it is owned by Mr Yesimbekov. How did this email come to life? I can just assume. I don't know why it says what it says, but I can tell you that in 2010 - at the end of 2010, she was asked to leave the company. And that's around January 2011, about the date of this email, she was no longer visiting the office of Kazakhstan Kagazy. Maybe Bek Yesimbekov asked her, maybe someone else. During this litigation I never asked my sister - sorry, I asked my sister why she wrote this email and what she asked about. She said she didn't remember. Maybe someone had asked her, was her assumption. So I don't have an explanation here. My assumption is Bek had asked her, but again, she had left by January she was no longer involved with Kagazy, because she had been asked to leave."

It can be seen from this answer that Ms Dikhanbayeva began with a denial that she or Mr Arip owned Lotos and then questioned the authenticity of the email, before only then answering Mr Howe's question by not altogether unreasonably explaining that she could only assume what lay behind the request. Interestingly, however, she asserted that she had not asked her sister about the email, before immediately contradicting herself and saying that she had done so and had been told by her sister that she could not remember. The truth is, however, that Ms Dikhanbayeva had no answer other than a bare denial to Mr Howe's point, which was that an email of this sort could not conceivably have been sent unless Lotos was a member of the KK Group.

230. Nor could Ms Dikhanbayeva have sent the emails which she did on 26 and 27 August 2009 in which she essentially shuffled around various financial obligations between members of the KK Group, including Lotos, if Lotos and the other companies mentioned were not companies which were under Mr Arip's (and Ms Dikhanbayeva's) control. It will be recalled, in particular, that in her message on 27 August 2009 she referred to Lotos and stated this: *"226,877,094 to be written off as bad debts as of August"*. It is perfectly apparent that Ms Dikhanbayeva had complete control over Lotos in the same way as she did in relation to all of the other companies in the KK Group. As I have previously mentioned, her explanation when asked about this by Mr Howe in cross-examination, was that she was simply assisting accounting employees of the KK Group who were going through the six-month audit for the first time without her. I reject that evidence which does not even begin to explain why Ms Dikhanbayeva felt able to make decisions concerning supposedly independent companies such as Lotos. In much the same way, Ms Dikhanbayeva had no answer to a document which Mr Howe showed her in native format on the computer screen which showed daily balances in the period between 5 January 2009 and 9 October 2009 for a number of companies including Kontakt Service Plus, Arka-Stroy, HW, TEW, Trading Company and Bolzhal as well as Lotos. Mr Howe put it to Ms Dikhanbayeva that somebody within the KK Group was monitoring the daily balances of the companies concerned and that this can only have been because those companies were all members of the KK Group. Ms Dikhanbayeva's response was obtuse to say the least. She maintained that she did *"not know who kept this document"* and that she *"did not request for this document to be kept"*. She added that by 9 October 2009 she was no longer with the KK Group but had no answer to Mr Howe's point that she had been there for the bulk of the relevant period covered by the monitoring document starting in January that year. Again, this was distinctly unimpressive evidence in which, quite clearly, Ms Dikhanbayeva was determined to avoid having to give an honest answer to Mr Howe's perfectly reasonable questions.

Kontakt Service Plus

231. The Claimants' case is that Kontakt Service Plus was paid a total net sum of KZT 84.2 million/US$ 0.7 million by Arka-Stroy. Mr Twigger submitted that no account has been taken by the Claimants of the fact (accepted by Mr Crooks) that they received directly from Kontakt Service Plus a greater net sum, US$ 703,104. For reasons previously given, however, this is not an answer to the claim. As Mr Twigger rightly reminded me, Kontakt Service Plus was disclosed

in the IPO prospectus as a related party. This was on the basis that 90% of its shares were owned by Mr Yuri Bogday, who was one of the senior managers of the KK Group and Mr Zhunus' brother-in-law. Furthermore, the prospectus suggests that Kontakt Service Plus was a company with a real business involved with the purchase of corrugated products in 2005 (as well as the provision of production equipment to the KK Group). Mr Twigger submitted that, in the circumstances, there was no reason to suppose that this company was owned or controlled by Mr Arip.

232. In cross-examination, Mr Arip, indeed, maintained his denial that he ever owned or had any interest in Kontakt Service Plus, making it clear that what he had to say concerning the company being owned (strictly speaking, majority-owned) by Yuri Bogday and trading with the KK Group was based not on what he knew at the time but on what he had learned from looking at the documents disclosed in these proceedings. Ultimately, however, it seems to me that similar considerations apply to Kontakt Service Plus as apply to Lotos. In particular, I struggle to see why it would be that the daily balance records for the period from January to October 2009 to which I have just referred in the context of Lotos should include entries for Kontakt Service Plus also unless that company (like Lotos and the others) were treated as part of the KK Group. It is right to acknowledge that, when he was shown this document by Mr Howe, Mr Arip denied all knowledge of what the Finance Department might have been doing, suggesting that *"maybe Shynar could have some better recollections"*. However, in the absence of an explanation as to why Kontakt Service Plus appears alongside other KK Group companies in the daily balance records, it would be wrong, in my view, to take Mr Arip's and Ms Dikhanbayeva's denials at face value, especially given that in other respects their evidence has been demonstrated to be quite obviously dishonest. When, indeed, Ms Dikhanbayeva was taken by Mr Howe to an email from Ms Lyazzat Zhambuzova to Mr Nazgul Sayasatova sent on 26 March 2009 and headed *"KK Group legal entities monitoring"*, she again had no answer to the fact that amongst the companies listed was Kontakt Service Plus. The best that she could come up with was the rather desperate explanation that *"Maybe some subject line got copied from earlier correspondence. It happens"*.

233. I bear in mind in this context that, as I have previously explained, Ms Dikhanbayeva was asked by Mr Howe about letters which Ms Kogutyuk sent to Alliance Bank on 15 February 2006, in which requests were made to install "*an additional service (second signature) per Bank-Client system*" and to "*reinstall the Bank-Client system to other computers*" for a number of companies in the KK Group. Those letters included also a reference to Kontakt Service Plus, making it perfectly obvious that (despite Ms Dikhanbayeva's insistence to the contrary and suggestion that the letters were "*simply impossible*") Kontakt Service Plus was, indeed, regarded internally as a member of the KK Group. It should also not be overlooked that there is other documentation which strongly supports the conclusion that Kontakt Service Plus was part of the KK Group. An example is an email which was sent on 12 December 2008 from Ms Zhambuzova to Mr Dolmatov in response to an email from Mr Dolmatov attaching draft employment agreements for various entities including Lotos, Trading Company and Kontakt Service Plus. Ms

Dikhanbayeva explained that she had nothing to do with this, but the fact remains that this is evidence which is at odds with the evidence which she and Mr Arip gave on the topic of Kontakt Service Plus and, as such, is not easily disregarded.

TEW

234. The Claimants' case is that Arka-Stroy paid TEW the total net sum of KZT 389 million/US$ 3 million. Mr Thompson has confirmed that TEW did, indeed, receive a total net payment from Arka-Stroy of KZT 388,978,960, consisting of four payments between February and May 2006. Each of the payments related to a contract dated 10 October 2005: the first payment was a refund of a prepayment whilst the others were payments for construction materials. Mr Twigger's submission was that the use to which TEW put the funds shows no misappropriation whatsoever. Specifically, although for reasons which I have previously explained, in my view, nothing turns on this, Mr Twigger drew attention to the fact that insofar as recipients of the funds have been identified: in February 2006, it paid Peak Akzhal KZT 201 million in respect of corrugated cardboard and thus the monies were received by the KK Group; on 20 April 2006, it paid KZT 54 million and on 16 May 2006 it paid KZT 36 million to TalkRock for construction materials; in early May 2006, it paid a modest KZT 156,000 to Kontakt Service Plus for materials; and also in early May 2006, it paid KZT 10,125,273 to Ideal Ltd for materials. The only material difference with Mr Thompson identified in Mr Crooks' report, Mr Twigger explained, is that, whereas Mr Thompson identified a payment to Ideal on 4 May 2006 of KZT 10,125,273 and a separate payment on the same date to an unknown recipient of KZT 88,694686 (amounting together to KZT 98,891,959), Mr Crooks identified two exact match payments from TEW to Bravo Trading amounting to KZT 98 million. This does not matter, however, since Mr Crooks has found that the KZT 98 million was paid from Bravo Trading to Peak Akzhal, meaning that it is common ground that, out of the US$ 3 million which was paid to TEW, US$ 2.4 million was paid back to Peak Akzhal. In addition, it is common ground also that the KK Group received US$ 4,311,938 more from TEW than it paid out, with the principal beneficiary being Peak Akzhal in the amount of US$ 4,067,725.

235. Turning to the alleged connections between the Defendants and TEW, it is the Claimants' case that TEW was administered by Ms Taissiya Kogutyuk/the administration department of the KK Group and that its owner and general director was Mr Zhekebatryov. In his written evidence coming into trial Mr Arip stated that he had never owned or had any interest in TEW and added that he did not know if TEW *"was connected to Mr Khekebatyrov [sic] or if it was administered by Tayissa Koguytuk and her administrative department as alleged by the Claimants"*. He went on to say that he *"did not recall this company before this litigation started"* and that he understood from Ms Dikhanbayeva that TEW was a customer of the KK Group and a supplier of construction materials to Arka-Stroy. He assumed, he stated, that the payments to Arka-Stroy were made for this reason. However, when he was cross-examined, he was taken by Mr Howe to certain board minutes relating to KK

JSC dated 29 December 2006. Those minutes record the attendees as being Mr Zhunus, Mr Arip and Mr Tulegenov. They go on to state as follows:

"Mr Aryp Maksat Yeskeruly spoke on the agenda item (On approval of the deals the Company is interested in) and proposed to the Board of Directors to approve the following deals as deals concluded with affiliated persons and making of which is of interest to the Company:

1. *The Deed of Assignment of Receivables as of 29 December 2006 for the amount of 951,953,326.30 ... concluded between Kagazkhstan Kagazy JSC, Kagazy Trading LLP and TEW & LTD LLP.*

...

The Chairman of the meeting, 'I ask you to vote on the agenda item'.

'Yea' – two.

'Nay' – one.

'Abstain' – none.

Mr Arip Maksat Yeskeruly did not vote [?] on the agenda item.

Voting results.

The members of the Board of Directors voted in favour of approval of the following deals as deals concluded with affiliated persons and making of which is of interest to the Company:

1. *The Deed of Assignment of Receivables as of 29 December 2006 with the amount of 951,953,326.30 ... concluded between Kagazkhstan Kagazy JSC, Kagazy Trading LLP and TEW & LTD LLP.*

...".

Mr Howe put it to Mr Arip that these minutes demonstrate that TEW was *"a related company"*, something which Mr Arip accepted. Mr Arip did not accept, however, that the reason why this was the case was that TEW was owned and controlled by Mr Zhunus and him. He justified this denial by saying this:

"... But it is clear it is related, not because of me, otherwise I would not be in a position to approve it. And I would not be present at the meeting. ...".

Mr Howe pointed out that Mr Arip is recorded in the minutes as not having voted *"on the agenda item"*. Mr Arip maintained his denial that he had anything to do with TEW. I consider nonetheless that Mr Howe was probably right in the point which he made. Indeed, it is interesting that, despite in her sixth witness statement, stating that she did not know who owned or managed TEW, by the time that she came to give her evidence Ms Dikhanbayeva was in a position to make a correction to what she had stated, explaining that she had *"remembered that the CEO of TEW was Andrey Gorokhov"*, somebody whom the next day

she told Mr Howe was married to Ms Kogutyuk. Although Ms Dikhanbayeva did not herself make the point, at least not expressly, Mr Twigger submitted that this would explain why it was that TEW was treated as an affiliated entity in the 29 December 2006 board minutes. Indeed, it may be that Mr Howe understood Ms Dikhanbayeva to be making the same point because he suggested to her that she was *"just making things up as you go along"*. She denied this suggestion but it seems to me that this is exactly what Ms Dikhanbayeva was doing. Having seen Mr Arip struggle somewhat to explain away the board minutes, particularly the reference to him not voting, I am quite clear that Ms Dikhanbayeva decided to take it upon herself to think up another explanation. This required her to modify the evidence which she had set out in her witness statement, hence the correction which she made during examination-in-chief. This was both devious and cynical.

236. I do not, in the circumstances, take up further time dealing with other aspects of the evidence which demonstrate that TEW was a company which was owned or controlled by Mr Arip. It is, however, worth noting that not only was TEW's CEO, in fact, Mr Zhekebatryov, somebody whose various roles I have already addressed, but additionally TEW was another of the companies in relation to which Ms Yelgeldieva sought second signature rights on 15 February 2006 and which featured in the daily cash balances records to which Mr Howe took both Mr Arip and Ms Dikhanbayeva in cross-examination. The notion, in the circumstances, that TEW was not owned or controlled by the Defendants is not one which can readily be accepted.

HW

237. It is convenient to deal next with HW since the position is similar to that of TEW.

238. The Claimants' case is that Arka-Stroy paid HW the total net sum of KZT 93.9 million/US$ 0.7 million. Mr Thompson has confirmed that HW was, indeed, paid a total net sum of KZT 95,115,000 by Arka-Stroy, with a KZT 95 million payment in January 2006 being followed by three small payments in March 2006, June and July 2007. Mr Twigger highlighted that HW used the KZT 95 million to pay Cariar LLP in respect of construction materials pursuant to an agreement dated 19 January 2006, suggesting that since there is nothing to indicate that Cariar LLP is connected to the Defendants, there can be no question of misappropriation. Again, this is a matter which is addressed by my earlier conclusion as to the appropriate approach to adopt in this case. Accordingly, I say no more about this and instead focus on whether HW was, indeed, a connected entity.

239. Although Mr Arip's evidence was that he had no contemporaneous knowledge of HW and that he had never owned it or benefitted from monies paid to it by Arka-Stroy, I reject that evidence for essentially the same reasons which led me to conclude as I did in relation to TEW. In particular, the board minutes dated 29 December 2006 went on after referring to the Deed of Assignment of Receivables in relation to TEW to refer to a further such deed *"for the amount of 183,646,033.54 ... tenge 54 tiyns concluded between Kazakhstan Kagazy JSC, Kagazy Trading LLP and HW& LTD LLP"*. The decision part of the

minutes then included a further paragraph reflecting approval of what was proposed in relation to HW. Furthermore, like TEW, HW had as its CEO the seemingly omnipresent Mr Zhekebatryov and was another of the companies in relation to which Ms Yelgeldieva sought second signature rights on 15 February 2006. HW also featured in the daily cash balances records to which Mr Howe took both Mr Arip and Ms Dikhanbayeva in cross-examination. As to Mr Zhekebatyrov in particular and picking up on a point which I have previously made concerning the email which Ms Dikhanbayeva sent to Ms Kogutyuk on 5 January 2007 in which she asked that certain *"claim assignment agreements dated December 29, 2006"* be prepared, besides the fact that Ms Dikhanbayeva apparently was able to give such instructions without there having been any discussions with the (allegedly) non-KK Group companies which were to be named in the various assignment agreements, it is striking that it was Ms Dikhanbayeva's evidence, both before trial and at trial, that she had no knowledge that Mr Zhekebatryov was involved with HW at all. She explained, in particular, when shown by Mr Howe a draft assignment agreement dated 29 December 2006 between HW and Holding Invest that she was unable to say why Mr Zhekebatyrov's name should appear (as it did) on the draft described as HW's *"Director"* because she was *"not in charge of the administrative department and what they did, I cannot tell"*. Given her longstanding working relationship with Mr Zhekebatyrov, this was somewhat surprising evidence to put things mildly.

Trading Company

240. As for Trading Company, the Claimants' case is that Arka-Stroy paid Trading Company the total net sum of KZT 579.8 million/US$ 4.5 million and there is no issue that this did, indeed, happen since Mr Thompson has confirmed that Trading Company received a total net sum from Arka-Stroy of KZT 579,823,721, with the large majority of payments being made between May 2006 and August 2007 and one payment of KZT 50.397 million made in November 2008. Mr Twigger explained, based on Mr Thompson's analysis, that of the KZT 579,823,721 paid to it, Trading Company paid KZT 323,976,276 to KK JSC, a further KZT 31.2 million to Kagazy Recycling in May 2007 and KZT 205.850 million to Holding Invest in May 2006. The small residual balance was spent on bank charges, tax and miscellaneous expenses. Mr Twigger added that, using his 'exact match' methodology, Mr Crooks has identified the payments to Holding Invest, KK JSC and Kagazy Recycling but as to KK JSC has only identified a smaller amount (KZT 50.4 million) due to the fact that he only took into account onward transactions which precisely match the amounts paid by Arka-Stroy. According to Mr Thompson, the KZT 323,976,276 was paid to KK JSC from the sums paid to Trading Company by Arka-Stroy because 12 of the payments from Trading Company to KK JSC were made on the same day as sums were received from Arka-Stroy (10 receipts) and in similar amounts. Mr Twigger submitted that the timing and amount of these payments is highly relevant in any consideration of the question whether Trading Company was used by Mr Arip and Ms Dikhanbayeva to misappropriate monies from the KK Group. So, Mr Twigger went on to submit, Mr Arip's and Ms Dikhanbayeva's alleged links to, and control of, Trading Company are of only *"marginal importance in circumstances where it can be*

shown that the monies paid to Trading Company by Arka-Stroy were not used for D2/3's benefit, as alleged, but rather for the corporate purposes of Cs/the KK Group". Again, however, for reasons which I have explained, I am not persuaded by this submission since it ignores what might be described as the overall 'balance of account'.

241. Mr Twigger submitted that Mr Arip had given *"very frank oral evidence"* about Trading Company. The focus on Mr Arip's *"oral evidence"* was obviously deliberate since, whatever Mr Arip may have been when being cross-examined in relation to Trading Company, he certainly was not frank (or, indeed, honest) in the evidence which he gave in the witness statement which he made in September 2016. In that witness statement, at paragraphs 244 to 247, Mr Arip stated as follows (alongside a photograph showing Trading Company's building in Almaty):

"244. Trading Company LLP is a not-for-profit organisation that runs a big clinic in central Almaty that provides antenatal and postnatal care to mothers. It charges a fee for people who can afford it, and subsidises care for people who cannot.

245. It is run by my mother-in-law, Ms Asilbekova, and she is a director and shareholder of the company which operates the centre. …

246. At the time of the payment from Arka-Stroy to Trading Company, we were trying to help Trading Company to raise money to set up the clinic. I telephoned all my friends and contacts to ask them to donate. For example, I asked Mr Gerassimov [sic] to donate some money, and he did so. In exactly the same way, I asked Arka-Stroy to consider donating money, which it did. I did not personally benefit from or receive any money from the donation to Trading Company by Arka-Stroy.

247. I have no knowledge of the transactions between Trading Company and members of the Kagazy Group referred to by the Claimants and I do not know if it was administered by Tayissa Koguytuk and her administrative department as alleged by the Claimants."

Mr Howe understandably asked Mr Arip about what he had to say in these passages during the course of cross-examination. He only did so, however, having first taken Mr Arip to a number of documents featuring Trading Company. By way of example, Mr Arip was shown a document on Trading Company notepaper dated 3 July 2006 and signed by Mr Zhekebatyrov in his capacity as *"Director of Trading Company LLP"*. This stated:

"I hereby ordered to employ Olga Evgeneva Gerasimova to the position of assistant accountant from 3 July 2006, on probation of 3 (three) months, with the salary as in the payroll plan. …".

Mr Howe asked Mr Arip why Trading Company, described by him in his witness statement as a not-for-profit organisation which was managing or operating a perinatal clinic, would be employing an assistant accountant in this way. Mr Arip gave a somewhat rambling answer in which he insisted that he

"didn't know about the previous situation of Trading Company". Mr Howe asked him whether he was able to explain why Mr Zhekebatyrov was named in the document as Trading Company's director. Mr Arip said that he did not know, repeating that he had no knowledge of what Trading Company did before it became one of his companies *"under control of my mother-in-law, when it was appropriated as a clinic"* which, it appears from the documents, was on or around 22 September 2008. Mr Zhekebatyrov's role as Mr Arip's nominee in relation, for example, to Holding Invest, made that evidence somewhat implausible.

242. It soon became apparent that Mr Arip did, indeed, know rather more about Trading Company's previous activities than he was prepared to admit since Mr Howe was able to show him one of the debt assignment agreements which I have previously mentioned dated 1 December 2006 and to ask why Trading Company appeared in that agreement described as *"Debtor"* in relation to a debt in the sum of KZT 340,461,627.50 seemingly owed to Trade House (Peak Akzhal) which under the agreement was assigning that debt to Arka-Stroy. His answer was that Trading Company "*probably was one of the clients of the Kazakhstan Kagazy, at least what I have seen from all kinds of reports … produced in the course of this trial, that Trading Company was buying products from Trade House"*. Mr Howe queried with Mr Arip how, in the circumstances, he could have stated what he did in his witness statement concerning his lack of knowledge of Trading Company's previous activities given that he was apparently able to explain the debt assignment agreement which he had been shown and which was entered into in late 2006. Mr Arip was unable to provide a satisfactory explanation, insisting that it was only as a result of these proceedings that he learned what Trading Company had previously done. I did not, however, find that evidence remotely convincing.

243. This impression was confirmed when Mr Howe later showed Mr Arip an employment agreement dated 5 April 2008 between Trading Company and a Mr Aleksandr Nazarov under which Mr Nazarov was appointed Trading Company's CEO. As Mr Arip himself pointed out when Mr Howe asked him why Mr Nazarov, a KK Group employee, was entering into such a contract with Trading Company, this was prior to the transfer of the company to his mother-in-law and so at a time when Trading Company's *"Sole Member"* was Mr Esimbekov, whose name appeared at the end of the agreement. Although Mr Arip denied the suggestion, it is clear to me that the reason why Mr Nazarov was being appointed to this position is because Trading Company was one of his companies. Indeed, it is interesting that only about a month later, on 14 May 2008, Mr Nazarov entered into a similar contract under which he was appointed CEO of Lotos also, again with Mr Esimbekov identified as the *"Sole Member"* of that company in the signature section. Mr Howe described Mr Nazarov as being *"another handy employee who can be put to service acting as a director of these two companies"*. Mr Arip denied that that was the case, but I am clear that it was. It is, furthermore, worth mentioning in this context that, very shortly before trial, Ms Dikhanbayeva had referred in her eighth witness statement to her having recalled, apparently prompted by something which Mr Crooks had to say in one of his expert reports, that she had had a conversation with Ms Kogutyuk *"sometime in 2008"* during which she was told that Mr Arip

"approached her and said that she [sic] needs a company to start a new business". She went on:

"Around the same time [Ms Kogutuyk] heard from Bek Yesimbekov that he had a company that he no longer planned to use and could sell. [Ms Kogutuyk] told me that she would offer [Mr Arip] to use [Mr Esimbekov's] company. I now think that this company was Trading Company. Thus, Trading Company was not always involved in the medical services business. Before sometime in 2008, when owned by Bek Yesimbekov, Trading Company had other operations, which explains why it had the trading operations identified by Mr Crooks."

This was evidence which, I am clear, was manufactured by Ms Dikhanbayeva in an attempt to explain away the type of documents which she would have appreciated Mr Howe would seek to deploy at trial.

244. I am fortified in the conclusion which I have reached in this regard by other documents which Mr Howe showed to Mr Arip, including a financial assistance agreement dated 25 November 2008 entered into between Arka-Stroy and Trading Company, under which Arka-Stroy agreed to give unlimited financial assistance to Trading Company. Mr Howe asked Mr Arip why a supposedly independent contractor such as Arka-Stroy would have been providing such assistance to Trading Company, a company which was concerned with the setting up of a medical centre on a not-for-profit basis. Again, Mr Arip was simply unable to answer Mr Howe's question in any coherent fashion. The best that he could do was to query whether any financial assistance was, in the event, given. That, however, was no answer since Mr Howe's question understandably had as its focus why such an agreement would have been entered into at all. Similar considerations apply to various other agreements (in draft form) to which Mr Arip was taken by Mr Howe, such as an *"Agreement on mutual settlement of accounts"* dated 30 March 2009 between Kagazy Invest and Trading Company. Mr Arip pointed out that the relevant transaction did not happen *"because everything that has happened with Kagazy Invest or Trading Company is completely known to you because of the expert evidence"*, suggesting also that *"clearly some lawyer has been keeping it for his own - just a working document"*. However, it is the fact that such agreements were drafted at all, whether they were executed or acted upon or not, which is important in the present context. Trading Company was, quite clearly, at all times a company whose activities were not only known about by Mr Arip but were controlled by him.

The 'Kazakh/Construction LLPs'

245. Having dealt with the (alleged) 'Connected Entities' which, between them, received US$ 36.9 million of the US$ 109.1 million paid by the Claimants to Arka-Stroy, I need now to consider the 'Kazakh/Construction LLPs' which, again between them, received US$ 23 million of the US$ 109.1 million. The companies concerned and the amounts which it is common ground were received are: Ritek - KZT 131,172,593/US$ 1.02 million; Mouli - KZT 1,043,057,706/US$ 8.08 million; Biznes-Privat - KZT 564,577,617/US$ 4.37 million; TESS - KZT 468,000,000/US$ 3.62 million; and Bedel Stroy - KZT 766,706,126/US$ 5.94 million. Again, Mr Twigger sought to highlight that the

KK Group was a net beneficiary of direct payments made to it by each of the 'Kazakh/Construction LLPs' (with the exception of TESS), referring to Mr Crooks having found that the KK Group was a net beneficiary of US$ 598,575 from Biznes-Privat, US$ 217,228 from Mouli, US$ 1,067,357 from Ritek and US$ 2,614,951 from Bedel-Stroy, adding up to US$ 4,498,111 in total. Mr Twigger did so, again, in support of his contention that the Claimants are obliged to give credit for these sums. As I have explained, however, in view of the analysis carried out by Mr Crooks, I do not accept that they are under any such obligation. Accordingly, the only issue, again, is whether the Defendants owned or controlled these entities or whether, as Mr Howe put it in the course of his opening submissions, they were *"shell companies"* or *"sinkholes"*, it being Mr Arip's evidence in the witness statement which he prepared for the purposes of the trial that none of the companies were *"owned by, controlled by, related to and/or associated with me"* and Ms Dikhanbayeva's evidence in her witness statement that she did not own or manage the companies and she did not know who did. These denials were maintained at trial and, specifically, in cross-examination.

246. Mr Twigger furthermore relied upon Mr Thompson's findings that the relevant payment narratives relating to the total of KZT 2,206,807,916 which was paid by Arka-Stroy to Ritek, Mouli, Biznes-Privat and TESS are consistent with the payments being made for construction work pursuant to agreements concluded in 2007 and early 2008. In addition, Mr Twigger pointed out, Mr Jumadilov's evidence in his witness statement was that these four companies were all involved in the construction/distribution business and had significant cash turnover. As I have explained, however, I did not regard Mr Jumadilov as a satisfactory witness and so place little weight on what he had to say. Nor do I feel able to place a great deal of weight on the fact that Ms Dikhanbayeva referred in cross-examination to having located the director of Biznes-Privat, a Mr Dorbabaev, who had confirmed that the company was involved in the construction business but that he had declined to be a witness. Although it does, indeed, appear that Ms Dikhanbayeva met Mr Dorbabaev and so apparently did Cleary Gottlieb, the fact is that he did not come and give evidence and, in such circumstances, I am sceptical about what Ms Dikhanbayeva had to say she was told by him. The fact that Cleary Gottlieb have disclosed certain tax returns concerning Biznes-Privat which Mr Dorbabaev provided to them in February 2017 and that they show a turnover of over KZT 3.407 billion in 2007 does not greatly assist me either. It may be that this is inconsistent with the Claimants' case that the 'Kazakh/Construction LLPs' were simply *"shell companies"* under the control of Mr Arip and Ms Dikhanbayeva but it is hardly conclusive of the position. It is a matter to weigh in the balance along with other evidence, but no more than that. Moreover, as Mr Howe pointed out, subsequent tax returns obtained in relation to a number of the (alleged) 'Connected Entities' (including Biznes-Privat but also Mouli, another of the 'Kazakh/Construction LLPs') reveal incomes of either nothing at all or virtually nothing, so making it improbable that, whatever the tax position as regards Biznes-Privat may have been in 2007, the company was, indeed, a substantial construction business since a substantial construction business would hardly be likely so quickly to end up apparently doing nothing at all.

247. Turning to the other evidence, Mr Twigger submitted that there are no documents linking Mr Arip or Ms Dikhanbayeva to the 'Kazakh/Construction LLPs'. I do not agree with him about this. Specifically, as Mr Howe pointed out, there are a number of draft agreements concerning the 'Kazakh/Construction LLPs' which, if Mr Arip and Ms Dikhanbayeva are to be believed, had nothing to do with the KK Group and so had no business being on the KK Group's computer systems which is where nonetheless they have been found. Examples include template agreements between Lotos (represented by Mr Esimbekov) and Biznes-Privat (represented by Mr Dorbabaev) dated 12 and 20 March 2006 respectively. When Mr Howe asked her about these documents, Ms Dikhanbayeva claimed ignorance. In relation to the latter, Mr Howe asked her why such a document would be found within the KK Group if she was right and neither Lotos nor Biznes-Privat had any connection with the KK Group. As I have noted above in relation to Lotos, her answer was unconvincing:

"I do not remember. I do not know why or who compiled the contract. I can just assume that maybe Yesimbekov contacted a lawyer from Kagazy to help him draft the contract. Because Lotos belongs to Yesimbekov and he ran the company, that is why. You could ask a lawyer to do it. But I cannot really explain."

This explanation made no sense at all since, if Mr Esimbekov wanted legal assistance and was running a company which was independent of the KK Group, the obvious place to have gone in order to obtain such assistance was a law firm. It is perfectly obvious that the reason why this was not done was that legal assistance could be provided essentially internally within the KK Group because both companies were members of the KK Group.

248. There are other such contracts, including for example a draft agreement between TESS and Trading Company (represented by Mr Esimbekov) dated 1 March 2007, which identifies a Mr Baysymakov as TESS's CEO, with a comment balloon next to his name querying whether he was a director as at the agreement date. This strongly suggests that a check needed to be made as to who, in effect, had been installed in the CEO position at the relevant time. Mr Twigger did not agree. He made the point that the origins of the draft agreement are unknown. He was, no doubt, right about that. This is not, however, a point which really assists Mr Arip and Ms Dikhanbayeva given that there is no question but that it was found on the KK Group's systems. Nor, in the circumstances, do I accept that Mr Twigger was right to suggest, as he did, that putting such drafts to Ms Dikhanbayeva involved what he described as an impermissible leap of logic. Ms Dikhanbayeva could offer no sensible explanation as to why such drafts would be on the KK Group's systems and that inability on her part seems to me to be very telling. It is clear to me that Mr Baysymakov must have been yet another individual who was used by Mr Arip and Ms Dikhanbayeva in an effectively nominal role. A further example is a draft contract relating to *"earthworks"* between Bolzhal and Biznes-Privat dated 20 March 2008 in the sum of KZT 196.5 million and so matching the payment from Bolzhal to Biznes-Privat made on 1 April 2008 as recorded in Mr Crooks' Appendix 14B relating to the Land Plots Claim. This is a payment which Mr Arip and Ms

Dikhanbayeva say was connected to the financing of the land purchases and, therefore, not to *"earthworks"* at all. Similarly, there is another a draft contract between Bolzhal and Ritek in the sum of KZT 1.117 billion which closely matches the payment from Bolzhal to Ritek in the sum of KZT 1.037 billion which again features in Appendix 14B, the description given in the contract being *"Intermediary services for search and acquisition of land plots"*. There is also a draft contract between Bolzhal and Mouli in the sum of KZT 205.375 million which is again described as being for *"earthworks"* but which likewise closely matches the payment from Bolzhal to Mouli recorded in Appendix 14B.

249. These are all matters which provide significant support for the Claimants' case. So, too, does the overlap with the Land Plots Claim since it can hardly be a coincidence that the 'Kazakh/Construction LLPs' should have been introduced into the transactions giving rise to the Land Plots Claim and the recipients of such large sums of money from Arka-Stroy, a company which I have concluded was controlled and run by the Defendants. In addition, of course, TESS also features in the Astana 2 Claim. Nor can it easily be overlooked that on 11 January 2009 Ms Dikhanbayeva was sent an email by an employee of the KK Group, Mr Marlen Elgeldiev, attaching several agreements between Kagazy Gofratara and Bedel-Stroy, Biznes-Privat and Mouli. Mr Howe asked Ms Dikhanbayeva why it was that she was being sent draft contracts in relation to companies which she claimed she did not know anything about. She suggested that these drafts were sent to her because *"We were in the middle of a tax audit and we couldn't find the documents related to Kagazy Gofrotara so we were trying to find the documents and re-establish that database"*. She went on to say that *"we had an outstanding agreement, an outstanding amount, hence these documents were drafted"* but that *"eventually we managed to find the original documents"*. As demonstrated by an email which was sent in response on 11 January 2009, she had *"reviewed all of the agreements"* and made a correction to a date in one of the agreements relating to Mouli. I am clear that this was Ms Dikhanbayeva once again dealing with essentially internal KK Group matters involving two KK Group members.

250. For all these reasons, I am quite satisfied that the 'Connected Entities' (including, therefore, the 'Kazakh/Construction LLPs') were, indeed, at all material times owned or controlled by Mr Arip and Ms Dikhanbayeva.

The construction work which was carried out

251. Mr Twigger submitted that this conclusion is not by itself sufficient to mean that the PEAK Claim should succeed since, as he put it, *"the heart of [the Claimants'] case is that the construction work on Akzhal and Aksenger was not carried out as part of a scheme to defraud them, they cannot realistically argue that the existence or otherwise of that construction is irrelevant to either liability or the quantum of any loss"*. I consider that Mr Twigger must be right about that and, in truth, I did not understand Mr Howe to disagree given his reference in his reply submissions to the Defendants having *"set up potentially a Potemkin Village exercise which consists of a few warehouses, but under the cover of which very large sums of money were paid away on fake construction projects"*. A Potemkin village, after all, involves at least some actual construction, the term apparently deriving from stories of a fake portable village

built only to impress Empress Catherine II during her journey to Crimea in 1787. In the circumstances, it is plainly relevant to consider what construction work was carried out at both the Akzhal-1/Akzhal-2 and the Aksenger sites in order to arrive at a conclusion on liability as regards the PEAK Claim. It is also relevant to consider this issue in evaluating the quantum of the Claimants' loss, assuming that liability is established, because it seems to me that it must be appropriate, at a minimum, that credit is given in respect of the works done at Akzhal-1 and Akzhal-2 in circumstances where construction of Akzhal-1 and construction of aspects of Akzhal-2 took place concurrently during 2006 and 2007 and both Mr Tapper and Mr Jackson agree that Akzhal-1 and Azkhal-2 should be treated as one site and in circumstances where there is now at Akzhal-1 an operational logistics facility with 14 class B+ warehouses (along with supporting buildings and infrastructure) and there is, in addition, a functioning railway which covers both Akzhal 1 and 2. I do not accept, in other words, that Mr Howe can be right when he submitted that no credit is required to be given at all since that would put the Claimants in a better position than they would ever have been which can hardly be right as a matter of principle. I shall come back later to consider whether any additional credit should be given in respect of Aksenger.

252. It is necessary, therefore, to address the quantity surveying evidence which was given by Mr Tapper and Mr Jackson. Before coming on to deal with this, however, it is convenient to outline the evidence on which Mr Twigger sought to rely in support of his submissions that substantial work was carried out at Akzhal-1 in particular. Mr Twigger highlighted, in particular, how planning in respect of Akzhal-1 commenced in late 2005 soon after the first of the agreements was entered into between Arka-Stroy and KK JSC on 15 August 2005, with design work subsequently starting in about March 2006, when Arka-Stroy instructed PTIpishcheprom, Intereng Almaty and AlmatyNPTszem and also KazNIIPI Dortrans in relation to the provision of engineering support and quality control. At about the same time, planning permission was sought and this was then granted on 25 May 2006. Shortly after that, work began on the Akzhal site, only for waterlogging to be encountered, necessitating a trench to be dug to the Aksai river in order to drain a lake which had appeared on the south side of the site and, as Mr Kosarev explained, earthworks which were not limited to Akzhal-1 but covered also the Akzhal-2 site. In the meantime, the metal structures for the warehouses were purchased from Loging pursuant to a contract dated 8 May 2006 and for a purchase price of approximately US$ 6.8 million. These were then transported from Slovenia to Almaty where they were assembled on the Akzhal 1 site such that by mid-2007 the 14 warehouses had been erected and the park was substantially complete. In the meantime, work had been carried out in relation to the railway at Akzhal, a working committee certificate dated 30 April 2007 recording that the work had been carried out by Regul and RSU and that, although there had been deviations from the project design, 70% of tracks 1-3 had been completed and 90% of track 4 up to the 'bending radius' had been completed. By 5 June 2007, the railway siding was largely complete, although certain defects remained to be remedied. Thereafter, at the KK Group budget committee meeting of 28 July 2007, it was decided to raise the standard of the warehouses to B+ (in order to make them more desirable to potential lessees) by pouring dust free floors and constructing

internal and external offices. There was then a delay in construction in or around September 2007, contemporaneously recorded by Mr Sharipov in a memorandum which he prepared on 17 September 2007. A working commission report dated 1 November 2007 confirms that by that date, the works were complete save for some remedial works. The PEAK Logistics Centre was subsequently, in December 2007, formally opened. The same month, on 7 December 2007, Act 255 was issued by the State Acceptance Committee (albeit that somewhat oddly approval did not actually come until 28 December 2007). In that document completion of the works was stated to be July 2007.

253. I come on, then, to consider the quantity surveying expert evidence. Perhaps not altogether surprisingly, given that there is not a great deal of scope for dispute over the work which was carried out at Akzhal-1/Akzhal-2, there was a large amount of common ground between Mr Tapper and Mr Jackson in relation to those sites. There was, however, rather more dispute in relation to Aksenger precisely because Mr Tapper and Mr Jackson were unable to agree not only in relation to costings but also, in several respects, in relation to whether particular work was carried out at all. As Mr Jackson neatly put it towards the outset of his cross-examination:

"Aksenger is a different situation. The problems at Aksenger are to do with not valuation of the work but primarily whether work was actually carried out or not."

254. I propose in what follows to focus on the real areas of dispute and to explain as briefly as possible the conclusions which I have reached and why I have done so, rather than to attempt to grapple with every detail of the very many points which were addressed in Mr Howe's and Mr Twigger's respective very lengthy written submissions on the quantity surveying issues.

255. I start by saying something about the criticisms which Mr Twigger made concerning Mr Tapper's approach to the quantity surveying exercise which he performed and the criticisms which Mr Howe made in relation to Mr Jackson's approach. These criticisms essentially entailed it being suggested that Mr Tapper set out to arrive at valuations which were too low and that Mr Jackson set out to arrive at valuation figures which were too high. In my view, however, neither did anything of the sort. I am quite clear, as I have stated previously, that both Mr Tapper and Mr Jackson in their evidence did their best to assist the Court. The fact that they disagreed about certain matters is not a reason to conclude the contrary. I ought, however, to address two particular matters, the first concerning Mr Jackson and the second in relation to Mr Tapper.

256. Mr Howe made two central criticisms concerning Mr Jackson: first, that Mr Jackson placed too much reliance on certain Acts of Acceptance relating to Akzal-2 and Aksenger which were prepared internally and signed off by personnel who were operating on both the KK Group side and the Arka-Stroy side; and secondly, that Mr Jackson asked himself the wrong question when undertaking the exercise which he performed in this case. It is convenient to address the first of these criticisms in context rather than at this stage. As to the second, Mr Howe drew attention to the fact that Mr Jackson had explained in his supplemental report that he had focused on *"what the work <u>should</u> have cost,*

not what the work actually cost". Mr Howe submitted that this was quite wrong since what the Court needed to know was, indeed, the value of the work which was actually carried out. Accordingly, Mr Howe suggested, Mr Jackson's evidence was of little (if any) assistance. I cannot agree with this submission, however, since it seems to me that, in truth, all that Mr Jackson was here meaning to do was to explain why, in his view, an appropriate valuation methodology is to adopt what might be described as a 'prospective' approach to valuation which entails looking not at buildings which have actually been built (such as the warehouses in the case of Akzhal-1) but at pre-construction drawings for those buildings. Whilst it is, of course, open to Mr Howe to criticise that as a methodology, in my view, the point does not go further than that. It does not, in particular, I am clear, mean that Mr Jackson's evidence ought to be disregarded because of any failure to engage with the issue which the Court must resolve. It is instructive in this regard to consider the exchanges between Mr Howe and Mr Jackson on this topic immediately after Mr Howe had read to Mr Jackson the passage in his supplemental report which I have quoted:

"Q. So that is what you have done, is it, to try to estimate what the work should have cost?

A. That's correct. And I can expand on that answer by saying I did look at the possibility of establishing what the actual cost was. I believe that that was - because of the nature of the records it was beyond my expertise. I thought it was much more for a forensic accountant to be able to do that. So the production of a value of what the work should cost is, in my view, a good starting point for the court, to assist the court, as to what is the starting point should be in its investigations.

Q. Yes. If the court were to conclude, however, that what really matters is to try to find out, so far as it reasonably can, what the work actually cost, then your reports are not much use, are they?

A. I think there is a great deal of value in my report because, as I said before, this is a good starting point. I don't believe the records are complete. If this is a starting point from which either additions or deductions can be made due to known actual costs, then it is of some value."

He went on, after explaining that he had *"carried out the instructions of my instructing solicitor"*, to acknowledge the point that was being put to him by Mr Howe, namely that if there are *"cost records ... then they establish the value"*, but explained that *"you would have to be certain"* and *"For that approach to be reliable, you would have to be certain that you have got all of the cost records"*. Indeed, when I explored the matter with Mr Howe during the course of his closing submissions, he acknowledged that it may be that all that Mr Jackson was seeking to do in the passage in his supplemental report highlighted by Mr Howe was to explain that, in his view, given the information which was available, a 'prospective' approach to valuation was appropriate. In my view, as I have explained, that is precisely what Mr Jackson was seeking to do. In those circumstances, I reject the suggestion that Mr Jackson's evidence ought to be regarded as lacking in reliability on this particular basis.

257. Secondly, as to Mr Tapper, Mr Twigger drew attention to the fact in relation to Akzhal-1 that, rather than carrying out his own 'high' valuation, Mr Tapper had treated Act 255 as the maximum value attributable to the work and the maximum amount of cost involved. He criticised this approach for three reasons. First, Mr Twigger made the point that the valuation methodology underlying Act 255 is completely unknown, highlighting how Mr Tapper had accepted in cross-examination that he had no experience of being involved with a committee of the kind which produced Act 255 and how Mr Tapper had gone on later to say that he did not know how *"it works in terms of their committee ... "* when it was put to him by Mr Twigger that, if Act 255 had been concerned with the railway, there would in all probability have been somebody on the committee from *"the railway department or something similar"*. Secondly, Mr Twigger submitted that it is very likely that Act 255 did not include any value for the construction of the railway, which both experts agree is a valuable item (in fact, as I shall explain shortly, Mr Tapper's valuation is higher than that of Mr Jackson) and, if that is the position, then, Act 255 cannot represent a maximum in the way suggested by Mr Tapper. Mr Twigger pointed out in this context that, if Act 255 had anything to do with the railway, then, it makes no sense that no detailed description of the railway was given in it in the same way as details were given concerning the warehouse specifications and other buildings. The most that there is in relation to the railway, Mr Twigger explained, were merely generalised references such as those contained in Supplement 2 to Act 255. Thirdly, Mr Twigger highlighted how, in seeking to explain why Act 255 represented an appropriate maximum, Mr Tapper explained that the *"work scope for Akzhal is not entirely clear, we don't know exactly"* and continued by stating that *"we have done the best we can to establish the work, but we don't know exactly how deep the foundations are, we don't know exactly how much filling they put in"*. In these circumstances, Mr Twigger suggested that Act 255 cannot sensibly be treated as a maximum. That is probably right. However, nothing really turns on this since the real battleground as between Mr Jackson and Mr Tapper was not as to Mr Tapper's 'high' valuation figures but as to his 'low' valuation figures. Indeed, once the railway is added to the Act 255 estimated figure (Mr Tapper confirmed that Act 255 did, indeed, only give an estimate), which appears to have been based on an acceptance on 5 July 2007 when not only the railway but other work also would not have been completed, Mr Jackson has calculated that the Act 255 figures would increase to KZT 4.601 billion which is not much less than Mr Jackson's preferred KZT 4.749 billion overall valuation.

Akzhal-1/Akzhal-2

258. Coming on, then, to deal specifically with Akzhal-1 and Akzhal-2, during his cross-examination of Mr Tapper, Mr Twigger produced a very helpful table which set out the different valuations arrived at by Mr Tapper and Mr Jackson respectively in relation to Akzhal-1 and Akzhal-2. As that table demonstrated, Mr Jackson's overall valuation in respect of Akzhal-1 and Akzhal-2 was KZT 4,749,048,869.55 whereas Mr Tapper's equivalent figure (taking what he described as his 'low' valuation and not the 'high' valuation which he based on Act 255) was KZT 2,590,279,786.00. The difference between Mr Jackson and Mr Tapper was, accordingly, approximately KZT 2.16 billion.

259. Mr Twigger's table showed that there are small differences in relation to categories described in Mr Twigger's table as *"Services/Utilities"* (where Mr Jackson's valuation adds up to KZT 98,429,732.86 and Mr Tapper's valuation is actually KZT 10,651,819.14 higher at KZT 109,081,552.00) and as *"Roads etc"* (where Mr Jackson's valuation adds up to KZT 230,703,256.94 and Mr Tapper's is again higher at KZT 244,053,361.00). Mr Tapper agreed with Mr Twigger in cross-examination that *"very broadly"* he and Mr Jackson were agreed in relation to these items and so I need not, in the circumstances, say anything more about these matters. There is also a difference apparent from the table concerning *"Railway"* in relation to which, despite Mr Tapper having made no allowance in respect of Akzhal-2 because he assumed that this was covered by Act 255, his valuation is higher at KZT 504,069,261.00 than Mr Jackson's valuation of KZT 414,709,393.01. In the circumstances, no point arises about these matters. It seems to me that it is appropriate to approach matters on the basis of Mr Tapper's higher (albeit described as his 'low') valuations.

260. The overall difference of KZT 2.16 billion is attributable to *"Earthworks"* (in the case of both Akzhal-1 and Akzhal-2), *"Warehouses"* (in the case of Akzhal-1 only) and *"Other Buildings"* (again in the case of Akzhal-1 only). Specifically, and dealing with these in reverse order since this enables the initial focus to be on Akzhal-1: as to *"Warehouses"* Mr Jackson's valuation is KZT 1,969,062591.44 whereas Mr Tapper's valuation is KZT 1,185,291,120.00 (a difference of KZT 783,771,471.44); and as to *"Other Buildings"* (the security building, administration building, electricity substation/reservoir, security guard hut and shelter), whereas Mr Jackson's valuation is KZT 274,502,688.66, Mr Tapper's valuation is KZT 35,718,917.00 (a difference of KZT 238,783,771.66). As to *"Earthworks"* and focusing first on Akzhal-1 only, Mr Jackson's valuation is KZT 473,219,247.18 whereas Mr Tapper's valuation is KZT 172,067,399.00 in respect of non-railway related works and KZT 225,044,890.00 in respect of railways adding up to approximately KZT 397.11 million, although in addition Mr Jackson valued landscaping (including fencing) at KZT 262.66 million and Mr Tapper valued site preparation and fencing together as KZT 178.01 million. As to the *"Earthworks"* at Akzhal-2, Mr Jackson grouped these into three categories: KZT 773.15 million for land clearance and earthworks (including those for the railway); KZT 184.5 million for site dewatering; and KZT 68.12 million for works to the Aksai river. Mr Tapper, on the other hand, attributed 'low' valuations: KZT 2.27 million for what he described as 'site preparation/clearance' and which Mr Jackson included within his 'bulk excavation' figure; and KZT 94.88 million for earthworks. This is as part of an overall 'low' valuation for Akzhal-2 which Mr Tapper puts at KZT 150.293 million. The difference overall on *"Earthworks"* across both Akzhal-1 and Akzhal-2, therefore, was KZT 1,249,575,631.61.

Warehouses: Akzhal-1

261. Dealing with each of these matters in turn and so starting with *"Warehouses"*, two points arise. The first concerns foundations in relation to which Mr Tapper gave a valuation in respect of the work which added up to KZT 366.4 million (specifically KZT 324,301,089, KZT 27,800,729 and KZT 14,242,834) as

compared with Mr Jackson's KZT 502.7 million. The difference, therefore, amounts to some KZT 135 million. Mr Tapper fairly accepted that he was not an expert *"in taking any sort of detailed measurements of underground work"*. Nor, of course, was Mr Jackson. In the circumstances, it seems to me that the appropriate course is to treat the appropriate figure in relation to foundations as being in the middle of these two amounts.

262. The second aspect is more significant in monetary terms. It concerns the warehouse superstructures. Mr Tapper in this respect based his valuation on the amount paid to Loging (US$ 6.8 million) less US$ 1.79 million which he explained that he was instructed to deduct on the basis that this was the amount which Loging had paid the Defendants by way of *"commission"*. Accordingly, Mr Tapper's superstructure valuation figure was US$ 5,008,477 or approximately KZT 646.72 million. Mr Jackson's valuation, in contrast, using his 'prospective' approach and so on the basis of a pre-construction estimate rather than the sums paid to Loging, amounted to KZT 771.75 million, although Mr Jackson considered that to this needs to be added sums in respect of internal finishes, services, ventilation, testing and commission and so forth, giving an overall valuation of KZT 1.461 billion. On the face of it, therefore, the difference between Mr Tapper and Mr Jackson on this issue is considerable. However, as Mr Twigger pointed out, if the US$ 1.79 million which Mr Tapper was instructed to deduct from the US$ 6.8 million which was paid to Loging is added back in, the equivalent amount in tenge (KZT 231.14 million) increases Mr Tapper's superstructure valuation to KZT 877.86 million which means that the difference between Mr Tapper and Mr Jackson reduces to approximately KZT 583.14 million.

263. Clearly, therefore, it is important to consider whether the US$ 1.79 million deduction is legitimately made. I am clear that it was not since I agree with Mr Twigger that it is wholly unsatisfactory that the first mention of the *"commission"* which is said to have been paid came not in any statement of case but in Mr Tapper's report which was served in early March this year, just a month before the trial started. The reference to *"commission"* is euphemistic since clearly what the Claimants have in mind, indeed this is precisely how the point was put to Mr Arip by Mr Howe in cross-examination, is that a bribe was received. This is a serious allegation which ought to have been properly pleaded as a matter of fairness, as recently explained by Carr J in the ***Elena Baturina*** case at [126] and [127]:

"126. I accept the general submission on behalf of Ms Baturina that there is an extent to which it is permissible to pursue unpleaded general challenges to credibility. But where it is intended to advance specific matters of dishonesty based on a particular set of facts, such matters should, as a matter of fairness, be pleaded. A striking example relates to the January 2008 valuations from Mr Benmakhlouf referred to above. It was suggested for the first time in Ms Baturina's written opening that these were only 'purported' valuations and that they 'wildly overstate[d]' the true value of the Paradise Golf plots of land. Ms Baturina then gave evidence for the first time in cross-examination that at a meeting on 30th January 2008 Mr Chistyakov told her that a

valuation had been received in Morocco commissioned by Mr Krupnov showing a market price of about €120 per square metre. This appeared nowhere in her pleaded case or her witness statements. It was then put to Mr Chistyakov in cross-examination that he had seen these valuations at the time and that they were false valuations commissioned by the consortium to justify the price allegedly being advanced to Ms Baturina. He denied seeing the valuations at the time, denied telling Ms Baturina of any such valuation and said that he did not believe the valuations to be false.

127. These are matters which should have been pleaded if they were to be advanced. Mr Chistyakov had no proper opportunity to consider in advance the allegations and to explore how he might wish to defend himself against them … ."

The position is no different in the present case. The bribery allegation having not been properly pleaded, Mr Arip had no proper opportunity to prepare his response. Nor has any disclosure been given in relation to the issue. In the circumstances, I am satisfied that the right figure to take on Mr Tapper's approach to valuation is, therefore, the full US$ 6.8 million which was paid to Loging and so KZT 877.86 million.

264. The question which, then, arises is whether that level is still too low given that, although it is more than Mr Jackson's KZT 771.75 million equivalent (before taking account of what might be described as 'add-ons'), it is nonetheless approximately KZT 583.14 million lower than Mr Jackson's all-inclusive KZT 1.461 billion valuation. This depends on whether Mr Tapper was justified in using the sums paid to Loging as the basis for his assessment of the value of the warehouses and that, in turn, depends on whether the US$ 6.8 million which was paid to Loging covered everything which Loging supplied. If it did not include everything, then, it must be right, as Mr Twigger submitted, that the US$ 6.8 million is a valuation which is too low. If, on the other hand, the US$ 6.8 million included the 'add-ons', then, it makes little sense to do what Mr Jackson has done and base the valuation on drawings relating to the warehouses in order to arrive at a theoretical value. As to this, Mr Jackson accepted, when asked by Mr Howe, that, whilst he knew of the Loging contract's *"existence … it didn't influence my view of these costs in my report"*. He was referring here to the 'add-ons' which he had listed in his first report and attributed values as follows: *"internal finishes"*, KZT 125,683,412; *"services"*, KZT 4,198,307; *"ventilation"*, KZT 291,241,542; *"electrical installations"*, KZT 203,869,003; *"fire-fighting system"*, KZT 38,307,881; *"communications systems"*, KZT 6,814,806; *"builders work in connect"*, KZT 8,166,473; and *"testing and commission"*, KZT 16,332,946. Mr Twigger nonetheless rightly accepted that the Loging contract and specifications included some internal finishes, installations and services (electricity, heating and cooling). That plainly was the case. So, for example, picking up on the reference to *"services"*, Mr Howe was able to show Mr Jackson how *"Appendix_Specification No. 1k"* to the Loging contract dated 8 May 2006 contained the following wording:

"1 unit

g) Sanitary insulated container in size of 6,055m x 2,435m, the internal height of 2,500m, the necessary elimination and sockets, a wall radiator, a 50-liter boiler, 5 toilet cabins with closet basins and drainage systems, 2 urinals and drainage systems, 2 lavabos, separate men and women entrances, windows are in the container walls. The wall isolation of stone fibre is 60mm, the floor and ceiling isolation is 100mm. The walls are tin-faced, the ceiling is of white wood chipboard (WCB)."

Mr Jackson accepted, at least by implication, that this description matched the internal structure shown in one of the photographs which he had included in his report (albeit described as an *"office unit"*). I see no reason, in the circumstances, to approach the matter on the basis that the 'add-ons' were not included in the Loging contract. The best that Mr Twigger could say in the course of his closing submissions was that *"it is not clear precisely what was supplied"*. No attempt was made, however, to trawl through the contractual documentation and demonstrate why Mr Tapper was wrong to have assumed (as he did) that the Loging contract covered the 'add-ons'. I consider that that was a fair assumption and that, in the circumstances, it is really incumbent upon Mr Arip and Ms Dikhanbayeva to explain with some precision why it was wrong to have made it. That, however, has not been done. It follows that I do not consider it appropriate to include additional sums for valuation purposes to cover the items identified by Mr Jackson in his report.

265. That is not, however, the end of the matter because Mr Tapper accepted that he included the cost of installation within his KZT 646.72 million, apparently under the impression that those costs were included in the Loging contract. Whether that is right or wrong is, in a sense, not important because, as a matter of fact, the installation was not done by Loging but, it seems, by a company called Parity Ltd LLP and Mr Tapper accepted that, if the installation work had not been carried out by Loging, a sum would have to be added in that regard. Although no particular amount was put to Mr Tapper, it appears from Mr Jackson's report that he allowed an amount for this somewhere in his 'add-ons' (perhaps in *"builders' work in connect"* or in *"testing and commission"*) because the 'add-ons' (taken together with the amounts he identified for foundations and superstructure) add up to the KZT 1,969,062,591.44 which he attributes to *"Warehouses"*. Without knowing more precisely what amount he allowed, however, it is not possible to reach a settled conclusion on the appropriate additional sum which should be included on top of Mr Tapper's US$ 6.8 million valuation. Similarly, since Mr Tapper explained that he had included in his US$ 6.8 million figure the cost of transport because he had assumed that it was included in the Loging contract, an additional amount should be added for this. That must, again, be included somewhere in Mr Jackson's 'add-ons' for the reason which I have given. However, it seems to me that, since the actual costs incurred with TKA Intertrans GmbH in respect of that transportation are known because they are set out in Mr Thompson's Appendix 3 at Table 1, the actual costs (€410,689.75) should be what is added to deal with this additional item. It follows that, in respect of *"Warehouses"*, I consider that the appropriate valuation is one which attributes to foundations an amount which is midway between Mr Tapper's and Mr Jackson's respective valuations, and which as to superstructure starts with a baseline valuation of

US$ 6.8 million which has added to it an amount in relation to the costs of installation (which can hopefully be agreed) and an additional €410,689.75 to cover transportation costs.

Other Buildings: Akzhal-1

266. As to *"Other Buildings"* (the security building, administration building, electricity substation/reservoir, security guard hut and shelter), Mr Tapper arrived at his figure of KZT 30.5 million by establishing the total cost per square metre of the warehouses (KZT 28,945) and applying that rate to the area of the other buildings. He nonetheless accepted, when asked by Mr Twigger, that these buildings were of a different type to the warehouses. He explained that, ideally, he would not have adopted a *pro rata* approach but that he *"didn't have any details other than these photographs, so that's why I have taken a pretty broadbrush approach"*. In relation to one of the administration buildings, however, as far as I can tell the building to which Mr Jackson attributes a KZT 63,678,720.00 valuation, it would appear that this is a building which was covered by the Loging contract since another of the specifications to that contract includes a drawing showing a building made up essentially of 22 containers (described by Mr Tapper as *"a series of Portakabins stacked up"*) which Mr Jackson stated that he seemed to recognise. On that basis, the relevant valuation ought to be deducted from Mr Jackson's total. This still leaves, however, approximately KZT 175 million between Mr Tapper and Mr Jackson. As to that, I bear in mind Mr Tapper's evidence that the relevant buildings were *"pretty simple buildings, as the warehouse"*, and so that Mr Twigger was probably not right to suggest that Mr Tapper's approach of using a *pro rata* figure based on (as Mr Twigger put it) *"the price of second-hand pre-fabricated warehouses"* was wholly inappropriate. Nonetheless, it does seem to me likely that Mr Tapper's valuation is simply too low. In those circumstances, adopting a necessarily broadbrush approach, and reflecting Mr Howe's point that Mr Jackson's methodology entailed his looking at drawings rather than the buildings as actually constructed, in my view, an appropriate valuation would be KZT 160 million rather than the approximately KZT 211 million left after the KZT 63,678,720.00 is deducted from Mr Jackson's KZT 274.5 million total.

Earthworks: Akzhal-1 and Akzhal-2

267. This brings me to *"Earthworks"*. I shall deal, in the first instance, with Akzhal-1. There are two points which arise here. The first concerns the appropriate rates. The second concerns the distance which soil removed from the site needed to be transported. As to that second matter, it is a short point. Mr Jackson has priced all of the earthworks (not just those at Akzhal) on the basis that surplus material would be transported 20 km away from the site rather than the 1-5 km estimated by Mr Tapper. Mr Jackson explained that *"in the absence of a specific destination, I revert back to my standard methodology which is 20 kilometres"*. The fact, however, is that in none of the relevant invoices is there any suggestion that removal entailed soil travelling anything like that kind of distance. Indeed, as Mr Howe was able to demonstrate, such reference as there is (in the form of an invoice relating to work on the bed of the Aksai River) suggests that the distance which soil had to be transported was just one kilometre. Accordingly, an adjustment would need to be made to Mr Jackson's figures, in any event.

268. The first issue is rather more significant. This is because, although the quantities assessed by Mr Tapper and Mr Jackson are similar (for bulk excavation, Mr Tapper allowed 304,000 cubic metres whereas Mr Jackson allowed 295,000 cubic metres; in relation to topsoil removal, Mr Tapper allowed between approximately 65,000 and 120,000 cubic metres whereas Mr Jackson allowed 178,000; and as for filling and backfilling, Mr Tapper assessed approximately 182,000 cubic metres and Mr Jackson assessed 181,000), the difference between the amounts assessed by Mr Tapper in his 'low valuation' and Mr Jackson for *"Earthworks"* is very considerable (KZT 172.07 million and KZT 473.22 million respectively) almost entirely (subject, no doubt, also to the distance point which I have just addressed) because of the different rates which Mr Tapper and Mr Jackson have applied for labour (skilled/unskilled) and plant in relation to the carrying out of the relevant works. The difficulty which arises in this respect is that, as I shall now explain, both Mr Howe and Mr Twigger were able to make legitimate criticisms of each other's expert. As a consequence, I am left in the position which Mr Twigger contemplated I might find myself in, which is that, in my view, the right rates lie *"somewhere in between the Jackson and Tapper rates"*. As he went on to observe, it *"is almost impossible to try and jiggle ... around with the rates, you obviously need the programme, the Excel spreadsheet or whatever it is, that is done on"*. Accordingly, all that I can usefully do at this stage is to indicate my conclusions on the rates as rates, leaving it to the parties to run whatever calculations then need to be run in order to arrive at an appropriate overall valuation. I shall come on, therefore, to set out my conclusions in this regard, after first outlining the criticisms which were, as I say legitimately, made in relation to the approaches to rates adopted by Mr Tapper and Mr Jackson respectively.

269. I start with Mr Tapper. Mr Howe submitted that Mr Tapper had done his best to obtain objective independent data on what rates might be applied, and then fully explained in his reports how he had adjusted that data in order to arrive at the rates which he considered most appropriate. I do not doubt that Mr Tapper did his best and that Mr Jackson did also. However, unlike Mr Jackson who has experience of working on a construction project in Kazakhstan, Mr Tapper had no such direct personal experience and so no direct personal experience of labour rates in that country. Nor, Mr Twigger submitted, in my view with some justification, did Mr Tapper appear to have a complete grasp of the nature, make-up and accuracy of the sources which he used to compile his rates. So, for example and as Mr Twigger highlighted in his closing submissions, whilst Mr Tapper was apparently under the impression that he had used three sets of rates, actually he had only used two since the rates which he quoted from the Ministry of Economy and Ranking.kz both came from the State Statistics Committee. This calls into question his decision to exclude from consideration certain benchmark rates prepared by his own company, T&T International, on the basis that those rates were in an outlier category when compared with what he mistakenly thought were three sources when there were, in fact, only two sources. I agree with Mr Twigger that, in the circumstances, it would have been better if, rather than taking no account of the T&T rates altogether, Mr Tapper had sought to adjust the T&T rates to take account of the fact that they were in respect of oil and gas projects which may not have been equivalent to the Akzhal project. Furthermore, again as Mr Twigger pointed out, it was unclear whether

the Ministry of Economy rates covered all types of labour and all types of construction. Mr Tapper could not say whether this was the position. It was also unclear what areas of Kazakhstan the rates covered, despite the fact that Ranking.kz showed that the rates paid to workers in Almaty were higher than those in Kazakhstan as a whole. Indeed and in fairness to Mr Tapper, he agreed that, in relation to the Ranking.kz rates, it would have been more appropriate for him to have applied the Almaty rates rather than the general Kazakh rates.

270. As to the hourly skilled worker rates which Mr Tapper identified by reference to the Ministry of Economy/Statistics Committee and Ranking.kz sources were US$ 4.64 and US4.75 respectively, these were considerably lower than the Compass International hourly skilled worker rate of US$ 8-US$ 13 (with unskilled labour at US$ 5-US$ 8). Furthermore, Compass International noted that these rates were lower end rates, with rates in major cities being as much as 20%-40% higher. Somewhat oddly, given that the relevant passages were set out in his report, Mr Tapper stated during cross-examination that he had not noticed that fact or, indeed, the fact that rates for unskilled workers in major cities could be up to 50% higher. Mr Tapper went on to agree with Mr Twigger that, had he used an uplift of between 20%-50% in respect of his rates, the T&T figures would not have looked so out of kilter.

271. Then, as to productivity, although Compass International had said that productivity rates in Kazakhstan were *"2.00-3.00"* lower than in the US, Mr Tapper took a different (and lower) figure having, in fact, referred in paragraph 983 of his report to Compass stating *"that productivity is 100%-200% lower in Kazakhstan than for works in the USA and UK"*. It appears that the reason for the difference is that the Compass International pricing document appended to his report was a different edition to the one to which he was here referring because, in brackets after saying what he did there is a reference to page 270, whilst the relevant page in the document in the appendix is page 262. Be that as it may, Mr Tapper then went on in paragraph 983 to say this:

"This is primarily based upon oil and gas work. On this basis, it would therefore seem reasonable that the labour productivity should be adjusted by 2 (100% uplift) for these works (i.e. if it takes one hour to do work in UK then it would take two hours for similar work in Kazakhstan)."

Mr Tapper then explained as follows in paragraph 984:

"However, the work in Almaty is not a technically complex high-quality oil and gas project; it is a warehouse construction on a reasonably level side, with a single track railway siding. Therefore in my opinion a productivity uplift of 2 is not appropriate. Having viewed the photographs provided by the Defendants, the quality of the machinery used appears to be older and therefore less reliable than that generally used for such work in the UK. In my opinion, I therefore consider that an uplift of 20% of the labour and plant hours these works is appropriate."

That reduction, I agree with Mr Twigger, was not appropriate given that Mr Tapper has no personal experience of productivity levels in Kazakhstan, unlike Mr Jackson who (with direct personal experience of Kazakh productivity levels)

was clear that the difference between the UK and Kazakhstan is very often between 100% and 200%. This applies, therefore, both to labour and plant rates since Mr Tapper ultimately accepted that, if it took a digger operator in Kazakhstan two hours to do the same thing as an operator in the UK would do in 1 hour, the digger would be required for twice as long. I consider, in the circumstances, that a 20% uplift was quite obviously too low, as indeed would have been a 100% uplift as originally canvassed by Mr Tapper in paragraph 983, and that a more appropriate uplift would have been 150%.

272. For all these reasons, therefore, I am clear that the average labour rates which Mr Tapper used to arrive at his unit rates, namely KZT 1,114 in respect of unskilled/general labourer and KZT 1,289 in respect of a skilled labourer, are appropriately to be regarded as being too low. As I have explained, I am in no position, however, to work out what the correct rates would be once the various aspects which I have described above are taken into account. It is a calculation which Mr Tapper will, accordingly, need to do in order that Mr Jackson can consider it and hopefully the rates (including the unit rates) can then be agreed.

273. I should mention that Mr Twigger made an additional criticism as regards Mr Tapper's approach to labour rates. This was that, although no criticism can be made in relation to Mr Tapper using more recent labour rates and adjusting those rates to reflect the fact that they are 71.42% higher than construction monthly salaries were in 2007, he did not make a comparison with what Mr Twigger somewhat vaguely described as *"official conversion tables"*. Mr Tapper agreed that *"Probably in retrospect"* it would have been a good idea to have done a comparison. However, as he pointed out, he arrived at his 71.42% by looking at statistics concerning construction monthly wages between 2005 and 2015 which he had obtained from the National Economics Ministry of Republic of Kazakhstan. In those circumstances, I do not consider that this further criticism was altogether warranted. No further adjustment is, therefore, needed to take account of this point.

274. Turning to plant rates, Mr Twigger pointed out that Mr Tapper's plant rates were predicated on the assumption that plant had been imported from the US, meaning that they had to be paid for in US dollars. Mr Tapper, accordingly, revised the 2015 rates which he was using for plant to take account of the devaluations in the tenge which had occurred during 2007. I agree with Mr Twigger, however, that the basis of Mr Tapper's assumption about plant needing to be imported from the US was somewhat unclear, if only because it seemed geographically and culturally rather more likely that any plant would come from Russia rather than from the US. Furthermore, Mr Tapper's adjustments for devaluation took no account of the subsequent devaluations of the tenge which took place in 2009 and instead applied what Mr Twigger characterised as a 'straight-line' adjustment of 278% to December 2016 plant rates across the entire period. I agree with Mr Twigger that, in the circumstances, primarily because there was only really a very slender justification for assuming that plant would be sourced from the US, Mr Tapper's adjustment in this regard was not appropriate. It follows that the rates set out in paragraph 987 of Mr Tapper's first report, which I understood Mr Tapper to be saying in the next paragraph (paragraph 988) were 2015/6 rates which had been

adjusted *"on 2007 rates"* as this was something which Mr Twigger clarified with Mr Tapper during cross-examination. If that is, indeed, the position, then, the rates set out in paragraph 987 are the rates which should be taken as applying.

275. It will be apparent that I have so far been considering Mr Tapper's approach. As I have explained, in my view, his is an approach which was not entirely appropriate, hence the need for further calculations to be carried out in the way which I have indicated. Mr Twigger's primary submission, however, was that the Court could be confident in the calculations performed by Mr Jackson and that his unit rates ought to be applied. Specifically, Mr Twigger highlighted how Mr Jackson had obtained actual quotations from suppliers and also submitted that the rates were based on actual comparable projects including a hotel and business centre in Astana, Oriflame near Moscow and a further project called Gas Device which was a warehouse and factory unit. Mr Twigger emphasised, in particular, that Mr Jackson had explained to Mr Howe during the course of cross-examination that it makes no difference whether these other buildings were or were not warehouses. For example, dealing with the building concerned with the Gas Device project, this exchange took place between Mr Howe and Mr Jackson:

"Q. ... Well, that is not comparable, is it? It is completely different constructing an engineering factory for the manufacture of high-precision engineering gas components to simply constructing warehouses for storage?

A. The concrete is the same, the excavation is the same, the steel portal frames are the same, the cladding is the same. There may be some differences internally, but for the most part it is a comparable project.

Q. Presumably an engineering factory needs to have extremely high levels of anti-vibration measures and also, for example, cleanliness and climate control?

A. Those are not areas that were influential in the prices that are used. As I say, concrete, excavation, steel, steel reinforcement; they are all the same components."

Mr Howe then asked about the hotel and the Oriflame building, making the point in the case of the latter that there would inevitably be different rates applicable to a construction project which was taking place in Moscow and *"nearly 2,000 miles from Almaty"*. Mr Jackson maintained, however, that the comparables were appropriate since:

"They are not completely different types of construction. The standard is definitely different internally. I don't know how I can say anything else other than keep repeating that particular point."

The difficulty nonetheless remains that the information which Mr Jackson provided in relation to the comparables was, leading into trial, very sketchy indeed. In his first report, he referred to his having used *"cost data from a variety of different sources"* and then identified just two such sources, namely the hotel in Astana and Oriflame. He did not mention Gas Device at that stage.

The first time that he referred to this was when Mr Howe asked him what other sources he had had regard to. This is despite the fact that in his discussions with Mr Tapper in the lead-up to trial, Mr Jackson *"undertook to provide rates"* or, as he immediately clarified, *"to try and provide some of these details from the other projects"*. Mr Jackson explained in cross-examination, however, that he then *"checked with my firm and the answer from them was because this was a court hearing, this was commercially sensitive information that belonged to clients and it would be difficult to disclose to Mr Tapper"*. I agree with Mr Howe that this was wholly unsatisfactory. I do not, in the circumstances, consider that I can place any great reliance on Mr Jackson's comparables since they are largely incapable of being tested, certainly in any particularly meaningful way. I consider, instead, that it is preferable to adopt Mr Tapper's approach, albeit with the modifications which I have described as being, in my view, necessary.

276. I turn, then, to Akzhal-2 and the three categories to which I have referred. Before dealing with these in a little detail, it is worth having in mind what difference the three areas of dispute have on the experts' overall valuations. It is not insignificant. Specifically, Mr Tapper's overall valuation for Akzhal-2 ranges from KZT 150.293 million (his 'low' valuation) to KZT 196.97 million (his 'high' valuation), whereas Mr Jackson's overall valuation for Akzhal-2 comes to KZT 1.63 billion (net of VAT at 14% and a 5.7% allowance which I shall come on to describe) or KZT 1.96 billion (inclusive of VAT and the 5.7% allowance) less KZT 45.82 million (which he accepts has been double-counted) and so KZT 191.14 billion.

277. Starting with the KZT 773.15 million which Mr Jackson had attributed to land clearance and earthworks (including those for the railway), there are two issues here. The first is the issue regarding appropriate rates which I have already addressed in the context of Akzhal-1. Mr Tapper will need, in his revised calculations, therefore, to make adjustments reflecting the matters which I have identified. The second issue involves a disagreement between Mr Tapper and Mr Jackson as to the height of the embankments at Akzhal-2. Unlike Mr Tapper who was reliant on what Warner Surveys had to say in this regard, Mr Jackson had personally observed and found physical evidence that, although the height of the embankment varied, it was in some places 2 metres (as shown in certain photographs although in his report Mr Jackson refers to 1.5 metres) and in other places as high as 7 metres. Mr Twigger submitted that this evidence should be preferred to what was, at best, second-hand evidence from Mr Tapper based on Warner Surveys having ascertained that the *maximum* height of the embankments was 2.5 metres. I agree with Mr Twigger about this since Warner Surveys had to make a number of significant revisions to their earthworks quantities, including, for instance, a correction to an assumption which they had made that the average depth of excavations across the sites was 1 metre which involved this changing to 4.5 metres. Mr Tapper agreed with Mr Twigger that this constituted a substantial revision. Mr Tapper's calculations will need, in the circumstances, to take account of Mr Jackson's evidence concerning the height of the embankments.

278. As for Mr Jackson's KZT 184.5 million for site dewatering, again the rates issue arises and a revised calculation will need, accordingly, to be undertaken by Mr

Tapper (and hopefully agreed by Mr Jackson). In addition, however, there was an issue between Mr Tapper and Mr Jackson over whether dewatering took place at the southern end of the Akzhal-2 site. Mr Jackson's evidence was that he had identified such dewatering and that, in his view, the lagoon would have required extensive removal of sludge and vegetable soil before being filled. Mr Tapper's view, however, was that, although there is evidence of *"some drainage on site"*, it *"appears to have been installed some years prior to the works commencing (i.e. when it was still agricultural land)"*. As Mr Twigger pointed out, this is an opinion which is not altogether easy to square with Warner Survey's identification of the area concerned as being one *"where dewatering has obviously occurred by design and as a specific action"*. It was, furthermore, both Mr Kosarev's and Mr Sannikov's evidence that dewatering and remedial work in respect of waterlogging took place. Mr Sannikov, in particular, stated as follows when giving evidence:

"So there were some works done for dewatering purposes and that is territory of 60 hectares, as a total, 50 plus 10. That territory had massive construction works performed, but the lake was dewatering through two pipes. It was dewatered and then, as I said, there was an error in project design and I remember that I saw huge amounts of soil, they clawed a huge pile, a huge heap of soil and the tractor was moving back, and that was hard soil to replace the local softer soil with that harder soil containing rocks and stones."

279. The photographs which were in evidence were not particularly enlightening because they appear to have been taken during the summer and so in dry conditions, but Mr Jackson was in no doubt about the matter, explaining that *"what is clear is that that fairly substantial embankment was built across what was otherwise a flood lagoon"* and that he felt that *"there must be some work ... done in order to drain that area"*. Although I see no particular reason to doubt what Mr Jackson was here saying, this is not, however, the end of the matter since in his first report, specifically in Appendix B1, where he set out his costings summary, Mr Jackson's justification for his figure of KZT 184,493,829.82, was stated to be as follows:

"The works are done. As the most of works are hidden the Acts were taken as a basis of calculation. It was checked that the rates and quantities in the Acts are reasonable. Total figure from the Acts was taken as basis of the estimate."

Mr Jackson was, in making these comments, referring to the Act of Acceptance relating to works apparently carried out in January 2007 involving *"a drainage system"*. He clarified in cross-examination that:

"I have relied on the acts as they have been stated. I take the acts as a starting point for establishing whether some work has been done. I believe some drainage works would have had to have been done. But I do not know the exact nature of that work."

Mr Howe put to Mr Jackson that, in fact, the Act of Acceptance on which he had relied had nothing to do with any drainage work carried out at Akzhal-2. He did so by taking Mr Jackson to an Arka-Stroy invoice relating to drainage work done at Aksenger. That invoice was in strikingly similar terms to the Act

of Acceptance, save in respect of one of the items in the invoice which did not appear in the Act of Acceptance. It is quite clear, looking at this material, that the Act of Acceptance is not a document on which reliance could legitimately be placed. Indeed, when this point was put to Mr Jackson by Mr Howe it is interesting that Mr Jackson's answer was as follows:

"I can explain how I have dealt with the lack of reliability of the acts. I recognised at the time when I put these values into my report that they may not be totally safe. That was certainly a consideration of mine. So here is how I have treated them: I have put them in, but within my overall valuation at Akzhal I have moderated the total value associated with all of the earthworks to the value of a roundabout 600 million tenge, i.e. a deduction.

And the mechanism I have used for that is the - as we have discussed the item earlier, that despite what the theoretical measurement of earthworks would be, in other words you would excavate, remove everything, I took the view to mitigate the total cost, because I thought that there is a danger that I have imported either some high values or some unreliable values, particularly in regard to the acts.

So, by way of mitigation, I have removed about 600 million tenge from my overall valuation. So that is why I have got them in, but I do recognise that these acts are a little unsafe."

Mr Jackson later, when discussing with Mr Howe the works relating to the Aksai River, explained in more detail what he meant by moderation. It was clear that he had in mind the type of thing which is done at a pre-construction stage in order to avoid either overvaluation or undervaluation. As Mr Howe pointed out, however, nowhere in his reports did Mr Jackson mention having engaged in a moderation process resulting in an overall reduction in the case of Akzhal amounting to KZT 600 million and, as he earlier explained, in the case of Aksenger amounting to *"nearly KZT 400 million"*. Mr Jackson insisted that he had explained what he had done by way of moderation to Mr Tapper in the experts' meeting. However, I was left with the impression that Mr Jackson was engaged in what might be described as damage limitation in the face of the difficulties which Mr Howe had explored with him concerning his reliance on the Act of Acceptance.

280. The Court is, therefore, left in a difficult position. It seems to me that, in all probability, based on what Mr Jackson says that he himself saw when he visited the site and based on what Warner Surveys reported, taken in conjunction with the evidence given by Mr Kosarev and Mr Sannikov, it would be wrong to conclude that no dewatering work took place. Attributing a value to that work is, however, not something which, in the circumstances, is easily done. I am troubled, in particular, about any reliance being placed on the Act of Acceptance on which Mr Jackson has, at least in the first instance, based his valuation. Similarly, Mr Jackson's somewhat broadbrush approach of discounting earthworks in respect of Akzhal-1/Akzhal-2 by KZT 600 million seems to me to be somewhat unsatisfactory since it remains the case that Mr Jackson's starting point is the Act of Acceptance which, as he himself accepted, is not reliable. In such circumstances, since there is no other evidence to indicate a

likely cost involved in dewatering, the Court has two options: either to attribute no value to dewatering work which nonetheless the Court considers has taken place, or to do its best to arrive at an appropriate figure. In my view, it is appropriate to try to do the latter and, doing the best that I can, I attribute to the dewatering work a value of KZT 60 million. This represents my broadbrush attempt at arriving at an appropriate figure. It is roughly a third of the amount which Mr Jackson attributed to dewatering and so represents a substantial reduction. I might add that since I have arrived at the figure in such a broadbrush way, it is not affected by any recalculation as to rates.

281. The third and final issue which arises as regards Akzhal-2 concerns Mr Jackson's KZT 68.12 million for works to the Aksai river. Mr Tapper's position, as described in his second report, was that, although there appears to have been some works in the relevant area, *"it cannot be confirmed that this was for cleaning and widening of Aksai river"*. Accordingly, Mr Tapper explained that he was *"not able to rely on Mr Jackson's estimate for these works"*. This is another aspect where Mr Jackson placed reliance on an Act of Acceptance, making the same comment in his cost summary at Appendix B1 to his first report as he had done in relation to the dewatering item. It was put to Mr Jackson that he had not independently verified whether the work described in the relevant Act of Acceptance had been carried out, to which Mr Jackson replied as follows:

"Well to the extent that I could by the view of the satellite imagery, that is what has led me to it. So that was my verification work and I certainly accept, as I have said before, it is not the most reliable piece of information. But I have used it."

Since Mr Jackson was clear that some work had been done, he explained that he relied upon the Act of Acceptance and then moderated the value downwards to mitigate the risk of the document being unreliable. The difficulty, however, is that, as Mr Howe pointed out to Mr Jackson, the reduction had not been specifically identified in his report. Indeed, there was no specific reduction in respect of this item of work since his evidence was that the moderation led to his overall KZT 600 million reduction. Again, therefore, the Court is left in the position where it either attributes no value to this work or does its best to arrive at an appropriate value without any real evidence before it to enable such a value to be achieved. Doing the best that I can, and so again adopting a very broadbrush approach, it seems to me that an appropriate value would be KZT 30 million, an amount which will again not be affected by any recalculation.

282. Lastly, before coming on to deal with Aksenger, it should be noted that, in addition to 6% being added to cover design costs, the experts are agreed that between 15%-17% should be added for preliminaries, overheads and profit. Mr Jackson put this at 15% but it seems to me that it is appropriate, in the circumstances, to apply Mr Tapper's slightly higher 17%. In addition, Mr Jackson took the view that it is appropriate to add a 5.7% contingency for the risk that the work will not have been executed in the most efficient manner as envisaged by the applicable rates. Mr Jackson was under the impression when he was being cross-examined by Mr Howe that Mr Tapper had allowed a 10% contingency equivalent. In fact, he has not done so but has, instead, as he put it

in the joint memorandum, *"included an allowance for the inaccuracy in the pricing and established scope of works of plus or minus 10%"*. I am satisfied that Mr Jackson's 5.7% approach is appropriate given, in particular, that he had based it on an apparently well regarded article by Chester and Hendrickson and given also that, in his experience, as he explained when he was re-examined, *"Almost every project has some form of additional cost arising out of delays and major projects in particular, the additional cost usually way exceeds that sort of value"*.

Aksenger

283. As to Aksenger, as I have previously mentioned, there are issues not only in relation to costings but also, in significant respects, in relation to whether particular work was carried out at all in circumstances where the type of work which Mr Arip and Ms Dikhanbayeva say was carried out was largely preparatory in nature and so, with the passage of time, it is not easy to identify and value that work. Mr Twigger submitted that this is not to say, however, that the work was not carried out, observing that the burden of proof rests on the Claimants to prove that, on the balance of probabilities and in the context of allegations of serious fraud, the work was not done. Accordingly, Mr Twigger submitted, it does not assist the Claimants if, as was suggested to him at various points in his evidence, Mr Jackson had not been able to prove that particular work had been done. That, Mr Twigger suggested, is to reverse the burden of proof since Mr Arip and Ms Dikhanbayeva are under no obligation to prove that the works had been performed. The more so, Mr Twigger submitted, in circumstances where Mr Tapper had taken a deliberate decision not to undertake investigations in relation to certain aspects which would have enabled it to be determined whether the work had been done.

284. As to this, in my view, the appropriate approach, and the approach which I propose to adopt, is to consider, in the usual way and without particular regard to where the burden of proof lies, whether the Court is satisfied, on the balance of probabilities, that particular work was carried out or not. This will entail me considering the evidence which both sides have put before me and seeing where that evidence takes me. In these circumstances, the burden of proof is unlikely to be determinative. It is against this background that I come on to consider the four aspects where there is a dispute between Mr Tapper and Mr Jackson. The first of these (again) concerns *"Earthworks"* which Mr Tapper in his second report valued at just over KZT 16 million (covering railway-related earthworks) and KZT 3.25 million, and which Mr Jackson valued at KZT 1.25 billion; *"Roads"*, which Mr Tapper valued at between zero and KZT 23.81 million and Mr Jackson valued at KZT 200.73 million; *"Land drainage"* which Mr Tapper valued at between KZT 1.74 and KZT 3.25 million and Mr Jackson valued at is KZT 367.49 million; and *"Centralised locking system"* which Mr Tapper valued at zero and Mr Jackson valued at KZT 2.01 billion.

Earthworks

285. Central to the *"Earthworks"* issue is certain satellite imagery which, in Mr Jackson's view, supports the proposition that such works were carried out in areas which were marked in the relevant images. These consisted primarily of

what Mr Howe described as two red and pink *"bunny ears"* and various smaller other red *"splodges"*. Mr Jackson confirmed, in particular, that he had not himself been to visit the red *"bunny ear"* area. In his second report, he gave details of the size of the land areas concerned, adding up to 79,860.80m^2 which was just under half of the land area which he had originally identified in his first report (164,270m^2). Mr Howe pointed out to Mr Jackson that, in such circumstances, his cost calculations ought obviously to be revised. Mr Jackson agreed with this whilst acknowledging that it had not been done. It follows that, on any view, the KZT 706,769,365.89 figure attributable to *"Earthworks"* (not including railway-related earthworks) which appears in Mr Jackson's cost breakdown would need to be reduced proportionately even assuming that Mr Jackson's rates were treated as being appropriate. In very broad terms, therefore, the KZT 706 million figure falls to be reduced by 48% to KZT 338 million. The more fundamental issue, however, is whether the Court can be satisfied on the material before it whether there were, indeed, the earthworks which Mr Jackson considers there were based on the satellite imagery since obviously, if the Court is not satisfied that there were, there is nothing to value.

286. In this regard, Mr Twigger drew attention to certain evidence which Mr Tapper gave both in his second report and under cross-examination. Specifically, he highlighted how Mr Tapper had explained that *"satellite images are no substitute for a detailed survey"* and that for that reason he had *"relied wherever possible on the physical survey of the sites as carried out by Warner Surveys"* which included *"physical measurements on site"* taken with *"sophisticated measurement equipment"* such as ground penetrating radar for establishing underground works. As Mr Twigger pointed out, Mr Tapper confirmed in cross-examination that he had not himself visited the site (with the exception of a different area in the bottom part). As Mr Tapper put it, he *"sent Warners up there and they came back saying it is all farm land, there is nothing to see"*. As Mr Tapper put it a little later, Warner Surveys *"didn't know what they were looking for, so they drove around and didn't find anything"*. In other words, Warner Surveys visited Aksenger and decided that nothing obvious had been done and so left without carrying out any investigation. As Mr Tapper explained in his second report, Warner Surveys did not survey the land (save for one area at the southern tip) and *"without further onsite investigation (i.e. boreholes, trial holes and GPR) the extent of works"* in the areas which Mr Jackson had identified (the red and pink *"bunny ears"* and the other *"splodges"*) *"cannot be ascertained"*.

287. Mr Twigger described this as entailing an approach which was remarkable, all the more so, he suggested, given that in his second report Mr Tapper had had this to say at paragraph 209:

"In summary, whilst there is earth scarring in the areas identified by Mr Jackson, the purpose for this work cannot be ascertained from an analysis of satellite images. Given the points discussed above, it appears unlikely that any of this work was for the benefit of the Aksenger industrial park. Even if this work had related to the planned industrial park, it is impossible to establish (from the information currently available) exactly what work was carried out."

Mr Twigger submitted that this made it essential that Mr Tapper should carry out ground penetrating radar investigations. In this context, Mr Twigger relied on this exchange with Mr Tapper:

"Q. I think you just accepted that it is possible that work was done –

A. It is possible, yes, and perhaps I should have gone out there again to have a look. But I haven't.

Q. There is quite a large amount of value attached to these areas and it would have been worth doing, wouldn't it, Mr Tapper?

A. Maybe, yes."

288. Mr Twigger submitted that this was an approach on the part of the Claimants (and Mr Tapper) which was not sufficient in circumstances where, as he put it, the Claimants have to show that earthworks have not been carried out. The difficulty with this submission, however, is that it seems to me that it would equally have been open to Mr Arip and Ms Dikhanbayeva (and Mr Jackson) to have carried out the necessary further investigations. Mr Jackson, indeed, as the following exchanges in his cross-examination make clear, apparently suggested to Mr Tapper that such investigations should be carried out.

"Q. … The reality is if you go to the site, as you have done, what you see is fields, stretching away into the middle distance, isn't it?

A. What you see is definitely fields, and one of the things I discussed with Mr Tapper - in order to actually settle this matter, we did discuss the possibility of Warners doing a GPR survey on all the pink and red areas and I did say to Mr Tapper I would accept those results, if those surveys were done."

Mr Howe then, in my view quite understandably, put it to Mr Jackson that he could have arranged for such survey work to be carried out:

"Q. Well, with respect, Mr Jackson, you are the one who is suggesting that the work was carried out; don't you think it was up to you to produce some evidence that it was?

A. Well, what we discussed was Mr Tapper could possibly have produced evidence that it wasn't done.

Q. Well, I see. So the position is that you propose that work is done somewhere on this 7 kilometre-long site in the middle of the field and your situation is, you having proposed it, it is up to Mr Tapper to disprove it; is that right?

A. No, we said a practical solution to settle the matter was for Warners to do a survey. It was just a practical solution. I wasn't suggesting that he has to prove anything."

I agree with Mr Howe that, in the circumstances, it is not really good enough for Mr Twigger to take the position which he did. I repeat that the Court's task

in this regard is to consider the evidence which is before it and arrive at a conclusion on the balance of probabilities.

289. I have considered the evidence in the form of the satellite imagery with some considerable care. Having done so, I feel unable to conclude that that evidence justifies the conclusion which Mr Twigger urged upon me. The satellite imagery is, in truth, wholly inconclusive since such changes to the ground which can be detected are at least as consistent with ordinary agricultural activity as with earthworks having been carried out. Mr Jackson was shown, for example, a close-up photograph which Mr Howe put to him showed plough marks. Mr Jackson agreed that that appeared to be the case. Mr Howe then postulated that, if there had been earthworks and excavation carried out together with refilling with materials to prepare the site for construction, it would not have been possible to plough in the way illustrated in the photograph. Mr Jackson agreed with that, adding that he doubted *"if you would want to plough either"*. Mr Jackson was clearly right about that. Mr Howe then showed Mr Jackson another photograph which he suggested showed *"what could easily be tractor marks or field boundaries"*. Mr Jackson agreed that that was *"a possibility"*, going on to agree that the *"evidence isn't substantial, no"*.

290. Mr Jackson's evidence in relation to the satellite imagery was, therefore, not particularly helpful to Mr Arip and Ms Dikhanbayeva on this issue. Indeed, it is somewhat telling that Mr Twigger had to resort to certain answers which Mr Jackson gave Mr Howe in relation to the pink *"bunny ear"* and, in particular, Mr Jackson's reference to one of the images looking *"typical of scarring of the earth"* and as showing *"…a whole series of trenches, certainly on the left-hand portion of that area, which could indicate some kind of activity to help drain or remediate that particular area"*. This is a slender basis on which to found a case that the earthworks were, in fact, carried out. In my view, the simple fact is that they were not. It follows that no value should be attributed to this aspect of the *"Earthworks"*.

291. Coming on, then, to the earthworks attributable to the railway at Aksenger, the issue is not whether works were carried out but what those works entailed and what rates should be used in arriving at an appropriate valuation. I have previously dealt with the second of these matters in the context of Akzhal and confirm that, in my view, the right approach to be adopted for valuation purposes is Mr Tapper's approach albeit taking account of the various points. On any view, therefore, Mr Jackson's figure in relation to earthworks attributable to the railway, KZT 547,581,134.78, cannot be accepted. Nor, given the need for Mr Tapper to recalculate using revised rates, can his valuation which he put in his second report at just over KZT 16 million.

292. As to the first issue, concerning the nature of the works which were performed, two sub-issues arise: as regards the width of the sub-base used by Mr Tapper in his second report, and as regards the height of the embankment. I can deal with both these points in short order. Mr Twigger's submission is that Mr Tapper was unjustified in reducing the width in his second report from the width used for the purposes of his first report. Specifically, whereas in his first report Mr Tapper based his calculations on a railway with a length of 1,119.60 m and an overall area of 8,750 m^2, in his second report Mr Tapper changed the length to

1,288 m yet performed a valuation based on an overall area of 4,403 m^2. Mr Tapper's explanation was that the reason for the change concerning width was that the data obtained from the GPR work carried out by Warner Surveys had *"been analysed in more detail"* and had *"given us more accurate areas of disturbed ground"*. Although Mr Tapper went on to express himself more confident in his recalculation, I tend to share Mr Twigger's scepticism about this change and am not persuaded that it was justified. Indeed, it is not a matter which was even addressed in Mr Howe's closing submissions.

293. As to the height of the embankment, Mr Jackson's valuation is based on the embankment having a 2 m height. Mr Howe made two points concerning this. First, he highlighted how Mr Jackson in his first report referred in paragraph 112 to the railway line being *"constructed either at grade, or upon shallow embankments"*, suggesting that this is inconsistent with an embankment as high as two metres. Secondly, Mr Howe suggested that the photographs relied upon by Mr Jackson do not show any embankment. Mr Tapper, who visited the site, furthermore, stated that as far as he could see there was no substantial embankment. Mr Tapper explained that a particular photograph which he was shown was of no relevance because it showed the main line rather than the railway line built as part of the project. Mr Jackson disagreed. He was adamant that the photograph showed *"the new spur line"*. Although it is not altogether easy to reach a particularly considered view on this issue, it does seem to me that there is considerable force in Mr Howe's point concerning Mr Jackson's reference in his first report to *"shallow embankments"*. I struggle to see how a 2 m high embankment can properly be described as *"shallow"*. In those circumstances, I am not persuaded that Mr Jackson's valuation based on an embankment of that height would be appropriate. I can see, however, that there should be some allowance for a raised embankment and, in my view, therefore, it would be appropriate to value based on an embankment measuring 1 m in height.

Roads

294. As to *"Roads"*, there was agreement between Mr Tapper and Mr Jackson in relation to a road running along the western boundary and also as to a road running along the bottom of the site parallel to the mainline railway. However, Mr Tapper did not agree that a 1.846 km road running north/south along the eastern boundary is a new road (as opposed to a road which existed before the construction works began). Mr Tapper also did not agree that some of the small tracks going across the site were constructed as part of the Aksenger works, although this probably does not matter since Mr Jackson explained, when asked by Mr Howe, that he did not think that he had included these tracks in his *"Roads"* calculation.

295. As to the road on the eastern boundary, Mr Howe took Mr Jackson to various 2006 photographs which Mr Jackson had produced, suggesting to Mr Jackson that these showed that the road pre-existed the works which Mr Jackson considered had taken place. Mr Jackson agreed that there did, indeed, appear to be an existing junction with a track in the area where he had identified a new road. Mr Jackson explained as follows:

"*... I think my position - I mean, just to save a little bit of time here, was that road was established for the purpose of those infill works. So if we agree that those infill works weren't carried out, then it is unlikely that the road would have been built for the purpose of Aksenger."*

This clarification came after Mr Howe had explored with Mr Jackson his understanding of where the eastern boundary lay, specifically in the context of certain satellite images which Mr Jackson had considered indicated a certain amount of landfill (see under *"Drainage"* below). Mr Jackson ultimately acknowledged during the course of those exchanges that he had been mistaken since he had not appreciated that the boundary as shown on the satellite images had moved. He accepted that, since it appeared that that was the case, then his *"interpretation would be incorrect"*. It follows that Mr Jackson's evidence in relation to that road did not ultimately support Mr Arip's and Ms Dikhanbayeva's case in this respect. In these circumstances, the fact that Mr Tapper had in his evidence the previous day acknowledged that, whilst there was always a track along the eastern boundary, the road in the satellite image was *"different"* meaning that *"something has happened"*, does not greatly assist that case either. It is not appropriate, in my view, to arrive at a conclusion that the road was constructed as part of the Aksenger works on so slight a basis. I need not, therefore, take up further time addressing a further quantum-related issue.

Drainage

296. The *"Drainage"* issue concerns the landfill which, as I have just explained, Mr Jackson ultimately accepted he had been mistaken about in view of his confusion over where the eastern boundary lay. It follows that this is not an aspect in which any valuation is appropriate. The fact that Mr Tapper accepted in relation to this also that *"something has been done"* is, in the circumstances, again no proper basis on which to reach a conclusion that drainage-related work was actually carried out. It is, in any event, clear that Mr Tapper's answers to Mr Twigger's questions assumed that the boundary line had not changed. It was only when Mr Howe came to cross-examine Mr Jackson that it became clear that it had done so, leading to Mr Jackson's acceptance that what he had thought was drainage work was not that at all.

297. Although Mr Twigger approached the *"Drainage"* issue as being confined to the works described above, it is right to acknowledge that in Mr Jackson's second report those particular works were described under the umbrella of *"Works of unclear scope"*, with *"Drainage"* being used in his first report to cover drainage work carried out in the pink *"bunny ear"* in the north of the site rather than any infilling work performed on the eastern boundary. It is right, in the circumstances, lest there be any confusion going forwards, that I should briefly address this matter also, even though it was not addressed in Mr Twigger's written closing submissions in the *"Drainage"*-specific context as opposed to when referring to what Mr Jackson had to say in re-examination concerning a satellite image of the pink *"bunny ear"* showing *"typical of scarring of the earth"* and indicating *"a whole series of trenches ... which could indicate some kind of activity to help drain or remediate"*. I repeat that this is an insufficient basis on which to conclude anything very much. I am quite clear,

in the circumstances, that it does not justify a conclusion that drainage work took place in that area. I am strengthened in that view by the fact that Mr Jackson relied for these purposes the Arka-Stroy invoice relating to drainage work to which I have previously referred when discussing the *"Dewatering"* issue in the context of Akzhal-2. That invoice is not a document which, in the circumstances, can be regarded as reliable. The more so, since the invoice describes no less than 25.547 km of 200mm diameter perforated drainage pipe and Mr Jackson said that it would not be possible to fit as much as that in an area the size of the pink *"bunny ear"* measuring, he accepted, about 200 m by 200 m. Although Mr Jackson pointed out that in his second report he had identified *"some more work"*, a reference to the eastern boundary infilling work addressed above and so not work which ultimately Mr Jackson accepted could have taken place, Mr Jackson made it clear that he *"certainly"* accepted Mr Howe's *"overall point that it is an unreliable figure"*. In these circumstances, since there is no other evidence to indicate that drainage work took place in the pink *"bunny ear"*, the inevitable conclusion is that no such work was carried out.

Centralised locking system

298. As to the centralised locking system, having considered the photographic evidence in particular, there is, in truth, no evidence to support the proposition that such a system was put in place at Aksenger. Mr Jackson, indeed, himself accepted in cross-examination that much of what he had thought was the centralised locking system for the Aksenger railway was a system on the mainline railway. He agreed with Mr Howe that the sidings would have to have rail control systems and so photographs which he had relied upon showing control boxes in the sidings did not evidence any control work on the Aksenger spur line. Similarly, he accepted that, for example, a photograph showing a station building with control systems in it did not in and of itself indicate that any centralised locking system had been constructed in respect of the Aksenger spur line since the system shown in the photograph could have been one which related to the mainline railway alone. The same applies to another of his photographs which showed *"Evidence of trenching for cables heading east towards the location of where rail construction has taken place…"* since Mr Jackson agreed that, as the sidings were positioned next to the spur, the cabling could have been concerned only with the sidings.

299. Mr Twigger referred to certain other photographs attached to a document described as *"Minutes of the on-site of inspection"* dated 15 July 2014. This is an Almaty Police Department document prepared by Major A.S. Kaisarov and related to a site inspection carried out by him in the company of various people, including Mr Esimbekov. Two of the photographs, indeed, show Mr Esimbekov pointing at boxes said to be the *"communication system of Aksenger railway branch"*. Furthermore, the minutes state as follows:

"… Then the participants of the investigative action returned, at B. Yesimbekov's suggestion, to the abandoned railway branch running from the main railway to the plot. Here, he explained that the railway branch leading to the plot was built as part of the project, complete with the communication systems, and that it was an integral part of the project to build the railway

branch, as no design, nor construction of a railway branch without communication means supporting the switching of signalisation devices, would have been impossible in principle, because any railway branch, naturally, becomes part over overall railway system. During the seven years that the branch was in an abandoned state some of the communication devices were stolen, but some of them are still in place.

B. Yesimbekov pointed to locked metal boxes standing along the southern part of the railway branch and explained that they belong to the railway communication system and prove that there is an underground cable running along the railway line.

The said metal boxes, their dimesions [sic] being 40x40x10, were located close to the existing track switch, in direct proximity to the rails. There is a cable going into each box from under the ground covered on the outside by a metal 6 cm protective tube. The examined section of the railway featured two such boxes. Similar boxes were installed along the main railway line, 50 m to the south of the said branch, as well as at the locations of track switches facilitating the switching of tracks in different directions."

Mr Twigger suggested that this provides significant support for Mr Arip's and Ms Dikhanbayeva's case. I do not, however, myself agree. It is quite clear that what was written in the minutes was heavily influenced by what Mr Esimbekov told Major Kaisarov. The fact that Major Kaisarov distinguished between the metal boxes along the railway branch and those (and the track switches) installed along the main railway line is, in such circumstances, not particularly persuasive. Nor do the photographs accompanying the document really assist. Indeed, when Mr Tapper was asked about the Minutes, he stated as follows:

"Well, the difficulty I have got here is the branch of the railway with the weighbridge was there before the work started. My own view is that these boxes relate to that part of the railway, not the new part. So when I was there I didn't see any evidence of any system, and all I've seen at the moment is photographs of boxes. So I don't know how to - what to believe. I mean they are clearly boxes and they are next to a railway line, but other than that there is not an awful lot to go on."

I agree. It is impossible to conclude, on the evidence, that the communication system was put in place.

Other railway work

300. There is another railway-related matter which I should briefly also address. This concerns a valuation in the sum of KZT 122,223,391 which Mr Jackson has attributed to certain works at Burunday, Aksenger and Akzhal 1 railway stations. Mr Tapper confirmed in cross-examination that neither he nor Warner Surveys had visited the station, observing that it is *"very hard to find underground cables from 10 years earlier, so you are back to looking for a needle in a haystack"* and so agreeing with Mr Twigger that it was impossible to say one way or another whether the work had been done. Mr Twigger was able, however, to refer to a police report prepared in August 2014 in which it is

stated that a Mr Yagmurov, the chief specialist at KazZhelDorProekt (which designed the Aksenger railway), had been interrogated and had confirmed that work had been undertaken as part of the reconstruction of Aksenger station in accordance with the technical specifications for the project. In those circumstances, it seems to me that there is evidence which would justify Mr Jackson's valuation. Mr Twigger suggested also that the same report supported the case that the centralised locking system was also put in place. However, the report is not explicit on that point and, therefore, I see no reason to change my conclusion on that aspect.

Relevance of Aksenger work

301. Before dealing with one further matter which relates to Akzhal-1/Akzhal-2 as well as Aksenger, there is a final matter which remains outstanding as regards Aksenger. This concerns the question of whether credit should be given in respect of the (admittedly limited, in view of my conclusions) works which were carried out at Aksenger, my having earlier explained that, in the case of Akzhal-1/Akzhal-2, I consider it appropriate that credit is given.

302. I recognise that the position might be regarded as being different in the case of Aksenger. As Mr Howe submitted, whatever the cost of the works done at Aksenger, it might legitimately be thought difficult to see that the works can, in truth, be regarded as having any value at all as far as the Claimants are concerned. As he put it, it is not immediately apparent how incomplete and redundant sections of railway at Aksenger serve any useful purpose. The position is not the same as regards Akzhal-1 where there is an operational logistics park in place. Furthermore, I have explained as regards Akzhal-2 that I consider it appropriate for these purposes not to differentiate between Akzhal-1 and Akzhal-2 given their geographical proximity. The question is whether, given that Aksenger is somewhere else altogether, it is appropriate to require that credit be given. In my view, it would be appropriate to do so since the fact remains that works were carried out, albeit not to the extent suggested by Mr Arip and Ms Dikhanbayeva. That said, in view of the conclusions which I have reached in relation to the works carried out at Aksenger and in relation to appropriate rates, any credit will inevitably be somewhat modest.

Work paid for by the Claimants direct

303. There is a further matter which needs to be addressed. This is Mr Tapper's analysis of contracts entered into between the Claimants and various sub-contractors and Mr Howe's submission, based on this analysis, that any valuation of the works carried out at Akzhal-1, Akzhal-2 and Aksenger should take account of payments which the Claimants made directly to contractors other than Arka-Stroy in respect of any parts of the work being valued. It will be recalled that Mr Howe's position was that something like half of the work done, viewed by value, is properly attributable to contractors other than Arka-Stroy, and that Mr Jackson's valuation would need to reduce to about US$ 40 million accordingly, even if it otherwise were to remain unaltered. The difficulty with this is that, when Mr Tapper was cross-examined about the analysis which he had performed in this regard, specifically when he was asked why in his first report he had merely stated that the sums concerned *"could fall within Arka-*

Stroy's scope of works", Mr Twigger suggesting to him that that did not *"sound very positive"*, Mr Tapper's response was to say this:

"No, I don't know - I don't know enough about these contracts or these works. I have had a look at the contract and I have had a look at the payment applications and I have listed out the information I have seen, there is not a lot to go on. It is the same with the Arka-Stroy contracts. There is not a lot of scope included in the contracts. It is very hard to know exactly what they were doing."

This makes it impossible to place any reliance on the exercise which was undertaken by Mr Tapper. It follows that it would not be appropriate to make further reductions on this basis.

Overall conclusions in relation to the PEAK Claim

304. In conclusion, therefore, I am satisfied that the PEAK Claim has been made out and that KK JSC, PEAK and Peak Akzhal are entitled to damages as sought but with credit being given in relation to the works carried out at Akzhal-1/Akzhal-2 and Aksenger calculated in the manner which I have described. Specifically and for the avoidance of doubt, for the reasons which I have given in considerable detail in this section of the judgment, I have concluded: (i) that Mr Arip is liable to KK JSC under Articles 62 and 63 of the JSC Law, given that he was a director of KK JSC at all material times; (ii) that Ms Dikhanbayeva is also liable to KK JSC under those provisions in respect of the time when she was a director of KK JSC, namely between April 2008 and July 2009, and otherwise under Articles 917 and 932 of the KCC; and (iii) that Mr Arip and Ms Dikhanbayeva are both liable to PEAK and Peak Akzhal under Articles 917 and 932 of the KCC. In the circumstances, there is no need for me to make any determination concerning KK JSC's, PEAK's and Peak Akzhal's (alternative) unjust enrichment claims brought under Articles 953, 955 and 956 of the KCC.

The Astana 2 Claim

305. The Astana 2 Claim arises out of a project to construct a logistics centre with Class A warehouses outside Astana. It was Mr Howe's submission that this claim has features which strongly resemble the PEAK Claim. He highlighted, in particular, that, despite large sums of money being spent, the logistics centre was either never built at all or, if there was any construction, it amounted to no more than 'window-dressing'.

306. The claim relates to monies which were disbursed in relation to the Astana project between August 2008 and June 2009. More specifically, in April 2008, the KK Group (via Peak Aksenger) purchased for approximately US$ 42 million the 'Astana Contract Group' which comprised Astana-Contract and its three subsidiaries, Astana-Contract LLP, Paragon and PD Logistics LLP. The Astana Contract Group was the largest logistics and warehouse operator in Central Asia and, as at April 2008, was the KK Group's main competitor. At the time of its acquisition, Astana-Contract was owned by Mr Sergey Kushenov, Mr Vladimir Loskot, Mr Timur Bashev and Mr Erik Khasanov. In acquiring the Astana Contract Group, the KK Group acquired the logistics park in Almaty to which I have referred (comprising a full service container terminal near Almaty-1 train

station and 48,000 m^2 of Class A warehouse space) as well as, importantly, 60 hectares of land outside Astana on which it planned to develop a transport logistics centre (the 'Astana Project').

307. During the early part of 2008 and prior to the acquisition, the KK Group provided funding of US$ 22 million to Astana-Contract because it urgently needed to refinance certain bank loans. The cash was used to repay Halyk Bank (US$ 14 million), ATF Bank (US$ 4 million), DBK (US$ 2 million) and other accounts payable (US$ 2 million). Furthermore, by the time of the acquisition, Astana-Contract and Paragon had taken out (in January 2008 and as co-borrowers) a loan from DBK in the amount of US$ 57.77 million for the purpose of constructing the Astana Project. It is this loan which is at the heart of the Astana 2 Claim since the Claimants' case is that the Defendants caused Peak Aksenger to acquire Astana-Contract and Paragon in order to misappropriate the DBK loan monies by repeating their alleged *modus operandi* deployed at Akzhal and Aksenger, specifically by causing GS, TESS, Regul and NSA, allegedly 'Connected Entities', to enter into fraudulent construction contracts in order to draw down loan monies for onward payment to the Defendants and without those entities carrying out the construction work, design work or supplies for which they charged the Claimants. Put shortly, the Claimants say that the general contractor appointed to the Astana Project, GS, was *"the Arka-Stroy of the Astana fraud"*. The Claimants' case is that at all material times the Defendants controlled Astana-Contract and Paragon by *"installing"* relatives and associates as directors of those entities, including Yuri Bogday (a relative of Mr Zhunus) and Mr Tulegenov, and that the Defendants caused Astana-Contract and Paragon to enter into various contracts which I shall now describe.

308. The first aspect of the Astana 2 Claim concerns certain contracts for the manufacture of steel structures and construction work which were concluded between Astana-Contract and GS. The first of these contracts was entered into on 1 December 2008 in the amount of KZT 3,600,001,269/US$ 27.8 million and as to which there were seven addenda, the final one being dated 1 October 2009 (the 'First GS Contract'). Having concluded this contract, GS entered into a sub-contract for the supply and installation of equipment with Regul on 26 December 2008 with a contract value of KZT 2,382,397,415/US$ 18.4 million (the 'Regul Supply Sub-Contract') and under that KZT 1.8 billion was paid to GS as a pre-payment (albeit that Mr Arip and Ms Dikhanbayeva allege that by a letter to GS dated 11 September 2009 Astana-Contract cancelled part of the construction work which GS was to carry out under the First GS Contract because the work was to be carried out by a different contractor and requested a pro rata reduction in the contract price). The second contract was entered into on 15 April 2009, with supplementary contracts dated 25 May and 22 September 2009 with a value of KZT 3,493,725,916/US$ 27 million (the 'Second GS Contract'), the Claimants' case being that KZT 609,975,663 was paid to GS pursuant to this second contract, meaning that between the two contracts a total of KZT 2,409,975,663 was paid. The Claimants' case is that GS was *"nothing more than a front and a vehicle for extracting money from [Astana-Contract] for the benefit of [the Defendants] and their associates"*. The Claimants rely upon various matters. First, they point to the fact that the logistics centre has never been constructed with only, the Claimants say, minimal (and preparatory)

work carried out on a section of the 25-hectare plot. Secondly, they point to what they say is the absence of any tender process prior to the awarding of the contracts to GS. Thirdly, they highlight how, pursuant to the First GS Contract, GS was paid KZT 1.8 billion/US$ 13.9 million drawn down from the DBK loan between 1 December 2008 and March 2009 against what the Claimants maintain are false Acts of Acceptance and invoices raised by GS for work that had not been done. Similarly and fourthly, they say that, pursuant to the Second GS Contract, on 3 June 2009 KZT 589,975,664/US$ 4.56 million was drawn down from DBK and paid to GS against Acts of Acceptance which were also false with invoices again being raised for work which had not been done. Fifthly, the Claimants say that GS concluded the Regul Supply Sub-Contract in circumstances where Regul's CEO was Mr Gerasimov, a close associate of Mr Arip, and Regul and GS shared a common director, Mr Meribek Kuanyshev. Lastly, the Claimants point to GS having made advance payments to Regul amounting to KZT 1,725,650,395 pursuant to the Regul Supply Sub-Contract notwithstanding that the completion certificates submitted by Regul only came to a total value of KZT 216,171,699. On the basis that KZT 1,542,000,000 was repaid to Astana-Contract, the Claimants' position is that they are entitled to be compensated by reference to the difference between these two sums, namely KZT 867,975,664/US$6,721,928.

309. The second aspect of the Astana 2 Claim concerns a contract in respect of certain design work for the transport and logistics centre concluded between Astana-Contract and TESS on 11 August 2008 for a price of KZT 574,266,000/US$ 4.45 million (the 'TESS Contract'). The Claimants' case as to this is that, the design work having been sub-contracted by TESS to Regul on 11 December 2008 for a price of KZT 68,049,605 (the 'Regul Design Sub-Contract') and Regul having sub-sub-contracted the work to Montazhprojekt for KZT 62,000,000, Astana-Contract is entitled to receive as compensation the difference between the sum which Astana-Contract paid to TESS (KZT 574,266,000/US$ 4.45 million) and the price which Regul paid to Montazhprojekt (KZT 62,000,000), namely KZT 512,266,000/US$ 3,967,179, on the basis that this was *"illicitly extracted"* from Astana-Contract.

310. The third aspect of the Astana 2 Claim concerns a contract dated 2 October 2009 for the supply of construction materials between Astana-Contract, GS and NSA for a price of KZT 1,723,449,467/US$ 13.35 million (the 'NSA Contract'). The Claimants' case is that, although Astana-Contract paid NSA KZT 1,422,305,092/US$ 11.01 million between October 2009 and April 2010, NSA supplied no goods or services of any substantial value in return. In those circumstances, the Claimants' case is that compensation is payable to reflect what had been paid essentially for nothing in return. They recognise, however, that that compensation needs to take account of various sums which were returned to the KK Group. Specifically, NSA paid KZT 1,255,625,600/US$ 9.72 million to Ada Trade LLP ('Ada Trade') which then paid KZT 927,900,000/US$ 7.18 million to Kazvtorsyrye LLP which in turn paid it to KK JSC and Kagazy Recycling, KZT 32,100,000/US$ 248,594 to KK JSC, and KZT 280,000,000/US$ 2.17 million to Holding Invest. The amount sought in respect of this contract is, accordingly, not the full KZT 1,422,305,092 which

Astana-Contract paid to NSA but that amount less what was repaid by Ada Trade, namely KZT 365,295,092/US$ 2.83 million.

311. The total claimed, therefore, is KZT 1,745,536,755/US$ 13.45 million, made up as follows: KZT 867,975,663/US$ 6.72 million in respect of the First and Second GS Contracts; KZT 512,266,000/US$ 3.97 million in respect of the TESS Contract; and KZT 365,295,092/US$2.83 million in respect of the NSA Contract. This is a relatively modest amount and, in such circumstances, I propose to deal with the issues which arise in relatively short order.

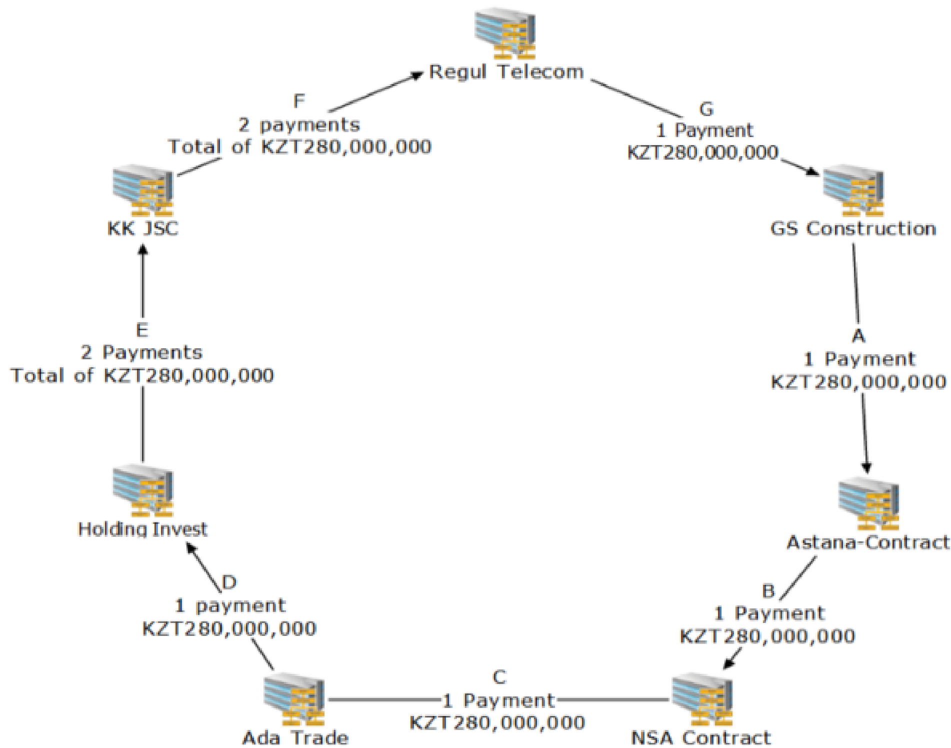
312. It was Mr Twigger's submission that the Claimants have failed to establish the necessary elements of their case. He suggested, indeed, that the Astana 2 Claim was addressed *"purely as an afterthought"*. Although that may be putting things a little too highly, it is nonetheless right to say that the Astana 2 Claim did not receive the same degree of attention as the PEAK and Land Plots Claims. Specifically, Mr Twigger submitted that the Claimants had failed to establish that Mr Arip and Ms Dikhanbayeva controlled Astana-Contract and Paragon to such an extent that they caused those entities to enter into each of the contracts which I have described, nor that they had done so with the intent to misappropriate sums for their own benefit. Similarly, Mr Twigger suggested, it had not been shown that Mr Arip and Ms Dikhanbayeva controlled each of GS, TESS, Regul and NSA such that they could procure the participation of those entities in the alleged fraud. Nor, Mr Twigger went on to submit, had it been demonstrated that those entities had not carried out the work or provided the services or goods they had purported to carry out or provide, in particular that the Acts of Acceptance against which payment was made were false. On the contrary, Mr Twigger submitted, Mr Arip and Ms Dikhanbayeva were not directors of Astana-Contract or Paragon and so there is no reason to suppose that those companies entered into the contracts which they did because Mr Arip and Ms Dikhanbayeva caused them to do so. Likewise, so it was suggested, neither Mr Arip nor Ms Dikhanbayeva controlled GS, TESS, Regul or NSA, and there is no evidence to indicate that they had any involvement in the sub-contracting arrangements which those companies entered into with Regul and Montazhprojekt. Furthermore, Mr Twigger highlighted the fact that a number of the contracts, work completion certificates and payments were concluded or made after Mr Arip and Ms Dikhanbayeva had left the KK Group in July 2009 and after Mr Arip had sold his shares in September 2009. Furthermore, Mr Twigger submitted that there was clear evidence that substantial work was, in fact, done at Astana.

313. As I shall now explain, I am not persuaded by these various points.

314. The backdrop to the Astana 2 Claim is highly suspicious. Specifically, Mr Howe submitted, correctly in my view, that the various money transfers which lie behind the three contracts which I have described and which were portrayed in an elaborate 'spider' chart (together with certain tables detailing the money transfers on a daily basis) prepared by Mr Crooks, reveal a carefully orchestrated scheme involving very large sums of money and co-ordinated actions amongst at least nine companies. Specifically, as the tables in particular show, between 21 December 2008 and 10 March 2009 KZT 1,320,000,000 of the funds drawn down by Astana Contract from DBK, purportedly for the

Astana 2 project, was funnelled through GS and Regul to KK JSC. This is most odd since it is difficult to see why GS and Regul would, as Mr Werner put it in his first affidavit, be paying KK JSC what *"must effectively have been its own money"*. GS and Regul were, after all, supposed to be acting as Astana-Contract's contractor and sub-contractor respectively. The oddities do not stop there, however, since thereafter, KK JSC having made some small payments back to Regul between 10 March 2009 and 8 September 2009, what then happened is that the balance held by KK JSC as at 8 September 2009, KZT 1,240,000,000, weaved its way between 30 September 2009 and 19 October 2009 from KK JSC to Regul (through payments of KZT 300 million on 30 September 2009, KZT 100 million on 7 October 2009, KZT 180 million on 7 October 2009, KZT 317 million on 8 October 2009 and KZT 343 million on 12 October 2009), from Regul to GS (through payments of KZT 300 million on 1 October 2009, KZT 280 million on 7 October 2009, KZT 317 million on 8 October 2009 and KZT 343 million on 12 October 2009), from GS to Astana-Contract (through payments of KZT 300 million on 1 October 2009, KZT 280 million on 7 October 2009, KZT 317 million on 8 October 2009 and KZT 343 million on 13 October 2009), from Astana-Contract to NSA (through payments of KZT 300 million – or, more accurately, KZT 300,010,000 with the extra KZT 10,000 being repaid by NSA on 20 October 2009 - on 5 October 2009, KZT 280 million on 7 October 2009, KZT 317 million on 8 October 2009 and KZT 343 million on 13 October 2009), from NSA to Ada-Trade (through payments of KZT 280 million on 7 October 2009, KZT 280 million on 8 October 2009, KZT 220 million on 9 October 2009, KZT 97 million on 12 October 2009, KZT 343 million on 14 October 2009 and KZT 20 million on 16 October 2009), from Ada Trade to Kazvtorsyrye (through payments of KZT 247.9 million on 8 October 2009, KZT 220 million on 9 October 2009, KZT 97 million on 12 October 2009, KZT 343 million on 14 October 2009 and KZT 20 million on 19 October 2009), from Ada Trade to Holding Invest (through a payment of KZT 280 million on 7 October 2009), from Ada Trade to KK JSC (through a payment of KZT 32.1 million on 8 October 2009), from Kazvortsyrye to KK JSC (through a payment of KZT 247.9 million on 8 October 2009), from Kazvortsyrye to Kagazy Recycling (through payments of KZT 220 million on 9 October 2009, KZT 97 million on 12 October 2009, KZT 343 million on 14 October 2009 and KZT 20 million on 19 October 2009) and from Holding Invest to KK JSC (through a payment of KZT 280 million on 7 October 2009). The end result of these transfers was that Kagazy Recycling held KZT 680 million and KK JSC held KZT 560 million.

315. Those transfers simply must have had some guiding mind behind them with the ability to control the actions of all of the entities concerned. They cannot have come about by accident, as further illustrated by Mr Crooks pointing out in his second report that, amongst these various transfers, he had *"identified a series of seemingly-related transactions in which KZT280,000,000 (US $2,168,425), was paid six times on the same day (07/10/2009) between seven different entities, namely: GS Construction to Astana-Contract to NSA Contract to Ada Trade to Holding Invest to KK JSC to Regul Telecom"*. Mr Crooks illustrated what he described as *"cycle"* with this diagram:



These KZT 280 million transfers can all be detected in the tables produced by Mr Crooks and so in the transfers which I have set out above, specifically the references to the transfers which were made on 7 October 2009. It simply cannot be the case, in the circumstances, that these transfers were made without somebody co-ordinating them. That somebody must have been able to direct what each of the companies in the chain should do. It is fanciful to suppose otherwise.

316. It is not, in truth, difficult to work out who that guiding mind (or minds) must have been. I have already explained that one of those entities, Holding Invest, is a company which it is common ground was jointly owned by Mr Zhunus and Mr Arip. I have also previously rejected certain evidence given by Mr Arip in particular in the context of the PEAK Claim. I have also explained why I am unable to accept the evidence which was given by Mr Gerasimov in relation to Regul and Ada Trade, specifically his insistence that neither Regul nor Ada Trade were entities over which Mr Arip and Ms Dikhanbayeva had any control. It will be recalled that Mr Gerasimov gave evidence concerning the large sum of money which Regul had received from GS sitting idly in Regul's bank account and his decision, as a result, to transfer the money to KK JSC as temporary financial assistance, to be repaid in two or three months. Ms Dikhanbayeva essentially stated the same thing. The explanation was plainly, however, false since there was no time when a large sum of money was sitting idle in Regul's bank account; on the contrary, apart from an initial payment of KZT 411,950,395, the monies passed straight through Regul to KK JSC, as Mr Howe put it, *"without touching the sides"* in two tranches, KZT 480 million on 6 February 2009 and KZT 840 million on 10 March 2009.

317. As to Ada Trade, I have previously explained, when dealing with the evidence which was given by Ms Dikhanbayeva, how Ada Trade was one of the companies which she listed in her emails sent on 26 and 27 August 2009 (the latter being the email which starts with the words *"If the auditors are raising questions"*), so demonstrating that Ada Trade was another of the entities in relation to which she was in a position to give instructions concerning the drawing up of contracts and the like. It will be recalled that Ada Trade was also a company which made two interest-free loans loans to the Exillon Group, totalling in excess of US$ 5.7 million in 2009, which were described as being *"expected to be re-assigned to Maksat Arip and repaid before the end of 2009"*. As Mr Howe pointed out, Ada-Trade (together with Trading Company, Lotos and Kontakt Service Plus amongst others) was additionally a conduit for the payment of further funds into Exillon, as demonstrated by the table prepared by Mr Crooks compiled from Trading Company's bank statements, which showed payments to Lotos, Ada Trade, and Kontakt Service Plus, as well as a number of KK Group companies. Mr Arip's evidence was that these payments came from Barnard, his separate oil business and had nothing to do with the KK Group. Mr Arip, however, accepted that, Barnard having paid KZT 1.4 billion to Trading Company on or around 25 December 2008 supposedly as *"financial aid"*, the money *"ended up in Russia, into the operations of this oil business"*. It did so, Mr Arip explained, *"not directly"* since there were some *"steps in the middle"*. Those steps included money being paid in tranches to a number of entities including Ada-Trade, Lotos and Kontakt Service Plus, so making it quite clear that these must have been entities controlled by Mr Arip. They were entities which, in the circumstances, Mr Howe appropriately described as *"funnels"*.

318. There is, then, also as regards Ada Trade, Mr Gerasimov's evidence to consider. Again, I have addressed this already but Mr Gerasimov's initial insistence when being cross-examined (despite Mr Arip having belatedly *"recalled"* that Ada Trade was *"Mr Gerasimov's company"*) that the *"director and owner"* of Ada-Trade was the youthful Mr Kozhamberdiev clearly represented an attempt on Mr Gerasimov's part to try and distance himself (and so Mr Arip) from Ada Trade. It then, of course, emerged not only that Mr Gerasimov was, by his own admission at least, one of Ada Trade's owners but also that Mr Kozhamberdiev, the other owner, was somebody whom Mr Gerasimov had met at the KK Group's offices where Mr Kozhamberdiev was employed as a lawyer. This evidence provides strong support for the proposition that Mr Arip and Ms Dikhanbayeva were the guiding minds behind the elaborate money dealings illustrated by Mr Crooks' 'spider' chart.

319. In the circumstances, I am not at all persuaded by Mr Arip's protestations that he had no first-hand knowledge of the TESS Contract, the First and Second GS Contracts and the NSA Contract. The fact that Mr Arip and Ms Dikhanbayeva (and other witneses called on their behalf) should have given dishonest evidence on these matters makes it very difficult to accept anything which they had to say in relation to the transactions which are the subject of the Astana 2 Claim. Furthermore, the fact that they also gave dishonest evidence concerning the PEAK Claim and, as I shall come on to explain later, the Land Plots Claim makes it all the more impossible to accept what they had to say in relation to the

Astana 2 Claim. Similarly, the fact that the Astana 2 allegations have been considered by the criminal authorities and the courts in Kazakhstan, and no criminal prosecutions or findings of liability have ensued, a matter relied on by Mr Twigger, is hardly conclusive since it is for me to make my own determination based on the evidence before me. Accordingly, although Mr Twigger drew my attention to the fact that in 2011, following a complaint submitted by Ms Kogutyuk, the Almaty Financial Police investigated the Claimants' allegations regarding embezzlement of funds by the management of Astana-Contract and concluded that the DBK funds received by Astana-Contract were used for the purpose of the Astana Project and there were insufficient grounds to initiate a criminal case, this can have no impact on the task which I must perform. Neither is it material that there were further investigations by the Astana and Almaty Financial Police in 2012 and 2013 which did not result in any criminal prosecutions, nor that civil proceedings brought by the Claimants against Mr Tulegenov, Ms Musagaliyeva and Mr Esimbekov resulted in no finding of liability.

320. Mr Twigger nonetheless sought to persuade me that there was insufficient evidence demonstrating that Mr Arip and Ms Dikhanbayeva had the requisite links with the entities involved in the Astana 2 Claim to justify a conclusion that they were behind the complex money transfers which the 'spider' chart prepared by Mr Crooks lays bare. Mr Twigger submitted, in particular, that the evidence of linkage with regard to GS, TESS and NSA was wholly lacking. I cannot accept that that is the position at all.

321. As for TESS, I have previously referred to a draft agreement between TESS and Trading Company (represented by Mr Esimbekov) dated 1 March 2007, which identifies Mr Baysymakov as TESS's CEO, with a comment balloon next to his name querying whether he was a director as at the agreement date. I referred to this in the context of the evidence in relation to that document which was given by Ms Dikhanbayeva. I reiterate that the fact that such a draft was on the KK Group's systems seems to me to be significant, certainly given Ms Dikhanbayeva's inability to offer any sensible explanation as to why it should be there if, as she insisted TESS was not a company which she and Mr Arip controlled. The linkage with TESS is, in short, made out. I shall come back shortly to address the question of what (if any) work was carried out by TESS.

322. As for GS, Mr Twigger highlighted that no allegations have been made by the Claimants against Mr Yuri Lavrov, described by Mr Gerasimov as the common shareholder of GS and Regul, or against Mr Dauren Khairullin, the General Director of GS. Mr Twigger submitted that, since it is the Claimants' case that GS *"is the 'Arka Stroy' of the Astana Fraud"*, Mr Khairullin would have to have been connected to Mr Arip and Ms Dikhanbayeva yet this has not even been alleged, still less established on the evidence. I have taken this into account. The difficulty, however, as far as Mr Arip and Ms Dikhanbayeva are concerned, is that this is just one matter to take into account alongside others which seem to me to point quite conclusively to the arrangements with GS not being as independent as Mr Arip and Ms Dikhanbayeva would have it. Similarly, Mr Twigger also made the point that Mr Werner was wholly mistaken when he asserted that no tender process took place ahead of the appointment of

GS since, although there are other board minutes suggesting that only GS was under consideration, the documents do appear to show there was a tender for the General Contractor role on the Astana Project. Indeed, Mr Twigger was able to point to the minutes of Astana-Contract's tender committee meeting held on 28 November 2008, signed by Ms Dikhanbayeva along with six other members of the committee, which demonstrate that the other bidders included Angar-Stroy, SKG Kazakhstan, Demeukurylys and Parity-Ltd. Still, however, whether or not there was a tender is just one matter to consider. Against this, as Mr Howe submitted, it is wholly unclear how it came to be that GS was paid more even than it sought in the various invoices which it submitted to Astana-Contract. So, for example, as regards the First GS Contract, despite the acceptance certificates adding up to KZT 1,349,098,721 and seven invoices being submitted by GS reflecting those acceptance certificates (and that amount), GS was, in fact, paid the US$ 1.8 billion to which I have previously referred in three instalments in December 2008 (KZT 480 million), January 2009 (KZT 480 million) and in March 2009 (KZT 840 million). This represented an overpayment of just under KZT 451 million. There was then a further overpayment in relation to the Second GS Contract. Accordingly, GS ultimately returned KZT 1.542 billion to Astana-Contract between June 2009 and October 2009. Even leaving aside whether any meaningful construction work was carried out by GS, a matter to which I shall return, why things should have happened in this way is suspicious to say the least.

323. This leaves NSA. Mr Twigger submitted that there is no evidence of any linkage between NSA and Mr Arip and Ms Dikhanbayeva. He dismissed the suggestion, in particular, that it is sufficient for Mr Howe to point to the fact that NSA paid KZT 1,255,625,600/US$ 9.72 million to Ada Trade, having between 5 October and 30 April 2010 received from Astana-Contract KZT 1,422,305,092/US$ 11.01 million under the NSA Contract. I have already dealt with Ada Trade. I agree with Mr Twigger, however, that a linkage between that company and Mr Arip and Ms Dikhanbayeva is not sufficient in isolation, even taken with the fact of the payments made to Ada Trade by NSA, to establish a linkage between NSA and Mr Arip and Ms Dikhanbayeva. The starting point, however, given the other linkages which I have described, the more so given Mr Arip's and Ms Dikhanbayeva's insistence that they had nothing to do with the various complicated transactions which I have also described, must be one of suspicion concerning what was happening in relation to those transactions. Ultimately, however, central to the Astana 2 Claim is the Claimants' assertion that the construction works for which they paid were not actually carried out or, if they were, only to a minimal degree. Only if the Claimants are right about this, will it be necessary to consider other aspects of the Astana 2 Claim. Equally, if works were carried out and those works have a value, the consequence will be, as Mr Howe acknowledged and consistent with my approach in relation to Akzhal-1/Akzhal-2, that the size of the claim will fall to be reduced accordingly. It is, therefore, important to consider the evidence concerning the construction work which was performed.

324. The only expert evidence on this question came from Mr Jackson since I was informed by Mr Howe that funding issues meant that the Claimants were not in a position to maintain instructions to Mr Tapper to carry out an equivalent

valuation to that performed by Mr Jackson. In such circumstances and since also Mr Howe did not cross-examine Mr Jackson in relation to his Astana valuation, it is not really open to the Court to reach a conclusion which is at odds with Mr Jackson's valuation in the sum of KZT 933,739,306/US$ 7.23 million (inclusive of VAT). Three points nonetheless arise. First, Mr Jackson's valuation does not include any costs associated with design work. Secondly, there is an issue as to whether credit ought to be given in respect of steel and machinery which was at one stage on site. Thirdly, for reasons which I have previously explained, I consider that Mr Tapper's approach to rates is to be preferred. Although Mr Tapper has not produced an alternative valuation based on his preferred rates (and unit rates), it would make little sense if Mr Jackson's valuation as regards Astana were not revised to take account of the matters which I have previously identified. Fourthly, although Mr Twigger is right to observe that the point was not put to Mr Jackson in cross-examination, there is an issue concerning when the works identified by Mr Jackson, and which he has valued, were carried out. I need say no more about the third matter. I do, however, need to address the first, second and fourth matters. I start with the fourth but, as a general point, I agree with Mr Twigger that, in view of Mr Jackson's valuation, the Claimants cannot make out their case that no meaningful work was carried out or that no materials were supplied. Specifically, the suggestions in opening which Mr Howe made that the construction works performed by GS were *"worth (at most) just over US$1 million"* and that *"very little value of goods or services was supplied"* under the NSA Contract are not suggestions which seem to be sustainable.

325. Turning, then, to the fourth point, Mr Howe's submission was that no substantial work was carried out after June 2010, and so several months after the last of the payments to GS had been made, namely on 8 September 2009, after the payment to TESS had been made on 14 August 2008, and after the last payment to NSA which was made on 30 April 2010. This, Mr Howe submitted, is consistent with an email which was sent on 7 May 2010 by Astana-Contract's former President, Ms Musagalieva, to Ms Dikhanbayeva and Mr Tulegenov and in which she explained that, following a technical audit, it had not been possible to prove how US$ 4 million of the US$ 22 million DBK loan had been used. Specifically, Ms Musagalieva stated as follows:

"only 4.5mln have been used ... we have done our best to 'convince' the auditor to use 18 mln for construction ... we feel that the Bank is aware of project violations and that they are loyal to us to a certain degree ... If we fail to provide a clear answer to their requests as to the application of the funds soon, and if no construction work is performed at the facility, we may end up with an additional audit, not only a repeated technical audit and financial inspection. In this case, our data concerning 18 mln will be absent from the reports. Besides, the absence of the down payment for construction work and inappropriate expenditures will be revealed ... Summing up, I would like to repeat that the ISSUES have to be DEALT with as soon as possible without letting 'other' inspections happen."

Mr Howe pointed out that this email was sent three days after the date of a report prepared by T&M Consulting LLP ('T&M') on the use of funds provided by DBK for the Astana development, what had stated that:

"As of the date of conducting the Evaluation of the Facility, the actually absorbed amount of funds, according to the Acts of delivery and acceptance was KZT 2,404,689,220."

In other words, Mr Howe submitted, although as much as KZT 2,404,689,220/US$ 18.6 million had been paid by DBK and Astana-Contract, according to Ms Musaglieva, only US$4.5 million *"had been used"*.

326. Furthermore, Mr Howe went on, Mr Tulegenov forwarded Ms Musaglieva's email to Ms Dikhanbayeva, copying Mr Arip, the same day, telling her to *"Please pass this message on to Maksat"*, before the same day emailing Ms Dikhanbayeva again (copying in both Mr Zhunus and Mr Arip), saying this:

"Based on the results review of the technical audit, we were provided with 18 million. Today the Development Bank of Kazakhstan called and demanded that we return the remaining amount of 4 million in cash.

They are indignant that we have not been able to complete the used of the funds for their designated purpose in one and a half years. For our part we reported that the money is being paid for the construction site. We urgently need money to close the remaining amount of 4 million."

Mr Howe submitted that these exchanges demonstrate that the sums drawn down from DBK were misappropriated and that at most only about US$ 4.5 million had been used, he suggested, to give the impression that some construction activity had been undertaken at Astana 2.

327. When Ms Dikhanbayeva was asked about this, specifically about the second of Mr Tulegenov's emails, she explained that she did not recollect it. Mr Twigger suggested that, given that she was employed by Exillon at this time, it was hardly surprising that she would not do so. I find that hard to accept, however, since it seems to me that there is considerable force in Mr Howe's submission that Mr Tulegenov was sending the email precisely because he considered that there had been some misuse of DBK's funds and wanted to raise that concern with the people involved. Although Ms Dikhanbayeva suggested that there could not have been any misappropriation since the money stayed in the KK Group, I consider that this was not really an answer to what Mr Howe was putting to her. Nor did I find Mr Arip's evidence on this topic very satisfactory:

"So what Sergey Tulegenov is saying, that money from this project, instead of being spent on the construction was sent back to Kazakhstan Kagazy. And that is what we have seen from the account. Nevertheless, they are saying that I have to pay, or suggesting -- they are not saying, like, I have to do it, but they are just saying we urgently need 4 million and obviously my reaction was they have to come from the company, because money was sent to the company so the company have to give you this from me and -- nothing to do with me. But what I also heard, roughly the same time, from Mr Gerasimov, because that was quite

an issue in that period of time, he said that actually also position of the DBK was inadequate, because what had been happening is that bank experienced some liquidity problems, they didn't want to continue projects, they didn't want to disclose, they were simply reluctant to admit that money was spent. So it was kind of back and forward with the bank, everyone understood nothing was stolen, but I had been under pressure just to find money and give cash to the company, and these people were under pressure, they were threatened, they was panicking with all kinds of investigations which might come from the company or from the bank, and which later on actually has happened, there was a lot of litigation about this money and criminal investigation about this money. But all these investigations and litigations actually found that all the money was spent on the proper purposes and the rest was returned to the Kagazy Group."

Mr Arip was plainly being approached because it was thought that he needed to know about the concerns which had been raised. I do not accept that there was a more innocent explanation. The immediate question, however, is whether these exchanges provide support for any suggestion (not, as I understand it, in fact, made by Mr Howe) that Mr Jackson has over-valued the works which were carried out. I do not consider that they do. Ms Musagalieva's reference to US$ 4.5 million has the appearance of an estimation. It would be wrong, in my view, therefore, to treat it as being too exact. Mr Jackson's valuation is, in my view, obviously more reliable.

328. There remains, however, the question of whether the works which Mr Jackson has valued, or the majority of them, were carried out after June 2010. Mr Howe relied for these purposes on passages in Mr Jackson's report which he suggested should be taken as Mr Jackson saying that most of the works now visible at Astana 2 were carried out after 1 June 2010 and before 11 November 2010. Specifically, Mr Howe highlighted how, in referring to various satellite imagery, Mr Jackson began by stating that *"By 30 May 2008, basic site preparation had taken place"* before going on to state that *"However, by the following year on 7 June 2009 very little further work, if any, had been undertaken"* and then stating that *"A year later, on 1 June 2010, some construction work had taken place and materials had been brought to the site and were being stored"* before stating alongside another image that *"By the winter of the same year, 11 November 2010, work had progressed such that grid lines of columns had been constructed, the site had been fully levelled and prepared and the access road around the main warehouse area had been constructed."*

329. I cannot agree with Mr Howe about this. It seems to me that Mr Jackson ought not to be treated as saying that the bulk of the Astana 2 works were performed after 1 June 2010. If there were any doubt about this, it is removed by what Mr Jackson went on to say over the page:

"In summary:

- *Basic site preparation took place, probably in April/May 2008.*
- *Little or no work was carried out in the first half of 2009.*

- *Most work was carried out later in 2009 and into 2010.*

- *By 2011 no further progress appears to have been made.*

- *The work that I have seen on site in 2016 is the same as that which was carried out up to 2010.*

- *There are now no materials on site."*

Quite clearly, as Mr Twigger submitted, site preparation work started in spring 2008 and the bulk of the works took place between mid-2009 and late 2010. It is, therefore, not right to suggest that meaningful works only started after June 2010. I agree also with Mr Twigger that this timeline is consistent with all of the payments made under the contracts, in that those made to TESS on 14 August 2008 included payments for design work, those made to GS ran throughout the period of the preparatory and main work, and those made to NSA also ran throughout the period of the bulk of the work. In these circumstances, it seems to me that it would be a mistake to conclude that the majority of the works was carried out after June 2010.

330. I come on now to deal with the second matter which stems from the last of the bullet points in Mr Jackson's summary timeline: the reference to there being *"now no materials on site"*. Mr Jackson was here (and elsewhere in his report) noting that materials had previously been stored on site but that they had been removed before he was able to value them. Specifically, in their report dated 4 May 2010 T&M confirmed that materials (travelling bridge cranes, structural steel for the warehouses, wall panels, corrugated metal panels and fencing) had been brought on to the site. T&M subsequently, in a further report, described there as being 2 travelling cranes of 50 tonne lifting capacity stored on the site with some components also being stored at Akzhal. Subsequently, in 2013 Bereke-Kab photographed materials on site such as metal sections, trusses and beams, gantry crane elements, corrugated sheets, temporary fencing and mineral wool sandwich panels. By the time that Mr Jackson visited, however, these items had been removed.

331. Mr Werner was asked about this by Mr Twigger, specifically about an email which he sent to Mr Khabbaz on 12 April 2012 and in which he described having been informed *"that there were around $30 million of steel lying around. Aida tells me that there are 1.385 tons of steel"*, and a further email in which Mr Khabbaz responded by saying *"By the way, judging from the picture, no way it's only 1.385 tons of steel, it's much more. You guys have no clue!"*. The following exchange took place between Mr Werner and Mr Twigger:

"Q. So given that there was $30 million of steel on the Astana site in April 2012, which you knew about, why are the claimants alleging that the acts of acceptance submitted by GS are false?

A. It is a little bit strange that about an hour ago I was told of knowing about a fraud that now you are saying doesn't exist because this is worth more than 30 million. It is a little bit strange that I have to answer just the opposite of what you were trying to prove about an hour ago.

Q. I'm afraid you do have to answer, Mr Werner, because that is how this process works. So why were you making allegations that work had not been done and acts of acceptance were false, in respect of $30 million worth of steel that Hermann saw?

A. I have not made any allegations. I have not made the calculations. This is not my estimation of the amount of the fraud. This has been an estimation that initially the Business Audit reported and then further investigations have established."

Mr Werner went on to describe how the steel had been sold since these proceedings were started, but he was insistent that he did not know how much was received for it. Mr Twigger submitted that, in the circumstances, since credit ought to be given in respect of the steel and since the best evidence as to its value is US$ 30 million, that is sufficient to dispose of the Astana 2 Claim which is, after all, valued at somewhat less, namely US$ 13.45 million. I agree with Mr Howe, however, that it is unclear how the emails which Mr Werner was asked about can really be thought to be reliable evidence of anything, in particular whether as to the quantity of steel on the Astana 2 site or its value or who supplied it. I am, accordingly, not disposed to place any reliance on those emails. The more so, in circumstances where, as Mr Howe went on to point out, on any view, their contents are not readily reconciled with the fact that GS received in net terms US$ 6.7 million, and not US$ 30 million or more.

332. This leaves the first issue concerning design work, which formed part of the work to be carried out under the TESS Contract. It was Mr Twigger's submission that, since the design documents were not before the Court and neither expert had undertaken an analysis of that documentation, the Claimants should be regarded as having failed to prove that TESS did not undertake design work or that it was not worth what was paid to Regul for it. Mr Twigger relied, for these purposes, on certain evidence which was given by Mr Gerasimov, who explained how Regul won a sub-contract from TESS in relation to the design documents. In particular, when being cross-examined about this, Mr Gerasimov explained that, although Regul did not have skills in this area, it did have a design licence and it wanted to expand its business and begin to undertake design work. So it was, Mr Gerasimov went on, that Regul sub-contracted its part of the work to Montazhprojekt which meant its *"margin was relatively low"* but that Regul *"earned a small profit and gained relevant experience on that project"*.

333. There are, however, a number of significant difficulties with this explanation, not least the fact that it can hardly be a coincidence that Regul should have won a sub-contract with TESS as well as a sub-contract with GS. That, however, on Mr Arip's and Ms Dikhanbayeva's case is the explanation. The fact that Regul managed to enter into both sub-contracts, one in relation to design work in which it had no experience, within just a couple of weeks of each other (with TESS on 11 December 2008 and with GS on 26 December 2008) makes the coincidence all the more implausible. Secondly, it is striking that, although Mr Gerasimov explained that *"Regul won a sub-contract from TESS for a part of the designs after it submitted the most competitive bid"*, there is no documentary evidence to support any such bid having been made. Thirdly, and perhaps most

significantly, there is the fact that the sub-contract which Regul entered into with TESS (the Regul Design Sub-Contract) entailed TESS agreeing to pay Regul just KZT 68,049,605 despite having entered into a contract (the TESS Contract) where the price was as much as KZT 574,266,000 and so almost nine times as much. The fact, in these circumstances, that Regul then sub-sub-contracted the design work to Montazhproject for KZT 62,000,000 is really neither here nor there. What matters, as Mr Howe submitted, is that TESS was paid approximately US$ 4.45 million by Astana-Contract for work which was sub-sub-contracted to Montazhproject at a cost of just US$ 480,000 or so, meaning that TESS was able to retain approximately US$ 3.9 million out of the funds which Astana-Contract had received from the DBK loan facility.

334. Mr Twigger sought to meet this last point by suggesting that the payment of KZT 574,266,000 made by Astana-Contract to TESS was not only for design services, but was also for construction work. He pointed out in this context that the TESS Contract was amended by an Addendum dated 12 November 2008 which specified that KZT 452,380,000 (inclusive of VAT) was payable to TESS for development of the detailed project design and that KZT 368,000,000 (inclusive of VAT) was payable for construction. He then explained, again basing himself on what was stated in the Business Audit Report, that those sums were then reduced in a Second Addendum dated 7 August 2009 which specified that KZT 206,266,000 (inclusive of VAT) was payable to TESS for development of the detailed project design and KZT 368,000,000 (inclusive of VAT) was payable for construction work. He also relied upon relevant completion acts supporting the performance of that construction. It was because of this non-design work, Mr Twigger submitted, that certain payments came to be made by TESS to two sub-contractors, namely Aspen Kurylys Company LLP (‘Aspen’) and Sarbaz (or Sabeez) LLP (‘Sarbaz’), for construction services on 15 August 2008. Specifically, Sarbaz received one payment of KZT 130,976,400 on 15 August 2008 pursuant to an agreement dated 12 August 2008 described as being for *“construction services”*, and Aspen received three payments on the same day, namely KZT 141,223,000 pursuant to an agreement dated 12 August 2008 for *“construction services”*, KZT 150,450,000 pursuant to an agreement dated 15 August 2008 for *“construction services”* and KZT 150,450,000 pursuant to an agreement dated 14 August 2008 for *“construction services”*. Mr Twigger submitted that, since it had not been suggested by Mr Howe that these companies were somehow connected with the Defendants, there is no reason to treat the payments to them as being anything other than legitimate. The difficulty with this, however, is that the payments to Sarbaz and Aspen were each made only a matter of days after the TESS Contract had been entered into (on 11 August 2008) and so several months before any addendum was entered into which expanded the scope of the TESS Contract beyond design work. In these circumstances, I am clear that it would not be right to proceed on the basis that the payments were in respect of construction services.

335. It follows that, although Mr Jackson’s valuation must be accepted (subject to recalculation to accommodate different rates) and the size of the already relatively modest Astana 2 Claim must be reduced accordingly, I cannot accept that there should be any further allowance in respect of steel left on site or design costs. The question which then remains is whether, given Mr Jackson’s evidence

that works were carried out, this means that there cannot have been the fraudulent conduct which has been alleged by the Claimants against the Defendants. In my view, the answer to this is that there can be, predominantly because (despite their denials) it is quite clear that Mr Arip and Ms Dikhanbayeva were behind the numerous transfers. The fact that construction work was carried out is not what is important. What matters is whether such work was anything more than 'window dressing'. As to this, although Mr Twigger placed significant reliance on the Acts of Acceptance which are in existence, in circumstances where neither Mr Thompson nor Mr Tapper is in a position to vouch for the accuracy of these documents or, indeed, their genuineness, the safest course is for the Court to proceed on the basis that Mr Jackson's valuation (as modified to reflect rates revisions) is the most reliable guide to the level of works carried out at Astana.

336. Mr Jackson accepted, in terms, when the point was put to him by Mr Howe, that he had *"no view at all"* as to whether a particular Act of Acceptance was genuine or not. As he put it, *"I simply note the documents I have seen and the numbers on them. But I give no view at all as to whether the value stated is correct, or indeed whether the document is genuine"*. As I have explained, although that valuation takes no account of design-related work or the steel to which I have referred, that is, in my view, appropriate. On this basis, although I cannot at this stage (ahead of Mr Jackson revising his valuation) say with any precision what the shortfall will be, it is clear that it will not be insignificant. By this, I mean, of course, the difference between the amount which Astana-Contract expended in relation to the TESS Contract, the First and Second GS Contracts and the NSA Contract, less amounts returned to the Claimants, and the value of the works which were carried out as valued by Mr Jackson.

337. The shortfall, in my view, must be the consequence of the various financial dealings which I have endeavoured to describe. Those are dealings which are opaque and complex but which must have had some purpose and I am clear that this must have been that described by Mr Howe, namely to enable there to be access for the Defendants (and their companies) to the funds which were available to Astana-Contract for construction purposes from DBK. Mr Twigger nonetheless submitted that the fraud which the Claimants have alleged makes little sense and is inherently unlikely when considered in context since it entailed, if the Claimants are right, the Defendants having caused Peak Aksenger to spend US$ 42 million buying Astana-Contract and Paragon in April 2008 in order to gain access to the DBK loan facility in order to misappropriate a much smaller amount, some US$ 13.45 million, when it would have been so much easier, if the Defendants were fraudulently inclined as suggested, for them not to have spent US$ 42 million buying Astana-Contract and Paragon but instead simply to have misappropriated that much larger amount of money. The answer to this, however, is that the alternative fraud suggested by Mr Twigger would, no doubt, have been rather more easily detectable. I do not, in the circumstances, consider that there is anything in this particular submission.

338. In conclusion, therefore, I am satisfied that the Astana 2 Claim has been made out and that Astana-Contract and Paragon are entitled to damages as sought but

with credit being given in relation to the works carried out calculated in the manner which I have described. Specifically and for the avoidance of doubt, for the reasons which I have given, I have concluded that Mr Arip and Ms Dikhanbayeva are both liable to Astana-Contract and Paragon under Articles 917 and 932 of the KCC. In the circumstances, as with the PEAK Claim (and, indeed, the Land Plots Claim), there is no need for me to make any determination concerning Astana-Contract's and Paragon's (alternative) unjust enrichment claims brought under Articles 953, 955 and 956 of the KCC.

Interest and penalties

339. There is a further aspect to the PEAK and Astana 2 Claims which needs also to be considered. This concerns the Claimants' claims in respect of interest, penalties and default interest which they allege they have paid, or are liable to pay, to Alliance Bank, DBK and certain Third Issue Bondholders. The Claimants' position is that they have incurred substantial liabilities in these respects as a result of the Defendants' frauds, specifically that the frauds left them with enormous debts which they could not service and that those debts resulted, in turn, in the liabilities described.

340. It was not in dispute that, in principle, compensation in respect of such liabilities is recoverable, whether as a matter of Kazakh law or as a matter of English law (if applicable). As to the former, Professor Suleimenov had this to say in his third report:

> *"145. Under Kazakh law, where a legal entity suffers damage as a result of wrongful conduct, such legal entity is entitled to claim compensation for the damage caused to it, including the real damage. The real damage includes all adverse consequences caused by the defendants' wrongful conduct and suffered by the victim.*
>
> *146. Therefore, if because of the defendants actions, the claimants were unable to repay the loans, under Kazakh law the defendants could in principle be held liable for the interest/default interest and/or penalties imposed by the bank on the claimants as part of the damage suffered by the claimants.*
>
> *147. However, there needs to be a direct causal link between the defendants' actions and the damage before the defendants can be made liable for that damage. A direct causal link means that the damage results objectively and directly from the wrongful conduct of the defendants. That means that, based on the factual circumstances of the case (the totality of factors) there must be an objective link between the defendants' conduct as a cause and the damage resulting from this cause - the negative and unfavourable property consequences for the victim.*
>
> *148. When a loan is taken, there is always a risk of failure to pay on time or failure to repay the loan due to the borrower's inability to reach the anticipated results of operations, due to changes in economic situation and market conditions, due to business risks, etc. In order to prove that*

the damage was caused by the defendants' actions specifically, it is necessary to establish a link between these actions as a cause and damage as a consequence of this cause. Proving such causal link under Kazakh law requires demonstrating with evidence (e.g., technical and economic calculations) that, if not for the unlawful conduct, the business would have generated income that could have been used to repay the loan and pay interest, and the default interest and penalties would not have been imposed by the bank.

149 The defendants may not be liable if the causal link between their conduct and the damage suffered by the claimants is not established (e.g., because the technical and economic calculations were wrong (e.g., they were unrealistic or the assumptions therein were wrong), or because the business would not have achieved the level of profitability to repay the principal and interest under the loans (e.g., due to economic crisis)).

150. Whether the defendants' wrongful conduct was (a) one of the causes of the damage, (b) the main cause or (c) the only cause, may be relevant to determine the size of the damage caused by the defendants and accordingly the limit of the defendants' liability. For instance, if it were established that the defendants' conduct was one of the causes and, apart from it, the damage had other causes, for example, the crisis on the real estate and financial markets of Kazakhstan, the defendants would be entitled to a proportionate reduction of the compensation to be paid by them. If it is established that the defendants' conduct was the only or the main cause, the defendants would be liable to compensate for the damage in full."

341. As to English law, Lord Nicholls in ***Sempra Metals Limited v HMRC*** [2007] UKHL 34 explained the position at [94] and [95] as follows:

"94. To this end, if your Lordships agree, the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.

95. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law."

342. It follows that the Claimants need to establish two things: first, that the payments were made, or that there are liabilities which will cause the Claimants to suffer loss in the future; and secondly, that such payments or liabilities were caused by the Defendants' wrongdoing.

343. Although it was common ground between Mr Howe and Mr Twigger that this is what the Claimants must do, there was an issue in relation to the second (causation) aspect inasmuch as Mr Twigger sought to contend, specifically as regards the Alliance Bank aspects of the claims for interest, penalties and default interest, that where sums were drawn down from the Alliance Bank credit line in different amounts at different times, the Claimants must show that each sum drawn down is referable to an amount shown to have been misappropriated. Mr Twigger's submission was that there is no evidence to show that particular sums drawn down were paid to Arka-Stroy at all nor that any sums returned by Arka-Stroy have not been included within the amount on which interest is claimed. I cannot accept that Mr Twigger is right about this, however, since I detect no such requirement in Professor Suleimenov's description of the appropriate approach to be adopted in the passages from his third report at paragraphs 145 to 150 which I have set out above. In such circumstances, I agree with Mr Howe when he submitted that there is no need for some sort of tracing exercise, and that the question is simply whether the losses in question were incurred as a result of the Defendants' wrongdoing. I shall come back to the causation issue shortly in order to address certain particular arguments advanced by Mr Twigger. First, however, I should explain what it is that the Claimants seek to recover.

344. In relation to the PEAK Claim and the relevant facilities with Alliance Bank, the total amount claimed is KZT 13.147 billion, made up as follows: interest paid to Alliance Bank up until August 2012 by PEAK in the sum of KZT 1.952 billion (approximately US$ 15.155 million); interest paid to Alliance Bank by KK JSC up until August 2012 in the sum of KZT 16.319 million (approximately US$ 109,000); penalties in the sum of KZT 7.232 billion (approximately US$ 38.9 million) and default interest in the sum of KZT 2.72 billion (approximately US$ 14.6 million) which KK JSC, PEAK and Peak Akzhal are liable to pay to Alliance Bank; and interest in the sum of KZT 1.253 (approximately US$ 9.436 million) which KK JSC has paid and is liable to pay to the Third Issue Bondholders.

345. In relation to the Astana 2 Claim, the claims are made by Astana-Contract and Paragon as follows, although it was acknowledged by Mr Crooks (and, at least as I understood it, by Mr Howe also) that these amounts will need to be adjusted to reflect my determination that what is recoverable in respect of the Astana 2 Claim is not everything which has been claimed. The following figures, which are figures verified by Mr Crooks and which differ to some degree to what is in the Re-Re-Amended Particulars of Claim, will, accordingly and on any view, need to be adapted to reflect what I have decided in relation to the Astana 2 Claim: interest in the sum of KZT 853,966,842 paid by Astana-Contract and Paragon to DBK up until October 2009; penalties in the sum of US$ 14,203,000 payable by Astana-Contract and Paragon to DBK up until October 2009; and default interest in the sum of US$ 15.824 million payable by Astana-Contract

and Paragon to DBK and Investment Fund of Kazakhstan ('IFK') which acquired the liabilities from DBK in 2013. Even these figures do not, however, reflect what is claimed because, as Mr Tapper explained, they need to be apportioned to reflect a comparison between what is recoverable in respect of the Astana 2 Claim and the amount of the loan from DBK. Mr Crooks originally reduced the figures by 25% but revised this subsequently to 22.53%. Clearly, however, that apportionment will need to be further revised.

346. Turning to the evidence concerning the various payments and liabilities, this consisted of evidence given by Mr McGregor in his third and thirteenth witness statements and the reports which Mr Crooks prepared in which he sought to verify the information provided by Mr McGregor. Mr Thompson then reviewed the available material and so his evidence needs also to be considered. The upshot of Mr Thompson's work was that, although he was able to verify the majority of the interest payments to Alliance Bank, he could only verify about half of the interest payments to DBK. Moreover, he was unable to find evidence that penalty and default interest would be payable. Specifically, in relation to the PEAK Claim, as Mr Twigger pointed out in closing, Mr Thompson identified that PEAK paid interest in the sum of KZT 1,932,243,207 to Alliance Bank in respect of loans drawn down under credit line 1928 S/06 during the period of the Defendants' management but excluded from consideration a further sum of KZT 19,801,590 which was paid between 15 May 2012 and 27 June 2012 in respect of a loan entered into on 5 November 2010 when the Defendants were no longer at the KK Group. As for interest payments in the sum of KZT 16.319 million from KK JSC to Alliance Bank, Mr Thompson was unable to identify actual proof of payment but that he had seen accounting entries in KK JSC's and PEAK's 1C databases where such payments appear. As for default interest and penalties, Mr Thompson's position was that he understood Alliance Bank not to be enforcing those liabilities following entry into a Co-operation Agreement on 4 September 2014 (the '2014 Co-Operation Agreement') to which I shall return. Lastly, as to payments from KK JSC to the Third Issue Bondholders, Mr Thompson identified payments totalling KZT 1,163,763,435 but not otherwise and queried the relevance of entries in certain 1C database extracts relied upon by Mr Crooks in circumstances where those indicate that payments were made by other companies in the KK Group which are not amongst the Claimants.

347. As regards the Astana 2 Claims, Mr Thompson identified that Astana-Contract and Paragon paid interest in the sum of KZT 853,966,842/US$ 5,697,650 to DBK prior to October 2009. In relation to penalties and default interest due to DBK, however, Mr Thompson's position, as described in the experts' joint statement, was that, although he agreed that penalties and default interest in the sums of US$ 14,203,000 and US$ 15,824,000 respective *"are consistent with liabilities in the KK's Group's financial statements for the year ended 31 December 2013 and 2014"*, he had *"not identified any evidence that penalties or default interest"* in those amounts *"were repaid to DBK, or that the KK Group intends to repay them"*, apparently based on the fact that in KK JSC's 2016 Rehabilitation Plan it is stated that as at 31 December 2015 there was no outstanding obligation to DBK owing to the bankruptcy of Astana-Contract.

348. Mr Howe explored a number of these points with Mr Thompson during the course of cross-examination. It emerged as a result that the exercise which he had been asked to perform was *"specific"* and entailed him being instructed *"to identify payments in respect of interest, and so in this case I hadn't identified such a payment"*. This was an answer which Mr Thompson gave to a question concerning his approach to payment entries appearing on 1C databases as opposed to what Mr Howe described as an *"actual payment"*. This short exchange then followed:

"Q Yes, I see. So you are interpreting your instructions as actual payments?

A. Absolutely, yes.

Q. And evidence of payments on the basis of that instruction, you don't think is enough for suggestions that a payment may have been made?

A. Just to be clear, again, I'm not saying whether I think it is enough, not enough, right or wrong.

Q. Yes.

A. I am merely setting out what I have seen, and I have not seen a payment of cash.

Q. Yes, I see. That is helpful, thank you."

It was, indeed, helpful to understand what approach Mr Thompson had been asked to adopt since it demonstrated very clearly that it was too restrictive. I am quite satisfied that Mr Crooks was right to take it that entries in the 1C databases were sufficient to enable payments to be verified. I suspect also that, but for the way in which he had been instructed, Mr Thompson would have agreed with Mr Crooks about this. Nor was I impressed by other points which Mr Thompson raised, again no doubt on instructions, concerning, for example, KK JSC's 2016 Rehabilitation Plan. As Mr Thompson acknowledged, this was not a point for him since this was a legal point. Another example concerns Mr Thompson's reference to the fact that KZT 1,932,243,207 was repaid in relation to a loan entered into on 5 November 2010 when the Defendants were no longer at the KK Group. Mr Thompson replied to Mr Howe's question on the topic by saying *"Again, I draw that fact out. Again, I give no view as to whether it is right or wrong. I simply make the observation"*.

349. In these circumstances, I cannot accept Mr Twigger's submission in closing that Mr Thompson's evidence *"had not been undermined"* so as to mean that the Court should reject all payments and liabilities that Mr Thompson has not verified on the basis that the Claimants have failed to evidence their claim. On the contrary, I am quite satisfied that through a combination of Mr Thompson's evidence and the verification exercise conducted by Mr Crooks that the Claimants have done just that.

350. This brings me, however, to the question of causation which I propose to address by dealing, first, with the single objection which Mr Arip and Ms Dikhanbayeva

take concerning the Astana 2 Claim. This is the point to which Mr Thompson referred concerning KK JSC's Rehabilitation Plan, specifically the fact that on page 8 of this document there is a footnote explaining that the list of *"short-term part of interest bearing loans"* set out in Table 1 *"does not include the debt to IFK due to the bankruptcy of Astana-Contract Group of Companies"*. Mr Twigger suggested to Mr McGregor that this reflects the reality that there was no continuing liability on Astana-Contract or Paragon's part to IFK. He also put it to Mr McGregor that, furthermore, Astana-Contract and Paragon (described by Mr McGregor as *"empty shells with no assets and no business"*) having assigned the Astana 2 Claims to KK Plc, any monies recovered will not go to Astana-Contract or Paragon (and so onwards to IFK). I agree with Mr Howe, however, that this does not matter since all that is important is that the liabilities came into existence. Astana-Contract and Paragon were entitled to enter into the assignment arrangements which they did. The fact that they did so does not in and of itself mean that the liabilities to IFK came to an end. It would be very odd were it to be the case that an assignment has the effect that the claim which is assigned (or part of that claim) comes to an end. Indeed, Mr Twigger cited no authority, whether under Kazakh or English law, to suggest otherwise.

351. As for the PEAK Claim, Mr Twigger made a number of criticisms concerning Mr McGregor's evidence, including in relation to Mr McGregor's reliance, in putting together the details of the amounts claimed, on the Co-Operation Agreement entered into on 4 September 2014 to which I have previously referred when setting out what Mr Thompson had to say concerning the verification exercise which he performed. That agreement was concluded between KK Plc, KK JSC, Peak LLP and Peak Akzhal and Alliance Bank. Importantly, it refers by way of background in recital B to the underlying credit line No. 1928 C/06 dated 1 November 2006, a contract which Mr Twigger was right to observe in closing Mr McGregor appeared not to know very much about, his position, rather, being that *"what had happened before is of course rolled up"* into the 2014 Co-Operation Agreement (and, at least as I understood it, a settlement agreement described in the 2014 Co-Operation Agreement as a *"Termsheet Agreement"* entered into on 11 July 2014). He described this as *"the very start of that particular journey"*, by which he explained that he meant that the 2014 Co-Operation Agreement was *"based on the loan agreements that were originally entered into and everything else which has happened since those were entered into, and this is the place that you've come to"*. Mr Twigger's response was to suggest that, as a lawyer, Mr McGregor should not have accepted *"what the other side say"* but should have checked that it was right. Mr Twigger was referring here to the fact that the Co-Operation Agreement described there as being a penalty liability of KZT 7.232 billion and a default interest liability of KZT 2.72 billion. Mr McGregor admitted, however, that he just assumed that this judgment related to sums drawn down for the purpose of developing the PEAK construction projects. I consider, however, that Mr Twigger's criticism in this respect was not warranted. Mr McGregor was, in my view, quite entitled to approach the matter in the way which he described.

352. In any event, in view of the verification exercise carried out by Mr Crooks, it is clear that nothing turns on Mr Twigger's criticism of Mr McGregor in this

respect. In particular, although Mr Howe was concerned at one stage that Mr Twigger might seek to argue (as Mr Thompson had implied in his first report) that the 2014 Co-Operation Agreement entailed the KZT 7.232 billion by way of penalties and the KZT 2.72 billion by way of default interest being written off by Alliance Bank, that was not ultimately an argument which Mr Twigger put forward other than, perhaps, in a footnote and in something of a throwaway reference to penalties and default interest having been *"relinquished"* pursuant to the 2014 Co-Operation Agreement. That is, however, an argument which does not work since, as Mr Howe pointed out, the clause providing for a mutual release between the KK Group and Alliance Bank, Clause 6.1, was *"Subject to the complete performance by all relevant KK Group entities of their obligations under clauses 2.1 to 2.10 … together with complete performance by Alliance of its obligations under clauses 2.12 to 2.16 …"*, and those provisions required the Claimants, *"In the event that any one or more of the KK Claimants is awarded judgment or reaches a settlement…in respect of the PEAK Claim"* to pay over the fruits of any such judgment or settlement. Since there has to date been no judgment or settlement of the PEAK Claim, and so there has been no payment of any proceeds to Alliance Bank, it necessarily follows that there cannot have been any release pursuant to Clause 6.1.

353. In the event, Mr Twigger advanced really only two causation arguments over and above his contention, which I have rejected, that the Claimants need to show that particular sums drawn down are referable to particular amounts which have been misappropriated. The first point was very generalised. It was that the Defendants' wrongdoing did not amount to the sole cause of any inability to repay the Alliance Bank (and, for that matter, the DBK) loans since there is also the global financial crisis to consider as that was also likely to have had a severe negative impact upon the Claimants' ability to repay. I regard this as an argument which is simply too vague. In any event, as Professor Suleimenov has explained, the inability to repay need not have been exclusively caused by a defendant's wrongdoing in order for a claim to succeed. In any event, on the evidence, it is quite clear that the substantial cause (if not the sole cause) of the inability to repay was the fact that there had been extraction of funds on a large scale as alleged by the Claimants.

354. Secondly, and rather more specifically, Mr Twigger criticised Mr McGregor for not having referred to a different Co-operation Agreement which KK JSC, PEAK and Peak Akzhal entered into with Alliance Bank on 22 October 2010 (the '2010 Co-Operation Agreement'). Indeed, Mr McGregor confirmed that he had not seen this agreement until it was referred to in Defendants' written opening submissions. Nor, he also confirmed, had he been aware of a document apparently prepared by Ms Yelgeldieva for the KK Group's auditors in April 2013, in which she stated as follows:

"PEAK LLP had initially defaulted on its obligations to Alliance Bank JSC in the third quarter of 2009. As a result of negotiations, in fourth quarter of 2010, Kazakhstan Kagazy Group of companies concluded with Alliance Bank JSC a Cooperation Agreement, addendums to Loan Agreements and refinanced the debt to Eurasian Bank JSC. …

At the time of the restructuring Alliance Bank loan and refinancing Eurasian Bank loan, all penalties that were charged to the Group during the default period were cancelled. Also payments of the principal amount (except for 7.5 million tenge per month) were deferred until March 2014, current accrued interest and accumulated overdue interests were deferred until March 2013 and March 2012, respectively.

One of terms of the restructuring of Eurasian Bank loan was repayment of 50% of the refinanced debt which was problematic for the business mainly for Class B warehouses, as it was servicing the debt. Under such circumstances, in February 2011, an addendum to the existing loan agreements was signed with Alliance Bank under which repayment schedule were changed, maturity date for repayment of 50% abovementioned debt - 396,900,000 tenge during 2011-2012 were extended. This resulted in successful completion of the first stage of the restructuring.

In order to fulfill the payment terms, the Group repaid Alliance Bank JSC 369.9 million tenge which were proceeds from the sales of Kazupack production site.

Allaince [sic] Bank loan is serviced by cash flows generated from Class B warehouses, however funds are insufficient for serve the debt under the current repayment schedule.

In March 2012 the Group requested Alliance Bank to reconsider the repayment schedule. As a result, Bank agreed to delay repayment the previously agreed interest payable in March and April 2012 to 15 May 2012 and in the meantime to consider alternatives to change debt servicing terms.

In May 2012 the Group proposed the Bank debt restructuring with the following major terms:

• Write-off the part of the principal debt

• cancellation of the requirement on payment of the accrued interest until 1 January 2012.

• deferral of the current interest payment until 2013.

• investments in the development of the Class B warehouses of 1.4 billion tenge during the period from 2012 to 2016.

However the Bank declined such proposal of the Group. The bank announced main terms of the restructuring such as increase of monthly payments and extension of the period provision of guarantee by Kazakhstan Kagazy JSC.

On 15 May 2012 PEAK LLP defaulted on payments under the repayment schedule and at present the Company is in default as no agreement on new terms of the debt servicing has been achieved yet."

355. Mr Twigger drew attention in closing to the fact that Mr McGregor was unaware of these matters, submitting that they were, however, significant since, as he put it, they demonstrate that *"the chain of causation was broken in 2010"*. Mr

Twigger highlighted in this context that the 2010 Co-Operation Agreement provided in clause 1.5.4.1 as follows:

"In relation to the past due interest to the Bank on loan obligations and interest of the bank on Debtors; obligations which shall arise as a result of additional financing, from the date of the additional financing and restructuring of the loan obligations. There shall be a grace period estabished for the Debtor in payment of this interest, for the period until 1st of March 2012."

In other words, the agreement was that there would be a grace period. In addition, and particularly relied on by Mr Twigger, the 2010 Co-Operation Agreement went on in clause 1.7 to provide as follows:

"If the Debtor, Company and the Partnership fulfills its obligations stipulated in the clause 1.4. and 1.6 of the present Agreement, the Bank shall agree:

1.7.1 cancel (forgive) the penalty fee charged on past due principal debt and past due interest as of the date of conducting of restructuring of the loan obligations of the Debtor.

1.7.2 Not to collect from the Debtor the commission for submission of the restructuring of acting loan obligations of the Debtor."

Clauses 1.4 and 1.6 were in these terms:

"1.4 The Parties agreed that the restructuring of the loan obligations of the Debtor and Additional financing of the Debtor to be made by the Bank shall be realized only if all below mentioned conditions are performed:

1.4.1. Lack of arrests and other encumbrance from the third parties in respect of the Security and Additional Security, except the right of the pledge of Eurasian Bank JSC for Encumbered Assets;

1.4.2. Availability of the state registration of the rights of pledge/surcharge of the Bank in respect of all objects of the additional Security;

1.4.3. Signing of the correspondent agreements, contracts, additional agreements, including those for Loan Obligations to be made by the Debtor, Company and/or the Partnership in relation to granting of Additional financing, restructuring of the Loan Obligations of the Debtor and submission of the Property of the Partnership as pledge and surcharge of Encumbered Assets.

…

1.6. The Parties agreed with the following terms of submission as a pledge to the Bank the following additional security:

1.6.1. The Partnership within 3 (three) working days from the date of signing of the present Agreement shall submit to the Bank the title and other documents, related to the property of the Partnership. ln relation to the encumbered assets, the Company and/or the Partnership, within the

term stipulated in the present sub clause, shall submit to the bank the consent of Eurasian Bank JSC on recharge of the corresponded Encumbered assets and transfer to the bank notary certified copies of the title and other documents related to these assets.

1.6.2. The Company and the Partnership shall submit the Additional Security as a pledge to the Bank, in order to provide the fulfillment of the Debtor's obligations, which shall arise as a result of the additional financing.

1.6.3. The bank, in its turn, shall prepare the pledge agreements/recharge for the additional security.

1.6.4. The Company and the Partnership shall submit to the authorized representative of the bank power of attorney and other documents necessary for registration of the pledge agreements/recharge in the authorized body and also direct its authorized representative signed the pledge agreements to the correspondent state body in order to participate on its registration. By the requirement of the Bank, the Company and/or the Partnership shall independently take all measures necessary for registration of the pledge/recharge agreements in the authorized state body. All expenses on the state registration of the pledge/recharge agreements shall be paid by the Company and/or the Partnership correspondingly.

1.6.5. Within 5 (five) calendar days from the date the debtor makes transfer of the funds to Eurasian Bank JSC for repayment of the refinanced loan obligations of the Company, the Company and/or the Partnership shall provide remittal of the encumbrance of Eurasian Bank JSC from the Encumbered Assets transferred as recharge to the bank, and submit to the bank the corresponding references on availabllity (lack) of encumbrance on immovable property and transactions related to it, issued by authorized state body, and also with lack of any encumbrance on these assets from Eurasian Bank JSC and any other third person and also the originals of the title and other documents related to the Encumbered Assets."

356. Mr Twigger put to Mr McGregor that he had no reason to believe that the *"obligations stipulated in the clause 1.4. and 1.6 of the present Agreement"* had not been fulfilled. Mr McGregor's perfectly reasonable response was to say that he did not know but that, in effect, what mattered to him was that in 2014 Alliance Bank was operating on the basis that there was still a liability. Again, it seems to me that Mr McGregor was entitled to take this view since, as Mr Howe pointed out in closing, there is no evidence to indicate whether the pre-conditions were fulfilled or not other than Ms Yelgeldieva's statement in her note that *"all penalties that were charged for the Group during the default period were cancelled"* and her reference to the *"successful completion of the first stage of the restructuring"* in 2011. In short, I am not persuaded that the 2010 Co-Operation Agreement has been demonstrated to have brought to an end the relevant liabilities. Nor do I agree with Mr Twigger's related submission that it is not open to the Claimants to claim in respect of penalties and interest

in circumstances where in May 2012 it became apparent that the restructuring had failed and the KK Group defaulted on the restructured loan on the basis, so Mr Twigger argued, that any wrongdoing committed by Mr Arip and Ms Dikhanbayeva in relation to the PEAK Claim can only have caused the penalties and default interest that accrued following the KK Group's default in the third quarter of 2009 and any failure to perform to the level intended when restructuring in late 2010 was nothing to do with Mr Arip and Ms Dikhanbayeva. The more so, Mr Twigger suggested, given that the principal sum had been increased by the refinanced sums under the Eurasian loans. The answer to this submission is that the Eurasian loan was entered into, and drawn down, under the Defendants' management, as Mr Thompson himself confirmed. It was, accordingly, a loan which, as Mr Howe put it, the Claimants *"were saddled with"* and that is why it came to be refinanced pursuant to the 2010 Cooperation Agreement and a related Loan Agreement entered into on 5 November 2010. It did not entail any fresh lending. In such circumstances, bearing in mind that the Claimants' ability to recover interest and penalties as damages is not contingent on them being able to establish that the amounts misappropriated were the very amounts borrowed, it must follow that Mr Twigger's 'break in the chain of causation' argument cannot succeed.

357. In conclusion, therefore, the claims in respect of interest, penalties and default interest succeed.

The Land Plots Claim

358. Turning to the Land Plots Claim, it will be recalled that this entails the allegation that the Defendants used nominee companies to acquire land plots cheaply from farmers in Kazakhstan which were then re-sold to KK JSC, ostensibly for development, at highly inflated prices. Specifically, the Claimants say that, at the instigation of the Defendants, KK JSC paid out a net total of KZT 6,344,103,952/US$ 52.097 million to three entities associated with the Defendants, namely CBC, Bolzhal and Holding Invest, purportedly in payment for the purchase of fourteen land plots, and that those three entities then paid on US$ 44.29 million to seven further entities associated with the Defendants (Lotos, TEW, Trading Company, Ritek, Mouli, Biznes-Privat and TESS), each of which also features (along with CBC, Bolzhal and Holding Invest) in the PEAK Claim.

359. Mr Howe suggested in closing that this *"turns on the explanations that have been advanced"* for what he described as an *"extraordinary set of arrangements"*. He was right about this, as demonstrated by the fact that Mr Twigger's focus in his submissions was on explaining that the land plot transactions which are the subject of the Land Plots Claim were unexceptional and legitimate from a commercial perspective. Specifically, Mr Twigger suggested that they were entered into at a time when Kazakhstan was experiencing an unprecedented economic boom and when KK JSC had good liquidity relative to its competitors which meant that acquiring more land was commercially sensible. If, Mr Twigger suggested, the land plots were acquired at the peak of a turning market, that was not clear at the time and anyway does not warrant a conclusion that there was fraud on the Defendants' part. Moreover, Mr Twigger submitted, the structure used for the purchases was not

uncommon in Kazakhstan at the time and had, indeed, been used by the KK Group itself when acquiring other land plots.

360. This, then, is what needs to be considered in deciding the liability question. Depending on the answer to that question, there is a further issue requiring determination as regards quantum. The Claimants' case is that the entire amount (KZT 6,344,103,952/US$ 52.097 million) which was paid by KK JSC to CBC, Bolzhal and Holding Invest has been misappropriated since there was no sound commercial reason for the purchase of the land plots. Alternatively, the Claimants say that only limited credit should be given to reflect the limited value of the land plots which were acquired. Applying Mr Mayhew's valuation and focusing on the land plots purchased via CBC and Bolzhal (ignoring, therefore, for reasons which will become apparent, Holding Invest), the Claimants' position is that the damages recoverable will reduce by approximately US$ 9.755 million so bringing the claim down to something in the region of US$ 40.42 million, whereas adopting Mr Kuznetsov's approach, and depending on what date is taken in relation to valuation, the amount recoverable would either be approximately KZT 4,180,535,020/US$ 34.2 million or KZT 3,716,899,719/US$ 30.33 million.

361. It can be seen, therefore, that, at least in relation to the Claimants' alternative case, the dispute is relatively limited, subject only to the Claimants being right on the relevant dates to use for valuation purposes. I shall return to that aspect of the quantum issue later, after first dealing with the question of liability, but it is convenient to deal with the question of whether any credit at all should be given right away since I am clear that the Claimants are not right about this. Mr Howe submitted that it would be inappropriate to require that credit be given for two reasons. First, Mr Howe suggested that the Defendants having (so it is alleged) organised a scheme which involved the land plots being acquired for very little and then sold to KK JSC for far more, in circumstances where there is no proper record to show how the monies paid by KK JSC were actually spent, the Court should infer that all of the monies were misappropriated. Secondly, Mr Howe submitted that, since the land plots which were purchased were useless, they should be regarded as being of no value to KK JSC. I cannot, however, accept that either of these reasons justifies the approach which was urged upon me by Mr Howe. As to the first, whatever criticism might be made as to how the land plot transactions came about, the fact is that KK JSC has acquired ownership of the land plots through the arrangements which were put in place. There must, therefore, have been some payments made to the owners of the land plots. It is, accordingly, unrealistic to adopt an approach which entails a conclusion that the Defendants misappropriated everything which KK JSC paid to CBC, Bolzhal and Holding Invest. As to the second of Mr Howe's points, KK JSC having become the owner of some 142 hectares of land adjacent, or proximate, to land which had previously been acquired, it simply makes no sense to attribute no value at all to that land. I am clear, in the circumstances, that credit should be given, and so that the Claimants' primary case as to quantum should not succeed. As I say, I shall come back to what this means in financial terms.

CBC and Bolzhal

362. As to the liability question and focusing in the first instance on the transactions involving CBC and Bolzhal, rather than Holding Invest in relation to which the position is not on all fours, the context is important, at least on the Claimants' case, since they say that the relevant transactions were part and parcel of a dishonest scheme designed to misappropriate the very substantial sums of money which were achieved through the IPO which took place in July 2007 and which raised proceeds of approximately US$ 273 million. Specifically and, as will appear, this is relevant also to the limitation issue, Mr Howe drew attention to the fact that the investigation into the Land Plots Claim arose out of a Grant Thornton report dated 11 November 2014 which had been commissioned in order to investigate the movement and destination of funds raised in KK Plc's IPO, including funds which were distributed to KK JSC which received, in all, some US$ 154.6 million in various tranches distributed between 28 July 2007 and 27 June 2008. Accordingly, part of Grant Thornton's work was to look into what happened to those monies, in particular to identify so-called *"Secondary Recipients"*. Grant Thornton discovered that outward payments of incoming IPO monies were made by KK JSC very shortly after they had been received, and that these included substantial payments to Bolzhal, CBC and Holding Invest, as follows: in the case of Bolzhal, monies totalling (when converted to US Dollars) US$ 35.8 million; in the case of CBC, monies totalling US$ 6.9 million; and in the case of Holding Invest, KZT 230,880,000/US$ 1.9 million. Subsequently, Mr Crooks and Mr Thompson have found (and agreed) that the sums paid to Bolzhal and CBC were, in fact, greater: KZT 4,388,247,952/US$ 36,366,760 in the case of Bolzhal; and KZT 1,724,976,000/US$ 13,815,274 in the case of CBC. These revised amounts are the amounts which the Claimants identify as having been paid out by KK JSC in relation to land plot transactions which were not all that they seemed to be.

363. As to the detail of those land plot transactions, in order to understand them, it is necessary to explain something about the structure which was employed. I shall do this by largely basing what follows on the useful summary in Mr Howe's written closing submissions which was itself based on what Mr Jumadilov described in his first witness statement, although I shall have to come back later to consider the use of that structure in the context of various criticisms which Mr Howe made of it. Step 1 entailed land plots which were not already in private ownership being acquired by farmers which was their statutory right, with the land brokers assisting in this process, at first funding the acquisition process but later using the funds advanced by KK JSC to CBC and Bolzhal. Step 2 consisted of the farmer owners selling the land plots to CBC's and Bolzhal's respective nominees, namely Mr Esperov and Mr Shabadanov, such transactions taking place between 11 October 2007 and 2 June 2008. I shall come back to this, but Mr Arip's and Ms Dikhanbayeva's position is that the amounts specified in the land sale and purchase agreements with the farmers did not reflect the actual price of the Land Plots owing to what was described as a widespread practice in Kazakhstan which allowed sellers to pay less tax on sale proceeds and addressed security concerns about receiving large sums of money. Step 3 involved the nominees contributing the land plots into the charter capital of CBC or Bolzhal in transactions which occurred between 7 December 2007 and 12 December 2008, something which Mr Mayhew acknowledged was a *"market practice"*. Again, I shall come back to this because, notably, Mr

Twigger made no mention of the amounts recorded by way of contribution in his summary or, indeed, anywhere in his written closing submissions. Step 4 then entailed CBC and Bolzhal entering into sale and purchase contracts with KK JSC pursuant to which they sold the land plots to KK JSC. Those transactions occurred between 19 February 2008 and 23 February 2009 and, so Mr Twigger suggested, amounted to necessary formalities (and no more) in order to complete the process of registering the land plots under KK JSC's ownership.

364. Specifically, again as helpfully explained by Mr Twigger in his written closing submissions, the land plots transactions comprising Step 2 were funded by KK JSC pursuant to preliminary agreements for the sale and purchase relating to the land plots which were entered into between CBC/Bolzhal and KK JSC. Accordingly, on 7 September 2007, KK JSC entered into such an agreement with CBC in relation to five land plots for a sum of KZT 1,724,976,000, which Mr Twigger described as 'Group 1'. Although the timings do not make a great deal of sense, this is consistent with what was proposed at a meeting of KK JSC's board on 25 September 2007, those minutes identifying the plots not by number but by hectare size. This was followed by *"Agreement No.3 for Contribution of Real Estate Charter Capital"* dated 7 December 2007, under which Mr Esperov (Ms Dikhanbayeva's then husband) delivered four land plots (nos. 058-173, 058-634, 058-475 and 058-476) to CBC by way of an equity contribution (Step 3). In the same way, land plot no. 058-424 was the subject of a separate equity contribution agreement dated 15 February 2008. Step 4 then saw KK JSC and CBC, on 19 February 2008, enter into separate contracts for the sale of four of the land plots by CBC to KK JSC, with a Ms Abekova (a KK Group employee) signing on behalf of CBC, and the following month, on 10 March 2008, entering into a similar contract for the sale of the fifth land plot, again which Ms Abekova signed on behalf of CBC.

365. Importantly, as Mr Howe pointed out, there was a significant difference between the valuations given in respect of the land plots transferred under *"Agreement No.3 for Contribution of Real Estate Charter Capital"* dated 7 December 2007, and the prices given for each of the land plots in the contracts of sale concluded between KK JSC and CBC in February and March 2008. This appears from the following table, as contained in Mr Howe's written closing submissions:

Land Plot	Contribution value (KZT)	Sale price (KZT)
No.03-047-058-173	114,131,405	181,576,421.05
No.03-047-058-634	385,273,614	1,044,064,421.05
No.03-047-058-475	88,208,266	136,182,315.79
No.03-047-058-476	88,208,266	136,182,315.79
No.03-047-058-424	n/a	226,970,526.32
Total	675,821,551	1,724,976,000.00

As this table demonstrates, and as Mr Howe submitted, the total sum recorded as paid by KK JSC to CBC for the five land plots is over two and a half times greater than the value CBC itself applied to the land plots when they were transferred to CBC as equity contributions. Moreover, again Mr Howe submitted, the value put on the land plots in the transfers to CBC does not necessarily correspond with the price recorded as being paid to the farmers since, although records only exist in relation to six land plots, those records show that the amount paid by KK JSC was approximately ten times the price which was paid to the farmers - a matter to which I shall return in a moment.

366. As for Bolzhal, under an *"Agreement on Immovable Property Contribution to Charter Capital No.10"* dated 15 February 2008, Mr Shabadanov, it will be recalled a relative of Ms Dikhanbayeva's husband and previously a driver employed by KK JSC, delivered three land plots (nos. 058-197, 058-198 and 058-636) to Bolzhal by way of equity contribution, albeit that it is not known what values were attributed to these land plots because the agreement itself has not been located. This was followed, somewhat out of sequence given that that was Step 3, on 25 March 2008, by Bolzhal and KK JSC entering into a *"Preliminary Contract for Sale of Real Estate"* (Step 2), under which Bolzhal and KK JSC undertook to enter into a contract for the sale and purchase of the same three land plots on or before 22 May 2008 and KK JSC agreed to pay KZT 930,579,151.68 as a *"down payment for the land plots to be bought in the future"*. This agreement, which Mr Twigger described as applying to 'Group 2' land plots, was likewise signed by Mr Shabadanov on behalf of Bolzhal. The following day, however, 26 March 2008, Bolzhal and KK JSC entered into a *"Supplemental Agreement No.1 to the Preliminary Contract for Sale of Real Estate dated March 25, 2008"*, under which an increase from KZT 930,579,151.68 to KZT 4,407,002,699.91 was agreed to cover the purchase of additional plots of land, again *"to be bought in the future"* ('Group 3'). This was followed, on 21 May 2008, by Bolzhal and KK JSC entering into separate contracts for the sale of the three ('Group 2') land plots which were the subject of the original preliminary agreement concluded on 25 March 2008 at the same prices per land plot as agreed in that preliminary agreement.

367. Subsequently, on 19 June 2008, a further preliminary agreement was entered into between KK JSC and Bolzhal, which was again concerned with the 'Group 3' land plots, recording the details of those six land plots and providing for the pre-payment of KZT 190,849,000 in addition to the sums already covered by the preliminary agreement dated 25 March 2008 (as amended on 26 March 2008). In the meantime, in the period from March to May 2008, Mr Shabadanov had been busy acquiring the six 'Group 3' land plots from their farmer owners, and subsequently, in December 2008, delivering each of those land plots to Bolzhal by way of equity contribution. Details of the prices paid to the individual farmers appear in the subsequent contracts documenting the onward sale of the plots to KK JSC and are set out in the table below, alongside details of the prices set out in the sale and purchase contracts which were concluded on 23 January 2009 between Bolzhal and KK JSC in relation to five of the 'Group 3' land plots and on 23 February 2009 in respect of the sixth, as well as the increased prices which appear in certain supplemental agreements each dated 7 April 2009 (albeit that, as Ms Dikhanbayeva explained, they were not actually

drafted until early September 2009 owing to delay on the part of Ms Kogutyuk following a meeting of KK JSC's board on 7 April 2009 when entry into the agreements was approved):

Land Plot	Acquisition Date	Value (KZT)	Sale Price (KZT) 23/01/2009 or 23/02/2009	Amended Sale Price (KZT) 07/04/2009
No.03-047-058-340	12/03/2008	54,930,950	409,536,000	779,736,200
No.03-047-058-838	20/03/2008	48,827,520	364,032,000	693,098,844
No.03-047-058-883	03/04/2008	24,413,760	182,016,000	346,549,422
No.03-047-058-877	07/04/2008	24,413,760	182,016,000	346,549,422
No.03-047-058-855	11/04/2008	79,345,000	591,552,000	1,126,285,622
No.03-047-062-381	02/05/2008	36,400	94,800,000	180,494,490
Total		231,967,400	1,823,952,000	3,472,713,999

368. As this table demonstrates, and as Mr Howe submitted, the total price which KK JSC agreed in January/February 2009 to pay to Bolzhal was substantially more than the prices which are recorded as having been paid to the original sellers of the land plots – over seven times as much. After the increases agreed on 7 April 2009, KK JSC ended up paying ten times as much – although, after taking account of certain adjustments, the total net payment which KK JSC made (as agreed by Mr Crooks and Mr Thompson) in relation to these and the other Bolzhal-related land plots amounted to KZT 4,388,247,952.

369. These are very substantial differences which, in truth, it is difficult to see can be justified. Mr Twigger sought to justify the differences by reference to what he suggested was (and possibly still is) a widespread practice in Kazakhstan which allows sellers of land to pay less tax on sale proceeds and address security concerns connected with receiving large sums of money. As a result, the actual price of the sale was recorded on handwritten receipts, in case it was necessary to prove the transfer of these funds at a later date, rather than in any sale and purchase agreement. Mr Twigger submitted, therefore, that the fact that the prices paid to the farmers (in the instances where they are known) appear to be so much lower than the prices paid by KK JSC is misleading. Mr Twigger relied in this context on the evidence which was given by Mr Mamedov, the farmer who was one of the holders of the largest land plots with a total area of 33.12 hectares and cadastral no. 03-047-058-634 which he sold to CBC. As I have

explained, however, I find it hard to accept that Mr Mamedov really can have been paid over US$ 1 million in respect of his share of the land plot sale. This is a substantial amount of money which it is difficult to see can really have been spent, as Mr Mamedov suggested, within a couple of months. As I have also noted, Mr Mamedov still lives in the same house where he has always lived. Moreover, if he did receive as much money as he suggested, then, it makes no sense at all that Mr Mamedov should have gone on to say that, if he had been the only owner of the land plot, he would not have sold it but continued to farm it. As Mr Howe submitted, this rather suggests that the price he and his relatives received cannot have been that attractive. Furthermore, again as Mr Howe submitted, if prices were truly as high as Mr Arip and Ms Dikhanbayeva would have it, *"there would be a lot of extremely rich farmers in the region around the Aksenger site"* yet there is no evidence that this is the case, with photographs taken of the houses lived in by the farmers who sold some of the land plots indicating that they continue to live in a frugal manner. In this regard, I should say that I afford only modest weight to the evidence which was given by Mr Khashimov and Mr Nagashibaev, the security guards who visited certain of the farmers who sold land plots. This is because, as I have explained, I agree with Mr Twigger that their evidence is open to some doubt and is, in any event, hearsay. I am satisfied, however, that, even without the evidence given by Mr Khashimov and Mr Nagashibaev, the position is clear: the farmers cannot have been paid as much money as Mr Arip and Ms Dikhanbayeva would have it. I might add that I am not swayed from this conclusion by Mr Twigger's reliance on the evidence given by Mr Jumadilov to the effect that the actual purchase price paid to the farmers was between US$ 1,500 and US$ 3,000 per sotka (i.e. 100 square metres of land) and, in some instances, was as high as US$ 5,000 per sotka once the farmers began to realise that the KK Group was buying up land since, as I have previously explained, Mr Jumadilov was a witness whose reliability is open to very considerable doubt.

370. The vast disparity between the prices paid to the original sellers and the prices paid by KK JSC to Bolzhal and CBC is not readily explained. It cannot be the result of agents' fees since Mr Jumadilov's evidence (which in this respect there is no particular reason to doubt) was that such fees were typically *"around 5% of the land plots sales price"* to KK JSC. Clearly, fees at that type of level cannot be the reason for such disparity. Nor can the reason be explained by bribes or *"facilitation payments"* since there is no suggestion that these would be at such a scale. Nor, also, can the commission payments allegedly paid to the 'Kazakh LLPs' for converting the monies paid by KK JSC into cash account for the divergence, not least because it appears from the evidence which Mr Atashev, like Mr Jumadilov one of the land brokers involved, would have given had he attended the trial, that a fee of only some 3% would typically be payable. As Mr Howe pointed out, the simple fact is that in the only cases where original sale and purchase contracts have been located, namely in relation to the six land plots which are listed in the second of the tables above, 57.72 hectares, in total, were purchased for, again in total, KZT 231,967,400. This works out at an average price per hectare of KZT 4,018,839 or approximately KZT 40,000/US$ 350 per sotka. Even though this may not be the most reliable source, it nonetheless provides some sort of indication as to what was paid, which is very substantially less than what KK JSC paid to CBC or Bolzhal. This, combined with the

disparity which is apparent from the first of the tables above as between what was paid by KK JSC to CBC and the level of equity contribution to CBC's capital, calls very much into question the propriety of what was happening in relation to the land plot transactions. In any event, even if Mr Twigger was right to submit that the farmers must have been paid more since it should be assumed that they must have had some idea as to what their land was worth, as I shall explain in a moment, the evidence concerning that issue (what the land was worth), in the form of Mr Mayhew's and Mr Kuznetsov's opinions, was not helpful to Mr Arip and Ms Dikhanbayeva.

371. This is the case even without taking into account issues concerning the appropriateness of the use of land brokers and the involvement of CBC, Bolzhal and the 'Kazakh LLPs', or the commercial rationale behind the purchase of the land plots. These are matters which I shall come on to consider, but it seems to me that the price disparity which I have highlighted is particularly significant. Indeed, it is instructive that, although in his written closing submissions, Mr Twigger addressed in considerable detail the evidence given by Mr Mayhew and Mr Kuznetsov concerning land plot valuation, submitting that Mr Kuznetsov's (higher) valuations should be preferred, he took no account of the fact that, even on the basis of Mr Kuznetsov's valuations, it can be seen that KK JSC must have very considerably overpaid.

372. Specifically, using a valuation methodology which entailed the identification of appropriate comparables from the contemporaneous land sale advertisements in the Kazakhstan newspaper, Krysha, and then the application of a statistical analysis to those comparables which involved the stripping out of some of the higher and lower asking prices to arrive at an average value per sotka, Mr Kuznetsov's valuation was KZT 2,396,324,233/US$ 19,847,276. This is based on the dates when the land plots were purchased from the farmers, as opposed to the dates when KK JSC acquired the land plots from CBC and Bolzhal, since Mr Kuznetsov's view is that the correct dates to use are the former rather than the latter. I shall come back to this issue shortly, merely noting for the present that Mr Kuznetsov's valuation, using the later dates, was KZT 1,932,688,932/US$ 15,975,288 whereas Mr Mayhew's equivalent valuation was KZT 1,181,591,410/US$ 9,747,000. What matters, for present purposes, is simply that both of Mr Kuznetsov's valuations are substantially lower than the KZT 6,113,223,952 which KK JSC paid to CBC and Bolzhal for the land plots which were purchased from the farmers. Therefore, although, clearly, the Claimants' (at least one-time) contention that the land plots are worthless cannot stand, it is equally clear that the notion that what KK JSC paid was what the farmers themselves received (subject only to matters such as agents' fees, *"facilitation payments"* and commission payments allegedly paid to the 'Kazakh LLPs') is unsustainable. Specifically, the *"arithmetic average value"* figures used by Mr Kuznetsov to arrive at his valuations were all somewhat lower than what, according to Mr Jumadilov, the farmers were paid (between US$ 1,500 and US$ 3,000 per sotka and, in some instances, as high as US$ 5,000 per sotka) and, crucially, lower than what KK JSC paid to CBC and Bolzhal. Indeed, interestingly, as Mr Howe observed in closing, Mr Kuznetsov identified land plots advertised for sale at prices comparable (namely in the US$ 300 to US$ 500 per sotka range) to the actual prices recorded as having been

paid to the farmers in respect of the six plots for which information is available (namely approximately US$ 350 per sotka). Mr Kuznetsov chose to exclude those comparables when calculating his averages. However, even if he was right to do so, what is significant is that his valuations do not justify the amounts which KK JSC paid to CBC and Bolzhal.

373. This is the case, as I have observed, irrespective of which of Mr Kuznetsov's two valuations is considered. Plainly, however, the applicable dates issue matters given that there is a difference between Mr Kuznetsov's valuations amounting to some US$ 4 million or so. It is significant also because there is a difference also as between Mr Mayhew's valuation (taking the later dates) and Mr Kuznetsov's valuation (again taking the later dates) of some US$ 6 million or so. Indeed, the only valuation exercise performed by Mr Mayhew is one which takes the dates when KK JSC entered into the final sale and purchase agreements with CBC and Bolzhal. Mr Mayhew has not, therefore, carried out a valuation equivalent to Mr Kuznetsov's KZT 2,396,324,233/US$ 19,847,276 valuation based on the dates when the farmers sold their land plots to Mr Esperov and Mr Shabadanov.

374. Mr Howe submitted that Mr Mayhew had plainly selected the correct valuation dates, given that KK JSC is the relevant claimant and what matters, in those circumstances, he suggested, was what value the various land plots had at the time when KK JSC acquired them, not what Mr Howe described as *"on other random dates in the course of the acquisition process"*. I cannot agree with Mr Howe about this. It seems to me that Mr Kuznetsov's approach of using the dates when KK JSC became committed to the purchases, in other words when its nominees purchased the land plots from the farmers with KK JSC's money and for KK JSC's benefit, is the right one in the circumstances of the present case. As Mr Twigger observed, those nominees did not purchase the land plots as independent third parties but acting indirectly for KK JSC. Their sole intention, as Mr Twigger also pointed out, was to contribute them to Bolzhal or CBC's charter capital in circumstances where those companies had signed preliminary agreements to sell the land plots to KK JSC.

375. It follows, in my view, that the relevant dates are those which were used by Mr Kuznetsov, namely between October 2007 and June 2008, and not the dates when KK JSC completed the purchases of the land plots from CBC and Bolzhal, namely between February 2008 and February 2009. Indeed, although perhaps not strictly a matter for him anyway, it is to be noted that Mr Mayhew, who had in his report stated that he was instructed to use the later dates only, at trial said that he himself had made the decision to do so, but was unable when pressed by Mr Twigger in cross-examination to explain in very convincing terms why he regarded his approach as preferable to that of Mr Kuznetsov. Apart from asserting that the appropriate date *"is the date of the transaction"*, which somewhat begged the question as to what was the relevant transaction for present purposes, it seemed that Mr Mayhew's only real point was that additional costs may have been incurred between the dates of the purchases from the farmers and the dates of the sales to KK JSC. That, however, is not a legitimate reason for taking the later dates for the simple reason that additional costs are not the same as land plot prices and as such, as Mr Kuznetsov

explained in his second report, would not be reflected in any price comparables. Mr Twigger illustrated the fallacy in Mr Mayhew's (and Mr Howe's) position by citing a hypothetical example of a plot being purchased from a farmer by a nominee in 2007 for US$ 1 million but not being transferred to KK JSC until 2008. He suggested, and I agree, that, in those circumstances, it would make no sense to say that the value in 2008 was only US$ 500,000, so that is all that KK JSC can have spent on the land, since nobody has suggested that the nominee bought the land plot from the farmer at his own risk so as to mean that he would suffer a US$ 500,000 loss.

376. I, therefore, proceed on the basis that the appropriate dates for valuation purposes are the earlier dates. Accordingly, the relevant valuation produced by Mr Kuznetsov is his KZT 2,396,324,233/US$ 19,847,276 valuation, rather than his KZT 1,932,688,932/US$ 15,975,288 valuation. Although this still means that the land plots are to be regarded as having been worth substantially less than KK JSC paid CBC and Bolzhal for them, the position is not as pronounced as it would be if either Mr Kuznetsov's alternative valuation or Mr Mayhew's (only) valuation based on the later dates were to be used. The differential is nonetheless significant, and more than enough to call into serious question how it could be that KK JSC came to pay so much more for the land plots than they were worth.

377. It is nothing to the point that Mr Twigger was able in his written closing submissions to point to various sources of information which were known to the KK Group at the time that KK JSC committed to purchase the land plots from CBC and Bolzhal and which, Mr Twigger suggested, demonstrated that the real estate market in Kazakhstan was buoyant. Mr Kuznetsov has arrived at his valuations, and these make it clear that KK JSC paid more than the land plots were actually worth. Mr Twigger relied, for example, on the fact that on 28 April 2007 Mr Mayhew provided a valuation report for the purpose of the KK Group's financial statements in which he valued the Akzhal 1 and 2 sites (partially developed) at US$ 48,450,000 (US$ 7,860 per sotka) and the Aksenger site (partially industrial and partially agricultural designated use) at US$ 147,700,000 (US$ 3,090 per sotka). Mr Mayhew also provided a draft report for the purpose of the IPO prospectus, in which he valued the Akzhal 1 and 2 sites at a slightly lower figure of US$ 36,063,000 and the Aksenger site at the same amount as in his 28 April 2007 report. CBRE Scot Holland similarly prepared valuation reports for the IPO prospectus on 24 and 25 May 2007, in which they valued the Akzhal 1 and 2 sites at US$ 75,150,600 (US$ 12,180 per sotka) and the Aksenger site at US$ 214,547,000 (US$ 4,500 per sotka). Mr Twigger additionally prayed in aid the fact that in the report which PwC Russia produced in December 2009 (and which I shall consider in more detail when dealing with the limitation issue), reference was made to the land plots purchased in 2008 having been purchased at prices ranging from US$ 2,620 to US$ 2,650 per sotka *"which seems to be in line with average rates"*. However, the report went on to say that there was no open land market in Kazakhstan, meaning that prices can vary significantly, and furthermore that the price range could serve as an indicator but not a confirmation of the reasonableness of the prices paid by the KK Group. This last comment seems to me to underline the limited assistance which can be derived from such further material and why the

more appropriate focus, for present purposes, is on the valuation work carried out by Mr Kuznetsov and Mr Mayhew (even allowing for the fact that his only valuation relates to the later dates).

378. I shall come back to the evidence concerning the state of the Kazakhstan real estate market when considering Mr Twigger's submissions concerning the commercial rationale which, he suggested, lay behind the land plot transactions. However, focusing for the present on the valuation exercises performed by Mr Kuznetsov and Mr Mayhew, the Court is in an odd position because, as I have observed, the only valuation which considers the dates when the land plots were purchased from the farmers has been carried out by Mr Kuznetsov. Mr Mayhew has not done an equivalent exercise. Mr Twigger suggested, indeed, that it should be inferred, in the circumstances, that, had he done so, Mr Mayhew would have arrived at a valuation substantially higher than Mr Kuznetsov's valuation. Mr Twigger highlighted in this context that Mr Mayhew's view was that the Kazakhstan real estate market had in the meantime declined. Although it would certainly have been helpful if Mr Mayhew had (like Mr Kuznetsov) produced an alternative valuation, I consider nonetheless that I should not draw the inference which Mr Twigger invited me to draw, if only because Mr Mayhew's valuation using the later dates (KZT 1,181,591,410/US$ 9,747,000) was not inconsiderably lower than Mr Kuznetsov's equivalent valuation (KZT 1,932,688,932/US$ 15,975,288).

379. The fact remains, however, that Mr Kuznetsov's KZT 2,396,324,233/US$ 19,847,276 valuation is the only valuation before the Court which is based on the earlier dates. It seems to me, in the circumstances, that I must consider the various submissions which have been made concerning the respective methodologies adopted by Mr Kuznetsov and Mr Mayhew and, if necessary, depending in particular on the view which I reach in relation to Mr Kuznetsov's approach, do my best to arrive at an appropriate valuation. This, in circumstances where, as I have previously explained, the land valuation evidence was not altogether satisfactory given that Mr Mayhew lacked particular experience of Kazakhstan and given that Mr Kuznetsov, at least judging from his curriculum vitae, had only limited experience of land valuation.

380. More specifically, however, as to Mr Mayhew and the methodology which he used, as Mr Twigger highlighted, although Mr Mayhew identified certain comparables which he used to arrive at the valuations which he did, he did not give details of other comparables which he rejected when arriving at those valuations. Mr Twigger asked Mr Mayhew about these other comparables, exploring with him what they entailed. Mr Mayhew was, however, not very forthcoming, insisting that he had identified the comparables which, in his view, *"are required to arrive at an opinion of value"* and that he did not *"see the benefit of putting comparables in to then take them out, because they are not comparable"*. This was not very helpful. Nor was Mr Mayhew's assertion, for that is what it was, that his selection of comparables which were appropriate was based on his *"expert judgment"*. As Mr Twigger submitted, this is unsatisfactory not only because, without proper identification of the comparables which were not selected by Mr Mayhew, it is impossible to test the

appropriateness of Mr Mayhew's selection, but also because Mr Mayhew's experience of Kazakhstan specifically, and so his *"expert judgment"*, was, on any view, not exactly vast. Indeed, it emerged that Mr Mayhew had never visited the comparable sites which he did use, and that he did not know where they are beyond the name of the village or district. Furthermore, I agree with Mr Twigger when he submitted in closing that Mr Mayhew's reasons for making the location adjustments were based on factors about which he lacked sufficient information and upon which he was unqualified to express an opinion, and specifically that he could not know that nearly all of the comparables he used were better located than the land plots he was valuing; indeed, he admitted when trying to defend his liquidity adjustment that *"we don't know a huge amount about them"*. Furthermore, again as Mr Twigger observed, Mr Mayhew had no real basis for reaching the conclusion that irregularly shaped farming land is less valuable; and, since he did not himself know what proportion of land plots in the region were irregular or regular shaped, his decision to make a 15-20% adjustment as regards a narrow comparable that was already being marketed at a lower price, to reflect the supposed concern about irregular shaped plots, must be questionable. All in all, therefore, particularly when taken together with his lack of Kazakhstan-specific experience and a somewhat argumentative approach when giving evidence, I would be reluctant to place too much weight on Mr Mayhew's valuation approach, even if he had produced a valuation which was based on the earlier dates which are, in my view, the right dates to take for valuation purposes.

381. The difficulty, however, is that just as Mr Twigger was able to make legitimate criticisms concerning Mr Mayhew's approach, so Mr Howe was in a position to level legitimate criticisms at Mr Kuznetsov's seemingly mechanical (or at least mathematical) valuation method which, Mr Howe suggested, meant that on one view, he failed to carry out any valuation exercise at all. This involved, as I have indicated, Mr Kuznetsov looking at advertisements for land sales and producing an average without, as Mr Howe pointed out, making any allowances whatsoever for the characteristics of the comparables he was using or of the plots of land he was supposed to be valuing. Mr Kuznetsov also, as Mr Miller demonstrated in cross-examination, adopted an approach which consistently saw him omit lower values. This meant, inevitably, that the valuations which he arrived at were higher than would otherwise have been the case. The danger inherent in such an approach is obvious, even though, in his closing submissions, Mr Twigger sought to explain that Mr Kuznetsov's approach did not entail any predisposition towards the selection of higher priced advertisements but merely involved Mr Kuznetsov endeavouring to achieve an appropriate level of homogeneity. Specifically, in order to try to create sets of comparables with acceptable homogeneity, Mr Kuznetsov calculated the variation coefficient for the data and, if it was not under 35%, he stripped out comparables in order to reach an acceptable degree of homogeneity. This did not, Mr Twigger suggested, involve Mr Kuznetsov simply stripping out lower priced data but data (whether lower or higher) which is furthest from the average. Nonetheless, as Mr Howe pointed out, when Mr Twigger explored the matter in re-examination asking how Mr Kuznetsov decided which figures to exclude, the response was disarmingly straightforward. Mr Kuznetsov stated that he *"would resort to the conditions of the task, that is the conditions under*

which the task should be solved, what result I want to achieve and what are the purposes for me to achieve this result" explaining that *"Only after that I would make a decision on which values to exclude"*. Mr Twigger, perhaps understandably in the circumstances, left matters there. However rigorous Mr Kuznetsov's approach may have been from a mathematical or statistical point of view, I was left with some unease as to its appropriateness in terms of arriving at a land valuation.

382. It follows that I do not consider that it would be right simply to accept Mr Kuznetsov's valuation, I repeat the only valuation dealing with the earlier dates, and that the right course, adopting a somewhat broadbrush approach once again, is to approach matters on the basis that Mr Kuznetsov's KZT 2,396,324,233/US$ 19,847,276 valuation is too high and that a more appropriate valuation would be KZT 1,929,041,007 (or approximately US$ 15.9 million). I have arrived at this figure by taking a mid-point figure between Mr Mayhew's later dates valuation (KZT 1,181,591,410) and Mr Kuznetsov's equivalent valuation (KZT 1,932,688,932), namely KZT 1,557,140,171, which equates to 80.5% of Mr Kuznetsov's KZT 1,932,688,932 valuation. Applying that percentage to Mr Kuznetsov's earlier dates valuation of KZT 2,396,324,233 produces KZT 1,929,041,007. I regard this as appropriate in circumstances where criticisms can legitimately be directed at both Mr Mayhew's and Mr Kuznetsov's approaches, and yet where the difference in their later dates valuations is not so very vast, it suggests to me that the appropriate valuation is likely to be somewhere in the middle.

383. What this means is, to repeat, that KK JSC can be seen to have substantially overpaid when it made the payments which it did to CBC (KZT 1,724,976,000) and Bolzhal (KZT 4,388,247,952). Specifically, on the basis that I have decided that the true value of the land plots was KZT 1,929,041,007, the total overpayment will have been KZT 4,184,182,945 (KZT 6,113,223,952 less KZT 1,929,041,007) or something in the region of US$ 36 million. In these circumstances and since I am quite clear that the farmers would not have received anything more than what the land plots were worth (indeed, based on the six land plot details which are known about, they may have received somewhat less), it must follow that, at a minimum, the monies paid by KK JSC in excess of what the land plots were worth (subject only to matters such as agents' fees, *"facilitation payments"* and commission payments allegedly paid to the 'Kazakh LLPs') ought not to have been paid. In short, the payments were far more than the land plots were worth and far more than was paid to the farmers. This amounts to fraud, at least when it is appreciated that it can hardly have been a coincidence that, aside from the roles played by CBC and Bolzhal (companies which I have previously concluded were at all material times owned or controlled by Mr Arip and Ms Dikhanbayeva) in receiving the monies from KK JSC, the so-called *"Secondary Recipients"* were also (with the exception of JSC Financial Company Alliance Capital which received a relatively modest KZT 47 million/US$ 400,000) all companies which I have determined were owned or controlled by Mr Arip and Ms Dikhanbayeva, namely four of the 'Kazakh/Construction LLPs' (Ritek, Mouli, Biznes-Privat and TESS) together with TESS and Lotos, and all of which feature in the PEAK Claim.

384. Specifically, as illustrated by another of Mr Crooks' helpful diagrams (Appendix 14B), of the KZT 4,388,247,952/US$ 36,366,760 received by Bolzhal, the majority went to the 'Kazakh/Construction LLPs': Ritek received KZT 1,07.6 million/US$ 8.6 million; Mouli received KZT 205.4 million/US$ 1.7 million; Biznes-Privat received KZT 196.5 million/US$ 1.6 million; and TESS received KZT 2,215 million/US$ 18.3 million. Otherwise, besides the KZT 47 million/US$ 400,000 received by JSC Financial Company Alliance Capital, as I shall come on to explain, KZT 605 million/US$ 5 million went to Holding Invest. As for CBC, of the KZT 1,724,976,000/US$ 13,815,274 received by CBC, US$ 6.89 million was paid to three of the 'Kazakh/Construction LLPs': Ritek received KZT 290.8 million/US$ 2.4 million; Mouli received KZT 285 million/US$ 2.4 million; TESS received KZT 95 million/US$ 800,000; and TEW received KZT 161.7 million/US$ 1.3 million which it paid the same day (28 October 2007) to Lotos which, in turn, again the same day, passed the money on to Biznes-Privat. It is not known what happened to the remaining US$ 6.9 million received by CBC.

385. Accordingly, the immediate recipients of the funds from Bolzhal and CBC were not the farmers who were selling the land plots, but instead companies which I have decided were not independent of Mr Arip and Ms Dikhanbayeva, and so were not genuine companies running cash-generative businesses willing to provide cash to the land brokers in return for a small commission. As I have explained in considerable detail already, the evidence that these were not genuine independent companies is clear and compelling, certainly when viewed cumulatively which I consider is appropriate in this case. The likelihood that the companies were independent in relation to the PEAK Claim, acting as genuine sub-contractors and as such receiving monies from Arka-Stroy for legitimate (essentially construction) purposes, and independent also in the context of the Land Plots Claim, acting not as construction companies but as companies willing to provide cash, is fanciful. As Mr Howe submitted, it can hardly have been a coincidence that the same companies should appear in relation to both the PEAK Claim and the Land Plots Claim. This is the position even without taking into account all the other matters connecting the companies to the Defendants. It should also, of course, be borne in mind in this context that I have decided in relation to the PEAK Claim that these entities were used by the Defendants to perpetrate fraud. The probability, in these circumstances, that they would also be involved in the fraud alleged in the Land Plots Claim is high.

386. It is also instructive, as Mr Howe highlighted in closing, that Mr Arip made no mention of payments having been made to these various companies (or to Holding Invest) until the witness statement which was prepared for trial in September 2016. Even then, Mr Arip was cagey in what he had to say. However, it is striking that, despite in an earlier witness statement dated 18 December 2014, Mr Arip specifically stated that, in the interests of *"full transparency, and because the claimants falsely suggest wrongdoing"*, he would *"set out the process for the acquisition of the land plots in full ..."*. He did nothing of the sort, however. He made no mention, in particular, of these companies providing cash to enable the farmers to be paid. In cross-examination, when asked about what he had omitted from his witness statement, his answer was that he was *"not controlling these transactions"* and that he did not know about their

involvement with the land plot transactions. As far as he was concerned, he explained, the land brokers decided to use them without his involvement, adding that he *"just generally was not involved into this kind of level of details ever"*. This is not evidence which I can accept, in view of the conclusions which I have arrived at in relation to the 'Connected Entities'. Mr Arip may not have been involved in all the details of every transfer, but I find it impossible to believe that he did not know about the role of the companies involved in the Land Plots Claim. These were, in effect, his companies; they were not independent. The suggestion, therefore, that Mr Atashev *"found"* (as Mr Jumadilov put it) the companies is not one which I can accept. Mr Twigger dismissed Mr Howe's observation during the course of Ms Dikhanbayeva's cross-examination that it would be *"a pretty extraordinary coincidence"* for these companies to have been selected as sub-contractors by Arka-Stroy and then separately as sources of cash by the real estate brokers. Mr Twigger pointed out that Ms Dikhanbayeva's position was that she did not know the companies and was unable to explain how they were chosen. He went on to suggest that there is no evidence to support what Mr Howe was putting to Ms Dikhanbayeva, suggesting in effect that there is nothing surprising in the fact that the companies should find themselves dealing with the KK Group *"in two separate spheres"*. Mr Twigger drew attention, in this respect, to the fact that Arka-Stroy used as many as 184 sub-contractors (based on certain lists prepared by Mr Thompson), observing that, in the circumstances, there is *"nothing remarkable or suspicious in a small number of those companies also being known to or introduced via the real estate brokers' connections"*. I simply cannot agree with Mr Twigger about this. The fact that the companies involved in the Land Plots Claim were among as many as 184 sub-contractors dealing with Arka-Stroy seems to me to mean nothing. What matters is the fact that the same companies are players in both the PEAK Claim and the Land Plots Claim. What matters even more than this is that I have concluded, based not only on this fact but also on the basis of other evidence, that the companies were owned or controlled by Mr Arip and Ms Dikhanbayeva.

387. This conclusion is, in truth, fatal to Mr Twigger's submission. So, too, however, is the fact that a number of the transfers from CBC and Bolzhal to the companies which are the subject of the Land Plots Claim were covered by contracts which, instead of identifying the services which the companies were providing in a straightforward and honest way, pretended that other services were being provided. I have mentioned certain of these already when discussing the connections between the companies and Mr Arip and Ms Dikhanbayeva. However, an example is a draft contract relating to *"earthworks"* between Bolzhal and Biznes-Privat dated 20 March 2008 in the sum of KZT 196.5 million and so matching the payment from Bolzhal to Biznes-Privat made on 1 April 2008 as recorded in Mr Crooks' Appendix 14B relating to the Land Plots Claim. There is also a draft contract between Bolzhal and Mouli in the sum of KZT 205.375 million which is again described as being for *"earthworks"* but which likewise closely matches the payment from Bolzhal to Mouli recorded in Appendix 14B. In his written closing submissions, Mr Twigger himself referred to these two contracts by saying that they were *"agreements with the Kazakh LLPs for land intermediary services which were for the sole purpose of documenting the Kazakh LLPs provision of cash"*. If so, then, it is difficult to

see why this could not simply have been stated, as it was in another of the agreements to which Mr Twigger referred which was a draft contract between Bolzhal and Ritek in the sum of KZT 1.117 billion (and so closely matching the payment from Bolzhal to Ritek in the sum of KZT 1.037 billion which again features in Appendix 14B) where the description given was *"Intermediary services for search and acquisition of land plots"*. The fact that draft agreements were drawn up which deliberately misstated what services were being provided, all the more so in circumstances where those draft contracts have been found on the KK Group's own systems, provides further confirmation that the role played by the *"Secondary Recipients"* was not an innocent one.

388. Nor was this confined to Bolzhal, since, as Mr Howe pointed out in his oral closing submissions, although agreements (or draft agreements) relating to CBC have not been found, it is telling that in certain internal email exchanges on 26 August 2009 (and so the day before Ms Dikhanbayeva's *"If the auditors are raising questions"* email in which she gave instructions in respect of Bolzhal "*to increase the value of the land plots"*) between Marlen Yelgeldiyev, a lawyer in the KK Group, and Ms Aiman Useinova there was discussion concerning the drawing up of such contracts with TESS, Biznes-Privat, Ritek and Mouli. Specifically, in the case of TESS, there was, again, a reference to *"earthworks"* and a direct reference to the KZT 95 million which CBC paid to TESS over a year before, on 14 March 2008. Ms Useinova clearly regarded the drawing up of these contracts as being important since she ended one of her emails by saying *"Marlen, please pay attention – this is serious!"*. The clear inference, given the timing of this email, is that Ms Dikhanbayeva was behind these email exchanges and so, as Mr Howe put it, involved in the process of creating these further *"false documents, because the two go hand in hand, to provide a cover for the auditors"*.

389. In these circumstances, although Mr Howe (supported by Mr Mayhew's evidence) was inclined to suggest that the structure used in relation to the land plot transactions was itself indicative of fraudulent activity, I need not reach any decision about that. It seems to me that, in truth, it is not the structure *per se* which gives rise to legitimate suspicion but the parties which, in this case, played their roles in that structure. Put differently, if CBC, Bolzhal and the *"Secondary Recipients"* had not all been 'Connected Entities', I doubt that the structure would itself have been open to serious criticism. I need not, therefore, take up too much further time dealing with Mr Twigger's various submissions in defence of the structure which was used. Indeed, as he pointed out, the European Bank for Reconstruction and Development produced an Information Memorandum in January 2007 in which it described a similar six stage structure used by the KK Group to purchase real estate on previous occasions. Furthermore, even Mr Mayhew (whose experience in relation to Kazakhstan was not substantial) acknowledged both in his report and in cross-examination that investors and developers employed *"creative approaches to buying land"*. Furthermore, I see considerable force in the reasons which Mr Twigger gave as to why the structure would have been used, even if some of those reasons (specifically the ability to minimise tax liabilities, whether on the part of KK JSC or the farmers) would not be regarded as especially laudable. I can see particular force in the point which Mr Twigger made concerning Kazakh law

imposing restrictions on the direct sale of agricultural (peasant farming) land from individuals to legal entities. Although, both Mr Mayhew and Mr Vataev suggested that this could be avoided by having the farmers apply for a change of designated land use, I agree with Mr Twigger that there is no evidence to suggest that the farmers would have agreed to this, nor that they would have been successful in this process if they could not show the plans for an industrial use, and nor that this was necessarily a simpler method than that adopted by the KK Group. To repeat, therefore, I do not regard the simple fact that the structure used was what it was as indicative that there was fraud in this case.

390. This brings me to Mr Twigger's submission concerning the commercial reasons behind the purchasing of the land plots, which he suggested were consistent with the growth of the KK Group's real estate division, together with his related submission that the real estate market in Kazakhstan at the time was in a state which made a decision to invest in land eminently understandable. I should say at the outset that, even if these submissions were to be accepted, still the conclusion which I have reached would not change because the position would remain that KK JSC had found itself making payments for land plot purchases in amounts which, unbeknown to KK JSC, vastly exceeded the prices, in fact, paid to the farmers who sold the land plots, and so with the consequence that monies which KK JSC intended should be used for such purchases went instead into the coffers of companies owned or controlled by Mr Arip and Ms Dikhanbayeva. In such circumstances, it makes no difference whether there were sound commercial reasons to purchase the land plots since the issue is not whether it made sense to make the purchases when they were made but whether the provider of the funds (KK JSC) was, in effect, duped into paying more than was necessary to effect the purchases. I propose, for this reason, to address these further submissions only relatively briefly.

391. As to the first submission which Mr Twigger made, essentially two points arise. First, it was suggested by the Claimants in the Re-Re-Amended Particulars of Claim that the land plots comprised *"undeveloped agricultural land plots on the far outskirts of the city"*. As Mr Twigger pointed out, however, and as Mr Howe acknowledged, the land plots were, in fact, at least to an extent, contiguous with the Aksenger site (with the exception of one of the land plots which was adjacent to the Akzhal 2 site). Secondly, Mr Werner had suggested in one of his witness statements that *"the land was, from a commercial perspective, of no use at all"*. This, however, somewhat overstated things since, as Mr Twigger went on to point out, the Aksenger development was on approximately 477 hectares of land which KK JSC had purchased in the preceding years. As a result, the land plots were close to good transport links, including highways, railways (which were expected to extend onto the Aksenger site) and other transport routes. Moreover, the area was one to which the Almaty city government had announced it would relocate industrial facilities, so driving up demand for industrial facilities and land in those areas. Indeed, Mr Mayhew and Mr Kuznetsov agreed in their joint memorandum as follows:

"The Karasay District is an important district in Almaty Region. Although it covers only 1.0% of the region's territory, the district accounted for 22.0% of its industrial output, 9.7% of its agricultural output and 42.6% of fixed capital

investments in 2007; 22.4% of its industrial output, 9.3% of its agricultural output and 30.8% of fixed capital investments in 2008; and 23.9% of its industrial output, 8.7% of its agricultural output and 21.5% of fixed capital investments in 2009."

They also agreed this:

"Notable commercial developments within a radius of approximately 15km include buildings for both international companies such as Coca-Cola, Efes, Pepsi and Hamle Company Ltd. and local firms such as Maxi, Vostock- Cement and Kazakhstan Kagazy."

392. Mr Twigger submitted, in my view with some legitimacy, that the land plots really amounted to an extension of the *"portfolio of adjacent plots"* which is how Jones Lang Lasalle described the Aksenger area in its *"Strategy for development of Industrial Park"* dated March 2007. In that document, it was, indeed, noted that one of the important factors determining the Aksenger project's success was the fact that there were *"opportunities for further expansion of the plot"*, albeit that later on under *"Weaknesses"* a note of caution appeared as follows: *"Complex shape of the land plot that might drive higher costs of infrastructure and requires well thought out planning of the territory to avoid problems in the future"*. Mr Howe highlighted this last point when making the observations that the land plots were irregular in shape and that some of them only partially adjoined the Aksenger site with some separated by plots not owned by the KK Group. However, as Mr Twigger submitted, the land plots either adjoined or were in very close proximity to KK JSC's land, with only one of the thirteen plots near the Aksenger site separated from the adjacent plots by a plot not owned by the KK Group. It is anyway obvious that the KK Group could have sought to buy up other land plots, so hopefully overcoming any difficulty in this respect. I agree with Mr Twigger that, in the circumstances, it can hardly be said that the plots had been purchased in random, isolated or remote locations.

393. It follows that I am unpersuaded by any objection to the land plots being purchased based on these sorts of essentially physical considerations. This brings me, however, to the second point which arises. This is that there was no need to buy more land plots given that, Mr Howe suggested, there was simply no need for KK JSC to buy up more land in view of the fact that, as confirmed by KK JSC's IPO prospectus, 528 hectares of *"prime land"* had already been purchased, including 477 hectares at the Aksenger site. I agree with Mr Howe that it is not immediately obvious why, in such circumstances, more land would be needed. As Mr Howe reminded me in this context, the Aksenger site was already vast, comparable in size to almost double the City of London. I agree, in particular, that, the valuations presented to IPO investors having apparently been provided on the assumption that the necessary industrial infrastructure for the existing Aksenger land plots would be developed, to acquire additional land plots would additionally have used up liquidity which otherwise would have been available to develop existing land plots. Even if, therefore, Mr Twigger was right when he suggested in closing that by late 2007, purchasing real estate was, in its own right, a separate stream of the KK Group's business, regarded as having the potential to make substantially higher profits than the paper

business, it still is difficult to see why at that stage more land would have been purchased.

394. In summary, therefore, in relation to the first of Mr Twigger's submissions, I am not convinced that it did make commercial sense for KK JSC to purchase the additional land plots, not because of their physical characteristics but because of the more general commercial implications of doing so. Nonetheless, had this matter stood alone, I would not have concluded that the decision to do so could provide any real support for a case in fraud. After all, poor commercial decisions are frequently made by businessmen who lack any fraudulent intent.

395. I come on, then, to consider the second of Mr Twigger's submissions. This was that, when KK JSC *"became committed"* (as Mr Twigger put it) to purchasing the land plots, Kazakhstan had experienced an unprecedented economic boom and there were a number of indicators that made it reasonable for the KK Group to continue to acquire land. Mr Twigger was prepared for these purposes to treat the relevant time period as being between October 2007 and June 2008. As a result, I need not deal with certain submissions which Mr Howe made to demonstrate that there cannot have been any commitment (he would say any decision, indeed) to purchase the land plots prior to the IPO in July 2007.

396. The issue here is whether by this stage, as alleged in the Re-Re-Amended Particulars of Claim, Kazakhstan was "*already in the throes of a serious financial crisis*" and whether the Kazakh "*property bubble*" had burst. There is also an issue as to whether by the time that it was decided to purchase the land plots a decision had already been made to put the development of the Aksenger site on hold. However, in truth, there is no real evidence to support the proposition that this was the case. On the contrary, it would appear that KK JSC was still in negotiations with Immo Industry Group, a potential joint venture partner for the Aksenger development, in mid to late 2008 as demonstrated by the drafting of a confidentiality agreement dated 15 October 2008 and draft heads of terms dated 22 October 2008.

397. Focusing, therefore, on the state of the real estate market in Kazakhstan between October 2007 and June 2008, it was Mr Howe's position (supported by Mr Mayhew, whose Kazakhstan-specific experience is limited and who was somewhat vague when he suggested that he had spoken to others in the market) that the global financial crisis, which commenced with the credit crunch in July/August 2007, meant that by mid to late 2007 conditions changed in such a way as to make the decision to purchase the land plots unreasonable. Specifically, Mr Howe relied on what Mr Manghi had to say in a conference call with investors in October 2007, namely:

"I would now like to talk about developments after the first half year. In August, there was an international credit crisis which hit Kazakhstan. It hit the banking sector in Kazakhstan particularly hard. As a result of this, there's a severe liquidity crisis in Kazakhstan and borrowing costs have risen sharply. We, therefore, have an unexpected competitive advantage now over other local companies simply because our IPO raised $255 million in cash and therefore we are very liquid. Our competitors are generally highly leveraged, and they are now suffering from high financing costs."

The difficulty with Mr Howe's reliance on this, however, is that a reference by Mr Manghi to a liquidity crisis does not seem to me, necessarily at least, to equate to an appreciation, as Mr Twigger put it in closing, to *"everybody"* thinking *"that land prices were going to fall off a cliff and the values were gong to plummet and therefore it wasn't a good investment"*. Indeed, it is important to note that Mr Manghi went on to state as follows:

" As a result of our acquisition of Kazupack, which occurred in August we now have an estimated 25% market share of the corrugated market in Central Asia. Because of the liquidity crisis we believe that there will be more acquisition opportunities over the coming six months."

Furthermore, Mr Arip later had this to say:

"According to Alessandro, Kazakhstan actually had a liquidity crisis, and we need to change our strategy a little bit in order to deal with the situation. First of all, we plan to obtain an advantage from the situation. Therefore, in our plans we have outlined acquisitions, because now we have a very high liquidity, and in this situation we have a very good chance for raising loans and we plan to refinance our expensive Kazakh loans through borrowings with lower interest rates and to leave part of funds raised from IPO for potential acquisitions on paper business.

…

In addition, as it was already noted by Alessandro, we have the possibility to attract international borrowings with much more favourable interest rates. I think that when we deal with all issues of funding, we will be able to increase our profitability as our borrowing costs will be reduced significantly. In general, the idea is to benefit from this situation and to move more aggressively to the said acquisition of paper facilities; we will also find potentially good options for acquisition of real estate, where we also want to strengthen our position."

Mr Twigger submitted that this, similarly, is not consistent with the contemporaneous view being that the liquidity crisis would have the effect on the Kazakh real estate market which Mr Howe suggested would have been clear by this point. I agree with Mr Twigger about this. Indeed, given that the investors on the conference call were themselves, no doubt, to a greater or lesser degree, knowledgeable about such matters, it is notable that nobody appears to have disputed what Mr Manghi and Mr Arip had to say. The position is further confirmed by this further statement by Mr Arip at the end of the conference call:

"The sales still may happen because even despite the fact that prices are going down there's a big need for the infrastructure and our main business is not to sell up but to develop infrastructure and to sell infrastructure land, and we are talking to several clients so this deal may happen. The problem is that it may happen not on the level that we expected and in this case maybe it's better for us to wait for a year or more, maybe one and a half years until the whole situation on the real estate market could be clarified. Anyway, most of the payoff of the land we planned to do has to be in the years 2009, 2010 and 2011 and we

believe that generally the economy is very strong. It's mostly commodity driven with all the historical peaks and as a result, I think those years liquidity crisis will be history. So we don't think that we have to strongly review our real estate strategy, maybe just to take advantage of the situation and acquire some more real estate assets during this liquidity situation because it certainly won't be long and it will continue for a couple of months more. Currently the market is stagnating, you don't see the strong fall of the prices but if this situation continues it will certainly continue for a couple of months, I think we have to expect some connection on the market, and also I believe we will have special opportunities for some companies who have leverage and are under pressure to sell their assets."

398. Mr Twigger submitted that, based on the available evidence, the position is that, after a period of unprecedented growth from 2000, after the banking sector's liquidity crisis in late 2007, during the first six months of 2008 neither the severity, the nature nor the longevity of the financial crisis was obvious to market participants. I consider that this is a fair assessment of the position. In truth, not least because of his limited knowledge of the Kazakhstan property market specifically, Mr Mayhew was in no real position to demonstrate otherwise, despite suggesting that *"there is no shortage of published commentary available which confirms that Kazakhstan was one of the first countries to be significantly influenced by the onset of the credit crunch during the third quarter of 2007"*. It is, however, somewhat doubtful that the material relied on by Mr Mayhew does any such thing. So, by way of example, on 5 October 2007, Troika Dialog, an investment bank, in a piece entitled *"Kazakhstan in Transition"* stated that *"The situation in Kazakhstan should not be overdramatized"* and went on to say nothing to support what Mr Mayhew had to say about Kazakhstan being one of the first countries to be affected. On the contrary, there were a number of really rather positive assessments, including references to there *being "no significant threat to the stability of the budget"* and to the *"growth of domestic assets"* becoming *"the major source of tenge liquidity in the future"*. As to real estate specifically, this was observed under the heading of *"CREDIT RISK"*:

"A deceleration in the growth of the banking system would have an adverse effect on overall economic growth, which in its turn can take a toll on asset quality. The clearest example of this is the domestic real estate market, which was fed by banking loans and has demonstrated rapid growth over last year and a half. The high share of mortgage loans in total retail loans (23%) and the exposure of loan books to the real estate market of around 25% make banks highly susceptible to borrowers' creditworthiness and/or the devaluation of collateralized assets.

At a recent meeting with Kazakh authorities, a speaker opined that the system could sustain a fall of up to 30% in the real estate market. Were this to occur, the crisis would have a substantial impact on the banking system but in the long run would likely improve risk management policies and push loan portfolios toward a more diversified structure."

This is expressed in somewhat provisional terms which hardly indicate a fall in property prices which is already underway, let alone any precipitous decline.

Similarly, the selection of short business news updates on Business New Europe Digest cited by Mr Mayhew provide only limited support for what he had to say. For instance, a report dated 14 September 2007 entitled *"Kazakh banks: Dealing with the issues"*, contains this:

"Global credit tightening, coupled with increasing regulatory measures, make Kazakh banking a tough space for investors at the moment. On a recent trip to Almaty, we focused on some of the key issues facing the banking system:

Funding. International funding is, by and large, closed to Kazakh banks, and most have put off issuance in the hope of better credit conditions in 2008E. With this trend, a slowdown in sector growth is inevitable, while potential for a local deposit war is clear as banks fight for the one sizeable funding pool available.

Asset quality. We do not foresee major risks in the securities portfolios of Kazakh banks beyond some inevitable (non-substantial) mark-to-market losses booked in 2H07. Within the loan book, the real estate and construction segment is a concern, with a local consensus view that real estate prices are under pressure, while certain real estate companies have encountered liquidity problems.

Sector liquidity. August saw an outflow of hot money from the banking sector, coupled with a minor deposit run as both corporate and retail depositors shifted deposits away from most players towards the perceived safety of Halyk. The National Bank of Kazakhstan (NBK) had to step in and provide liquidity in its role as lender of last resort."

Again, there is no suggestion here that the real estate market had already suffered any major decline.

399. Indeed, it is telling that, when Mr Mayhew was taken to what Mr Arip had to say to investors in October 2007, specifically to the passages set out above, and it was put to him by Mr Twigger that *"it wasn't an unreasonable decision at that time ... to see a potential opportunity and to think, 'Well, let's try and acquire some land and then hopefully prices will go up again and we will be in a strong position"*, Mr Mayhew's response was to say this:

"It is certainly an opportunity but of course what this brings with it is the decision one has to make as to where the market is actually going. Because if you buy too early in a downturn you could be buying into assets which, in due course, either are not developable or can't be sold because the market has completely imploded. So I don't think it is that straightforward, to be honest."

There was then this exchange:

"Q. It is not straightforward, I agree, Mr Mayhew. It was a judgement, and it was quite a difficult judgement to make. But what one can't say is that was a completely unreasonable, irrational judgement; do you agree?

A. All options were open at the time.

Q. Yes, and do you agree that at the end of 2007 and beginning of 2008 no one could really have foreseen how serious or sustained the financial crisis was going to be?

A. I think at that time it was very apparent that there had been an extremely significant event and it would have been a brave person to call exactly which direction the market was going. I think it was an environment that people hadn't seen before, particularly in this region."

I agree with Mr Twigger that, in the circumstances, it would not be right to conclude that a decision to buy additional land plots at the time can, in and of itself, amount to evidence of fraud. As he put it, *"Optimistic, or even speculative, investment decisions in the early months of the 2008 global financial crisis are a far cry from the allegations of fraud made against"* Mr Arip and Ms Dikhanbayeva. It does not follow, however, for reasons which I have explained, that there was no fraud involved in the implementation of the decision to buy. On the contrary, I am clear that there was.

400. I would add, out of completeness, that Mr Howe also placed reliance on an email which was sent on 3 April 2010 by KK JSC's then CFO, Aida Yelgeldieva, to Ms Musagalieva, Mr Tulegenov and Ms Kogutuk. The email began by saying that there were *"a few questions, which were raised by the auditors and which we should answer"*. These included at point 3:

"Land purchase via Bolzhal – the economic and commercial nature of the transaction: at the time of the purchase, there was already a recession at the real estate market, but the land was purchased at an 'inflated' price."

Mr Howe suggested that it is telling that this email was not also sent to Mr Werner or any other member of the KK Group's new management. Mr Howe's suspicion might be understandable, but I do not myself consider that the email justifies, without more, any particular conclusion concerning the Kazakhstan real estate market. This is because it is not known on what basis the auditors, BDO, apparently arrived at such a view. Furthermore, as Mr Twigger pointed out, only a few months before the PwC Russia report had referred to the land plot prices paid in 2009 as being higher than those paid in 2008 *"before the economic downturn had begun"*. Although, again, I would be reluctant to place too much weight on this observation, made not by a valuer but by another accountancy firm, what this does demonstrate is that there were differing views.

401. In conclusion, therefore, I am satisfied that the Land Plots Claim has been made out and that KK JSC is entitled to damages as sought but with credit being given as I have described. Specifically and for the avoidance of doubt, for the reasons which I have given in this section of the judgment, I have concluded: (i) that Mr Arip is liable to KK JSC under Articles 62 and 63 of the JSC Law, given that he was a director of KK JSC at all material times; and (ii) that Ms Dikhanbayeva is also liable to KK JSC under those provisions in respect of the time when she was a director of KK JSC, namely between April 2008 and July 2009, and otherwise under Articles 917 and 932 of the KCC. As with the PEAK and Astana 2 Claims, there is no need for me to make any determination concerning

KK JSC's (alternative) unjust enrichment claims brought under Articles 953, 955 and 956 of the KCC.

Holding Invest

402. There remains the role played by Holding Invest also to consider. This relates to two payments received by that company, namely a payment by Bolzhal to Holding Invest on 1 April 2008 in the amount of KZT 605.9 million and a payment made directly by KK JSC to Holding Invest on 8 May 2008 in the amount of KZT 230,880,000/US$ 1,915,937. As to the first of these, it was Mr Jumadilov's evidence that this payment represented 50% of the purchase price for an office block owned by Holding Invest and that the payment was made on behalf of a group of investors (including Mr Jumadilov himself) who were buying that block. I have previously mentioned this when describing my impressions of Mr Jumadilov's qualities as a witness. It will be recalled, in particular, that Mr Jumadilov accepted in cross-examination that to use KK JSC's money in this way was an improper use of funds. He also agreed, using the phrase "*C'est la vie*", that he was prepared to act dishonestly if there was money in it for him. It was nonetheless Mr Twigger's submission that Mr Jumadilov's evidence concerning the payment from Bolzhal to Holding Invest, and moreover what he suggested was a subsequent cash payment in the other direction, should be accepted. Specifically, according to Mr Jumadilov, he decided to use money which KK JSC had paid Bolzhal and which was sitting in Bolzhal's bank account to make the payment, with around US$ 1 million of this constituting Mr Jumadilov's anticipated fees in relation to the land plots transactions and the remaining US$ 3.7 million being returned to Mr Jumadilov (and so to Bolzhal) in cash by his fellow investors for use by Bolzhal in the acquisition of the land plots – to be followed by the other investors subsequently returning his US$ 1 million as well after, so he explained in his second witness statement served shortly before trial, Mr Jumadilov realised that the pledge over the property held by Alliance Bank could not be removed. On this basis, therefore, at least according to Mr Jumadilov, there was no detriment to Bolzhal: Bolzhal was repaid and Holding Invest kept the money which it had received by way of the purchase price of the office block which it owned. The difficulty with this, however, is that it is an explanation which entirely depends on Mr Jumadilov having told the truth in the evidence which he gave since there is no documentation supporting what he had to say. This, he explained, was because the transaction came to nothing and because also the events in question took place almost a decade ago. Mr Arip also speculated that, as Holding Invest had in the meantime been subject to a number of investigations, it is possible that relevant documents may have been taken by the Financial Police or prosecutors. This was, however, really no more than speculation. I am not prepared, in the circumstances, bearing in mind the view which I have formed both as to Mr Jumadilov and Mr Arip, simply to accept what they (or, for that matter, Ms Dikhanbayeva) had to say on the matter. It is striking that there is absolutely nothing in any document to support their version of events and very convenient (in truth, too convenient) that the return payments made by Mr Jumadilov's fellow investors should apparently have been made in cash. Indeed, it is instructive to note how Mr Jumadilov described things in his first witness statement where he said this:

"We used funds received from KK JSC to make the purchase because I was owed fees for the land plots transactions and whilst the amount due to me was less than the amount paid to Holding Invest for the property, the difference was made up by me and my co-purchasers through the cash payments we made to sellers of land plots."

Accordingly, it would seem that, on Mr Jumadilov's account, he and his co-investors did not, as such, repay Bolzhal but that they provided funds which were used, apparently as direct payments from them (as opposed to from Bolzhal), to pay the sellers of land plots. This explanation seems to me likely to have been designed to make it all the more readily explicable that there are no documents showing that he and his co-investors ever repaid (whether directly or indirectly) the monies which Bolzhal transferred to Holding Invest effectively on their behalf. There is also the point made by Mr Howe in closing that neither Mr Jumadilov in his first witness statement nor Mr Arip in his fourteenth witness statement (both of which were served in September 2016) suggested that the purchase of the office block did not ultimately go ahead. This was something which was only mentioned in Mr Jumadilov's second witness statement and Mr Arip's sixteenth witness statement (both served shortly before trial). I agree with Mr Howe, however, that if this really was what happened, it would obviously have needed to be mentioned but, instead, the opposite impression was given.

403. I cannot, in these circumstances, accept the explanation which has been put forward by Mr Jumadilov and Mr Arip. It is not the end of the matter, however, since, alongside the clarification (if that is the right word) which Mr Jumadilov and Mr Arip gave in the immediate lead-up to trial concerning the non-sale of the office block, Mr Arip and Ms Dikhanbayeva took the opportunity to say something, as Mr Arip put it, about *"how Holding Invest used the KZT 605,900,000 paid by Bolzhal in April 2008"*. Mr Arip, in particular, said this:

"This money was used to pay a commitment fee to Central Asian Investment Consulting Company. This was related to the purchase of Astana Contract, which was a transaction for the benefit of the Kagazy Group and Holding Invest put the money forward to assist the Kagazy Group in the takeover of Astana Contract. …".

In her witness statement, Ms Dikhanbayeva supplemented what Mr Arip had to say by reference to bank statements showing that KZT 603,400,000 was paid in two instalments on 1 April 2008. She added that Holding Invest subsequently assigned this debt to PEAK Aksenger, as authorised by KK JSC's board on 16 March 2009, and that PEAK Aksenger repaid this amount of money to Holding Invest on 17 April 2009. She explained in cross-examination that the thinking was that, if Holding Invest made the payment, it would be easier to reclaim this money from Central Asian Investment Consulting Company ('Central Asian') if something went wrong with the deal.

404. Even assuming that what Mr Arip and Ms Dikhanbayeva had to say about this was true, and the bank statements and the assignment agreement do, of course, somewhat speak for themselves, the difficulty remains, aside from the fact that it is evidence which ought to have been forthcoming somewhat earlier than

proved to be the case, that monies which were paid by Bolzhal to Holding Invest on 1 April 2008 were (at least almost entirely) paid the very same day to Central Asia. As a matter of timing, it is difficult see that this can have been a coincidence. I agree with Mr Howe that it is most unlikely that back-to-back payments such as this can have been completely unrelated. The more so, given the conclusion which I have reached concerning the role played by the Defendants in relation to Bolzhal and the fact that Holding Invest was a company which was owned by Mr Zhunus and Mr Arip. In short, unless Mr Jumadilov's evidence concerning the office block (as corroborated by Mr Arip but supported by nothing by way of documentation) is to be believed, the only realistic inference is that the monies received from Bolzhal were used to pay Central Asia. The fact that Central Asia repaid PEAK Aksenger on 17 April 2019 changes nothing in circumstances where the monies transferred from Bolzhal to Holding Invest did not, as I conclude, find their way back to Bolzhal or, more accurately, land plot owners as Mr Jumadilov suggested. I, therefore, reject Mr Twigger's submission that, as a result of offsetting, *"the final balance was neutral"*.

405. This brings me to the second payment (KZT 230,880,000) which was made by KK JSC to Holding Invest on 8 May 2008 and which then was paid on to Trading Company and then on to Sunclub LLP the self-same day. Like the payment with which I have just been dealing, although treated by the Claimants as a Land Plot Claim, this aspect is in a different category since it does not involve any purchase of a land plot. Whereas, however, it can be said in relation to the payment which Bolzhal made to Holding Invest that this involved monies which, at least as far as KK JSC was concerned, had been transferred to Bolzhal for the purposes of land plots purchases, the KZT 230,880,000 payment which KK JSC made to Holding Invest was not, both Mr Crooks and Mr Thompson agreed, described as being related to land but instead as a payment relating to the rent of office space in accordance with a contract with the reference A-04-1/08 and dated 30 April 2008. Mr Howe suggested that, whether or not this strictly qualifies as a Land Plots Claim, what is clear is that there is a misappropriation claim. He highlighted, in this regard, Mr Arip's connections with Trading Company, Mr Arip's mother-in-law's company, as well as the fact that Sunclub LLP is a company which, according to Ms Dkhanbayeva, built a clinic for Trading Company. The fact that the payment which KK JSC made did not purport to be in respect of a land plot purchase means, however, that the focus is different. It is not good enough for Mr Howe, therefore, to say (as he did in his written closing submissions) that *"it is difficult to see what proper or honest explanation there could be for such a transaction, which resulted in Trading Company receiving a substantial sum of money which [KK JSC] was supposedly paying for the purchase of the Land Plots"* since that is simply not what the payment was ever meant to cover. The focus must, instead, be on whether the payment, although described as being for rent, was not actually a rental payment at all. As to that, although Mr Howe submitted that there is no documentation to support the existence of an agreement that rent would be paid in advance in order to cover refurbishment costs in circumstances where the rental space was fully fitted out, Ms Dikhanbayeva was able in her eighth witness statement, served shortly before trial, to explain by reference to 1C database entries as follows:

"26. To assist me in responding to what Mr. Crooks says about this payment to Holding Invest, I have reviewed extracts of KK JSC's 1C database that have been provided to me. From the 1C database, I can see that KK JSC had made advance payments to Holding Invest which related to the office building rented by KK JSC from Holding Invest, including the KZT 230,880,000 payment made on 8 May 2008. I can see that by 31 July 2009, after I had left the KK Group, the overall amount due from Holding Invest to KK JSC was KZT 596 million.

27. Monthly rent for the building was around KZT 11.9 million, including VAT. The KK JSC 1C database shows advance payments being applied against rent payments to Holding Invest at the end of August 2009, September 2009 and October 2009. It also shows that in October 2009, Holding Invest returned KZT 527.9 million to KK JSC.

28. After this payment of KZT 527.9 million, the balance owed by Holding Invest to KK JSC was around KZT 65 million. The 1C database shows that this was applied to various costs such as lease of cars, water, electricity, sewage and other services, the purchase of furniture and office equipment and rent payments for November and December 2009.

29. On 18 August 2010, when the 1C database extract provided to me ends, it appears that there was still an outstanding balance of approximately KZT 30 million owned to KK JSC by Holding Invest. I do not know how this was eventually resolved.

30. Thus, Holding Invest's liabilities to KK JSC were almost entirely repaid including by the KZT 527.9 million payment which happened after I had left the KK Group."

It seems to me, in the circumstances, that it would not be appropriate to conclude that the payments made by KK JSC directly to Holding Invest were illegitimate since there is evidence in the form of these database entries that consideration was provided for what was paid. It follows that there was nothing to stop Holding Invest deciding to pay the monies on to Trading Company or to prevent Trading Company making payments to Sun Club LLP.

Limitation

Applicable Kazakh law

406. I turn now to the limitation issue. Clearly, in the light of my conclusions thus far, this is an issue of considerable importance. It is common ground that the relevant limitation period for present purposes is three years, and that the dates which matter are 1 August 2010 in relation to the PEAK and Astana 2 Claims and 27 August 2012 in relation to the Land Plots Claim. The significance of these dates is that the Claim Form commencing the PEAK and Astana 2 Claims was issued on 2 August 2013, and the Land Plots Claim was introduced by amendment pursuant to a Consent Order dated 28 August 2015 which made it clear in a recital that the Land Plots Claim was made or deemed to have been made on the date of the order and not on the date the original action was

commenced unless the Claimants could establish that the Land Plots Claim arose out of the same facts or substantially the same facts as the claims in respect of which the Claimants had already claimed a remedy in these proceedings. In the event, Mr Howe did not attempt to argue that the proviso operated to allow the operation of the 'relation back' principle, accepting that the relevant date for limitation purposes in respect of the Land Plots Claim is three years before the amendment was made.

407. I shall set out the relevant provisions of the KCC in a moment, but in broad terms the question which arises is whether the Claimants were aware, or should have become aware, of the violations of their rights about which they complain in these proceedings before the dates to which I have referred. If the Claimants were aware, or should have become aware, of such violations by the relevant dates, then, the claims will be time-barred. In that event, the question which then arises is whether the limitation period can be *"restored"* applying Kazakh law or disapplied as a result of the application of the Foreign Limitation Periods Act 1984. Mr Arip's and Ms Dikhanbayeva's case is that each of the claims is time-barred and that there is no justification to *"restore"* or to disapply.

408. The three-year limitation period is stipulated in Article 178 of the KCC. Article 179 (*"Application of Limitation Period"*) goes on to provide (in translation) as follows:

"1. The claim for protection of a violated right shall be accepted by the court for consideration irrespective of expiry of the limitation period.

2. The limitation period shall be applied by the court only upon the application by party in the dispute, which is made prior to the adoption of a decision by the court.

3. The expiry of the limitation period prior to the presentation of the claim shall be the basis for the court's passing the decision to dismiss the claim.

…".

In other words, a claimant is able to commence proceedings even if the three-year limitation period has expired, and it is for the defendant (at least typically) to raise a limitation objection in which case the court will deal with the question of limitation. If the limitation period has, indeed, expired, then, the court will dismiss the claim. I observe, in passing, that this reflects the position in this jurisdiction also.

409. Article 180.1 (*"Running Of Limitation Period"*) then provides (again in translation, although I shall come on to explain that an issue arose about this in the context of the evidence given by Mr Vataev, the Claimants' expert on Kazakh law):

"The limitation period begins to run from the day when a person became aware or should have become aware of a violation of his rights. Exceptions from this rule shall be established by this Code and the other legislative acts."

It is in relation to this provision that it will be necessary for me to consider the awareness issue (in both its respects) on the facts of this case in some depth. As to this, Mr Vataev and Professor Suleimenov agreed as follows in their joint memorandum:

"2) Pursuant to Article 180.1 of the Civil Code, the limitation period starts running from the date on which the person whose rights have been violated became, or should have become, aware of the violation of his rights. The moment of commencement of the limitation period is a matter of fact, which is to be established by the court based on the actual circumstances of a particular case. ...

3) In the case of a corporate violation, the limitation period starts to run when the claimant company became, or should have become, aware of the harm caused to the company as a result of an officer's failure to perform or their improper performance of, one more of his/her corporate duties, i.e. as a result of a corporate offence. ...

4) Since Articles 62-63 of the JSC Law provide for a broad range of violations, it is practically impossible to formulate a universal rule for determining when the potential claimant 'should have become aware' of the violation. It is necessary to ascertain for every specific offence and considering the specific factual circumstances, when the company should have become aware of the damage and the fact that it was caused by the officer's violation of his/her duties under Articles 62-63 of the JSC Law."

Although the matter was not expressly addressed by the experts in the joint memorandum, I did not understand there to be any issue on Mr Vataev's part with Professor Sulemeinov's view that, in the context of tortious liability under Art. 917 of the KCC, the limitation period will run from the time when the potential claimant was, or should have become aware, that its property has suffered damage as a result of unlawful conduct, and that, as regards an unjust enrichment claim, the relevant starting point is when the potential claimant is aware, or should have become aware, that a third party was unjustly enriched at the claimant's expense.

410. The experts disagreed, however, on the question of whether a claimant needs to have awareness of the identity of the wrongdoer in order for the three-year limitation period to run. I shall come back to this matter shortly, after first dealing with what is meant by 'awareness' more generally. There were two aspects to this: first, whether 'awareness' for the purposes of Article 180.1 requires, as Mr Twigger put it when cross-examining Mr Vataev, *"discovering something"*; and secondly, what level of awareness qualifies as 'awareness' for the purposes of Article 180.1. In truth, however, as demonstrated by the question which Mr Twigger himself posed in cross-examination, the first of these issues is a non-issue. It seems to me that 'awareness' must always be acquired in the sense that there is inevitably a time when a party lacks awareness and a time when that party obtains it. It is of the essence of a limitation provision that time must start running at some point, so making it obvious that there will be a before and after. Indeed, this is recognised within Article 180.1 itself with its reference to a person becoming (the words used are *"became"* and

"become") *"aware of a violation of his rights".* The real issue, therefore, is as to the second matter.

411. In opening, Mr Twigger drew attention to the fact that Article 180.1 uses the language of awareness rather than knowledge. He highlighted, in doing so, that the provision does not state *"when the person knew that there had been a violation of their rights"*. Whilst acknowledging, as he put it, that there *"may not be much difference"*, he nonetheless admitted that *"awareness is a slightly more inchoate concept than knowledge"* in that a person *"can be aware of something without necessarily knowing that it is correct"*. I queried whether the original Russian used in Article 180.1 could be translated in a way which meant that the references to 'aware' in the translation which was before me (and which I have quoted earlier) could be translatable also as 'know'. Mr Twigger charitably described that as *"a very good question"* to which he did not know the answer. This prompted Mr Vataev, shortly before he came to give his evidence, to suggest that the more accurate translation of the relevant Russian word used in Article 180.1 (*"uznal"*) was *"obtaining knowledge"*. This was even though in the joint memorandum (as demonstrated by the quotation set out above) of Mr Vataev and Professor Sulemeinov had said Article 180.1 entails the limitation period *"running from the date on which the person whose rights have been violated became, or should have become, aware of the violation of his rights"*. During cross-examination, Mr Vataev rejected the suggestion put to him by Mr Twigger that he had changed his mind *"in order to come up with a translation ... more favourable to the claimants' case"*. He insisted that it was his *"responsibility to deliver the true and exact meaning of the law"* and that that is why he had raised the translation issue.

412. I was not particularly impressed by Mr Vataev's somewhat belated clarification as to how Article 180.1 should be translated. I tend to agree with Mr Twigger that Mr Vataev adopted a somewhat opportunistic approach in this respect. Ultimately, however, not only did it emerge when Professor Suleimenov came to be cross-examined that he, too, spoke in terms of knowledge (as well as awareness), but I am, in any event, not convinced that anything really turns on the translation point. This is because, as pointed out by Mr Howe, the view of Mr Arip's and Ms Dikhanbayeva's own Kazakh law expert, Professor Suleimenov, was that for time to start to run a claimant must have *"reasonable grounds to believe"* that his rights have been violated. He explained that by *"reasonable grounds to believe"* he meant *"knowledge, although to a lesser degree than specific knowledge"*. He added that *"Whereas specific knowledge simply cannot exist when the claim is filed"*, before adding further that *"again, it is 'uznal', knowledge"* (and so, in fact, rather making the point that awareness and knowledge in the context of Article 180.1 amount to much the same thing). The position seems to be, as Mr Twigger submitted (and I did not understand Mr Howe ultimately to dispute), that Article 180.1 requires the court to consider whether a claimant was actually, or acting reasonably should have become, aware of the violation of his rights, with 'awareness' in this context meaning having *prima facie* evidence of or reasonable grounds to believe there was a violation. This is, indeed, what Mr Vataev appeared to consider, as demonstrated by the following exchanges during his cross-examination:

"Q. What you are saying is, in very broad terms, you need to know enough, and what 'enough' is may depend on circumstances, do you agree?

A. Yes.

MR JUSTICE PICKEN: It is really prima facie, isn't it?

MR TWIGGER: That may be another way of putting it, except now we are in Latin, my lord

MR JUSTICE PICKEN: Are you saying that you need to know 'enough', as you say - but on the face of it there is a violation, prima facie?

A. Yes, sir."

There then followed this exchange between Mr Twigger and Mr Vataev:

"Q. Would you agree that it is actually impossible to give a definitive version, a definitive description of the level of confidence that is required before the limitation period starts to run? We can agree it is more than suspicion ...

A. It would be fact-specific.

Q. Fact-specific, exactly. More than suspicion, ...

A. More than suspicion, less than absolute certainty. Somewhere in between."

Professor Sulemeinov expressed a similar view during his cross-examination by Mr Howe:

"A. If I may, I would like to explain. The thing is knowledge could have different degrees. Absolute knowledge is non-existent. Specific knowledge that Mr Vataev is referring to cannot exist when the claim is filed. It can only come in the judge's decision and then again it is not always specific because that could be appealed against. We are talking about relative knowledge only and hence that mean specific knowledge referred to by Mr Vataev cannot be the subject of our discussion here. Instead we must be discussing reasons to believe which is also a category of knowledge, but a degree of knowledge that cannot be very specific. Specific knowledge is non-existent, especially at the time when the claim is only filed, in my view."

413. Ultimately, therefore, there was no real dispute between the Kazakh law experts on this point. Nor, at least as I understood it, was there any issue that, in terms of actual awareness, it is a claimant's subjective awareness of the essential elements of the claim which is required to be considered whereas, when assessing whether a claimant should have become aware of particular facts, the test is objective and so the question is whether a reasonable person acting with reasonable diligence would have acquired the requisite awareness. As Mr Twigger pointed out, Mr Vataev accepted this in the following cross-examination exchanges:

"Q. It follows from the way that you have put that there, doesn't it, Mr Vataev, that you accept that once the claimant has grounds for suspicion, it is incumbent on him to make, as you say, all reasonable efforts, to find out whether he has a claim, whether his rights have been violated or not?

A. Yes, and still there might be a kind of multi-level inquiry here. I have suspicion and let's say arise those suspicions I am given some plausible explanation that yes, that is a legitimate business transaction that may lull the victim into a sense of calm and quiet. But then, you know -

Q. Yes, I see that. So if you were given -

A. - there was, again, how reasonable is reasonable and how sufficient is sufficient, so we are again in the factual –

Q. We are back into the factual scenario. I see that. So if you are given some sort of explanation to throw you off the scent, then obviously it may not be reasonable, depending on the facts, for you to do anything. But if that doesn't happen, you just find out about something, you get suspicious about transactions that have happened, you are under - it is difficult to describe it as being under a duty, but the court would look at whether you had made reasonable efforts to investigate, is that right?

A. Yes, I agree."

414. This brings me to the issue of whether it is necessary for Article 180.1 purposes that the identity of the wrongdoer should be known before the limitation period commences. In truth, although in the joint memorandum a disagreement was identified, there was no real difference between Mr Vataev and Professor Sulemeinov in relation to claims arising out of Article 62 of the JSC Law. Mr Vataev acknowledged that there is no express requirement under Kazakh law that the identity be known but makes the practical point that, in order for a claim to be filed, the identity would need to be known because *"a claim may not be made against an unidentified person"*. Professor Sulemeinov said in cross-examination that *"the most important thing is to identify not the person but rather the category of official"* since *"then as a rule it is not difficult to identify the specific person"*. He nonetheless also agreed with Mr Howe that for the purposes of Articles 62 and 63 it is necessary to identify the particular company officer concerned, and so I was not entirely sure whether there was any real difference between the two Kazakh law experts. In any event, if it proves impossible to identify the relevant officer, then, as I understood both experts' evidence, limitation would not start running because the potential claimant would not fall foul of the *"should have become aware"* aspect of Article 180.1.

415. That said, in the present case, since there was no uncertainty as to who the relevant company officers were, the identity issue does not really arise. The position is the same concerning the claims under Article 917 (tort) and Articles 953-960 (unjust enrichment) of the KCC because there can be no doubt that, whatever the Claimants may have known or should be taken as having known concerning the violation of their rights, this is not a case where they should be taken to have had the requisite awareness of everything they need to be aware

about except for the identity of the (alleged) wrongdoers. As Mr Twigger observed, the Claimants have only ever thought that, if there had been wrongdoing, it was caused by Mr Zhunus and Mr Arip with the assistance of Ms Dikhanbayeva. For completeness, however, I was not altogether persuaded by Professor Suleimenov's view that in tort cases, where the wrongdoing and the causal link between that and the damage are evident, the wrongdoer need not be identified to trigger the limitation period since the potential claimant will then have three years in which to identify the wrongdoer. In particular, I struggled to see why Professor Suleimenov appeared to take the view that, whereas identification of the relevant (wrongdoer) company officer is necessary for the purposes of Articles 62 and 63 of the JSC Law, there is no similar need to identify the wrongdoer for the purposes of Articles 917 and 953-960 of the KCC. Indeed, as I put to Professor Suleimenov, since (as he himself put it) *"the circle of people who may have committed the wrongdoing is much, much broader"* than it is where the claim is under Articles 62 and 63, this would suggest that it is all the more necessary that the potential claimant should know the identity of the wrongdoer before time starts to run since it is all the more difficult, potentially anyway, to identify the wrongdoer where the circle is so much wider. Professor Suleimenov did not really have an answer to this point.

416. Another matter which arises in this context is not a matter which was explored in cross-examination with either of the Kazakh law experts. Professor Suleimenov's position is that, for the limitation period to commence, a potential claimant does not need to know that a fraud has been committed if fraud is not an essential element of the violation about which the potential claimant needs to be aware under Article 180.1. In this regard, Professor Suleimenov pointed out that a company officer can be liable under Articles 62 and 63 of the JSC Law even if *"he/she acted out of good intentions and in good faith"*. He made the same point in relation to an unjust enrichment claim. He did not, however, extend this observation to claims in tort. As for Mr Vataev, as Mr Twigger highlighted, he referred in one of his reports to it being *"only when the legal entity or its shareholder obtained sufficient grounds and ability to realise that the transaction was a fraud, and not a good faith, reasonable and fair deal"* that a claimant should be treated as having known of the violation. Mr Vataev was not taken to this particular passage in cross-examination. He was, however, taken to certain paragraphs of a subsequent (his third) report which he had prepared, including paragraph 141 in which he stated as follows:

"Only when the legal entity or its shareholder obtained sufficient grounds and ability to realise that the transaction was a fraud, and not a good faith, reasonable and fair deal, only then it may be concluded that they 'should have known' of the violation in the full sense, and that time should be considered the time when the clock of the limitation period would start running".

He was also shown the previous paragraph in the report in which Mr Vataev stated:

"Imagine a situation in which a new owner discovers that his acquired company appears to be in poor financial condition. So far, no violation is discovered as the company's distress could be caused by valid business reasons. The new owner start examining the records and discovers a series of suspicious

transactions that his acquired company performed in the past. Again, at this point, no violation is truly known by the new owner-there is a mere suspicion, which needs further investigation. Only after the new owner discovers sufficient details about suspicious transactions, which would allow him to conclude that the transactions were indeed against the company's interests and/or fraudulent, can the new owner be attributed with knowledge of the violation, in the full legal sense of this word, having occurred which would mean the period of limitation would then start to run."

Mr Twigger summarised what he understood Mr Vataev to be saying as being that *"the claimant needs details which would be sufficient to cause a reasonable person to consider there has been a fraud"*. Mr Vataev agreed with this. It should be noted, therefore, that Mr Twigger put to Mr Vataev that a claimant would need to know that there had been a *fraud*, not merely an innocent violation of rights. I consider that Mr Twigger was right to put things in this way since, in my view, it is necessary to consider the nature of the claims which the claimant comes to assert since it is those claims (and not others) which are being considered for time-bar purposes. If the claimant alleges fraud, in those circumstances, the focus should be on what the claimant knew, or should have known, relating to the allegations of fraud under consideration for time-bar purposes. It seems to me that it is artificial to adopt an approach which is divorced from a consideration of the actual allegations which the claimant has made. It may be, for example, that a claimant is aware of violations of its rights which, because they appear to be innocent, the claimant chooses not to pursue. If the claimant later becomes aware that the violations are not at all innocent but involve fraud, and so wishes to pursue a case, and the reason why the claimant has only come to the realisation that there has been fraud is because the wrongdoer has managed to date to succeed in concealing its fraud from the claimant, then, it is difficult to see why the wrongdoer should be permitted to rely on a time-bar in relation to the fraud case which the claimant seeks to put forward. In summary, it seems to me that a claimant needs to know enough to plead the actual fraud case which has been advanced and which it is said is time-barred in order for the limitation clock to start running. Accordingly, if a claimant does not have enough knowledge to do this, then, there cannot have been the requisite awareness.

417. Lastly, I should say something about attribution of knowledge. There was no issue between Mr Vataev and Professor Suleimenov in the joint memorandum which they prepared as to the fact that *"Awareness of a legal entity's chief executive officer, executive body, board of directors, general meeting of shareholders (participants) all the sole shareholder (participant) would mean awareness of the legal entity"*. Although in the joint memorandum there appeared to be disagreement as to the position in terms of attribution of knowledge where a group of companies is involved, during cross-examination Mr Vataev acknowledged that in some cases the facts could justify attribution where a parent and subsidiary companies are involved. He referred to the situation where "*essentially the parent company runs the business of its subsidiary"*. It would appear to follow from this that, as Mr Twigger submitted, knowledge on the part of those engaged in the management of KK Plc and KK JSC ought to be attributed to the other Claimants. This includes, of course, Mr

Werner, whose knowledge is obviously attributable to all of the Claimants. There is no issue about this. Nor could there be given that, as Mr Twigger highlighted: in September 2009, Mr Zhunus sold his shares in KK Plc to Mr Werner for nominal deferred consideration; and in November 2009, Mr Werner was appointed Chairman of KK JSC's Board and assumed control over key management decisions of the KK Group (as Mr Werner put it in cross-examination, by January 2010 he was *"the person who was taking the ultimate decisions in the company"*); and on 26 April 2010, Mr Werner was formally appointed as a director of KK Plc by written resolution, becoming Chairman four days later.

418. The other aspect in relation to which attribution of knowledge is relevant concerns SP Angel in circumstances where between October 2009 and 1 August 2010 Mr Werner and SP Angel worked together closely in trying to put the KK Group on a proper financial footing. Strictly speaking, the question of whether SP Angel personnel's knowledge is attributable to KK Plc is subject to the law of the Isle of Man (the place of KK Plc's incorporation). In relation to the other Claimants, the relevant law is Kazakh law which, Mr Vataev agreed in cross-examination, essentially entails knowledge being attributed where the facts support such attribution. Ultimately, Mr Vataev accepted that knowledge of contractors to whom relevant authority has been delegated in something formal like a contract can be attributed to a company. On the facts of the present case, I am clear that SP Angel's knowledge is properly attributable to the Claimants. It should be borne in mind in this context that, not only did SP Angel become a shareholder in KK Plc in October 2009, acquiring from Mr Gerasimov the shares which Mr Arip had the previous month sold to him, but Mr Werner acknowledged in cross-examination that SP Angel had a broad remit and performed a not inconsiderable management role. Specifically, having acquired Mr Gerasimov's shareholding in October 2009, SP Angel the same month was appointed to lead the Steering Committee which KK JSC had set up to assist the process of enabling KK Plc's shareholders to work with the KK Group's management. In that capacity SP Angel reported to Mr Werner (as well as to KK Plc's and KK JSC's Boards) on the KK Group's financial position. It is clear that Mr Werner and SP Angel personnel worked closely together, Mr Werner explaining that it was unlikely that many days would go by without conversations taking place between them. Mr Werner agreed also that SP Angel kept him informed about their activities. Moreover, on 19 January 2010, SP Angel informed KK Plc's insurers that representatives of SP Angel had been acting in roles which *"clearly amount to their acting as shadow directors"* of KK Plc.

The Claimants' state of awareness

419. Turning now to the facts, it was Mr Howe's submission that the Claimants did not become aware of the relevant facts to enable them to bring a claim against the Defendants, and should not be treated as being caught by the *"should have become aware"* wording in Article 180.1: in the case of the PEAK Claim, until about March 2013 when the Arka-Stroy 1C database was discovered; in the case of the Astana 2 Claim, until about March 2013 for the same reason and because of the similarity between the PEAK Claim and the Astana 2 Claim, and anyway

not before late 2012 when the Business Audit Report was given to Mr Werner; and in the case of the Land Plots Claim, until about November 2014 when Mr Arip served evidence in these proceedings which led the Claimants to pursue inquires about the monies which had been paid to Bolzhal and CBC. Mr Twigger did not accept this. He argued that, in relation to all three claims, the essential elements constituting the alleged corporate offences and tort claims advanced were simple and discoverable (indeed, Mr Twigger would say, discovered) much earlier than the Claimants were prepared to admit. Mr Twigger's position was that, whilst the available evidence supporting allegations can almost always be improved (as can the strength of any inferences being relied upon), what matters for Article 180.1 purposes is when the Claimants were, or should have become, aware of the essential elements of the allegations which they now make. As Mr Twigger put it, *"If possessed of the same knowledge or means of knowledge, the claims of a cautious potential claimant will be time barred at the same time as those of an eager one"*. It seems to me that Mr Twigger must be right about this as a matter of principle. I shall, however, have to come back to what were the relevant essential elements in the present case.

420. As I shall endeavour to explain in what follows, I have reached the conclusion that the Claimants had neither actual nor what might (albeit not entirely accurately) be described as deemed awareness before the critical dates: 1 August 2010 in relation to the PEAK and Astana 2 Claims, and 27 August 2012 in relation to the Land Plots Claim. That said, I do not accept that in relation to the PEAK and Astana 2 Claims, the position was quite as it was portrayed when the matter first came before the Court. I consider also that Mr Werner was somewhat coy when giving his evidence at trial in relation to what he knew at various stages. As to the first of these matters, Mr Twigger drew attention to the fact that in the skeleton argument provided to the Court by the Claimants' counsel at the *ex parte* application for the worldwide freezing order which was made at the outset of these proceedings, it was stated that Mr Werner's awareness of the PEAK fraud was triggered by the discovery of the Arka-Stroy 1C database. Mr Twigger pursued this point with Mr Werner towards the end of his cross-examination, putting to Mr Werner that it was misleading to give the impression that before the discovery of the database nothing at all was known about the fraud which is now alleged in these proceedings. Mr Werner's response was to distinguish between having evidence and being suspicious. As he put it:

"… I did not have any evidence of the connection. I had suspicions. I had belief. But I didn't have the evidence, yes."

This was followed a little later by this exchange:

"Q. You knew who you thought had done the fraud for a long, long time, Mr Werner.

A. Yes. I thought that it had been the former shareholders who had misappropriated, but I was not able to establish a link between the money that had left the company and them."

There was then shortly afterwards this exchange:

"Q. ... Same question, Mr Werner: that was not correct, was it?

A. We had no ability to implicate the defendants until the discovery of the Arka-Stroy database, with evidence.

Q. That is not what was being said. It was said that each claim -- no: '... the frauds, delicts and unjust enrichment were concealed ... and were not discovered until March 2013 - ...' That means you didn't know about them?

A. Yes, we didn't know -- we did not have any knowledge of the unjust enrichment until March 2013. That is exactly the way I understand this.

Q. You did know, you did have a firm belief in your own mind that there was a fraud well before March 2013?

A. Yes. But you cannot go to court and just speculate, saying that I think there has been a fraud."

Mr Twigger submitted that Mr Werner's acknowledgment that he had suspicions was impossible to square with what the Court had been told when the injunction was sought, and that this casts considerable doubt on the evidence which Mr Werner gave concerning his state of knowledge at any given time. Mr Twigger, in fact, went further because his submission was that Mr Werner had not been candid in what he had to say. On the contrary, Mr Twigger suggested, the evidence demonstrates that Mr Werner had clear and firm beliefs about the essential elements of the alleged violations of the Claimants' rights long before the discovery of the 1C database which was relied upon so heavily when seeking injunctive relief. Mr Twigger in this regard was able to point to the fact that, whereas in a draft of Mr Werner's first affidavit, it had been written that Mr Werner had *"for many months been trying to get to the bottom of the KK Group's dealings"*, no reference was made to any such investigations in the final version of his first affidavit which went before the Court.

421. Quite clearly, Mr Werner made the decision (along with his then solicitors) to give the impression that nothing was suspected, still less known, prior to discovery of the 1C database. I so find. This is regrettable as it would plainly have been preferable if the Court had not been given the impression that nothing was known about the alleged frauds until the 1C database was discovered and, in particular, that no investigations had been carried out before the discovery. It does not follow, however, that Mr Werner's evidence concerning his state of knowledge at various times should be discounted in the manner suggested by Mr Twigger. The fact that Mr Werner undoubtedly over-egged the position when seeking injunctive relief is certainly to be borne in mind when assessing his credibility, but I do not consider that it is as critical in assessing Mr Werner's evidence generally as Mr Twigger was inclined to suggest.

422. It is against this backdrop that I now turn to my findings based on the evidence and the lengthy submissions which were addressed to me concerning that evidence. Inevitably, the primary focus when considering the evidence is on

events which took place before these two dates specifically by reference to the Claimants' level of awareness concerning each of the three Claims at particular times. Subsequents events are, however, also potentially relevant because they shed some light on the Claimants' level of actual or deemed awareness prior to 1 August 2010 and 27 August 2012 respectively. Specifically, Mr Twigger submitted that it can be seen from the fact that when Mr Khabbaz bought a stake in KK Plc and started looking into bringing proceedings in New York in the first half of 2012 after being provided by Mr Werner with a copy of the PwC Russia Report that had been produced in December 2009, that the Claimants must already have had the requisite awareness, in any event as regards the PEAK and Astana 2 Claims, as at 1 August 2010.

The PEAK and Astana 2 Claims: whether the Claimants "became aware" by 1 August 2010

423. In dealing with whether, as regards the PEAK and Astana 2 Claims, the Claimants *"became aware"* (for the purposes of Article 180.1 of the KCC), I start, as did Mr Twigger and Mr Howe, with the position in the months after Mr Werner arrived. The first point which arises in this regard concerns certain discussions which Mr Werner had with Mr Gerasimov. Specifically, Mr Twigger referred in closing to Mr Werner's evidence that one of the first things that happened after he became a shareholder of KK Plc in July 2009 was that Mr Gerasimov told him that money which Astana-Contract had borrowed from DBK had been routed through Regul back to the KK Group and that, as a result, *"some equipment would have to be bought on behalf of the supplier"*. That concerns about the use of DBK's money was one of the immediate problems which Mr Werner had to deal with when he first became a shareholder is not in doubt. It does not follow, however, that Mr Werner should be regarded as being aware at that time about the principal elements of the Astana 2 Claim which is what Mr Twigger sought to suggest. On the contrary, as Mr Werner later explained when being asked about his discussions with DBK in 2010, he was not aware even then that GS *"had misappropriated money"* since, as he understood it, *"Quite to the opposite; in the balance, we were the ones receiving the money, not the ones being defrauded"*. Nor do I accept that Mr Twigger can derive any assistance from the fact that Mr Werner was already at the KK Group when, as described in detail earlier, monies were being transferred between KK JSC, Regul, GS and Astana-Contract and an onward payment was being made under the NSA Contract during the first two weeks of October 2009. Mr Twigger suggested that Mr Werner must have been aware of this happening at least in general terms, but I cannot agree with this. On the contrary, consistent with what I have decided in relation to the Astana 2 Claim, it is perfectly obvious that Mr Werner would have been the last person to have been made aware of such transfers. The fact that later in his evidence, when being asked about an email which he sent to Mr Mackay on 15 November 2009 and to which I shall return, he described himself as wanting to know in relation to money which *"had been sent into the company ... had been used by the former shareholders from the company in any untoward way"* does not justify a conclusion that he wanted to know this as early as September 2009 and so almost as soon as he had started at the KK Group.

424. I mentioned other discussions between Mr Werner and Mr Gerasimov. This is because, according to Mr Gerasimov, *"in late September 2009, Mr Werner said that he believed money had gone missing and that it was likely that Mr Arip and Mr Zhunus had taken it"*. Mr Gerasimov explained that Mr Werner *"said it to me privately on several occasions… [that he] suspected that money had been siphoned off and that he believed an investigation was necessary"* and that, the following month, Mr Werner started *"openly saying that we needed to get to the bottom of where the money was and that we must find evidence… of what happened"* and mentioning to Mr Gerasimov *"privately that we need to exert pressure on the former shareholders so that they contribute to the financing of Kazakhstan Kagazy's future business"*. Mr Gerasimov was also insistent that he remembered *"Mr Werner gathering the senior management of the company in October 2009, including in-house counsel and finance department, for an internal meeting and announcing that there would be an audit, he used the words 'forensic' audit"*.

425. This is not, however, evidence which I can accept, coming as it did from a witness such as Mr Gerasimov whom I have described as having been very far from straightforward with the Court in the evidence which he gave; indeed, as I have explained when addressing the Astana 2 Claim, Mr Gerasimov was at the very time that he claims to have had these conversations with Mr Werner involved in fraudulent conduct. Moreover, since Mr Werner was aware of Mr Gerasimov's close friendship with Mr Arip, it is all the more unlikely that Mr Werner would have chosen to confide in Mr Gerasimov about Mr Arip (and Mr Zhunus) siphoning off money from the KK Group. As I have previously observed, whatever relationship Mr Werner might have developed with Mr Gerasimov in the time that he had been in Kazakhstan, could hardly compare with the relationship which Mr Gerasimov and Mr Arip had built up over several years. It follows also that Mr Gerasimov's evidence that he decided to leave the KK Group after Mr Werner had said these things to him because he became upset about Mr Werner's alleged unjustified threats to try to obtain money from the former shareholders is not evidence which can readily be accepted. Indeed, I am quite clear that it was simply made up. So, too, I am clear was his suggestion, made for the first time in cross-examination, that another reason for leaving was that Mr Werner had threatened him with investigations into Astana-Contract. Mr Gerasimov explained that he had not mentioned this previously because it was an unpleasant memory for him and he did not think it important. In my view, the real reason why he had not previously mentioned it was that it was an invention designed to bolster his evidence concerning Mr Werner's state of awareness. Mr Werner described Mr Gerasimov as telling him in around October 2009 that he wished to dispose of his shareholding because he was afraid of certain investigations being carried out by the Kazakh Financial Police connected with the Alliance Bank lending, but that is not the same thing. It appears also, however, that Mr Gerasimov had expressed concern about being a shareholder in a company *"which might go broke"* as that is the explanation given in an email which was drafted by Mr McKay of SP Angel and sent to Mr Werner on 2 December 2009 in the context of negotiations concerning liability for certain sums which would otherwise be payable on the transfer of Mr Gerasimov's shareholding to SP Angel.

426. Mr Twigger pointed also to the fact that on 23 October 2009 Mr Werner received an email from Mr Arip containing an email (in Russian) which Mr Arip had received from Mr Valitov. Mr Werner forwarded this to Ms Phillips of Norton Rose, the solicitors then acting for the Claimants, without a covering message. Mr Werner explained in evidence that he wanted Ms Phillips to translate what Mr Valitov was saying, although Mr Twigger observed with some legitimacy that if that really was all that Mr Werner wanted from Ms Phillips, then, it was an expensive method of obtaining a translation, especially as there would have been people within the KK Group who could, no doubt, have been called upon to translate. Indeed, since Ms Phillips simply responded with an electronic translation, something which Mr Werner could have obtained without Ms Phillips' assistance, it is clear that Mr Werner must have wanted to involve Ms Phillips as more than merely a translation facilitator. Indeed, this is rather confirmed by the fact that in the covering message which Ms Phillips sent back to Mr Werner she summarised what Mr Valitov was saying as being that Mr Arip should *"explain why the company was geared so heavily"* and what he (Mr Valitov) could tell Mr Werner when Mr Werner started *"asking him questions about missing money"*. The translation itself included the following passage:

"*Already on Friday, October 16, the new shareholder, T. Mathias [Werner] asked several questions regarding the transactions made in 2008 regarding the acquisition of additional assets and logistics business."*
...
"T. Mathias received an explanation from the financiers, that 4.9 million, spent on the preparations for the construction of warehouses in Astana, and 13.5 million - a pre-payment for equipment ordered. From which income you are going to serve this new loan? And the payments - they are already due. ... Who should be responsible?"

It was suggested to Mr Werner by Mr Twigger that this email demonstrates that his concerns at the time went beyond the DBK/Astana 2 funds issue. Mr Werner denied this, although he stated that he remembered visiting the warehouses, noting that they were empty and asking why. He explained also that he did not investigate the allegations in this email further because Mr Arip had characterised Mr Valitov as *"crazy"* and "*feeling aggrieved at that time because he had been bypassed and he had not [been] given the opportunity"* that Mr Werner had been given. Accordingly, Mr Werner added, based on what Mr Arip had told him, he thought that Mr Valitov was an "*extremely erratic person*" and "*a loose cannon*". I can see, in the circumstances, especially as Mr Werner had only recently arrived at the KK Group, why Mr Werner would have listened to what Mr Arip had to say in this regard. Indeed, as Mr Werner explained, at this stage he "*simply could not believe that Mr Arip, who I thought to be an amazing businessman, was in the business of defrauding, of stealing money ... it simply did not come to my mind*". That is evidence which I accept and which makes it all the more improbable that Mr Werner would have had the conversations which Mr Gerasimov claimed to have had with him at about this time.

427. Mr Twigger's primary focus in relation to this period, and indeed going forwards also in view of the prominence given to it, was not, in any event, on

Mr Gerasimov's evidence concerning discussions with Mr Werner, but on the PwC Russia report to which I have referred. Mr Twigger highlighted, in particular, how by at least November 2009, Mr Werner was taking an active role in the management of the KK Group and had hired SP Angel to assist him. Specifically, as Mr Werner put it in his second affidavit, in *"their capacity as financial adviser to KK ... SP Angel became aware of some peculiar movements of cash relating to the KK Group's investments in land and property"*. He went on to say that *"SP Angel and KK Group management felt it would be appropriate to have a clear understanding of these movements in order to facilitate financing discussions with the KK Group's bankers"* and for this reason SP Angel *"advised the KK Group to instruct PwC ..."*. As Mr Twigger pointed out in closing, during cross-examination Mr Werner denied that SP Angel had any suspicion of peculiar movements of cash, suggesting that what he had stated in his second affidavit about this was inaccurate. I am in no doubt, however, that this was Mr Werner trying to downplay the level of suspicion which he and SP Angel had at the time. I agree with Mr Twigger that Mr Werner was being less than straightforward, therefore, on this matter. This is regrettable and did not reflect well on Mr Werner's credibility as a witness.

428. It does not follow, however, that Mr Werner should be taken as having awareness over and above the awareness which he described SP Angel as having in his second affidavit, namely as to *"some peculiar movements of cash relating to the KK Group's investments in land and property"*, and nor, obviously, was Mr Twigger in a position to suggest otherwise. What SP Angel did or did not suspect does, however, have a potential bearing on the nature of the exercise which PwC Russia were asked to perform since it was Mr Twigger's submission, in substance, that Mr Werner and SP Angel were looking to PwC Russia to look into suspected fraud on the part of the KK Group's former shareholders. In my view, that was not the case, however. I say this for a number of reasons. First, it should be borne in mind that, soon after SP Angel were appointed, a Steering Group meeting took place on 23 October 2009, and the minutes of that meeting record Mr Werner as explaining that in order to assist with *"shareholders objectives to work with the management to ensure the long term future of the company"*, an *"external team of advisors [sic]"* had been set up *"to take this process forward assisted by senior management"*. That team, Mr Werner is recorded as saying, *"will be led by SP Angel as financial advisors [sic] supported by Norton Rose and a credible accountancy firm yet to be appointed"*. Over the page, the minutes go on to record one of the action points as being the *"appointment of accountancy firm for financial model is required by 27th of October"*. Nothing is said in these minutes about suspected fraud or instructing accountants to investigate fraudulent activity. Secondly, in certain minutes relating to a meeting of KK JSC's Management Committee held on 29 October 2009, there is no mention of any suspected wrongdoing and the only mention of any accountancy firm (actually three firms, PwC, KPMG and Deloitte) is in the context of work being carried out on a *"business plan"*. Furthermore, attached to these minutes is a draft letter apparently intended to be sent by SP Angel to the KK JSC's *"Board/management"* in which, under *"Recommendations"*, the only proposal as far as accountants are concerned is that *"PriceWaterhouseCooper or an alternative leading firm of accountants be engaged to produce a detailed independent financial forecast and business*

review to be used as the core of a business plan which will support the proposed debt restructuring process". There is, therefore, no mention in either the minutes or the draft letter of SP Angel asking any accountancy firm to look into suspected wrongdoing.

429. Thirdly, although I shall come back in a moment to deal with another email also sent by PwC Russia the day before, it is significant also that on 20 October 2009 Mr Vadim Khrapoun from PwC's Almaty office emailed SP Angel (Mr Mackay) and Norton Rose (Ms Phillips), apparently after a telephone conversation that morning, suggesting that the work be split *"into two different streams, namely (1) Historical Cashflow Analysis and (2) Future Cashflow Analysis"*. It is helpful to consider the section of the email dealing with Stream 1, as this sets out PwC's understanding of the purpose, objective and scope of this workstream.

"*Stream 1 - Historical Cash Flow Analysis*

Background
The two new shareholders wish to understand the flow of funds expended on investments in land, machinery and company acquisitions relative to the USD 520m plus of financing received (USD 270m IPO; USD101m of Tenge bonds; USD 157m of local bank financing). The shareholders need to be in a position to discuss future business and financial plans with the group's bankers. We should assume that our reporting is likely to be used for this purpose.

Objective
Our objective would be to undertake a high level review of sources and uses of funds covering the period mid-2007 to date within the Kagazy group of companies.

Proposed approach
Using the audited cashflow statement as at 31 December 2008 (which includes 31 December 2007 comparatives) as a basis - drill down into the balances presented for both financing, investing and (significant) changes in working capital. Our review will be principally based on matching cashflows to those cashflows expected based on a review of significant contractual agreements. In respect of significant movements in working capital we will need to understand significant movements based on discussions with management. At the same time we would propose to include a review for potentially undisclosed liabilities, within the review of the significant contractual arrangements. At this stage we do not plan to carry out backdated valuation of assets acquired and compare it with the consideration given. However, should any transaction appear to be not an arm-length basis we will report accordingly."

Having quoted a fee of US$ 90,000 for this workstream and estimated that *"the shareholders"* would get their desired *"high level feedback within the next 14-20 day"*, Mr Khrapoun then went on to deal with the second workstream in this way:

"During our discussion today you mentioned that there is a need to carry out financial modelling of the subject business. It was also mentioned that this might

the Company to negotiate restructuring of its borrowings. From our experience depending on a particular bank there could be different requirements to that model and also to the final deliverable. In case of the model being used to assess viability of the restructuring proposal being made to the bank additional work would be required (not just financial modelling) including something which is called Independent Business Review (we have just recently completed one in Kazakhstan for an international bank). Given complexity of this stream may I suggest to have a discussion with you to make sure I am very clear at the moment what exactly is needed and what is the purpose and intended use of the Stream 2 deliverable. Thanks for your understanding and patience – will try to resolve it tomorrow."

Accordingly, Mr Khrapoun in his email sought to divide into two the work described in the documents to which I have so far referred. What is important, however, is that his description of the first workstream did not entail PwC Russia performing the type of exercise which, had fraud been suspected, would have been necessary. On the contrary, Mr Khrapoun expressly stated PwC would not *"carry out back dated valuation of assets acquired and compare it with the consideration given"*. The fact that he went on to say *"However, should any transaction appear to be not an arm-length basis we will report accordingly"* does not warrant a different conclusion being arrived at because I agree with Mr Howe that this reflects no more than commonsense and does not hint at an exercise directed at unearthing fraud. If PwC Russia had been asked to investigate suspected fraud, Mr Khrapoun would surely have included some wording which made this clear and not simply have made a passing reference like this. Furthermore, if that really were what PwC Russia had been asked to do, it would be difficult to see how that could be consistent with the stated objective of undertaking *"a high level review of sources and use of funds covering the period mid 2007 to date"*.

430. Against this, Mr Twigger was able to point not only to what Mr Werner stated in his second affidavit (which he denied in cross-examination) but also to certain other documents. Specifically, Mr Twigger cited an email from Deloitte sent to SP Angel on 20 October 2009, which had attached to it a document which included the following under the heading *"Scope"*:

"*An investor in the group has requested specific procedure to confirm the assets and other acquisition transactions funded from the IPO and loans. The time period in scope will be from the IPO in July 2007 until August 2009… Specific procedures to be performed are as follows ...*".

The document then went on to list various procedures which would be performed, as follows:

"*For each selected investment, trace and agree amount transferred to the agreement, bank account, G/L, etc.*"

"*Physical confirmation of the assets - for those located in and around Almaty*."

"*Trace proceeds from the IPO and other loans into the accounting records and bank accounts*."

I do not consider that this work description really changes anything, especially since it contained an express exclusion in respect of *"Bank transfers to off-shore or foreign bank accounts shall be noted and agreed with supporting documents though not investigated further at this stage"*. If Deloitte had been asked to investigate suspected fraud, to have included such an exclusion would have made no sense at all. Nor do I consider it matters that in the email which Mr Khrapoun sent to SP Angel and Norton Rose on 19 October 2009, the day before his email in which he identified two workstreams, this was stated:

"*As a way of introduction I am a PwC Advisory partner based in Almaty and looking after PwC Advisory practice ... I understand from Richard that following change of shareholders in Kagazy there is a need to carry out certain business review/forensic investigation in relation to the company. We had an internal discussion on this subject this afternoon and realised that more information is need [sic] in order to scope the assignment properly. Perhaps we can have a conference call/meeting with you to get a full understanding what is required*."

Although Mr Twigger did not in closing specifically rely on Mr Khrapoun's description of the investigation which he understood PwC Russia to have been asked to undertake as entailing a *"forensic"* exercise, as will appear, he did place considerable reliance on Mr Werner's own use of the word *"forensic"* in an email which he sent to Mr Mckay on 15 November 2009. I shall deal with that next but, focusing for the present on Mr Khrapoun's email, it seems to me that it would be a mistake to place too much store on the description which he used in circumstances where, not only did he refer to *"forensic"* alongside a reference to *"business review"*, but his email the following day, which followed a conversation where matters were clearly better described, spelt out what was to be done in the two workstreams and this did not entail any fraud-specific investigation.

431. Furthermore, this is consistent with the (signed) engagement letter between KK Plc and PwC Russia which was subsequently entered into in November 2009, clause 1.1 of which described the task as being to *"assist the Client with the limited financial review of the consolidated cash flow statement for 9 months ended 30 September 2009, the year ended December 31, 2008 and December 31, 2007"*, as well as from the PwC Russia report itself which stated that the work done entailed a *"Limited financial review of cash flows in the period from January 2007 to September 2009"* and which described the "Scope of work" as entailing *"the following procedures for the period under review:*

• review transactions on the acquisition of property, plant and equipment. Understand the deal terms (if internal policies were followed, the vendor selection process, tendering process). Review the quality of the supporting documents available. Match the supporting documents (such as contracts) to the cash outflows incurred;

• review construction investment costs and agree them to the supporting documents (such as contracts, budgets, etc). Understand the deal terms (if internal policies were followed, the vendor selection process, tendering

process). Review the contracts and budgets available. Match the supporting documents (such as contracts) to the cash outflows incurred;

• review significant movements in working capital (such as, for instance, a significant increase in the inventory balance) and understand the reasons behind them by talking to management;

• match, on a high level, the actual cash inflows with the expected cash flows from the transactions;

• identify potential related parties. Our corporate intelligence group has performed a search of all related parties. The search was conducted based on publicly available information and databases."

Although Mr Twigger suggested in closing that there had been some other work carried out by PwC Russia which was separate from this work, the fact is that the PwC Russia report relied on so heavily by Mr Twigger is a report which describes work in this way. Mr Twigger referred, in particular, to an email which Mr Khrapoun sent to Mr Werner on 4 November 2009, in which Mr Khrapoun explained that *"We are making reasonable progress with the forensic stream"* and went on:

"While we have been progressing with our work in order for us to be able to provide you with a broader picture we believe that our scope should be revised slightly to capture cashflows at the PLC level as well. So, we have updated the engagement letter and attached it to this note."

Mr Khrapoun continued:

"Finally, we really need to get the engagement letter signed so this does not postpone our delivery of the draft report or any progress updates to you. Perhaps to speed the process up we could sent it to Taissiya for execution if you are comfortable with this or given sensitivities of this stream you would like to sign it personally or get someone else to sign it. Please advise on your preference."

Mr Twigger suggested that this shows that PwC had, indeed, been instructed to investigate fraud allegations. The difficulty with this, however, is not only that a single report came to be produced and the scope of that report was as defined, but that any *"sensitivities"* did not stop Mr Werner immediately forwarding the email to Mr Gerasimov, somebody Mr Werner knew was close to Mr Arip as I have previously explained. This makes it somewhat unlikely that the *"sensitivities"* involved suspicion that Mr Arip had committed fraud.

432. This brings me, indeed, to Mr Werner's 15 November 2009 email. The context in which this came to be sent is that by mid-November 2009 SP Angel had reached an agreement with Mr Gerasimov to buy his shares in the KK Group and Mr Werner either had already taken up or was very shortly to take up the Chairmanship of KK JSC. In his email on 15 November 2009, therefore, Mr Werner thanked SP Angel for stepping in as shareholders and set out the

priorities, as he saw them, over the following few weeks. The email, which began with *"Dear partner!"*, opened with Mr Werner saying this:

"Events last week have been very encouraging: it is crucial that we have a strategically aligned shareholder base; with Vladimir on board I was not able to drive the company in a coherent fashion. I have told you (and make it extensive to your partners) that I value immensely you stepping in as shareholders; I am also willing to up my commitment and take an active role in the management of the company, ie the Chairmanship of the JSC. The future of the company looks a lot brighter since last Friday."

Mr Werner then went on:

"We have had a steep learning curve and done a lot in this past month and a half. Crucially in my opinion we have changed the approach of dealing with the financial crisis of the company, which is the only way the it has a chance of surviving."

He then explained that *"Over the next three weeks and before we sit in front of banks we have to"* do a number of things and these included:

"5. Raise equity: nobody will invest equity in the company now, but the former shareholders should reinstate part of the funds they withdrew. They will obviously not do this if not forced to, so the forensic report becomes crucial to identify a 'smoking gun'. In the meantime it is also important that their covert financial support stops - Bruce I need your help here."

Mr Werner ended by saying that in the following week, amongst other things, he would *"meet with PWCs forensic team in Moscow on Tuesday"*.

433. Mr Twigger emphasised Mr Werner's references to *"the former shareholders"* needing to *"reinstate part of the funds they withdrew"*, to *"the forensic report"* and to that report identifying *"a 'smoking gun'"*. His submission was that these references make it abundantly clear not only that Mr Werner and SP Angel believed at this time that there had been fraud committed against the KK Group by the *"former shareholders"* Mr Zhunus and Mr Arip, but that PwC Russia had been instructed to look into whether there had been fraud. I do not accept that Mr Twigger was right about this. I accept, on the contrary, Mr Werner's explanation in his fourth witness statement that, had he *"known about massive fraud committed by the former shareholders, my only reference to it would not have been in a short aside in a section of an email concerned with raising funding"*. Indeed, as he also explained in that witness statement, he did refer to theft in his email but at a merely operational level. He did this in the first of the points which he identified as things needing to be done over the following three weeks when he wrote this:

"Continue with a disciplined focus on cash. We have to make sure that the company generates enough cash in the next month a half to finance its operations and advisors. I think that Bruce is doing a fantastic job here, and I encourage him to continue to keep a strict discipline. One thing that worries me is level of theft at operational level - the only short term solution I see is to

involve operational management into the cash management process. Bruce what do you think?"

I agree with Mr Werner that for him to have mentioned this type of theft and yet to have made no mention at all of the frauds which Mr Twigger would have it that Mr Werner suspected at this time had been committed by Mr Zhunus and Mr Arip simply makes no sense.

434. Nor can I agree with Mr Twigger when he submitted that Mr Werner's explanation that the reference to withdrawal of funds by the former shareholders was a reference, and only a reference, to the misuse of the DBK loan monies in relation to Astana 2, was not credible. Again, this is evidence which I accept since, having rejected Mr Gerasimov's evidence that Mr Werner told him about his suspicions concerning Mr Zhunus' and Mr Arip's fraudulent activities, there is, in truth, no evidence which would justify a conclusion that Mr Werner, so recently arrived on the scene in Kazakhstan, would have been in any position to suspect Mr Zhunus and Mr Arip of fraud. As for Astana 2 and what Mr Werner thought at this time about what had happened in relation to the DBK loan monies, I repeat that if Mr Werner had really thought when sending this email that Mr Zhunus and Mr Arip had misappropriated the monies concerned, then, it is inconceivable that he would not have spelt this out, and not as the last of five action points but at the top of the list of things to be attended to. Mr Werner explained in cross-examination that he was referring in the email, through his reference to funds having been withdrawn, not to Mr Zhunus and Mr Arip having themselves taken the monies relating to the DBK loan but, on the contrary, that *"funds had been withdrawn from the project, funds that had to be invested in the project were withdrawn and were sent to the company"*, meaning the KK Group. Mr Werner went on to speak in terms of management getting *"in touch with Mr Arip and Mr Zhunus asking them for support in order to reinstate the funds into the project"*, before putting it like this:

"… I mean the company – at that point money had been taken away from the project, sent back to the company. And we were facing the question by the bank: what is happening with the project? And the company didn't have any money at that point in time. So one of the only ways to deal with this situation is if there was anything untowards in this situation, that it would have to be – it would have to be solved by the shareholders."

I understood Mr Werner to be saying here that there had been some withdrawal of funds by the former shareholders from the Astana 2 project and introduction of those monies into other parts of the KK Group and that, in those circumstances, Mr Zhunus and Mr Arip needed to assist, not that at that stage he thought that they had been fraudulent. As Mr Howe submitted, it needs in this respect to be borne in mind that Mr Werner had only recently arrived in an extremely complex situation, where there was considerable uncertainty and lack of clarity as to what had been going on and was going on in the business. In those circumstances, he was hardly in any position, so early in the day, to understand what had happened to the DBK monies and still less to form the view that Mr Arip, somebody whom he had respected, had committed fraud.

435. Mr Twigger suggested that this is not a conclusion which sits at all happily with Mr Werner's description of a *"forensic report"* becoming *"crucial to identify a 'smoking gun'"*. I recognise that this could, indeed, suggest that Mr Werner must have had fraud in mind. I do not accept, however, that it establishes that this is the only thing which Mr Werner could have had in mind since the description is also consistent with what Mr Werner explained when cross-examined was his then thinking. Furthermore, I repeat that, if it was fraud that Mr Werner was referring to, then, it is odd that he should have chosen to address the matter only as his fifth (and final) action point. Mr Twigger submitted nonetheless that, if what Mr Werner had to say in evidence was right, then, there was no need for a *"forensic report"* because circulation of the DBK loan monies would have been easily traceable in the KK Group's accounts. I cannot accept this submission, however, since it somewhat assumes that what has now emerged, as part of preparations for trial, would have been ascertainable in November 2009 to somebody in Mr Werner's position, a private banker who had arrived in Kazakhstan with no or very little relevant previous business experience to be confronted by an ever-worsening financial position. It is understandable, in such circumstances, that Mr Werner should turn to SP Angel in the way that he did and, having done that, it is also entirely understandable why Mr Werner and SP Angel should want to have the financial position of the KK Group appraised by an accountancy firm such as PwC Russia. Similarly, I am unpersuaded by Mr Twigger's heavy reliance, both in cross-examination and in closing, on Mr Werner's use of the word *"forensic"*. Although Mr Werner did somewhat implausibly, given his proficiency in English, suggest that he did not understand the meaning of the word *"forensic"*, I am satisfied that, in truth, at the time he did not really focus on the technical meaning of the word and that, as he explained to Mr Twigger, all he meant was that PwC Russia would conduct *"an analysis into something that had happened in the past"*, in other words *"investigating the cashflows"*, rather than, as Mr Twigger suggested, that they would investigate *"a crime"*.

436. For these reasons, I reject Mr Twigger's submission that the 15 November 2009 email amounts to evidence that Mr Werner suspected, still less that he considered or believed, that Mr Zhunus and Mr Arip had committed fraud and that this was why PwC Russia were instructed to do what they did. I note, really only in passing, that the 15 November 2009 email was considered in some detail by HHJ Waksman QC in his judgment dealing with the Defendants' applications for summary dismissal of the proceedings: [2015] EWHC 3059 (Comm). Specifically, HHJ Waksman QC had this to say at [72] to [74]:

> *"72. As to what this [the underlined] part of the email meant, the Defendants say that the only sensible reading is the suggestion that the former shareholders had indeed misappropriated monies and they should pay it back and the PWC Report might be relied upon to implicate them. They say that the different explanation given by Mr Werner does not hold water which, here, means that he was lying in his evidence. They are not suggesting that he was confused. This is consistent with the submission that he deliberately misled the Court both initially and indeed on the previous applications as to his true state of mind or knowledge as to the existence of any fraud.*

73. *I agree that Mr Werner's explanation is not very clear and if the object of the remarks was the misallocation of monies back within KK (i.e. to pay off other loans) the use of the word 'withdrew' is not very apt. On the other hand if Mr Werner meant as the Defendants suggested, then the notion that they should reinstate only 'part' of what they dishonestly took in the fraud makes little or no sense. One also needs to bear in mind that Mr Werner's starting point was that he did not recall this specific email and no others around the time assisted on what it was about. I do not accept that this explanation goes nowhere because he did not expressly state that he could not recall the "issue" over the recirculation of the DBK Loan as distinct from the email itself. But if this was what he meant at the time and in fact the matter went no further, then I can see how it would not loom large at that stage and so be something easily remembered. It is true that action point 6 also refers to a review of cashflow but it is not clear if this happened (PWC were of course reviewing cashflow and certainly SPA has produced no document about it).*

74. *One also has Mr Werner's evidence in paragraph 73 that in general he thought it right that the former shareholders should put something back, and transparently; there is nothing implausible in that. Finally there is the wider context. At that time (November 2009) there are no other documents clearly implicating the former shareholders emanating from or sent to Mr Werner. And he says he never raised the frauds then because he did not know of them. There is a suggestion – and it is no more than speculation – that perhaps, while he knew, he did not want to make a big issue of it lest it scared off potential new shareholders but there is no evidence of this and I disregard it. Finally the explanation of the smoking gun reference I can see as plausible – if PWC did identify clear breaches on the DBK loans which could be laid at the former shareholders' door then that might well be the pressure point needed to encourage them to put some monies back into KK. … ."*

It will be apparent that I agree with HHJ Waksman QC about these matters.

437. Mr Twigger went on to submit, however, that a later email, this time from Mr Mackay to Mr Werner rather than the other way round, which was sent about a year later, on 7 December 2010, when the relationship between SP Angel and Mr Werner was coming to an end, indicates that fraud was suspected a year before. In that email Mr Mckay made a number of points and stated as follows in particular:

"At the time we acquired control of the Shares, we all agreed that KK had little or no tangible value due to the level of its indebtedness. Further, there was a strong possibility that KK would fail to restructure its financial obligations (the 'Restructuring') and would go into bankruptcy. There were, additionally, serious questions about the existence of fraud within the Company and as you will recall, threatening articles in the press and a real concern that the Financial Police might close the Company down. You will also recall that while Mr Gerassimov may have been concerned that his presence was jeopardizing the Company's future, he was as, concerned, if not more, that his presence within the Company might lead to his being criminally prosecuted and jailed.

At this time, we were also told by Mr Gerassimov and by senior members of the KK JSC management team that unless KK had a strong Kazakh shareholder: a) the Kazakh Banks would not agree to the Restructuring and b) the Financial Police would launch an investigation into the Company which would likely result in significant damage to the Company's prospects and possibly even in its bankruptcy."

Mr Twigger submitted that the reference to *"serious questions about the existence of fraud"* supports the proposition that Mr Werner and SP Angel had relevant knowledge the previous year when PwC Russia were instructed. Again, I cannot accept this. It seems to me that Mr Mackay was, in all probability, referring here to the Financial Police investigations into the former shareholders of Alliance Bank and concerns in relation to the ramifications of those investigations for the KK Group, rather than suspicions that Mr Zhunus and Mr Arip had defrauded the KK Group.

438. The next document to consider is the PwC Russia report itself or, more accurately, at least in the first instance, a draft of that report which was sent to Mr Werner by PwC Russia on 3 December 2009. The report began by describing the "services" which PwC Russia had performed in the manner which I have previously described. In the *"Executive summary"* this was stated under the heading *"Overview"*:

"• In the period from 2007-2009, Kazakhstan Kagazy Plc (the 'Group', the 'Client' or 'you') received financing in a total amount of 509.7 m, including USD 273.5 m raised in an IPO on the London Stock Exchange (LSE), USD 171.8 m received as bank loans and USD 39.5 m raised from a bond issue on the Kazakhstan Stock Exchange.

• In the same period, the Group spent USD 405.1 m. The objective of our work was to identify major cash outflows and their business reasons."

This was followed by *"Key findings"* as follows:

"Purchase of property, plant and equipment (PPE) and investments in construction in progress (CIP)

• Investments in PPE and CIP peaked in 2007 and 2008 when the Group companies received the proceeds from the IPO.

• The most significant component of PPE additions is land. In the period under review, USD 67 m was spent to acquire plots of land. In the consolidated financial statements, this amount is partially recognised in fixed assets and partially in the inventory balance (under trade property).

• Our background checks on the key suppliers revealed that most of the land was purchased from companies related to the prior management of the Group (please see the paragraph below).

…

• According to the management accounts, the majority of CIP expenditures relate to the Aksenger industrial park project (USD 72 m, or 61 % of the USD 119m spent in the period under our review). The second largest project is the Akzhal logistics park in the Almaty region (USD 33 m, or 28% of the total CIP expenditure).

• Based on our review, a significant portion of the CIP costs incurred lacks detailed supporting documents (such as budgets, detailed acceptance statements, detailed breakdowns of the stages of work performed). This creates a risk that some of the construction funds could have been misused or not spent effectively."

This was followed by a section headed *"Related parties"* where this was stated:

"• We have identified that all the land plots for which we obtained and reviewed contracts were purchased from related parties (at least USD 64 m of the USD 67 m paid for all land plots obtained by the Group in 2007-2009), namely:

- Bolzhal LLP

- Commerce Business Centre LLP

- Alpen Building LLP

- Lotos LLP

- Kazvtorsyrye LLP

• The details are disclosed on page 32 of this report and in Appendix 5 - List of identified related parties.

• We have identified that the major CIP and PPE suppliers were also related parties of Kazakhstan Kagazy employees. Specifically, these related parties include:

- Arka-Stroy LLP, which is the general subcontractor for the construction works on the Aksenger industrial park project;

- Papcel A.S. (Czech Republic), which supplied a paper manufacturing machine.

• The details are disclosed in Appendices 2 and 5 to this report.

• The price of the services and assets purchased from related parties as well asthe future return on investment is to be determined by the management."

The *"Executive summary"* went on under *"Choice of subcontractors for construction works"* to state this:

"• As we understand from the management, the CIP contractors were chosen based on a tender process. We requested but have not been provided with tender

documentation. Therefore, we cannot confirm that the contractors were chosen based on the best quality/cost and in the best interests of the Group.”

Then, under *“Conclusion”*, there was a passage which was relied on very heavily by Mr Twigger:

“• Following our review of cash flows for FY2007 to 9M2009, we bring to your attention the following questionable transactions (see the table below).

Item	*USD’000*
*Land plots purchased from related parties**	*63,691*
*Construction in progress from related parties***	*57,400*
Purchase of Astana Contract Group	*48,440*
*Purchase of houses and apartments for employees****	*1,177*
Production equipment	*180*
Total	*170,888*

** The amount was calculated based on the major land purchase contracts provided to us. For details, please refer to the section “Acquisition of land plots”, page 32, and to Appendix 3 for a summary of the contracts we reviewed. The total amount of transactions with related parties may be higher.*

*** These transactions do not include all the investments in CIP projects. Nevertheless, we have identified a significant lack of detailed qualitative supporting information for the actual work done. We recommend that management engage a professional engineering company to assess the value of the investments made.*

The amount was calculated based on a review of the major CIP contracts provided to us. The total amount of transactions with related parties may be higher.

The total amount of CIP projects from related parties was calculated as the sum of payments to Arka-Stroy LLP: USD 39 m of investment in Aksenger industrial park and USD 18m investment in the Akzhal project.”

The *“Executive summary”* ended with *“Our recommendations”*, as follows:

“Based on our findings, we recommend that you consider the following steps in order to confirm the Group’s financial position and eliminate potential further transactions not in the Group’s best interests:

Undisclosed related parties as suppliers of CIP and PPE	*We recommend performing an analysis of the current subcontractors in order to identify if related parties are still being used. Where related parties are revealed, assess the reasonableness of pricing through benchmarking or a tender process.*

Construction in progress	*We recommend performing a technical expertise to verify and confirm that the level of construction work claimed to have been performed was actually carried out and that the costs of the work performed correspond with the outcome.* *We also recommend reviewing the current contracting procedure, including the tender process. Introduce a through system of internal controls to avoid overpaying for goods and services in the future.*
Acquisition of Astana Contract Group	*We recommend performing a retrospective due diligence of the Astana Contract Group in order to identify the fair value of the group's assets and liabilities.*
Assets of the Group	*We recommend performing a review of all current assets of the Group, including fixed assets, accounts receivable, financial instruments, etc. The review should include a physical inspection of all material assets (if they are actually in place) and estimation of their net realisable value."*

439. Mr Twigger highlighted these various passages, along with other parts of the PwC Russia report which addressed the points made in the *"Executive summary"* in more detail. It is not necessary or particularly practicable to set out those other parts. It is convenient instead to refer to Mr Twigger's summary in his written closing submissions even if that summary in some respects repeats what is stated in the *"Executive summary"* passages set out above. Indeed, it is not only convenient to refer to Mr Twigger's summary but important to do so given that, as will shortly become clear, Mr Twigger's essential submission was that the matters listed in his summary are the matters which ought to have alerted Mr Werner (and the Claimants) to the Defendants' fraudulent conduct and which ought to have prompted him to take the recommended action.

440. Mr Twigger's summary (entirely accurate as far as I can tell from reading the PwC Russia report) described the PwC Russia report as having: (1) concluded that there were *"questionable transactions"* to a total value of US$ 170 million, including at least US$ 57 million for construction work in progress ('CIP') that was paid to the related party Arka-Stroy; (2) found that a significant portion of the CIP costs incurred lacked detailed supporting documents, *"which created a risk that some of the construction funds could have been misused"* or not spent effectively; (3) noted that Arka-Stroy was paid US$ 39 million for construction work on Aksenger but the contracts provided to PwC Russia only covered US$ 9 million and that in some cases the KK Group paid more than the price named in the contract; (4) observed that the management accounts did not reconcile

with the financial statements of the KK Group and that, although told that suppliers were chosen to do work through an official tender process, no tender documentation was provided; (5) identified that the major CIP and PPE suppliers were also related parties of KK Group employees, noting that these related parties included Arka-Stroy LLP and noting that Arka-Stroy was the general subcontractor for the construction works on the Aksenger industrial park project; (6) noted that the related party Arka-Stroy was *"managed by Bek Esimbekov, currently the director of PEAKL [sic] LLP and the person responsible for the Astana Contract project"*; (7) conducted a review of all land acquisition contracts for KK JSC based upon a detailed breakdown of land purchased in 2007 to September 2009; (8) identified that US$ 67 million had been spent to acquire plots of land – including 14 of the Land Plots at issue in the present proceedings; (9) revealed *"that most of the land was purchased from companies related to the prior management of the Group"*, including Bolzhal and CBC, reported that the corporate databases said that these companies were managed by Ms Dikhanbayeva; (10) identified that *"all the land plots for which [PwC Russia] obtained and reviewed contracts were purchased from related parties (at least USD 64m of the USD 67m paid for all land plots obtained by the Group in 2007-2009)"*; and (11) reported that the land purchased in 2008 appeared to be purchased in line with average rates, noting that there is no open land market in Kazakhstan and prices can vary significantly, but that the land purchased in 2009 was purchased at a higher price than paid by the KK Group in 2008 before the economic downturn had begun.

441. Although I do not intend setting out further passages from the PwC Russia report, it is nonetheless worth picking up on one aspect covered by this summary. This concerns Appendix 5 which contained a *"List of identified related parties"* and stated as follows:

"Company name	*Type of product/service provided*	*Description of relations*	*Comments*
Alpen Building LLP	*Vendor of land*	*Shynar Nurbekovna Dikhanbayeva, Kazakhstan Kazagy JSC's financial director since 2001 and the chairman of the board of directors in 2008. At present, Mrs. Dikhanbayeva is not listed as the Group's employee. She is listed as the director of Alpen Building LLP.*	
Commerce Business	*Vendor of land*	*Shynar Nurbekovna Dikhanbayeva,*	*Both Commerce*

Centre Ltd LLP		*Kazakhstan Kazagy JSC's financial director since 2001 and the chairman of the board of directors in 2008. At present, Mrs. Dikhanbayeva is not listed as the Group's employee. She is listed as the director of Commerce Business Centre LLP.*	*Business Centre Ltd LLP and Bolzhal Ltd LLP are registered at the same address in Almaty.*
Bolzhal Ltd LLP	*Vendor of land*	*Shynar Nurbekovna Dikhanbayeva, Kazakhstan Kazagy JSC's financial director since 2001 and the chairman of the board of directors in 2008. At present, Mrs. Dikhanbayeva is not listed as the Group's employee. She is listed as the director of Bolzhal Ltd LLP.*	*Both Commerce Business Centre Ltd LLP and Bolzhal Ltd LLP are registered at the same address in Almaty.*
Lotos Ltd LLP	*Vendor of land*	*The company is registered in s. Abay, Karasayskiy rayon, Almatinskaya oblast, which is the same legal address with Kazakhstan Kagazy JSC.*	
Kazvtorsyrye LLP	*Vendor of land*	*Sergey Tulegenov, current general director of KK, is listed as the (former) director of*	*Kazvtorsyrye LLP was referred to a subsidiary or an affiliated companyof KK and its supplier of compressed waste paper, providing over 10% of all of KK's supplies. Kazvtorsyrye*

			LLP is also one of the main debtors of KK.
Arka-Stroy LLP	*CIP supplier*	*The company is managed by Esimbekov Bek Kanatovich, current top manager of PEAK LLP*	
Papcel S.A.	*Vendor of equipment*	*The affiliate of the company - Papcel Kazhstan PPL which is managed by Esimbekov Bek Kanatovich, current top manager of PEAK LLP."*	

442. Mr Twigger submitted that, particularly against what he described as the backdrop of *"serious questions about the existence of fraud"*, the PwC Russia report was a document which Mr Werner would have been bound to have been interested in and would obviously have read. The more so, Mr Twigger suggested, given that the report identified very clearly in the *"Conclusion"* to the *"Executive summary"* that there were over US$ 170 million worth of *"questionable transactions"*, including land plots and CIP purchased from related parties. Mr Twigger observed in this context that this was in a different order to any concerns which Mr Werner might have had about US$ 22 million borrowed by Astana-Contract from DBK, arguing that it *"simply beggars belief"* that Mr Werner would not have thought when reading the PwC Russia report that there was nothing to be concerned about. Mr Twigger highlighted also that SP Angel would have been bound to have read the report and that this made it all the more improbable that its significance was not appreciated. Mr Twigger submitted that, in the circumstances, the Court should reject Mr Werner's evidence that, although he read the report, he did not do so in any detail because it was "*just a report*" and "*it didn't raise any further questions*" or *"any flags or any concerns at that time that I thought that should be followed"*. Indeed, Mr Twigger suggested in closing that Mr Werner had described the report as *"superfluous"*. Strictly, however, this was how Mr Werner described the recommendation that a *"technical expertise"* be undertaken, rather than the report itself. Whilst, therefore, I agree with Mr Twigger that Mr Werner is most unlikely really to have regarded the report as *"superfluous"*, not least because it was a report which he and SP Angel themselves commissioned and for which PwC Russia were paid a not inconsiderable amount of money, that is not actually what I understood Mr Werner to be saying. On the contrary, much earlier in his cross-examination (indeed, three days before he gave his *"superfluous"* answer), the following exchange took place between Mr Werner and Mr Twigger:

"A. It was an important document and it was an important document at that time because again what we were expecting is to have a better understanding of how the former shareholders had spent the money, and indeed that is what this report explains.

Q. Exactly.

A. But this report doesn't have the central importance that it has got on hindsight. This report was just a report, not something that at that time, again, was looked into in more detail because again, it didn't raise any further questions.

Q. You say it was just another report, but this was the report that you said you needed to understand what had happened to the $520 million?

A. Yes, and it is explained what happened to the $520 million in this report, exactly."

Mr Werner was here describing the exercise which PwC Russia, in fact, performed. That was not, however, an exercise which involved looking at suspected fraud. Indeed, aside from PwC Russia's own description of the work which they undertook (both before the report was prepared in Mr Khaproun's email on 20 October 2009 and in the report which was ultimately produced), it is important to note that nowhere in the PwC Russia report is there any reference to fraud, let alone fraud on the part of Mr Zhunus and Mr Arip whose names are not even mentioned in the report's sixty pages. The context should be borne in mind, my having rejected Mr Twigger's submissions that the report was commissioned to look into whether there had been fraud on the part of the *"former shareholders"*. The *"backdrop"*, therefore, is not the one which Mr Twigger has described where fraud is suspected and PwC Russia have been asked to investigate the matter. If PwC Russia really had been instructed to investigate allegations or suspicions of fraudulent conduct, then, it is remarkable that the report should make no reference to such conduct anywhere. True it is that the report refers prominently to *"questionable transactions"* but it needs to be appreciated that it did so in the context of PwC Russia doing what they were asked to do which was to report on cashflows. Nor, as Mr Howe pointed out, is there any mention in the report of missing funds or unaccountable expenditure. In short, as Mr Howe went on to submit, in my view rightly, none of the information contained in the PwC Russia report could, without more, have been deployed to plead a claim in fraud against anybody. It follows that I do not accept Mr Twigger's submission that Mr Werner should be regarded as having appreciated that what PwC Russia were describing in their report was fraudulent conduct on the part of Mr Zhunus, Mr Arip and Ms Dikhanbayeva.

443. This is important because, focusing on the PEAK and Astana 2 Claims exclusively for the present, Mr Twigger's submission was that the Claimants (again, in practical terms, Mr Werner) should be regarded as having been aware of the following matters (which I describe almost exactly as set out in Mr Twigger's written closing submissions) by 1 August 2010: (1) that around US$ 22 million had been paid to GS for construction works at Astana but that a significant proportion of that money had been paid on, via Regul, to the KK

Group rather than being spent on construction since Mr Gerasimov told Mr Werner that this was the case in October 2009; (2) that a significant proportion of the money paid to GS in this way had been recirculated back to Astana-Contract and out to the KK Group again via NSA Contract since (i) the recirculation had happened after Mr Werner had become a shareholder, (ii) Mr Gerasimov had told him about the problem at the time, (iii) Mr Werner's evidence was that he had been required to spend time dealing with this issue when he arrived, and (iv) SP Angel can be expected to have discovered what had happened given that they had taken control of the KK Group's finances; (3) that Mr Werner believed that some form of *"covert financial support"* had taken place involving the former shareholders in connection with the money circulated through GS since Mr Werner's email of 15 November 2009 shows this; (4) that DBK was concerned that KZT 563,002,000 of its loan had been paid for construction work for which there were no corresponding acts of acceptance since T&M's report dated 4 May 2010 had said this and, Mr Twigger suggested, it is overwhelmingly likely that Mr Werner would have been informed about what the report had to say; (5) that, as Mr Werner stated in his second affidavit (albeit that he described it as being inaccurate when being cross-examined), there had been some *"peculiar movements of cash relating to the KK Group's investments in land and property"*, and this went wider than Astana 2 given the reference to land and property; (6) that US$ 39 million had been paid to Arka-Stroy in respect of works undertaken at Aksenger since the PwC Russia Report said this; (7) that, with the exception of some work on the railway spur, which was visible, the works undertaken at Aksenger were largely hidden, and such works as could be seen did not appear to be worth US$ 39 million; (8) that there was an absence of supporting documentation in relation to the construction work at Aksenger and no available tender documents since the PwC Russia Report said this; (9) that the construction work had been carried out by Arka-Stroy, which PwC considered to be a *"related party"* given Mr Esimbekov's dual role as Arka-Stroy's manager and as a senior manager at Peak Akzhal, as again stated in the PwC Russia Report; (10) that construction in progress had needed to be impaired in the accounts of KK Plc by US$ 40.3 million, which Mr Werner knew because he signed those accounts; (11) that PwC Russia's view at the time was that the transactions were worth US$ 170 million, which included payments for construction work in progress, were all *"questionable"*, and that a *"technical expertise"* was required to confirm that the construction work was worth what had been paid for it; (12) that SP Angel's view at the time was that there were *"serious questions about the existence of fraud within the company"*, there was a *"possibility of misappropriation of the Company's funds"* (as discussed with Norton Rose), they discussed with Mr Khaparov how to *"extract value"* from the former shareholders and they informed the D&O insurers that the previous shareholders *"may have knowingly authorised payments for contracts which were not properly fulfilled"*; and (13) that Mr Werner's true opinion at the time was that there was a real likelihood that the former shareholders *"withdrew"* funds from the KK Group without proper justification, that there had been financial flows to them and that they had used the KK Group's money in an *"untoward way"*, as demonstrated by Mr Werner's *"smoking gun"* email and by subsequent events, including the evidence of Mr Manghi concerning the meeting at the Rixos Hotel in December 2009.

444. Mr Twigger's invitation to the Court was to make findings that the Claimants were aware of these matters. He submitted that, were the Court to do so, it would follow that the Claimants were aware of enough to mean that they should be taken as being aware that their rights had been violated, so as to mean that the limitation clock had already started running by 1 August 2010. His submission was that, even though there are aspects of the PEAK and Astana 2 Claims which are not included in the above list, the essential elements of those claims are included. Specifically, he suggested that, *"Both individually and in combination with the other matters referred to, the PwC report established in Mr Werner's mind a prima facie case against the former shareholders (and [Ms Dikhanbayeva] as their alleged accomplice)"*. This was a recognition on Mr Twigger's part that the PwC Russia report is critical to the case which he was advancing on Mr Arip's and Ms Dikhanbayeva's behalf. Put differently, unless it can be established that the Claimants became aware or should have become aware of the matters identified by Mr Twigger by 1 August 2010 by virtue of what was contained in the PwC Russia report, then, the limitation defence as regards the PEAK and Astana 2 Claims must fail. I acknowledge that, in setting out the findings he was asking the Court to make, Mr Twigger referred not only to the PwC Russia report but also at (4) to T&M's report dated 4 May 2010, at (12) to SP Angel's holding certain views and having discussions with Norton Rose and Mr Khaparov and at (13) to the meeting with Mr Manghi at the Rixos Hotel. The second and third of these matters ((12) and (13)), however, do not entail, even on Mr Arip's and Ms Dikhanbayeva's case, Mr Werner or SP Angel acquiring knowledge other than through the PwC Russia report. It is only the first concerning T&M ((4)) which involves, or is said to involve, other information coming to Mr Werner's and SP Angel's attention. I will come back to the T&M issue shortly but, subject to that, Mr Twigger's submissions concerning actual awareness hinge on the PwC Russia report.

445. This gives rise to three difficulties as far as Mr Arip's and Ms Dikhanbayeva's actual awareness case is concerned. First, for reasons which I have sought to explain, I am unable to conclude that Mr Werner appreciated from the PwC Russia report that Mr Zhunus and Mr Arip had committed fraud. I shall come back to this topic when dealing with Mr Twigger's reliance on what happened when Mr Khabbaz came on the scene but, as I shall explain when I do that, I do not consider that this warrants a change to the conclusion which I have reached. Secondly, even if it were the case that the Claimants (and Mr Werner) were aware of the matters identified by Mr Twigger, it does not seem to me that this would have amounted to the Claimants (and Mr Werner) having anything more than mere suspicion, in any event. To take an example, (3) is quite clearly concerned with Mr Werner's belief that there had been wrongdoing, whether that wrongdoing was confined to Astana 2 or it went further. Similarly, (11) concerns PwC Russia's view that things were *"questionable"* and that a *"technical expertise"* was required to confirm that the construction work was worth what had been paid for it amounted to suspicion. So did SP Angel's view, described in (12), that there were *"serious questions about the existence of fraud within the company"* and a *"possibility of misappropriation of the Company's funds"*. This does not equate to the Claimants having enough (actual or deemed) awareness of the frauds or (actual or deemed) awareness that *prima facie* the frauds had been committed. Thirdly, even if the matters relied upon by Mr

Twigger entailed more than mere suspicion, in my view, this was still not enough. As I have previously explained, it is important to appreciate that what the Claimants allege in these proceedings is that fraud has been committed. In those circumstances, as Mr Twigger put it to Mr Vataev, *"the claimant needs details which would be sufficient to cause a reasonable person to consider there has been a fraud"*. The Claimants must, therefore, be shown to have become aware of the frauds which are now alleged (alternatively it needs to be established that the Claimants should have become aware of those frauds). Nothing less (including mere suspicion) than this will do. Nor would it have been enough if fraud in a general sense had been in Mr Werner's or SP Angel's minds. What is required is that there is awareness of the actual frauds which are now alleged. In the present case, as Mr Howe submitted, there is no evidence at all, whether in the PWC Russia report or anywhere else, demonstrating the following matters, all of which are integral to the claims which are brought in these proceedings: that the Defendants controlled Arka-Stroy; that the Defendants pretended that Arka-Stroy was independent, when it was not; that Arka-Stroy had no genuine independent commercial existence; that Arka-Stroy was managed by colleagues and associates of the Defendants; that the Defendants concealed their own links with Arka-Stroy; that Arka-Stroy paid sums it had received from the Claimants to the 'Connected Entities'; that Mr Arip controlled Bolzhal and CBC; that Bolzhal and CBC paid sums received to entities connected to and controlled by the Defendants, at which point the money disappeared; that GS was not an independent contractor, but controlled by Mr Gerasimov; that TESS was not an independent contractor, but a connected entity mixed up in fraud; that NSA was controlled by Mr Arip's nominee; and that Ada-Trade was controlled by Mr Arip's nominee.

446. These are all reasons which mean that Mr Arip's and Ms Dikhanbayeva's case on actual awareness cannot conceivably succeed, even if Mr Twigger were right (which, as I shall explain, I do not consider he was) in what he went on to submit concerning Mr Werner's and SP Angel's contemporaneous reaction to the PwC Russia report and subject again to the T&M issue which relates to things that happened some months later in May 2010.

447. As to what Mr Werner and SP Angel did having received the PwC Russia report, in fact both after receiving the draft report on 3 December 2009 and the final report a little later on 14 December 2009, Mr Twigger pointed out that Mr Werner's evidence was that he remembered discussing the recommendation concerning *"performing a technical expertise"* with PwC Russia. Indeed, on 11 December 2009, Ms Novikova of PwC Russia emailed Mr Werner stating that she had *"asked around about an engineering company who could provide engeniering [sic] expert services to you and evaluate the actual % of work done from the contract and the costs of actuall [sic] work performed. I guess I have found one – 'Stroyexpert'"*. Clearly, therefore, Mr Werner must have read the PwC Russia report and, at least initially, considered acting on it even if, as was the case, ultimately he did not take the matter forward (an issue to which I will return later when dealing with the second limb of Article 180.1 of the KCC). Mr Twigger pointed also to the fact that it is apparent that Norton Rose were involved at the time. Indeed, Norton Rose's time records indicate that they had done work several weeks earlier, on 12 November 2009, which involved their

"researching on liabilities of third parties, constructive trusts and inducing breach of contract". Mr Twigger suggested that this again illustrates that Mr Werner and SP Angel, who were the main (although perhaps not only) point of contact with Norton Rose, must at the very least have harboured suspicions concerning Mr Zhunus' and Mr Arip's conduct. I do not agree, however, since the work recorded as having been carried out is non-specific in the sense that it merely refers to *"third parties"* rather than former directors and the reference to *"inducing breach of contract"* seems to me somewhat less than apt to cover actions take by Mr Zhunus and Mr Arip given that they had been inside the KK Group until recently. Another explanation, consistent with Mr Werner's evidence, is simply that the work related to the DBK loan monies issue. As I have explained, if fraud on the part of Mr Zhunus and Mr Arip really had been suspected at the time that PwC Russia were being instructed and doing their work, this would have been clearly stated which it was not, whether by Mr Werner or by SP Angel or by PwC Russia themselves.

448. Mr Twigger next relied upon the fact that Norton Rose's time records also indicate that on 2 and 3 December 2009, time was spent *"discussing position of former shareholders with J. Mackay"*. Since, however, the draft PwC Russia report was not received until 3 December 2009, the discussions concerned cannot all have been about the PwC Russia report, if it was mentioned at all. Furthermore, there is nothing to indicate in the relevant records that the report was sent to Norton Rose. It is nonetheless clear that there were discussions and they cannot simply be dismissed by Mr Werner on the basis that he was not part of them and was unaware that they were taking place since, as I have explained, SP Angel's knowledge ought to be attributed to the Claimants and since also Mr Werner accepted that he was in frequent dialogue with SP Angel. It nonetheless does not follow that the discussions between Mr Mackay and Norton Rose were about suspected fraud on the part of Mr Zhunus and Mr Arip in circumstances where by this stage, my having rejected Mr Gerasimov's evidence concerning the discussions he claimed to have had with Mr Werner in September/October 2009, there had been no mention of fraud by anybody. Indeed, it should be noted that Norton Rose do not describe the discussion with Mr Mackay as having involved suspected fraud.

449. This brings me, however, to an internal Norton Rose email dated 31 December 2009 in which it is stated that *"there might be a possibility of misappropriation of the Company's funds"*. Clearly, this is rather more explicit than the previous two records of the work which Norton Rose had carried out. Mr Werner insisted in cross-examination that he was not part of any discussions with Norton Rose. Although that may well be the case in the sense that he was not himself directly involved, it is nonetheless again difficult to accept that he and Mr Mackay did not discuss what Norton Rose were doing. In any event, as I have explained, SP Angel's knowledge is attributable to the Claimants, and so if they had relevant knowledge the Claimants are to be regarded as also having that knowledge. Mr Werner's explanation as to what Norton Rose were doing was that he thought (now rather than at the time) that they were looking into his and Mr Mackay's concern about the circulation of the DBK loan. I agree with Mr Twigger, however, that, if that were the case, it is not easy to see why Norton Rose would have described the circulation of funds back into the KK Group as

"misappropriation of the Company's funds" or an *"alleged misappropriation"* since the funds could hardly be regarded as having left. This point is somewhat underlined by the fact that on 4 January 2010 Anna Roberts of Norton Rose is recorded as having carried out *"research re possible duties and liabilities of directors and shareholders in connection with an alleged misappropriation of company funds"* and time is also recorded for *"analysis of duties and liabilities of directors and shareholders in connection with an alleged misappropriation of company funds"*. That said, it needs to be borne in mind that these are only brief records of the work which was done. I do not consider that they should, as such, be subject to too close textual analysis. It may well be, therefore, that the DBK loan issue was, indeed, what they were asked about. What is nonetheless clear is that work was being performed, and that work would be consistent with Norton Rose looking into fraud on the part of Mr Zhunus and Mr Arip. Equally, however, the work described could have been at a rather more general level or, as Mr Werner put it, at a *"fairly high level"*. Indeed, that is what Norton Rose stated in a letter dated 5 November 2013 which was written by the partner involved, Mr Andrew Phillips. Specifically, Mr Phillips explained that Angelica Phillips *"does not recall anything other than generic discussions about the duties of directors and neither she nor I recall any specific questions in connection with named persons"* and that Anna Roberts *"cannot remember any detail either"*. If Mr Mackay had asked Norton Rose about Mr Zhunus and Mr Arip in particular, no doubt Angelica Phillips and Anna Roberts would have remembered it. The fact that they do not leads me, therefore, to conclude that the advice which they were asked to give was, indeed, at a generalised level. This does not mean, of course, that Mr Twigger's point loses all force since he was still able to question why Norton Rose would have been asked even for general advice if Mr Mackay, and possibly Mr Werner, had no suspicion about misappropriation whether by Mr Zhunus or by Mr Arip or by any other former shareholder or director. The answer is either that there was a suspicion or that Mr Mackay was wanting to ascertain the legal position in general terms for other reasons. The latter seems unlikely, however, to be the explanation since it is not easy to discern what the other reasons might be. Although this conclusion means that Mr Werner's denial that by this stage he and Mr Mackay had any suspicion at all cannot be right and so calls into question Mr Werner's credibility more generally, it nonetheless does not follow that Mr Werner and Mr Mackay should be regarded as harbouring more than mere suspicion at this stage, and suspicion is not by itself sufficient for present purposes.

450. Mr Twigger was also able to point to the fact that on 13 December 2009 Mr Mackay emailed one of his contacts at a public relations firm, Ivo Gabbara, referring to an earlier meeting with a potential investor named Nurlan Khaparov. Mr Mackay wrote that *"We would like to correct what we fear is a generally held belief that we are a front for the old (and corrupt) shareholders"* and went on to refer to the fact that *"The meeting with Nurlan went well … We discussed how to extract value from the former shareholders"*. Mr Twigger suggested that these discussions arose from Mr Werner and SP Angel's belief that Mr Zhunus and Mr Arip had misappropriated funds which they should be forced to return. He highlighted, in particular, that Mr Werner denied being at the meeting, suggesting that he did not explain what might have been meant by

this comment. That is not quite accurate, however, since what Mr Werner, in fact, had to say on the topic in cross-examination was this:

"I remember that there was a suggestion by Mr Khaparov that he would be able to put pressure on the former shareholders because he was a very, very politically connected person and that pressure could have – I mean that he could put pressure, because they had left the company in a parlous state."

Mr Werner was, therefore, referring not to misappropriation on the part of Mr Zhunus and Mr Arip but to something else, namely the fact that they had left the KK Group in a bad financial state. That is not the same thing as saying that Mr Zhunus and Mr Arip had misappropriated money from the KK Group. It should also be noted that Mr Mackay attached to his email a press article. It is clear, indeed, that when he referred to *"a generally held belief that we are a front for the old (and corrupt) shareholders"* he was referring to the allegation which was made in the article since, although the translation before the Court was not at all good, it is clear enough what the article was saying. Specifically, it refers to *"the new owners of Astana Contract"*, a reference to Mr Zhunus and Mr Arip, moving *"for permanent residence at the Foggy Albion"* and selling *"their shares to offshore companies"*. The article went on to state that:

"But the fact is a fact. The first sells its shares Theta Investment Holdings Limited and the second – Frajon Holding Limited."

The article then continued by referring to those companies as offshore companies which *"do not even own websites"*, before explaining that Theta Investments Holdings Ltd was owned by Mr Werner and that Frajon Holding Ltd was owned by Mr Mackay, a reference to the fact that SP Angel used this company when purchasing Mr Gerasimov's shares on his departure. This passage then followed:

"Businessmen who sold offshorkam business, earn a good idea, get rid of problem assets, and both de jure and de facto responsibility for the further development of the situation does not bear. All the 'arrow' and converge on Meteos Makeye. And with bribes smooth."

This is very garbled but the gist is clear enough, particularly once it is appreciated that the reference to *"Meteos Makeye"* is probably intended to mean Mr Werner (whose full name is Tomas Mateos Werner) and Mr Mackay rather than some other person with a very peculiar name. I am clear that what Mr Mackay was, therefore, seeking to do in contacting Ivo Gabara was seeking assistance to help protect SP Angel's and Mr Werner's images rather than raising his own thoughts concerning Mr Zhunus' and Mr Arip's fraudulent conduct.

451. This brings me to the meeting which took place on 14 December 2009, the same day as the final version of the PwC report was sent to Mr Werner. This is the meeting which took place at the Rixos Hotel in Almaty. I have addressed the evidence which Mr Manghi gave concerning this meeting already. I need not, in the circumstances, do so again. Suffice to say that I reject Mr Manghi's version of events which, despite Mr Twigger describing it as *"frank and*

detailed", I consider represented nothing more than invention. I acknowledge in this regard that Mr Werner was obliged to change his own version of events when during the course of cross-examination, in response to his denial that any meeting took place at all, he was confronted by the email which Mr Manghi sent to Ms Kogutyuk on 21 December 2009 in which Mr Manghi referred to a meeting with Mr Werner in the evening on 14 December 2009. However, given that as far as Mr Werner was concerned the meeting did not happen in the way described by Mr Manghi, I can understand that Mr Werner would not necessarily have remembered the meeting which was mentioned in Mr Manghi's email a week later yet without a description coming anywhere near the description which Mr Manghi somewhat belatedly gave in his fifth witness statement in September 2016.

452. Mr Twigger also highlighted the fact that on 29 December 2009 Mr Werner received a draft presentation to DBK and the draft recorded that the new management had concerns over the valuations of the KK Group's assets at 31 December 2008. Mr Twigger submitted that those concerns arose out of the PwC Russia report. Mr Werner denied this, explaining that the concerns were about *"the economic crisis and the situation we had with the creditors"*. Although Mr Twigger suggested that this made no sense since there would have been no reason to have *"concerns"* about valuations that were previously correct but which had been superseded by a financial crisis, I do not agree with this since it seems to me that it would have been quite understandable if Mr Werner had been concerned about the KK Group having bought assets when the market was booming (and so at high prices) only to see the market (and prices) subsequently collapse. Either explanation seems to me to be plausible. However, in the light of the views which I have expressed in relation to the PwC Russia report, the imperative to view the matter in the way suggested by Mr Twigger is much reduced. In short, I do not consider that the draft presentation really assists Mr Twigger's argument on limitation.

453. More promising from Mr Twigger's perspective, however, is an email which Mr Mackay sent on 19 January 2010 to KK Plc's D&O brokers. In that email, Mr Mackay wrote as follows:

"*...Further to our call this morning, I attach a copy, of the D&O [directors and officers] policy (and the policy for the previous year) for our client.*

Just to reiterate, SP Angel Corp Fin LLP is advising Kazakhstan Kagazy PLC on debt restructuring. As part of this assignment one of our employees is going on the Board, one Partner will become an alternate director, and they, together with one further Partner have been acting performing functions within the Company which clearly amount to their acting as shadow directors.

The Company is in a parlous state, and if our negotiations fail, there is a real risk that it goes bust.

We believe that previous shareholders, and senior managers, may have caused assets to be purchased at over-value, and may have knowingly authorized payments for contracts which were not properly fulfilled.

The questions I have are:

Are we, as I read, all covered for D&O liability? And what does this cover?

Is there any better, fuller, or extra cover which we would be advised to take? Do we need to inform the insurer about Board changes, our role as shadow directors, or the Company's financial state (noting that it has publically announced that it is in the process of debt restructuring)?

Mr Twigger submitted that telling the brokers that *"we believe that previous shareholders, and senior managers, may have caused assets to be purchased at over-value, and may have knowingly authorized payments for contracts which were not properly fulfilled"* amounts to clear evidence that SP Angel believed that there had been wrongdoing in the past and that their concern quite obviously related to different and wider concerns than the possible misuse of the DBK loan. I acknowledge that there is force in this submission. I acknowledge also that it is unlikely that Mr Werner would not himself have been aware that SP Angel held the belief described given that he was working so closely with SP Angel at the time. He may not have known that Mr Mackay was wanting to check SP Angel's own position as regards coverage but that is not really the critical point since it is the description of the belief which was apparently held which matters for present purposes. In any event, as I have explained, it seems to me that knowledge held by SP Angel ought to be regarded as the Claimants' knowledge irrespective of whether Mr Werner himself had the same knowledge as SP Angel did. The fact remains, however, that SP Angel can (at most) only have had a suspicion at this stage, indeed only a general suspicion at that, and this does not equate to actual awareness as a matter of Kazakh law. There is simply nothing in the documents to support a conclusion that there was any greater level of knowledge. As HHJ Waksman QC put it at an earlier stage in these proceedings at [81], albeit when expressing some doubt that SP Angel must have shared their belief with Mr Werner, *"the fact is that there is no other document from SPA dealing with such a belief"* and *"If that belief was really 'out there' and it was a real talking point, one would expect to find some reference to it in documentary form"*.

454. It follows that I cannot agree with Mr Twigger's submission that Mr Werner and SP Angel had by this time discovered the essential elements of the allegations which the Claimants did not formally pursue until August 2013, some three and a half years later. It follows, therefore, that I also cannot agree that Mr Werner and SP Angel should be regarded as having decided not to pursue claims of which they had become aware for the purposes of Article 180.1. The Claimants had not become aware and so the limitation clock had not yet started running, certainly anyway by this point, namely December 2009/January 2010. Accordingly, although I consider that Mr Twigger was probably right when he submitted that Mr Werner and SP Angel took the decision to focus their efforts on trying to restructure the KK Group's finances, I do not accept that this involved any parking of claims which Mr Werner and SP Angel knew (as opposed to merely suspected) that the Claimants had. Indeed, although it was Mr Twigger's submission that Mr Werner and SP Angel must have reasoned that evidence showing the misuse of loan and bond/IPO monies would likely prevent a successful restructuring since banks and bondholders would be unlikely to agree to take a haircut on what they were owed in circumstances where there was a claim that former shareholders had

misappropriated the loan/bond proceeds, it seems to me that the other side of this particular coin is that it might have been positively helpful if the banks and bondholders were to have been told that it was believed that there was an ability to bring claims against Mr Zhunus and Mr Arip since this might very well have given the banks and bondholders more confidence that monies would be coming into the KK Group. It might also have been positively helpful if Mr Werner and SP Angel had been in a position to make it clear that the difficulties which were being encountered at the KK Group were not the result of some underlying business problem meaning that the business was inherently loss-making but were caused by the previous owners who had since left.

455. In any event, as Mr Twigger's submission itself recognised, there is a difference between a decision not to pursue a case against Mr Zhunus and Mr Arip when the essential elements of that case are known, on the one hand, and a decision not to pursue such a case when the essential elements are not known and instead there is merely a suspicion, on the other. I am clear that the present case is an example of the latter, rather than the former, at least as far as the *"became aware"* limb or actual awareness of Article 180.1 is concerned. A similar point was made by Mr Werner himself in his first affidavit, albeit when distinguishing between fraud and non-fraudulent mismanagement. There, he described the PwC Russia report as *"an early sign that something was not right"* but explained that his *"immediate priority was to save the KK Group from bankruptcy"* and that *"all energies were being expended on management of the business, the financial restructuring of the KK Group and staving off its creditors"*. He went on to state that *"Once I was satisfied that the viability of the KK Group had been assured, I started investigations into the various matters highlighted by PwC, still believing that I was addressing issues of ordinary (ie honest) mis-management …"*. Although Mr Twigger complained that it was misleading of Mr Werner to state that investigations only began after the Claimants' viability had been assured in circumstances where in cross-examination he explained that he commenced investigations in early 2012 after Mr Khabbaz had joined and the first round of restructuring was beginning to fail, I see no reason to doubt Mr Werner's evidence that the decision to focus on the restructuring was one which was made at a time when it was not known that there had been fraud on the part of Mr Zhunus and Mr Arip as opposed to non-fraudulent mismanagement.

456. Mr Twigger went on to suggest that Mr Werner and SP Angel likewise made a deliberate decision not to disclose the PwC Russia report to BDO in the context of their audit of the 2009 year because they were concerned that it would *"scupper the ongoing negotiations with the banks"*. Specifically, having been engaged to carry out the audit in October 2009, BDO had begun to liaise with Mr Facey of SP Angel about the audit process by 19 January 2010, the same day on which Mr Mackay emailed the D&O insurers, with Mr Facey copied in, about previous shareholders having knowingly authorised payments for contracts which were not properly fulfilled. Mr Twigger's submission was that, having obtained the PwC Russia report during the immediate build-up to the commencement of the audit, it should obviously have been provided to BDO. The more so, Mr Twigger submitted, since Mr Facey was himself an ex-auditor and so ought to have appreciated its potential significance, especially in view of

its reference to *"questionable transactions"* and what it had to say concerned related parties. This is a matter which I shall come on to address in the context of the second limb of Article 180.1 (*"should have become aware"*), including dealing with the issue of whether the PwC Russia report was something which from an auditing perspective was required. Its significance in relation to the first limb presently under consideration, however, is Mr Twigger's suggestion that Mr Werner and SP Angel made a deliberate decision not to disclose because they had already become aware of the essential elements of the claims now advanced against the Defendants and only chose not disclose the PwC Russia report because of the concern identified by Mr Twigger. It is tolerably clear, not least from a letter from BDO dated 7 February 2017 saying that they were not provided with it, that BDO were not provided with the PwC Russia Report. Indeed, I agree with Mr Twigger that, if BDO had been provided with it, BDO would almost certainly have referred to it or at least some of its content in its report to the Financial Reporting Council in August 2014. The fact that this was not done indicates that BDO cannot have been provided with the report. Nonetheless for the reasons which I have already given, primarily that I do not accept that Mr Werner and SP Angel had anything more than a suspicion of fraudulent conduct at this stage, I reject this further submission made by Mr Twigger.

457. This brings me to T&M's report dated 4 May 2010 described as a *"Report on Assessment of the appropriateness of using the financial resources provided under the Investment Project 'Transport and Logistics Center of Astana-Contract JSC in Astana'"*. I have previously referred to this report but without explaining the background in any detail. That background was the restructuring discussions which had been taking place between the Claimants and DBK. It was in this context that Mr Facey (with Mr Werner copied in) was sent an email by a KK Group employee, Mr Dmitriy Odintsov, on 15 March 2009 in which he explained that DBK was convening a meeting to discuss the loan restructuring and had asked for confirmation as to who would represent Astana-Contract and Paragon at that meeting. DBK were also requesting that a *"technical audit of construction works"* be performed, Mr Odintsov explaining as to this as follows:

"In general they agree that Astana Contract JSC has sufficient documented proves for KZT 950 mio. Not proved portion of the expenses as of today is KZT 650 mio or USD 4.3 which as we informed them is prepaid and will be used to finalize construction of container terminal, which will also need to be confirmed by auditor's opinion. Audit of land works will be possible only when construction site is uncovered from snow."

458. T&M's report was, therefore, the *"technical audit"* of the Astana 2 construction work which DBK had requested. The report included an evaluation of work done under Contract No. 08/01 dated 11 August 2008 with TESS, and Contract No. 08/03 with GS Construction, which are the subject of the Astana 2 Claim, as well as other contracts. The report concluded that KZT 563,002,000 of the DBK loan had been paid for construction work for which there were no corresponding Acts of Acceptance, broadly equating to the US$ 4.3 million

which DBK considered to be the portion of expenses on the Astana project which had not been proved.

459. In this context, Mr Twigger pointed out that Mr Werner was wrong to suggest in cross-examination that this sum was the money that had been circulated back into KK JSC via Regul. As Mr Twigger observed in closing, that cannot have been right because the amount circulated back to KK JSC via Regul was over US$ 10 million and so more than twice as much as the US$ 4.3 million mentioned in T&M's report. Be that as it may, the T&M Report prompted further questions from DBK and, in response to those questions, T&M prepared a *"Supplement"* to the report in June 2010. DBK continued to query the use of funds, however, as demonstrated by an email which was sent by Ms Musagalieva to Mr Werner, Mr Facey and Mr Mackay, explaining that DBK was asking for *"more detailed information regarding the USD 4 million"* and that *"We don't have documents confirming that this amount of funds given by them were spent properly"*.

460. It was Mr Twigger's submission, in these circumstances, that, if funds had gone astray on Astana 2, then, Mr Werner must have become aware of that by this stage, if he was not aware already. I cannot accept that submission, however, given that it is quite clear that Mr Werner was not told everything and could not possibly have appreciated at this time what the Astana 2 Claim entailed given the complexity which that claim entails. It will be recalled in this respect also that the initial T&M report was produced three days before an email which was sent on 7 May 2010 by Ms Musagalieva to Ms Dikhanbayeva in which she explained that, following the technical audit, it had not been possible to prove how US$ 4 million of the US$ 22 million DBK loan had been used and that *"we have done our best to 'convince' the auditor to use 18 mln for construction"*, despite the fact, according to Ms Musaglieva, that only US$4.5 million *"had been used"*. Mr Werner was, hardly surprisingly in the circumstances, not copied into Ms Musagalieva's email to Ms Dikhanbayeva. The suggestion, therefore, that Mr Werner must have had the requisite awareness is simply not tenable.

461. The last matter which should be mentioned in relation to the period leading up to 1 August 2010, and the last matter dealt with by Mr Twigger in his written closing submissions, is the letter which BDO wrote to KK JSC on 28 May 2010, drawing its attention to a number of issues that they had discovered during the 2009 audit and outlining potential consequences and recommendations. These issues and recommendations were put into a table format, as follows:

Issue	Implications	Recommendations
In January 2009 land plots were acquired from Bolzhal, Addendums on changes in transaction amounts were concluded on 07.04.2009. According to the letter from	*Non-provision of the services by Bolzhal.*	*To make appropriate changes in the real estate sales contracts.*

Issue	Implications	Recommendations
the General Director of Bolzhal the reason of increase in the land value is provision of services on changing the intended use of the land plots. Those terms were not contractually agreed. [“Issue A”]		
The minutes of [KK JSC] board of directors’ meeting dated 11.08.2009 include the suggestion of Ms Dikhanbayeva on the fourth issue of the agenda and the decision of the Board of Directors after her speech. However, Ms Dikhanbayeva left the company on her own according to the General Director’s order dated 31.07.2009. [“Issue B”]	*Influence of those having no authority on important decision made in respect of the company operations. The decision of the Board of Directors may be invalidated.*	*To exercise internal control over the risk management*
The contract for building and construction works with Mega Expos LLP concluded on 29.05.2009 was not authorised by the Board of Directors. The total contract value is 265.5 million tenge. [“Issue C”]	*Non-compliance with Kazakhstan law ... It is likely that the deal will be ruled illegal, if it is a high-value transaction.”*	*To comply with the requirements of the current laws.*
During the period under audit an interest-free financial aid was granted by Regul Telecom to the Group companies for significant amounts, However, this company is not in the list of the related parties. [“Issue D”]	*Losses are likely where transactions are made on the conditions more favourable than market conditions.*	*To comply with the requirements and apply definitions of IAS 24 Related Party Disclosures*
Significant flows of related party transactions [“Issue E”]	*Losses are likely where transactions are made on conditions more favourable than market conditions*	*To strengthen control over related party transactions as to pricing, compliance with arms-length principles.*

462. Mr Werner's evidence was that he did not personally investigate any of the issues raised in this table, but that he thought that he would have forwarded on BDO's letter to SP Angel "*and they would have discussed it with the finance department and they would have been responsible to go through each of these points*" since, he explained, SP Angel were "*tutoring and guiding and leading*" the finance department at that time. He evidently regarded what BDO were saying as requiring certain weaknesses of the finance department to be addressed, but not as going beyond that. He explained, in particular, that he knew that KK JSC was "*a little bit in a mess*" but that as far as he was concerned what had been done was "*correct and right*". The fact that something was not properly documented, or a document had an incorrect date, would not have given him particular concern. His main concern at this time was to avoid bankruptcy, and that the financial state of the company at this time was such that it would have been "*completely irresponsible*" to have been concerned about what he saw as minor issues.

463. Although in closing Mr Twigger made a number of criticisms of Mr Werner's evidence concerning the BDO letter, for example calling into question Mr Werner's failure to investigate the issue raised about Ms Dikhanbayeva appearing to have continuing influence over board decisions at a time when she had left the KK Group (Issue B) and Mr Werner's apparent lack of concern about there being significant flows of related party transactions (Issue E), in my view, those criticisms somewhat overlook a simple fact: that BDO did not find that there had been any fraud when they conducted their audit. Specifically, the letter contained a section headed *"Consideration of fraud"*. This stated that BDO had performed audit procedures to test identified risks of fraud and performed procedures to consider the risk of the management's override of controls, such as "*review of accounting estimates for any deviations, which may result from fraud*" and "*evaluation of business rationale for material unusual transactions*". BDO then stated, in terms, that "*In the course of our audit of 2009 consolidated financial statements we detected no instances of fraud which, in our opinion, should be communicated to you*". There is, in short, nothing in BDO's letter which further enhances Mr Arip's and Ms Dikhanbayeva's argument that the Claimants had actual awareness as at 1 August 2010. That is the position in relation to all the other material relied upon by Mr Twigger in the period leading up to 1 August 2010. Although, in the circumstances, it would be tempting to stop there and not take up time considering events after 1 August 2010, it is necessary to go on and do so, not only in relation to the second limb of Article 180.1 but also, at least so Mr Twigger submitted, in relation to the first limb since he suggested that later events, or some of them, cast light on what the Claimants (specifically Mr Werner and SP Angel) should be taken as having known before 1 August 2010.

464. Three matters, in particular, were relied upon by Mr Twigger. First, it was submitted by Mr Twigger that, in post-1 August 2010 negotiations with DBK, Mr Werner displayed a clear determination to conceal the PwC Russia report from DBK in order not to derail restructuring negotiations because Mr Werner recognised that the PwC Russia report revealed a *prima facie* claim against the former shareholders in respect of a misappropriation of money (including the money which DBK had lent Astana-Contract). Secondly, Mr Twigger suggested

that the arrival of Mr Khabbaz at the KK Group and his efforts to bring proceedings alleging fraud illustrate that the PwC Russia report was understood by Mr Werner to have revealed a *prima facie* case against the former shareholders that they had stolen at least US$ 170 million from the KK Group since it was the PwC Russia report (and nothing else) which led to Mr Werner and Mr Khabbaz making the decision to bring proceedings. Thirdly, as to the events leading up to the commencement of these proceedings, Mr Twigger submitted that these also show that the PwC Russia report was regarded as containing information which revealed a *prima facie* case.

465. I start, therefore, with the DBK negotiations which took place after 1 August 2010 and which concerned what is described in these proceedings (but obviously not in the negotiations) as the Astana 2 Claim. Essentially, DBK continued to do what had been done in May and June 2010 in the context of the T&M report, which was to challenge the use of the money DBK had lent to Astana-Contract. Thus, on 15 September 2010, Ms Musagalieva emailed Mr Facey, Mr Mackay, Ms Yelgeldieva and Ms Kogutyuk about DBK's two technical audits, explaining that DBK were prepared to accept that US$ 12 million of the total US$ 22.8 million loan had been used properly but not the balance of US$ 10.8 million. A meeting followed this on 26 November 2010 between SP Angel and DBK, during which there was a discussion concerning trying to get the *"misused loan monies back from GS Construct"* and DBK insisted on a letter from Astana-Contract or KK JS promising that they would *"pursue the evil-doers"*. It was nonetheless agreed that this would have to await completion of the restructuring in order not to derail that. Be that as it may, shortly after the meeting Mr Facey sent an email to KK JSC's board on 7 December 2010 which included an agenda item referring to *"letter to DBK re seeking redress from previous shareholders"*.

466. There then followed a meeting with DBK on 14 January 2011, attended by Mr Werner and Ms Kogutyuk, at which DBK demanded *"the disclosure of information regarding claims against the former shareholders"* which, despite some quibbling from Mr Werner in cross-examination when he suggested that this was a reference to the former shareholders of Astana-Contract, was clearly a reference to the former shareholders of KK JSC which, in context, meant Mr Zhunus and Mr Arip. Four days after this, on 18 January 2011, Mr Werner wrote to DBK stating as follows:

"A review of the Group's historic use of funds has been commissioned. This review is not yet complete and its conclusions have not yet been finalised. In the event that there is evidence that Group funds have been used inappropriately, we will seek appropriate explanation and, subject to any explanation, seek redress to recover any such funds by any legal means available to the Group."

It was Mr Twigger's submission that Mr Werner was here deliberately telling DBK something which he must have known to be untrue since not only was there no ongoing review since there had been no other review commenced since PwC reported in December 2009 but also there was no question of that review by PwC being continuing. I agree. Mr Werner was not being straightforward with DBK. Nonetheless I do not consider that it follows that, as Mr Twigger went on to submit, Mr Werner did what he did because he did not want DBK to

know that PwC had recommended that an investigation be carried out but this had not been done. If that was Mr Werner's thinking, then, it would appear that DBK would have understood since a similar approach had been advocated in the meeting between SP Angel and DBK on 26 November 2010 when DBK and SP Angel had discussed delaying any action until after the restructuring had been achieved. This, however, is not a point which Mr Werner made when pressed on the issue in cross-examination. Instead, he obfuscated and was particularly unforthcoming as to whether he had provided a copy of the PwC Russia report to DBK at all when, as he ultimately acknowledged, he quite clearly did not do so.

467. In giving the evidence which he did, Mr Werner was being less than frank because he was trying to ensure that nothing he had to say would cause a problem on the limitation front. This was not at all to his credit, and nor was the evidence which he gave concerning a letter which was sent on 7 February 2011 by Mr Orumbayev of DBK to Astana-Contract, Paragon and KK JSC in which complaint was made that they had failed to submit data on the claims against KK JSC's former shareholders and asking that this information be provided by 11 February 2011. Mr Werner suggested that this may relate to claims against Astana-Contract's shareholders or to a potential future claim *by* the former shareholders. This was, however, perfectly obviously not the case at all, not least because in his letter to Mr Iskaliev of DBK sent on 15 February 2011 Mr Werner makes it perfectly clear that he understood the claims to which DBK were referring were claims *against KK JSC's* former shareholders. In that letter, Mr Werner stated as follows:

"I will hold any employee and/or previous shareholder accountable for the potential misappropriation [of] funds in the Company.

Therefore when the Company has achieved the final restructuring of its debts I will immediately commission a detailed forensic analysis of major financial transactions which took place before I assumed ownership and control of the Company. We will instruct a leading forensic analysis firm, probably one of the Big Four auditing companies, to undertake this exercise on our behalf. If there is any evidence of fraud, or of misappropriation of funds or assets of the Company, we will pursue the people responsible, in order that the Company should recover any money it has lost, and that the people responsible be made to account for their actions.

In particular we will examine the role of the previous shareholders, Baglan Zhunus and Maksat Arip, in all major investments and transfers of cash out of the Company, or from one subsidiary of the Company to another."

It is, therefore, clear from this letter that Mr Werner understood precisely what DBK were referring to when they complained about the absence of data. It is clear also, however, from his reference to the commissioning of a *"detailed forensic analysis"* that Mr Werner was giving the impression that there had to date been no such analysis despite the fact that Mr Werner had previously used the word *"forensic"* to describe the PwC Russia report. Furthermore, it is noteworthy that Mr Werner's letter was based on, but materially differed from, a draft which Mr Mackay had prepared the previous day because in the draft,

instead of a reference to the future instruction of *"a leading forensic analysis firm, probably one of the Big Four auditing companies"*, Mr Mackay's draft letter stated that *"We will instruct PWC to undertake this exercise on our behalf"*. Although it is possible that this alteration between the two versions came about because Mr Werner was keen to avoid any reference to PwC, I doubt that this was the position since it is not immediately obvious to me that Mr Werner would have had any particular difficulty in telling DBK about the PwC report, as Mr Twigger suggested, in circumstances where DBK were themselves plainly alive to the possibility of proceeding against the former shareholders.

468. It follows that I do not accept that Mr Werner deliberately chose to hold back on letting DBK see the PwC Russia report, and so to conclude from the fact that Mr Werner did not provide it to DBK that this was because it would be revealed to DBK that he and SP Angel (and so the Claimants) appreciated from the report that there had been the fraudulent behaviour which is now complained about in these proceedings. As I have explained, in my view, the PwC Russia report did no more than raise suspicion in Mr Werner's and SP Angel's minds. Since DBK also harboured suspicions, providing them with the PwC Russia report would, in my view, hardly have been problematic. Indeed, it was through pressure from DBK to take some positive action in relation to the misuse of funds that, in March 2011, Mr Werner arranged for Ms Kogutyuk on KK JSC's behalf to complain to the Financial Police for the City of Almaty to commence a pre-investigation examination of the use of the loan from DBK. Why Mr Werner should in his first affidavit have apparently forgotten about this complaint and so failed to mention it is, I agree with Mr Twigger, not wholly clear. I tend to agree that Mr Werner is unlikely simply to have forgotten about a matter such as this. The explanation, in my view, is that he had not done so when he came to make his first affidavit but instead was anxious not to say anything which would detract from the impression which he wanted to give to the Court when seeking injunctive relief that it was only by discovering the 1C database in March 2013 that he became aware of the Defendants' fraud. This was regrettable since Mr Werner ought to have been more open with the Court. However, it does not seem to me that the fact that the request to the Financial Police was made demonstrates, without more, that Mr Werner (and the Claimants) did anything more than suspect fraud as at March 2011.

469. That is not quite the end to the matter, however, because Mr Twigger was able in cross-examination to show that the request related to the three contracts which are the subject of the Astana 2 Claim (those between Astana-Contract and GS, TESS and NSA). This, Mr Twigger suggested, demonstrates that by March 2011 Mr Werner must have known rather more about the Astana 2 Claim than simply the point (oft repeated by him in cross-examination) concerning the circulation of funds via Regul Telecom. I struggle to see, however, how this really assists Mr Arip and Ms Dikhanbayeva given that, even though the PwC Russia report did review the DBK loans and the construction work at Astana 2, as far as I can tell, it did not mention TESS or NSA, as the complaint to the Financial Police did. If that is right, then, Mr Twigger's reliance on what was raised by the complaint inasmuch as it entails reliance on the contents of the PwC Russia report is somewhat weakened. This still leaves the question of how Mr Werner and Ms Kogutyuk obtained information not in the PwC Russia

report, which is a matter of speculation. Unless it can be shown, however, that there was some other source of information before 1 August 2010, there is no basis on which to conclude that the Claimants (through Mr Werner or Ms Kogutuyk) had the requisite level of actual knowledge as at 1 August 2010.

470. This brings me next to Mr Khabbaz's involvement, which coincided with the KK Group and SP Angel going their separate ways. The first contact between Mr Khabbaz and Mr Werner was in March 2011 when out of the blue Mr Khabbaz made contact with Mr Werner. Mr Werner and Mr Khabbaz became friendly straightaway; indeed, Mr Werner even attended Mr Khabbaz's wedding just a few months later. By September 2011, Mr Khabbaz had bought a large stake in KK Plc and by November he had become a non-executive director in that company. Not long after that, on 25 January 2012, Mr Khabbaz prepared a note entitled *"Almaty Settlement talks"* to use in negotiating SP Angel's exit from the KK Group, which Mr Werner accepted was largely based on information which he had provided to Mr Khabbaz. Mr Khabbaz had, after all, only just arrived on the scene. Under *"Background"*, Mr Khabbaz included this point:

"From the start of negotiations, frame the conversation as to the Assessment of the Restructuring (success/failure). Why are we here if it succeeded?"

Mr Khabbaz clearly had in mind that a different approach was needed, as confirmed by what he went on to state under *"Negotiating points"*:

"-Their plan was maybe well intentioned but flawed. Their 21OCT2009 restructuring plan expected a Eurasian Bank debt 'haircut'; banks at the time would be slapped with heaving tax penalties if they took a haircut on their debt … Their plan expected equity participation by DBK; which is expressly prohibited by banking laws in Kazakhstan … According to their plan, KK would be all restructured and profitable by 2011 … Basically, their debts restructure options failed because they were flawed.

- Discuss what other –successful- restructurings they've done in Kazakhstan (try to show their inexperience?)

- The relationship between the parties is no more what it used to be. So let's face it and move on.

- If they tried to sell their shares today, they would probably fetch no more than 2-3 cents in average, and that is if they were able to move such a huge volume. If it would become known that they're selling (for example, if we filed a release), it may just go to 1cent and stay there at which point we take it private and force them out at 1.5cents.

-Our motivation to get back all the shares is to either negotiate in freedom potential restructuring with creditors or retire them in case of bankruptcy.

-If needed, remind them that they expressly stated they would return half the shares for $1 (+$25,000 in fees) so we are only negotiating for the price of the second half

- Restructuring failed: not $1 of debt or even accrued interest has been written off. ALB was completely rescheduled on ALB terms; not a comma was changed and as a result needs rescheduling again in 2012. DBK failed; we are now talking with our lawyers about returning them the assets (warehouse A and Container terminal) because they are worth much less than their debt on the books. Bondholders & EBRD; very prohibitive conditions."

The same section went on to state this:

"-SPA failed to identify previous owners' actions (buying land worth nothing and presenting it as worth hundreds of millions of dollars) as main reason for the company's troubles. They should have immediately gone after the previous owners and tried to collect some monies back. Instead, they blamed solely on the 'economic crisis' (?); they failed to (or didn't want to?) identify the primary issue being that the company's Assets are in fact worth much less than their inflated costs on the books."

Then, under *"Strategy for negotiating"*, Mr Khabbaz stated as follows:

"- Because restructuring has failed, we are left with 3 painful ways to make money: 1- Sue them to recover fees (if negotiations fail); 2- We also intend to sue previous owners and recover some monies there too; 3- We are going to walk away from the majority of the assets (orderly handover to banks) against writing-off debt and taking the company through bankruptcy and forcing banks to settle with us on debt ...

That's the new strategy because the previous one cost millions, took years and ultimately failed. Banks have no more faith in SPA nor KK.

We may also need to hire new restructuring team that is experienced with bankruptcy courts."

471. Mr Twigger submitted that, given Mr Werner's acceptance that he was the source of Mr Khabbaz's information, Mr Khabbaz's note demonstrates that Mr Werner must have been aware by this stage that Mr Zhunus and Mr Arip had misappropriated the KK Group's money. In my view, however, the most that can really be concluded based on this note and the evidence which I have reviewed so far is that Mr Werner suspected misappropriation. Mr Werner denied this in cross-examination, explaining that what he believed at the time was that *"the previous shareholders had bought a lot of assets at the time of irrational exuberance and had made a bad - had made bad acquisitions and obviously they had left the company indebted and in a dismal situation and no assets to be able to generate profits to repay the loans"*. It seems to me, however, that it must have been more than just this given Mr Khabbaz's reference in his note to *"previous owners' actions (buying land worth nothing and presenting it as worth hundreds of millions of dollars)"*. I, therefore, do not accept that Mr Werner only began to suspect misappropriation later still than this.

472. Be that as it may, by February 2012, Mr Khabbaz had become involved in considering the appropriate way of dealing with the pressure being applied on

the KK Group by DBK and was exploring the possibility of launching proceedings in New York. Specifically, on 29 February 2012 he wrote to Mr Maxim Telemtayev at White & Case asking about the enforceability of a US Federal Court judgment in Kazakhstan, and Mr Telemtayev replied by telling Mr Khabbaz that *"If it were just a lawsuit that doesn't involve protecting assets in Kazakhstan, I would have strongly recommended filing and/or suing in the U.S. (ex: lawsuit against former shareholders)"*. Mr Werner was copied into these exchanges, demonstrating that both he and Mr Khabbaz were at that stage looking into the bringing of proceedings. As Mr Twigger pointed out, it is not clear who had first suggested the *"lawsuit against former shareholders"*, although it seems rather likely that it would have been Mr Khabbaz's idea since his strategy was clearly a litigation-based one. What is nonetheless clear is that it was Mr Khabbaz's exchanges with Mr Telemtayev which prompted Mr Werner to provide the PwC Russia report to Mr Khabbaz since he did that by email the very next day, 2 March 2012. Mr Twigger suggested that it was somewhat curious that Mr Werner should do this in view of the fact that Mr Werner's evidence at trial was that the PwC Russia report did not as far as he was concerned raise any major issues. Mr Werner's explanation was that

"at that time we were analysing the documentation in regards to the -- in regards to the banks and what he wanted to allege as a conspiracy between the banks and the former shareholders for having received loans with the idea of misappropriating these loans. As these ideas over time, over these months came together, I remembered that we had this PwC report and I said, look -- I forwarded it to him to take a look at it."

Mr Twigger then asked Mr Werner *"How come you suddenly remembered this report that on your evidence you had not given any thought to for a year and a half?"*, to which Mr Werner's response was this:

"I had not given any thought for more than two years because again at that time it became clear to me that the former shareholders had probably defrauded the company."

There was then this exchange:

"Q. So it is at this point that you formed a firm belief that Mr Arip and Mr Zhunus had misappropriated KK's money?

A. Yes, again, I just have to insist, this is not a specific -- it is not a specific day. It is a progress and it is at this moment where I had a belief that they had done something, that it was not a problem of mismanagement or mistakes that they had done, but that they really had -- that money had been stolen.

Q. I quite accept that you wouldn't be able to remember a specific day, Mr Werner, but it is important that we get this clear. So as I understand it, you are saying it is about this time when you send this PwC report?

A. Yes, correct."

Mr Twigger submitted that it is important to appreciate that no new information had come to light in March 2012 and nothing had changed other than the fall from grace of SP Angel and a clear change in strategy brought about Mr Khabbaz's litigious inclinations. I consider that Mr Twigger was right about this. It does not follow, however, that Mr Werner (and the Claimants) should be regarded as having had anything more than a suspicion, whether in March 2012 or at any stage after receiving the PwC Russia report. Mr Werner was, in my view, simply reacting to Mr Khabbaz's litigation plans by providing him with the PwC Russia report. It was, in short, Mr Khabbaz who prompted Mr Werner to dig out the PwC Russia report. I am clear that Mr Werner would not have done so had Mr Khabbaz not adopted the approach which he did.

473. Thereafter, as Mr Twigger put it, the momentum shifted with Mr Werner signing a settlement agreement terminating SP Angel's engagement by the KK Group on 7 March 2012 and, just over two weeks after receiving the PwC Russia report, with Mr Khabbaz instructing Ballon Stoll as New York attorneys to draft a complaint alleging the misappropriation of funds and/or breach of fiduciary duties by the former shareholders. This was followed two days later by Mr Werner's signing of a litigation contract indemnifying Phoenicia Capital for its costs of *"suing the former insiders and the banks to try and recover costs on behalf of kagazy"*, as Mr Khabbaz summarised it in an email to Mr Werner on 20 March 2012. This entailed Mr Werner agreeing on KK Plc's behalf to provide a full indemnity for legal costs and to invest at least US$ 100,000 into the lawsuit. As Mr Twigger observed, there was no suggestion at this stage that Mr Werner was concerned about the ability to make good the case which it was envisaged by Mr Khabbaz would be brought. I do not find this surprising, however, since it seems to me that all that Mr Werner was really doing at this stage was allowing Mr Khabbaz to pursue his strategy. This does not mean that Mr Werner should be taken as having had anything more than (at most) suspicion.

474. Shortly after the litigation contract had been entered into, on 14 April 2012, Mr Khabbaz asked Mr Werner to obtain the consent of PwC Russia to use the PwC Russia report as an exhibit in the planned lawsuit in New York. Four days before this, however, there was an email exchange between Mr Khabbaz and Mr Werner concerning Mr Werner's reference in an email to Mr Khabbaz on 10 April 2012 to his having looked into *"money that disappeared through related parties to the former shareholders"*. As Mr Khabbaz pointed out in response to Mr Werner's email, this seemed to concern things which had happened in 2010 and 2011 and so *"after the former shareholders were gone"*. It was not clear whether Mr Werner's intention in sending it to Mr Khabbaz was for it to be used in the intended proceedings against the *"former shareholders"*. Mr Twigger nonetheless submitted that Mr Werner's email was significant because he suggested that it shows that Mr Werner certainly believed at this point that money had disappeared through related parties to the former shareholders and this was the case despite the absence of any significant new evidence. Again, however, it seems to me that the most that Mr Werner's email can really be said to do is to confirm that Mr Werner was suspicious rather than that, as Mr Twigger put it, he *"had plainly believed this all along"*. As Mr Werner put it when asked about the Excel spreadsheet worked on by Ms Yelgeldieva which

he forwarded to Mr Khabbaz on 24 April 2012, specifically in answer to the suggestion that this showed that Mr Werner had been *"looking at the amounts by which the construction in progress has been impaired and ... looking at that in the context of the amounts that Alliance Bank has paid to PEAK and PEAK has then paid on to Arka-Stroy ... So you have got all the elements of your case at that point, haven't you, the case you have brought in this claim?"*, Mr Werner had this to say:

"I had an understanding that the loans were—that there were serious issues with the loans, that there were fraudulent loans that they were giving. I also understood that the value of the assets was probably not corresponding to the amount of loans that had been raised. Again I knew that there were certain parties and certain construction companies like Arka-Stroy, that were involved. But at this point I didn't have the full understanding of the fraud. ... At this point I didn't know that these impairments had been caused not by the financial crisis or not by the fact that the industrial park had to be stopped, but basically by the fact that the works were not done. Again, that is what I discovered later in the year ... ."

475. In any event, there is nothing to indicate that Mr Werner knew what he knew in April 2012 *"all along"*. Indeed, it is perhaps not insignificant in this context that on 26 April 2012 Mr Khabbaz forwarded to Mr Werner an email from Ballon Stoll asking for further information. Ballon Stoll, in particular, made the point that, *"although the documents show some of the results of the misconduct, they do not explain how it occurred"*. This was, of course, a reference, at least in part, to the PwC Russia report which Ballon Stoll would have been sent. Indeed, the email from Ballon Stoll refers to *"the Coopers report"* which is obviously a reference to the PwC Russia report, interestingly describing the report as not being *"an examination or review"*. The email explained:

"As you are aware, in order to sustain the causes of action for fraud the allegations must be plead in detail with particularity. Therefore, what we need in order to draft a complaint is a complete detailed narrative of all of the pertinent events with names, dates, circumstances, amounts, conduct, the specific property involved, the results of the improper conduct, etc."

476. On 30 April 2012 Mr Khabbaz emailed Mr Werner saying, *"I am still waiting for the needed information/timeline from you..."*. Mr Werner's response was to say this:

"I have not forgotten our timeline, it is holiday here today and tomorrow, working full time on it: I have taken over now, going through each single document and fact and squeezing information and thoughts out of Taissiya and Aida. ... btw it is starting to make sense, I am working towards sending you a timeline and some supporting documents today. Good news is that I have started to be more confident not about the legal merits of our case but about the supporting evidence we are able to provide you... ."

Clearly, therefore, as Mr Twigger observed, Mr Werner was himself working on what had been sought.

477. So it was that, on 8 May 2012, Mr Werner sent Mr Khabbaz a document which was described in its Word form as the *"Lawsuit Narrative"* but which was actually entitled *"Derivative Lawsuit Against Kazakhstan Kagazy"*. Mr Twigger highlighted a number of features of this document, which named Mr Arip and Mr Zhunus (along with "Kazakstan Kagazy") as defendants, in support of his submission that it contains the elements of the PEAK Claim and the Astana 2 Claim. These included the fact that the document described the case against them as being the following:

"*The case against the former shareholders is basically laid out in the PwC ... review dated 3 December 2009, which identified USD $170.188 million of 'questionable transactions' on page 4 of the report and which also identified the related parties with whom these transactions occurred on page 57 of its report.*

The former shareholders were firmly in control of the company during the review period. They then fled the country in December 2009 and handed the keys to Tomas Mateos, current chairman ..."

Other aspects highlighted by Mr Twigger were the following: the reference to the claim amount being under calculation but *"probably north of USD 200 million"*; the fact that it mentioned the fact that the impairments in 2009 to 2011 related to the US$ 170 million of *"questionable transactions"* flagged by the PwC Russia report but not identified by the BDO audits; its reference to the US$ 22 million loan from DBK in 2008 and 2009 *"for 'construction in progress' in Astana; for construction which does not exist"*; the fact that the document then provided further details relating to this, including the contracts with TESS and GS, and described *"Claim 1"* as being in respect of the amounts sent to *"Astana Project (USD 22,8 million) minus construction in progress (USD 16,5 million) plus interest accrued (USD 5,4 million) and plus penalties (USD 2,4 million) plus USD 10 million from the Almaty project: USD 24,1 million"* in view of the fact that the *"Astana loan was supposedly contracted to build the 'Astana City project'"* yet *"the monies were spent and yet no such project exists today"*; the document referred to the establishment of PEAK by *"K Zhekebatyrov (related party former shareholders)"* and the disbursement of a loan from Alliance Bank to Arka-Stroy which it noted was *"(owned 50% by Mr Zhekebatirov, 50% Vladimir Khan, former employee KK)"*, before going on also to note that Arka-Stroy was sold to *"B Esimbekov (former employee, related party)"*; and the document also described how *"the 'Industrial park' infrastructure for USD $15.33 million is non-existent as the industrial land is a bare land that has no infrastructure on it"*.

478. Mr Twigger submitted that, in view of its contents, the Lawsuit Narrative establishes that, apart from the land plots allegations, Mr Werner was quite able to detail an arguable case in relation to the PEAK and Astana 2 allegations which was very largely, and indeed avowedly, based on the contents of the PwC Russia report. Moreover, Mr Werner was able to obtain any additional information required directly from Ms Kogutyuk and Ms Yelgeldieva since the Lawsuit Narrative was put together before Ms Gorobtsova had started at the KK Group (she started in early May 2012 but only 5 days before Mr Werner sent the Lawsuit Narrative to Mr Khabbaz) and before also Mr Gafurov had carried

out any investigation (which he did in January the following year). It was also, Mr Twigger, observed before discovery of the Arka-Stroy 1C database in March 2013. Indeed, Mr Werner accepted in cross-examination that he had got all of the information which he put in the Lawsuit Narrative without the Arka-Stroy 1C database. The difficulty with Mr Twigger's submissions in relation to the Lawsuit Narrative is, however, that the document was very lacking in detail. It was, indeed, as Mr Howe put it in closing, *"threadbare"*, showing, if anything, the *limits* of the Claimants' knowledge, particularly as regards Arka-Stroy where nothing is said about Arka-Stroy's role, again as Mr Howe put it, acting as *"a Trojan horse within the system, being used effectively as simply a front to siphon money out of the company under cover of construction contracts"*. Mr Werner's acceptance that he was able to prepare the Lawsuit Narrative without having access to the Arka-Stroy 1C database needs to be viewed in the context of a document which did not develop the case as it is ultimately came to be framed as far as Arka-Stroy is concerned. I do not accept, therefore, that the Lawsuit Narrative is as helpful a document to Mr Arip and Ms Dikhanbayeva as Mr Twigger sought to portray it.

479. Returning to the chronology, over a month later, on 25 June 2012, Mr Khabbaz emailed Mr Werner, asking him *"Why has Kagazy never sued the former shareholders in spite of your knowing about the PWC Review since 2009; do you realize what a huge breach of fiduciary duty that is?"*. As Mr Twigger observed in closing, Mr Werner never responded to that question. In particular, he did not suggest that the reason was that the PwC Russia report gave insufficient information to enable a claim to be launched. I do not find that surprising, however, since I can well understand, having read the exchanges between Mr Werner and Mr Khabbaz from around this time, that Mr Werner might not have thought that a response was really sought. The question posed was, in context, somewhat rhetorical. It needs also to be appreciated that Mr Khabbaz's email ranged over a number of different matters, including the rather disconcerting fact as far as Mr Werner was concerned that he found himself named as a defendant in the draft proceedings which had been sent to him. As to this, it is worth setting out what Mr Khabbaz had to say because it shows something about his approach:

"I know you were taken back by the current draft of the complaint but believe me when I say that we wrote it in a very accommodating and honest way. It was to be expected to include you as a defendant especially when your past was so entangled with that of the former shareholders. You simply can't make an omelette [sic] without breaking eggs. But as I already told you for example, that if I wanted to be tough, I would have also gone after invalidating your shares. My point is, I am not after you, but I am after everyone else named in the lawsuit and that has harmed this company and I will not let go until I clear them out of the Company's way. To accommodate your request in our conversation and to make you feel comfortable, I will ask my attorneys to amend the lawsuit and take you out completely as a defendant in the lawsuit, in effect protecting shares for the future and not getting your name sullied in public legal filings. It's important for me that you feel comfortable with my course of action even if as a result, the lawsuit will be something that is not ideal from a legal basis."

480. Mr Twigger pointed out in closing that Mr Werner suggested in cross-examination that Mr Khabbaz was wrong to sue when he did and his claim failed and was dismissed, despite the fact that Mr Werner had fully supported the claim, had raised no complaint about it being premature and had entered into the litigation contract which he did. These were fair points. So, too, was the criticism which Mr Twigger made concerning Mr Werner's reliance on an advice which he received from the New York attorneys, GS2 Law, on 2 July 2012 since it is quite clear that that advice was mainly focused on technical procedural aspects related to the bringing of a derivative action, with very little being said concerning the underlying merits of the claims intended to be brought. However, as Mr Howe pointed out in closing, in his fourth affidavit, Mr Werner relied not only on the advice which he had received (albeit that KK JSC had paid for the advice) from GS2 Law, but also on what Mr Arip's own New York lawyers had to say in support of the Motion to Dismiss which they came to file on his behalf. Specifically, Mr Werner quoted the following passages from the motion:

"Fourth, and finally, under both Isle of Man and New York law, Phoenicia has failed to state any claim against Arip or Zhunus for which relief can be granted. The complaint falls woefully short of providing the required level of specificity to support any of Phoenicia's breach of fiduciary based claims… as it consists of little more than wholly unfounded vague and conclusory allegations, as well as numerous inherent inconsistencies. The only other claim asserted against Arip and Zhunus - civil conspiracy (the First Cause of Action)-fails for the same reasons, because under both Isle of Man and New York Law such a claim stands or falls on the allegations of the underlying wrongful conduct. The complaint's lack of specificity is particularly telling here, where the sole owner of Phoenicia is also a current board member of KK Plc and thus had full access to the Company's financial records one would expect the complaint to contain a detailed and coherent account of the means by which tens of millions of dollars were allegedly stolen from the company. It of course does not.

…

The only semi-coherent allegation of wrongdoing in the complaint is Phoenicia's contention that MTS obtained loans from several Kazakh banks to finance a construction project and that some of the loan proceeds 'appear to have been misappropriated and converted through payments to a (unnamed) construction company for work that was never performed'. The complaint contains virtually no factual allegations to support this alleged scheme-including the name of the construction company that was purportedly a sham, the dates or specific amounts of any payments to the construction company (.. .) Nor is it clear from the complaint which entity is alleged to have made the payments to the construction company -- while the complaint initially asserts those payments were made by KK JSC, 3 paragraphs later it alleges that the same payments were made by MTS. Such conclusory and conflicting allegations fail under Isle of Man. All of Phoenicia's remaining claims also fail for lack of specificity …".

481. It is nonetheless clear that what really caused Mr Werner to have a change of heart was that he was a named defendant in the draft complaint. Until then, it is

apparent that Mr Werner was content that the action should proceed and that he was probably not overly concerned about the underlying merits of the action and was instead somewhat swept along by Mr Khabbaz's enthusiasm for litigation. Once Mr Werner found himself named as a defendant in the draft, he took a rather different view of what Mr Khabbaz was proposing. Accordingly, when he was sent a further draft in late July 2012 which removed his name as a defendant but in which there was reference to a *"John Doe defendant"*, he emailed Mr Khabbaz in trenchant terms saying this:

"The initial draft of the complaint included me and some false allegations against me to strengthen the complaint by proving continuity of crime. I obviously asked you to revise these and to name in your complaint only those whom you thought had acted fraudulently as although you said that allegations against me would be dropped once I had been 'cleared' there is no way of controlling the outcome of any litigation, especially if based on spurious allegations that could take a life on its own.

From the revised complaint I can say that I [sic] although I do not appear as a defendant, this is only all in but name, as the John Doe Defendant and some of the allegations are phrased so as to have the ability to reintroduce me as a Defendant.

It defies any logic that I am supporting a complaint that potentially accuses me of fraud. If sued my problems would be compounded by knowingly letting myself be accused with allegations that I knew were false and we could both be accused of conspiracy by the Defendants by making allegations that are not true.

Take me out completely, or otherwise sue me if you think that I acted fraudulently - which I think you don't, otherwise why would you offer me a partnership and so much of your professional knowledge and personal affection.

Any other logic is convoluted, weak and can turn against both of us if challenged. Let us pursue a clean and defendable strategy, sue those we know have acted fraudulently and defend ourselves with the facts on our side. … ."

Mr Twigger highlighted two things about this: first, that Mr Werner made no reference to new material of which he was previously unaware or of a lack of evidence but only to Mr Khabbaz's ability to pursue a claim in New York and he referred to having given his *"full support"* to launch the claim; and secondly, that Mr Werner asked Mr Khabbaz to *"take me out completely, or otherwise sue me if you think I acted fraudulently – which I think you don't"* and proposed *"…let us pursue a clean and defendable strategy, sue those we know have acted fraudulently and defend ourselves with the facts on our side"*. Mr Twigger suggested, in particular, that this was Mr Werner saying, in terms, that he (and Mr Khabbaz) knew that Mr Zhunus and Mr Arip had acted fraudulently. I cannot agree, however, since, read in context, particularly given Mr Werner's earlier reference to his previous request that Mr Khabbaz *"name in your complaint only those whom you thought had acted fraudulently"*, it is clear that Mr Werner was not meaning by using the word *"know"* later on in the email to

say how firm was his knowledge or the extent of his knowledge concerning Mr Zhunus and Mr Arip's conduct.

482. This brings me, lastly in this context, to a KK Plc board meeting which took place over the telephone on 20 August 2012. Mr Twigger highlighted how in the transcript of that meeting, Mr Khabbaz is recorded as having stated when referring (implicitly rather than expressly) to the PwC Russia report that:

"the company has commissioned a review from one of the major accounting firms, and the review is less thorough than an audit, but it's still a good indication for the accounting of what went on in the company. And for the purpose of prior to 2009 there was over $170 million that was stolen from the company by the two shareholders. And that's really in a nutshell what the case is."

Mr Werner then set out his thinking:

"My view and I think the view that the board should sustain for the benefit of the company is that given that we are … have this ability to sue them is coming up three years after these gentlemen have left the company, and from a board that has been managing the company now, not in its entirety but most of the members have been for the last three years, and pursuing…and this board not having in this case jurisdiction in the US like John [Khabbaz] has through his Phoenicia capital vehicle, means that I don't see any possibility of successfully suing the bank and the former shareholders and that the board has a lack of … a lack of credibility because it actually … we have been living the situation for three years. And that is why I think the right position is that we are not willing to pursue Alliance bank and the former shareholders and that is why the board …We want to reject this. And it would be distraction for the company whereas John, being a new shareholder, that has just … that has just made aware of the situation with, based in…with the ability to claim US jurisdiction can have … can have a chance of success."

483. Mr Twigger emphasised that Mr Werner made no mention here of any concern on his part that there was a lack of evidence. The explanation for this, in my view, however, is that Mr Werner was most concerned about the fact that he was to be named, whether expressly or by implication, as a defendant, and not about lack of evidence. This is demonstrated, indeed, by the fact that, after Mr Khabbaz agreed to remove him as a defendant and despite the board deciding in August not to support the derivative action, Mr Werner was clearly less concerned about what Mr Khabbaz was doing in New York, albeit that ultimately the two men went their separate ways.

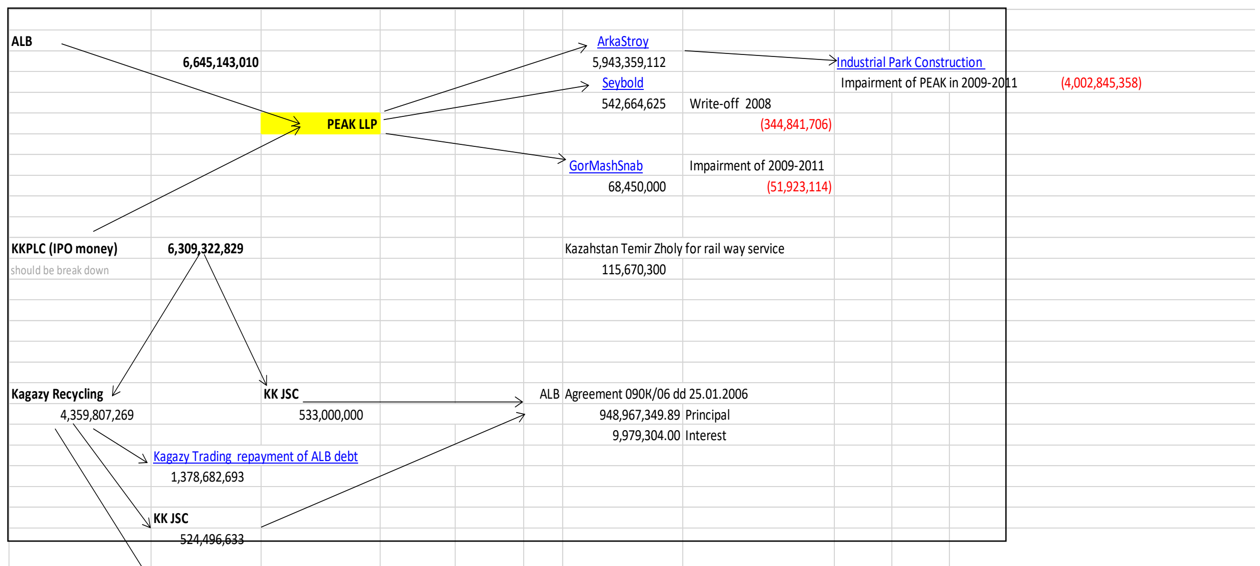
484. As for what Mr Khabbaz did in New York, Phoenicia filed its derivative complaint against Mr Zhunus, Mr Arip and Alliance Bank on 21 September 2012. The Phoenicia complaint included these passages:

"*The owners of the construction company that received payments from KK JSC for supposed work in progress that was never performed on Plot 1 were the very same individuals who owned MTS [PEAK] (ie Mr Zhekebatirov) before it was sold to the KK Group. Furthermore, Mr Zhekebatirov was a relative of Zhunus,*

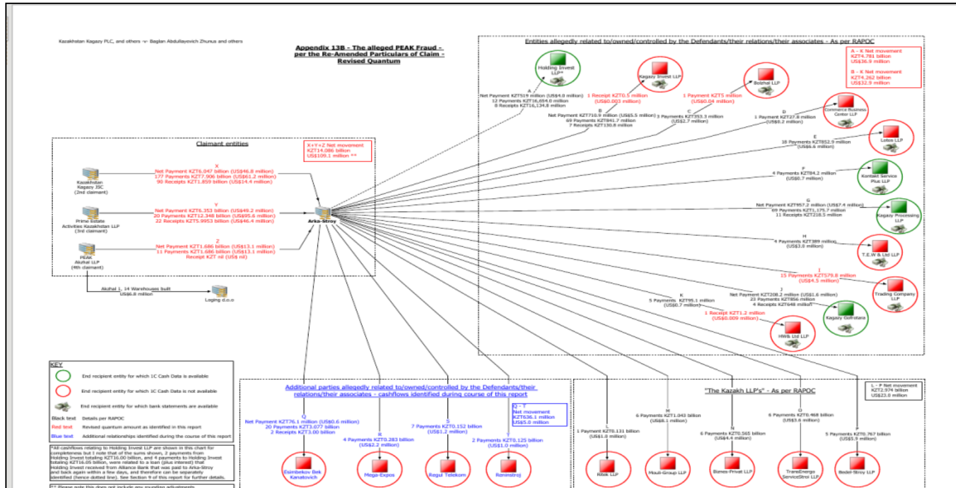
and MTS [PEAK] was nothing but a front for Zhunus, Arip and Alliance's former management." (paragraph 39)

"*In short, this whole series of transactions was illegitimate and designed to bilk the KK group out of their assets: MTS* [PEAK] *was taking loans from Nur Bank and from Alliance, loans that KK JSC pledged lands against. MTS* [PEAK] *was then using this money to make payments to a construction company owned by the very same shareholders for work that was never performed, so that the money ended up with MTS's and the construction company's shareholders…*" (paragraph 42)

Mr Howe pointed out that, although Phoenicia's claim was broadly based on the (alleged) PEAK fraud, it lacked an understanding of the central role of Arka-Stroy. I agree about that. The fact is that the complaint was pretty vague and was not framed in the same way as the PEAK Claim has been in these proceedings. This is because, as Mr Werner explained, although it was clearly understood that Arka-Stroy was related to the *"former shareholders"*, what was not known was that, rather than being an independent construction company, it was "*a complete KK company, like we discovered in the end*". Indeed, as Mr Howe pointed out in his reply submissions, even in the most up-to-date version of the Excel spreadsheet put together by Ms Yelgeldiyeva in, it appears, October 2012 and sent to Mr Khabbaz by Mr Werner on 17 December 2012 which set out the information as to what happened to monies after they had been received by Arka-Stroy, was very incomplete, with essentially just one arrow going nowhere, so demonstrating that there was no real appreciation or understanding as to what had actually happened:



The rudimentary and scanty nature of this spreadsheet is to be contrasted with the diagram prepared by Mr Crooks known as Appendix 13B:



485. I come on, then, to deal with the preparations which the Claimants made for the purposes of the present proceedings, specifically in the context of Mr Twigger's submission that those preparations again reveal that the Claimants (and Mr Werner) had actual awareness by 1 August 2010 since the PwC Russia report disclosed a *prima facie* case against Mr Zhunus and Mr Arip in respect of the PEAK and Astana 2 Claims.

486. Three points arise here as far as the PEAK and Astana 2 Claims are concerned. First, Mr Twigger points to the fact that, on 5 October 2012, Mr Werner sent an attachment called *"KK Story"* to a Mr Alastair Murray, who was assisting Mr Werner in his efforts to obtain investment and who had emailed Mr Werner on 26 September 2012 to set out what information the *"timeline"* document which he required from Mr Werner should contain. This email suggested, in particular, that Mr Werner should include the following:

"Then narrative/detail about the loans, what you found (in terms of money out via looting/fraud)

Then your feeling about what the company would/could be worth if the debt were rescinded & instead criminal charges brought against the looters

What you have found out about the looters & where the money went…"

The email went on to say that "*There is nothing to hide here, to get his help requires being open with him*", and in a second email the later the same day Mr Murray also suggested that the document should include "*data around the individual, where they are now, what was done with the money, etc ….*"

Mr Werner responded to those emails on 26 September 2012 as follows:

"*I will send you the requested information over the weekend. You will appreciate that there are gaps in the information that you have requested. I know now what has happened because for the last year I have been involved in the day to day of the company and have been able to form a detailed picture of how the previous shareholders managed the company. But not everything I'm sure of can be proven documentary, otherwise I would have proceeded much earlier …*".

Then, just over a week later Mr Werner sent Mr Murray the *"KK Story"* document under cover of email in which he stated this:

"*It has taken me some time to confirm some of the information provided in the document attached but I now have good evidence on all the points included in it.*

I hope it proves useful. I will be obviously happy to provide more detailed explanations. I am working on obtaining even more precise and conclusive intelligence and especially on how the funds misappropriated in KK were channelled into new, lucrative projects in Russia ".

The document itself contains these passages:

"*The impressive performance of the company has not been sufficient though to reach an agreement to restructure the debt of KK with two of its banks, USD 90 million with DBK and USD 40 million ALB. The root of the problem lies in the fact that the KK does not own all the assets for which it received loans from DBK and ALB. More specifically, approximately USD 200 million of loans that the company received were fraudulently misappropriated by the former shareholders.*

…

A deeper analysis of the accounts has revealed that the former shareholders did not run into difficulties because of the financial crisis but had been planning to defraud and rig the accounts of the company systematically from the beginning of their investment.

Forensic analysis conducted internally by the company and by PwC has revealed that out of total investments of approximately USD 700 million, at least 200 million were fraudulently extracted from the company by the former shareholders using various methods. (Detail is available separately).

…

The money defrauded to KK has been channelled by the former shareholders into new projects in Russia … ."

Then, in an annex, under the heading "*Why did the new shareholders not act before?*", this is stated:

"*1. They bought a company with record Net Profits … believing it only had financial difficulties; please note that in 2009 KK was a company listed on the Main Board of the London Stock Exchange, audited by a reputable UK auditing firm, BDO … having undergone the very stringent disclosure requirements of an IPO process …*

2. The depth, complexity and sophistication of the fraud committed by the former shareholders only became evident once taking control of the company and progressively having access to detailed and granular financial information. The new shareholder was only able to appoint a trusted CEO in November 2010.

3. *The company was in an extremely weak situation from the change in ownership to May 2011, until it had generated sufficient cash to make its restructuring plan credible and effectively restructured its bond portfolio and closed numerous bankruptcy cases that would have led to the complete bankruptcy of the company in case of initiating a legal battle against the former shareholders ...*

4. *... especially as the new shareholders, being foreigners, did obviously not have the administrative resources of former shareholders who would have happily bankrupted their old company to destroy any evidence of their fraud*."

The same annex, in a section headed "*What are the current shareholders doing?*", went on to state as follows:

"*1. They have or are about to initiate legal actions against the former shareholders in New York and Isle of Man courts separately;*

2. They have started to gather further intelligence on the past actions, destination of the money defrauded and current assets of the former shareholders. In particular they are trying to establish a conclusive link between the money that fraudulently left KK and was channelled into various projects in Russia.

3. Once further intelligence is gained, they are seeking to request a worldwide injunction of the assets of the former shareholders with the aim of reinstating any money or assets obtained ... ."

487. Mr Twigger submitted that these passages demonstrate that at this stage Mr Werner clearly was aware of the essential elements of the PEAK Claim. The difficulty with this submission, however, is that the *"KK Story"* document is a far from detailed document. It gives only very limited information and does so by reference (again) to the PwC Russia report. I consider that, indeed, if anything, it illustrates how little in terms of detail was known at this stage, rather than how much was known as Mr Twigger would suggest. The reason is straightforward: as with the Lawsuit Narrative, the *"KK Story"* document was prepared at a time when, as Mr Werner explained when dealing with the Lawsuit Narrative, it was not known that Arka-Stroy was "*a complete KK company, like we discovered in the end*". This was only known on discovery of the 1C database. Until then that important aspect of the PEAK Claim was not known or, as Mr Howe put it in his reply submissions, *"the piece of the puzzle which makes the picture comprehensible"* in the sense that it explains the real nature of the PEAK Claim, and Mr Twigger was in no position to suggest otherwise. Indeed, as I have previously explained, in setting out the factual findings which he invited the Court to make concerning the Claimants' knowledge as at 1 August 2010, Mr Twigger did not suggest that that knowledge included awareness that Arka-Stroy was *"a complete KK company"* since, of course, the findings which Mr Twigger invited the Court to make were derived from the PwC Russia report, a document which I have already concluded did not give the Claimants enough knowledge (as opposed to suspicion) to amount to actual awareness for Article 180.1 purposes.

488. The second matter which arises concerns the fact that, consistent with what was stated in the annex to the *"KK Story"* document, in December 2012 the Claimants instructed Zaiwalla, which had been engaged by Mr Werner a couple of months previously, to pursue an application for an injunction in England. The background to this involves Ms Gorobtsova's arrival at KK JSC in May 2012 as an assistant to Mr Werner, specifically her evidence that, within a few months of joining the KK Group, by around August 2012, through general "*chit-chatting*" and "*gossips*" with KK employees whose trust she had gained, she got a picture of how the company had operated before Mr Werner joined the company. As she is a Russian speaker, it was easy for people to talk to her, and certain employees would discuss, over lunch, how the company used to have expensive cars, helicopters, and "*lots of money*", but that they knew that the money came from the bank, and so "*something was obviously happening*". Some employees went so far as to describe the former shareholders to her as "*fraudsters*". In around August 2012, she discussed this with Mr Werner, whom she knew had his own suspicions but "*no real evidence*", and his response was that he was also thinking about this and that they should see if there was any evidence. Ms Gorobstova explained that, as she was born in Kazakhstan, she knew it was a typical scheme to take huge loans from the banks, which would then "*close their eyes*" to the fact that construction is not really in progress, and then the borrower would "*build something on $10million and $200 million … take away*".

489. It was for this reason, she explained, that it was her "*natural feeling*" that they should investigate the construction works. This appears likely, therefore, to be the reason why, in the context of his instructions to seek injunctive relief, on 13 December 2012, Mr Werner emailed Mr Sarosh Zaiwalla that he was ordering *"a technical audit to prove that whatever was accepted by the company as constructed (for the MTS fraud) actually was never constructed"*, something which Mr Werner accepted in cross-examination PwC Russia had recommended be done in the report which they produced three years previously. Mr Leigh Crestohl replied that he hoped that *"the result of the audit would be that there is a total mismatch between what was claimed to have been completed on the construction projects and what was in fact completed"*, Mr Zaiwalla observing the next day that *"For the purpose of an injunction application, we don't see any downside to you engaging and giving the green light to VHS. For the reasons explained in Leigh's emails last night, we don't think that a more renowned, more expensive and more experienced firm would bring anything extra to the table for the purpose of an injunction, especially given that the central issue here should be relatively simple"*.

490. In the event, however, Mr Werner decided to obtain a report from Mr Gafurov, Ms Gorobtsova's friend. Ms Gorobstova knew Mr Gafurov, who with his father ran a construction company, Kazstroyinvest, and she approached him around November/December 2012 to ask if he would be able to carry out an assessment. Ms Gorobstova explained that, at that time, they were not instructing Mr Gafurov to make a formal report to use in evidence (not least because she knew Mr Gafurov did not have the necessary qualifications which would be required), but that she personally wanted to understand what had happened, and wanted someone she trusted to "*help us understand if there is really something, or we*

should just drop that". Mr Gafurov and his father visited the Akzhal and Aksenger sites in December 2012, a few days before Christmas, and Mr Gafurov returned around 15/16 January 2013 for two weeks to carry out a more detailed survey of the sites and analyse relevant paperwork. At the end of January 2013, Mr Gafurov produced his report, which made a number of findings which are relevant to the claims in these proceedings.

491. In relation to the PEAK Claim, the report stated that the amounts paid for the work at Akzhal-1 appeared inflated, with little or no work at all having been completed at Akzhal-2 and Aksenger, and that the Acceptance Acts appeared to be seriously inaccurate, recording, for example, earthworks of a scale of which there was no evidence and which it was highly improbable had been carried out. The report noted the consistent involvement of Arka-Stroy as general contractor, and concluded that it seemed likely that a "*large scale fraud*" had taken place. Relevant extracts from the *"Introduction"* section of the report include the following:

"*Akra-Stroy LLP (AS) ... was chosen as a head developer to organize the efforts of various architect groups, suppliers and contractors to carry out the work. All of the funds were to be distributed through AS.*

...

Three years into the project, when more than KZT22bn (150m USD) was already transferred to AS accounts and all paperwork portrayed the projects to be well under way, the only developed site was Akzhal-1, while the other two remained untouched.

To cover the funds transferred, AS produced a number of false Acts of Acceptance, that portrayed the alleged work at the site. In response, KK Group accepted the papers and confirmed the work progress, thus continuing to finance the stagnant construction.

It is suggested, therefore, that both sides committed to an intended fraud scheme which was aimed at extracting funds from KK Group into companies affiliated with the then management of KK Group."

492. The report did not refer to any of the Defendants by name, but referred to the KK Group's "*management*" as having sold *"all of their shares on the market"* and *"left the company with unfinished projects and no cash*". Clearly, as Ms Gorobtsova acknowledged in cross-examination, this was a reference to Mr Zhunus and Mr Arip. The report went on to give further details of the works carried out at Akzhal-1, Akzhal-2 and Aksenger, and explained why the Acceptance Acts did not coincide with the work which was carried out. The section on *"Affiliation"* stated:

"*Affiliation of companies brought to develop the projects is another proof of fraud and its main tool. Starting from the companies that the land was bought from to ones that allegedly carried out the work, all are indirectly controlled by the management of KK Group. A paper obtained from the State Tax Office shows that AS was founded and run by KK Group's lawyer, while KK's accountant was also employed in the same position at AS. Such a close circle of*

people in charge meant that no one even had to know about what was going on, because all papers were prepared, presented, checked and approved by the same group of people."

493. In relation to the Astana 2 Claim, the report noted that TESS and GS Construction were two of the main contractors. The report stated that, in relation to work carried out by TESS, although there was a state assessment confirming work had been completed, that assessment did not look at the scope of works and so did not verify that the initial projection of the costs was realistic. It also noted that a payment had been made to TESS in respect of a third contract which could not be located and so it was unknown to what this payment related. In relation to GS, the report stated that the contracts with GS, and the amendments to these contracts, were unusual, and that one contract had apparently been formulated in such a way as to "*confuse the reader into believing that GS actually did fulfil all obligations under the contract*." The report stated that the level of work carried out could not be verified because the site was covered in six feet of snow.

494. The report, which also contained information relating to the land plots which are in issue in the Land Plots Claim (a topic to which I shall return later), concluded as follows:

"*As a conclusive note, it is fair to say that the KK Group management executed a large scale fraud aimed at taking possession of corporate funds, attracted from lenders for development of logistics projects, with prior knowledge that no work will be done… This report has identified a list of potential counts of wrong-doing and mismanagement by the KK Group's management that would have to be verified in court:*

- *misuse of borrowed money*

- *directing corporate funds to affiliated companies for taking possession of the money*

- *defrauding the future shareholders by lying about the realistic fixed assets in the KK Group's ownership*

- *bribing (or some other way of convincing) consultants, surveyors and auditors into giving incorrect estimates of the KK Group's assets*".

495. Mr Twigger submitted that Mr Gafurov's report is significant not for the reason suggested by Mr Werner, namely that it was one of the pieces of information that allowed him to discover, as he put it in cross-examination, the *"full extent"* of the alleged frauds, but because of the fact that it was commissioned in order to provide evidence in support of an application for a freezing injunction which Mr Werner had already decided should be made, as demonstrated by his instructions which he gave to Zaiwalla in December 2012. As Mr Twigger put it, it was the need to obtain evidence to support the claim which prompted Mr Gafurov's report, not his report which prompted the claim. This, Mr Twigger submitted, indicates that Mr Werner already had sufficient awareness to justify his giving those instructions. I disagree. The fact that Mr Werner gave the

instructions which he did to Zaiwalla shows what he wanted to achieve. It does not follow, however, that he already knew what Mr Gafurov was to go on and report. Indeed, if that were the position, there would have been no need to have instructed Mr Gafurov at all unless, of course, the exercise carried out by Mr Gafurov had already been performed yet there is no evidence, and nor has it even been suggested by Mr Twigger, that that had happened. In this respect, although it was put to Mr Werner that he knew that the Acts of Acceptance were false before Mr Gafurov's report, the evidence that this was the case is somewhat lacking. The most that might be said, in my view, is that Mr Werner harboured suspicions concerning the Acts of Acceptance. In the absence of evidence showing that he had already done the exercise which Mr Gafurov performed or that somebody else had done it for Mr Werner, it makes no difference that, as Mr Twigger pointed out, Ms Gorobtsova commented in cross-examination on how simple the exercise undertaken by Mr Gafurov was, entailing as it did Mr Gafurov looking "*at the contracts that were available*", looking *"at the amount of work that had been claimed to have been done, amongst the work paid"* and Mr Gafurov then giving *"his professional thinking of how much it should have cost"* so as to arrive at *"the difference, which was something over 100 million"*. The simple fact is that what Mr Gafurov did had, on the evidence, not been done before. Nor does it matter that Mr Gafurov's work predominately relied upon information that was freely available to the Claimants, so as to mean that, as he agreed with Mr Twigger, if he *"had done the same investigation in 2009"*, he *"would have got the same documentation"* and could, therefore, have reached the same conclusions in 2009 or 2010. There is no evidence that, prior to Mr Gafurov doing what he did, anybody else had performed the exercise. On the contrary, if it had already been done, it is inconceivable that Mr Gafurov would have been asked to carry out the exercise at all.

496. Mr Twigger also drew attention to the evidence which was given by Mr Gafurov, Ms Gorobtsova and Mr Werner in relation to how a meeting between the three of them, possibly at the Rixos Hotel but it does not much matter where, differed. Specifically, Mr Twigger highlighted how Mr Gafurov stated that he believed Mr Werner to have been shocked because he said words such as *"Oh my God"* and *"What the hell"* as regards what Mr Gafurov's report had to say concerning the land purchases, the affiliation of the companies involved to the KK Group and the amount of money paid to Arka-Stroy, and how Ms Gorobtsova suggested that Mr Werner's shock was as to the *"specifics"* in the report such as Acts of Acceptance *"saying that they used 3.2 people or something really obvious"* and that *"we were shocked that it really happened in such a huge amount"*. Mr Twigger submitted that *"by contrast"* Mr Werner's evidence was that, prior to the January 2013 meeting, he had met with Mr Gafurov on a number of occasions, describing Mr Gafurov's report as an *"iterative process"* as opposed to *"a sort of black box exercise, where it just came out one day"*. That is, indeed, what Mr Werner stated. Mr Twigger went on to suggest that Mr Werner had said that he had not been shocked about Arka-Stroy but because the Acts of Acceptance had been forged. The relevant exchanges between Mr Twigger and Mr Werner, which follow Mr Werner's *"black box"* reference, are these:

"Q. So was he telling you, as he went along, the kinds of things that he was finding and what his thoughts were?

A. Yes.

Q. So by the time it got to the end and you had your last meeting with him, you weren't shocked by anything that he said, because he had been filling you in as he went along.

A. No, I was shocked when he told me that the acts of acceptance were forged. And again, I remember very precisely when he said, 'Look, there is an act of acceptance that was signed on 31 December of earthworks when the ground is frozen'. I also remember him – I don't remember the number, but I think he said the earthworks would cover 14 football stadiums. He also mentioned that there were some round figures for objects and there were two and a half elements of something which obviously could not be. It had to be two or three. That is what I recall.

Q. So your shock, the shock you describe there, was about the acts of acceptance; is that right?

A. Yes. That was the main thing I recall, the fact that the acts of acceptance were forged. That is my main recollection of the work that he did.

Q. You weren't surprised to hear him talk about Arka-Stroy, because you had always thought that Arka-Stroy was involved in the fraud?

A. Yes, and again, we were circling in around Arka-Stroy."

In this last answer Mr Werner was, in my view, simply confirming that (at most) he had prior suspicions over Arka-Stroy's role and that those suspicions had increased, hence his reference to *"circling"*. I do not consider it follows, however, that Mr Werner should be taken as saying that what Mr Gafurov's report had to say concerning Arka-Stroy was not shocking since, in view of what was stated about the Acts of Acceptance, it is somewhat artificial to divorce Mr Werner's reaction to what was said by Mr Gafurov about Arka-Stroy from what was said by Mr Gafurov concerning the Acts of Acceptance. In short, I am not persuaded by Mr Twigger's submission that the evidence as to Mr Werner's shock is so contradictory as to mean that it has been made up. Furthermore, although it is not clear whether Mr Werner was agreeing with Mr Twigger that by *"always"* he meant from the outset or from the time when the PwC Russia report was received. It is, however, unlikely that Mr Werner was saying this given his insistence on other occasions that he did not have such suspicions at so early a stage. In any event, suspicion is not enough for Article 180.1 purposes.

497. The third issue which arises concerns the discovery of the 1C database and the evidence which Mr Werner gave on this. I have addressed certain particular criticisms previously and so need not do so again. The more general point which was made by Mr Twigger was that the discovery of the Arka-Stroy 1C database was neither crucial nor necessary for the Claimants to make the allegations

which they now make. At most, Mr Twigger submitted, the contents of the database enabled the Claimants, at least on their case, to strengthen the inferences upon which they now rely because they can allege that the recipients of a portion of the sums paid to Arka-Stroy were connected to the Defendants. Mr Twigger's submission was that, even without the database, the Claimants would have still alleged, as they do now, that Arka-Stroy is Mr Zhunus' and Mr Arip's company and so that all sums paid to it were for their benefit. I cannot accept this, however, since it is clear to me, as I have previously explained, that it was not until discovery of the database that Mr Werner (and so the Claimants) could understand what had happened in terms of money flow from Arka-Stroy and in terms also, crucially as I see it, of understanding what Arka-Stroy actually was, which was that it was "*a complete KK company*". The fact that Mr Werner was already aware of connections between Mr Zhunus and Mr Arip and Arka-Stroy is not the same thing as learning that Arka-Stroy was actually "*a complete KK company*".

498. I should mention one final matter concerning the Business Audit Report which was sent to Mr Werner on 23 November 2012 by Ms Yelgeldieva. This was something which Mr Werner also relied upon in his first affidavit, as having revealed information without which he could not have known that he had a potential claim in relation to the Astana 2 allegations. Mr Twigger submitted that not only was Mr Werner wrong to say that he did not obtain this report until January 2013, but also that it cannot have been a report which was as significant as Mr Werner sought to suggest in that it resulted, as Mr Werner himself stated in his first affidavit and on other occasions, in no *"incriminatory conclusions"* to the effect that there had been fraud (as opposed to *"only mis-management"*). This submission, however, overlooks the real point which Mr Werner was making in his first affidavit, which was that it was the contents of the report (rather than its overall outcome) that he regarded as significant and about which he had not previously known. I can understand this. The more so, given that the Astana 2 Claim involves the level of complexity which it does. It should be borne in mind also that the majority of the matters relied upon by Mr Twigger in the limitation context are matters which concern the Claimants' alleged awareness of the PEAK Claim, specifically concerning Arka-Stroy's involvement, rather than Astana 2-related matters.

499. It follows, therefore, that I reject Mr Twigger's submission that the three matters which I have addressed concerning the preparations undertaken for the purposes of the present proceedings serve to demonstrate that the Claimants (specifically Mr Werner) had actual awareness by 1 August 2010 in respect of the PEAK and Astana 2 Claims. Accordingly, the conclusion which I reach in relation to the first limb of Article 180.1 is that the Claimants (whether through Mr Werner or SP Angel or anybody else for that matter) did not in relation to the PEAK and Astana 2 Claims have the requisite actual awareness for limitation purposes.

The PEAK and Astana 2 Claims: whether the Claimants "should have become aware" by 1 August 2010

500. I come on now, again focusing at the moment only on the PEAK and Astana 2 Claims, to address the question of whether the Claimants *"should have become aware"* of the requisite matters by 1 August 2010 so as to mean that the 3-year

limitation period had expired by the time that proceedings were commenced. Mr Twigger's submission was, even if it were to be decided that the Claimants were not aware of the violations of their rights by 1 August 2010, or that they deliberately decided not to investigate what were only suspicions, the Court should nonetheless find that the Claimants *"should have become aware"* of such violations for the purposes of the second limb of Article 180.2 of the KCC. Put shortly, Mr Twigger submitted that, if the Court were to find (as I have done) that the matters on which he relied for the purposes of his contention that there was actual awareness for the purposes of the first limb of Article 180.1, then, those matters (characterised by Mr Twigger as *"triggers"*) ought to be viewed as enough to have caused a reasonable person in Mr Werner's shoes to have carried out investigations, or commissioned investigations, which would have resulted in him (and the Claimants) acquiring sufficient awareness of sufficient facts to mean that the limitation clock started running before 1 August 2010.

501. Mr Twigger identified what he described as *"three principal routes"* through which (either independently or in combination), he contended that the Claimants should have become aware of the violations of their rights. First, he submitted that, even without following the express recommendation in the PwC report to instruct an expert to carry out a *"technical expertise"*, Mr Werner should himself have pursued at an earlier stage the investigations he subsequently undertook in the period from March to May 2012 when he and Mr Khabbaz had decided that a claim should be instigated and were taking steps to enable this to happen, including preparation of the Lawsuit Narrative, which Mr Twigger submitted demonstrates a sufficient awareness of the violation of the Claimants' rights to start the limitation period running. Secondly, Mr Twigger submitted that Mr Werner or SP Angel should have pursued the recommendation in the PwC Russia report to engage to carry out a *"technical expertise"* and that, if they had done so, the result would have been equivalent to (or better than) the result achieved by Mr Gafurov in 2013. Thirdly, Mr Twigger submitted that Mr Werner or SP Angel should have provided the PwC Russia report to BDO when they were performing their audit and that, if this had been done, then, the result would again have been that what Mr Gafurov was to find out almost three years later would have been ascertained before 1 August 2010. As I shall explain in what follows, I am not persuaded by any of these propositions.

502. Starting with the Lawsuit Narrative, Mr Twigger's central submission was that, once the decision was taken to commence proceedings in New York, they were able to move very quickly to a position of drafting the complaint which came to be issued. Mr Twigger in this context highlighted the relevant timing whereby, Mr Werner having provided Mr Khabbaz with a copy of the PwC Russia report on 2 March 2012, Ballon Stoll came to be instructed just seventeen days later, on 19 March 2012, under a retainer which described their work as being as regards the filing of *"Derivative Claims ... by Phoenicia Capital LLC Against Former Insiders of Kazakhstan Kagazy PLC ... on Behalf of Kazakhstan Kagazy PLC"* in relation to *"the Insiders' wrongful misappropriation of [KK Plcs's] funds and/or breaches of their fiduciary duties towards [KK Plc]"*. This was followed, it will be recalled, very shortly afterwards by the Claimants entering

into a litigation contract under which they agreed to cover the legal costs associated with the New York lawsuit. Mr Twigger also highlighted how Mr Khabbaz plainly considered the PwC Russia report in some detail, as demonstrated by the fact he reverted to Mr Werner with various questions, so promoting Mr Werner to carry out research into the use of the Alliance Bank loans with the assistance of Ms Yelgeldieva who prepared an Excel spreadsheet showing how the money had been used to fund Arka-Stroy.

503. Accordingly, Mr Twigger submitted, things were able to move speedily and effectively, so showing that there is no reason why there could not have been similar steps taken after the PwC Russia report was first received. Specifically, having been asked by Ballon Stoll to produce a detailed narrative, Mr Werner was then able by 8 May 2012, just under two months after the decision was taken to sue, in conjunction with Mr Khabbaz, to produce the Lawsuit Narrative. As Mr Twigger correctly pointed out and as has been explained already, that document was largely based on the PwC Russia report. Although there is no issue about that, again as has been previously explained, there is very much an issue as to whether Mr Twigger was right when he went on to submit that the Lawsuit Narrative contained, as he put it, *"all the essential elements of the PEAK and Astana 2 violations that are alleged in these proceedings"*. Indeed, I have already decided that that was not the case, specifically (and significantly) that what it was able to say about Arka-Stroy was very limited indeed with nothing about, again adopting Mr Howe's description, Arka-Stroy's role, in effect, as *"a Trojan horse"*. This conclusion is as fatal to Mr Twigger's submissions on the second limb of Article 180.1 of the KCC (*"should have become aware"*) as it is to the actual awareness issue. It is not, in my view, sufficient for Mr Twigger merely to refer to the fact that the PwC Russia report described Arka-Stroy as a related party by virtue of Mr Esimbekov's involvement and to the fact that the Lawsuit Narrative itself referred to a number of connections between the KK Group, the *"former shareholders"* and Arka-Stroy. It is one thing to know (let alone suspect) fraudulent conduct in a generalised sense, but quite another to know enough actually to put forward a fraud case. Mr Twigger submitted that details of the onwards payments from Arka-Stroy are not essential elements of the PEAK Claim, and so that the destination of the payments from the Claimants to Arka-Stroy was not something which needed to be known before the Claimants could plead the claims for breach of duty. Whether that is strictly right or wrong is not really the point, however, in circumstances where it was through knowing where the monies went (in other words to the 'Connected Entities') that there had, indeed, been fraud and what that fraud entailed. In that way, suspicion could make way for something rather more concrete. It is that something more concrete which is required for present purposes. Nor, in my view, does it assist Mr Twigger to point to the facts that the PwC Russia report identified a mismatch between the amounts paid for construction work and the contracts for that work, or to the Excel spreadsheet which he produced with Ms Yelgeldieva in March 2012 based on work carried out by the KK Group's financial department in relation to Acts of Acceptance, or to the fact that in the Lawsuit Narrative reference is made to Acts of Acceptance signed by Mr Tulegenov and Mr Yesimbekov adding up to EUR 37 million alongside a claim valuation of as much as EUR 200 million. This is because, whilst it may well be that it was suspected that the

Acts of Acceptance were not what they appeared to be, again suspicion alone is not enough. Mr Werner explained the position in this exchange with Mr Twigger:

"Q. You believed at the time, i.e. when the lawsuit narrative was written, that the acceptance acts were false, didn't you?

A. I had not looked at the acts of acceptance. I had received an Excel spreadsheet. So I didn't know what these acts of acceptance contained. And again, this was only possible when I was told by Mr Gafurov that these acts of acceptance were forged. I had never analysed the acts of acceptance. I had an Excel spreadsheet that is telling me a number of acts of acceptance, but it could have been an Excel spreadsheet about anything. And the clue was not the detailed analysis of the acts of acceptance. The clue was understanding that some of these acts of acceptance were forged.

Q. … It refers to the acts of acceptance being signed by Mr Tulegenov and so on and it refers expressly to the impairments, and then it says that the claim is the whole amount. The claim being the whole amount is only consistent, isn't it, with the acceptance acts being invalid?

A. Does it say that the acts of acceptance are false or invented? Does it say that these acts of acceptance are for earthworks and things that it is impossible on hindsight to establish what has happened? No, it does not.

Q. It says: 'The claim is the whole amount sent to Arka-Stroy'. Just listen to the question.

A. Yes.

Q. That could not be right if the acceptance acts were valid, could it?

A. No. This is not what John [Khabbaz] is saying here. John – and again, I have to interpret for John. This is not what John is saying. John has the state of knowledge that – exactly the state of knowledge that I had at the time, which was that we thought that money had been misappropriated through this company [Arka-Stroy] because this company has some links to the former shareholders. And it was the inference. But we didn't know what we are pleading now."

Although Mr Werner was somewhat argumentative here in some of his answers, I consider that what he was saying made sense. There was a suspicion, but not more than that. Indeed, if there was more than a suspicion, it is hard to see why the Lawsuit Narrative would not have spelt out the fact that the Acts of Acceptance were fake in express terms. That this was not done is, in my view, telling.

504. It follows that I cannot accept Mr Twigger's submission that the Lawsuit Narrative demonstrates, without more, that the Claimants could have been in the position which they were in when the Lawsuit Narrative was produced much earlier, specifically in 2010, to enable proceedings to be brought before 1

August 2010 in much the same way as the New York proceedings were able to be launched in September 2012. The Lawsuit Narrative does not, for the reasons which I have given, demonstrate a level of knowledge (as opposed to suspicion) which is sufficient. Furthermore, given that the New York proceedings were the subject of a Motion to Dismiss and then came to be withdrawn, it is difficult to see how the fact that those proceedings were commenced (in, after all, a jurisdiction where allegations of fraud are more easily levelled than in some other jurisdictions) really assist Mr Arip's and Ms Dikhanbayeva's case in this respect.

505. Secondly, as to the *"technical expertise"*, it will be recalled that one of the four recommendations which was made in the PwC Russia report was this:

"Construction in Progress: We recommend performing a technical expertise to verify and confirm that the level of construction work claimed to have been performed was actually carried out and that the costs of the work performed correspond with the outcome … ."

This followed a footnoted reference on the previous page of the report which recommended *"that management engage a professional engineering company to assess the value of the investments made"*.

506. Mr Twigger submitted that a reasonable director in Mr Werner's position would (and should) have followed this recommendation and that it was unreasonable and inexcusable for him not to have done so, in circumstances where the report had made reference to there being *"questionable transactions"* amounting to at least US$ 170 million, had described much of the monies incurred on construction work as having been paid to a related party, Arka-Stroy, and had observed that there was a lack of detailed supporting documentation. Mr Twigger suggested that, had the recommendation been followed, this would have very quickly led to the discovery of the material elements of the PEAK and Astana 2 Claims in the same way as happened after Mr Gafurov had been asked to carry out the investigation which he undertook in December 2012/January 2013.

507. As to the first of these matters, Mr Twigger submitted that none of the reasons which Mr Werner gave when being cross-examined can excuse the decision made by Mr Werner not to commission a *"technical expertise"*. Mr Twigger drew attention to Mr Werner's reference to the audit process undertaken by BDO having *"taken a lot of initiative starting with the valuation of all the assets"*. Mr Twigger suggested that Mr Werner *"appeared"* to suggest that the audit made it reasonable not to carry out further investigations. The passage in Mr Werner's cross-examination cited by Mr Twigger involved Mr Werner being asked not about the recommendation which was contained in the PwC Russia report, but about the Representation Letter which was provided to BDO some months later, specifically why in that letter no reference was made to fraud on the part of Mr Zhunus and Mr Arip being suspected. It is not, therefore, strictly accurate to suggest that Mr Werner's evidence at the time that he received the PwC Russia report was that the audit process in and of itself made it reasonable not to arrange for a *"technical expertise"* to be performed. Mr

Werner's contemporaneous thinking at the time that he received the PwC Russia report was explained in the following exchanges between him and Mr Twigger:

"Q. ... Did you understand that it was your duty to take reasonable steps to detect fraud?

A. Absolutely, it was my absolute responsibility to detect fraud and to present transparent and truthful accounts.

Q. So why didn't you follow the recommendation in the PwC report and obtain a technical expertise to verify the construction work had been carried out?

A. Because I didn't know that that was something that was relevant at that time, and as a result of this audit - of this audit process, we conducted independent valuations of precisely the assets that you are saying that these construction valuers were going to value. So again, I had a clear understanding that these assets had been valued a month or a month and a half before this valuation had been done by companies that were accredited according to international standards, with all the -- with all the necessary requirements, and as a result of these valuations, there were $250 million of impairments.

Q. Are you saying that you thought about following the recommendation in the PwC report but for the reasons you have just given you didn't think you needed to follow that recommendation, or are you saying that you just didn't think about it at all?

A. Again, I just want to be very clear. I didn't think, at the time at which I was given the recommendation by PwC, that this was a necessary exercise. And on top I just received a confirmation later, through the audit process, that these assets had been valued. So it is not that I thought that it was not necessary because the audit was done. I didn't think it necessary at the time and I just had a confirmation that this process had been done in the course of the audit report."

508. As I understand it, Mr Werner was referring here to a letter dated 15 January 2009 (but obviously meaning 2010) received from a firm of valuers called Apprais-Consult, which described a market value appraisal of the tangible assets of the KK Group as at 31 December 2009. What Mr Werner, therefore, was saying was that he decided not to follow the recommendation on reading the PwC Russia report because he regarded it as unnecessary to do so. He then confirmed that, at least as far as he was concerned, something similar had been done by Apprais-Consult. However, this was not as such a reason why he had already decided not to commission a *"technical expertise"*. That was for a reason he had given when first asked, the previous day, about the recommendation in the following exchanges:

"Q. Why didn't you think it was necessary?

A. Because I didn't think that there was anything to be specifically concerned at, at that time.

Q. Well, you have paid or your company has paid a lot of money for a report from a top auditing firm and they carry out their report, their exercise, and they tell you that you ought to perform a technical expertise, as they put it; get an expert involved to verify that the level of the construction work was actually carried out. Why did you think there was nothing to be troubled by? Surely you would want to follow their recommendation?

A. I was not troubled. I think I have - no, I have explained my state of mind at that time and my belief. The first thing is that it is something which I have learned as a result of my work in the company and of this fraud, what a technical expertise means. I supposed at that time that everything was in order. Not in order in the sense that everything was in order. Definitely I knew that these projects had interrupted, that these projects had fallen in value tremendously, that the company was in huge financial difficulties. But it didn't dawn on me that I had to go, and go and do a technical expertise at that point in time. I didn't have the knowledge of construction and what had to be done and what would be the result of this exercise.

Q. But I think your evidence was earlier that the purpose of asking PwC to do this report, or at least one of the main purposes, was so that you would be able to explain things to creditors when they asked what had happened to all this money?

A. Correct.

Q. So you wouldn't be able to explain that, would you, unless you followed through with the recommendations that PwC gave you?

A. No, I don't think so. I think we had -- at that time, we had what we thought was a coherent picture in order to explain things to the creditors and to the market, like we did following this report. I didn't think there was any need to conduct a technical expertise of construction work in order to give an explanation to creditors."

Later, the following day, when being cross-examined about his reaction to BDO's audit report produced some months later, Mr Werner expanded on the predicament which he and the KK Group found themselves at the time, as follows:

"Again, I don't think that I have to insist, but the context of this company is that the company was close to bankruptcy. It had an enormous amount of legal proceedings, it was enormous difficulties in financing with creditors. I think that one has to be reasonable and a director and personnel have to make reasonable enquiries and reasonable -- they have to make reasonable use of their time. Because otherwise if they misspend the time on things that we didn't consider relevant at that time, the company would have gone bankrupt and then I would have had to assume the responsibility of not pointing to the things that mattered at that time to the company, which were not necessarily just a comment about one contract."

509. Mr Twigger described this as merely an excuse, observing that, if lack of resources was genuinely a difficulty, then, this would have given even more reason for Mr Werner personally to carry out the kind of investigations which he eventually undertook in 2012 leading to the Lawsuit Narrative and, furthermore, that, in view of the sheer scale of the *"questionable transactions"* described in the PwC Russia report, it was incumbent on Mr Werner to ensure that action was taken. In my view, however, Mr Howe was right when he suggested that such criticism really amounts to no more than second-guessing a commercial decision made by Mr Werner that a *"technical expertise"* was not necessary in order to give an explanation to creditors. This seems to me to be a reasonable decision given the parlous financial state that the KK Group was in at the time. I acknowledge, however, that the position would be different if I had reached a different conclusion concerning how the PwC Russia report would have been received by the Claimants since, if it had described fraudulent behaviour on the scale suggested by Mr Twigger, then, a lack of funds in and of itself would be less likely to justify a decision to follow the recommendation. This conclusion makes it unnecessary to go on and consider what would have happened if Mr Werner had instructed an expert, whether that be Stroyexpert, the firm recommended by Ms Novikova of PwC Russia in her email to Mr Werner on 11 December 2009, or Mr Gafurov or any other expert for that matter.

510. Thirdly, as to the suggestion that the Claimants should have become aware of the violation of their rights by providing the PwC Russia report to BDO, it was Mr Twigger's submission that the relevant trigger in relation to this was the duty which Mr Werner was under to provide the report to the auditors. It will be recalled that I have previously expressed certain reservations concerning the audit-related expert evidence which was given by Mr Crooks and Mr Grummitt. Having considered that evidence and for reasons which I shall set out below, my conclusion on this issue is that, whilst the PwC Russia report ought to have been provided to BDO for the purposes of their audit, nonetheless the issues identified in the report ought to have become apparent to BDO as a result of their audit, in any event.

511. As to the trigger issue, I agree with Mr Twigger that it is perfectly obvious that the PwC Russia report ought to have been provided to an auditor in BDO's position. Indeed, as I have pointed out, ultimately once he focused on the fact Mr Twigger was asking him to assume for the purposes of the questions which he was being asked that BDO had neither seen the PwC Russia report nor been made aware of its contents and that the report contained material information, Mr Crooks conceded that this is the position. In truth, since, again as I have pointed out, it is tolerably clear that BDO were not provided with the report, the only real question is whether it contained information which was material and, as such, should have been provided to BDO.

512. Specifically, and essentially adopting the reasons which Mr Twigger put forward in his written closing submissions, KK Plc's directors confirmed in the 2009 annual report that they were *"not aware of any relevant audit information of which the auditors are unaware"*. This is terminology which finds an echo in section 418(3) of the Companies Act 2006 where "relevant audit information"

is defined as being *"information needed by the company's auditor in connection with preparing his report"*. Although this Act has no direct application in the present case since KK Plc is an Isle of Man company, Mr Crooks and Mr Grummitt were agreed that the definition is helpful when considering KK Plc's obligations. I agree with Mr Twigger the word *"needed"* cannot sensibly be taken to mean that a document does not have to be provided to the auditors if it contains information of which they might already be aware but is instead directed at the type of information which an auditor needs. Viewed in this way, it is clear that the PwC Russia report contained *"relevant audit information"* given that it identified material *"questionable transactions"*, which were in areas that BDO had informed KK Plc's directors in their audit plan were *"key issues and risk areas"* for the BDO audit.

513. I agree with Mr Twigger, in particular, that it does not matter whether, for example, as Mr Crooks suggested, BDO were already aware of the use of related parties and the existence of a weak control environment, since there is an important distinction between knowing that there is a *risk* of related party transactions and *knowing* about actual related party transactions. As for Arka-Stroy, for instance, although Mr Crooks was unwilling to accept that knowing that Mr Esimbekov was involved as a senior manager on both sides of the KK Group and Arka-Stroy would have been material information *"needed"* by BDO in connection with preparing their audit report, he ultimately accepted that, had he been carrying out the audit, he would have taken this information and investigated it to see what the consequences were since he agreed that *"to make a full assessment you need all the required information"*. Similarly, as regards CBC and Bolzhal, Mr Crooks accepted that what PwC Russia had had to say about those companies being related parties (even if he was inclined to quibble over whether PwC Russia had applied the correct technical definition) was *"relevant audit information"* which BDO would have needed in order to investigate the relationship.

514. This conclusion, namely that there was a duty to disclose the PwC Russia report to BDO, makes it inevitable that I should also conclude that a reasonable director would have disclosed the report and brings me to the next question which needs to be considered. This is whether, had the report been provided to BDO, this would have resulted in the material allegations which are made in these proceedings being identified by BDO when performing their audit. It was Mr Twigger's submission that they would have been, given that the PwC Russia report highlighted US$ 170 million of *"questionable transactions"* and a *"significant lack of detailed qualitative supporting information for the actual work done"* and given also that it concluded that Arka-Stroy was a related party, on the basis of facts which were unknown to BDO, specifically that Arka-Stroy was managed by Mr Esimbekov. Mr Twigger submitted that these matters would have caused BDO to have increased the scrutiny of their audit, in accordance with ISA 330, by taking various additional steps such as investigating whether Arka-Stroy was a related party and looking into whether the construction work carried out by Arka-Stroy was worth what was paid for it, carrying out the type of *"technical expertise"* recommended in the PwC Russia report itself.

515. Mr Twigger went on to criticise the suggestion that there is a large degree of consistency between the work which BDO actually carried out when they did their audit and the work which they might have carried out if they had received the PwC Russia Report. He described there as being *"a gulf of difference between being astute to various risks and being expressly informed by a third party major accounting firm that there are questionable transactions and that recommended steps should be performed"*, before going on to explain in some detail why this is the case.

516. The fundamental difficulty with this, however, is that it is contradicted by what Mr Grummitt, Mr Arip's and Ms Dikhanbayeva's own audit expert, had to say on the matter since it will be recalled that, in a report prepared in October 2013 in support of the Defendants' application to have the freezing injunction obtained by the Claimants overturned, Mr Grummitt stated that, in his opinion, *"the areas of KK Plc's activities covered by the PwC Report should have been addressed as part of BDO's routine audit procedures because not only are they material to KK Plc's FY2009 financial statements, they are financial transactions which in my experience fall to be audited in the ordinary course"* and so that *"the issues identified by PwC should, if genuine, also have become apparent to BDO"*. Importantly, despite this not being something which he included in his reports prepared for trial, Mr Grummitt confirmed in answer to Mr Howe that what he had previously stated was *"still my view"*. In other words, Mr Grummitt's view is (and always has been) that it should not have made any difference whether BDO were given the PwC Report or not because BDO should have discovered the frauds anyway in the course of their audit. In short, BDO should have more than covered the same ground as the PwC Report in the course of their audit, and so it should not have made any difference whether they received that report or not. Accordingly, the so-called third route cannot assist the Defendants either.

517. It follows that I cannot agree with Mr Twigger's submission that, had the Claimants gone down any of the three routes which he identified, they would have acquired sufficient awareness for Article 180.1 purposes by 1 August 2010, so meaning that the *"should have become aware"* limb of that provision comes into play. As a result, I consider that the PEAK and Astana 2 Claims ought not to be regarded as being time-barred.

The Land Plots Claim: whether the Claimants "became aware" by 27 August 2012

518. This brings me to the issue of awareness as regards the Land Plots Claim, which I can deal with quite shortly. The Claimants' case is that they did not become aware of the facts material to the Land Plots Claim until November 2014, and that they could not reasonably have become aware of them before then (so as to mean that this is not a case where they should be regarded as falling within the *"should have become aware"* limb of Article 180.1).

519. As to actual awareness, Mr Werner explained in his third witness statement that he only discovered the claim as a result of investigations carried out in the course of these proceedings, in part in response to evidence served on 13 November 2014 on behalf of Mr Zhunus by Mr Jonathan Tickner from Peters & Peters in which it was stated that there was nothing at all suspicious about

certain payments which were made to Bolzhal and CBC because the payments had been made in return for plots of land. This witness statement was served in response to a report from Grant Thornton dated 6 November 2014 which was exhibited to a witness statement from Mr Crestohl dated 11 November 2014. Grant Thornton had been instructed to trace the flow of funds raised through KK Plc's IPO in July 2007 *"to entities controlled by the Defendants and thereafter to Exillon"* and had discovered in the course of doing that exercise that there were seven clear instances when funds raised on the IPO had been paid, directly or indirectly, to KK JSC and then very shortly afterwards paid out by KK JSC to Holding Invest, Bolzhal or CBC, hence Mr Tickner's denial that those monies had been misappropriated and, importantly, his suggestion that this was substantiated by the PwC Russia report.

520. Mr Werner stated that he realised that the land purchases were suspicious when, having noted what Mr Tickner had had to say, he met with Mr Crestohl and Mr McGregor, and they looked at a map of the Aksenger site, comparing this to the PwC Russia report and Mr Tickner's statement. Specifically, Mr Werner explained that he and Mr McGregor (together with Mr Crestohl) realised that the location of these 14 land plots on a cadastral map was highly suspicious because it showed them to be outside the area of the Aksenger site, that the land was, from a commercial perspective, of no use at all, and that the prices paid for this land seemed to be exceedingly high, particularly considering the financial crisis which was in full effect in Kazakhstan at the time the land was acquired.

521. It was, in the circumstances, Mr Werner's evidence that he *"had not previously considered or realised the relevance and significance of these particular land plot purchases to a fraud claim involving the misappropriation of KK Group funds or IPO monies …"* and that *"there was no reason to investigate these transactions before"* November 2014. It was Mr Twigger's submission, however, that this cannot be right. He pointed in this connection to the draft version of Mr Werner's first affidavit which had been put together no later than 21 May 2013, in particular to a passage in which this was stated:

"It has been established by our internal investigations that KK JSC entered into a number of land transactions with parties who were connected with the defendants. In total, during the period in which we have investigated from [2007] to [2009], KK JSC spent 63.9 million in acquiring plots of land from these parties."

Mr Twigger observed that the reference to US$ 63.9 million had quite clearly been taken from the PwC Russia report and, furthermore, that that report had identified all of the fourteen land plots transactions which are the subject of the Land Plots Claim. Mr Twigger also drew attention to the fact that Mr Werner agreed in cross-examination that this showed that he had realised that the land plots transactions were connected with the Defendants.

522. Significantly, Mr Twigger went on to point out, the draft then contained this:

"I consider it very likely that KK JSC has suffered significant losses as a result of these transactions. I am equally convinced that the Defendants have personally benefited through their network of connected parties."

Mr Twigger submitted that, regardless of why it might have been that these passages did not appear in the sworn version of Mr Werner's first affidavit, it follows that what Mr Werner had to say in his third witness statement about not having *"previously considered or realised the relevance and significance of these particular land plot purchases to a fraud claim"* simply cannot have been accurate since it is plain that Mr Werner had considered the land plots transactions at an earlier stage. Indeed, as Mr Twigger also pointed out, Ms Yelgeldieva had included a land plots worksheet in her Excel spreadsheet sent to Mr Werner in December 2012.

523. Mr Twigger is right about this. It is no answer for Mr Howe to make the point, as he did during the course of his reply submissions, that the draft showed that not much was known about the Land Plots Claim because it is replete with square brackets. Nor is it an answer for Mr Howe to say that, despite Zaiwalla having been instructed, little progress had been made in uncovering the fraud. These matters show that the Claimants had, indeed, *"previously considered"* the matter, even if they had not *"realised the relevance and significance of these particular land plot purchases to a fraud claim"*. Again, therefore, it seems to me that the contents of a witness statement made by Mr Werner has not been altogether satisfactory.

524. This is a conclusion which is only reinforced once it is appreciated that in the report which he prepared at the end of January 2013 Mr Gafurov had prepared a *"summary of purchased plots"*, which listed all of the land that had been purchased by the KK Group, and a further *"compilation of land contracts"*, which set out more information on the number, size and purchase price of the land plots. Mr Gafurov also noted a suspicious disparity in prices between the various purchases of land plots by the KK Group, noting in particular that one of the land plots bought from Bolzhal was purchased for KZT 31,523,684 whereas a similar sized plot in a nearby location was bought for KZT 217,418. He observed that the management did not act in a coherent way when buying land and allowed the company to become subject to land price speculation. Mr Gafurov formed the view, as he explained when being cross-examined and as I am clear that he would have explained to Mr Werner and Ms Gorobtsova at the time, that his investigations had shown that it was clearly not the case that the KK Group was buying the land plots in the best interests of the company and that he concluded that the KK Group was overpaying for the land without any care for the fair price, indeed that it looked *"more like money was siphoned out, rather than just buying land"*. In those circumstances, it is difficult to see how Mr Werner can have been right to say when giving evidence that before November 2014 nobody, including Mr Gafurov, *"had ever come up with the idea that there was a fraud"* in relation to the land plots transactions.

525. This, however, only takes Mr Arip and Ms Dikhanbayeva so far since demonstrating that Mr Werner (and the Claimants) had earlier awareness, even assuming that it amounted to more than mere suspicion and so awareness which is material for Article 180.1 purposes, in 2013 does not in and of itself establish that it had the requisite awareness prior to 27 August 2012. Specifically, reliance on Mr Gafurov's report in January 2013 (and so approaching six months after 27 August 2012) takes matters nowhere. Recognising this, Mr Twigger

concentrated his submissions as far as actual awareness is concerned on matters which pre-dated 27 August 2012.

526. Specifically, Mr Twigger referred to the Lawsuit Narrative and the board minutes relating to the meeting which took place on 20 August 2012, suggesting that, although there was no express reference to land plots, the US$ 170 million of *"questionable transactions"* (the phrase, of course, used in the PwC Russia report) referred to in the Lawsuit Narrative should be regarded as including them. He also relied on the PwC Russia report's references to the fourteen land plots as having been purchased for US$ 45.171 million in cash from two related parties, Bolzhal and CBC, and to Ms Dikhanbayeva, who was KK JSC's financial director since 2001 and Chairman of the Board in 2008, was listed as the director of Bolzhal and CBC, together with the fact that the same report observed that, although the price paid for the land plots in 2008 seemed to be in line with average rates, in *"2009 the average price per hectare is 399 thousand"* which *"is higher than the price per hectare paid by the group in 2008 (USD 262 thousand), before the economic downturn had begun"*. Unsurprisingly, perhaps, for the reasons which I have previously set out at some length when addressing the issue of awareness as regards the PEAK and Astana 2 Claims, I am not persuaded by these submissions. The more so, in the case of the Land Plots Claim given that the PwC Russia report is, if anything, even less explicit in relation to that claim than it is in relation to the other two claims. The reference to *"questionable transactions"* is very generalised and the suggestion, therefore, that it should be regarded as including the land plots is more than a little ambitious. The references to CBC and Bolzhal do not really point in any very clear way to fraud in the case of land plots, and the last matter is again not exactly unequivocal.

527. Mr Twigger also pointed out that, in relation to the Land Plots purchased from Bolzhal in 2009, BDO's Management Letter dated 28 May 2010 implied that no services had been provided by Bolzhal when it stated as follows:

> *"Addendums on changes in transaction amounts were concluded on 07.04.2009. According to the letter from the General Director of Bolzhal LTD the reason of increase in the land value is provision of services on changing the intended use of the land plots. Those terms were not contractually agreed."*

This, in my view, however, even when taken in conjunction with other matters relied upon by Mr Twigger, provides only very weak support for Mr Arip's and Ms Dikhanbayeva's actual awareness case. So, too, in my view, does the fact that the KK Group's land plots as a whole (including the fourteen land plots) had needed to be impaired in the accounts of KK plc by US$ 135.2 million. I accept Mr Werner's evidence that he believed that the impairment of land values in the 2009 accounts was attributable to the financial crisis. In particular, I note that the audited accounts of the KK Group for the 2009 financial year stated that the revaluation of and subsequent decrease in the book value of the land assets "*reflects the current weakness in the real estate market in Kazakhstan in general and in Almaty in particular*".

528. Mr Twigger next relied upon the fact that Mr Khabbaz appears to have held the view that the *"former shareholders"* had bought land worth nothing and

presented it as worth hundreds of millions of dollars. Specifically, it will be recalled that in January 2012, he noted that "*SPA failed to identify previous owners' actions (buying land worth nothing and presenting it as worth hundreds of millions of dollars) as the main reason for the company's troubles*". Mr Werner, indeed, accepted that Mr Khabbaz had formed a view at an early stage that land had been purchased at an overvalue and that he had told Mr Khabbaz that land had been purchased at a time of irrational exuberance. This does not necessarily mean, however, that Mr Khabbaz believed that the land plots had been purchased for the purpose of misappropriating monies from the KK Group. Indeed, if that was what Mr Khabbaz really believed, then, it is curious that apparently he did not himself press Mr Werner to take the steps which Mr Twigger suggested at trial ought to have been taken. It seems more likely, in fact, that what Mr Khabbaz had in mind in the document which he prepared was that Mr Zhunus and Mr Arip had improperly misrepresented the value of company property in order to artificially inflate the share price since that is what the complaint filed in New York in September 2012 appears to have had as its focus.

529. Lastly, Mr Twigger relied upon the fact that, a few days after 27 August 2012, on 31 August 2012 to be precise, Mr Werner sent an email to Ms Kogutyuk, in which he asked various questions including this:

"4. Which company from the Kagazy group and during what period bought up the lands in the Southern land plot and the Northern land plot (in what manner).

Northern land plot – 622.77 ha was acquired during the period from 2006 till 2009.

Southern land plot – 64,7 ha was acquired during the period from 2005 till 2009.

The lands were purchased and registered under the name of the company"

At best, this email demonstrates that Mr Werner harboured suspicions over the land plot transactions. It does no more than that, however. I cannot accept, in the circumstances, that it justifies a conclusion that he believed that there was a *prima facie* case in relation to those transactions at that stage.

530. Accordingly, I find that the Claimants did not have the requisite actual awareness for the purposes of Article 180.1 of the KCC.

The Land Plots Claim: whether the Claimants "should have become aware" by 27 August 2012

531. Turning to the second limb of Article 180.1, as Mr Twigger observed in closing, the only issue is as to whether the Claimants *"should have become aware"* of the violation of their rights in respect of the Land Plots claim before 27 August 2012, since it is not in dispute that, were the Court to find that investigations should have been carried out, then, it would have been possible to have arrived at the same conclusions as Mr McGregor and his team were able to reach in just two weeks, between 11 and 26 November 2014, by the end of which a draft

amended pleading and a lengthy witness statement setting out full details of the Land Plots Claim had been produced.

532. Mr Twigger made a number of submissions in this regard. First, he made what he described as two *"cross-fertilization"* points. The first of these involved Mr Twigger pointing out that the present proceedings were commenced on 2 August 2013 when the PEAK and Astana 2 Claims were advanced, whereas the Land Plots Claim's first mention was not until 26 November 2014, some 15 months or so later. Mr Twigger submitted that, in these circumstances, were the Court to accept that the Claimants were, or should have been, aware of the violations of their rights in relation to the PEAK and Astana 2 Claims by 1 August 2010, then, it is likely that proceedings in respect of those two claims would have been commenced in relatively short order and, had that happened, then, the Claimants would have become aware of the Land Plots Claim sooner than they actually did because, based on what has actually happened in relation to these proceedings, the Claimants would have acquired such awareness within about 15 months after the PEAK and Astana 2 Claims had been commenced. Accordingly, Mr Twigger submitted, the Land Plots Claim ought now to be regarded as time-barred.

533. This is an ingenious argument which I cannot accept. It is an argument which has a certain logic to it but it also seems to me to have an air of artificiality to it. In any event, in view of the conclusion which I have reached concerning awareness in relation to the PEAK and Astana 2 Claims, this aspect of cross-fertilisation cannot avail Mr Arip and Ms Dikhanbayeva. Nor does the second cross-fertilisation point raised by Mr Twigger do so. This entailed an argument that Mr Gafurov's report was either sufficient, when combined with the information in the PwC Russia Report that Bolzhal and CBC were related parties, to give the Claimants a *prima facie* case in relation to the Land Plots Claim, or it was certainly enough to prompt a reasonable person to investigate at that stage and the Claimants should, therefore, have had a *prima facie* case two weeks later. This argument, however, depends on the Court having concluded that the Claimants should have followed PwC Russia's recommendation to engage an expert in late 2009 or early 2010, so as to mean that the Claimants should have become aware of the Land Plots Claim well before 2012. In view of the conclusion which I have reached on that issue, this point also, therefore, falls away.

534. It is necessary, therefore, to consider Mr Twigger's reliance on the matters which he submitted ought to have triggered the kind of investigation carried out by Mr McGregor in November 2014. The first of these was, again, receipt of the PwC Russia report in December 2009. Mr Twigger observed that the matters relied on in relation to actual awareness above are equally clear reasons why a reasonable person would have carried out an investigation. Accordingly, he submitted, that, for example, even if Mr Werner did not himself notice the reference to the prices paid in 2009 being higher than those paid in 2008 before the downturn began, a reasonable director would have noticed it, especially given that the report identified those transactions as *"questionable"*. For reasons which I have explained, however, this point similarly goes nowhere. Similarly, again for reasons which I have previously given, Mr Twigger's

suggestion that a reasonable person would have provided the PwC Russia report to BDO (something which I accept) and that this report would have revealed to BDO that the sellers of the plots were (potentially) related parties and that would have been bound to raise suspicions about the transactions, also does not assist Mr Arip's and Ms Dikhanbayeva's contention. The same applies to the next point, namely Mr Twigger's related reliance on the reference to an increase in the price of land plots said to have arisen as consideration for services which had not been provided and for which no contract existed as described in the Addendum dated 7 April 2009.

535. Fourthly, Mr Twigger highlighted Mr Werner's evidence that in early 2011, in the context of the dispute with DBK, it *"was starting to be obvious, yes, that it was not only the financial crisis but that"* the former shareholders *"probably had mismanaged the company"*. He pointed out also that Mr Werner had also accepted that DBK had alleged fraud, stating that *"this was the first time that somebody was accusing the former shareholder of misuse of funds, and definitely this was something that I registered and that was a little bit of a shock"*. If that is right, then, Mr Twigger submitted that the realisation that he admits to having in 2011 that the company's problems could not just be put down to the financial crisis but could be related to fraud on the part of Mr Zhunus and Mr Arip, would have prompted a reasonable director to investigate the land plots transactions. This, however, taken alone, is not a substantial point since there would, in my view, need to be something rather more concrete on which to base any investigation commenced in consequence.

536. Fifthly, Mr Twigger relied on what Mr Khabbaz had to say in January 2012 concerning the land plot transactions. Once again, however, I do not see how this assists for the reasons which I have previously explained. Indeed, although Mr Werner acknowledged that this was part of what prompted the investigations he began to take in March 2012, it would only constitute a trigger for present purposes if there were evidence that Mr Khabbaz raised with Mr Werner his belief that there was fraud of the type described in the Land Plots Claim. There is, however, no such evidence. On the contrary, as I have explained, the conduct which Mr Khabbaz had in mind appears to be that Mr Zhunus and Mr Arip had improperly misrepresented the value of company property in order to artificially inflate the share price.

537. Lastly, Mr Twigger suggested that, having decided to bring legal proceedings against Mr Zhunus and Mr Arip, a reasonable director would have carried out a thorough investigation to ensure that a full understanding of the scale and nature of Mr Zhunus' and Mr Arip's fraudulent activities. Although, in a general sense, this submission makes sense, the difficulty is that the Claimants needed to know what they were looking for, and this depends on the Claimants having sufficient awareness of matters from other triggers. Having decided as I have done in relation to the other suggested triggers identified by Mr Twigger, it follows that this is an end to this further point, and so that this is not a case in which the Claimants *"should have known"* for the purposes of Article 180.1.

538. This conclusion makes it unnecessary to consider what would have happened if Mr Werner had done what Mr Twigger suggested he should have done. In truth, as I have explained, there is no issue about this. As a matter of completeness,

however, since in his written closing submissions Mr Twigger focused in this respect on what would have happened if Mr Werner had shown the PwC Russia report to BDO as part of the audit which they were performing, I am not persuaded that BDO would have acted any differently had they been provided with the report and noted what it had to say concerning land plots transactions. Although what Mr Grummitt had to say in his October 2013 report was necessarily focusing on the PEAK and Astana 2 Claims since the Land Plots Claim had yet to be introduced into the proceedings, what he had to say was framed in broad terms, namely that *"the issues identified by PwC should, if genuine, also have become apparent to BDO"* and he confirmed in cross-examination that this was *"still my view"*. It follows, therefore, that this applies to the Land Plots Claim as well as the PEAK and Astana 2 Claims. Even if this is wrong, however, the conclusion which I have stated in the previous paragraph makes the point, in any event, academic.

Overall conclusion on limitation

539. My conclusion, therefore, is that the Claimants ought not to be regarded either as having actual awareness or as falling within the ambit of the *"should have become aware"* limb of Article 180.1 of the KCC at the relevant dates, namely 1 August 2010 (as far as the PEAK and Astana 2 Claims are concerned) and 27 August 2012 (as regards the Land Plots Claim). It follows that none of these claims is time-barred under Kazakh law.

Restoration under Kazakh law

540. In the light of this conclusion, it is strictly unnecessary to go on to consider whether it is possible under Kazakh law to 'restore' the limitation period under the KCC. Specifically, Article 185.1 (*"Extension Of Limitation Period"*) provides (in translation) as follows:

"In exceptional cases where the court recognises the reason for missing the limitation period as valid because of the circumstances which are associated with the personality of the claimant (serious illness, helpless condition, illiteracy, etc.), the violated right of the citizen shall be subject to protection. The reasons for missing the limitation period may be recognised as valid where they took place during the last six months of the limitation period, and where the limitation period is equal to or less than six months, during the limitation period."

541. There was a dispute between Mr Vataev and Professor Suleimenov as to whether Article 185.1 applies only to natural persons (as Professor Suleimenov considered) or whether it extended also to cover what were described by the experts as *"legal entities"* by which was meant companies such as the Claimants (as, in Mr Vataev's view, is the case). On this issue, I much prefer the opinion expressed by Professor Suleimenov. This is for a really rather straightforward reason: the wording used in Article 185.1 seems to me to be wholly inapposite in the case of a company. It is to be noted in this context that the provision refers to *"the personality of the claimant"*. Although I acknowledge that a legal entity can sometimes, formally at least, be viewed as having a personality, the more usual circumstances in which a reference to

personality is made is where natural persons are involved. Secondly, it needs to be borne in mind that the reference to *"the personality of the claimant"* is not in glorious isolation. On the contrary, it is immediately followed by a description of *"circumstances which are associated with the personality of the claimant"* which clearly relate to (and only relate to) natural persons. A natural person can suffer from a *"serious illness"* or be in a *"helpless condition"* or suffer from *"illiteracy"*. A company cannot suffer or be any of these things. The fact that the list in brackets is not exhaustive, as Mr Vataev was at pains to point out, hardly assists since clearly the *"etc."* is intended to bring into play *"circumstances"* of a similar type and so related to natural persons as opposed to companies. Indeed, Mr Vataev agreed with Mr Twigger in cross-examination that the original Russian, which has been translated as *"etc."*, means something like *"and similar"*. Mr Vataev's contention was that this would permit *"circumstances"* such as (as he memorably put it) a *"coma"* involving a company being *"essentially helpless and incapacitated"*. I simply cannot accept Mr Vataev's position on this. It was inventive but also unrealistic. If there were any doubt about the matter, that doubt is removed by the words which follow, namely *"the violated right of the citizen shall be subject to protection"*. The reference to *"the citizen"* seems to me to underline the fact that Article 185.1 has nothing whatever to do with companies. A company is, most certainly, not, on any view at all, a *"citizen"*.

542. I have previously set out an exchange which I had with Mr Vataev in the context of the evidence which he gave concerning Article 185.1. I asked him, whether what he was saying represented a *"possible argument"* or his *"actual ... considered opinion"*. His answer was that it was his *"opinion that a company may rely on this article and request the restoration of the statute of limitation period"* but that *"Whether it will be successful or not, I would… Refrain from giving the probability here"*. I am quite clear that what Mr Vataev was doing when giving his opinion in relation to Article 185.1 involved his identifying an argument rather than describing his actual and considered opinion as to whether the provision extends to cover legal entities in addition to natural persons. True it is that Mr Vataev was able to point to certain decisions in Kazakh courts where a limitation period has been 'restored' under Article 185.1 in cases where the claimant is a legal entity. In my view, these were of very doubtful assistance. Mr Vataev relied, in particular, on a Supreme Court decision (no. 3a-232-05 dated 5 January 2006), in which two corporate entities, requested restoration of the limitation period under Article 185. The Supreme Court refused this request on the basis that the Claimants "*did not provide the court with evidence that the deadline for the limitation period had been missed for good reason, and therefore the court had no grounds, as provided by Article 185 of the Civil Code, to restore it*". Mr Vataev's point was that the Supreme Court did not reject the Claimants' request on the basis that Article 185.1 does not apply to legal entities but on the grounds that they did not have a legitimate excuse. So, Mr Vataev suggested, had the claimants in that case had a legitimate excuse, there would have been 'restoration' notwithstanding the fact that they were not natural persons. I do not accept this. I suspect that the applicability of Article 185.1 to legal entities was simply not raised by anybody in circumstances where the focus was on the legitimacy of the excuse advanced. Since Mr Twigger described this as the best case in support of Mr Vataev's position, it will be

appreciated that I need not take up time considering other decisions which were explored during the course of the evidence.

543. This is all the more the case in view of the fact that, although Professor Sulemeinov very properly recognised that there have been lower court decisions where Article 185.1 has been applied in relation to legal entities (as he put it, *"I do not deny that such decisions may be taken sometimes and they do occur"*), he was able to refer to decisions at various levels within Kazakhstan (including at the Supreme Court) which consistently confirmed that Article 185.1 has no application to legal entities. For example, in decision no. 3a-162-02 dated 16 May 2002, the Supreme Court dismissed a bankruptcy receiver's request to restore the limitation period under Article 185.1 on the grounds that the claimant bankruptcy receiver (an individual) filed the claim on behalf of a corporate debtor and so Article 185 "*did not apply to such legal entity*". Another decision that Article 185.1 does not apply to legal entities is decision no. 3a-101-06 dated 4 April 2006, in which the Supreme Court rejected the claimant companies' argument that the limitation period should be extended under Article 185 on the basis that "*... the limitation period can only be extended at the request filed by a natural person because the court may only exercise its discretion to extend the limitation period in a situation where the claimant's personality is affected (ie where the claimant is affected by a serious illness or is in helpless condition or is illiterate…) and where the claimant is a natural person but not a legal entity*". This decision is entirely contrary to the stance adopted by Mr Vataev, who in fairness was ultimately constrained to accept the weight of the Supreme Court authorities is very much in favour of Article 185.1 not applying to legal entities and that this is also the prevailing view amongst scholars and practitioners.

544. I should mention in this context that Mr Vataev also referred to something described as Normative Resolution No. 9 dated 19 December 2003. Apparently the Kazakh Supreme Court can issue 'Normative Resolutions' on a legal issue which, unlike Supreme Court decisions, then become a binding source of law. The Normative Resolution relied upon by Mr Vataev applies to labour disputes, and so does not have specific application to the issues in this case. The relevant part states:

"*The limitation period shall be applied by the Court only at the request of one of the parties to the dispute.*
A statement on the expiration of the limitation period may be made by a party before the court withdraws to the conference room.
If it is established by the court that the limitation period has been missed by the claimant for a legitimate excuse, it shall be stated in the resolutory part of the decision and the dispute shall be resolved on the merits.
If during the examination of the case the court has found that the plaintiff's employment rights have been breached, but the limitation period has been missed without a legitimate excuse, as provided for in the Labour Law, then the violation of the rights is specified by the court in the reasoning section of the decision and the court denies the claim on the basis of missing the limitation period."

Mr Vataev highlighted the references to *"a party"* and *"one of the parties"*, arguing that in a labour dispute at least one of the parties may be a corporate entity. He was probably right about this. I do not see how it helps him, however, since the claimant in labour disputes is, in most cases, likely to be the employee (and therefore, an individual), rather than the employer (typically a company), although I accept that it may be possible for an employer to assert employment rights in a broad sense. Mr Twigger also submitted that all this resolution should be interpreted to mean is that the court must include its reasons as regards 'restoration' of the limitation period in its decision, rather than anything specific about the application of Article 185 to legal entities. I agree with this submission. I do not consider that Normative Resolution No. 9 provides any insight as to the applicability of Article 185 to corporate entities.

545. Lastly on this topic, there is ***JSC BTA Bank v Mukhtar Ablyazov & Others*** [2013] EWHC 510 (Comm) to consider since, somewhat unusually, the Claimants have served notice pursuant to CPR 33.7 (and section 4 of the Civil Evidence Act 1972) of an intention to rely on a finding made by Teare J in that case at [241] that, under Kazakh law, the discretion to extend the limitation period pursuant to Article 185 extends to companies. Specifically, having heard expert evidence from two Kazakh law experts one of whom was Mr Vataev, Teare J stated as follows:

"In case, contrary to my view, the Bank was aware or ought to have been aware that its rights had been violated more than a year before the Granton action was commenced, I should consider the final point raised by the Bank. It is common ground that in Kazakh law the court has a discretion to extend the limitation where there is a 'valid reason' for doing so. This is not stated in any code but has been stated by the Supreme Court. Mr. Norbury submitted that this did not apply to employers who were companies rather than natural persons. He based this submission on Article 185 of the Civil Code which gives a similar discretion but which Professor Maggs said did not apply to companies. I preferred Mr. Vataev's opinion that Article 185 also applied to companies. A purposive construction leads to the conclusion that a company can rely upon the discretion just as a natural person can. In any event there was no evidence that the Supreme Court restricted its ruling to employers who were natural persons."

As indicated in the opening words of this passage, Teare J was here dealing with an issue which did not, strictly speaking, need to be determined. This is because in the previous paragraph Teare J had reached the conclusion that the claimant bank in that case was neither aware, nor should it have been aware, that its rights were violated more than a year before the relevant action was commenced. It is, in fact, worth setting out what Teare J had to say on that issue at [240] because, although clearly highly fact-specific, a number of the considerations which he regarded as relevant to the 'awareness' issue were clearly regarded by him as reasons why time should be extended:

"Notwithstanding the absence of direct evidence from the Bank I cannot turn a blind eye to the realities of the situation of the Bank between February and June 2009 and to the inherent probabilities. Upon nationalisation the new management of the Bank had a considerable task. The AFN had requested the

nationalisation because the old management had not made the substantial provisions of US$3.58 billion demanded by the AFN against its loan portfolio. The Bank's auditors reported in May 2009 that the Bank's liabilities exceeded its assets by US$6.2 billion. In these circumstances it is, it seems to me, more likely than not the Bank's new management concentrated on the survival of the Bank in the early months of 2009 rather than upon possible claims against Mr. Ablyazov and Mr. Zharimbetov (who had fled to England) arising out of the operation of the loan portfolio. Although KPMG had investigated the loan portfolio prior to the arrival of PWC it seems likely, as stated by Mr. Kenyon, that such efforts were directed towards the restructuring of the Bank. The number of loan projects was about 300 which had generated some 3,700 loans. Any attempt to discover what claims there were against the former management would have been, and no doubt was, a very considerable and detailed exercise. I consider it more likely than not that by mid-June 2009 the Bank was not aware of the violation its rights in respect of the Later Loans and could not reasonably have been expected to be. The fact that the AFN had found many loans to be potential problem accounts including the Later Loans is evidence that losses may be sustained on them, not that losses had been sustained or that the Bank's rights had been violated. It was hardly unreasonable for the new management to concentrate on the survival of the Bank rather than on investigating potential claims between February and June 2009. Nor does knowledge that the police were bringing charges against Mr. Zharimbetov in March 2009 establish an awareness on the part of the Bank that its rights had been violated in respect of the Later Loans. That would require a very detailed knowledge of the police investigations. Whilst it is probable that there was some contact between the new management and the police it is also probable that the new management concentrated on the Bank's survival and left the police to carry out their own investigations."

Drawing on these various matters when explaining why he considered it appropriate that time be extended, Teare J stated as follows at [242]:

"I consider that there is a valid reason to extend the limitation period (which would otherwise expire on an unidentified date between February and 17 June 2010) until 17 June 2010 when the Granton action was commenced. That valid reason was that it was reasonable to delay the commencement of proceedings against Mr. Zharimbetov until (a) PWC had had an opportunity to carry out a systematic investigation of the loan portfolio with a view to identifying claims against the former management (b) the management had had an opportunity to consider the results of PWC's investigations and (c) legal advice had been obtained with regard to such claims. Such delay was reasonable having regard to the magnitude of the sums involved and the complexity of the investigation required to establish the frauds alleged by the Bank."

546. As will become apparent when I come on shortly to address whether it would be appropriate to disapply the limitation periods in the present case pursuant to the Foreign Limitation Periods Act 1984, Mr Howe's submissions on that question are not dissimilar to the matters identified by Teare J as justifying an extension of time in the ***BTA Bank*** case. What matters, for present purposes, however, is that it is quite clear that what Teare J had to say concerning Article

185's applicability to companies was *obiter*. First, Teare J was dealing with the operation of a one-year limitation period applicable under Article 172 of the Labour Code (see [219]), and even then only in circumstances where he had actually decided that that one-year limitation period was inapplicable given that breaches of Articles 62 and 63 of the JSC Law were alleged (see [230] and [231]). Secondly, as made clear by Teare J in [241] itself the discretion exercisable under Kazakh law to extend the limitation period where there is a *"valid reason"* is *"not stated in any code but has been stated by the Supreme Court"*. Accordingly, Article 185 had no application and was only raised before Teare J by way of analogy. Thirdly, no doubt for this very reason, Teare J did not need to analyse Article 185's wording or consider any of the Kazakh decisions concerning the applicability of the provision to legal entities (as opposed to natural persons). In the circumstances, I struggle to see how it can be the case that Teare J made any relevant determination for the purposes of section 4 of the 1972 Act. I agree with Mr Twigger also that, even if Teare J should be taken as having made a determination, since the effect of section 4(2)(b) is only that the Kazakh law *"shall be taken to be in accordance with that finding or decision unless the contrary is proved"*, it is open to me to reach a contrary conclusion based on the evidence which is before me, both in the form of the expert evidence and the various Kazakh law decisions which I have had the benefit of looking at. In short, I am not bound by Teare J's decision in the ***BTA Bank*** case and, accordingly, see no reason to change the conclusion which I have, for the reasons explained, reached in relation to the applicability of Article 185.

The Foreign Limitation Periods Act 1984

547. It is necessary, next, to consider the Foreign Limitation Periods Act 1984, specifically whether it would be appropriate in the present case to disapply the three-year limitation period contained in Article 180.1 of the KCC. In considering this matter, I do so on two hypothetical bases, each of which is contrary to the conclusions which I have arrived at concerning the 'awareness' issues: first, that the Claimants (whether through Mr Werner or SP Angel) had actual 'awareness' and, secondly, that they *"should have become aware"* for the purposes of Article 180.1.

548. Section 1(1) of the 1984 Act provides:

"Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter –

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings …; and

(b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply."

Section 2 goes on to provide (in part) as follows:

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

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

549. Mr Howe's submission was that it would be appropriate in the present case to decide that the three-year limitation period contained in the KCC should not apply. He submitted that that limitation period conflicts with public policy for essentially two reasons. First, as he put it during the course of his oral closing submissions, *"if Kazakhstan limitation law is framed in the way that the defendants would have it, so that it can start to run and apply and bar a claim before a claimant is in a position reasonably to have brought the claim"*, then, this is contrary to public policy. He highlighted in this context, in particular, that it was Mr Arip's and Ms Dikhanbayeva's case (and Professor Sulemeinov's evidence) that time would run for Kazakhstan for limitation purposes without a claimant knowing the identity of the wrongdoer. Secondly, Mr Howe submitted that the application of the three-year limitation period under the KCC would cause undue hardship (and so conflict with public policy) within the meaning of section 2(2).

550. Mr Twigger submitted that there should be no disapplication of the Kazakh law three-year limitation period since there is no conflict with public policy in this case. He observed that the application of the Kazakh law on limitation serves the same policy concerns in this case as limitation periods do in any other country (including in England and Wales). He highlighted, quite correctly, that limitation periods serve a useful function in managing the difficulties faced by a defendant when answering stale claims. He went on to submit that the Claimants' burden of proving a conflict with public policy is a heavy one. He relied in this context on ***KXL v Nicholas Murphy*** [2016] EWHC 3102 (QB), a decision in which Wilkie J considered whether Ugandan law on limitation, which applied a three-year limitation period upon reaching the age of 18 on the claimants' allegations of sexual abuse and assaults by a religious brother stationed in Uganda, would conflict with public policy and/or cause undue hardship to the claimants. Wilkie J answered that question in the negative. Mr Twigger drew particular attention to the fact that, as he explained at [53], Wilkie J approached the matter on the basis that the conflict with public policy must be *"a conflict with fundamental principles of justice readily and clearly identifiable"*. He highlighted also that, in setting out the applicable principles at [45], Wilkie J drew particular attention to the following:

"i) It would be wrong to treat a foreign limitation period as contrary to English public policy simply because it is less generous than the comparable English provision in force at the time (Durham v T&N plc 1996 Court of Appeal unreported).

ii) *Public policy should be invoked for the purposes of disapplying the foreign limitation period only in exceptional circumstances. Too ready a resort to public policy would frustrate our system of private international law which exists to fulfil foreign rights not destroy them.*

iii) *Foreign law should only be disapplied where it is contrary to a fundamental principle of justice.*

iv) *The fundamental principle of justice with which it is said foreign law conflicts must be clearly identifiable. The process of identification must not depend upon a Judge's individual notion of expediency or fairness but upon the possibility of recognising, with clarity, a principle derived from our own law of limitation or some other clearly recognised principle of public policy. English courts should not invoke public policy save in cases where foreign law is manifestly incompatible with public policy. (City of Gotha v Sothebys, Transcript October 8 1998 p89)."*

Mr Twigger also relied upon what Wilkie J went on to say concerning undue hardship at [54], specifically in sub-paragraph (ix) as follows:

"The question can be framed in the following manner. Does the application of the foreign limitation period deprive the claimant of his claim in circumstances where he did not have a reasonable opportunity to pursue it timeously if acting with reasonable diligence and with knowledge of its potential application, where the claimant is deemed to have knowledge of the application of the relevant foreign limitation period (Naraji v Shelbourne 2011 EWHC 3298(QB) at paragraph 177, and, Bank of St. Petersburg v Arkhangelsky 2013 EWHC 3674 CH at paras 15 and 17)."

551. Mr Twigger's submission was that, applying these principles and since this is not an exceptional case, there is no justification in the present case for the Claimants' suggestion that the Kazakh law three-year limitation period should be disapplied under sub-sections 2(1) and (2) of the 1984 Act.

552. Before coming on to deal with this submission and Mr Howe's responses to it, I should first refer to certain other authorities. The first is ***City of Gotha v Sotheby's and Cobert Financa SA***, 9 September 1998 (unrep.). This case involved a painting by Joachim Wtewael which, at the end of the Second World War, disappeared from the collection in the gallery of the Ducal Family of Saxe-Coburg-Gotha in the City of Gotha, only to reappear when offered for sale by Sotheby's in 1992. The claimants sought the return of the painting. Moses J had to decide, first, who had title to the painting and, secondly, whether the claim was time-barred under German law. As to the latter, he concluded that the relevant German limitation period (30 years) had not expired by the time that the proceedings were commenced. He went on, however, to consider whether, had he concluded that the claim was time-barred under German law, it would have been appropriate to disapply the limitation period pursuant to section 2 of the 1984 Act. He drew attention to the fact that the argument advanced by the claimants in support of the contention that the limitation period should be disapplied included the point that under German law *"no account is taken of the plaintiffs' state of knowledge"*. It was also relied upon in argument that the

defendants in that case had (as Moses J concluded) deliberately concealed facts relevant to the right of action (including details of Cobert Finance SA's identity). Moses J explained that, in his view, it is not *"possible to identify with sufficient clarity a public policy which deprives the defendant of the benefit of time which is already running his favour before he is guilty of deliberate concealment"* and so *"it is not possible to disapply a foreign law of limitation merely because that foreign law does not recognise the same consequences of concealment as those which the House of Lords has recognised to be the consequences of section 32(1)(b)"* of the Limitation Act 1980. He then referred to section 4 of the 1980 Act and the fact that the effect of this provision would have been, had English law applied, that the plaintiffs would not have been met with a time bar argument in circumstances where the painting had been stolen (as was the case in that case). He then said this:

"It does seem to me possible to identify, from that legislation, a public policy in England that time is not to run either in favour of the thief nor in favour of any transferee who is not a purchaser in good faith. The law favours the true owner of property which has been stolen, however long the period which has elapsed since the original theft. If German limitation law is not disapplied the result will be to favour a purchaser with no title to the painting who does not even contend that it or its predecessors purchased the painting in good faith. To permit a party which admits it has not acted in good faith to retain the advantage of lapse of time during which the plaintiffs had no knowledge of the whereabouts of the painting and no possibility of recovering it is, in my judgement, contrary to the public policy which finds statutory expression in Section 4. To allow Cobert to succeed, when, on its own admission it knew or suspected that the painting might be stolen or that there was something wrong with the transaction or acted in a manner in which an honest man would not, does touch the conscience of the court. Moreover, to recognise such a public policy does not in any way undermine the purposes of a law of limitation; there is no reason why a defendant in the position of Cobert should be protected from this claim nor does the recognition of such a public policy discourage claimants from instituting proceedings without unreasonable delay. ... It does not seem to me that the question whether a foreign law should be disapplied on grounds of English public policy can depend upon the nature of the plaintiff seeking to disapply that law. I should, however, make it clear that if the victim of the theft had itself delayed once it had discovered the facts relevant to its cause of action that might well be a ground for not disapplying the foreign law."

Moses J then went on to deal with undue hardship specifically, saying this:

"The plaintiffs rely also upon Section 2(2) of the 1984 Act contending that they would be caused undue hardship if German limitation law was applied. In Jones v Trollope Colls Cementation Overseas Ltd (Times Law Reports 26 January 1990), Farquharson LJ said that:

'the word undue added something more than just hardship. It meant excessive or greater hardship than the circumstances warranted.'

In AMF v Hashim ... Evans J emphasised that the provision was intended to have a narrow application (page 952). Moreover he said:

'It cannot be said that the three-year period for claims of this sort (under Gulf law) is so short that the plaintiffs suffer undue hardship merely by reason of the fact that it is imposed. There must be some additional factors which make the hardship excessive in this case.'

That additional factor might have arisen if the plaintiffs had been defeated because of transitional provisions which were not easy to apply (see page 593 and Saville LJ in the Court of Appeal at page 600). In the instant case the additional circumstance upon which reliance is placed over and above the mere impact of a limitation period of thirty years, is that the plaintiffs were the victims of theft and between that theft and 1991, they had no means of discovering the facts which would have enabled them to identify the possessor of the painting and its whereabouts. But it is difficult to see how that additional fact would justify invoking Section 2(2) in circumstances where Section 2(1) did not apply. Either the public policy which I have already identified exists or it does not. If it does not, then all the plaintiffs are, in essence, complaining about is the length of the German limitation period. That by itself is not enough, and in those circumstances had I not been prepared to display German law under Section 2(1), I would not have done so under Section 2(2)."

553. In further support of his submission that, at least as the Defendants (and Professor Suleimenov) portray it, the Kazakh law on limitation is in conflict with public policy, Mr Howe also drew my attention to ***Durham v T & N PLC and others***, 1 May 1996 (unrep.), in which Sir Thomas Bingham MR (as he then was) commented that if *"the law of Quebec provided, as English law once did, that a limitation period ran from the date of sustaining personal injury irrespective of whether a claimant did, or even could, know of his injury at that time, it would be strongly arguable that such a rule would cause a plaintiff undue hardship and so conflict with English public policy"*.

554. As I say, I shall in a moment come on to deal with this point, after first addressing what Mr Howe had to say concerning the ***KXL*** case. Mr Howe drew particular attention to the fact that Wilkie J in that case does not appear to have had cited to him the Court of Appeal decision in one of the cases to which he referred in setting out the principle relied on by Mr Twigger at [54(ix)], namely ***Bank of St Petersburg v Arkhangelsky*** [2014] EWCA Civ 593, [2014] 1 WLR 4360, since the case citation given by Wilkie J in that sub-paragraph is a reference not to the decision of the Court of Appeal but to the decision of Hildyard J at first instance. Mr Howe submitted, in effect, that, had Wilkie J been referred to the Court of Appeal decision, his description of the principle identified in sub-paragraph (ix) would have been different, in that Wilkie J would have included reference to it being necessary, when assessing whether there has been undue hardship, if a claimant is himself at fault in failing to commence proceedings within time, to consider whether the consequences are out of proportion to the claimant's fault.

555. The ***Bank of St Petersburg*** case was a case in which Hildyard J had extended the relevant three-year limitation period for a variety of reasons, as summarised by Longmore LJ at [10] and (because, in fact, Hildyard J was obliged to give a second judgment after two further authorities had been cited to him) at [17] where Longmore LJ identified the *"essential factors"* as being:

"(i) the Arkhangelskys' impecuniosity and disorientation resulting in their being out-gunned and out-lawyered; (ii) their reasonable expectation that Baker & McKenzie would be instructed to accept service of the Commercial Court proceedings; (iii) the 'hardball' attitude of the Bank and Mr Savelyev in refusing so to instruct them; (iv) the inherent likelihood of difficulty, delay and expense in attempting to serve in Russia proceedings which called into question the integrity of the Russian courts; (v) the limited time available between the agreement for English jurisdiction in December 2011 and the expiry of the limitation period in March 2012; and (vi) the disproportionality and unfairness which would occur if the Arkhangelskys were denied the opportunity of bringing claims of which the Bank had long been aware after agreeing that their claims could be substantially litigated in England."

Longmore LJ then went on at [18] to record the submission which was made by the appellant challenging Hildyard J's decision to dissaply:

"Mr Marshall's main submission was that the judge had not appreciated that, for the purposes of section 2(1) of the 1984 Act, it had to be the application of the Russian limitation provision that had given rise to the undue hardship. He submitted that the real cause of any hardship in this case was that it had taken two years for the Arkhangelskys to begin any proceedings and that the proceedings in the BVI were misconceived; the short time between the agreement for English jurisdiction and the expiry of the Russian time limit only occurred because of the Arkhangelskys' delays at a time when they did have sufficient money to institute and pursue proceedings as they had in Cyprus; in any event they did institute English proceedings within time so the application of the Russian time limit could not be said to have caused any hardship at all."

He continued at [19]:

"For this purpose he cited the two authorities which had not been cited to the judge before his first judgment, Harley v Smith [2010] EWCA Civ 78 reported at [2009] 1 Lloyd's Rep 359 at first instance but curiously not reported in those reports in the Court of Appeal and Naraji v Shelbourne [2010] EWHC 3298 (Comm) in which Popplewell J at paragraph 176 considered the question to be whether the time period prescribed by the limitation provision is such that its application would deprive the claimant of his claim in circumstances where he did not have a reasonable opportunity to pursue it if acting with reasonable diligence and with knowledge of its potential application. I agree with this description of the question."

This, it is worth noting, is essentially the point, based as it is on Popplewell J's decision in the ***Naraji*** case to which Wilkie J also referred at [54(ix)] in the ***KXL*** case, that Wilkie J made when identifying the principle which he did in that sub-paragraph. What follows in the judgment of Longmore LJ was not, however, included. This is hardly surprising, of course, if (as it would appear) the Court of Appeal decision was not before Wilkie J.

556. Longmore LJ went on at [20] to say this:

"The only other authority which needs citation is the decision of this court in Jones v Trollope Colls Cementation Overseas Ltd The Times 26th January 1990, [1990] WL 754869 which applied the well-known (at least to those with arbitration practices) decision of Liberian Shipping Corporation v A. King and Sons Ltd [1967] 2 QB 86 in which Lord Denning MR addressed the question of undue hardship (at page 98G): 'undue' … simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault."

He continued at [21]:

"Guided by these authorities, I find I am in agreement with the judge. Applying the Russian time limit in this case to prevent any counterclaim by OMG Ports causes both the Arkhangelskys and OMG Ports undue hardship because, even though they may have been to some extent at fault e.g. in not applying sooner than they did for an order dispensing with the service of their Commercial Court claim or in not finding enough money to translate the proceedings into Russian and serving them pursuant to the Hague Convention on Service of Proceedings on the Bank in Russia, the consequences of being unable to pursue their counterclaim (which the Bank and Mr Savelyev had already agreed could be pursued in England) are out of proportion to that fault."

Nor, no doubt again because he was not shown what the Court of Appeal had to say, did Wilkie in the ***KXL*** case make any reference to what Longmore LJ stated by way of conclusion at [23] to [25]:

"It can also be said that the Arkhangelskys should have begun proceedings before 2011, granted that they knew their rights had been violated in March 2009 but that is something of a counsel of perfection if one's business world is disintegrating and it is necessary to emigrate and find a roof over one's head. To begin proceedings towards the end of the limitation period may be risky and to that extent blameworthy but the judge was entitled to think that the consequence of losing one's claim was out of proportion to that fault.

Mr Marshall also launched an attack on the idea that impecuniosity had any relevance to the question of undue hardship, unless the lack of funds was actually caused by the Bank. That cannot be right; the court has to look at all the circumstances in order to decide whether the application of the foreign limitation period will cause undue hardship and impecuniosity must be highly relevant to that question. In any event the judge held (para 19(b) of his second judgment) that the Arkhangelskys' impecuniosity did indeed arise from the bringing of the Russian proceedings and their exile from Russia. I have already dealt with the question whether the judge was entitled to find impecuniosity at all.

I conclude therefore that the judge directed himself properly as to the law on the question of undue hardship under section 2(2) of the 1984 Act and applied the law correctly to the facts. He had to adopt a multi-factorial approach with which this court should not interfere unless satisfied that he was wrong. I am not so satisfied and would dismiss the second appeal."

557. It was Mr Howe's submission, stripped to its essence, that it would be a mistake to view Wilkie J in the ***KXL*** case as having framed the relevant question at [54(ix)] entirely accurately. I agree with Mr Howe about this. Although it is understandable why Wilkie J did not go on to make the further point made by Longmore LJ based on Lord Denning MR's dictum in the ***Liberian Shipping*** case given that he was not shown the Court of Appeal judgment in the ***Bank of St Petersburg*** case (although he did have cited to him the ***Jones v Trollope*** case which applied the dictum), it is quite clear that it is appropriate to approach the question of undue hardship on the basis that (as Lord Denning MR put it) "*'undue' ... simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault.*"

558. Turning now to the reasons why the Claimants say that the three-year limitation period under the KCC should be disapplied, there are two aspects to these. The first is Mr Howe's submission that the Kazakh law on limitation is, in and of itself, in conflict with public policy. The second is his submission that the Claimants would suffer undue hardship (specifically identified in section 2(2) of the 1984 Act as an example of conflict with public policy) if the limitation period were not disapplied, in particular the point that it would be out of all proportion to any fault on the Claimants' part to deprive them of their claims.

559. The first of these submissions has three aspects. First, it is submitted by Mr Howe that if time starts to run for limitation purposes even though a potential claimant does not know the identity of the (alleged) wrongdoer, this would result in what he described as *"great injustice"* because the claimant would, in effect, be *"deprived of its claim before it even has a chance to bring it"*. This point goes nowhere, however, since, as Mr Twigger pointed out, in the present case there can be no argument that the Claimants have not had a reasonable opportunity to pursue their claim because they were not aware of the identity of the wrongdoer. In any event, as I have previously explained, I am somewhat doubtful that Professor Suleimenov was right in what he had to say concerning the need for the identity of the wrongdoer to be known. Indeed, in relation to claims under Articles 62 and 63 of the JSC law, he ultimately accepted that it is necessary to identify the particular company officer involved. Secondly, Mr Howe suggested that, if time should be taken as running from when a potential claimant has only *"a general knowledge"* that its rights have been violated, then, again, this is something which ought to be regarded as contrary to public policy. The difficulty with this is that Professor Suleimenov's evidence was not to that effect but that one needs *"reasonable grounds to believe"* and, ultimately, Mr Vataev agreed with Mr Twigger about this. It is impossible to take the view that, this being the level of knowledge or awareness required, the Kazakh law on limitation is in conflict with public policy. Thirdly, Mr Howe sought to suggest that, if it is the case that Article 185.1 of the KCC only permits 'restoration' in the case of claimants who are natural persons and does not also apply to legal entities such as companies then, this, too, is contrary to public policy since there can be no justification for depriving corporate entities of rights afforded to individuals. Again, I struggle with this as a proposition. It seems to me that this simply cannot be the conflict with public policy which Mr

Howe suggested. Indeed, as Mr Twigger pointed out, English law might be thought to have a similar provision to Article 185.1 in the shape of section 28(1) of the Limitation Act 1980 which provides as follows:

"Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired."

This is a provision which applies, and only applies, to natural persons; there is no equivalent provision dealing with companies. In the circumstances, it can hardly be said that Kazakh law on limitation is in conflict with public policy here.

560. I come on, then, to deal with Mr Howe's submissions in relation to undue hardship. His overall submission, in line with the approach to what amounts to undue hardship described by Lord Denning MR in the ***Liberian Shipping*** case, was that it would be out of all proportion to any fault on the Claimants' part to deprive them of their claim; indeed, he suggested, not to disapply the limitation period in such circumstances would in effect be assisting the Defendants to commit *"the perfect fraud"* (the description used by Jackson LJ in the Court of Appeal hearing in this case which took place in 2014: [2014] EWCA Civ 381).

561. Three particular points were made by Mr Howe in support of this overarching submission. First, Mr Howe drew attention to the fact that, if the limitation period is not disapplied, then, there are shareholders, employees and creditors of the Claimants, all of whom would be prejudiced. However, I see no merit in this point since, as Mr Twigger submitted, a company is controlled by its management and, if they fail to commence proceedings within the limitation period, any hardship that this causes to the company's shareholders and creditors is caused by that failure. It is not a reason to disapply a limitation period on the basis that there has been undue hardship to the Claimants (the companies). I had the impression that Mr Howe recognised that he was not on the strongest of grounds on this point since it is fair to say that he did not place much (if any) weight on the point.

562. I do, nonetheless, consider that there is merit in Mr Howe's two other points. The first of these was that, in circumstances where (as I have, indeed, now decided) the Claimants are victims of fraud on a significant scale, it would result in the clearest possible undue hardship were the Kazakh law time-bar not to be disapplied. I acknowledge that in some cases the fact that a claimant is aware or *"should have become aware"* for the purposes of Article 180.1 of the KCC will mean that there ought not to be disapplication of the 3-year limtation period. It cannot be an absolute bar, however, since, if that were the case, it would mean that the 1984 Act could never apply to the Kazakh law limitation period. Furthermore, it is obvious that the undue hardship test must apply even where there has been fault. Ultimately, the degree of fault is but a factor to be weighed in the balance. In the present case, I consider that any fault which might have resulted in the Claims becoming time-barred (had that been the case) was not at

such a level as to warrant a decision not to disapply. The Claims are not only far from trivial but are also very substantial. The result is that the hardship to the Claimants in being prevented from making a recovery would be very great indeed. Furthermore, even had I reached a different conclusion on the 'awareness' issues, what is clear is that the frauds were not obvious. Indeed, I consider that there is considerable force in Mr Howe's submission that the Defendants went to considerable lengths to hide their tracks, as demonstrated by, for example, Ms Dikhanbayeva's *"If the auditors are raising questions"* email on 27 August 2009 and the many instances where contracts were drawn up on Ms Dikhanbayeva's instructions seemingly with the express intention of covering up fraudulent activity. In my view, there is also considerable force in Mr Howe's further submission that there should be disapplication in circumstances where the very fraud which has brought about the claims has meant that the Claimants have had to face a critical and ongoing financial crisis entailing what Mr Howe characterised as *"a fight for their very survival"* which has meant that the Claimants had to concentrate their efforts on things other than the bringing of the claims. Although Mr Twigger suggested that there is no evidence to justify a conclusion that the KK Group has been in any such fight as a result of anything done by the Defendants, it is wholly unrealistic to dispute that this was the position. The evidence of Mr Werner, in particular, on this issue is very clear. I accept that evidence.

563. For these reasons, it follows that, had it been necessary, I would have regarded it as being appropriate to disapply the Kazakh law limitation period under the 1984 Act. I should make it clear that, in the circumstances which I have described, I would have been prepared to disapply not only had I decided that the Claims were time-barred because the Claimants *"should have become aware"* for the purposes of Article 180.1 of the KCC, but also had I decided that the Claimants had actual awareness. This is because, even on Mr Arip's and Ms Dikhanbayeva's case, the awareness which the Claimants should be treated as having had was not particularly extensive, largely being derived from the PwC Russia report, and because, as I have mentioned, the Defendants were engaged in efforts to cover their tracks. In the light of my conclusions on the limitation issue, however, there is no reason, in fact, to make an order under the 1984 Act.

Conclusion

564. I can summarise my conclusions as follows:

(1) The PEAK, Astana 2 and Land Plots Claims have each been established by the Claimants. As to what this means in financial terms, the parties will need to try and reach agreement, failing which the matter will need to come back before the Court.

(2) In terms of penalties, interest and default interest, these are payable but, again, the parties will need to try and agree the relevant calculations.

(3) The claims are not time-barred as a matter of Kazakh law.

(4) Had the claims been time-barred, it would not have been possible to have restored the limitation period under KCC Article 185, but it would have been appropriate to disapply the Kazakh law limitation period under the 1984 Act.

The Claimants are entitled to judgment against Mr Arip and Ms Dikhanbayeva accordingly.

565. There is an issue between the parties as to what is the appropriate currency to be awarded to the Claimants. Mr Twigger proposed in opening that this is a matter which is best addressed after judgment has been handed down when dealing with consequential matters. Mr Howe was content with this suggestion. Accordingly, I say nothing more about the issue at this juncture.

566. I end by expressing my gratitude to all counsel and solicitors for the admirable way in which the trial was conducted. As I have previously observed, this was hard fought litigation which involved serious allegations of dishonesty. It was litigation which at times at the interlocutory stages has entailed costly and, perhaps, not wholly necessary skirmishing. At trial, however, and in the immediate lead-up to trial, the parties and their lawyers co-operated well to ensure that there was no slippage in what was a tight timetable and despite a number of practical challenges brought about, in particular, by so many witnesses giving evidence in the Russian language (with simultaneous translation) and, in several cases, by video link from Astana, Moscow and Vancouver.