Neutral Citation Number: [2012] EWCA Civ 808

Case No: A3/2011/3093, 3270 and 3306

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE ARNOLD
[2011] EWHC 3107 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 June 2012

Before:

LORD JUSTICE LLOYD
LORD JUSTICE RIMER
and
LORD JUSTICE AIKENS

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Between:

VTB CAPITAL PLC	**Claimant Appellant**
- and -	
(1) NUTRITEK INTERNATIONAL CORP	
(2) MARSHALL CAPITAL HOLDINGS LTD	
(3) MARSHALL CAPITAL LLC	**Defendants Respondents**
(4) KONSTANTIN MALOFEEV	

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Clive Freedman Q.C., Richard Snowden Q.C., Paul McGrath Q.C., Andrew Burrows Q.C. (Hon), Iain Pester, David Davies and David Peters (instructed by **PCB Litigation LLP**) for the **Appellant**
Nigel Jones Q.C. and David Lewis (instructed by **Kearns & Co**) for the **First Respondent**
Michael Lazarus and Christopher Burdin (instructed by **SJ Berwin LLP)** for the **Second Respondent**
Ian Milligan Q.C., Cyril Kinsky Q.C. and James McClelland (instructed by **SJ Berwin LLP)** for the **Fourth Respondent**

Hearing dates: 19 to 23 March 2012

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Approved Judgment

Lord Justice Lloyd:

Introduction

1. This is the judgment of the court, jointly written by all three members of the court, on appeals by the claimant against an order made by Mr Justice Arnold on 29 November 2011. That order was made after a six day hearing of applications by the claimant and by each of the first, second and fourth defendants. The third defendant has not yet been served with the present proceedings and played no part in the hearing before the judge or before this court.

2. The first and second defendants are companies incorporated in the British Virgin Islands; the third defendant is a Russian company; the fourth defendant is resident in Russia. The main issues on the appeal are to do with the exercise of the jurisdiction of the English courts over parties who are not resident, or otherwise to be found, within the jurisdiction, so that they have to be served with the proceedings outside the jurisdiction.

3. The applications heard by the judge were, first, an application by the claimant to amend its Particulars of Claim, so as to allege a liability on the part of the second, third and fourth defendants in contract, in the alternative to the claim in tort originally pleaded. Secondly, the first, second and fourth defendants challenged the jurisdiction of the English court even on the basis of the claims in tort. Thirdly, the fourth defendant applied to set aside a worldwide freezing order (WFO) which had been granted against him by Roth J and continued by Vos J, as against which the claimant applied for that order to be continued.

4. Arnold J refused permission to amend to add the claims in contract. He acceded to the defendants' challenges to the jurisdiction. On that basis the WFO could not be continued. However, approaching it on the basis of the tort claim alone, if the court's jurisdiction had been accepted, he held that the evidence did not establish a real risk of dissipation of assets by the fourth defendant and he also held that the original order was tainted by material non-disclosure by the claimant to the court in one respect so that, even if the WFO had otherwise been justified, it should be discharged on that ground, and that it should not be continued or re-granted. The reference to his judgment is [2011] EWHC 3107 (Ch).

5. The judge gave permission to appeal on the application for leave to amend to plead the case in contract. He continued the WFO for a short time so as to allow the claimant to apply to the Court of Appeal for permission to appeal against the refusal to continue the WFO and for interim continuance of the WFO pending the appeal. The claimant made such an application within the time allowed. On 5 December 2011 Tomlinson LJ and Sir Richard Buxton heard the application and granted permission to appeal, continuing the WFO until after disposal of the substantive appeal. On 19 January 2012 Tomlinson LJ heard the claimant's application for permission to appeal on the remaining points, as to jurisdiction, and granted permission to appeal.

6. Formally there are three appeals before the court, all by the claimant, but they have rightly been treated in a consolidated manner, as if they were one appeal. Between them they raise the three separate points described above: first the contract claims,

sought to be added by amendment, secondly the issues of jurisdiction on the basis of the tort claims as already pleaded, and thirdly the continuance of the WFO.

7. The hearing before the judge lasted for six days. Before us the case was listed for five days and took virtually the whole of that time. We have not been able to emulate the judge in his impressive achievement of having given judgment less than three weeks after the conclusion of argument. Counsel before us coped admirably with the demands of a tight timetable for oral submissions. If we identify in particular Mr Freedman Q.C., Mr Snowden Q.C., Mr Milligan Q.C. and Mr Lazarus as contributing to the efficient, economical and effective use of time that is because they had the largest tasks and the greatest challenge in compressing their submissions into the available time. We have no doubt that their submissions before us were only the most obvious part of substantial collaborative efforts on the part of the teams acting for each party.

8. Although in some respects we do not agree with the judge's conclusions, we also pay tribute to his masterly and careful judgment. Since this is a very long judgment, it is appropriate to say now that we will dismiss the appeals.

The factual background

9. The claimant (VTB) is a company incorporated in England which carries on business as a bank in London. It is majority owned by JSC VTB Bank (VTB Moscow) which is a state-owned bank, and the second largest bank in Russia. VTB lent some $225 million to Russagroprom LLC (RAP) under a Facility Agreement (the Facility Agreement) dated 23 November 2007, to fund the acquisition by RAP of six Russian dairy plants and associated companies (the Dairy Companies) from the first defendant, Nutritek. RAP defaulted on the loan. VTB has recovered less than $40 million by way of enforcement of securities taken under the Facility Agreement and under the Interest Rate Swap Agreement entered into at the same time between VTB and RAP (the ISA). It alleges that it was induced to enter into the Facility Agreement by fraudulent representations made by Nutritek, for which the other defendants are alleged to be jointly liable. Two distinct misrepresentations are alleged: first as to the value of the Dairy Companies, and secondly that, contrary to the fact, RAP was not under common control with Nutritek.

10. As the judge said at his paragraph 4, his account of the factual background was based on the evidence then before the court, which was incomplete, untested and in some respects highly controversial. His account was necessarily provisional as well as being selective, focussing on matters relevant to the applications with which he was then dealing. The same is true, all the more so, of the account set out in this judgment. In any event, since the account given by the judge is, allowing for limitations arising from the circumstances, full and careful, we can be more brief in our rendering of the background, since the judge's own account is available to those who may be interested, as set out in his judgment.

11. At this stage of this judgment we set out the most generally relevant factual material. We will need to go into more detail on certain aspects when we come to deal with the several points at issue on the appeal.

12. Nutritek, incorporated in BVI, is owned and operated from Russia. It used to be the owner of the Dairy Companies. The purpose of the Facility Agreement was to fund the acquisition of the Dairy Companies from Nutritek by RAP through the purchase of the shares in a special purpose vehicle, a BVI company called Newblade Ltd.

13. The second defendant (Marcap BVI) is a holding company with no employees or operations of its own. According to VTB's evidence, Marcap BVI owned, indirectly, a substantial interest in Nutritek, as well as owning Marcap Moscow, the third defendant.

14. The fourth defendant, Mr Malofeev, is alleged by VTB to be the principal beneficial owner and controller of Nutritek, Marcap BVI, Marcap Moscow and RAP.

15. RAP was incorporated in Russia. Its parent company in November 2007 was Migifa Holdings Ltd (Migifa), a Cypriot company, and the latter's parent was Brentville Ltd (Brentville), a BVI company.

16. The judge summarised the agreements entered into (or apparently entered into) at his paragraphs 42 and 43. The first of the main agreements was the Facility Agreement, to which the parties were VTB as lender, RAP as borrower, and Migifa and Brentville as guarantors. The Share Purchase Agreement (SPA) was dated 27 November 2007, and made between RAP (buyer), Nutritek (seller) and Newblade (the subject of the sale). VTB also entered into the ISA with RAP, dated 28 November 2007, and a Participation Agreement (the Participation Agreement) with VTB Moscow dated 28 November 2007.

17. The judge set out material provisions of the Facility Agreement at his paragraph 47. We set out some of its provisions in Appendix One to this judgment. In summary, it is governed by English law and is subject to the non-exclusive jurisdiction of the English courts, though VTB has the right to refer any dispute arising out of or in connection with the agreement to arbitration in London. The agreement provided for facilities in two tranches, Tranche A of $208.7 million, and Tranche B of $21.7 million. Among other relevant provisions, the availability of Tranche A was subject to VTB having received, in form and substance satisfactory to it, a number of contractual and other documents. The former included the Participation Agreement, as well as the Facility Agreement itself, duly executed by all parties. Another document required as a pre-condition was a financial report of an independent valuer regarding the determination of the market value of various shares, including the shares in Newblade and in the Dairy Companies.

18. In addition to the Facility Agreement, under a share warrant deed made (or purportedly made) between Migifa, VTB, Brentville and RAP, VTB held warrants for shares in RAP amounting to 5% of its share capital. There are issues about the formal validity of the document, but the 5% equity entitlement was provided for in the last version, the fourth, of the draft term sheet for the loan, dated 12 November 2007. (Previous versions, which we mention below, had provided for a larger equity entitlement.)

19. The ISA was to hedge RAP's liability for interest under the Facility Agreement, which was calculated by reference, among other things, to LIBOR. It takes the form of a confirmation supplemental to an ISDA master agreement. It is governed by

English law and has an English arbitration clause. Appendix Two to this judgment describes some of its provisions, as well as some provisions of the SPA.

20. The Participation Agreement provided (in effect) for VTB Moscow to put VTB in funds to make any payment due from VTB to RAP under the Facility Agreement (clause 2), while VTB remained entitled to receive, recover and retain all sums payable under the Facility Agreement, but was obliged, on receipt of sums from the borrower, to pay amounts governed by clause 3.2 to VTB Moscow. Clause 6 stated that the agreement itself did not amount to an assignment or transfer of any rights under the Facility Agreement to VTB Moscow, though the latter might call for such an assignment after a default by the borrower. The agreement was governed by English law and the English courts had non-exclusive jurisdiction, but with an option for either party to refer any dispute to arbitration in London. Material provisions of this agreement are set out in Appendix Three to this judgment.

21. Pursuant to these various agreements, on 28 November 2007 VTB Moscow paid to VTB the whole of Tranche A, $208.5 million, and VTB credited that amount to RAP's US$ account at VTB. RAP immediately transferred $195 million to Nutritek under the SPA. RAP paid $5 million to VTB as an arrangement fee under the Facility Agreement, and RAP also paid $3.5 million to Dalford Consultants Ltd, a company incorporated in Belize.

22. Tranche B was paid out by VTB in three stages: $5.325 million credited by VTB to RAP's account on 7 April 2008, $5.325 million paid to a BVI company, Madinter Associates Ltd (Madinter) on 21 May 2008 and $5.7 million paid to Madinter on 5 September 2008. The latter two payments were connected with payments of interest, and other sums due, by RAP to VTB on Tranche A. Madinter was part of the Marshall Capital group of companies.

23. Interest and other payments fell due from RAP to VTB at the end of February, May, August and November 2008. The first three payments were met. It seems that in February 2008 Madinter lent RAP the necessary sum ($5.2 million) on an interest-free basis, with which RAP paid the money due to VTB. It may be that the first instalment of Tranche B, mentioned above, enabled RAP to repay the amount of that loan. In May 2008 RAP and Madinter entered into a strange transaction, the details of which do not matter for present purposes. This led to the payment already mentioned of a second instalment of Tranche B to Madinter and, in turn, to Madinter making the payment due from RAP to VTB at the end of May 2008. Another transaction ensued between RAP and Madinter late in August, as a result of which Madinter paid the sums due from RAP to VTB at the end of August, and the last instalment of Tranche B was paid to Madinter soon afterwards, as mentioned above. All of these arrangements were necessary because RAP had no income, or not enough, from the Dairy Companies with which to service its obligations under the loan from VTB. It therefore had to resort to other arrangements, including using VTB's own further lending, to pay the sums falling due under the loan already made.

24. The available arrangements presumably ran out after the third interest payment. RAP defaulted on the interest payment due under the Facility Agreement on 24 November 2008, and made no payment of interest or principal after that. VTB sent notices of default under the Facility Agreement in December 2008 and January 2009. It did not begin to enforce its security until later in 2009, eventually taking control of

Newblade, Migifa and RAP itself. According to VTB's evidence there is a very large shortfall on the outstanding debt after realisation of the available assets.

25. VTB's claims in tort, as originally pleaded, arise from what preceded the entry into the Facility Agreement and the other related agreements. The judge described this in his paragraphs 11 to 39. What follows borrows largely from that description.

26. VTB Moscow had at that time an employee, Konstantin Tulupov, whose role was to act as project manager in relation to projects assigned to him by the managing director, then Konstantin Ryzhkov. The negotiations leading to the Facility Agreement were one such project. The project started when Mr Tulupov and Mr Ryzhkov met Mr Malofeev and Mr Alexander Provotorov for lunch in the summer of 2007. Mr Malofeev led the discussions. He explained that he had founded a family of funds known as Marshall Capital. As the judge put it at paragraph 12, Marcap Moscow, part of Marshall Capital, controlled Nutritek, a dairy and baby food producer. (For VTB it is contended that the correct understanding, in this context, of Mr Malofeev's reference to Marshall Capital was not just to Marcap Moscow but also (or instead) to Marcap BVI. We will revert to that point.) The Marshall Capital group wanted Nutritek to sell the dairy business but to retain the baby food side. A possible buyer for the dairy business had been found. The group wanted to organise a package which would include finance for the purchaser, of the order of $200 million. Mr Malofeev wanted to find out what facilities VTB Moscow might be able to offer and what its requirements would be. Mr Tulupov explained the bank's requirements, which included an independent valuation of the business, and due diligence on the borrower. The possible buyer was not identified. Mr Tulupov said in his witness statement that he assumed it was an independent third party, since the discussions were about the sale of the business.

27. On 18 July 2007 Mr Tulupov instructed the London office of Dewey LeBoeuf, Greene & Macrae (DLGM) in relation to the proposed transaction. On the next day a conference call took place between representatives of VTB Moscow, VTB (Marina Bragina, in London), Marcap Moscow (Mr Provotorov and Mr Yury Leonov) and DLGM. After the call Mr Bruce Johnston of DLGM sent an email to Mr Tulupov asking who controlled the borrower, because he would need to do conflict searches. Mr Tulupov's answer was "Marshall Capital controls Nutritek, and the potential purchaser is controlled by a group of individuals with whom, MarCap assures, you can't have any conflict of interest". Mr Johnston replied that this was an evasive answer, and that VTB would need to do a "know your client" clearance on the borrower.

28. Between late July and early October three draft term sheets were sent by Mr Tulupov to representatives of Marcap Moscow, and others, setting out the currently proposed terms of the deal. By the time of the third document, dated 8 October 2007, the lender was to be VTB (with a participation agreement with VTB Moscow which would provide all the funding for the facility), the borrower was to be RAP, an arrangement fee of $8.5 million was to be payable, the finance was to be provided in two tranches of $208.5 million and $13.5 million, towards an acquisition cost of $250 million, and an "additional commission (equity fee)" was provided for, which was to be 15% of the shares in the borrower or the Dairy Companies, and English law was to govern the contract. Mr Tulupov had been told in the meantime that RAP, a new company, was to be the buyer, that it was a friendly transaction under which many of Nutritek's

senior management would move to the new company and that Marcap Moscow and Nutritek would help the new company while it established itself.

29. In early October work started in earnest on preparing the documentation for the transaction. Mr Tulupov said that as project manager he was primarily responsible for getting information from Marcap Moscow, Nutritek and RAP, and passing that information to others in VTB Moscow and VTB who needed to have it. He said that Mr Leonov (of Marcap Moscow) and Mr Skuratov (of Nutritek) were careful to give him the impression that RAP was an independent third party buyer.

30. VTB Moscow's Credit Committee approved the proposed transaction on 31 October 2007.

31. Central to VTB's case of misrepresentation as regards the ownership of RAP are two emails sent on 6 and 8 November 2007 by Ms Bragina of VTB to others within VTB and VTB Moscow, recording information which, it is said, she got from Nutritek or from Marcap Moscow. The first states that RAP was incorporated on 21 May 2002 (a mistake for 2007) as an SPV for a Nutritek dairy division acquisition "and has no other operations", and that RAP's beneficiary is a Mr Vladimir Alginin. The second is in response to a list of questions put to her, presumably by VTB Moscow. It says, relevantly (as question and answer):

> "Confirm that [RAP] is 100% owned by Alginin. As per the info just received from Nutritek management, Mr Alginin has a 90% share in [RAP], the remaining 10% share belongs to the management team."

32. In the meantime, on 7 November 2007 the Moscow office of Ernst & Young Valuation LLC (E&Y) sent the final version of a valuation report on the Dairy Companies dated 5 September 2007 by email to Mr Leonov and to RAP, and on the next day RAP sent it on to Mr Tulupov. He said in evidence that he had seen earlier versions of it, and had put the then latest version to the VTB Moscow Credit Committee before it approved the transaction on 31 October. The valuation, based on information provided by Nutritek's management, valued the Dairy Companies at around $366 million.

33. On that basis, VTB asserts that it entered into the Facility Agreement and the ISA in reliance on two representations made by Nutritek which were false, and which Nutritek must have known to be false. The first is that Nutritek and RAP were independent of each other, whereas it is alleged that they were in fact under common ownership or control. The second is that the E&Y valuation report, relying on information supplied by Nutritek's management, overvalued the assets of the Dairy Companies substantially.

34. As to the first of these, VTB knew at the time that Mr Malofeev, through Marcap Moscow, had practical control of Nutritek. What it says it did not know at the time was that Mr Malofeev also controlled RAP, through Marcap BVI. That being so, both seller and buyer were under common control and the transaction was not a commercial transaction at arms' length. The judge recorded that it was not necessary for him to go into the details of how Mr Malofeev controlled RAP, and that is also true for present purposes: see his paragraph 59.

35. VTB also alleges that it and VTB Moscow relied on the E&Y valuation, and that this was based on false financial figures and unsupportable forecasts provided to E&Y by Nutritek. VTB relies on an opinion provided by Deloitte LLP which supports the proposition that Nutritek very substantially overstated the true performance figures of the Dairy Companies, to an extent such that VTB contends that the overstatement must have been deliberate.

36. VTB's case is that the misrepresentations were made by Nutritek, but that they were made pursuant to a conspiracy between various persons, including Marcap BVI, Marcap Moscow and Mr Malofeev, the prime movers being Mr Malofeev and Marcap Moscow, all of whom are therefore jointly liable with Nutritek for deceit, or liable in conspiracy, or both.

37. It is on that basis that VTB's original case was pleaded in tort, specifically in deceit and in unlawful means conspiracy.

The issues on the appeal

38. Originally VTB had obtained permission (ex parte) to serve proceedings out of the jurisdiction on Nutritek, Marcap BVI and Mr Malofeev, pursuant to CPR Part 6, Practice Direction 6B, paragraph 3.1 gateway 9, on the basis of VTB's tort claims. The judge held that this permission was not justified: as against Marcap BVI because there was no sufficiently arguable case against it, and as against it and the other two defendants for a variety of reasons, but overall on the basis that VTB had not demonstrated that England was clearly or distinctly the appropriate forum for the trial of the issues between the parties. VTB challenges all the judge's conclusions on these topics. It has also sought to reinforce (or save) its case for establishing the jurisdiction of the English courts by its application to amend to add a claim in contract against Marcap BVI, Marcap Moscow and Mr Malofeev. VTB argues that the court should pierce the corporate veil of RAP so as to show that Marcap BVI, Marcap Moscow and Mr Malofeev are all liable as parties under the Facility Agreement. As already noted, the judge rejected this application also. He would, in any event, have rejected VTB's claim to a WFO.

39. Thus there are three sets of issues on the appeal, concerning the claims in contract and in tort and the application for a WFO. They may be summarised as follows.

The contract issues

i) The first set of issues arises from VTB's application for leave to amend its Particulars of Claim so as to assert that Marcap BVI, Marcap Moscow and Mr Malofeev are liable to VTB in contract, by piercing the veil of incorporation of RAP. The first and fundamental point is whether there is (at least) a good arguable case for asserting contractual liability on that basis.

ii) If the answer to that is yes, the second aspect of this set of issues is whether article 23(1) of Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation) applies so that VTB would be entitled to serve the amended Claim Form on the defendants as of right.

iii) The third aspect, which also depends on a positive answer to the first question, is whether, if VTB cannot rely on article 23(1) and so requires permission to serve the amended proceedings out of the jurisdiction, it should have permission to do so (so far as the claim in contract is concerned) pursuant to gateway (6) of paragraph 3.1 of PD 6B of Part 6 of the CPR.

The tort issues

iv) The second group of issues concerns the tort claims. The three basic requirements that VTB must satisfy in order to obtain permission to serve the proceedings out of the jurisdiction (pursuant to gateway (9)) on Nutritek, Marcap BVI and Mr Malofeev, are common ground. Thus, first, VTB must show that there is a serious issue to be tried on the merits of the claims as against each defendant on which it seeks to serve the proceedings out of the jurisdiction. That means that VTB must show that there is a substantial question of law or fact or both, with a real, as opposed to a fanciful prospect of success. Secondly, VTB must establish that there is a good arguable case that the claim against each particular foreign defendant falls within the class of case relied on for permission to serve out of the jurisdiction. Thirdly, it is for VTB to establish that the English court is clearly or distinctly the appropriate forum in which to try the issues that arise between the parties.

v) On the first of these three requirements, the judge's conclusion that there was no good arguable case for liability on the part of Marcap BVI is challenged by VTB and his finding that there was such a case on the part of Mr Malofeev was challenged by him.

vi) On the second requirement, the defendants challenged the judge's conclusion that there was a good arguable case that VTB had suffered a loss as a result of the fraudulent deception of the defendants. They submitted that he should have accepted their argument that the real loss had been suffered by VTB Moscow and that VTB was protected from any loss by virtue of the Participation Agreement. The defendants argued that if VTB could not show that it had a good arguable case that it had suffered real, as opposed to nominal, loss then it could not bring itself within gateway (9)(a) of Practice Direction 6B to Part 6 of the CPR.

vii) As to the third requirement, the argument in this court concentrated on three particular aspects of the overall question as to whether VTB could establish that England was clearly or distinctly the appropriate forum and whether, in consequence, the court should exercise its discretion to give permission to serve proceedings out of the jurisdiction. The first was whether, assuming that there is a good arguable case that VTB has suffered a loss within the jurisdiction as a result of the torts committed, there is, in law, any kind of presumption that England is to be regarded as clearly or distinctly the appropriate forum.

viii) The second aspect of the third requirement was what law governs the claims in tort. It was accepted that, at this stage of the case, the question is whether one side or the other has "by far the better of the argument" as to whether the applicable law of the torts is English or Russian. The issue has to be decided

according to sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995. The judge favoured Russian law. VTB challenged that, arguing for English law.

ix) The third aspect of the third requirement was whether, overall, the judge was correct to conclude that England was not shown to be clearly and distinctly the appropriate forum for the determination of the issues between the parties. VTB argued that the judge had erred in this regard and that he should have exercised his discretion to permit service out of the jurisdiction on Nutritek, Marcap BVI and Mr Malofeev pursuant to gateway (9).

x) There is a subsidiary issue which is relevant to both the contract and the tort claims. VTB's only claim against Nutritek is in tort, but if it can establish jurisdiction against one or more other defendants, whether in tort or in contract, it will be able to rely on gateway (3) in paragraph 3.1 of the Practice Direction ("necessary or proper party") to serve on Nutritek, as a "proper" (though not a "necessary") party. Thus Nutritek's position on the appeal depends on the view taken by the court on the merits of the tort claim generally (i.e. the "no loss" point) and on whether the claim can proceed in these courts against another defendant. If it cannot proceed against another defendant, then jurisdiction as regards Nutritek would depend on gateway (9) in paragraph 3.1 of the Practice Direction, that is to say on the merits of the tort claim. In the circumstances, this aspect of the case did not require or receive any separate submissions.

The WFO issues

xi) The last set of issues arises from VTB's application for a WFO. If VTB can maintain the permission to serve out as originally granted, as regards Mr Malofeev, or can establish that it can or should be allowed to serve out on the basis of its contract claim against him (or both), should it continue to have the benefit of the WFO against him? There are two points here. The first is whether it has shown a sufficiently well arguable case for liability against him, and whether it has established that there is a real risk that, unless restrained by injunction, he will dissipate his assets, otherwise than through ordinary living or business expenditure. The second is whether the WFO as originally obtained ought to be discharged because of material non-disclosure on the part of VTB when applying for it to Roth J.

The amendment application: piercing the veil of incorporation

40. On 11 May 2011 Chief Master Winegarten gave permission to VTB to serve the proceedings out of the jurisdiction on each of the four defendants. Each defendant other than Marcap Moscow was then served. The permission was granted on the basis of the only claims advanced in the Particulars of Claim, namely claims in tort for deceit and for "unlawful means" conspiracy. The "unlawful means" were the fraudulent representations alleged in the deceit claim. They are said to have been made primarily by Nutritek but pursuant to a common design by Marcap BVI, Marcap Moscow and Mr Malofeev. They are (1) that, contrary to the fact, the SPA was a sale between companies (Nutritek and RAP) that were under separate control; and (2) that the figures provided for the Dairy Companies' performance deliberately overstated

their true performance. Only the first representation is material to the amendment application.

41. In October 2011 VTB produced a draft of the amendment to the Particulars of Claim for which permission was sought from the judge. The amendment alleged a claim for breach of contract against each of Marcap BVI, Marcap Moscow and Mr Malofeev. The contracts they are alleged to have breached are the Facility Agreement made on 23 November 2007 and the associated ISA made on 28 November 2007. Both are written agreements.

42. The Facility Agreement is stated on its face as being "made between" (1) RAP; (2) the parties listed in Part 1 of Schedule 1, there described as "The Original Guarantors", being Migifa, the immediate 100% parent of RAP, and Brentville, the immediate 100% parent of Migifa; and (3) VTB, the lender. The agreement occupies 135 pages of which section 1, "Interpretation", sets out nearly 200 definitions. Nowhere is mention made of Marcap BVI, Marcap Moscow or Mr Malofeev. Clause 1.3 provides that "A person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement". "Party" is defined as meaning "a party to this Agreement". The agreement imposes primary obligations upon RAP to repay loans of up to US$230m to be made to it by VTB; and it imposes upon Migifa and Brentville obligations as guarantors of the due performance by RAP of its obligations. Clause 34 provides for the agreement to be governed by English law; and clause 35.1 confers non-exclusive jurisdiction in relation to any dispute on the courts of England, which the parties agreed were the most appropriate and convenient courts. The parties to the ISA are VTB and RAP.

43. By the proposed contract claim, VTB claims that Marcap BVI, Marcap Moscow and Mr Malofeev are jointly and severally liable with RAP under the Facility Agreement and the ISA. It so claims on the basis that they are parties to those agreements. That proposition is advanced on the basis of the following assertions. First, contrary to the dishonest representation that the four defendants made, RAP was *not* a purchaser in separate control that was buying the Dairy Companies from Nutritek under an arm's length agreement: it was in fact controlled by Marcap BVI, Marcap Moscow and Mr Malofeev, who also controlled Nutritek. Second, the use by those three defendants of RAP as the vehicle to enter into the two agreements and thereby to obtain the loans made by VTB:

> "… involved the fraudulent misuse of the company structure. This was an improper use of the company structure of RAP, which was used as a device or façade to conceal the wrongdoing of each of Marcap BVI, Marcap Moscow and Mr Malofeev". (Paragraph 72 of the draft amended Particulars of Claim).

Third, that combination of facts entitles VTB to "pierce the corporate veil" of RAP and to hold the three defendants jointly liable with RAP under the two agreements. That conclusion is said to follow from the assertion that, once the veil is pierced, Marcap BVI, Marcap Moscow and Mr Malofeev can be seen always to have been parties to the two agreements jointly with RAP and the guarantors.

44. As the judge pointed out at paragraph 67, VTB's primary motive in wishing to advance the contract claim is to provide an alternative basis for establishing the jurisdiction of the English court for its claims against the defendants. If, as VTB asserts, Marcap BVI, Marcap Moscow and Mr Malofeev are parties to the agreements, it claims that it follows that they are also parties to their jurisdiction provisions so that article 23(1) of the Brussels Regulation gives mandatory jurisdiction to the English court. Alternatively, VTB claims that it ought to be given leave to serve out under paragraph (6) (Claims in relation to contracts) of CPR Practice Direction 6B – Service out of the Jurisdiction. If VTB can get that far, it claims that the court should also assume jurisdiction in respect of Nutritek as a necessary or proper party to its claim.

45. VTB's case is, therefore, that proof of the first two steps of its case entitles it as of right to the judicial conclusion that Marcap BVI, Marcap Moscow and Mr Malofeev are, and always have been, parties to the two agreements. Indeed, that has to be its case if it is to claim the jurisdictional advantage that it does. Mr Snowden, who argued this aspect of the case for VTB before us, expressly disclaimed that VTB's proposed contract claim against Marcap BVI, Marcap Moscow and Mr Malofeev is dependent upon the exercise of any judicial discretion. Consistently with that, he rejected the suggestion raised during argument that the contractual obligations that VTB seeks to visit upon these three defendants can only arise under something in the nature of a "remedial constructive contract". VTB's position is simply that the threefold elements of its pleaded case advance what it asserts is a reasonable cause of action. This argument faces the difficulty that, apart from the first instance decisions of Burton J in *Antonio Gramsci Shipping Corporation and Others v. Stepanovs* [2011] EWHC 333 (Comm); [2011] 1 Lloyd's Law Reports 647 (which pre-dated Arnold J's decision under appeal) and *Alliance Bank JSC v. Aquanta Corporation and Others* [2011] EWHC 3281 (Comm) (which post-dated it), there is no authority providing express support for the existence of such a cause of action. Arnold J regarded *Gramsci* as contrary to principle and declined to follow it. He held that VTB's claim was unsustainable as a matter of law and refused to allow the amendment.

46. Before us, Mr Snowden advanced excellent submissions to the effect that the judge was in error in this respect, that *Gramsci* was a logical and correct development and application of the law and that this court should endorse it. Counsel for each of the three defendants before the court submitted that the judge was correct. The main burden of that argument was assumed by Mr Lazarus, for Marcap BVI, who also advanced excellent submissions. The opposing arguments disclosed a wide gulf between Counsel. Whereas Mr Snowden submitted that the contractual cause of action which VTB asserts by its proposed amendment is simply a logical application of the judicial "veil piercing" in which the courts engage in reaction to the misuse of a company by those in control of it so as to conceal their own wrongdoing, Mr Lazarus came close to submitting that there is no such thing as "veil piercing". He submitted that the concept is ultimately meaningless and that the reported authorities referred to as supposed illustrations of its application can all be explained on other grounds.

47. What is meant by "piercing the veil of incorporation"? The starting point is that, as illustrated by the decision of the House of Lords in *Salomon v. A. Salomon and Company, Limited* [1897] AC 22, a duly incorporated company is a legal person separate from its corporators and controllers, with its own separate rights and

liabilities (see at 30 to 31, per Lord Halsbury LC). A company can, however, only act by its human agents and the authorities also show that there can be exceptional cases in which the court will regard it as appropriate to "pierce the corporate veil" and thereby identify the company with those in control of it. In cases in which that is done, the authorities show that it will or may lead to the granting of remedies against the company which, veil piercing apart, might appear in principle to be available only against those controlling it; and, equally, against the controllers when they might appear in principle to be available only against the company.

48. To the extent that it was part of Mr Lazarus' submissions that there is no such principle as "piercing the veil", we disagree. In the decision of the House of Lords in *Woolfson v. Strathclyde Regional Council* 1978 SLT 159, Lord Keith of Kinkel delivered the only reasoned speech, with which Lord Wilberforce, Lord Fraser of Tullybelton and Lord Russell of Killowen agreed. In reference to the decision of the Court of Appeal in *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council* [1976] 1 WLR 852, Lord Keith said, at 161:

> "I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts."

49. That statement recognised, therefore, that there is one (and apparently only one) special case justifying a court in looking behind a company's corporate façade. Lord Keith went on to distinguish *DHN Food Distributors* on its facts, so his observation about it may be obiter. However, his statement was quoted and relied on, and the existence of that special case was expressly recognised, in the Court of Appeal's judgment in *Adams and Others v. Cape Industries Plc and Another* [1990] Ch 433, at 539D to E, although in that case the court declined to pierce the veil. We do not consider that it is open to this court to question the existence of the "veil piercing" principle. The critical question raised by this appeal is, however, as to the effect and consequences of a finding (if such a finding were to be made on the facts of this case, as to which we take VTB's case to be at least arguable) that the circumstances of the particular case *do* justify the piercing of the corporate veil. In particular, does the proof of the first two steps of VTB's case lead to the legal conclusion that Marcap BVI, Marcap Moscow and Mr Malofeev were also *original* parties to the two agreements?

50. Mr Snowden's submission is that it does. His propositions are that (i) if the controller of a company fraudulently deceives another into entering into a contract with the company in the belief that the company is in fact in different control and therefore so uses the company as a mere façade to conceal the controller's true identity, the discovery of the true facts will lead to the consequence that as a matter of law the controller will be regarded as a party to the contract; and (ii) even though the controller and the company will thus in practice be regarded as one and the same, the controller will not simply be substituted for the company as a contracting party, he will be jointly and severally liable under the contract with the company, his alter ego. Further, if the contract is one that is required to be in writing and signed by or on behalf of the parties to it (as, for example, is required for a contract for the sale etc of land: see section 2 of the Law of Property (Miscellaneous Provisions) Act 1989), the signing by the company as its controller's alter ego will be a sufficient signing also on

behalf of the true contracting party, the controller. Mr Snowden disclaimed that his proposition involves the making of any inroads into the basic principle recognised by *Salomon's* case to the effect that a company is a corporate body separate from its corporators. His submission is founded essentially on the fraudulent or dishonest use of a company by its corporators or controllers so as to conceal the latters' true identities.

51. The issue we have to decide is therefore ultimately a narrow, although fundamental, one: it comes down to a question as to the consequences of a judicial determination that, in a particular case, the veil of incorporation of a company ought to be pierced. The answer to the question requires a reference to the authorities cited to us in order to ascertain whether or not they support VTB's proposition; and, if they do not, whether the adoption of that proposition would represent a principled development of the law. There was no dispute before the judge or us that, in considering this issue, the court must apply English law.

52. The earliest authority upon which Mr Snowden relied is *In re Darby, Ex parte Brougham* [1911] 1 KB 95, a decision of Phillimore J. The facts were complicated but, reduced to their essentials, they involved the activities of two fraudsters, D and G, who concealed their apparently notorious identities by incorporating C Ltd, which they controlled. They procured C Ltd to enter into an agreement with W Ltd by which it sold to W Ltd a licence to work a slate quarry that C Ltd had acquired, and some materials and plant. The sale was in consideration of shares, debentures and cash of £10,500, of which £9,200 was paid on account. The £9,200 was part of £14,000 odd subscribed by the public in answer to prospectuses that D & G procured C Ltd to issue inviting subscriptions to debentures. The prospectuses disclosed that C Ltd was the vendor and promoter of W Ltd and was making a large profit on the sale but did not disclose that D and G were promoters and were to receive the profit through C Ltd. Within a year, C Ltd went into liquidation, its assets realising only about £160. Three years later D & G were adjudicated bankrupt for a second time and were charged with, and convicted of, making fraudulent misrepresentations in the prospectuses. Two years after that, the liquidator of W Ltd lodged a proof against D's estate for what Phillimore J described as "damages for breach of trust as promoter of [W Ltd], or alternatively, for moneys had and received to the use of [W Ltd] in respect of the undisclosed profits as such promoter". The claim was for £8,950, part of the £9,200. The official receiver rejected the proof but Phillimore J reinstated it on the liquidator's appeal.

53. The liquidator's case was that C Ltd was an "alias" for D and G and the hand by means of which they secretly and fraudulently obtained the money from the public by means of W Ltd. The case for the official receiver was that D had inflicted no wrong on W Ltd. Any wrong was done to the public. In any event, the real and only promoter was C Ltd, not D and/or G, and it was immaterial that D and G controlled W Ltd: C Ltd, the real promoter, was not the "alias" of D and G, and reliance was placed on *Salomon's* case.

54. Phillimore J found that C Ltd was simply an "alias" for D & G. It was, he said, "merely a name under which they carried on business". He found that, by representing that C Ltd was carrying on business and concealing that the business was being done by D & G, they were probably perpetrating a fraud. He said, at [1911] 1 KB 95, 101:

> "I say this because their names and their persons were so well known generally that the chance of detection and the chances of repudiation were great in connection with any commercial transactions in which they engaged. The fraud here is that what they did through the corporation they did themselves and represented it to have been done by a corporation of some standing and position, or at any rate a corporation which was more than and different from themselves".

He found that they purported to sell C Ltd's "trivial interest" in the quarry for shares and cash to W Ltd and thereby made a large profit. The case for the liquidator was that they concealed that profit from W Ltd and also concealed from it that they were 'the real vendors and promoters'. Phillimore J appears to have accepted, at 102, that the W Ltd prospectuses that were issued to the public were untruthful in describing C Ltd as the promoter and vendor, since D & G were the real promoters. The claim, however, was not by members of the public who had subscribed pursuant to the prospectuses, but was (in effect) by W Ltd. Phillimore J regarded the only issue he had to decide as being whether D & G, having received, through C Ltd, their personal profit on the sale to W Ltd, were entitled to retain it as against W Ltd. In his view, they were not entitled to do so unless they had disclosed their making of that profit to W Ltd. He said, at 103:

> "Now they made that profit either directly or through the agency of [C Ltd], it does not matter which, and they may hold it if they disclosed it at the proper time. They may not hold it if they did not disclose it, and the burden of shewing that they did so disclose it is upon them."

He found that they had not made a disclosure of their profit to W Ltd. Thus the appeal succeeded.

55. We well understand why Mr Snowden referred us to *Darby*, on which he placed considerable reliance. Indeed, as the argument progressed, we sensed that he began to regard it as his best case. We do not, however, regard it as throwing helpful light on the question of principle before us. The case was decided by Phillimore J on the basis that D & G were "in truth and in fact … the promoters and vendors" (see at 102) and therefore owed a personal duty to disclose to W Ltd the secret profit that they had personally made through C Ltd on that company's sale to W Ltd, failing which they were accountable to W Ltd for the profit. It is true that Phillimore J described C Ltd as a mere "alias" for D & G, by which they carried on business. We do not, however, read his judgment as founded on the basis that D & G were to be identified with C Ltd as a result of a piercing of C Ltd's veil of incorporation. That is not how he explained his decision; and the passage quoted in the preceding paragraph founds the decision on the basis that they made their profit "either directly or through the agency" of C Ltd. Phillimore J also made no suggestion that the case was one in which the true facts required D & G to be regarded as parties to any contract in addition to C Ltd. His approach to the case may perhaps have been influenced by the fact that the concept of a 'promoter' is an imprecise one, for which the law has provided no comprehensive definition; but he had no doubt as to who the promoters were in the case before him.

56. *Gilford Motor Company, Limited v. Horne* [1933] 1 Ch 935 is a decision of the Court of Appeal, upon which Mr Snowden also placed much reliance. The defendant was

appointed the managing director of the plaintiff company for six years from 1 September 1928. Clause 9 of his service contract restrained him, during and after his employment, from soliciting the custom of anyone who was a customer of the plaintiff during his employment. His employment determined in November 1931 following which he started trading in a like field, initially on his own account and later through a company, J.M. Horne & Co Ltd, which was incorporated on 8 April 1932. The shares in the company were held by Mr Horne's wife and a Mr Howard, an employee, who were the only directors. The plaintiff sued both Mr Horne and the company for injunctions restraining breaches of the covenant in the service agreement.

57. Before Farwell J, the issues were (i) whether Mr Horne had been released from the covenant upon the termination of his employment, a case that the judge rejected; (ii) whether the covenant was unenforceable as being in restraint of trade, which the judge held it was. The result was that he dismissed the action, although had the covenant been enforceable, *prima facie* it would have been enforceable only against Mr Horne, the contracting party. Farwell J explained, however, at 937, that the case against the company was that it was "merely the creature of [Mr Horne], and [he] is committing breaches of the covenant by the agency of [the company]." He found, at 943, that the company was "a company which … is obviously carried on wholly by [Mr Horne]" and that it was "the channel through which [he] was carrying on his business". He also said, at 944, that the plaintiff's claim was wholly dependent on the covenants in the service agreement and that "unless the plaintiff can succeed on the agreement itself, this action cannot succeed at all".

58. The Court of Appeal, disagreeing with the judge, held that the covenant imposed a valid restraint and allowed the plaintiff's appeal. It granted an injunction not only against Mr Horne but also against the company. The issue of present interest is the basis on which it granted the injunction against the company.

59. Lord Hanworth MR recited Farwell J's findings as to the company being the channel through which Mr Horne carried on his business, expressed his agreement with them and then said, at 956:

> "I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr E.B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which, on consideration of the agreement which had been sent to him just about seven days before the company was incorporated [that was a copy of the service agreement], was a business in respect of which he had a fear the plaintiffs might intervene and object."

Lord Hanworth then explained, at 961, why the injunction should go both against Mr Horne and the company:

> "[Leading counsel for the defendants] admitted that if the company were such as is indicated by Lindley LJ in *Smith v. Hancock* [1894] 2 Ch. 377, 385, it would not be possible to object to the injunction against the company. Lindley LJ indicated the rule which ought to be followed by the Court: 'If the evidence admitted of the conclusion that

> what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly.' I do draw that conclusion; I do hold that the company was 'a mere cloak or sham'; I do hold that it was a mere device for enabling [Mr Horne] to continue to commit breaches of clause 9, and under those circumstances the injunction must go against both defendants, ..."

Lawrence LJ, at 965, and Romer LJ, at 969, essentially agreed with that as the basis for the grant of an injunction also against the company.

60. Mr Snowden's submission on *Gilford's* case was that the court could only have granted the injunction against the company on the basis of its acceptance that the plaintiff had established a cause of action against the company. He said that what the court was therefore doing was treating the company as party to Mr Horne's service contract. Unless it was doing that, there would be no cause of action against it; and Farwell J in his judgment had explained how the plaintiff's claim was founded exclusively on a claimed breach of that contract.

61. We respectfully disagree with that interpretation of *Gilford's* case. First, nowhere in the judgments is there a suggestion that the court was enjoining the company on the basis that it was, or must be treated as, a party to the service contract. Second, any such suggestion would have been absurd. The company was not incorporated until some three years after the making of the service contract. For the court to have worked on the basis that the company must be treated as being party to, and in breach of, a contract that was made before it came into existence would have required recourse to a legal fiction of considerable dimensions, but one of which no mention is made in the judgments. Third, the factual basis upon which the injunction was granted was simply that the company was Mr Horne's device for enabling him to continue to commit his own breaches of the restrictive covenant in the (we presume) mistaken belief by him that if the relevant acts were being carried out by a company rather than by him personally, he would have an answer to any complaint that he was breaching the covenant. The finding was, however, that the company was the channel through which he carried on his own business. He had therefore used it in an attempt to mask from the eyes of the court what in substance were his own wrongful acts; and the court regarded the circumstances as ones in which it was appropriate to pierce the company's corporate veil and identify it as mere device for Mr Horne's continued commission of such acts.

62. As to the legal basis upon which the court thought it appropriate to grant the injunction against the company, the court does not discuss it expressly. That may have been because, as Lord Hanworth explained, counsel for the defendants conceded that, once a finding was made that the company was "a mere cloak or sham", there could be no objection to the grant of an injunction against it. We agree with Mr Lazarus, however, that *Smith v. Hancock* [1894] 2 Ch 377 (apparently the basis for Counsel's concession) does not in fact support the conclusion that an injunction could also go against the company. The alleged equivalent of the company in *Smith's* case was the defendant's wife and her nephew. But neither was a defendant, no relief was sought against them and the claim against the only defendant (the husband, who was

in alleged breach of his covenant) anyway failed on the facts. *Smith's* case supports no more than that if the husband *had* been carrying on the offending business that was ostensibly being carried on by the wife and nephew, an injunction would properly be granted against *him*.

63. Reverting to *Gilford's* case, we therefore find it difficult to conclude that the injunction made against the company was granted otherwise than on the basis that it was regarded by the court as just and convenient to do so. If the injunction had been granted against Mr Horne alone, it would have been in the conventional form restraining him from doing the prohibited acts by himself, his servants or agents or otherwise howsoever, and such an order would in practice have restrained the continued commission of breaches via the actions of the company, to which knowledge of the injunction and of any continuing infringements by Mr Horne would have been attributed. It therefore made sound practical sense to grant the injunction also against the company. *Gilford's* case provides, in our view, no authority for Mr Snowden's core submission. It is no more than an example of a case in which the court was prepared to pierce the veil and, on the facts, to grant discretionary, equitable relief against both the contract breaker and the company that he was using to perpetrate his own continuing breaches.

64. The next authority is *Jones and Another v. Lipman and Another* [1962] 1 WLR 832. Mr Lipman, the first defendant, entered into a contract to sell registered land to the plaintiffs. He repented of the bargain and, before completion, sold and transferred it to the second defendant, Alamed Limited, a company whose control he appears to have acquired a few days after the plaintiffs had served him with a notice to complete. The plaintiffs' application for summary judgment for specific performance against both defendants (but, we infer, for any claim for damages for breach of contract against Mr Lipman alone: see the facts as summarised at 834) came before Russell J. He noted that it was admitted that Mr Lipman's strategy in selling on the land had been carried through solely for the purpose of defeating the plaintiffs' rights.

65. Russell J ordered specific performance against both Mr Lipman and Alamed. As against the former, it was based on the proposition (illustrated by *Elliott and H. Elliott (Builders) Ltd v. Pierson* [1948] Ch 452) that, as Mr Lipman wholly controlled the company, he was in a position to procure it to perform the contract by which he was and remained bound. As against Alamed, reliance was placed on *Gilford's* case. Having cited from the judgments of the Court of Appeal in that case, Russell J said, at 836:

> "Those comments on the relationship between the individual and the company apply even more forcibly to the present case. [Alamed] is the creature of [Mr Lipman], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. [*Gilford's* case] illustrates that an equitable remedy is rightly to be granted directly against the creature in such circumstances…. The proper order to make is an order on both the defendants specifically to perform *the agreement between the plaintiffs and [Mr Lipman]*." (Our emphasis)

66. Whilst it would have provided no answer to the making of an order against Mr Lipman, a perhaps slightly odd feature of *Jones's* case is that there is no reference in

the report to whether, prior to the sale to Alamed, the contract had been protected as an estate contract by an entry against Mr Lipman's title to the land. If it had, Alamed would have acquired the land subject to the contract and the order for specific performance against it would have been uncontroversial, whether or not Alamed was in Mr Lipman's control. If it had not, *prima facie* Alamed would have acquired the land free of the contract (see section 20 of the Land Registration Act 1925) and the making of an order for specific performance against it might, on one view, appear questionable. The inference, however, is that such considerations featured neither in the evidence nor in the argument.

67. That being so, we must take *Jones's* case as we find it. On no basis does it support Mr Snowden's proposition. Russell J was certainly piercing the veil so as to identify Mr Lipman with his creature company, Alamed, which he had used with the intention of defeating the plaintiffs' rights: Mr Lipman was advancing Alamed as an unrelated legal person that was in no manner bound by the contract. The case was not, however, decided on the basis that, once the truth was uncovered, Alamed was revealed as an original contracting party. It plainly was not, such a notion would have been absurd and the emphasised closing words of the quoted passage from Russell J's judgment tend to show that he had no such notion in mind. The basis of the order against Alamed was simply that, in the circumstances that had been revealed, *Gilford's* case showed that "an equitable remedy is rightly to be granted directly against the creature ….". *Jones's* case illustrates no more than that, in a case in which the contracting puppeteer has used his creature company in a bid to escape his contractual obligations, and the circumstances merit the piercing of the company's veil, it may be appropriate also to grant an equitable remedy directly against the company. It does not, we consider, develop the law any further than *Gilford* had taken it.

68. The only further observation that we would make about *Jones* (and indeed about other "veil piercing" cases in which the word is used) is that we are not, with respect, clear as to what Russell J meant by his description of Alamed as a "sham". If he was using that word as a synonym for façade or device, it adds nothing. But otherwise we do not understand how Alamed could accurately be described as a "sham". It was a genuine company, genuinely incorporated, with a genuine separate legal personality of its own: see in this context, the observations in the judgment of this court in *Neufeld v. Secretary of State for Business, Enterprise and Regulatory Reform* [2009] 3 All ER 790, at paragraph 34.

69. *Gencor ACP Ltd and others v. Dalby and others* [2000] 2 BCLC 734 is a decision of Rimer J. The application before him was for summary judgment on a variety of claims, including one by Gencor ACP Ltd against Mr Dalby, a former director, for an account in respect of commission that belonged in equity to ACP but which he had diverted directly to a British Virgin Islands company in his sole control, Burnstead Limited. The defence was that Mr Dalby was not accountable because he had not received the commission; and Burnstead was not accountable because it was not in a fiduciary relationship with ACP. That argument was rejected, as Rimer J explained at paragraph 26:

> "I do not accept that argument which, if correct, would provide the easiest possible escape from the rigours of equity's strict principle of accountability. All that would be required would be for the profiting

> director to ensure that he diverts the profit into his own creature company. The facts of this case are that Burnstead was an offshore company which was wholly owned and controlled by Mr Dalby and in which nobody else had any beneficial interest. Everything it did was done on his directions and on his directions alone. It had no sales force, technical team or other employees capable of carrying on any business. Its only function was to make and receive payments. It was in substance little other than Mr Dalby's offshore bank account held in a nominee name. In my view this is the type of case in which the court ought to have no hesitation in regarding Burnstead simply as the alter ego through which Mr Dalby enjoyed the profit which he earned in breach of his fiduciary duty to ACP. If the arrival at this result requires a lifting of Burnstead's corporate veil, then I regard this as an appropriate case in which to do so. Burnstead is simply a creature company used for receiving profits for which equity holds Mr Dalby to be accountable to ACP. Its knowledge was in all respects the same as his knowledge. The introduction into the story of such a creature company is, in my view, insufficient to prevent equity's eye from identifying it with Mr Dalby: see generally, as to the readiness of the courts in appropriate cases to pierce the corporate veil, *Re H (restraint order: realisable property*) [1996] 2 BCLC 500, at 511, per Rose LJ. I hold that Mr Dalby and Burnstead are both accountable for the profit represented by this commission and I will make an order against them accordingly."

70. That shows that the rationale for the decision was that Burnstead was being used by Mr Dalby as a mask or device to conceal his own interest in the commission for which he was accountable. Although neither *Gilford* nor *Jones* was apparently cited to Rimer J, the basis of his decision was essentially the same as that of those decisions. It was another example of the court being prepared to grant an equitable remedy against the creature company of the person primarily answerable. It was not, however, a case in which the court proceeded on the basis that, once the facts had been disclosed, Burnstead was held to have been subject from the outset to the like fiduciary duties towards ACP as had been Mr Dalby.

71. *Trustor AB v. Smallbone and others (No 2)* [2001] 1 WLR 117, a decision of Sir Andrew Morritt V-C, was factually a very similar case. The essence of the issue was this. Mr Smallbone, a director of Trustor, had misappropriated large sums of Trustor's money, which he had procured to be paid to various recipients, including himself and his creature company, Introcom (International) Limited. An order had earlier been made in Trustor's favour for the repayment by Introcom of the money it had received. The application before the Vice-Chancellor was for a joint and several order against Mr Smallbone for the repayment to Trustor of the same money after giving certain credits. It was said that Mr Smallbone was liable to repay on the basis that his procuring of its payment to Introcom made him answerable in equity for his knowing receipt of it as a constructive trustee. It was argued that the case justified the court in piercing Introcom's veil so as to identify it with Mr Smallbone. As the Vice-Chancellor said, at 1184B, the issue was whether the court was entitled to regard the receipt by Introcom as the receipt by Mr Smallbone.

72. The Vice-Chancellor summarised, at paragraph 14, counsel's submission that the authorities showed that there were three, potentially overlapping, categories of case which warranted the piercing of a corporate veil: (1) where the company was shown to be a façade or sham with no unconnected third party involved; (2) where the company was involved in some impropriety; and (3) where it is necessary to do so in the interests of justice and no unconnected third party was involved. The Vice-Chancellor referred, at paragraph 20, to *Gilford*, *Jones*, *Woolfson*, *Adams* and *Gencor* and held that they all established proposition (1); and, so far as that goes, we respectfully agree. The Vice-Chancellor declined to accept proposition (3), which he considered went further than had been recognised by this court's decision in *Adams*. We also agree and Mr Snowden did not submit otherwise. As for proposition (2), the Vice-Chancellor regarded that as too widely stated unless used in conjunction with proposition (1); and Mr Snowden also disclaimed any disagreement with that. In upholding the claim against Mr Smallbone for knowing receipt, the Vice-Chancellor expressed his conclusions as follows:

> "23. In my judgment the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individual(s). …
>
> 24. [The Vice-Chancellor summarised the facts relating to Mr Smallbone's use and control of Introcom]
>
> 25. In my view these conclusions are such as to entitle the court to recognise the receipt of the money of Trustor by Introcom as the receipt by Mr Smallbone too. Introcom was a device or façade in that it was used as the vehicle for the receipt of the money of Trustor. Its use was improper as it was the means by which Mr Smallbone committed unauthorised and inexcusable breaches of his duty as a director of Trustor…."

73. Mr Snowden adopted the statement in paragraph 23 as a sound summary of the principle underlying the "veil piercing" theory and we too respectfully agree with it. We do not, however, regard *Trustor* as materially advancing Mr Snowden's core proposition. It was simply an example of the court being prepared, once it had pierced the veil, to grant an equitable remedy against the controller of the puppet company. It provides no authority for the proposition that a piercing of the veil enables the court to go to the lengths of finding that the puppeteer must, as a consequence of such piercing, be regarded as a party to a contract he had procured between the puppet company and a third party. No such question arose in it.

74. Mr Lazarus submitted that a solution leading to the same result in *Trustor*, which would have involved no need to lift Introcom's veil, would have been simply to treat Introcom's receipt at the direction of Mr Smallbone as the receipt by Mr Smallbone himself. In support of that, Mr Lazarus referred us to *Goss v. Chilcott* [1996] AC 788, a decision of the Privy Council which illustrated a successful common law claim in restitution against B who had directed the relevant money to be paid to C; and, with regard to claims for an account in equity, to *CMS Dolphin Limited v. Simonet and Another* [2001] 2 BCLC 704, at paragraphs 98 to 105, in which Lawrence Collins J

indicated that there may be no need to pierce the veil of the corporate recipient in order to make the individual fiduciary personally answerable. Mr Snowden responded to that submission by disputing Mr Lazarus's explanation of the basis for the decision in *Goss*; and by referring us to the judgment of Lewison J in *Ultraframe (UK) Limited v. Fielding and Others* [2005] EWHC 1638 (Ch), at paragraphs 1550 to 1576, in which doubt was expressed as to the correctness of Lawrence Collins J's approach in *CMS Dolphin.* Mr Snowden said that *Goss* was simply a case in which the defendants had, on the facts, been unjustly enriched at the plaintiff's expense. He also submitted that *Ultraframe* shows that the true principle is that if a fiduciary misapplies company property by paying it to a company in which he has an interest, he will be personally liable to pay equitable compensation for the loss so caused. But, as regards claims for knowing receipt and liability to account, he will only be liable to account for the benefits he has personally received; equally, and on the assumption that the recipient company has the requisite knowledge for the purposes of knowing receipt, the company will also be liable to account only for the benefits which it has received. The individual and the recipient company cannot, however, be jointly and severally liable to account for all the misapplied money; and, to the extent that *CMS Dolphin* decided otherwise, it was wrong. The individual and the recipient company can, Mr Snowden said, only be made jointly and severally liable if the company's veil is pierced, which was the basis of the orders made in both *Gencor* and *Trustor.*

75. Whilst the opposing arguments on the authorities and issues discussed in the preceding paragraph were instructive and interesting, we propose to express no view on them. Even if Mr Lazarus is right that *Trustor* could have been decided on a basis that did not require the piercing of Introcom's veil, the fact is that it was not. It was decided on the basis that the case was an appropriate one in which to pierce Introcom's veil. We add that the judgment in *CMS Dolphin* was delivered approximately two months after that in *Trustor*, which does not, however, appear to have been cited to Lawrence Collins J; and Lawrence Collins J himself expressly recognised that a "piercing of the veil" is an approach known to the law and may be justified in appropriate circumstances: see [2001] 2 BCLC 704, at paragraph 103.

76. The next authority in the chronology is the decision of Warren J in *Dadourian Group International Inc and Others v. Simms and Others* [2006] EWHC 2973 (Ch). That case is rather closer to home in that it included a claim akin to that sought to be made by the amendments in issue before us. The assertion was that two of the individual defendants had used a company as a façade designed to conceal their personal involvement and as a vehicle for fraud. The case was that the company's corporate veil should be pierced and the two individuals made liable for the loss of bargain damages for breach of contract that had been awarded against the company in an arbitration. Warren J, at paragraphs 679 to 681, referred to *Woolfson, Adams, Gilford, Jones* and *Trustor* and continued by saying:

> "682. In all of the cases where the court has been willing to pierce the corporate veil, it has been necessary or convenient to do so to provide the claimant with an effective remedy to deal with the wrong which has been done to him and where the interposition of a company would, if effective, deprive him of that remedy against him. It seems to me that the veil, if it is to be lifted at all, is to be lifted for the purposes of the relevant transaction. …

> 683. It is not permissible to lift the veil simply because a company has been involved in wrongdoing, in particular because it is in breach of contract. And whilst it is clear that the veil can be lifted where the company is a sham or façade or, to use different language, where it is a mask to conceal the true facts, it is, in my judgment, correct to do so only in order to provide a remedy for the wrong which those controlling the company have done …."

77. Consistently with that approach, Warren J proceeded to reject the claim that the company's veil should be pierced in order that those in its control could be made jointly and severally liable with it for the contractual damages awarded against it. His reason was because the claimant was entitled to recover all his loss by a tortious claim in fraudulent misrepresentation against the two individuals. As he said at paragraph 686, "[t]here is simply no need, in order to give the Claimants redress for that misrepresentation, to lift the veil at all: indeed, to do so would achieve nothing in relation to that wrong."

78. *Faiza Ben Hashem v. Shayif and Another* [2008] EWHC 2380 (Fam) is a judgment of Munby J that includes between paragraphs 144 and 221 a comprehensive discussion of the principles by reference to which the court may pierce the veil of incorporation. Between paragraphs 159 and 164 Munby J re-stated the principles, which he summarised as follows. First, ownership and control of a company are not of themselves sufficient to justify piercing the veil. Second, the court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justice. Third, the corporate veil can only be pierced when there is some impropriety. Fourth, the company's involvement in an impropriety will not by itself justify a piercing of its veil: the impropriety "must be linked to use of the company structure to avoid or conceal liability" (a principle derived from *Trustor*). Fifth, it follows that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer *and* impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing. Sixth, a company can be a façade for such purposes even though not incorporated with deceptive intent:

> "164. … The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes."

79. Mr Snowden accepted that summary as a correct statement of the principles save that he questioned the correctness of the final principle, as to a requirement of necessity, as he also questioned the correctness of Warren J's like point in *Dadourian.* He said that it does not follow that a piercing of the veil will be available only if there is no other remedy available against the wrongdoers for the wrong they have committed. In principle, we agree with Mr Snowden's suggested qualification. It appears to us to be illustrated by both *Gilford* and *Jones.* In *Gilford*, there was no need to grant any injunction against the company, although it was obviously convenient to do so: we consider that it would, in practice, although less convenient, have been sufficient to grant an injunction against Mr Horne, which would conventionally have been in a

form that restrained him from doing the enjoined acts, whether by himself, his servants or agents or otherwise howsoever. In *Jones,* there was also no need to grant an order for specific performance against the company. It was sufficient to grant the order against Mr Lipman on the basis that his control of the company meant that he was in a position to procure the completion of the contract. We refer in that respect to the decision of this court in *Coles and Others (Trustees of the Ward Green Working Men's Club) v. Samuel Smith Old Brewery (Tadcaster) (an unlimited company) and Another* [2007] EWCA Civ 1461, [2008] 2 EGLR 159, in which, in circumstances very similar to those in *Jones,* this court made an order for specific performance against the contracting party, but not also against the company in its control to which the land had been sold (see at paragraph 20, per Rimer LJ, with whose judgment Sedley and Pill LJJ agreed). With that qualification, we would, however, respectfully agree with Munby J's summary of the principles.

80. Mr Snowden also submitted, in expansion of Munby J's fourth principle (and in reliance on what Munby J said at paragraph 199) that it is not sufficient for veil piercing purposes merely to show that the company is involved in wrongdoing, for example that it is carrying out a fraud: there will be no question in such a case of the company being used as a façade. The relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts. In principle, we agree with that too. Where, however, we have more difficulty, as we shall explain, is in also agreeing with Mr Snowden's submission that the relevant wrongdoing in this case was the misuse of the corporate personality of RAP so as to conceal that the true *contracting* parties were, or included, Marcap BVI, Marcap Moscow and Mr Malofeev. We add that in the *Ben Hashem* case the bid to pierce the veil failed. Nothing that Munby J said provides any support for the effect of a successful piercing of the veil for which Mr Snowden contends. Such a point simply did not arise before Munby J for consideration.

81. We come now to the decision in *Gramsci* [2011] 1 Lloyd's Law Reports 647. There is no need to explain the factual background of the application that came before Burton J, an *inter partes* application as to the court's jurisdiction in the proceedings. The primary point was essentially the same as that raised by Mr Snowden's argument. It was summarised by Burton J, at paragraph 8, as follows:

> "Whether the claimants can pierce the corporate veil on the basis that the Corporate Defendants were used, by the defendant (and the other Beneficial Owners) controlling them, as a device for the purpose of a fraud on the claimants, and, if so, whether the defendant (with the others) is liable as a party to the charterparties which claimants were caused to enter into with the Corporate Defendants".

82. Burton J referred, at paragraphs 13 and 14 to *Gilford, Gencor, Trustor* and *Ben Hashem* and, having cited paragraph 23 from the Vice-Chancellor's judgment in *Trustor,* said that was exactly what had happened in the case before him. He rejected the suggestion to be found in certain of the authorities that it was a condition of any piercing of the veil that it should be *necessary* to do so in order to provide the claimant with an effective remedy, and we have indicated our agreement that necessity is not such a condition. As to whether it followed that a piercing of the veil in the case before him would entitle the claimant to hold the defendant (the puppeteer)

jointly and severally liable under the charterparties into which his puppet companies had entered, counsel for the claimant conceded that there was no reported case in which the veil had been pierced so as to place the puppeteer into the puppet's contract. Burton J appears, however, to have regarded *Gilford* and *Jones* as both cases in which the court was treating the puppet as liable under the puppeteer's contract (see paragraph 23) and to have favoured the view that there was therefore no reason in principle why, in the reverse situation, the puppeteer should not be held liable under the puppet's contract. Such a reverse situation arose in both *Dadourian* (where Warren J refused to pierce the veil) and in *Lindsay v. O'Loughnane* [2010] EWHC 529 (QB) (where Flaux J did likewise). Burton J explained his reasons for concluding that the claimant had a good arguable case for holding the puppeteers liable on their puppets' charterparties at paragraph 26:

> "I am satisfied that both Warren J in *Dadourian* and Flaux J in *Lindsay* were only ruling out the course of finding the puppeteer liable for breach of contract because in neither case was it appropriate to do so in the event, since a remedy of finding the puppeteer personally liable (as tortfeasor) had already been granted which was, certainly in the case of *Dadourian,* inconsistent with taking the contractual route. None of the reasons which Warren J put forward argues against a conclusion, depending on how the facts fall out at trial, that in this case the puppeteer should be held party to the puppet company's contract. There is in my judgment no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppeteer who, all the time, was pulling the strings. The claimants seek to enforce the contract against both the puppeteer and the puppet company (as in *Gilford* and *Jones*). …"

83. In *Linsen International Limited and Others v. Humpuss Sea Transport PTE Ltd and Others* [2011] EWHC 2339 (Comm), another decision of Flaux J, the claimants placed reliance on that part of Burton J's decision in *Gramsci*, to which Flaux J referred at paragraphs 137 to 142 without questioning its correctness. In the event, however, he regarded neither *Gramsci* nor any other of the veil piercing cases cited to him as relevant to the facts before him, and his decision does not progress the line favoured by Burton J in *Gramsci.*

84. The next first instance decision to consider *Gramsci* was that of Arnold J now under appeal, following which the like question once again came before Burton J in *Alliance Bank JSC v. Aquanta Corporation and Others* [2011] EWHC 3281 (Comm). Burton J noted Arnold J's disagreement with his decision in *Gramsci* but said, at paragraph 20, that:

> "I have no doubt nevertheless that, for the reasons I gave in *Gramsci,* there is a serious issue of fact and law as to whether, in the circumstances described by me above, the Sixth, Seventh and Eighth Defendants are to be treated as being parties to the Loan Agreements, as I found arguable in the case of the defendant and the interposed chartering companies in *Gramsci.* I also am satisfied that, as I concluded in *Gramsci*, the question of whether the veil should be pierced in such a situation, so as to decide whether the puppeteers are parties to the contract, is to be resolved, just as would be issues of

> agency, undisclosed or otherwise, by reference to the proper law of the contract (see paragraph 46 of *Gramsci*). In this case, the proper law of the Loan Agreements is expressly English law …."

85. Returning to Mr Snowden's submissions, he said that in a case such as the present, in which on the assumed facts Marcap BVI, Marcap Moscow and Mr Malofeev have misused the corporate structure of a contracting party (RAP) for the purpose of fraudulently concealing their own interest as controllers of RAP and misleading VTB into believing that the character of its contract with RAP was different from its true nature, it is open to the court to pierce the veil, ascertain the true facts that were going on behind RAP's façade and identify the three defendants as such controllers. The true facts show that the controllers of RAP have, by concealing their identity, obtained a loan from VTB; and it is, therefore, logical to proceed to the conclusion that they are true, *additional*, contracting parties to the Facility Agreement and ISA and so answerable jointly and severally with RAP for its breaches. There is, he said, no reason in principle why the (as must be assumed) fraudulent controllers should not be equally liable on the contracts into which they have procured their puppet company, RAP, to enter. It is irrelevant that VTB has, or may have, an alternative claim in the tort of deceit against the three defendants and both Warren J in *Dadourian* and Arnold J in this case were wrong to conclude otherwise. The fact that at trial VTB may have to make an election as to which of its contractual or tortious remedies to pursue is irrelevant. If, however, it elects for contractual remedies against the three defendants, it will be entitled to loss of bargain damages, being the loss of the money lent plus the interest payable under the contract.

86. Mr Snowden adopted by way of supporting analogy for his submissions the position of an undisclosed principal in the law of contract. For a statement of the principle, he referred us to the advice of the Privy Council in *Siu Yin Kwan (Administratrix of the estate of Chan Ying Lung, decd.) and Another v. Eastern Insurance Co Ltd* [1994] 2 AC 199. Lord Lloyd of Berwick, in delivering the judgment, said, at 207:

> "For present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.
>
> The origin of, and theoretical justification for, the doctrine of the undisclosed principal has been the subject of much discussion by academic writers. … It seems to be generally accepted that, while the development of this branch of the law may have been anomalous, since it runs counter to fundamental principles of privity of contract, it is justified on grounds of commercial convenience."

87. Mr Snowden recognised that the law relating to undisclosed principals has anomalous features about it but said that the main criticism of it was in relation to the ability of the undisclosed principal to intervene in the contract as against the third party, who had no inkling of the principal's existence. He submitted, however, that the law has no reservations about allowing the third party to sue the principal once he has discovered his existence. In support of that, he referred us to *Armstrong v. Stokes and others* (1872) 7 L.R.Q.B. 598, at 603 to 604, per Blackburn J. Mr Snowden said that that principle could, as a matter of policy, easily be translated to the circumstances of the present case, in which VTB seeks to make answerable on the two contracts the true, undisclosed, contracting parties standing behind RAP. Creature companies that are used to perpetrate the sort of fraud that is alleged in the present case will usually be insufficiently capitalised to be able to satisfy any judgment. It is, moreover, no answer for the controllers to say that they gave no authority to the creature company to act as their agent. That is to commit the error of trying to shoehorn the exercise of veil piercing into an agency relationship, which it is not. Of course fraudsters are not going to grant any such express authority to their creature companies. Veil piercing, however, engages a different technique. It is about substance, not form; and the inability to demonstrate a true agency relationship between controller and its puppet company is no bar to its application.

88. We come to our conclusions on the appeal against Arnold J's refusal to allow the amendment. We respectfully consider that Arnold J was correct to hold that the contract claim that VTB wishes to advance against the three defendants is not founded on a cause of action known to English law. We can also identify no principled basis upon which the law might be incrementally developed so as to recognise such a claim. We consider that Arnold J was right to refuse the amendments.

89. First, we derive no assistance from any analogy with the law relating to undisclosed principals. That corner of the law of contract is recognised as anomalous and we are unable to draw from it any guidance that can be said to assist, let alone support, Mr Snowden's essential submission. At least one reason why it does not is that the undisclosed principal can neither sue nor be sued unless the agent entering into the contract on his behalf did so with his authority. On the assumed facts of the present case, there is no question of the puppeteers having authorised the puppets to enter into the contracts on their behalf, whether expressly or impliedly, or by any means of apparent or "usual" authority. Therefore there is no analogy with the position of an undisclosed principal. The question that the appeal poses for us must, we consider, be answered by reference to considerations of more general principle.

90. Second, there is no arguable factual basis for the assertions that, when the Facility Agreement and the ISA were concluded: (i) VTB intended to contract with anyone other than the counterparties named in them; (ii) such counterparties intended to contract with VTB on behalf of anyone but themselves; (iii) any of Marcap BVI, Marcap Moscow or Mr Malofeev intended to contract with VTB; or, therefore, that (iv) on an objective assessment of the evidence, any of those three defendants *was* a party to either of the contracts. VTB's submission amounts to the proposition that there is a principle of English law that a person can be held to be a party to a contract when, assessed objectively, none of the undisputed parties to the contract had any thought that he was, let alone an intention that he should be. In our judgment, to accede to VTB's submission would be to make a fundamental inroad into the basic

principle of law that contracts are the result of a consensual arrangement between, and only between, those intending to be parties to them. It is contrary to that principle, which is applicable save in some exceptional cases, none of which applies here, that a stranger to the contract should be held to be a party to it.

91. Third, whilst we accept that the court can, in an appropriate case, "pierce a company's corporate veil" and, in doing so, substantially identify the company with those in control of it, no authority has been cited to us, apart from Burton J's decisions in *Gramsci* and *Alliance*, that supports the proposition that, once the veil is pierced, the court either does or can (or that it is arguable that it does or can) proceed in consequence to a holding either that the puppet company was a party to the puppeteer's contract, or vice versa. As we have said, we interpret Burton J as having regarded *Gilford* and *Jones* as cases in which the remedies against the companies were granted on the basis that they were themselves parties to the individuals' contracts. We respectfully regard that as a misreading of both cases.

92. We of course recognise the logic of Mr Snowden's proposition in relation to *Gilford* and *Jones* that, if the remedies of an injunction and specific performance were to be granted against the companies, it was necessary for such orders to be underpinned by the existence of recognisable causes of action against them. We nevertheless do not regard the orders made against the companies in either case as premised on the basis that there was a cause of action in contract against them. Neither court so explained its decision. We regard the order made in *Gilford* as having been based on the conclusion that, for the reasons we have given, it was convenient to make an order against the company directly. The latter explanation is also clearly the basis on which Russell J made his order in *Jones*. Our consideration of the reported authorities leads us to the conclusion that, in a case in which it is thought appropriate to pierce the veil, any order made in consequence of such veil piercing is by way of the exercise by the court of a discretionary jurisdiction. We do not see how else the orders against the companies in *Gilford* and *Jones* can be explained. Neither case supports VTB's proposition that the judicial piercing of the veil of a company that an individual has used with a view to masking his own breach of contract results in the court treating the company as itself a party to that contract. Insofar as the starting premise for Burton J's decisions in *Gramsci* and *Alliance* was to a different effect, we have indicated our disagreement with it. It follows that we also respectfully regard as wrong Burton J's extension of the decisions in *Gilford* and *Jones* to embrace the proposition that there is a good arguable case in law for the conclusion that, if the puppet can have the puppeteer's contract imposed on it, so can the puppeteer have the puppet's contract imposed on him.

93. Fourth, we respectfully consider that Mr Snowden's submission is flawed by its own inherent unreality. His proposition is that, once the corporate veil is lifted and the *true facts* are revealed, such facts will require the court to conclude that the puppeteers are additional parties to the contracts into which they have procured the puppet to enter. We do not understand this. It is inconceivable that the revelation of the true facts will show Marcap BVI, Marcap Moscow or Mr Malofeev to be parties to either of the relevant contracts. It will at most show no more than that they induced VTB to enter into the relevant contracts by dishonest deception. The suggestion that the application of the veil piercing principle to the facts will require the court to find that these three defendants were original, additional parties to the contracts is nothing

more than an appeal to the court to decide the case on the basis of pure fiction. No authority, *Gramsci* and *Alliance* apart, supports the view that that is something the court might or should do.

94. Fifth, there remains a question as to whether, even if founded on mistaken reasoning, *Gramsci* and *Alliance* anyway represent a principled development of the law that this court should adopt. We have said enough to show that we consider that they do not. The "veil piercing" cases show that the principle is, in its application, a limited one, which has been developed pragmatically for the purpose of providing a practical solution in particular factual circumstances. The reported authorities certainly proceed on the basis that (in the usual case) the puppet company and the controlling puppeteer are to be closely identified, an identification that will or may be regarded as justifying the grant of a judicial remedy against the puppet as well as the puppeteer, if only on the basis that it will be just and convenient to do so. They do not, however, go to the length of treating the puppet company as other than a legal person that is formally distinct and separate from the puppeteer; and, were they to do otherwise, they would wrongly be ignoring the principles of *Salomon.* Consistently with that, they do not provide any basis for the proposition that the puppeteer should be regarded as having always been a party to a contract to which it or he plainly was not a party.

95. Not only do we not regard the common law as recognising the principle for which VTB contends, we are also not persuaded that it would be a principled development of the law for us to recognise it by our decision in this appeal. Any such development would not be a modest development of existing principle. It would, in substance, amount to the adoption by the courts of a jurisdiction to subject parties to contractual obligations under a contract to which neither they, nor the only undisputed parties to the contract, had ever agreed or intended that they should be subject. Yet further, if, which we question, it would ever be appropriate to develop any such principle, we do not regard this case as the right one in which to do so. There is no need to do so. Mr Snowden submitted that English law needs the tools to deal with commercial fraud. In principle, we agree. But if VTB's factual assertions are well founded, English law already provides it with a perfectly good remedy against the defendants, by way of a claim in the tort of deceit for the wrong which it claims they have inflicted upon it. There is no good policy reason for inventing and giving it an artificial remedy in contract, which VTB does not need, but which it merely invokes in support of its claim that the English courts should assume jurisdiction in its claims. In this context, Mr Lazarus referred us to the cautionary words of Lord Goff of Chieveley in *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 AC 349, at 378A to D, as to the manner in which the judges do or should develop the common law. We have had regard to them.

96. We are conscious that we have not referred to Arnold J's full and careful reasons for declining to follow and apply Burton J's decision in *Gramsci.* We intend no discourtesy to the judge if we do not extend this part of our judgment yet further by setting out and discussing his reasons. We say simply that, for the reasons we have given, which are similar in substance to those expressed by him, we respectfully agree with his conclusion that, contrary to the view favoured in *Gramsci*, VTB's proposed contract claim is unsustainable as a matter of law. We therefore dismiss the appeal against his refusal to allow the amendments; and, to the extent that *Gramsci* and

Alliance provide support for the view that the proposed amendments assert a cause of action for the reasonableness of which there is a good arguable case, we overrule them as having been wrongly decided.

Service out of the jurisdiction

97. Having decided that VTB is not entitled to pierce the corporate veil so as to make Marcap BVI, Marcap Moscow and Mr Malofeev parties to the Facility Agreement, we do not need to decide the issue of whether VTB can rely on clause 35 of the Facility Agreement to confer jurisdiction on the English Courts pursuant to article 23(1) of the Brussels Regulation. Nor do we need to consider the alternative argument of VTB that it can rely on paragraph 3.1 (6) of the Practice Direction 6B of the CPR as a basis on which to obtain leave to serve proceedings out of the jurisdiction on Marcap BVI, Marcap Moscow and Mr Malofeev in respect of a claim based on the Facility Agreement. We heard arguments on both these points but they are moot in the light of our conclusion on lifting the corporate veil.

98. The issue on jurisdiction, therefore, is whether VTB should have permission to serve proceedings out of the jurisdiction on Nutritek, Marcap BVI and Mr Malofeev in respect of the two claims in tort that are alleged. VTB asserts that it is entitled to obtain permission to serve the proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction pursuant to paragraph 3.1 (9)(a) of Practice Direction 6B, viz. that "… a claim is made in tort where (a) damage was sustained within the jurisdiction;…". The defendants dispute this right and the judge held they were correct.

99. There was no dispute between the parties on the general principles to be applied when deciding whether permission should be granted to serve proceedings on a defendant who is out of the jurisdiction, under the terms of paragraph 3.1 of Practice Direction 6B of the CPR. The three basic principles were recently restated by Lord Collins of Mapesbury in giving the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7, 1 CLC 205 at paragraphs 71, 81 and 88. They can be summarised as follows: first, the claimant must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of Practice Direction 6B. "Good arguable case" in this context means that the claimant has a much better argument than the foreign defendant. Further, where a question of law arises in connection with a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction (e.g. whether a claim falls within one of the classes set out in paragraph 3.1 of Practice Direction 6B), then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law.

100. Thirdly, the claimant must satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. This requirement is reflected in Rule 6.37(3) of

the CPR, which provides that "The court will not give permission [to serve a claim form out of the jurisdiction on any of the grounds set out in paragraph 3.1 of Practice Direction 6B] unless satisfied that England and Wales is the proper place in which to bring the claim".

101. On the last of the three basic principles, two further points should be made. They arise from the now classic speech of Lord Goff of Chieveley in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, at 475-484. They are: first, where a claimant seeks leave to serve proceedings on a foreign defendant out of the jurisdiction, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. Secondly, in such a case the burden is on the claimant to persuade the court that England is clearly or distinctly the appropriate forum.

Order of dealing with the three principal components

102. On the first of the three principal components, the respondents all argued that, contrary to the conclusion of the judge, there is no serious issue between them and VTB to be tried because, it was said, VTB had suffered no loss as a result of the alleged fraudulent misrepresentations and conspiracy; if there has been no loss then there is no completed cause of action in tort. The same argument arises in relation to the second of the principal components. If VTB has suffered no loss then VTB cannot claim that damage has been sustained within the jurisdiction; therefore VTB would not come within the ambit of sub-paragraph (9)(a) of paragraph 3.1 of the Practice Direction 6B, so permission to serve out should be refused on that ground also. The defendants say that this is an issue of law which goes to the court's jurisdiction to grant permission to serve out and so should be decided definitively now, in accordance with the principles set out by Lord Collins in the *AK Investment* case, referred to above. VTB accepts that it has to establish a "good arguable case" that it has sustained damage within the jurisdiction as a result of the torts alleged against the defendants in order to come within sub-paragraph (9)(a) of paragraph 3.1 of Practice Direction 6B.

103. On behalf of Marcap BVI it was also submitted that there was no real prospect of success in VTB's argument that Marcap BVI is jointly liable with Mr Malofeev for the tort of deceit or was a party to the conspiracy. That point goes directly to the first of the three principal components we have identified. But it does not go to the second. If there is a triable issue that Marcap BVI is jointly liable with Mr Malofeev for the tort of deceit or was a party to the conspiracy, there is no independent point that Marcap BVI can take on "no loss". Accordingly, it seems to us that VTB has only to establish that there is a serious issue to be tried in relation to its claim against Marcap BVI.

104. Before the judge Mr Malofeev had also argued that VTB had no real prospect of establishing: (1) a misrepresentation as to the absence of common control of the seller and buyer companies; (2) that Mr Malofeev was jointly liable in respect of the misrepresentation as to the value of the Dairy Companies; and (3) that there was any reliance by VTB on any understanding as to the ownership or control of RAP. The judge rejected the arguments as regards Mr Malofeev on the evidence before him: see paragraphs 179 to 183 and 226. In Mr Malofeev's "Skeleton" argument, those conclusions were challenged. Mr Freedman made submissions on those points in

opening the appeal for VTB. Mr Milligan did not develop those arguments orally on behalf of Mr Malofeev. We think that he was right not to do so. The judge carefully analysed the evidence that VTB had advanced in support of its case in deceit and conspiracy against Mr Malofeev and made his overall assessment that VTB had established a good arguable case. It would have to be demonstrated that the judge's assessment of the evidence was seriously flawed in some respect. That has not been done, so we say no more on that issue.

105. Both below and before us, these two issues of "no loss" and "no arguable case against Marcap BVI" were argued on the basis of English law. Arnold J decided that Russian law is the applicable law to the torts alleged against all the defendants. That conclusion is challenged by VTB before us. Mr Lazarus, who was principally responsible for arguing the "no loss" point and who presented the argument that there was no arguable case against Marcap BVI, did not submit that if the defendants were correct on the applicable law of the torts point, then that made a difference to the argument on the issues of "no loss" or no arguable case against Marcap BVI. Nor did Mr Freedman for VTB. Both approached the "no loss" issue and the liability of Marcap BVI as issues to be decided according to English law and we shall do so too.

106. We will deal first with the "no loss" and "no arguable case against Marcap BVI" issues. We will then consider the arguments on the third principal component: viz. is England clearly or distinctly the appropriate forum for the trial of these issues? Under that head VTB's main challenge relates to two principal conclusions of the judge. The first is that the "natural forum" for these disputes is Russia: paragraph 195 of the judgment. In VTB's submission the tort of deceit was committed against VTB in England and the conspiracy was carried out in England by unlawful means by virtue of the deceit which itself was committed in England. Therefore, VTB argues, the judge should have held that there is a presumption that England is the "natural forum" and he should also have held that such a presumption could not, on the facts of this case, be displaced. The second principal conclusion of the judge that is challenged is that the applicable law of the torts alleged against the defendants is that of Russia. VTB argued that the applicable law is English law and that this has an important consequence in relation to the issue of whether England is clearly or distinctly the appropriate forum for these disputes.

The "VTB has suffered no loss" point

107. As noted above, Mr Lazarus argued this point for all three defendants. The steps in Mr Lazarus' argument were as follows: first, the Facility Agreement and the Participation Agreement are indivisible parts of one transaction and neither would have existed without the other. Secondly, on VTB's own case, both those agreements must have been induced by the same fraudulent misrepresentations for which Nutritek, Marcap BVI and Mr Malofeev are said to be responsible. Thirdly, therefore the same fraud (and conspiracy) which caused VTB to advance funds to RAP must also have caused VTB Moscow to advance funds to VTB under the Participation Agreement. Fourthly, because the same fraud (and conspiracy) caused both the outflow of funds from VTB to RAP and the inflow of funds to VTB from VTB Moscow, it cannot be argued that the outflow of funds from VTB and the inflow of funds from VTB Moscow were *res inter alios acta*, so as to create a loss when there was none. Fifthly, because VTB Moscow must have its own, independent claim to have suffered loss as a result of the torts committed by the defendants, there are

insuperable problems of double recovery if VTB is permitted to pursue its "loss" against the defendants, when the true loser must be VTB Moscow.

108. In relation to the first point in the argument, Mr Lazarus noted that under Clause 4.1.1 of the Facility Agreement and also Schedule 2, Part 1, paragraph 2.1.2, it was a condition precedent of RAP being able to request an advance under that agreement that VTB should have received funds from VTB Moscow under the Participation Agreement. Further, by Clause 4.2.3 of the Facility Agreement, VTB was only obliged to make an advance to RAP once VTB Moscow had credited VTB's account with funding in accordance with the Participation Agreement. Mr Lazarus pointed also to the provisions at Clauses 2.1 and 2.2 and 3.2 and 4.5(b) of the Participation Agreement. He submitted that the structure of the two agreements was such that VTB bore no risk from the transaction with RAP because it was bound to obtain funds from VTB Moscow and it was not bound to refund anything to VTB Moscow unless it actually received amounts from RAP. Accordingly, he submitted that VTB had, "in fact", suffered no loss; rather, it was VTB Moscow that had done so.

109. Mr Lazarus also relied on two well established principles of the law of damages in support of his argument. The first is that damages are to be awarded so as to put the "injured party" in the position that it would have been in had it not sustained the wrong for which it now sought compensation or reparation: see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, at 39 per Lord Blackburn. The second is that, in the particular context of the tort of deceit, when a court is assessing the damages recoverable, the claimant has to give credit for any benefits which it has received "as a result of the transaction giving rise to the loss": see *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 266H per Lord Browne-Wilkinson. Mr Lazarus submitted that the comparison in this case must be between the position that VTB would have been in had the torts not been committed and the position it was actually in as a result of the torts. The sums that VTB received from VTB Moscow were received "as a result of" the operation of the Facility and the Participation Agreements which are to be regarded as part of the same transaction. Therefore the funds paid by VTB Moscow to VTB must, Mr Lazarus submitted, be taken into account; the exercise of ascertaining the loss suffered by VTB is not to be confined to benefits received under the actual Facility Agreement transaction but all those received "as a result of" the overall transaction. If the VTB Moscow sums are taken into account, then it is clear, he submitted, that VTB itself has suffered no loss. The judge's error, at paragraph 154, he submitted, was to concentrate on the Facility Agreement alone.

110. We can accept that the same fraudulent misrepresentations gave rise to the agreements to conclude both the Facility Agreement between VTB and RAP and the Participation Agreement between VTB and VTB Moscow. We can also accept that VTB would not have been prepared to enter into the obligations of the Facility Agreement if it had not had a source of funds with which to pay RAP pursuant to the Facility Agreement or to make the payment to RAP unless it had received funds from another source beforehand. But those facts alone do not solve the question of whether VTB has suffered any loss as a result of the defendants' (assumed) torts against VTB. Clause 6.1 (b) and (c) of the Participation Agreement states that the relationship between VTB and VTB Moscow is one of debtor and creditor and that VTB is not the agent or fiduciary or trustee of VTB Moscow. Thus when VTB Moscow paid over the sum of

US$ 225 million to VTB, that sum became the property of VTB. VTB was the owner of property (viz. a sum of US$ 225 million) which it lent to RAP under the terms of the Facility Agreement. As soon as VTB parted with that money it suffered loss because (on the assumptions being made) the reason it had done so was the contractual obligation to RAP that was created as a result of the defendants' torts. The position is the same as in the well-known case of *Forster v Outred* [1982] 1 WLR 86, in which the Court of Appeal held that a claimant who agreed to mortgage her house as security for an advance to her son suffered damage as soon as she entered into the mortgage deed in reliance on the negligent advice of her solicitors: see page 98 per Stephenson LJ and page 99 per Dunn LJ; Sir David Cairns agreed with both judgments. We accept that the amount of the loss will have become crystallised at a later stage, i.e. once the insufficiency of the security given by RAP was known. But VTB's loss occurred, at the latest, when it paid over sums under the Facility Agreement.

111. Furthermore, we dismiss the argument that the judge erred in rejecting the submission that the funds that VTB received from VTB Moscow had to be taken into account. Those funds were not a "benefit received as a result of the transaction" in Lord Browne-Wilkinson's words. They were not a "benefit"; they were the source of the funding for the loan to RAP, rather than some additional benefit that resulted from the transaction overall and in consequence of the tort of the defendants. That is the type of "benefit" which we think Lord Browne-Wilkinson had in mind. That analysis reflects what Viscount Haldane stated in *British Westinghouse v Underground Railway* [1912] AC 673 at 689, where he said:

> "… when in the course of his business, he has taken action arising out of the transaction, which action has diminished his loss, the effect in the actual diminution of the loss he has suffered may be taken into account … The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business. This distinguishes such cases from a quite different class of case illustrated by *Bradburn* … The reason of that decision was that it was not the accident, but a contract wholly independent of the relation between the plaintiff and the defendant which gave the plaintiff the advantage".

112. The fact that VTB would not have parted with the money in the first place without being put in funds by VTB Moscow is irrelevant. VTB Moscow's funding, under the separate and distinct Participation Agreement, was the source of VTB's loan to RAP, not the consequence. Moreover, money is not the same as a physical object, which, once lost, might only be the subject of one damages claim (although there can be successive claims in respect of the same object, e.g. in conversion). Logically, the fact that the ultimate source of the funds defrayed by VTB to RAP was another party cannot diminish VTB's loss. Otherwise, if Mr Lazarus' argument were correct, then it would equally follow that VTB would have suffered no loss if the source of the funds advanced to RAP was another, entirely unconnected, third party as opposed to VTB Moscow.

113. Nor, we think, can the fact that the same fraudulent misrepresentation led to the conclusion of the Participation Agreement as well as the Facility Agreement be relevant. Just because the defendants have committed torts of the same type against

two entities cannot, by itself, mean that only one of those entities has suffered damage. The torts, although of the same nature, are separate and distinct. In principle, each separate tort can give rise to a loss of a different party who is the victim of the tort.

114. Mr Lazarus relied heavily on the reasoning of Thomas J in *Interallianz Finanz AGE v Independent Insurance Company Ltd and others,* (judgment dated 30 May 1997, unreported). In that case Interallianz had lent £25.6 million to an SPV property company to enable it to refinance the purchase of a commercial property. Interallianz had obtained from the fourth defendant surveyors and valuers, Allsop and Company, an open market valuation of the property. Subsequently the SPV borrowers ceased paying interest on the loan and the SPV was eventually put into receivership and the property was sold for much less than the value as assessed by Allsop. Interallianz obtained mortgage indemnity insurance from Independent, who at first refused to pay but eventually the action against it by Interallianz was compromised. However, Interallianz continued its claim against Allsop for damages for professional negligence as to their valuation of the commercial property.

115. One of Allsop's defences to the claim was that after the SPV had drawn down on the loan pursuant to the contract with Interallianz, the latter entered into sub-participation agreements with five other financial institutions. That was done at a time when no one suspected that Allsop's valuation was negligent. The result of the sub-participation agreements was that Interallianz was left having to fund from its own resources only 12.56% of the total amount of the loan to the SPV. Allsop accepted that it did not owe any duty of care to the sub-participants, but it argued that the fact of these sub-participation agreements reduced Interallianz's loss to the net amount of the loan which it had to fund from its own resources. In response, Interallianz argued that the sub-participation agreements were *res inter alios acta* and, in any event, that it was under a duty to account to the sub-participants for their respective shares of any recovery that Interallianz made from Allsop.

116. Thomas J noted first (page 70), that the claim was not one in deceit. Therefore the principle stated by Lord Browne-Wilkinson in the *Smith New Court* case (referred to above) that in a claim in deceit a claimant had to bring into account all the benefits accruing from the relevant transaction, did not apply to that case. Secondly, Thomas J accepted that the issue in that case was whether the "benefits" that Interallianz had obtained as a result of the sub-participation agreements had to be taken into account depended on whether they were to be regarded as collateral or whether they were a result of a subsequent transaction which arose out of the consequences of the wrong founding the claim and in the ordinary course of business (page 70-71). He considered a number of statements of principle in leading cases, including that stated by Viscount Haldane in *British Westinghouse v Underground Railway* [1912] AC 673 at 689 quoted above and those in the then current edition of McGregor on Damages (the 15th edition). He concluded that it was not possible to give a comprehensive definition of the circumstances when "benefits" derived from third parties were to be regarded as collateral and so did not need to be taken into account when assessing the amount of a claimant's loss (page 72-3).

117. Thomas J concluded that Interallianz did not have to bring the "benefits" of the sub-participations into account. He emphasised (at page 73-4): (1) the sub-participation agreements had been concluded when Interallianz had no knowledge of Allsop's

breach or of any damage flowing from it; (2) therefore those "benefits" did not arise out of the breach of duty or the loss, but were wholly independent of them; (3) Interallianz's loss occurred on draw down of the loans to the SPV; (4) the sub-participation agreements were independent arrangements with others and the loans to Interallianz by them did not have to be repaid; and (5) the fact that the sub-participations were concluded before Interallianz knew of Allsop's negligence, rather than after it became aware of it, was significant.

118. Mr Lazarus argued that the last factor was the key to Thomas J's decision. In the present case he submitted that all the relevant facts were known to both VTB and to VTB Moscow before the Facility Agreement was concluded (on 23 November 2007) and the Participation Agreement was concluded (on 28 November 2007). Therefore, the sums received by VTB from VTB Moscow were benefits obtained as a result of the transaction and must be taken into account. We do not agree. The whole basis of the claims against the defendants is that the two agreements were concluded in ignorance of any fraudulent misrepresentations by the defendants, just as much as Interallianz agreed to loan sums to the SPV in ignorance of the fact that the valuation given by Allsop was negligent.

119. We also cannot accept Mr Lazarus' argument that if VTB is entitled to recover substantial losses that would lead to insuperable difficulties of "double recovery". That argument looks at the issue from the wrong perspective. If the defendants have committed the torts alleged then they have committed the torts against both VTB and VTB Moscow. Each has, *prima facie*, suffered loss as a result of those torts. Each loss involves the property of the two separate banks. The fact that VTB Moscow supplied VTB with funds to lend to RAP does not make it "one" loss. VTB Moscow may have obtained its funds from a third party and if that was the case it surely could not be argued that VTB Moscow had not suffered a loss as well as VTB itself. The fact remains (on the assumptions being made) that VTB Moscow parted with its property as a result of the torts alleged and so did VTB.

120. Lastly, we should deal with the fact that before the judge and before us there was considerable argument on whether, if VTB recovered damages from the defendants in the present litigation, it would be obliged to account to VTB Moscow for such recoveries. The judge held that VTB was under a duty to account to VTB Moscow either by virtue of clause 6.4(b) of the Participation Agreement or by virtue of an implied term of that agreement: see paragraph 168. We do not need to decide the point. Whether VTB is obliged or not to account to VTB Moscow for any damages VTB recovers in the present action cannot, logically, affect the question of whether VTB has suffered loss. Either it has or it has not; what (if any) its obligations are in relation to any damages that VTB recovers because it has suffered a loss as a result of the defendants' torts is a separate question.

121. Our conclusion is that, on the material presently available to us, there is a serious issue to be tried on whether VTB has suffered a loss as a result and VTB does have a good arguable case that it has sustained damage within the jurisdiction within sub-paragraph (9)(a) of paragraph 3.1 of Practice Direction 6B.

VTB's case against Marcap BVI of participation in the alleged fraud/conspiracy

122. VTB challenges the judge's conclusion, at paragraph 176, that there is no serious issue to be tried between VTB and Marcap BVI that it is jointly liable for the fraudulent misrepresentation or that it took part in the conspiracy. The judge noted (at paragraph 170) that it was common ground before him that the question of whether a person is a party to a conspiracy is essentially the same as whether he is liable as a joint tortfeasor by reason of having participated in a common design and that it was not necessary to show that the person himself committed the tort. (See, respectively: Clerk & Lindsell on Torts, 20th Ed at 24.94 and *Dadourian Group International Inc v Simms* [2009] 1 Lloyd's Rep 601 at paragraph 84 per Arden LJ). That remained common ground before us. It was also common ground that Marcap BVI is a BVI holding company which is part of the Marcap group of companies, that it has no employees or operations of its own and that its beneficial owners are Mr Malofeev and Mr Sazhinov.

123. VTB's pleaded case is summarised by the judge at paragraph 171 of the judgment. To summarise that summary, its case is: (1) the Marcap group, through Marcap BVI, controlled and beneficially owned Nutritek at the time of the Facility Agreement and the SPA; (2) the Marcap group stood to benefit from the deceit on VTB; (3) the whole transaction under which VTB was defrauded was co-ordinated by the Marcap group; (4) Mr Malofeev exercised substantial control over the Marcap group including Marcap BVI; (5) Mr Malofeev was closely involved in the whole transaction and it was introduced to VTB and VTB Moscow by him and it must have taken place with his approval and encouragement. Finally, VTB alleges in paragraph 69 of the Particulars of Claim:

> "The only inference that can reasonably be drawn is that the Marcap group and Mr Malofeev were party to a conspiracy with Nutritek to defraud VTB. Further, it is reasonable to infer that the Marcap companies involved included not only Marcap Moscow but also Marcap BVI which owned at least a little under half of Nutritek".

124. The judge's conclusion (at paragraph 176) was that there was nothing in VTB's pleaded case to found a case that Mr Malofeev had authority, express or implied, to act on behalf of Marcap BVI to involve it in the actions that constituted the torts alleged. His actions were entirely equivocal: reference was made to a case emphasising the difficulty of implying from equivocal conduct a contract for the carriage of goods by sea: *The Aramis* [1989] 1 Lloyd's Rep 213. The judge also rejected arguments which were not specifically pleaded but were based on evidence to the effect that one of the directors of Marcap BVI, Phillipe Houman, had, in September 2007, signed a loan agreement on behalf of another company, Leskata, which was linked to a subordinated loan obtained by RAP for the balance of the purchase price of the dairy companies; that he had signed another loan agreement, in favour of RAP, on behalf of a further company, Madinter, in January 2009 and that Mr Houman had signed further documents in September 2011 when Mr Malofeev was attempting to get the WFO discharged.

125. Before us, Mr Freedman on behalf of VTB submitted, first, that at this very early stage of the case, VTB cannot be expected to be in a position to set out the precise basis on which Marcap BVI may have been involved in the fraud. However, the fact

that Mr Malofeev is one of the two beneficial owners of Marcap BVI is support for the inference that Mr Malofeev had the authority of Marcap BVI to act as its agent in the fraudulent deception of VTB and that Marcap BVI, acting through the agency of Mr Malofeev, was therefore a joint conspirator to defraud VTB. Secondly, Mr Freedman submitted that there were sufficient pleaded facts about the actions of Mr Malofeev to be capable, if proved, of leading a court to infer that there was an agency relationship between Mr Malofeev (as agent) and Marcap BVI.

126. This issue does not concern the second principal component for deciding whether permission to serve out of the jurisdiction should be granted, viz. whether the claim falls into one of the classes set out in paragraph 3.1 of Practice Direction 6B. It concerns only the question of whether there is a serious issue to be tried as to whether Marcap BVI was a party to the torts alleged to have been committed against VTB. In our view, although the current case against Marcap BVI is thin, there is enough in the pleaded case as supported by uncontested facts to conclude that there is a triable issue. We think this follows from the combination of the following factors: (1) Mr Malofeev is one of the two directing minds and wills of Marcap BVI; in principle the knowledge of a directing mind of a company will be attributed to the company itself (save in circumstances which are not material here). (2) Mr Malofeev set up the Marcap group including Marcap BVI. (3) Marcap BVI was a part owner of Nutritek and therefore an important element in the chain of ownership between Mr Malofeev and Nutritek. (4) Mr Malofeev and the Marcap group were heavily involved in the negotiations leading to the Facility Agreement and SPA and, on VTB's case, Mr Malofeev was the maker of the fraudulent misrepresentations. (5) The actions of Mr Malofeev are capable, if proved, of leading a court to infer that there was an agency relationship between Mr Malofeev (as agent) and Marcap BVI (as principal), in circumstances where Mr Malofeev is part of the "directing mind" of Marcap BVI.

127. We conclude, therefore: (1) the judge was correct to reject the defendants' argument that VTB had suffered no loss; but (2) the judge was wrong to conclude that VTB had no reasonable prospect of success in establishing that Marcap BVI was, through the agency of Mr Malofeev, a party to the torts against VTB.

Is England and Wales clearly or distinctly the appropriate forum in which the claim of VTB against the defendants should be determined?

General

128. The judge stated, at paragraph 185 of the judgment, that, based on the principles set out in the speech of Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, the question of whether England is clearly or distinctly the appropriate forum so that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction is normally approached in two stages. He said that the first stage is to ask whether England is the "natural forum", i.e. that with which the action has its "most real and substantial connection". If it is not, then the second stage is to ask whether England is nevertheless the appropriate forum, in particular because there is a real risk that the claimant will not obtain substantial justice in the (non-English) "natural" forum.

129. With great respect to the judge, we think he may have erred in his interpretation of Lord Goff's speech in *Spiliada.* In that case the application was to set aside leave to

serve proceedings out of the jurisdiction where shipowners wished to sue (in the Commercial Court) shippers under bills of lading governed by English law. The application to set aside the leave granted *ex parte* was made on the basis that England was not the appropriate forum, but the courts of British Columbia were - for various reasons. Lord Goff (who had been leading counsel in *The Atlantic Star* [1974] AC 436, in which he had argued, with only partial success, for the adoption in England of the Scots doctrine of *forum non conveniens*), used the opportunity to propound the basic principles of how a court should deal with the issue of the appropriate forum in two different circumstances. The first is where a claimant has served proceedings on the defendant in England "as of right" (e.g. because the defendant was in the jurisdiction or a ship was arrested here) and there is then an application to stay English proceedings on the basis that another forum is more appropriate than England. The second is where there is an application to serve proceedings out of the jurisdiction under what was then RSC Order 11, and is now paragraph 3.1 of the Practice Direction 6B of the CPR. It was in relation to the first of these cases that Lord Goff adumbrated the two stage test. He concluded that, at the first stage, it is for the defendant to satisfy the court that there is another forum which is prima facie the "appropriate" forum for the trial of the action. If the defendant did so, then the second stage is to decide whether there are special circumstances by reason of which justice required that the trial should, nevertheless, take place in England: see page 476D-E. It is in connection with the first stage exercise in such "stay" cases that Lord Goff used the expressions, (culled from *The Abadin Daver* [1984] AC 398 at 415, per Lord Keith of Kinkel), the "natural forum", as being that "with which the action had the most real and substantial connection".

130. Lord Goff accepted that the fundamental principle, as stated by Lord Kinnear in *Sim v Robinow* 19 R 665, 668: viz. that the court has to identify the forum "… in which the case can be suitably tried for the interests of all the parties and for the ends of justice", is the same in both "stay" cases and "service out of the jurisdiction" cases: see page 480G. In "service out" cases, the burden is on the claimant to show that England is clearly or distinctly that forum: see page 481E. In relation to "service out" cases the court does, of course, have to consider the issue of legitimate juridical or personal advantages and disadvantages of the contending forums to both sides in the litigation; but it does so by reference to the fundamental principle of where the case may be tried "suitably for the interests of all the parties and the ends of justice", to use Lord Kinnear's words again: see Lord Goff's speech at 483D. In deciding where the overall balance lies, the court has to consider the factors in favour of one side or another in one jurisdiction or another.

131. Thus, we prefer to formulate the principle in a different way from the judge. In our view the court will only grant permission to serve proceedings out of the jurisdiction if, overall, it is satisfied by the claimant that England is clearly or distinctly the appropriate forum. Alternatively, to adopt the words of the CPR rule 6.37(3), the court has to be satisfied by the claimant that England and Wales is the proper place in which to bring the claim.

132. VTB challenges the judge's conclusion, at paragraph 195 of his judgment, that Russia is the "the natural forum" for the resolution of the disputes between VTB and the defendants. VTB's case is that the judge erred in law because (1) he failed to have regard to the fact that the wrongs committed against VTB were committed in

England; so that (2) England is the "presumptive" appropriate forum for the resolution of VTB's claims; and (3) none of the matters relied on by the defendants (including the applicable law of the torts and matters relating to administrative convenience) were sufficient to rebut that presumption.

133. We will therefore deal the following four questions: (1) can it be said where the wrongs alleged were committed against VTB; if so and if the answer to that question is "England", then (2) does that mean that England is to be regarded as the "presumptive" appropriate forum for the resolution of VTB's claims; (3) can VTB establish, on the material presently available, that there is a "good arguable case" that English law is the applicable law of the torts it alleges have been committed against it by the defendants; if so (4) how does that affect the overall question of whether VTB has demonstrated that England is clearly the appropriate forum for the resolution of the disputes?

Where were the torts committed?

134. The judge concluded, at paragraph 135 of his judgment, that the misrepresentations alleged were "made and mainly received in Russia" and that they were primarily relied on in Russia, "since it was VTB Moscow's Credit Committee and Management Board which made the essential decision to enter into the proposed transaction in reliance on those representations. VTB's reliance was wholly secondary". He went on to accept that the loss suffered by VTB was sustained in England, but he held that this loss was sustained because of "the inadequate security provided by assets in Russia which were the subject of the misrepresentations". Furthermore, the "ultimate economic impact" was felt by VTB Moscow, to whom VTB had to account for any recoveries, on the judge's construction of the express terms of the Participation Agreement.

135. In relation to the conspiracy, the judge found that it had been "hatched in Russia". The judge held that this fact was important because it not only founded the claim in conspiracy but it was also an important aspect of VTB's claims against Marcap Moscow and Mr Malofeev as joint tortfeasors in relation to the deceit. So the judge's overall conclusion was that "the most significant events constituting both torts occurred in Russia": see paragraph 135 of the judgment.

136. Mr Freedman submitted that the judge failed properly to take into account the fact that it was only the representations that were made to VTB that mattered, not those made to VTB Moscow. He emphasised that, before the judge, the defendants' counsel had accepted that any misrepresentations made in Russia initially were either passed on to or confirmed to VTB in London. Further, he noted two factual points. The first was that there was unchallenged evidence before the judge (in witness statements of Mr Tulupov and Mr Muraviev) that VTB's own procedures and processes had to be completed satisfactorily before any loan could be made by VTB to RAP, whatever the views of VTB Moscow. The second was that Mr Tulupov's evidence was that the person responsible primarily for the conduct of the loan transaction on behalf of VTB was Mr Tulupov's opposite number in London, Ms Marina Bragina. (She has not given any statement, as the defendants were at pains to emphasise). Thus the two vital emails of 6 and 8 November 2007, said to evidence the fact that the alleged misrepresentations as to common ownership and control had been made, were sent by Ms Bragina from her office in London.

137. Mr Freedman therefore submitted that both of the asserted misrepresentations were received by VTB and acted on by VTB in London. The judge was therefore wrong, he argued, to conclude (at paragraph 135) that the misrepresentations were "made and mainly received in Russia" and that they were "primarily relied on in Russia", because it was VTB Moscow's Credit Committee and Management Board who made the essential decision and so VTB's reliance was "wholly secondary".

138. Mr Milligan presented the argument on this issue on behalf of the defendants. He accepted that the misrepresentations may have been received in England but, he submitted, the centre of gravity of the alleged torts was in Moscow, as the judge correctly found. He relied particularly on the fact that, as Mr Muraviev stated in his witness statement, it was sufficient for the loan to proceed if it was approved by Mr Ryzhkov, the head of Acquisitions and Leverage Finance of VTB, who, Mr Milligan stated, was based in Moscow, as appears clearly from his email address. The 2007 E&Y Moscow valuation was also sent to Mr Ryzhkov. He submitted that the judge was correct to characterise the misrepresentations as being made and mainly received in Russia and that they were primarily relied on in Russia. Therefore, even if, as the judge accepted, the loss suffered by VTB was sustained in England, he was correct to say that the ultimate economic impact was sustained in Russia.

139. We will have to examine in rather more detail below the significance of the different elements of the events constituting the torts of deceit and conspiracy and where they occurred in the context of the argument concerning the applicable law of the torts alleged. Some elements occurred in Russia, even on VTB's own case. But we think that it has to be accepted that, in terms of sub-paragraph (9)(a) of paragraph 3.1 of Practice Direction 6B, VTB is entitled to say that it has a good arguable case that its loss was sustained in England and Wales. That was the judge's conclusion and there was nothing in Mr Milligan's argument which undermines it. Therefore the next question is whether this gives rise to any "presumption" that England is the "natural forum" or the "appropriate forum" for the resolution of these disputes.

Does this give rise to a "presumption" that England is the "natural forum" or the "appropriate forum" for the resolution of these disputes?

140. For VTB, Mr Freedman argued that if it is established that there is a good arguable case that the loss was sustained in England, then there is a "presumption" that England is the "natural forum" in which to prosecute a claim in respect of the tort giving rise to that loss. For this proposition he relied on statements of Lord Pearson in *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468, and of Ackner and Goff LJJ in *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey, ("The Albaforth")* [1984] 2 Lloyd's Rep 91 at 94 and 96. Those cases were decided under the old provisions of RSC Order 11 rule 1(1)(h), which entitled the court to grant leave to serve proceedings out of the jurisdiction when the claim was founded on a tort committed within the jurisdiction. Mr Freedman submitted that, after the terms of that paragraph were changed (and when it had become sub-paragraph (f) of RSC Order 11 rule 1(1)) so that leave could be granted when the claim was founded on a tort "and the damage was sustained or resulted from an act committed within the jurisdiction", and after the *Spiliada case,* the majority of the House of Lords applied the same approach in *Berezovsky v Michaels* [2000] 1 WLR 1004, a defamation case**.** He also relied on the decision of Tugendhat J in a

subsequent defamation case, *Lennon v Scottish Daily Record and Sunday Mail Ltd* [2004] EMLR 18.

141. If the words used by Ackner and Goff LJJ in "*The Albaforth"* are examined closely, it is clear that neither Lord Justice stated the proposition that there was a presumption that the country where the tort was committed *was* the "natural forum" for the resolution of a claim arising out of that tort. Ackner LJ referred to it being "prima facie" the natural forum: see 94. Goff LJ said that "if the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum": page 96. When Lord Steyn came to analyse the effect of the decisions in the *Distillers Co (Biochemicals) case, "The Albaforth"* and subsequent cases in *Berezovsky v Michaels,* he noted (at 1014D) that counsel for Mr Michaels, the editor of Forbes magazine and defendant in the libel action, accepted that he could not object to a proposition that the place where the substance of the tort arises "is a weighty factor pointing to that jurisdiction being the appropriate one". Lord Steyn continued (at 1014E):

> "This illustrates the weakness of the argument. The distinction between a prima facie position and treating the same factor as a weighty circumstance pointing in the same direction is a rather fine one. For my part the *Albaforth* line of authority is well established, tried and tested and unobjectionable in principle. I would hold that Hirst LJ [who gave the decision in the Court of Appeal] correctly relied on these decisions".

142. Lord Nolan gave a short speech to the same effect. Lord Hobhouse of Woodborough agreed with Lord Steyn. Lord Hoffmann and Lord Hope of Craighead dissented, but Lord Hope said, on this point (at 1031E), that he agreed with Lord Steyn for the reasons he gave that Hirst LJ was right to rely on the "*The Albaforth*" line of authority. He continued:

> "Like him, I would reject the argument [of counsel] advanced that the application of the *Spiliada* test did not admit of the application in this case of the principle that the jurisdiction in which the tort is committed is prima facie the natural forum for the dispute".

143. The judgment of Tugendhat J in *Lennon v Scottish Daily Record and Sunday Mail Ltd* takes the matter no further.

144. We conclude that the most that can be extracted from the House of Lords' decision in the *Berezovsky* case is that where a tort is committed within this jurisdiction then that jurisdiction is, *prima facie,* the natural forum for the resolution of claims arising from it. But two points are important. First, it has not been stated that this principle applies where the *loss* is sustained in the jurisdiction but other elements of the tort occur elsewhere. We will examine below the submissions of the parties on where the various elements of the torts alleged to have been suffered by VTB took place and what the consequences of our conclusions must be. Secondly, the statements made in the *Berezovsky* case can only describe, at best, a *prima facie* position. That cannot detract from the overall test which has to be applied. This remains that permission to serve out of the jurisdiction will only be granted if the claimant demonstrates that

England is clearly or distinctly the appropriate forum for the resolution of the dispute. Thus, we conclude, there is no "presumption" in favour of England being either the natural or the appropriate forum in this case.

The law applicable to VTB's claims in tort

145. The Council Regulation 864/2007/EC of 31 July 2007 on the law applicable to non-contractual obligations (known as "Rome II"), only applies to claims relating to damage which occurred after 11 January 2009. That point was determined by the Court of Justice of the European Union in *Homawoo v GMF Assurances SA*, Case C-412/100, judgment given on 17 November 2011. The damage in this case would have occurred after November 2007 but before January 2009. Therefore it was common ground before us that the question of the applicable law of the torts must be determined in accordance with the English conflict of laws rules set out in sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"). It was also common ground that the issues arising in the claims that have been pleaded in tort are "…issues relating to tort or delict" within the terms of section 9(2) of the 1995 Act; see the discussion in *Trafigura Beheer BV v Kookmin Bank Co* [2006] 2 Lloyd's Rep 455 at paragraphs 63 to 70 per Aikens J.

146. Sections 11 and 12 of the 1995 Act provide as follows:

> "Choice of applicable law: the general rule.
>
> 11(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being:
>
> (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
>
> (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
>
> (3) In this section 'personal injury' includes disease or any impairment of physical or mental condition.
>
> Choice of applicable law: displacement of general rule.
>
> 12(1) If it appears, in all the circumstances, from a comparison of:
>
> (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

> (b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

147. These sections have been analysed in four decisions to which both the judge and we were referred: *Morin v Bonhams & Brooks Ltd* [2004] 1 Lloyd's Rep 702 (CA); *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] Lloyd's Rep IR 127 (Aikens J) and [2006] 2 Lloyd's Rep 475 (CA); *Trafigura Beheer BV v Kookmin Bank Co* [2006] 2 Lloyd's Rep 455 (Aikens J); and *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Andrew Smith J). The following propositions relevant to the present case can be derived from those cases and from our own consideration of the statutory provisions; the first six concern section 11 and section 11(2)(c) in particular. The remainder concern section 12.

148. (1) Section 11 of the 1995 Act sets out the general rule for ascertaining the applicable law of a tort. It adopts a geographical approach to that question. (2) Where the elements of the events constituting the tort or delict occur in different countries and the cause of action relates to something other than personal injury or damage to property, then section 11(2)(c) requires an analysis of all the elements of the events constituting the tort in question. (3) In carrying out that exercise, it is the English law constituents of the tort that matter. (4) The analysis requires examination of the "intrinsic nature" of the elements of the events constituting the tort. It does not, at this stage, involve an examination of the nature or closeness of any tie between the element and the country where that element was involved or took place. This latter exercise is only relevant if section 12 is invoked. (5) Once the different elements of the events and the country in which they occurred have been identified, the court has to make a "value judgment" regarding the "significance" of each of those "elements". "Significance" means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation. (6) Under section 11(2)(c), (i.e. in relation to causes of action other than in respect of personal injury or damage to property where the elements of the events constituting the tort occur in different countries) the applicable law of the tort in question will be that of the country where the significance of one element or several elements of events outweighs or outweigh the significance of any element or elements found in any other country.

149. If section 12 has to be considered, we derive the following additional propositions from our consideration of the statute and the cases. (7) The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule. (8) At this stage there has to be a comparison between the significance of those factors with the significance of any factors

connecting the tort or delict with any other country. The question is whether, on that comparison, it is "substantially more appropriate" for the applicable law to be the law of the other country so as to displace the applicable law as determined under the "general rule". (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the "elements of the events constituting the tort" in section 11. They can include factors relating to the parties' connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict. (10) In particular the factors can include (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict.

150. Two further but important points emerge from the decision of Aikens J and this court in the *Dornoch* case**.** The first is that if this exercise is being carried out at the interlocutory stage as part of an overall exercise to determine whether the English court should have jurisdiction to determine the claim in tort in question, the court cannot finally determine the applicable law of the tort. That was accepted to be so in relation to contract in *Dornoch* (see the CA decision at paragraph 40) and must also follow if there is an interlocutory issue as to the applicable law of the tort. The second is that it is "quintessentially" for the judge to make an assessment of the significance of the elements of the events constituting the tort for the purposes of section 11(2)(c). This court will not interfere with that assessment unless it is satisfied that the judge "made such an error in his assessment as to require this court to make its own assessment": see the judgment of Tuckey LJ at paragraphs 46 and 47, with which Sir Mark Potter, President, and May LJ agreed.

151. The judge identified three elements of the tort of deceit at paragraph 132 of his judgment: (i) the making of fraudulent misrepresentations to a person; (ii) reliance by that person on those misrepresentations; and (iii) resultant loss by that person. He said that the tort of an "unlawful means" conspiracy added the element of a combination between the conspirators to make the fraudulent misrepresentations. The judge indicated that he would assume the facts alleged by VTB to be true for the purposes of his analysis on the applicable law issue.

152. The judge's conclusion of his analysis of the elements of the tort of deceit is at paragraph 135 of his judgment. VTB's criticism focussed on the following evaluations of the significance of the various elements considered by the judge: (i) that the misrepresentations were made "and mainly received" in Russia; (ii) that the misrepresentations were "primarily relied on in Russia", because it was VTB Moscow's Credit Committee and Management Board which made the essential decision to enter into the proposed transaction in reliance on those misrepresentations, whereas "VTB's reliance was wholly secondary"; and (iii) although VTB's loss was sustained in England it was because of "the inadequate security provided by assets in Russia which were the subject of the misrepresentations" and, further, the "ultimate economic impact is felt by VTB Moscow to which VTB must account for its recoveries".

153. In the same paragraph the judge said, in relation to the tort of conspiracy, that it "seems clearly to have been hatched in Russia". He said that point was important because it founded not only the claim in conspiracy but it was also "an important aspect" of VTB's claims against Marcap Moscow and Mr Malofeev as joint tortfeasors in relation to the deceit. The judge therefore concluded that the most significant elements of both torts were in Russia so that the applicable law of both torts was Russian law.

154. We have concluded that there is some force in VTB's criticisms of the judge's approach to the assessment of the significance of the various elements that he identified. First, we accept that the misrepresentations would have been made in Russia in the first place, but the judge does not appear to have taken account of the admitted fact that they were passed on to or confirmed to VTB in London. Secondly, whilst we accept also that VTB Moscow's Credit Committee and Management Board had to make the decision to take part in the enterprise before the transaction between VTB and RAP could take place, the judge does not appear to have taken into account the unchallenged evidence that VTB had its own procedures and processes that needed to be completed satisfactorily before it could enter into the Facility Agreement. At least one vital person, Miss Bragina, was based in London. Thirdly, whilst we also accept that there was an "economic impact" on VTB Moscow, that is beside the point when the focus has to be on the significance of the elements of the events that constitute the tort committed against VTB. As we have already stated above, VTB suffered loss as soon as the transfer of funds from it to RAP was made; the crystallisation of the extent of that loss occurred later after credit had been given for the value of such security as did exist in Russia.

155. However, we think that the most important error in approach of the judge is that he does not appear to have made a value judgment as to the significance of the "intrinsic nature of the element(s) of the tort …" in the phrase of Mance LJ in *Morin v Bonhams & Brooks Ltd,* at paragraph 21. This must mean that the judge has to decide what is or are the most significant element or elements in relation to the tort of deceit (or conspiracy) on the facts of this case. In relation to the deceit, is it the making of the fraudulent misrepresentation that is the most significant element, or its transmission to VTB or its reception by VTB or is it the damage resulting? In relation to the conspiracy, what is the significance of the plot being hatched in Russia?

156. As for the tort of conspiracy, VTB argued that there was no evidence that the conspiracy was hatched in Russia and the judge did not explain the basis for that conclusion. However, VTB cannot point to any evidence to show that it has the better of the argument in demonstrating that the conspiracy was hatched elsewhere than in Russia. In our view the judge was entitled to draw the conclusion from the fact that Mr Malofeev is a Russian businessman, whose business activities are at least heavily centred in Russia and where the companies at the centre of the alleged conspiracy, that is to say Nutritek, Marcap Moscow and RAP, are also either owned or operated in Russia.

157. We have concluded that the errors in the judge's approach to the significance of the different elements of the events constituting the two torts entitles this court to make a reassessment of their significance. In our view, on the facts of this case, we judge that the most important elements of the facts constituting the tort of deceit are, by their "intrinsic nature", the reliance on the misrepresentations by VTB and the loss suffered

by VTB. Although there was some reliance by VTB in Russia (because the statements were first made there), the more important reliance must have been in England because the completion of the Facility Agreement and the necessary regulatory processes in England would not have gone ahead without reliance in this country. The judge accepted that the loss suffered by VTB was sustained in England.

158. Based on section 11(2)(c) alone, our tentative conclusion would be that the most significant elements of the events constituting the tort of deceit took place in England so that, under the "general rule", the applicable law of the deceit is English law. However, we are not convinced that VTB has "by far the better of the argument" on this question. It seems to us that the arguments are evenly balanced. In relation to conspiracy, we think that there is considerable significance in the element of the initial agreement of the conspirators. Our inclination is to say that, in relation to conspiracy, the arguments on the significance of the events constituting that tort are very evenly balanced.

159. This means that, in both cases, we have to go on to consider section 12, which requires us to make a comparison of the significance of the factors which connect a tort with the country whose law would be the applicable law under section 11(2)(c) with any factors which connect the tort with another country. We have to ask: is it substantially more appropriate for the applicable law of that other country to be the one that determines the issues (in tort) arising in the case; if it is then the applicable law will be that of the other country. The test is specific to the issues that arise in the particular case concerned. As already noted, section 12(2) makes it plain that a broad range of factors can be considered in this exercise.

160. We agree with the judge's conclusion that the fact that the Facility Agreement, ISA and SPA all contained English law and English jurisdiction or arbitration agreements is not a significant factor, for the reasons that he gives at paragraphs 142 and 143, which we need not repeat. As to other pointers, we have to take into account factors relating to the parties, the events constituting the torts in question and the circumstances and consequences of those events. Moreover, these are all factors that also have to be taken into account in deciding whether England is the appropriate forum. The judge considered those factors, (albeit for the purposes of seeing whether England was the "natural" forum as part of a two stage exercise, on which we have commented above), at paragraphs 186 to 195. The judge concluded that the factors pointed to Russia being the "natural" forum for the resolution of these disputes.

161. On appeal, VTB has only criticised certain conclusions to which the judge referred in those paragraphs, viz. the reliance of VTB being secondary to that of VTB Moscow and the loss being caused because the Russian assets provided inadequate security: see paragraph 187 of his judgment. We have accepted that those criticisms have force. However, VTB does not challenge the judge's analysis of the connection with Russia of the parties to the transactions and the other entities involved in the circumstances and consequences of the events which constitute the torts in question, as set out at paragraph 188 of his judgment. Nor does VTB challenge the connections with Russia of the events constituting the torts that are identified in paragraph 189 of the judgment, apart from the conclusion that the misrepresentations were primarily relied on by VTB Moscow acting through its Credit Committee and Management Board in Russia. Even if that is discounted, it still leaves many factors connecting the torts with Russia.

162. Mr Freedman did argue, however, that when the judge was considering section 12 for the purposes of deciding the applicable law issue, he failed to take relevant factors into account. The first was that VTB is an English company. Secondly, he should have taken account of the fact that the purpose of the fraud was to induce VTB to enter into a loan facility contract in London governed by English law. This, he submitted, was clear from the third term sheet of 8 October 2007 and the email of DLGM of 15 October 2007 which stated that the facility was to be governed by English law. These indications were given before the key misrepresentations were made as to the companies being under separate control and before passing on the 2007 E&Y valuation based on the Nutritek figures. Mr Freedman submitted that those were powerful factors connecting the torts with England, not Russia.

163. We take account of those points. However, in our view the factors identified in the judgment at paragraphs 188 and 189, even after discounting the point about primary reliance on the representations in Russia and the securities being in Russia, are of considerable significance. On the material that is before us, taking all those factors into account we have concluded that the centre of gravity of these torts lies in Russia. Therefore, for present purposes, we have decided that a comparison of the significance of the section 11(2)(c) factors, assuming that they would lead to the applicable law being English, with the significance of the other factors connecting the torts with Russia, leads to the conclusion that it is substantially more appropriate for the applicable law for determining the issues concerning the torts to be that of Russia.

Was the judge wrong to conclude that VTB had failed to demonstrate that England was "clearly or distinctly the appropriate forum" to determine these disputes for the ends of justice and in the interests of all the parties?

164. We have already commented that the judge may have erred in his interpretation of the test adumbrated in the *Spiliada* case**.** Instead of asking first whether England was the "natural forum" and then, even if it is not, asking whether England is nevertheless the appropriate forum for other reasons, there is only one overall question to be answered: has VTB established that England is clearly or distinctly the appropriate forum?

165. In our view the judge was correct to conclude that VTB has failed to do so. The steps leading to our conclusions are as follows: first, we will assume (based on our discussion above) that the fact that VTB has sustained its loss resulting from the torts in England raises a prima facie case that England is the appropriate forum in which to try the disputes. Secondly, however, we have to take account of all the other factors identified by both sides in order to determine whether VTB has satisfied the court that England is clearly or distinctly the appropriate forum.

166. Thirdly, in that regard, we have concluded, on the basis of the material presently before us, that the applicable law of the torts is Russian law. That cannot be a concluded view. Wherever a trial takes place, it can be challenged. But that point works both ways. Even if we had concluded that the applicable law of the torts was English law, this would not have been a factor that would weigh heavily in making England the appropriate forum, precisely because if the defendants wished to allege and plead that the applicable law was Russian law, both sides would have had to prepare for a trial on that basis. If the case were to be heard in England, both sides would have to prepare expert evidence on Russian law; and, doubtless, the obverse would be so if the case were to be heard in Russia. This is not a case, such as we

think Lord Goff of Chieveley contemplated in *Spiliada* at 481G, where the law of the contract is a known certainty. In this case the applicable law of the torts remains very much in issue. Moreover, there was no serious challenge to the judge's view (at paragraph 194) that the key issues in the case are likely to be factual rather than legal.

167. Fourthly, we have to give due weight to all the other factors (apart from those where we have found the judge erred) which the judge took into account and which have not been challenged on appeal. These are set out at paragraphs 188 and 189 of the judgment and, as we have indicated in relation to the applicable law point, we think that these indicate that the centre of gravity of these disputes is in Russia, not England. Fifthly, VTB has not challenged the judge's conclusion that VTB had failed to show that there was a real risk that it would not obtain substantial justice in Russia for any of the reasons it advanced before him.

168. Accordingly, the judge was correct to set aside Chief Master Winegarten's order granting VTB permission to serve the proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction.

The WFO

169. Since we have concluded that the judge was right not to allow VTB to amend its Particulars of Claim to make a claim in contract against Marcap BVI, Marcap Moscow and Mr Malofeev, and that he was right to hold that the order granting permission to serve the proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction should be set aside, the question of continuing the WFO does not arise for decision, any more than it did before the judge.

170. The point was fully argued before us, both as to whether VTB's case as put to the judge justified the grant of such an injunction and as to whether the grant was vitiated by any material non-disclosure. In addition, in case this court found itself in a position to exercise afresh the discretion as to whether or not to grant such an order, Mr Milligan, on behalf of Mr Malofeev, relied on additional factors as being relevant to such exercise.

171. We have considered fully the arguments put before us on this aspect of the case. Most of them are fact-specific, and do not raise any issue of more general relevance. In those circumstances it is not necessary or appropriate for us to deal at all with most of the arguments either way, as we would have done if it had arisen for decision. The only point on which we propose to say anything is one on which some authority was cited to the judge and more was cited to us, which might possibly be of wider relevance.

172. If the question had arisen, it would have been on the footing that VTB has a seriously arguable case for saying that Mr Malofeev had been engaged in a major fraud against VTB, by which VTB was persuaded to lend RAP $220 million to fund what was represented as a sale of assets worth substantially more than that amount, whereas in fact, first, the assets were worth a great deal less, and secondly the transaction was not a true sale, and moreover a substantial part of the proceeds of the loan (it can be assumed) disappeared into the complex web of corporate entities in various jurisdictions, including several offshore, for the benefit of Mr Malofeev, and maybe for that of others involved. Furthermore, not only was the use of that web of

corporate entities a significant part of the means whereby the fraud was committed, by concealing the true ownership of RAP, but it would also make it difficult for VTB to enforce any judgment that it was able to obtain. All of that is made out, but VTB has failed to establish that it should be allowed to bring proceedings on that basis against Mr Malofeev (and the other defendants) in this jurisdiction.

173. It seems to us that these propositions would have provided a strong starting point for a case in favour of the grant of a WFO. It could be inferred that a wealthy individual who uses such methods to defraud a bank in this way and on this scale might readily resort to similar methods to render his major assets proof against enforcement in response to proceedings being taken against him, at any rate if he had reason to fear that the proceedings might be pursued effectively.

174. The judge attached little, if any, weight to those basic elements of the situation, as regards the application for the WFO, for particular reasons to do with the evidence and the presentation of the case, to which we need not refer. In addition to discounting, for those reasons, the factors to which we have referred at paragraph [172] above, the judge observed at paragraph 233 that it was common for international businessmen to use offshore vehicles for their operations, particularly for tax reasons, and that this may make it difficult to enforce a judgment, but that claimants such as VTB "have to take defendants such as Mr Malofeev as they find them", the use of offshore companies not being sufficient evidence of a risk of dissipation. It seems to us that, while that may be a fair comment as regards international businessmen generally, the factor of a good arguable case as to fraud against the person in question, and the use of a web of offshore companies in connection with the fraud, could properly provide a basis for taking this into account in favour of the grant of an injunction.

175. Given that there is (as the judge held) a good arguable case against Mr Malofeev on an allegation of fraudulent misrepresentation used to procure a loan of $220 million against wholly inadequate (and itself misrepresented) security, on the part of a businessman with international connections and assets, using offshore companies in many parts of the world, it might not be difficult to suppose that, if Mr Malofeev thought he was at risk of having his assets seized to answer a judgment against him, he would dispose of those assets, or move them into a situation in which it would be difficult or impossible for the claimant to reach them.

176. As regards the significance of evidence of dishonesty, the judge referred at paragraph 229 to what he called a salutary warning by Peter Gibson LJ in *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272, from which he quoted from paragraph 28. The relevant passage is as follows:

> "Mr Blackett-Ord submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted."

177. We agree with Peter Gibson LJ that the court should be careful in its treatment of evidence of dishonesty. However, where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets. That is supported by two earlier Court of Appeal decisions, not cited in *Thane Investments.* These are *Norwich Union v Eden* (25 January 1996 unreported) and *Grupo Torras SA v Al Sabah* (21 March 1997 unreported). Both of them were cited by Flaux J in his judgment in *Madoff Securities International Ltd and others v Raven and others* [2011] EWHC 3102 (Comm). Those decisions are not inconsistent with what Peter Gibson LJ said in *Thane Investments v Tomlinson*, but they put it into context, and their context is a good deal closer to that of the present case. We will quote from paragraph 163 to the beginning of paragraph 167 of Flaux J's judgment.

> "163. In this context, and entirely properly, Mr Weekes referred me to the decision of the Court of Appeal in *Thane Investments v Tomlinson* [2003] EWCA Civ 1272 where Peter Gibson LJ at [28] deprecates the tendency to infer a risk of dissipation from the fact that allegations of dishonesty are made against the defendant. However, Mr Weekes submitted that *Thane Investments* was a case which must be approached with caution, as it was an ex tempore judgment given where the defendant was unrepresented, so that the case was not perhaps as fully argued as it might have been. In particular, two earlier relevant decisions of the Court of Appeal do not appear to have been cited to the Court of Appeal.
>
> 164. The first is *Norwich Union v Eden* (1996 25 January, unreported) a decision of a two man Court of Appeal (Hirst and Phillips LJJ). The main judgment was given by Phillips LJ who said:
>
> > "It seems to me that when the court considers whether there is a good arguable case it is at that stage that it considers whether the likelihood of a judgment in favour of the plaintiff is sufficient to justify the grant of Mareva relief. If it is so satisfied, the question then arises:- if such a judgment is given, what is the risk that there will be no assets there to satisfy it? If the judgment in question being considered is a judgment in which allegations of fraud are made, then it seems to me that it is open to the court to conclude from that fact alone that there is sufficient risk of dissipation of assets to justify the grant of relief. For myself it does not seem to me that there would be any prospect of persuading this court that the learned Judge had erred in principle in so concluding."
>
> 165. The other decision is that in *Gru po Torras SA v Al Sabah* 1997 WL 1105536 (21 March 1997) where Saville LJ said:
>
> > "Mr Etherton also criticised the judge for failing, as he put it, properly to address himself to the question

> whether there was a real risk of dissipation of assets, and simply concluded that such a risk existed because this was a fraud case. In this context Mr Etherton pointed out that Mr Dawson had lived and worked as an investment adviser in Switzerland for a long time and that his assets included a very valuable house in Geneva, so that it was hardly likely that he would set about making them judgment proof. Mr Etherton also drew attention to the fact that the litigation had begun years ago and long before Mr Dawson was joined to it, yet there was no suggestion that he has yet made any attempt to dissipate assets.
>
> These are certainly points that can be made on behalf of Mr Dawson, but again I am not persuaded that the judge simply failed to take them into account. What is clear from the judgment is that the judge took the view that there was a good arguable case that Mr Dawson was knowingly implicated in the fraud; and that the nature of the allegations was such that there was a strong fear of dissipation. Since it is part of Mr Dawson's own case that he was expert in the sort of intricate, sophisticated and international financial transactions which feature in this case, and since the plaintiffs had established a good arguable case that Mr Dawson had used his expertise for dishonest purposes, I am not in the least surprised that the judge reached the conclusion he did. In short I remain wholly unpersuaded that the judge so erred in his assessment of the risk of dissipation that it would be right for this court to interfere."

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

> "The relevance of that passage, of course, is to the submission made by Mr Lord, on behalf of the claimants on this application, that I should infer from the apparent dishonesty of Mrs Chelton, together with the recent change of circumstances, a real likelihood and risk of dissipation. I have no difficulty in accepting the general principle, emphasised by Peter Gibson LJ, that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an

> application for a freezing order. It is necessary to have regard to the particular respondents to the application and to ask oneself whether, in the light of the dishonest conduct which is asserted against them, there is a real risk of dissipation. As Peter Gibson LJ made clear in the passage I have already quoted, the court has to scrutinise with care whether what is alleged to have been dishonesty justifies the inference. That is not, therefore, a judgment to the effect that a finding of dishonesty (or, in this case, an allegation of dishonesty) is insufficient to found the necessary inference. It is merely a welcome reminder that in order to draw that inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care."
>
> 167. I agree with that analysis of the approach which the court should adopt when considering whether to grant a freezing injunction, in a case where there are allegations of fraud or deliberate misconduct against a defendant."

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

179. As it is, however, the question of continuing the WFO beyond the decision on this appeal does not arise, and we say no more about how we would have regarded the various points argued before us, or what our final decision would have been on this point, if we had held otherwise on the issue of service out of the jurisdiction as regards the tort claims.

Final conclusion and disposition

180. For the reasons set out above, we consider that the judge was right to refuse VTB's application to amend to introduce a claim in contract against Marcap BVI, Marcap Moscow and Mr Malofeev, and that he was also right to set aside the order permitting service of the proceedings, as originally formulated in tort only, out of the jurisdiction. We therefore dismiss VTB's appeals.

APPENDIX ONE: THE FACILITY AGREEMENT

Relevant provisions

1. **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions**

In this Agreement:

…

'**Acquisition Agreement**' means the sale and purchase agreements to be entered into relating to the sale and purchase of the Target Shares …

…

'**Buyer's Account**' shall mean the blocked bank account in the name of the Company with the London officer of the Lender with account number 1001632020.

…

'**Fee Letter**' means the letter dated on or about the date of this Agreement between the Lender and the Company in respect of the arrangement fee.

…

'**Obligor**' means each of the Company, the Guarantors and the Production Companies.

…

'**Participant**' means [VTB Moscow] in its capacity as participant under the Participation Agreement.

'**Participation Agreement**' means the Terms and Conditions of the funded participation agreement dated or on about the date hereof between the Lender as grantor and the Participant …

'Party' means a Party to this Agreement.

…

'**Pledged Shares**' means the Production Company Shares, the Company Participatory Interest, the Target Shares and the Migifa Shares.

…

'**Production Companies**' means [the Dairy Companies].

…

'**Repeating Representations**' means each of the representations set out in Clause 18 (*Representations*) other than Clauses 18.9 (*No Filing or Stamp Taxes*) and 18.29 (*Sales Contracts*).

…

'**Seller**' means [Nutritek].

'**Seller's Acquisition Account**' means the account at the offices of the Lender with account number 1001622020.

…

'**Target**' means [Newblade].

…

'**Target Shares**' means 49,001 shares (being 100% of the issued and outstanding shares) in the Target purchased by the Company pursuant to the Acquisition Agreement

…

'**Tranche A Commitment**' means two hundred eight million seven hundred thousand Dollars ($208,700,000).

…

'**Tranche B Commitment**' means twenty-one million three hundred thousand Dollars ($21,300,000).

…

1.3 **Contracts (Rights of Third Parties) Act 1999**

A person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement.

…

2. **THE FACILITY**

2.1 **The Facility**

Subject to the terms of this Agreement, the Lender makes available to the Company:

2.1.1 a US Dollar term loan facility in an aggregate amount equal to the Tranche A Commitment ('**Tranche A**'); and

2.1.2 a US Dollar term loan facility in an aggregate amount equal to the Tranche B Commitment ('**Tranche B**'),

together, the '**Facility**'.

…

3. PURPOSE

3.1 Purpose

The Company shall apply all amounts borrowed by it:

3.1.1 under Tranche A, towards partial payment of the purchase price for the Target Shares under the Acquisition Agreement, payment of the Acquisition Costs, (other than periodic fees), payment of financing and other transactional costs (including legal fees) incurred in connection with the Finance Documents, or for the general corporate purposes of the company; and

3.1.2 under Tranche B, towards the general corporate purposes of the Company.

3.2 Direction to Pay

3.2.1 The Company directs the Lender to deposit into the Buyer's Account (and such monies shall be thereafter immediately transferred into the Seller's Acquisition Account in accordance with the irrevocable instructions referred to in Schedule 2, Part 1 Clause 4.17) on the date of first Utilisation of Tranche A, part of the proceeds of the first Utilisation of Tranche A equal to the purchase price (howsoever defined) under the Acquisition Agreement to be paid by the Company less the Reserved Amount.

…

4. CONDITIONS OF UTILISATION

4.1 Initial Conditions Precedent

4.1.1 The company may not deliver a Utilisation Request in respect of Tranche A unless the Lender has received all of the documents and other evidence listed in Part 1 of Schedule 2 (*Conditions Precedent*) in form and substance satisfactory to the Lender (acting reasonably). The Lender shall notify the Company promptly upon being so satisfied. The first drawdown of Tranche A shall comply with Clause 3.2 above.

…

4.2 Further conditions precedent

Subject to Clause 4.1 (*Initial Conditions Precedent*), the Lender will only be required to comply with Clause 5.3 (*Lender's Funding*), if on the date of the Utilisation Request and on the proposed Utilisation Date:

4.2.1 no Default is continuing or would result from the proposed Loan;

4.2.2 the Repeating Representations to be made by each Obligor are true in all material respects; and

4.2.3 the Participant has credited the Receiving Account of the Lender with the funding for that Loan in accordance with the terms of the Participation Agreement.

…

11. FEES

11.1 Arrangement Fee

The Company shall pay to the Lender an arrangement fee in the amount and manner specified in the Fee Letter.

…

18. REPRESENTATIONS, UNDERTAKINGS AND EVENTS OF DEFAULT

…

18.11 No Misleading Information

Save as disclosed in writing to the Lender prior to the date of this Agreement:

18.11.1 any factual information (including in relation to the Acquisition and the Group) provided to the Lender was true and accurate in all material respects as at the date it was provided;

18.11.2 any financial projection or forecast (including in relation to the Acquisition and the Group) provided to the Lender has been prepared on the basis of recent historical information and on the basis of reasonable assumptions and was fair (as at the date it was provided) and arrived at after careful consideration;

18.11.3 the expressions of opinion or intention provided by or on behalf of an Obligor to the Lender were made after careful consideration and (as at the date of the relevant report or document containing the expression of opinion or intention) were fair and based on reasonable grounds; and

18.11.4 no event or circumstance has occurred or arisen and no information has been omitted from the information provided to the Lender pursuant to paragraphs 18.11.1 to 18.11.3 above and no information has been given or withheld that results in the information, opinions, intentions, forecasts or projections contained in the information provided to the Lender pursuant to paragraphs 18.11.1 to 18.11.3 being untrue or misleading in any material respect.

…

34. GOVERNING LAW

This Agreement is governed by English law.

35. ENFORCEMENT

35.1 Jurisdiction of English Courts

35.1.1 Subject to Clause 35.3 (Arbitration) below, the courts of England have nonexclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a Dispute regarding the existence, validity or termination of this Agreement) (a '**Dispute**').

35.1.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

35.1.3 This Clause 35.1 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.

…

35.3 Arbitration

In addition to Clause 35.1 (*Jurisdiction of English Courts*) above, the Lender shall have the right to refer any dispute which may arise out of or in connection with this Agreement to final and binding arbitration in London, England, pursuant to the arbitration rules of LCIA (the '**LCIA Rules**'). The language of the arbitration proceedings shall be English. Such arbitration shall be conducted in accordance with LCIA Rules. The seat or legal place of arbitration shall be deemed to be England, and accordingly the substantive laws of England shall be applicable for the purposes of the arbitration. The procedural law for any reference to arbitration shall be English law. …

…

Schedule 2

Conditions Precedent

Part I

Conditions Precedent to Utilisation of Tranche A

The Lender shall have received (in form and substance satisfactory to the Lender) each of the following:

…

2. **Finance Documents**

The following original Finance Documents each duly executed by each of the parties to it:

2.1.1 this Agreement;
2.1.2 the Participation Agreement (and confirmation thereto);
2.1.3 the Transaction Security Documents;
2.1.4 the Hedging Documents;
2.1.5 the Production Company Guarantees (other than MK Penzensky);
2.1.6 the Fee Letter; and
2.1.7 an Accession Letter from the Target.

3. **Transaction Security**

3.1 A financial report of an independent valuer acceptable to the Lender regarding the determination of the market value of the Pledged Shares (other than the shares in Molkombinat and the participatory interests in Aktiv).

…"

APPENDIX TWO

The SPA and ISA - summaries

The SPA

The purchase price under the SPA was US$250 million less the "Indebtedness" as defined in clause 3.2 and determined under Annex 1 of the SPA. It was to be paid in two instalments: on the Closing Date, US$50 million less the "Indebtedness" was to be paid by RAP to Nutritek, whereupon the shares in Newblade were to be transferred to RAP (clause 3.3.2); and within two days thereafter, a further US$200 million (less US$5 million which was to be retained by RAP pending performance by one of the Nutritek group companies of a particular obligation (clause 19.6)) was to be paid (clause 3.3.5).

The SPA is governed by English law (clause 17.1) and provides that any dispute arising out of or in connection with it shall be referred to arbitration under LCIA rules (clause 18.1).

The ISA

The ISA takes the form of a Confirmation supplemental to an International Swap and Derivative Association Master Agreement between VTB and RAP dated 23 November 2007. The purpose of the ISA was to hedge against an increase in the interest paid by RAP pursuant to the Facility Agreement which was to be calculated by reference to, amongst other matters, LIBOR. The dates and spreads under the Facility Agreement and the ISA were matched. The ISA benefited from the same security as the Facility Agreement.

The ISA is governed by English law and provides that any dispute arising out of or in connection with it shall be referred to arbitration under the LCIA rules (Part 5 (g)).

APPENDIX THREE: THE PARTICIPATION AGREEMENT

Relevant provisions

1. APPLICABILITY AND INTERPRETATION

…

1.2 Interpretation

In these Terms and Conditions words and expressions shall (unless otherwise expressly defined in these Terms and Conditions) have the meaning given to them in the Facility Agreement and:

…

'**Enforcement Proceeds**' means, following an Enforcement Event, all receipts and recoveries by the Lender (or by any person which are properly paid over to the Lender):

(a) pursuant to, upon enforcement of or in connection with the Transaction Security; and

(b) without prejudice to subclause (a) above, in respect of all representations, warranties, covenants, guarantees, indemnities and other contractual rights of the Lender made or granted in or pursuant to any Finance Document.

…

2. PARTICIPANT'S PAYMENT OBLIGATIONS

2.1 Sums Due Under the Relevant Finance Documents

If at any time on or after the date of the Confirmation a sum falls due from the Grantor under the Relevant Finance Documents and the sum is, in the Grantor's reasonable opinion, attributable in whole or in part to any Loan or Participated Tranche, then the Participant shall pay to the Grantor amount equal to such sum.

2.2 Payment of sums due

The Participant shall make each payment required under Clause 2.1 (*Sums Due Under the Relevant Finance Documents*) in the currency and funds and in the place and time at which the Grantor is required to make the payment under the Relevant Finance Documents.

3. PAYMENTS

3.1 Receipts

The Grantor is entitled to receive, recover and retain all principal, interest and other money payable under the Relevant Finance Documents in relation to each Participated Tranche.

3.2 **Payments**

Subject to compliance by the Participant with its payment obligations under the Participation, on and after the date of the Confirmation the Grantor shall, upon applying any amount actually received by it in respect of any Loan or Commitment (whether by way of actual receipt, the exercise of any right of set-off or otherwise), pay to the Participant:

(a) if that amount is applied in respect of the principal of a Loan, an amount equal to the amount so applied by the Grantor;

…

4. **PAYMENTS ADMINISTRATION**

4.1 **Place**

All payments or deposits by either Party to, or with, the other under the Participation shall be made to the Receiving Account of that other Party. Each Party may designate a different account as its Receiving Account for payment by giving the other not less than five Business Days notice before the due date for payment.

…

4.5 **Failure to remit**

The Grantor shall not be:

…

(b) liable to remit to the Participant any amount greater than the amount it received from any Obligor in respect of any Participated Tranche or Loan.

6. **STATUS OF PARTICIPATION**

6.1 **Status of Participation**

(a) The Grantor does not transfer or assign any rights or obligations under the Relevant Finance Documents and, subject to Clause 6.3 (*Assignment Following Event of Default*) the Participant will have no proprietary interest in the benefit of the Relevant Finance Documents or in any monies received by the Grantor under or in relation to the Relevant Finance Documents.

(b) The relationship between the Grantor and the Participant is that of debtor and creditor with the right of the Participant to received monies from the Grantor

restricted to the extent of an amount equal to the relevant portion of any monies received by the Grantor from any Obligor.

(c) The Participant shall not be subrogated to or substituted in respect of the Grantor's claims by virtue of any payment under the Participation and the Participant shall have no direct contractual relationship with or rights against any Obligor.

(d) Nothing in the Participation constitutes the Grantor as agent, fiduciary or trustee for the Participant.

…

6.3 **Assignment Following Event of Default**

At any time following an Event of Default and while such Event of Default is continuing, the Participant may (at its election and in its sole discretion):

(a) require the Grantor to assign and/or novate all of its rights and interest in the Facility Agreement and other Relevant Finance Documents to the Participant; and/or

(b) instruct the Grantor to procure that all amounts payable by the Obligors to the Grantor under the Relevant Finance Documents be paid by such Obligors directly to the Participant, at such account as the Participant may inform the Grantor,

and the Grantor shall so comply.

6.4 **Enforcement Event**

Notwithstanding any other provision of these Terms and Conditions the Parties hereby agree that, subject to Clause 6.3 (*Assignment Following Event of Default*) above, following the occurrence of an Early Termination Date, the Grantor shall apply all Enforcement Proceeds in the following manner:

(a) first, in payment of costs, charges, expenses and liabilities incurred by on or behalf of the Grantor and any receiver, attorney or agent in connection with exercising its powers of enforcement under the Finance Documents and the remuneration of every receiver, attorney or agent under or in connection with the Finance Documents;

(b) second in *pro rata* payment of:

(i) amounts due to the Participant under the Participation; and

(ii) amounts due under the Hedging Documents;

…

9.2 **No obligation to support losses**

(a) The Grantor notifies the Participant and the Participant acknowledges that the Grantor shall have no obligation to repurchase or reacquire all or any part of the Participation from the Participant or to support any losses directly or indirectly sustained or incurred by the Participant for any reason whatsoever, including the non-performance by any Obligor under the Relevant Finance Documents of its obligations thereunder (other than any loss caused by the gross negligence or wilful default of the Grantor in performing its obligations under the Participation).

(b) Any rescheduling or renegotiation of Participation shall be for the account of, and the responsibility of, the Participant, who will be subject to the rescheduled or renegotiated terms.

…

16. **GOVERNING LAW AND JURISDICTION**

16.1 **Governing Law**

These Terms and Conditions and the Participation are governed by English law.

16.2 **Jurisdiction**

The parties submit to the non-exclusive jurisdiction of the English courts.

…

16.4 **Convenient Forum**

Save as provided below, the Parties agree that the courts of England are the most appropriate and convenient courts to determine and settle any dispute arising relation to the Agreement (including any question as to its existence, validity or termination) (a "Dispute") between them and accordingly no party shall raise any arguments based on forum non convenience.

…

16.7 **Arbitration**

Notwithstanding the submission by the Parties to the jurisdiction of the English courts in Clause 16.2 (*Jurisdiction*), either Party refer any Dispute to be finally resolved by arbitration under the Rules of the London Court of International Arbitration in London, England. There will be 3 arbitrators, one of whom will be nominated by each of the claimant and the defendant, and the third to be agreed by the 2 arbitrators so appointed and in default thereof shall be appointed by the President of the London Court of International Arbitration. If there is more than one claimant or defendant they will jointly nominate one arbitrator. The

arbitration will be conducted in English and any judgment rendered shall be final and binding on the Parties.