



Neutral Citation Number: [2020] EWHC 1844 (Comm)

Case No: CL-2016-000494

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2020

Before:

THE HON. MR. JUSTICE PICKEN

Between:

AVONWICK HOLDINGS LIMITED

Claimant

- and -

(1) AZITIO HOLDINGS LIMITED
(2) DARGAMO HOLDINGS LIMITED
(3) OLEG MKRTCHAN
(4) SERGIY TARUTA

Defendants

and between:

(1) DARGAMO HOLDINGS LIMITED
(2) SERGIY TARUTA

Additional
Claimants

- and -

(1) AZITIO HOLDINGS LIMITED
(2) AVONWICK HOLDINGS LIMITED
(3) OLEG MKRTCHAN

Defendants to
Additional
Claims

- and -

(1) VITALI GAIDUK
(2) ROSELINK LIMITED
(3) PRANDICLE LIMITED
and Others

Third Parties

Neil Calver QC, Edward Ho, Ben Woolgar and Alexandra Whelan (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the Gaiduk Parties.

David Foxton QC, Louise Hutton, Anton Dudnikov and Catherine Jung (instructed by **Hogan Lovells International LLP**) for the Taruta Parties.

David Wolfson QC, Sebastian Isaac, Harris Bor and Henry Hoskins (instructed by **Covington & Burling LLP**) for the Mkrtchan Parties.

Stephen Smith QC and Peter Ratcliffe (instructed by **Baker & McKenzie LLP**) for Prandicle Limited.

Hearing dates: 2, 3, 7, 8, 10, 15, 16, 17, 18, 23, 24, 25, 28, 29, 30 and 31 October, 1, 4, 5, 6, 7, 8, 11, 12, 18, 19, 20 and 21 November 2019

Draft judgment supplied to the parties: 6 July 2020

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 HONOURABLE MR JUSTICE PICKEN

THE HON. MR. JUSTICE PICKEN:

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Introduction

1. These are very substantial proceedings which have been described, not inaccurately, as being akin to divorce proceedings between three extremely wealthy Ukrainian businessmen: Mr Vitaliy Gaiduk, Mr Sergiy Taruta and Mr Oleg Mkrтчan (together, the ‘Partners’). Mr Gaiduk and Mr Taruta are also prominent in Ukrainian politics, Mr Gaiduk being a former Deputy Prime Minister of Ukraine (as well as having held various other ministerial posts) and Mr Taruta being both a former Governor of Donetsk Oblast, a region which has since March 2014 been held by pro-Russian forces, and a member of the Ukrainian Parliament representing the same region. Another party, Prandicle Ltd (‘Prandicle’: the Third Third Party), is beneficially owned by Mr Oleh Dubyna, who was for a time Minister of Industrial Policy and First Vice Prime Minister of Ukraine. As for Mr Mkrтчan, although amply represented by both solicitors and counsel at trial, he was unable himself to attend trial owing to the fact that he is currently in prison in Russia after a secret trial which culminated in his receiving a nine-year sentence of imprisonment in August 2019.
2. By way of relatively brief background, the history of this dispute begins in 1995, when Mr Gaiduk and Mr Taruta (amongst others) founded a global portfolio of assets which came to be worth billions of dollars, including a Ukrainian metallurgical business called the Industrial Union of Donbass (‘IUD’). Mr Gaiduk was then Deputy Chair of the Donetsk Regional Council/Deputy Head of the Donetsk Oblast region, in which role he was responsible for the region’s industrial and energy sectors. Mr Taruta had enjoyed a successful career in the metallurgical business and was appointed as IUD’s first General Director.
3. At first, IUD principally traded in and supplied gas and other commodities to the many steel producers in Eastern Ukraine.
4. By August 1996, Mr Gaiduk and Mr Taruta each held a 35% stake in IUD via their respective corporate vehicles, CJSC Vizavi (‘Vizavi’) and Azovintex LLC (‘Azovintex’). At that time, Mr Taruta was appointed as General Director of IUD. In that role, Mr Taruta was responsible *“not only for the operational activity of IUD but also for devising a rapid expansion plan”*.
5. In 1997 Mr Taruta appointed Mr Mkrтчan as Head of IUD’s Metallurgical Department. Mr Taruta and Mr Mkrтчan had met in the early part of that decade, when Mr Mkrтчan was working as a metal trader and Mr Taruta was working for Azovstal Metallurgical Plant. Mr Gaiduk did not previously know Mr Mkrтчan and was introduced to him by Mr Taruta.
6. In the years which followed, IUD increasingly expanded into steel production, and in 2002 it acquired a number of steel businesses from the Ukrainian state. These included OJSC Alchevsk Iron and Steel Works, OJSC Dnieper Iron and Steel Integrated Works and OJSC Alchevsk By-Product Coke Plant.
7. That same year, Mr Mkrтчan replaced Mr Taruta as IUD’s General Director, so becoming responsible for the operations of IUD which had previously been managed by Mr Taruta.

8. Mr Mkrтчan's taking over of this role enabled Mr Taruta to focus his efforts on developing IUD's external business, such as acquiring assets and dealing with financiers. Mr Mkrтчan and Mr Taruta worked alongside one another in IUD's head offices in Donetsk in these respective roles.
9. As for Mr Gaiduk, he moved on from his state-based role to Kiev where he held various political offices at a national level, including Minister for Energy and later, as previously mentioned, Deputy Prime Minister of Ukraine, until about 2004. He was not involved in the day-to-day management of IUD, and his role in IUD's management was more limited than that of Mr Mkrтчan and Mr Taruta. He was, as Mr Taruta described it, a "*passive investor*" focused on politics rather than IUD's business. In that political sphere, Mr Gaiduk worked to promote IUD's interests.
10. Mr Mkrтчan and Mr Taruta became close personal friends, describing each other as brothers and socialising with each other's families. They even lived in houses on neighbouring plots of land.
11. Mr Gaiduk also had a close relationship with both Mr Taruta and Mr Mkrтчan, although this was largely professional rather than social.
12. In terms of shareholdings, in 1998, the then shareholders of IUD, Mr Gaiduk and Mr Taruta and a Mr Akhmetov, agreed to give Mr Mkrтчan a bonus in recognition of the work which he was doing.
13. Meanwhile, by June 2003 only Mr Gaiduk and Mr Taruta were shareholders in IUD, with PJSC Vizavi ('Vizavi') and PJSC Azovintex ('Azovintex') each holding 49.99% of the shares in IUD. The remaining 0.02% was held by FDI Onyx Don ('Onyx Don'), which was jointly controlled by Mr Gaiduk and Mr Taruta.
14. It was at this point that, according to Mr Mkrтчan, the Partners reached a further understanding that he (Mr Mkrтчan) would acquire a one-third shareholding of IUD for US\$14 million (i.e. US\$7 million to each of Mr Gaiduk and Mr Taruta), although he accepts that this understanding was not made formal or binding until 2006. It was his position that, as far as he was concerned, this reflected the reality that the Partners were, by this point, equal partners in IUD, each with distinct and complementary roles within the business. This is a matter to which I shall return later.
15. Mr Mkrтчan formally acquired his shareholding in late 2006: IUD issued additional share capital and allotted it to Mr Mkrтчan's corporate vehicle, Region LLC ('Region'). The effect was that Vizavi held 33.84% of IUD, and each of Azovintex and Region held 33.08%. The reason for Mr Gaiduk's larger share was that earlier in the year it had been agreed with Mr Oleh Dubyna, who managed certain IUD-owned businesses, that he would receive a share in IUD by way of bonus. This was to be held for Mr Dubyna by Mr Gaiduk. The terms on which Mr Mkrтчan acquired his stake entail some dispute, as explained later.
16. On the same day, Mr Taruta's company Azovimpex Limited Liability Foreign Trade Company ('Azovimpex') acquired a 17% interest in Region, equal to an additional 5.62% interest in IUD. In practice, therefore, Mr Taruta held 38.70% and Mr Mkrтчan 27.46% of IUD.

17. By 2007-2008, the Partners had accumulated very considerable wealth and IUD, now one of Ukraine's largest companies, was worth several billions of US dollars, having achieved huge growth in revenue, profits and value in part through the increase in global demand for steel. This growth enabled IUD to expand by acquiring assets both in Ukraine and abroad: between about 2003 and 2006, IUD acquired steelworks and metallurgical plants in Ukraine, Poland and Hungary.
18. Mr Gaiduk and Mr Taruta (and from about 2003, Mr Mkrchtan) had also jointly invested in a number of other metallurgical and non-metallurgical assets in Ukraine and abroad. The metallurgical assets (the 'Metallurgical Assets') included Kramatorsk Kuybyshev Metallurgical Plant ('Kramatorsk'), a producer of cast iron, steel, rolled steel products and ferroalloys; Dnieper Pipe Plant ('DPP'), a producer of steel pipes; United Steel Industries ('USI'), a steel rolling mill in the UAE; a steel rolling plant in Russia ('Armavir'); and the Sandal Bar Rolling Mills, a steel rolling plant in Pakistan (the 'Pakistan Plant'). In around 2007, they also acquired a majority stake in Ukrainian Mining and Metallurgical Company ('UGMK').
19. The non-metallurgical assets (the 'Non-Metallurgical Assets') included Ayvazovskoye Spa ('Ayvazovskoye'), Yalta Intourist hotel (the 'Yalta Hotel'); OSJC Donbass Holiday Home, a resort in Crimea (the 'Donbass Holiday Home'); the Hyatt Hotel in Kiev (the 'Hyatt Hotel') held by PJSC New Engineering Technologies ('NET'); LLC United Transport Holding ('Transport Holding'), a transport and logistics company operating in Ukraine; a number of companies producing steel construction materials, collectively referred to as Ukrstalkonstruksiya ('Ukrstal'); CJSC Bakhmutsky Agrarian Union ('Agro Holding'); a construction business ('Construction Holding'); and a shipyard located in the Polish city of Gdansk (the 'Gdansk Shipyard'). The Partners also acquired various office premises in Kiev, of which 40-B and 42-B Ivana Franka Street and 14-B Yaroslavov Val Street feature in this dispute.
20. Many of the Partners' assets were held and managed by Consortium Industrial Group ('CIG'), a holding company established in 2004 which also provided advisory services to IUD. Although CIG was a joint business, many of its employees were aligned with certain of the Partners. For example, Mr Oleksii Petrov was for some time Executive Vice-President of CIG, but he also acted as a personal adviser to Mr Gaiduk and his family. Similarly, Ms Yuliya Morozova was previously employed in CIG's legal department but now works as Mr Taruta's General Counsel.
21. In 2007, Mr Gaiduk decided to sell his stake in IUD. He told Mr Mkrchtan and Mr Taruta that this was his wish. According to him, the reason was that "*ISD's business operations needed modernising*" but that "*Mr Mkrchtan and Mr Taruta did not share that view and thought that investment should be geared towards increasing ISD's operational capacity, to take advantage of booming steel prices at the time*". Mr Petrov described also Mr Gaiduk's apprehensiveness about IUD's ability to obtain coal and iron ore at competitive prices, together with an unhappiness on Mr Gaiduk's part about Mr Taruta demanding an additional 5.62% interest in IUD from Mr Mkrchtan.
22. Mr Taruta mentioned also Mr Gaiduk having ambitions and interests outside IUD, with a desire "*to free up capital and make investments outside the metallurgical industry*". According to Mr Taruta, however, Mr Gaiduk's exit was accelerated by a breakdown in his relationship with Mr Mkrchtan. There is also some indication that Mr Gaiduk had become frustrated with the informal way in which the business was run, including the

practice whereby the Partners would withdraw vast sums from IUD for private purposes before balancing these out at the end of the year.

23. Whatever the precise reasons, and I consider that they likely included each of these various factors, what is obvious is that Mr Gaiduk wanted to exit IUD with, as Mr Taruta put it, “*no on-going commitments or liabilities*” and with the sale happening “*as quickly as possible*”.
24. Mr Gaiduk wanted a price of US\$3 billion for his stake in IUD. Mr Taruta’s evidence was that this was an unrealistic price in the prevailing market, but that he and Mr Mkrтчan were forced to try and facilitate Mr Gaiduk’s exit so as to prevent him from selling his interest to a hostile third party. On 20 November 2007 Vizavi wrote formally to Azovintex and Region notifying them of an intention to dispose of its share in IUD at a price of approximately US\$3.55 billion and offering them an opportunity to purchase the stake or to waive their pre-emption rights over it. According to Mr Taruta and Mr Mkrтчan, this was an attempt by Mr Gaiduk to force them to acquire the stake at an inflated price, when in reality (and as Mr Gaiduk accepted at trial) he had identified no alternative buyer.
25. In early 2008, however, an upturn in the market meant that the US\$3 billion price was more attractive. Discussions as to the terms of sale, therefore, began in earnest. Some of the discussions were attended by Mr Petrov, Mr Vladimir Kravets and Mr Denis Pisarevsky. Mr Petrov and Mr Kravets were advising Mr Gaiduk, whilst Mr Pisarevsky was advising the other two Partners.
26. Unrelated to the sale of IUD, on 15 January 2008 the Partners concluded a memorandum of understanding regarding the terms on which US\$150 million of dividends would be distributed by Ferrous Metals Trading Group (FMTG) Ltd (‘FMTG’) (the ‘FMTG MOU’), a company jointly owned by the Partners. The FMTG MOU related back to Mr Mkrтчan’s 2006 acquisition of his one-third stake in IUD and provided for Mr Taruta and Mr Mkrтчan to pay their US\$50 million share of the dividends to Mr Gaiduk. Mr Taruta’s contribution (the ‘FMTG Payment’) was expressed as a loan to Mr Mkrтчan but the repayment terms of this loan were left blank. According to Mr Mkrтчan this is because the US\$50 million payment by Mr Taruta was not, in fact, a loan at all but, in essence, the price of his 17% stake in Region, an interest which had not been disclosed to Mr Gaiduk.
27. Mr Taruta and Mr Mkrтчan could not acquire Mr Gaiduk’s stake in IUD without additional financing, and by April 2008 they envisaged that this financing would come from a merger with the Russian steel and mining company, Evraz. Negotiations regarding the proposed merger were codenamed ‘Project Gogol’.
28. Discussions between the Partners regarding the sale of Mr Gaiduk’s stake continued. These were recorded, to some degree anyway, in a series of memoranda of understanding (‘MOUs’), the first of which was dated 16 April 2008 (‘MOU 1’). This followed a meeting that month between Mr Gaiduk, Mr Taruta and Mr Mkrтчan, who together with Mr Petrov and Mr Pisarevsky met in the offices of CIG in Kiev in April 2008. At that meeting Mr Gaiduk repeated his demands for payment of US\$3 billion for his interest in IUD, a form of security for the price and also a penalty if Mr Taruta and Mr Mkrтчan did not enter into a contract to buy Mr Gaiduk’s interest in IUD by mid-July 2008. MOU 1 records the Partners’ intention that Mr Taruta and Mr Mkrтчan

would acquire Mr Gaiduk's 33.84% stake in IUD for a price of US\$3.063 billion. It set out payment terms and provided for the agreement for the sale and purchase of the shares (the 'SPA' – a shorthand also used more generally to describe other 'sale and purchase agreements') to be signed by the parties by 15 July 2008. As security for the timely execution of the SPA, Mr Taruta and Mr Mkrtchan would transfer their shares in CIG to Mr Gaiduk. In turn, they would pledge 100% of their shares in IUD as security for timely payment under the SPA.

29. As contemplated by MOU 1, on 12 May 2008 Azovintex and Region each entered into separate sale and purchase agreements (the 'CIG SPAs') for their interests in CIG with companies owned by Mr Gaiduk, namely CJSC Vega ('Vega') and Uniglow Limited ('Uniglow'). The price under each CIG SPA was UAH 153,318,000 (about US\$6 million), payable within 150 days. The price of UAH 153,318,000 constituted so-called 'technical consideration'.
30. On or about the same day as the CIG SPAs, the Partners signed a further memorandum of understanding ('MOU 2'). This referred back to MOU 1, in which the parties had "*determined the basic aspects of buyout of the entire 33.84% stake*". MOU 2 provided that Mr Gaiduk would transfer the interests in CIG back to Mr Taruta and Mr Mkrtchan within 15 days of executing the contract for the sale of Mr Gaiduk's stake. If the contract had not been executed within five months of the execution of the CIG SPAs (i.e. by 12 October 2008), Mr Gaiduk would sell all of CIG's assets. He would be entitled to a penalty payment of US\$300 million out of the proceeds (the 'US\$300 million penalty'), with the remainder to be distributed equally between the Partners.
31. In mid-2008 Mr Gaiduk instructed Allen & Overy LLP ('Allen & Overy') to advise him in relation to the sale of his interest in IUD and to begin work on draft SPAs. However, negotiations with Evraz had taken longer than expected. The 15 July 2008 deadline stipulated by MOUs 1 and 2 passed without a sale. In September 2008 the parties, therefore, signed an "*Agreement on Making Amendments to Memoranda of Understanding No. 1 and No. 2*" ('MOU 3') which extended the deadline for the execution of the IUD sale to 31 October 2008.
32. In anticipation of the merger between IUD and Evraz, on 1 October 2008 the Partners' interests in IUD were restructured, such that their interests were instead held by Castlerose Ltd ('Castlerose') for Mr Gaiduk, Muriel Ltd ('Muriel') for Mr Mkrtchan and Kairto Ltd ('Kairto') for Mr Taruta. One consequence of this restructuring was that Mr Taruta's 17% stake in Region would be lost. Mr Taruta and Mr Mkrtchan, therefore, entered into a Settlement Agreement dated 15 September 2008 (the 'Settlement Agreement'). Under this, Mr Mkrtchan agreed, in effect, to pay Mr Taruta US\$750 million, failing which Mr Mkrtchan would transfer to Mr Taruta sufficient shares in IUD to restore the relative proportions in which their shares were held before the restructuring.
33. The Mkrtchan Parties' case is that the purpose of the Settlement Agreement was for Mr Mkrtchan to pay agreed consideration for the transfer of the 5.62% IUD stake which Mr Taruta held through the 17% Region stake, and so to achieve a final settlement between Mr Mkrtchan and Mr Taruta regarding the circumstances in which Mr Mkrtchan had formally acquired his interest in IUD in 2006, including in particular the original transfer of the 17% Region stake and therefore the 5.62% interest in IUD to Mr Taruta.

34. The Taruta Parties dispute this account of the Settlement Agreement, contending that Mr Mkrtchan owed Mr Taruta payment for the one-sixth interest in IUD that Mr Mkrtchan formally acquired from Mr Taruta in 2006 and that the Settlement Agreement related to these sums.
35. The global financial crisis struck in the autumn of 2008. This caused a collapse in steel prices (and, therefore, the value of IUD) and difficulty in obtaining bank financing. Mr Mkrtchan and Mr Taruta failed to complete the deal with Evraz, or acquire Mr Gaiduk's stake, by the 31 October 2008 deadline stipulated in MOU 3. Although the terms of MOU 3 would, if binding, have entitled Mr Gaiduk to sell CIG's assets and take the US\$300 million penalty, no steps were taken to enforce that right.
36. Following the collapse of the Evraz merger, Mr Taruta and Mr Mkrtchan went in search of a new buyer. They formed the view that the most likely buyer would be an entity backed by the Russian state, which would have the financial means and the strategic incentive to acquire a major Ukrainian asset like IUD. They, therefore, engaged the services of Mr Igor Bakai, who is said to have had extensive connections in Russian political and business circles. Mr Bakai's engagement was not documented at the time. Instead, it was recorded in agreements drawn up in January 2010 but backdated to 1 February 2009, pursuant to which Mr Bakai received US\$225 million, or 8.2% of the eventual transaction price.
37. Meanwhile, the Partners had resumed negotiations, although not as yet in relation to IUD. The negotiations instead concerned sums due to Mr Gaiduk, some of which arose out of the long-standing practice among the Partners of making very substantial withdrawals from IUD for private purposes. Ordinarily these withdrawals would be balanced out at the end of the year, but in late 2008 Mr Gaiduk learned that the other Partners' withdrawals had amounted to several hundred million dollars. Mr Gaiduk, therefore, wished to obtain a substantial payment in respect of these withdrawals, as well as compensation for the collapse of the Evraz deal. These discussions resulted in a series of MOUs produced in early 2009, which provided for Mr Taruta and Mr Mkrtchan to compensate Mr Gaiduk for the withdrawals, as well as for the failed sale of IUD.
38. Specifically, by 31 January 2009, Mr Petrov had produced the first of these draft MOUs (although it is dated 2 February 2009). This recorded a preliminary understanding between the Partners, in particular: that the US\$300 million penalty would be reduced to US\$50 million, to be paid by 15 December 2009; that Mr Mkrtchan and Mr Taruta (referred to as the "*Purchasing Shareholders*") were to pay Mr Gaiduk (the "*Selling Shareholder*") US\$70 million in monthly instalments in respect of withdrawals from IUD; that IUD was to finance the media group belonging to Mr Gaiduk in the amount of UAH8 million, paid in equal instalments before August 2009; that, if all outstanding sums (including interest) were not repaid by the end of 2009, Mr Gaiduk would sell CIG's assets and distribute the proceeds equally between the Partners, save that Mr Gaiduk would be entitled to an additional US\$50 million and the other outstanding sums; and that, in relation to the sale of CIG to Mr Gaiduk, the "*funds that are supposed to be paid by [Mr Gaiduk] under the agreement for the sale and purchase of participatory interests in [CIG] shall be considered technical and due to be refunded to [Mr Gaiduk] within 5 days from the time of such payment*".

39. Further negotiations subsequently took place regarding the exact amount of the Partners' withdrawals from IUD, with by early April 2009 the Partners proceeding on the basis that Mr Mkrтчan and Mr Taruta would pay Mr Gaiduk US\$97.5 million in respect of withdrawals. The Partners also discussed how Mr Mkrтчan and Mr Taruta would pay the amounts being discussed. In about April 2009, the Partners discussed that, instead of making all the payments in cash, Mr Mkrтчan and Mr Taruta would transfer to Mr Gaiduk their interests in the Hyatt Hotel, whose value would cover at least some of the payments. This was recorded in a further draft MOU (which was again unsigned) dated 13 April 2009, which provided: that Mr Mkrтчan and Mr Taruta were to pay Mr Gaiduk, by 15 December 2010 a penalty of US\$50 million, US\$97.5 million in respect of withdrawals from IUD and UAH8 million to provide finance for the media assets owned by Mr Gaiduk; and that these sums owed to Mr Gaiduk would be partially repaid by Mr Mkrтчan and Mr Taruta transferring their shares in NET (which owned the Hyatt Hotel) to Mr Gaiduk. The Partners also provisionally valued 100% of the Hyatt Hotel at US\$150 million. On that basis, Mr Mkrтчan's and Mr Taruta's interest in two-thirds of Hyatt Hotel was worth US\$100 million. As regards the transfer of Hyatt Hotel to Mr Gaiduk, "*monies that could technically be paid by [Mr Gaiduk] under the agreement for the sale and purchase of shares in Hyatt Hotel shall be deemed 'technical' and shall be refundable to [Mr Gaiduk] within 5 days of such a payment being made*". Mr Mkrтчan and Mr Taruta would have an option to buy-back their majority (two-thirds) interest in the Hyatt Hotel, based on a valuation of US\$150 million, leaving Mr Gaiduk with only a minority (one-third) interest. This option was valid until 1 July 2010.
40. A further amended draft MOU was, then, prepared by Mr Petrov on 2 June 2009, which extended some of the deadlines for payments by Mr Taruta and Mr Mkrтчan. This again included the same valuation of Hyatt Hotel, and the same option for Mr Taruta and Mr Mkrтчan to repurchase two-thirds of Hyatt Hotel from Mr Gaiduk, albeit with an extended deadline.
41. In the meantime, at some stage prior to February 2009 Mr Taruta and Mr Mkrтчan had commenced discussions regarding a deal involving Vnesheconombank ('VEB'), a Russian state bank which has a mandate of investing in assets of strategic benefit to the Russian Federation. Although the eventual buyers were, in fact, three special purpose vehicles (or 'SPVs'), the transaction was financed and orchestrated by VEB.
42. VEB instructed Troika Dialog ('Troika') to advise it in relation to the transaction and to negotiate the deal on its behalf. By 8 June 2009, a preliminary term sheet had been signed by VEB/Troika and Mr Mkrтчan which provided for a "*preliminary estimate of the Transaction Amount*" of US\$2.75 billion. This version contemplated a sale by all three of the Partners' corporate vehicles. On about 8 June 2009, VEB/Troika sent an updated draft term sheet. This corrected the identity of the sellers under the SPA, such that only Mr Mkrтчan and Mr Taruta's vehicles would be selling shares to VEB. The term sheet also provided, *inter alia*, that Mr Mkrтчan and Mr Taruta would provide warranties and personal guarantees in respect of the Sellers' obligations under the sale, and that 85% of the dividends would be received by the Buyers until such time as the financing was paid off.
43. The same month, June 2009, Mr Mkrтчan went to see Mr Gaiduk at 14-B Yaroslavov Val in Kiev, where the two men had adjacent offices (the 'June 2009 Meeting'). According to Mr Gaiduk, this was at some point between 2 and 16 June 2009. Mr Petrov

was also in attendance. As noted above, Mr Mkrтчan was unable to give evidence in this trial. The only first-hand evidence of this meeting, therefore, came from Mr Gaiduk and his close adviser, Mr Petrov. According to Mr Gaiduk, Mr Mkrтчan told him that “*a Russian buyer*” (‘the Russian Buyer’) had expressed an interest in buying Mr Gaiduk’s stake in IUD and that Mr Mkrтчan wished to discuss this proposal. On hearing this, Mr Gaiduk telephoned Mr Taruta, who allegedly confirmed that Mr Mkrтчan had authority to negotiate on his behalf. Mr Taruta’s account is that he stated only that he was prepared to match whatever price Mr Mkrтчan agreed to pay.

44. Following the call with Mr Taruta, Mr Mkrтчan proceeded to explain the proposal. He told Mr Gaiduk that the Russian Buyer wished to acquire Mr Gaiduk’s interest in IUD for a price of US\$750 million. Mr Gaiduk alleges that Mr Mkrтчan then told him that all three Partners would receive the same price per share from the Russian Buyer and that they were “*all in the same boat*”. This is the so-called ‘Price Representation’ which forms the basis of Avonwick’s claim (the ‘Avonwick Claim’). Mr Gaiduk’s position is that, had it not been for this representation, he would have asked what the other Partners were receiving for their stakes, and would then either have insisted on receiving a proportionate price, or would have refused to proceed with the transaction altogether. Mr Gaiduk also alleges that Mr Mkrтчan told him that the Russian Buyer required certain assets (in particular, the Yalta Hotel) as a condition of acquiring the IUD interest (the ‘First Asset Representation’).
45. Mr Petrov recorded the outcome of the June 2009 Meeting in a further MOU sent to Mr Gaiduk on 16 June 2009. This was updated a number of times, resulting in a version which was sent to Mr Gaiduk on 3 July 2009. This built upon the MOUs produced earlier in 2009, recording that the “*aggregate debt*” owed to Mr Gaiduk was US\$123.75 million, of which US\$100 million would be satisfied by the transfer to Mr Gaiduk of the Hyatt Hotel and US\$23.75 million paid in cash at the time of the IUD sale, and providing for the division of the Partners’ office premises. The July 2009 MOU also provided for an option for Mr Taruta and Mr Mkrтчan to buy Mr Gaiduk’s interest in IUD for US\$750 million, to be paid by 31 August 2009. This price was to include a number of other assets, namely Kramatorsk, DPP, Yalta Hotel, USI and Armavir.
46. Consistent with the terms of the MOU sent on 3 July 2009, on or about 2 July 2009, Mr Gaiduk, Mr Taruta and Mr Mkrтчan, through their respective corporate vehicles (Avonwick, Azitio Holdings Ltd (‘Azitio’: the First Defendant to the Additional Claims) and Dargamo Holdings Ltd (‘Dargamo’: the First Defendant)) entered into an agreement for the sale and purchase of the shares in Castlerose, by which Avonwick granted Azitio and Dargamo an option to acquire its shares at a price of US\$723.5 million by giving notice by 24 August 2009 (the ‘July Castlerose SPA’).
47. On 3 August 2009, Mr Taruta and Mr Mkrтчan wrote to Troika/VEB in a bid to get the deal done by 15 August 2009. This would have allowed them to exercise the option under the July Castlerose SPA by the 24 August 2009 deadline. However, VEB was undertaking a due diligence exercise and refused to complete the transaction before this was complete. The deadline, therefore, passed. Meanwhile, IUD was teetering on the brink of insolvency. In November or December 2009, the majority of IUD’s lenders entered into a temporary standstill agreement which postponed all repayments for an initial period of two months.

48. Mr Gaiduk alleged (at least coming into the trial) that, during this period, Mr Taruta and Mr Mkrтчan repeated the alleged Price Representation, as well as what was characterised in the proceedings as the alleged First Asset Representation. Mr Gaiduk also alleged (coming into trial) that a further representation was made to the effect that that the Russian Buyer required his interest in the Hyatt Hotel (the ‘Second Asset Representation’).
49. As discussions progressed, a number of draft MOUs were circulated in December 2009. None of these was signed, either then or subsequently. These are considered in detail later. These included drafts dated 14 December 2009, 15 December 2009 (the ‘15 December Draft’) and 18 December 2009 (the ‘18 December Draft’).
50. At about the same time, on 9 December 2009, Linklaters LLP (‘Linklaters’) produced a draft side letter (described in the subject line as the “*India SPA side letter*”), which was sent to Mr Gaiduk, Mr Mkrтчan and Mr Taruta’s representatives. This contemplated that, in addition to the obligations under the soon to be entered into Castlerose SPA, Mr Gaiduk would transfer to Mr Mkrтчan and Mr Taruta the assets listed in its schedule (albeit that this was left blank). The draft side letter was never finalised or executed.
51. Also at about the same time, and so again in about December 2009, shortly before the deal with VEB was due to be signed, Mr Taruta requested that he and Mr Mkrтчan enter into an agreement amending the Settlement Agreement and providing for payment by Mr Mkrтчan. The background to this was that from September 2008 the value of IUD had fallen dramatically, such that the September 2008 price of US\$750 million significantly overvalued a 5.62% interest in IUD. A new price of US\$281 million was, accordingly, agreed, based on a valuation at the same price per share which VEB was to pay to buy its interest in IUD (less commission). The date for payment was extended to 30 April 2010. The parties waived any claims arising under the original Settlement Agreement prior to the ‘Amended Settlement Agreement’.
52. Final negotiations regarding the detail of the agreement for the sale of Mr Gaiduk’s interest in IUD took place in early December 2009. On 15 December 2009, the directors of the Partners’ corporate vehicles, Avonwick, Azitio and Dargamo approved the transaction and granted powers of attorney to the relevant Partners to enter into it on their behalves. The final version of the Gaiduk sale was a deed signed on 18 December 2009 (the ‘Castlerose SPA’) which gave Azitio and Dargamo the right to acquire Avonwick’s shares in Castlerose for US\$950 million. Although not clear from the face of the Castlerose SPA, it is common ground that the US\$950 million price was intended to include Mr Gaiduk’s interest in a number of assets including the Hyatt Hotel, UGMK, Agro Holding and DPP. Mr Taruta’s case is that an agreement was reached, reflected in the Castlerose SPA as well as in certain other exchanges in December 2009 (the alleged ‘2009 Shareholders’ Agreement’), pursuant to which Mr Gaiduk was required to transfer to Mr Taruta and Mr Mkrтчan his interests in those assets.
53. On 30 December 2009, the share purchase agreement between Azitio, Dargamo and the Russian Buyer was entered into (the ‘VEB SPA’ and the ‘Iris transaction’). Azitio and Dargamo agreed to sell 50% plus 2 shares to Bastion LLC (25% minus 1 share); VEB-Invest LLC (25% minus 1 shares); and Selkhozpromexport LLC (4 shares). The price was US\$2.716 billion, with a further US\$27 million to be paid if the shares in Armavir were transferred. The parties also entered into a shareholders’ agreement (the ‘Russian

Buyer Shareholders' Agreement') which governed their future relationship as shareholders in IUD.

54. The physical signing of the VEB SPA and the closing and transfer of shares under the Castlerose SPA took place simultaneously at the Hilton Hotel in Cyprus. Signing of the VEB SPA and execution of the various transactional documents took place at the same time and in the same room, where all the relevant documents that required signing in relation to both transactions were laid out. This signing was attended by representatives of Mr Gaiduk, including Mr Petrov.
55. This, then, is the relevant essential background as far as the Avonwick Claim is concerned. It is necessary, however, again at this stage at only a relatively high level, to describe some further essential background which is relevant to the cross-claims.
56. First, following the acquisition of IUD, the Russian Buyer wished to acquire Gorlane Business Inc ('Gorlane'), which owned almost 50% of Zaporozhstal Steel Works ('Zaporozhstal'). The Russian Buyer insisted that Mr Taruta and Mr Mkrchtan match their investment. It was agreed that Mr Mkrchtan would fund Mr Taruta's share of the investment of US\$105,825,000 through his company, Etmor Investments Ltd ('Etmor') (the 'Etmor Payment'). This payment was made on 19 May 2010. Although it is common ground that this was intended as part-payment of a debt owed by Mr Mkrchtan, there is a dispute as to the nature of that debt. Mr Taruta's position is that the payment was repayment of the US\$100 million loan in respect of Mr Mkrchtan's acquisition of Mr Gaiduk's shares. Mr Mkrchtan's case, on the other hand, is that there was no US\$100 million debt and that the Etmor Payment constituted part-payment of the US\$281 million debt under the Amended Settlement Agreement.
57. Secondly, after the sale of Avonwick's stake in IUD, discussions between the parties continued on two fronts: first, to put in place agreements to transfer the assets identified in MOU 4; and secondly, to agree the division between the parties of the numerous other assets in which the Partners had joint interests. Mr Taruta's case is that, in the course of these discussions, the Partners agreed that: (i) Mr Gaiduk would buy Mr Taruta and Mr Mkrchtan's share of 14-B Yaroslavov Val for US\$15.83 million each; (ii) Mr Taruta and Mkrchtan would sell their shares in USK, a steel business, for US\$42 million each; and (iii) Mr Gaiduk would transfer his interest in Transport Holding in equal shares to Mr Taruta and Mr Mkrchtan, who would in return transfer to Mr Gaiduk their interests in Construction Holding. Mr Taruta refers to this series of agreements as the 2010 Further Shareholders' Agreement (the alleged '2010 Further Shareholders' Agreement'). Mr Gaiduk and Mr Mkrchtan deny the existence of any such agreement.
58. Thirdly, thereafter, in 2011 the Partners took steps to give effect to the common understanding that Mr Gaiduk would arrange to transfer his interests in UGMK, DPP, NET and Agro Holding to Mr Taruta and Mr Mkrchtan in equal shares. Thus, in April 2011 draft SPAs were drawn up which provided for Trotio Holdings Ltd (a company beneficially owned by Mr Mkrchtan) and Frankiro Holdings Ltd (a company beneficially owned by Mr Taruta) each to acquire one half of Mr Gaiduk's interest (in fact, held, by his wife Olena Gaiduk) in UGMK at a price of US\$1,012,500. It is common ground that this sum constituted technical consideration. Draft documents were sent to Mrs Gaiduk for signature on 20 April 2011. However, Mrs Gaiduk required that the SPAs provide for the payment of technical consideration before the transfer of

the shares could take place. The SPAs were amended accordingly and executed on 27 April 2011.

59. Mr Mkrtchan completed his purchase. However, Mr Taruta was unwilling to pay the price under the SPA until he received an assurance from Mr Gaiduk that the funds would be returned to him. Mr Taruta's case is that he received no such assurance and, therefore, refused to proceed with the SPA. The UGMK shares originally destined for Mr Taruta were eventually transferred to Mr Mkrtchan in June 2012. Mr Taruta alleges that this was the product of a conspiracy between Mr Gaiduk and Mr Mkrtchan to deny Mr Taruta his interest in UGMK.
60. The transfer of shares in Agro Holding followed a similar pattern. The technical consideration payable under the SPAs was UAH3 million, which at current exchange rates is somewhere in the region of US\$120,000. Mr Mkrtchan paid this sum and received 50% of the Gaiduk interest. Mr Taruta refused to pay without an assurance regarding technical consideration, and the interest was never transferred.
61. As regards NET, this had been transferred from CIG to Mr Gaiduk's company Roselink Ltd ('Roselink': the Second Third Party) under arrangements by which Mr Taruta and Mr Mkrtchan provisionally transferred their interests to Mr Gaiduk in discharge of US\$100 million of their debt to him. On 12 April 2012 Roselink entered into a SPA with Pontena Holdings ('Pontena'), a company owned by Mr Mkrtchan, to transfer 49.99% of its interest in NET (the 'Roselink-Pontena SPA'). This agreement provided for technical consideration of US\$13,400,900. This sum was paid, and the shares were transferred to Pontena. Mr Gaiduk claims to have been ready and willing to transfer the other 50% of NET to Mr Taruta but that Mr Taruta made no attempt to conclude a SPA. This is denied by Mr Taruta, who states that he was, in fact, pressing for the transfer of NET. An SPA between Roselink and Prandicle, Mr Dubyna's corporate vehicle, was executed on 11 September 2012 (the 'Roselink-Prandicle SPA'), whereby Prandicle acquired 24.5% of NET for the price of US\$6.5 million, that money having been lent by a Gaiduk company, Sputnik Ltd, to Blake Industries Services Ltd ('Blake') which, then, lent it to Prandicle. Over the same period, Mr Gaiduk and Mr Mkrtchan were in the process of finding a buyer for the Hyatt Hotel.
62. Fourthly, in late 2012 the relationship between the Partners soured. Between 2012 and 2015 Mr Taruta's representatives made some effort to contact Mr Gaiduk regarding the transfer of the above assets, although there is some dispute as to the extent of those efforts. In the event, in 2013, the Russian Buyer brought arbitral proceedings against the vehicles of Mr Taruta and Mr Mkrtchan that were heard in London in 2015. This seems to have prompted Mr Taruta to enlist Mr Mkhitar Madoyan, an ex-employee of IUD, to help in recovering the alleged debts from Mr Mkrtchan. Mr Madoyan suggested that Mr Taruta engage the services of a Moscow-based organisation called Za Spravedlivost ('For Justice' in English). On 18 November 2015, Mr Taruta signed a co-operation agreement with Za Spravedlivost, which provided for Za Spravedlivost's assistance in recovering US\$281 million from Mr Mkrtchan, and the shareholdings to which Mr Taruta was allegedly entitled under the alleged 2009 Shareholders' Agreement and the Further Shareholders' Agreement. Mr Gaiduk and Mr Mkrtchan allege that Mr Madoyan was a former associate of the powerful criminal Mr Aslan Usoyan, and that Za Spravedlivost is a criminal organisation with close links to the Chechen mafia.

63. In early 2016 Mr Madoyan and Za Spravedlivost were involved in discussions with Mr Gaiduk and Mr Mkrtchan. When those meetings took place, and how they came about, is contentious. In around April 2016 Mr Taruta presented Mr Gaiduk with a proposed draft settlement agreement regarding their outstanding business interests, which Mr Gaiduk refused to sign.
64. Mr Gaiduk says that he, then, met Mr Mkrtchan at Vienna Airport on 3 May 2016. He says that Mr Mkrtchan appeared shaken and told him that Mr Taruta (with the assistance of Mr Madoyan and Za Spravedlivost) had been threatening him to make payment of an alleged debt. When Mr Gaiduk asked what the debt was, Mr Mkrtchan explained that at the time of the VEB SPA, he had agreed to pay Mr Taruta US\$280 million in respect of his stake in Region. Mr Gaiduk says that this prompted him to ask Mr Mkrtchan what the price paid by the Russian Buyer had been and that Mr Mkrtchan unguardedly mentioned that it had been “2.7”, i.e. US\$2.7 billion.
65. On 5 May 2016 Mr Gaiduk wrote to Mr Taruta, acknowledging receipt of the draft settlement agreement referred to above, and asking a number of questions about the transaction with the Russian Buyer, including what the price paid to Mr Taruta and Mr Mkrtchan had been. Mr Taruta responded without answering the questions posed.
66. At a face-to-face meeting in May 2016, Mr Gaiduk raised the question of the IUD price with Mr Taruta. Mr Gaiduk says that he told Mr Taruta that he had learned of the true price of the sale to the Russian Buyer from Mr Mkrtchan and challenged Mr Taruta to deny that it was US\$2.7 billion. Mr Taruta allegedly confirmed the price. As noted above, however, Mr Taruta’s position is that Mr Gaiduk had known about the price since 2012.
67. Mr Gaiduk wrote to Mr Taruta on 16 May 2016 to say that he considered that the issue as to the price of the IUD shares should be resolved before any broader settlement of the outstanding business interests could be agreed. Mr Taruta did not respond to that letter. The two men eventually agreed that their various disputes should be discussed by their representatives. This resulted in a meeting between Mr Petrov (representing Mr Gaiduk), a Mr Sergiy Udovenko (representing Mr Mkrtchan) and Ms Morozova (representing Mr Taruta) on 9 August 2016. However, these discussions were stopped in their tracks when, later that day, Avonwick filed its claim.

Approach to this case

68. Having set out the essential background in this way, I turn to the parties’ respective cases which I seek to summarise in what follows.
69. I should also explain by way of preliminary that, consistent with the approach adopted at the trial, I refer in this judgment to the various groups of parties as the ‘Gaiduk Parties’, the ‘Taruta Parties’ and the ‘Mkrtchan Parties’. Specifically and to be clear: the Gaiduk Parties are Avonwick, Mr Gaiduk, Mrs Olena Gaiduk and Roselink; the Taruta Parties are Mr Taruta and Dargamo; and the Mkrtchan Parties are Mr Mkrtchan, Azitio and Gastly Holdings Limited (‘Gastly’: the Fifth Third Party).
70. It will obviously be necessary to revisit some aspects of the factual background when I come on later to address those cases in more detail. I should make it clear, however,

that it would be impracticable to address every such detail and I do not propose, therefore, even to try to do that.

71. This is a case in which the written closing submissions amounted, in total, to some 1,700 pages - in addition to over 700 pages of written opening submissions. In such circumstances, as Teare J put it in *Suez Fortune Investments Ltd & Anor v Talbot Underwriting Ltd & Ors* [2019] EWHC 2599 (Comm) at [25]:

“if I were to refer to and comment upon each and every point made by counsel this judgment would be of an intolerable length”.

He went on at [25] to say this, citing *Simetra Global Assets Limits and another v Ikon Finance Limited and others* [2019] EWCA Civ 1413 at [39]-[46] per Males LJ:

“The fact that particular points have not been mentioned does not mean that they have not been considered. What I have sought to do is to express my conclusions on the major or fundamental issues which have been debated by the parties and the reasons which have led me to my decision. I have thus endeavoured to explain ‘why’ I have reached my decision, to identify and record those matters which were ‘critical’ to my decision and to describe ‘the building blocks of the reasoned judicial process’ which led to my decision including in particular the evidence which has been accepted or rejected as unreliable ...”.

72. I shall adopt the same approach in this case. The parties in this case have been represented by large teams of lawyers - at one stage during the trial I counted what appeared to be approaching 40 lawyers in court. It is reasonable to take it, therefore, that the comprehensive written submissions which were produced were the result of a considerable *combined* effort which it is simply unrealistic to expect that a judge, as an individual, would be in a position to replicate, even assuming (which, to be clear, is not the case) that that judge has unlimited time within which to produce a judgment. It will become apparent, therefore, that there are aspects, some quite significant aspects, which I do not address. Most notable amongst these, again as will become apparent, are the causation and loss issue in the context of the Price Representation case. Nor, for the same reason, have I found it necessary to address every factual detail (such as, for example, the case advanced by the Taruta Parties on breach of the alleged 2009 Shareholders’ Agreement and the alleged 2010 Further Shareholders’ Agreement), preferring instead to focus on the facts which are most relevant to the issues which require to be determined and to my reasons why I have decided as I have done.

The Avonwick Claim: an outline

73. I have already given some indication as to what the Avonwick Claim entails. Albeit that in opening Mr Neil Calver QC, on behalf of the Gaiduk Parties, observed that this is *“a relatively straightforward commercial claim, which has been made to look much more complicated than it is”*, it is probably helpful to pause at this juncture and highlight the fact that it is the Gaiduk Parties’ case that, Mr Mkrchan having come to Mr Gaiduk in June 2009 to inform him that he and Mr Taruta had found a Russian Buyer for Mr Gaiduk’s stake in IUD at a price of US\$750 million, being the best price he and Mr Taruta could get in the current market, the Court should conclude that, the Price Representation having thereby been made, Mr Taruta and Mr Mkrchan ruthlessly took financial advantage of the trust which Mr Gaiduk placed in them when they

subsequently, in December 2009, through their respective corporate vehicles, Dargamo and Azitio, ‘flipped’ Avonwick’s 33.84% interest in IUD to the Russian Buyer at a vast profit to themselves, the Russian Buyer paying them US\$2.74 billion for the 50% + 2 share stake in circumstances where Avonwick (and so Mr Gaiduk) received a more modest US\$750 million.

74. As Mr Calver QC put it, whatever the precise words which were used, the message that Mr Mkrchan must have intended to convey, and did convey, in the June 2009 Meeting was unequivocal: that the three Partners were all being treated equally so far as price was concerned and the price being paid to Avonwick represented its *pro rata* share of the price being paid by the Russian Buyer. That, Mr Calver QC submitted, was a lie which was relied upon by Mr Gaiduk (and Avonwick) in not inquiring any further about the price being paid by the Russian Buyer and instead proceeding on the basis that US\$750 million represented Avonwick’s *pro rata* share of the price being paid by the Russian Buyer for the shares in IUD. As a result, Mr Calver QC submitted, Avonwick should be awarded damages for the loss that it suffered, measured by reference to the difference between the price paid for its shares by the Taruta Parties and the Mkrchan Parties and the much higher price for which the same shares were on-sold to the Russian Buyer.
75. It was Mr Calver QC’s submission that the Avonwick Claim had clearly been made out and so that there should be judgment in favour of the Gaiduk Parties in relation to it. He highlighted, in particular, how it was common ground at trial as between Mr Gaiduk and Mr Mkrchan (and, indeed, Mr Petrov who was present also at the June 2009 Meeting) that the purpose of the meeting was to negotiate the price for which Mr Gaiduk’s stake would be acquired, Mr Mkrchan telling Mr Gaiduk that the Russian Buyer would be acquiring 50% + 1 share of IUD, including Mr Gaiduk’s 33.08% stake, and that at the start of the meeting they spoke to Mr Taruta on the telephone during which conversation Mr Taruta indicated that Mr Mkrchan would be speaking on his behalf at the meeting – indeed, that Mr Taruta indicated that he would accept whatever price Mr Gaiduk and Mr Mkrchan agreed.
76. Furthermore, as Mr Calver QC emphasised, Mr Mkrchan accepts that he told Mr Gaiduk that the price he was getting was determined by the price being paid by the Russian Buyer. In these circumstances, Mr Calver QC submitted, Mr Gaiduk must have asked what price Mr Mkrchan and Mr Taruta were themselves going to be getting from the Russian Buyer, only to be told that they were each (Mr Gaiduk, Mr Taruta and Mr Mkrchan) receiving the same price per share. It is, as he put it, “*thoroughly implausible*” that Mr Gaiduk did not inquire and was not told what it is alleged he was told by Mr Mkrchan, given that it is accepted that Mr Mkrchan and Mr Gaiduk were having a discussion about price and nobody (neither Mr Gaiduk nor Mr Mkrchan or, indeed, Mr Petrov) asserts that Mr Mkrchan told Mr Gaiduk (and Mr Petrov) what price he and Mr Taruta were receiving from the Russian Buyer. Mr Calver QC added in this regard that Mr Gaiduk’s account of what was said about price at the meeting is corroborated by the events of April and May 2016, specifically the fact that, after Mr Gaiduk was told by Mr Mkrchan about the price paid under the VEB SPA, he immediately approached Mr Taruta and, having done so, in response Mr Taruta did not suggest that Mr Gaiduk already knew what price Mr Taruta and Mr Mkrchan were to receive.

77. Mr David Foxtton QC, on behalf of the Taruta Parties, and Mr David Wolfson QC, on behalf of the Mkrтчan Parties, were each dismissive of the Avonwick Claim, suggesting that it lacks any merit since it depends on an alleged oral representation (the Price Representation) which was never made, indeed that the claim has been brought dishonestly. In this respect, Mr Foxtton QC and Mr Wolfson QC pointed to a number of matters.
78. These include, first, the absence of documentary evidence which refers to the Price Representation having been made. There is, they explain, no email, no note and no reference in any of the transaction documents; this, in circumstances where there is no lack of documents showing what was discussed.
79. Secondly, Mr Foxtton QC and Mr Wolfson QC submitted, Avonwick faces the further problem that it would have made no commercial sense for Mr Gaiduk to get the same price per share as Mr Mkrтчan and Mr Taruta since Mr Gaiduk was selling a minority interest in IUD, and giving minimal warranties, in exchange for an immediate cash payment and a quick and clean exit from IUD with no ongoing involvement in its management, whereas Mr Mkrтчan and Mr Taruta were selling a majority interest in IUD, giving extensive warranties and undertaking other obligations to convince VEB to invest in what was at the time a financially troubled business.
80. Indeed, this is why, Mr Wolfson QC in particular highlighted, in 2013 Mr Mkrтчan and Mr Taruta had to defend themselves (successfully) in certain LCIA arbitration proceedings brought by VEB on the warranties which they had been required to give to VEB. It is also why, Mr Wolfson QC added, Mr Mkrтчan was not able to attend the trial, Mr Mkrтчan having (seemingly at least), subsequently and as a result of his involvement with VEB, a Russian State-owned bank, fallen foul of the Russian state with the consequence that he now finds himself convicted and imprisoned by a Russian Court for allegedly defrauding VEB.
81. In these circumstances, Mr Foxtton QC and Mr Wolfson QC submitted that it would have been obvious to all the Partners in 2009 that Mr Gaiduk had struck a different bargain for a different price and with different purchasers (Mr Taruta and Mr Mkrтчan) when compared with that struck by Mr Taruta and Mr Mkrтчan with VEB. So, they suggested, any suggestion that they would all be getting the same price per share would have been absurd. Nor, they went on to submit, is it realistic to suppose that an experienced businessman such as Mr Gaiduk would have agreed to the price of US\$750 million for his interest in IUD without any negotiation, merely on the faith of the Price Representation which he alleges was made.
82. The reality, Mr Foxtton QC and Mr Wolfson QC submitted, is that Mr Gaiduk agreed to the price of US\$750 million because he thought it was a good deal to achieve the quick and clean exit from IUD that he desired. In any event, albeit for essentially the same reason, Mr Foxtton QC and Mr Wolfson QC added, even if the Price Representation was made, Avonwick's claims go nowhere because the reality is that it has suffered no loss.
83. In addition, Mr Foxtton QC and Mr Wolfson QC argued that the Avonwick Claim is, in any event, barred by limitation.

84. Lastly, if under any liability to the Gaiduk Parties in respect of the Avonwick Claim, the Taruta Parties seek an indemnity and/or contribution from the Mkrтчan Parties, specifically Mr Mkrтчan and Azitio.

The Taruta Claims: an outline

85. Turning to the Taruta Claims, again it will already be apparent what these comprise and what position in relation to this claim has been adopted by the Gaiduk Parties and the Mkrтчan Parties: a denial of liability. As to these claims, indeed, and in contrast to the position which they adopt in relation to the Avonwick Claim, the Mkrтчan Parties align with the Gaiduk Parties' side rather than with the Taruta Parties.
86. There are a number of different claims which arise.
87. First, there are various contractual claims arising out of the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement concerning the transfer of Mr Gaiduk's interest in some of the Partners' assets to Mr Taruta and Mr Mkrтчan in equal shares. These comprise the alleged failure to transfer to Mr Taruta his share of a number of assets which were to be transferred by the Gaiduk Parties as part of the divorce and for which Mr Taruta has already paid the agreed consideration, namely UGMK, DPP, Agro Holdings and NET, and a second set of obligations said to arise in relation to Transport Holding. Mr Taruta also has monetary claims for breach of contract against Mr Gaiduk in respect of the premises at 14-B Yaroslavov Val in Kiev transferred to Mr Gaiduk as part of the divorce, USK which was also transferred to Mr Gaiduk as part of the divorce and Mr Taruta's share of 2009 IUD dividends received by Mr Gaiduk.
88. The Taruta Parties also bring a number of alternative claims. These include tortious claims for inducing breach of contract and conspiracy, and equitable claims for breach of trust, dishonest assistance and knowing receipt.
89. These claims are all disputed by the Gaiduk Parties and the Mkrтчan Parties on the primary basis that there was never a concluded or binding agreement for the transfer of the relevant shares in the stated assets. Their position, indeed, is that this is why Mr Taruta only raised these claims by way of counterclaim in November 2016 notwithstanding the fact that it is the Taruta Parties' case that Mr Gaiduk was in breach of the agreements alleged as long ago as 2009 and 2010.
90. In any event, the Gaiduk Parties and the Mkrтчan Parties also say, any such claims are now time-barred.
91. Thirdly, the Taruta Parties bring claims in unjust enrichment against the Gaiduk Parties in relation to the sums they received from the Taruta Parties for interests in NET (US\$75 million) and Agro Holding (US\$7.5 million) and against the Mkrтчan Parties (including Gastly) in relation to the interests in UGMK and Transport Holding which they variously received.
92. Fourthly, there are claims arising out of the Roselink-Prandicle SPA relating to the sale of a 24.5% interest in NET by Mr Gaiduk's vehicle, Roselink, to Prandicle, namely Mr Taruta's claims against Roselink and Prandicle.

93. Fifthly, Mr Taruta has certain other claims against Mr Mkrctchan for the repayment of outstanding loans totalling US\$100 million and under clause 3 of the Settlement Agreement concluded on 15 September 2008 as subsequently amended.

Contingent Claims against the Taruta Parties

94. The Gaiduk Parties and Mr Mkrctchan bring contingent counterclaims against the Taruta Parties. These are only pursued if the Taruta Claims under or arising out of the 2009 Shareholders' Agreement and the Further Shareholders' Agreement succeed. Specifically, Mr Mkrctchan claims in respect of three further assets (the Yalta Hotel, Donbass Holiday Home and Ayvazovskoye) and both Mr Gaiduk and Mr Mkrctchan bring further contingent claims in respect of an investment in the Gdansk shipyard in Poland.

Other claims not yet for determination

95. Lastly, there are a series of claims brought by the Taruta Parties, and to some extent by the Gaiduk Parties also, in relation to what are alleged to be further asset transfers by the Mkrctchan Parties which the Taruta Parties say had as their objective putting Mr Mkrctchan's assets out of reach of his creditors, including Mr Taruta. These claims did not, however, form part of the trial since they were only put forward in the months leading up to it. There may, therefore, need to be a further trial to address these further claims.

The Evidence

96. In assessing the evidence, I adopt the now orthodox approach articulated by Robert Goff LJ (as he then was) in *Armagas Ltd v Mundogas SA (The 'Ocean Frost')* [1985] 1 Lloyd's Rep 1 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."

97. This approach is of particular importance where the key events took place some appreciable time in past – in the present case a decade or so ago. As Lord Goff (as he had by then become) put it in *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Law Rep 207 at page 215:

"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."

98. Passage of time goes further than merely weakening memory, however, or at least it can do, since in some cases it will positively distort a person's recollection of relevant events. In this respect, it is worth bearing in mind the observations concerning the fallibility of memory which were made by Leggatt J (as he then was) in ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm) at [16]-[22], another authority which it has become customary now to cite in this context, specifically that it would be a mistake to suppose not only that, the stronger and more vivid is our recollection, the more likely it is to be accurate, but also that, the more confident that a person is in his or her recollection, the more likely it is that their recollection is accurate.
99. In addition, again as pointed out by Leggatt J, external information, as well as a person's thoughts and beliefs, can intrude into a witness's memory. Events can come to be recalled which did not happen at all. Perhaps more commonly, a person's assumptions as to a state of affairs, or their interpretations of events, can come to be recalled as memories of what in fact happened. Furthermore, as explained by Leggatt J, memory is particularly vulnerable to interference when a person is presented with new information or suggestions about an event in circumstances where it is already weak due to the passage of time. The process of civil litigation can frequently exacerbate this tendency. In particular, the preparation of witness statements has the effect of establishing in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events. It is for these reasons, amongst others, that Leggatt J concluded at [22] that:

"...the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. However, its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

100. This is not to say that witness evidence of events long past will necessarily be inaccurate since, on the contrary, in my view, that would entail far too extreme an approach; indeed, it would potentially result in witness evidence becoming wholly redundant. As Teare J made clear in ***Filatona Trading Ltd v Navigator Equities*** [2019] EWHC 173 (Comm) at [12]-[13]:

"I find it difficult to rule out the possibility that, in contrast with recollection of events such as an accident, there may still be some major matters (as for example the person with whom a witness struck a deal, or the person for whom the witness acted over a period of time) of which the witness may have some real and reliable recollection."

101. That must be right. Nonetheless, in this case (as in many other such cases) it is of particular importance to have regard to the contemporaneous documents, the parties'

motives and the inherent probabilities. That, indeed, was the very point made by Teare J at [11]-[12] in the same case. As noted above, the key events took place between 2008 and 2010. Much of the dispute turns on the contents of undocumented conversations. Each of the factual witnesses was either a party to the action or, if not themselves a party, a long-serving employee or associate of one of the parties. The passage of time, combined with the natural tendency to reconstruct memories in a selective and self-serving way, means that the witnesses' recollection of those events ought probably not to be too readily accepted. The more so, since I am clear that each of the main witnesses sought, on occasion, to tailor their evidence to suit their case or the case of the party on whose behalf they were called.

102. A further reason to attach particular weight to the documentary evidence in this case is that, with one exception, all of the factual witnesses gave evidence in either Russian or Ukrainian. Mr Kravets gave evidence in English. As Teare J (again) noted in ***Kairos Shipping Ltd v ENEKA & Co LLC*** [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525 at [11]:

“a fact-finding judge can gain little from the demeanour of a witness when the witness is foreign, comes from a different culture and does not give evidence in his first language or does so through an interpreter”.

103. This is the position, at least to some extent, in the present case since, despite the sterling work done by the interpreters, difficulties were inevitably encountered. On a number of occasions, it appeared that a witness was being deliberately evasive, only for it to transpire that problems of interpretation had led to a misunderstanding between the witness and counsel. There were also several instances where a witness was cross-examined about the English translation of a Russian-language document, only for the interpreter to indicate that a word or phrase in that document could (and sometimes should) have been translated differently, so as to alter the meaning and significance of the document as a whole. It seems probable that there were, additionally, other miscommunications which went unnoticed.

104. Quite aside from linguistic difficulties, it is important also to assess the evidence in its cultural and regional context. As Gloster J (as she then was) put it in ***Berezovsky v Abramovich*** [2012] EWHC 2463 (Comm) at [38]:

“The dispute between the two men has to be evaluated against the sometimes turbulent political and economic backcloth of Russia in the late 1990s and early 2000s, and in the context of the deterioration of their relationship. Nonetheless, the dispute is in essence a commercial one, which, like any other tried in this court, has to be decided on the factual evidence, both oral and documentary, relating to the specific transactions in issue. And, although this court necessarily views that evidence ‘Under Western Eyes’, it has to be careful about applying what it might regard as conventional Western European business standards to judge the conduct of businessmen operating in the very different, and largely unregulated, commercial and political environment of Russia at the material times. As I remind myself: ‘... this is not a story of the West of Europe’.”

105. This is essentially the point which I was myself seeking to make in ***Kazakhstan Kagazy Plc & Ors v Zhunus & Ors*** [2017] EWHC 3374 (Comm) at [2] and it is also what Teare J had in mind in ***Filatona*** at [11], where he cited Lord Bingham's 'The Business of Judging', as follows:

“An English judge may have, or thinks that he has, a shrewd idea how a Lloyd's broker, or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ship's engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which might be quite different - in accordance with his concept of what a reasonable man would have done.”

Teare J, then, added:

“In this case the probabilities must be assessed, as best this court can, in the light of the collapse of the USSR, the emergence of private enterprise in Russia, the accumulation of huge wealth by a few individuals, the manner in which ‘oligarchs’ do business with each other, the importance of support from those in power, the loyalties which huge wealth can generate and the use of offshore companies and trusts to hold (and hide) such wealth.”

106. It is with these various considerations in mind that I come on now to consider the witnesses from whom evidence was adduced at trial – by which I mean the factual witnesses since the expert evidence is evidence which I intend to address in context when considering the various issues to which that expert evidence relates.

The Gaiduk Witnesses

Vitaliy Gaiduk

107. Mr Gaiduk was in many respects a satisfactory, indeed persuasive, witness. His answers were generally direct and precise, although he was sometimes prone to overly long responses to questions which did not necessitate such prolixity. He is plainly a highly intelligent individual and displayed an impressive command of detail. On occasion, however, the level of detail which he claimed to recall regarding events and conversations in 2008 and 2009 was implausible. It was also apparent that Mr Gaiduk was sometimes willing to tailor his evidence to suit his case, probably, in my view and as explained later, as part of what has been described previously as *“litigation wishful thinking”*.
108. Instances where he did this will appear later when particular topics are addressed. However, for example, Mr Gaiduk's evidence, advanced for the first time at trial, was that Mr Mkrтчan initially proposed a direct sale from Avonwick to the Russian Buyer, only to change the transaction structure at a subsequent meeting. This account was entirely inconsistent with Avonwick's pleaded case, which makes clear that the initial proposal envisaged a sale to Azitio and Dargamo. It is also inconsistent with Mr Gaiduk's witness statements, in which Mr Gaiduk stated that, but for the Price Representation, he would have *“insisted that Avonwick be allowed to negotiate and contract with the Russian Buyer directly”*, evidence which only makes sense if Mr Gaiduk understood that the proposal did not entail his contracting with the Russian Buyer. Most tellingly, Mr Gaiduk emphasised that *“I was never asked if [...] Avonwick would be willing to sell part of its interest in ISD together with Azitio and Dargamo*

directly to the Russian Buyer". Other aspects of the account of the first meeting with Mr Mkrtchan make little sense if the Russian Buyer was to contract with Mr Gaiduk.

109. Mr Gaiduk's evidence regarding the transfer of shares in NET (through which the Hyatt Hotel was owned) was also contradictory. Mr Gaiduk's case was that Mr Mkrtchan had informed him that the Russian Buyer required the Hyatt Hotel as a condition of acquiring Mr Gaiduk's stake in IUD. At the end of December 2009, Mr Gaiduk received US\$950 million under the terms of the Castlerose SPA, of which US\$150 million was referable to the shares in NET. In 2011-2012 Mr Gaiduk took steps to transfer 49.99% of the shares to Mr Mkrtchan, and 24.5% to Mr Dubyna. In 2012 Mr Gaiduk and Mr Mkrtchan began to search for a third-party purchaser for 100% of NET.
110. These steps are obviously inconsistent with Mr Gaiduk believing that the Russian Buyer had paid for and was entitled to 100% of the shares in NET. Mr Gaiduk's explanation was that in 2012 Mr Mkrtchan had told him that the Russian Buyer no longer required the hotel. This is itself an implausible statement, given that on Mr Gaiduk's account the Russian Buyer had paid US\$150 million for this asset.
111. However, there are two further problems with the evidence. The US\$150 million valuation of NET had been calculated by reference to a debt owed on a US\$29.5 million loan from the International Finance Corporation ('IFC'). In June 2011 the shareholders decided to repay this loan in full ahead of schedule. However, there would have been no reason to reduce NET's debt if the Hyatt Hotel had already been promised to and paid for by the Russian Buyer, with the debt priced in. Mr Gaiduk's explanation in cross-examination was that the Russian Buyer "*would have paid more*". It is also difficult to understand the commercial rationale for paying off the IFC loan if the asset was already destined for the Russian Buyer.

Oleksii Petrov

112. Mr Petrov is a close adviser to Mr Gaiduk. From 2004 to 2013 he was Executive Vice-President of CIG, and from 2013 to 2018 adviser to the Executive Vice-President.
113. Mr Petrov was a careful, and generally truthful, witness. However, it appeared at times that Mr Petrov was taking great care not to give an answer which might undermine his former employer's case. For instance, there is some dispute as to whether Mr Gaiduk's representatives could have discovered the Russian Buyer price at the closing meeting in Cyprus on 30 December 2009. Mr Petrov's written evidence was that:

"My team representing Avonwick were on our side of the room, and we did not go to the other side of the room where the onward transfer papers were: we were busy sorting out our own papers, and since we were not involved at all in the execution of the onward transfer papers, we had no business to go over to, or examine, those papers".

114. However, when it was put to Mr Petrov that there was nothing to stop him from inspecting the Russian Buyer documents, his evidence was: "*what did stop me was that we were asked not to do that ... We were asked to stay in our corner of the room*". No hint of this evidence appears in Mr Petrov's witness statement and it appears to have been intended to fortify the Gaiduk Parties' position that they did not discover (and could not have discovered) the Russian Buyer price at the closing meeting.

Vladimir Kravets

115. Mr Kravets is an adviser to Mr Gaiduk. From 2006 to 2008 he was Executive President of CIG and from 2010 to 2018 President of CIG. He was the only factual witness to give evidence in English.
116. I am satisfied that Mr Kravets was, like Mr Petrov, a generally truthful witness. He was criticised by the other parties for giving evidence not foreshadowed in his witness statement. However, Mr Kravets' two witness statements were brief, and the second was responsive to Mr Taruta's. This reflects Mr Kravets' more limited role in the disputed events.
117. That said, Mr Kravets was at times eager to frame the evidence in a manner which was favourable to the Gaiduk Parties' case. For example, Mr Kravets accepted that in 2008 the Partners' representatives ensured that there was a detailed record of their discussions. It was put to him that the reason why there was no such record of the Price Representation was that it was not made. In response, Mr Kravets attempted to draw a distinction between the "*complex transaction, which was involving external consultants, the bankers and lawyers... and I would say very complex discussions of the structure of the transaction*" in 2008 and the "*simple transaction*" in 2009. However, as Mr Kravets was compelled to accept, the 2008 sale was on his evidence a straightforward sale to the other Partners involving limited warranties, whereas the 2009 transaction was (according to him) a back-to-back sale to the Russian Buyer.
118. I nonetheless reject the suggestion made by Mr Foxton QC in his oral closing that the evidence given by Mr Kravets, Mr Petrov and Mr Gaiduk represented something of "*a package deal, with Mr Petrov and Mr Kravets essentially signed up to support whatever Mr Gaiduk said*".

The Taruta Witnesses

Sergiy Taruta

119. Mr Taruta was not a satisfactory witness. He was evasive and, on a number of occasions, plainly just not telling the truth. Indeed, even Mr Foxton QC was compelled in closing to "*recognise that the Court may have reservations about certain parts of Mr Taruta's evidence*". A number of examples serve to illustrate the point, although I address in more detail later other particular aspects in relation to which I found Mr Taruta's evidence to be unconvincing or worse.
120. In July 2018 Mr Taruta was interviewed by Russian authorities in connection with the criminal investigation into Mr Mkrtchan, which has since led to his imprisonment. The transcript of that interview was obtained by the Mkrtchan Parties during the trial and disclosed to the other parties. However, the first page of the interview was omitted and it was not apparent from the face of the document when or where the interview took place. The Taruta Parties were, therefore, asked to explain the circumstances in which this interview came about. In a letter sent by Mr Taruta's solicitors, Hogan Lovells LLP ('Lovells'), on 17 October 2019, it was said that:

"Following repeated requests, including from the Chairman of VEB, Mr Taruta ultimately agreed to meet with the investigator Mr Miniahetov, in Minsk in July 2018

... The meeting took place at a restaurant over lunch, and lasted around one and a half hours ... He left Minsk later that day."

The first page of the interview was obtained some days later. This showed that much of the information provided had been incorrect. The interview had taken place not in Minsk, but in a hotel on the outskirts of Smolensk in Russia, specifically Tikhaya Zavod (which translates as 'Quiet Pool'). It had started at 5 pm and lasted for as long as three hours (recorded in the interview record as ending at 8 pm, albeit that the translation gives a different time).

121. Mr Taruta was cross-examined extensively on these contradictions. His oral evidence was that he had flown to Minsk and then travelled by car to the Belarus-Russia border, where he had met the investigator in a restaurant. He was adamant that he had not crossed the border because *"post-2014, when I became the governor, and I have been quite vociferous in my criticism on Russian policies, I could have run into problems"*. The meeting had not lasted three hours, he said, because he was rushing back to Minsk to catch his return flight. Mr Taruta explained that *"Lunch doesn't necessarily mean specific time of the day, it means sitting around the table with food on it"*.
122. As it transpired, Mr Taruta's solicitors had failed (albeit entirely innocently) accurately to record Mr Taruta's account. A note of the meeting with Mr Taruta was disclosed and showed that he had, indeed, told his solicitors that he had travelled from Minsk to the Russia-Belarus border. The Belarussian authorities have since provided confirmation that Mr Taruta flew into Minsk at around lunchtime on 19 July 2018 and flew out later that night. It follows that many of the inconsistencies seized upon by the Gaiduk and Mkrтчan Parties were not quite what they seemed. However, it remains the case that his continued claim that he was not sure whether he crossed the border into Russia was unconvincing. The hotel where the interview took place is approximately 40 minutes' drive from the border. Mr Taruta would obviously have had to cross it in both directions. It is simply not plausible that he failed to notice that he had entered Russia.
123. Perhaps more telling, however, are the inconsistencies between the evidence given by Mr Taruta in the interview with the Russian investigator and his evidence in these proceedings. For example, an important issue as between Mr Taruta and Mr Mkrтчan, addressed later in context, concerns the terms on which Mr Mkrтчan acquired his share in IUD from Mr Taruta. Mr Taruta's case is that they agreed that payment would be deferred and that Mr Taruta would acquire 17% of Region as security for that debt. However, this is contradicted by Mr Taruta's statement to the Russian investigator as follows:

"About 40% belonged to me, 34% to Gaiduk, and 26% to O.A. Mkrтчan. The shares belonging to Mkrтчan were transferred to him by me without compensation in connection with our friendship."

This is consistent with Mr Mkrтчan's account, which is that Mr Taruta agreed to transfer his shares on the condition that he acquired a stake in Region, thereby effectively transferring a smaller stake in IUD to Mr Mkrтчan free of charge.

124. A further and, perhaps, even more striking example concerns the role played by 'Za Spravedlivost', the Russian organisation engaged by Mr Taruta to resolve his disputes with the other Partners. Mr Taruta was shown a number of press cuttings which describe

Za Spravedlivost as a violent debt collection agency, founded in 2010 by Mr Adam Delimkhanov.

125. Mr Delimkhanov is a member of the Russian Duma and a close associate of the President of the Chechen Republic, Ramzan Kadyrov. In 2009 Interpol issued an arrest warrant for him in connection with the assassination of a former Chechen military commander. He has also been designated by the US Department of Treasury due to his links to the 'Brothers' Circle', a multi-national criminal group based in countries of the former USSR.
126. It was put to Mr Taruta that he must have known about the reputation of Za Spravedlivost and Mr Delimkhanov, and that he had enlisted them to intimidate Mr Mkrtchan. Although Mr Taruta denied any knowledge of these reports, I cannot accept that he was entirely unaware of these allegations of criminality. Indeed, Mr Taruta gave no satisfactory explanation for his decision to hire Za Spravedlivost, rather than seeking to recover the debt through what might be described as more usual channels. Whilst I recognise that there is no evidence of actual or intended criminality on the part of Mr Taruta or his representatives, and no suggestion that violence was used or explicitly threatened, it is improbable that Mr Taruta neither knew about nor intended to exploit Za Spravedlivost's rumoured criminal links as leverage in his negotiations with Mr Mkrtchan.
127. These are merely examples but they serve to explain why I attach little or no weight to Mr Taruta's evidence except where it is consistent with the documentary record or the inherent probabilities.

Nataliya Bashynska and Yuliya Morozova

128. Ms Bashynska has been an adviser to Mr Taruta since 2009. Ms Morozova worked in the CIG legal department from 2008 to 2012, after which she was employed at IUD from 2012 to 2013. Since January 2013 Ms Morozova has acted as Mr Taruta's General Counsel. Neither Ms Bashynska nor Ms Morozova had any involvement in negotiations with the Russian Buyer, over the Castlerose SPA or regarding MOU 4.
129. Both were unaware of the alleged 2009 Shareholders' Agreement until shortly before (or in Ms Bashynska's case, after) the commencement of these proceedings. Their evidence was, therefore, largely immaterial.
130. To the extent that they were able to give relevant evidence, I am satisfied that they were for the most part truthful witnesses. Like Mr Petrov and Mr Kravets, however, they were both eager to support the case of their long-standing employer, Mr Taruta.

The Dubyna Witnesses

Oleh Dubyna

131. As previously mentioned, Mr Dubyna is a former First Vice Prime Minister of Ukraine, who additionally held other senior governmental positions between 2001 and 2005. He has received state honours for his contributions to the Ukrainian metallurgical industries and to the constitutional development of Ukraine as an independent State. He was head of Naftogaz from 2008 to 2010.

132. Mr Foxton QC sought to criticise Mr Dubyna’s approach to this case, suggesting in particular that he (and Mr Davydenko) had tried to reveal as little as possible and, more than that, to conceal sources of relevant information that would have assisted the Court in resolving the claim against Prandicle. He pointed, specifically, to a suggested attempt at downplaying the significance of the role played by Mr Vyacheslav Novak, the Head of the Legal Department at CIG until the autumn of 2009.
133. For my part, however, I formed a favourable impression of Mr Dubyna. I consider that he was an honest witness doing his best to assist the Court in difficult circumstances which saw him embroiled in so bitter a dispute between the Partners. In any event, as will appear, the claim against Prandicle, Mr Dubyna’s company, is a claim which I have decided cannot succeed for reasons which have nothing to do with Mr Dubyna’s performance as a witness.

Sergiy Davydenko

134. As for Mr Davydenko, he is a Ukrainian lawyer who has worked as a legal and business adviser to Mr Dubyna since 2010, albeit that he only became involved in events relevant to this dispute in early 2012 when he conducted due diligence for Prandicle’s acquisition of its 24.5% shareholding in NET.
135. Again, Mr Foxton QC criticised Mr Davydenko for caginess. However, whilst (like Mr Petrov, Ms Bashynska and Ms Morozova) obviously loyal to somebody for whom he has worked for a long time, in my view, he was an honest witness.

Absent witnesses

136. The Gaiduk and Taruta Parties made a number of criticisms regarding the other’s failure to call certain witnesses, as well that of the Mkrtychan Parties. In each case I was invited to draw adverse inferences from those failures in accordance with the principles articulated *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at page 340:

“(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.”

137. The Gaiduk Parties were criticised for failing to call Mr Vladimir Kupchyshyn, Mr Gaiduk's longstanding lawyer. Mr Kupchyshyn was closely involved in many of the events which form the substance of this dispute, including the sale of what was described at trial (and in the pleadings) as the 'Castlerose Interest' and IUD's debt restructuring. Indeed, Mr Kupchyshyn was often present in court during this trial and played an active role in the litigation, including signing the statement of truth on the Gaiduk Parties' response to a Request for Further Information from the Taruta Parties.
138. Meanwhile, the Gaiduk Parties pointed to the Taruta Parties' failure to call Mr Denis Pisarevsky. Mr Pisarevsky acted for both Mr Taruta and Mr Mkrtchan in the transaction with the Russian Buyer and is said to have liaised on their behalf with Mr Bakai. On at least two occasions, Mr Taruta stated that absent documents might be in Mr Pisarevsky's possession. In relation to Mr Bakai, Mr Taruta said that *"For all I know, Mr Pisarevsky may have had some documents because he was the one who was in constant contact with him"*. As to whether he and Mr Mkrtchan had calculated the value of the warranties and indemnities under the VEB SPA, he claimed that *"Mr Pisarevsky had calculations and he would show us... Apparently they are still with him"*.
139. Mr Mkrtchan was, of course, unable to give evidence due to his imprisonment in Russia. It has not been suggested that I should draw adverse inferences from Mr Mkrtchan's conviction for fraud. However, it is surprising that the Mkrtchan Parties did not call any of Mr Mkrtchan's close advisers to fill this evidential gap. The Taruta Parties identified Ms Olga Shchygolyeva and Mr Sergei Udovenko, two of Mr Mkrtchan's advisers, as the obvious candidates. Both were involved in many of the events with which this litigation is concerned and are parties to the second stage of the litigation. There were a number of areas where their evidence would have been relevant. To take only a handful of examples, Mr Udovenko would have been able to give evidence regarding the formation of the alleged 2009 Shareholders' Agreement: the version of MOU 4 produced by Mr Petrov on 14 December 2009 was sent to Mr Udovenko and, according to Mr Petrov, Mr Udovenko asked to be sent MOU 4 *"a few months after the deal"*. Both Mr Udovenko and Ms Shchygolyeva were involved in the transfer from Mr Gaiduk to Mr Mkrtchan of assets which were supposedly governed by the 2009 Shareholders' Agreement. Ms Shchygolyeva was also involved with preparations for the Roselink-Pontena SPA.
140. I accept that these individuals (as well as Mr Novak in the case of Mr Dubyna) could, and perhaps should, have been called. That said, consistent with the approach recently described by Cockerill J in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [150], care should be exercised when faced with reliance on *Wisniewski* since the principle derived from it *"is likely to genuinely arise in relatively small numbers of cases; and even within those cases the number of times when it will be appropriate to exercise the discretion is likely to be still smaller"*. Furthermore, as Sir Ernest Ryder SPT put it in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882 at [30]:
- "Wisniewski is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion i.e. 'the court is entitled [emphasis added] to draw adverse inferences'."*

Referring to this authority, Cockerill J went on in *Magdeev* at [154] to identify the following propositions:

“i) This evidential ‘rule’ is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.

ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the ‘missing’ witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of:

a) the overriding objective; and

b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial. ...”.

141. In the present case, whilst I accept that individuals could, and perhaps should, have been called (with the exception of Mr Mkrтчan obviously), I do not consider that it necessarily follows that any adverse inference should be drawn against the party which has not called such evidence, not least because no real attempt was made to do as envisaged by Cockerill J at (ii). Nonetheless, I do accept that where the parties positively rely on the involvement of those individuals (the non-witnesses) as evidence in support of their case (for example, Mr Taruta’s assertion that Mr Pisarevsky possesses the documents concerning Mr Bakai), that is evidence which it would be wrong too readily to assume would have been substantiated had the witnesses, in fact, been called, and so to consider whether there is documentary evidence which is supportive or whether the inherent probabilities provide such support. However, it would not be appropriate, in my view, to draw adverse inferences from the mere fact that particular witnesses were not called to give evidence in circumstances where the same criticism can be made of each party.

Document deletion

142. The Taruta Parties raised a number of concerns regarding data deletion by the Gaiduk and Mkrтчan Parties. It was noted that for the period 2009-2012, the Gaiduk Parties disclosed only three emails involving Mr Gaiduk; fewer than 350 emails involving Mr Petrov; and 114 emails involving Mr Kravets. The Mkrтчan Parties disclosed only seven emails involving Mr Mkrтчan; 44 involving Mr Udovenko; 184 involving Ms Shchygolyeva; and 23 involving Mr Koval. These numbers are said to illustrate a failure to preserve and produce documents which should in fairness be used “*to fill the evidential gap and so establish a positive case*”: *Earles v Barclays Bank Plc* [2009] EWHC 2500 (Merc) at [37]. However, this approach applies only where there is a “*deliberate void of evidence*”.
143. A number of reasons were given for the gaps in the Gaiduk Parties’ disclosure. The Gaiduk Parties’ solicitors informed the court that for cyber security reasons, Mr Kravets and Mr Petrov habitually delete emails in their mailboxes which do not relate to matters

they are immediately concerned with. Back-ups of CIG mailboxes were generally deleted one year following the termination of an employee's employment, while CIG's IT providers were under a standing instruction to delete any back-ups of Mr Gaiduk's and Mr Kravets' email accounts. In 2012, documents at CIG's offices in Kiev, Mr Gaiduk's home, and his offices in Donetsk were "*irretrievably destroyed*". Initially, no explanation was given, save that "*the decision was made for reasons unrelated to the present proceedings or the issues in dispute between the parties*".

144. Mr Gaiduk first elaborated on this in re-examination, explaining that in March 2012 criminal proceedings were brought against his wife and their documents were confiscated. This apparently prompted Mr Gaiduk to delete the documents in question. It was also revealed in July 2018 that in 2012 Mr Petrov had given a one-off instruction in 2012 to wipe all emails from his CIG account and transfer them to a device. This device subsequently stopped working and the data was lost. This amounts to a persistent pattern of data deletion. However, given that most of these documents were deleted in 2012 or earlier, it would be wrong to infer that there was a deliberate decision on the part of the Gaiduk Parties' deliberately to conceal or destroy evidence relevant to these proceedings.
145. By contrast, there is some suggestion that the Mkrтчan Parties did take deliberate steps to destroy evidence after proceedings were issued. On 12 June 2018 the Taruta Parties made an application for specific disclosure in relation to devices belonging to Ms Shchygolyeva, Mr Molchanov, Ms Strilko and Ms Buzovskaya. At a CMC on 16 July 2018, the Mkrтчan Parties were ordered to search those devices, which included four desktop computers. However, it was subsequently revealed that in late June or early July, the hard drives of those computers had been erased and replaced. That this occurred shortly after the issue of the Taruta Parties' application (and long after the Mkrтчan Parties came under an obligation to preserve documents), raises the distinct possibility that it was done to prevent adverse documents from coming to light.

The Avonwick Claim

146. Turning, then, to the Avonwick Claim, it is necessary, first, to address an issue concerning applicable law (English or Ukrainian), before going on to deal with the claim substantively. Mr Calver QC's position was that English law is applicable, something with which Mr Foxton QC did not quibble, whereas Mr Wolfson QC's submission was that the applicable law is the law of Ukraine.
147. More specifically, whilst it is common ground that Avonwick's claim against Azitio (Mr Mkrтчan's vehicle) is governed by English law, given the English governing law clause in the Castlerose SPA, by virtue of Article 14 of EU Regulation No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), Mr Wolfson QC submitted that, as regards Avonwick's claim against Mr Mkrтчan personally, the applicable law is Ukrainian law since Mr Mkrтчan was not himself a party to the Castlerose SPA and so (as Mr Calver QC ultimately accepted) not bound by that governing law clause. It was Mr Wolfson QC's submission that, in relation to that claim, Ukrainian law applies under Article 4(3) of Rome II.
148. Avonwick contends, through Mr Calver QC, that English law applies under Article 4(3), alternatively that Cypriot law applies under Article 4(1) (which is accepted to be materially the same as English law).

149. The applicable law issue is only relevant, however, as both Mr Calver QC and Mr Wolfson QC acknowledged, no doubt in view of the Joint Report on Ukrainian law prepared by the respective experts instructed by the Gaiduk Parties and the Mkrchan Parties, to the question of whether the Avonwick Claim is time-barred since there are different limitation periods and different limitation regimes under English and Ukrainian law respectively; in other (non-limitation) respects any differences between English and Ukrainian law are immaterial. Mr Wolfson QC was clear, indeed, both in opening and in closing, that the Mkrchan Parties (more accurately probably, Mr Mkrchan) were content to proceed on the basis that Ukrainian law is materially the same as English law for the purpose of the Avonwick Claim, save for the issue of limitation.

Applicable law

150. Mr Calver QC and Mr Wolfson QC were agreed that the question of which law is applicable to the Avonwick Claim falls to be determined by reference to Article 4 of Rome II, which is in these terms:

“(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

(2) However, where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

(3) Where it is clear from all the circumstances of the case that the tort / delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”

It can be seen, therefore, that Article 4(1) provides the default applicable law and that it is only if one of the derogations in Articles 4(2) or 4(3) is engaged that a different law will apply.

151. It was not in dispute as between Mr Calver QC and Mr Wolfson QC that the default applicable law under Article 4(1) is the law of Cyprus in that this was the country in which the event giving rise to the damage occurred since, although Avonwick was incorporated in the BVI and its entry into the Castlerose SPA was formally authorised in Ukraine, Avonwick’s directors were based in Cyprus and the steps necessary to transfer its shares in Castlerose to Azitio and Dargamo would, therefore, have been taken by those directors in Cyprus. Nor was it suggested by Mr Wolfson QC that Cypriot law is materially different to English law.
152. It follows that the applicable law is the law of Cyprus, and so, in effect, English law, unless either Article 4(2) or Article 4(3) applies. Since neither Mr Calver QC nor Mr Wolfson QC suggested that Article 4(2) has any application to the present case, the

issue is whether Mr Wolfson QC was right when he submitted that Article 4(3) is applicable, so that Cypriot law is displaced by Ukrainian law, or whether Mr Calver QC was right to submit that Article 4(1) (and so the law of Cyprus) applies.

153. I should just add in this connection that, although it was Avonwick's primary position, at least as a matter of pleading, that Article 4(3) should lead to a displacement of Cypriot law by English law, ultimately at trial it was Mr Calver QC's position that there should be no displacement at all, whether in favour of Ukrainian or English law, since there is nothing in the present case which would necessitate the non-application of the law of Cyprus (and so Article 4(1)). The key question, therefore, is whether, for the purposes of Article 4(3), Ukraine is "*manifestly more closely connected*" with the torts/delicts alleged in this case than is Cyprus.

154. Mr Calver QC and Mr Wolfson QC were agreed as to the approach to be adopted when considering Article 4(3). They were agreed, in particular, that Mr Mkrchan has the relevant "*burden of ... seeking to disapply Article 4(1)*": **Gaynor Winrow v Hemphill and another** [2014] EWHC 3164 at [16] per Slade J. They were agreed also that it will take an exceptional case to come within the ambit of Article 4(3), as made clear by Cockerill J in **FM Capital Partners Ltd v Frédéric Marino** [2018] EWHC 1768 (Comm) at [517]:

"The starting point with any Article 4(3) argument is that it represents an 'exceptional' route: (See Recital 18 of Rome II and p.12 of the Commission's Proposal for Rome II ... To avail itself of this route a party seeking to invoke it must overcome a 'high hurdle': Pan Oceanic at [206] and Committeri v Club Méditerranée [2016] EWHC 1510 at [36] and [57]. The conclusion has to be reached against all the circumstances, which can include the event or events which give rise to damage, whether direct or indirect, factors relating to the parties, and possibly also factors relating to the consequences of the event or events Dicey, Morris & Collins [35-032])."

155. The same point was made by Flaux J (as he then was) in **Fortress Value Recovery Fund ILLC v Blue Skye Special Opportunities Fund LP** [2013] 2 BCLC 351 at [47] when explaining that, in order for a tort to be manifestly more closely connected to another country, the centre of gravity of the tort or the clear preponderance of factors must point toward it, as follows:

"...[Art 4(3) Rome II] is only to be used on an exceptional basis. The defendants rely upon [35-032] of Dicey, Morris & Collins: The Conflict of Laws which states that Article 4(3) should only be applied where there is a 'clear preponderance of factors' pointing to another country than that indicated by Articles 4(1) and (2). The Explanatory Memorandum refers to the 'centre of gravity' of the tort."

156. As to "*all the circumstances*", as referenced in Article 4(3), these might include a variety of features. Thus, relevant matters include: where the alleged wrongdoing "*was planned, orchestrated and implemented*" which, as Flaux J put it in **Fortress Value** at [74], may involve focusing on the country in which "*the 'puppet masters' pulling the strings*" carried out the relevant alleged acts, even if other entities carried out other alleged acts in one or more other countries; the places of domicile of the parties (**Gaynor** at [8]); the location of the "*damage arising from the tort, whether direct or indirect*" (**Gaynor** at [50]); the location of assets which are "*at the heart of*" the alleged wrongdoing, even if this is not the place where the direct damage occurred for the

purposes of Article 4(1) (*Fortress Value* at [71]); and, as expressly stated in Article 4(3) itself the “*pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question*”, in contradistinction to “*mechanisms by which the allegedly dishonest scheme was implemented*” (*Fortress Value* at [73]). The fact that proceedings have been brought in a particular jurisdiction is “*not a strong connecting factor*” since, as Slade J explained in *Gaynor* at [61], the “*choice of forum does not determine the law of the tort*”; it is important, in other words, not to conflate the issue of jurisdiction with the separate governing law issue.

157. I should, in this context, mention a particular submission made by Mr Calver QC. This was that the law applicable to claims between the claimant and a third party, which are related to the claim between the claimant and the defendant, can be a relevant consideration in determining the country with which the tort is manifestly more closely connected for the purposes of Article 4(3). In support of this proposition, Mr Calver QC relied on *Pickard v Motor Insurers' Bureau* [2017] EWCA Civ 17. This was a case in which Cranston J (sitting in the Court of Appeal as a single judge) refused a renewed application for permission to appeal against a judgment of Dingemans J (as he then was). Specifically, at [8] Cranston J set out the following passage in the judgment (at [20]):

“It is also common ground that article 4(3) imposes a ‘high hurdle’ in the path of a party seeking to displace the law indicated by articles 4(1) or 4(2), and that it is necessary to show that the ‘centre of gravity’ of the case is with the suggested applicable law. In this case there are a number of circumstances which, in my judgment, make it clear that the tort/delict is manifestly more closely connected with France than England and Wales. These are: first that both Mr Marshall and Mr Pickard were hit by the French car driven by Ms Bivard, a national of France, on a French motorway. Any claims made by Mr Marshall and Mr Pickard against Ms Bivard, her insurers (or the FdG as she had no insurers) are governed by the laws of France; secondly the collision by Ms Bivard with Mr Marshall and Mr Pickard was, as a matter of fact and regardless of issues of fault or applicable law, the cause of the accident, the injuries suffered by Mr Marshall and Mr Pickard and the subsequent collisions; and thirdly any claims that Mr Marshall and Mr Pickard have against Generali, as insurers of the vehicle recovery truck, are also governed by the laws of France.”

158. It was argued on the renewal that Dingemans J was wrong to hold that French law applied, in particular that he was wrong to take into account the three circumstances which he mentioned in this paragraph since they were not circumstances of the case against Mr Pickard, the alleged tortfeasor. Cranston J rejected this submission, deciding at [21] that Dingemans J had been right to consider the three circumstances identified.
159. As I understand it, what both Dingemans J and Cranston J had in mind is not merely that French law would be applicable as regards other parties, but also (at least in part) that other claims involving other parties would be justiciable not in England and Wales but in France, where, of course, the relevant incident happened. If I am right about this, then, it seems to me that this authority is probably of less assistance on the facts of the present case than it might be on other facts. Put shortly, the fact that in the present case precisely the same claims which are brought against Mr Mkrtschan are brought against the other three defendants (Azitio, Dargamo and Mr Taruta), and those will all be tried under English law, is of somewhat lesser significance. The more so, in my view, given that it is not English law which is applicable by virtue of Article 4(1) but the law of

Cyprus since the fact that Cypriot law and English law are to be treated as identical in this case cannot, in such circumstances, amount to a reason why Cypriot law should not be displaced in favour of Ukrainian law. For this reason, I do not base my decision concerning Article 4(3) on this further consideration.

160. Nor, I might add, do I accept an alternative contention which was put forward by Mr Calver QC, although ultimately not pursued by him in closing, namely that English law governs Avonwick's claim against Mr Mkrтчan pursuant to Article 12 of Rome II, by virtue of the English governing law clause in the Castlerose SPA. Article 12 provides that:

"The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into."

161. As Mr Wolfson QC submitted, Article 12 cannot assist the Gaiduk Parties in circumstances where Mr Mkrтчan is not a party to the Castlerose SPA.

162. As Bryan J noted in *The Republic of Angola and others v Perfectbit Limited and others* [2018] EWHC 965 (Comm) at [200], *"both the leading texts indicate that a claim by a contracting party against a non-party for misrepresentation or the like can fall outside Article 12"*. He was referring here to *Dicey, Morris & Collins on the Conflict of Laws* (15th Ed.) at paragraph 35-093 (*"Scope of Article 12"*), which states:

"According to Recital (30) to the Regulation culpa in contradendo is an autonomous concept and should not necessarily be interpreted within the meaning of national law. The Recital goes on to point out that it should include 'the violation of the duty of disclosure and the break-down of contractual negotiations'. But, Art. 12 'covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. The means that if, while a contract is being negotiated, a person suffers personal injury, Art.4 or other relevant provisions of this Regulation should apply'. The terminology and these various observations suggest that Art.12 will apply to fault based claims, for example, to non-disclosure, fraudulent or negligent misrepresentations and duress which occur during the negotiation of a contract. Accordingly other types of claim, for example a claim for the value of services provided in anticipation of a contract, may fall outside Art.12, and within other provisions of the Regulation (notably, Art.10 dealing with unjust enrichment). Equally, however, these observations emphasise that the 'culpa' in whatever form must occur in the context of negotiations with a view to concluding a contract. Thus Art.12 would not, it seems, apply in a case where (for example) a misrepresentation is made outside contractual negotiations or where a third party relies on a representation made in connection with a contract concluded between the representor and a different party. Such cases will fall, normally, within Art.4. Finally, as the principal connecting factor under Art.12 is the law applicable to a contract (or putative contract), its application may be restricted to claims between the parties (or prospective parties) to that contract, and not against any third party (e.g. an agent) involved in the pre-contractual dealings."

163. The other reference was to *Dickinson, The Rome II Regulation* at paragraph 12.07:

“As the primary connecting factor within Art 12 is the law applicable to a contract, either concluded or contemplated, there is a strong argument for restricting its scope to claims between the (intended) parties to the contract so as to exclude (for example) a claim for damages by one of the parties against the issuer of securities that he has purchased on the market or the agent of another for misrepresentation or as a false procurator. There may, of course, be good reasons for concluding that claims against an agent, whether in contract or in tort/delict, should be governed under the Rome I Regime or Art 4 of the Rome II Regulation by the law of the contract (lex contractus), especially if he has taken an active part in negotiations conducted on the basis of drafts containing a choice of law provision. Art 12, however, would appear to contemplate an existing or contemplated contractual relationship between the parties to the non-contractual obligation. That view is consistent, for example, with the approach taken under English law to liability for misrepresentation, providing a separate claim for damages as between the contracting parties only. ...”.

This is followed by paragraph 12.08, as follows:

“The language of Recital (30) ... reduces the significance of comparative analysis of this kind, which in any event is inconclusive. On balance, therefore, claims by or against the representatives of negotiating or contracting parties should be considered to fall outside Art 12, although the contract or supposed contract to which the agent's conduct relates should be considered as a circumstance to be taken into account in applying a flexible rule of displacement such as that in Art 4(3) of the Rome II Regulation or in identifying the law applicable under the Rome I Regime to any contract between agent and counterparty.”

164. Clearly, in these circumstances, Mr Wolfson QC's submission must be correct, and Article 12 cannot assist the Gaiduk Parties.
165. Returning, therefore, to Article 4(3) and the parties' respective stances as to how this provision should be applied in the present case, it was Mr Calver QC's submission that this is not one of the exceptional cases where there is the requisite clear preponderance of factors which can overcome the high hurdle needed to displace the default applicable law (the law of Cyprus and so, in practice if not in form, English law). Mr Calver QC submitted that there are a number of significant factors linking Avonwick's claims to jurisdictions other than Ukraine, with the result that there is not a clear preponderance of factors pointing to Ukraine.
166. Mr Wolfson QC, on the other hand, submitted that the alleged wrongdoing of Mr Mkrтчan was clearly more closely connected with Ukraine than with Cyprus for a number of reasons, with which I agree.
167. First, as Mr Wolfson QC pointed out, all the relevant natural persons were domiciled in Ukraine at all material times, including not only Mr Mkrтчan and Mr Taruta, both defendants, but also Mr Petrov and Mr Gaiduk, Avonwick's agents.
168. Secondly, the alleged wrongdoing concerns a conspiracy which, on Avonwick's own case, is alleged to have been planned, orchestrated and implemented by Mr Mkrтчan and Mr Taruta in Ukraine, with the misrepresentations alleged to have been made by Mr Mkrтчan (and, through him, Mr Taruta) to Mr Gaiduk and Mr Petrov in Ukraine.

169. Thirdly, again on the Gaiduk Parties' own case, Mr Mkrтчan and Mr Taruta were, as Mr Wolfson QC put it, the 'puppet masters' who pulled the strings from Ukraine, even though their corporate vehicles, Azitio and Dargamo, were incorporated in Cyprus and certain steps took place in Cyprus at the direction of Mr Mkrтчan and Mr Taruta.
170. Fourthly, whilst the directors of Avonwick (a BVI company) were based in Cyprus, and certain steps took place there in order to transfer the shares of Castlerose pursuant to the Castlerose SPA, as demonstrated by the fact that the Castlerose SPA was formally authorised by Mrs Gaiduk in Ukraine on behalf of Avonwick, this was ultimately directed by Mr Gaiduk and his advisers who were domiciled in Ukraine.
171. Fifthly, the asset at the heart of the alleged wrongdoing is the Gaiduk Parties' interests in IUD, a company incorporated and operated in Ukraine, with its principal assets in Ukraine.
172. Sixthly, the ultimate victims of the alleged wrongdoing were Mr and Mrs Gaiduk in their capacity as the ultimate owners of the interest in IUD.
173. Seventhly, the alleged wrongdoing relates to Mr Gaiduk's exit from IUD, and so is closely connected to the pre-existing relationship between the Partners regarding IUD and their other joint business interests in Ukraine, which is connected with Ukraine and also likely to be governed by Ukrainian law.
174. All in all, I agree with Mr Wolfson QC when he submitted that the centre of gravity of the alleged wrongdoing was clearly Ukraine.
175. The only relevant factor connecting the alleged wrongdoing to England was the English governing law clause in the Castlerose SPA subsequently entered into. However, as Mr Wolfson QC rightly observed relying on *Fortress Value* at [73], Article 4(3) has as its focus "*agreements in place before the allegedly tortious acts took place*" and not "*mechanisms by which the allegedly dishonest scheme was implemented*". As such, I agree with him that the Castlerose SPA is of only limited significance in this context. The more so, in view of the fact that the English governing law clause does not bind Mr Mkrтчan.
176. It follows, for the reasons which I have given, that my conclusion is that the Avonwick Claim against Mr Mkrтчan is, pursuant to Article 4(3) of Rome II, governed not by the law of Cyprus but by Ukrainian law - albeit that, as previously explained, this is only relevant to the issue of limitation and not, therefore, to the substantive merits of that claim since, again I repeat, Mr Wolfson QC was content to proceed on the basis that, aside from in relation to limitation, Ukrainian law is materially the same as English law.

Relevant legal principles

177. Turning, then, on the basis just explained, to English law concerning fraudulent misrepresentation/deceit, this is both well known and well settled. The same applies to the claim brought against Dargamo as its contractual counterparty pursuant to s. 2(1) of the Misrepresentation Act 1967. There was, indeed, at least as far as I could discern, no dispute between the parties as to the relevant principles.

178. The elements of a deceit claim are (i) a representation, which is (ii) false, (iii) dishonestly made and (iv) intended to be relied on and, in fact, relied on: see, most recently, *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 per Males LJ at [35], citing *The Kriti Palm* [2006] EWCA Civ 1601, [2007] 1 Lloyd's Rep 555 at [251] per Rix LJ. Expressed only slightly differently, Jackson LJ in *EC03 Capital Limited v Ludsin Overseas Limited* [2013] EWCA Civ 413 described the “four ingredients” at [77] as follows:

“i) The defendant makes a false representation to the claimant.

ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.

iii) The defendant intends that the claimant should act in reliance on it.

iv) The claimant does act in reliance on the representation and in consequence suffers loss.”

He added that:

“Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant’s state of mind. Ingredient (iv) describes what the claimant does.”

179. There is in this case no dispute that, if the Price Representation was made, as the Gaiduk Parties allege but which the Taruta and Mkrchan Parties deny, then, it was not only false (as clearly must have been the position) but was also fraudulent. There is, accordingly, no issue as to Jackson LJ’s ingredient (ii) in *EC03 Capital* (and Males LJ’s elements (ii) and (iii) in *Simetra Global*).

180. The dispute is, rather, as to whether a representation was made (Jackson LJ’s ingredient (i) in *EC03 Capital* and Males LJ’s element (i) in *Simetra Global*) and whether, if so, it was intended to be relied on and, in fact, relied on (element (iv) in *Simetra Global* and ingredients (iii) and (iv) in *EC03 Capital*). It is convenient, first, to address these various issues, before coming on to deal with the distinct and necessarily follow-on issue of limitation.

181. There is, in addition, a dispute as to whether Mr Taruta would, in any event, be liable in respect of the representation (if made and relied on), either on the basis that Mr Mkrchan was acting as his agent in making the representation or as a joint tortfeasor. This, likewise, is an issue which I shall address later.

182. The approach to determining whether a representation has been made was summarised by Toulson J (as he then was) in *IFE Fund v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd’s Rep 264 at [50]:

“In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor’s words and conduct in their context.”

183. As to the party making the representation knowing that it was false, specifically where a representation is capable of being understood in more than one sense, it is clear that “*it is essential to liability in deceit that the party making the statement should have intended it to be understood in its untrue sense, or at the very least that he should deliberately have used the ambiguity for the purpose of deceiving the claimant*”: see *Clerk & Lindsell on Torts* (22nd Ed.) at 18-25. As Christopher Clarke J (as he then was) put it in *Raiffeisen Zentralbank Osterreich v The Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) at [339]:

“It is not sufficient that the representation was false in a sense which the representor did not understand or intend it to bear”.

184. Furthermore, as I explained in *Marme Inversiones 2007 Sl v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [117], the position was summarised by Hamblen J (as he then was) in *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] 1 CLC 701 at [215] in this way:

“A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee ...”.

185. He went on at [221] to say this:

“In a deceit case it is also necessary that the representor should understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary ‘to show that the representor intended his statement to be understood by the representee in the sense in which it was false’ In other cases of misrepresentation this is not a requirement, but one would generally expect it to be reasonably apparent to both representor and representee that the implied representation alleged was being made.”

186. Avonwick must, in these respects and more generally, establish its case on the balance of probabilities. However, when assessing the evidence, given that this is a case where fraud is alleged, the approach set out by Lord Nicholls in *Re H and Others (Minors)* [1996] AC 563 at [586] falls to be adopted, namely:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. 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 ...

Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same,

this does not mean that where a serious allegation is in issue the standard of proof is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”

187. Although that case concerned a very different factual context, this approach has been adopted and endorsed in several commercial cases, including by Rix LJ in **AIC Limited v ITS Testing Services (UK) Ltd (The Kriti Palm)** [2006] EWCA Civ 1601 at [259]. Avonwick must, accordingly, provide clear and cogent evidence that Mr Gaiduk was intentionally and dishonestly deceived by the Defendants.
188. In terms of reliance, again there was no dispute between the parties as to what the law requires. As I put it in **Marme**, at [279], a claimant “*must show a causal connection between the making of the representation and its decision to enter into the contract which ensued from the making of the representation*”. That this is a factual question was made clear by Lord Toulson in **Hayward v Zurich** [2016] UKSC 48 at [63].
189. As to what is entailed by inducement, the test is not “*what would you have done if you had been told the truth?*”, to adopt the language used by Clarke J in **Raiffeisen** at [182] (albeit when explaining that that is, indeed, not the test), but, as Males J (as he then was) put it in **Leni Gas v Malta Oil Pty Ltd** [2014] EWHC 893 (Comm) at [17]:

“... whether the claimant would have entered into the contract if the representation had not been made at all, and not whether it would have done so if a different representation (i.e. the truth) had been made to it”.

190. Furthermore, despite some prior judicial debate (including in **Marme**) as to whether a claimant must show that he *would* not have contracted unless the representation had been made to him or only that he *might* not have contracted, the position is now clear in the light of the decision of the Court of Appeal in **BV Nederlandse Industrie Van Eiprodukten v Rembrandt** [2019] EWCA Civ 596, in which Longmore LJ explained as follows at [32]:

“In the light of these authorities it seems to me that the law at the end of the nineteenth century had assimilated the requirement of inducement in the tort of deceit and in actions for rescission for fraudulent misrepresentation and could be stated as being that the representee had to prove he had been materially ‘influenced’ by the representations in the sense that it was ‘actively present to his mind’ to use Bowen LJ’s phrase; that, whereas there is a presumption that a statement, likely to induce a representee to enter into a contract, did so induce him, that is merely a presumption of fact which is to be taken into account along with all the evidence. There was no requirement as a matter of law, that the representee should state in terms that he would not have made the contract but for the misrepresentation but the absence of such a statement was part of the overall evidential picture from which the judge had to ascertain whether there was inducement or not. The fact that there were other reasons (besides the representation) for the claimant to have made the contract did not mean that he was not induced by the representation made. Insofar as Reynell v Sprye had said that there was no need for evidence from the claimant or that it was sufficient if the claimant ‘might’ have made the contract, if there had been no representation, that

did not represent the law at any rate if ‘might’ meant something different from ‘influencing’ his decision in deciding whether to make the contract.”

191. Longmore LJ went on at [45] to say this:

“I have already pointed out the ambiguity in the word ‘might’ which was in fact used in Barton v Armstrong. If it means no more than being actively present in the mind of the representee to repeat the phrase of Bowen LJ, it is perhaps a convenient shorthand. However, if it means that the court cannot make up its mind on inducement and, therefore, decides as a matter of law to give the representee the benefit of the doubt, it is not a helpful concept because that would be contrary to the law as I conceive it to be, see para 32 above, which requires the representee to prove inducement albeit with the assistance of a presumption that ‘will be very difficult to rebut’. To some extent this is a matter of terminology but terminology can be important in some cases.”

It follows that the test entails asking whether there has been a material influence, it being possible that a representation is but one reason among several reasons provided that it is nonetheless itself material.

192. There is in this respect also a presumption to be taken into account, as noted by Longmore LJ at [41]-[42] when pointing out that in **Zurich Insurance v Hayward** [2017] AC 142 at [34], Lord Clarke considered it right to say that the inference is particularly strong where the misrepresentation was fraudulent. Longmore LJ had earlier, indeed, in the course of reviewing what he described as “*the Victorian authorities*”, stated as follows at [25]:

“This to my mind shows that if a representor fraudulently intends his words to be taken in a certain sense and the representee understands them in that sense and enters into a contract, it is likely to be inferred that the representee was induced to enter into the contract on the faith of the representor’s statement. It is fair to call this a presumption of inducement. However, it is a presumption of fact which can be rebutted, not a presumption of law which cannot be rebutted or can only be rebutted in a particular way. The tribunal of fact has to make up its mind on the question whether the representee was induced by the representation on the basis of all the evidence available to it.”

The alleged Price Representation

193. It is against this background that I come on now to address the alleged Price Representation.

194. Avonwick’s pleaded case as to this is as follows:

“4. A meeting took place at the office of Mr Gaiduk in Kiev in June 2009 to discuss terms for a sale. At the start of the meeting Mr Taruta attended by telephone and indicated that Mr Mkrchan would be speaking on his behalf. After the call with Mr Taruta ended, Mr Mkrchan explained to Mr Gaiduk and Mr Petrov that he and Mr Taruta had found a buyer who wished to acquire a controlling interest in IUD, and that the buyer was a Russian entity that wished its identity to remain confidential.

5. Mr Mkrtchan proposed that a transaction be structured as follows: the Claimant would sell its 33.84% interest in IUD to Azitio and Dargamo. They would in turn (at about the same time) sell that stake plus approximately 8.5% of each of their own participation interests in IUD to the Russian Buyer, thus providing it with a controlling interest of 50% plus two shares.

6. Mr Mkrtchan represented orally to Mr Gaiduk and Mr Petrov that ... the price paid to the Claimant for its 33.84% participation interest would represent the same 'price per share' as paid by the Russian Buyer to the Defendants for the combined 50% plus two shares ('the Price Representation') ...

7. The Price Representation and/or the First Asset Representation (or words to similar effect) was repeated to Mr Gaiduk and/or Mr Petrov on various occasions by Mr Mkrtchan and/or Mr Taruta (acting at all material times on behalf of Azitio and Dargamo respectively) during the negotiations for the sale of the Claimant's interest in the period June - December 2009. During the same period, Mr Gaiduk and/or Mr Petrov were also told by Mr Mkrtchan and/or Mr Taruta that the Russian Buyer also required Mr Gaiduk wife's stake in the Hyatt Hotel in Kiev as a condition of acquiring the IUD interest (the 'Second Asset Representation' and, together with the First Asset Representation, the 'Asset Representations'). In particular, Mr Mkrtchan and Mr Taruta separately and repeatedly emphasised to Mr Gaiduk and/or Mr Petrov that the price that they were offering (which was less than the Claimant had hoped for) was determined by the position taken by the Russian Buyer, and that since the Defendants were getting the same price per share, all of them were in the same position."

195. As the Gaiduk Parties stress, much of what was said at the June 2009 Meeting is not in dispute. Thus, Mr Mkrtchan admits that a meeting took place between him, Mr Gaiduk and Mr Petrov at Mr Gaiduk's office in Kiev in June 2009 to discuss terms for a sale of the Castlerose Interest. At the start of the meeting there was a call between Mr Gaiduk, Mr Mkrtchan and Mr Petrov in Kiev and Mr Taruta in Donetsk. Mr Taruta was aware of the nature of the meeting and approved of it. It is common ground that after this call ended, the discussion continued between Mr Gaiduk, Mr Mkrtchan, and Mr Petrov. Mr Mkrtchan, furthermore, admits that he told Mr Gaiduk and Mr Petrov that he and Mr Taruta had found a buyer who wished to acquire a controlling interest in IUD, and that the buyer was a Russian entity that wished its identity to remain confidential. Mr Mkrtchan indicated that the price for Avonwick's stake would be US\$750 million.
196. Before turning to the evidence regarding the alleged Price Representation itself, it is important to make it clear that, ultimately, the Gaiduk Parties' Asset Representations case was not pressed, their exclusive focus being upon the Price Representation case. It is unnecessary, in the circumstances, to explore in any detail that case. Nonetheless, I do bear in mind the fact that this case was advanced on the part of the Gaiduk Parties since it is obviously material to an assessment of the Price Representation case which continued to be maintained.
197. It is necessary, furthermore, to address what Mr Foxton QC characterised as the ever-evolving nature of the Price Representation (albeit not in quite the detail deployed by Mr Foxton QC) since there is merit in the criticism which has been levelled. Thus, in response to the case as pleaded by the Gaiduk Parties, at paragraph 16 of the Taruta Parties' Defence to the Avonwick claim, the Taruta Parties asserted that:

“During 2009, the Shareholders continued to negotiate together for the sale of the Castlerose Interest in IUD to the Mkrтчan Parties and the Taruta Parties ...”.

198. In Avonwick’s Reply this was admitted, although Avonwick subsequently amended so as to change that admission to a denial and to add this:

“There were no negotiations concerning the Claimant’s stake in IUD in the first half of 2009, and the subsequent negotiations concerned the sale of Avonwick’s interest to the Russian Buyer (through a back-to-back sale to Azitio and Dargamo), not a sale to the Taruta and Mkrтчan Parties ...”.

199. In other words, as Mr Foxtton QC put it, what had originally been an admission that what was being discussed in 2009 was a sale of Avonwick’s interest to the Taruta and Mkrтчan Parties became a denial. This was, then, supported by what Mr Gaiduk had to say in his witness statements, in which there was no mention of there having been two meetings in June 2009; indeed, in opening, the Gaiduk Parties’ position was that there was a single June 2009 meeting. As he was giving his oral evidence, however, asked about the inconsistency between the originally pleaded case and the more recent amendment, Mr Gaiduk produced his account of key features of his sale of the Castlerose Interest being outlined by Mr Mkrтчan at two different meetings, despite the fact that in his written evidence, when referring to further meetings with Mr Mkrтчan around the middle or end of June 2009, he made no suggestion that any significant features of the transaction were changed after the initial June 2009 Meeting or that the structure of the transaction changed after that meeting.
200. The point goes further than this, however, since the evidence which Mr Gaiduk went on to give when cross-examined had the appearance of having been made up. This saw Mr Gaiduk insist that the structure of the transaction proposed at the June 2009 Meeting was different to the transaction proposed at the further June meeting with Mr Mkrтчan when he agreed to sell the Castlerose Interest.
201. Specifically, it was put to Mr Gaiduk that there was inconsistency between his saying in his written evidence that at the June 2009 Meeting Mr Mkrтчan was acting as a *“messenger from the Russian Buyer, communicating the Russian Buyer’s offer”* and paragraph 5 of the Particulars of Claim which states that the transaction would be structured as a sale by Avonwick of its 33.84% interest in IUD to Azitio and Dargamo. Mr Gaiduk explained in response to this that paragraphs 4 and 5 of the Particulars of Claim relate to two different meetings: the first being concerned with the June 2009 Meeting, the second relating to *“the next meeting, when we discussed how to do it technically ...”*. He, then, went on to say that it was at the first meeting that the proposal was made that Avonwick should sell its indirect interest in IUD (via a sale of its shareholding in Castlerose) directly to the Russian Buyer. However, when being cross-examined by Mr Wolfson QC three days later and asked how this was consistent with his having stated in his first witness statement that he *“was never asked if Avonwick was willing to provide more extensive warranties to the Russian Buyer or if Avonwick would be willing to sell part of its interest in ISD together with Azitio and Dargamo directly to the Russian Buyer”*, his answer was rather less than compelling.
202. The relevant exchanges are these:

“My Lord, this does not contradict or is not inconsistent at all. Can I just go back to the meeting that the counsel was referring to? Mr Mkrchan was saying that the Russian Buyer wants the majority stake ... He said, apart from my share, the Russian Buyer was also buying their partial share. So there was no inconsistency that the majority share could have been purchased like that. When it turned out that the Russian Buyer wanted a controlling stake holding, controlling shareholding, it became clear that it was impossible to do directly. The partners first had to buy my share, so that having owned 100% they would have sold a controlling shareholding ... At my first meeting, Mkrchan said ‘majority shareholding’ and nothing about a controlling package. You can have a majority stake holding in an asset without having control over it. They are completely separate things.

...

MR WOLFSON: At the time of the June meeting, did you or did you not understand that Avonwick would have a direct contract between itself and the Russian Buyer; yes or no?

A: During the first June meeting I understood that we shall have a direct contract because it allowed that to happen, because the majority shareholding could have been purchased in different ways or could have been obtained in different ways.”

203. As Mr Foxton QC highlighted in closing, this is not an explanation which makes any sense for a number of reasons.

204. First, it is difficult to square with the evidence which Mr Gaiduk gave to Mr Foxton QC three days earlier, when he stated that in *“the first meeting Mr Mkrchan told me that he cannot name the Russian Buyer because he wants to buy the controlling shareholding and Mr Taruta and he stays in business ...”*.

205. Secondly, and to repeat, it is inconsistent with the Gaiduk Parties’ pleaded case that at the June 2009 Meeting, when the Price Representation was made:

“Mr Mkrchan explained to Mr Gaiduk and Mr Petrov that he and Mr Taruta had found a buyer who wished to acquire a controlling interest in IUD, and that the buyer was a Russian entity that wished its identity to remain confidential”.

206. Thirdly, it is at odds with certain evidence given by the Gaiduk Parties’ solicitor when permission to serve out of the jurisdiction was sought at the start of the proceedings, namely that Mr Gaiduk and Mr Petrov had instructed him that:

“in June 2009, a meeting took place at the office of Mr Gaiduk in Kiev to discuss terms for a sale of the Claimant’s stake in IUD. The Claimant’s recollection is that Mr Mkrchan, who was acting on behalf of Mr Taruta, explained to Mr Gaiduk and Mr Petrov that he and Mr Taruta had found a buyer who wished to acquire a controlling interest in IUD, and that the buyer was a Russian entity that wished its identity to remain confidential”.

The relevant witness statement, then, went on to state this:

“The Claimant recalls that Mr Mkrтчan proposed a transaction whereby the Claimant would sell its 33.84% interest in IUD to Azitio and Dargamo. They would in turn (at the same time) sell that stake plus approximately 8.5% of each of their own participation interests in IUD to the Russian Buyer, thus providing it with a controlling interest of 50% plus two shares and leaving Azitio and Dargamo as minority shareholders.”

207. Furthermore, again as Mr Foxton QC pointed out, Mr Petrov’s evidence has consistently been that the Price Representation was made at the same meeting when the structure of the sale as a sale by Avonwick to Dargamo and Azitio was agreed, that structure having been put forward in response to questions from Mr Petrov as to how it would be feasible to frame a deal between Mr Gaiduk and the Russian Buyer in time.
208. In the circumstances, I consider that there is force in Mr Foxton QC’s submission that, in trying to reconcile his evidence about Mr Mkrтчan bringing him an offer from the Russian Buyer with the case which the Gaiduk Parties have advanced, Mr Gaiduk put forward a version of events which should not be accepted, although I am less clear whether Mr Gaiduk deliberately invented a false story or has simply persuaded himself that what he now says happened, in fact, happened. I am, accordingly, satisfied that it was not the case that at the June 2009 Meeting he was told that the Russian Buyer only wanted a majority interest, which it could get by way of direct transfers from Dargamo, Azitio and Avonwick, and that it was only at a subsequent June meeting that he was told that the Russian Buyer wanted a controlling interest.
209. That is not what was pleaded since the case as pleaded was that it was at the first meeting that he was told that the Russian Buyer wanted a controlling interest rather than just a majority one. This is not merely a pleading point, however, since the inconsistency highlighted by Mr Foxton QC inevitably impacts on the credibility of the Gaiduk Parties’ case that the Price Representation was made. A controlling interest could not be transferred directly from Dargamo, Azitio and Avonwick. Nor did the documents subsequently produced (specifically the 15 June ‘Iris’ Shareholders’ Agreement term sheet) reflect an intention that Mr Gaiduk should sell to the Russian Buyer and then remain as an ongoing shareholder in IUD along with the Russian Buyer, Dargamo and Azitio.
210. It is important also to consider context since this inevitably informs the analysis of how probable it was that the Price Representation was made. There are a number of aspects which arise here.
211. The first relates to previous negotiations regarding the sale of Mr Gaiduk’s stake. The Gaiduk Parties rely heavily on the much lower price per share that Mr Gaiduk received in the 2009 transaction as evidence that he must have been deceived. However, the Defendants point out, not unreasonably in my view, that in 2008 Mr Gaiduk was content with a transaction where his Partners received a much higher price per share, which means that a deal under which Mr Gaiduk would receive the same price per share in 2009 was inherently implausible.
212. In 2008, the Partners had agreed that Mr Gaiduk would sell his stake in IUD to Mr Taruta and Mr Mkrтчan for around US\$3 billion. This was to be financed by a merger with Evraz. Mr Gaiduk would have known that, for their part, Mr Taruta and Mr Mkrтчan intended to retain 27.5% in the proposed merger because a draft

Memorandum of Intent regarding the proposed Evraz merger, dated 13 June 2008, was also emailed by Mr Pisarevsky (who was advising Mr Mkrtchan and Mr Taruta) to Mr Petrov on 1 December 2008, who sent it to Mr Gaiduk two days later. This made it clear that Mr Mkrtchan and Mr Taruta had been seeking a cash payment plus a 27.5% stake in the merged entity.

213. After the merger collapsed in the autumn of 2008, Mr Gaiduk used his contacts and travelled to Moscow to meet Mr Abramov, one of Evraz's majority shareholders. At this meeting, Mr Gaiduk was told that in the merger Mr Taruta and Mr Mkrtchan would have received a US\$6 billion cash payment and retained 27.5% of the merged entity had the merger gone ahead.
214. As to that 27.5% interest, the putative merged entity was valued on 4 June 2008 by Merrill Lynch at US\$66.65 billion, meaning that the 27.5% retained by Mr Taruta and Mr Mkrtchan would have been worth approximately US\$18 billion. It follows, as was explored with Mr Gaiduk in cross-examination, that the total consideration received by Mr Taruta and Mr Mkrtchan for 100% of IUD would have been US\$24 billion (US\$6 billion and US\$18 billion), or US\$240 million per 1%. Mr Gaiduk, by contrast, stood to receive a price per 1% of approximately US\$89 million (calculated by reference to the US\$3 billion he was to have received for his 33.84% interest). It further follows that the price disparity was even greater in 2008 than it was in 2009.
215. The Defendants, therefore, say, again not unreasonably in my view, that the Evraz merger made it clear to Mr Gaiduk that any sale to a third-party would involve two very different transactions at very different prices. In fact, however, the point goes further since it appears that, in the context of the Evraz deal, Mr Gaiduk had no particular interest in knowing the amount of the consideration which Mr Mkrtchan and Mr Taruta had been seeking, as this exchange in Mr Gaiduk's cross-examination demonstrates:

"Q. Now, in 2008 you had teams of both internal and external advisers, didn't you?"

A. Yes, that's correct.

Q. Including Mr Kravets, who was very experienced in corporate finance; correct?"

A. Yes, that's correct.

Q. And your external advisers included PwC, UBS and Allen & Overy, didn't they?"

A. Yes, that's correct.

Q. You confirmed to Mr Foxtan that -- he was asking you about a time in November 2007 when you asked for a price of \$3.5 billion for your family stake; you confirmed to Mr Foxtan that you had a very good feel for the value of IUD. That is right, isn't it?..."

A. Yes, that is correct.

Q. With the information available to you, sir, you and your advisers could easily have produced an approximate valuation of both IUD and Evraz, couldn't you?"

A. Yes.

Q. So you could easily have calculated the approximate value of the 27.5% stake in the merged entity that Mr Mkrтчan and Mr Taruta were seeking under the proposed deal with Evraz? You could have done that, couldn't you?

A. Yes. It was difficult, but theoretically I think it could have been done.

Q. If you had been at all interested in the consideration which Mr Mkrтчan and Mr Taruta were seeking in the Evraz merger deal, you would have instructed your advisers to do that calculation, wouldn't you?

A. It was possible, but I didn't need that."

216. That said, it needs to be appreciated that the position in 2008 was somewhat different since Mr Gaiduk had initiated that round of negotiations and set the price of US\$3 billion. Once he had achieved a satisfactory price, it is entirely understandable that he would not have concerned himself with the possibility that his Partners might, then, turn a profit on any related transaction. By contrast, in 2009 Mr Gaiduk was presented with a much lower price and told that there was no room for negotiation. In those circumstances, it is, in my view, much more likely that he would wish to know that everyone was, as it were, "*in the same boat*". Moreover, the two deals were not directly comparable. I am not, therefore, persuaded, on balance, that the Evraz merger particularly assists one way or the other.
217. This leads to a closely related second point. A central argument advanced by the Gaiduk Parties was that it would be inconceivable for Mr Gaiduk not to have asked about the price. The Defendants' answer to this was to make the point that, since Mr Gaiduk was looking for a "*clean break*", he did not wish to give warranties or indemnities in relation to IUD, but instead was simply looking to extricate himself from his relationship with Mr Taruta and Mr Mkrтчan as quickly and cleanly as possible. This was said to explain his willingness to accept the price of US\$750 million without further negotiation. I cannot agree with that, however, because I am clear that, whilst Mr Gaiduk may have been willing to accept a lower price in order to facilitate a "*clean break*", I do not consider that he would have been so eager to exit the business that he would do so on disadvantageous terms. I will come on later, however, to deal with the broader warranties/indemnities point since it is one upon which significant reliance was placed by the Defendants.
218. The third related point advanced by the Defendants is that by June 2009 the relationship had broken down to such an extent that Mr Gaiduk would never have trusted Mr Mkrтчan if he had made the Price Representation. The Defendants rely, in particular, on Mr Petrov's evidence that Mr Gaiduk felt that he had been taken advantage of when he discovered the scale of the 2008 withdrawals. I cannot accept this point either, however, since, even if there was some ill feeling between the Partners by the time of the June 2009 Meeting, as I consider there was, it is unrealistic to suppose that Mr Gaiduk would, as a result, have doubted everything that he was told by them, particularly if it was consistent with what he might have expected. The Partners had worked together for many years and had, as is common ground, enjoyed in that time a relationship of trust and confidence. Furthermore, if Mr Gaiduk did, in fact, mistrust Mr Mkrтчan and Mr Taruta, then, it seems to me that he would have been wary of any attempt by them to exploit the situation, which would have made it more, not less, likely

that he would have sought confirmation of the price being paid by the Russian Buyer. Again, however, the mistrust point is one to which I shall return.

219. It is with these introductory, but not insignificant, considerations in mind that I come on to address the specific submissions which were made by the parties. In doing so, no less importantly, I do not overlook Mr Calver QC's submission, which I consider to be well-founded, that the starting point is that it was not in dispute as between Mr Mkrtchan and Mr Gaiduk that Mr Mkrtchan did, indeed, say the things pleaded in both paragraphs 4 and 5 of the Particulars of Claim.
220. Mr Mkrtchan admits, in short, that he told Mr Gaiduk that there was a Russian Buyer of their stakes but that the way in which the transaction would be structured would be by way of a sale of the Gaiduk Parties' interest to Azitio and Dargamo and, then, a sale of that stake (together with 8.5% stakes of both Azitio and Dargamo) to the Russian Buyer at around the same time. The issue between the Gaiduk Parties and the Mkrtchan Parties is as to whether Mr Mkrtchan also told Mr Gaiduk (and Mr Petrov) that they would be paid the same price per share. This, in circumstances where Mr Mkrtchan admits in the Mkrtchan Parties' Defence that he told them that "*the price that was being offered to Avonwick was determined by the position of the Russian Buyer*" but not otherwise and not, as the Gaiduk Parties would have it, that Mr Gaiduk was told that he would be paid US\$750 million for his shareholding, that this was the best price that Mr Mkrtchan and Mr Taruta could obtain in the market, that there was a Russian Buyer for the combined majority stake whose identity could not be revealed and that Mr Gaiduk would receive the same price proportionate for the share that he was selling as Mr Taruta and Mr Mkrtchan would receive for theirs.
221. This is the critical issue – not only as between the Gaiduk Parties and the Mkrtchan Parties (whose principals, Mr Gaiduk and Mr Mkrtchan, were in attendance at the June 2009 Meeting) but also as between the Gaiduk Parties and the Taruta Parties (the latter of whose principal, Mr Taruta, was not in attendance at the meeting).
222. Mr Calver QC submitted that, considering what a reasonable person would have understood from the words used in the context in which they were used, in line with the approach advocated by Toulson J in *IFE Fund*, these are representations (including, crucially, the Price Representation) which the Court should decide were made.
223. It was Mr Calver QC's submission, furthermore, that what he described as the inherent probabilities supported the Gaiduk Parties' case. He made the point, in particular, that this is not a case where the parties can remember nothing about a meeting which took place ten years ago and where their recollections are, as a result, inherently unreliable since, in fact, Mr Gaiduk, Mr Petrov and Mr Mkrtchan each have a clear recollection as to what was discussed by them in June 2009 with the only dispute between them being on whether Mr Gaiduk did or did not ask what price the Russian Buyer had agreed to pay for the IUD shares.
224. Mr Calver QC helpfully in this context identified three possibilities as to what happened when Mr Mkrtchan arrived at Mr Gaiduk's office in June 2009 to tell him that he had found a Russian Buyer for a combined majority stake in IUD of 50% plus 2 shares.
225. The first of the possibilities identified by Mr Calver QC is that, as the Defendants say, Mr Gaiduk failed to ask what the price was being paid by the Russian Buyer, and so

never learned it. The second is that, as the Gaiduk Parties say, Mr Gaiduk did ask, and was lied to, being told that he was getting the same price per share as his two partners. The third is that Mr Gaiduk did ask, was told the truth, but asked nothing more and nonetheless caused Avonwick to enter into the Castlerose SPA, knowing the huge disparity between the prices.

226. The third possibility was not suggested by anybody, not least because nobody suggests that Mr Gaiduk was told the price. I need, therefore, say nothing further about it. As to the first possibility, it was Mr Calver QC's submission that this defies common sense and that only the second possibility makes any sense at all. Mr Calver QC suggested, indeed, that it is "*perfectly obvious*" that, since Mr Gaiduk and Mr Mkrтчan were plainly having a conversation about the position of the Russian Buyer as to price, Mr Gaiduk must have asked what price the Russian Buyer was paying and that "*the only rational conclusion*" is that he was, indeed, told that they were all getting the same price per share.
227. Mr Calver QC in this context made much play of the fact that, when pressed in cross-examination on this issue, Mr Taruta's response was to suggest that Mr Mkrтчan could not have said that the price that was being offered to Avonwick was determined by the position of the Russian Buyer because "*he is not a foe of himself*". Since, however, Mr Taruta was not at the meeting himself, this is not evidence which, in my view, much assists other than, perhaps, to demonstrate Mr Taruta's willingness to act as an advocate for his own case.
228. More substantively, Mr Calver QC relied also upon Mr Taruta's acceptance of the fact that he and Mr Mkrтчan had by the time of the June 2009 Meeting worked out the price which they were willing to pay Mr Gaiduk by reference to the price which they were themselves receiving from the Russian Buyer – indeed, that he had given consideration to the price per share which each of them (Mr Taruta, Mr Mkrтчan and Mr Gaiduk) would receive. Specifically, Mr Calver QC highlighted how Mr Taruta and Mr Mkrтчan met in their offices in Donetsk in June 2009, before Mr Mkrтчan left for Kiev to discuss matters with Mr Gaiduk, in order to agree a price with Mr Gaiduk in order that the deal with the Russian Buyer could be progressed or, as Mr Taruta somewhat inaccurately characterised it, in order to renegotiate the price under the Evraz deal.
229. As Mr Taruta accepted, by the time of this meeting, he and Mr Mkrтчan knew that they were getting between US\$2.5 billion and US\$2.75 billion from the Russian Buyer. He had, indeed, again as he accepted, calculated that, on that basis, the price for 1% of IUD was US\$105 million. Moreover, as also acknowledged by Mr Taruta, the agreement which he and Mr Mkrтчan reached at the meeting was arrived at by reference to their knowledge of what the Russian Buyer was willing to pay. It follows, Mr Calver QC submitted, and I agree, that Mr Taruta and Mr Mkrтчan had very much in mind the relative prices which would be obtained by themselves and Mr Gaiduk.
230. Indeed, although not altogether contemporaneous since they date from several months later, after the June 2009 Meeting, Mr Calver QC was also able to point to certain handwritten notes made by Mr Taruta concerning the transaction overall involving both the deal with the Russian Buyer and the deal with Mr Gaiduk.

231. The first of these notes was made, so Mr Taruta explained, in either September or December 2009. It shows Mr Taruta giving “2500” as the price payable by the Russian Buyer less the commission to Mr Bakai. From this, he deducted the US\$750 million payable to Mr Gaiduk, indicating this with “*Gaiduk (33.84%)*” on one side and “22.16” as the price for 1% of that interest. Mr Taruta then writes “16.6” in order to reflect the share which he and Mr Mkrctchan were selling to the Russian Buyer. Next to this, the figure “1750” appears, i.e. US\$2.5 billion (the proceeds from the Russian Buyer transaction) less US\$750 million (what was to be paid to Mr Gaiduk). Alongside this is “105.42”, which is the price for 1% of IUD calculated by reference to the fact that the price for 16.6% is US1.75 billion. Mr Taruta, then, averaged 105.42 (the price per share received by himself and Mr Mkrctchan) and 22.16 (the price per share received by Mr Gaiduk), so as to arrive at a “63.79” blended figure, before, then, giving US\$361 million as 5.66% multiplied by that blended figure.
232. The second handwritten note was produced, it seems shortly after 24 December 2009, in the context of the amount to be paid by Mr Mkrctchan under the Deed of Amendment to the Settlement Agreement. As before, Mr Taruta adopted a figure of “2500” as the starting point for the proceeds for the Russian Buyer. Similarly, he again took a figure of “1750” for the cash that he and Mr Mkrctchan were to receive from the Russian Buyer. Although the value produced for Mr Gaiduk’s stake is not the same but a little lower since it uses 33.4% rather than 33.84% as the basis of the calculation, the figures are much the same.
233. Importantly, so Mr Calver QC submitted, what this second note shows (like the earlier note) is that Mr Taruta was thinking about the transaction in terms of the price per share that would be received by all the participants, that he was connecting the two transactions and that no distinction in his mind fell to be made between majority and minority interests in IUD, with no minority discount being applied. This is significant, Mr Calver QC went on to submit, for at least two reasons: first, because it demonstrates that Mr Gaiduk’s interest in knowing what price per share was going to be paid was entirely to be expected; and secondly, because it shows that Mr Taruta, and so also Mr Mkrctchan, were trying to generate as much profit as possible from what was, in essence, a ‘flip’ transaction and were calculating that profit by reference to the price per share. It does not, in my view, follow from this, however, that the Price Representation was made. On the contrary, it seems to me that the handwritten notes make it neither more nor less likely that the Price Representation was made.
234. The same applies, in my view, to Mr Taruta’s acceptance that by the time of the June 2009 Meeting he had worked out the price which he and Mr Mkrctchan were willing to pay Mr Gaiduk by reference to the price which they were themselves receiving from the Russian Buyer, giving consideration to the price per share which each of them (Mr Taruta, Mr Mkrctchan and Mr Gaiduk) would receive. This is because whether the Price Representation was made or not ultimately depends on an assessment as to what is likely to have been stated during the course of the June 2009 Meeting, and that is an issue on which little (if any) light is cast by evidence such as this. The focus needs, obviously enough, to be on the evidence which exists specifically in relation to that meeting.
235. The evidence as to this is not substantially in dispute. Thus, as Mr Calver QC sought to highlight, not only does Mr Mkrctchan admit that the meeting took place, but it is common ground also that at the start of the meeting there was a telephone call between

Mr Gaiduk, Mr Mkrtchan and Mr Petrov in Kiev and Mr Taruta in Donetsk, at which Mr Taruta's awareness of what was about to be said was discussed.

236. Furthermore, it was Mr Taruta's own evidence that it "*was natural for Mr Mkrtchan to take the lead on negotiating with Mr Gaiduk*" on his behalf, and Mr Mkrtchan admits also that "*At the start of the meeting Mr Taruta attended by telephone and indicated that Mr Mkrtchan would be speaking on his behalf*".
237. In addition, Mr Mkrtchan admits that he told Mr Gaiduk and Mr Petrov that he and Mr Taruta had found a buyer who wished to acquire a controlling interest in IUD, and that the buyer was a Russian entity which wished its identity to remain confidential. Mr Mkrtchan, then, indicated that the price for Avonwick's stake would be US\$750 million. Mr Gaiduk and Mr Petrov recall that this was presented as the price that the Russian Buyer was willing to pay for the Gaiduk Parties' stake in IUD.
238. It is also common ground that there was a discussion of the Russian Buyer's identity and the need for confidentiality.
239. Nor is it in dispute that at the meeting Mr Mkrtchan stated that the Russian Buyer wished to acquire other assets including various metallurgical assets, UGMK, and the Yalta Hotel and Donbass Holiday Home as part of the transaction.
240. Returning to the telephone call which took place at the start of the meeting, such controversy as exists is limited. It is as to whether, as Mr Gaiduk put it in his oral evidence, he "*wanted to ask him [Mr Taruta] two straightforward questions*", namely whether he was "*aware of the proposal*" and whether he would "*confirm that Mr Mkrtchan has the authority to talk on behalf of both of you as opposed to just one of you*".
241. It is important to appreciate nonetheless that the controversy is not as between Mr Gaiduk and Mr Mkrtchan since Mr Mkrtchan admits in paragraph 10 of the Mkrtchan Defence that at "*the start of the meeting Mr Taruta attended by telephone and indicated that Mr Mkrtchan would be speaking on his behalf*". Rather, the controversy is as regards Mr Taruta, who disputes not only what Mr Gaiduk has to say concerning the telephone call but also what Mr Mkrtchan admits, for Mr Taruta insisted in evidence that he confirmed during the call that he would agree to pay whatever price Mr Mkrtchan agreed to pay.
242. This is not evidence which, however, I can accept since I am quite clear that Mr Mkrtchan was taking the lead in the negotiations with Mr Gaiduk, as ultimately even Mr Taruta accepted when agreeing also that Mr Mkrtchan was perceived to be a "*more hard-nosed*" negotiator. Mr Taruta also accepted that he placed no limitation on Mr Mkrtchan's authority to speak for him, whether in his private discussions with Mr Mkrtchan or in the telephone call at the start of the meeting or, indeed, at any other time.
243. It is, furthermore, inherently unlikely, in my view, that a sophisticated businessman such as Mr Taruta would agree whatever price Mr Mkrtchan negotiated for himself with Mr Gaiduk. It is much more likely that, instead, he agreed and stated simply that Mr Mkrtchan would be negotiating on his behalf as well as on his own behalf. The more

so, in circumstances where Mr Mkrtchan and Mr Taruta had acted jointly in offering to buy Mr Gaiduk's stake in 2008.

244. This is, of course, a matter which bears on a later issue, namely joint liability in respect of the Price Representation if it was made. It is, however, relevant also to an assessment of Mr Taruta's evidence more generally and, specifically, the evidence which he gave concerning the making of the Price Representation since I am quite satisfied that Mr Taruta's evidence on this topic was untruthful. As such, it is appropriate to factor this into the assessment of whether the Price Representation was made and to do so in the Gaiduk Parties' favour.
245. This is not, however, the only feature concerning the June 2009 Meeting consideration of which assists the Gaiduk Parties' case since I also agree with Mr Calver QC when he submitted that the failure to mention the identity of the Russian Buyer, VEB, during the June 2009 Meeting gives rise to at least the suspicion that this was because neither Mr Taruta nor Mr Mkrtchan wanted VEB's identity to be known in order that Mr Gaiduk could not try to find out what price was to be paid.
246. That VEB was not named as the Russian Buyer was, ultimately at least, not in dispute since, when during the course of his evidence Mr Taruta was asked about Mr Mkrtchan's assertion in his Defence that he and Mr Taruta had found a Buyer "*who was a Russian entity that wished its identity to remain confidential*", Mr Taruta had this to say:
- "The only explanation I can venture would be this. The actual buyer is the VEB, and it is true that Mr Mkrtchan did not mention that and nor did I, because that was an agreement that had been struck between ourselves. VEB, by virtue of its legal nature, because it is a state-owned corporation, did not have the right to buy anything directly. So a very complex and sophisticated structure had to be devised and we did not say that the end buyer is the VEB..."*
247. This is consistent with Mr Petrov's evidence that he recalls that VEB was mentioned, although only in the capacity of a financing bank, and I reject Mr Taruta's subsequent suggestion in evidence that Mr Gaiduk had been told that VEB was the *de facto* buyer but not the *de jure* buyer. This is evidence which was given by somebody who was not at the meeting itself. It is also evidence which seems to me to have an air of unreality about it. I am in no doubt at all that it was contrived. I am clear that VEB was mentioned but only in the capacity of a financing bank and not as the Russian Buyer, and that Mr Gaiduk was told that the Russian Buyer wished its identity to remain confidential.
248. On the other hand, as previously mentioned, there is the evidence given by Mr Gaiduk concerning whether Mr Mkrtchan presented the offer as the sum which the Russian Buyer was willing to pay for Mr Gaiduk's stake in IUD to consider. This is, of course, related to the issue of whether there was more than one meeting in June or a single meeting, another topic which has already been considered and which casts some doubt on the evidence which was given by both Mr Gaiduk himself and by Mr Petrov on his behalf.
249. Although Mr Calver QC sought to justify the evidence which, in the event, came to be given by Mr Gaiduk on this issue, namely that there would be a direct sale between Avonwick and the Russian Buyer, pointing to certain material which suggests that the

Russian Buyer itself viewed the transaction in the same way, in particular the term sheet in the form which it took until at least 15 June 2009, the evidence given by Mr Gaiduk on this matter was less than satisfactory. This inevitably needs to be considered when analysing the evidence which he gave concerning the Price Representation more generally, and specifically on the critical issue in relation to which his evidence (and the Gaiduk Parties' case) differs from what has been admitted by Mr Mkrтчan.

250. There are, in short, aspects of the evidence which weigh both in favour of the Gaiduk Parties and against them, and *vice versa* as regards both the Taruta Parties and the Mkrтчan Parties. It is with this in mind that the inherent probabilities identified by Mr Calver QC must be considered – specifically the first and second since, I repeat, nobody promulgates the third.
251. Mr Calver QC submitted in this regard that Mr Taruta had no respectable answer when asked, in effect, why he did not tell Mr Gaiduk what price the Russian Buyer was paying. Mr Taruta's answer was that "*Mr Gaiduk never asked us about that*" but I agree with Mr Calver QC when he submitted that this does not explain why neither Mr Taruta nor Mr Mkrтчan (the only of the two present at the June 2009 Meeting) told Mr Gaiduk, knowing as they did at this stage that the Russian Buyer was paying US\$2.75 billion for a 50% plus 1 share stake of which 33.84% belonged to Mr Gaiduk, unless there was a reason why they wished to keep it from him. The following cross-examination exchange is instructive in this regard:

"Q. I am asking you please to answer my question, it was a very simple question, which is: there was nothing to stop you, was there, from telling Mr Gaiduk at your meeting in June 2009 that you were going to be paid 2.75 billion by the Russian Buyer?"

A. If Mr Gaiduk had asked me, I would have told him. I never concealed that. It was not a secret."

252. Later, however, Mr Taruta contradicted himself when he suggested that the price payable under the VEB SPA was confidential and that, as such, he had no right to disclose it even to Mr Gaiduk.
253. The point goes further since, as Mr Calver QC went on to highlight, Mr Taruta was asked a series of questions which he was unable to answer in a way which was even remotely compelling. First, he was asked this:

"You see, Mr Taruta, as soon as somebody is told these two critical pieces of information at a meeting, firstly, there is a Russian Buyer for your shares who wishes to remain confidential, and secondly, that the price that is being offered to you by your fellow shareholders was determined by the position of the Russian Buyer, what would be your very first question?"

He gave what can only be described as a non-answer to this question:

"The first question I would have asked would have been the following, 'I want to withdraw. My dear fellow partners, how much are you happy to pay me? If I am happy, I will accept the price. If I am not, I will try to identify an alternative buyer.' I have been working in the metallurgical business since 1980, and I know very well how

transactions were done and put together, and so here is what I would have said if I had been in Mr Gaiduk's shoes."

Then, he was asked this:

"Yes. What you would say, Mr Taruta, is 'What price is the Russian Buyer paying?' wouldn't you? That would be your first question, 'What price is the Russian Buyer paying?'"

His no less evasive response was:

"No. If I am selling, why would I ask them that question? After all, the follow-on sale was a very sophisticated and multi-component one. You cannot establish a link between the Russian transaction and the transaction with Gaiduk. The nature of the pricing of those transactions is entirely different and distinct from each other."

When it was put to him that that answer was untruthful, he stated:

"I told you the absolute truth. I promise you that I had seen lots of transactions in the former Soviet Union and in western Europe, and I take it upon myself to tell you, sir, that this is what any seller would have done, any seller who had achieved at least some success in their business."

This critical question was then posed:

"So if you are told that your shares are going to be sold on to a Russian Buyer, that they are going to be sold through your partners' companies and then moved to the Russian Buyer, you are saying in those circumstances you wouldn't be interested in what the Russian Buyer was paying; is that right, is that your evidence?"

His response was this:

"If we visualise the situation whereby I am selling directly, then I would have been a party to the negotiations. I would have never delegated my negotiating authority or power to anyone. But, if I am selling, then it is up to me to decide whether I accept the terms and conditions or I do not. Now what happens afterwards, downstream, in terms of what my partners will do with the assets that I have sold to them, is of no consequence to me."

Then, he was asked this:

"Of course, if you had told Mr Gaiduk the price that the Russian Buyers were paying, he would have had a whole list of questions for you, wouldn't he, such as, 'Where does the 750 million price come from?'"

His answer was:

"The 750 million price is very straightforward. It is four times worth the assets of metallurgical companies. That was the multiple. That was the thing we were operating on the basis of, and also considering that the company was in default and that the company would never have been able to handle all those issues and cope with them on its own."

This question, then, was asked:

“He would want to know what profit are you and Mr Mkrтчan making on the on-sale, wouldn’t he?”.

Mr Taruta’s reply was:

“No, this is not profit; it’s the consideration that we received from the Russians. That is the money that we still had to repay. There is no profit element in here.”

This question followed:

“All right, let’s use your word. He would want to know what consideration are you receiving from the Russians for the on-sale.”

The response was:

“Definitely. He would have liked to know. But up until 2016 never ever did he raise the question of the price, whether or not it was a just and fair price. He had sufficient information available to him to understand what the level of the transaction was.”

254. This was evidence which was evasive and unimpressive in equal measure. Mr Taruta was, in short, doing his best to avoid the point which was being put to him. The reason for this, I am clear, is that he recognised that he risked giving an answer which would be used against the Taruta Parties’ case. This is not an attitude to the giving of evidence which reflected well on him.
255. I remind myself, nonetheless, that Mr Taruta was not himself at the June 2009 Meeting and, indeed, for that very reason, it is not suggested that he himself (as opposed to Mr Mkrтчan) made the Price Representation. The question, to repeat the critical question, is whether Mr Mkrтчan went further than he admits and stated not merely that *“the price that was being offered to Avonwick was determined by the position of the Russian Buyer”* but represented that the price to be paid to Avonwick would be the same price per share as paid to the Defendants.
256. The issue, in the circumstances, is whether Mr Gaiduk would have asked the questions which were being put to Mr Taruta had he been told what Mr Mkrтчan says that he was told since, if he would not have done so, then, Mr Taruta’s evasiveness in answer to the questions directed at him, whilst unattractive, is not as significant as might otherwise have been the case.
257. The same applies, in my view, to the Gaiduk Parties’ reliance on certain other matters. Thus, coming back to an issue already touched upon, Mr Calver QC relied upon the fact that Mr Gaiduk had been offered US\$3 billion for his stake between April and September 2008, suggesting that, notwithstanding what had happened in the market since then, a 75% reduction in the value of the asset was extreme. Anybody in Mr Gaiduk’s shoes, Mr Calver QC suggested, would have asked follow-up questions as to how the price of US\$750 million had been reached. I have, however, previously explained that, in my view, the significance of the Evraz deal can be overstated. I do not accept that it assists in the way suggested by Mr Calver QC.

258. Nor does the fact that the offer described by Mr Mkrtchan to Mr Gaiduk at the June 2009 Meeting came out of the blue seem to me to assist in quite the way suggested by Mr Calver QC since I do not consider that it follows from this that, as Mr Calver QC suggested, Mr Taruta and Mr Mkrtchan had got together before the meeting, calculated the price that they were going to offer Mr Gaiduk by reference to that being paid by the Russian Buyer and, recognising that Mr Gaiduk would obviously be surprised and disappointed by the low offer, decided that they needed to orchestrate a way to present the offer which would make it seem urgent and a *fait accompli*.
259. As I have previously explained when dealing with the handwritten notes, the fact that Mr Taruta and Mr Mkrtchan met beforehand and appear to have done the calculations described does not, in my view, make it either more or less likely that the Price Representation was made. That is a question which turns, inevitably, on what was or was not said by Mr Mkrtchan to Mr Gaiduk at the June 2009 Meeting itself.
260. Other submissions similarly pointing to allegedly nefarious intentions on the part of Mr Taruta and Mr Mkrtchan, including the submission that they did not want Mr Gaiduk to know of the identity of the Russian Buyer for fear that he would seek to scupper the deal having discovered what price was to be paid by asking VEB, likewise do not seem to me to take matters any further since they essentially presuppose that the Price Representation was made and, then, provide an explanation as to why it was made. What they do not do is assist with enabling the critical question to be answered, and it is to that critical question to which I now turn.
261. It is for the Court to decide whether it is more likely than not that Mr Mkrtchan told Mr Gaiduk and Mr Petrov that Avonwick would be paid the same price per share as he and Mr Taruta (or their companies) would receive from the Russian Buyer. It is only if the Court is satisfied that it is more likely that Mr Mkrtchan did say this than that he merely said that "*the price that was being offered to Avonwick was determined by the position of the Russian Buyer*" that the Price Representation case can succeed. There are, in my view, however, a number of difficulties with that case.
262. The first, and probably most significant, such difficulty is that I am not persuaded that, had Mr Mkrtchan said what he admits saying, Mr Gaiduk (and Mr Petrov) would necessarily, then, have followed up by doing as Mr Calver QC suggested he (or they) would have done, which is to ask what price Mr Taruta and Mr Mkrtchan (or their companies) were to receive from the Russian Buyer. On the contrary, it seems to me that, if Mr Mkrtchan did, indeed, tell Mr Gaiduk and Mr Petrov that "*the price that was being offered to Avonwick was determined by the position of the Russian Buyer*", then, Mr Gaiduk (and Mr Petrov) would very likely have accepted this without following up with the type of question which, if the Gaiduk Parties' case is to succeed, needs to have been posed.
263. I appreciate that it is not accepted by Mr Gaiduk (and Mr Petrov) that Mr Mkrtchan said what he admits saying, and so that it is not strictly part of the Gaiduk Parties' case that he did so, but it is instructive that the questions put to Mr Taruta in cross-examination by Mr Calver QC, as set out earlier, took as their starting point the fact that Mr Mkrtchan did, indeed, say what he admits saying and, in my view, understandably so since I consider that it is likely that Mr Mkrtchan said it. Although Mr Mkrtchan did not attend trial, for reasons which have previously been explained, and nor did he prepare a witness statement, for the same reasons, the fact that he made the admission which he

did in his Defence is, in my view, significant. He did not merely deny what had been alleged, as he could have done, but was very specific in making the admission which he did.

264. That admission seems to me, in the circumstances, to have an authenticity which ought not to be too readily dismissed. I consider, in short, that Mr Mkrтчan did, indeed, say what he admits saying and that, having done so, neither Mr Gaiduk nor Mr Petrov felt any necessity to ask a follow-up question. Although Mr Calver QC suggested, only really in passing, that what Mr Mkrтчan admits saying could reasonably be understood as an admission that US\$750 million was his proportionate share of the price that he, Mr Taruta and Mr Mkrтчan (or their companies) were going to be paid by the Russian Buyer, the Price Representation case is not an implied representation case but an express representation case and, as such, must stand or fall on the Gaiduk Parties being able to establish that Mr Mkrтчan went further than he admits and represented that all three of them were to be paid the same price per share. There is no scope for implication in such circumstances. Nor, in any event, do I consider that Mr Calver QC was right when he suggested that the words which Mr Mkrтчan admits using carry with them such an implication.

265. The second, and also significant, difficulty with the Price Representation case is the complete absence of any reference to the Price Representation having been made in the contemporaneous documents. There is, indeed, no evidence in the documents at all which points to the Price Representation having been made. This was fairly acknowledged by Mr Gaiduk in cross-examination when the point was put to him, as the following exchange shows:

“Q. There is not any document, is there, which says that you would get the same price per share as Mr Mkrтчan and Mr Taruta? Is there?”

A. That’s correct.

Q. You never recorded it or even jotted it down on a piece of paper, did you?”

A. No, I didn’t jot it down.

Q. And we don’t have any document from any of your advisers which records or references this fact either, do we?”

A. That’s right.”

266. Mr Calver QC submitted, nonetheless, that the absence of documents is not altogether surprising and that, as such, the Court should not place any weight on this factor. He submitted, in particular, that there is nothing unusual about Mr Mkrтчan’s confirmation to Mr Gaiduk not being recorded, or even referenced, in any document since Mr Gaiduk, Mr Taruta and Mr Mkrтчan trusted each other to treat each other equally in their dealings and, as such, Mr Gaiduk would have seen nothing surprising in being told that he would be treated equally in this transaction. It is, Mr Calver QC submitted, what he would have expected to be the case and so he would have seen no reason to record it.

267. These are submissions which do not, however, in my view, overcome, or sufficiently explain, the lack of contemporaneous documents. I say this for a number of reasons.
268. First, as Mr Wolfson QC rightly pointed out, it was Mr Gaiduk's own (wholly unsurprising) evidence that his stake in IUD was one of his most important assets. In those circumstances, it is somewhat surprising, at least on the face of matters, that there is not a single document which even hints at the making of the Price Representation. The more so, given that it was Mr Kravets' evidence that the alleged Price Representation was "*the driver*" of Mr Gaiduk's decision to sell that stake.
269. Secondly, I accept the submission made by Mr Wolfson QC that, whatever trust once existed between the Partners, it had become strained. As Mr Wolfson QC pointed out, this is shown by the Gaiduk Parties' own evidence, including the evidence that by the autumn of 2008 Mr Gaiduk had been told by Mr Petrov that his Partners' representatives were stalling the negotiations with him, Mr Gaiduk explaining in cross-examination as follows:
- "Mr Petrov said that the representatives of Mr Mkrтчan and Taruta looked like they were dragging on and stalling or wasting time in negotiations, because they carried on arguing or discussing relatively minor and technical matters. Representatives, yes."*
270. Moreover, after those negotiations collapsed altogether shortly afterwards, Mr Gaiduk confronted Mr Taruta and Mr Mkrтчan. He told them that it "*was their own greed that had led to the collapse of their deal with EVRAZ*" and it was at this point, the October deadline having passed without the 2008 SPA being concluded, that he decided that he would sell his wife's interest in IUD to a third party.
271. This was followed, in January 2009, by Mr Gaiduk learning and being shocked by the scale of the withdrawals which Mr Mkrтчan and Mr Taruta had taken from IUD, which in cross-examination he described as being "*very, very large*" and at odds with what he had been led to believe were Mr Taruta and Mr Mkrтчan's financial position during 2008. This is something which both Mr Petrov (in his witness statement) and Mr Gaiduk (in cross-examination) confirmed in evidence and is suggestive of at least an element of mistrust creeping into the relationship between Mr Gaiduk, on the one hand, and Mr Taruta and Mr Mkrтчan, on the other.
272. In addition, as Mr Gaiduk confirmed to Mr Wolfson QC in cross-examination, he had also become concerned by this time at Mr Taruta and Mr Mkrтчan's refusal to abandon informal and unstructured business practices. So it was that, as Mr Gaiduk put it in his witness statement, by the end of January 2009 he decided that "*a wholesale 'divorce' between my family, Mr Mkrтчan and Mr Taruta had become necessary*".
273. I consider that it would have been more likely, in such circumstances, that there would have been something recorded in writing if the Price Representation had been made.
274. Thirdly, even leaving to one side the point about trust (or lack of it) and so assuming in the Gaiduk Parties' favour that there was no or no significant lack of trust, still the absence of any documentation referring to the Price Representation is not easily explained in relation to what was, after all, on the Gaiduk Parties' own case highly significant, given the consequences which are alleged to flow from the representation

having been made and given Mr Kravets' evidence that the Price Representation was "*the driver*" of the deal.

275. As Mr Wolfson QC put it, this is not a case where an agreement was made on a handshake and nobody troubled to write anything down. On the contrary, very many documents were drafted, including by professional advisers acting for Mr Gaiduk, Mr Taruta and Mr Mkrтчan. These included emails and letters of varying degrees of formality but also formal contracts and MOUs.
276. The latter are a species whose legal status I shall come on to consider somewhat later when dealing with the Taruta Claims. That is not, however, an issue which matters for present purposes since their relevance at this stage lies in the fact that nowhere in any of the MOUs or in any other document is there any mention, even a passing mention, of the Price Representation. This, despite the fact that it was Mr Petrov's evidence that, after the June 2009 Meeting and two further meetings the same month, "*As usual, I recorded the matters discussed at the June 2009 Meeting and the subsequent meetings outlined above in a MoU*". Crucially, that draft MOU included the price of US\$750 million and set out further details as to how that sum was to be paid. What it did not do was refer to the Price Representation.
277. This was a notable omission if, as the Gaiduk Parties maintain, the Price Representation was made. It was not the only occasion, however, when this omission was made because, similarly, when the later meetings between the Partners took place in November and December 2009 and Mr Petrov, following these meetings, "*recorded the outcome of the Partners' discussions in an updated MoU*", again the Price Representation did not feature in the draft MOU which he put together.
278. To suggest, as Mr Calver QC did, that the explanation for these omissions is that the MOUs were not intended to record anything other than the outcome of the meetings which took place, a submission based on Mr Petrov's evidence that he "*recorded the outcome of the Partners' discussions*", is, in truth, no answer because it is clear that the MOUs went beyond merely recording this, not least because they included recitals setting out background matters. Had the Price Representation been made, I am quite clear that it would not merely have been mentioned but that it would have featured with a significant degree of prominence, probably, indeed, as a term in the MOU or the Castlerose SPA providing that Mr Gaiduk would be paid the same price per share as Mr Mkrтчan and Mr Taruta were to receive.
279. The lack of any reference to the Price Representation in the MOUs is echoed by a similar lack of any such reference in other documents, specifically emails which passed between Mr Kravets and the Gaiduk Parties' external lawyers, Allen & Overy. Thus, although it should be pointed out right away that only some documents were produced and that in respect of others privilege was maintained, it was Mr Kravets' evidence that Mr Petrov told him orally in June 2009, shortly after the June 2009 Meeting, that Mr Mkrтчan and Mr Taruta wanted to buy Mr Gaiduk's minority interest in IUD and proposed to sell a majority interest to a Russian Buyer. So it was, he went on to explain, that he "*immediately began the process of engaging the relevant advisors to ensure the timely completion of the sale*".
280. It was Mr Kravets' responsibility, as Mr Gaiduk acknowledged in cross-examination, "*to make sure that any points which were important to [Mr Gaiduk] were*

communicated to the external advisers so that they, those advisers, could do their jobs effectively” since Mr Kravets was “experienced in the ways in which these major corporate transactions were done”. Unsurprisingly in the circumstances, Mr Kravets telephoned Mr Hannigan at Allen & Overy on 19 June 2009. In doing so, however, he “did not tell Mr Hannigan about the representation made as to the price on this call or at any other point, although I was aware of it”. I find this somewhat surprising. It seems to me that, had Mr Kravets really been aware that the Price Representation had been made, then, he would almost certainly have drawn it to Mr Hannigan’s attention since it was obviously an important aspect of the discussions which had taken place.

281. When pressed in cross-examination, it was ultimately Mr Kravets’ evidence that it was his own decision not to make reference to the Price Representation despite its commercial significance. That is, however, an explanation which makes no sense given that Mr Kravets was acting as a commercial adviser, and an experienced one at that, rather than the person who was making commercial decisions. To repeat, this was “*the driver*” as he himself had described the Price Representation. If that is what it was, it simply makes no sense for there to be no reference to the Price Representation.
282. The far more likely explanation, in my view, is that he made no mention of the Price Representation simply because he was not told by either Mr Gaiduk or Mr Petrov that it had been made, and that the reason why he was not told that it had been made was because it had not, in fact, been made.
283. This conclusion is bolstered by two further considerations. The first entails consideration of certain events in 2008, specifically the fact that, on 20 August 2008, Mr Gaiduk made “*oral representations*” to Mr Mkrтчan and Mr Taruta at a meeting between the three of them, which representations were (in contrast to the Price Representation the following year) recorded in an email from Mr Pisarevsky to Mr Petrov in this way:

“On Monday the three current principals of [IUD] met to resolve the outstanding differences within the SPA. The outcome of this meeting is that the Ukrainian pledge will be allowed (including the possibility of enforcement through English courts). No personal guarantee of [Mr Gaiduk] will be provided, based on his oral representations to [Mr Mkrтчan and Mr Taruta] that he ([Mr Gaiduk]) will maintain his interest, directly or indirectly, in the BVI vehicle and will assure, through a separate memorandum, that in the event that an auction takes place outside of the escrow agreement, he will procure that the auction procedure is carried out in accordance with that described in the SPA.”

284. In fact, this email followed an earlier email sent from Mr Pisarevsky to Mr Petrov on 12 July 2008, in which he referred to a “*summary of principal terms of Project India discussed today between two of the principals*”. Both these documents, therefore, did what no document did in relation to the Price Representation, which was to make reference to a representation having been made. It is difficult to see why there should be different treatment in relation to two oral representations, particularly given that Mr Kravets agreed in cross-examination, when the point was put to him, that the earlier representation was of considerably less significance than the Price Representation.
285. The second matter to be considered is the fact that there is nothing in either the July Castlerose SPA or the (December) Castlerose SPA which points to the Price

Representation having been made. This is despite, as Mr Wolfson QC pointed out, Mr Gaiduk evidently considering it important to have a formal legal contract with his Partners for the sale of his interest in IUD, choosing to instruct Allen & Overy for this purpose and requiring that the three Partners personally sign the July Castlerose SPA on behalf of their respective companies, “*as I wanted to impress a sense of personal responsibility on Mr Taruta and Mr Mkrтчan for the conclusion of the deal*”. Mr Kravets was unable to explain why, in such circumstances, he did not ensure that the Price Representation was included in the Castlerose SPA or in some type of side letter, simply stating that it “*did not occur to me at the time*”.

286. Moreover I agree with the submission which was made that, in fact, the terms of the July Castlerose SPA and the (December) Castlerose SPA were positively *inconsistent* with the Price Representation having been made, both containing materially identical provisions as follows:

“Each Party acknowledges that in agreeing to enter into this agreement and the other Transaction Documents it has not relied on any express or implied representation, warranty, collateral contract or other assurance (except those stated in the Transaction Documents) made by or on behalf of any other Party before entering into this agreement. Each Party waives all rights and remedies which, but for this Clause 12.2, might otherwise be available to it in respect of any such representation, warranty, collateral contract or other assurance.”

As Mr Wolfson QC put it, if the Price Representation had been made, it is difficult to imagine that Mr Kravets would have allowed an agreement containing a provision like this (which provided that no such representation had been relied on) to be entered into.

287. These are the two main reasons why I have concluded that it is more likely than not that the Price Representation was not made. It is, strictly speaking, unnecessary, in the circumstances, that I should go on and address further reasons. It is, however, obviously appropriate that I do so.
288. The first of these further reasons, and so the third reason overall, concerns the fact that, on any view and despite Mr Calver QC’s attempts to suggest the contrary, the deal which Mr Gaiduk (through Avonwick) concluded when selling his stake in IUD was not a deal which was the same as that entered into by Mr Taruta and Mr Mkrтчan.
289. It does not seem to me to make any difference that the distinctions highlighted both by Mr Foxton QC and Mr Wolfson QC in the course of their submissions either were or were not expressly canvassed between the Partners at the time as reasons why a different price per share should be paid to Mr Gaiduk as opposed to Mr Taruta and Mr Mkrтчan. What matters is simply that there were differences, and very real differences at that, which mean that the fact that Mr Gaiduk received less per share than Mr Taruta and Mr Mkrтчan did is not merely explicable but, in truth, entirely understandable.
290. I do not agree with Mr Calver QC when he sought to characterise the differences between the Castlerose SPA and the VEB SPA as amounting to an “*artificial lawyer’s construct*” thought up after the event. Nor do I agree with his allied submission that, since Mr Mkrтчan and Mr Taruta needed Mr Gaiduk’s shares to do the deal with the Russian Buyer and the only way they could get them at the price that they did, it necessarily follows that they deceived Mr Gaiduk as to the price being paid by the

Russian Buyer. This is because, as previously explained, I do not accept that it is, as Mr Calver QC put it, “*obvious*” that, after Mr Mkrтчan had told Mr Gaiduk that the price that was being offered to Avonwick was determined by the position of the Russian Buyer, there would then inevitably have been a discussion about the price being offered by the Russian Buyer and so about the differences in the two parts of the deal which meant that Mr Gaiduk received so much less than Mr Taruta and Mr Mkrтчan did.

291. Mr Calver QC’s submission, in my view, starts from the premise that Mr Taruta and Mr Mkrтчan deceived Mr Gaiduk, and so that Mr Mkrтчan told him that he would receive the same price per share, when that is, of course, the issue which the Court must decide. Clearly, with such a starting point, the differences are not as significant as they are if the assumption made by Mr Calver QC is not made and, instead, the Court proceeds with a more open mind as to what Mr Taruta and Mr Mkrтчan were doing in June 2009.
292. The first of the differences highlighted by both Mr Foxton QC and Mr Wolfson QC concerns the fact that, whereas what Mr Gaiduk sold to Mr Taruta and Mr Mkrтчan was a minority stake in IUD, what Mr Taruta and Mr Mkrтчan sold to the Russian Buyer was a majority stake, albeit that this largely comprised the stake which they purchased from Mr Gaiduk.
293. As a general proposition, not really disputed by Mr Calver QC, a majority stake would have been more valuable to the Russian Buyer than a minority stake. I agree with Mr Foxton QC and Mr Wolfson QC, therefore, that it was inherently unlikely that Mr Gaiduk would receive the same price per share for his Castlerose Interest as the Russian Buyer was paying for a majority and controlling stake. Mr Calver QC’s submission was, rather, that in this particular case the Court should proceed on the basis that the various buyers under the VEB SPA were not acquiring a majority stake. Whilst that might well, strictly speaking, be right since there were, in fact, as Mr Calver QC put it, multiple ‘Russian Buyers’, the submission nonetheless overlooks the reality that what Mr Taruta and Mr Mkrтчan sold was a majority stake to entities which, as a result of the transaction, overall acquired that majority stake and so control of IUD. It is artificial, in my view, to suggest otherwise.
294. There is, however, more substance in Mr Calver QC’s submission that the two transactions were treated as a single, overall transaction and, as such, Mr Gaiduk’s minority sale to Mr Taruta and Mr Mkrтчan ought to be regarded as part of the overall onward majority sale to the Russian Buyer, so as to mean that the distinction between minority and majority stakes is less significant than would otherwise be the case.
295. It is instructive, indeed, in this context, that Mr Gaiduk’s initial understanding as to what was proposed was consistent with the way that the Russian Buyer itself viewed the transaction, in the sense that there was a single transaction by which Mr Gaiduk’s stake was being sold to the Russian Buyer, as reflected in the term sheet with the Russian Buyer until at least 15 June 2009 and in early drafts of the VEB SPA which envisaged a direct payment to Avonwick for the Castlerose shares right up until 13 December 2009, just a few days before execution of the Castlerose SPA, when the relevant provision (Clause 3.2.1) was revised to provide that Azitio and Dargamo would pay Avonwick for the Castlerose interest using funds provided by the Russian purchasers. Mr Taruta himself described the transaction in a similar way some years later, in an interview given in February 2013, when asked:

“formally you purchased [Mr Gaiduk’s] shares in IUD and then sold them to Russians, didn’t you?”.

His response to this question was:

“In fact, it all was done within one transaction. If we had not engaged in that transaction, we would have had no money to implement it”.

Although in cross-examination he speculated that there may have been a mistranslation of what he had said, he nonetheless went on to acknowledge as follows:

“With respect to the transaction per se, definitely the transaction would have been possible with Gaiduk only on the premise that a transaction was going to be entered into with the Russian Buyer. That makes perfect sense.”

He also confirmed, when it was put to him that he knew that the Russian Buyer regarded the purchase of the Castlerose interest from Avonwick as *“an integral part of the deal, of the Russian deal”*, that *“Without that, we would not have been able to sell the controlling stake to them in each of the companies”*.

296. It is tolerably clear, therefore, that the parties viewed the two deals as a single transaction. Although, therefore, Mr Foxton QC and Mr Wolfson QC both placed reliance on Mr Gaiduk’s acceptance in evidence that there were two separate transactions, I am not persuaded that it is appropriate to place too much weight on this.
297. Specifically, in a public statement reported in a Minfin article on 15 January 2010 (under the headline *“Businessman Gayduk announces the sale of his share in IUD to the businessmen Taruta and Mkrтчhan”*), just two weeks after the deals closed, Mr Gaiduk said this:

“I can confirm that my family has sold all of our IUD shares to our partners: Mr Taruta and Mr Mkrтчhan. I have nothing to do with any subsequent transactions.”

He, then, went on:

“The fact is my partners bought my share. I really did not take part in further negotiations, and it was only from the media that I later learned that Alexander Katunin had headed the pool of investors. I’m not aware of who the final buyers are, as this lies outside my competence. I sold my shares to my partners. That’s it.”

298. Asked about this in cross-examination, Mr Gaiduk confirmed that he had made this statement and that it was true in the sense that it represented an accurate description of the transactions: a sale of his shares to Mr Taruta and Mr Mkrтчhan followed by subsequent transactions in which he had no involvement. The statement was made, it is clear, in order to enable Mr Gaiduk to distance himself politically from the transaction at a time when it would not have been helpful to him, from a political perspective, for the people of Ukraine to be under the impression that he had sold his shareholding to a purchaser which was Russian. As he put it, he was *“not offering the people of Ukraine an account of the legal structure of the transaction”* but *“assuring them that the real purchaser of [his] shares was not the Russian Buyer but [his] partners”*.

299. Accordingly, I approach what Mr Gaiduk had to say at the time with some degree of caution. I consider that the reality was that everybody (Mr Gaiduk included) viewed the transaction as a single transaction consisting of a number of different elements. It does not follow, however, that it would be appropriate to regard Mr Gaiduk as being in the same position when selling his shareholding to Mr Taruta and Mr Mkrtchan as Mr Taruta and Mr Mkrtchan were when selling their shareholdings (bolstered by Mr Gaiduk's shareholding as sold to them) to the Russian Buyer.
300. This is because I consider that there is very considerable force in the submission which was made by Mr Foxton QC and Mr Wolfson QC that, even if Mr Calver QC was right in relation to the minority stake point, the structure of the transaction ought nonetheless not to be ignored and nor, furthermore, should the fact that, however the transaction overall is viewed, Mr Gaiduk had a minority share which he wanted to sell whereas Mr Taruta and Mr Mkrtchan, between them, had a majority share.
301. As to the structure of the transaction, although in a sense a single transaction and viewed as such by the Partners, it was not, strictly speaking and as a matter of legal technicality, a back-to-back transaction. On the contrary, under the first transaction, Avonwick agreed to sell its 100% interest in Castlerose (and thus Castlerose's 33.84% interest in IUD) to Dargamo and Azitio with virtually no obligations but the transfer of the shares whereas, under the second transaction, Dargamo and Azitio agreed to sell a 50% + 2 share interest in each of Kairto, Muriel and Castlerose (and thus an indirect 50% + 2 share interest in IUD) but on terms giving the Russian Buyer 75% of the value, and locking Mr Taruta and Mr Mkrtchan into significant commitments and for a long period. Accordingly, the Russian Buyer never obtained the entire 100% share in Castlerose which was sold by Avonwick to Dargamo and Azitio: the Russian Buyer received a 50% + 2 share interest in Castlerose and the other 50% - 2 share interest remains with Dargamo and Azitio, in equal proportions (25% - 1 share each).
302. The two transactions were, of course, related, in particular since there were provisions in the VEB SPA which cross-referred to the Castlerose SPA, but this does not change the fact that there were two separate transactions, the explanation for such provisions obviously being that the Russian Buyer had an interest in ensuring that Mr Gaiduk did not retain any interest in his stake in order that Mr Mkrtchan and Mr Taruta could pass full title to the Russian Buyer.
303. As Mr Wolfson QC pointed out, there is not a single provision in the Castlerose SPA which contains any reference to the VEB SPA, quite obviously because Mr Gaiduk was only interested in selling his stake and not interested in the separate deal Mr Mkrtchan and Mr Taruta were doing with the Russian Buyer. Whatever may or may not have been considered as regards the structuring of the deal at an earlier stage, this is how the deal ultimately came to be structured. It should not, and cannot, sensibly be ignored.
304. The more so, given that all parties had the benefit of legal advice and so this is not a case where the structure can realistically be regarded as having been arrived at in error. As Mr Wolfson QC submitted, even taking Mr Gaiduk's evidence at trial at face value, the most that he appeared to be saying was that he briefly thought at the June 2009 Meeting that he would have a direct contract with the Russian Buyer but that he was told soon afterwards in another meeting the same month that there would be no such direct contract.

305. There was some suggestion by Mr Gaiduk that it was “*impossible to sell a controlling stake*” unless this was sold “*via Dargamo and Azitio*”, and that this is why there could be no direct contract between his company and the Russian Buyer, but I agree with Mr Wolfson QC when he submitted that this makes no sense since quite obviously it would have been possible to sell a controlling interest directly to the Russian Buyer.
306. The real significance of this being the structure lies, as I have indicated, however, not in the question of whether Mr Gaiduk was selling a minority share to Mr Taruta and Mr Mkrтчan, but, rather, in the fact that, as Mr Wolfson QC in particular submitted, Mr Gaiduk was only a minority shareholder in IUD whereas, at least viewed as a unit, Mr Taruta and Mr Mkrтчan were the majority shareholders. As such, Mr Gaiduk was in a position where he had only relatively limited power, as the Ukrainian law experts agreed and as, indeed, acknowledged by Mr Gaiduk himself when he gave evidence.
307. More importantly still, it is clear that Mr Gaiduk was not in a strong bargaining position since it can hardly be overlooked that, aside from the offer which was put to him by Mr Mkrтчan at the June 2009 Meeting, Mr Gaiduk had no other offer in respect of his IUD shareholding, again as he fairly acknowledged when the point was put to him in cross-examination.
308. I agree with Mr Wolfson QC when he submitted that, in contrast, Mr Taruta and Mr Mkrтчan were in a stronger bargaining position since their combined shareholdings constituted the majority stake in IUD. As such, not only did Mr Taruta and Mr Mkrтчan obviously have control of the company, but they were also in a position where, had they wished, they could themselves have sold a majority stake without needing to purchase from Mr Gaiduk and whilst still being able to retain a not insubstantial proportion of their shares.
309. Moreover, if this is what Mr Mkrтчan and Mr Taruta had done, Mr Gaiduk would, then, have found himself in a much diminished position since he would, then, be a minority shareholder with a controlling majority held not by Mr Taruta and Mr Mkrтчan but by a shareholder with which he had no prior relationship and with which for political reasons he may well wish not to be seen to be associated with.
310. Nor, it is clear, did Mr Gaiduk himself seek to negotiate with any other potential purchasers, at least in the relevant time period, albeit that I struggle in this connection with the suggestion floated during Mr Kravets’ cross-examination that there was any unwillingness on Mr Gaiduk’s part to seek offers from other parties because of a sense of honour to Mr Taruta and Mr Mkrтчan, if only because Mr Kravets himself told Mr Gaiduk to make such approaches to provide “*leverage*” in his efforts to achieve a deal which, far from seeking to exclude Mr Taruta and Mr Mkrтчan, involved them.
311. Added to these considerations, Mr Gaiduk positively wanted to depart and so to sell his shares (all of them), unlike Mr Taruta and Mr Mkrтчan who wished to remain as shareholders. Mr Petrov, indeed, appeared to acknowledge the force of this point during this cross-examination exchange:

“MR FOXTON: So if the Russian Buyer was making an offer to Mr Gaiduk, why didn’t you say ‘Well, we are all in the same boat, Mr Mkrтчan, we’ll sign up to the same deal with the Russian Buyer you’ve already negotiated’?”

A. Because we understood that we are a shareholder who is leaving completely, whereas they would continue. The conditions and terms would be much more complicated for them, including the agreements of who was going to be managing the company. Mr Mkrtchan never tried to hide his desire to manage the company jointly with Mr Taruta. So naturally our agreements would be different from their agreement.”

312. This is, however, a point which goes further since Mr Taruta and Mr Mkrtchan also wished to continue to manage IUD with the advantage that any potential purchaser would inevitably see in this; indeed, as I shall explain in a moment, the Russian Buyer required just that continued involvement.
313. In such circumstances, whatever the technical position concerning the overall transaction was and however it was viewed at the time, the commercial reality was, as Mr Wolfson QC submitted, that Mr Gaiduk had only a minority stake and it was that minority stake which he sold. That is the case as far as the actual sale to Mr Taruta and Mr Mkrtchan is concerned. It also would have been the case, however, even if Mr Gaiduk had sold his shares directly to the Russian Buyer alongside Mr Taruta and Mr Mkrtchan’s selling of their shares to the Russian Buyer.
314. In both cases Mr Gaiduk was selling what he had and what he only ever had: a minority stake. It follows that, contrary to the submissions which were advanced by Mr Calver QC, it is not surprising that Mr Gaiduk should have received a lesser price per share. It follows also, therefore, that I cannot accept that Mr Mkrtchan must have told Mr Gaiduk that he would be paid the same price per share as he and Mr Taruta would receive.
315. The various considerations which I have highlighted in seeking also, and thirdly, to explain why Mr Gaiduk’s bargaining position was not on a par with that of Mr Taruta and Mr Mkrtchan also serve to explain why Mr Mkrtchan and Mr Taruta were subject to extensive warranties and other obligations owed to the Russian Buyer but Mr Gaiduk was not.
316. As was pointed out by Mr Wolfson QC, the Castlerose SPA is a short document, running to just over 20 pages, under which Avonwick gave only very limited warranties. Mr Gaiduk accepted as much, explaining that he “*gave virtually no warranties at all*” since “*nobody asked me for them and nobody requested for me to give any warranties or guarantees*”. As Mr Hannigan from Allen & Overy, indeed, noted on 22 June 2009:

“Avonwick will only warrant as to its capacity, the title to its shares in Castlerose, that Castlerose holds the 33.84% participation interest in ISD and that the shares and the participation interest are unencumbered - note: the warranties in India [the abortive 2008 transaction] were slightly wider than just capacity eg no material breach of applicable law.”

317. In contrast, the VEB SPA was a rather different contract, some 174 pages in length and containing extensive representations, warranties and other obligations on the part of Azitio and Dargamo (and so, indirectly, Mr Mkrtchan and Mr Taruta). These included, in addition to warranties as to Azitio and Dargamo’s unencumbered title to their interests in IUD, extensive warranties as to the accuracy of the accounts of IUD and its wider group, including that the accounts “*correctly state the assets and liabilities of the Group and present fairly, in all material respects, the state of affairs of the Group as*

at the Accounts Date”, “*have been prepared on a proper basis in accordance with IFRS since 1 January 2007*”, “*have been properly and accurately prepared with due care and attention*” and “*do not contain any material inaccuracies or discrepancies of any kind*”, as well as warranties that IUD’s “*business has been conducted only in the ordinary course of the business and consistent with past practices*” since 31 December 2008.

318. There were, additionally, warranties concerning taxation (including that “[f]ull provision or reserve under IFRS has been made in the Accounts for all Taxation” including in respect of “*profits, gains, or income*” and “*any transactions effected or deemed to be effected*”) and regarding any transactions at an undervalue, including that:

“No purchase contracts or commitments of any Group Company continue for a period of more than 12 months (other than those entered into in the usual and ordinary course of business) or are in excess of the normal, ordinary and usual requirements of business or at an excessive price ... No Group Company is party or subject to any contract, transaction, arrangement, understanding or obligation which: ... is not in the ordinary and usual course of business; ... is not wholly on an arm’s length basis”

319. There were also warranties that IUD and its wider group were not involved in any actual litigation valued in excess of US\$10 million, or any pending or threatened litigation valued in excess of US\$1 million, and a general warranty that:

“The information contained in this Agreement (including the Schedules) is true and accurate in all material respects and there is no fact, matter or circumstance which makes any of that information untrue, inaccurate, incomplete or misleading”.

320. There was, furthermore, a warranty that the sellers had made written disclosure of all material information to the purchasers, as follows:

“All information relating to the [IUD] Group which is known to or would after reasonable inquiry be known to the Sellers and which would reasonably be expected to materially affect a Purchaser’s decision to purchase the applicable Sale Shares for valuable consideration on arm’s length terms has been disclosed by or on behalf of the Sellers to the Purchasers in writing.”

321. None of these warranties was given by Avonwick (or Mr Gaiduk). Furthermore, there were other provisions in the VEB SPA, which imposed additional restrictions and obligations on Azitio and Dargamo designed to ensure that Mr Taruta and Mr Mkrchan remained involved in IUD, thereby retaining the benefit of their knowledge and expertise and allowing the investment to be presented as a Russian-Ukrainian partnership. Thus, an early term sheet provided that:

“The individual Sellers who hold key positions on the Company’s Board of Directors and in its management shall remain at the Company (retain a shareholder’s stake) and perform their duties for at least three to five years after the conclusion of the Deal.”

322. It was also contemplated that there would be a detailed shareholders’ agreement addressing such issues as rights of pre-emption and control. Thus, from 21 June 2009, the term sheet contemplated that Mr Taruta and Mr Mkrchan’s interests in two of the IUD-owning companies would be pledged in support of the Russian Buyer’s lending,

as did the first draft of the VEB SPA (now with their interests in the third also pledged in support of performance of the Sellers' obligations under the SPA). The first draft of the VEB SPA circulated on 26 June 2009 provided for a lock-up period for sales of shares of 5 years and required the consent of other shareholders for changes in control. The final version of the SPA provided that the Sellers would pledge shares in Muriel, Kairto and Castlerose as security for the performance of their operations under the SPA and their shares in Muriel and Kairto for the benefit of the lender to the Russian Buyer.

323. The final version provided for a 5-year lock-up period for the disposal of shares. This was accompanied by an undertaking restricting Azitio and Dargamo from ceasing to be beneficially owned by Mr Mkrtchan and Mr Taruta respectively. Mr Mkrtchan and Mr Taruta were, accordingly, locked into IUD as ultimate shareholders, imposing on them the risk of IUD falling in value.
324. Significantly also, as Mr Foxton QC pointed out, the agreement also contained an exclusivity clause requiring the shareholders or their affiliates to offer any opportunity to which they are party to acquire assets in the steel, metals, mining, smelter or power sectors to the Group. Mr Taruta and Mr Mkrtchan were thereby giving the Russian Buyer a right of first refusal on any future investment or joint activity in their field of expertise, even if unconnected to IUD. Again, none of these provisions applied to Mr Gaiduk, no doubt in recognition of the fact that he wanted to exit IUD.
325. The differences do not stop there, however, since the Iris transaction contemplated personal or additional exposure on the part of Mr Taruta and Mr Mkrtchan, which did not apply to Mr Gaiduk. So it was that an early term sheet provided that the Sellers would have to match the Russian Buyer in buying back up to US\$500 million of IUD's debt. The term sheet of 15 June 2009 provided for Mr Taruta and Mr Mkrtchan to guarantee to pay back the advance payments made if the deal did not complete, to guarantee the restructuring of the deal and the price if certain governmental consents were not received and to guarantee "*all of the obligations of each of the Sellers under the SPA*". The draft VEB SPA of 26 June 2009 contained an obligation on Mr Taruta and Mr Mkrtchan's vehicles to match capital contributions by the Russian Buyer of up to US\$500 million.
326. Additionally, as at 5 July 2009, the Russian Buyer was seeking collateral from the Sellers for a period of three years as security for their outstanding obligations, and personal guarantees from the UBOs if the collateral proved to be insufficient, and also personal guarantees from the UBOs that no one would buy up and seek to redeem IUD debt. As at 25 September 2009, the Russian Buyer was still asking for personal guarantees for the Sellers' obligations under the SPA, and they were maintaining their position as at 22 October 2009. The final version of the VEB SPA imposed an obligation on Mr Mkrtchan and Mr Taruta to ensure that Mr Gaiduk and his affiliates did not become a creditor of IUD and included a small number of personal warranties (although in 2017 Promeritum, a hedge fund in which the Gaiduk Parties are investors, did just that).
327. Furthermore, whilst there was no express obligation on Mr Mkrtchan and Mr Taruta to match capital contributions by the Russian Buyer, there was inevitably a strong pressure to do so, and Mr Mkrtchan and Mr Taruta matched the US\$120 million injected by VEB even if, as should be acknowledged, that was another matter where Mr Taruta's tendency to overstate things was evident given that ultimately was obliged to concede

that the US\$120 million was not mentioned in the VEB SPA and so was not, at least in strict contractual terms, a requirement.

328. Again, things do not stop there, however, since the VEB SPA also contained terms which gave the Russian Buyer a disproportionately large share of the economic value associated with owning an interest in IUD. Thus, Clauses 8.6 and 8.7 gave the Russian Buyer so-called “*Tag Along Rights*” and “*Drag Along Rights*”. These enabled the Russian Buyer to effect a sale of 100% of the shares in IUD to a third party, and to receive 60% of the purchase price in exchange for selling their 50% plus 2 shares stake. Clause 16.2 entitled the Russian Buyer to receive 85% of the dividends issued by IUD, in order for the Russian Buyer to repay the money it had borrowed to finance the acquisition of its stake in IUD.
329. Still things do not stop there, however, since the VEB SPA also contained provisions allowing for termination in the event of loss of title to certain assets, in which event any consideration previously paid would be repayable with interest. The Castlerose SPA, in contrast, contained no provision for termination once the option had been exercised for any reason other than the failure to deliver the shares and associated documentation.
330. These are all obligations which are significant, as illustrated by the fact that arbitral proceedings were brought by the Russian Buyer in 2013 against Mr Mkrтчan and Mr Taruta, alleging breach of various of the warranties. No such proceedings could be brought against Mr Gaiduk because he did not himself assume equivalent obligations.
331. Furthermore, there can be no question that Mr Gaiduk was unaware that he was giving less extensive warranties than Mr Mkrтчan and Mr Taruta since Mr Petrov expressly accepted in evidence that he understood at the June 2009 Meeting that “*the conditions and terms would be much more complicated for*” Mr Mkrтчan and Mr Taruta and that “*naturally our agreements would be different from their agreement*” since “*we understood that we are a shareholder who is leaving completely, whereas they would continue*” co-existing with this new partner.
332. Mr Calver QC submitted to the contrary: that the Gaiduk Parties did not know about the warranties which Mr Taruta and Mr Mkrтчan were giving. He described Mr Gaiduk’s evidence as being clear that he was never told about the warranties provided by Mr Mkrтчan and Mr Taruta and that he did not negotiate with the Russian Buyer or VEB directly (indeed, Mr Gaiduk stated that he was expressly asked not to do so). Mr Taruta himself accepted, as Mr Calver QC pointed out, that he and Mr Mkrтчan never told Mr Gaiduk about the additional warranties and indemnities being provided by Azitio and Dargamo and, furthermore, that they never asked Mr Gaiduk to provide additional warranties and indemnities.
333. That said, as I have explained, Mr Petrov’s evidence was to the effect that he understood that the agreement into which Mr Taruta and Mr Mkrтчan would enter with the Russian Buyer would differ from that concluded by Mr Gaiduk with Mr Taruta and Mr Mkrтчan, and for understandable reasons. If Mr Petrov recognised this at the time, then, Mr Gaiduk must be taken to have done so also. Mr Gaiduk knew that, whereas he was departing IUD, Mr Taruta and Mr Mkrтчan were not. He must, therefore, have known, like Mr Petrov, that the agreement into which Mr Taruta and Mr Mkrтчan were to enter would differ. He must have known that the differences would include the fact that Mr Taruta and Mr Mkrтчan would have to give warranties. He might not have

known the detail of those warranties or other obligations. This was not a matter in which he would be interested. What matters, and all that matters, is that he would have known that warranties would be given.

334. This is sufficient to justify a different price being paid per share to Mr Gaiduk, on the one hand, and to Mr Taruta and Mr Mkrctchan, on the other. It is, as such, also a reason why, contrary to the submission advanced by Mr Calver QC, I cannot accept that Mr Gaiduk must have asked Mr Mkrctchan what price was being paid to Mr Taruta and Mr Mkrctchan and so that Mr Mkrctchan must have told Mr Gaiduk that they were all (all three of them) receiving the same price per share.
335. Nor, in my view, does it matter that Mr Calver QC was able to make the point that there is no documentary evidence showing any attempt on the part of either Mr Taruta or Mr Mkrctchan (or, for that matter, the Russian Buyer) to re-negotiate the price to take account of the warranties which Mr Taruta and Mr Mkrctchan were required to give. There is, indeed, no such evidence. There is, however, evidence, as Mr Calver QC fairly acknowledged, that Mr Taruta and Mr Mkrctchan tried to avoid having to give warranties as extensive as the Russian Buyer required. Thus, for example, Mr Taruta wrote to VEB on 27 September 2009 as follows:
- “Having reviewed them, we are willing to agree with Clauses No. 5 and No. 12. We are not willing to accept the remaining clauses, as they have already been approved by all the parties, including Vnesheconombank. Joint discussions were held on each of them, with a substantiation of the position of each party, and the corresponding agreements were reached. A change to these clauses will lead to a fundamental review of all the material parameters of the deal, including the purchase price and the structure for closing the deal.”*
336. Two days earlier, Linklaters prepared a “*KEY OUTSTANDING ISSUES LIST*” on behalf of Mr Mkrctchan and Mr Taruta, which set out numerous examples of terms proposed by the Russian Buyer to which Mr Mkrctchan and Mr Taruta were not willing to agree. Mr Mkrctchan and Mr Taruta were clearly doing their utmost to avoid having to give all the warranties which were being sought.
337. The fact that there is nothing approximating to a re-negotiation is not, in the circumstances, significant. It is obvious that the warranties came with a price, and so that, in giving the warranties, Mr Taruta and Mr Mkrctchan would be able to secure a better price than would Mr Gaiduk who was able to sell without having to give such warranties.
338. These, then, are the reasons why I consider that the Gaiduk Parties have not established that the Price Representation was made. They are, individually and the more so when considered together, reasons which lead me to conclude, on a balance of probabilities, that it is less likely than not that the Price Representation was made.
339. In my view, this is a case in which Mr Gaiduk (aided by Mr Petrov) has engaged in what has previously been described as “*litigation wishful thinking*” by Mann J in *Tamlura NV v CMS Cameron McKenna* [2009] EWHC 538; [2009] Lloyd's Rep PN 71 at [174]:

“... as is not unfamiliar in litigation, regret over what happened has led to a search for those who might be blamed, and has tinted the spectacles through which the events are now viewed. It is a form of 'litigation wishful thinking'. So [the representatives of the Claimant] have forgotten they were content with the original deal, and meetings at which they discussed things with [the solicitor] have turned into false recollections of advice that was not given. This does not amount to a deliberately fabricated case, but it does not create a good one either.”

As I pointed out in *Jaison Property Development Co. Limited v Howard Swinhoe* [2010] EWHC 2467 (QB) at [77], another way of describing the phenomenon would be to say that Mr Gaiduk and Mr Petrov are in denial, having persuaded themselves that events were as they say they were. As such, they are genuine in their recollection but are mistaken.

340. It is convenient at this juncture, albeit only relatively briefly, to address two further submissions which were made.
341. The first is a submission put forward by Mr Wolfson QC (and to some extent echoed by Mr Foxton QC, albeit that his focus was rather more on what Mr Gaiduk knew some months later which is a topic more relevant to the issue of limitation), namely that it would be wrong to suppose that Mr Gaiduk, having been told about the offer of US\$750 million, accepted the price with no negotiation on the faith of what he was told by Mr Mkrтчan and nothing else. Mr Wolfson QC suggested that, on the contrary, the evidence given by Mr Gaiduk, Mr Petrov and Mr Kravets was that they did, in fact, carry out investigations to confirm that US\$750 million was a reasonable price.
342. Mr Wolfson QC referred in this respect to the following exchange between Mr Foxton QC and Mr Gaiduk:

“MR FOXTON: Mr Gaiduk, I want to ask you a little bit more about your evidence you have given, that you took steps to understand how such a price could be, and that you spoke, I think you said, to experts. I would like you to tell me more about who carried out these enquiries and when they were carried out?”

A. We discussed it with Mr Kravets, who had quite good informal relations with many representatives of different sector companies, industry companies, including Usmanov's, Lisin's, Severstal's staff. We had no information about any potential interest from Ukrainians such as Mr Akhmetov, Mr Kolomoisky. So from the industry perspective, from the industry companies, potential industry buyers at the time, as far as our information told us, there were no interested parties. Therefore, the price, the potential price, there could be quite a big spread of potential prices because of the crisis. So it all depended on who the buyer would be. So it could be the price Mr Mkrтчan was stating; it could be different. But a different price, unfortunately, was not confirmed by any interest expressed.

Q. When did these enquiries take place?

A. After our first meeting with Mr Mkrтчan.

Q. And you asked Mr Kravets to make the enquiries, did you?

A. We discussed, Mr Kravets and myself, and he said yes, he was talking to everyone and he had no information about anybody having any talks with the IUD and anybody having any interest in buying.

Q. Did you ask Mr Kravets to consider the appropriateness of the price which you say Mr Mkrтчan suggested at the first meeting of \$750 million for your 33.85% share?

A. I don't remember personally asking Mr Kravets, but I think he and Mr Petrov must have discussed it. I remember that by the time I spoke to him, Mr Kravets was ready to comment on it.

Q. Is it your evidence that Mr Kravets spoke to other knowledgeable people in the market about this issue?

A. I think he did, yes. According to his information, this was the case."

343. Mr Wolfson QC went on to refer to this further evidence which was given when Mr Petrov came to be cross-examined:

"A. We did discuss after our meeting with Mr Mkrтчan, we discussed this matter with Mr Kravets and Gaiduk, and as far as I remember Mr Kravets, based on the models that he used in the past and they used in calculations, he looked at what was the corridor, the price corridor, the range. We thought that the range was quite wide, different indicators had to be taken into consideration, so we decided that, given certain variables and certain assumptions, that today's market would probably reflect that price. That's all I remember how we discussed it and how we tried to analyse whether this price was adequate and acceptable."

344. As for Mr Kravets, asked "to tell us what you now say you did ... to investigate the appropriateness of the price", he said this:

"... I basically did two things, and that probably took me maybe a day, maybe half of a day (sic), maybe two days, but it was something very short and I was not very much into that. So two things were probably the following: I did look at the sale analyst's research as to the industry to get the update ..., and I did a quick re-run of the sensitivities of the 2007 model, which was used in the other transaction called Laguna, to see what the outcome would be. Basically, the result for me, if I may say, was kind of a glimpse of what the high level viability of the transaction could be, and that was as much as it went."

345. It is clear, therefore, that some investigation or check was performed. It is equally clear, however, in my assessment, that it cannot have been a particularly detailed exercise. It follows that I do not base my conclusion that the Price Representation was not made on this further suggested ground.

346. The second submission, primarily again advanced by Mr Wolfson QC rather than by Mr Foxton QC, is that it is implausible that there would have been what Mr Wolfson QC suggested would have to have been a widespread fraud. Mr Wolfson QC submitted, specifically, that it is impossible to see how the alleged fraud could have worked in circumstances where numerous people knew the true position, many of whom were colleagues of Mr Gaiduk and his own advisers working at CIG's offices in Kiev.

347. Mr Wolfson QC highlighted in this respect how it had not been suggested by anybody that Mr Mkrtchan set out by himself to deceive Mr Gaiduk without the knowledge or involvement of Mr Taruta. As he pointed out, such a fraud would have been impractical given that there would have been the obvious and constant risk that Mr Taruta would have given away the true position to Mr Gaiduk at any time; indeed, Mr Gaiduk expressly accepted that he was not suggesting that there was any fraud by Mr Mkrtchan alone.
348. Mr Wolfson QC went further, however, because he submitted that, if there was a fraud as the Gaiduk Parties allege, then, it must have been a fraud in which more than just Mr Mkrtchan and Mr Taruta were embroiled given the many internal and external advisers who were assisting Mr Mkrtchan and Mr Taruta, all of whom, Mr Wolfson QC suggested, knew that Mr Gaiduk was not getting the same price per share as Mr Mkrtchan and Mr Taruta were doing.
349. In this respect, Mr Wolfson QC made the point that Mr Gaiduk, Mr Taruta and Mr Mkrtchan each had people who were assisting them: in the case of Mr Gaiduk, who was President of CIG in 2009, Mr Petrov (Executive Vice-President of CIG), Mr Kravets (an adviser to IUD and former Executive Vice-President of CIG), Mr Nosov (a financial adviser at CIG) and Mr Kupchyshyn (a lawyer who worked at CIG as well as advising Mr Gaiduk); and in the cases of Mr Mkrtchan and Mr Taruta, Mr Tkachenko (Head of Legal at CIG), Mr Koval (Head of Audit and Control Department at CIG), Mr Pisarevsky (a financial adviser at CIG), Mr Novak (a lawyer at the relevant times at either CIG or IUD), Mr Udovenko (Chief Financial Officer at IUD), Ms Shchygolyeva (who worked at IUD) and Mr Avtomonov (a lawyer at CIG).
350. Mr Wolfson QC highlighted how these are all people who were colleagues at the time that, on the Gaiduk Parties' case, a fraud was being perpetrated by Mr Taruta and Mr Mkrtchan against Mr Gaiduk. These were people who were closely involved in the work done in the second half of 2009 to negotiate with IUD's lenders in order to restructure IUD's debt. It was Mr Wolfson QC's submission that, in view of this, the likelihood that there was such a fraud in operation ought to be rejected. The more so, he submitted, given that Mr Gaiduk and Mr Petrov were running CIG, and so working with (and relying upon) individuals such as Mr Tkachenko (Head of Legal) and Mr Koval (Head of Audit and Compliance).
351. There is, however, a problem with this submission. This is that it is one thing for it to be shown, as clearly was the case and as Mr Calver QC himself acknowledged, that various CIG employees knew what price was being paid by the Russian Buyer, but quite another for it to be shown that those employees thought the price, in and of itself, to be significant. This is because such people would only know of its significance if they knew that the Price Representation had been made. There is no evidence that they had that knowledge and, since none of them was called to give evidence, the Court is in no position to arrive at any conclusions as to what in this specific respect they knew.
352. Mr Wolfson QC also highlighted the involvement of external advisers. Thus, JP Morgan and Allen & Overy were both instructed by IUD to assist with this process, as seen by an email from Mr Griffith of Allen & Overy on 25 June 2009 to "*ISD and JPM teams*" which included Mr Pisarevsky, Mr Novak and Mr Kupchyshyn, as well as a number of people at JP Morgan and Allen & Overy. As Mr Wolfson QC pointed out, Mr Pisarevsky and Mr Novak knew the Russian Buyer price, whilst Allen & Overy and

Mr Kupchyshyn were advising Mr Gaiduk on the sale of his stake in IUD. Similarly, on 11 December 2009, JP Morgan sent Mr Pisarevsky a draft of a presentation, which Mr Pisarevsky then forwarded to Troika on 19 December 2009 (the next day after the Castlerose SPA was signed) explaining that:

“attached is the very preliminary draft of the presentation to be given during the all-lender meeting in London on December 21, 2009. Please note that some elements of this presentation will need to be changed substantially, as JP Morgan may not possess the necessary level of detail in respect of the deal.”

That presentation included a slide which explained that *“VEB provides a \$[3]bn loan to HoldCo in order to finance acquisition of 50% + 1 share from ISD shareholders”* and *“HoldCo uses the cash from the VEB loan to purchase the entire stake in ISD...”*.

353. As Mr Wolfson QC put it, Mr Pisarevsky was, therefore, proposing to broadcast the Russian Buyer price to all of IUD’s lenders, who included dozens of international and Ukrainian banks, and to do this in an *“all-lender meeting”* to be held on 21 December 2009 and so in the critical period before the Castlerose SPA closed on 31 December 2009. As Mr Wolfson QC memorably put it, in such circumstances, it would have been *“a surprising and risky fraud, if Mr Mkrтчan and Mr Taruta simply crossed their fingers and hoped that none of their many advisers would give the game away by a stray comment to their friends and colleagues at CIG”*.
354. That said, since, as Mr Calver QC submitted, there is no evidence that Allen & Overy actually received this presentation, and in any event, different Allen & Overy teams were working on the transactions, it seems to me that Mr Wolfson QC’s submission is not as compelling as it might otherwise have been. As to Linklaters, they were not told about the Price Representation and, even if they had been, they would hardly have been at liberty to disclose that information to a counter-party without their client’s consent. As to IUD’s lending banks generally, since they were never in fact told the price, no point arises. For these reasons, I do not found the conclusion which I have reached concerning the making of the Price Representation on this further suggested reason.
355. There is a last matter which should also be addressed, again albeit only relatively briefly. This concerns the circumstances in which Mr Gaiduk says that he came to discover that he had been paid substantially less per share than Mr Taruta and Mr Mkrтчan had been at a meeting at Vienna Airport which took place on 3 May 2016 and involved Mr Gaiduk meeting Mr Mkrтчan. It was Mr Wolfson QC’s submission that the Gaiduk Parties’ case as to this is incredible and ought, as such, not to be accepted.
356. More specifically in the present context, where what is being considered is whether the Price Representation was made in the first place, Mr Wolfson QC suggested that the fact that Mr Gaiduk should give the evidence which he did concerning how he came to know that he had not received the same price per share as Mr Taruta and Mr Mkrтчan reflects on the credibility of his evidence as to whether the Price Representation was made by Mr Mkrтчan. This is because, Mr Wolfson QC submitted, the *“logic”* of the Gaiduk Parties’ case requires *“some moment of epiphany”* when Mr Gaiduk learned the truth to be put forward in order to explain both why he did not previously object to not receiving the same price per share.

357. Mr Wolfson QC submitted, accordingly, that Mr Gaiduk invented a story which entailed Mr Mkrтчan telling him what price had been paid by the Russian Buyer to Mr Taruta and Mr Mkrтчan during a meeting at Vienna airport and, subsequently, on 13 May 2016, during another meeting, this time between Mr Taruta and Mr Gaiduk and not involving Mr Mkrтчan, Mr Taruta confirming to Mr Gaiduk what price the Russian Buyer had paid.
358. Mr Wolfson QC highlighted, in particular, how originally Mr Gaiduk had not alleged that Mr Mkrтчan told him anything at a Vienna Airport meeting, instead relying only upon the meeting with Mr Taruta on 13 May 2016. This, Mr Wolfson QC submitted, casts considerable doubt on Mr Gaiduk’s evidence concerning both the alleged meeting with Mr Mkrтчan on 3 May 2016 and the alleged subsequent meeting with Mr Taruta on 13 May 2016.
359. The explanation given by Mr Gaiduk, that he did not “*want to create additional difficulties*” for Mr Mkrтчan given that he had received threats, Mr Wolfson QC submitted, is particularly implausible.
360. I am not so sure that I agree with Mr Wolfson QC about this since it is clear that Mr Mkrтчan was, indeed, in a difficult position at the time that these proceedings were first started, albeit not in quite so difficult a position as he now finds himself in.
361. More generally, however, Mr Wolfson QC was dismissive of the idea that either Mr Mkrтчan or Mr Taruta would have volunteered the information which they are said to have disclosed, as Mr Wolfson QC colourfully put it, confessing “*falling like a tower of cards at the lightest of puffs from Mr Gaiduk*” which he described as being “*the stuff of Alice in Wonderland*”. Mr Wolfson QC pointed in this respect not merely to the way in which the discovery had originally been pleaded, but also to the fact that, in response to Mr Taruta sending a proposed draft settlement agreement to Mr Gaiduk at some point before 5 May 2016, which asserted (as is now accepted, wrongly) that Mr Taruta had claims against Mr Gaiduk, Mr Gaiduk sent a letter on 5 May 2016, and so just two days after the alleged meeting with Mr Mkrтчan at Vienna Airport, in which he posed to Mr Taruta various questions, including:
- “What amount of compensation/price was paid to you and Mr. O. Mkrтчan (or to the companies that you own or control) for the transfer of rights of ownership to the IUD Stake and additional assets described above?”*
362. Mr Wolfson QC made the point that this letter made no mention of a meeting on 3 May 2016 with Mr Mkrтчan. Nor, he added, did a further letter which Mr Gaiduk sent to Mr Taruta on 16 May 2016, in response to a letter from Taruta sent on 12 May 2016, refer to Mr Mkrтчan as having told Mr Gaiduk anything about the price which was paid by the Russian Buyer, instead, the letter merely stated, where relevant, as follows:
- “While I would like to believe that you both treated me properly and acted in accordance with our agreements, over time, I began to have some doubts on the matter”*
363. Mr Wolfson QC went on to highlight Mr Petrov’s evidence on the topic, which was that Mr Gaiduk told him that the price paid by the Russian Buyer was revealed to Mr Gaiduk by Mr Taruta. Even then, Mr Wolfson QC suggested, there was an inconsistency since

it was Mr Petrov's evidence that Mr Gaiduk told him and Mr Kravets in May 2016 not that Mr Taruta had told him that the price received was US\$2.7 billion but that "*Mr Taruta had told him that he and Mr Mkrctchan received an amount of more than US\$2 billion from the sale*", and so something less precise. Indeed, it was Mr Petrov's evidence that nobody mentioned US\$2.7 billion to him at any time, and that it was not until the VEB SPA was disclosed in late 2017 in these proceedings that he discovered that this was the price which the Russian Buyer paid (despite the fact that this figure was pleaded in the Particulars of Claim filed in August 2016, which Mr Petrov reviewed).

364. It was Mr Wolfson QC's submission, in these circumstances, that the evidence given by both Mr Gaiduk and Mr Petrov concerning the events of 2016 was made up. The truth, he submitted, is that they never believed that Mr Gaiduk (or Avonwick) would be receiving the same price per share as Mr Mkrctchan and Mr Taruta.
365. The difficulty with these submissions, however, is that, whilst they understandably focus on certain inconsistencies in how the case has been put by the Gaiduk Parties, they overlook some rather significant evidence which, unheralded, Mr Taruta himself gave when he was asked about the meeting which he had with Mr Gaiduk on 13 May 2016. Specifically, Mr Taruta ultimately accepted in cross-examination that Mr Gaiduk did, indeed, tell him at such a meeting that Mr Mkrctchan had told him what price had been paid by the Russian Buyer, and that he (Mr Taruta) confirmed to him during this meeting that what Mr Mkrctchan had told him was true.
366. That Mr Gaiduk must have been told what he says he was told by Mr Mkrctchan at Vienna Airport also explains why Mr Gaiduk had the meeting with Mr Taruta at all. It also explains why Mr Gaiduk sent the letter which he did on 5 May 2016, albeit admittedly in somewhat laconic terms.
367. I am satisfied, in short, that Mr Gaiduk was telling the truth when he gave evidence that at the meeting on 3 May 2016 Mr Mkrctchan told him what price the Russian Buyer had paid. I accept also, therefore, that Mr Gaiduk was telling the truth when he described Mr Mkrctchan as recounting during the meeting that he had been threatened and had been required during a meeting in Moscow in December 2015 attended by Mr Taruta and, *inter alios*, Mr Delimkhanov to sign a document which stated that he owed Mr Taruta substantial sums.
368. I accept, furthermore, that Mr Gaiduk asked what obligations Mr Mkrctchan was talking about, to which Mr Mkrctchan explained the Amended Settlement Agreement entered into on 30 December 2009, which required Mr Mkrctchan to either pay Mr Taruta c. US\$280 million or transfer a c. 5% interest in IUD to him. That led, I also accept, Mr Gaiduk to ask how much the Russian Buyer had paid, because it was readily apparent that, if a 5% interest in IUD was worth US\$280 million, the Russian Buyer had paid far more than Mr Gaiduk had been told. This led Mr Mkrctchan, unthinkingly, to say "2.7" – thereby revealing the price. I agree with Mr Calver QC that, whilst Mr Mkrctchan's admission was a surprising one, in context, it was understandable given that Mr Mkrctchan had been summoned to the meeting with Mr Delimkhanov and feared for his life.

369. As for the letter which Mr Gaiduk sent to Mr Taruta on 5 May 2016, I agree also with Mr Calver QC when he submitted that, had Mr Gaiduk known the price paid by the Russian Buyer all along, it is unlikely that he would have sent such a letter.
370. Lastly, consistent with the evidence which Mr Taruta ultimately came to give, I accept that at the meeting on 13 May 2016 Mr Taruta confirmed the price to Mr Gaiduk, Mr Gaiduk had told him that he felt deceived by, and angry at, him and that there was a discussion at this meeting about the fact that the price paid to Avonwick was not proportionate to that paid by the Russian Buyer.
371. None of this, however, means that it necessarily follows that the Price Representation was made some seven years or so previously. This is notwithstanding Mr Calver QC's submission that the evidence given by Mr Gaiduk concerning his discovery of the price paid by the Russian Buyer lends "*very considerable weight*" to Mr Gaiduk's account that he was deceived at the June 2009 Meeting because "*that is obviously what triggers his meeting about the price with Mr Taruta on 13 May 2016*".
372. The suggestion, in particular, that, had the Price Representation not been made, Mr Gaiduk "*would not have had anything to complain about*" seems to me simply to beg the ultimate question. Mr Gaiduk might very well have felt aggrieved having discovered how much better Mr Taruta and Mr Mkrchan did compared with him, not because the Price Representation was made but simply because, the years having passed, he was regretting at settling for the price which he did.
373. Having decided that there is insufficient evidence to justify a conclusion that the Price Representation was made, even without having to grapple with Mr Foxton QC and Mr Wolfson QC's submission that the market value of Mr Gaiduk's interest in IUD was no more than the price of US\$750 million he received for it, it is obviously unnecessary to go further and consider other aspects which would only be relevant if the Court had decided that the Price Representation had been made. It is appropriate nonetheless that this should be done, if only out of completeness.

Falsity and fraud

374. The first of these contingent further topics is whether the Price Representation, had it been made, would have been false. Unsurprisingly in this case, there is no issue about this. The Taruta Parties expressly accepted that this is the position in the Amended Defence and Counterclaim, and so, for all practical purposes, did the Mkrchan Parties since the relevant denial in their Defence is a denial which is founded exclusively on their prior denial that the Price Representation was made.
375. Nor was there any dispute that, if the Price Representation was made, then, it was fraudulent. Although denied as a matter of pleading, in the case of the Mkrchan Parties again on the basis that it is denied that the Price Representation was made at all, and in the case of the Taruta Parties on the basis that he was allegedly unaware that the Price Representation was made, in truth, it was accepted by both Mr Foxton QC and Mr Wolfson QC that, if made, then, the Price Representation was made fraudulently.

Reliance

376. The next issue concerns reliance. As previously explained, it is for the Gaiduk Parties (strictly speaking, Avonwick) to establish this: that the Castlerose SPA was entered into in reliance on the Price Representation (and that loss was suffered as a result). Again as previously explained, the question, in the present circumstances, is what Mr Gaiduk (and so Avonwick) would have done if no Price Representation had been made, there being a presumption, given that this is a fraud case, that he (and so Avonwick) was induced to enter into the Castlerose SPA on the faith of the Price Representation.
377. Reliance was not conceded by either Mr Foxton QC or by Mr Wolfson QC. On the face of it, however, it is difficult to resist the conclusion that there was reliance in this case, on the hypothesis, that is, that the Price Representation was made (contrary to what has been decided), that it was false and that it was made fraudulently.
378. I make it clear in this connection that I am assuming, obviously, that the Price Representation was made rather than that Mr Mkrtchan said what he admits saying (that *“the price being offered to Avonwick was determined by the position of the Russian Buyer”*), and so either that the Price Representation was made without Mr Mkrtchan having said what he admits saying or (more likely) after Mr Mkrtchan had to say what he admits saying, even though the conclusion which I have reached is that, Mr Mkrtchan having said what he admits saying, Mr Gaiduk would not have followed up by asking what price Mr Taruta and Mr Mkrtchan were going to receive.
379. Assuming all of these matters, it seems to me inevitably to follow that, if Mr Mkrtchan did not say what he admits saying, there was the requisite reliance. I am satisfied, specifically, that, in that scenario specifically, had Mr Mkrtchan not made the Price Representation, Mr Gaiduk would not have allowed Avonwick to enter into the Castlerose SPA. Mr Gaiduk had this to say when asked during the course of his evidence:
- “Had I known the sum or the amount the Russian Buyer was actually paying my partners, there would have been three possible options. First, I would have demanded that there should be a proportional sum, as has been mentioned, similar to the others. Or I would have been ready to sell one-third of my stake and remain in the company, if proportionality depended on that. If neither, I would have just refused to go through with the deal. But I wasn’t given any options.”*
- For present purposes, what matters is that Mr Gaiduk was here making it clear that he *“would have just refused to go through with the deal”* had he known that he was not going to be paid the same price per share as Mr Taruta and Mr Mkrtchan.
380. Although not, strictly speaking, the relevant test, again as previously explained, asking what would Mr Gaiduk have done if he had been told the true price being paid by the Russian Buyer is instructive from an evidential perspective when seeking to answer the correct question, namely what Mr Gaiduk (and Avonwick) would have done had the Price Representation not been made. It is tolerably clear, at least if Mr Mkrtchan did not say what he admits saying, that what Mr Gaiduk would have done was ask what Mr Taruta and Mr Mkrtchan (or their companies) were to be paid, and that, as a bottom line, he would not have allowed Avonwick to enter into the Castlerose SPA.

381. It should be made clear that I approach this matter on the basis that, ultimately, as Mr Gaiduk himself stated, he would not have entered the Castlerose SPA, and not, therefore, on the basis that, had the Price Representation not been made, he would have allowed Avonwick to enter into this contract but on different terms to those, in fact, agreed. This is because, as I shall come on to explain later when dealing with causation and loss, the only case which has been pleaded, and so the only case which it is open to the Gaiduk Parties to advance, is that, but for the Price Representation, Mr Gaiduk would not have entered into the Castlerose SPA at all or entered into any other such contract of sale with any other party, not whether Avonwick would have entered into a sale contract at a different price or on other terms.
382. I should add that I am not dissuaded from this conclusion by the submission which was made by Mr Foxton QC in particular, namely that the fact that certain inquiries were made by or on behalf of Mr Gaiduk, Mr Petrov and Mr Kravets in order to verify the price being offered demonstrates that Avonwick was relying on its own resources and research and not on the alleged Price Representation in entering into the transaction. This is because, as I have previously explained, it is equally clear that whatever was done cannot have been a particularly detailed exercise. Moreover, as made clear by Longmore LJ in *Rembrandt* at [32] and [45] the test for reliance entails asking whether there has been a material influence and it is possible that a representation is but one reason among several reasons provided that it is nonetheless itself material.

Joint tortfeasor liability and agency

383. Although strictly speaking this is another point which does not arise, it is convenient at this juncture, before coming on to deal with the limitation and causation/loss issues, to address Avonwick's case that Mr Taruta (and through him Dargamo) is liable as a joint tortfeasor, as parties to a common design to make the Price Representation, alternatively that, in making that representation, Mr Mkrтчan was acting as the agent of Mr Taruta (and Dargamo).
384. In addressing this issue, my main focus is on the position as a matter of English law, given that as between the Gaiduk and Taruta Parties there is no issue that it is English law which is applicable and given that, at least in the first instance, the dispute is as between those parties. Indeed, the submissions which were advanced to me on the agency topic by Mr Calver QC and Mr Foxton QC had as their sole focus the position under English law. However, having decided that it is Ukrainian law which applies to the Avonwick Claim, I shall come on later to address, albeit only briefly, the Ukrainian law position also.
385. As to the first of these points, it was Mr Calver QC's submission that Mr Taruta and Mr Mkrтчan must have got together and planned the fraud which is alleged since this would have been necessary for that fraud to succeed and there has been no suggestion that Mr Mkrтчan somehow made the Price Representation on a frolic of his own without agreeing it in advance. Mr Calver QC relied for these purposes on the following extract from *Chitty on Contracts* (33rd Ed.) at paragraph 7-025:

"In order to ground relief to a person who has entered into a contract as a result of a misrepresentation, it is normally necessary that the misrepresentation should have been made either by the other party to the contract, or by his agent acting within the scope of his authority, or that the other party had notice of the misrepresentation; notice may

be actual or constructive. A person who has been induced to enter into a contract with A as a result of a misrepresentation made to him by B and of which A had no notice has no ground of relief against A unless B was A's agent. It is, however, not necessary to show that the misrepresentor was the agent of the other contracting party for the purpose of concluding the contract, or even for the purpose of conducting negotiations; it is sufficient if the misrepresentor was the agent of the other contracting party simply for the purpose of passing on the misrepresentation to the misrepresentee."

386. As I see it, however, this is dealing with Mr Calver QC's alternative agency argument rather than with the joint tortfeasor point. More pertinent, in my view, is the following observation in *Clerk & Lindsell* at paragraph 18-10:

"... a person may be liable in deceit as a joint tortfeasor if he is a knowing and active party to a scheme to defraud, even if he has not himself said anything and the actual representation has been made by someone else."

387. Mr Calver QC relied also on certain observations made in *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, [2015] AC 1229 in support of the proposition that a person may be liable for a fraudulent misrepresentation made by another where there is a shared intention or common design between the two persons. Specifically, Lord Toulson explained the principle in this way at [21]:

"To establish accessory liability in tort it is not enough to show that D did acts which facilitated P's commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further."

388. At [58], Lord Neuberger similarly referred to the need that there *"be a common design between the defendant and the primary tortfeasor that the tortious act, that is the act constituting or giving rise to the tort, be carried out"*, going on at [59] to say this, referring at [59] to *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583, as follows;

"A common design will normally be expressly communicated between the defendant and the other person, but it can be inferred, a point which is clear from Lord Mustill's reference to 'agreed on common action' and 'tacit agreement' in Unilever at p 609. I have some concerns about the notion that the defendant has to [make the tortious act] his own', as Peter Gibson LJ put it in Sabaf SpA v Meneghetti SpA [2003] RPC 264, para 59. While it can be said that it rightly emphasises the requirement for a common design, this formulation is ultimately circular and risks being interpreted as putting a potentially dangerous gloss on the need for a common design."

389. In a subsequent case, *Inter Export LLC v Townley* [2017] EWHC 530 (Ch), Proudman J, having considered *Fish & Fish*, noted the need for each defendant to be *"party to a common design"*, which meant, as she went on to explain at [40], that *"the four elements of the tort of deceit must be shared by both parties"*.

390. Alternatively, as I have explained, Mr Calver QC submitted that, in any event, Mr Mkrchan should be regarded as having acted as Mr Taruta's (and Dargamo's) agent in

making the Price Representation. He observed, uncontroversially, in this regard that agency may be actual or apparent and that it is only necessary to show that the agency relationship arose for the purposes of the misrepresentation (and not for the purposes of the negotiations as a whole or the conclusion of the contract). It is in the latter respect that the passage cited above from *Chitty* at paragraph 7-025 is apposite. So, too, is the following passage in *Marme* at [415] in which I said this, having considered the Court of Appeal decision in *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567

*“... the Court should not feel constrained to find that there is an agency relationship when the facts do not support such a conclusion. Reliance on specific and limited acts which might be capable of being characterised in terms of agency but which, viewed in the round and taken together with other features which are either present or absent, do not justify a conclusion that there is an agency relationship ought not to result in such a finding. Indeed, it should be noted that in *Branwhite* itself and in *Shogun Finance v Hudson* [2001] EWCA Civ 1000, [2002] QB 834 it was decided that, even where all contact was between the third party (the car buyer and the finance company respectively) and the supposed agent, with no direct involvement on the part of the supposed principal at all, it was decided that no agency relationship existed”*

391. In *UBS* both Hamblen LJ and Briggs LJ (as they then were) suggested, at [88], that the decision of the House of Lords in *Branwhite v Worcester Works Finance Limited* [1969] 1 AC 552 was authority for the proposition that:

“The court should not impose an agency analysis upon a relationship which may better be analysed in other terms, in particular where the intermediary ... has its own interest in the transaction as a principal.”

392. They considered also, at [89], that the Supreme Court decision in *Plevin v Paragon Personal Finance Limited* [2014] 1 WLR 4222, in the admittedly rather different statutory consumer credit context, *“reinforces the warning to be found in the *Branwhite* case against forcing into an agency analysis a relationship better explained in some other way, in particular where the supposed agent is already an agent of another party to the contemplated transaction”*.

393. Whether there is an agency relationship which embraces the making of a representation is, ultimately, a factual question, as to which it is perhaps worth bearing in mind what I went on to say in *Marme* at [416]:

“It follows, therefore, that Mr Saini QC was right when he submitted that a person may be an agent where he acts on behalf of a principal but has no authority to affect the principal's relations with third parties and that it is not a sine qua non that an agent should owe his principal a fiduciary duty. It would be quite wrong, however, to approach matters on the footing that the absence of these features is immaterial, the more so when both features are absent, since to do so could result in a finding that there is an agency relationship in situations where such a finding would be wholly inappropriate.”

394. I note, indeed, that Green J (as he then was) appears to have adopted a similarly cautious approach in *Khakshouri v Jimenez* [2017] EWHC 3392 (QB) at [123(ii)], when summarising certain arguments deployed by counsel in that case, as follows:

“The basis on which a principal becomes responsible for the statements of an agent (who is neither an employee or partner stricto sensu) is, as Bowstead & Reynolds on Agency 20th ed) observes at paragraph 8-182, ‘somewhat limited’ and is confined to cases where: ‘... the function entrusted is that of representing the person who requests his performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity.’”

395. Lastly as to the relevant law, it was not in dispute that, as confirmed by the Court of Appeal in *Winter v Hockley Mint Ltd* [2018] EWHC Civ 2480, [2019] 1 WLR 1617 at [63], a principal is liable for misrepresentations made by his agent if it was within the agent’s actual or apparent authority to make that representation. That is the position even if the principal is unaware that the misrepresentations were being made.
396. Applying these principles to the facts of this case, I have concluded that Mr Calver QC’s submissions are to be preferred to those which were advanced by Mr Foxton QC. In short, even adopting the cautious approach which, in my view, both Mr Calver QC’s primary and alternative cases require to be exercised, I consider that it would have been unrealistic and artificial to have decided that Mr Taruta and Dargamo would not have been under a liability to Avonwick, had I decided differently thus far.
397. Indeed, Mr Foxton QC explained in his opening oral submissions that he was “*less excited about this point than others*” about this issue because, as he put it, “*I struggle to see how the deceit case could ever begin to get off the ground unless Mr Taruta and Mr Mkrтчan were in it together*”. Mr Foxton QC was recognising, therefore, that, if this stage in the analysis were to be reached, the Court would have concluded that the Price Representation had, indeed, been made and this conclusion would likely entail an allied conclusion that this was on behalf of both Mr Mkrтчan and Mr Taruta (and Dargamo).
398. Formally nonetheless, in closing Mr Foxton QC maintained the stance that, if the Price Representation was made, then, it was made only by Mr Mkrтчan, who did not have authority to speak on behalf of Mr Taruta or Dargamo and in circumstances also where Mr Taruta and Dargamo should not be treated as being joint tortfeasors. It was Mr Foxton QC’s submission, in short, that, Mr Mkrтчan having attended the June 2009 Meeting in order to discuss the sale of Avonwick to both Mr Taruta and himself, Mr Taruta’s confirmation over the telephone, and at the request of Mr Gaiduk, that he was willing to purchase for the same price as Mr Mkrтчan, should not be regarded as conferring authority (whether actual or apparent) on Mr Mkrтчan to speak on his behalf.
399. I cannot agree with Mr Foxton QC about this, however, since, in my view, the position is clear: at the telephone call at the start of the June 2009 Meeting, Mr Taruta informed Mr Gaiduk that he authorised Mr Mkrтчan to speak on his behalf.
400. I have already touched on this topic. However, that there was the call is not in dispute. Nor is it in dispute that the call took place towards the start of the meeting, Mr Gaiduk and Mr Mkrтчan (as well as Mr Petrov) being in Mr Gaiduk’s office at 14-B Yaroslavov and Mr Taruta being in his office at IUD in Donetsk. The call was placed by Mr Gaiduk’s assistant, who contacted Mr Taruta’s reception, it appears, using IUD’s secure lines between Kiev and Donetsk.

401. It was Mr Gaiduk's evidence in his witness statement that, indeed, the reason why the call took place at all was to check that Mr Taruta was content for Mr Mkrtchan to negotiate on his behalf. That was what Mr Petrov said in his witness statement also. Asked in his oral evidence about this, Mr Gaiduk was explicit:

"...I said to him 'We are on a loudspeaker', and I wanted to ask him two straightforward questions: number (1) is he aware of the proposal and (b) will he confirm that Mr Mkrtchan has the authority to talk on behalf of both of you as opposed to just one of you? Because Mr Mkrtchan told me he is talking on behalf of both of them. All I needed to hear from Mr Taruta is the confirmation."

This is evidence which I accept. It has more than a ring of truth, and it makes sense, since it is not easy to see why the call needed to take place at all if the position were as Mr Taruta maintained in his evidence, which was merely that he confirmed on the call that he would agree to pay whatever price Mr Mkrtchan agreed to pay. That is something which Mr Taruta could have been asked to confirm after the meeting between Mr Gaiduk and Mr Mkrtchan (and Mr Petrov) had come to an end, whereas it would obviously have been sensible to have ascertained whether Mr Mkrtchan had authority to speak on behalf of Mr Taruta before Mr Gaiduk and Mr Mkrtchan took their discussion forward.

402. Moreover, Mr Mkrtchan himself admitted in the Defence served on his behalf (and on behalf of the Mkrtchan Parties) as follows:

"At the start of the meeting Mr Taruta attended by telephone and indicated that Mr Mkrtchan would be speaking on his behalf."

Mr Mkrtchan did not, of course, give evidence to this effect owing to his incarceration in Russia. He was, accordingly, unable to be tested by Mr Foxton QC on this issue. However, his is an admission which is both clear and unequivocal. As I say, it also accords with what I consider to be the inherent probability. I repeat that this is a topic on which I have already touched, but Mr Taruta's evidence that he was doing no more than agreeing to pay whatever price Mr Mkrtchan himself agreed to pay was, in contrast, implausible. Mr Taruta was, indeed, ultimately constrained to accept in cross-examination that it was Mr Mkrtchan, a tough negotiator, who was taking the lead on the negotiations with Mr Gaiduk. The fact that Mr Mkrtchan was taking the lead is entirely consistent with Mr Taruta being content that Mr Mkrtchan should represent him at the meeting.

403. Mr Taruta agreed, furthermore, that he placed no limitation on Mr Mkrtchan's authority to speak for him, either in his discussions with Mr Mkrtchan or in their joint discussions with Mr Gaiduk. Again, this is consistent with Mr Mkrtchan representing Mr Taruta. The same had happened previously when Mr Mkrtchan and Mr Taruta had acted jointly in offering to buy Mr Gaiduk's stake in 2008. They had agreed that Mr Mkrtchan would take the lead on this negotiation with Mr Gaiduk.
404. In these circumstances, Mr Gaiduk was entitled to assume that Mr Mkrtchan was acting on behalf of Mr Taruta, and that is sufficient to establish apparent authority, although in all probability there was, in fact, actual authority vested in Mr Mkrtchan by Mr Taruta. Either way, I am clear that the agency case is made out. It makes no difference

that the relevant agency was confined to the making of representations such as the Price Representation.

405. I might add in this context that I consider that Mr Taruta's evidence that he told Mr Gaiduk that he would agree whatever price Mr Mkrctchan negotiated for himself with Mr Gaiduk implausible even as a matter of language. I agree with Mr Calver QC when he described this as strained and unnatural. This further supports my conclusion that the evidence given by Mr Taruta on this topic is not evidence which can be accepted. On the contrary, it is evidence which, in my view, was made up.
406. I am satisfied, in short, that Mr Gaiduk's evidence, supported as it is both by Mr Petrov and, indeed, by Mr Mkrctchan, is to be preferred and so that the position is that Mr Taruta told Mr Gaiduk that Mr Mkrctchan was authorised to negotiate on his behalf in respect of the sale of the Castlerose Interest.
407. Even if Mr Taruta's evidence were to be accepted, however, and so it were to be concluded that nothing was expressly said during the telephone call at the start of the meeting about Mr Mkrctchan having authority to negotiate on Mr Taruta's behalf, still, in my view, the requisite agency relationship would have been made out in this case. This is because I agree with Mr Calver QC when he submitted that, in substance, by telling Mr Gaiduk that he would pay whatever price Mr Mkrctchan agreed to pay, Mr Taruta was bestowing upon Mr Mkrctchan the power to negotiate the price for him. That negotiation entailed Mr Mkrctchan telling Mr Gaiduk, again on the assumption that the Price Representation has been established, what he did about the price being paid by the Russian Buyer. This would have been integral to the negotiation since a party which authorises another to negotiate on its behalf should, in my view, be regarded as authorising that person both to receive and, importantly in the present context, to communicate information relevant to, and as part of, that negotiation. If that is right, then, in making the Price Representation, Mr Mkrctchan must have been acting not only on his own behalf but on behalf of Mr Taruta also.
408. The same result is achieved through the joint tortfeasor analysis which Mr Calver QC put forward as his primary case. I agree with him that, if the Price Representation was made (contrary, therefore, to the conclusion which I have reached), then, the evidence as to the existence of a common design to deceive Mr Gaiduk is sufficient to support a conclusion that there is liability on the part of Mr Taruta (and so Dargamo). Put differently, had the Price Representation been established, I would also have concluded that Mr Taruta and Mr Mkrctchan agreed in their prior discussions to perpetrate a fraud on Mr Gaiduk.
409. I bear in mind in this context that, before Mr Mkrctchan left for Kiev to attend the meeting with Mr Gaiduk in June 2009, Mr Taruta and Mr Mkrctchan met in their offices in Donetsk. Mr Taruta accepted in evidence that the purpose of this meeting was to agree a price (he characterised it as a renegotiation of the price under the Evraz deal) with Mr Gaiduk in order that the deal with the Russian Buyer could be progressed. Mr Taruta accepted also that by this stage the two of them knew that they were getting between US\$2.5 billion and US\$2.75 billion from the Russian Buyer and that he had calculated that the price for 1% of IUD on that basis was US\$105 million and that his and Mr Mkrctchan's agreement was reached by reference to their knowledge of what the Russian Buyer was willing to pay.

410. If, therefore, the Price Representation was made, as the Gaiduk Parties maintain, then, Mr Taruta and Mr Mkrchan must have known that they stood to receive much more from the Russian Buyer for their smaller proportion of shares than Mr Gaiduk was set to receive. Had the Price Representation been made, the irresistible inference would, accordingly, have been that Mr Taruta and Mr Mkrchan had decided by about this time that they would deceive Mr Gaiduk by buying his shareholding and flipping it on to the Russian Buyer instead of allowing him to share in the profits of the sale to the Russian Buyer by way of a single SPA to which they were all parties.
411. The fact that in his evidence Mr Taruta sought to distance himself from what Mr Mkrchan was doing when he met Mr Gaiduk in June 2009 only serves to strengthen this conclusion. His suggestion, in particular, made for the first time during the course of his cross-examination, that he “*did not want to take any part in this, because I needed to hop on the plane and go somewhere*”, despite being unable to explain where it was that he was going, appeared to be an attempt to distance himself from anything said or done by Mr Mkrchan and so to protect himself from the allegation of deceit which he knew was being levelled at him.
412. In the circumstances, although, as Mr Calver QC submitted, it would probably have been sufficient for Mr Taruta to have participated in a common design that he knew Mr Mkrchan was going to make the Price Representation to Mr Gaiduk, in order to induce him to agree a particular price, the fact that, as I have concluded, Mr Taruta confirmed in the telephone call at the start of the meeting in June 2009 that Mr Mkrchan was speaking on his behalf serves to underline the correctness of that conclusion.
413. Turning to Ukrainian law, but only briefly given that this is not an aspect which was addressed in Mr Wolfson QC’s written closing submissions at all having been the subject of a single paragraph in his written opening submissions, the position seems to me to be clear. Mr Beketov (the Taruta Parties’ expert) and Mr Likarchuk (the Mkrchan Parties’ expert) were in agreement that, if the claimant and defendant are parties to a contract which is recognised as valid and binding under Ukrainian law, albeit that it may not, strictly speaking, amount to an agency contract as a matter of Ukrainian law, then, the parties’ rights and obligations will be governed by the general principles applicable to contracts.
414. It follows that, if (as the Mkrchan Parties maintain) Mr Taruta confirmed the authority of Mr Mkrchan to speak on behalf of the Taruta Parties in the telephone conversation at the start of the June 2009 Meeting, then, a contract came into existence, under which Mr Mkrchan must be regarded as having agreed to act in good faith.
415. If that is right, then, if the Avonwick Claim were to have succeeded, the Taruta Parties would likely have had a claim over as against the Mkrchan Parties based on what Mr Mkrchan told Mr Gaiduk (and Mr Petrov). That is, indeed, what Mr Foxton QC submitted would be the position and, in his written closing submissions, Mr Wolfson QC did not seek to gainsay such an analysis. If so, then, irrespective of whether a formal agency relationship came into existence or not, it is difficult to see how it could really be suggested that the Avonwick Claim should not succeed also against the Taruta Parties, bearing in mind the factual matters which I have addressed at some length when considering the position under English law.

416. It follows that, had the Price Representation alleged to have been made by Mr Mkrctchan at the meeting in June 2009 been established, I would have gone on to hold that Mr Taruta and Dargamo are liable in respect of it, whether as a matter of English law or as a matter of Ukrainian law.

Limitation

417. The limitation issue is yet another issue which does not, strictly speaking, arise but which I will address in any event.
418. It will be recalled that, as between the Gaiduk Parties and the Taruta Parties, there was no issue that it is English law concerning limitation which applies. As between the Gaiduk Parties and the Mkrctchan Parties, however, I have decided that it is Ukrainian law which is applicable. Accordingly, it is necessary to consider the limitation question by reference both to Ukrainian law and to English law, lest I am wrong to have decided that Ukrainian law is applicable, it being agreed between the parties that the law of Cyprus is to be regarded as being the same as English law. I propose, merely for convenience and admittedly somewhat illogically, to address the English law position before, then, going on to consider Ukrainian law.
419. The position as a matter of English law is, of course, well known. The applicable limitation period, pursuant to s. 2 of the Limitation Act 1980, is six years from the date when Avonwick's cause of action accrued. Since it is common ground that the cause of action accrued either on 18 December 2009 when it agreed in the Castlerose SPA to sell its shares for US\$950 million or on 30 December 2009 when that transaction was completed and the sale went ahead, there is no issue in this case that the six-year limitation period had passed by the time that the proceedings came to be commenced on 9 August 2016 and so that, prima facie, the Avonwick Claim is time-barred. The issue is as to whether Avonwick is entitled to rely on either the fraud or deliberate concealment provisions contained in ss. 32(1)(a) and (b) of the 1980 Act, which are in these terms:

“... where in the case of any action for which a period of limitation is prescribed by this Act, either –

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; ...

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.”

420. There can be no question that a claim for deceit is an action based on the fraud of the defendant for the purposes of s. 32(1)(a) since, plainly, fraud is a necessary component of the claim. This is made clear in *McGee* at paragraph 20.009:

*“The meaning of this expression was considered in *Beaman v ARTS Ltd* [[1949] 1 K.B. 550, Denning J; [1949] 1 All E.R. 465, CA] The claimant entrusted property to the defendants to look after. During the Second World War the defendants, believing that the claimant could not be traced and being fearful for the safety of the goods during the Blitz, gave the property away. After the War the claimant reappeared and demanded the return of her goods. She sued the defendants in conversion when they were unable to comply with this demand. They pleaded that the cause of action arose in 1940 when they disposed of the goods (on which assumption the action was out of time) but the claimant argued that the disposal of the goods was ‘fraud’ within what is now s.32(1)(a), so that time did not start to run until she discovered the loss in 1946. Both Denning J and the Court of Appeal held that the action was not based on fraud, although their approaches to the definition of fraud in this context were different. Denning J held that there was no fraud where the defendant honestly believed that the owner had consented to the disposal or that he would have done so had it been possible to contact him and seek his approval. The Court of Appeal laid down a more general test applicable to any case in which s.32(1)(a) is pleaded. An action is ‘based on fraud’ for this purpose when (and only when) fraud is an essential element of the claimant’s claim.²¹ This requirement was not satisfied here, since the action was pleaded in conversion, a tort which can be committed without any fraud (though of course it may involve fraud).”*

421. Although Mr Foxton QC took no issue with this being the position, he nonetheless maintained that s. 32(1)(a) does not apply to a claim under s. 2(1) of the Misrepresentation Act 1967, citing the following passage from *Chitty* at paragraph 28-084 in support of this submission:

“Section 32(1)(a) of the Limitation Act 1980 provides that where the action is based upon the fraud of the defendant, the period of limitation shall not begin to run until the claimant has discovered the fraud or could with reasonable diligence have discovered it. This provision is, however, of limited scope because it only covers cases where the cause of action requires the allegation and proof of fraud in the strict sense, e.g. as in actions for fraudulent misrepresentation or deceit. It is submitted that an action under s.2(1) of the Misrepresentation Act 1967, though equated for some purposes to an action based on fraud, would not fall within s.32(1)(a).”

422. It may be that Mr Foxton QC was right about this. However, he appeared, correctly in my view, to acknowledge that, whether or not s. 31(1)(a) applies, s. 32(1)(b) is at least potentially applicable. Indeed, *Chitty* goes on to state this at paragraph 28-085:

“Section 32(1)(b) of the Act provides that where any fact relevant to the claimant’s right of action has been deliberately concealed from him by the defendant, the period of limitation shall not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it. It is further provided that a deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty. The use of the word ‘deliberate’ indicates that an unwitting (even if negligent) concealment of a relevant fact or commission of a breach of duty is not enough. It also appears that no fraud or dishonesty on the part of the defendant need be proved. Where there is a deliberate commission of a breach of duty, e.g. a breach of contract, it is unnecessary to show that the defendant took active steps to conceal the

breach: all that is required is that it is committed 'in circumstances in which it is unlikely to be discovered for some time'.

423. It is implicit in what is here stated that where the misrepresentation is other than innocent or negligent, in other words where it is fraudulent, s. 32(1)(b) is potentially applicable. I agree with Mr Calver QC, therefore, when he observed that, on the facts of this case, it is impossible to see how Azitio and Dargamo could be found liable under s. 2(1) without s. 32(1)(b) being engaged. That said, as Mr Foxton QC pointed out, after himself referring to paragraph 28-085, if facts come to be known to the claimant by other means, there can be no concealment (deliberate or otherwise) for the purposes of s. 32(1)(b), as made clear by Lord Millett in **Cave v Robinson Jarvis & Rolf** [2002] UKHL 18, [2003] 1 AC 384 at [14]. Accordingly, as, in essence, Mr Calver QC and Mr Foxton QC agreed (along with Mr Wolfson QC also, assuming that English law applied rather than Ukrainian law), the issue in this case is whether Mr Gaiduk and Avonwick either did discover, or could by reasonable diligence have discovered, the fraud prior to 9 August 2010, which is to say 6 years prior to the issue of the proceedings.

424. As to the first of these considerations, whether Mr Gaiduk and Avonwick actually discovered the relevant fraud or concealment, it is clear that suspicion alone will not be sufficient. As *Lewin on Trusts* (19th Ed.) puts it at paragraph 44-153, citing **Halford v Brookes** [1991] 1 WLR 428 per Lord Donaldson MR at page 443 and **Allison v Horner** [2014] EWCA Civ 117 per Aikens LJ at [14]:

“Where actual discovery is relied on, discovery does not connote knowledge for certain and beyond possibility of contradiction but suspicion is not enough: reasonable belief suffices. In a case of fraud by deceit, it seems that knowledge is needed of the precise deceit practised and that knowledge of fraud ‘in a more general sense’ does not start time running.”

425. As to what a claimant “*could with reasonable diligence have discovered*”, Millett LJ (as he then was) described matters in this way in **Paragon Finance plc v D.B. Thakerar & Co.** [1999] 1 All ER 400 at page 418:

“The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take [...] [T]he test [is] how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency.”

426. The question, therefore, is whether the claimant could, not should, have discovered the fraud sooner, as further confirmed in subsequent cases such as **Law Society v Sephton** [2004] EWCA Civ 1627 at [110] per Neuberger LJ (as he then was) and in **Allison v Horner** [2014] EWCA Civ 117, in which, at [16], Aikens LJ described Neuberger LJ as having in that case (**Law Society v Sephton**) concurred with the view of the trial judge in that case (Michael Briggs QC, as he then was, sitting as a Deputy High Court Judge) that:

“it followed from Millett LJ’s construction of section 32(1) that there must be an assumption that the claimant desires to discover whether or not there had been a fraud

committed on him. Not to make such an assumption would rob the word 'could' in the section of much of its significance. Moreover, the concept of 'reasonable diligence' carried with it the notion of a desire to know and, indeed, to investigate."

427. I agree with Mr Calver QC, however, when he submitted that this ought not to be taken to mean that the reasonable person is expected, upon being defrauded but not realising that this is the case, immediately to start to interrogate whether he has been defrauded. As he pointed out, **Sephton** was a case where the claimant already knew that he had a cause of action in negligence and had, indeed, already issued proceedings. In **Allison v Horner**, by way of contrast, Aikens LJ considered at [42] whether certain matters were such as to "put Mr Horner on enquiry that Ms Allison might have made such fraudulent representations so that he ought to have followed the matter up". That, therefore, was a case more like the present case, where the claimant did not already know that there was a cause of action.

428. I agree with Mr Calver QC, in short, that it would not be right to start from the assumption that, in respect of every statement made to a person in a commercial context, that person must immediately start ascertaining whether that statement is fraudulent without at least being put on inquiry. A more recent case is also instructive in this context, namely **Gresport Finance Limited v Battaglia** [2018] EWCA Civ 540, in which Henderson LJ referred both to what Millett LJ had to say in **Paragon Finance** and to Neuberger LJ's observations in **Sephton**, before saying this at [49]:

"Neuberger LJ added that 'one must be very careful about implying words into a statutory provision', but he said that the judge had not been seeking to imply words, or a new concept, into the statutory provision. He was merely 'explaining what was involved in the process of deciding whether a claimant could, with reasonable diligence, have discovered the fraud which it now seeks to plead'. I respectfully agree. Another way of making the same point, as I suggested in argument, might be that the 'assumption' referred to by Neuberger LJ is an assumption on the part of the draftsman of section 32(1), because the concept of 'reasonable diligence' only makes sense if there is something to put the claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake (as the case may be)."

429. This seems to me to lend further support to the correctness of the submission which was made by Mr Calver QC. As I shall come on to explain, on the facts of the present case, however, I am clear that this is not a factor which assists the Gaiduk Parties.

430. It, perhaps, lastly, goes without saying that the burden is on a claimant to show that he could not with reasonable diligence have discovered the fraud sooner. That is what is stated, accurately as I see it, in *Lewin* puts it at paragraph 44-152, citing **Paragon Finance** at page 418B-D, **Schulman v Hewson** [2002] EWHC 855 (Ch) at [42] and **Allison v Horner** at [19], as follows:

"The burden of proof that the claimant both lacked the relevant knowledge and could not have made the discovery earlier than he did rests on him."

431. I have reached the conclusion that this is not a case in which either s. 32(1)(a) or (b) can be relied upon by the Gaiduk Parties. I am satisfied, in short, that Avonwick either could or did discover that the Price Representation (assuming, for these purposes, that it had been made) was false by no later than 30 June 2010 and, in any event, before 9

August 2010, the relevant cut-off date. As will become clear, although I do not accept all that was submitted to me by Mr Foxton QC and Wolfson QC in this regard, I am clear that there is evidence in this case which warrants such a conclusion.

432. The starting point, as Mr Wolfson QC pointed out, is that the business of Avonwick was to act as a holding company for a number of Mr Gaiduk's business assets, including his interest in IUD. That interest in IUD was a very valuable asset, and its proposed sale was, therefore, of particular importance to Avonwick. It follows that, when considering Millett LJ's reference in *Paragon Finance* at page 418 to "*how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources but not excessive sense of urgency*", it needs to be borne in mind that Avonwick was a vehicle of Mr Gaiduk, who was at the relevant time a very wealthy and powerful individual, with a team of internal advisers and the resources to instruct external advisers such as Allen & Overy, UBS and PwC. It is with this in mind that the parties' respective contentions fall to be considered.
433. Mr Wolfson QC submitted, firstly, that a reasonable person in Avonwick's position would have begun investigating whether the Price Representation was true right from the outset.
434. Although, as I have explained, I agree with Mr Calver QC that a reasonable person, upon being defrauded but not knowing that to be the position, is under no obligation to start looking into whether he has been defrauded, I consider that this is a proposition which in the present case is of only limited application since I am satisfied that a reasonable person in Avonwick's position would, indeed, have begun investigating whether the Price Representation was true for a beguilingly simple reason: for reasons which have previously been canvassed, the idea that Mr Gaiduk would receive the same price per share as Mr Mkrchan and Mr Taruta were to receive was inherently unlikely. I consider that, in view of that, this would have led a reasonable person in Avonwick's position to take steps to investigating whether the Price Representation was true.
435. It should, furthermore, be borne in mind in this connection that, as Mr Wolfson QC pointed out, it was the Gaiduk Parties' own case that the price Mr Gaiduk was offered at the June 2009 Meeting "*was less than [Avonwick] had hoped for*". Mr Gaiduk's evidence, indeed, was that he queried this with Mr Mkrchan at the June meeting by asking: "*Who is this buyer? At that kind of a price I could go and negotiate the sale myself*". Mr Petrov also apparently considered at the time that "*the price seemed very low*".
436. That said, as Mr Calver QC submitted, it is not altogether clear how Avonwick could have verified the position even if Mr Gaiduk had harboured doubts concerning the Price Representation. Mr Wolfson QC suggested that Avonwick had a means available to it from about June or July 2009 to investigate whether the alleged Price Representation was true since it was known by Mr Gaiduk then that VEB and Mr Dmitriev were closely involved in the transaction, and Mr Gaiduk discussed this further with Mr Taruta in December 2009. Accordingly, he observed, Mr Gaiduk, Mr Petrov or Mr Kravets could have approached Mr Dmitriev (whether directly or indirectly) in order to discover whether the alleged Price Representation was true – as, indeed, Mr Gaiduk had done previously in the context of the proposed transaction with Evraz. I am not persuaded by this, however, since I consider that Mr Calver QC was right when he made the point that there is no real basis for supposing that, had Mr Dimtriev and VEB been asked,

they would have told Mr Gaiduk the true position, thereby jeopardising the transaction. I do not, therefore, consider it right to decide that either s. 32(1)(a) or (b) is applicable on this specific basis.

437. Mr Wolfson QC next submitted that another opportunity for Avonwick to check what price was being paid by VEB came with the signing of the Castlerose SPA and the VEB SPA at the closing meeting in Cyprus which was attended by Mr Petrov. Mr Wolfson QC suggested that it is difficult to understand, on the Gaiduk Parties' *own* case, why Mr Petrov did not take that opportunity to confirm the true position. Again, however, I cannot agree with Mr Wolfson QC about this since, as Mr Calver QC observed, the evidence was that Mr Petrov was asked to remain on one side of the room and so away from the documents relating to the VEB SPA. This was not a case, therefore, where, it would seem, as a matter of fact, that Mr Petrov did actually cross the room to look at such documents. It follows that there was no actual knowledge. Nor is there any reason to think that, had he tried to look at the documents, this would have been permitted. Either way, this is neither a s. 32(1)(a) nor a s. 32(1)(b) case. Indeed, it is worth bearing in mind in this respect that it was Mr Foxtton QC's submission, admittedly directed at the prior question of whether Mr Taruta and Mr Mkrтчan should be treated as having set out to deceive Mr Gaiduk rather than the limitation issue, that it was clear in the lead-up to the closing, and so obviously at the closing itself, that the amount being paid by the Russian Buyer would not be revealed to Avonwick since it was a matter which was confidential as against Mr Gaiduk.
438. Mr Foxtton QC submitted, in this context, that, if the deal was being done on the basis that Avonwick was receiving the same price per share as the Russian Buyer was paying and that this was effectively a sale by Avonwick to the Russian Buyer as the Gaiduk Parties would have it, there would have been no need for any such sensitivity. Given this confidentiality, it is difficult to see how it really can be the case that Mr Petrov (and, through him, Mr Gaiduk) should be treated as having either actual or constructive knowledge of the price which the Russian Buyer was paying to Mr Taruta and Mr Mkrтчan or their respective companies.
439. There is, however, in my view, considerable merit in a fourth submission which was made by Mr Wolfson QC and which was effectively Mr Foxtton QC's central submission. This is that, whatever Avonwick knew or could have known previously, Avonwick must have acquired the requisite knowledge, alternatively could have acquired such knowledge, by early 2010 (specifically January to April 2010, and so before 9 August 2010). This is because both the international and Ukrainian press were reporting at that time that the transaction had a value of US\$2 billion. This was inaccurate, of course, in that the transaction had a higher value since VEB paid more than this. What matters, however, is that such a valuation is inconsistent with the Price Representation since it works out at some 1.8 times more than the price per share which was received by Mr Gaiduk.
440. That the Gaiduk Parties were aware of this reporting at the time was confirmed by Mr Petrov in his witness statement where he described there as having been "*a lot of speculation in the press about the transaction, including the price paid by the Russian Buyer*" which he and Mr Gaiduk "*followed ... closely*". Mr Gaiduk further confirmed this when he came to give evidence, as this exchange concerning the Minfin article dated 15 January 2010 makes clear:

“Q. Mr Gaiduk, do you see the third paragraph there, a reference to “it is estimated that the Russians paid US\$2 billion for 50% plus 2 ... shares ”.

MR JUSTICE PICKEN: It may be worth reading the previous paragraph above it, because that is where VEB is mentioned.

MR FOXTON: If you can just cast an eye to yourself, Mr Gaiduk, through the second and third paragraphs of report. (Pause)

A. Yes, I can see that.

Q. You were following the reports in the media about this deal, weren't you?

A. I did see some reports. I was aware of some of the reports, yes.

Q. And I suggest that some of the reports you saw were giving a figure of \$2 billion as the amount the Russian Buyer had paid for 50% plus 2 shares.

A. Some were referring to 2 billion and some were referring to a lot less. All these are speculations which are journalists' writing and none of it was proven by confirmed information. None of it was based on confirmed information.

Q. However, it would have been the easiest thing in the world for you to say to Mr Taruta and Mr Mkrchan, 'I have seen reports of the Russian Buyer paying \$2 billion, is that true?'

A. Not the case. If the media said, quoted Mr Taruta or Mr Mkrchan that there was a deal with the Russian Buyers and they paid - - or the price that was paid was 2 billion, I could have asked them and I would have asked them, but I had no reasons.

Q. The reason you had, on your evidence, Mr Gaiduk, is that there were more than one report at this time of a Russian Buyer price that was not remotely consistent with you getting the same price per share as the Russian Buyer had paid.

A. No, that's not the case.”

441. Picking up on Mr Gaiduk's suggestion that the press reports were inconsistent, Mr Calver QC submitted in closing that it cannot seriously be suggested that the articles themselves revealed the truth to Mr Gaiduk since, so he suggested, it is far from clear in the various press reports relied upon what the price actually was. He went on to submit that, as a result, it is not clear what reasonable diligence Mr Gaiduk should have conducted, adding that, had he asked Mr Taruta or Mr Mkrchan, it is unlikely that they would have admitted that the Price Representation was false given that they had (at least on the Gaiduk Parties' case) just defrauded him. I am clear, however, that the exchange in cross-examination just quoted shows very clearly that Mr Gaiduk had the relevant knowledge and, in any event and at a minimum, that the Gaiduk Parties could have acquired that knowledge.
442. The suggestion by Mr Gaiduk that the reports were inconsistent is of no consequence since, as Mr Wolfson QC submitted, there were important points of consistency. Specifically, in five press articles which appeared in the Ukrainian press and in a sixth piece which appeared in the Financial Times a specific figure in relation to the

transaction was given. Two of those (an Antiraid article dated 9 January 2010 and a uaprom article dated 12 January 2010) reported that US\$2 billion was the price paid for an interest of 50% plus one or two shares (an “*announced price of US\$ 2 billion, for the 50%+1 package*” and “*the Russians paid US\$ 2 billion for 50%+2 shares*” respectively), whilst the other four articles referred to that same US\$2 billion figure without spelling out whether this related to all or part of IUD.

443. This was not the sort of inconsistent coverage which would have merited Mr Gaiduk simply disregarding what was being reported. It must have been apparent to Mr Gaiduk very soon after the joint closing that the Russian Buyer had paid substantially more for its 50% share in IUD than the US\$700 million which Mr Gaiduk was receiving for his 33.84% share.
444. The fact that the Financial Times reported on 6 January 2010 that there could be “*a transaction valuing ISD at up to \$2billion*”, implying a valuation for a 50% +1 stake of US\$1 billion, broadly congruent with the price which Mr Gaiduk may or may not have thought was being paid, does not assist the Gaiduk Parties since US\$2 billion was the immediate cash payment under the Iris transaction, with up to a further US\$750 million secured by letters of credit. Nor is the position altered by the likelihood that the various Ukrainian media sources which reported a figure of US\$2 billion would likely, in the usual way, have fed off each other.
445. On the contrary, in my view, even if Mr Gaiduk were appropriately to be regarded as having lacked actual knowledge, the press reports were quite sufficient to mean that the *Septon* (“*desire to know and, indeed, to investigate*”) and *Gresport Finance* (“*put ... on notice of the need to investigate*”) tests are met in this case.
446. The Gaiduk Parties might not have had “*knowledge for certain*” but that does not matter since I am satisfied that they did have a “*reasonable belief*” in the existence of the misrepresentation. Mr Gaiduk was aware at the time of the press reports and he knew, in particular, about the reporting of the figure of US\$2 billion. This is sufficient to mean that he had (and so the Gaiduk Parties had) the relevant knowledge for s. 32(1)(a) and/or (b) purposes. It follows that, for English law purposes, the limitation period began to run from before 9 August 2010. The Avonwick Claim having been issued on 9 August 2016, it further follows that it is, therefore, time-barred under English law.
447. In the light of the conclusion which I have reached concerning the limitation position under English law, it might be thought to be unnecessary to go on to consider the Ukrainian law position since, as will appear, the limitation period under Ukrainian law is shorter and the relevant principles are not wholly dissimilar under both systems of law. It is appropriate, however, that I should do so.
448. Under Articles 257 and 261 of the Ukrainian Civil Code, the relevant limitation period is three years from when a claimant becomes aware, or should have become aware, of the alleged wrong and the identity of the defendant. This requires the claimant to act both honestly and conscientiously, as well as to use any steps that are reasonably available to it. Applying this standard is primarily a question of fact, to be determined based on the relevant circumstances on a case by case basis.
449. The Ukrainian court has a discretion to disapply the limitation period if it determines that there are “*important*”, “*compelling*” or “*valid*” reasons for doing so pursuant to

Article 267(5) of the Ukrainian Civil Code. As explained in a little more detail later, the case law indicates that this requires objective reasons beyond the claimant's control, which make impossible or significantly hinder the timely filing of a claim. Specifically, in making the relevant assessment, the claimant's conduct is assessed by applying a standard of reasonableness. In the present case, there would be no justification for disapplying the limitation period. Indeed, Mr Calver QC only somewhat faintly suggested the contrary.

450. It follows that, in truth, although not as a matter of strict analysis, the position is similar to English law, the only real distinction being that the period of limitation is six years in English law whereas in Ukrainian law it is three years. The relevant cut-off date, therefore, is 9 August 2013, and so it further follows, in the light of the conclusion which I have reached, having regard to the facts, concerning the position as a matter of English law, that the Avonwick Claim is time-barred not only under English law but also under Ukrainian law. I am satisfied, in short, that by no later than that date Avonwick either was aware of the alleged fraud or should have become aware of it, acting honestly and conscientiously and using steps reasonably available to it.
451. That is the case even though I acknowledge that, as in English law, there is no requirement as a matter of Ukrainian law that a claimant should have to investigate whether its rights have been violated even in the absence of reasonable grounds to suppose that they have been, as Mr Calver QC put to Mr Likarchuk who agreed with him.

Causation and loss

452. The last matter which would ordinarily fall to be considered is the question of loss, it being incumbent upon the Gaiduk Parties to establish not only that the Price Representation induced Avonwick to enter into the Castlerose SPA, the issue which has already been addressed, but also that the Price Representation caused Avonwick loss.
453. These are distinct issues. As Jacobs J put it in ***Vald Nielsen Holding A/S v Baldorino*** [2019] EWHC 1926 (Comm) at [430], albeit describing the matter as being common ground:

“... the question of causation was a separate legal question from the issue of inducement. Whilst there might be an overlap on the facts relevant to both questions, a favourable answer to the Claimants on inducement did not enable the Claimants to bypass the question of causation.”

454. He went on to refer to the following passage in *Chitty* at paragraph 7-039:

“It seems to be the normal rule that, where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered the contract (or at least not on the same terms) but for the misrepresentation. Certainly this is the case when the misrepresentee claims damages in tort for negligent misstatement; and it seems also to be required if damages are claimed for fraud.”

455. Jacobs J, then, at [431], referred to Doyle CJ's analysis in ***Copping v ANZ McCaughan Ltd*** (1997) 67 SASR 525, 539:

“It is sufficient if the relevant loss can be said to be caused by the representation, and it is not necessary to show that the loss is attributable to that which made the representation wrongful. In that sense the test is a relatively generous one, in that the misrepresenting party may have thrown upon it risks unrelated to the representation. However, there is still the requirement that the loss flow from the representation, and it seems to me impossible to conclude that it does so flow if one concludes that quite apart from the representation the appellant would have entered into a transaction bringing with it the very risk which eventuated in the relevant transaction and which can be seen as the cause of the loss which the appellant seeks to recover. There may be an element of impression in all this.”

456. In the present case, Avonwick’s pleaded case is that its loss is the difference between the price for which it sold its interest in IUD and the true value of that interest as at 18 December 2009. Mr Calver QC clarified in closing that since, under the Castlerose SPA, Avonwick sold its 33.84% interest in IUD for US\$950 million, and that was the amount which Avonwick, in fact, received, the starting point in the damages calculation must be US\$950 million rather than US\$750 million.
457. It was common ground that the ‘true value’ of Avonwick’s interest in IUD was its market value on 18 December 2009, the dispute between the parties being as to what that market value should be taken to be. Avonwick’s case is that its 33.84% interest in IUD was worth at least US\$1.003 billion, namely Avonwick’s interest on a Net Asset Valuation (‘NAV’) basis, although Mr Calver QC explained that its interest in IUD was worth considerably more if IUD is instead valued on the basis that it would not simply have liquidated its assets and paid off its debts but would, instead, have continued trading. That alternative valuation, a Discounted Cash Flow (‘DCF’) valuation, leads, according to Mr Calver QC, to a very much larger amount: US\$2.054 billion and after a suggested 15% minority discount, US\$1.746 billion.
458. Alternatively, the Gaiduk Parties invite the Court to arrive at a valuation using the price paid under the VEB SPA for a 50% + 2 share interest in IUD, subject to certain adjustments being made, in order to extrapolate a valuation of Avonwick’s 33.84% interest of US\$1.636 billion. On this basis, Avonwick’s loss is put at a minimum of US\$53.1 million and a maximum of US\$899 million.
459. Mr Calver QC confirmed in closing that, contrary to the impression given in opening (although Mr Calver QC did not accept that this impression was given), the Gaiduk Parties do not seek contend that, had it not been for the Price Representation, Mr Gaiduk would have negotiated a better deal with Mr Mkrтчan and Mr Taruta or would have negotiated directly with the Russian Buyer, and in either case Avonwick would have demanded payment of its pro rata share of that price, so as to mean that Mr Gaiduk (through Avonwick) would have obtained the lion share of the price which was paid by the Russian Buyer (US\$1.7 billion) and the clean exit which he desired, with Mr Taruta and Mr Mkrтчan receiving only about US\$500 million each and remaining locked into IUD as minority shareholders alongside the Russian Buyer.
460. Objection having been taken to that case, on the basis that it had not been pleaded and was not a case which the valuation experts had had the opportunity to consider, as I say, Mr Calver QC confirmed in closing that it is not a case which the Gaiduk Parties were advancing and, indeed, had never intended to advance. It is unnecessary, therefore, to say anything further about it.

461. The focus, instead, is (or ordinarily would be) on the case described earlier, the position of the Taruta Parties and the Mkrctchan Parties being that it is a case which should be rejected with the Court concluding, based on the valuation evidence which was heard, that Avonwick, in fact, suffered no loss since Avonwick's 33.84% stake in IUD was worth no more than the US\$750 million which Avonwick received in respect of it. Specifically, the Taruta Parties insist that the stake had a value within the range of US\$430 million to US\$640 million, whereas the Mkrctchan Parties maintain that the appropriate range was between US\$680 million and US\$870 million.
462. The closing submissions concerning this issue, combined, ran to several hundred pages. Underpinning those submissions was expert evidence given by three experts in voluminous reports accompanied by appendices running to over 20 or so bundles. This is, in short, a very substantial topic. It is, however, a topic which, my having already decided that the Price Representation case must be rejected on other grounds, including my factual determination that the Price Representation was not made, does not arise. To grapple with the myriad of matters raised would require a detailed examination which would lengthen an already long judgment and which would delay its production.
463. For these reasons, consistent also with the approach which I described earlier, I do not propose to deal with those submissions or that evidence. Given the factual determinations which I have made, not only concerning the making of the Price Representation but also on the issue of limitation, it would be academic to deal with submissions on matters of quantum. In the event that the matter were to proceed to an appeal and that appeal were to be successful, I would obviously be willing at that juncture to produce a further judgment dealing with this topic.

Conclusion

464. It follows that, for all the reasons which I have sought to give, the Price Representation case cannot succeed and must be rejected. It, furthermore, follows that the Taruta Parties' claims against the Mkrctchan Parties for an indemnity or contribution do not arise.

The Taruta Claims against the Gaiduk Parties and the Mkrctchan Parties

465. As previously explained, the Taruta Claims have been put forward in a variety of different ways: a claim for breach of contract, trust claims, a claim for inducing or procuring a breach of contract, a conspiracy claim and a claim in unjust enrichment.
466. Central to each of these ways in which the case is put, with the possible exception of the unjust enrichment claim (although even then the issue is relevant) is the question of whether the Taruta Parties can establish that the 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement were concluded. If they cannot do this, then, as Mr Foxton QC acknowledged, each of the ways in which the claims are put (with the possible exception of the unjust enrichment claim) will fail.

Applicable law

467. It is necessary to begin by addressing the issue of applicable law since, whereas it was the Taruta Parties' position that it is English law which applies to the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement, this

was not accepted by the Gaiduk Parties and the Mkrтчan Parties whose position was that the governing law is Ukrainian law.

468. The law governing contracts formed on or after 17 December 2009 falls to be determined under EU Regulation No. 593/2008 on the law applicable to contractual obligations ('Rome I'). There is, accordingly, no issue that Rome I applies as far as the alleged 2010 Further Shareholders' Agreement is concerned.
469. In the case of the alleged 2009 Shareholders' Agreement, the position is, however, less straightforward. This is because, although until closing submissions, the Taruta Parties' case had been that the Partners had seen and approved the terms of the 18 December 2009 version of MOU 4 sent by Mr Tkachenko in the evening of 17 December 2009 (the 18 December Draft) to Mr Mkrтчan's reception team, that case underwent something of a late change, which impacts on the applicability of Rome I.
470. The background to this change is that the Mkrтчan Parties' pleaded case was that Mr Mkrтчan never received the 18 December Draft, and there is no documentary evidence to suggest that he did, although the fact that the draft was sent to Mr Mkrтчan's team with a request that it be passed to him of course supports an inference that he did see it. Neither Mr Taruta nor any of the Taruta Parties suggested in their witness statements that they knew or believed that the document had been provided to Mr Mkrтчan.
471. For his part, Mr Gaiduk's evidence was that he never saw the 18 December Draft; indeed, there is no documentary evidence that it was sent to him or his representatives, and nor was it put to Mr Gaiduk in cross-examination that he had ever seen the 18 December Draft. Notably also, Mr Taruta was not able to give evidence that Mr Gaiduk had ever seen the 18 December Draft since all that he was able to say was that: he "*cannot imagine any reality in which he would not have asked to see the final version of one of the principal documents governing the sale*", an assertion which, as Mr Wolfson QC put it, does no more than "*reason backwards*" since it assumes that the document under discussion is, indeed, "*one of the principal documents governing the sale*".
472. Nor is there any document to indicate that the 18 December Draft was sent even to Mr Taruta himself since there is no documentary evidence to suggest that Mr Taruta saw the 18 December Draft and he did not state in his witness statement that it was sent to him for review.
473. I am clear that it was because he recognised the difficulties which were facing him that, during the course of cross-examination, Mr Taruta put forward a new account of a telephone conversation on the evening of 17 December 2009, when he was in London, in which Mr Taruta and Mr Mkrтчan allegedly discussed the 18 December Draft and "*agreed about the final terms*". Mr Taruta added that "*Mr Mkrтчan told me what they agreed finally with Mr Gaiduk and what will be a part of the SPA.*"
474. When pressed on this, Mr Taruta appeared to suggest that he had made annotations to a physical copy of the 18 December Draft. However, when asked why there was no record of his reception team sending the draft to him, he said that he may have been annotating a version of the 15 December Draft produced by Mr Petrov; or that JP Morgan might have printed a copy of the 18 December Draft out for him. It appeared,

to be blunt, that Mr Taruta was improvising (a polite way of saying that he was lying) when giving this evidence.

475. If Mr Taruta really did recall a telephone conversation with Mr Mkrтчan on the evening of 17 December 2009 in which Mr Mkrтчan confirmed that he had discussed the terms of the 18 December Draft with Mr Gaiduk, and both he and Mr Gaiduk agreed to those terms, then, as Mr Wolfson QC put it, that would be “*the single most important factual assertion*” which would be expected to have appeared in both the Taruta Parties’ pleadings and in Mr Taruta’s own witness statements, yet it was only whilst giving evidence that Mr Taruta apparently recalled it.

476. I am in no doubt that it was in recognition of this that, in closing, the Taruta Parties placed no reliance on the 18 December Draft but, instead, advanced a case that the terms of the 2009 Shareholders’ Agreement were agreed at a meeting on or before 13 December 2009, and that this was, then, reflected in the 15 December Draft produced by Mr Petrov on 14 December. This case followed Mr Gaiduk’s explaining in re-examination that, as a result of a meeting on 13 December in Kiev:

“Mr Petrov introduced amendments in the memorandum, and on the 14th, and then dated 15th, he sent it to Mr Tkachenko automatically all the partners. So he introduced the changes or the agreements that we had struck, what we had agreed, the Dubyna and other aspects, all the components.”

477. Mr Taruta’s initial position had been that he was “*almost certain*” that he did not meet with Mr Gaiduk in December 2009 because he was “*rarely in Kiev at that time*”. However, Mr Taruta, then, recalled, Mr Wolfson QC suggested displaying “*a good nose for the prevailing wind*”, that he had since seen family photographs from a celebration of his daughter’s birthday on 13 December 2009, which was held at the Hyatt Hotel in Kiev.

478. This case was foreshadowed by a letter from the Taruta Parties’ solicitors, Lovells, which was sent on 21 October 2019 (after Mr Gaiduk had stopped being cross-examined and shortly before Mr Taruta gave evidence) in which this was stated:

“Mr Taruta also wishes to clarify the following in relation to paragraphs 73 and 80 of his second witness statement, which should be read as a new paragraph 73A:

‘In my second witness statement I said that, although it is difficult for me to now recall exactly, I am almost certain that I did not meet with Mr Gaiduk in December 2009. Since then, I have seen a couple of family photographs from a celebration of my eldest daughter’s birthday on 13 December 2009. The photographs indicate I was at the celebration, which was held in the Hyatt Hotel in Kyiv. Previously I hadn’t remembered being in Kyiv in December 2009. Considering I was in fact in Kyiv then, it might be the case that I did meet with Mr Gaiduk and/or Mr Mkrтчan at that time, although I cannot specifically recall a meeting taking place. My handwritten annotations on the version of the 2009 MoU Amendment circulated by Mr Petrov (CD-00005675) also suggest that there may have been a meeting at or around this time.’”

479. When he came to give evidence and asked about this, Mr Taruta suggested that he knew that there had been a meeting between Mr Gaiduk and Mr Mkrтчan and that it was likely that he had been present as well:

“Q. Now I am completely lost, Mr Taruta, as to what your evidence is to his Lordship. You now seem to be saying that there was an agreement on 14 and 15 December, what, between who, between Mr Mkrтчan and Mr Gaiduk, is that your evidence?”

A. Between Mkrтчan, Gaiduk, and possibly I was there at the meeting as well, because the photos -- we provided the photos, and recently I was looking through them whether I could have been there as well or not, and I saw that there was a birthday party and at that birthday party on 13 December I was at the daughter's, and most likely on the 14th or the 13th when we had a meeting we were together as well.”

480. It is this case which, ultimately, was the case which was put forward in closing by Mr Foxtton QC, who made no attempt to rely upon any other version of events. This is despite its lateness, despite its inconsistency with other evidence given by Mr Taruta and despite the fact that it was not the case which was put to Mr Gaiduk.

481. This is an issue to which it will be necessary to return when dealing with the substance of the case advanced by the Taruta Parties. What matters for present purposes is simply that, on the Taruta Parties' case as it had become by the time of closing submissions, since the agreement is alleged to have been concluded before 17 December 2009, the relevant regime is not Rome I but its predecessor, the Rome Convention. It is, accordingly, to the Rome Convention that I refer in the first instance – albeit that, as will shortly appear, the relevant provisions are materially the same in both Rome I and the Rome Convention.

482. The Rome Convention provides in Article 3(1) that:

“A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.”

483. Article 4(1) states that:

“To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with any country may by way of exception be governed by the law of that other country.”

484. Article 4(2), then, provides:

“it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration.”

485. The relevant scheme under Rome I is as follows. Article 3(1) provides that:

“A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the

circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.”

486. Where no such agreement can be identified, Article 4(1) sets out which law applies to certain specified types of agreement. None of these is relevant to the present case. Article 4(2) would, therefore, be engaged. This provides that:

“the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.”

487. This is subject to Article 4(3), which provides that where:

“it is clear from all the circumstances of the case that the contract is manifestly more connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply”.

488. Finally, Article 4(4) provides that, if the governing law cannot be determined by reference to Articles 4(1) or 4(2):

“the contract shall be governed by the law of the country with which it is most closely connected.”

489. Whether such a choice has been made is in essence a question of construction. However, the editors of *Dicey* suggest at paragraph 32-048 *“that the question of interpretation should be looked at from a broad Regulation-based approach, not constrained by national rules of construction”*.

490. In *Aeolian Shipping SA v ISS Machinery Services Ltd* [2001] EWCA Civ 1162, [2001] CLC 1708 (a case decided under the Rome Convention), Potter LJ observed at [16] that:

“The circumstances which may be taken into account when deciding whether the parties have made an implied choice of law... range more widely in certain respects than the considerations applicable to the implication of a term into a written agreement.”

491. A number of examples of *“circumstances which may be taken into account”* have been identified in the authorities, as well as in the Giuliano-Lagarde Report which, pursuant to s. 3(3)(a) of the Contracts (Applicable Law) Act 1990, could be considered in interpreting the Rome Convention. Since many of the provisions of Rome I are derived from the Rome Convention, it remains a useful guide to both. At page 17 of the Giuliano-Lagarde report it is suggested that:

“a previous course of dealing between the parties under contracts containing an express choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties.”

492. An obvious example is where agreements form part of the same series. In *FR Lurssen Werft GmbH & Co KG v Halle* [2010] EWCA Civ 587 the claimant, a German shipbuilding company, had entered into two shipbuilding contracts with the defendant, an American citizen resident in Florida. These contained a London arbitration clause

and were, save in some immaterial respects, to be governed by English law. The parties subsequently entered into a commission agreement which provided that, if either of the vessels was purchased by a client introduced by the claimant, a commission of 5% of the sale price would be payable by the defendant to the claimant. The commission agreement did not contain any dispute resolution clause or a provision as to the governing law. The claimant brought proceedings against the defendant in England. The defendant challenged the court's jurisdiction, contending (*inter alia*) that the commission agreement was not governed by English law. Simon J dismissed the application and the Court of Appeal dismissed the defendant's appeal. Aikens LJ said this at [20]:

“The Commission Agreement follows on from the two shipbuilding contracts. The Commission Agreement concerns the sale of the two vessels which are the subject matter of the two shipbuilding contracts. The Commission Agreement would not have come into existence if those two contracts had not existed and if the two vessels were not there to be sold, having been built. To my mind it is obvious that these contracts are all of a series. There has been a previous course of dealing between the same parties, and the Commission Agreement is closely associated with those other two contracts. There is nothing in either of the terms of the Commission Agreement or in the surrounding circumstances to lead away from the conclusion that the parties did silently, as it were, choose English law.”

493. Likewise, in ***Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Limited*** [2001] EWCA Civ 2019, Potter LJ accepted at [23] and [28] that it was appropriate to have regard to the negotiating history between the parties as forming part of the “*circumstances of the case*” under Article 3 of the Rome Convention.
494. It follows that it may be appropriate to infer such a choice on the grounds that it would not have occurred to the parties that a different law might apply from that which governed their previous agreements. As Lord Toulson, sitting in the Court of Appeal, explained in ***Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd*** [2013] EWCA Civ 365, [2013] 2 Lloyd's Rep 98 at [32]:

“Logically there may be a certain artificiality in attributing to the parties a tacit choice in circumstances which do not suggest that they gave actual thought to the matter, as Redfern and Hunter comment in their book on International Arbitration, 5th Edition, 2009, at para 3.206. However, one can see the justice of inferring a choice of law in circumstances where it would not reasonably have occurred to the parties to suppose that a different law might apply. It would lack practical sense to require that they should have contemplated that which would not reasonably have occurred to them.”

He went on at [33] to say this:

“The objective nature of the test means that the party asserting an implied choice of law has to satisfy the court to the required standard that, on an objective view, the parties must have taken it without saying that their contract should be governed by that law – or, in Lord Diplock's formulation, that the contract taken as a whole points ineluctably to the conclusion that the parties intended it to be governed by that law. He does not have to prove that there was in fact a subjective conscious choice (for, as I have said, evidence of subjective intention would be inadmissible), but he does have to satisfy the court that the only reasonable conclusion to be drawn from the

circumstances is that the parties should be taken to have intended the putative law to apply.”

495. The editors of *Dicey* also suggest at paragraph 32-037 that:

“the English court should be entitled to take subsequent conduct into account, at least to the extent that it sheds light on the intention of the parties ... at the time the contract was concluded.”

496. Similarly, the Giuliano-Lagarde Report states at page 17 that Article 3(1):

“does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice”.

497. Nevertheless, it would follow from Lord Toulson’s judgment in ***Lawlor*** that an express choice of law might signal that an earlier, related agreement ought to be governed by the same system of law, even if it is not possible to demonstrate that there was a subjective conscious choice to that effect.

498. As a matter of principle, it is entirely possible for different parts of a contract to be governed by different systems of law. However, the Giuliano-Lagarde Report states at page 18 that:

“when the contract is severable the choice must be logically consistent, i.e. it must relate to elements of the contract which can be governed by different laws without giving rise to contradictions”.

499. The position is summarised by the editors of *Dicey* at paragraph 32-026 in this way:

“There is no objection in principle to different parts of the contract being subject to different laws for the purpose, for example, of interpretation: it is in theory possible (although in practice inconvenient, and infrequent) for one part of a contract to be construed in accordance with the principles of English law, and for another part to be construed in accordance with the principles of French law. However, there is an objection in principle to what has been called “the general obligation” of a contract being governed by more than one law. Even if different parts of a contract are said to be governed by different laws, it would be highly inconvenient and contrary to principle for such issues as whether the contract is discharged by frustration, or whether the innocent party may terminate or withhold performance on account of the other party’s breach, not to be governed by a single law.”

500. That said, the Report emphasises that it:

“did not adopt the idea that the judge can use a partial choice of law as the basis for a presumption in favour of one law invoked to govern the contract in its entirety. Such an idea might be conducive to error in situations in which the parties had reached agreement on the choice of law solely on a specific point. Recourse must be had to Article 4 in the case of partial choice.”

501. Mr Foxton QC submitted that, in accordance with Article 3(1) of the Rome Convention (albeit that, strictly speaking, his submission was addressing the Rome I equivalent), it

is English law which should be treated as governing both the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement.

502. As to the former, it was his submission that the position is, as he put it, "*straightforward*" given that it is common ground that the price payable under the Castlerose SPA – which contains an express choice of English law – included US\$200 million for assets which were identified in MOU 4. In such circumstances, he suggested, any question as to whether a contract governs the transfer of those additional assets (and, if so, the nature of its terms and whether or not they were breached) must be governed by the law of the Castlerose SPA either because this contract is subject to an express choice of English law or because such a choice is "*clearly demonstrated by the terms of the contract or the circumstances of the case*" in view of the close relationship between the Castlerose SPA and any wider contract governing the transfer of those additional assets.
503. Mr Foxton QC observed that it would be "*hopelessly impracticable*" if the position were otherwise, with Ukrainian law determining the question of whether there was a binding agreement to transfer the assets, whether it was or remained enforceable and what its legal incidents were, but with English law determining when and whether the amounts to be paid for those assets were paid and/or whether the amounts paid were recoverable if no part of the assets was transferred.
504. As to the alleged 2010 Further Shareholders' Agreement, Mr Foxton QC's submission that English law is the applicable law was contingent upon that law being the governing law of the alleged 2009 Shareholders' Agreement. His submission was that, since the alleged 2010 Further Shareholders' Agreement was, in part, a variation of the alleged 2009 Shareholders' Agreement insofar as it concerned the office premises at 14-B Yaroslavov Val and since the other obligations which it brought about were also closely bound up with the obligations in the alleged 2009 Shareholders' Agreement in that they put into further effect the division of assets parties started in that agreement as part of the ongoing 'divorce' process which the alleged 2009 Shareholders' Agreement had begun, it is "*inherently improbable*", as he put it, that the parties would have intended that a different law would govern.
505. It was Mr Foxton QC's submission, in short, that the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement were all of a series such that the later agreement would not have come into existence but for the earlier agreement, so pointing clearly to an implicit choice of English law to match the explicit choice of law to be found in the Castlerose SPA and the similarly implicit choice of law which he submitted should be taken to have been made in relation to the alleged 2009 Shareholders' Agreement.
506. Mr Foxton QC submitted in this connection that the background and negotiating history of both the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement justify the conclusion that a choice of English law can be "*clearly demonstrated*" since they demonstrate not only a clear linkage between the Castlerose SPA and the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement but because they point also to the parties' use of English law more generally. Thus, he highlighted how the 15 and 18 December Drafts were described as being an "*AGREEMENT amending Memoranda of Understanding No. 1 and No. 2*", namely MOUs which set out the terms on which it had been agreed

that Mr Gaiduk would sell his interest in IUD. This would later be achieved through the Castlerose SPA (with its provision as to English law) but, Mr Foxtton QC pointed out, throughout the negotiations which resulted in that agreement drafts of the Castlerose SPA were circulating which all contained the English law provision. So, too, Mr Foxtton QC added, did the Settlement Agreement concluded between Mr Taruta on 15 September 2008 (and amended on 30 December 2009). This, he suggested, “*formed part of the same negotiating continuum and had an overlapping subject matter*”, reinforcing the submission that the parties were generally choosing English law to govern the arrangements into which they were entering.

507. Accordingly, Mr Foxtton QC submitted, neither Article 4 of the Rome Convention nor (if applicable) Article 4 of Rome I falls to be considered, there having been a choice of law for both the alleged 2009 Shareholders’ Agreement and the alleged 2010 Further Shareholders’ Agreement. In any event, under Article 4(1) and (2) of the Rome Convention or Article 4(3) of Rome I, Mr Foxtton QC suggested, English law should be regarded as applicable given that both agreements are ‘most closely’ (Article 4(1) and 2) of the Rome Convention) or ‘manifestly more closely’ connected (Article 4(3) of Rome I) with England as a result of their close relationship with the Castlerose SPA.
508. I cannot agree with Mr Foxtton QC about this last matter or, indeed, his prior submissions. I am clear, on the contrary, that Mr Calver QC and Mr Wolfson QC were right when they submitted that the governing law in relation to both the alleged 2009 Shareholders’ Agreement and the alleged 2010 Further Shareholders’ Agreement is not English law but Ukrainian law.
509. I agree with them both that, contrary to Mr Foxtton QC’s submission, this is not a case in which there has been a choice of English law, whether expressly or impliedly and whether in relation to the alleged 2009 Shareholders’ Agreement (or in relation to the alleged 2010 Further Shareholders’ Agreement).
510. I agree with them, further, that it is Ukrainian law which is obviously applicable by reason of Article 4 of either the Rome Convention or Rome I as a result of the parties’ habitual residence and that this conclusion is unaffected by other ‘most closely’ (Article 4(1) and 2) of the Rome Convention) or ‘manifestly more closely’ connected (Article 4(3) of Rome I) considerations.
511. As to the first of these points, whether there was a choice of English law, the starting point is that neither the alleged 2009 Shareholders’ Agreement nor the alleged 2010 Further Shareholders’ Agreement contains an express choice of law provision – unsurprisingly, perhaps, in the case of the latter given the nature of the agreement alleged. It is, in truth, plain that there was no such choice of English law.
512. First, none of the MOUs produced by Mr Taruta, Mr Gaiduk and Mr Mkrchan, or by others on their behalf, including MOU 4, contains an express choice of law provision. In fact, there is no evidence that they ever expressly discussed which law would apply to the agreements now alleged by Mr Taruta, namely the alleged 2009 Shareholders’ Agreement and the alleged 2010 Further Shareholders’ Agreement.
513. Secondly, Mr Foxtton QC’s reliance on the fact that the Castlerose SPA contains an express English choice of law provision does not assist in circumstances where that was an agreement between Avonwick, Dargamo and Azitio, and so an agreement to which

Mr Gaiduk, Mr Mkrтчan and Mr Taruta (the alleged parties to the alleged 2009 Shareholders' Agreement) were not themselves parties. It follows that the express choice of English law in the Castlerose SPA was not an express choice of law made by the parties to the alleged 2009 Shareholders' Agreement. The fact that the parties to the Castlerose SPA were closely associated with these individuals is, as a matter of analysis, neither here nor there: the simple point is that the choice of law made in the Castlerose SPA cannot, in my view, constitute an express choice of law between entirely different parties to a different agreement.

514. Thirdly, the wording of the choice of law provision to be found in the Castlerose SPA ought not to be overlooked. Clause 13.1 is in these terms:

“This Deed and any non-contractual obligations arising out of or in connection with it shall be governed by English law.”

This is, of course, entirely unexceptional. What it shows, however, is that the parties to the agreement (Avonwick, Dargamo and Azitio) were choosing English law as far as the Castlerose SPA itself is concerned, together with any non-contractual obligations connected to that agreement, and not seeking to apply their choice of law more widely – including to agreements entered into by other, associated entities. It follows, for these two reasons, that I am unpersuaded by submissions which are reliant on what was agreed in the Castlerose SPA.

515. Fourthly, as to Mr Foxton QC's more widely couched submission that Mr Taruta, Mr Gaiduk and Mr Mkrтчan used English law more generally, the evidence at trial provides no support for such a contention. Specifically, Mr Gaiduk was clear that this was not the case. So, too, was Mr Petrov, who made the point that Mr Taruta, Mr Gaiduk and Mr Mkrтчan only had limited knowledge of English law. Indeed, Mr Taruta himself accepted that no English law advice was taken prior to signing MOU1 or MOU2.
516. More significantly still, Mr Taruta accepted in cross-examination that agreements between the parties prior to 2009 contained no English choice of law clause or any choice of law provision and, indeed, in some cases were expressly subject to Ukrainian law. Thus, the IUD's members' agreement and foundation agreement from 2006 were expressly subject to Ukrainian law. Similarly, Mr Taruta acknowledged that the Dubyna MOU from January 2008 did not contain an English governing law clause.
517. Faced with this evidence, Mr Taruta asserted a distinction between agreements governing the activities of IUD and transactions between Ukrainian companies (which would be governed by Ukrainian law) and transactions between non-resident companies (which would be governed by English law). However, this assertion was not borne out by the documents. For example, in the process of restructuring IUD, each of Region, Azovintex and Vizavi sold their shares in IUD to Kairto, Muriel and Castlerose, which are Cypriot companies, and each SPA was governed by Ukrainian law.
518. I am clear, therefore, that the contention that this is a case in which it can safely be concluded that Mr Taruta, Mr Gaiduk and Mr Mkrтчan expressly agreed that English law should apply to the alleged 2009 Shareholders' Agreement or, for that matter, the alleged 2010 Further Shareholders' Agreement is a contention which should be rejected. There was, in short, no express choice of English law.

519. This brings me to Mr Foxton QC's alternative submission, which is that, even if there was no express choice of law, there was an implied choice of law because of the close connection between the Castlerose SPA (with its English law choice of law provision) and the obligations imposed by reason of the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement. This, again, is a submission which I cannot accept for a number of reasons.
520. First, as previously explained, since the Castlerose SPA was entered into between different parties to the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement, it is difficult to see how it can be the case that Mr Gaiduk, Mr Mkrtchan and Mr Taruta should be treated as though they made an implied choice as to the applicable law when concluding the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement. To repeat, they were not themselves parties to the Castlerose SPA.
521. Secondly, even if it were permissible to approach the contractual party matter in a somewhat looser way, still it is difficult to see that the implied choice suggested by Mr Foxton QC is made out in this case. The more so, given that there were agreements entered into between the parties concerned with their 'divorce' in which there was an express choice not of English law but of Ukrainian law: the 2008 SPAs, the CIG SPA, the UGMK SPAs, and the Agro Holding SPA all provide for Ukrainian law. Why, in such circumstances, it should be assumed that Mr Taruta, Mr Gaiduk and Mr Mkrtchan were impliedly choosing English law (as opposed to Ukrainian law) is hard to fathom, particularly given that the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement relate to the assets to be transferred under those very (Ukrainian law-governed) agreements. I agree with Mr Wolfson QC's submission that the parties would have been unlikely to have chosen a different or inconsistent law from that chosen in these agreements to apply to the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement.
522. Thirdly, although Mr Foxton QC was keen to highlight that US\$200 million of the Castlerose SPA sale price was attributable to assets which are the subject of the alleged 2009 Shareholders' Agreement, it does not follow from this that the two agreements (the Castlerose SPA and the alleged 2009 Shareholders' Agreement), still less the alleged 2010 Further Shareholders' Agreement, were so closely related that English law should be treated as having been impliedly agreed in respect of all three agreements. The Castlerose SPA was a standalone agreement.
523. It follows that I reject Mr Foxton QC's submissions based on Article 3(1) (whether of the Rome Convention or of Rome I) and turn now to Article 4(1) and (2) of the Rome Convention and Articles 4(2) and (3) of Rome I.
524. The position is clear in this regard and was not disputed by Mr Foxton QC: since at all material times Mr Gaiduk, Mr Mkrtchan and Mr Taruta were habitually resident in Ukraine, it is Ukrainian law which applies. It is only if the presumption to be found in Article 4(2) of the Rome Convention is displaced or if Article 4(3) of Rome I can be shown to operate so as to displace the applicability of Ukrainian law through habitual residence that English law will, instead, apply.
525. It is clear, however, that this is not a case in which it can be established that either the alleged 2009 Shareholders' Agreement or, for that matter, the alleged 2010 Further

Shareholders' Agreement is most closely or manifestly more closely connected with England than with Ukraine. As Mr Calver QC put it, if the interrelationship between the Castlerose SPA and the alleged 2009 Shareholders' Agreement is insufficient to spell out an implied choice of law in favour of English law, it will be equally insufficient to make the alleged 2009 Shareholders' Agreement (and the alleged 2010 Further Shareholders' Agreement) most closely or manifestly more closely connected with England.

526. This is all the more the case given the very clear connections with Ukraine which exist in this case. These include, obviously, the fact that Mr Taruta, Mr Gaiduk and Mr Mkrтчan are not only habitually resident in Ukraine but are, in addition, Ukrainian; the fact that most of the assets covered by the alleged 2009 Shareholders' Agreement and the 2010 Further Shareholders' Agreement are situated in Ukraine; the fact that the discussions leading to the alleged agreements took place in Ukraine; and the fact that, as previously explained, a number of previous agreements expressly provide for the application of Ukrainian law.
527. These various reasons are as applicable to the alleged 2010 Further Shareholders' Agreement as they are to the alleged 2009 Shareholders' Agreement; indeed, in setting them out, I have not sought to differentiate between these two alleged agreements.
528. However, it is right to record that, since the Taruta Parties' contention was that the alleged 2010 Further Shareholders' Agreement amounted to a "*variation*" of the alleged 2009 Shareholders' Agreement and that, in any event, the two agreements were "*all of a series*" (to use the language of Aikens LJ in *Lurssen Werft*) or formed part of the same "*negotiating continuum*", Mr Foxton QC was obliged to acknowledge that, unless the alleged 2009 Shareholders' Agreement could be shown to be subject to English law, his submission that the alleged 2010 Further Shareholders' Agreement is subject to English law must inevitably fail.
529. Further and in any event, I am not persuaded that there is a sufficient link between the two alleged contracts to derive from the alleged 2009 Shareholders' Agreement a choice of English law in respect of the alleged 2010 Further Shareholders' Agreement. The two agreements may, in a general sense, have formed part of the same "*continuum*", but this does not put this case into the same category of case such as *Lurssen Werft*, where the agreements were inextricably linked. There may be a superficial connection between the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement, but it is just that: superficial. I do not accept that it is a sufficient basis for saying that a choice of English law has been expressly or clearly demonstrated by the terms of the contract or the circumstances of the case for the purposes of Article 3(1) both of the Rome Convention and of Rome I.
530. It follows, for these various reasons, that, through the application of Article 4(1) and (2) of the Rome Convention and Article 4(2) and (3) of Rome I, the governing law of the alleged 2010 Further Shareholders' Agreement is not English law but the law of Ukraine.

Contractual formation

531. I turn next to the evidence concerning the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement. As will appear, despite the

controversy over which is the applicable law as just addressed, ultimately, whether under Ukrainian law or under English law, the conclusion is the same: that neither the alleged 2009 Shareholders' Agreement nor the alleged 2010 Further Shareholders' Agreement was a concluded and legally binding agreement.

532. I start by setting out the relevant law: first, Ukrainian law in the light of the fact that I have decided that it is this law which is applicable, and then English law in case (contrary to what I have decided) it is English law which governs. After doing this, I will address the evidence.

Ukrainian law

533. The relevant Ukrainian law concerning contractual formation was not really in dispute. There was, in particular, agreement between the experts that, pursuant to Article 638(1) of the Civil Code of Ukraine, in order for a contract to have been concluded there must be agreement between the parties on all "*material*" (or "*essential*") terms in the necessary form. Article 638(1), paragraph 2, stipulates that such terms are those that (i) concern the subject matter of the contract, (ii) are required by law, (iii) are necessary for contracts of that type and (iv) are required by one of the parties to be agreed. It appears, in particular, as Mr Beketov (the expert instructed by the Taruta Parties) acknowledged when asked, that underlying these requirements is a desire to ensure that contracts should be sufficiently clear to allow a party to understand what performance is required of it under the contract. No doubt for the same reason, Ukrainian law requires agreements to be formulated very clearly to avoid any uncertainty. As it was put in *A v OJSC Raiffeisen Bank Aval* No 591/5726/15-ц dated 31 January 2018:

"The terms of the agreement must be formulated very clearly, be specific, [and] reflect all peculiarities of the legal relationship established between the parties".

534. There was no issue, as far as I was able to detect, that in the context of a share sale agreement, in order for there to be the requisite certainty, there would need to be agreement as to the identity of the shares to be transferred, the numbers of shares to be transferred, the identity of the recipients of those shares and the amount to be paid for them (as well as the payment mechanism).
535. Furthermore, since such an agreement would constitute a commercial contract, if only because Mr Beketov fairly accepted in cross-examination that individuals acting as "*commercial subjects*" if they are in "*full control of legal entities and exercise their ownership right on this basis*", the Ukrainian Commercial Code would also operate, including Article 189(2) of that Code which provides that the price for a contract would need to be agreed as a material term. As Professor Kuznetsova (the Gaiduk Parties' expert) put it in her evidence, share-purchase agreements are "*precisely the sort of transaction which fall within the scope of the Commercial Code*".
536. As the experts also agreed, there should additionally be an intention to create legal relations. This means that the parties must intend to create the legal rights and obligations stipulated by their agreement. The agreement should, in short, be genuine.
537. As for how a contract is formed, again the position resembles English law, in that Ukrainian law looks for offer and acceptance. As to acceptance specifically, Article

642(1) stipulates that an acceptance of an agreement in response to an offer “*must be complete and unconditional*”. Article 646, then, goes on to provide that:

“if a party, which receives an offer, suggests alternative terms to those offered, the initial offer is deemed to have been rejected and the new proposal constitutes a new offer which can be accepted or rejected.”

538. Acceptance can, however, be by conduct, as made clear by Article 642(2), which states as follows:

“If the person that received an offer to enter into a contract does, within a response period, any act pursuant to the contractual terms specified in that offer (ships goods, provides services, carries out work, pays a relevant sum of money, etc), which act shows that such person is desirous of entering into the contract, such act constitutes acceptance of that offer, unless otherwise specified in the offer or provided by law.”

539. Indeed, as Mr Foxton QC pointed out, Mr Likarchuk (the Mkrтчan Parties’ expert) referred to certain Ukrainian authorities applying the principle that “*partial performance can provide evidence of a concluded agreement*”. Accordingly, even an unsigned draft agreement can constitute or evidence a final agreement where it is fully or partially performed. However, as Mr Likarchuk explained, by reference to one of the authorities he cited, *LLC Food Trading Company v A* No 338/180/17 dated 5 June 2018, partial performance needs to be consistent with the content of the draft agreement and must evidence the intention of both parties to be bound by the terms of the draft. I take from his evidence and the evidence given also by Professor Kuznetsova that the partial performance must be sufficient to lead to the conclusion that there has been acceptance and that it would not be enough were the partial performance also to be explicable for some other reason which does not involve a contract having been entered into. As Mr Beketov again fairly accepted, this is a question of fact.

540. As to the form which contracts must take under Ukrainian law, the experts were agreed that, in order for a contract to be valid, then, in accordance with Article 203, the contract must, *inter alia*, be in the “*form required by law*”. In this respect, it should be noted that Article 205(1) provides as follows:

“A transaction may be made orally or in writing (electronically). Parties may choose the form of their transaction, unless otherwise prescribed by law.”

Article 639(1) is also worth noting. It is in these terms:

“A contract may be concluded in any form if the requirements as to the form of the contract are not prescribed by law.”

541. Article 208(1), however, stipulates that “*legal acts*” between legal entities or an individual and a legal entity must be concluded in writing. So, too, does Article 24(4) of the Law of Ukraine “*On Joint-Stock Companies*”, which requires “*transactions regarding shares*” to be “*made in writing*”. It is clear, therefore, that in the present case the alleged 2009 Shareholders’ Agreement and the alleged 2010 Further Shareholders’ Agreement would need to have been in writing.

542. As to what is meant by the requirement that the contract be in writing, Mr Likarchuk and Professor Kuznetsova were agreed that this is a requirement which entails not merely that the contract is in writing but also that it is signed. Mr Likarchuk, in particular, was of the view that the Ukrainian courts would approach an unsigned draft with “*a strong presumption*” that it neither constitutes nor evidences a binding agreement. Mr Beketov, on the other hand, suggested that the relevant part of the Code provides for mutually exclusive alternatives, only one of which requires that there be signing. Specifically, Article 207(1) provides as follows:

“A transaction shall be considered to be in writing if it is contained in one or more documents (including electronic ones) or in letters or telegrams exchanged between the parties.

A transaction shall be considered to be in writing if the parties’ will is expressed by means of teletype, electronic or other communications equipment.”

This is, then, followed by Article 207(2) which states:

“A transaction shall be considered to be in writing if it is signed by its party (parties).

A transaction to which a legal entity is a party shall be signed by the persons authorised to do so in accordance with its constituent documents or a power of attorney, the law or other civil statutes.”

543. It seems to me that Mr Beketov was probably not right about this. I consider, on the contrary, that Articles 207(1) and (2) contain two separate elements: the first identifies what type of document can amount to a written document, whilst the second stipulates that there must be signing.
544. If the position were otherwise, and Mr Beketov were right that there are merely alternative requirements, it is difficult to see what Article 207(2) contemplates is to be signed since it must obviously be a document of some sort and, as such, a document which is embraced by the wide wording of Article 207(1). The fact that Article 207(1) contemplates a contract being in writing if it is concluded by exchanging telegrams does not detract from this conclusion, even though it seems that there is nothing in Ukrainian law that requires telegrams to be signed, since it seems probable that the Article 207(2) reference to signing would be regarded as not being confined to a conventional signature on the written page.
545. The requirement that there be a written contract, with or without a signature, is nonetheless not as critical in this case as might at first blush appear. This is because a failure to comply with a requirement for writing does not invalidate the contract concerned at least as a general rule. Thus, Article 218(1), paragraph 1 states as follows:
- “Failure by parties to comply with the statutory written form requirement applicable to a transaction shall not result in its invalidity, unless otherwise prescribed by law.”*
546. The consequence of non-compliance is, in short, merely procedural, Article 218(1) going on to provide in paragraph 2 that a Ukrainian court cannot rely upon witness evidence as proof of a contract that does not comply with a requirement as to written form: the so-called “*Witness Evidence Rule*”. Although there was some debate between

the experts as to whether this is a procedural or substantive rule, the distinction is of no real consequence given that it is for the Court to apply English rules of evidence rather than any Ukrainian rules of evidence in accordance with Article 18(2) of Rome I which stipulates:

“A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.”

547. There was, in truth, no issue about this: that, as a matter of English private international law, even if there was a failure in relation to the requirement for writing (with or without signing), that requirement of Ukrainian law is not a requirement which the Court must apply because it is merely procedural requirement rather than a substantive rule of law. It is, therefore, unnecessary for the Court to be concerned with whether the alleged 2009 Shareholders’ Agreement or the 2010 Further SHA was in written form, save to the extent that the failure to comply with the ‘written form’ requirement is indicative of a failure by the parties to reach agreement. In any event, as Mr Foxton QC submitted, even if the matters addressed by the “*Witness Evidence Rule*” do not fall within Article 18(2) of Rome I, as made clear in *Dicey* at paragraph 7-002:

“the English court will always apply its own rules of procedure and will, moreover, refuse to apply any foreign rule which in its view is procedural.”

548. Since the “*Witness Evidence Rule*” would clearly be characterised as a procedural rule as a matter of English law, and thus subject to English law, it is English procedural rules which fall to be applied.

English law

549. Turning to the relevant English law, the principles which determine whether or not a binding contract has been concluded are well known. They were summarised by Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH Co KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753 at [45]:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

550. Thus, Lord Clarke summarised the decision in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd’s Rep 601 in the following terms at [48] of his judgment in *RTS*:

“although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement.

The parties regarded them as relatively minor details which could be sorted out without difficulty once a bargain was struck. The parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later.”

551. As Andrew Smith J put it in **Bear Stearns Bank plc v Forum Global Equity Ltd** [2007] EWHC 1576 (Comm) at [171]:

“The proper approach is, I think, to ask how a reasonable man, versed in the business, would have understood the exchange between the parties. Nor is there any legal reason that the parties should not conclude a contract while intending later to reduce their contract to writing and expecting that the written document should contain more detailed definition of the parties’ commitment that had previously been agreed.”

552. The same judge in **Maple Leaf Macro Volatility Master Fund v Rovroy** [2009] EWHC 257 (Comm) (upheld on appeal: [2009] EWCA Civ 1334), Andrew Smith J subsequently explained at [242] as follows:

“Although the formation of contract is conventionally analysed in terms of whether a contractual offer was accepted, the law does not require rigorous compliance with an analysis along these lines. Nor does it require that any particular communication or act must in itself manifest that the party intends to contract: the court will, if appropriate, assess a person’s conduct over a period of time and decide whether its cumulative effect is that he has evinced an intention to make the contract.”

553. The Court will nonetheless decide that an agreement lacks contractual force when it fails to deal with important matters requiring further negotiations. For example, in **Cobbe v Yeoman’s Row Management Ltd** [2008] UKHL 55, a case concerning whether an oral agreement in principle was binding, this was observed by Lord Scott at [7]:

“The oral agreement in principle that had been reached, i.e. the core terms, did not cover everything that would have been expected in due course to be dealt with in a formal written contract. It must have been expected, for example, that Mrs Lisle-Mainwaring would have wanted some provision to be included in the formal contract regarding the reasonably expeditious commencement and progress of the development and, also, some security and timetable for the payment of the appellant’s share of the excess over £24 million of the gross proceeds of sale. The nature of the transaction would plainly have excluded reliance on a vendor’s lien. Mr Cobbe, for his part, would probably have wanted some contractual assurance as to the timing of the availability of vacant possession of the block of flats. These would not have been expected to have been difficult matters on which to reach agreement but were all matters for future discussion, and the outcome of future negotiations has always an inherent uncertainty.”

554. In order to conduct the necessary assessment, the whole course of the parties’ negotiations must be considered. This is because, as Hamblen LJ put it in **Global Asset Capital Inc v Aabar Block SARL** [2017] EWCA Civ 37, [2017] 4 WLR 163 at [28]:

“It is well established that when deciding whether a contract has been made during the course of negotiations the court will look at the whole course of those negotiations.”

555. Likewise in **Air Studios (Lyndhurst) Limited T/A Air Entertainment Group v Lombard North Central Plc** [2012] EWHC 3162 (QB) Males J noted at [5] as follows:

“In deciding whether the parties have reached agreement, the whole course of the parties’ negotiations must be considered and an objective test must be applied ... Once the parties have to all outward appearances agreed in the same terms on the same subject matter, usually by a process of offer and acceptance, a contract will have been formed. The subjective reservations of one party do not prevent the formation of a binding contract. Further, it is perfectly possible for the parties to conclude a binding contract, even though it is understood between them that a formal document recording or even adding to the terms agreed will need to be executed subsequently. Whether they do intend to be bound in such circumstances, or only as and when the formal document is executed, depends on an objective appraisal of their words and conduct.”

556. Nevertheless, it may be that *“the words and conduct relied upon are so vague and lacking in specificity that the court is unable ... to attribute to the parties any contractual intention”*, although the courts are *“reluctant”* to reach such a conclusion: **Devani v Wells** [2019] UKSC 4, [2019] 2 WLR 617 per Lord Kitchin at [18]. Similarly, in **NHS Commissioning Board v Vasant** [2019] EWCA Civ 1245 Lewison LJ said this at [35]:

“Ms Demetriou QC, on behalf of the dentists, forcefully submits that the court should be reluctant to hold that an agreement is too uncertain to be enforced. The court’s reluctance should be all the greater where what the parties believe to have been a valid contract has been partly performed. That is undoubtedly the case where the question is whether the parties are legally bound at all. The court’s extreme reluctance to find that the parties have failed to make any contract because of their omission to specify particular terms in detail is well illustrated by the recent decision of the Supreme Court in Wells v Devani ...”

557. The same point is, unsurprisingly in the circumstances, made in **Lewison** at paragraph 8.14, in which the dictum of Steyn LJ (as he then was) in **G Percy Trentham Ltd v Archital Luxfer Ltd** [1993] 1 Lloyd’s Rep 25 at 27 is quoted:

“The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations.”

558. There may be cases where the parties have reached agreement, but the manner in which they document that agreement indicates that they do not intend for it to be legally binding. The editors of *Chitty* describe the position at paragraph 2-195 as follows:

“... ‘letters of intent’ or ‘letters of comfort’ may lack the force of legally binding contracts. The assumption in all these cases was that the parties had reached agreement, but lack of contractual intention prevented that agreement from having legal effect.”

559. That said, in **Air Studios (Lyndhurst)**, again at [5], Males J went on to say this:

“Further, it is perfectly possible for the parties to conclude a binding contract, even though it is understood between them that a formal document recording or even adding to the terms agreed will need to be executed subsequently. Whether they do intend to be bound in such circumstances, or only as and when the formal document is executed, depends on an objective appraisal of their words and conduct.”

560. The same point was most recently made in *Abberley v Abberley* [2019] EWHC 1564 (Ch), in which HHJ Jarman QC observed at [39] that the “*mere fact that a more formal document is envisaged does not of itself preclude the existence of a binding agreement*”.

Was the alleged 2009 Shareholders’ Agreement a valid and binding agreement?

561. I turn now to consider the evidence regarding the formation of the alleged 2009 Shareholders’ Agreement, it being the Taruta Parties’ case that it should be so regarded and the Gaiduk and Mkrтчan Parties’ case that there was no valid and binding agreement concluded.
562. As previously mentioned, the case put forward by the Taruta Parties underwent something of a change during the course of the trial. I need not, in the circumstances, rehearse again the background to how the case was previously put, despite the fact that, unsurprisingly in the circumstances, both Mr Calver QC and Mr Wolfson QC were critical of the way in which the Taruta Parties (and Mr Taruta in particular) had advanced their case. It is, indeed, somewhat ironic that, in his written closing submissions, Mr Foxton QC should highlight as a “*key deficiency*” that the Gaiduk and Mkrтчan Parties should have focused on MOU4 as being “*the source rather than the record of the agreement to transfer and pay for the assets*” given that until closing that is what the Taruta Parties themselves did.
563. Suffice to say that I consider that there is much force in the criticisms which were made by Mr Calver QC and Mr Wolfson QC. This is not merely a technical point but, rather, a point of substance. This is because the Taruta Parties’ case by the end of trial was wholly at odds with the evidence which Mr Taruta had himself previously given namely that, as he put it in his written evidence, “*I am almost certain that I did not meet with Mr Gaiduk in December 2009*”. That Mr Taruta should have denied that a meeting took place is telling, given that it is now his case (and that of the Taruta Parties) that it was at this very meeting that the oral agreement so critical to the Taruta Parties’ case was made. In such circumstances, I am sceptical about the merits of that case.
564. Until the late shift in Mr Taruta’s evidence and in how the Taruta Parties put their case, there had been no mention of any oral agreement having been arrived at and, furthermore, the agreement had been alleged to have been made “*on or by*” 18 December 2009 rather than several days previously. That said, Mr Gaiduk’s evidence concerning the 15 December 2009 version of MOU 4 (the 15 December Draft) being that, following a meeting between the Partners “*no later than*” 13 December 2009, Mr Petrov “*introduced amendments in the memorandum, and on the 14th, with the date as of 15th, he sent it to Mr Tkachenko automatically to all the partners*” and “*So he introduced the changes or the agreements that we had struck, what we had agreed, the Dubyna and other aspects, all the components*”, it is clearly open to the Taruta Parties to advance the case which they ultimately came to advance, namely that by 13 December 2009 the Partners had reached a final (oral) agreement between themselves and this resulted in revisions to MOU 4 being made by Mr Petrov, specifically the version which on 14 December 2009 was sent (albeit that it was dated 15 December) to Mr Tkachenko and then to Mr Udovenko.
565. Given how the case ultimately came to be advanced, as an oral agreement case, Mr Foxton QC was right when he submitted that, in such circumstances, whether each of the Partners saw or discussed amongst themselves either the 15 December version of

MOU 4 (the 15 December Draft) or the subsequent 18 December version (the 18 December Draft) after that meeting and before the Castlerose SPA was executed may not be as material as would otherwise have been the case.

566. Mr Foxton QC highlighted, in this connection, how Mr Gaiduk appeared to acknowledge in re-examination, the 15 December version of MOU 4 simply stated “*what we had agreed upon, de facto*”. I shall come back to this but, suffice to say, that I do not consider that it follows that there was final agreement. Indeed, Mr Taruta’s own evidence is instructive in this regard since what he had to say concerning how the 2009 Shareholders’ Agreement came to be entered into was, to put it mildly, somewhat less than compelling, as the following exchanges, highlighted by Mr Calver QC in closing, amply demonstrate:

“Q. So can I just understand. The written documents that you say contain the terms of your agreement with Mr Gaiduk and Mr Mkrтчan are, what, which documents? Which documents do you point to as containing the terms of your agreement?”

A. These are MOUs and the sale and purchase agreements during 2008 and 2009. It was one transaction which started from the moment of the receipt of the letter of Vizavi, and until the closure of the deal on 30 December.

Q. So you say, do you, that the terms of the agreement that were reached with Mr Gaiduk can be found in the 2008 MOUs?

A. In 2008 we clearly set out the price, which was the most important factor, and we set out the terms, the dates, which were renegotiated based on the circumstances which occurred on the metallurgical market.

Q. I am just going to ask you the question once more, Mr Taruta. I am trying to understand your case as to which agreements contain the terms of your deal with Mr Gaiduk. Do you say that the terms of the 2008 MOU are part of the binding agreement that you reached with Mr Gaiduk?

A. Yes, that is so. All memoranda were binding. They were the agreements and we, on our part, were performing all the requirements which Mr Gaiduk was putting to me and to Mr Mkrтчan. We were providing pledges; we re-registered companies, based on the MOUs which, from the very start, on the initiative of Mr Kravets and Mr Petrov, were formed, and they were binding, to be performed by all the parties.”

567. The following exchange only serves to strengthen the impression that Mr Taruta did not himself consider that MOU4 reflected terms which had been agreed:

“Q. So it is your case, is it, that the terms of the agreement are to be found exclusively in the 2009 memoranda of 18 December. Is that your case?”

A. Not only in those memoranda. There were also pledge agreements, re-registration of shares agreements, agreements of sale and purchase of the option, and in 2009 -- and at the end of 2009 they were derivatives of the agreements we reached and reflected in our agreements.”

This was distinctly unimpressive evidence from a witness whose own case was (at least as pleaded) that MOU4 “*contained and/or evidenced*” the alleged 2009 Shareholders’ Agreement or (at least by the end of the trial) that MOU4 was the “*record*” (as opposed to the “*source*”) of that agreement.

568. Mr Foxtton QC nonetheless relied on other evidence which he suggested demonstrates that the 15 December version of MOU 4 (the 15 December Draft) was seen by both Mr Mkrтчan and Mr Gaiduk.

569. He highlighted, in particular, how, following receipt of the 15 December Draft from Mr Petrov, Mr Tkachenko made only a handful of minor drafting amendments on 17 December 2009, those amendments being visible in blue text in the native and translated versions of the document. These included the amendment of the date from “*15 December 2009*” to “*18 December 2009*”, so reflecting the delay in the signing of the Castlerose SPA (discussed further below), the correction of typographical errors and certain asset descriptions, and other changes, for example, to the drafting of Clause 3. Plainly, as Mr Foxtton QC put it, Mr Petrov’s description of the 18 December version as “*obviously*” being “*a very different document*” was not an accurate characterisation.

570. As for Mr Mkrтчan, Mr Foxtton QC explained how in the Mkrтчan Parties’ Defence to the Avonwick Claim there is reference to the 15 December ‘clean’ version of MOU 4 as recording the:

“... agreement under which, inter alia, Mr Mkrтчan and Mr Taruta were to buy (i) Mr Gaiduk’s indirect interest in ISD for US\$750m and (ii) Mr Gaiduk’s indirect interest in a number of other assets.”

It follows, Mr Foxtton QC submitted, that Mr Mkrтчan (like Mr Gaiduk) regarded MOU4 as recording an agreement which had been made.

571. As for Mr Gaiduk, Mr Foxtton QC explained that in mid-December 2009 the Partners were completing the final reckoning of the 2008 dividends. He pointed specifically to two dividend reports, both signed by Mr Gaiduk and one also signed by Mr Mkrтчan. This is important, Mr Foxtton QC suggested, given that the recitals of both the 15 December Draft and the 18 December Draft refer to “*approximately USD 184 million*”, so indicating that the Partners were reflecting the agreements which they had reached in the MOUs. That, Mr Foxtton QC submitted, is consistent with Mr Gaiduk’s evidence in re-examination that MOU 4 contained “*all the components*” of the agreement between the Partners, MOU 4 being a document which was created by Mr Petrov on Mr Gaiduk’s behalf and received and annotated by Mr Mkrтчan as a clean document (as well as received and annotated by Mr Taruta).

572. Against this background, Mr Foxtton QC submitted that the Court should conclude that Mr Taruta, Mr Gaiduk and Mr Mkrтчan regarded themselves as having entered into the alleged 2009 Shareholders’ Agreement. This, Mr Foxtton QC submitted, is a conclusion which is necessitated for several reasons.

573. First, he pointed to what he characterised as the Partners’ long-established practice of conducting their mutual dealings informally and on the basis of oral agreements without any particular formality.

574. Secondly, although, in truth, the point is related to the first, Mr Foxton QC pointed to the Partners' use of MOUs since 2008 as a record of the terms that they had orally agreed. The fact that these MOUs tended to contemplate the entry into formal SPAs, Mr Foxton QC submitted, does not mean that binding agreements were not reached.
575. Thirdly, but again the point is related to the last, Mr Foxton QC highlighted how the Partners used MOUs outside of the context of their 'divorce' where they had plainly reached a binding agreement.
576. Fourthly, Mr Foxton QC suggested that the fact that documents were track changed and had no signatures makes no difference given that there was evidence to suggest that at the time the Partners afforded no significance to such matters.
577. Fifthly, as to the chronology throughout 2008 in relation to MOUs 1 to 3, Mr Foxton QC submitted that this demonstrates that the Partners regarded themselves as bound by the terms contained in those MOUs.
578. Sixthly, he suggested that the same applies to the chronology over the course of 2009 in relation to the various iterations of MOU 4.
579. Lastly, Mr Foxton QC submitted that the circumstances in which agreement was finally reached between the Partners in December 2009 and subsequently documented in the 15 December Draft (and the 18 December Draft) and the Castlerose SPA demonstrate that a valid and legally binding contract came into existence.
580. These are matters which it is unnecessary to take in turn since, as indicated already, it is clear that there is a degree of overlap between the various points made.
581. There can be no doubt, by way of starting point, that Mr Foxton QC was right when he submitted that Mr Taruta, Mr Gaiduk and Mr Mkrtchan had a long-established practice of conducting their mutual dealings informally and on the basis of oral agreements.
582. That was clearly the position leading up to 2008, when they started to use MOUs. As Mr Foxton QC pointed out, Mr Gaiduk confirmed that, prior to 2008, he, Mr Taruta and Mr Mkrtchan did not record their agreements in the form of MOUs, something which Mr Taruta agreed also, and that this included matters such as partner withdrawals and entitlements (in the cases of Mr Mkrtchan and Mr Dubyna) to profit shares in IUD. Mr Dubyna, indeed, confirmed, when asked about a bonus which it was agreed he would receive, that informality was usual, as this exchange makes clear:
- "Q. There was nothing unusual in Ukraine at that point in time in the fact that the bonus arrangement was agreed orally but not documented, was there?"*
- A. At that point in time, in our relationships that was fine, that was okay.*
- Q. But presumably you understood that the agreement to pay you a bonus represented a binding commitment.*
- A. Yes, my Lord."*
583. The same informality also operated, it is clear, as regards the Partners' respective agreements to transfer to Mr Mkrtchan an equal shareholding in IUD between 2006 to

2008, which were only partially evidenced in documentary form. This is, however, merely background since it is doubtful whether evidence concerning the approach adopted by Mr Taruta, Mr Gaiduk and Mr Mkrtchan in that pre-2008 period much assists, things having changed in 2008 when MOUs started to be used. It is this use and that post-2008 period which are, therefore, more significant for present purposes

584. The Taruta Parties' case is that each MOU was a "*written contract*", whereas the Gaiduk and Mkrtchan Parties maintain that they were merely a record of the stage that the Partners' discussions had reached at any particular time, or "*roadmaps*" which would form the basis of more formal arrangements. I consider, however, that, in truth, the MOUs are not susceptible to any kind of sweeping characterisation.
585. The position is, in short, more nuanced: in some cases they were plainly used to record ongoing negotiations, with no intention on the part of the Partners to be bound to their terms; in others, the MOUs were, on their face, expressed to be legally binding and were, in substance, treated as such; other MOUs fell somewhere between these two ends of the spectrum.
586. In support of their case, the Taruta Parties relied on a number of statements made by Mr Gaiduk and Mr Petrov in cross-examination to the effect that the MOUs reflected 'agreements' between the Partners. For example, Mr Gaiduk variously explained that:
- "when we used the word 'memorandum of understanding' I mean something to remember, aide-memoire, to remember what we agreed upon during our previous dealings and agreed with";*
- "[Mr Petrov] just recorded what the partners had agreed on. The next amendment would be introduced only after the partners had agreed on something";* and
- "what is noted in the MOUs is what the partners agreed, came to an agreement about."*
587. Mr Petrov, meanwhile, described the MOUs as recording "*agreements in principle*" and as having "*reflected or recorded everything that was important, I considered important, in our MoU*".
588. This evidence does not, however, seem to me to advance the case one way or another. Mr Gaiduk's evidence that the MOUs reflected agreements with the Partners is merely a statement of the obvious: it is common ground that the MOUs were drawn up to record the outcome of the Partners' discussions. It does not follow that there were, as a result, agreements which were final and binding; on the contrary, Mr Petrov's characterisation of them as recording "*agreements in principle*" is, if anything, consistent with the view that they were not final and binding.
589. Indeed, Mr Taruta himself accepted the proposition put to him in cross-examination that the MOUs were "*continuous drafts of memoranda of understanding simply reflected the progression of your negotiations at any point in time*". Mr Taruta's acceptance that the role of the MOUs was to reflect negotiations "*at any point in time*" somewhat suggests that the MOUs were not regarded as binding agreements.
590. That said, it was also Mr Taruta's position in cross-examination that:

“All memoranda were binding. They were the agreements and we, on our part, were performing all the requirements which Mr Gaiduk was putting to me and to Mr Mkrтчan. We were providing pledges; we re-registered companies, based on the MoUs which, from the very start, on the initiative of Mr Kravets and Mr Petrov, were formed, and they were binding, to be performed by all the parties.”

591. I consider that, in truth, Mr Taruta and, I suspect, Mr Gaiduk and Mr Mkrтчan also, had a view about the role played by the MOUs which was what might be described as a layman’s view. For this reason, again, I consider that the evidence given on this topic from Mr Taruta, Mr Gaiduk, Mr Petrov and Mr Dubyna was of only limited assistance.
592. Turning to the MOUs themselves, the first was the Dubyna MOU, which was concluded on 5 January 2008.
593. The Partners had agreed that Mr Dubyna should receive a 0.75% stake in IUD in exchange for his work as a manager in several of IUD’s subsidiaries. The Dubyna MOU was intended to formalise the position. It recorded that the Partners had since 2002 been indebted to Mr Dubyna in the amount of US\$4,500,000, on which an annual interest rate of 20% had accrued and would continue to accrue. The Partners also acknowledged a pre-existing agreement to accept Mr Dubyna as a participant in IUD with a stake of 0.75%, valued at US\$66 million. The agreement was that these sums would be repaid jointly by Mr Taruta and Mr Mkrтчan in connection with the acquisition of Mr Gaiduk’s shares in IUD. The Dubyna MOU included a confidentiality provision and the following terms (Clause 3):

“This Memorandum shall enter into force from the moment it is signed by the Parties, and shall remain valid until the Parties fulfil the obligations assumed herein.

The Parties shall make every effort to achieve the goals established by this Memorandum.

Unilateral amendment to the terms of this Memorandum or unilateral refusal to perform obligations under this Memorandum is not allowed.

This Memorandum is composed in Russian in four original copies with equal legal force, one copy for each Party.”

594. The second of these four provisions might suggest that the Partners were only required to use ‘best endeavours’, but were under no strict obligation to perform the terms of the MOU. However, the three other clauses do seem to contain the language of legal commitment. They provide that the MOU “*shall enter into force from the moment it is signed*” (as it was), prohibit a “*unilateral refusal*” to perform its terms and provide that each copy has “*equal legal force*”.
595. As Mr Foxton QC submitted, Mr Gaiduk’s position that this MOU was not legally binding, even allowing for the fact that he is not a lawyer, was somewhat implausible, if only because, if he were right about that, then, Mr Gaiduk was under no legal obligation to pass on to Mr Dubyna any sums which Mr Taruta and Mr Mkrтчan paid in respect of Mr Dubyna’s share.

596. However, whilst the Dubyna MOU is of some relevance in demonstrating that MOUs were, at least sometimes, treated as giving rise to valid and binding obligations, in my view, it nonetheless does not follow that MOUs were, strictly speaking, legally binding in the sense that they constituted valid and binding legal contracts. Another explanation is merely that, for practical purposes, the MOUs (or some of them) were treated as giving rise to obligations which the Partners would expect to be honoured regardless as to whether those obligations were legally enforceable.
597. I am clear, in any event, that simply because in the past some MOUs might have given rise to legally enforceable obligations (or been regarded as doing so) does not mean that any MOU entered into by the Partners amounted to a valid and binding contract since, ultimately, the question of whether a legally enforceable contract has been concluded will, in each case, depend on the particular circumstances which are said to give rise to that contract.
598. The next MOU was the FMTG MOU dated 15 January 2008. This concerned the distribution of dividends in FMTG, under which it was agreed that all of the US\$150 million would be paid to Mr Gaiduk in discharge of Mr Mkrtchan's debts to him, and is addressed in detail later.
599. It is against this background, for that is all it really is, that I turn now to consider the MOUs governing the sale of Mr Gaiduk's stake in IUD. The first of these, MOU 1, was dated 16 April 2008. An "execution copy" was attached to an email from Mr Pisarevsky to Mr Novak on 18 April 2008. It is instructive to set out its terms in some detail:

"Whereas

- *the Parties engage in joint business and are joint beneficial owners of 100% in Donbass Industrial Union Corporation (hereinafter referred to as 'ISD');*
- *the Selling Shareholder intends to exit the joint business and sell his interest in ISD, which comprises 33.84% (hereinafter referred to as the 'Interest');*

as a result of negotiations, the Parties agree as follows:

1. *The Parties agree that the price of the Selling Shareholder's Interest in ISD is US\$3.063 million (three billion sixty-three million United States Dollars).*
2. *The Parties agree that the Selling Shareholder shall sell his Interest to the Buying Shareholders on the terms set out below.*
3. *The Parties have agreed the following terms and procedure for the transfer of the Interest as well as settlements for it.*
 - 3.1 *The Selling Shareholder shall sell the Interest to the Buying Shareholders on credit terms under the Interest Sale and Purchase Contract (hereinafter referred to as the 'Contract').*
 - 3.1.1 *The principal shall be repaid according to the following schedule:*
 - *By 15 December 2008: US\$500 million.*

...

3.2 In order to secure timely payment under the Interest Sale and Purchase Contract and subject to paragraph 3.1, the Selling Shareholders shall pledge 100% of their shares with ISD and 100% of shares of the relevant non-resident shareholders as set out in paragraph 4 of this Memorandum.

...

4. The Parties agree to carry out interim restructuring of ISD assets as follows: the three non-resident companies that each Party is the beneficial owner of shall enter ISD by buying out the additional issue. As a result, the aggregate interest of the three non-resident companies in ISD shall be at least 99%.

...

7. The Parties agree that the Interest Sale and Purchase Contract, pledge agreements and other requisite legal documents shall be signed by the Parties by 15 July 2008.

8. In order to secure timely conclusion of the Contract, the Buying Shareholders agree to reregister their stakes in Industrial Group ('IG') Consortium to the Selling Shareholder at par value with 5-month deferment of payment within 15 business days of the signing hereof. If the Contract is entered into within five months, the Selling Shareholder shall sell the stakes in IG acquired in this manner to the Buying Shareholders within 15 business days.

9. As of the signing of this Memorandum, the Parties shall keep confidential the proposed transaction, not disclose or supply information to third parties."

600. The terms of MOU 1 (which was signed by the Partners) were relied upon to advance both sides' cases. Mr Calver QC highlighted how MOU 1 contains wording which contemplates a different, future agreement rather than an existing, binding agreement. Thus, for example, Clause 9 refers to "*the proposed transaction*".

601. Furthermore, Mr Calver QC pointed out that, if MOU 1 was binding, then, under Clause 1, Mr Gaiduk would have been entitled to receive the price of US\$3.063 billion, yet, if that was the case, then, just over a year later, he must have voluntarily surrendered that right and accepted a price of US\$750 million. This, Mr Calver QC suggested, indicates that the Partners did not understand MOU 1 to be legally binding since, he submitted, it is distinctly improbable that Mr Gaiduk would have been content to forego some US\$2.313 billion by entering into the subsequent MOUs and, indeed, ultimately, the Castlerose SPA.

602. Notwithstanding this, according to Mr Taruta, MOU 1 did give rise to a valid and binding contract since, as he put it, "*All memoranda were binding*". Mr Taruta was pressed on this in cross-examination in the following exchanges, which highlighted the oddity of the position:

"Q. But on your approach to these documents, you were legally obliged to pay Mr Gaiduk \$3 billion in cash, which you didn't have. That is correct, isn't it?

A. Correct.

Q. Mr Gaiduk, if he had wanted to, on your approach, could have sued you for that money and you would be forced either to sell your interest in IUD in order to pay him; that would be one option, would it not?

A. Possibly so.

Q. And even if you had sold your interest in IUD, you would probably still owe him money because your interest and Mr Mkrtchan's interests together would probably not have been worth \$3 billion; correct?

A. It would be worth much less than that.

Q. Or Mr Gaiduk could have taken your share and Mr Mkrtchan's share in IUD from you, and sold the whole of IUD to a third party. That would be another option which he could have done, isn't it?

A. Yes. That would have been possible.

Q. Over and above that, he could have sold CIG, taken his share, as well as a \$300 million penalty, leaving you and Mr Mkrtchan with whatever might be left over after that. That is also correct, isn't it?

A. Yes, that is true.

Q. So the fact is, on this approach, Mr Taruta, that you and Mr Mkrtchan were on the brink of losing almost everything you had, and Mr Gaiduk was entitled to \$3 billion in cash. That is correct, isn't it?

A. Yes.

Q. But as you have already agreed, you didn't pay him \$3 billion at this time, you actually paid him \$750 million in December 2009. Correct?

A. Yes, that had been the agreement that was reached at that time, to lower the price, to go down.

Q. Because you don't say, do you, that you and Mr Mkrtchan still owe Mr Gaiduk \$2.3 billion, do you?

A. I'm not saying that. When we signed the next agreement, it had an express provision that we had renegotiated the terms and the price had changed.

Q. What your position boils down to, Mr Taruta, doesn't it, is that during the course of 2009 Mr Gaiduk voluntarily gave up his legally binding contractual entitlement to \$2.3 billion. That is right, isn't it?

A. Yes."

603. The oddity goes further, however, so Mr Wolfson QC submitted, since Mr Taruta accepted that it was never even discussed between him, Mr Mkrtchan or Mr Gaiduk that any such entitlement under MOU 1 (or, for that matter, MOU 2 and MOU 3) might be enforced by Mr Gaiduk. The following exchange makes this clear:

“Q. What we don’t see in the documents leading up to this email at the end of January 2009 is any evidence of, first, Mr Gaiduk demanding to be paid \$3 billion or the \$300 million penalty. We don’t see that, do we?”

A. No, there wasn’t this document, and this memorandum shows the amendments of our understandings.

Q. Nor do we see Mr Gaiduk telling you and Mr Mkrтчan that you are in breach of contract with him. We don’t see that either, do we?”

A. Yes, I agree.

Q. Nor do we see any discussion between you and Mr Mkrтчan saying ‘Oh my Lord, we owe Mr Gaiduk \$3.5 billion and we haven’t got the money to pay it, what are we going to do?’ We don’t see that either, do we?”

A. No, it didn’t happen.

Q. Because you don’t suggest, do you, that any of those three things took place, do you?”

A. No, I do not suggest that.”

604. This, again, in my view, points strongly to MOU 1 not being a valid and binding agreement. There are, however, other aspects which point in the same direction.
605. As Mr Wolfson QC went on to point out, on 10 June 2008, Mr Pisarevsky, who was representing Mr Mkrтчan and Mr Taruta in the negotiations with Mr Gaiduk, sent a memorandum to Mr Mkrтчan and Mr Taruta discussing some proposals that had been received from Mr Gaiduk’s representatives on 5 May 2008 regarding the understanding in principle set out in MOU 1. He noted that *“these comments are given outside the context of a detailed sale and purchase contract containing all essential conditions of the transaction (such a contract has yet to be developed)”* and, on that basis, observed that *“at this stage it is inadvisable to offer counter comments to the selling shareholder’s party”*. He went on to explain that the *“normal procedure for consideration of complex legal documents is to exchange complete drafts of contracts”* with lawyers being instructed on either side.
606. Mr Taruta, when asked about this, acknowledged that Mr Pisarevsky was here explaining that the MOUs which he was negotiating were *“not the formal sale and purchase agreements which would contain all the essential terms of the transactions”*. This is consistent with there not at this stage being a concluded sale contract, and so with MOU 1 instead merely recording the commercial terms discussed between the parties. This supports, in turn, the view that, whatever the position concerning earlier MOUs entered into between the Partners, whether they gave rise to legally enforceable obligations (or were regarded as doing so) or not, in the case of MOU 1 the Partners were not at this stage treating it as a valid and binding contract.
607. Mr Foxton QC, however, highlighted how one of the aspects addressed by MOU 1 was acted upon in short order. He was referring here to how, in recognition of certain liquidity issues which would be caused to Mr Taruta and Mr Mkrтчan, it was envisaged in Clause 8 of MOU 1 that their shares in CIG could be temporarily transferred to Mr

Gaiduk in lieu of payment. As Mr Foxton QC explained, the first draft of the SPAs effecting the temporary transfer was circulated on 29 April 2008 and final versions were executed on 12 May 2008, 14 business days after MOU 1 was executed, with provision for payment to be deferred for 150 calendar days in line with the five months contemplated in MOU 1.

608. Mr Foxton QC was dismissive of Mr Petrov's evidence on this, which was that what MOU 1 had to say about the transfer was a "*leap of faith*" which conferred "*no legal rights*" on Mr Taruta or Mr Mkrтчan. The fact that the SPAs were entered into, however, is just as consistent with the parties having discussed what would happen as it is with their having entered into a valid and binding contract which imposed an obligation on Mr Taruta and Mr Mkrтчan to do what they, then, and in short order as envisaged by MOU 1, actually did.
609. Indeed, if Clause 8 itself gave rise to a legally binding commitment by Mr Taruta and Mr Mkrтчan to pay US\$3 billion, then, it might be thought to be unnecessary that there would need to be security for the conclusion of that commitment.
610. Nor am I persuaded by Mr Foxton QC's reliance on the fact that on 12 May 2008, the same day as the CIG SPAs were executed, the Partners signed a further MOU, MOU 2, which referred in the recitals to the transfer of CIG in lieu of payment of US\$300 million. Specifically, MOU 2 provided, so far as material, as follows:
- "WHEREAS, on April 16, 2008, the Parties signed Memorandum of Understanding No. 1 (Memorandum No. 1) in accordance with which they determined the basic aspects of buyout of the entire 33.84% stake of the Selling Shareholder in the charter fund of ISD (the Stake),*
- WHEREAS, the Parties temporarily, instead of contributing USD 300 (three hundred) million as security for their obligations to execute the agreement for sale and purchase of the Stake (hereinafter the Contract), transferred (sold under sale and purchase agreements with deferred payment of 150 calendar days) to the Selling Shareholder their interests in the charter fund of INDUSTRIAL GROUP Consortium (the Consortium), ...".*
611. I agree with Mr Calver QC that the reference to the penalty, if not oblique, as he characterised it, is nonetheless not expressed in terms which suggest (and only suggest) that a legally binding obligation thereby came into existence. Indeed, it would be somewhat surprising if that were the case with what, after all, is merely a recital. Furthermore, the fact that Clause 2 goes on to reflect the fact that, when CIG's assets are sold, Mr Taruta and Mr Mkrтчan (as the Buying Shareholders) are to have their share reduced by US\$300 million, again, hardly represents, as Mr Calver QC put it, "*language generating a free-standing debt*".
612. Mr Foxton QC also prayed in aid the fact that MOU 2 reflected discussions (he submitted agreement) between the Partners that, in order to give Mr Taruta and Mr Mkrтчan oversight in relation to CIG's business and assurance that Mr Gaiduk would not dissipate its underlying assets without their consent, they would be appointed as Uniglow and Vega's representatives on CIG's board.

613. Accordingly, MOU 2 contained a provision entitling Mr Gaiduk to sell CIG's assets if the SPA governing the buy-out was not entered into within five months of the temporary transfer of CIG, with Mr Gaiduk being entitled to keep the first US\$300 million derived from the sale (with the remainder to be distributed equally among the three Partners). Specifically, MOU 2 provided as follows:

“WHEREAS, in this Memorandum No. 2 the Parties intend to determine [also translated as ‘formalise’] their relationship for management of the Consortium for the period until execution of the Contract or at the end of five (5) [months] after the signing of Memorandum No. 1

...

2. *Not later than 15 calendar days from the date of execution of the Contract, the Selling Shareholder undertakes to take all of the necessary actions to transfer the interest in the Consortium back to the Buying Shareholders.*

If the Contract has not been executed at the end of five (5) months after the signing of the agreements for sale and purchase of interests in the charter fund of the Consortium, in that case the Selling Shareholder undertakes to sell all of the Consortium's assets within twelve (12) calendar months from the end date of that five (5) month period. Such sale shall be accomplished through the international investment bank agreed upon with the Buying Shareholders. The proceeds from the sale shall be distributed among the Parties in proportion to their initial participatory (before transfer) interest in the Consortium. In addition, the amount payable to the Buying Shareholders in proportion to their participatory interest in the Consortium will be reduced in favour of the Selling Shareholder by USD 300 (three hundred) million.”

614. Mr Foxton QC highlighted how these were not provisions which were included in the CIG SPAs which were executed on the same day, so supporting the submission that MOUs and SPAs “*need to be read in tandem*”, but each nonetheless as binding agreements.
615. Mr Foxton QC suggested, indeed, that this was recognised by Mr Gaiduk. As I see it, however, Mr Gaiduk was not saying that MOU 2 was a binding agreement since what, in fact, he said was that “*we just recorded the facts here based on the events that took place between the first and second memoranda*”. He did not say, in terms, that MOU 2 contained any legally binding obligation.
616. Furthermore, that a more formal agreement would have to be concluded for the actual transfer of IUD is apparent not merely from Mr Pisarevsky's 10 June 2008 memorandum and the other aspects which have just been considered but also from the involvement of external lawyers since it is clear that Mr Gaiduk also envisaged that external lawyers would need to be instructed. So it was that, on 18 June 2008, Allen & Overy produced a draft contract accompanied by a note headed “*PROJECT INDIA*” in which they stated in the first bullet point that:

“The MOU dated 16 April 2008 set out the commercial terms of the agreement reached between the parties whereby Mr. Gayduk ... will sell his participation interest in the corporation ...”.

The note, then, went on in the next bullet point to say this:

“This note seeks to clarify some of the provisions of the MOU in order to make the arrangements between the parties workable in practice and should be read together with the draft sale and purchase agreement (the ‘SPA’) relating to the (indirect) sale of the Seller’s interest”.

617. Similarly, on 25 June 2008, Mr Pisarevsky (to repeat Mr Taruta’s and Mr Mkrtchan’s adviser) prepared a memorandum for IUD’s lenders informing them that:

“On April 16, 2008 all the shareholders have signed a Memorandum of Understanding, which outlines major commercial agreements regarding such Buy-out. It is further envisaged that within the next 4 months, the parties to the Memorandum will enter into a definitive agreement, which will govern the Buy-out.”

618. The next day, Daniel Cousens of Linklaters (like Mr Pisarevsky, acting for Mr Taruta and Mr Mkrtchan) sent a table to his counterparts at Allen & Overy, in which he set out his (and Linklaters’) *“understanding of the positions of the parties on key transaction terms”*.

619. That MOUs 1 and 2 were not being treated by the external lawyers as binding contracts is, therefore, self-evident, save in respect of their provisions regarding the transfer of CIG by way of security. The fact that these external lawyers were instructed at all makes this obvious. So, too, does what the lawyers had to say having been instructed.

620. Added to this and in addition to the point previously addressed (namely that it is unlikely that, by reason of MOU 1, Mr Gaiduk had an accrued right to receive US\$3 billion for his stake in IUD), there is a further matter which makes it distinctly unlikely that either MOU 1 or MOU 2 gave rise to legally binding obligations.

621. This is that the agreed deadline for entry into an SPA for Mr Gaiduk’s interest in IUD was 15 July 2008. However, delays with the Evraz merger meant that this deadline could not be met. Mr Gaiduk, therefore, agreed to extend the deadline, with MOU 3 (dated 4 September 2008) referring to an extension of the deadline to 31 October 2008. He accepted, indeed, in cross-examination that the extension of the deadline was necessary to avoid triggering the penalties prescribed in MOU 2.

622. Mr Foxton QC submitted that, as a result, Mr Gaiduk was conceding that what had previously been agreed both as regards deadlines and as regards penalties was legally binding. If that is right, however, then, the Evraz deal subsequently having collapsed in October 2008, so as to mean that the revised deadline was also missed, on the assumption that the MOUs were binding, Mr Gaiduk would have been entitled to sell CIG and retain US\$300 million in addition to his share of the proceeds. However, as previously explained, at no point did Mr Gaiduk seek to enforce this right. He never received the US\$3.063 billion, the shares in IUD were never pledged and, although CIG was transferred, that was not done within 15 days. MOU 2 was similarly not performed: in particular, no US\$300 million penalty was ever paid and CIG’s assets were not auctioned. I agree with Mr Calver QC that the reason why he did not do this is that it was understood not only by him but also by Mr Taruta and Mr Mkrtchan that MOUs 1 and 2 were not legally binding.

623. Mr Foxton QC submitted that the argument that Mr Gaiduk did not demand payment of the originally agreed penalty figure because the MOUs were not legally binding belies the commercial reality in which the negotiations were taking place, namely that the financial crisis had left the markets in meltdown. He suggested that, in such circumstances, the only possible commercial solution was to renegotiate the price. Even if that is right (and it may well be), it does not explain, however, why nowhere in the documents is there any indication that Mr Gaiduk was making a decision not to enforce his rights. The more likely explanation is that nobody (Mr Gaiduk included) considered that there were the legal entitlements which, on the Taruta Parties' case, Mr Gaiduk enjoyed. Instead of taking the steps to which I have referred, on 10 November 2008, Mr Novak, who had been involved in drafting the earlier MOUs, produced a further MOU (MOU 3) which extended the deadline from 31 October 2008 to 1 May 2009.
624. MOU 3 included a provision stating that "*after the Parties sign this Agreement regarding amendments, the Agreement of 4 September 2008 will cease to be in force*", which Mr Foxton QC submitted is indicative not only of Mr Novak's understanding that MOUs 1 and 2 (and, indeed, MOU 3) had legal effect but also the Partners' understanding to the same effect. For my part, however, I consider this to amount to evidence which is unpersuasive. As I see it, the words highlighted by Mr Foxton QC merely reflect the fact that MOU 3 came after MOUs 1 and 2 and, as such, supplants MOUs 1 and 2. It does not follow that MOUs 1 and 2 were legally binding in the way in which Mr Foxton QC suggested.
625. I would briefly interject here, as a matter of completeness, to make the point that it follows that the Taruta Parties' claim against the Gaiduk Parties under MOU 1 for a share of certain dividends (or withdrawals) received by the Gaiduk Parties must be rejected: MOU 1 gave rise to no such legally binding entitlement.
626. Subsequently, on 31 January 2009, Mr Petrov circulated a further MOU dated 2 February 2009, the date apparently being when it was contemplated that there would be a meeting when the draft would be discussed. This was the first draft of MOU 4, the final drafts of which would appear on 15 December and 18 December 2009 (the 15 and 18 December Drafts).
627. The 2 February 2009 draft included the following wording, in particular references to a reduction in the amount of the penalty from US\$300 million to US\$50 million and to Mr Taruta and Mr Mkrtychan's interests in CIG being returned provided that the buy-out was completed "*by the end of 2009 or by the time of sale of the Consortium's assets*":

"WHEREAS, the Parties have not entered into the Agreement for the sale and purchase of the Selling Shareholder's participatory interest in ISD within the agreed-upon period;

WHEREAS, the Purchasing Shareholders are obligated to pay a penalty in the amount of US\$300 million under the terms of Memoranda No. 1 and No. 2;

WHEREAS, Industrial Group Consortium (CIG) has been registered in the names of the Selling Shareholders' entities with deferred payment;

WHEREAS, the Purchasing Shareholders collectively spent US\$140 million for personal use in 2008 out of ISD's mutual funds – 'Dividends';

WHEREAS, the Purchasing Shareholders collectively spent 16 million US hryvnias [sic] in 2008 on financing the media group belonging to the Purchasing Shareholders;

WHEREAS, the world financial crisis has affected ISD's financial position,

NOW, THEREFORE, the Parties have collectively agreed as follows:

- 1. The amount of penalties has been reduced from US\$ 300 million to US\$ 50 million.*
- 2. Penalties in the amount of US\$50 million shall be paid to the Selling Shareholder no later than 15 December 2009.*
- 3. The Purchasing Shareholder must arrange the payment of 'Dividends' to the Selling Shareholder in the amount of US\$70 million. This will ensure the balance of 'Dividends' received by each of the three ISD shareholders for 2008.*

...

- 5. In the event of the late performance by the Purchasing Shareholders of their obligations under this agreement, penalties shall be charged at the rate of 20% per annum on the overdue amounts. If such obligations, including penalties, are not discharged by the end of 2009, the Selling Shareholder shall be obligated to sell the assets of Industrial Group Consortium within 6 months. The monetary funds received from such sale shall be distributed among the Parties in proportion to their original participatory interests in the Consortium. In such event, the amount payable to the Purchasing Shareholders shall be reduced in favor of Selling Shareholder by the amount of the obligations, including penalties, under this Agreement. The funds that are supposed to be paid by the Selling Shareholder under the agreement for the sale and purchase of participatory interests in the Consortium shall be considered technical and due to be refunded to the Selling Shareholder within 5 days from the time of such payment.*

...

- 7. If the Purchasing Shareholders have performed their obligations by the end of 2009 or by the time of the sale of the Consortium's assets, then the Selling Shareholder shall take all the necessary steps to re-register their participatory interests in the Consortium back to the Purchasing Shareholders."*

628. Although Mr Foxton QC placed heavy reliance on these provisions, I am not persuaded, for reasons which I have explained, that it follows that the Partners should be regarded as having previously entered into legally binding agreements through entering into MOUs 1 to 3 or as entering into a legally binding agreement by, subsequently, entering into MOU 4.

629. Nor do I regard it as especially instructive that in early 2009 it was, as Mr Foxton QC would have it, 'agreed' that Mr Taruta and Mr Mkrchan would transfer their interests in NET to Mr Gaiduk in part-payment of their financial liabilities to him. There was no such agreement, as demonstrated by the fact that the basis on which the shares in NET

were being transferred was the subject of continued negotiation even after 13 April 2009 since, although the draft of that date provided for a buy-back option exercisable until 1 July 2010, on 26 May 2009 Mr Novak introduced certain amendments, including an extension of the buy-back period to two years, and a provision that the management and decision-making in respect of the Hyatt would be preserved during the term of the option. The updated MOU circulated by Mr Petrov on 2 June 2009 did not include this buy-back period, instead providing that after the shares were transferred the parties would sign an option agreement for buy-back by 1 August 2010.

630. Thus, the Partners were still negotiating the terms on which the shares in NET would be transferred long after the transfer had been set in motion. This is supportive of the Gaiduk and Mkrchtan Parties' characterisation of MOUs as records of ongoing negotiations which were subject to continual revision and amendment.
631. Following the June 2009 Meeting (at which the Price Representation was allegedly made), Mr Petrov made a number of amendments to MOU 4, culminating in a draft circulated on 3 July 2009 which now included Clauses 7, 8 and 9 regarding the additional assets to be included in the deal.
632. This was the last draft of MOU 4 until negotiations resumed in December, resulting in the 15 December and 18 December Drafts referred to previously.
633. Against that background, I turn to consider the evidence in relation to the alleged 2009 Shareholders' Agreement itself. I do so, I make it clear again, having rejected Mr Foxtton QC's submission that the Partners should be regarded as having universally treated MOUs as legal binding agreements and, indeed, specifically, having decided that they had not treated MOUs 1 to 3 in such a way.
634. It is not in dispute that, owing to delays caused by due diligence, the option under the July Castlerose SPA could not be exercised by 24 August 2009 and, accordingly, that deadline expired. Mr Taruta and Mr Mkrchtan thereafter tried to reach agreement with the Russian Buyer, with negotiations between the Partners taking something of what Mr Foxtton QC characterised as "*a backseat*" as a result. Then, in early December 2009, those negotiations were re-awoken, with Linklaters circulating a mark-up of the July Castlerose SPA on 7 December 2009. At this stage, closing was scheduled for 15 December 2009 and, as Mr Foxtton QC pointed out, it is probably no coincidence that, also on 7 December 2009, Mr Mkrchtan appears to have requested to see the MOU amended by Mr Novak in May 2009.
635. Two days later, as previously mentioned, on 9 December 2009, Mr Cousens of Linklaters sent a "*first draft*" of a side letter to Mr Tkachenko. Mr Tkachenko forwarded this the next day to various people who were acting for Mr Gaiduk, Mr Mkrchtan and Mr Taruta. The draft was expressed in terms which imposed an obligation on Mr Gaiduk, in addition to the obligations under the Castlerose SPA, to transfer to Mr Mkrchtan and Mr Taruta the assets listed in its schedule, which was, however, left blank.
636. Thus, Clause 2.1 stated as follows:

“In addition to the obligations of the parties under the SPA, Vitaly Gayduk will transfer or procure the transfer to Oleg Mkrтчan and Sergiy Taruta of the assets listed in the schedule to this Letter...”

Clause 4.1, then, provided:

“The Parties agree that the Transfer shall take place on the [•] day following the Completion.”

This was followed by Clause 4.3, which stated:

“On the date of completion of the Transfer Vitaly Gayduk will execute instruments of transfer, notifications of change of ownership and such other documents with each of Oleg Mkrтчan and Serhiy Taruta as may be required to effect the Transfer.”

Clause 5.1, then, stipulated that:

“This Letter is intended to be legally binding.”

637. It was Mr Wolfson QC’s submission, in particular, that these are all provisions which indicate an agreement intended to be a legally binding contract. He contrasted the position in relation to the wording to be seen in MOU 4, especially the absence of an equivalent to Clause 5.1.

638. Further, in the covering email, Mr Cousens stated as follows:

“Needless to say, depending on what the assets are, there are a number of other issues we may want to deal with in more detail, including:

Tax/structuring issues

AMC/other regulatory consents

pre-emption rights/waivers

Transfer formalities (for example in relation to transfers of property)

Pre-closing restrictions (there are none for the moment)

Warranties (beyond the basic absence of encumbrances, there are none for the moment)

If there are companies involved, issues such as removal of directors/change of account mandates/etc on transfer.”

639. This email, Mr Wolfson QC submitted, was making the obvious point that, if Mr Mkrтчan, Mr Gaiduk and Mr Taruta wished to enter into a binding agreement for the transfer of additional assets, then, there were numerous matters that would need to be addressed in addition to identifying the assets and the price. If, Mr Wolfson QC submitted, the intention was that there would be an agreement as is now alleged (in the form of MOU 4), then, it makes no sense for the side letter to have been produced at all, even if only in draft form.

640. This was a point which was explored with Mr Taruta, who was asked, in effect, why Mr Tkachenko and Mr Pisarevsky would have asked Linklaters to draft the side letter in circumstances where they knew that there had been MOUs in circulation throughout 2009. This particular exchange is relevant in this regard:

“Q. But they were not going to rely on those draft MOUs as the contract to transfer Mr Gaiduk’s assets other than the Castlerose SPA, because they instructed an English law firm to draft a formal contract, didn’t they?”

A. Yes, in order to draft the SPA.

Q. Now let’s just have a look at this and imagine that you are Mr Tkachenko, because he’s not here to answer questions so I’ve got to put them to you. Let’s just think about what the position would be if you and Mr Mkrтчan did intend the draft MOU to become legally binding, and believed that it would be legally binding. Let’s just think through how that would work out. Okay? The first point is that Mr Tkachenko, who is your most senior in-house lawyer, is instructing Linklaters, no doubt at some cost, to produce a legally binding English law contract to transfer those assets, despite knowing that you, Mr Mkrтчan and Mr Gaiduk propose to sign the MOU, which, on this basis, would be a binding contract for the transfer of those same assets. Are you suggesting that Mr Tkachenko therefore misunderstood the basis on which he was instructing Linklaters?”

A. No. He understood correctly. It seems that he received instructions from Mr Mkrтчan that we had the SPA prior to that in the summer, and it needed to be just renewed and the new amount to be included. Apparently this is what Mr Mkrтчan told Tkachenko, and Tkachenko gave these instructions to Pisarevsky and to our lawyers.”

641. It is apparent from Mr Taruta’s answers that the side letter and the instructions provided to Linklaters in respect of it were not matters about which he knew very much, if anything. Indeed, he earlier gave evidence that he was unaware of the progression of the side letter and that:

“At the level of the shareholders, at our level, we continued having meetings and exchanging MoUs.”

642. Nor, in truth, was he alone in not having much, if anything, to do with the side letter since it was Mr Petrov’s unchallenged evidence that, on receipt of the side letter, he telephoned Mr Gaiduk to discuss it and that Mr Gaiduk did not know what it was and refused to sign it. If the Taruta Parties are right and an agreement was reached on 13 December 2009, which was evidenced in the 15 December Draft, then, it would not be altogether surprising that the side letter became sidelined in the manner suggested by Mr Foxton QC during closing when he submitted that the Partners (to the extent that they were aware of the side letter at all) were content to record their agreement by means of an updated MOU, namely MOU 4, an agreement which they recognised the necessity of reaching that agreement before the Castlerose SPA was signed.

643. In short, it does not seem to me that the fact that a side letter was produced represents particularly compelling evidence either way. That said, were it to be concluded that agreement was not reached, then, the fact that a side letter had been circulated would obviously support that conclusion. So, too, would the fact that, as I find, the side letter having been raised with him by Mr Petrov, Mr Gaiduk’s position was that he had no

interest in reaching any binding agreement to transfer the disputed assets, preferring instead that they be dealt with in the overall balancing exercise.

644. Coming on, then, to the case as it had come to be put by the end of the trial, as previously noted, Mr Gaiduk's evidence was that he and the other Partners met in Kiev "on or by" 13 December 2009 to discuss the asset transfers. That day, 13 December 2009, Mr Petrov emailed Mr Tkachenko, attaching a version of MOU 4 under cover of a message in which this was stated:

"This version was approved in the summer; now amendments will be made concerning dividend amounts; certain assets will be added; and I think the order of payments will be changed."

645. Mr Tkachenko replied later in the day as follows:

"I'd like to bring to your attention that it is very important to receive an updated version of the memorandum as soon as possible, because, as far as I understand, the document has to be definitively approved and signed before day X."

646. The following day, 14 December 2009, Mr Petrov sent Mr Tkachenko and Mr Pisarevsky a revised version dated 15 December 2009 – the 15 December Draft. He also sent a copy to Mr Udovenko shortly afterwards.

647. A number of versions of the 15 December Draft were disclosed. The version sent by Mr Petrov, and all other versions (except for one), contained a number of visible tracked changes. One 'clean' version of the document was disclosed by the Mkrctchan Parties. It is not clear how that version came into Mr Mkrctchan's possession, though for reasons explored below I am not persuaded that it makes any material difference whether or not the 15 December Draft was in tracked changes, because this version was subject to further amendment by Mr Tkachenko.

648. It is worthwhile setting out the terms of the 15 December Draft pretty much in full. It began in this way:

"V.A Haiduk, hereinafter referred to as the Selling Shareholder, as the party of the first part, and also S.A Taruta and O.A. Mkrctchan, referred to as the Buying Shareholders, as the party of the second part, all together referred to as the Parties, have entered into this agreement as follows:"

It, then, set out various recitals, as follows:

"WHEREAS The Parties did not execute the Agreement for Sale and Purchase of the Selling Shareholder's stake in ISD within the agreed timescale.

WHEREAS The Buying Shareholders are obligated to pay a fine of USD 300 million according to Memoranda No. 1 and No. 2.

WHEREAS Industrial Group Consortium has been transferred to the structures of the Selling Shareholder with deferred payment *WHEREAS In 2008 the Buying Shareholders together spent USD 184 million from profits of ISD on private purposes – the 'Dividends'.*

WHEREAS In 2008 the Buying Shareholders together spent UAH 16 million on financing the media group owned by the Buying Shareholders.

WHEREAS The global financial crisis has affected the financial condition of ISD”.

649. The 15 December Draft continued with the following provisions, which were described as having been “jointly agreed” by the Parties:

“1. The total indebtedness of the Buying Shareholders to the Selling Shareholder taking into account its share of the “Dividends” for 2008, adjusted penalties and expenses for financing the media group is USD 119,000,000.

2. Thus, the Buying Shareholders shall pay the Selling Shareholder USD 119,000,000.

3. The Parties have valued the Hyatt Hotel as USD 173.3 million minus the debt to IFC (USD 23.3 million as at January 1, 2009). The total net value of the Hyatt Hotel is equal to USD 150 million. The share of the Buying Shareholders is two thirds of the value of the Hyatt Hotel, which is USD 100 million.

4. The Parties have decided that as partial payment of the debts mentioned in Clause 1 hereof the Buying Shareholders will transfer their shares in the Hyatt Hotel free of charge to the Selling Shareholder. It will be considered that the Buying Shareholders have settled with the Selling Shareholder in the amount of USD 100 million. The funds that may be technically paid by the Selling Shareholder under the agreement for sale and purchase of shares of the Hyatt Hotel shall be considered ‘technical’ and shall be returned to the Selling Shareholder within five days of such payment.

After transferring the shares in the Hyatt Hotel to the Selling Shareholder, the Parties will sign the following agreements:

- Agreement (option) for buyback of shares in the Hyatt Hotel in favour of each of the Buying Shareholders, under which each of the Buying Shareholders may, by August 1, 2010, buy back one third of all the Hyatt shares at a price of USD 173.3 million for 100% of the shares, minus Hyatt’s financial debts at the time of the buyback. The buyback cannot be done if the indebtedness under Clause 10 hereof has not been discharged. The Selling Shareholder undertakes not to change the operator of the Hyatt Hotel during the term of the option.

- Agreements terminating the agreements for sale and purchase of interests in the charter fund of IG Consortium in accordance with which the ownership title to such interests will be returned and re-registered to Azovinteks LLC and Region LLC.

5. The Buying Shareholders shall pay the outstanding indebtedness of USD 19 million at the time of buyout of the ISD interests from the Selling Shareholder.

6. In addition, the Parties hereby intend to document their existing arrangements regarding division of offices, which shall occur as follows:

- The office located at the address ul. Panasa Mirnogo, Kyiv, which is on the balance sheet of UGMK, and the office that is on the balance sheet of Industrial Group Consortium and is located at the address 42-B ul. Ivana Franka, Kyiv, shall go to the Selling Shareholder.

- The offices located at the address 14-B ul. Yaroslavov Val, Kyiv, and the office that is on the balance sheet of SAM Travel Agency and is located at the address 40-B ul. Ivana Franka, Kyiv, shall go to the Buying Shareholders.

7. The Parties hereby set a new timescale and conditions for entering into the agreement for sale and purchase of the Stake in ISD:

- The price of the Selling Shareholder's Stake in ISD is USD 750 million (hereinafter, the Stake Price);

- The payment date for the Stake shall be on or before January 1, 2010;

- Ownership title to the Stake (shares in the non-resident company) shall pass on the day the Stake Price is credited to the bank account of the Selling Shareholder;

- If the Stake is not paid in full by the above-mentioned date, such sale and purchase agreement for the Stake shall terminate.

8. The Parties hereby specify that the Stake Price also includes the price of the shares of the Selling Shareholder in the following companies:

- Kuibyshey Kramatorsk Metallurgical Plant OJSC;

- Dnieper Pipe Plant OJSC;

- Yalta Intourist Hotel Complex OJSC and Donbass resort;

- UGMK OJSC;

- United Steel Industries FZC, Fujairah, United Arab Emirates.

- Kuban Holding Company CJSC and Armavir Metallurgical Plant CJSC

- Metallurgical plant in Pakistan

9. The Parties have agreed that under the agreement for sale and purchase of the Stake in ISD the following may be paid:

- 100% of shares in the Hyatt Hotel. The 100% shares in the Hyatt Hotel are valued at USD 173.3 million as at December 14, 2009, minus the debt to IFC (USD 20.7 million as at September 30, 2009), for a total of USD 152.6 million;

- The stake of the Selling Shareholder in Argo Holding: USD 15 million;

- The stake of OV in ISD: USD 15 million;

- The stake of LOK Aivozovskoye [sic]: USD 2 million;

10. The Parties have hereby specified the following Payment Procedure for the Stake Price and payments of indebtedness according to Clauses 5, 8 and 9 hereof:

- Buyout of the shares of the non-resident directly holding the Stake in ISD: USD 953.6 million (comprised of 750+19+152.6+15+15+2).

11. The Parties hereby specify that if the Stake in ISD is not bought according to Clause 9 hereof, the obligations of the Buying Shareholders mentioned in Clauses 1 and 2 hereof will be increased by the amount of additional penalties and will be USD 142.75 million. In that case, USD 100 million shall be repaid according to Clause 4 hereof. The remaining USD 42.75 million shall be repaid by August 1, 2010, but no later than the buyback date of the Hyatt Hotel shares.

12. As of the signing of this Agreement the Parties shall keep the proposed transaction confidential and shall not disclose or provide information to third parties.”

650. At the end, under “*Signatures of the parties*”, there were spaces for the signatures of each of Mr Gaiduk, Mr Taruta and Mr Mkrтчan.

651. As previously explained, the Taruta Parties’ case, ultimately at least, is that this followed an oral agreement which was reached between the Partners “*on or by*” (by which is, in reality, meant “*on*”) 13 December 2009, and that the terms of that agreement were recorded in the 15 December 2009 draft of MOU 4 together with the Castlerose SPA. Mr Foxton QC submitted, indeed, that Mr Gaiduk’s evidence on this issue could not have been any clearer, highlighting in particular the following exchanges when Mr Gaiduk was asked about the 15 December Draft:

“Q. I suggest what Mr Petrov was doing was making amendments to reflect what you had told him you were doing with your partners?”

A. No, that’s not the case. Mr Petrov was trying to reflect what we discussed with my partners.

Q. Look at clause 1, the reference to 119 million, that figure was one you had agreed with your partners, wasn’t it?

A. Yes, my Lord, that is exactly what we agreed with my partners.

Q. If we look over to clause 9, for example, the figure there of 15 million for Agro Holding was a figure you had agreed with your partners, wasn’t it?

A. Yes, my Lord, that is the case.”

652. Mr Foxton QC also drew attention to a later exchange, again on the same topic but specifically arising out of the fact that one of the disclosed versions of the 15 December Draft contained handwritten annotations by Mr Taruta, which are very much consistent with the view that the parties were intending to implement the agreement in MOU 4 by means of payment under the Castlerose SPA. Specifically, Mr Taruta had circled the assets said to be included in the price for IUD and written the figure of US\$750 million next to it. Below that, he rounded down the total price, including the additional assets, from US\$953.6 million to US\$950 million – the price paid under the Castlerose SPA. The exchange was as follows:

“Q. I suggest that what happened after this document we have been looking at was produced, is that there was a meeting between you, Mr Mkrтчan and Mr Taruta, in Kiev, at which you had a physical copy of the document we have just been looking at.

A. My Lord, we have never worked with a paper copy of the document which we are looking at right now.

Q. Can we have a look, and my Lord it will be necessary to go to a Russian version ... I wonder if we can go over to the second page of that document Mr Gaiduk, do you see on the second page there is some handwriting?

A. Yes, I can see that.

Q. Do you recognise whose handwriting it is?

A. I believe it is Mr Taruta's handwriting.

Q. Can you see in clause 10, underneath the figure of 953.6, there is a handwritten figure '950'?

A. Yes, I do.

Q. I suggest what happened is that at this meeting in Kiev the three of you agreed that the figure that would go into the Castlerose SPA would be rounded to 950 million.

A. Yes. Yes, we agreed that.

Q. Of that 950 million, 750 million was in respect of the interest in IUD, wasn't it?

A. To my share, to my interest in IUD, yes.

Q. And I suggest that the terms we see recorded in this Document, with the adjustment to 950 million, represented the final agreement that you had reached with your partners.

A. Yes, that's true."

653. Mr Foxton QC additionally made reference to certain evidence which Mr Gaiduk gave during the course of re-examination, which Mr Foxton QC submitted supports the Taruta Parties' case that agreement was reached at the meeting on 13 December 2009 and that the fact that MOU 4 lacked certain formalities does not matter. The exchanges to which Mr Foxton QC referred are these:

"Q. Now, on the first of those two questions I want to ask you: did you have a meeting with Mr Mkrтчan and Mr Taruta in Kiev between 15 and 18 December 2009?

A. My Lord, the meeting, the last meeting we held was no later than 13 December. I don't remember the exact date but it was no later than 13 December. As a result of that meeting, Mr Petrov introduced amendments in the memorandum, and on the 14th, with the date as of the 15th, he sent it to Mr Tkachenko automatically to all the partners. So he introduced the changes or the agreements that we had struck, what we had agreed, the Dubyna and other aspects, all the components. And I think it was at the same meeting on the 13th, or before the 13th, we rounded up the sum, the amount. I don't exactly remember when, but I can tell you exactly that starting from 13 December until the appearance of the memorandum we had no meetings, neither with Mr Taruta nor with Mr Mkrтчan, not separately, not together.

...

MR CALVER: At the time, Mr Gaiduk, did you see this track changed document that we see on the screen?

A. No, my Lord. This document was never sent to me. It was put together after the meeting we had. So it was never addressed to me, never sent to me.

Q. Did you ever signify to anyone else that you agreed to what was in that document?

A. Well, it states here what we had agreed upon, de facto. This has recorded what had been discussed by us, and it was then compiled, it was drafted after the meeting finished.

Q. Then after the MoU is compiled, after the meeting, what then would happen for you to signify that you agreed to what was in the MoU? What would need to happen?

A. Well, my Lord, I had never seen the MoU and therefore there is only - - there was no need for me or for anybody else to monitor what was in the MoU, because we had discussed it all.

Q. We can see there are lots of changes, in track changes, Mr Gaiduk, to this document.

A. My Lord, the document with track changes, not made by Petrov. Because the 14 or 15 December, it is the continuation of the MoU that we had in July, and so on and so forth. So the document, maybe you mentioned the document that Mr Novak had sent with track changes. We had never seen it and nobody had ever sent it to us. Or maybe it was Mr Tkachenko, you mean Mr Tkachenko? I don't know which of them had done that.

Q. We know there was a further version on 18 December; did you see the version on 18 December?

A. We never saw that version. It was never sent to us. Neither to me or nor to Mr Petrov."

654. It was Mr Foxton QC's submission that this evidence (specifically the reference to *de facto* agreement) demonstrates that Mr Gaiduk attached little significance to MOU 4 as a document because he regarded it as simply evidencing a final agreement that had already been reached orally between the Partners.
655. I do not agree with Mr Foxton QC about this. On the contrary, in my view, all that Mr Gaiduk was saying in these passages is that there had been discussions which were, then, reflected in the 15 December Draft. I do not take Mr Gaiduk to be saying that the intention was that there would be no further discussions and so that the meeting on 13 December 2009 represented a legally binding agreement, still less a final such agreement.
656. Indeed, even on the Taruta Parties' case, at least as it stood prior to closing, once the MOUs were introduced in 2008, the practice of making *ad hoc*, informal agreements ceased. If that is so, then, it is difficult to see on what basis Mr Foxton QC could, ultimately, advance a submission to the effect that MOU 4 merely recorded a prior oral agreement. Indeed, even Mr Foxton QC did not suggest that MOU 4 was irrelevant, yet

the case as it came to be put forward in closing effectively sidelined the role which it played, as demonstrated by Mr Foxtton QC's suggestion that Mr Gaiduk did not care about any formalities associated with it.

657. There is, in any event, the further difficulty which has previously been identified concerning Mr Taruta's position. Specifically, it will be recalled that it was only after Mr Gaiduk had given his evidence that Mr Taruta somewhat tentatively clarified that, based on his looking at certain family photographs from around 13 December 2009, he had worked out that he was in Kiev for his daughter's birthday on that date, and so considers that there may have been a meeting at around that time.
658. This is hardly the most definitive (or compelling) evidence from somebody whose case ultimately came to rest on there having been such a meeting. That is all the more the case given that that person's position had previously been not that an oral agreement was reached at a meeting on 13 December 2009 but that the agreement was contained in a subsequent version of MOU 4. It follows that Mr Foxtton QC's reliance on the fact that on 14 December 2009 Mr Petrov sent Mr Tkachenko and Mr Pisarevsky the 15 December Draft (a revised version of MOU 4 allegedly reflecting an agreement reached at the 13 December 2009 meeting) is problematic.
659. So, too, was Mr Foxtton QC's reliance on the fact that the draft was post-dated 15 December 2009, in line with the scheduled closing date of the Castlerose SPA, and the fact that, prior to its circulation, on 13 December 2009, Mr Tkachenko stressed the importance of the MOU being "*finally agreed and signed before day x*", that being a reference to 15 December 2009, the closing date of the Castlerose transaction and Mr Taruta and Mr Mkrtchan's deal with the Russian Buyer. This is for a simple reason: if the Partners had entered into a final and binding agreement on 13 December 2009, then, it is difficult to see why Mr Petrov, in sending the 15 December Draft, did not make it clear that what he was sending reflected what had been finally agreed the day before. He, however, did nothing of the sort, instead merely describing the 15 December Draft as "*another draft*".
660. The very fact that the 15 December Draft was followed by other drafts makes it impossible to conclude that the parties had already entered into a final and binding agreement since, if that were the position, there would obviously be no need for further drafts to be produced.
661. Furthermore, if it really was the case that there was a final agreement on 13 December 2009, then, it is odd that, when Mr Petrov told Mr Gaiduk about the side letter which had been produced by Linklaters on 10 December 2009, Mr Gaiduk did not propose that Mr Petrov revert with the suggestion that the blank schedule of assets should list what had been agreed at the meeting on 13 December 2009. Although, therefore, as previously explained, I am unpersuaded that the side letter, in and of itself, makes it implausible that the Partners would have entered into an agreement in the form of MOU 4, it does nonetheless seem to me that this particular aspect concerning the side letter makes it unlikely that there was the final and binding agreement which Mr Foxtton QC submitted was entered into at the meeting on 13 December 2009.
662. Mr Foxtton QC went on to suggest that, the closing of the Castlerose transaction having been delayed until 18 December 2009 and the date of MOU 4 having been updated by Mr Tkachenko to reflect this on 17 December 2009, what happened in terms of the

further draft MOUs was all part and parcel of what had been agreed at the meeting on 13 December 2009. There is, however, a clear difficulty with this. This is that the Partners continued to negotiate over the wording of MOU 4 in the days which followed, until it was decided to enter into the Castlerose SPA without including in that agreement any obligation as regards the transfer of disputed assets.

663. Furthermore, as I shall explain in a moment, not even the final version of MOU 4 produced by Mr Tkachenko (the 18 December Draft) was in what could conceivably be characterised as a final form. In fact, however, there is a further consideration which is relevant in this regard. This is that the day after sending out the 18 December Draft, during the morning of 18 December 2009, Mr Tkachenko also circulated an execution copy of the Deed of Amendment to the Settlement Agreement.

664. As Mr Wolfson QC pointed out, this agreement contained a series of provisions characteristic of and appropriate for a binding commercial contract, including:

Clause 4: *“Each Party warrants and represents to the other that he has the legal right and full power and authority to enter into and perform this Deed, and any other documents to be executed by it pursuant to or in connection with this Deed and this Deed and such documents will, when executed, constitute valid and binding obligations on such Party, in accordance with their respective terms.”*

Clause 5: *“This Deed may be entered into in any number of counterparts, all of which taken together shall constitute one and the same instrument. Each Party may enter into this Deed by signing any such counterpart.”*

Clause 6: *“Any dispute arising out of or connected with this Deed, including a dispute as to the validity or existence of this Deed and/or this Clause, shall be resolved by arbitration in London conducted in English by a single arbitrator pursuant to the rules of the London Court of International Arbitration... .”*

Clause 7: *“This Deed and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with English law.”*

665. Mr Wolfson QC rightly observed that none of this type of legal drafting is to be found in the 18 December Draft, making it unlikely that Mr Tkachenko could really have been under the impression either that the draft he sent out the previous day would constitute a final and binding agreement (even leaving aside the fact that it was anyway only a draft) or that the Partners had already entered into a final binding agreement at the meeting which took place on 13 December 2009.

666. It is telling, indeed, as to the former, that in his email on 17 December 2009 Mr Tkachenko asked that the draft be sent to Mr Mkrtschan and that *“if possible”* it be printed in colour since that *“would be easier for him to see the corrections”*. How, in the circumstances, there can have been a binding agreement already entered into is difficult to discern. It is clear that there was not. It is equally clear that the draft which Mr Tkachenko was sending was not itself a binding agreement.

667. As for the form which the 18 December Draft took, again, it is important to set out its wording, including the track changing used in the draft. The introduction was in similar terms:

“V.A. Gayduk hereinafter referred to as the ‘Selling Shareholder’, being one party hereto, as well as S.A. Taruta and O.A. Mkrchan, hereinafter referred to as the ‘Buying Shareholders’, being all other party hereto, hereinafter referred to jointly as the ‘Parties’, enter into this Agreement to the following effect:

WHEREAS the Parties have not entered into the Sale and Purchase Contract for the Selling Shareholder’s Interest in ISD within the specified period.

WHEREAS the Buying Shareholders must pay a fine to the amount of USD 300 million pursuant to Memoranda No. 1 and No. 2.

WHEREAS ‘Industrial Group Consortium’ has been re-registered to the Selling shareholder’s Shareholder’s structures with deferment of payment.

WHEREAS in 2008 the Buying Shareholders jointly spent for their personal aims from the profit of ISD to the amount of [circled by hand USD 195 approximately USD 184 million – the ‘Dividends’.

WHEREAS in 2008 the Buying Shareholders jointly spent for the financing of the media group owned by the Buying Shareholders UAH 16 million.

WHEREAS the global financial crisis has affected the financial position of ISD.”

This, then, followed:

“NOW THEREFORE, the Parties jointly agree to do the following:

- 1. The Buying Shareholders’ aggregate debt to the Selling Shareholder, including his share of the ‘Dividends’ for 2008, adjusted penalties and the expenses for the financing of the media group is USD 119,000,000. ~~The amount of the penalties has been reduced from USD 300 million to USD 50 million.~~*
- 2. ~~The Buying Shareholders shall ensure payment of the “Dividends” for 2008 to the Selling Shareholder to the amount of USD 97.5 million. Thus, a balance of the “Dividends” received by each of the three ISD Shareholders for 2008 shall be obtained~~*
- 3. ~~The Parties agree that the ISD Group shall secure the financing of the media group owned by the Selling Shareholder to the amount of UAH 8 million. The funds shall be paid in equal instalments by September 2009.~~*
- 4. ~~2. Thus, the Buying shareholders shall pay the Selling Shareholder USD 119,000,000 USD 147.5 million and UAH 8 million.~~*
- 5.3. The Parties have appraised shares in New Engineering Technologies CJSC, which is the owner of the building in All Tarasova Street in the city of Kiev where the Hyatt Regency Kyiv Hotel ~~Hyatt Hotel~~ is situated at USD 173.3 million, The Parties agree with the fact of the existence of ~~less~~ debt of New Engineering Technologies CJSC to IFC (as at 1 January 2009: USD 23.3 million) and deem it to be necessary to account for this fact when appraising the shares of New Engineering Technologies CJSC. Thus, ~~The total~~ net value of shares in New Engineering Technologies CJSC ~~the Hyatt Hotel~~ is USD 150 million. Furthermore, the interest of the Buying Shareholders comprises 2/3 ~~two thirds~~ of the above net value of shares ~~in the Hyatt Hotel, which comprises USD 100 million.~~*

6.4. *The Parties have decided that as part-payment of the outstanding amounts specified in paragraph 1 hereof the Buying Shareholders shall transfer their shares in New Engineering Technologies CJSC ~~the Hyatt Hotel~~ to the Selling Shareholder free of charge. Furthermore, the Buying Shareholders shall be deemed to have paid the debt to ~~made settlements with~~ the Selling Shareholder in the amount of USD 100 million. The funds that may technically be paid by the Selling Shareholder under a sale and purchase contract for shares in New Engineering Technologies CJSC ~~the Hyatt Hotel~~ shall be deemed to be 'technical' and subject to being returned to the Selling Shareholder within 5 days of such payment.*

After the registration of shares in New Engineering Technologies CJSC ~~the Hyatt Hotel~~ to the Selling Shareholder, the Parties shall sign the following agreements:

- *Repurchase Agreement (Option) for shares in New Engineering Technologies CJSC ~~the Hyatt Hotel~~ in favour of each one of the Buying Shareholders, under which each one of the Buying Shareholders may buy back by 1 August 2010 ~~one third~~ one-third (1/3) of all the shares in New Engineering Technologies CJSC ~~Hyatt~~ based on the price for 100% of shares being USD 173.3 million less financial debts ~~debt of Hyatt to IFC~~ at the time of purchase. Furthermore, no purchase may take place unless debt has been repaid pursuant to clause 107 hereof. The Selling Shareholder shall not change the operator of ~~Hyatt~~ the Hyatt Regency Kyiv during the term of the option.*
- *Termination Agreements to the Sales and Purchase Contracts for stakes in the shareholder capital of IG Consortium, under which title to such stakes shall be returned and re-registered to Azovintex LLC and Region LLC.*

7.5. *As for the rest of the outstanding amount of USD ~~47.5-19~~ million, the Buying Shareholders shall pay it at the time of the purchase of the stakes in ISD from the Selling Shareholder, by 1 August 2010. ~~If the Buying Shareholders delay performance of their obligations hereunder, penalties shall accrue at 20% per annum on the overdue amounts.~~*

6. *The Parties further intend by this Agreement to record the existing arrangements with regard to the division of office premises, which shall be carried out as follows:*

- *The Selling Shareholder shall be given the office premises located at Panas Myrny Street, city of Kiev, which is listed on the books of Ukrainian Mining and Metallurgical Company ~~UGMK~~ OJSC, as well as the office premises at 42-B Ivan Franko Street, city of Kiev, which is on the books of Industrial Group Consortium.*
- *The Buying Shareholders shall be given the office premises at 14-B Yaroslaviv Val Street, city of Kiev, as well as the office premises at 40-B Ivan Franko Street, city of Kiev, which is on the books of SAM Travel Firm.*

7. *The Parties hereby set the new dates and terms for entering into the ISD Interest Sale and Purchase Contract:*

- *The price of the Selling Shareholder's Interest in ISD shall be USD 750 million (hereinafter referred to as the 'Interest Price');*
- *The Interest payment date shall be no later than 1 January 2010;*
- *The transition of title to the Interest (shares in the non-resident company) shall be on the date of the Interest Price being credited to the Selling Shareholder's bank account;*
- *If the Interest is not paid for in full by the above date, such Interest Sale and Purchase Contract shall be terminated.*

[number circled in pen]8. The Parties hereby determine that the Interest Price shall also include the price of the Selling Shareholder's Stakes (shares) in the following enterprises:

- *Kramatorsk Metallurgy Plant names after Kuybyshev OJSC;*
- *Dnipropetrovsk Pipe Plant OJSC;*
- *Yalta Intourist Hotel Complex OJSC and Donbass Guesthouse;*
- *UGMK OJSC;*
- *United Steel Industries FZC, Fujairah, UAE;*
- *Kuban Holding Company CJSC and Armavir Metallurgy Plant CJSC;*
- *a metallurgy plant in Pakistan*

9. *The Parties agree that the following may be paid for under the ISD Interest Sale and Purchase Contract:*

- *100% of shares in the New Engineering Technologies CJSC ~~the Hyatt Hotel~~, The Value of 100% shares in New Engineering Technologies CJSC ~~Hyatt~~ as at 14 December 2009 is USD 173.3 million less debt to IFC (as at 30 September 2009; USD 20.7 million) – a total of USD 152.6 million;*
- *The Selling Shareholder's interest in Argo Holding is USD 15 million;*
- *OV's interest in ISD -USD 15 million;*
- *Ayvozovskoye Treatment and Rehabilitation Complex's interest – USD 2 million.*

10. *The Parties hereby determine the following Procedure for Payment of the Interest Price and Debt pursuant to paragraph 5, paragraph 8 and paragraph 9 hereof:*

- *Buyout of the shares of the non-resident that owns the interest in ISD directly: USD 953.6 million (consisting of 750 + 19 + 152.6 + 15 + 15 + 2).*

11. *The Parties hereby determine that if the Interests in ISD are not bought out pursuant to paragraph 9 hereof, the obligations of the Buying Shareholders set out in paragraph 1 and paragraph 2 shall be increased by the amount of additional penalties and comprise USD 142.75 million. Furthermore, USD 100 million shall be repaid pursuant to paragraph 4 hereof. The remaining USD 42.75 million shall be repaid by 1 August 2010 but no later than the date of the reverse purchase of shares in New Engineering Technologies CJSC ~~the Hyatt Hotel~~.*

8.–12.As of the signing hereof, the Parties shall keep confidential the proposed transaction and not disclose or supply information to third parties."

668. It is impossible to conclude, based on this wording, either that this itself was a valid and binding agreement or that such an agreement had already been concluded at the meeting on 13 December 2009.

669. As Mr Stephen Smith QC, counsel for Prandicle, put it, the position was clearly still in "a state of flux", with, as Mr Wolfson QC put it in his oral closing submissions, "three separate rounds of contractual changes in different colours and highlighting" and "handwritten annotations, the meaning of which is unclear even after hearing the evidence", with the consequence that "it is hard to actually work out what the document says and what the document means, let alone to think that this could be a contractual document".

670. As Mr Smith QC observed, for example, by reference to what was stated concerning NET, far from the document evidencing an agreement to sell or cause or procure the sale of NET, Clauses 4, 9 and 11 represent a contradictory set of provisions, which fall short of defining in clear terms the performance required of each party.
671. Nor, it follows, given that it represented a further iteration of the 15 December Draft, can it properly be concluded that there was a prior legally binding agreement concluded between the Partners at the meeting on 13 December 2009.
672. Specifically, the draft (which, again, was unsigned) is replete with track changes. Not only that, but it also leaves open the amount of the withdrawals compensation giving only an approximate figure with a footnote indicating that the final amount was to be calculated in March 2010.
673. The draft also fails to set out in clear terms the respective rights and obligations of the parties, the precise steps that are required to be taken to implement the agreement (including the tax and corporate approvals required), the precise assets to be transferred including who or which entities they are held by and their status with respect to encumbrances, the mechanism for transfer, including the terms relating to technical consideration, the timing by which any further agreement or any transfer is required, or the proportions by which assets will be held by the Taruta Parties and Mkrctchan Parties post-transfer.
674. Furthermore, the draft contains mutually contradictory provisions, for instance providing for the Hyatt Hotel to be transferred both to Mr Gaiduk, and to Mr Taruta and Mr Mkrctchan. As Mr Calver QC and Mr Wolfson QC also rightly pointed out, it also left critical matters uncertain, including who was to be responsible for the payment of technical consideration and the practice of pragonka (which subsequently led to disputes between the partners), and the separation between 'core' and 'non-core' assets of certain of their joint businesses.
675. In addition, as Mr Wolfson QC submitted in his oral closing submissions, if there really had been a binding agreement concluded in December 2009, then, it is difficult to see why none of the versions of MOU4 was signed, if not in December itself, then, in January 2010. Even if this was a busy time, there is no reason why the agreement was not formalised in the weeks which followed the 13 December 2009 meeting. The fact that this did not happen suggests that, contrary to what is now contended, no binding agreement was, in fact, concluded.
676. Notwithstanding these difficulties, Mr Foxton QC went on to submit that, consistent with his position that the Castlerose SPA was part and parcel with what had been agreed on 13 December 2009, the US\$950 million consideration inserted into the MOU on 13 December 2009 was later inserted into the Castlerose SPA on 17 December 2009. As he pointed out, as with the July Castlerose SPA, the December SPA provides no indication of the assets other than IUD which Mr Gaiduk had agreed to transfer in exchange for the payment price. The payment price had increased significantly from the US\$723.75 million to which reference was made in the July version. As Mr Foxton QC submitted, the price of US\$950 million was calculated on the basis that it represented US\$750 million for the Claimant's 33.84% interest in IUD plus US\$200 million for various other assets that were owned indirectly by Mr Gaiduk and which were to be transferred to the Defendants at the same time.

677. This was not in dispute. Indeed, the terms of the document acknowledge it to be the position expressly. Nor is it in dispute, therefore, that the Mkrtrchan Parties and Taruta Parties used the Castlerose SPA to pay the Gaiduk Parties money which was intended to be applied against the transfer of the Additional Assets.
678. I do not consider, however, that this means that it should be concluded that the Partners entered into a binding agreement on 13 December 2009 as recorded, if not contained, in MOU 4, specifically the 15 December Draft. Nor do I consider that it even means that, as Mr Foxton QC put it in closing displaying his apparent liking for tennis, the Taruta Parties “*start sort of 30-Love up*”.
679. I am clear that, on the contrary, the fact of the payment having been made is of only limited significance to the question of whether there was an agreement concluded as alleged by the Taruta Parties. I agree with Mr Wolfson QC that the basis on which these sums were transferred under the Castlerose SPA was that they represented an advance from Mr Taruta and Mr Mkrtrchan to Mr Gaiduk, made in the expectation that the parties would reach legally binding agreements, against which those sums would be offset using offshore structures.
680. On any view and in any event, the payment of the additional sum under the Castlerose SPA cannot be said to be consistent *only* with the existence of the alleged 2009 Shareholders’ Agreement. As such, it is not evidence which assists the Taruta Parties’ case. Again as Mr Wolfson QC put it, in his case displaying more of an agricultural bent than a sporting one, reliance on the payment having been made is to put the cart before the horse since, although if there was a separate 2009 Shareholders’ Agreement between the Partners, then, the payment could constitute performance of that agreement, if there was no 2009 Shareholders’ Agreement, then, the payment would amount to a deposit or advance made in hope of future agreements.
681. In English law, the position on this is clear since in *Chillingworth v Esche* [1924] 1 Ch 97, a case concerned with the payment of a deposit made before the preparation of a formal contract, Lord Pollock MR stated as follows at pages 106-107:

“What ground is there then for saying that the purchasers who were entitled to break off negotiations have thereby lost the deposit? It is said that they could not seriously enter into these negotiations and then break them off without reason, but that is not for us to consider. That they were entitled not to complete the purchase seems clear, and I do not accept the view that the purchasers were paying the deposit as a guarantee or earnest of good faith that they would complete the purchase, because they could have revoked what had up to that time been agreed upon at any moment. It seems to me that when once the negotiations came to an end the rights of the parties were gone, and the purchasers were entitled to receive their money back.”

Warrington LJ adopted a similar approach at page 110:

“In the first place, [the defendant] says that the document itself acknowledges the payment of the deposit, but in my opinion the payment of the deposit is a neutral fact, and assists neither party. It may be paid by way of guarantee that the purchaser will not break off negotiations without good cause, or it may be paid, as [the claimant] contends, in anticipation of a binding contract. In any event, the mere fact that a deposit has been paid does not help me. Then it is said that in contemporaneous documents the

parties refer to the document as an agreement for sale, but when you know from the document itself that it is not an agreement for sale, the mere reference to it as such in the other documents does not make it so. Therefore neither the payment of deposit nor the reference to the document as an agreement for sale is sufficient to alter the prima facie meaning of the document of July 10, 1922. It has been undoubted ever since the decision of Sir George Jessel in Winn v. Bull 36 that the words 'subject to the preparation and approval of a formal contract' in a document prevented the document from being held to be a final agreement."

In short, it is possible to make a payment without entering into a contract, and it necessarily follows that proof of a payment cannot, in and of itself, prove the existence of a contract.

682. Nor, for completeness, I should add, am I persuaded by the Taruta Parties' reliance on the fact that Mr Gaiduk subsequently set about transferring half of the Gaiduk Parties' interest in UGMK to Mr Taruta and half to Mr Mkrtchan (before transferring the entirety of that interest to Mr Mkrtchan) and also transferring half of the Gaiduk Parties' interest in Agro Holding to Mr Taruta and half to Mr Mkrtchan (and did transfer Mr Mkrtchan's half to him). Although Mr Foxton QC submitted that this was done in accordance with the alleged 2009 Shareholders' Agreement, that is just not right since the transfers took place pursuant to further binding SPAs which were later entered into.
683. Otherwise, although anyway, in my view, of doubtful relevance, whether under Ukrainian or English law, in determining whether the 2009 Shareholders' Agreement was entered into as the Taruta Parties allege, there is only very limited evidence that, after allegedly entering into the 2009 Shareholders' Agreement, Mr Taruta was operating on the basis that he was contractually entitled to the assets in question.
684. In this respect, reliance was placed on some documentary evidence which appears to demonstrate that Mr Taruta had a right to a transfer of shares in the assets, or that he was entitled to dividends in respect of those assets. For example, in late 2012 (it seems on 5 October 2012 but, in any event, at some point after 25 September 2012) Mr Taruta wrote to Renaissance Capital ('RenCap') in relation to the Hyatt Hotel, stating that "*according to the agreement*" between the Partners, "*the title to this asset is currently being reassigned and no decision related to any disposal thereof can be made without the consent of all beneficiaries*", and asking that:
- "In case your company indeed was engaged for the purposes of sale of Hyatt Regency Kiev hotel we urge you to suspend the performance of any activity related to this matter until the receipt of written instructions from all the beneficiaries"*.
- A similar missive was also sent to Mr Thomas J. Pritzker, the Executive Chairman of the Hyatt Hotels Corporation, on 28 December 2012. This referred to the earlier letter to RenCap as having been sent on 5 October 2012.
685. Furthermore, in November 2012, Mr Petrov appeared to acknowledge that dividends from Agro Holding which were paid out to Mrs Gaiduk "*should be in TSA [Mr Taruta]'s favour*".
686. These are isolated instances, however, given that the disclosure in this case involved a substantial amount of correspondence covering a period of more than six years of

ongoing discussions and negotiations. If the 2009 Shareholders' Agreement had been concluded as alleged, then, it could be expected that there would be a body of correspondence referring to the existence of that agreement, yet this is not the case. Indeed, even Mr Taruta's letter to RenCap regarding the Hyatt Hotel does not suggest that Mr Taruta was already legally entitled to receive a stake in NET, as demonstrated by the fact that, albeit that an agreement is mentioned, what Mr Taruta, in fact, described was the asset "*currently being reassigned*". The same applies to the later letter sent to Mr Pritzker. At most, it demonstrates that he expected to receive a stake at the culmination of an ongoing allocation of assets.

687. In this context, the table sent by Ms Bashynska to Mr Udovenko on 31 March 2014 regarding the division of assets is striking. The entry for UGMK, for example, reads as follows (under "*STATUS*"):

"MOA's companies have re-registered in their name VAG's entire stake (26.6720%) which was supposed to be registered in equal shares (13.336% each) between MOA' and TSA's companies, in their own name.

MOA's companies currently hold 60.8359% of shares, while TSA's companies hold 34.1639% of shares."

Alongside this, under a heading "*ISSUES TO BE COORDINATE[D] WITH MOA'S SIDE*", this is, then, recorded:

"Equalizing MOA's and TSA's ownership rights in UGMK at 50%/50% by buying out part of the participatory interest (half of GAV's interest) from MOA's company."

688. This table does not speak in terms of there being an existing contractual entitlement. There is no suggestion that Mr Gaiduk or Mr Mkrтчan have acted inconsistently with Mr Taruta's rights. On the contrary, the equalisation of their shareholdings is described as an issue to be "*coordinated*" with Mr Mkrтчan. That is not consistent with the assertion of an existing right.
689. This reinforces the view that much of the evidence relied upon by the Taruta Parties is not consistent *only* with the existence of the alleged 2009 Shareholders' Agreement. It is common ground that the Partners had shared interests in the assets and that they were engaged in complex negotiations regarding the separation of those assets, in which each claimed rights in assets arising out of their Partnership. It is apparent that each had a sense of how these assets would be allocated in the final reckoning. In those circumstances, I am not convinced that isolated references to an understanding that Mr Taruta would receive or had an interest in certain assets can provide a sufficient basis for concluding that the alleged 2009 Shareholders' Agreement was agreed.
690. Furthermore, it appears that, following Mr Taruta's failure to perform the SPAs in respect of UGMK and Agro Holding, nobody on the Taruta side contacted the Gaiduk Parties to seek fresh arrangements regarding the transfer of those assets. Certainly, there is no record of any attempt to enforce a contractual right. For instance, Ms Bashynska's role was to engage in negotiations regarding the transfer of interests in UGMK and Agro Holding from Mr Gaiduk to Mr Taruta. Mr Taruta's evidence was that, frustrated with the lack of progress, he "*instructed [his] representatives to become more forthright*" in the pursuit of his interests. However, the only communication which is

said to have arisen out of that instruction is an email from Ms Bashynska dated 17 September 2012, in which she said:

“On behalf of Sergey Aleksevich, I request a meeting to discuss the issues of the registration of ownership on the following objects:

UGMK

Transport Holding

BAS.”

Despite Ms Bashynska’s role being what it was, her evidence was that Mr Taruta “*did not give me the background to why he was entitled to interests in UGMK and Agro Holding*” and that this “*also explains why I never saw a copy of the 2009 MoU Amendment [MOU 4] (although I was aware of its existence from Mr Pilipenko and Mr Mkrtchan’s team)*”. As I see it, however, if the 15 or 18 December Drafts evidenced a contractual entitlement on Mr Taruta’s part to the assets in question, these would obviously have been shown to Ms Bashynska. The fact that they were not suggests that, contrary to what is now contended for by Mr Taruta, there was no such contractual right.

691. The position is similar for Ms Morozova, who joined Mr Taruta’s team in January 2013 and now, as previously mentioned, serves as Mr Taruta’s General Counsel. Shortly after her appointment, Ms Morozova was appointed to the board of DPP, one of the companies said to be a subject of the 2009 Shareholders’ Agreement. Like Ms Bashynska, Ms Morozova did not at first receive a copy of the draft MOUs. Indeed, her evidence was that she first *heard* of any such agreements in the autumn of 2015. Even after that date, Ms Morozova did not appear to rely on any single MOU as evidencing a binding contract. On 9 August 2016, Ms Morozova attended a meeting with Mr Petrov and Mr Udovenko. After the meeting, Ms Morozova emailed Mr Petrov and Mr Udovenko, and said:

“As previously agreed and as I promised at the meeting on the 09th August concerning the settlement of pending issues on transfer of the assets that were paid as part of the transaction on V. A. Gaiduk’s share buyout in IUD (the ‘Transaction’), as well as the assets, whose distribution was agreed upon after the Transaction, I hereby send the copies of draft Agreement on Amendments to Memorandums of Understanding No. 1 and No.2, which were discussed in 2009 and during the meeting dated the 09th August.”

692. The two drafts of MOU 4 attached to that email were the 15 December and 18 December Drafts. Notably, Ms Morozova did not rely on a single version of MOU 4 or assert that either was a definitive version which reflected the Partners’ agreement.
693. Subsequently, on 15 August 2016, Mr Petrov circulated draft minutes of the meeting, which Ms Morozova edited the next day. It is her evidence that the edited version “*accurately reflected what was discussed*”, although it was never actually returned to Mr Petrov to seek agreement. The version edited by Ms Morozova, therefore, contains her account of the argument she made at the meeting on 9 August 2016. She said:

“S.A. Taruta saw this document prior to the transaction, because there are several drafts of the Agreement containing his notes in his archives, the first of which (and there were several of them) are dated 2 February 2009, the draft Agreement dated 15 December 2009 in the track changes mode, in which you can see a change in the date from 2 February 2009 to 15 December 2009, and the draft Agreement dated 18 December 2009 in the track changes mode, in which you can see that the date of 15 December 2009 was changed to 18 December 2009.

It’s significant that the difference in time between the two drafts of the Agreement is 3 days. That indicates that starting from February 2009 and throughout the whole of 2009, including directly prior to the transaction itself, the Shareholders held negotiations on the terms of the buyout from V.A. Gaiduk not only of the interest in IUD, but also of the other assets specified in clause 8 of the Agreement and which formed part of the IUD Interest with a value of 750 million dollars, and of the assets specified in clause 9 of the Agreement, which were included in total in the value of the IUD Interest of 950 million dollars.

I have all the drafts of the Agreements with me and you can have a look at them, including the draft of the Agreement dated 15 December 2009 and the draft of the Agreement dated 18 December 2009.”

694. This account was given after Ms Morozova had been briefed by Mr Taruta about his claims and provided with copies of the draft MOUs, and very shortly before the claims in this action were issued. It, therefore, represents Mr Taruta’s position after he started pursuing his claims, but shortly before they were considered by his English lawyers.
695. Ms Morozova states, as is undoubtedly correct, that Mr Taruta had seen some drafts of MOU 4 between February and December 2009, and that the multiple drafts – including the 15 and 18 December Drafts – proved that the parties had been holding negotiations about the assets listed at paragraphs 8 and 9 of those drafts. She did not, however, assert that any of these drafts contained or evidenced a final contract between the Partners, or that the Partners had reached a final contract in respect of those assets. It is highly likely that, if Mr Taruta had ever said to Ms Morozova that he, Mr Mkrchan and Mr Gaiduk had reached a binding, enforceable agreement on the terms of the 15 or 18 December Drafts, Ms Morozova would have said so in the meeting on 9 August 2016, and would have recorded the assertion in this minute.
696. Drawing together these various evidential threads, I have reached the clear conclusion that the Taruta Parties have not established the existence of the alleged 2009 Shareholders’ Agreement, whether applying Ukrainian law or (in the alternative) having regard to English law principles.
697. As to the former, I agree with both Mr Calver QC and Mr Wolfson QC when they submitted that the Partners did not reach or express any agreement and did not intend to create legal rights and obligations.
698. Mr Foxton QC identified what he described as the “*real issue*” as being whether what the Partners were doing in December 2009 was “*simply some point in time on a moving continuum without any significance at all*” or as representing “*an agreement clearly intended to be final and have binding effect*”. He suggested that “*the latter is clearly correct, because this is not happening in abstract but in the context of the need to arrive*

at the figure that is to go into the Castlerose SPA, which Mr Gaiduk accepts is the 950 million figure they have arrived at”.

699. I cannot, however, agree with Mr Foxton QC about this. The parties did not agree on essential terms or those required to provide the certainty required of contracts under Ukrainian law, including on the Taruta Parties’ case, the precise consideration for the shares, notwithstanding that the alleged 2009 Shareholders’ Agreement was a commercial agreement for the purposes of Ukrainian law, meaning that agreement on consideration is a material term in accordance with Article 189(1) of the Commercial Code.
700. Nor was there agreement on the mechanism for the payment/repayment of technical consideration, even though Mr Taruta himself acknowledged that *“Ukrainian law requires the payment of ‘technical consideration’ in order for a transfer to be effected”*.
701. Nor was there agreement on the proportions of each company’s shares (or the number of shares) which were to be transferred; indeed, as Mr Wolfson QC pointed out, although it was the Taruta Parties’ case that most of Mr Gaiduk’s interests in the assets were to be split 50/50, this was not the case with Ayvazovskoye, which he was to retain 100%, despite the consideration for this asset having been paid by Mr Mkrтчan and Mr Taruta 50/50. In such circumstances, there needed to be an express agreement in order to avoid the law operating in a way which would entail a 50/50 split.
702. More fundamentally still, for reasons previously given, there is no evidence of a complete and unconditional acceptance by any of the Partners. Although, given how the case ultimately came to be advanced, the absence of a signed agreement is not critical, whether evidentially or as a matter of Article 208 of the Civil Code (given Article 218(1) of the same Code and Article 18(2) of Rome I), nonetheless the fact that there is no signed MOU is an evidential feature which points against an agreement having been concluded.
703. Lastly, as to part performance, as previously explained, this would need to be consistent with there being an agreement and must evidence the intention of both parties to be bound by that agreement; it would not be enough were the partial performance also to be explicable for some other reason which does not involve a contract having been entered into. In this case, the alleged part performance is not unambiguously attributable to the existence of the alleged 2009 Shareholders’ Agreement and cannot be explained only as performance of that alleged agreement.
704. The position is no better from the Taruta Parties’ perspective applying English law since there was no objective agreement to any terms, at best being by reference only to ‘heads of terms’, the alleged 2009 Shareholders’ Agreement being simply too vague and incomplete to be enforceable: viewed objectively and having regard to the course of the negotiations, this is the unavoidable conclusion. As for part performance, the same difficulty applies under English law as it does under Ukrainian law.

Was the alleged 2010 Further Shareholders’ Agreement a valid and binding agreement?

705. Turning, then, briefly, indeed very briefly, to the alleged 2010 Further Shareholders’ Agreement, it will be recalled that the Taruta Parties’ case is that, and moving forward in time, into 2010, after the sale of Avonwick’s stake in IUD, as a result of discussions

between the parties allegedly to put in place agreements to transfer the assets identified in MOU 4 and to agree the division between the parties of the numerous other assets in which the Partners had joint interests, the Partners agreed that: (i) Mr Gaiduk would buy Mr Taruta and Mkrctchan's share of 14-B Yaroslavov Val for US\$15.83 million each; (ii) Mr Taruta and Mkrctchan would sell their shares in USK, a steel business, for US\$42 million each; and (iii) Mr Gaiduk would transfer his interest in Transport Holding in equal shares to Mr Taruta and Mr Mkrctchan, who would in return transfer to Mr Gaiduk their interests in Construction Holding. These various agreements are alleged to comprise the 2010 Further Shareholders' Agreement.

706. The way in which this aspect of the case has been put is vague to say the least, the Taruta Parties saying in response to a Request for Further Information from the Gaiduk Parties that the agreements were reached in a "*series of meetings and telephone calls during the first quarter of 2010 and extended until the third quarter of 2010*", yet being "*unable presently to identify specific dates or the gist of the words used (save to say that the gist of the words used collectively reflected the terms pleaded)*".
707. Be that as it may, the Gaiduk Parties accept that discussions took place in early 2010 which resulted in certain agreements being arrived at on the basis what was described as the 'shotgun principle'. Under this, the Partners would 'bid' for an asset; it was understood that the Partner who named the highest offer would ultimately receive the asset, and that in the balancing exercise there would be a credit in favour of the other Partners in respect of that asset. The Gaiduk and Mkrctchan Parties' position, however, is that no obligation to make payments or transfers arose until a "*final reckoning*" had been reached by the Partners as to the global terms of their divorce. The Taruta Parties' position, in contrast, is that legal entitlements were acquired before the "*final reckoning*", pointing, indeed, to examples of such agreements being acted on far in advance of such a reckoning. For example, Mr Petrov conceded in cross-examination that assets were transferred to Mr Mkrctchan well before any such final reckoning had taken place. Consistently with this, Transport Holding dividends were paid to Mr Taruta and Mr Mkrctchan 50:50 up until October 2012, which the Taruta Parties say reflects an understanding that the Taruta Parties had an immediate legal entitlement to a half-share of this asset.
708. I need not address these matters in any detail, however, since, although a number of detailed submissions were advanced at trial by Mr Foxton QC in support of his submission that the Court should conclude that there was the 2010 Further Shareholders' Agreement and by Mr Calver QC and Mr Wolfson QC in support of the contrary position, it was recognised by all counsel that, unless the Taruta Parties could make out their 2009 Shareholders' Agreement case, then, their 2010 Further Shareholders' Agreement case must fail. This is because the 2010 Further Shareholders' Agreement case depends on it have been established that the alleged 2009 Shareholders' Agreement was entered into. Although not a controversial point, it is worth noting in this context that paragraph 20.1 of the Taruta Parties Re-Amended Defence and Counterclaim pleaded the alleged 2010 Further Shareholders' Agreement in relation to the so-called "*Office Premises*", as follows:

"to vary the 2009 Shareholders' Agreement so far as concerned the Office Premises, such that the Gaiduk Parties would instead purchase (or cause or procure the purchase of) the interest of each of the Taruta Parties and the Mkrctchan Parties in the premises at 14-B Yaroslavov Val, for US\$15.83 million each, to be paid at the same time as the

transfers of the Other Assets [i.e. the Included Assets and Additional Assets to which Mr Taruta claims to be entitled under the alleged 2009 Shareholders' Agreement] were effected."

Furthermore, in advancing the argument that English law applies to the alleged 2010 Further Shareholders' Agreement, the Taruta Parties' Written Opening stated as follows at paragraph 423.1:

"The Further Shareholders' Agreement was (in part) a variation of the 2009 Shareholders' Agreement (insofar as it concerned the Office Premises). The other obligations it imposed were also closely bound up with the obligations in the 2009 Shareholders' Agreement, in that they put into further effect the division of assets parties started in that agreement as part of the ongoing 'divorce' process which the 2009 Shareholders' Agreement had begun."

Two paragraphs later, in paragraph 423.3, this was, then, stated:

"the close relationship between the 2009 Shareholders' Agreement and the Further Shareholders' Agreement is such that they were (to quote Lurssen Werft) "all of a series", with the result that the Further Shareholders' Agreement "would not have come into existence" but for the 2009 Shareholders' Agreement."

709. It follows, in view of the conclusion which I have reached concerning the alleged 2009 Shareholders' Agreement, that the same conclusion must be arrived at in relation to the alleged 2010 Further Shareholders' Agreement, namely that the case concerning the agreements which the 2010 Further Shareholders' Agreement is alleged to have comprised has not been established. This applies irrespective of whether Ukrainian or English law is applicable; the evidence does not support the case which has been advanced.
710. There are other reasons, however, which militate in favour of the same conclusion and which are worthwhile briefly setting out.
711. The first of these further reasons concerns the lack of documentation suggesting that any final agreements were concluded. Mr Foxton QC was able to point to two spreadsheets used by Mr Gaiduk and Mr Mkrtschan during their balancing exercise in the period 2011-2013, described in the proceedings (but not contemporaneously) by the Taruta Parties as the 'FSHA Spreadsheet' and the 'Divorce Spreadsheet', the former dealing only with the assets for which payment is now claimed under the 2010 Further Shareholders' Agreement, the latter dealing with other assets which formed part of the wider 'divorce'. It was Mr Foxton QC's submission that the Partners were dealing with the assets listed in the separate FSHA Spreadsheet because they were already the subject of a final, binding agreement. This, however, is, in truth, little more than supposition. In any event, it does not follow that there were binding agreements of the sort now alleged.
712. The same applies to Mr Foxton QC's reliance on the fact that, in the final iteration of the FSHA Spreadsheet, the sum payable for USK was reduced by US\$19,164,750.00, being the sum paid by Mr Gaiduk under the CIG SPAs, in support of a contention that Mr Gaiduk intended for that sum to constitute part-payment. Although Mr Foxton QC submitted that, if the Partners had only reached a preliminary understanding regarding

the division of assets, it would have made no sense for Mr Gaiduk to agree for the CIG SPA payment to be made in partial discharge of those obligations, again, I do not agree that it necessarily follows that the payment was made in respect of a binding contract. Mr Gaiduk had paid the deferred consideration under the CIG SPA and thereby acquired its assets. The Partners were nonetheless proceeding on the basis that he would have to pay for his share in those assets. It would, therefore, have been a sensible and practical solution to agree that the payments under the CIG SPAs would serve as part-payment, to be credited to him in the “*final reckoning*”. This is consistent with what the Gaiduk and Mkrtchan Parties say was happening in this period or at least as consistent with what they say as with what is alleged by the Taruta Parties. On this basis, it would be inappropriate, whether under Ukrainian law or under English law, to decide that the agreements alleged by the Taruta Parties were final and binding.

713. The same also applies to the Taruta Parties’ reliance on the fact that asset transfers were being made long before the final balance was reached. Mr Petrov relied on documents dating from August 2013 as setting out the final balance, by which point Mr Gaiduk had already transferred to Mr Mkrtchan interests in, *inter alia*, Transport Holding. Similarly, Mr Taruta received 50% of the dividends in Transport Holding in 2011 and 2012, which on the Taruta Parties’ case reflected Mr Taruta’s contractual entitlement to half of that asset. It, again, does not follow that the agreements were binding in isolation. Given the scale of the balancing exercise, there was obvious sense in implementing certain of the transfers on the understanding that the value attached to the asset in question would stand to the credit of the selling party.

Breach and remedies

714. In view of this conclusion, a conclusion which I have reached on the facts, it is unnecessary to consider whether there were the breaches of the alleged 2009 Shareholders’ Agreement and the alleged 2010 Further Shareholders’ Agreement alleged by the Taruta Parties – including, therefore, the various issues which arise in the context concerning the proper construction of those agreements (if agreements they were).
715. Specifically in this context, it is not necessary to consider an argument which Mr Calver QC sought to advance concerning Article 538(3) of the Civil Code, namely that if the alleged 2009 Shareholders’ Agreement and/or alleged 2010 Further Shareholders’ Agreement were entered into, then, there was, in any event, no breach because any obligations arising under those agreements were terminated because of the Taruta Parties’ own failure to put in place arrangements for the Gaiduk Parties to make the required transfers.
716. Mr Foxton QC objected that this was a case which was not open to Mr Calver QC to put forward since it had not been pleaded. It was, furthermore, again as Mr Foxton QC pointed out, a case which involved Professor Kuznetsova giving less than persuasive evidence as to the applicability of Article 538(3), during which she gave far from convincing answers to questions which distinguished between termination of contracts and suspension of contractual obligations where nonetheless the contract stays on foot, Article 538 forming part of a chapter (Chapter 48) in the Civil Code concerned with fulfilment of obligations rather than another chapter (Chapter 50) dealing with contractual termination.

717. As I say, however, in the circumstances, given that I have decided that neither the alleged 2009 Shareholders' Agreement nor the alleged 2010 Further Shareholders' Agreement were agreements which were entered into, this is a matter which need not be further explored. Nor is it necessary, in the circumstances, to address the remedies sought in respect of any such breaches.
718. Again, however, should it be required in the event that there were a successful appeal, I would be willing at that juncture to produce a further judgment dealing with these topics.

Limitation

719. Limitation insofar as it concerns the contractual claims is another issue which it is unnecessary to address. Nonetheless, since it is an issue which can be dealt with relatively briefly and since, as will become apparent, limitation is a further reason why I consider that the Taruta Parties' claims cannot succeed, I propose to deal with the issue in what follows. I propose doing so by reference only to Ukrainian law since, for reasons previously explained, I consider that to be the applicable law.
720. It will be recalled that, under Articles 257 and 261 of the Ukrainian Civil Code, the relevant limitation period is three years from when a claimant becomes aware, or should have become aware, of the alleged wrong and the identity of the defendant.
721. Mr Calver QC and Mr Wolfson QC submitted that, proceedings with respect to the Taruta Parties' claims having been issued on 30 November 2016, any claim under Ukrainian law would, therefore, have had to have accrued no later than 30 November 2013.
722. It was Mr Calver QC's position, in the circumstances, that claims under the alleged 2009 Shareholders' Agreement and under the alleged 2010 Further Shareholders' Agreement must be time-barred. As to the former, since this was allegedly concluded "on or by" 13 December 2009, Mr Calver QC and Mr Wolfson QC submitted, time should be treated as having started to run from then and to have expired in December 2012 on the basis that the Taruta Parties had an immediate right to demand performance of the agreement as soon as it was entered into. As to the latter, their position was that, since the Taruta Parties' case was that the 2010 Further Shareholders' Agreement was concluded (more accurately, the various agreements which comprise the 2010 Further Shareholders' Agreement were concluded) in the first half of 2010, time expired in the first half of 2013. In each case, this was long before 30 November 2016, with the consequence, so Mr Calver QC submitted, that the contractual claims are time-barred.
723. Mr Wolfson QC adopted a more accommodating position, although only slightly more accommodating since the result, on his analysis, remains that the contractual claims are time-barred, in submitting that time began to run for the purposes of Articles 257 and 261 not when the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement were entered into, but when any transfer obligations arising from those agreements were capable of being put into effect. He suggested that this was within four months from the start of 2010, and so by 30 April 2010, a suggestion which he made based on the fact that the Taruta Parties had alleged in their statements of case that this is the earliest time that the alleged 2010 Further Shareholders' Agreement would have been agreed and, indeed, that the assets were to be transferred within a

“reasonable time”. Mr Wolfson QC characterised this four-month period as being objectively reasonable.

724. For his part, Mr Foxton QC drew attention to Article 261(5), which provides:

“In respect of obligations with a specific period of performance, the limitation period shall begin to run upon expiry of that period.

In respect of obligations with no specified period for performance or where it is determined by the moment of demand, the limitation period shall begin to run from the date on which the creditor becomes entitled to demand performance of the obligation. If a debtor is given a grace period to satisfy such a demand, the limitation period shall begin to run upon expiry of that period.”

725. Mr Foxton QC emphasised the reference here to time beginning to run from the date on which “the creditor becomes entitled to demand performance”. It was his submission that this means that time only begins to run when a demand is actually made. Unless and until there has been a demand, Mr Foxton QC submitted, the limitation clock does not start ticking.

726. Mr Foxton QC also cited in this context Article 530(2), which provides:

“If no period (deadline) for the performance of an obligation by a debtor is fixed or if it is determined by the moment of demand, a creditor has the right to demand its performance at any time. The debtor must perform such obligation within a period of seven days from the date of demand, unless immediate performance is implied by the contract or civil statutes.”

727. Mr Foxton QC submitted that this provision provides, in effect, for a seven-day grace period from the making of any demand, meaning that, consistent with the last sentence of Article 261(5), time begins to run after 7 days of a demand having been made. It was his position, in the circumstances, that, since neither the alleged 2009 Shareholders’ Agreement nor the alleged 2010 Further Shareholders’ Agreement contains a “specified period for performance” within the meaning of Article 261(5), the limitation period, accordingly, started to run on the eighth day following a demand by the Taruta Parties. A demand not having been made until 30 November 2016, when the Taruta Parties filed their Additional Claims, Mr Foxton QC submitted that there can be no question of the claims in this case being time-barred.

728. Alternatively, Mr Foxton QC submitted that, in the case of the Gaiduk Parties, time began to run not earlier than April 2016, when Mr Taruta and Mr Gaiduk began their exchanges in writing concerning some of the outstanding obligations of the Gaiduk Parties, and, in the case of the Mkrтчan Parties, not earlier than 6 September 2016, which was when Mr Taruta wrote to Mr Mkrтчan about some of the outstanding obligations of the Mkrтчan Parties.

729. Mr Calver QC and Mr Wolfson QC did not agree with this analysis, Mr Wolfson QC noting, in particular, not only that the Taruta Parties’ pleaded case is that the assets should be transferred within a “reasonable time” but also that, at an earlier stage of the proceedings when seeking leave to serve out of the jurisdiction and consistent with this, the Taruta Parties’ solicitor had made various observations concerning what was a

“reasonable time” in this case. Mr Calver QC and Mr Wolfson QC’s position was that nothing in Article 530(2) dictates a conclusion that parties to a contract (including, therefore, the parties in the present case) cannot have intended that performance would take place immediately (Mr Calver QC’s position) or within a reasonable time (Mr Wolfson QC’s primary position) and instead requires that in a case such as the present “the debtor” should be given a demand to perform and, then, should have the seven days to which Article 530(2) refers. This would, they suggested, make no sense at all since it would mean that a claimant could wait any period of time after a contract to make a demand, and that time would only start running eight days after that demand was made.

730. Central to Mr Foxtton QC’s analysis, and seemingly at odds with the position taken by Mr Calver QC and Mr Wolfson QC, is the Resolution of the Plenary Meeting of the High Commercial Court of 29 May 2013 ‘On Certain Issues of the Practice of Applying the Limitation Period in the Settlement of Commercial Disputes’, which states as follows:

“In respect of obligations for which the time period for performance is undefined or which is defined with reference to the moment of demand, the limitation period shall begin to run from the day that the right to demand performance of the obligation arose with the creditor (Article 261.5, paragraph 2 of the Civil Code of Ukraine), i.e. upon the expiry of either: the 7-day period following a demand prescribed by Article 530.2 of the Civil Code of Ukraine; or [the expiry] of another grace period prescribed by statute or the contract for performance of the debtor’s obligation. The exception to this rule is a case where it follows from the law or the contract that the obligation shall be performed immediately; in such a case the limitation period shall start to run from the date of the creditor’s demand.”

731. Mr Foxtton QC highlighted in this context how Professor Kuznetsova, the expert instructed by the Gaiduk Parties, agreed that this decision was “very good evidence of the general court practice in Ukraine”. Indeed, in her first report, she had acknowledged, in terms, that “the general and prevailing position is that the limitation period should begin running from the eighth day following the presentation of the demand (i.e., upon the expiry of the seven-day period)”.
732. Mr Foxtton QC went on to submit that there is no merit in a submission which was made by Mr Calver QC in particular (albeit that it was adopted by Mr Wolfson QC), namely that it would be “absurd” if a demand needed to be made in order for time to begin to run for limitation purposes since this would mean that a claimant could wait any period of time after a contract had been made before deciding to make a demand and triggering the commencement of the relevant limitation period 7 days afterwards. Mr Foxtton QC observed, indeed, that the position is the same in this jurisdiction in the case of loan contracts without a fixed date for repayment, where a loan may not become repayable until either a demand (in any form) is made for its repayment, or (if it meets the criteria of s. 6 of the Limitation Act 1980, a provision considered later in a different context) until a demand in writing is made for repayment. He also submitted that any absurdity which might arise would be the result not of the Taruta Parties’ position but if the Gaiduk Parties were right and the limitation period could commence before there was any obligation to perform.

733. This is not a particularly easy matter to resolve. On the face of it, the Resolution provides significant support for Mr Foxton QC's position. On the other hand, not only is it not in dispute that the Resolution is not binding and is merely persuasive (as Professor Kuznetsoka put it, it "*is just of a recommendatory nature*") but, furthermore, there are a number of Ukrainian court decisions identified by Professor Kuznetsova in which a different approach has been adopted both before and after the Resolution, perhaps the most apposite of which is a decision of the Ukrainian Supreme Court dated 7 May 2018. In that case, Princom-Group (as seller) and Dubko (as buyer) had concluded a contract which required that Dubko should pay a security deposit before 11 June 2012 and also that the parties should enter into a purchase agreement by 31 December 2013. Whilst Dubko paid the security deposit on time, the parties did not enter into a purchase agreement, with the result that in May 2017 Dubko brought a claim to recover the security deposit which it had paid. Princom's response was to assert that the claim was time-barred. It appears that the contract provided no deadline for the return of the security deposit. Applying the analysis of the law advanced by the Taruta Parties, it ought to follow that time did not start to run until the buyer first sought to recover the security. However, the Supreme Court did not approach matters in this way and instead approved the Appeal Court's decision:

"that time period for TOV 'Dubko' apply to the court with request about returning paid funds started on 01.01.2014 and finished on 31.12.2016, while the claimant applied to the court on 16.05.2017, thus with omission of three-year time period of legal limitation determined by Article 257 of the Civil Code of Ukraine."

734. It follows that the Appeal Court (and so also the Supreme Court) treated time as beginning to run when the period for entering into the purchase agreement expired, namely the day after 31 December 2013. This was when Dubko was entitled to require repayment of the security deposit which it had paid. It was on this basis that the Appeal Court (and also the Supreme Court) concluded that the claim became time-barred after 31 December 2016, three years after Dubko became entitled to demand repayment even though no such demand was, in fact, made. The Appeal Court (and the Supreme Court), accordingly, approached matters on the basis that no demand was required in order for the limitation clock to start to tick.
735. This, to repeat, is a decision which comes after the Resolution, so underlining the Resolution's merely recommendatory nature and, in addition, demonstrating that the suggestion made by Mr Foxton QC that the position is (and can only be) as he submitted is a suggestion which needs to be viewed with some scepticism. In addition, although Mr Beketov (the Taruta Parties' expert) considered that the case is covered not by the second part of Article 261(5) but by the first part ("*In respect of obligations with a specific period of performance, the limitation period shall begin to run upon expiry of that period*"), that plainly is not right since there is no hint in the decision that either the Appeal Court or the Supreme Court approached matters on the basis that the case entailed an obligation with a defined time for performance.
736. As Mr Calver QC pointed out in this context, the time to conclude the further purchase contract was relevant only as defining the time when Princom's obligation to return Dubko's security deposit arose since that was when Dubko first had a right to demand the return of its deposit; it is not a case where what was sought in the proceedings by Dubko was performance by Princom of an obligation within a defined period.

737. There are, however, other examples of cases in which the approach described in the Resolution has not been followed.
738. Another such example is a decision of the Kyiv Commercial Court dated 4 April 2017. In that case, the claimant contractor and the defendant customer had contracted for the claimant to carry out building works. The contractor duly completed the building works, and a certificate of acceptance dated 25 April 2013 was agreed, entitling the contractor to the price of UAH 15,040.24. The defendant failed to pay the price and the claimant issued a claim for it. The defendant raised a limitation defence. The court held, first, that the parties' contract did not set a time within which the customer had to pay the contractor the price and, secondly, that time began to run from the time when the claimant's right to demand the purchase price arose. Again, this is a decision which is inconsistent with the Resolution since the court was here deciding that time began to run when the right to demand performance arose rather than when a demand was actually made.
739. A last example for present purposes is the decision of the Kiev Economic Court of Appeal dated 17 November 2015, which was upheld on appeal by the Supreme Economic Court of Ukraine. In that case, the claimant, NVF Grant, claimed against the Revne Rural Council, for an unpaid debt which was due for work performed under a contract. The council raised a limitation defence. Under the parties' contract, once NVF Grant had completed its work for that phase of the project, it had to send to the Council a "*delivery and acceptance certificate*". If the Council did not, within 5 days, sign the certificate confirming that it accepted the certificate, then, by Clause 3.5 of the contract, it was deemed to accept it and came under an obligation to make payment in accordance with the contract. On 30 September 2010, the parties drew up a delivery and acceptance certificate for some work which NVF Grant had done. Despite signing the certificate, the Council did not pay the UAH 57,800 due to NVF Grant for that phase. In January 2013, NVF Grant wrote to the Council demanding payment and, then, brought a claim in January 2015 for the unpaid debt.
740. The court, having referred to Articles 261 and 530 CC as well as to the Resolution, decided that NVF Grant had not brought its claim within time since NVF Grant's right to make a demand arose when the delivery and acceptance certificate was agreed on 30 September 2010. The focus, in other words, was not on when a demand was made but on when the right to make a demand accrued. The court also held that, since the Council's obligation to pay the price was not subject to a defined time for performance, the Council had a 7-day grace period to do so from the time of NVF's right to make a demand arising, with time beginning to run for limitation purposes following the expiration of that grace period. This, then, is another decision which differs from the approach adopted in the Resolution, the court clearly deciding that time began to run not from when NVF Grant made a demand in January 2013 but from 7 days after NVF Grant became entitled to make such a demand.
741. In the circumstances, I do not consider myself bound to adopt the approach in the Resolution, particularly given that all the experts, in any event, agreed that (with the exception of decisions of the European Court of Human Rights, which are treated as a source of law) Ukrainian courts "*do not operate with a system of judicial precedent*". Furthermore, bearing in mind the first of the decisions which I have cited, it is significant that, although he expressed things a little differently to Professor Kuznetsova and Mr Likarchuk (the Mkrтчan Parties' expert), Mr Beketov himself

acknowledged that the Supreme Court has “*authority to ensure the harmonised application of the law by the lower courts and to issue official guidance to them*” by virtue of Articles 36(6) and (7) of the Law of Ukraine on the Judiciary and the Status of Judges. For this reason, Mr Beketov explained, “*Ukrainian courts will often cite judgments and official guidance of the Supreme Court as authority for particular positions*”.

742. It is particularly instructive in this context that in the Supreme Court decision dated 7 May 2018 this was stated:

“Application of periods of legal limitations has several important purposes, namely: to ensure legal certainty and completeness, to protect potential respondents against delayed requests and to prevent unfairness, which can occur in case, if courts will be forced to solve cases about events, which took place long time ago, based on evidences, which could already lost accurate and complete with time passage.”

743. This represents an entirely orthodox approach, not confined to Ukrainian law and reflected, for example, in this passage in *McGee* at paragraph 1-047:

“Policy issues arise in two major contexts. The first concerns the justification for having statutes of limitation at all and the particular limits that presently exist. The second concerns the procedural rules that apply after an action has been commenced. Arguments with regard to the policy underlying statutes of limitation fall into three main types. The first relates to the position of the defendant. It is said to be unfair that a defendant should have a claim hanging over him for an indefinite period and it is in this context that such enactments are sometimes described as ‘statutes of peace’. The second looks at the matter from a more objective point of view. It suggests that a time-limit is necessary because with the lapse of time, proof of a claim becomes more difficult—documentary evidence is likely to have been destroyed and the memories of witnesses will fade. The third relates to the conduct of the claimant, it being thought right that a person who does not promptly act to enforce his rights should lose them.”

744. As a matter of policy, therefore, and by way of starting point, I am not attracted by a contention that time only starts to run on the eighth day after a demand for performance is made potentially long after the entitlement to make that demand, As Mr Calver QC submitted, Mr Beketov’s position (as adopted by Mr Foxton QC in submissions) would mean that a creditor could “*wait 10, 20, 50 or even 100 years to make a demand, and only on the eighth day after that demand would time start to run, with the limitation period then only expiring three years after that*”. As Mr Wolfson QC similarly put it:

“If a share purchase agreement were performable on demand, the court could be faced with a claim under an oral agreement, many decades, even centuries, old. There might be no existing evidence at all, never mind evidence which has grown stale.”

745. I agree with Mr Calver QC and Mr Wolfson QC about this and, in truth, Mr Beketov had no real answer when it was put to him that his position ran counter to the limitation rationale reflected in the Supreme Court’s decision dated 7 May 2018. His only response was to assert that Ukrainian law is as he described it, declining to engage in “*talking maybe now about some philosophical categories*”, which is how he characterised Mr Calver QC’s point that the approach explained by him “*would not protect potential respondents against delayed requests*”. I disagree with any

suggestion, however, that Mr Beketov was acting as an advocate in giving the evidence which he did since I consider that, like Professor Kuznetsova, Mr Likarchuk and the Prandicle Ukrainian law expert, Mr Aloszyn (together with Dr Kisil in his reports written before, unfortunately, he died), Mr Beketov was doing his best to assist the Court.

746. It is against this background that I turn to Article 261 itself since, ultimately, the issue boils down to how this is to be properly understood, specifically Article 261(5). As Mr Calver QC pointed out, there is no dispute about the fact that the general position is governed by Article 261(1) and so that:

“Duration of a limitation period shall commence as of the day when a person became aware of or could have become aware of a violation of his/her right or of a person that violated the right.”

747. Article 261(5), then, goes on to deal with obligations, starting with the situation where there is a *“specific period of performance”* before, in the second paragraph, addressing the situation where there is *“no specific period of performance”*. This is, in my view, important because it is likely that, in laying down the regime applicable to obligations, those involved in the drafting of Article 261(5) would have intended to adopt a consistent approach. If, therefore, the situation covered by the first sentence (where there is a *“specific period of performance”*) requires that there be no demand to perform made, merely that the *“specific period of performance”* should have passed without performance, then, it might be expected that the position in relation to the second paragraph (where there is *“no specific period of performance”*) would, similarly, not require that a demand is made, merely that a right to demand has arisen. It would make no sense if the first sentence were to require one thing, and the second sentence something different.
748. I put this point to Mr Beketov but did not receive a principled explanation as to why it is not right. This, despite the fact that, consistent with what I was putting to him and highly significantly, Mr Beketov agreed with me that the first sentence of the second paragraph dealing with the situation where there is *“no specific period of performance”* has as its focus a claimant acquiring the right to demand performance (or becoming entitled to demand performance), rather than the actual making of such a demand. This was a fair acceptance of the obvious, given that the first sentence refers, in terms, to the creditor becoming so entitled and not to the creditor actually making a demand. This, in my view, must have been deliberate, and for good reason: if the requirement were that a demand needs to be made, it would lead to the type of absurdity which Mr Calver QC and Mr Wolfson QC were right to identify since it would allow a claimant to do the very thing which laws relating to limitation periods are intended to counteract, namely, in effect, permit the cold storage of claims which ought to be progressed in a timely way. A claimant would be in a position to delay, and unilaterally so, by choosing not to make a demand despite having the entitlement to do so. That cannot be what Article 261(5) was intended to permit.
749. It follows that I reject the submission advanced by Mr Foxton QC (ultimately, at least on analysis if not in terms, unsupported by Mr Beketov’s evidence and anyway at odds with the views expressed by Professor Kuznetsova and Mr Likarchuk) that time should be regarded as beginning to run only when a demand is made – or, more accurately,

after a further seven days have passed by virtue of Article 530 and the interplay with the second sentence of the second paragraph of Article 261(5).

750. I might add that, as to that “*grace period*” provision, I agree with Mr Calver QC (and Mr Wolfson QC) that this is a provision which operates if a demand is actually made and assuming that it is a demand which is itself made within the currency of the three-year limitation period but not otherwise. In effect, time starts to run when a right to make a demand accrues, but, if a demand is made within three years of then and a grace period is either given in that demand or is treated as having been given by virtue of Article 530, then, the *prima facie* starting date for limitation purposes is adjusted accordingly and time starts to run from the expiration of that adjusted starting date. This might mean that, by making a demand late in the three-year limitation period, a claimant buys a considerably longer limitation period, potentially almost as long as six years, but nonetheless there is, on this basis, less risk that stale claims will be brought than if time starting is linked to the making of a demand at any point, however long that might be after the right to make a demand has accrued.

751. This still leaves the question of whether time should be treated as having started to run from when the alleged 2009 Shareholders’ Agreement and the alleged 2010 Further Shareholders’ Agreement were entered into (Mr Calver QC’s position) or within a reasonable time thereafter (Mr Wolfson QC’s position). It was Mr Foxton QC’s submission, relying upon certain evidence given by Mr Beketov, that there is simply no scope under Ukrainian law to imply an obligation to perform within a reasonable time where no express provision is made in the contract to that effect. I am not so sure, however, that the position is quite so clear cut as that since, as Mr Wolfson QC pointed out, Mr Beketov confirmed in cross-examination that there is nothing in Article 530 to prevent a court from finding that the parties must have intended performance to take place immediately (or, for that matter, in some other timescale), even if this was not expressly set out in the relevant contract. Mr Beketov said this on the topic when asked by Mr Wolfson QC:

“I think it is a matter of construction and interpretation of specific agreement. Of course if agreement is drafted in a way which provides obligation to perform immediately, and this is in the agreement or it actually, I would say, emanates from the provision of agreement, because if literal words cannot provide to the court clear answer it may go and find meaning of the agreement by other means under Article 213, then of course it is possible scenario.”

752. In my view, it would, therefore, be open to a court to discern from what has been agreed in a contract a time for performance, which could include an agreement based on what is reasonable, if that is the appropriate construction of the contract concerned. There is no bar on this; it will depend on what it is appropriate to be discerned.

753. Having said this, there is a danger in adopting too English (and Welsh) a standpoint, and so in applying an approach which is familiar with notions of reasonable time for performance to a contractual environment (in Ukraine) where such notions are unfamiliar. Ultimately, in this case, however, it does not matter whether it is Mr Calver QC’s more strict position or Mr Wolfson QC’s more lenient position which prevails since, either way, given the clear view which I have reached concerning Article 261(5), the contractual claims must obviously be regarded as time-barred. It is unnecessary, in

the circumstances, to choose between Mr Calver QC and Mr Wolfson QC's rival positions, and I decline to do so.

754. A last point which arises concerns the ability of the Court to disapply the limitation period under Article 267(5), the experts being agreed that the limitation period can be disapplied at the Court's discretion, if it considers that there are "*important*", "*compelling*" or "*valid*" reasons for doing so. Mr Beketov referred in this context to certain cases involving relationships of trust, but he acknowledged, when asked in cross-examination, that these were merely examples where there had been disapplication; Article 267(5) is not confined to such cases. They were also cases which were factually very different to the present case, involving small amounts of money and non-commercial loans made between friends, it being a matter for the court's discretion in every case.
755. Mr Taruta, in contrast, is a sophisticated businessman and would, as such, be an unlikely beneficiary of a decision to disapply.
756. Moreover, Mr Beketov having accepted that a party seeking to have a limitation period disapplied must show that the reasons relied upon by him "*... actually objectively prevented or hindered [the claimant] from filing a statement of claim within time of limitation*", it is impossible to regard this as a suitable case for disapplication. The suggestion that Mr Taruta had received assurances that "*he would get his due*", which warranted his delay in bringing the contractual claims is not borne out by the evidence.
757. Even if such assurances were given, it is not suggested that they were given by anybody other than Mr Mkrtchan, meaning that they would not be relevant as far as the claims against Mr Gaiduk are concerned.
758. In any event, there is no suggestion that any assurances were given after December 2012, and so it is inconceivable that they could have played any part in a decision not to bring the claims earlier, still less that they "*objectively prevented or hindered*" the Taruta Parties from bringing the claims. The reality is that the contractual claims could have been brought in time. The fact that they were not, and so had become time-barred by the time that they were brought, is a consequence which should not, in the circumstances, be overridden.
759. It follows that, even had the claims under the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement otherwise been viable, by which I mean the contractual claims, those claims would have been time-barred under Ukrainian law.
760. To be clear, this is the position in relation also to the claims for specific performance since it was not in dispute that Ukrainian law applies the contractual time bar to claims for specific performance, meaning that those claims would have to have been brought within the same timescale as any damages claim.

Alternative claims

761. It is unnecessary to address in any detail the alternative ways in which the claims against the Gaiduk and Mkrtchan Parties are put. This is because none of these alternatives can succeed where the claims in contract have failed and for the same reason: that it has not

been established by the Taruta Parties that the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement were entered into as binding agreements. This is the case irrespective of whether those claims are properly to be regarded as being subject to English law or to Ukrainian law since, whichever law is applicable, the claim cannot succeed.

762. To take an example, although this is a matter to which I shall return a little later when addressing the claims against Prandicle, the answer to the Taruta Parties' contention that the alleged 2009 Shareholders' Agreement gave the Taruta Parties proprietary rights in the shares in NET currently held by Roselink sufficient to enable the Taruta Parties to bring a proprietary claim against Roselink for the return of those shares is answered by the fact that Mr Gaiduk, Mr Taruta and Mr Mkrтчan never entered into the alleged 2009 Shareholders' Agreement. If that agreement was not concluded, then, it inevitably follows that the Taruta Parties have no proprietary rights in the NET shares which Roselink holds, and their proprietary claims must fail. This is the case whether Ukrainian law applies as the Gaiduk Parties (strictly Roselink) maintain or whether English law applies as the Taruta Parties say is the case.
763. The same applies to the inducing or procuring breach of contract case since, unsurprisingly, such a case could only conceivably succeed, whether under English law (as the Taruta Parties say applies) or under Ukrainian law (as the Gaiduk Parties and the Mkrтчan Parties say is applicable): without a contract, there can have been no breach and so there can have been nothing which was procured or induced.
764. The position is no different in relation to the conspiracy case, again whether under English law (as the Taruta Parties favour) or under Ukrainian law (as favoured by the Gaiduk Parties and the Mkrтчan Parties), given that the case as pleaded by the Taruta Parties expressly, and understandably, described the conspiracy as entailing their deprivation "*of the assets to which they were entitled under the 2009 Shareholders' Agreement and the Further Shareholders' Agreement*".
765. Likewise, the breach of trust and dishonest assistance claim has at its heart a plea in terms which make it plain that the case depends on the Taruta Parties having established that the alleged 2009 Shareholders' Agreement and the alleged 2010 Further Shareholders' Agreement have been established:

"The 2009 Shareholders' Agreement and the Further Shareholders' Agreements were effective to vest equitable ownership of 50% of the Gaiduk Parties' interests in each of DPP, UGMK, Agro Holding, NET and Transport Holding in the Taruta Parties. Accordingly, by transferring the relevant interests in those assets other than to the Taruta Parties (as set out above), the Gaiduk Parties acted in breach of trust and are accountable to the Taruta Parties for the proceeds of the onwards sales made in breach of trust."

766. The same also applies to the unjust enrichment claim brought against the Mkrтчan Parties (including Gastly) in respect of UGMK and Transport Holding. As to Transport Holding in particular, the Taruta Parties' case is that, under the alleged 2010 Further Shareholders' Agreement, it was agreed that the Gaiduk Parties would, "*in return for certain other assets*", transfer (or cause or procure the transfer of) their interest in Transport Holding in equal shares to the Mkrтчan Parties and the Taruta Parties, and that the Partners (through their respective corporate vehicles) would each transfer or

receive such interests in Transport Holding as would result in the Mkrтчan Parties and the Taruta Parties each acquiring 50% of Transport Holding, within a reasonable time. On this basis, complaint is made that the Mkrтчan Parties wrongfully received interests in Transport Holding from the Gaiduk Parties, which they failed to transfer to the Taruta Parties, in that they received (via Gastly) an interest in Transport Holding through an SPA entered into with CIG on 24 July 2012 and, then, later that year, transferred a 30% interest in Gastly to or for the benefit of the Gaiduk Parties through Sputnik, so enabling the Mkrтчan Parties thereby to obtain control of companies in the Transport Holding group to the exclusion of the Taruta Parties. This claim does not work, however, given that I have decided that there was no 2010 Further Shareholders' Agreement as alleged.

767. It is right to acknowledge that the unjust enrichment claim was also advanced on an alternative basis, if it were to be decided that there was no contractual obligation to transfer. However, as Mr Wolfson QC, in my view, rightly submitted, the Mkrтчan Parties having lawfully acquired the relevant interest through a share purchase agreement and paid all amounts due, there cannot have been the unjust enrichment alleged.
768. It is convenient, next, to address the claim in unjust enrichment which the Taruta Parties have brought against the Gaiduk Parties. This does not depend on the alleged 2009 Shareholders' Agreement having been entered into.

The unjust enrichment claim against the Gaiduk Parties

769. The unjust enrichment claim against the Gaiduk Parties entails the Taruta Parties seeking restitution of the sums paid over in respect of NET and Agro Holding, in the amount of US\$82.5 million (comprising two elements: US\$75 million and US\$7.5 million). They say that the Gaiduk Parties were unjustly enriched in this amount because the Taruta Parties have received nothing in return – in other words, that there has been a total failure of consideration. The claims are put on the basis either (as originally pleaded) that the payments for which the consideration and/or basis had failed were made “*pursuant to the 2009 Shareholders' Agreement and the Castlerose SPA*” or on the basis that the 2009 Shareholders' Agreement was not entered into and so the only relevant contract is the Castlerose SPA.
770. There is, first, an applicable law issue which needs to be resolved. It was Mr Foxton QC's submission that English law applies to the unjust enrichment claims against the Gaiduk Parties, either pursuant to Article 3 of Rome I or Article 10 of Rome II.
771. It was Mr Foxton QC's primary submission that, assuming that it were to have been decided that the alleged 2009 Shareholders' Agreement existed, pursuant to which the Gaiduk Parties were obliged to transfer interests in NET and Agro Holding, the unjust enrichment claim should be classified as contractual, with the result that, pursuant to Article 3(1) of Rome I (or, strictly speaking, the Rome Convention), English law applies. As Mr Foxton QC explained, Article 12(1)(c) of Rome I provides that the law applicable to a contract shall govern “*within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of an obligation*”. As he also explained, where failure of consideration arises from a failure by one party to perform its obligations under a contract, the unjust enrichment claim arises as the “*consequence of a total or partial breach of obligations*”. As it is put in *Dicey* at paragraph 36-023:

“Although the position cannot be stated with confidence, it is tentatively suggested that given that the consequences of nullity of a ‘contract’ fall within the ambit of the Rome I Regulation [under Article 12(1)(e)], so too do the consequences of breach and frustration. This ensures that a single law determines whether a contract has been breached or frustrated and the consequences of this event.”

772. To similar effect, in *Profit Investment Sim SpA v Ossi* C-366/13 [2016] 1 WLR 3832, the CJEU decided that actions seeking the annulment of a contract and restitution of sums paid (but not due) on the basis of that contract constituted “*matters relating to a contract*” within Article 5(1)(a) of the Brussels I Regulation, observing at [55] that:

“the causal link between the right to restitution and the contractual relationship is sufficient to bring the action for restitution within the scope of matters relating to a contract.”

773. Mr Foxton QC’s alternative submission was that English law is applicable since the claim is appropriately classified as arising out of unjust enrichment and so comes within Article 10 of Rome II, specifically Article 10(1) in that the unjust enrichment claim “*concerns a relationship existing between the parties ... that is closely connected with that unjust enrichment*”, namely the 2009 Shareholders’ Agreement which, so Mr Foxton QC submitted at least, is governed by English law.

774. The difficulty with both of these submissions, however, is that they each depend on the Court agreeing that the alleged 2009 Shareholders’ Agreement was entered into and that English law is the governing law of that contract. It will be appreciated that I have decided against the Taruta Parties in relation to both of these matters: that the alleged 2009 Shareholders’ Agreement was not entered into and that, even if it was, it was subject not to English law but to Ukrainian law, which is what Mr Calver QC submitted was the case.

775. In the further alternative, Mr Foxton QC submitted that, if the Court were to have decided that the alleged 2009 Shareholders’ Agreement was not entered into, and so that the Gaiduk Parties were under no contractual obligation to transfer the interests in NET and Agro Holding, then, English law, again he submitted, applies either pursuant to Article 3 of Rome I (or the Rome Convention) because Article 15(1)(e) provides that the law applicable to the putative contract covers “*the consequences of the nullity of the contract*” or under Article 10(1) of Rome II because the Gaiduk Parties’ obligation to make restitution “*concerns a relationship existing between the parties ... that is closely connected with that unjust enrichment*” given that the Castlerose SPA (which is governed by English law) made provision for the payment by the Taruta Parties of additional amounts for the interests in NET and Agro Holding.

776. Although the first of these further alternatives suffers from the same deficiency as Mr Foxton QC’s first two arguments, the second of the further alternatives is obviously correct. Indeed, Mr Calver QC acknowledged, in terms, that, if and insofar as the unjust enrichment claim flows from, and is closely related to, the Castlerose SPA, then, as he put it, “*there may be considerable force in the contention that English law applies*”. As a result, in what follows I propose only to address the position under English law and not also the position under Ukrainian law.

777. In doing so, it should be noted at the outset that, although there was a significant debate between Mr Foxton QC and Mr Calver QC whether an unjust enrichment claim is precluded if there is a contract between the parties, something previously regarded as trite law but which Mr Foxton QC submitted was no longer the position, this is not an aspect with which it is strictly necessary to grapple in view of my earlier conclusion concerning the alleged 2009 Shareholders' Agreement, namely that no such legally binding agreement was concluded.
778. That it is strictly unnecessary to address this issue is underlined by the fact that, if the alleged 2009 Shareholders' Agreement had been entered into, then, the Taruta Parties would have no need to advance an unjust enrichment case at all. It follows that whether the law in this respect remains as it was before or has undergone a shift is not a question which matters in the present case. All that matters is whether there is a legitimate unjust enrichment claim as a matter of English law on the premise that the alleged 2009 Shareholders' Agreement did not come into existence.
779. That said, in deference to the submissions which were made and albeit on the basis that what follows inevitably amounts to *obiter dicta*, I propose to explore the issue relatively briefly.
780. The general position is described in *Goff & Jones, The Law of Unjust Enrichment* (9th Ed.) at paragraph 3-13 in this way:
- “Where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie while the contract is subsisting.”*
781. This point was considered in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, one of the ‘swaps cases’ in which local authorities had entered into interest rate swaps which had subsequently been found to be unlawful by the House of Lords in *Hammersmith & Fulham LBC v Hazell* [1992] 2 AC 1. Lord Hope identified three questions for the Court, two of which related to whether there has been a mistake of law in the making of payments under the swaps. The third was “*Did the payee have a right to receive the sum which was paid to him?*”: see page 407H He explained at page 408B:
- “The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground.”*
782. Mr Foxton QC identified a number of authorities in recent years which demonstrate the court’s willingness to depart from this orthodox approach. The first was the decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68. In that case, tobacco retailers sought to recover from a wholesaler amounts they had paid, as part of the overall price for tobacco products, in respect of a tax which had subsequently been held to be unconstitutional and invalid. Although the contracts had not been terminated or avoided, the High Court held that the retailers had a good claim in unjust enrichment. Gleeson CJ, Gaudron and Hayne JJ in a joint judgment stated at [21] that:

“It accords with the basis of dealing, and contractual arrangements, between the appellants and the respondent to regard that part of the net total amount of each invoice referable to the ‘tobacco licence fees’ as a severable part of the consideration, which has failed. There is no conceptual objection to this. For the reasons already given, the tax component of the net total wholesale cost was treated as a distinct and separate element by the parties. It was externally imposed. It was not agreed by negotiation. It was not like the discounts, which might differ between retailers, just as the wholesale list price would vary from time to time in accordance with market conditions. To permit recovery of the tax component would not result in confusion between rights of compensation and restitution, or between enforcing a contract and claiming a right by reason of events which have occurred in relation to a contract.”

783. The second was another decision of the High Court of Australia, **Mann v Paterson Constructions Pty Ltd** [2019] HCA 32, in which Kiefel CJ, Bell and Keane JJ noted at [23] that **Roxborough**:

“was not a case of breach of contract on the part of the defendant where the compensatory principle of the law of contract was engaged. The restitutionary claim did not cut across the contractual charter of the parties’ rights and obligations.”

784. The third was **Barnes v Eastenders Cash & Carry plc** [2014] UKSC 26, [2015] 1 AC 1, which concerned a claim by a receiver to recover the costs of his services from the CPS, the receiver having been appointed by the CPS (pursuant to a framework agreement subsequently approved by court order) to manage the assets of a company whilst a criminal investigation was being undertaken. Pursuant to that arrangement, the receiver was granted a lien over the assets he was managing and was expected to recover his remuneration and expenses from those assets. The framework agreement provided that *“the receiver will be remunerated from the sums that they may realise from the sale of the assets over which they are appointed ... To the extent [that] there is any shortfall, the contracting bodies will not agree to grant indemnities either in full or in part”*. The receiver’s lien over the assets was subsequently quashed. An issue, therefore, arose whether the receiver could recover remuneration and expenses from the CPS on restitutionary grounds. The Supreme Court held that the receiver was so entitled, despite the fact that the framework agreement subsisted unchallenged.

785. Lord Toulson (giving the judgment of the court) held at [99] that, although the CPS had made no contractual promise to the receiver that the lien would be legally enforceable, *“this was their mutual expectation and was the premise on which the receiver agreed to act”*. At [106] Lord Toulson went on to observe as follows:

“Failure of basis, or failure of consideration as it has been generally called, does not necessarily require failure to a promise counter-performance; it may consist of the failure of a state of affairs on which the agreement was premised.”

He, then, referred at [107] to what he described as a *“succinct summary of the meaning of failure of consideration”* as having been given by Professor Birks in his *‘An Introduction to the Law of Restitution’* (1989) at page 223 (as approved in **Sharma v Simposh Ltd** [2013] Ch 23 at [24]):

“Failure of consideration for a payment ... means that the state of affairs contemplated as the basis of reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself.”

He went on to say this at [109]:

“The point that a failure of consideration may consist of the failure of a non-promissory event or state of affairs is reiterated in Burrows’ Restatement at pp86-87. He states that consideration which fails may have been ‘an event or a state of affairs that was not promised’, and he cites the decision of the High Court of Australia in Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516 as an example of a failure of a non-promissory condition as to the future.”

786. Going on to discuss **Roxborough**, Lord Toulson said this at [113]:

“Gummow J held ... that there had been no failure in the performance by Rothmans of any promise made by them, but that there had been a ‘failure of consideration’ in the ‘failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover.’”

He observed at [114]:

“Similarly, in the present case the receiver agreed to accept the burden of management of the companies on the basis that he would be entitled to take his remuneration and expenses from the companies’ assets, and that state of affairs which was fundamental to the agreement has failed to sustain itself.”

He concluded at [115], as follows:

“In the present case there was a total failure of consideration in relation to the receiver’s rights over the companies’ assets, which was fundamental to the basis on which the receiver was requested by the CPS and agreed to act. I use the expression ‘fundamental to the basis’ because it should not be thought that mere failure of an expectation which motivated a party to enter into a contract may give rise to a restitutionary claim. Most contracts are entered into with intentions or expectations which may not be fulfilled, and the allocation of the risk of their non-fulfilment is a function of the contract. However, in the present case the expectation that the receiver would have a legal right to recover his remuneration and expenses was not just a motivating factor. Nobody envisaged that the receiver should provide his services in managing the company as a volunteer; those services were to be in return for his right to recover his remuneration and expenses from the assets of the companies, such as they might be. The agreement between the CPS and the receiver so provided, and that provision was incorporated into the order of the court.”

He ended by saying this at [116]:

“I would hold that the CPS fulfilled its contractual obligations to the receiver by ensuring that the order appointing him conformed with the terms of the underlying agreement between them, but that the receiver is entitled to recover his proper remuneration and expenses from the CPS because the work done and expenses incurred

by the receiver were at the request of the CPS and there has been a failure of the basis on which the receiver and was asked and agreed to do so.”

787. The Supreme Court subsequently gave further consideration to the issue in *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33; [2016] AC 509. In that case, GGLCL had employed Mr Carré for 27 years. For six of those 27 years, GGLCL had liability insurance with Midland. Mr Carré contracted mesothelioma and brought proceedings in Guernsey for damages against IEG (the successor to GGLCL’s liabilities). IEG settled Mr Carré’s claim and brought proceedings in England against Zurich (the successor to the liabilities of Midland), seeking an indemnity. The Supreme Court had to consider whether IEG was entitled to a full indemnity, or whether Zurich had an equitable right of recoupment against IEG for a portion of the claim, in order to reflect the time that it was not on risk. A majority of the seven-strong Supreme Court held that, whilst the insurer was obliged to meet the whole of the employer’s liability to Mr Carré under the insurance contracts, it was entitled to recover proportionate contributions from other insurers which had given liability cover and, in respect of any period in which there was no insurer, from the employer itself.
788. Whilst the decision in *IEG* was relied upon by Mr Foxton QC as an example of a restitutionary claim succeeding despite the existence of a valid and subsisting contract, it is clear that *IEG* belongs to what has become known as the ‘*Fairchild* enclave’, a series of decisions in which the courts have sought to respond to the unique legal difficulties thrown up by mesothelioma.
789. Thus, in *Fairchild* [2003] 1 AC 32, the House of Lords considered that the ordinary rules concerning causation do not apply to employers’ liability for mesothelioma, specifically that an employer who employs an employee for any part of their period of exposure to asbestos is liable for their mesothelioma, notwithstanding that there is what would normally be regarded as an insufficient causal connection between exposure and disease. In *Barker v Corus UK Ltd* [2006] 2 AC 572, it was held that the common law nonetheless limited the damages for which an employer was liable only to that part of the loss suffered by the employee in the period that they were employed by that employer. That was, then, reversed by the Compensation Act 2006, which made any given employer liable in full for the loss, regardless of their contribution to the exposure. In *Durham v BAI (Run Off) Ltd* [2012] 1 WLR 867 (the ‘*Trigger*’ cases), the Supreme Court held that standard form employers’ liability policies responded to a claim by an employer who was liable on the *Fairchild/Barker* basis, notwithstanding the fact that these policies responded on a causation basis, and that they responded in the policy years of the exposure to the asbestos, rather than the year in which the mesothelioma manifested.
790. *IEG* was decided under Guernsey law, which had no equivalent of the Compensation Act 2006. It was, therefore, common ground that, by reference to *Barker*, Zurich could only be liable for 6/27th of IEG’s liability to Mr Carré, because IEG’s liability to Mr Carré in the six Zurich policy years was 6/27th of its total liability. This was sufficient to dispose of the issue. Nonetheless, the Court went on to consider what the outcome would have been if the case was decided under the 2006 Act. The Court decided that the outcome should still be that IEG could recover only 6/27th of the settlement from Zurich, but differed as to the route to that conclusion. The minority considered that the result was achieved by construing the insurance policy, which required liability to be pro-rated between policy years.

791. Lord Mance (in the majority) took the view that, in cases under the 2006 Act, the insurer would similarly be liable for the full loss under a standard employers' liability policy. However, he noted at [65] that the:

“obvious counter-balance in this situation is to treat the insured employer, GGLCL or now IEG, as a self-insurer for the remainder of the 27-year period in respect of which it can show no insurance capable of affording contribution. Nothing obliged GGLCL to maintain its liability insurance with any particular insurer. However, in so far as it chose not to take out any insurance or chose to insure with another insurer, that should in common sense be at its risk. It should not be able to avoid the consequences of that risk by electing to pursue Zurich.”

792. IEG argued that this conclusion was inconsistent with the terms of the insurance contract. Lord Mance's response to that argument was set out at [67]:

“The answer to this in my view is that a mere need to refer to the insurance contracts is not fatal to a recoupment claim. It does not involve contradicting or acting inconsistently with such contracts. On the contrary, it is accepting their implications, and relying on matters independent of them. It is relying on GGLCL's decision not to insure with Midland for 21 years and its decision, so far as appears, to go without insurance for up to 19 of such years. These are matters that are not touched by, and are outside, the terms and scope of the Zurich and Excess policies. They ground an equity that IEG should contribute proportionately to a loss arising from risks of exposure continuing throughout the whole 27 years.”

793. In support of this conclusion, Lord Mance referred at [68] to the statement of the law proposed in *Burrows on the Law of Restitution* (3rd Ed.), where it is suggested that the general rule that restitution is unavailable where there is a valid, subsisting contract is subject to exceptions which:

“operate where, contrary to the general position, there is no policy inconsistency in granting the claimant restitution of the enrichment even though the defendant is legally entitled to it.”

794. More recently, in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718, [2019] 3 WLR 613 the Court of Appeal considered whether an insurer, liable in full to its employer insureds in respect of mesothelioma by virtue of the decisions in *Barker* and the 'Trigger' cases, could allocate claims under the reinsurance to chosen policy years, or whether it was required to spread each reinsurance claim on a *pro rata* basis across all the relevant years. At [143], Leggatt LJ expressed doubt as to whether Lord Mance's solution in *IEG* should be of broader application:

“Without seeking to question the necessity of adopting Lord Mance's approach in the IEG case, I respectfully share this last concern. While recognising a 'broad equitable right' of contribution between insurers may be regarded as an extension of existing principle, giving an insurer an equitable right to recoup part of the insured loss from its insured is not just close to inconsistent, but is clearly inconsistent, with the contract between the parties as it was interpreted by the majority in IEG. As Lord Sumption observed, at para 183:

‘If the insured is contractually entitled to the whole amount, there cannot be a parallel right of recoupment in equity on the footing that it is inequitable for the insured to have more than part of it.’”

At [144], he went on to say this:

“Although Lord Mance sought to rely on a thesis of Professor Andrew Burrows to suggest that there are exceptions to the general rule that a claimant will not be entitled to restitution where the defendant is legally entitled to the enrichment, commentators have convincingly argued that the authorities relied on do not support this thesis and that there is no legal principle which allows a claim to recoup money based on equity or unjust enrichment to override an unconditional contractual right to be paid the sum in question: see R Merkin ‘Insurance and reinsurance in the Fairchild enclave’ (2016) 36 Legal Studies 302; KV Krishnaprasad, ‘Unjust enrichment in the ‘Fairchild enclave’: International Energy Group Ltd v Zurich Insurance Plc’ (2017) 80 MLR 1150 ; R Stevens, ‘The Unjust Enrichment Disaster’ (2018) 134 LQR 574 , 597-8. As Lord Sumption put it at para 183:

‘The basis of the suggested right of recoupment is that it is unjust for the insurer to have to bear the whole loss. However, I do not understand by what standard it is said to be unjust when the parties have agreed that it should be so.’”

At [145], he added this:

“The response of allowing an equitable principle or restitutionary claim to override a valid and binding contract should in my view be regarded as an absolutely last resort, if not a counsel of despair.”

795. It is right to acknowledge, however, as Mr Foxton QC pointed out, that Leggatt LJ was not concerned with, and did not consider, the interaction of a claim in unjust enrichment based upon failure of consideration (where, by definition, some element of the parties’ arrangement has ‘gone wrong’) with a valid and subsisting contract; indeed, he did not consider **Barnes** and **Roxborough**, neither of which were cited in argument presumably for this very reason. It is also right to acknowledge that Males LJ at [43] plainly regarded Lord Mance’s judgment in **IEG** as having considerable force since he had this to say:

“Although strictly speaking this part of Lord Mance JSC’s judgment was obiter, it was clearly intended as a definitive statement of English law which would guide the insurance market in dealing with mesothelioma claims on EL policies. Mr Colin Edelman QC for Equitas did not suggest, either before the judge-arbitrator or on appeal before us, that Lord Mance JSC’s judgment should not be followed. On the contrary this submission was that it was an accurate statement of the law as it applies at the insurance level, but that a different solution to the problems thrown up by Fairchild jurisprudence is needed at the reinsurance level.”

796. That said, as Males LJ explained in the same case at [1], the ‘Fairchild enclave’ is

“an area of law within which conventional principles have had to be adjusted to take account of the implications of this decision and to ensure that the anomalies which it has thrown up do not result in injustice – or, as Lord Sumption JSC, taking a less

sanguine view, was to describe the process, in which the law has moved from ‘each one-off expedient to the next’, generating ‘knock-on consequences which we are not in a position to predict or take into account’: see his dissenting judgment in [IEG], para 114.”

797. Drawing these threads together, in my view, the general rule – that where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie while the contract is subsisting – continues to operate but subject to certain exceptions. Those exceptions include that applicable in *IEG* which was developed in response to the unique difficulties thrown up by mesothelioma claims. In my view, it is best confined to the *Fairchild* enclave or cases where similar policy considerations arise. As I see it, it would be wrong to draw from *IEG* a principle of universal application.
798. As to *Roxborough* and *Barnes*, in both of those cases, the claimant was able to recover in unjust enrichment because the basis on which it had performed its obligations had fallen away for reasons outside the control or contemplation of the parties. The present case, by contrast, does not concern an external state of affairs which has either failed to materialise or (if it did exist) has failed to sustain itself. Rather, it concerns the failure of the parties to perform the part of the contract in respect of which the payment was made. In such circumstances, I can see no principled reason for departing from the orthodox approach.
799. Where the basis for payment fails, there is no need to turn to the law of unjust enrichment in order to achieve a fair result: if that failure is caused by the enriched party’s breach of contract, a claim in damages will lie; if the failure is caused by the party which has given the relevant consideration, then, it is at fault and there is no real injustice in barring recovery. There is nothing exceptional about this case which justifies a departure from the general rule. It follows that if, contrary to what I have decided, there was a concluded 2009 Shareholders’ Agreement, then, I would likely have gone on to decide that the Taruta Parties were unable to recover any sums paid in accordance with that agreement through the unjust enrichment route.
800. Turning to the issue which matters for present purposes, the position where there is no subsisting contract in place (in the present case, the 2009 Shareholders’ Agreement), it is not in dispute that, as made clear in *Goff & Jones* at paragraph 1-09 a claim in unjust enrichment requires a claimant to establish “*that the defendant was enriched, that his enrichment was gained at the claimant’s expense, and that his enrichment at the claimant’s expense was unjust*”.
801. In the present case, the controversy is only as to the third of these aspects: whether, as Lord Steyn put it in *Banque Financiere de la Cite SA v Parc (Battersea) Ltd* [1999] 1 AC 221 at page 227, “*Restitutionary liability is triggered by a range of unjust factors or grounds of restitution*”, which in the present case entails it to be decided whether there has been a total failure of consideration in respect of part of the US\$950 million paid under the Castlerose SPA.
802. Although Mr Foxton QC’s primary submission was that this question should be answered on the assumption that the Gaiduk Parties were under binding contractual obligations to transfer the interests in NET and Agro Holding under the alleged 2009 Shareholders’ Agreement, his argument being that consideration for the promise to

effect such transfers as contained in the alleged 2009 Shareholders' Agreement had totally failed because the Taruta Parties received no part of those interests, plainly this is not a case which can prevail in view of my earlier conclusion that such no contract came into existence.

803. The focus must, therefore, be on Mr Foxton QC's alternative submission, which was that, if the Gaiduk Parties were not subject to any contractual obligation to transfer the interests in NET and Agro Holding, then, still the Taruta Parties are entitled to bring an unjust enrichment claim on the basis that the US\$75 million and US\$7.5 million transferred to the Gaiduk Parties in respect of these interests were made in anticipation of, and on condition that, binding contracts for the transfer of those interests would subsequently be concluded. No such contracts having been concluded, Mr Foxton QC submitted, consideration should be regarded as having totally failed so as to mean that unjust enrichment is appropriate in this case.
804. In this regard, Mr Foxton QC cited a number of authorities which he submitted illustrated that there can be a total failure of consideration in a case where the claimant has transferred money or provided services in anticipation of a contract being concluded, the first of these being *Chillingworth*. In that case, a purchaser agreed to buy land subject to a proper contract being prepared by the vendor's solicitors, and paid a 5% deposit to the vendor. Although a contract was drawn up, the purchaser changed his mind, and withdrew from the sale. His claim to recover the deposit succeeded, Sargent LJ explaining as follows at pages 114-115:

"Then on the basis that the contract that the contract is conditional, what is the result of the payment of the deposit? One obvious object of such payment was that it should form a deposit in the ordinary way if and when the contemplated definite contract was subsequently signed and exchanged. Is it necessary to assume any additional object, such as that the purchaser was giving an interim guarantee that he would enter into a reasonable contract? In my judgment that is not common sense. The parties were not agreeing that they would enter into a reasonable contract, but that they would enter into such a contract, if any, as they might ultimately agree and sign. I look on the whole payment as being sufficiently explained as being an anticipatory payment intended only to fulfil the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at."

805. Reference was also made to three further cases. The first was *Guardian Ocean Cargoes Ltd v Banco Do Brasil SA (Nos 1 and 3)* [1994] 2 Lloyd's Rep 152, a case in which the Court of Appeal upheld a decision by Hirst J that payments made by the claimants to the defendant bank had been in anticipation of a refinancing deal being concluded between the parties, "so that if no deal transpired then naturally the bank would have no right to retain the money", as Saville LJ put it at page 158.
806. The second was *Cobbe v Yeoman's Row*, in which Lord Scott stated as follows at [42]:

"It seems to me plain that Mr Cobbe is entitled to a quantum meruit payment for his services in obtaining the planning permission. He did not intend to provide his services gratuitously, nor did Mrs Lisle-Mainwaring understand the contrary. She knew he was providing his services in the expectation of becoming purchaser of the property under an enforceable contract. So no fee was agreed. In the event the expected contract did

not materialise but a quantum meruit for his services is a common law remedy to which Mr Cobbe is entitled.”

807. The third was a decision of the New South Wales Court of Appeal in ***Nu Line Construction Group Pty Ltd v Fowler*** [2014] NSWCA 51, in which the appellant successfully reclaimed payments made in anticipation of the conclusion of a contract for the sale of land. In that case, Young AJA observed as follows at [202(a)]:

“... the parties were both people of commerce, unrelated, and such people do not pay hundreds of thousands of dollars out of the goodness of their hearts, they expect some commercial return and when the commercial return is not forthcoming there is no reason why they should not demand their money back”

808. It was Mr Foxton QC’s submission that in the present case it cannot sensibly be disputed that the Taruta Parties transferred US\$75 million and US\$7.5 million to the Gaiduk Parties in the expectation of receiving the interests in NET and Agro Holding in return. He highlighted, indeed, that in Avonwick’s Reply at paragraph 15.3 it was expressly acknowledged that the US\$950 million transferred to Avonwick included *“US\$200 million which was intended to reflect the value of (i) Mr and/or Mrs Gaiduk’s direct or indirect interests in NET and Agro Holding ... ”*.

809. Accordingly, Mr Foxton QC submitted during the course of his oral closing submissions, if it is asked on what basis the US\$950 million was transferred, the answer is that it was not limited to an analysis of what obligations were owed under the Castlerose SPA since the claim in restitution not only permits a wider inquiry than that but also enables proper account to be taken of the fact that the US\$82.5 million *“that came Mr Gaiduk’s way ... was not paid, and he knows and does not deny it, was not paid for the interest in IUD”*. This means, Mr Foxton QC submitted, that *“if Mr Taruta is to get nothing back in respect of the assets for which it was paid then equally there is no reason why he cannot demand his money back”*.

810. There is, however, a difficulty with this submission and so with the unjust enrichment claim brought against the Gaiduk Parties in the present case. This is that, as I shall explain, I struggle to see that there has been the total failure of consideration which is alleged, and so that there is the ‘unjust factor’ which is suggested and which is necessary if the unjust enrichment claims are to succeed.

811. Looking at the Castlerose SPA in isolation, Dargamo was entitled to the transfer of half of Avonwick’s shares in Castlerose, in exchange for a payment of US\$475 million (half of the total of US\$950 million). This is what happened. Mr Calver QC referred in this context to the fact that Clause 2.4 of the Castlerose SPA described the *“Consideration”* as being payable in respect of *“the Shares”* and as being set at US\$950 million, with *“the Shares”* defined in Schedule 6 as being the shares in Castlerose.

812. There is no reference, Mr Calver QC pointed out, to any obligation in respect of any asset other than the Shares. The fact that the parties may have had some non-binding extra-contractual understanding or expectation of the sort alleged by the Taruta Parties is immaterial since, as Mr Calver QC put it, there is no principle of English law which permits the Court to find that sums were paid in respect of some understanding which was not an obligation under the relevant contract.

813. Furthermore, although Mr Calver QC was just about prepared to accept (albeit that he expressly stated that he was not making an “*express concession*”) that, if the alleged 2009 Shareholders’ Agreement had been entered into, it would probably be possible to apportion in the manner suggested by Mr Foxton QC (albeit that Mr Calver QC’s position was that the existence of that contract would preclude an unjust enrichment claim, in any event), it was Mr Calver QC’s submission that the position is different where, as in the present case given what I have decided concerning the alleged 2009 Shareholders’ Agreement, the Taruta Parties are unable to point to another contract in aid of the apportionment exercise.

814. I agree with Mr Calver QC about this, although I acknowledge (as did Mr Calver QC in advancing his submissions) that, as explained in *Goff & Jones* at paragraph 12-24, “*the courts have not adopted a literal approach*” to the general requirement that there should be a total failure of consideration in that it may be possible to ‘sever’ the payment and allocate parts of it to distinct elements of the benefit in return for which it was made. As Stadlen J put it in *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [263]:

“Where it is possible to apportion different parts of a contractual price to the performance of different contractual duties under a contract it is not in my judgment inconsistent with the proposition that there may be a total failure to perform contractual duties in respect of which payment is due that there has been performance of part or all of contractual duties in respect of which the payment is not due.”

815. Stadlen J referred in this context to *Goss v Chilcott* [1996] AC 788, in which the capital sum advanced under a defective loan agreement was held to be recoverable because consideration for it had wholly failed. There had been two repayments of interest to the lender, but the Privy Council held that as their function had been to pay for the use of the sum rather than for the advance itself, the two repayments of interest did not prevent a finding that there had been a total failure of consideration for the capital sum advanced. However, Lord Goff said this in *obiter dicta* at page 798E-F:

“... even if the part of the capital sum had been repaid, the law would not hesitate to hold that the balance of the loan outstanding would be recoverable on the ground of failure of consideration; for at least in those cases in which apportionment can be carried out without difficulty, the law will allow partial recovery on this ground.”

816. In *Giedo* at [297], Stadlen J took from this statement the proposition that:

“the question whether apportionment can be carried out turns not on whether apportionment is provided for either expressly or even by implication by the contract but rather on whether as a matter of practical common sense the court considers that it is able to apportion on objective analysis of the nature of the contract and the consideration”.

817. It was Mr Foxton QC’s submission, based on this passage in *Giedo*, that apportionment does not entail a process of simply construing a contract or identifying obligations within a contract, and that a wider analysis is appropriate provided that practical common sense is applied in engaging in the apportionment process. On that basis, it was Mr Foxton QC’s submission in the present case that it is possible to do this for two reasons.

818. First, Mr Foxton QC pointed to the fact that MOU 4 (by which Mr Foxton QC meant the 15 December Draft, although the point applies also to the 18 December Draft) recorded that US\$15 million was payable by the Taruta and Mkrtchan Parties in respect of Agro Holding. On that basis, Mr Foxton QC suggested, it is perfectly possible for the Court to apportion US\$7.5 million of the total monies paid by the Taruta Parties to the acquisition of this interest. Secondly, Mr Foxton referred to the sums payable for NET, suggesting that it is clear that “at least \$75m” of the monies transferred by the Taruta Parties was in respect of the interest in NET. The difficulty with Mr Foxton QC’s reliance on both of these matters is that they entail reliance on it having been established that the alleged 2009 Shareholders’ Agreement was, in fact, entered into.
819. There may well, indeed, be a prior difficulty with Mr Foxton QC’s approach, although it is not a point on which it is necessary for me to state a concluded view. This is that it needs to be appreciated that what Stadlen J had to say in *Giedo* as relied upon by Mr Foxton QC in support of the proposition that it is permissible to engage in a “wider analysis” was made in the context of a case in which all the relevant obligations in consideration for which the price was paid were obligations which were contained within the contract. Although the obligations were not expressed as being referable to particular components of the price, the case did not, therefore, entail having to look at whether other obligations were owed outside of those contained in the contract.
820. Nor is the difficulty facing the unjust enrichment claims confined to these matters since the authorities relied upon by Mr Foxton QC in support of his submission that there need not be a total failure of consideration if there can be apportionment are themselves all cases in which there was no contract in place at the time that the relevant payment was made. In the present case, in contrast, the monies now sought to be recovered by way of the unjust enrichment claims were paid pursuant to a contract, namely the Castlerose SPA. The fact that it was anticipated that other contractual arrangements would be entered into thereafter does not alter the fact that what was paid was paid pursuant to an existing contract and not, as for example in the case of a deposit, merely in anticipation that a contract would be entered into.
821. *Chillingworth, Cobbe* and *Nu Line* are essentially deposit or deposit-type cases, where monies were not paid under any contract but gratuitously. As for *Guardian Ocean*, in particular, it should be appreciated that this was a case in which Hirst J had made a finding, at pages 157-158, that the claimant charterers’ payment of US\$600,000 expressed as payments under certain promissory notes were not, in fact, intended to be payments under those promissory notes and were not understood to be such payments. It follows that it was not a case in which monies were paid pursuant to any contract. It further follows that it was not a case like the present case, in which the monies were paid pursuant to the contractual obligations contained in the Castlerose SPA. The present case, in contrast to *Chillingworth, Cobbe, Nu Line* and *Guardian Ocean* involved payment which was not gratuitous but which was required by a contract. This is an important (indeed, vital) point of distinction.
822. I agree with Mr Calver QC when he submitted that the Taruta Parties’ case requires the Court to decide that, in respect of US\$75 million and US\$7.5 million, Avonwick has not done what it agreed to do in exchange for the money, yet all that Avonwick agreed to do in the Castlerose SPA was transfer the shares in Castlerose.

823. It is not appropriate to do what Mr Calver QC described as the Taruta Parties inviting the Court somehow to look through the terms of the Castlerose SPA and decide in some abstract way that they have paid for something other than the shares in Castlerose. The truth is that, without the alleged 2009 Shareholders' Agreement being found to exist, there is simply no basis on which it can be concluded that any part of the consideration agreed in the Castlerose SPA has failed. As Mr Calver QC also submitted, this is not a surprising result since, if parties design a bargain in a particular way and conclude a binding contract on that basis, it is not, then, open to them to claim a restitutionary remedy.
824. It follows, for these reasons, that the Taruta Parties' unjust enrichment claims against the Gaiduk Parties must be rejected. I need not, in the circumstances, address Mr Calver QC's additional reliance on the fact that the Castlerose SPA contains an 'entire agreement clause' (Clause 2.4) or his argument that, in relation to Agro Holding, it was Mr Taruta's refusal to perform his side of the SPA with Mrs Gaiduk which led to the interest not being transferred to him. These are points which Mr Foxtton QC submitted were bad points but I need not deal with them.
825. It is also unnecessary to go on to consider a further issue which was raised, namely whether, had they otherwise have been viable, the unjust enrichment claims would have been time-barred. I shall, however, do so, my conclusion being that under English law (the law which I have concluded, and which Mr Calver QC effectively conceded, is applicable) this would not have been the case.
826. It is common ground that the limitation period for a claim in unjust enrichment is six years pursuant to s. 5 of the Limitation Act 1980. This was made clear by Lord Mance in *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc* [2015] UKSC 38, [2015] 1 WLR 2961 at [25], as follows:
- "Since Aspect's cause of action arises from payment and is only for repayment, it is, whether analysed in implied contractual or restitutionary terms, a cause of action which could be brought at any time within six years after the date of payment to Higgins, ie after 6 August 2009. For this purpose an independent restitutionary claim falls to be regarded as 'founded on simple contract' within section 5 of the Limitation Act"*
827. The Gaiduk Parties' contention was that this time period started running from the date when the Taruta Parties made the relevant payment to Avonwick, which was on 30 December 2009. I do not agree with this, however, since, although I recognise that the Taruta Parties' primary position cannot be correct (namely that their cause of action in unjust enrichment did not arise until the time when the Gaiduk Parties should have transferred the interests in NET and Agro Holding to the Taruta Parties under the alleged 2009 Shareholders' Agreement) since I have decided that the alleged 2009 Shareholders' Agreement did not come into existence, nonetheless I agree with Mr Foxtton QC when he submitted that, on the basis that the Gaiduk Parties were not under any contractual obligation to transfer the interests in NET and Agro Holding, time did not start running until the condition upon which the Taruta Parties transferred the monies (namely that binding contracts for the transfer of these interests would be concluded) failed to materialise.

828. I agree with Mr Foxton QC that the date when the Taruta Parties made the payment to Avonwick cannot be the correct date for the purposes of limitation in circumstances where the ‘unjust factor’ (the failure of consideration) did not arise at that point but at a later stage (as must inevitably be the position). As *Goff & Jones* put it at paragraph 33-11:

“Limitation periods generally run from the date when the claimant’s cause of action accrues, and a cause of action in unjust enrichment normally accrues at the date when the defendant receives a benefit from the claimant ... However, this rule probably does not apply in cases where benefits are transferred on a basis that subsequently fails: here the cause of action is not complete until the failure of basis occurs, and so this is most probably the date at which time starts to run.”

829. Had the unjust enrichment claims succeeded in this case, it would have been on the basis that what was expected to happen (in terms of entering into subsequent binding agreements) did not happen. At the time that the payment was made, on 30 December 2009, there had yet to be the failure of consideration which gave rise to the entitlement to claim in restitution. It follows that the cause of action cannot by that stage have accrued.

830. Support for Mr Foxton QC’s alternative position is also to be found in *Nu Line*, in which Young AJA observed at [193] that it “*is very difficult to put a time on when something doesn’t happen*”, before going on to say this at [194]:

“... one must be looking to the time when both parties would be reasonably considered to have taken the position that the arrangement between them was finally and definitely not going to proceed. Only at that time did it, to use the modern jargon, become unjust, or, to use the ancient jargon, become inequitable for the person who received the money to retain it.”

831. Barrett JA in the same case stated as follows at [108]:

“... a shared intention to enter into a contract should be taken to have ended if a contract has not been concluded by the time impliedly envisaged by the shared intention and there is, in an objective sense, no sufficient evidentiary basis for a finding that the mutual commitment continued beyond that time. Unless the parties’ conduct shows some contrary consensus, the envisaged time for the making of the contract will be the time that is reasonable in the circumstances of the case.”

832. These are observations which I find persuasive. They strengthen my view that, as a matter of principle, Mr Foxton QC’s submissions must be right, and so that time for limitation purposes starts to run in a case such as the present not when the payment is received but when it became inequitable (or unjust) for the recipient to retain the money received.

833. In this case, it was Mr Foxton QC’s submission that a period of between 18 months and 3 years was equally a reasonable time for the parties to conclude contracts for the transfer of the interests in NET and Agro Holding. I agree with Mr Foxton QC about this. It is a timescale within which the Gaiduk Parties, in fact, made transfers to the Mkrchan Parties, which, as Mr Foxton QC submitted, no doubt reflected the

complexity of the arrangements which had to be put in place for each of the relevant transfers.

834. Mr Taruta, indeed, alluded to such complexity in this cross-examination exchange:

“Q. Did you want those assets to be transferred to you quickly or did you not really care when they were transferred to you?”

A. Time-wise I understood it was a very complex matter, I mean all those transactions. So my understanding was that there were some assets that it would be more difficult to transfer, others that would be more easy to transfer . But my understanding was that over the next two to three years all of them would be transferred.”

Thus, for example, the transfer by the Gaiduk Parties to the Mkrctchan Parties of a 50% interest in Transport Holding took place pursuant to an SPA dated 24 July 2012, some 2½ years after the date of the alleged 2009 Shareholders’ Agreement. It is also not without significance that on 27 April 2011 Mrs Gaiduk and Mr Taruta concluded an SPA for the sale of an interest in Agro Holding. I agree with Mr Foxton QC when he submitted that, in the circumstances, it would be wrong to treat time as having started to run before then. On that basis, the Taruta Parties’ claims having been brought on 30 November 2016, the unjust enrichment claims are not time-barred.

835. Notwithstanding my rejection of Mr Calver QC’s time-bar submissions, it remains the case, however, that the unjust enrichment claim against the Gaiduk Parties must fail for reasons which I have previously given.

Conclusion

836. In conclusion, therefore, the Taruta Claims against the Gaiduk and Mkrctchan Parties must fail. It follows that Mr Mkrctchan’s contingent counterclaims against Mr Taruta do not arise since those claims were only advanced on the premise (disputed by the Mkrctchan Parties and rejected by me for reasons which have been given) that the alleged 2009 Shareholders’ Agreement was entered into.

The Taruta Claims against Prandicle

837. I turn, next, to the claim brought by the Taruta Parties (strictly, Mr Taruta and Dargamo) against Prandicle, together with the contingent additional claim made by Prandicle against the Second Third Party, Roselink.

838. What follows, to some extent, echoes what has already been set out, but it is helpful to draw the threads together nonetheless. Prandicle, it will be recalled and Mr Smith QC at all times made clear, is the registered owner of the shares in NET, the Ukrainian company which owns the Hyatt Hotel in Kiev. Specifically, Prandicle became the owner of that shareholding after entering into the Roselink-Prandicle SPA on 11 September 2012.

839. The background to Prandicle’s entry into that agreement dates back to the early 2000s, when Mr Dubyna lent Mr Taruta, Mr Gaiduk and Mr Mkrctchan US\$4.5 million.

840. Subsequently, in 2005, Mr Dubyna agreed to become the Chief Executive Officer of one of the main IUD subsidiaries, F. Dzerzhinsky Dneprovsky Iron & Steel Works

(‘DI&SW’), which was then loss-making. It was agreed, in doing so, that part of his remuneration would be performance-related.

841. Mr Dubyna was successful in that role, turning the company’s fortunes and contributing in other ways to the development of the IUD group. However, two years later, in December 2007, he was appointed by Yulia Tymoshenko, then Prime Minister of Ukraine, to the role of the Chief Executive Officer of Naftogaz, the state body responsible for securing the supply of energy to Ukraine and its distribution.
842. At about the same time as Mr Dubyna was leaving the IUD group, Mr Gaiduk announced that he wanted to exit IUD. This led to a meeting in Mr Gaiduk’s office on 5 January 2008 attended by Mr Taruta, Mr Gaiduk, Mr Mkrtschan and Mr Dubyna, when it was discussed how much was owed to Mr Dubyna and who would be responsible for payment of the monies due to him and in what proportions. This is what resulted in the Dubyna MOU.
843. Three years later, in March 2011, having had nothing to do with any ‘divorce’ negotiations between the Partners and, specifically, not having seen any of the versions of the MOUs produced in 2008 and 2009, Mr Dubyna raised with Mr Gaiduk the question of payment of monies due to him.
844. Mr Dubyna had, in the meantime, suffered from ill health and been forced to leave his position at Naftogaz when there was a change in government in early 2010, after which he had to face criminal charges laid against him by that new government.
845. According to Mr Dubyna, and I accept, Mr Gaiduk proposed to him that he should accept a 24.5% shareholding in NET. Mr Dubyna says, and again I accept, that he reluctantly agreed to the proposal, and that Mr Petrov and Mr Kupchyshyn were tasked by Mr Gaiduk with arranging the sale of the shares to Mr Dubyna for about US\$6.5 million, the bulk of which Mr Gaiduk agreed to lend to Mr Dubyna.
846. Mr Petrov suggested that Mr Dubyna should hold the shares in NET through an offshore corporate structure. Mr Dubyna agreed to this but, as he had no experience of offshore company formation, it was left to Mr Petrov and Mr Kupchyshyn to set up the structure. They acquired Blake for Mr Dubyna at the end of March 2011, and acquired Prandicle for Blake in July 2011.
847. In early 2012 Mr Dubyna asked Mr Davydenko to assist with the acquisition of the NET shareholding by Prandicle. Mr Davydenko was involved from March 2012, liaising with Mr Petrov, conducting searches of various registers and drafting documents. So it was that, as previously mentioned, on 11 September 2012, the Roselink-Prandicle SPA was entered into, with Prandicle shortly thereafter becoming the registered holder of the shares in NET.
848. The Taruta Parties’ case is that Mr Gaiduk’s sale of the 24.5% shareholding in NET to Mr Dubyna was a disposal which it was not open to him to make in view of the obligations which were assumed in the alleged 2009 Shareholders’ Agreement, specifically the obligation to sell 50% of the shares in NET to the Taruta Parties, with the consequence that the Taruta Parties have a proprietary interest in those shares, that Prandicle is liable in restitution and the Roselink-Prandicle SPA should be set aside.

849. It will be immediately apparent, in the circumstances, that this is a case which cannot succeed since there is no issue that, were the Court to have decided that there was not the 2009 Shareholders' Agreement alleged by the Taruta Parties, then, that case must fail. That is the position, irrespective of whether it is English law or Ukrainian law which is applied.
850. It is, accordingly, unnecessary to address other issues, although it is convenient to consider what Mr Dubyna (and Prandicle) knew when entering into the Roselink-Prandicle SPA since it has a bearing on the limitation position which it is appropriate to address given that, as will shortly appear, I am satisfied that the claims against Prandicle are not claims which, even if they otherwise had merit, would, in any event, meet with success.
851. There is absolutely no evidence that Mr Dubyna knew of Mr Taruta's interest in the shareholding in NET. I see no reason to doubt Mr Dubyna's denial that he did. Indeed, as Mr Smith QC somewhat wryly observed, it is, perhaps, not surprising that Mr Dubyna lacked such knowledge given that individuals much closer to Mr Taruta such as Ms Bashynska and Ms Morozova apparently also did not know about his interest in NET. I repeat that Mr Dubyna had nothing to do with any 'divorce' negotiations between the Partners. He did not see any of the versions of the MOUs produced in 2008 and 2009, including those produced in December 2009.
852. Although Mr Foxton QC sought to rely upon various press articles which alluded to an interest, there is no evidence that Mr Dubyna saw any of these. There is no equivalent to the January 2013 article in the Kiev Post to which I shall refer in a moment and in which Mr Taruta himself was interviewed. Indeed, several of the articles prayed in aid by Mr Foxton QC post-date Prandicle's acquisition and are, as such, of no assistance to the case which he was advancing.
853. I might add that what I have had to say here concerning Mr Dubyna's knowledge is an answer also to an alternative unjust enrichment case advanced on the Taruta Parties' behalf which does not depend on the alleged 2009 Shareholders' Agreement having been entered into. It is unnecessary to expand on the nature of that alternative case since, as apparently recognised by the Taruta Parties, even if it might otherwise have been viable, it is not a case which can succeed in the light of Mr Dubyna's state of knowledge.
854. As to limitation, although ultimately nothing turns on which law is applicable since, either way, the claims are time-barred, I am satisfied that, as Mr Smith QC submitted, the relevant law which falls to be considered is Ukrainian law rather than English law. This is because, even if I had concluded that the alleged 2009 Shareholders' Agreement which form the foundation of the claims against Prandicle was governed by English law (contrary to what I have decided), there would still be the difficulty that Prandicle (like Roselink and Dargamo) was not a party to that agreement. There is no basis on which it can properly be concluded, in such circumstances, that English law is applicable, Prandicle, Roselink and Dargamo all being Cypriot companies whose owners (ultimately and indirectly), Mr Dubyna, Mr Taruta and Mr and Mrs Gaiduk, are all Ukrainian citizens who reside in Ukraine.
855. The essential submission made by Mr Smith QC in this context, which I accept, is that Prandicle's ownership of its NET shareholding has been public knowledge for an

appreciable time and has never previously been challenged by the Taruta Parties before the commencement of these proceedings. I am clear that, as Mr Smith QC submitted, Mr Taruta should be regarded as having become aware of Prandicle's acquisition of the shares in NET and that Prandicle was owned by Mr Dubyna by January 2013 at the latest when he saw, as he must have done, an article in the Kiev Post based on an interview which he himself gave whilst in Davos, in which Mr Dubyna was described as the ultimate owner of NET.

856. I would add that I reject Mr Taruta's evidence that he continually raised the question of the shares in NET with Mr Gaiduk, specifically the suggestion that "*naturally at all the meetings the first I mentioned was Hyatt*". He did not say this in his witness statements. Nor was it something which Mr Gaiduk agreed was said. Nor is it corroborated by any of the documents.
857. Similarly, I consider his explanation that his patience with Mr Gaiduk was "*wearing thin*" by 2012 and that he told Mr Gaiduk in May 2012 and again in October 2012 that he would not commence proceedings against him because their daughters were friends to be implausible. In any event, as Mr Smith QC pointed out, even if that was Mr Taruta's thinking, it can have no bearing on any decision not to proceed against Prandicle (and so, indirectly, Mr Dubyna). The truth is that, other than the suggestion that Mr Taruta did not know of Mr Dubyna's ultimate interest in Prandicle until after the proceedings commenced, a suggestion which I have rejected, no justification has been put forward as to why no claim was asserted as against Prandicle until so late in the day.
858. As has previously been seen, the three-year limitation period under Ukrainian law pursuant to Article 257 begins to run, by virtue of Article 261(1), from the date when a claimant became aware or could have become aware of the relevant violation of his right, and of the identity of the person who committed the violation.
859. It is unnecessary that I set out the detail of these various provisions or how the various claims are put. However, it is common ground that this three-year limitation period applies to the Taruta Parties' proprietary claims for an order for the transfer of the NET shares under Article 388, consequential loss in the form of lost profits under Article 390 and an order for the transfer of the NET shares under Article 400, as well to the Taruta Parties' unjust enrichment claim under Article 1212 and the Taruta Parties' claims pursuant to Articles 215 and 216 for a declaration that the Roselink-Prandicle SPA is void or voidable and invalid.
860. There is disagreement between the Ukrainian law experts as to whether the three-year period applies to proprietary claims under Article 392, Mr Foxton QC highlighting how in the experts' joint memorandum three of the Ukrainian law experts agreed that no limitation period applied to such a claim. This, Mr Foxton QC submitted, is consistent with the practice of the Supreme Court of Ukraine, as illustrated by a Resolution of the Plenum of High Specialized Court dated 7 February 2014 and certain decisions of 6 March 2018, 21 March 2018 and 30 January 2019.
861. The rationale, Professor Kisil (the expert instructed by Prandicle itself) explained in his report, is "*that, according to the remedy under Article 392, if the claimant's right of ownership is disputed or not recognized, that is not a singular event in time but rather a continuous violation of the claimant's rights*". Mr Beketov considered that, as a

result, “a person has the right to file a claim for recognition of his property rights at any time”. Mr Foxton QC understandably, in the circumstances, sought to suggest (as had Mr Dudnikov in cross-examination) that Mr Aloshyn’s contrary view should not be accepted.

862. However, I remind myself that, as previously explained, resolutions are not binding but are merely persuasive. Furthermore, as Mr Smith QC pointed out and as Mr Aloshyn explained when he described the issue as being “quite disputable”, the guidance given in the 2014 Resolution has since been inconsistently applied by the Supreme Court of Ukraine, with some decisions adopting the guidance and others not.
863. On the face of it, the Resolution provides significant support to Mr Foxton QC’s position. Mr Aloshyn and Mr Likarchuk both concluded, however, that the Resolution was wrong as a matter of principle under Ukrainian law, in particular because a claim under Article 392 is not specified in Article 368 as being a claim to which no limitation period is applicable, and that the inconsistent practice of the Supreme Court with regard to the application of the three-year limitation period to claims under Article 392 indicates that there is no settled practice in favour of the position stated by the Plenum. Their view is that claims under Article 392 should be treated as being subject to the general three-year limitation period in Article 257.
864. As for Professor Kuznetsova, she did not distinguish Article 392 from the other Articles relied on by the Taruta Parties with regard to their proprietary claim, explaining as follows:
- “Since none of the claims for the protection of ownership rights and other rights in rem in Chapters 29-31 CC are one of the claims provided for in Articles 258(2)-(4) to which a special limitation period applies, the general three-year limitation period provided for by Article 257 CC applies to them.”*
865. For my part, I can see no reason in principle why the three-year time-bar should apply only to certain types of proprietary claim and not to all types. That would accord with Professor Kuznetsova’s view and chimes also with the views expressed by Mr Aloshyn and Mr Likarchuk. I proceed, on the basis, therefore, that the three-year limitation period applies across the board.
866. It follows from what I have previously had to say, that the claims under Ukrainian law, however they are put, are to be regarded as time-barred. The Taruta Parties’ Claim Form in respect of their Additional Claims was issued on 30 November 2016. As a result, the Ukrainian law claims are time-barred if they accrued prior to 30 November 2013.
867. Mr Foxton QC sought to argue that the January 2013 article in the Kiev Post referring to Prandicle as belonging to Mr Dubyna ought to be discounted as a means of knowledge on Mr Taruta’s part because the Kiev Post is an English language publication and because, Mr Foxton QC suggested, it would not be reasonable to expect him to find and read it.
868. This was an unrealistic submission, however, given that the piece involved an interview which Mr Taruta had himself given. It must have been brought to his attention in such circumstances.

869. Equally unrealistic, in my view, was Mr Foxton QC's submission that Mr Taruta's knowledge is not relevant for the purposes of Article 261 as far as Dargamo's claims against Prandicle are concerned.
870. Mr Foxton QC relied in this respect on the opinion of Professor Kisil that, under Ukrainian law, any links between the ultimate beneficial owner and the company are not considered "at all" in the context of attribution of knowledge, the pool of relevant individuals being limited to directors and persons authorised by a power of attorney or incorporation documents – a view also shared by Mr Beketov. I do not, however, find this a compelling position to adopt in the circumstances of the present case: Mr Taruta's knowledge is, quite obviously, attributable to Dargamo.
871. Nor, in my view, is this an appropriate case in which to disapply the three-year limitation period pursuant to Article 267(5). As previously explained, this is not a case in which this would be justified or warranted.
872. It is unnecessary, in the circumstances, to resolve a dispute concerning the claims which were made under Articles 215 and 216. These were claims which were introduced into the Particulars of Additional Claim by amendment at a PTR which took place in July 2019, the parties agreeing that there should be permission to amend on the basis that the question of whether permission should be granted pursuant to CPR 17.4(2) (so as to enable the Taruta Parties to benefit from the doctrine of 'relation back' for limitation purposes) would be left over to trial. Since I have decided that these claims (like the other Ukrainian law claims) are time-barred taking the relevant date as being 30 November 2016, it makes no difference whether the Taruta Parties can establish either that the amendment does not raise a new claim for the purposes of CPR 17.4(2) or, if it does, that the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the Taruta Parties had already claimed a remedy in the proceedings. Accordingly, I say nothing more on this topic.
873. As to English law, a claim will be barred by laches where "*having regard to the delay, its extent, the reasons for it and its consequences, it would be inequitable to grant the claimant the relief he seeks*": *P&O Nedlloyd BV v Arab Metals Co (No. 2)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288, per Moore-Bick LJ at [61]. Earlier, at [51], he observed that periods of significantly less than six years have been sufficient to engage the doctrine of laches. However, as he went on to explain, this provides little or no guidance as to whether it would be unjust to grant equitable relief in the specific circumstances of any given case:

"However, although the cases to which Mr Davey drew our attention demonstrate that specific performance may be refused on the grounds of laches well before the expiration of the ordinary six-year limitation period, I do not think they provide as much assistance as he suggested. In some of them (Cowell v Watts 2 H&T 224, Pollard v Clayton 1 K&J 462 and Glasbrook v Richardson 23 WR 51), the court was prepared to infer that the defendant had altered his position on the understanding that he would not be required to perform the contract. In such cases it is not difficult to see why the court should have considered that relief should be withheld on equitable grounds regardless of any limitation period. In others (Barclay v Messenger 43 LJ Ch 449 and perhaps Watson v Reid 1 Russ & My 236, though the report of the case is so brief as to be uninformative) greater emphasis is placed on the plaintiffs failure to act with the necessary diligence, but in the absence of any discussion of this question I do not think that one can derive

any principle from these decisions other than that the court will withhold relief whenever it considers that it would be unjust in all the circumstances to grant it.”

874. Whilst Moore-Bick LJ plainly here meant that the length of delay cannot itself be determinative, in the following paragraph, at [52], he noted that:

“The equitable doctrine of laches ... provides the court with ample power to refuse relief when delay on the claimant’s part would make it inequitable to grant it and I should be surprised if there were many cases in which, in the absence of fraud, the court would be willing to grant relief by way of specific performance if the claim had not been made within six years after the contract was due to be performed.”

875. That said, it is necessary to identify some consequence of the delay which justifies a refusal to grant the relief. *Snell* at paragraph 5-011 states as follows:

“That doctrine is not based, however, on the mere fact of delay. Something more than mere delay, more even than extremely lengthy delay, is required before B will be denied equitable rights under the doctrine of laches, as the question is whether the lapse of time has given rise to circumstances that now mean it would not be inequitable to deny relief to B. The principal example occurs where, perhaps as a result of having relied on a mistaken belief that B has no relevant right, A would now suffer an irreversible detriment, as a result of B’s delay, if B were permitted relief.”

876. Thus, in ***Paddico (267) Ltd v Kirklees Metropolitan Council*** [2014] UKSC 7, [2014] AC 1072 Baroness Hale stated as follows at [31]:

“... the general principle is that there must be something which makes it inequitable to enforce the claim. This might be reasonable and detrimental reliance by others on, or some sort of prejudice arising from, the fact that no remedy has been sought for a period of time; or it might be evidence of acquiescence by the landowner in the current state of affairs...”

877. As regards acquiescence, *“the essential ingredients of the defence are ... by no means clear”*: see *Chitty* at paragraph 28-137. In ***Jones v Stones*** [1999] 1 WLR 1739, Aldous LJ quoted (at 1744) from ***Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note)*** [1982] QB 133, in which Oliver J (as he then was) stated that the doctrine:

“.... requires a very much broader approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.”

878. More recently, in ***Fisher v Brooker*** [2009] UKHL 41, [2009] 1 WLR 1764, Lord Neuberger queried at [62] whether acquiescence:

“adds anything to estoppel and laches. The classic example of proprietary estoppel, standing by whilst one’s neighbour builds on one’s land believing it to be his property, can be characterised as acquiescence ... Similarly, laches, failing to raise or enforce an equitable right for a long period, can be characterised as acquiescence.”

879. Consistent with this, it seems to me that acquiescence is not a sufficient basis for engaging the doctrine of laches. When a party fails to assert or enforce a right for many years, it will almost invariably be the case that they may be taken to have ‘acquiesced’ in the face of the other party’s failure to perform. However, it cannot follow that the claimant will be denied their rights irrespective of whether this acquiescence has caused prejudice. As Sir Kim Lewison, sitting in the Privy Council, put it in *Cenac v Shafer* [2016] UKPC 25 at [31], “*in order to resist a claim for specific performance on the ground of delay, it is necessary to show that prejudice has resulted from the delay.*”
880. Mr Foxton QC submitted that there is no evidence that Prandicle detrimentally relied or would otherwise be prejudiced by the pursuit of the claims. Nor, furthermore, he submitted, can it be said that the Taruta Parties acquiesced in or encouraged the view that he would not be pursuing a claim in relation to the assets.
881. I cannot agree with him about either of these matters, however. On the contrary, I agree with Mr Smith QC when he submitted that not only would it not be inequitable to deny the Taruta Parties the relief which they seek but that it would be inequitable to grant that relief.
882. First, as Mr Smith QC submitted, the Taruta Parties have not shown themselves desirous or prompt or eager to obtain the NET shares to which they say they are entitled, taking no meaningful steps between December 2009 and November 2016 and, even then, only taking steps when proceedings were commenced by Avonwick.
883. Secondly, again as Mr Smith QC pointed out, in the meantime, whilst the Taruta Parties were taking no steps to enforce their alleged rights, the 24.5% shareholding was sold to Prandicle without Prandicle knowing about the Taruta Parties’ alleged interest in that shareholding.
884. Thirdly, as previously explained, Mr Taruta should be regarded as having become aware of Prandicle’s acquisition of the shares in NET and that Prandicle was owned by Mr Dubyna by January 2013 at the latest.
885. Fourthly and in any event, Mr Taruta accepted that he became aware that the Hyatt Hotel might be sold in 2012 and took steps to protect his interests, yet he failed to take any legal action to assert his rights.
886. Lastly, if the alleged 2009 Shareholders’ Agreement were a binding agreement, which for present purposes it must be assumed to be, then, at least on the Taruta Parties’ case, this gives them a good claim as against the Gaiduk Parties (as well as the Mkrchan Parties) and so they have no need to claim against Prandicle. If that claim has become time-barred, as I have concluded is the case, that is a problem of the Taruta Parties’ own making.
887. For all these reasons, the claims against Prandicle must fail. It is, as a result, unnecessary to go on and address Prandicle’s contingent claim against Roselink under the Roselink-Prandicle SPA.

The Loan and Amended Settlement Agreement Claims against Mr Mkrtchan

Background

888. The Taruta Parties pursue two further claims against Mr Mkrtchan personally. The first is a claim for US\$100 million in respect of loans allegedly advanced by Mr Taruta to Mr Mkrtchan in the period 2006-2008 (the 'Loan Claim'). The second is a claim for sums allegedly due under the Amended Settlement Agreement concluded between Mr Mkrtchan and Mr Taruta on 30 December 2009 (the 'Amended Settlement Agreement Claim').
889. It is useful to repeat and supplement some of the relevant chronology in this section – as helpfully (and largely uncontroversially) summarised by Mr Wolfson QC in his written closing submissions.
890. Again, to a degree, this is territory which has already been traversed. However, in 1997, Mr Mkrtchan joined IUD as Head of the Metallurgical Department. There is some dispute about the precise details, but it is common ground that at some point between 1998 and 2002 (when Mr Mkrtchan replaced Mr Taruta as General Director of IUD) it was agreed that Mr Mkrtchan would receive a bonus of either 5% or 10% of the profits of IUD.
891. In 2003, there was a further change. According to Mr Mkrtchan and, indeed, Mr Gaiduk also, it was informally agreed that Mr Mkrtchan would become a one-third partner and shareholder in IUD. Mr Taruta denies this; he says that it was merely agreed that Mr Mkrtchan should receive a bonus of 30% of the profits generated by IUD, but that from this point onwards Mr Mkrtchan began to press to acquire a one-third shareholding in the company.
892. Although the Taruta Parties (but not the Gaiduk Parties) dispute that this was the case, Mr Taruta's evidence being that Mr Mkrtchan was campaigning to be made a shareholder from about 2003 but that there was no agreement to make him a shareholder until 2006, it probably does not matter whether Mr Taruta is right about it since all parties are agreed that, whether or not the Partners reached an understanding in 2003, arrangements for Mr Mkrtchan to become a shareholder in IUD did not become legally binding until August 2006, when Mr Mkrtchan's company, Region, acquired a 0.02% interest in IUD.
893. Later the same year, on 27 December 2006, IUD issued additional share capital and the ownership of IUD was restructured. This was accomplished not by a direct transfer of shares from Vizavi (Mr Gaiduk's company) and Azovintex (Mr Taruta's company) to Region (Mr Mkrtchan's company), but by increasing the share capital of IUD, and allotting a 33.18% interest in IUD to Region. The effect of these allotments was to transfer to Mr Mkrtchan a 1/6 share in IUD from each of Mr Gaiduk and Mr Taruta.
894. On the same day, Mr Taruta's company, Azovimpex acquired a 17% interest in Region, with the result that Mr Taruta's indirect interest in IUD was increased by 5.62% and Mr Mkrtchan's interest was correspondingly decreased.
895. As a result, the interests in IUD were, therefore, to repeat, held as follows: Mr Taruta held 38.70% of IUD (comprising 33.08% held via Azovintex, and the indirect 5.62%

held via Azovimpex's 17% interest in Region); Mr Mkrтчan held 27.46% of IUD (comprising 33.08% held via Region, less Mr Taruta's indirect 5.62% held via Azovimpex's 17% interest in Region); Mr Gaiduk held 33.84% of IUD.

896. There is no issue that Mr Mkrтчan agreed to pay Mr Gaiduk for his shares. Mr Gaiduk and Mr Mkrтчan both say that the price agreed was US\$100 million, whilst Mr Taruta says that it was US\$200 million and that he helped to fund Mr Mkrтчan's acquisition by lending him US\$100 million. Mr Taruta also claims that he took a 17% stake in Region as security. This is the basis of the Loan Claim.
897. Mr Mkrтчan denies liability. His account is that Mr Taruta contributed only US\$50 million towards the acquisition of Mr Gaiduk's share and that Mr Taruta agreed to waive payment for his own (Mr Taruta's) interest in exchange for the 17% stake in Region.
898. As for the other claim which is brought by Mr Taruta against Mr Mkrтчan, it will be recalled that in 2008 it was proposed that there would be a merger between IUD and Evraz. To facilitate this, a restructuring of IUD would have been needed so that the one-third interests in IUD held by the Partners' three Ukrainian companies (Region, Vizavi and Azovintex) were, instead, held outside Ukraine by their Cypriot companies. Under such an arrangement Mr Taruta would lose his additional 5.62% of IUD held through his 17% shareholding in Region, which would cease to be a shareholder in IUD. It was for this reason that Mr Taruta required Mr Mkrтчan to enter into an agreement under which, in effect, Mr Mkrтчan would buy back from Mr Taruta that 5.62% interest in IUD.
899. This was the reason why, on 15 September 2008, Mr Mkrтчan and Mr Taruta, entered into the Settlement Agreement. In effect, this provided that in consideration for Mr Taruta consenting to the transfer of Region's interest in IUD to a company solely owned by Mr Mkrтчan, Mr Mkrтчan would pay US\$750 million to Mr Taruta.
900. In the following weeks, the global financial crisis struck and the Evraz merger also collapsed.
901. On 30 December 2009 (the same day as the VEB SPA was entered into) Mr Taruta and Mr Mkrтчan entered into the Amended Settlement Agreement, which provided for Mr Mkrтчan to pay US\$281 million by 30 April 2010, failing which he was obliged, *inter alia*, to transfer to Mr Taruta sufficient shares in IUD so as to restore their respective shareholdings to the proportions in which they were held prior to the restructuring.
902. Some months later, on 19 May 2010, Mr Mkrтчan's company, Etmor, made the Etmor Payment of US\$105.825 million on behalf of, and for the benefit of, Mr Taruta's company, Parborio Holdings Ltd ('Parborio'), in connection with the acquisition of Gorlane.
903. Mr Mkrтчan and Mr Taruta had agreed with VEB at the time of the sale of their IUD interests in December 2009 that they would join with VEB in funding the acquisition of Gorlane, hence the fact that five buyers were named in the Gorlane SPA: Parborio, Atinia (another Mkrтчan-owned company), and three companies associated with VEB, with Etmor as the payment agent for making the payments due under it: a purchase price of US\$850 million, in two tranches of US\$425 million. The liability of Mr

Taruta's company, Parborio, in respect of the Advance Payment (US\$425 million) was US\$105.825 million, which Mr Taruta asked and Mr Mkrchan agreed to pay for him.

904. As will shortly appear, there is a dispute between Mr Taruta and Mr Mkrchan as to whether this was made on the basis that it would repay the alleged US\$100 million loan (as Mr Taruta claims) or as part payment of the sum of US\$281 million due under the Amended Settlement Agreement (as Mr Mkrchan claims).
905. Other than the Etmor Payment, no payment was made in respect of either the alleged US\$100 million loan or the sum payable under the Amended Settlement Agreement between December 2009 and the issuing of Mr Taruta's claims on 30 November 2016.

The Loan Claim

906. The submissions directed at the Loan Claim were very lengthy in the case of Mr Mkrchan but rather shorter in Mr Taruta's case. I propose, in the circumstances, to adopt something of a middle course.
907. It was Mr Foxton QC's submission that the position is straightforward: Mr Mkrchan is liable to Mr Taruta to pay US\$100 million, subject only to whether the Etmor Payment is to be characterised as a loan repayment (as Mr Foxton QC suggested) or as a payment which was made under the Amended Settlement Agreement (as Mr Wolfson QC submitted).
908. There is no issue about Mr Taruta having agreed to provide Mr Mkrchan with US\$50 million in relation to what, through the December 2006 restructuring, was paid to Mr Gaiduk for his share in IUD. Specifically, it is not in dispute that US\$50 million in dividends due to Mr Taruta from FMTG was, in fact, paid to Mr Gaiduk in satisfaction of Mr Mkrchan's liability to pay for Mr Gaiduk's shares in IUD.
909. The dispute is essentially threefold.
910. First, there is a dispute as to whether Mr Taruta made a loan not of US\$50 million but of US\$100 million, which he paid in two separate tranches.
911. Secondly, there is a dispute as to whether (as Mr Taruta contends) the agreement was that the second of those US\$50 million tranches would be repaid by Mr Mkrchan in cash, with Mr Taruta advancing a loan to Mr Mkrchan by allowing him to "*defer his payment obligation*" in respect of the Taruta share and took the 17% Region stake as a security interest for Mr Mkrchan's liability to repay him the value of that share. It is Mr Mkrchan's case in this latter respect that the 17% Region stake was not a security interest but an outright transfer and that the Taruta share was transferred to him without compensation as 'sweat equity' as a result of the close business and personal relationship which he enjoyed with Mr Taruta.
912. There is, then, a third issue: if there was combined US\$100 million loan, whether (as Mr Taruta alleges but Mr Mkrchan denies) the Etmor Payment constituted repayment of that amount (plus interest).
913. As I shall explain, I am not persuaded that Mr Taruta has either of the entitlements to be repaid which he asserts. This is for a number of reasons.

The alleged US\$100 million loan

914. Starting with the first of the issues to which I have referred, whether the loan or loans alleged to have been extended to Mr Mkrtchan by Mr Taruta entailed US\$50 million or US\$100 million being lent, it is worth beginning in this context by looking at how this claim has been pleaded. Thus, in the Re-Amended Defence and Counterclaim this was stated at paragraph 5.1:

“In around 2006 or 2007, Mr Taruta had lent Mr Mkrtchan US\$50 million for the purchase of part of Mr Gaiduk’s interest in IUD. In around 2008, Mr Taruta lent Mr Mkrtchan a further US\$50 million, to enable Mr Mkrtchan to repay debts to Mr Gaiduk. The said loans are referred to herein as the ‘Mkrtchan Loans’.”

Later, in paragraph 55 this, then, was stated:

“Demands for the repayment of the debts owed to Mr Taruta by Mr Mkrtchan under the Mkrtchan Loans were made by or on behalf of Mr Taruta:

55.1. at a meeting between Mr Mkrtchan and Mr Taruta’s authorised representatives in November 2015; and

55.2. in writing by letter to Mr Mkrtchan dated 6 September 2016.”

In the paragraph which followed, paragraph 56, this was, then, alleged:

“However, Mr Mkrtchan has since failed and/or refused in breach of the said contracts to re-pay the amounts due (or any amounts); and Mr Taruta has thereby suffered loss in those amounts. In the premises, Mr Taruta is entitled to and claims from Mr Mkrtchan US\$100 million in respect of the Mkrtchan Loans (alternatively, damages in that amount).”

915. That said, in paragraph 52, this was stated:

“If or to the extent that Mr Mkrtchan and Etmor fail unequivocally and irrevocably to confirm that, contrary to the said demand, Parborio is not liable to Etmor under the Purported Etmor-Parborio Loan (or otherwise), Mr Taruta claims in respect of the Mkrtchan Loans as follows.”

916. It follows that it was the Taruta Parties’ case at trial that, in fact, the US\$100 million alleged to have been lent to Mr Mkrtchan (in two US\$50 million instalments) has been paid back by the Etmor Payment. More specifically still, it is only if the Etmor Payment did *not* amount to a repayment that the claim for US\$100 million is pursued at all. It is convenient, in these circumstances and essentially by way of preliminary, to consider this matter first.

917. The dispute here, to repeat, is as to whether it was agreed between Mr Mkrtchan and Mr Taruta that the Etmor Payment would be a repayment of the alleged US\$100 million (with interest) or whether it was a partial repayment of the sum due under the Amended Settlement Agreement. Mr Taruta says the former; Mr Mkrtchan says the latter.

918. The significance of this dispute is that, on Mr Taruta’s case, there was no demand for repayment of the alleged US\$100 million loan other than in connection with the Etmor

Payment. Accordingly, were it to be concluded that the Etmor Payment was made in respect of the Amended Settlement Agreement, it would follow that there was no such repayment demand. If there was no such demand, this makes it unlikely that the alleged US\$100 million loan ever existed since it would make no sense at all for Mr Taruta never to have sought repayment of so substantial an amount of money.

919. It is quite clear that that is, indeed, the position since I am satisfied that, the Amended Settlement Agreement having been executed on 30 December 2009 and Mr Mkrtchan thereby having come under a liability to Mr Taruta (with a payment date of 30 April 2010), the Etmor Payment was subsequently made in relation to *that* liability and *not* any loan liability as suggested by Mr Taruta. I say this for various reasons.

920. First, it should not be overlooked that until only a few months before the start of the trial Mr Taruta's case had been pleaded in this way in paragraph 22.2.2 of the Amended Reply:

“Mr Mkrtchan caused or procured the Etmor Payment. Mr Taruta agreed to it on the basis that it would be treated as part repayment of the total sum owed by Mr Mkrtchan to Mr Taruta pursuant to the Mkrtchan Loans (of US\$100 million) and the sum payable under the Settlement Agreement (of US\$281 million).”

This was amended in June 2019, so that by the time of the trial the paragraph read as follows:

“Mr Mkrtchan caused or procured the Etmor Payment. Mr Taruta agreed to it on the basis that it would be treated as ~~part~~ repayment of the total sum owed by Mr Mkrtchan to Mr Taruta pursuant to the Mkrtchan Loans (of US\$100 million, plus interest) ~~and the sum payable under the Settlement Agreement (of US\$281 million).~~”

In short, it was no longer alleged that the Etmor Payment represented repayment of any sum payable under the Amended Settlement Agreement.

921. Secondly, as Mr Wolfson QC highlighted in closing, Mr Taruta's written witness evidence was internally inconsistent (or, as Mr Wolfson QC put it in his oral closing, “*schizophrenic*”) on this subject since in one place he described Mr Mkrtchan as never having paid him back in respect of the alleged US\$100 million loan, only, then, in another place to say this:

“Mr Mkrtchan and I agreed that he would fund my share of the initial consideration (US\$105,825,000) in part-payment of his outstanding debts to me. Mr Mkrtchan agreed to do this. I recall a very clear discussion with Mr Mkrtchan about this where I told him that I considered this as repayment of US\$100,000,000 due to me in respect of his purchase of 17% of IUD from Mr Gaiduk in 2006 and that he could treat the US\$5,825,000 as interest on that loan. Mr Mkrtchan agreed.”

922. Thirdly, if it was the position, as Mr Taruta would have it, that the Etmor Payment included an amount in respect of interest, then, it is curious, to say the least, that a reference to interest having additionally been paid did not previously appear in the case put forward by Mr Taruta.

923. Fourthly, although related to this last point, if Mr Taruta was right in what he had to say about interest being paid, then, it is a striking coincidence that the amount paid by way of interest, taken together with the US\$100 million said to constitute the money lent to Mr Mkrchtan by Mr Taruta, added up to precisely the same figure (US\$105.825 million) as Parborio (Mr Taruta's company) was liable to pay in respect of the first tranche of the purchase price due under the Gorlane SPA. In fairness, when this point was put to him, Mr Taruta agreed that the US\$105.825 million was, indeed, calculated in this way.
924. Fifthly, although again related to the last point, were the US\$5.825 million supposedly paid as interest really an interest payment, then, it is difficult to fathom why Mr Taruta would have regarded that as an acceptable sum for Mr Mkrchtan to pay since, when asked how interest was calculated, Mr Taruta referred to a loan which at about the same time he took out with a Mr Schlosberg (as referenced in certain internal accounting documentation described shortly), saying this:

"I did not calculate the interest rate. When I took out the loan from Mr Schlosberg, I agreed with Mkrchtan that I would take out the loan at 20% per annum. He was aware of that. ... So I said that I had paid 20% interest per annum to Misha, so it is 105 million, so we will include the 5 million as interest. But no one actually did the calculation, neither myself nor Mr Mkrchtan."

There, then, followed this instructive exchange:

"Q. If you are borrowing money at 20% over two years from Mr Schlosberg, and you are getting back from Mr Mkrchtan 5.825 million, from your perspective that is a pretty bad bargain, isn't it?"

A. Correct. It's not a very pretty -- it's not a very good bargain."

925. Sixthly, it is similarly instructive that, the month before the Etmor Payment was made (on 19 May 2010), Ms Bashynska (the head of Mr Taruta's family office) and Ms Shchygolyeva (on Mr Mkrchtan's behalf) arranged jointly for the production of a novation agreement (drafted by Linklaters) to implement Mr Taruta and Mr Mkrchtan's preference that the obligations under the Amended Settlement Agreement be settled via their respective wholly owned SPVs rather than personally as had previously been envisaged. There was no mention in this context of there being any loan indebtedness, despite the fact that, only the day before Etmor Payment was made, a draft Deed of Novation, Amendment and Restatement was produced under which Mr Mkrchtan's obligations under the Amended Settlement Agreement would have been novated to Etmor. Mr Wolfson QC was plainly right when he submitted that it would be a somewhat surprising coincidence had the parties been negotiating an agreement to transfer the debt under the Amended Settlement Agreement to Etmor the day before Etmor made a payment which would have partially discharged Mr Mkrchtan's liability under the Amended Settlement Agreement.
926. Seventhly, there are internal accounting documents which record the Etmor Payment as having discharged an Amended Settlement Agreement liability rather than any loan liability. Thus, an internal presentation on cash flow entitled "*Flow of Funds January –April 2010*" produced on 5 May 2010 recorded a liability from Mr Mkrchtan in the sum of US\$280 million, not US\$100 million or any lesser loan amount. The same

document, updated as at August 2010 and produced on 13 September 2010, recorded an expected payment from Mr Mkrтчan of US\$174 million, explaining that this liability was US\$280 million, “(less 105,825,000)”. Mr Taruta’s only answer to this was to speculate that there might have been an error on the part of Ms Bashynska. I do not accept that explanation, however. Mr Taruta was here simply trying to explain away the obvious: that the Etmor Payment was made in discharge of obligations not under any loan arrangement but under the Amended Settlement Agreement.

927. Eighthly, again as highlighted by Mr Wolfson QC, it is significant that, when in 2012 Mr Taruta and Mr Mkrтчan were in negotiations for Parborio and Atinia to sell their interests in Gorlane to a third party buyer, Quinira Holdings Limited (‘Quinira’), VEB, which negotiated the terms of this acquisition, made it clear that it required contractual assurances that Etmor would not be able to assert any claims relating to the interest sold by Parborio to Quinira arising out of the making the Etmor Payment on behalf of Parborio.

928. This was explained in an email from Ms Bashynska to Ms Schygolyeva on 19 October 2012 and led to her producing (in conjunction with a lawyer acting for Mr Taruta, Mr Yuri Yatseniuk) an agreement which would record formally the fact that the Etmor Payment had been made in satisfaction of Mr Mkrтчan’s liabilities under the Amended Settlement Agreement. Specifically, the draft agreement, described as a “*Netting, Amendments and Novation Agreement*”, recorded that:

“USD105,825,000 ... shall be deemed to be the proper fulfilment of the obligations by Mr Mkrтчan under the Settlement Agreement in the amount of USD105,825,000 ... and this amount shall be offset and deducted from Mr Mkrтчan’s obligations under para. 2.1 of the Settlement Agreement.”

929. Although not signed and although, as Mr Foxton QC rightly pointed out, the set-off proposal fell away, the fact that this draft entailed Mr Taruta’s own representatives including such language, with no reference to the Etmor Payment being in respect of any loan liability (as opposed to liability under the Amended Settlement Agreement) is obviously material and, again, Mr Taruta’s suggestion in cross-examination that Ms Bashinskaya made an error “*as she did not have all the background*” was as unconvincing as it was unimpressive. The more so, in circumstances where (contrary to Mr Taruta’s insistence in evidence) the set-off proposal was not one which was put forward by Mr Mkrтчan’s side but by Ms Bashynska (in March 2012). Indeed, that this was the case is made very clear in an email which Ms Bashynska sent Mr Taruta himself on 19 October 2012. In that email she said this:

“I am hereby forwarding you the March correspondence on elaboration of the Deed of Set-Off document (which was initiated by us). As a result of this correspondence the VEB lawyers should have elaborated the document which would be of comfort to all parties of the process on resolving of issues related to absence of claims from all parties.”

930. This was the same day as Ms Bashynska sent the email to Ms Shchygolyeva to which reference has already been made in which, echoing what she had told Mr Taruta, she said this:

“In the course of discussion between MOA and TCA a question arose that VEB required making of funds transfers within the frames of mutual settlements of accounts between Etmor and Parborio.

Having analysed the correspondence on the whole it is possible to conclude that it is a principle for VEB that we sign the documents on absence of any claims between us.

I hereby forward the March correspondence on elaboration of document Deed of Set-Off (which was initiated by us). As a result of this correspondence the VEB lawyers should have elaborated the document which would be of comfort to all parties of the process on resolving of issues related to absence of claims from all parties.

It was already in the pack of documents of 1 October 2012”

931. Mr Foxtton QC sought to meet Mr Wolfson QC’s reliance on these matters by highlighting the fact that in December 2011 Ms Shchygolyeva sent Ms Bashynska a draft *“Supplemental Deed”* dated 23 December 2011, the contention being that it was this draft that formed the basis of the draft Netting, Amendments and Novation Agreement which Ms Bashynska produced in March 2012 (as referred to in Ms Bashynska’s emails on 19 October 2012). The difficulty with this contention, however, is not only that it has a different title but it is apparent also that it was to be between different parties (only Mr Taruta and Mr Mkrтчan personally, rather than Mr Mkrтчan, Mr Taruta, Etmor and Mr Taruta’s company, Enard). Furthermore, the draft contemplated the setting off of a different sum: US\$211.65 million.
932. I am driven to conclude, in these circumstances, that what Mr Taruta had to say in evidence on this topic is unreliable and cannot be accepted. I am quite satisfied that Ms Bashynska was under no false impression and, accordingly, that what she regarded as being the position concerning the Etmor Payment (that it was made in partial discharge of liability under the Amended Settlement Agreement rather than under any loan) was right.
933. In the light of this conclusion, it obviously becomes necessary to address the claim for repayment of the US\$100 million which the Taruta Parties allege was lent to Mr Mkrтчan by Mr Taruta. A number of issues arise in this connection.
934. The first such issue concerns the question of whether there was a loan of US\$50 million or of US\$100 million.
935. It was recognised by Mr Foxtton QC that Mr Taruta’s evidence as to there having been a further US\$50 million lent to Mr Mkrтчan was *“uncertain”* and that *“there is significantly less by way of evidence for the second 50 million”*. Mr Wolfson QC, in closing, indeed, accurately described Mr Foxtton QC as not entirely having put his case on this issue with gusto. Mr Foxtton QC suggested nonetheless, however, that the evidential deficiencies should not necessitate a conclusion that there was no such further loan. He made the point, in particular, that *“one difficulty when the two loans are of the same amount is looking at a reference in a document to a 50 million loan ... the court does not know whether it is referring to a single 50 million loan because there was only ever one, or more than one 50 million loan”*.

936. The truth, however, is that the case that Mr Taruta advanced an initial US\$50 million tranche of the alleged US\$100 million loan is not borne out by the available evidence. Again, there are a number of reasons why I have reached this clear conclusion.

937. First, Mr Taruta's evidence on this topic was, as Mr Wolfson QC quite rightly characterised it in closing, "*as vague as it possibly could be*". This is illustrated by the fact that in the Re-Amended Defence and Counterclaim, at paragraph 5.1, this is all that is pleaded:

"In around 2006 or 2007, Mr Taruta had lent Mr Mkrchan US\$50 million for the purchase of part of Mr Gaiduk's interest in IUD."

938. Similarly, in his witness statement Mr Taruta was constrained to put things as imprecisely as this:

"I cannot now exactly recall how the US\$50 million loan in 2006-2007 was paid, save that it was in cash. But I do remember that by lending Mr Mkrchan this money I created some liquidity problems for myself."

939. This is very vague evidence. The fact that it is evidence which is given in support of a claim for as much as US\$50 million merely serves to underline its inadequacy. As Mr Wolfson QC submitted, it is unrealistic to suggest that, although apparently unable to recall any of the details of the loan, Mr Taruta nonetheless has a clear and reliable recollection that the sum was advanced and that this was done by way of a loan.

940. Secondly, there is next to no documentary evidence which supports Mr Taruta's case that the first tranche which he insists was advanced was, in fact, advanced. The alleged US\$50 million loan was not recorded in writing. Nor is there any contemporaneous evidence of any transfer to either Mr Mkrchan or to Mr Gaiduk (or any company associated with either of them).

941. Mr Foxton QC sought in this context to place reliance on a "*Flow of Funds*" document said to have been produced by Ms Bashynska and which identifies as an "*Income target*" a US\$50 million "*Repayment of MOA loan (Castle, old debt)*". Mr Taruta suggested in evidence that this was a reference to the US\$50 million first tranche. I reject that suggestion, however, in circumstances where nowhere does that document even hint at a connection with Mr Mkrchan's acquisition of Mr Gaiduk's share. There is, specifically, no suggestion at all that the reference to "*Castle*" has any bearing on matters since the Court has only Mr Taruta's own evidence that he needed a "*Castle*" loan in order to fund an onward loan for Mr Mkrchan to acquire Mr Gaiduk's share. That is not evidence which can conceivably be accepted in the absence of documentary support.

942. Mr Foxton QC relied also upon the terms of the 15 January 2008 FMTG MOU, referred to previously, specifically the reference in Clause 1(a) not only to "Party 1" [Mr Taruta] agreeing to "*extend a loan to Party 3 [Mr Mkrchan] for 50 million USD, for a term of --- years and annual interest rate of --- % to be paid upon loan maturity*", but also this in Clause 1(b):

"Party 3 [Mr Mkrchan] shall pay 100 million USD toward partial repayment of its outstanding debts to Party 2 [Mr Gaiduk]".

943. Clause 2, then, provided as follows:

“The Parties have agreed, for the purposes of effecting the payments referenced in Clause 1 of this Memorandum, to distribute dividends of 150 million USD from the company FMTG to Party 2 [Mr Gaiduk].

For this purpose, Party 1 [Mr Taruta] shall be deemed to have extended a loan to Party 3 [Mr Mkrтчan] for 50 million USD on the terms set out under Clause 1 hereof; and that Party 3 [Mr Mkrтчan] has paid 100 million USD to Party 2 [Mr Gaiduk] to pay its outstanding debt for previously purchased Ukrainian assets.”

944. These provisions followed recitals in these terms:

“WHEREAS, FMTG has undistributed earnings of 150 million USD, and therefore the beneficial owners have unanimously elected to distribute profits in the form of dividends proportional to their ownership interests;

AND WHEREAS,

Party 3 [Mr Mkrтчan] owes Party 2 [Mr Gaiduk] for earlier purchased Ukrainian assets, and wishes to repay part of that debt to Party 2 [Mr Gaiduk].

Party 1 [Mr Taruta] has elected to extend a loan facility of 50 million USD to Party 3 [Mr Mkrтчan], for a term of --- years and annual interest rate of --- %.

Party 3 [Mr Mkrтчan] has elected to partially pay off its debts to Party 2 [Mr Gaiduk] for previously purchased Ukrainian assets, by transfer of 100 million USD.”

945. It was Mr Foxton QC’s submission that the FMTG MOU was a significant document which was prepared by the parties with some care and which remained important, having gone through at least one draft and subsequently, on 16 March 2010, when the Gorlane investment was underway, a copy of it having been sent to Mr Taruta on behalf of Mr Petrov.

946. Mr Foxton QC highlighted, in particular, how the MOU records in no fewer than three places that the amount of US\$100 million being received by Mr Gaiduk represented only partial payment of the amount due to him from Mr Mkrтчan in respect of an interest in IUD: the first paragraph of the second recital refers to Mr Mkrтчan wishing “to repay part” of the debt he owes “for earlier purchased Ukrainian assets”; the third paragraph refers to Mr Mkrтчan having elected “to partially pay off its debts for previously purchased Ukrainian assets by transfer of 100 million USD”; and Clause 1(b) provides that Mr Mkrтчan would pay “100 million USD towards partial repayment of its outstanding debts to Party 2 [Mr Gaiduk]”.

947. This was no accident, Mr Foxton QC observed, since the previous draft of the MOU referred in all these places to Mr Mkrтчan wishing “to pay off its outstanding debt to Party 2”, and so without a reference to such repayments being merely partial. Mr Foxton QC suggested, in the circumstances, that Mr Gaiduk’s evidence that he was only paid US\$100 million by Mr Mkrтчan for a share in IUD, with US\$50 million coming from Mr Mkrтчan’s own distribution from FMTG and the other US\$50 million coming from Mr Taruta’s distribution from FMTG, was demonstrably false and given, as Mr

Foxton QC put it, “*with a view to damaging Mr Taruta even though Mr Gaiduk had no personal financial interest in the issue*”.

948. Mr Foxton QC highlighted in this connection how Mr Gaiduk was seemingly unable to explain why the MOU referred so frequently to payment of US\$100 million as *partial* payment rather than full payment, suggesting merely that he did not “*really pay attention*” to the document when he must have noticed that it had been amended in as many as three places to make the point concerning partial payment. He suggested also that it would have made no sense for Mr Mkrtchan to have signed a document which described a loan if that loan did not exist.

949. There are, in my view, however, a number of difficulties with these submissions.

950. First, starting with the last of the points made by Mr Foxton QC, I agree with Mr Wolfson QC when he submitted in his oral closing that the suggestion made orally by Mr Foxton QC that such is “*the level of bad blood Mr Gaiduk feels for Mr Taruta, that on this point, when he has absolutely no personal financial skin in the game, he has nonetheless told a lie to try to undermine Mr Taruta*” is one which turns the normal approach on its head since, as Mr Wolfson QC put it, “*Normally we assume if someone doesn’t have a reason to lie and is saying something sensible, we start from the assumption that they are probably telling the truth*”.

951. I agree with Mr Wolfson QC about this. The truth is (and this is my third reason overall for rejecting Mr Foxton QC’s submission that there was the US\$100 million loan which has been alleged) that the evidence which Mr Gaiduk gave on this topic was clear and unequivocal: it was that he was “*not aware of any other loans advanced by Mr Taruta to Mr Mkrtchan, including the additional USD 50 million which Mr Taruta says he advanced to Mr Mkrtchan*”. Nor, he was clear, was he paid US\$200 million as opposed to US\$100 million (as, indeed, reflected in the FMTG MOU itself). Thus, in his first witness statement Mr Gaiduk referred to “*the USD 100 million price agreed for the sale of Vizavi’s share in ISD to him ...*” and in his second witness statement he stated as follows:

“I did not demand that Mr Mkrtchan should pay me USD 200 million for a 16.16% stake in ISD ... Rather, Mr Mkrtchan and I agreed on a price of USD 100 million ...”.

952. Mr Gaiduk was resolute when pressed on these matters in cross-examination by Mr Foxton QC. He was asked, in the first place, this:

“The first issue I want to ask you about is how much Mr Mkrtchan paid you to acquire 17% of IUD from you?”

His answer was:

“100 million”.

He was, then, asked:

“And you will know that Mr Taruta believes the figure was \$200 million?”

His answer was:

“I don’t know on which basis Mr Taruta believes this. Our agreement with Mkrchan was that he was to pay me \$100 million and not a cent more.”

He was, then, asked by reference to the FMTG MOU:

“If you had only agreed with Mr Mkrchan that he would pay you 100 million, this document would not have described 100 million as a partial payment, would it?”

His reply was:

“This document was prepared on the request of my partners. I didn’t need this document. And I didn’t really pay attention to it, whether it was partially or together. I had an agreement with Mr Mkrchan that he was to pay 100 million for my interest and we were going to a big transaction -- we had a big transaction in 2008 and it was a time to settle the debt.”

He was, then, asked:

“And can we agree that Mr Mkrchan would never have signed a document saying 100 million was only a partial payment if in fact 100 million was all that he was obliged to pay?”

His response was:

“My Lord, I am not aware of these details. What was important to me is that there to be evidence that the instructions to the companies of Mr Mkrchan would have been given and that I would receive my 100 million. We can see that the document had been signed, and it doesn’t talk about any schedules, any interests, because it had nothing to do with me. This is not even mentioned here; these details are not even mentioned in here.”

953. This is evidence which I accept. I do so, in particular, having regard to various factors.
954. First (albeit as my fourth reason overall) and somewhat fundamentally, it is not in dispute that Mr Mkrchan paid US\$100 million to Mr Gaiduk via distributions of dividends from FMTG, made up of US\$50 million to which Mr Mkrchan was entitled in his own right and US\$50 million due to Mr Taruta. That is what the FMTG MOU itself records and it is also what other documents demonstrate. It follows that the suggestion that Mr Gaiduk, in fact, received twice as much is simply not established on the evidence.
955. Since no further money was paid to Mr Gaiduk, it is impossible to conclude that Mr Taruta can have advanced a further US\$50 million to Mr Mkrchan for the purpose of paying Mr Gaiduk for his share of IUD as alleged.
956. Secondly (or fifthly overall), it would have made no sense at all had the sum to be paid to Mr Gaiduk been US\$200 million because, on that basis, Mr Mkrchan would have been US\$50 million short in terms of what he needed to pay Mr Gaiduk, even if Mr Taruta had lent him US\$100 million rather than merely US\$50 million. That is because, to repeat, the sum paid to Mr Gaiduk via the FMTG dividends was US\$100 million and Mr Taruta says that he only advanced a further US\$50 million (the alleged first tranche) for the purpose of the purchase of part of Mr Gaiduk’s interest in IUD. If Mr Taruta

were right about this, it would give a total paid to Mr Gaiduk not of US\$200 million but of just US\$150 million. Mr Taruta's version of events, therefore, results in an inexplicable shortfall.

957. Thirdly (and sixthly overall), turning to the FMTG MOU itself, as Mr Wolfson QC pointed out, this does not stipulate which "*Ukrainian assets*" had previously been purchased and in respect of which US\$100 million represented partial (as opposed to full) payment. Nor does the MOU stipulate what the level of indebtedness owed to Mr Gaiduk by Mr Mkrтчan actually was, whether that be US\$200 million as alleged by Mr Taruta (or US\$100 million after payment of the US\$100 million) or any other level of indebtedness. Nor does it anywhere refer to Mr Taruta having paid a first tranche of US\$50 million to Mr Mkrтчan with another US\$50 million tranche due also to be paid. Indeed, as Mr Wolfson QC explained, the FMTG MOU is not even consistent with Mr Taruta's own case given that what he maintains was a first tranche had been paid over a year before. In such circumstances, the language used in the MOU makes no sense.
958. Suffice to say, for present purposes, that I consider that the FMTG MOU provides no real support for the submission advanced on Mr Taruta's behalf that there was an initial US\$50 million tranche (prior to any subsequent US\$50 million tranche) advanced to Mr Mkrтчan by way of loan. I say this notwithstanding Mr Foxtон QC's submission that Mr Gaiduk appears to have required that the FMTG MOU referred not to full repayment but partial repayment. Mr Gaiduk's evidence at trial as to what he was paid was clear. It is evidence which I accept.
959. I conclude, in short and for these various reasons, that there was no such first tranche. I would merely add that I am strengthened in this conclusion having regard to the fact that it was Mr Taruta's position that the first US\$50 million tranche was paid "*in cash*". This was an all too convenient thing for him to say since it might explain the absence of documentation pointing to the existence of a loan liability. Needless to say, when asked about this, Mr Taruta changed his tune and agreed that cash was not the means of payment, yet the fact remains that there is no record of a transfer. The notion that this should be the case in relation to so large a sum of money is little short of fanciful.
960. Recognising this, it seems, Mr Taruta explained in cross-examination that, in fact, the tranche was paid in three tranches by way of withdrawal of dividends: US\$10 million in 2006, and two further tranches in 2007.
961. I am quite clear, however, that this evidence, given for the first time in cross-examination and when being asked about his reference to the tranche having been paid in cash, was made up.
962. It cannot be right that Mr Taruta should have apparently not been able "*exactly*" to recall how the first tranche was paid, including which year it was paid in (either 2006 or 2007), albeit that he could apparently recall that the payment (there was no mention of more than a single payment) was made in cash, yet by the time that he came to give evidence he should be able to recall that payment was made in separate tranches in particular amounts (the details of which he could recall), and not in cash but by way of dividend withdrawal.
963. As to that latter point, Mr Taruta's attempt at reconciling his earlier reference to the payment having been made in cash as being intended as a reference to "*cash from the*

dividends” that he received was not an explanation which remotely withstands scrutiny, given that in his witness statement Mr Taruta had specifically contrasted the fact that the first tranche was paid in cash with the fact that the second tranche was effected by way of distribution of dividends.

964. It follows, for all these various reasons, that I reject Mr Taruta’s US\$100 million loan case, including, therefore, his case that there was a loan of an initial US\$50 million tranche which was extended to Mr Mkrтчan by way of a loan. There was no such loan and, accordingly, there is no such liability.

The alleged US\$50 million loan

965. This brings me to Mr Taruta’s case in respect of the US\$50 million which it is not in dispute came from dividends due to Mr Taruta from FMTG but which were, in fact, paid to Mr Gaiduk in satisfaction of Mr Mkrтчan’s liability to pay for Mr Gaiduk’s shares in IUD.

966. Mr Taruta’s case is that this sum was advanced as the second tranche of the alleged US\$100 million loan. It was Mr Wolfson QC’s submission that, given this, were the Court to have decided that there was no first tranche (and so no US\$100 million loan), it necessarily follows that Mr Taruta’s case concerning what on his version of events was a second US\$50 million tranche should likewise, and without more, be rejected. It would, he submitted, at a minimum be “*surprising*” if there was any loan at all in circumstances where what Mr Taruta has alleged is not that there was a US\$50 million loan but that there was a US\$100 million loan and that contention has not been accepted.

967. Although there is some force in this submission, and I consider it appropriate to bear Mr Wolfson QC’s point in mind, I prefer nonetheless to consider the case that the US\$50 million dividend payout represented a loan on its own individual merits.

968. Doing so gives rise to certain fundamental difficulties as far as Mr Taruta’s case is concerned.

969. The first of these difficulties concerns Mr Taruta’s key contention, as set out in his witness statement, that:

“As an assurance that [the alleged debt for the Taruta Share] would be repaid, Mr Mkrтчan and I agreed that I would take a stake in Region (just under 17%) by way of security, documented in board minutes dated 27 December 2006.”

That, I am quite clear, is not what was agreed at all: the 17% Region stake was not a security interest.

970. As between Mr Mkrтчan and Mr Taruta, in particular, there were three key (and connected) aspects of this transaction, each of which is common ground and were helpfully described by Mr Wolfson QC as entailing: Mr Taruta’s transfer of an interest in IUD to Mr Mkrтчan equal to that transferred by Mr Gaiduk, so as to make Mr Mkrтчan ostensibly an equal shareholder with Mr Taruta and Mr Gaiduk in IUD; Mr Taruta’s provision (through the dividend route previously described) of 50% of the funding which Mr Mkrтчan used to pay the price stipulated by Mr Gaiduk (i.e. US\$50

million); and Mr Taruta requiring that Mr Mkrchtchan transfer to him a 17% share in Region, giving him an additional indirect 5.62% interest in IUD.

971. To reiterate, it is Mr Mkrchtchan's case that the 17% Region stake was not a security interest but an outright transfer and that the Taruta share was transferred to him without compensation as 'sweat equity' as a result of the close business and personal relationship which he enjoyed with Mr Taruta. His position is that, as between Mr Taruta and himself, no consideration was due for the transfer of the interest in IUD in recognition of Mr Mkrchtchan's contribution to the day-to-day running of the business.
972. Although Mr Foxton QC made certain play of how the case had been pleaded on Mr Mkrchtchan's behalf, that the arrangements in respect of the 17% Region stake did not entail the creation of a security interest is apparent from the fact that the transfer was achieved through a share issue, which transferred the shares in Region to Mr Taruta absolutely (and so as owner), as made clear by Region's Board Minutes dated 27 December 2006 which record just that. Specifically, these state as follows:

"RESOLVED:

To accept Azovimpex Limited Liability Foreign Trade Company (EDRPOU [Unified State Register of Enterprises and Organizations of Ukraine] code 23605421) as a member of Region LLC.

To increase Region LLC's registered capital to 11 325.30 UAR (eleven thousand three hundred twenty-five UAR 30 kopecks) through the 1 925.30 UAR (one thousand nine hundred twenty-five UAR 30 kopecks) capital contribution of the new member of Region LLC, Azovimpex Limited Liability Foreign Trade Company.

To approve capital contributions of members and reallocation of ownership interest in Region LLC as follows:

Oleh Artushevych Mkrchtchan 83%

Azovimpex 17%."

973. This is not a matter of mere "*forensic convenience*", as Mr Foxton QC characterised it in closing. The simple fact is that there is nothing in any document (not merely these Board Minutes) which suggests that Mr Mkrchtchan could insist on a retransfer of the 17% Region shares, and nor is there anything which even hints at Mr Taruta having the entitlement to sell the stake in the event of a default by Mr Mkrchtchan.
974. Mr Taruta was asked about the latter by Mr Wolfson QC in this exchange during the course of cross-examination:

"Q. If you had refused to give the Region shares back to Mr Mkrchtchan after he had paid you \$750 million, is there anything in these minutes which Mr Mkrchtchan could use to force you to give him back the shares?"

A. No.

Q. I suggest that this is a very odd form of security interest, because the truth is it wasn't a security interest at all. That's right, isn't it?"

A. I disagree with that. If you read the memorandum and articles of Region, it's clearly set out that that was a security."

975. Mr Taruta was here, again, simply making things up. Region's Charter says nothing about the 17% Region stake being held as a security interest.

976. Nor does the manner in which the parties dealt with the 17% Region stake provide the slightest support for the proposition that the 17% Region stake represented merely a security interest since, as Mr Wolfson QC observed, Mr Taruta realised substantial value from that transfer when, subsequently, he and Mr Mkrchan agreed in the Settlement Agreement that, in return for Mr Taruta foregoing the interest in IUD held through Region's shares in IUD, involving a *de facto* transfer of a 5.62% interest in IUD from Mr Taruta to Mr Mkrchan, Mr Taruta secured a promise from Mr Mkrchan to pay him US\$281 million.

977. Consistent with this, the negotiations regarding the transfer of the 17% Region stake were carried out on the basis that the sum to be paid was open for negotiation and by reference to the value of the stake in September 2008 and December 2009, when those discussions took place.

978. Mr Taruta himself observed in his witness statement as follows:

"Although I continued to hold a share in Region through Azovimpex, the real value of this was about to dramatically decrease as Region was about to be replaced as a shareholder in IUD. I should note that at no stage did Mr Mkrchan and I agree that I would give up my 17% stake in Region. I still considered that was some security notwithstanding the new arrangements."

979. It follows that it was Mr Taruta's *own* case that he intended to retain the 17% Region stake after the execution of the Settlement Agreement and also after payment under that agreement.

980. Mr Taruta was wrong about this since Mr Wolfson QC was right when he submitted that, following the execution of the Amended Settlement Agreement (and *a fortiori* following payment under that agreement), there could not possibly be a continuing debt in respect of the transfer of Mr Taruta's share to Mr Mkrchan, even on Mr Taruta's own case. What matters, for present purposes, however, is that Mr Taruta himself appears to have contemplated retaining the interest.

981. The position is not changed by certain evidence given by Mr Taruta in re-examination to this effect:

"Q. At any point from 2006 to December 2009 did you ever receive any dividends or profits in respect of that 5.62% indirect interest in IUD?"

A. No, never. And also the same applies to Region."

This was followed by a letter from Lovells, which had the following to say:

"We refer to the re-examination of Mr Taruta by Mr Foxton QC on day 15 of the trial, in which Mr Taruta confirmed that he had never received any dividends or profits as a result of his 17% interest in Region LLC via Azovimpex LLC (see transcript page 162).

We now enclose a letter from Azovimpex LLC confirming that during the period in which it was a shareholder in Region LLC (27 December 2006 to 28 December 2016), it never received dividends or any other financial support (amongst other things) from Region LLC.”

982. That this point should be addressed in such a way is regrettable. If it were a point which had any real merit, it should have been raised in a proper and timely way. In any event, even if dividends were otherwise formally distributed to shareholders in IUD and no dividends were distributed in respect of the 17% Region stake, I agree with Mr Wolfson QC that this would not be sufficient to establish that the stake was a security interest in the face of the overwhelming contrary evidence. Furthermore, the evidence was clear that the Partners’ approach to dividends was somewhat haphazard. As a result, the dividends point is not a significant one.
983. The conclusion that the 17% interest was not a security interest is consistent also with Mr Mkrtchan’s evidence (and case) that the Taruta share was transferred as ‘sweat equity’ in recognition of the work he was doing and his close friendship with Mr Taruta.
984. Mr Taruta himself described his relationship with Mr Mkrtchan prior to 2008 as being as though they were brothers. Mr Taruta told Mr Gaiduk at the time that this was the case. Mr Mkrtchan, indeed, he explained, called him “*brother*”.
985. This, I am satisfied, provides the explanation why, whereas Mr Gaiduk required to be paid for his share, there is nothing to indicate that Mr Taruta did so also – although he did require that the 17% Region stake be transferred to him and so did receive something in return for the transfer.
986. For these various reasons, I am quite clear that the 17% Region stake was not a security interest as Mr Taruta has maintained.
987. The second fundamental difficulty with Mr Taruta’s insistence that the FMTG Payment entailed the payment of a loan instalment is that there is no documentary evidence of such a debt having come into existence. There is no loan agreement. There is not even so much as a handwritten note or jotting which is said to evidence or reflect the existence of this supposed agreement and the liability thereunder.
988. The FMTG MOU is the most that there is. That, however, is a document which, as previously explained, is of somewhat limited evidential assistance. Indeed, aside from the features which have already been identified and aside also from the obvious fact that the FMTG MOU is not itself a loan agreement, as Mr Wolfson QC pointed out, it is a document which contains a number of inaccuracies. These include the fact that, contrary to what is stated in the first recital, of the US\$150 million distributed by FMTG, US\$32 million had already been distributed some two months earlier, on terms that the whole of that sum would be paid to Mr Gaiduk. Other inaccuracies include the fact that, contrary to what is also stated in the recitals, at the time of the FMTG MOU, owing to his ownership of the 17% Region stake, Mr Taruta had a 38.7% beneficial interest in IUD rather than the one-third interest described, and Mr Mkrtchan did not have a 100% interest in M3 but (because of Mr Taruta’s 17% interest) only an 83% beneficial interest.

989. Asked about this latter point in cross-examination, Mr Taruta acknowledged the inaccuracy but explained as follows:

“... it was implied here that as between the individuals, not between the corporates, but it was an agreement as between the individuals here, and that’s why no one took into account the fact that there was my interest within Mkrctchan’s shareholding here. We did not specify that here.”

This makes no sense, however. The position is, furthermore, made worse by virtue of the fact that Mr Gaiduk knew nothing about the arrangements concerning the 17% Region stake held by Mr Taruta. That was not disclosed.

990. Further and in any event, it can be seen from the extracts of the FMTG MOU previously cited that nothing is stated about the duration of the loan or as to rate of interest. Mr Taruta, indeed, gave no evidence that he ever agreed or even discussed such matters with Mr Mkrctchan. These are essential features of any loan arrangement. Indeed, as previously explained, interest would have been particularly relevant given the liability which, according to him, he had to incur to fund the loan through Mr Schlosberg.

991. Mr Wolfson QC speculated that the FMTG MOU was an instance of what he described as ‘papering up’ as loans payments and transfers which were not, in fact, loans but absolute transfers giving rise, therefore, to no repayment obligations. Ms Bashynska agreed, indeed, in cross-examination that, on occasion, this was the practice, at least in the context of what is known as ‘progonka’. Accordingly, Mr Wolfson QC suggested, the FMTG Payment was made to look as though it was a loan which was never intended to be enforced, hence there being no need to agree the normal features of a loan such as duration and interest rate.

992. I incline to the view that Mr Wolfson QC was right about this. Whether he was right may not much matter, however, since, in my view, all that matters is that I feel unable to place any evidential weight on the FMTG MOU, for the other reasons which I have sought to give.

993. Nor, this being the third fundamental difficulty, is this a case in which Mr Taruta is able to point to a demand for repayment and say that this shows that there was the debt alleged. Mr Taruta, indeed, accepted in cross-examination that the only document said to evidence any demand for repayment of the debt for the Taruta share was the Amended Settlement Agreement. That, however, does not evidence such a demand, which is hardly surprising, as I shall come on to explain, given what the purpose of the Amended Settlement Agreement was.

994. Furthermore, Mr Taruta confirmed in this respect that such oral requests for repayment as were made were made in the context of the Amended Settlement Agreement; they were not freestanding loan repayment demands. Thus, Mr Taruta was asked this by Mr Wolfson QC:

“There are no documents in the disclosure where either you or any of your advisers ask for this debt to be repaid, are there?”

His answer was:

“Wrong. No, the settlement agreement in September 2008 with respect to the 750 million, and then in December 2009 with respect to the 281 million, precisely provides for the settlement to be made with respect to my 17%.”

He was, then, asked:

“I’m not going to go over that discussion with you again, Mr Taruta. But after the VEB sale and the settlement agreement, you never made any request for a repayment of this debt, did you?”

He replied:

“That is wrong. Of course I did. There was a timeline, April, provided for April.”

Then, he was asked:

“Do you mean payment under the settlement agreement or payment for this alleged debt, for the one-sixth share in IUD?”

His response was:

“The contract provides for 281 million.”

Mr Wolfson QC, then, asked:

“Yes. Are you saying that you demanded repayment of a debt for the transfer of a one-sixth interest in IUD or are you saying that you demanded repayment of the price due under the settlement agreement? Which of those are you talking about?”

He answered:

“I am referring to the 281 million.”

995. The absence of a repayment demand separate and apart from the Amended Settlement Agreement is telling. This was, after all, a very substantial loan (at least on Mr Taruta’s case), even by the Partners’ (admittedly somewhat lavish) standards.
996. The fourth fundamental difficulty is that Mr Taruta’s case requires it to be accepted that the purpose of the Settlement Agreement (and the Amended Settlement Agreement) was for Mr Mkrtchan to repay the alleged debt owed for the Taruta share. It was his evidence, indeed, that the Settlement Agreement is the only document relied upon by him evidencing the alleged debt. He accepted this, in terms, when asked by Mr Wolfson QC in cross-examination.
997. I am clear, however, that the Settlement Agreement (and the Amended Settlement Agreement) had nothing to do with any such alleged indebtedness. On the contrary, its clear purpose was for Mr Mkrtchan to pay the agreed value for a 5.62% interest in IUD which Mr Taruta had held indirectly as a result of the acquisition of the 17% Region stake, and not to settle an existing liability owed by Mr Mkrtchan to Mr Taruta.
998. There are a number of reasons for taking this view.

999. First, the Settlement Agreement is explicit as to its purpose: it records that it is concerned with the equalisation of the parties' respective interests in IUD which resulted from the transfer of Region's shares in IUD. Thus, Recital A is in these terms:

“Immediately prior to the Capital Increase (as defined below) the Parties and Vitaliy Anatolievich Gayduk (‘Mr Gayduk’) together controlled Corporation Industrial Union of Donbass (‘ISD’) through a number of holding companies in the manner and proportions summarised in Schedule 1. At such time the proportions in which Mr Mkrтчan and Mr Taruta held their interests in ISD (directly or indirectly) relative to each other were as follows:

- Mr Mkrтчan 41.5%

- Mr Taruta 58.5%

(the ‘Previous Proportions’).”

Recital B, then, states as follows:

“On the date of this Agreement three Cyprus companies, controlled by the Parties and Mr Gayduk (‘Cyprus SPVs’) have agreed to make contributions to the charter capital of ISD on terms agreed between companies controlled by the Parties and Mr Gayduk, with the result that ISD will be controlled by the Parties and Mr Gayduk in the manner and proportions summarised in Schedule 2 (the ‘Capital Increase’).”

This followed by Recital C:

“As a result of the Capital Increase, the proportions in which Mr Mkrтчan and Mr Taruta hold their interests in ISD (directly or indirectly) relative to each other are as follows:

- Mr Mkrтчan 49.9%

- Mr Taruta 50.1%”

1000. Clauses 2.1 and 2.2 of the Settlement Agreement provide expressly that the agreed payment by Mr Mkrтчan to Mr Taruta will be made in consideration for this adjustment to the parties' shareholdings. Thus, Clause 2.1 states as follows:

“In consideration for Mr Taruta procuring that companies controlled by him comply with their obligations under the Capital Increase, Mr Mkrтчan agrees to pay Mr Taruta the sum of US\$281,000,000 not later than 30.04.2010 (the ‘Payment Date’) (the ‘Capital Increase Price’).”

Clause 2.2 is, then, in these terms:

“In consideration for and conditional upon Mr Taruta procuring that companies controlled by him will comply with their obligations under the Ukrainian Buyout and the Ukrainian Buyout completing, Mr Mkrтчan agrees to pay to Mr Taruta, or to any other person nominated in writing by Mr Taruta, an additional sum of US\$ 1 (one) (the ‘Ukrainian Buyout Price’ and in aggregate with the Capital Increase Price, the ‘Price’) on or before the Payment Date.”

1001. There is no issue that, as Mr Wolfson QC put it, it is obvious from the Shareholdings and Appendices that the change from the Previous Proportions (41.5% to 58.5%) to 50:50 ownership is a result of the transfer of IUD shares out of Region, and, therefore, the loss of Mr Taruta's 5.62% interest in IUD through Region. Mr Taruta accepted as much.
1002. Secondly, nowhere in the Settlement Agreement is there the slightest suggestion that what was being settled was a debt owed by Mr Mkrtchan to Mr Taruta for the Taruta share. Mr Taruta, again, acknowledged this when the point was put to him in cross-examination. He was asked this by Mr Wolfson QC:

"... What I put to you, Mr Taruta, is that there would be nothing in this settlement agreement which Mr Mkrtchan could point to and say, 'Just a minute, that debt from December 2006 was repaid when I paid you the \$750 million under the settlement agreement'. That's right, isn't it? There is nothing in here which would enable Mr Mkrtchan to say that."

Mr Taruta denied that that was the case, saying this:

"No, this is not the case. Mr Mkrtchan knew that my word always was an agreement and it was always agreed, it was always followed. He did not need to do anything else to formalise anything else in some document. My word always meant obligations."

Mr Wolfson QC, then, asked:

"So is the answer to my question: yes, there is nothing in the agreement, that Mr Mkrtchan was going to rely on your word. Is that your evidence?"

Mr Taruta replied:

"Yes, based on my words. He received the share at IUD, and for him it was extremely generous move on my part, and he knew that."

1003. I cannot accept this evidence. It is wholly unrealistic to suppose that Linklaters would somehow have omitted to include wording in the Settlement Agreement (and Amended Settlement Agreement) designed to settle the debt to which Mr Taruta was referring, if that was really what Mr Taruta intended was to be settled, as he maintained in evidence was both what he intended and what Linklaters were instructed to do. It is, indeed, "vanishingly unlikely", as Mr Wolfson QC put it, that, if those were the instructions which Linklaters received, they would have produced a draft agreement which did not even mention the debt.
1004. Mr Taruta had no answer to this point when it was put to him, as this exchange demonstrates:

"Q. Mr Taruta, I would suggest to you that if those had been the instructions given to Linklaters, the document they came up with would be a very strange document indeed, because it does not record anywhere the debt from 2006, the transfer in 2006, and nor does it settle that debt, does it, as you have just confirmed to me?"

A. Yes.

Q. What I suggest, Mr Taruta, is that, faced with the contradiction between what Linklaters have drafted and what you say they were told to draft, the truth is that your evidence as to what this agreement was meant to be doing is false, is it not?

A. Of course not.

Q. There [are] only two choices, Mr Taruta. Either your evidence is wrong or Linklaters' were incredibly negligent. Are you saying it's the second of those possibilities?

A. No, they were not negligent. They have explained the indebtedness of Mr Mkrtchan to me, and between Mr Mkrtchan and Mr Bakai there were no agreements whatsoever, and that didn't stop to settle and to receive the share. And the same as between the two of us. Mr Mkrtchan had not a company that was able to pay that debt, so he personally made that offer and I agreed with him..."

1005. It follows that, the Settlement Agreement (and the Amended Settlement Agreement) not having the purpose for which he contends, Mr Taruta faces a considerable difficulty since it was his position that the Settlement Agreement and the Amended Settlement Agreement evidence the loan which he maintains came into being. Indeed, his case essentially depends on that being found to be the position.
1006. The fifth fundamental difficulty, although closely related to the previous point, concerns the amount which it was agreed in the Amended Settlement Agreement (in December 2009) that Mr Mkrtchan would pay Mr Taruta: US\$281 million (as opposed to the US\$750 million originally agreed in the Settlement Agreement in October 2008).
1007. It is quite impossible to conclude that either the US\$750 million or the US\$281 million were intended to represent settlement of a debt stemming from December 2006, regardless of whether the price was US\$100 million (as Mr Gaiduk and Mr Mkrtchan maintain, and as I have decided) or as much as the US\$200 million which has been suggested by Mr Taruta. This is because it simply makes no sense to suppose that Mr Mkrtchan agreed in 2006 to pay Mr Taruta multiples of the price paid to Mr Gaiduk for an identical asset which was transferred at the same time.
1008. As Mr Wolfson QC put it by reference to the US\$750 million (and so what was agreed in October 2008):

"In any event, due to your very close friendship with Mr Mkrtchan, compared to his friendship with Mr Gaiduk, he agrees to pay you 7.5 times the amount he had paid Mr Gaiduk, on the basis that he had paid him, as I suggest he had, \$100 million. Correct?"

Mr Taruta's response somewhat missed the point:

"Apparently so. But again, one doesn't have to look at how much he paid Gaiduk but rather one has to go by the amount of the assets that he acquires by way of the 17%. That was the kind of calculation that was going through our minds at that time."

The point is simply this: US\$750 million (in October 2008) and US\$281 million (in December 2009) are quite obviously contemporaneous valuations; they are not

valuations which bear any relationship with a debt incurred in December 2006. Indeed, Mr Taruta accepted as much in cross-examination.

1009. Moreover, it is clear also that the US\$750 million and US\$281 million were negotiated by reference to the transfer of a 5.62% interest in IUD, namely the interest which was being transferred. That this is the case is clear if the US\$281 million is considered by way of example, taking the price to be paid under the VEB SPA executed on 30 December 2009, the same day as the Amended Settlement Agreement was entered into. As Mr Wolfson QC pointed out, the VEB SPA provided for two payments totalling US\$2,716,000,863.96, which (after deduction of Mr Bakai's handsome 8.2% commission) resulted in a net consideration of US\$2.493 billion: in other words, some US\$2.5 billion for a 50% interest in IUD.
1010. This is consistent, indeed, with the handwritten notes to which I have referred previously dating from December 2009, in which Mr Taruta gave "2500" (or US\$2.5 billion) as the price payable by VEB. Mr Taruta went on in that document to calculate a price for a 5.66% interest in IUD, which was US\$361.8 million. In fact, 5.66% was an error since the correct percentage ought to have been 5.62%. Had that been applied and rounding up from 50% to 100% *produces* US\$281 million, the very amount which appears in the Amended Settlement Agreement.
1011. It is obvious, in the circumstances, that this is how the US\$281 million was arrived at. Despite this, however, it was Mr Taruta's evidence that this was merely "a coincidence", insisting that:

"... That was a negotiation when Mr Mkrтчan said 150, I said 361, after that he said 'Well, I am ready to do 200', and I said 'No, 320'. Then he said 280, I said, 'All right, then neither for you, not for me, a small satisfaction of 281'. And Mr Bakai wasn't negotiating, he was simply being present. However, you see, it turns out that there was a coincidence even with the math. But then we did not look at the maths, and we were all heated up and we certainly did not look at the maths."

This was, however, clearly another lie. There was perfectly obviously a sophisticated negotiation, not the horse trade which Mr Taruta was, in effect, describing. Mr Taruta's own handwritten note itself demonstrates that to be the case.

1012. The sixth fundamental difficulty concerns the interview which Mr Taruta gave with the Russian investigative officer on 19 July 2018 since in that interview Mr Taruta was clear that he had transferred the Taruta share to Mr Mkrтчan, as he put it, "*without compensation*". Specifically, his recorded (and signed) statement on this topic was in these terms:

"As my relationship with O.A. Mkrтчan developed, we became partners in a common business project related to the company Industrial Union of Donbass, hereinafter IUD, and O.A. Mkrтчan, S.V. Gaiduk and I became shareholders of this company.

About 40% belonged to me, 34% to Gaiduk, and 26% to O.A. Mkrтчan. The shares belonging to Mkrтчan were transferred to him by me without compensation in connection with our friendship."

1013. This was a statement which was made in the knowledge that there could be serious criminal consequences if a lie were told. I am in no doubt that, as a result, Mr Taruta would have been especially keen to tell the truth. Indeed, he did not himself suggest (probably unsurprisingly in the circumstances) that what he had said was untrue. Instead, when asked in cross-examination, Mr Taruta explained that what he had meant was that Mr Mkrтчan had not paid him to date, by which he meant not paid under the Amended Settlement Agreement.

1014. The relevant exchange was this:

“Q. You told the Russian prosecutor, did you not, that you had transferred shares in IUD to Mr Mkrтчan for no compensation. That’s right, isn’t it?”

A. Without payment. I said ‘without payment’, and they wrote ‘without compensation’, but that was not the main topic. But for 11% Mr Mkrтчan did not pay me. Therefore, so far it was without consideration.

...

MR JUSTICE PICKEN: Why did you say anything about compensation or payment then, if it wasn’t the point of the conversation? Sorry, carry on.

A. No, I told him that he did not pay to that day, that so far it was without compensation.”

1015. This was not truthful evidence. Mr Taruta was endeavouring to explain away something which he had very clearly and unambiguously said on a previous occasion. In doing so, he chose to lie. That this is the case is underlined by the fact that Mr Taruta’s explanation ignores the words which follow the reference “*without compensation*”, namely “*in connection with our friendship*”. Those are words which inform what is meant by “*without compensation*” and which are wholly inconsistent with Mr Taruta’s suggestion when giving evidence that he was merely intending to refer to the fact to date payment had not been received.

1016. For these various reasons, I conclude that Mr Mkrтчan did not owe any debt to Mr Taruta, whether the alleged US\$100 million loan or the alleged US\$50 million loan.

Discharge by the Settlement Agreement?

1017. This conclusion means that an alternative submission which was advanced by Mr Wolfson QC does not arise. This was that, if there was any debt owed to Mr Taruta by Mr Mkrтчan, that liability was settled by the Settlement Agreement in both its original and amended form.

1018. Mr Wolfson QC relied, for these purposes, on the fact that the Settlement Agreement provided in Clause 7.2.1 that it “*supersedes any previous written or oral agreement between the Parties in relation to the matters dealt with in this Agreement*”. As Mr Foxton QC, however, pointed out, it is difficult to see how any loan made to Mr Mkrтчan to enable Mr Mkrтчan to buy a separate 17% interest from Mr Gaiduk can come within the ambit of this wording. The Settlement Agreement was concerned with something different: a capital increase which was to be conducted as a pre-requisite to

a sale of an interest in IUD by Mr Mkrchan and Mr Taruta which would have the result of equalising their interests in IUD, effectively transferring the 5.62% interest in IUD which Mr Taruta held via the 17% Region stake from Mr Taruta to Mr Mkrchan. The fact that the 17% Region stake and the indirect 5.62% interest in IUD was transferred to Mr Taruta as part of the transaction under which Mr Taruta also agreed to provide funds towards satisfaction of the liability for the Gaiduk share is nothing to the point: it is background at best and certainly not in the category of *“any previous written or oral agreement between the Parties in relation to the matters dealt with in this Agreement”*.

1019. In fairness to Mr Wolfson QC, the submissions which he made on this topic took as their premise that there was a debt from Mr Mkrchan to Mr Taruta under the alleged US\$100 million loan and, furthermore, that the transfer of the 17% Region stake was a security interest rather than an outright transfer in return for the FMTG Payment. On that basis, the argument that the alleged US\$100 million loan and the Amended Settlement Agreement were so closely connected that the former should be regarded as discharged by the latter is more viable than it might at first appear. Still, however, I am unconvinced that the discharge argument can be right, given the very particular wording of Clause 7.2.1 and the express subject matter of the Settlement Agreement/Amended Settlement Agreement.
1020. It will be appreciated that my rejection of this argument makes no difference to the overall fate of Mr Taruta’s Loan Claim: that it cannot succeed. It is unnecessary, in the circumstances, to address a limitation defence which was put forward by Mr Wolfson QC on Mr Mkrchan’s behalf, and I say no more about that issue.

The Amended Settlement Agreement Claim

1021. I turn, lastly, to the Amended Settlement Agreement Claim.
1022. It is common ground that the Amended Settlement Agreement (which is governed by English law) is a contract binding on Mr Taruta and Mr Mkrchan. The difficulties arise in relation to the nature of Mr Mkrchan’s obligations under this agreement, which, in turn, affects the analysis of whether Mr Taruta’s claims are time-barred.
1023. It is necessary to set out a number of the Amended Settlement Agreement’s provisions. The key payment obligation is found at Clause 2.1, which is repeated purely for convenience:

“In consideration for Mr Taruta procuring that companies controlled by him comply with their obligations under the Capital Increase, Mr Mkrchan agrees to pay Mr Taruta the sum of US\$281,000,000 not later than 30.04.2010 (the ‘Payment Date’) (the ‘Capital Increase Price’).”

1024. There is a further nominal payment obligation at Clause 2.2 of the Amended Settlement Agreement, which is again repeated:

“In consideration for and conditional upon Mr Taruta procuring that companies controlled by him will comply with their obligations under the Ukrainian Buyout and the Ukrainian Buyout completing, Mr Mkrchan agrees to pay to Mr Taruta, or to any other person nominated in writing by Mr Taruta, an additional sum of US\$ 1 (one) (the

‘Ukrainian Buyout Price’ and in aggregate with the Capital Increase Price, the ‘Price’) on or before the Payment Date.”

1025. Clause 3 provides for an agreed remedy in the event of breach of Clause 2. It is headed “Default” and provides that:

“The parties agree that if Mr Mkrtchan fails to pay the Capital Increase Price and (if payable) the Ukrainian Buyout Price on or before the Payment Date, the Parties shall procure, as Mr Taruta’s sole and exclusive remedy, that the Parties shall be returned, to the fullest extent possible, to the economic and legal position relative to each other which they would have held if their relative interests in ISD or Elba had at all times been held in the Previous Proportions.”

1026. Clause 3.1 provides for the specific steps which are to be taken to put this agreed remedy into effect, being that “Accordingly, if the Price is not paid on or before the Payment Date, within -- months of the Payment Date”.

1027. Clause 3.1.1 is in these terms:

“Mr Mkrtchan shall procure the transfer of sufficient shares in either the Cyprus SPV controlled by him or its sole shareholder or any other company holding ISD participation interests or Elba shares for Mr Mkrtchan, in order to procure that Mr Taruta’s and Mr Mkrtchan’s interests in ISD or Elba relative to each other are returned to the Previous Proportions.”

1028. Clause 3.1.2, then, provides:

“Mr Mkrtchan shall pay Mr Taruta a proportion of all sums received by Mr Mkrtchan between the date of this Agreement and the date of payment pursuant to this Clause, as a result of his holding shares in ISD or Elba (whether in the form of dividends or otherwise) including any cash consideration paid to Mr Mkrtchan pursuant to the Elba Merger and including any sums received from Elba or its controlling shareholder by way of loan (‘Benefits’). The sum payable by Mr Mkrtchan shall be calculated as the Benefits actually received by Mr Mkrtchan less the Benefits Mr Mkrtchan would have received if Mr Taruta’s and Mr Mkrtchan’s interests in ISD or Elba relative to each other were held in the Previous Proportions at the time of such receipt;”

1029. This is followed by Clause 3.1.3, which states:

“Mr Taruta shall repay Mr Mkrtchan any of the Price already paid to Mr Taruta;”

1030. As for Clause 3.1.4, this stipulates that:

“Mr Taruta shall pay Mr Mkrtchan a proportion of:

*the consideration paid by the Parties to Mr Gayduk pursuant to the Shareholder Exit;
and*

Losses suffered by Mr Mkrtchan between the date of this agreement and the date of payment pursuant to this Clause either as a result of his holding shares in ISD ...

in each case where Mr Mkrтчan's share of such Losses is higher than under the Previous Proportions.

The sum payable by Mr Taruta shall be calculated as the Shareholder Losses Mr Mkrтчan actually suffered less the Shareholder Losses he would have suffered if Mr Taruta's and Mr Mkrтчan's interests in ISD or Elba were held in the Previous Proportions or their liabilities under such indemnities, guarantees, or other liabilities were attributed according to the Previous Proportions."

1031. Clause 3.1.5, then, states:

"Mr Taruta shall indemnify Mr Mkrтчan against a proportion of any contingent liabilities which may result in Shareholder Losses ('Contingent Liabilities') where Mr Mkrтчan's share of such Contingent Liabilities is higher than under the Previous Proportions. The extent of the indemnity to be given shall be calculated as such indemnity as will procure that Mr Taruta's and Mr Mkrтчan's relative shares of Contingent Losses shall be the Previous Proportions."

1032. Pursuant to Clause 2.1 of the Amended Settlement Agreement, Mr Mkrтчan was obliged to pay the Capital Increase Price by 30 April 2010. It is common ground that Mr Mkrтчan did not pay the Capital Increase or Ukrainian Buyout Price by 30 April 2010, and, therefore, was in breach of Clause 2.1 (and, indeed, Clause 2.2 also).

1033. There is, however, no claim in these proceedings which is founded on such breaches. This is because it is recognised that any such claim would be time-barred, Mr Taruta's claim under the Amended Settlement Agreement having been commenced on 30 November 2016.

1034. Mr Taruta's claim is, instead, focused on Clause 3. His primary claim is for an order for specific performance of Mr Mkrтчan's obligations under Clause 3.1 of the Amended Settlement Agreement. This entails the transfer of an interest in IUD pursuant to Clause 3.1.1, and the payment of sums under Clause 3.1.2 to reflect "*the benefits actually received by Mr Mkrтчan less the benefits he would have received if their respective interests in IUD relative to each other had been held in the Previous Proportions at all material times*". Mr Taruta claims damages in the alternative.

1035. It is convenient to consider, first, the specific performance claim in respect of Clause 3.1.2, before coming on to deal with the alternative claim for damages in respect of Clause 3.1.2 and, then, the claim for specific performance in respect of Clause 3.1.1.

Clause 3.1.2: specific performance

1036. Mr Wolfson QC accepted that, in principle, specific performance is available in respect of the entitlement to shares in IUD on the basis that they are shares in a private company which are not widely traded in the market. This applies to the specific performance claim in respect of Clause 3.1.1. However, he maintained that specific performance could not be ordered in relation to a claim under Clause 3.1.2 since it is a money claim.

1037. Until a very late stage, the Taruta Parties maintained that specific performance was frequently granted in respect of money obligations, relying on a passage from Virgo et al, *Contractual Duties: Performance, Breach, Termination and Remedies* (2nd Ed.) at

paragraphs 27-036 and 27-038, as well as the decisions in *Beswick v Beswick* [1968] AC 58, *Cogent v Gibson* (1864) 33 Beav 557 and *Metrogem Ltd v Corrett* (unreported, 22 May 2001, ChD). In reliance on these authorities, Mr Foxton QC submitted that specific performance ought to be granted in respect of Clause 3.1.2 given that it does not simply require the payment of a specific sum of money, but rather a calculation in accordance with the contractual methodology. However, as *Virgo* makes clear, such an order will be very rare:

“In the vast majority of cases an action for damages, or as the case may be, in debt, will amply vindicate the claimant’s rights ... Nevertheless, there is no doubt that on principle the remedy is available for money obligations. It thus can be had in special cases where a simple action in debt or damages will not do, as with promises to pay annuities and pensions, and for agreements to pay money where the payment is intended to provide a vital injection of cash into a joint venture ... Although most of the above cases concern special instances of obligations to pay money, it nonetheless seems clear that the court may equally give an order of specific performance whose only effect is to require payment of a given sum by the defendant to the claimant, and where an action of debt would lie just as well. Thus, where a contract of sale is specifically enforceable at the suit of the purchaser, it is equally so enforceable at the instance of the vendor even if the latter has already performed, so that the only obligation left unperformed is payment of the price.”

1038. Perhaps more helpful in this context is the explanation given in *Snell’s Equity* at paragraph 17-011, as follows:

“In most cases a monetary remedy of damages or the action for an agreed sum will be an adequate remedy for breach of contract for the payment of money, but in exceptional cases such a contract may be specifically enforced. This may occur where the action for an agreed sum would be unavailable or unsuitable, such as where the contract is to pay a third party, so that the damages recoverable by the contracting party would be merely nominal, or where the contract is to make periodical payments, requiring a multiplicity of actions at law to enforce payment. Although the third party cannot himself sue on the contract, he can enforce any order for specific performance which the contracting party obtains. More controversially, in what has been described as an ‘awkward exception’ to the normal requirement that damages should be inadequate, in contracts for the sale of land, the vendor is readily awarded specific performance even though his interest in performance is purely financial and thus damages or the action for an agreed sum would (other than in exceptional cases) be an adequate remedy. This is commonly justified on the basis of mutuality, but this principle is no longer given the weight it traditionally was and, in any event, the purchaser’s entitlement to specific performance against the vendor may no longer be absolute.”

1039. It follows that specific performance should only be awarded in respect of a payment obligation where an action in damages or debt would not properly vindicate the claimant’s right. It is clear that, whilst it is not impossible to obtain specific performance in relation to an obligation to pay money, this is not the normal position. On the contrary, it is only in what might be regarded as special cases that such a remedy will be available. Nothing about the present case puts it into a special category. It is not a case of a type described in *Virgo* or in *Snell* where it might be appropriate to require that there be specific performance.

1040. There is, in particular, nothing about the calculation contemplated in Clause 3.1.2 which means that the ordinary remedy would be inadequate or which necessitates an order for specific performance since it is not a calculation which it is contemplated will be performed by a third party. It is a calculation which, if necessary, the Court could perform. Furthermore, if Mr Foxton QC were right that the fact that a calculation is required means that specific performance is appropriate, this would potentially mean that specific performance would be available in a far wider range of cases than hitherto recognised. The plain fact is that the claim under Clause 3.1.2 is a money claim. As such, it is not appropriate to order specific performance in respect of it.
1041. On the final day of trial, perhaps recognising these difficulties, Mr Foxton QC sought to elaborate on his case by submitting that Clause 3 is a composite remedy which requires Mr Mkrchan to return the shares pursuant to Clause 3.1.1 and, then, return the benefit derived from having held those shares pursuant to Clause 3.1.2. Mr Foxton QC, therefore, submitted that, if the obligation to transfer the shares is amenable to specific performance (as the Mkrchan Parties accept it is), then, the same should apply to Clause 3.1.2, which is “*part of the same package*”, making consequential adjustments following the share transfer.
1042. Indeed, it is right that no payment under Clause 3.1.2 can be made until the transfer under Clause 3.1.1, because until that point it is not possible to know what benefits and detriments have followed from Mr Mkrchan’s retention of the additional shares. In my view, however, this argument, although superficially attractive, adds little of substance.
1043. This is because, to repeat, whether or not Clauses 3.1.1 and 3.1.2 form part of a composite remedy, the fact remains that Clause 3.1.2 imposes an obligation to pay money. True it is that that obligation is parasitic on Clause 3.1.1. The reverse, however, is not true: it is possible to order specific performance of Clause 3.1.1, but not of Clause 3.1.2.
1044. The Taruta Parties have identified no reason why an order for the payment of a sum of money would not be adequate. In truth, the only reason why the Taruta Parties pursue an order for specific performance is to avoid the limitation period applicable to a claim in simple contract: whether in respect of a claim under Clause 2 (a claim which is not made since it is accepted that it would be time-barred) or under Clause 3.1.2 (a claim which is made but which, as I shall shortly explain, would also, in any event, be time-barred). That does not make this an exceptional case where justice requires an order for specific performance of a payment obligation.

Clause 3.1.2: damages

1045. Two issues arise in this context: first, as previously mentioned, whether Mr Taruta can bring a freestanding claim alleging breach of Clause 3.1.2; and, secondly, if so, when the cause of action for breach of Clause 3.1.2 accrues for limitation purposes.
1046. The first issue depends on the distinction between primary and secondary obligations. Mr Taruta’s case is that it is open to him to claim damages either under Clause 2 or under Clause 3.1.2 or, indeed, under both Clause 2 and Clause 3.1.2. The Mkrchan Parties’ case, on the other hand, is that Mr Taruta can only sue on the breach of the primary obligation under Clause 2, as opposed to the agreed remedy (or secondary obligation) for such breach which is provided for in Clause 3 (including, therefore,

Clause 3.1.2). The context, of course, is that there is no claim which has been brought under Clause 2 since it is apparently recognised that such a claim would be time-barred. The only claim alleging breach, and so seeking damages, concerns Clause 3.1.2.

1047. Mr Taruta insists, in effect, that there is a different cause of action under Clause 3 (and so under Clause 3.1.2) which is separate and distinct from the cause of action under Clause 2.
1048. Mr Mkrtchan takes issue with this. His position is that Clause 3 (including Clause 3.1.2) does not contain any primary obligation on which it is open to Mr Taruta to sue, but instead merely sets out an agreed remedy (and so a secondary obligation) in the event that there is a breach of Clause 2.
1049. The nature of a secondary remedial obligation was explained by Lord Diplock in *Moschi v LEP Air Services Ltd* [1973] AC 331 at page 350:

“Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of the rescission. It deprives him of any right as against the other party to continue to perform them. It does not give rise to any secondary obligation in substitution for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. However, for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations.”

1050. A secondary obligation may arise not only by operation of law, but also as a matter of contract, as in the common case of liquidated damages. Importantly, where a contract specifies a remedy, the remedy is not thereby rendered a primary obligation. In the same way, any accrued right to damages as a matter of law (rather than contract) does not give rise to any primary obligation. That is, of course, why it is not open to a party to claim damages in respect of a failure to pay damages. Such a claim would entail the party seeking to claim in respect of a secondary obligation. It makes no difference, as a matter of principle, if the secondary obligation arises by operation of law or by contract: either way, the obligation is secondary rather than primary, and so cannot be independently sued upon.
1051. In this regard, it is necessary to draw a distinction between conditional primary obligations and secondary obligations. The position was explained by Lord Neuberger and Lord Sumption in *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67 at [14]-[15] in this way:

“... where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.”

1052. Accordingly, a secondary obligation arises on a breach of contract, whereas a conditional obligation is one that arises on some other contingent event.
1053. That distinction is critical in the present case since, on analysis, there can be little doubt that Clause 3 provides an agreed remedy for breach of Mr Mkrctchan's obligations under Clause 2. Clause 3 is headed "*Default*" and the introductory wording stipulates very clearly, indeed, that what follows (including Clause 3.1.2) applies "*if Mr Mkrctchan fails to pay the Capital Increase Price ... on or before the Payment Date ...*".
1054. The provision, then, goes on to record the parties' agreement that they "*shall procure, as Mr Taruta's sole and exclusive remedy, that the Parties shall be returned, to the fullest extent possible, to the economic and legal position relative to each other ...*".
1055. Clause 3, therefore, only comes into play at all if there has been a breach of Clause 2; it has no independent significance but is entirely parasitic on there having been a Clause 2 breach.
1056. Consistent with this, Clause 3.1, then, goes on to use the word "*Accordingly*" (so linking with the prior "*if Mr Mkrctchan fails to pay the Capital Increase Price ... on or before the Payment Date ...*" wording) before stating the words "*if the Price is not paid on or before the Payment Date, within -- months of the Payment Date*".
1057. Put differently, Clause 3 is, in no sense, an alternative to Clause 2. It is, instead, concerned with what the parties agreed should happen in the event that there is a breach of Clause 2 by Mr Mkrctchan.
1058. Put differently still, Mr Taruta was not given a choice: whether to allege breach of Clause 2, on the one hand, or to allege breach of Clause 3, on the other hand. There is, as Mr Wolfson QC put it, no optionality under which Mr Taruta could choose to allege a breach of Clause 3 in place of alleging a breach of Clause 2. It is, on the contrary, only possible for Mr Taruta, as it were, to access Clause 3 if there has been a breach in respect of Clause 2.
1059. It follows that Clause 3 is concerned with remedy. As such, it amounts to a secondary obligation. It is not in the category of conditional primary obligation. There is one primary obligation, and that is to be found in Clause 2, not also in Clause 3.
1060. The consequence is that there can be no freestanding claim by Mr Taruta under Clause 3 since that would entail his seeking to recover damages for breach of a secondary obligation – in effect, seeking damages in respect of non-payment of damages. That is not permissible as made clear by Lord Brandon in the demurrage context in ***President of India v Lips Maritime*** [1988] AC 395 at page 422:

"It is essential to the decision of that question to have in mind the legal nature of demurrage: both what it is and what it is not. I deal first with what demurrage is not. It is not money payable by a charterer as the consideration for the exercise by him of a right to detain a chartered ship beyond the stipulated lay days. If demurrage were that, it would be a liability sounding in debt. I deal next with what demurrage is. It is a liability in damages to which a charterer becomes subject because, by detaining the chartered ship beyond the stipulated lay days, he is in breach of his contract. Most, if not all, voyage charters contain a demurrage clause, which prescribes a daily rate at

which the damages for such detention are to be quantified. The effect of such a clause is to liquidate the damages payable: it does not alter the nature of the charterer's liability, which is and remains a liability for damages, albeit liquidated damages. In the absence of any provision to the contrary in the charter the charterer's liability for demurrage accrues de die in diem from the moment when, after the lay days have expired, the detention of the ship by him begins."

1061. Lord Brandon went on to say this:

"Once it is recognised that a claim for demurrage sounds in damages rather than in debt, it becomes apparent that the two concepts, first, of a contractual date for the payment of such damages, and, secondly, of a claim for damages for breach of contract in not paying them by such date, have no basis in law. As I said earlier an owner's cause of action for demurrage, being one for damages, albeit liquidated damages, accrues de die in diem from the moment when the ship is detained beyond the stipulated lay days. There is no such thing as a cause of action in damages for late payment of damages."

1062. Thus, contractual provisions which provide remedies for breaches of contract are not standalone obligations which can themselves give rise to a separate cause of action. This is summarised in *Virgo et al, Contractual Duties: Performance, Breach, Termination and Remedies* (2nd Ed.) at paragraph 19-004:

"Where a debt is paid late, the creditor may, quite apart from his right to statutory pre-judgment interest, claim damages at large for any loss he has suffered as a result of being kept out of his money, on the simple basis that the debtor who pays late commits a breach of contract. In addition, if the debt is a trade or governmental debt, there may also be a statutory right to generous interest under the provisions of the Late Payment of Commercial Debts Act 1998. Damages, by contrast, are treated in an entirely different way. The duty to pay damages not being a primary duty arising under the terms of the contract, it follows that there can be no liability in breach of contract for delay in paying them.

1063. Mr Foxton QC submitted that the Mkrтчan Parties' reliance on the distinction between primary and secondary obligations is apt to mislead. The key question, he suggested, is as to the nature of the obligation imposed, and a clause which imposes a further set of performance obligations upon one or both of the parties, whether arising upon a breach of contract or otherwise, gives rise to a separate cause of action in the event of its non-performance, subject to its own limitation period.

1064. Mr Foxton QC pointed in this respect to a number of examples of parties agreeing terms that do not simply require payment of damages or a pre-determined sum in the event of breach, but rather impose a further set of obligations. For example, it is common in shipbuilding contracts for the purchaser's sole remedy, in the event of a default, to be repair by the shipbuilder. Thus, in *Star Polaris LLC v HHIC-Phil Inc* [2016] EWHC 2941 (Comm) the contract contained a 12-month guarantee of quality, and a clause obliging the yard to repair defects against which the vessel was guaranteed within that period.

1065. Similarly, in the sale of goods context, breaches of obligations of quality or fitness for purpose are frequently stated to be remediable by the provision of a replacement, as in

the classic case of *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, where the contract stated that the seller would replace any seeds or plants found to be defective. It is equally common for construction contracts to make detailed provision for the remedying of any breaches of quality or workmanship identified by the purchaser.

1066. This distinction is recognised, indeed, by *Keating on Construction Contracts* (10th Ed.), where this is noted in paragraph 11-035:

“A cause of action for ordinary failure to build in accordance with the contract normally arises at practical completion. A cause of action for failure to comply with defects liability obligations normally arises at such later date after practical completion as the contract prescribes for carrying out those obligations.”

1067. I am not persuaded, however, that these authorities are of any real assistance. Each case will, ultimately, depend on the particular provisions which are applicable: whether they entail a primary obligation or a secondary obligation, and whether the relevant provision sought to be sued upon requires proof of breach of a (prior) primary obligation.

1068. In *Star Polaris* the obligation arose out of a freestanding guarantee which gave rise to a freestanding and independent claim. There was no requirement that there be proof of breach of the primary manufacturing and furnishing obligation in order that the guarantee claim could be brought. In the present case, the position is not the same since Clause 3 quite obviously requires there to be a breach of Clause 2. The same distinction applies to *George Mitchell*.

1069. It follows that I reject Mr Foxton QC’s submission that Clause 3 (specifically Clause 3.1.2) gives rise to a new primary obligation. It is, accordingly, not open to Mr Taruta to bring an independent claim seeking damages under Clause 3.1.2.

1070. I would add, in any event, that, even if it were theoretically possible for an independent claim under Clause 3.1.2 to be brought, I am clear that this is a claim which would be time-barred. This is because I consider that any cause of action for breach of Clause 3.1.2 accrued on 30 April 2010, the same time as any claim (not, in fact, brought in these proceedings) under Clause 2 would have accrued.

1071. I am not persuaded in this respect that the position should be any different simply because the contract prescribes a time for performance of the secondary obligation. As I shall explain, I doubt whether a deadline for performance of the obligation under Clause 3.1.2 could properly be implied. However, and in any event, it would not follow from the implication of that deadline that the cause of action for breach of Clause 2 would not accrue on 30 April 2010.

1072. In this regard, the decision in *Coburn v College* [1897] 1 QB 702 is instructive. Under s. 37 of the Solicitors Act 1843, in force at the time, a solicitor could not bring an action for the recovery of any fees until one month after a bill had been delivered to the client. The question was whether a solicitor’s action for payment under a bill of costs accrued as soon as he had completed the work, or whether it accrued only after a month had elapsed following delivery of the bill of costs. Lord Esher MR held that the cause of action accrued on completion of the work. He explained at page 706 that the statute:

“takes away, no doubt, the right of the solicitor to bring an action directly the work is done, but does not take away his right to payment for it, which is the cause of action. The Statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly, I think s. 37 of the Solicitors Act, 1843, deals, not with the right of the solicitor, but with the procedure to enforce that right.”

1073. By the same token, Mr Taruta’s cause of action – his right to the remedies under Clause 3 – should be treated as having accrued on breach of Clause 2 on 30 April 2010. The fact that Mr Mkrchan had a prescribed period of time to comply with his obligations does not alter that fact.
1074. Mr Foxton QC criticised this analysis of the Amended Settlement Agreement. He submitted that in the cases relied upon by the Mkrchan Parties all that was decided was that, on the construction of the contracts in those cases, the ordinary rule that the right to payment arose as soon as work was done was not displaced by provisions allowing a period of grace. As such, these cases are, he suggested, very far away from the position with which the Court is concerned.
1075. I am not persuaded by this distinction, however: indeed, in *Coburn*, it was held that a solicitor’s right to payment accrued immediately but could only be enforced after one month. In my view, the same would be true of the Amended Settlement Agreement: the right to payment under Clause 3.1.2 would accrue immediately, irrespective of whether a time for performance were prescribed.
1076. For these reasons, I conclude that Mr Taruta’s only actionable claim is for breach of Clause 2 (a claim not brought) and, in any event, that any cause of action for breach of Clause 3.1.2 accrued on 30 April 2010, the same time as the claim under Clause 2 accrued, irrespective of whether the Amended Settlement Agreement provides for a time for compliance beyond that date.
1077. If I am wrong about either of these matters, it, then, becomes necessary to consider whether a time for compliance ought to be implied and, if so, for what period.
1078. Mr Foxton QC relied, in this respect, on the fact that Clause 3.1 provides that *“if the Price is not paid on or before the Payment Date, within --- months of the Payment Date ...”* Mr Foxton QC submitted, in particular, that, in the absence of the parties specifying a number of months, a reasonable time for performance must be implied, which is said to be no less than 18 months but no more than three years. On this analysis, the cause of action would accrue only on expiry of that deadline. He suggested that the fact that the Amended Settlement Agreement made express provision for the obligations set out in Clause 3.1 to be performed *“within --- months of the Payment Date”* clearly indicates that the parties envisaged that these obligations would not be capable of immediate performance, but would rather take several months to complete (and thus that payment would not fall due until such a period of time had elapsed).
1079. The omission of any specific number from the Amended Settlement Agreement only demonstrates, Mr Foxton QC suggested, that there was considerable uncertainty over exactly how long performance of Clause 3 would take. The obligations imposed by Clause 3 not only required Mr Mkrchan to procure share transfers in Mr Taruta’s

favour, but also for various calculations to be made of the benefits received and losses incurred by Mr Mkrtchan before any overall payment was to be made.

1080. The fact that the Amended Settlement Agreement expressly stated that “*The Parties shall make their best endeavours to obtain any regulatory or other consents required to give effect to this Agreement*” is said to evidence the potential complexity (and thus the length of time required to perform) the obligations imposed by Clause 3. Mr Foxton QC noted that the IUD Shareholders’ Agreement entered into on the same day as the Amended Settlement Agreement imposes material restrictions on the transfer of shares between Mr Taruta and Mr Mkrtchan. In particular, Clause 8.2 prohibits (other than in respect of “*Permitted Transfers*”) any transfer of shares without the written consent of the other shareholders until the fifth anniversary of the Completion Date. A transfer under Clause 3.1.1 could, therefore, only be perfected once consent had been provided by the other shareholders, while regulatory and other consents were also required.
1081. In response, Mr Wolfson QC submitted that, if the contract did not contain the words “*within --- months of the Payment Date*” of the payment date, there would be no prospect of the Court implying a term that the obligation to fulfil Clause 3.1 did not accrue until a reasonable number of months, or a reasonable time, after the breach of Clause 2: the contract is workable and commercial absent any grace period, and there would be no grounds for implying one. The fact that transfers pursuant to the terms of Clauses 3 might as a matter of practice have taken some (limited, or indeed significant) amount of time does not justify the implication of a grace period for performance. The victim of a breach of contract is ordinarily entitled to an immediately enforceable right to the agreed remedy, notwithstanding the actual time required for compliance. Lord Brandon touched on this point in *Lips Maritime* at page 423:
- “It is no doubt true that, because there has to be a general settlement of accounts between the charterer and the shipowner after the completion of the charter voyage, and because time is needed to agree the calculation of the amount of demurrage where a liability for it has been incurred, demurrage will not in practice be settled and paid for until a reasonable time, which may well be of the order of two months, has elapsed after the completion of discharge. This circumstance, however, does not afford a basis for implying a term that the charterer’s liability to pay demurrage does not accrue until such a reasonable time has elapsed.”*
1082. Thus, unlike the position as regards primary obligation, it is not ordinarily necessary to imply a term that the contract will be performed within a reasonable time. I, therefore, accept that there would be no warrant for implying the term now contended for by the Taruta Parties were it not for the words “*within --- months of the Payment Date*”. The question, therefore, is whether those words provide an adequate basis for implying such a term.
1083. Mr Wolfson QC in this context suggested that the failure to identify the deadline evidences that Mr Taruta and Mr Mkrtchan did *not* come to such an agreement. It is relevant, in this regard, to note that the parties had an opportunity to fill this gap both in September 2008 (when the original Settlement Agreement was executed) and in December 2009 (when the Amendment was executed). In those circumstances, there is force in the submission that there is no proper basis for concluding that the failure to include a time for performance was an accidental omission of a matter which was in fact agreed. If anything, it tends to suggest that no such agreement is reached. For that

reason, I consider that it would be wrong to imply the term proposed by the Taruta Parties. The contract is workable without it.

1084. In any event, even if such a term could be implied, it does not follow that the time for performance would be the 18 months to three years proposed by Mr Foxtton QC. The obligation under Clause 3.1.1 was to “*procure the transfer of sufficient shares in either the Cyprus SPV controlled by him or its sole shareholder or any other company holding ISD participation interests*”. The Cypriot SPV in question was Azitio, of which Mr Mkrтчan would have had to transfer to Mr Taruta a 17% stake. The only specific obstacle identified by the Taruta Parties is the requirement under the IUD Shareholders’ Agreement that Mr Taruta and Mr Mkrтчan obtain the consent of the other shareholders for any transfer of shares in IUD. However, there is no reason to think that it would have taken any substantial period of time to obtain this consent.
1085. Nor am I persuaded, absent evidence to this effect, that regulatory approvals and the like would have caused a delay of anything like 18 months. Indeed, in the weeks before the execution of the Amended Settlement Agreement, Mr Taruta and Mr Mkrтчan were entering into arrangements with the Russian Buyer in which they agreed to transfer equity interests and sums of money far in excess of those contemplated by the Amended Settlement Agreement.
1086. The Castlerose SPA, executed on 18 December 2009, provided that the transfer of the interests in Castlerose and payment of US\$950 million should take place no later than 31 December 2009. The VEB SPA was made on 30 December 2009, the same date as the Amended Settlement Agreement. This provided for the transfer of the shares and the payment of US\$2 billion to be made on the Closing Date, followed by a transfer of US\$716,000,863.96 on the L/C Drawdown Date 90 days after the closing. The transfers were, in fact, made on 30 December 2009 and 30 March 2010.
1087. The VEB SPA also provided for the sellers to exercise best endeavours to transfer an 80.1% interest in a company called Armavir Iron and Steel Works to the wider group “*as soon as reasonably practicable after Closing, and in any case within six (6) months of the L/C Drawdown Date*”. The “*L/C Drawdown Date*” was defined as 90 days after Closing. This six-month deadline was, therefore, set in circumstances in which, as Mr Taruta explained, “*the construction of Armavir was not yet complete and there was uncertainty surrounding when the transfer could be made*”. It follows that the six-month deadline was set in circumstances where little or no preparatory work could be carried out, and where there may have been a number of unforeseeable difficulties associated with the transfer.
1088. Naturally, it is not possible to draw a direct comparison between the Castlerose and VEB SPAs, on the one hand, and the obligations under the Amended Settlement Agreement on the other. The former were the product of lengthy preparation and negotiation. By the time of execution, it is reasonable to assume that the parties were ready, such that the obligations under the SPAs could be implemented soon after execution. However, the timeframes for performance of the obligations under those contracts do suggest that a period of 18 months to three years for performance under Clause 3 of the Amended Settlement Agreement would be unnecessary. Nor would such a timeframe have been desirable since Mr Taruta would have wanted a quick remedy in the event that Mr Mkrтчan failed to pay the Capital Increase Price.

1089. Mr Foxton QC pointed to Clause 3.1.2 and suggested that this is a provision which would have involved a complex calculation. However, the relevant information was information which Mr Taruta and Mr Mkrтчan had. Indeed, if anything, the calculation would become increasingly complex the longer Mr Mkrтчan retained the shares which he ought to have transferred. It follows that the parties would have preferred a short deadline for performance.
1090. For these reasons, I consider that, if it were appropriate to imply a term for performance, that term would be one of merely six months. The cause of action would, therefore, have accrued on 30 October 2010 at the very latest, with the result that Mr Taruta's claim for payment under Clause 3.1.2 would be time-barred. In the light of this conclusion, it is unnecessary to consider the quantum of that claim.

Clause 3.1.1: specific performance

1091. This still leaves Mr Taruta's claim for specific performance in respect of Clause 3.1.1. As I have previously explained, it is common ground that, in principle, this is a case in which specific performance in respect of Clause 3.1.1 should be ordered, albeit that the utility of such an order being made is likely to be limited given that IUD's shares are not presently worth very much. There is, however, a dispute as to whether such relief should be ordered in view of what Mr Wolfson QC characterised as the delay involved in the bringing of this claim.
1092. Mr Foxton QC submitted (and, in truth, I did not understand Mr Wolfson QC to take issue with him about this) that any claim for specific performance is not subject to a limitation period on the basis that, under s. 36(1) of the Limitation Act 1980, it is provided that the ordinary time limit under s. 5:

“shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.”

1093. In *Nedlloyd*, Moore-Bick LJ considered whether a claim for specific performance ought to be subject to the six-year limitation period applicable to claims in simple contract. In this regard, he referred to *Knox v Gye* LR 5 HL 656, *Coulthard v Disco Mix Club Ltd* [2000] 1 WLR 707 and *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 2 WLR 112, all cases in which it was held that the limitation period applicable to the claim at law should also apply to the claim in equity. However, as Moore-Bick LJ noted at [45], these:

“are all cases in which the facts giving rise to the claim were sufficient to found an action at law and a suit in equity and in which substantially identical relief (an account in the first two cases and damages or equitable compensation in the third) was available in each case. In such circumstances one can well see why equity took the view that the limitation period applicable to a claim at law should also apply to a claim in equity. To hold otherwise, even at a time in the 19th century when the jurisdictions of the common law courts and the courts of equity were separate, would have undermined the statutory provisions; in the modern legal world, in which the same courts apply the rules of both law and equity, the consequences would be even more anomalous and unacceptable. However, in cases where the facts capable of supporting a claim for

equitable relief differ from those capable of supporting a claim at law, or where the equitable remedy differs in a material respect from that available at law, there is not the same reason to deprive the court of the power to grant equitable relief in an appropriate case by adopting the statutory limitation period by analogy.”

1094. Moore-Bick LJ continued at [47]:

“No doubt it is true that most claims for specific performance are made in response to an existing breach of contract, but as Hasham v Zenab [1960] AC 316 shows, an accrued right of action for breach of contract is not a necessary precondition to obtaining relief of that kind. It is, therefore, wrong in principle to treat specific performance as merely an equitable remedy for an existing breach of contract. Moreover, since a claim for specific performance may be made as soon as the contract has been entered into, it is very arguable that, if the limitation period were to be applied by analogy, it would be necessary to regard the cause of action as accruing at that moment with the unfortunate result that the claim could become time-barred before any need for relief had arisen. This lends further support to the conclusion that the application of the limitation period by analogy is not appropriate in relation to claims for specific performance.”

1095. At [52], from which I have previously quoted in part, Moore-Bick LJ expressly considered the relationship between the availability of specific performance and damages in a breach of contract claim:

“In my view that question must be answered by reference to the nature of the remedy and the circumstances in which it is available. Both factors point to the conclusion that claims for specific performance fall outside the scope of the principle identified by Lord Westbury in Knox v Gye LR 5 HL 656 and applied by this court in Cia de Seguros Imperio v Heath (REBX) Ltd [2001] 1 WLR 112 : the remedy is available in circumstances where no cause of action exists at law, so the factual circumstances giving rise to a claim need not be the same as those which would support a claim for breach of contract, and no comparable remedy is available at law. It follows that despite the powerful arguments put forward by Colman J [2005] 1 WLR 3733 in favour of holding that the same limitation period applies to claims for specific performance as to claims for damages for breach of contract, I think he was wrong in reaching the conclusion that P & O’s claim was time-barred as a result of the application by analogy of the limitation period contained in section 5 of the Limitation Act 1980. Moreover, with all respect to the judge this is not in my view such an implausible position when one bears in mind that in general under English law limitation bars the remedy and not the right itself. Nor does it mean that claimants can delay with impunity safe in the knowledge that, although their claims for damages may become time-barred, their right to obtain specific performance can still be asserted. As one can see from the cases mentioned earlier, one can find many examples of the court’s refusing relief by way of specific performance as a result of delay far shorter than is necessary to bar a claim for damages. The equitable doctrine of laches, to which I shall turn in a moment, provides the court with ample power to refuse relief when delay on the claimant’s part would make it inequitable to grant it and I should be surprised if there were many cases in which, in the absence of fraud, the court would be willing to grant relief by way of specific performance if the claim had not been made within six years after the contract was due to be performed.”

1096. It follows that Mr Taruta's claim for specific performance of Clause 3.1.1 is not subject to the six-year limitation period. Mr Wolfson QC submitted, however, that the claim is, in any event, barred by laches.
1097. In this regard, Mr Wolfson QC pointed to a number of factors which he suggested render it inequitable to grant specific performance in this case.
1098. First, Mr Wolfson QC pointed out that a claim for specific performance would have been available immediately on the failure to make payment under Clause 2 – some six and a half years after the accrual of the contractual cause of action. Furthermore, again as Mr Wolfson QC pointed out, any such entitlement would have accrued following a breach of contract, in circumstances which are exactly analogous with a claim for damages for breach of contract, a claim which is itself subject to a six-year limitation period. This is in contrast to the position in *Nedlloyd* where the availability of specific performance did not depend on establishing a breach of contract. In the present case, any liability under Clause 3 only arises on breach of Clause 2 and as a remedy for that breach. In such circumstances, I agree also with Mr Wolfson QC that Mr Taruta must be taken to have known from the moment of breach that he had an entitlement under Clause 3.1.1 yet he did nothing.
1099. Secondly, again as Mr Wolfson QC submitted, Clause 3.1.1 is only one of the aspects of the mechanism under Clause 3.1; it is inextricably tied to the other elements of that remedy, with the individual liabilities set out under Clause 3.1 implementing an overriding remedy contained in Clause 3 overall. It follows that there is some force in Mr Wolfson QC's observation that the individual sub-clauses are so connected that they should not be enforced individually. This is acknowledged, indeed, by Mr Taruta's acceptance that Mr Mkrchan has an entitlement to repayment of the Etmor Payment under Clause 3.1.3 provided that Mr Taruta is able to enforce his own claims under Clause 3.1. I do not agree with Mr Wolfson QC, however, when he suggested that not only *should* there not be such enforcement but that the individual provisions *cannot* be enforced. It seems to me that that is not the case at all.
1100. It follows that nor can I agree with Mr Wolfson QC that, in such circumstances, Mr Taruta's monetary claim under Clause 3.1.2 being time-barred (and so also, by the same logic, Mr Mkrchan's claim to set off the Etmor payment under Clause 3.1.3), the claim for specific performance under Clause 3.1.1 must be barred by laches. Such a conclusion effectively makes the specific performance claim subject to a statutory limitation period which does not apply to it.
1101. Although Mr Wolfson QC suggested that this would be an appropriate outcome in this case, given the close linkage between the constituent parts of Clause 3 and that to grant specific performance would entail something happening which would not have been contemplated would happen independently, I do not accept that that would be the position. The parties should be taken as knowing that, whereas any monetary claim under Clause 3.1.2 (like the claim under Clause 2) is subject to a six-year limitation period, a specific performance claim in respect of Clause 3.1.1 is not subject to an equivalent (or, indeed, any) limitation period. In consequence, there was always the prospect or possibility that relief could be obtained in respect of Clause 3.1.1 which could not be obtained under Clause 3.1.2 (or under Clause 2), and so that Mr Mkrchan would have to comply with the discrete aspects of Clause 3 without having to comply with all the obligations which it contains.

1102. In any event, I agree with Mr Foxton QC when he submitted that there is no evidence that Mr Mkrtchan has suffered detriment in the belief that Mr Taruta would not enforce his rights under the Amended Settlement Agreement, and (to the extent that it is relevant) no basis on which to conclude that Mr Taruta acquiesced in Mr Mkrtchan's failure to perform. Mr Wolfson QC sought, in this respect, to rely upon the fact that Mr Mkrtchan is now imprisoned in Russia and so was unable to attend trial or give evidence in his defence – indeed, also that he has been made subject to swingeing fines and orders for compensation which would (if ever enforced) make him destitute. This, in circumstances where the Russian criminal proceedings which gave rise to Mr Mkrtchan's imprisonment arise, so Mr Wolfson QC suggested, directly from his ongoing involvement with IUD as a shareholder and manager following the Amended Settlement Agreement. I agree with Mr Foxton QC, however, that this is not relevant prejudice for laches purposes, specifically that the linkage between Mr Mkrtchan's trial and imprisonment in Russia and the Amended Settlement Agreement is somewhat tenuous.
1103. For these reasons, I consider that Mr Taruta's claim for specific performance under Clause 3.1.1 of the Amended Settlement Agreement is not barred by laches. To that extent only, therefore, the claim under the Amended Settlement Agreement succeeds.

Conclusion

1104. In conclusion, for the reasons which I have given (necessarily at some length):
- (1) The Avonwick Claim is dismissed; the Taruta Parties' indemnity/contribution claims against Mr Mkrtchan do not arise.
 - (2) The Taruta Parties' Claims concerning the 2009 Shareholders' Agreement and the 2010 Further Shareholders' Agreement are dismissed, as are the various alternative claims (including the unjust enrichment claims) also; the Mkrtchan Parties' and the Gaiduk Parties' contingent cross-claims do not arise.
 - (3) The Taruta Parties' claim against the Gaiduk Parties under MOU 1 for a share of certain dividends (or withdrawals) received by the Gaiduk Parties is dismissed.
 - (4) The Taruta Parties' claims against Prandicle are dismissed.
 - (5) The Taruta Parties' Loan Claim is dismissed.
 - (6) As to Mr Taruta's Amended Settlement Agreement Claim, this succeeds to the extent that specific performance is ordered in respect of Clause 3.1.1; otherwise, however, the claim is dismissed.
1105. I would like to end by thanking all counsel, and the solicitors instructing them, for the assistance which they gave me during the course of what was a very complex case. The fact that the trial was able to be completed on time was the result of their hard work and diligence. It is a trial which, but a few years ago, would have taken at least twice as long as it did, so involved (there were some 500 electronic trial bundles) and multitudinous were the issues which it entailed.