Neutral Citation Number: [2018] EWHC 2415 (Comm)

CL-2018-000108

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

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 14/09/2018

Before:

THE HONOURABLE MR JUSTICE PHILLIPS

- -

BETWEEN:

UNITED COMPANY RUSAL PLC
(a company incorporated in Jersey)

Claimant

and

(1) CRISPIAN INVESTMENTS LIMITED
(a company incorporated in Cyprus)
(2) WHITELEAVE HOLDINGS LIMITED
(a company incorporated in Cyprus)

Defendants

- -

Christopher Pymont QC, **David Mumford QC**, **Thomas Munby** and **James Kinman** (instructed by **Macfarlanes LLP**) for the **Claimant**
Daniel Jowell QC, **Alan Roxburgh** and **Richard Eschwege** (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP)** for the **First Defendant**
Lord Goldsmith QC, **PC, Daniel Toledano QC** and **David Davies** (instructed by **Debevoise & Plimpton LLP**) for the **Second Defendant**

Hearing dates: 14, 15, 16, 17 and 22 May and 27 June 2018

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Approved Judgment

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Introduction

1. The central issue in these proceedings is whether the first defendant ("Crispian") validly and effectively commenced a right of first refusal ("ROFR") procedure contained in a shareholders' agreement dated 10 December 2012 ("the Framework Agreement") to which Crispian, the claimant ("Rusal") and the second defendant ("Whiteleave") are parties. The Framework Agreement governs the relationship of those parties in their capacity as the major shareholders of PJSC MMC Norilsk Nickel ("NN"), including the rights and obligations of the parties in relation to the sale or transfer of some or all of their respective shareholdings.

2. Crispian purported to commence the ROFR procedure by written notice to Rusal and Whiteleave dated 6 February 2018 ("the Contested Notice"), offering to sell 3.99% of the share capital of NN for the same price (approximately US$1.477 billion in total) at which Crispian had conditionally agreed to sell that stake to Bonico Holdings Co. Limited ("Bonico"), an associated company of Whiteleave. The offer was made on the implicit basis that such price had been "*proposed by a bona-fide third party purchaser*" as required by clause 2.5(5) of the Framework Agreement.

3. Rusal disputes the contractual validity of the Contested Notice, asserting that the ROFR procedure, on its true construction, is not engaged by an offer from any of the major shareholders (or their affiliates), but only by an offer from an independent party. Rusal further contends that Bonico was not, in any event, "*a bona-fide third party*" as the price offered to Crispian was not an arm's length commercial price just for the shares in question, but was artificially inflated. Both Crispian and Whiteleave refute Rusal's contentions.

4. Nonetheless, both Whiteleave and Rusal purported to accept the offer contained in the Contested Notice and entered share purchase agreements with Crispian for their *pro rata* share of the 3.99% stake, Rusal doing so without prejudice to its contention (by then formalised in these proceedings, commenced on 12 February 2018) that the Contested Notice was invalid and ineffective. All three parties gave undertakings to the court on 8 March 2018 that, in the event that Rusal's contention was successful, any completed sale of Crispian's shares would be unwound and the parties restored to their respective positions prior to the sales.

5. Subject to the above qualifications, Whiteleave and Crispian duly completed the sale and purchase of Whiteleave's *pro rata* share of the 3.99% stake on 15 March 2018. Rusal delayed completion of its purchase, as it was entitled to do under clause 2.5(5), but Crispian asserts that Rusal thereafter failed to provide security for 25% of the purchase price as required by that clause, entitling Crispian to sell those shares to any party for no less than the price offered by Bonico. On 27 March 2018 Crispian gave a further undertaking to the court not exercise the right it asserts in that regard until after judgment in these proceedings.

6. On 27 June 2018, following the expedited trial of preliminary issues (and in advance of the Annual General Meeting of NN), I delivered my decision that the Contested Notice was invalid and ineffective, such that Crispian was and is precluded under the terms of the Framework Agreement from disposing of shares pursuant to it. This judgment sets out my reasons for that decision.

The essential facts

The background to the Framework Agreement

7. NN, a company incorporated in Russia, is the world's largest producer of nickel and palladium and a substantial producer of various other metals. NN's ordinary shares are listed on the Moscow and St Petersburg Stock Exchanges and American Depositary Receipts ("ADRs") for its shares, issued at a rate of 10 per ordinary share deposited, are traded on several international exchanges.

8. In the period from 2008 to 2014 the two largest shareholders in NN were Interros International Investments Limited ("Interros"), a company incorporated in Cyprus and ultimately owned and controlled by Vladimir Potanin, and Rusal. Rusal's largest and controlling shareholder is the EN+ Group, of which Oleg Deripaska is a major shareholder and, until recently, the President. At the start of these proceedings Mr Deripaska was also the President of Rusal.

9. Prior to December 2012 Interros and Rusal were engaged in a substantial and protracted dispute as to the management and control of NN, resulting in litigation in several jurisdictions and an LCIA arbitration.

10. On 10 December 2012, shortly before the commencement of the arbitration hearing, the dispute was settled by the Framework Agreement, pursuant to which:

    10.1. Interros and Rusal engaged LLC Millhouse ("Millhouse"), a company ultimately owned or controlled by Roman Abramovich, as an independent investor in NN, each agreeing to sell part of its shareholding in NN to Millhouse for US$160 per share (equating to market price at that time), so that Millhouse would acquire approximately 5.87% of NN's share capital;

    10.2. Interros, Rusal and Millhouse, Mr Potanin and Mr Abramovich agreed corporate governance rules for NN, including the election of Mr Potanin as its General Director, the composition of its Board of Directors, its Dividend Policy and the decision-making procedure in relation to Reserved Matters (as defined);

    10.3. Millhouse was appointed to act as "Fiduciary" in relation to a block of "Escrow Shares", consisting of 20.87% of NN's share capital, comprising its own shareholding acquired from Interros and Rusal and a further 7.5% stake to be transferred by each of those parties. Further provision was made for the manner in which the Fiduciary would direct the Escrow Agent to vote the Escrow Shares on specified matters, in particular ensuring that Interros and Rusal could each, in certain circumstances, exercise an effective veto.

11. Mr Deripaska executed a separate deed by which, in broad terms, he undertook the obligations and liabilities he would have borne had he been a party to the Framework Agreement.

12. The Framework Agreement was subsequently varied by numerous side letters and two deeds of substitution. Crispian (a company ultimately owned jointly by both Mr Abramovich and Alexander Abramov) replaced Millhouse in April 2013, Crispian thereafter acquiring the 5.87% shareholding in NN from Rusal and Interros. Whiteleave

(another company ultimately owned by Mr Potanin) replaced Interros in October 2014 and acquired its remaining shareholding in NN.

13. It was originally intended that the Framework Agreement would be replaced by a restated or new agreement by 24 May 2013 (as provided in clause 4.5), but in the event negotiations in that regard were unsuccessful and no replacement was signed. Clause 1.4(3) of the Framework Agreement made it clear that, in such circumstances, the full terms of the Framework Agreement would continue to remain in force.

14. Prior to completion of the share purchase agreement between Crispian and Whiteleave on 15 March 2018:

    14.1. Rusal held 27.82% of the share capital of NN;

    14.2. Whiteleave or its affiliates held in the region of 31%;

    14.3. Crispian or its affiliates held 6.37%;

    14.4. The balance, approximately 34%, traded freely on the stock exchanges.

The relevant terms of the Framework Agreement, as varied

15. The Framework Agreement is in the Russian language (save for three clauses in English), but is expressly governed by English law and provides for the courts of England and Wales to have jurisdiction over disputes. The parties to these proceedings (collectively referred to in the Framework Agreement as "the Investors") have agreed a definitive English translation of all the Russian language clauses to which they have referred and have also produced an agreed composite version, reflecting all amendments. It was common ground that three well-known international law firms (Herbert Smith Freehills LLP and the two firms of solicitors acting for the defendants in these proceedings) were involved in the drafting of the Framework Agreement, although the nature and extent of their input was not apparent. It was also agreed that the version presented to me falls to be construed as though it were an original contract drafted in English.

16. Clause 1.3 identifies the purposes of the Framework Agreement, including the parties' intention to settle the (then) ongoing disputes and their intention "*to implement the corporate governance principles set forth in this Agreement, including by engaging Crispian as an independent investor*".

17. Clause 4.4 provides that the Framework Agreement shall be effective until 1 January 2023, a term of just over 10 years.

18. The critical provisions, for the purpose of these proceedings, are those set out in clause 2.5, entitled "*Lock-up in Relation to Sale of Shares in NN, Acquisition of Shares by Investors and Rights of First Refusal*". Although the relevant ROFR procedure is contained in clause 2.5(5), it must be considered in the context of clause 2.5 as a whole. It is therefore necessary to set out most of that clause verbatim (save for clause 2.5(9)(i), a lengthy sub-clause in respect of which a summary will suffice):

> "*(1) On or before the earlier of the following two dates (the "**Shares Lock-up Period**"): (i) the 5th anniversary of the signing of this Agreement or (ii) the date when Crispian's equity stake in*

NN falls below 2.5% of NN's share capital (but in any case not earlier than 3 years from the signing of this Agreement), Rusal and Whiteleave may not sell or otherwise dispose of their shares in NN if, as a result of such sale and/or disposal of NN shares, the number of shares beneficially owned by the respective Party becomes less than 20% of NN (taking into account the shares such Party has transferred to the Escrow Agent).

*(2) Subject to paragraph (9) of this clause 2.5, in the event that Rusal or Whiteleave disposes of any number of NN shares (the "**Selling Party**"), except (as amended by paragraph 26 of Side Letter dated 18 April 2013) for any transfer of such shares to its affiliates pursuant to clause 5.3 of this Agreement, the Selling Party shall grant to other Investors (the "**Non-Selling Parties**") (pro rata to their shareholdings but subject to provisions of paragraph 6 of this clause) the right of first refusal in respect of all of the shares being disposed of, on the terms of a bona fide offer from a third party. In the event that one of the Non-Selling Parties refuses to exercise its right of first refusal with respect to its part of the shares being disposed of, such right may be exercised by the other Non-Selling Party in respect of all such shares on the terms set out in this paragraph.*

*(3) Following the expiration of the Shares Lock-up Period, each of Rusal or Whiteleave (the "**First Party**") shall be entitled to offer to the other party (the "**Second Party**") to buy out such number of shares as is equal to the lesser of either all of the shares held by Whiteleave and its affiliates and related persons, or all of the shares held by Rusal and its affiliates and related persons (the "**Shares Block**"), at the price not lower than the average weighted price on the Moscow Exchange for the six months preceding the date of such offer, plus 20%.....*

.....

(5) Subject to paragraphs (6) and (9) of this clause 2.5, Crispian may not sell or otherwise dispose of its shares in NN, except (as amended by paragraph 26 of Side Letter dated 18 April 2013) that such shares may be transferred to its affiliates pursuant to clause 5.3 of this Agreement, if, as a result of any such sale and/or disposal of NN shares, (i) within 2 years of the date of this Agreement, the shareholding owned by Crispian and its affiliates falls below 5.87% of NN share capital, and (ii) within the 3 following years, the shareholding owned by Crispian and its affiliates falls below 2.5% of NN share capital. If Crispian sells any number of NN shares, except (as amended by paragraph 26 of Side Letter dated 18 April 2013) for any transfer of such shares to its affiliates pursuant to clause 5.3 of this Agreement, Crispian shall grant to Whiteleave and Rusal the right of first refusal to buy out the shares being so disposed of

*(pro rata to their shareholdings) (the "**Crispian Sell Shares**") on the following terms:*

*(i) In the event that Rusal and Whiteleave exercise their right of first refusal, they shall serve a notice of exercise of the right of first refusal within 10 days of receipt of the relevant notice from Crispian. Rusal and Whiteleave shall pay the share price within (i) 2 months of the date when notice of exercise of the right of first refusal was served, provided that the sale block of shares is less than 2% of NN total share capital, or (ii) 6 months of the date when notice of exercise of the right of first refusal was served, provided that the sale block of shares is between 2% (inclusive) and 4% of NN total share capital; or (iii) 1 year of the date when notice of exercise of the right of first refusal was served, provided that the sale block of shares equals or exceeds 4% of NN total share capital. Subject to subparagraph (iv) below[1], the share price, at the discretion of Crispian, shall be equal to the price proposed by a bona-fide third party purchaser (the "**Starting Price**") or the Market Price (as defined below). In case of deferred payment Whiteleave and/or Rusal shall (pro rata to their participation in the right of first refusal with respect to the Crispian Sell Shares) provide to Crispian security amounting, in the aggregate, to 25% of the Starting Price or the Market Price (whichever is applicable) in the following form (at the discretion of Whiteleave and Rusal, respectively): (a) pledge over shares in NN, or (b) bank guarantee from first-rate European banks or top-5 Russian banks, or (c) monetary prepayment, or (d) security in the form of other marketable securities listed on LSE, NYSE, HKSEx with the trading volumes of not less than one fifth of the daily trading volume of NN shares and ADRs, or (e) any other form of security acceptable to Crispian. If the security is not granted within 30 days of the date when notice of exercise of the right of first refusal was served by the respective purchaser, Crispian shall become entitled to sell that part of Crispian Sell Shares for which no security has been granted, to any third party at a price not less than the Starting Price.*

*(ii) The market price of NN shares shall be understood to mean the average weighted price per share on the Moscow Exchange for 90 days prior to the date of the respective event (the "**Market Price**").*

[1] It is common ground that the reference to subparagraph (iv) is a mistake, the plain intent being to refer to subparagraph (v).

*(iii) In case of deferred payment, interest shall be payable to Crispian at 3 months LIBOR plus 5% that shall accrue from the date when notice of exercise of the right of first refusal was served until the date of payment or the date of refusal to purchase on the terms set out in this Agreement (whichever is applicable) (the "**Interest on Crispian Sell Shares**").*

(iv) The delivery of Crispian Sell Shares to each purchaser shall be made against payment of the purchase price by the respective purchaser. Before the transfer of the Crispian Sell Shares, Crispian shall retain all its rights attaching to such shares (including the right to vote and the right to dividend but excluding the right to dispose of the shares), as well as its rights and obligations under this Agreement.

(v) If the Market Price of the shares on the date of payment exceeds the Starting Price plus the interest accrued at the date of payment, the sale price shall be equal to such Market Price. Otherwise, the sale price shall be equal to the Starting Price plus the interest accrued at the date of payment.

*(vi) After the notice of acceptance of the Crispian's offer to exercise the right of first refusal in response to Crispian's offer has been served, each of Rusal and Whiteleave may at any time refuse to purchase such shares (the "**Refusing Party**"), and in the event of such refusal, the Refusing Party's right of first refusal to purchase Crispian's shares shall terminate and shall remain terminated until the expiration of this Agreement.*

(vii) If at the time of such refusal the Market Price of NN shares is below the Starting Price plus the interest accrued as at the date of the refusal, the Refusing Party shall reimburse to Crispian the difference between the Market Price and the Starting Price plus the interest accrued.

(viii) If at the time of such refusal the Market Price exceeds the Starting Price plus the interest accrued, the Refusing Party shall not be required to make such reimbursement.

A breach by Crispian of any provision of this paragraph (5) shall give rise to the consequences set out in clause 3.12 of this Agreement.

(6) Crispian shall be entitled to sell all its shares in NN notwithstanding the lock-up in relation to its NN shares established under paragraph (5) of this clause in the following instances:

> *(i) If the Managing Partner commits a breach the consequence of which, under this Agreement, is the termination of the powers of [Mr Potanin] … as General Director [which breach is not remedied]..*
>
> *Any such sale by Crispian shall be governed by the provisions of paragraph 5 above save that only Rusal shall be entitled to exercise the right of first refusal in respect of all the shares being so sold.*
>
> *(ii) If before such time as the Escrow Shares have been transferred to the Escrow Agent, [Rusal has failed to comply with its obligations in that regard]….Any sale of shares by Crispian pursuant to this paragraph shall be governed by the provisions of paragraph 5 above save that only Whiteleave shall be entitled to exercise the right of first refusal in respect of all the shares being so sold.*
>
> ……
>
> *(7) If the shareholding owned by Crispian and its affiliates falls below 1% in accordance with this Agreement … this Agreement shall terminate for Crispian … but shall remain effective between Whiteleave and Rusal until the expiry of its term. Whiteleave and Rusal shall then procure that the Fiduciary's powers are transferred to Valentin Yumashev.*[2]"

19. Clause 2.5(9)(i), added to the Framework Agreement on 18 April 2013, provides an exception to the lock-up provisions and the right of first refusal provisions, permitting any Investor or its affiliates to transfer shares to "*any third party*" in excess of a specified percentage. In the case of Crispian the relevant percentage is initially 4%, reduced by any subsequent transfers permitted by clause 2.5. Clause 2.5(9)(i), however, does not permit transfers to a "*strategic investor*", meaning any investor in NN whose nominee has been elected, or is reasonably likely to be elected following the transfer of shares, to NN's board of directors.

20. Clause 3.6 provides for each of Whiteleave, Rusal and Mr Abramovich to have the right to exercise a veto in respect of decisions in relation to Reserved Matters (such as changes to NN's dividend policy), sub-clause (7) providing that that right will be lost if an Investor's shareholding falls below specified percentages during specified periods. In particular, Mr Abramovich's right of veto is lost if, after two years, Crispian's shareholding falls below 2.5%.

21. Clause 3.11 provides as follows:

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[2] Mr Yumashev is a well-known businessman in Russia, was formerly head of the presidential executive office of former President Yeltsin's administration and is married to President Yeltsin's daughter. He is also Mr Deripaska's father-in-law. Although Mr Yumashev is not a party to the Framework Agreement, he was involved in its negotiation.

> *"Any Investor has the right to enter into any transactions with the NN shares held by it without notifying the other Investors. If as the result of such acquisitions the shareholding of such Party exceeds, by 1% of shares of the charter capital of NN, the shareholding of such Party in NN that it held on the date of redemption of NN treasury shares, as set out above, then such Investor shall notify the other Investors of such acquisition."*

The Bonico Offer

22. The Shares Lock-up Period (as defined in clause 2.5(1) of the Framework Agreement) ended on 10 December 2017, its fifth anniversary. After that date Whiteleave and Rusal were each permitted to offer to buy-out the other's shareholding in NN pursuant to the "Shoot-Out" or "Russian Roulette" mechanism set out in clause 2.5(3), the triggering of which risked the other party exercising a right to buy out the offeror at the price offered or requiring the offeror to choose between buying or selling at a higher price.

23. Further, Crispian was then permitted to sell all or part of its shareholding in NN, subject to compliance with the ROFR procedure set out in clause 2.5(5). It is important to note, however, that for the three years prior to the expiry of the Shares Lock-up Period, Crispian had been entitled to sell all but 2.5% of its shareholding by utilising the ROFR procedure in clause 2.5(5).

24. In the run up to 10 December 2017, and in the period immediately thereafter, there were numerous discussions between the Investors as to their respective rights and how they might be exercised, it being apparent in that context that there was a serious risk that Mr Potanin and Mr Deripaska would once again fall out as to the management and direction of NN. The detail of those negotiations, hotly disputed in certain crucial respects, is considered below.

25. What is clear is that Crispian and Whiteleave eventually reached an agreement pursuant to which, on 2 February 2018, Bonico made its offer to purchase 6,313,994 of Crispian's shares (approximately a 3.99% shareholding in NN) at US$234 per share ("the Bonico Offer"), enclosing a draft share purchase agreement. The letter stated:

> "*We understand that pursuant to the agreement in relation to NN dated 10 December 2012, as amended (the "NN Agreement"), you will grant to UC Rusal Plc ("Rusal") a right of first refusal (the "ROFR") in respect of a pro rata portion of the Sale Shares ("Pro-rata Shares"), at the same price as offered by us. If Rusal exercises its ROFR in respect of all or any of the Pro-rata Shares (the "Rusal ROFR Shares"), we confirm that we will purchase the difference between the Sale Shares and the Rusal ROFR Shares. As contemplated by the NN Agreement, you will also grant the ROFR to Whiteleave. We understand that Whiteleave will exercise the ROFR in connection with our offer. This letter is subject to you giving required ROFR notices to Rusal and Whiteleave no later than 18:00 (Moscow time) on 9 February 2018.*"

26. Clause 4.8 of the draft share purchase agreement provided that if Rusal and Whiteleave exercised the ROFR in respect of the offered shares, the agreement would terminate.

The Contested Notice

27. On 6 February 2018 Crispian countersigned the Bonico Offer (thereby entering a conditional share and purchase agreement with Bonico ("the Bonico SPA")) and served the Contested Notice upon both Rusal and Whiteleave, purportedly pursuant to clause 2.5(5) of the Framework Agreement. The Contested Notice stated as follows:

> *"1. We, Crispian Investments Limited ("we" or "Crispian"), have received from Bonico Holdings Co Limited ("Bonico") (a subsidiary of Whiteleave Holdings Limited) an irrevocable offer (the "Offer") to buy 6,313,994 ordinary shares (in the form of shares or American depositary receipts representing shares ("ADRs")) held by Crispian in NN (the "Offered Shares"), at a price of US$234.00 per Offered Share or US$23.40 per American depositary receipt representing the Offered Shares, plus interest on such amount at the rate of 3-month LIBOR plus 5%, which shall accrue from (and including) the date of our acceptance of the Offer to (and including) the date of actual payment.*
>
> *Right of first refusal*
>
> *2. In accordance with clause 2.5(5) of the NN Agreement, we hereby give each of UC Rusal Plc ("Rusal") and Whiteleave Holdings Limited ("Whiteleave") (each an "Investor") notice of such Investor's right to exercise its right of first refusal (the "ROFR") to acquire all (but not some only) of the Offered Shares on the terms and conditions set out in this letter (this "Letter") and set out in the enclosed share purchase agreement (the "SPA"), including as to purchase price (as set out in the SPA). The SPA should be read in conjunction with this Letter (and, if the ROFR is accepted, the Acceptance Letter) and shall be incorporated in, and shall form an integral part of, this Letter (including the Acceptance Letter). The Completion Date (as defined in the SPA) for the ROFR is the same as the completion date under the Offer.*
>
> *…*
>
> ***Share allocation***
>
> *5. If a valid Acceptance Letter is served on us by only one Investor in accordance with paragraph 4, all of the Offered Shares shall be sold and transferred to such accepting Investor pursuant to the SPA. In such case, the term "Sale Shares" in the SPA shall mean all of the Offered Shares (as defined in the SPA)...*

> ***NN Agreement***
>
> *9. All terms and conditions which are specifically provided for in the NN Agreement with respect to the ROFR shall continue to apply and remain enforceable by us and each Investor (in each case, unless expressly waived).*
>
> *…*
>
> ***Binding nature***
>
> *11. This Letter (including, if the ROFR is accepted, the Acceptance Letter), and all its terms and conditions, together with the SPA, and all its terms and conditions, shall be legally binding on any Investor upon countersignature by such Investor of this Letter.*
>
> ***Governing Law***
>
> *12. This Letter (and the Acceptance Letter) shall be governed by and construed in accordance with English law."*

28. Whiteleave and Rusal were given until 23:59 (Moscow time) on 16 February 2018 to exercise their right of first refusal by delivery of the required acceptance letter, agreeing to the terms of a share purchase agreement, a draft having been attached to the Contested Notice.

The crystallisation of the dispute and the commencement of these proceedings

29. On 7 February 2018 Rusal's solicitors wrote to Crispian, asserting that the Contested Notice was not a valid notice under clause 2.5(5) and that, in consequence, any sale of NN shares based on that notice would be a breach of the Framework Agreement. The letter asserted, among other matters:

    29.1. that the ROFR under clause 2.5(5) is a joint right of Whiteleave and Rusal, only capable of being exercised by them jointly, whereas the Contested Notice impermissibly offered the right separately to those parties and provided that it might be accepted by Whiteleave (or Rusal) alone.

    29.2. that Whiteleave was not a third party for the purposes of clause 2.5(5), so could not itself (or by an affiliate such as Bonico) make an offer triggering the mechanism of that clause.

    29.3. that the Bonico Offer was not, in any event, a *bona fide* or genuine offer, but was made pursuant to a scheme agreed between Mr Potanin and Mr Abramovich (which Mr Potanin had alluded to and threatened to implement at a meeting with Mr Deripaska on 1 February 2018). The scheme involved an inflated offer by Whiteleave or an affiliate for up to 4% of NN's shares held by Crispian (to deter Rusal from exercising its ROFR), following which the remainder of Crispian's shares would be sold at a counterbalancing discount under clause 2.5(9) to a "third party" who was not a "strategic investor". The rationale of the co-ordinated transactions would be to permit NN to proceed with the purchase from Millhouse

of certain metal deposits in the Baimskoye region without Rusal being able to veto the transaction on the basis that it was a Related Party transaction.

30. Crispian and Whiteleave both refuted those contentions and declined to give undertakings that Rusal had demanded. Rusal commenced these proceedings on 12 February 2018, seeking a declaration that the Contested Notice was invalid and of no effect and an injunction preventing Crispian from selling NN shares pursuant to any purported acceptance or rejection of the Contested Notice. By application notice also issued on 12 February 2018, Rusal sought an interim injunction against Crispian.

31. On 16 February 2018 I ordered that Rusal's application for an interim injunction against Crispian be adjourned to the week commencing 5 March 2018, Crispian undertaking not to transfer shares in NN pursuant to the Contested Notice in the meantime. The application was in due course listed for hearing on 8 and 9 March 2018.

The share purchase agreements

32. By letter dated 15 February 2018 Whiteleave accepted the Contested Notice by returning the acceptance letter, thereby agreeing to the terms of the attached share purchase agreement with Crispian ("the Whiteleave SPA").

33. On 16 February 2018 Rusal also returned the acceptance letter, doing so without prejudice to its position in this litigation, and so entered into a share purchase agreement with Crispian ("the Rusal SPA"), conditional upon the Contested Notice being held to be valid.

Preservation of the position pending trial and completion of the Whiteleave SPA

34. On 18 February 2018 Whiteleave nominated 28 February 2018 as the Completion Date of the Whiteleave SPA, triggering the issue of further applications on 20 February 2018 by (i) Rusal for an interim injunction to prevent such completion and (ii) Crispian, seeking to be released from its undertaking to the court not to transfer its shares in NN. The further applications were adjourned to 8 and 9 March 2018 upon Whiteleave and Crispian undertaking to vary the Completion Date until 5 days after judgment following that hearing.

35. On 8 March 2018, by consent of the parties, Butcher J made no order on each of the three interlocutory applications, each party being released from their previous undertaking and instead undertaking that, in the event that Rusal obtained judgment at trial in its favour, any completed sale of Crispian's shares would be unwound and the parties restored to their respective positions prior to the sale. By further consent order dated 9 March 2018 Butcher J directed that there be an expedited trial of liability to commence on 14 May 2018.

36. The Whiteleave SPA was completed on 15 March 2018, Whiteleave paying US$772.3 million for the NN shares acquired.

Further issues arising as to security and force majeure

37. On 20 March 2018 Crispian wrote to Rusal asserting that Rusal had failed, within 30 days of serving notice of exercise of the ROFR on 16 February 2018, to provide security

for 25% of the purchase price under the Rusal SPA as required by clause 2.5(5)(i) of the Framework Agreement. Crispian asserted that it was therefore entitled to sell the shares in question to another party.

38. On 27 March 2018 Popplewell J made an order, by consent, that the parties have permission to plead their respective cases as to whether Rusal had failed to provide security as required by the Framework Agreement and the consequences of any such failure, Crispian undertaking not to sell the shares in question to a third party until 5 business days after judgment following trial.

39. Rusal notified Crispian on 6 April 2018 that it intended to complete the Rusal SPA on 17 April 2018. However, on 11 April 2018 Rusal wrote to Crispian stating that Rusal was unable to purchase the Sale Shares in accordance with the Rusal SPA due to US sanctions issued against Rusal on 6 April 2018, further notifying Crispian of its contention that this was a Force Majeure Event within clause 5.13 of the Framework Agreement.

40. At the Pre-Trial Review on 20 April 2018 I directed that the expedited trial listed for 14 May 2018 be the trial of an Agreed List of preliminary issues. Those issues related to (i) whether the Contested Notice was valid and, if it was, (ii) whether Rusal had failed to provide security as required by the Framework Agreement and the consequences if it had so failed and (iii) an issue relating to the meaning of "*third party*" in clause 2.5(9)(i). Issues relating to Rusal's claim that a Force Majeure Event had occurred, and its subsequent failure to complete on 17 April 2018, would be determined at a second trial, if required.

41. In view of my decision that the Contested Notice was not valid or effective, for reasons set out below, it is not necessary to consider the question of whether Rusal failed to provide security and, further, a second trial is not required. The issue as to the meaning of the expression "*third party*" in relation to clause 2.5(9)(i) is determined below in the course of considering clause 2.5(5).

The validity of the Contested Notice

The proper interpretation of clause 2.5(5) of the Framework Agreement

(i) The applicable legal principles

42. It was common ground that, at least in general terms, the proper approach to interpreting the Framework Agreement is that set out by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173.

43. Lord Hodge, in the last of those decisions, emphasised that the *Rainy Sky* and *Arnold* cases adopted the same "unitary" approach to contractual interpretation, summarising that approach as follows:

> "*10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the*

> *particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.*
>
> *11…. Interpretation is… a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…*
>
> *12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated… To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements…*"

44. The defendants, however, argued that in this case the general approach should be qualified by the principle, established in the context of construing pre-emption provisions in articles of association of private companies, that the right freely to transfer shares can only be removed or restricted by clear words. In *In re Smith and Fawcett Ltd.* [1942] 1 Ch 304 Lord Greene MR explained the principle as follows:

> "*… in construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than that the shareholder has such a prima facie right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity.*"

45. Lord Greene MR applied the same principle in *Greenhalgh v Mallard* [1943] 2 All ER 234, holding that restrictions on the transfer of shares contained in a company's articles of association had no application to a sale to existing members, it being unclear whether

the restriction was limited to transfers to non-members. The principle was restated as follows:

> "*Questions of construction of this kind are always difficult, but in the case of the restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is prima facie transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.*"

46. More recently, that principle ("the *Greenhalgh* principle") has been applied by the Court of Appeal in interpreting articles of association in *BWE International Ltd v Jones* [2003] EWCA Civ 298, and *Cosmetic Warriors Ltd v Gerrie* [2017] 2 BCLC 456.

47. The defendants contended that the *Greenhalgh* principle also applies with full force in interpreting the Framework Agreement, a contract between some (but not all) of the shareholders of NN as to how they will deal with their shares as between themselves only. They submitted that any ambiguity as to the nature and extent of the restriction on Crispian transferring its shares (in particular, to Whiteleave or its affiliates) must be resolved in their favour.

48. I see no reason, however, why such a contract should be subject to any special principles of interpretation. Whilst a company's articles of association are a contract between all shareholders, they are also part of the constitution of the company, defining the rights and restrictions applicable to the shares, including making provision for their transferability. A presumption that the articles do not intend to cut down the normal rights of transferability of the shares without express provision is understandable and no doubt desirable. In contrast, a subsequent commercial agreement between two or more shareholders (for their own specific purposes) as to how they will or will not deal with their shares as between themselves does not affect the intrinsic rights attached to those shares (as per the articles), but is simply a matter of contractual agreement as to how such rights will or will not be exercised. No presumption would be appropriate in interpreting such agreement: such parties are free to agree whatever they wish in respect of their property rights in their shares in their own commercial interests and there is no reason to approach their agreement from any preconceived starting point.

49. The defendants pointed to the fact that, in *Re Coroin* [2013] EWCA Civ 781, Arden LJ referred to the *Greenhalgh* principle in the context of interpreting a shareholders' agreement in the following terms at [65]:

> "*In addition, cl.6 of the shareholders' agreement and the pre-emption provisions in the articles set out circumstances in which members may lose the right to their shares. They are, therefore, expropriatory in nature. Given the ambiguity in the meaning of the phrase "becomes enforceable" the court should in my judgment prefer the narrower meaning. This approach is consistent with the earlier decisions of this court on construing articles of association of a company restricting the transfer of*

> *shares laid down in: Re Smith v Fawcett Ltd…. and Greenhalgh v Mallard…*"

50. The shareholders' agreement in *Re Coroin* was, however, of a very different nature to the Framework Agreement. As appears from the first instance decision of David Richards J at [2012] EWHC 2343 (Ch) at [71] to [80], that agreement was made on the establishment of the company between all the initial shareholders and all subsequent allottees or transferees also became parties to it. The company's articles of association were adopted in accordance with the terms of the shareholders' agreement (and, in particular, mirrored its provisions in relation to the transfer of shares), but subject to a provision in the agreement that, in the event of any inconsistency between the shareholders' agreement and the articles, the shareholders' agreement would prevail and the parties would ensure that the articles were amended accordingly. It is therefore apparent that the shareholders' agreement was effectively synonymous with the articles and performed the same or a similar function: Arden LJ explained at [20] that "*the pre-emption provisions appear, so far as material, in the same form in Coroin's articles and in cl.6 of the shareholders' agreement. It is therefore sufficient to take the relevant provisions of the shareholders' agreement"*. It is accordingly understandable, in those circumstances, that principles applicable to construing articles of association were considered (if not directly applied) in interpreting the provisions in the shareholders' agreement which were intended to be and were replicated in the articles, Arden LJ noting that she was interpreting the agreement consistently with the principle applicable to interpreting articles. That is very different to directly applying the principle to a subsequent agreement between some only of the shareholders of a company, introducing restrictions which are not contained in the company's articles.

51. In any event, I do not accept that Arden LJ's reference to the *Greenhalgh* principle in interpreting the shareholders' agreement in *Re Coroin* case binds me to apply that principle to the Framework Agreement in the present case. In addition to the points made above:

    51.1. Arden LJ referred to the *Greenhalgh* principle in considering whether security had become enforceable within cl.6.6 of the shareholders' agreement, determining that it had not;

    51.2. However, both Moore-Bick LJ at [146] and Rimer LJ at [181] disagreed with Arden LJ's conclusion that the security in question had not become enforceable, making no mention of the *Greenhalgh* principle and certainly not applying it. It follows that Arden LJ's approach was a minority view and her reasoning is not binding;

    51.3. Further, a differently constituted Court of Appeal had previously considered the interpretation of the pre-emption provisions in the very same shareholders' agreement in *McKillen v Misland (Cyprus) Investments Ltd.* [2012] BCC 575. The Court expressly considered and applied authorities relating to the interpretation of commercial contracts in general: there was no reference to the *Greenhalgh* principle.

52. It follows that, in my judgment, the Framework Agreement falls to be interpreted according to usual principles applicable to commercial contracts, without any presumptions or heightened requirements.

(ii) The competing interpretations

53. It is common ground that the sale by Crispian of a block of 3.99% of NN's share capital fell within the ROFR provisions in clause 2.5(5) of the Framework Agreement. It is also not in dispute that those provisions carried with them an implied negative obligation on Crispian not to sell those shares without granting a ROFR in compliance with those provisions, an obligation capable of being enforced by injunction.

54. The dispute concerns whether Crispian, by the Contested Notice, granted a ROFR in compliance with the terms of clause 2.5(5). Whilst the ROFR must of course be considered in the context of clause 2.5 (and indeed the Framework Agreement) as a whole, it is useful to identify the central wording as follows:

> "*If Crispian sells any number of NN shares…Crispian shall grant to Whiteleave and Rusal the right of first refusal to buy out the shares being so disposed of (pro rata to their shareholdings)…on the following terms:*
>
> *(i) In the event that Rusal and Whiteleave exercise their right of first refusal, they shall serve a notice of exercise of the right of first refusal within 10 days of receipt of the relevant notice from Crispian. Rusal and Whiteleave shall pay the share price within (i) 2 months of the date when notice of exercise of the right of first refusal was served, provided that the sale block of shares is less than 2% of NN total share capital, or (ii) 6 months of the date when notice of exercise of the right of first refusal was served, provided that the sale block of shares is between 2% (inclusive) and 4% of NN total share capital; or (iii) 1 year of the date when notice of exercise of the right of first refusal was served, provided that the sale block of shares equals or exceeds 4% of NN total share capital. Subject to subparagraph (iv) below, the share price, at the discretion of Crispian, shall be equal to the price proposed by a bona-fide third party purchaser (the "**Starting Price**") or the Market Price (as defined below).*"

55. Rusal's essential contention is that Crispian's right to offer the shares at "*the price proposed by a bona-fide third party purchaser*" does not extend to offering them at a price proposed by Whiteleave or its affiliates (such as Bonico) as none of the Investors (or their affiliates) is a "*third party*" in the context of the ROFR to be granted by Crispian to Whiteleave and Rusal.

56. Whilst success in that contention would be sufficient for it to succeed in the present proceedings, Rusal advanced a more detailed overall interpretation of clause 2.5(5) as follows:

56.1. The ROFR is a single right which must be offered to Whiteleave and Rusal in relation to the shares being sold by Crispian and must be exercised by both of them or not exercised at all;

56.2. The event which triggers the ROFR mechanism ("*If Crispian sells ..*") is to be read literally and requires an executed contract of sale by Crispian (not an intention to sell in future or mere receipt of an offer), which must necessarily be conditional upon the ROFR not being exercised, just as the executed Bonico SPA was conditional;

56.3. The consequence of the above is (a) that the mechanism can only be triggered by an off-market sale (as a stock exchange transaction could not be conditional); and therefore (b) there must be a (bona-fide) third party purchaser and a Starting Price.

57. The defendants contend that the reference to the purchaser being "*a bona fide third party*" denotes no more than that the offer must be from a party unrelated to Crispian and does not exclude offers from Whiteleave or Rusal (or one of their respective affiliates).

58. In relation to the broader interpretation of the ROFR mechanism, both defendants oppose Rusal's contentions (i) that the ROFR must be accepted by both Whiteleave and Rusal or not at all and (ii) that there must be an executed conditional sale in order to engage the ROFR mechanism. But whereas Crispian accepted in oral argument that there must ordinarily be at least an offer from a proposed purchaser, and so also a Starting Price, Whiteleave contended that all that is necessary is that Crispian has decided to sell the shares in question: if there is no offer (or no offer from a bona-fide third party), it contended, Crispian must offer them to Whiteleave and Rusal at the Market Price.

(iii) Textual analysis

59. As the Framework Agreement is a detailed and complex contract between sophisticated commercial parties (advised by leading international law firms), the most appropriate starting point is a close examination of the wording used to create and define the rights and obligations in question.

60. In the case of the ROFR, the parties have, in my judgment, used language which makes it tolerably clear that it is a single right, granted to both parties and to be exercised by both or neither of them. Both the right itself and its exercise is consistently described in this way (underlining added for emphasis):

60.1. Crispian's obligation is to "*grant to Whiteleave and Rusal the right of first refusal..*". It would have been easy to provide that a right of first refusal is granted to each of Whiteleave and Rusal, but the parties did not do so;

60.2. Exercise of the right is described as follows: "*In the event that Rusal and Whiteleave exercise their right of first refusal, they shall serve a notice of exercise of the right of first refusal...*". Again, it would have been simple to provide for the consequences if "Rusal and/or Whiteleave" (an expression used later in the clause) exercised their right and served a notice. The parties did not do so;

60.3. The payment obligation is that "*Rusal and Whiteleave shall pay the share price...*" and the payment date is (i) calculated from *"when notice of exercise of the right of first refusal was served"* and (ii) based on the size of *"the sale block of shares"*. Whilst the sale block of shares could be read as referring separately to the blocks to be sold to Rusal and Whiteleave (and the clause does not at this

point use the defined term *"Crispian Sale Shares"*), it seems far more likely to be a reference to the entire block being sold, not least because it is unlikely that Whiteleave's or Rusal's pro rata share of Crispian's stake would ever equal or exceed 4% (the third level of transaction, permitting 1 year for payment of the price), whilst it was highly likely that the whole block might do so.

61. The defendants' counter-argument is that the wording referred to above can, in each case, be read as shorthand for the grant of separate rights to Whiteleave and to Rusal and the separate exercise of those rights. They further point to the fact that clause 2.5(5)(i) recognises that Whiteleave and Rusal will have separate rights and obligations in relation to providing security (which may result in one of those parties losing the right to buy their share of the Crispian Sale Shares) and that clause 2.5(5)(vi) provides that, after accepting Crispian's offer, either Rusal or Whiteleave may refuse to purchase the shares, whilst the other may proceed. I see little force in any of those arguments for the following reasons:

    61.1. The consistent and persistent reference to the ROFR in singular or joint terms must be taken to have been both deliberate and for good reason;

    61.2. The recognition that Whiteleave and Rusal might pay for their *pro rata* share at different times and might have different obligations and abilities to provide security does not seem to have any real relevance to the prior question of whether the ROFR is a single right at the outset;

    61.3. The express provision that "*each of Whiteleave or Rusal may*" refuse to proceed with the purchase only (i) emphasises that the parties were perfectly capable of distinguishing between the rights of those two parties where they were intended to be separate and (ii) demonstrates the assumption, running throughout the clause, that there will have been only a single notice of acceptance of the ROFR and that it will have been exercised by both Whiteleave and Rusal, if at all.

62. The defendants also point to clause 2.5(2), which requires Rusal or Whiteleave, if they dispose of NN shares, to grant to the other Investors *"<u>the</u> right of first refusal"*, but then provides that, if one of the Non-Selling Investors refuses to exercise its right, the other may do so. The defendants submit that this demonstrates that using the expression "*the right*" in the singular does not, in the context of this clause, entail that the right is granted jointly and must be exercised by both recipients. In my judgment, however, the express provision in clause 2.5(5) that one party may exercise the right when the other refuses demonstrates that the right is otherwise a joint one and could, but for that express wording, only be exercised by both. Such wording is, of course, absent from clause 2.5(2), an omission which must be taken to be deliberate and intended to create a clear distinction.

63. If the above analysis of the ROFR as a single joint right is correct, it is decisive of the further question of whether Whiteleave (or one of its affiliates) or Rusal (or an affiliate) can be a bona-fide third party purchaser for the purposes of the ROFR. If either Whiteleave or Rusal could agree a purchase from Crispian as a "*bona-fide third party*" within clause 2.5(5), that party could ensure that it alone purchased the entire sale block simply by declining to exercise the ROFR, rendering the ROFR right nugatory and entirely defeating the mechanism. Indeed, jointly exercising the ROFR right triggered by an offer by one of the beneficiaries, which would supersede the provisional purchaser's

offer, would be a strange course for that beneficiary to adopt and would effectively be a consensual tripartite arrangement which could be agreed in any event, regardless of the terms of the ROFR. The concept of a "third party", in the context of a single joint ROFR simply cannot, as a matter of logic or common sense, encompass either of the joint beneficiaries of the ROFR.

64. But even if, contrary to the analysis above, the ROFR is granted severally to Whiteleave and Rusal and may be exercised by only one of them, it remains difficult to regard either of them (or their affiliates) as being a bona-fide third party purchaser within the meaning of clause 2.5(5) for the following reasons:

    64.1. The context of the reference to "*a bona-fide third party*" is a contract in which a right is to be granted by Crispian to Whiteleave and Rusal. The natural and ordinary meaning of those words, which connote an outside person, unconnected with the transaction in question, would obviously exclude the very parties to the grant, and probably also all parties to the contract in which it is contained. It would certainly be an odd use of language to refer to Whiteleave and Rusal as "third parties" when they would be making an offer which would trigger an obligation to grant a ROFR to themselves;

    64.2. It is apparent that the parties used the term "*third party*" throughout the Framework Agreement consistently with the meaning referred to above, contrasting such a party with the parties to the Framework Agreement and, in particular, the three Investors: examples are found in clauses 3.8, 4.1, 4.3, 5.2 and 5.12, including standard provisions excluding the grant of any rights to third parties;

    64.3. Clause 2.5(9), which expressly qualifies clause 2.5(5), is particularly pertinent, excluding from the ROFR provisions transfers "*by any Investor or its affiliates to any third party*", provided they did not reduce each Investor's shareholding in NN below a specified level and provided the transfer was not to a "*strategic investor*". It is entirely clear, in my judgment, that the reference to "third party" in this context does not include any of the Investors (or their affiliates), and it would be strange indeed if that expression had a different meaning in the closely-related ROFR provision in clause 2.5(5). The defendants mounted an argument that the reference to "*third party*" clause 2.5(9) does include Whiteleave, Rusal and Crispian because they are subsequently expressly "carved out" by the exclusion of transfers to "*strategic investors*", the defendants arguing that the only parties capable of fulfilling that definition are the three Investors. However, it is perfectly possible that, within the 10 year duration of the Framework Agreement, another party (a "third party" in the usual sense) could acquire sufficient NN shares to qualify as a "strategic investor". In my judgment the expression clearly applies to such a third party (and excludes a transfer to that party): it certainly is not a reference to Whiteleave, Rusal and Crispian, as they could and would have been referred to by the defined term *"the Investors"*, not by the obviously different term "*strategic investors*".

65. The defendants argued that, in any event, clause 2.5(5) should not be read as preventing Whiteleave and Rusal from agreeing to purchase from Crispian and thereby triggering the ROFR mechanism, pointing to the fact that the central wording of the ROFR contains no restriction on the party to whom Crispian can sell, let alone a restriction on selling to

the two most obviously interested parties, Whiteleave and Rusal. They argue that no such restriction should be read into the mechanism by virtue of the use of the words "*a bona-fide third party purchaser*" right at the end of clause, addressing one of two options for the price of the ROFR offer. They explain the use of the phrase as preventing a price offered by a party related to Crispian from being used as the Starting Price for the ROFR. The defendants therefore suggest that the term "third party" is to be read as excluding a purchaser related to Crispian, but not one which is or is related to Whiteleave or Rusal.

66. I do not find those contentions to be persuasive for the following reasons:

66.1. Whilst the clause does not expressly state at the outset that Crispian's triggering sale cannot be to Whiteleave or Rusal, it is at least an open question as to whether the ROFR to be granted to those parties can be so triggered, even if the ROFR is not a joint or single right. The subsequent reference to the Starting Price being an offer by a bona-fide third party purchaser supplies the answer to that question;

66.2. Indeed, in accepting that the phrase excludes purchasers related to Crispian from being third party purchasers, the defendants necessarily accept that it does have the effect of excluding certain purchasers from that category, regardless of its position in the clause. Once that is accepted, all that is necessary is to determine the meaning of "third party". For the reasons set out above, that expression can only sensibly be interpreted as referring to persons unconnected with the Framework Agreement (and certainly with the ROFR);

66.3. On close analysis it is also apparent that the Starting Price is not merely one of two options for the price at which Crispian may grant the ROFR, but is a necessary part of the mechanism. Thus the right of Crispian to sell if security is not provided in clause 2.5(5)(i) is "*at a price not less than the Starting Price*" and, by virtue of clause 2.5(5)(v), the sale under the ROFR will be at the Starting Price unless the Market Price is higher. The exact interrelationship of the Starting Price and Market Price is less than clear in the provisions, but it is sufficiently clear that both the Starting Price, and therefore also the bona fide third party purchaser, are key aspects of the ROFR and perfectly capable of playing a central role in defining the nature of the party to which Crispian may sell.

66.4. The defendants' argument is also difficult to reconcile with clause 2.5(6), which provides that Crispian shall have the right to sell some or all of its shares in NN if one of Whiteleave or Rusal has committed a specified significant breach, such sale being governed by the ROFR mechanism in clause 2.5(5), save that only the innocent Investor would be entitled to exercise the right in respect of all the shares being sold. The plain and obvious intention of that mechanism is that a significant default would not only permit Crispian to sell its stake, but would penalise the defaulting party by depriving it of the right to purchase the stake, enabling the innocent party to acquire it all. However, if the defendants' interpretation of the mechanism were correct, a defaulting party could avoid the intended consequence by itself making an offer to purchase Crispian's entire shareholding at a price the innocent party will not match. Indeed, a party could deliberately default during the Shares-Lock-up period so as to be entitled to make such an offer. That cannot be the intended effect of clause 2.5(6).

67. I therefore conclude that, as a matter of the wording of the ROFR, neither Whiteleave nor Rusal is permitted, directly or through an affiliate, to purchase shares from Crispian other than by exercise of the ROFR. Further, that right must be exercised by both Whiteleave and Rusal, if it is to be exercised at all.

68. Whilst it is not necessary to reach a conclusion on the point, I also accept Rusal's argument that the wording of the ROFR, on its face, provides that it will only be triggered by an executed but conditional contract of sale with a third party. The phrases "*If Crispian sells…*" and "*…the right of first refusal to buy out the shares being so disposed of*" both suggest an actual sale, not merely an offer or an intention to sell. This was, indeed, the approach taken by the defendants in relation to the Bonico SPA. Although that subsequent conduct by two of the parties to the Framework Agreement is not relevant to the interpretation of the ROFR, the procedure adopted demonstrates (if it was in doubt) that an executed conditional contract of sale is an entirely workable trigger for the ROFR mechanism.

(iv) The contextual analysis

69. The defendants contend that the commercial context of the Framework Agreement strongly militates against the provisional conclusion I have reached above on the basis of examination of the text alone. The broad thrust of their argument may be summarised as follows:

69.1. The Framework Agreement provides for Crispian, in common with the other Investors, to be "locked-in" as a shareholder of NN (to varying extents over the first 5 years), providing a period of stability in the management and control of NN;

69.2. The Framework Agreement provides for a significant change after 5 years. At the end of the Shares Lock-up Period, Whiteleave and Rusal can each instigate a process which will result in a buy-out of the other and Crispian is free to sell its entire shareholding, subject only to giving the other Investors the ROFR;

69.3. The obligation to grant the ROFR to Whiteleave and Rusal cannot be intended to restrict Crispian's ability to realise full commercial value for its shares (the ROFR being an obligation to offer them first to the other Investors for that commercial value). It was common ground that Crispian had invested in NN as a commercial investor and was looking to make a profit;

69.4. However, the parties most likely to be interested in purchasing Crispian's shares in NN, and at the highest price, would be Whiteleave and Rusal, both of them being, in effect, special purchasers. There would be few parties likely to be interested in purchasing Crispian's holding off-market (Metalloinvest, Suleyman Kerimov and Glencore were mentioned), not least because such purchasers would not necessarily have the protections of the Framework Agreement. Selling a significant block on the open market would be a difficult and slow process and would likely involve taking a discount on the market price: there was evidence that Metalloinvest had taken a 4.5% discount when selling a block of 1.8% of NN's shares;

69.5. It follows that a reading of the ROFR which excludes the possibility of Crispian selling to Whiteleave or Rusal (and thereby triggering the ROFR at the price agreed) would, effectively, lock Crispian in as a shareholder for a further 5 years (10 years in all) and/or deprive Crispian of the ability to obtain proper value for those shares in the meantime.

70. However, the above approach fails to recognise a crucial aspect of the ROFR mechanism. Clause 2.5(5) permits Crispian to sell all but a 2.5% stake in NN after only 2 years after inception of the Framework Agreement, subject only to the ROFR provisions. It follows that the ROFR mechanism could have been used by Crispian to sell a very significant block of NN shares (at least 3.37%) at a relatively early stage of the Framework Agreement, and for 3 years during the Shares Lock-up Period. The commercial rationale for the ROFR must be considered in that context also.

71. In that regard, it would in my judgment be surprising if, only two years after Whiteleave and Rusal had each sold a block of shares to Crispian at the market price (as part of a complex structure designed to broker and maintain peace between them), one of those parties could agree to buy out a significant proportion of Crispian's shares, taking at least a proportion of the shares sold by the other to Crispian if the other was not willing or able to match the price offered. Indeed, Whiteleave (for example) could offer to buy small blocks of shares from Crispian at increasing prices until it found the price that Rusal would not match, thereafter buying out all but 2.5% of the Crispian stake. Yet that is precisely the effect of interpretation for which the defendants contend.

72. In my judgment, the following aspects of the commercial context are far more persuasive indications as to the intended meaning and effect of clause 2.5(5):

72.1. The Framework Agreement provided for Mr Abramovich, through a corporate vehicle, to take on the role of an "honest broker" or peacemaker between Whiteleave and Rusal, ensuring a period of stability for NN (prima facie intended to be 10 years) during which it would be managed according to agreed decision-making procedures and would honour stated obligations in relation to the payment of dividends;

72.2. To that end Rusal and Interros each agreed to sell a block of NN shares to Crispian at the market price prevailing (and to transfer a further 7.5% stake to an escrow agent), all of which was to be voted by Crispian as Fiduciary according to the provisions in the Framework Agreement;

72.3. The shares sold to Crispian were in proportion to Whiteleave and Crispian's existing holdings, matched by the ROFR provisions which gave them the right to buy back in similar proportions in the event that Crispian subsequently sold those shares;

72.4. In that context it would be very surprising if Crispian were entitled to field offers from Whiteleave and Rusal, eliciting the highest offer for some or all of its stake and forcing the other Investor to match that offer or allow the portion of shares it had contributed to the arrangement to be sold to its rival. Such a potential outcome would encourage the breakdown of the arrangements effected by the Framework Agreement and would likely result in (i) one or both of Whiteleave and Rusal paying a high premium for shares they had sold to Crispian at market

price and/or (ii) one of Whiteleave and Rusal obtaining the portion of shares sold to Crispian by the other. Far from supporting stability and peaceful and balanced co-existence of the two main shareholders, the ability of Whiteleave and Rusal to attempt to buy-out Crispian would reward Crispian for seeking to sell to one of the other Investors at the expense of the third;

72.5. Again in that context, it makes commercial sense that, if Crispian wished to sell some or all of its shares, it would, in the first instance, seek to re-sell them to Whiteleave and Rusal on an agreed tripartite basis, no provision in the Framework Agreement being necessary in that regard. It further makes sense that, if such a sale could not be agreed, Crispian's contractual rights to sell would be to an outside party, but subject to giving Whiteleave and Rusal a (single/joint) right of first refusal in respect of the shares being sold. The (single/joint) right of refusal would ensure that Whiteleave and Rusal did not find themselves with a new significant investor without the right to re-acquire the shares instead, but also would ensure that the balance between them was maintained;

72.6. The fact that Crispian might find it difficult to find an outside party to purchase its shares at an attractive price is not, in my judgment, a good reason to reject the above analysis of the intended commercial arrangement. Crispian agreed to fulfil the role of Fiduciary for 10 years, acquiring shares in a company which is, it was common ground, remarkably profitable (the evidence being that it pays dividends of 10% each year) and which in the event (no doubt in part due to its own involvement as an independent investor) have increased significantly in value;

72.7. It is not surprising that, if Crispian wished to sell its stake in NN, it would have to find, in effect, a replacement independent investor, Whiteleave and Rusal having the right to prevent that occurring and take back their shares by exercising the ROFR. No doubt their decision as to whether to do so would depend on the identity of the third party and the role it would agree to play, as well of course as the price.

73. The defendants contended that it would be wrong, in considering the context of the ROFR, to put too much emphasis on either the continuance of the role of Mr Abramovich/Crispian in the Framework Agreement or the need to maintain the shareholding balance between Whiteleave and Rusal. In this regard, they stressed that the Framework Agreement:

73.1. provided for a replacement Fiduciary (Mr Yumashev) in the event that Crispian's stake reduced below 1%, and that Fiduciary would continue to vote the Escrow shares as per its provisions;

73.2. contained mechanisms for protecting the interests of all parties in relation to Reserved Matters and veto rights (clause 3.6), composition of the Board of Directors (clauses 3.1 and 3.2) and the payment of dividends (clause 2.2), including imposing draconian sanctions on parties acting in Material Breach (clauses 3.4(2) and 3.12), all of which would continue to apply regardless of any increase in the stake held by Whiteleave or Rusal;

73.3. in any event permitted (by clause 3.11) the Investors to acquire further NN shares, subject only to a notification requirement.

74. Whilst the above factors would undoubtedly mitigate to some extent the unfortunate consequences of the defendants' interpretation of the ROFR, they do not, in my judgment, meet the fundamental objection that the mechanism cannot sensibly have been intended to allow Crispian (only two years into the arrangement) to sell to one of Whiteleave or Rusal, forcing the other to match the price (if it is able to do so) or allow the entire share block to be acquired by its rival. Whilst that last outcome might be mitigated for the remainder of the term of the Framework Agreement, at the end of that term the imbalance created would remain. Further, the loss of Crispian as an independent investor and the Fiduciary (after 5 years), at the same time as competition resumed between Whiteleave and Rusal, would undoubtedly cause instability and uncertainty for NN, contrary to the express purposes of the Framework Agreement.

(v) Conclusion

75. It follows that both an analysis of the wording of clause 2.5(5) and consideration of its commercial context lead to the same conclusion as to the proper interpretation of that clause, namely, that neither Whiteleave nor Rusal (directly or through an affiliate) are permitted to purchase shares from Crispian other than by exercise of the ROFR. Further, that right must be exercised by both Whiteleave and Rusal, if it is to be exercised at all.

76. I also consider that the commercial context set out above, recognising that the ROFR is designed to give Whiteleave and Rusal a right to buy-back rather than find themselves with a replacement independent investor, gives further support to an interpretation of the ROFR which requires an executed conditional contract to trigger its operation.

The contents of the Contested Notice

77. If, contrary to my finding above, an offer from an affiliate of Whiteleave can, in principle, constitute an offer from a bona-fide third party purchaser for the purposes of the ROFR mechanism, two further issues arise as to the contractual validity of the notice.

78. The issues are of limited relevance, not only given my finding above, but also because an error in the form or content of the Contested Notice (if the ROFR notice had otherwise been triggered validly) could be corrected by service of a fresh notice. I therefore propose to deal with them relatively briefly.

(i) The right purportedly granted

79. The first issue concerns the nature of the right granted to Whiteleave and Rusal. Pursuant to clause 2.5(5) of the Framework Agreement, Crispian was required to grant Whiteleave and Rusal the right to buy out the shares being sold "*pro rata to their shareholdings*". However, the Contested Notice granted the right "*to acquire all (but not some only)*" of the offered shares, on the basis that if the right was exercised, the party exercising the right would be obliged to purchase the entire block if the other party did not also exercise its ROFR right.

80. Even leaving aside the question of whether the ROFR has to be exercised by both Whiteleave and Rusal, it is plain that the "right" purportedly granted was fundamentally different from that stipulated by clause 2.5(5). Rather than being granted the unconditional right to purchase its *pro rata* share, each grantee could only exercise the right offered by entering into a contract obliging it to purchase the full stake if the other

did not exercise its equivalent right. Given that the price of the full 3.99% stake was in the region of US$1.4 billion, the difference was potentially very substantial and might well affect an assessment of whether the right offered could be accepted at all.

81. The defendants did not accept that granting a right in the above terms would render the Contested Notice ineffective, arguing that clause 2.5(5) did not expressly exclude the ROFR right being so framed. However, in closing submissions Crispian did not further advance that argument and Whiteleave stated that the point would not be "pushed hard". It is in any event, in my judgment, without any merit. The right purportedly granted by the Contested Notice did not constitute or encompass the right required to be granted by clause 2.5(5), and so did not fulfil Crispian's contractual obligation. It is nonsense to suggest that non-performance of a contract is permitted because it is not expressly excluded.

82. The defendants' alternative argument was that, read as whole and properly interpreted, the Contested Notice did validly and effectively grant the right required by clause 2.5(5). They argued that, even if the description of the right being granted and the terms of the attached SPA were inconsistent with that clause, the grant should be read as matching that required because it was expressed as being "*In accordance with clause 2.5(5)…*" and further provided, in paragraph 9, that:

> "*All terms and conditions which are specifically provided for in the NN Agreement with respect to the ROFR shall continue to apply and remain enforceable by us and each Investor (in each case, unless expressly waived).*"

83. In this regard the defendants referred to *Lancecrest v Asiwaju* [2005] EWCA Civ 117, [2005] L&TR 22, in which Neuberger LJ, at paragraph 40, stated that:

> "*The question whether a particular document is a valid notice must, of course, depend on the contractual provisions under which it is said to have been served, and the precise terms of the document and the matrix of facts in which it is received….*"

84. Further, in *Rennie v Westbury Homes (Holdings) Limited* [2007] EWCA Civ 1401 Dyson LJ stated:

> "*17. The correct approach to the validity of a contractual notice is not now in doubt. It is that the notice should be in terms that are sufficiently clear to bring home to the reasonable recipient that the person giving the notice is exercising the relevant contractual right…*
>
> *18. It is clear that the notice must clearly and unambiguously convey a decision to exercise the contractual right. In Mannai, the third of Lord Steyn's five propositions was in these terms:*
>
> > *"It is important not to lose sight of the purpose of the notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right*

> *reserved. That purpose must be relevant to the construction and validity of the notice. Prima facie one would expect that if a notice unambiguously conveys a decision to determine a court may nowadays ignore immaterial errors which would not have misled a reasonable recipient."*

Part of Lord Steyn's fourth proposition reads as follows:

> *"Even if such notices under contractual rights reserved contain errors they may be valid if they are "sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate" ... That test postulates that the reasonable recipient is left in no doubt that the right reserved is being exercised. It acknowledges the importance of such notices. The application of that test is principled and cannot cause any injustice to a recipient of the notice..."* "

85. The defendants submitted that, in serving the Contested Notice, Crispian clearly and unambiguously conveyed its intention to grant the right stipulated in clause 2.5(5), according to its terms, and stated the essential additional elements of the offer: the number of shares in question and the price. They argued that Rusal could have been in no doubt as to the right being granted and the terms of that grant. The defendants further submitted that Rusal could have amended the attached draft SPA before executing it and would, in any event, not have been obliged to purchase more than its *pro rata* share.

86. However, the Contested Notice was not merely a contractual notice, giving rise to a readily ascertainable consequence, but was an offer to enter a binding contract on the terms of an attached draft, made in parallel with a corresponding offer to another party. In my judgment it cannot be said that Rusal was left in no reasonable doubt as to the nature and effect of the offer. The express terms of Crispian's offer clearly required Rusal to accept (or refuse) an obligation to purchase the full sale block, an obligation which cannot be reconciled with clause 2.5(5). Even if that inconsistency could be ignored, there remained huge uncertainty as to the contractual consequences which would result if Rusal did or did not execute the SPA, on its face an independently binding contract, exacerbated by uncertainty as to the position if Whiteleave did or did not execute the corresponding SPA. There was scope for doubt as to whether the ROFR would be lost if the SPA was not executed and scope for further uncertainty as to whether execution of the SPA would constitute a waiver of the true ROFR or otherwise be enforceable as a separate agreement to purchase the full block. In summary, the Contested Notice was far from clear as to what was being granted and its terms were, at best, ambiguous. In my judgment, for this reason also, it was not a valid notice under clause 2.5(5).

87. The defendants also suggested that the challenge to the validity of the Contested Notice on this ground lacked merit and was overly technical as, they said, it was plain that Whiteleave would exercise the ROFR and, indeed, Whiteleave did so the day before Rusal took the same step, removing any risk or concern about having to purchase the entire share block. However, the validity of the notice must be considered at the time it is issued: it cannot become valid because of the subsequent action of Whiteleave, the day

before the ROFR would have to be exercised, if validly granted. At the time it was issued there may have been a clear expectation on the part of all parties that Whiteleave would exercise its ROFR, but there was no certainty of that. Such an expectation cannot affect the (invalid) nature of the right granted nor the (inappropriate) obligation required to be undertaken.

(ii) The date for completion

88. The second issue concerns the Completion Date specified in the draft SPA attached to the Contested Notice, providing for completion of the sale 60 days after service of the notice.

89. The inclusion of that provision is difficult to understand on any basis as:

89.1. Clause 2.5(5) provided that the completion period would be 6 months where the sale block was greater than or equal to 2% but less than 4%;

89.2. The Contested Notice required both Whiteleave and Rusal to agree to purchase the full sale block of 3.99%, for which completion would undoubtedly be 6 months;

89.3. Even Whiteleave's *pro rata* share was greater than 2%, for which completion would therefore be 6 months;

89.4. Even if the correct period was two months, that would have been 59 rather than 60 days.

90. In any event, for reasons set out above, I am satisfied that the "share block" in question was the whole block being sold by Crispian, not merely the *pro rata* share to be purchased by Rusal. It follows that Rusal was entitled to 6 months in which to complete.

91. The defendants again argued that any inconsistency between the specified completion period and that provided for in clause 2.5(5) did not affect the validity of the Contested Notice as it was plain that the Contested Notice was invoking the provisions of clause 2.5(5) and that such provisions would prevail in the event of any inconsistency.

92. Whilst the position is less clear in the case of this inconsistency, the fact remains that the Contested Notice granted a right to acquire shares only by executing an SPA which did not reflect the terms of clause 2.5(5), again in an important (if not crucial) respect, namely, the period in which Rusal would have to raise and pay a very substantial sum. The inclusion of the incorrect completion period gave rise, in my judgment, to similar ambiguities and uncertainties as discussed above, including (i) the effect of refusing to execute the SPA due to the error and (ii) the effect of executing the SPA with the error uncorrected. For this reason also I find that the Contested Notice was invalid.

Whether the price offered was "bona-fide"

93. If, contrary to my finding above, an offer from an affiliate of Whiteleave could, in principle, constitute an offer from a bona-fide third party purchaser for the purposes of the ROFR mechanism, the further issue arises as to whether Bonico was, on the facts of this case, such a purchaser.

(i) The applicable test

94. It was common ground that the question is whether the price agreed between Crispian and Bonico was an arm's length price for the shares alone, or whether there was some other agreement or understanding between Crispian and Whiteleave which affected the price being offered. Rusal agreed with the following formulation put forward in closing argument by Mr Jowell QC on behalf of Crispian:

> "*…the offer must be one that comes from a party that is at arm's length to Crispian, and in particular it must be a genuine offer for the shares, a price that the offeror is willing to pay for the shares and for the shares alone.*"

95. Rusal sought to add that, in order to be "bona fide", the purchase must be without collusion and not be part of a scheme to avoid the provisions of the Framework Agreement, but in my judgment those aspects are already encompassed within the requirements that the offer be at arm's length and for the shares and the shares alone.

(ii) Rusal's pleaded case

96. Rusal's pleaded case is that the Bonico offer was at an artificially inflated price, inferring that fact from (i) the amount by which the price represented a premium above the prevailing market price and (ii) the indication Mr Potanin is alleged by Rusal to have given at a meeting on 1 February 2018 of his intention to acquire Crispian's shareholding in NN by a scheme which involved offering an inflated price for a 3% stake, counterbalanced by the purchase of the remainder at a lower price.

97. In the event Rusal did not seriously pursue the contention that the price in itself indicated that the offer was artificially inflated, calling no expert evidence as to market levels or valuations. Such an argument would have been particularly difficult given that, when Rusal considered whether to exercise the ROFR itself, the relevant board minutes record the view that the premium requested by Crispian was "*acceptable given the volume of the stake*".

98. Instead Rusal focused in evidence and argument on the existence of a scheme or agreement between Whiteleave and Crispian whereby the price offered by Bonico was inflated by other extraneous considerations.

(iii) The witnesses

99. I heard evidence from five witnesses on this issue:

99.1. Rusal called Mr Deripaska and Mr Sokov. Mr Sokov is a member of Rusal's Board and, since 2008, has overseen Rusal's cooperation with the management and shareholders of NN, being an appointee of Rusal on NN's Board of Directors. On 15 March 2018 he was appointed President of the EN+ Group, before which he was its Chief Executive Officer.

99.2. Whiteleave called Mr Potanin and Mr Bashkirov. Since 2013 Mr Bashkirov has been the Deputy CEO for Investments and a member of the management board of Interros and also a member of NN's Board;

99.3. Crispian called Mr Davidovich, the Deputy General Manager of Millhouse.

100. Crispian did not call or adduce evidence in writing from either Mr Abramovich or Mr Abramov. On 15 May 2018 Mr Davidovich explained that Mr Abamrovich was in Switzerland, preparing to give evidence in long-running proceedings in that jurisdiction on 17 or 18 May. It was not suggested that Mr Abramov was unable to attend to give evidence, but Mr Davidovich expressed the opinion that Mr Abramov's evidence would not be relevant as, although he was a "50-50" partner with Mr Abramovich, the latter was leading the project and, in reality, taking all the decisions.

(iv) The discussions and negotiations leading to the Bonico offer

101. Mr Potanin stated that Mr Abramovich first raised with him the possibility of exiting NN when they met in June 2017. Mr Abramovich expressed concern that Mr Potanin had not met Mr Deripaska for over a year and was worried another battle was brewing. Mr Abramovich asked whether he should "leave" NN or whether Mr Potanin wanted him to stay. Mr Potanin recounts saying that he wanted Mr Abramovich (through Crispian) to remain as a shareholder and that Mr Potanin would attempt to resolve problems with Mr Deripaska. Mr Potanin therefore contacted Mr Deripaska and eventually arranged to meet him on 29 July 2017.

102. On 29 July 2017 Mr Deripaska and Mr Potanin met in the South of France. During that meeting possible amendments to the Framework Agreement were discussed, including the removal of the shoot-out provision. Mr Potanin's evidence was that he informed Mr Deripaska of his desire to acquire more shares in NN, but this was denied by Mr Deripaska. Mr Deripaska stated that he indicated that Rusal had no intention of seeking control over NN, provided Whiteleave complied with the terms of the Agreement.

103. The meeting of 29 July 2017 was followed by an email dated 11 August 2017 from Mr Sokov to Ms Zakharova (a nominee of Whiteleave on the NN board), attaching a document setting out ten possible amendments to the Framework Agreement. Further email exchanges continued between them until the end of 2017.

104. In the course of October and November 2017 Mr Potanin and Mr Bashkirov had discussions with representatives of Crispian, exploring the possible terms on which it might exit from NN. In November and December 2017 Mr Potanin met Mr Abramov on a number of occasions. There were also some discussions between representatives of Mr Abramov and Mr Abramovich on the one hand and Mr Potanin on the other. There is a lack of contemporaneous evidence (or indeed witness evidence) as to what was discussed, save for an exchange of emails between 19 and 22 December 2017 between Mr Bashkirov and Mr Bratukhin (of Invest AG, a company associated with Mr Abramov), sent after a meeting between them. In his email of 19 December 2017 Mr Bashkirov referred to the fact that, applying Crispian's "proposed approach" of a 20% premium (the figure in the shoot-out provision in the Framework Agreement), the cost of Crispian's 6.3% portfolio "*at the time of the last conversation between our principals*" (12 December 2017) was $1.934m, or $19.46 per ADR.

105. Meanwhile, on 1 December 2017, Mr Potanin had met Mr Sokov at Interros' office in Moscow. Mr Sokov set out his account of what was discussed in an email to Mr Deripaska, although Mr Potanin disputes its accuracy in some limited respects. The email states:

> "*I met with VOP yesterday - the meeting lasted for more than two hours. Generally, he was very positive. He asked me to discuss this only with you — that is why I am writing to you only.*
>
> *He said with a smile that he saw two options — live together or not live together. And that we need to make up our mind. Therefore, he wants a one-on-one meeting with you, preferably as soon as possible, and proposes to discuss two options:*
>
> *1. If not together — instead of throwing shoot out notices at each other and discussing this through the press, he proposes to discuss who will buy out and for how much. To my direct question whether he is prepared to sell he said yes and that this was a matter of price. But objectively he sees us as sellers, thinking that we will not be able to collect enough money.*
>
> *2. If together — he proposes to make a new agreement (its principles are described for the two parties, but RAA may join with his stake):*
>
> *−the agreement concerns 25+1 share from each party (+undertaking that no shares in excess of those can vote)*
>
> *−term of 10 years*
>
> *−we sell to him 2.8% in excess of our 25+1% share NN at shoot out price (or, if we don't want to sell all at once, we can execute some instrument for 3 years, either collar or forward)*
>
> *−we share all economic effect 50/50, including GD fund (this is 80mn a year)*
>
> *−dividends of $10bn for 5 years - $2bn each year, but the absolute floor is $1.5bn (but if during the next year it cannot top up the dividends of the last year to $2bn, interest will accrue on the delta, increasing the entire amount to $10bn)*
>
> *−the only veto rights left are transactions with related parties*
>
> *−if the dividend obligation is not complied with, an extended veto list "kicks in" (according to him, "in this case you can halt any investment project")*
>
> *−as an option, we can set up an SPV in which we will contribute 25% each + RAA will contribute his share - this will allow us to save on the dividend tax (but he does not insist on that)*"

106. A short passage has then been redacted. After that Mr Sokov went on to state:

> "*He was telling abstractly that he just started "hanging up the paintings" and that he shouldn't be undervalued. He is ready to spend money on infrastructure and social development in*

> *Norilsk if we fail to agree and keep nd/ebitda above 2.2 at all times to pay minimum dividends.*
>
> *But on the whole, he looked as if he wanted to come to agreement. He needs our 2.8% so that the gap between his stake and our stake is sufficient for him to feel comfortable that he preserves control (I think he just wants his stake to be higher than ours + RAA).*
>
> *He wants to meet you one-on-one since these matte[r]s do not affect RAA. Moreover, he thinks that RAA has a conflict of interests in this case as his major issue is to sell Baimskaya. VOP himself does not want to buy Baimskaya very much. And he says straightforwardly that if Baimskaya is bought, dividends for this separate stream would have to be reduced as the source is one and the same. And he understands that we will oppose in this case.*
>
> *I think it would be right for you to meet him. In the proposed structure it is possible to find solutions that are interesting to us (for example, to make Matias NN Board Chairman right away).*
>
> *Ready to discuss.*"

107. The Baimskoye Deposits are very large deposits of high-grade copper and gold in the far north of Russia, in which Mr Abramovich has an interest. The deposits are close to the surface, and so are relatively easy to mine, but are located in a remote region with limited infrastructure, so that the mining operation would require very significant capital expenditure (the figure given in evidence was some US$4 billion). Mr Potanin maintains that, contrary to the impression given in Mr Sokov's email, he was positive about investing in the project, but only with Rusal's support. He knew that Mr Deripaska does not share his enthusiasm for the investment.

108. On 12 December 2017 Mr Potanin and Mr Deripaska met at Mr Potanin's residence in Luzhki. The respective accounts of the meeting differ in significant respects, but there is agreement that no basis was found for working together as co-shareholders. It seems, from Mr Bashkirov's email of 19 December 2017 referred to above, that Mr Potanin also had a discussion with Mr Abramovich and/or Mr Abramov on 12 December 2017 about the terms on which Crispian would sell its stake to Whiteleave.

109. It is clear, however, that Mr Potanin met Mr Abramovich on 19 January 2018. Mr Potanin recounts that he told Mr Abramovich that it was not possible to resolve his differences with Mr Deripaska, and then expressed an interest in purchasing shares from Crispian. Mr Abramovich requesting some time to come to a decision. It seems that a few days later Mr Abramovich telephoned Mr Potanin to inform him that Crispian was ready to sell down its stake, to request an offer and to say that Mr Davidovich would be negotiating on Crispian's behalf. The evidence of both Mr Potanin and Mr Bashkirov was that Whiteleave and Crispian agreed that the closing market price of NN's shares on 19 January 2018, US$202.30 per share, would be used as the base for calculations of the price. Mr Potanin further stated that, although Mr Abramovich had not indicated the

number of shares Crispian would sell, his "*impression was that [Mr Abramovich] was prepared to sell Crispian's full stake*."

110. Mr Davidovich stated his belief that Mr Abramovich reached a decision to sell (in principle) shortly before 24 January 2018, as Mr Davidovich met Mr Potanin that day to negotiate the terms of the sale. Further meetings between the two of them took place at Mr Potanin's residence on 25, 30 and 31 January 2018 to agree the terms of a sale. Mr Potanin and Mr Davidovich both gave evidence that the latter indicated that Crispian was looking to sell for a premium of US$200m above the base price of US$202.30 per share, although Mr Davidovich stated that this was initially on the basis of a sale of a 3% stake, equating to approximately 20%.

111. On 28 January 2018, representatives of Whiteleave (Mr Potanin, Ms Zakharova and Mr Bashkirov), Rusal (Mr Deripaska and Mr Sokov) and Crispian (Mr Abramovich, Mr Abramov, Mr Davidovich and Mr Bratukhin) met at Mr Abramovich's residence in Skolkovo. There was an initial meeting between Mr Abramovich, Mr Potanin and Mr Deripaska. Although the numerous accounts differ to some degree, it seems that Mr Abramovich explained at this initial meeting that he intended to exit from NN. Then Mr Deripaska and Mr Potanin had a separate discussion. The evidence is that there was some discussion of the Baimskoye Deposits and of a potential project with Russian Platinum. Mr Potanin then discussed Mr Abramovich's willingness to sell Crispian's stake and asked Mr Deripaska whether Rusal would waive its ROFR in exchange for amendments to the Framework Agreement. Mr Deripaska's evidence is that this was the first he had heard of a specific suggestion that Crispian was looking to sell its shares. In any event, it was agreed that there would be a further meeting.

112. On 31 January 2018 Mr Zakharova, on behalf of Whiteleave, sent a USB flash drive to Mr Glushchenko of Crispian, containing a draft "Term Sheet", described as a summary of the principal terms and conditions of a potential transaction for the sale of (i) Crispian's stake in NN and (ii) 100% of the shares of Aristus Holdings Ltd (Cyprus) ("Aristus"), a company indirectly holding the rights to explore and extract the Baimskoye Deposits.

113. The Term Sheet proposed:

    113.1. that Crispian would sell 9,969,465 shares in NN (that is, Crispian's entire holding, the number being in square brackets) in accordance with the terms of the Framework Agreement for a price of "*at least US$ 2,023,801.395*", equating to US$203 per share;

    113.2. that NN would purchase 50% plus one share of the voting shares in Aristus for US$80 million, presumably from Crispian. The significance of US$80 million is that this was the maximum size of transaction that Mr Potanin was permitted to authorise under the Framework Agreement without engaging Rusal's veto rights;

    113.3. that NN was to be granted an option to purchase the remainder of the voting shares of Aristus after two years for a further US$482.5 million (subject to governmental and corporate approvals). If NN did not exercise the option due to a lack of corporate approval, Whiteleave would acquire those shares. If governmental approval was not forthcoming, neither NN nor Whiteleave was obliged to proceed;

113.4. that non-voting shares were to be subject to a put and call option between Crispian and Whiteleave and were to be transferred for US$187.5 million.

114. Mr Davidovich gave evidence that he did not see the above Term Sheet, but was told about it by Mr Glushchenko and was unhappy that it combined offers in respect of the two transactions, recognising a potential conflict of interests. Mr Davidovich stated that he called Ms Zakharova and asked that the matters be kept separate. On 1 February 2018, a revised version was delivered to Crispian by USB flash drive, excluding any reference to Crispian's NN shares.

115. On 1 February 2018 Mr Deripaska and Mr Potanin met at Mr Potanin's residence in Luzhki. Also present were Ms Zakharova and Mr Bashkirov (for Whiteleave) and Mr Sokov and Mr Afanasiev (for Rusal). There was an initial meeting between Mr Deripaska and Mr Potanin alone at around 5:30 pm. Mr Potanin's evidence was that he immediately informed Mr Deripaska that he would be making an offer for Crispian's shares imminently as the "closed" period was about to commence (on 3 February 2018) in the lead up to the publication of NN's annual financial results, during which he (as General Director of NN) would not be permitted to make an offer for NN shares.

116. Mr Deripaska and Mr Afanasiev subsequently left the meeting as Mr Deripaska had to attend to a personal matter, but they agreed to return later. Mr Sokov remained and engaged in conversation with Mr Potanin. Mr Sokov described the conversation in his witness statement as follows:

> "*60. While Mr Deripaska and Mr Afanasiev had been away from the meeting, I had been given the clear impression by Mr Potanin that, if Mr Deripaska did not agree to his acquisition of the Crispian shares, he would still take steps to acquire the shares (and procure that Norilsk Nickel acquired the Baimskoye copper ore deposits). He had not told me explicitly what he intended. Instead, he had initiated a supposedly hypothetical conversation with me (he said something along the lines of, "Let's play a game") about ways in which he might be able to get around restrictions in the Framework Agreement."*
>
> *61. Mr Potanin had discussed the possibility that he could cause an offer to be made for 3% of Crispian's core shareholding at an above-market price, so as to trigger the right of first refusal procedure (and at which uplifted price Whiteleave would buy the 3% block) and he suggested that, once the 3% block had been disposed of, it would then be open to CrispIan to sell the remaining 2.3% of its shares to another party at a lower price and Crispian would then also have no restrictions on selling the remaining 1% (if it falls below 1%) of its shares outside the Framework Agreement.*
>
> *62. Mr Potanin had not said explicitly that he planned to buy the right of first refusal shares at an inflated price, and then be compensated by Crispian with a reduced price for the remaining shares (or otherwise). Instead, he discussed matters with me by means of hypotheticals, asking me "You're a smart guy, what*

> *would you do if you were me?" and making physical gestures and facial expressions to indicate when I had guessed right. It was very clear that this was his way of indicating that, if Rusal did not agree to "step away" and let the share sale take place, he would try to go ahead anyway by offering an inflated purchase price for the shares subject to the right of first refusal, and then later acquire the remaining shares at a lower price through an arrangement with Crispian. At one point he also said something like "I can buy a larger number at a smaller price or a smaller number at a higher price" (which I understood to be a coded reference to him buying a 3% block at the higher price - to keep us out of the process).*"

117. Mr Potanin, when cross-examined, did not deny that he engaged in this discussion nor, indeed, that he was drawing out responses from Mr Sokov as Mr Sokov suggests. Mr Potanin's explanation was that he was joking and/or expressing some amused surprise that Mr Sokov was suggesting such a course of action. He denied that Mr Sokov had correctly read his body language, stating that Mr Sokov's interpretation was "*a wild guess*".

118. Mr Sokov was sufficiently concerned by the exchange, however, to send messages to Mr Deripaska and his associates through the WickrMe system. The text of the messages is available because, although the system automatically deletes messages after a short period, screenshots of the messages were preserved. Mr Sokov's first two messages stated:

> "*Tomorrow he wants to sign with RAA* [Mr Abramovich] *to purchase his packet. The deal will be structured with 2.3% to a third party (without ROFR, probably will be back to back), 3% - they will send us ROFR for our proportion; RAA will fall below 1% - the agreement will terminate with respect to Crispian and after that they will purchase the remaining 1%. Clearly, the price for the 3% will be inflated. And low balled for the rest of the packets so as to counterbalance the "inflated" price for the 3% for which they want to give us ROFR*".

> "*He is prepared to do Baimka via the purchase of a small stake for $80 million – through the GD reserve, but consolidating it via an agreement where NN will have control. Then he will finish buying Baimka – after the sale RAA will be a third party and he will finish buying for $200 million in 3-6 months.*"

119. Mr Soloviev, an officer of Rusal, responded by asking whether Mr Abramovich had agreed to such a scheme. Mr Sokov replied "*Apparently RAA agreed to do it in exchange for Baimka*". Mr Deripaska then stated "*We are documenting everything for the files!!!*" and Mr Afanasiev followed up with:

> "*Maksim, OVD* [Mr Deripaska] *has a request: when OVD and I get there, make sure that the colleagues themselves (and not you) repeat in detail everything that you have written down from their words. Under the pretext of explaining the urgency.*"

120. It is common ground that, when Mr Deripaska and Mr Afanasiev returned to the meeting at about 11.30pm, the latter challenged Mr Potanin and asked him to confirm, on the record, what Mr Sokov had communicated to Mr Deripaska. The evidence from all the witnesses present is that Mr Potanin stated words to the effect that the "scheme" had been articulated by Mr Sokov and not by Mr Potanin. Mr Potanin went further in his witness statement, asserting that he said expressly that there was no such plan.

121. The discussions then carried on into the early hours of 2 February 2018, finishing between 3 and 4 am. Mr Potanin sought to agree terms upon which Rusal would waive its ROFR. The matters discussed were recorded by Mr Afanasiev in a further message of 2 February 2018. It appears from that message that Rusal sought an unconditional put option at a favourable price, a floor on dividends, increased reserved matters and greater control over capital expenditure. No agreement was reached.

122. The Bonico Offer was made later the same day. Mr Potanin stated in his witness statement that he decided to make an offer for a 4% stake at a price which provided a US$200m premium, explaining as follows:

> "*A US$200 million premium was where I thought we could get Crispian to agree. A lower premium would probably not entice Crispian and Mr Abramovich. I decided not to reduce that premium even though I was not offering it for Crispian's entire stake. Similarly, I did not look at the price on a per share basis. My focus was really on the premium for the block of shares being purchased, mainly because I thought that was how Mr Abramovich would assess the merits of the offer and that was in line with the previous discussions with Crispian.*"

123. It was put to Mr Potanin that he thought that US$200m was the premium Crispian required for the whole of its stake in NN. Mr Potanin replied as follows:

> "*Yes, I thought that maybe Abramovich could accept this kind of premium for the whole stock. But when I realised that I raised only $1 .5 billion to acquire the stake, I decided that if I will try to reduce the premium proportionately, let's say, to the acquired stake, maybe Abramovich will not be interested, because he has in his mind $200 million. That's why I decided to leave the offer with the same premium, which, for Davidovich, as he mentioned, means the decrease in premium, in the price. But for me, if I was thinking about the whole stake, it means, on the contrary, I increase the premium."*

124. On 2 February 2018 Crispian sent Whiteleave a draft of the Bonico offer, inserting a number of shares to be sold that equated to a 3% stake and a price of US$244.42, resulting in a premium of US$200m, but stating that this did not take into account recent discussion as to the shareholding size. It seems that Mr Potanin had offered to purchase a stake of 4.15% (at a price which provided a premium of US$200m), being the most he could purchase given the finance he had raised, but (as Mr Davidovich explained when cross-examined) Crispian wished to limit the sale block to 3.99% so as to keep it below the threshold of 4% at which, pursuant to clause 2.5(5) of the Framework Agreement, a purchaser under the ROFR would have a year to complete the purchase.

125. Mr Potanin agreed to the offer being reduced to 3.99%, resulting in a price of US$234 per share so as to maintain the premium at US$200m. The Bonico Offer was made accordingly.

(v) Rusal's case in closing argument

126. Rusal submitted that the evidence demonstrated that a scheme was devised between Mr Abramovich (or Mr Davidovich on his behalf) and Mr Potanin, consisting of three parts (although Rusal submitted that only the first two parts are necessary to Rusal's case):

126.1. First, a sale of a portion of Crispian's shares to exhaust the threshold (set out in clause 2.5(9)(i)) above which shares had to be sold through the ROFR procedure in clause 2.5(5). The US$200m premium for the sale of Crispian's entire stake was loaded into this first part.

126.2. Second, the remainder of Crispian's stake was to be sold to entities under the control of Mr Potanin without any premium and without a ROFR having been offered to Rusal, pursuant initially to clause 2.5(9)(i) (either in the incorrect belief that a direct sale could be made under that clause or by a back-to-back arrangement with a purported third party) and then, upon Crispian's shareholding falling below 1%, pursuant clause 2.5(7).

126.3. Third, there was an agreement or understanding that Mr Potanin would effect a purchase of Mr Abramovich's interest in the Baimskoye Deposits for US$750 million.

(vi) The defendants' objections

127. Lord Goldsmith QC, for Whiteleave, argued that it was not open to Rusal to advance the alleged scheme because it had not been sufficiently pleaded and was not put to the defendants' witnesses.

128. In this regard I was referred to the following passage from the speech of Lord Hobhouse of Woodborough in *Three Rivers DC v Bank of England* [2003] 2 AC 1 at [161]:

> "*… The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading and then at the trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden – the balance of probabilities – but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out….*"

129. In *Haringey v Hines* [2010] EWCA Civ 1111 Rimer LJ stated the following at [39]:

> "*Haringey's omission so to put its deceit case to Ms Hines in cross-examination was in my judgment a serious omission. It is a basic principle of fairness that if a party is being accused of fraud, and is then called as a witness, the particular fraud alleged should be put specifically to that party so that he/she may answer it. That was never done in this case…*"

130. Rimer LJ further expressly approved the decision of Lewison J in *Abbey Forwarding Ltd (in liquidation) v Hone and others* [2010] EWHC 2029 (Ch), which in turn cited and agreed with the following passage from the decision of Briggs J in *Dempster v HMRC* [2008] STC 2079, considering an allegation that certain alleged transactions were a dishonest sham:

> "*… Secondly, it is a cardinal principle of litigation that if serious allegations, in particular allegations of dishonesty are to be made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross-examination. In my judgment the tribunal's conclusion that it was constrained, notwithstanding suspicion, from making the necessary findings of knowledge against Mr Dempster (necessary that is to permit the consequences of the alleged sham to be visited upon him) was nothing more nor less than a correct and conventional application of that cardinal principle.*"

131. The above propositions are uncontroversial, but I doubt that they are applicable in the present proceedings. Whilst Rusal's case is that Bonico was not a bona-fide third party purchaser, its cause of action is in contract, not fraud, and the allegation is that the Bonico Offer was related to other transactions, not that any party necessarily acted in bad faith or dishonestly. There is no allegation that the defendants deceived Rusal, nor that any arrangements they made were a sham. It is certainly not necessary for Rusal to establish a subjectively dishonest mind on the part of any witness, and it has made no such allegation.

132. In that context, and in any event, I am satisfied that Rusal's case has been sufficiently pleaded. As it was not a party to any agreement or understanding between Whiteleave and Crispian, the most Rusal could do was to set out the grounds on which it inferred that the Bonico Offer was not at arm's length. In my judgment Rusal gave the defendants ample notice of the case which was being advanced in its letter before action, pleadings and witness statements, albeit that that case inevitably evolved in the light of the defendants' evidence. It must be borne in mind that the trial was expedited, so that the process of pleadings and evidence was seriously compressed.

133. I am also satisfied that Rusal's case was put clearly and fairly to the relevant witnesses. Lord Goldsmith complained that Mr Davidovich, in particular, had not been challenged in relation to his explanation that he had asked for a premium of US$200m for 3% and had ultimately compromised by agreeing to accept that same premium for 3.99%. However, in cross-examining Mr Davidovich, Mr Pymont QC, for Rusal, asked, among many others, the following questions:

> "*You explained in your evidence the 200 million premium that you were going to charge. My suggestion to you is that that was a premium that you are going to charge for Mr Potanin buying the whole of Crispian's stake in Norilsk. Is that right?*"
>
> and
>
> "*What Mr Potanin was offering, though, was a linked deal with you, to ensure that the Baimskaya project was also taken off your hands on suitable terms at the same time as, I would suggest, completing a deal for the rest of the shares; is that right?*"
>
> and
>
> "*You see, I suggest…that he had paid you an extremely high price, including a 20 per cent premium above the market rate, which itself was an attractive market rate to you, and that the true expectation and the true understanding between you was that, first, he would be prepared to pick up the remaining 2.3 per cent shares and, secondly, he would expect to do that cheaply, because he'd been so generous with the 200 million in the first tranche.*"

134. In cross-examination, Mr Potanin explained that he agreed to pay the same US$200m for 3.99% of NN's shares as he had thought Mr Abramovich would want for the whole of Crispian's stake of 6.37%. Mr Pymont put to him the following:

> "*I'm suggesting to you that the reason you were comfortable to do that was that you had an arrangement with Crispian that you would pick up the rest of their shareholding at a price which would recognise you'd already paid all the premium attributable to the total shareholding in the first transaction.* "
>
> and
>
> "*My suggestion is that both of you well understood that the real purpose of this arrangement was to effect the first tranche of a transaction, under which you were to purchase the remaining 2.3% of Crispian's shares*"

(vii) Findings and conclusion

135. Given that I heard accounts of numerous meetings, sometimes from several of the persons present, it is not surprising that there were many inconsistencies and areas of dispute, some of which I have identified in the account above. Most of the disagreements do not need to be resolved in order to decide the key issue of fact, namely, what (if anything) was agreed or understood between Whiteleave and Crispian above and beyond the Bonico Offer at the time that offer was made. I turn directly to consider that central issue, emphasising that I have given careful consideration to all the written and oral evidence in forming my view of the witnesses and the events they describe.

136. It was plain to me from Mr Potanin's oral evidence that he was willing to pay a premium of US$200 million above market price for the proposed purchase of shares from Crispian, no matter the size of the stake in question. It seems he made no attempt to adjust that premium by any amount to reflect any change in the proposed number of shares being purchased. The fact that a fixed premium had been agreed, regardless of the size of the stake, is most apparent from the events of 2 February 2018, when a last-minute reduction from 4.15% to 3.99% was accommodated by the price being adjusted upwards so as to keep the premium at the apparently inviolable figure of US$200 million.

137. However, as Mr Potanin accepted, the difference between purchasing 6.37% with that premium and 3.99% with the same premium was huge and, in particular, would represent very different propositions to the banks being asked to fund the transaction. It was a remarkably uncommercial approach for a very astute and successful businessman such as Mr Potanin to take and is only explicable, in my judgment, on the basis that there was some extraneous factor compensating for paying the same total premium for 3.99% as he would have paid for 6.37%.

138. On the other side of the transaction, Mr Davidovich gave a more coherent explanation of Crispian's approach to the premium, which is no doubt why Lord Goldsmith focused on that evidence in closing argument rather than the evidence of his own underlying client. Mr Davidovich explained that the starting position had been a premium of US$200 million for 3% and that increasing the sale block to 3.99% had been by way of compromise. However, the effect of increasing the sale block to that level was that Crispian's stake fell below the 2.5% required by clause 3.6(7) to maintain its veto rights under the Framework Agreement. Mr Davidovich was unable to explain satisfactorily why Crispian had agreed to lose such a valuable right at the same time as agreeing to a reduction in the price per share sold. His only answer was the rather incredible suggestion that he did not know of the 2.5% veto threshold and that it had not been brought to his attention in connection with this transaction. Again, the only plausible explanation is that there was an extraneous factor accounting for Crispian selling at a level which would result in the loss of its veto.

139. In my judgment the extraneous factor was identified by Mr Potanin himself in his discussions with Mr Sokov on 1 February 2018. I found Mr Sokov's account of those exchanges to be entirely believable, supported by the largely consistent messages he sent at the time to Mr Deripaska. Mr Potanin's attempt to portray those discussions as playful teasing was not convincing. I am satisfied that Mr Potanin, in a last attempt to persuade Rusal to accept his acquisition of Crispian's entire stake on an agreed basis, disclosed how he intended to do so without Rusal's agreement if necessary, but in a way which gave him plausible deniability.

140. What Mr Potanin disclosed was, I have no doubt, the product of the discussions he had had with Mr Abramovich and then Mr Davidovich. It is plain that those discussions were numerous and concerned the terms on which Whiteleave would purchase Crispian's stake. It is more than reasonable to conclude that they were not limited simply to price for and quantity of the NN shares to be sold (particularly as both of those aspects were quickly resolved at the very last minute) but involved discussion of how to deal with Rusal and the ROFR and also of the Baimskoye Deposits, as revealed by the Term Sheet.

141. A further factor in assessing the merit of Rusal's case as to what was, in reality, agreed or understood between Crispian and Whiteleave, is that one of the two principals to the

crucial discussions, Mr Abramovich, has not given an account of what occurred. Whilst Mr Davidovich conducted detailed negotiations, he made plain in his oral evidence that Mr Abramovich was the ultimate decision-maker. It may well be that Mr Abramovich was unable to attend the trial to give oral evidence (even by video-link) given that it was arranged on an expedited basis. But it is unclear why he could not have provided a witness statement. The result is that he has not given any version of events nor, indeed, personally countered Rusal's contentions. Rusal invites me to draw the "obvious inference" that Mr Abramovich's evidence would not have been helpful to Crispian's case (referencing *Wisniewski v Central Manchester HA* [1998] PIQR P324). I accept that the inference is obvious and must be drawn, its effect being to confirm the view I had in any event reached on the basis of the evidence which was called.

142. On the basis of the above, I find that Whiteleave and Crispian reached an agreement or formed an understanding that:

    142.1. an initial portion of Crispian's stake in NN (ultimately 3.99%) would be sold to Whiteleave or an affiliate for a US$200m premium (in the hope or expectation that Rusal would not exercise its ROFR);

    142.2. the remainder of Crispian's stake (2.38%) would be sold at market price. It may be that it was understood that the further sale would be to Whiteleave or an affiliate pursuant to or purportedly pursuant to clause 2.5(9) of the Framework Agreement (whether or not a mistaken belief), but it might also have been understood to be through a further ROFR process (at market price) for just over 1.38%, leaving Crispian entirely free to sell the remaining stake of just under 1% by virtue of clause 2.5(7). In the latter case, Whiteleave would ultimately acquire all but about 0.6% of Crispian's 6.37% stake;

    142.3. Crispian would be further incentivised to participate in the above scheme, and to take the associated risk of proceedings such as these, by an agreement that NN, or otherwise Whiteleave, would purchase Aristus. In the event, perhaps because of these proceedings, negotiations between Whiteleave and Crispian in relation to Aristus came to an end.

143. I therefore conclude that the Bonico Offer was not at arm's length, but was at an inflated price due to being related to other transactions between Whiteleave and Crispian. It was therefore not an offer from a bona-fide third party within the meaning of clause 2.5(5). It follows that the Contested Notice, based on the Bonico Offer, was not valid or effective.

144. I should emphasise, in view of the way in which the matter was framed by Lord Goldsmith in particular, that my conclusion is limited to the question of whether the Bonico Offer fell within the terms of clause 2.5(5) of the Framework Agreement and the related question of the contractual validity of the Contested Notice. It is certainly not a finding of impropriety, let alone fraud or dishonesty, on the part of the parties to the Bonico SPA or the individuals involved.

Conclusion

145. For the reasons set out above, the Contested Notice was not a valid or effective exercise of the ROFR procedure set out in clause 2.5(5) of the Framework Agreement. In particular, upon the true and proper interpretation of that clause:

145.1. in order validly to commence the ROFR procedure, Crispian must have received an offer to buy the relevant shares from a "bona fide third party purchaser".

145.2. the phrase "bona fide third party purchaser" in clause 2.5(5) excludes not only Crispian and its affiliates but also (a) Rusal and Whiteleave; (b) affiliates of Rusal and Whiteleave (such as Bonico); and (c) entities acting in concert with Rusal, Whiteleave or their affiliates.

146. Even if, as a matter of the true and proper interpretation of clause 2.5(5) of the Framework Agreement, Bonico was not excluded from being a bona fide third party purchaser, the price of US$234 per share, as set out in the Contested Notice, was not a price offered by a "bona fide third party purchaser" because the price was not agreed on an arm's length basis but was conditional on or related to other agreements or understandings between Crispian and Whiteleave.

147. Accordingly the Contested Notice was invalid and ineffective, such that Crispian was and is precluded under the Framework Agreement from disposing of shares pursuant to it. Rusal is entitled to declarations to that effect. I will hear from the parties as to the form of relief to which Rusal is entitled and as to any other consequential matters which arise.

148. I am grateful to counsel and solicitors for their assistance in achieving an expedited resolution of these proceedings. The fact that a dispute of this size and complexity reached a full trial of all essential issues of fact and law in just over three months from the issue of the claim is a testament to a high degree of cooperation between all involved and their considerable skill and endeavour.