Neutral Citation Number: [2021] EWHC 411 (Comm)

Case No: CL-2016-000172

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24/02/2021

Before :

MRS JUSTICE MOULDER

- -

Between :

PJSC TATNEFT	**Claimant**
- and –	
GENNADY BOGOLYUBOV **IGOR KOLOMOISKY** **ALEXANDER YAROSLAVSKY** **PAVEL OVCHARENKO**	**Defendants**

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- -

David Railton QC, Henry King QC, David Davies, James Sheehan and Nicolas Damnjanovic (instructed by **Debevoise & Plimpton LLP**) for the **Claimant**
Ewan McQuater QC, Matthew Parker and Nathaniel Bird (instructed by **Enyo Law LLP**) for the **First Defendant**
Mark Howard QC, Ruth den Besten, Tom Ford and Alexander Milner (instructed by **Fieldfisher LLP**) **for the Second Defendant**
Kenneth MacLean QC and Owain Draper (instructed by **Mishcon de Reya LLP**) **for the Third Defendant**
Marcus Staff (instructed by **Sherrards Solicitors**) **for the Fourth Defendant**

Hearing dates: 12-15, 19-22, 26-30 October, 2-6, 9-13, 16-19, 23-27, 30 November, 1-3, 14-17 and 21 December 2020

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Approved Judgment

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

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 on 24th February 2021.**"

Mrs Justice Moulder :

Introduction

1. PJSC Tatneft ("Tatneft") brings this claim as assignee of Kompaniya Suvar-Kazan LLC ("S-K").

2. Tatneft is a publicly traded joint stock company incorporated in Tatarstan, a constituent Republic of the Russian Federation, and is a producer of crude oil. Ukrtatnafta JSC ("UTN") was, at all material times, a Ukrainian company which carried on the business of oil refining and production of oil-derived products and which owned the Kremenchug oil refinery in Ukraine.

3. During 2007, the oil was sold to UTN by Tatneft via S-K and through a chain of intermediary companies comprising "Avto", "Taiz" and "Tekhnoprogress" pursuant to a series of oil supply agreements.

4. On 19 October 2007, a *"takeover"* of the Kremenchug oil refinery occurred and Mr Ovcharenko, the fourth defendant, was *"reinstated"* as Chairman of the Management Board of UTN. Thereafter, Tatneft ceased to supply oil to UTN, and UTN ceased to make outstanding payments in respect of oil delivered by Tatneft.

5. In November 2007, S-K brought a claim against Avto under the SK-Avto contract to recover the debt which had become due by that time. On 19 December 2008, the sole arbitrator issued the ICAC Award partially upholding S-K's claim, for approximately US$17.9 million plus interest. This decision was never enforced.

6. On 18 April 2008 S-K, Avto, Taiz and Tekhnoprogress entered (or purported to enter) into an assignment agreement (the "2008 Assignment Agreement") for the assignment of claims for the unpaid oil deliveries against UTN to S-K and the termination of the previous payment obligations.

7. On 26 May 2008, S-K filed a claim against UTN with the Arbitrazh Court of the Republic of Tatarstan to enforce its claims against UTN under the 2008 Assignment Agreement, and on 28 August 2008 it obtained a judgment (the "Tatarstan Judgment"), in the sum of approximately UAH 2.5 billion against UTN. The Tatarstan Judgment was subsequently confirmed by the decisions of the Russian courts of higher instance.

8. In June 2008 UTN brought proceedings, and on 2 September 2008 obtained a Ukrainian court judgment (which was subsequently confirmed by the decisions of the Ukrainian courts of higher instance (the "Ukrainian judgments")) to the effect that the assignments under the 2008 Assignment Agreement were unlawful and invalid as a matter of Ukrainian law.

9. S-K enforced the Tatarstan Judgment in Russia against UTN's shares in Tatnefteprom OJSC, a Russian company, which were sold at auction on or about 15 September 2009.

10. In essence Tatneft's case in these proceedings is that in June 2009 the defendants procured that the value of the oil payments then owed by UTN was paid by UTN to Taiz and Tekhnoprogress and then *"siphoned"* out of Taiz and Tekhnoprogress through a series of sham transactions for the benefit of the defendants (the "Scheme"). This is

said to have caused harm to S-K in that, save for a sum of 3.2 billion roubles (then worth approximately $105.3 million) recovered by S-K from UTN in September 2009, it is said that the Scheme prevented S-K from receiving payment of the monies owed by UTN in 2009.

11. Tatneft's claim is brought under Article 1064 of the Russian Civil Code ("the RCC"), it being common ground that Russian law is the governing law of the tort pursuant to the Rome II Regulation on the Law Applicable to Non-Contractual Obligations 864/2007 ("Rome II").

12. The assignment (or purported assignment) of the present tort claim was pursuant to a written agreement referred to in these proceedings as the "2015 Compensation Agreement". S-K entered into bankruptcy proceedings in June 2015. The 2015 Compensation Agreement was entered into on 22 October 2015. On 23 November 2015 S-K was held bankrupt by the Arbitrazh Court of the Republic of Tatarstan and this was followed by its liquidation on 30 December 2015.

13. Tatneft contends that S-K (and therefore Tatneft as S-K's assignee) is entitled to recover damages of US$294.3 million pursuant to such claim and that the defendants are jointly and severally liable for such sums by reason of their participation in the alleged Scheme.

COVID

14. In the light of the current pandemic the trial was held remotely in relation to all those involved including counsel and witnesses.

Judgment

15. There are many issues which were common to all the defendants and counsel for the respective defendants helpfully divided responsibility for the common issues to minimise duplication. The defendants therefore adopted submissions made by other defendants and reference in this judgment to submissions by counsel for a particular defendant is merely for identification and (unless the context otherwise requires) should be read as being made in respect of all the defendants.

16. The court had extensive opening and closing written submissions from counsel for each party (although it acknowledges the division of responsibility in relation to common issues by the defendants) as well as oral submissions. The court has reviewed both the written and oral submissions for the purposes of writing this judgment and the absence of a reference to a particular submission in the judgment should not be taken to be a failure to consider such submission.

17. There were numerous issues between the parties and expert evidence was called in relation to a number of these issues. It is not necessary for the court to determine all these issues in order to resolve the proceedings and the court considers in this judgment only such issues as it deems appropriate in the circumstances.

Limitation

18. It is common ground that the claim brought by Tatneft is subject to a three-year limitation period under Russian law (Article 196 of the RCC). The issue for determination by this court is whether any claim under Article 1064 is time-barred.

19. This gives rise to the following sub-issues:

    i) Russian law issues on limitation.

    ii) Application of Russian law on limitation to the facts.

    iii) Whether it is an abuse of rights or contrary to public policy for the defendants to be allowed to rely on limitation as a defence.

Expert evidence

20. In relation to Russian law and limitation, Tatneft relies on the expert evidence of Professor Anton Asoskov, Professor of Civil Law at Moscow State University. The Defendants rely on the evidence of Mr Maxim Kulkov, managing partner at Kulkov, Kolotilov and Partners (KK&P).

21. Each expert produced reports as well as a joint report dated 20 July 2020. Professor Asoskov's main report is his fourth report dated 26 June 2020 and his supplemental (fifth) report dated 26 June 2020. Mr Kulkov's main report is his second report dated 26 June 2020 and his supplemental report dated 11 September 2020.

22. Both experts gave oral evidence and were cross examined.

An unattractive defence

23. Before considering the Russian law issues, there is an initial point which needs to be addressed. It was submitted for the claimant (paragraph 17 of closing submissions) that the defendants were guilty of *"the most brazen hypocrisy"* in that at the time of the fraud they took elaborate steps to obscure what was really happening but when litigation was commenced, they said that the evidence does not establish that they committed a fraud but at the same time it was so obvious that Tatneft should be criticised for not bringing the claim much sooner.

24. Tatneft referred the court to the Court of Appeal in *Kazakhstan Kagazy v Arip* [2014] EWCA Civ 381 at [54]:

> "This whole litigation leaves me uneasy. The essence of the limitation defence is that the Defendants' fraud was so obvious that KK ought to have discovered it and issued proceedings before 2013. If the Defendants ultimately succeed on that defence, they might then have achieved the 'perfect' fraud. The money which has been stolen (over $100 million) will become irrecoverable as a consequence of the judgment of the English court."

25. I do not regard these dicta as of any material assistance: I do not see any difficulty with drawing a distinction between whether the test for knowledge for the purposes of limitation has been met and whether the claimant has proved its case on the substantive claim. It is common ground that the claim is subject to a limitation period under Russian law. If the defence is made out as a matter of Russian law, then it seems to me that that is the end of the matter and there is no scope to overlay any consideration of the merits. Professor Asoskov agreed in cross examination that the policy with which the law of limitation is concerned, is not only looking at the interests of the claimant but is also looking at the interest of the defendants in creating certainty and finality and in the interests of the administration of justice to ensure that stale claims are not being litigated. [Day 27 p17]

Russian law issues on limitation

26. The Russian law issues in relation to the law of limitation which in the light of the closing submissions need to be considered are:

    i) The burden of proof.

    ii) When does time start to run: What amounts to "knowledge" for this purpose?

    iii) The effect of the amendment to Article 200 of the RCC from 1 September 2013.

27. These issues are considered below. However as will be apparent from the findings of the court below, on the facts of this case issues (i) and (iii) do not affect the ultimate outcome of these proceedings.

The burden of proof

28. In the Joint Written Statement of Mr Kulkov and Professor Asoskov, it is stated that:

> "53. Both Experts are in agreement that: …
>
> Burden of proof that the limitation period expired is on the defendant, whereas the claimant bears the burden of proof with respect to suspension or interruption of the limitation period."

29. It appeared to be common ground that Tatneft does not rely on the provisions relating to the suspension or interruption of the limitation period which are governed by Articles 202 and 203 of the RCC.

30. The defendants submitted that the issue of whether the claim is time-barred is unlikely to turn on the burden of proof but submitted that the *"better view"* is that the defendant's burden is only an evidential one and relatively easily discharged. (Paragraphs 94 and 95 of D2's closing submissions).

31. Tatneft relied on the Resolution of the Plenum of the Supreme Court of the Russian Federation Number 43 dated 29 September 2015:

> "10. Pursuant to Article 199(2) of the Russian Civil Code the limitation period will only apply upon request of a party to the proceedings which by virtue of Article 56 of the Russian Civil

> Procedure Code and Article 65 of the Russian Arbitrazh Procedure Code bears the burden of proof of the facts evidencing that the claim is time-barred."

32. The defendants relied on a decision of the Federal Arbitrazh Court from 2019 and extracts from legal commentaries which, it was submitted, were not inconsistent with the Supreme Court resolution. The defendants relied on part of the commentary on the Civil Code written by Professor Sarbash, a judge of the Supreme Arbitrazh court and accepted by Professor Asoskov in the course of cross-examination to be *"a highly respected jurist"*. [Day 27 Page 114]

33. In his commentary on Article 199 Professor Sarbash wrote:

> "The lack of formal requirements for application concerning the limitation period does not mean exemption from the burden of proof that the limitation period has expired. As a general rule, this burden is borne by the person who seeks application of this remedy, i.e., usually the defendant. According to Clause 2 of Article 199 of the RCC, the limitation period applies only at the request of the party to the dispute, which, by virtue of the provisions of article 56 of the Civil Procedure Code of the Russian Federation and article 65 of the Commercial Procedure Code… bears the burden of proof of circumstances indicating the expiration of the limitation period (Para 10 of the resolution of the SC Plenum Number 43 dated 29 September 2015). <u>If the claimant believes that the limitation period has not expired, the claimant is entitled to provide its own evidence in reply to the defendant's petition regarding the limitation period and provision of evidence of its expiration by the defendant, i.e., the claimant bears the burden of rebutting the defendant's evidence</u>.
>
> "Since evidence about the subjective elements of the limitation period is often inaccessible to the defendant, applying a high standard of proof to the defendant may result in a violation of his or her right and therefore should not be allowed."[emphasis added]"

34. This commentary was published in 2018 and the phrase highlighted above appears in the judgment of the Arbitrazh court in 2019. Professor Asoskov's view was that the wording was "unfortunate" and there was a contradiction between the statement that the claimant was "entitled" to provide evidence and the phrase that the claimant bears the burden. Professor Asoskov's view was that the matter had been decided by the Supreme Court and there was no room for further discussion. [Day 27 Page 118]

35. The defendants also relied in their submissions on a commentary by Professor Sergeev but I note that this commentary dates from 2010 and therefore predates the Supreme Court decision.

36. In cross examination, Mr Kulkov did not dispute the statement in the joint report that the burden of proof lies with the defendant. His evidence was:

> "Q. So just looking at 53.2 again, do you actually agree that burden of proof that limitation period expired is on the defendant? Do you actually think that or not?"
>
> "A. No. Again on first stage it's -- the burden of proof is on the defendant, yes, but the argument or the dispute between Professor Asoskov and me is in the standard of such burden. So, again, Professor Asoskov believes that it's a usual standard, so quite high standard; I believe that the standard is really easy here, so the test is simple here, so just to raise this argument, and usually it's enough." [emphasis added]

37. As to the standard of proof Mr Kulkov's evidence in cross examination was that:

> "Professor Asoskov has not presented any relevant case law or authority to prove that the standard is usual, and I did the opposite. So I provided quite authoritative text and case law supporting my position that the standard is much less than a usual one."

38. It seems to me that the experts agreed that the burden of proof lies on the defendant to show that the claimant had actual or constructive knowledge for the purposes of limitation and this accords with the resolution of the Supreme Court. I do not accept the submission that it is merely an *"evidential burden"*.

39. As to the standard of proof, whilst I see force in Mr Kulkov's arguments, and having considered the passage in his report dealing with this issue, I am not persuaded that as a matter of Russian law a lower standard of proof applies to the defendants. The commentary of Professor Sarbash (quoted above) is unclear on the point and not a source of law (paragraph 21 of Mr Kulkov's report). The judgment of the lower court is also not a source of law and it would appear not even persuasive authority given the resolution of the Plenum (paragraph 20 of Mr Kulkov's report).

40. I therefore proceed on the basis that it is the *"ordinary balance of probabilities test"* that is that the defendants must show that it is more likely than not that SK had the necessary knowledge to start time running more than three years before the claim was issued, that is, prior to 23 March 2013.

When does time start to run? What is "knowledge" for this purpose?

41. It was submitted for Tatneft in oral closing submissions that in relation to the issue of when time started to run, the evidence and the position of the parties appeared to have converged. It was submitted that:

    i) time only starts to run when the claimant has the knowledge of the facts necessary to plead a claim.

    ii) in a claim under Article 1064 based on abuse of right, the claimant has to know enough to be able to plead that a particular defendant has caused harm by bad faith actions; and

iii) that the knowledge has to be sufficient to plead a proper claim with an objective basis as opposed to a claim based on speculation or suspicion.

42. It was submitted for Tatneft in written closing submissions (paragraph 904) that the court should:

> "accept the clear evidence of Professor Asoskov. Time begins to run when the claimant has the necessary actual or constructive knowledge to be able to bring a claim with a real prospect of success as described above."

43. It was submitted (paragraph 900) that

> "… time only started to run against S-K in relation to each separate Defendant when it had actual or constructive knowledge of facts sufficient to plead out a proper Article 1064 claim with real prospects of success against that Defendant in relation to the Oil Payment Siphoning Scheme as defined in the Particulars of Claim."

44. I do not accept that these submissions properly reflect the evidence of Professor Asoskov:

i) It was clear from the evidence of Professor Asoskov in cross examination that his references in the reports that a claimant had to have sufficient knowledge to bring a claim with a "*real prospect of success*" (e.g. paragraph 555 of his Fourth Report) was not intended to refer to the test under English law on a summary judgment application and was not a test applied under Russian law. It is therefore in my view unhelpful to refer to this as the test.

ii) The concept of being able to *"plead out"* the claim in order to have knowledge was not the concept used by Professor Asoskov and the footnote to paragraph 900 of Tatneft's closing submissions does not support this submission. The evidence of Professor Asoskov (referred to in that footnote) was as follows:

> "If S−K knew or had known that an asset dissipation or siphoning scheme was in place with respect to T and T, S−K had sufficient knowledge with respect to the substance and gist of the scheme and it understood that as a result of that criminal scheme S−K would not be in a position to receive funds for the oil that had been supplied and it understood the existence of a causal link, causation, between those two events, then I do agree with you, sir that that would have been sufficient for the limitation period to start running." [emphasis added]

iii) The claimant has to have knowledge of the elements which constitute the tort claim under Article 1064 (harm, wrongful act and causation) but Professor Asoskov did not link this to the case as pleaded in the Particulars of Claim. In cross examination Professor Asoskov's evidence was as follows:

> "Q. In order to have knowledge −− if we break it down −− in order to have knowledge for the purposes of Article 200 in relation to a tort claim, you are saying you must have knowledge of at least the three elements which constitute the cause of action: harm, wrongful acts and causation. Sorry, let me put it another way: a wrongful act that has caused you harm; correct?"
>
> A. Yes, knowledge about those three elements.
>
> Q. Yes, so if we just stop there for a moment, what I understand you to be saying: if, for instance, you simply had knowledge of harm but you didn't know that harm had been caused by a wrongful act of someone else, that wouldn't be sufficient; correct?
>
> A. That is correct, yes.
>
> ….
>
> Q…Taking it that you have to have knowledge of the ingredients of the cause of action, as I understand what you're saying is you have to have sufficient knowledge that allows you to articulate a case which sets out those ingredients; in other words you have to be able to say that "I have suffered harm which was caused by an unlawful act, and at least since 2013, of X person"; correct?
>
> A. You cannot simply say that −− assert that the unlawful act has been committed. You have to specify what the act was and what the harm that has been inflicted upon you was and you have to describe the causation, the causal nexus, the link. You have to specify what those three elements are."

45. I reject the submission (paragraph 899.1 of Tatneft's closing submissions) that:

> "Such a claim will obviously require the claimant to articulate the means by which the defendant caused the harm as this is essential to pleading causation." [emphasis added]

In my view this overstates the position as set out in the evidence of Professor Asoskov (footnoted to paragraph 899.1). Professor Asoskov did say:

> "You cannot simply say that −− assert that the unlawful act has been committed. You have to specify what the act was and what the harm that has been inflicted upon you was and you have to describe the causation, the causal nexus, the link."

However, Professor Asoskov went on to say:

> "If S−K knew or had known that an asset dissipation or siphoning scheme was in place with respect to T and T, S−K had sufficient knowledge with respect to the substance and gist of the scheme and it understood that as a result of that criminal scheme

> S−K would not be in a position to receive funds for the oil that had been supplied and it understood the existence of a causal link, causation, between those two events, then I do agree with you, sir that that would have been sufficient for the limitation period to start running." [emphasis added]

46. It was however common ground by closing submissions that the claimant had to have more than a speculative belief that his rights had been violated: for the defendants it was submitted that a claimant had enough knowledge:

> "if he has some reasonable basis for believing that his rights have been violated (or that the defendant is responsible) and is able to articulate the elements of the violation of rights." (paragraph 99.2 of D2's closing submissions) [emphasis added]

47. Tatneft expressed the test as follows:

> "However, time only starts running where the claimant is in a position to plead a proper claim with a proper objective basis as opposed to a claim based on guesswork or speculation. Hence, time only starts to run when the claimant has sufficient actual or constructive knowledge to plead a claim with a real prospect of success (which can also be expressed as a claim "that has realistic chances of being granted", an "actual and robust claim" or a case with a "solid evidential base" – all ways of expressing the same underlying idea)." (paragraph 899.2) [emphasis added]

48. The evidence of Professor Asoskov was as follows:

> "Q. …The claimant has to either himself believe that, on the material he has, his rights have been violated and harm has been caused to him by the defendant or objectively the material has to demonstrate that a person in his position would reasonably form that belief. Do you agree?"
>
> A. I agree overall. It is important that the claimant, when we have an alternative, an alternative possibility −− for example, a claimant is not clearly certain of what was the exact wrongful action or actions. Maybe the wrongful actions were A, B or C −− if we are describing that type of situation, then I believe the claimant would need a clearer understanding. The claimant ought to understand that we are discussing a specific criminal scheme. It's not sufficient just to have guesswork. One needs to have understanding what are the elements of the criminal scheme and, if that test is passed, then I agree with your supposition, sir." [emphasis added]

49. Mr Howard then sought to clarify the reference to a criminal scheme and Professor Asoskov's evidence appeared to confirm that what was required was knowledge of the harm caused by the wrongful act not of a criminal scheme. The relevant evidence was as follows:

> "Q. …What the claimant as a matter of Russian law has to have knowledge of is harm caused to him by wrongful act of the defendant. That I think you do agree; correct?"
>
> A. Claimant has to know about three elements that we have listed with you, sir, not just about the harm.
>
> Q. No, I didn't put just the harm.
>
> A. The claimant has to have a knowledge in order to have the opportunity to formulate such a tort claim that as a result will have a chance to be upheld. That's my position."

50. It was clear on the evidence of Professor Asoskov that *"knowledge"* for this purpose is not the same as having evidence to prove the claim.

51. Tatneft submitted (paragraph 899.3):

> "That does not mean, and Professor Asoskov is not suggesting, that time only starts to run when the claimant has <u>all the evidence necessary to succeed</u> on its claim at trial." [emphasis added]

52. Insofar as I infer that Tatneft sought to suggest that there needed to be *"sufficient evidence"* to prove the claim before the claimant would have *"knowledge"*, Tatneft's closing submissions did not accurately reflect Professor Asoskov's evidence on this issue. Professor Asoskov's evidence was:

> "Q. …Do you agree with this, Professor, that there is a distinction drawn in the case law between knowledge of violation of rights and evidence necessary to prove the case at trial? Do you agree that the cases draw such a distinction or not?
>
> A. Yes, I agree with that.
>
> Q. And the fact that the cases draw such a distinction suggests that, although a claimant may not have sufficient evidence to prove its case at trial, that does not mean that it does not have knowledge for the purposes of Article 200 and limitation; do you agree?
>
> A. <u>I agree that one has to draw a distinction between knowledge and evidence and, for the purposes of the running of the limitation period, one has to use the concept of knowledge which may not necessarily at that point in time be supported by evidence.</u>
>
> Q. So I think what we can agree, Professor, is once the claimant has knowledge of the elements of the cause of action that we've discussed, <u>it cannot rely on the fact that it needed to gather more evidence about the case in order to allow it to prove matters at the trial in order to delay the start of the limitation period</u>; correct?

A. Yes, I agree." [emphasis added]

53. Further it seems to me that (contrary to Tatneft's submissions) Professor Asoskov did not require a "*solid evidential base*" for knowledge. His evidence in this regard was as follows:

> "I would like to clarify here. We should not conflate whether we have solid knowledge and confidence about the elements of the case, that's one story, or we are discussing a solid evidential base, solid evidence for that information. When I am referring in my report to what the claimant should know, I mean, firstly, that the claimant has to be sure that the claimant has correct knowledge about all the elements of the case. Subsequently, the claimant would support that with evidence –– support the elements of the claim with evidence." [day 27 p30] [emphasis added]

54. That position that the claimant does not need to have evidence to prove its case in order for time to start to run is reinforced by the policy underlying the limitation period which allows a period of three years in which to gather evidence. Professor Asoskov's evidence was:

> "Q. If one asks oneself about the policy here, the policy of the law, by giving the three years, is to give a claimant, who has knowledge of the violation of his rights –– he has three years within which to gather evidence, whether through ordinary channels of communication or utilising court processes or whatever; do you agree?
>
> A. That is one of the policies, one of the purposes. There are others to allow him to instruct lawyers, to prepare the pleadings to be filed with the court, et cetera."

55. Accordingly, in my view "knowledge" for this purpose is a belief that the violation of rights has occurred which goes beyond mere speculation but knowledge is distinct from evidence and a claimant can have knowledge even though it does not have evidence which would prove the case at trial.

56. As to what amounts to knowledge of violation of its rights, the claimant needs to have knowledge such that it is able to articulate its case but I do not accept that this is the same as the pleaded case under English rules and practice which may be more extensive or contain additional elements over and above what is necessary to satisfy the Russian law test. Under Russian law the claimant has to be able to specify what the act was, what the harm inflicted was and the causal nexus. The application of that test to the facts of this case is discussed below.

The effect of the amendment to Article 200 from 1 September 2013

57. Article 200 of the RCC governs the question of when time starts to run for the purposes of limitation.

58. Until 1 September 2013 Article 200 (1) provided that for the purposes of determining limitation, time ran "*from the day when a person knew or should have known of the violation of his right*".

59. With effect from 1 September 2013, Article 200(1) was amended to provide that for time to run a claimant also needed to know by whom its rights were alleged to have been violated *("the one who is the proper defendant for a violation of this right"*).

60. Tatneft's position is that this was an amendment without substance i.e., the identity of the alleged defendant was required to be known in order for time to run in respect of a violation of rights prior to 2013.

61. Tatneft submitted that:

    i) The defendants' position is "deeply unattractive" and was accepted by Mr Kulkov to be "unfair".

    ii) The highest Russian courts interpreted Article 200 as requiring knowledge of the identity of the wrongdoer prior to September 2013.

    iii) There is no good reason to draw a distinction between deprivation of property cases and damage to property.

62. In my view the fact that the position is unfair is not determinative or even persuasive: in cross examination Mr Kulkov accepted that it was unfair but explained how this situation had historically arisen.

63. Tatneft relied on the commentary edited by Professor Karapetov in 2018 and in particular a section written by Professor Sarbash in which he said:

> "From 1 September 2013 a further subjective element was added to the rule [regarding the commencement of the limitation period]– knowledge of the person that breached the right…It is a well-known situation in practice that a person may be aware of a breach of its rights (for example, in the event of a tort or involuntary loss of possession of an item) but not of the identity of the person responsible for the breach. Ultimately even before this addition was made to the law the second element of identification of the moment at which the limitation period commences had begun to be recognised in judicial practice (see … Information Letter No 126 of the Presidium of the Supreme Commercial Court of the Russian Federation dated 13 November 2008). Failure to take this element into account could have resulted in an entitled person's right to file a claim expiring without his ever having been able to file that claim due to not knowing the identity of the respondent. From 1 September 2013 this criterion was reflected in statute." [emphasis added]

64. In submissions Tatneft said:

> "When shown this commentary in cross-examination, Mr Kulkov rightly accepted that Professor Sarbash was speaking generally about the position under Article 200 of the RCC."

65. This is not an accurate reflection of the substance of Mr Kulkov's evidence read in context whose evidence was that the Information Letter of 2008 related to vindication claims (the recovery of property from unlawful possession). The relevant exchange was as follows:

> "Q. …Now that is an accurate statement of the position, isn't it?
>
> A. Yes, but again it adds nothing new to what we just discussed. So, yes, even before 2013 -- so it was clarification that information letter 126, we already discussed -- but this information letter was dedicated exclusively to vindication claims. Then, so, Professor Sarbash said that it was unfair, and I agree that it was unfair, so therefore the law was changed in 2013, and from 2013 this criterion applies to any other types of claims, including tort claims, so nothing new in it.
>
> Q. Yes, but this commentary we have in front of us is speaking generally about the position under Article 200 of the Civil Code; correct?
>
> A. Correct." [emphasis added]

66. In my view Mr Kulkov did not express the view that this commentary suggested that knowledge of the identity of the defendant was a requirement for tort claims prior to 2013. The next section of his evidence put this beyond doubt:

> "Q. Yes. Indeed if you see at the bottom of this page we have on screen, it says: "The fact that [the] criterion for determining the date from which the limitation period should start running [knowledge by the claimant of the amount of the losses] is not mentioned in the statutory provision ... [The fact that it is not mentioned] does not in itself constitute an absolute bar, because, before, before ... September 2013, the absence of reference to such subjective element as the knowledge about the proper defendant in the same provision did not prevent the courts from deriving it from purposive interpretation of law ..." And it refers to the information letter. So, again, he's speaking generally about the position under Article 200; correct?
>
> A. Not correct because he refers to the same information letter number, 126, which was quoted exclusively to vindication claims and there -- well, by reference to this information letter, so we cannot say that this is a -- was a general approach. For example, if in this text there were some references as well to tort claims with the same approach, yes, I could agree with the counsel that it was a general approach, but it quite clearly follows

> from this text that this is all about vindication claims -- well, before 2013." [emphasis added]

67. Irrespective of the correct interpretation of the commentary, it is not a source of law (paragraph 21 of Mr Kulkov's report and paragraph 44 of Professor Asoskov's report). By contrast the Information Letter of the Presidium of the Higher Arbitrazh Court No. 126 dated 13 November 2008 is accepted to be "binding guidance" (paragraph 881.1 of Tatneft closing submissions). (Professor Asoskov explained in his report that up to August 2014, the highest court of general jurisdiction was the Russian Supreme Court and the highest arbitrazh court was the Russian Higher Arbitrazh Court. In August 2014, the Russian Higher Arbitrazh Court was dissolved and a united Russian Supreme Court established.)

68. The Information Letter clearly stated that it applied to vindication claims. Paragraph 12 read so far as material:

> "12. The limitation period for a claim seeking to reclaim movable property from another entity's unlawful possession starts on the date of discovery of such property… By virtue of Article 195 of the Russian Civil Code the limitation period means the period during which the affected party may bring an action to defend its right. However, no adversary proceedings to defend a right may be instituted unless and until the affected party becomes aware of who the wrongdoer and the potential defendant is. Though the owner's property was misappropriated in 1997 the limitation period for a vindication claim started to run from the time the claimant became aware that the property was in possession of the defendant." [emphasis added]

69. The Information Letter was entitled "*Overview of judicial practice in certain aspects of requisition of property from another person's unlawful possession*" and Professor Asoskov confirmed that it was concerned with the recovery of property from unlawful possession, a claim which would be brought under Article 301 of the RCC.

70. The evidence of Mr Kulkov was as follows:

> "Q. And I think it's also your evidence that, pre-September 2013 there was a fundamental distinction between cases where the claimant's property was stolen on the one hand and cases where the claimant's property was damaged on the other hand. Do you understand what I mean?
>
> A. Yes, so it was in 2008, so it was a clarification of Supreme Commercial Court about, yes, stolen property, so claims in -- so-called vindication claims. For this specific type of claims the court clarified that the identity of the tortfeasor was an additional condition for the statute of limitation to start to run."

71. In his fourth report Professor Asoskov relied on the Information Letter and the cases of *Elita-Mekh* and *Biznes-Resurs*. These cases were heard by the Supreme Court in 2009 and by the Presidium of the Higher Arbitrazh Court in 2013 respectively.

72. Tatneft submitted (paragraph 882 of its closing submissions) that:

> "The logic and good sense of these decisions is plain enough. Article 200 of the RCC is being interpreted such that time cannot begin to run until the claimant is actually in a position to bring a claim against the relevant defendant."

73. However, both cases concerned vindication claims and the issue is not the "logic" but the state of Russian law. As Mr Kulkov said in his evidence:

> "A. … I think we should divide between a legal principle and the logic. I expressly agreed that it was illogical, so logic was in breach, but it doesn't mean that the legal principle, the legal principle is always logical. Unfortunately the law is not always fair. Yes, at that time it was illogical to apply another principle to tort claims, I agree, but, well, dura lex sed lex."

74. The defendants relied on the *Progress Garant* case and the *Krasodarsky* case.

75. Tatneft submitted that *Progress Garant* was a special category of case namely subrogated insurance claims which it submitted were subject to a special rule pursuant to the Resolution of the Plenum of the Supreme Court No. 20 dated 27 June 2013 which stated that:

> "…the limitation period for the insurer who paid the insurance indemnity shall start from the moment the insured event occurs."

76. However, *Progress Garant* was a decision of the Supreme Court dated 28 April 2009; in other words it predated the Resolution No. 20 in 2013 relied upon by Tatneft.

77. In *Progress Garant* the Supreme Court stated:

> "The conclusion of the court that the limitation period, which was asserted by the Defendants as to be expired, was not expired for the claimant, because the claimant's right to claim the Defendant A.G. Litvinenko arose on 20 April 2007, when Progress-Garant Insurance Company OJSC knew about the General Power of Attorney issued by I.V. Kianovsky to A.G. Litvinenko, cannot be considered as correct.
>
> According to Article 200 of the Civil Code, the limitation period runs from the day when the person knew or should have known about the violation of their right. Exceptions to this rule are established by the Civil Code and other laws. <u>In this case, the limitation period for the insurer, who paid the insurance recoveries, starts from the time of occurrence of the harm, and not from the time when the Claimant learns of the Defendant under the specified claims. According to the Civil Code and other laws, there is no such exception to the general rules of limitation period that would define the commencement of the</u>

> limitation period at the moment when the Claimant learns about who is the Defendant in the dispute." [emphasis added]

78. Even if *Progress Garant* were a special category of case, the claimant has not provided an answer in respect of the *Krasodarsky* case (relied on by the defendants) other than to say it is only a decision on a permission to appeal. The decision of the Judicial Chamber of the Supreme Court is dated 27 November 2009, that is after the Information Letter relied on by Tatneft. In refusing permission to appeal the Court stated that:

> "The Applicant's argument that the Courts failed to correctly determine the limitation period in this case against Kubanoptprodtorg-2 LLC is unfounded and is due to an incorrect interpretation of Article 200(1) of the Civil Code by the Applicant. This provision states that the limitation period commences when the person knew or should have known about the violation of its right, and not when the person who violated the right was identified. In relation to the present Case, the Claimant learned of the violation of its rights from the moment of the road traffic accident on 20.06.2003, for which reason the commencement of the limitation period from the moment of rendering Judgement dated 25.09.2008 on the review of the judicial acts upon discovery of new circumstances by the Commercial Court of the Krasnodar Territory is deemed inconsistent with the law." [emphasis added]

79. Professor Asoskov was asked in cross examination why he had not referred to this case in his report to which he replied:

> "A. When I prepare my reports, I try not to refer to rulings which deny to grant leave to appeal because all Russian lawyers understand that such documents have limited value. These court rulings are of limited value and cannot serve as grounds for reliable conclusions…"

80. However, it was submitted for the defendants that such permission to appeal rulings were used by Professor Asoskov in his fourth report (e.g. paragraph 389 -*Stroy Elite* case) and had been relied upon by him in his report in earlier interlocutory proceedings in this case.

81. In an expert report dated 25 October 2018 (at paragraph 58) Professor Asoskov stated:

> "I set out below a number of Russian court judgments, which show that the recognition and enforcement of English court judgments and orders has become settled practice…"

He then made reference to 11 cases including the case of *Kedart Finance Limited v. Leznik*, a judgment of the English courts, which was recognised and enforced in Russia. Professor Asoskov stated that:

"The Russian Supreme Court refused to grant leave to appeal"

and in the footnote to that sentence, he stated:

> "The fact that the Russian Supreme Court (before 2014 – the Russian Supreme Arbitrazh Court) renders a ruling on the case does not mean that the case is difficult. Different from the English procedure, Russian law allows the losing party in each case to make a request to the Russian Supreme Court for granting a leave to appeal. Even if the request is denied, the judge of the Russian Supreme Court has to issue a reasoned ruling. Such rulings are frequently cited by Russian lawyers as persuasive. In other words, the involvement of the Russian Supreme Court can occur in any Russian case, if the losing party files the relevant request." [emphasis added]

82. In my view therefore this court is entitled to regard the *Krasodarsky* case as persuasive authority and to reject the oral evidence of Professor Asoskov on this point which appears to be contrary to the position that he has taken in his own reports.

83. Finally, there was the evidence of the "Concept" document. This was the "*Concept for development of the civil legislation of the Russian Federation. Approved by resolution of the Russian Federation Presidential Council for Codification and Refinement of the Civil Legislation dated 07/10/2009*." The document was accepted by Professor Asoskov to be part of the pre-legislative work carried out in advance of the 2013/2015 reforms. The court was taken both to an interim draft and the final version. At paragraph 1.4 of the interim version, it stated:

> "In practice there are cases when the claimant due to lack of knowledge about the person who is subject to liability cannot issue rei vindicatio claims, delictual claims, as well as claims against a testator. The current legislation does not provide for any exclusions from the general rules in relation to the limitation periods for these claims, which makes it impossible to protect violated rights effectively." [emphasis added]

84. This text did not appear in the final version but the following paragraph did appear:

> "7.4. It is a common occurrence in practice that due to lacking details of the responsible party in rei vindicatio claims and claims for damages, a claimant is unable to bring the corresponding claim. There are various means by which this problem may be resolved.
>
> Firstly, a rule could be introduced stating that the limitation period for these claims only runs from the moment that the claimant became aware or should have become aware of the responsible party, but in any event expires at the end of the maximum limitation period after the moment of loss of possession or infliction of harm. In this instance the maximum limitation period would be established by law and could amount to ten years, for example.

> Secondly, provision could be made for reinstatement of the limitation period for individuals and legal entities in the event that they have been prevented from bringing a claim by such a circumstance as unawareness or uncertainty as to the identity of the respondent, by adding a provision to this effect to Art.205 of the Civil Code." [emphasis added]

85. There is no evidence to explain the change in wording between the interim and final versions of the document. Professor Asoskov sought to explain the meaning of the language but his explanation did not appear to accord with the obvious inference in context. He said:

> "… And when a new amendment of the Civil Code text is coming about, all the main legal positions previously enshrined in court practice have to be transferred into the text of the Code. Consequently the authors of the concept are saying that the Code text is not perfect and it has to be amended –
>
> Q. Right.
>
> A. -- but they're not commenting upon the matter about what the case practice is, what the court practice is, not in any way.
>
> ….
>
> A. It says further on that current legislation does not encompass any exclusions for such situations. They are formulating -- they are saying that the Civil Code is imperfect. We have to touch it up in some way to address the situation, and it's natural that -- it would be logical to touch it up in the same vein as the Russian courts are solving that problem."

86. In my view the wording of the final version and the proposed solutions supports the defendants' case that a change in the law was necessary in 2013 in order to prevent (as stated in the final version) a claimant from being "unable" to bring a claim within the limitation period by reason of lack of knowledge of the perpetrator.

87. It was submitted for Tatneft on this issue that the court should:

> "prefer the clear and compelling evidence of Professor Asoskov on this point. It is worth remembering in this regard that the task for the English court applying foreign law is to assess that foreign law from the perspective of the highest appeal court of the foreign jurisdiction: see the *National Bank Trust* case at [937] 1327 per Bryan J referring to *Re Duke of Wellington* [1947] Ch 506 at [514]. One only needs to imagine what the Russian Supreme Court would have decided had a sophisticated financial fraud case come before it prior to September 2013 in circumstances where the defendant was arguing that the limitation period could start to run and indeed expire before the defendant had any reasonable means of discovering that the

> defendant was responsible for the fraud. There would have been every reason for the Russian Supreme Court to adopt Professor Asoskov's analysis since that had already been employed in the vindication cases and was consistent with the principles underlying the existence of a limitation period in the first place." [emphasis added]

88. This submission was put in substance to Mr Kulkov whose evidence was as follows:

> "Q. …I would suggest is that it was overwhelmingly likely that the Russian courts would have held in a fraud case that time only starts to run when the claimant knows the identity of the proper defendant.
>
> A. I disagree. My Lady, you may imagine that fraud took place in Russia quite often, especially 10/20 years ago, and if the counsel is right, so we would have plenty of cases confirming such argument, that identity of the tortfeasor is essential for the statute of limitation and that, unless the claimant knows such identity, the statute doesn't start to run. But we have no support for it and so the question: why? And the answer is simple: because the law didn't provide for it. The law was different, maybe unfair, but the courts must follow the law. They cannot just take a fair decision against the law because it would be unlawful judgment. So therefore we don't have -- well, Asokov argument is that even before the reform we had the unified case law about this issue, but Asokov didn't refer to any case law with regard to tort cases, so the question: why? My answer I already said."

89. I do not accept that the Russian Supreme Court would have adopted the analysis in the vindication cases to a case of financial fraud had such a case been brought before it prior to September 2013: in my view it did not represent the law at that time and I am not persuaded that a Russian court would have in effect extended or modified the law on limitation. I note that (according to Professor Asoskov) the Plenum of the Russian Supreme Court (previously, also the Plenum of the Russian Higher Arbitrazh Court) does not hear disputes in specific cases and only has the power to issue binding *"clarifications on the interpretation of statutory provisions"*.

90. For the reasons discussed I find that it was not a requirement prior to the change in the law taking effect that the claimant had to have knowledge of the identity of the defendants.

91. It is common ground however that the change applies unless the limitation period had expired by 1 September 2013 and therefore the test under the old law (pre 2013 amendment) will only be met if the defendants show on the facts that SK had knowledge of the violation of its rights prior to 31 August 2010.

Application of Russian law to the facts-Actual knowledge of violation of rights

92. Turning to apply the principles of what constitutes knowledge of violation of rights to the facts of this case.

93. In closing submissions (paragraph 834.2) Tatneft submitted that it is knowledge of the "*core elements*" of the Scheme (and the identity of the defendants). Tatneft submitted (paragraph 836) that the Scheme was "*summarised*" in RAPoC at para 55 but that it was a "*highly sophisticated fraud carried out in a deliberately complex and opaque manner through myriad Ukrainian and offshore companies*." It was submitted that the "*essence of the unlawful acts*" was the fraudulent siphoning of the oil monies through the sham transactions and for the defendants' own benefit. Without the siphoning of the monies it was submitted there would be no claim under Article 1064.

94. As referred to above, Professor Asoskov described the elements for knowledge as follows:

> "If S−K knew or had known that an asset dissipation or siphoning scheme was in place with respect to T and T, S−K had sufficient knowledge with respect to the substance and gist of the scheme and it understood that as a result of that criminal scheme S−K would not be in a position to receive funds for the oil that had been supplied and it understood the existence of a causal link, causation, between those two events, then I do agree with you, sir that that would have been sufficient for the limitation period to start running."

95. Professor Asoskov's evidence was:

> "A. The claimant has to have an understanding that he understands the three elements of claim well and he is able to put them forward in the claim statements so that the claim would be upheld, will prevail.
>
> Q. When you say "so that the claim would be upheld", what I understand you to mean by that is that you look at what it is the claimant is stating as to what has happened and that that statement of the facts, if proved at the trial, would constitute the full ingredients of the cause of action; in other words if his story that he sets out is ultimately accepted by the court, that that story proves his cause of action. Is that right? Is that what you mean?
>
> A. Yes, yes, this is what I mean." [Day 27 p37]

96. The pleaded case at paragraph 55 of the RAPoC is as follows:

> "In 2009 Bogolyubov and Kolomoisky, with the assistance of the other Defendants, procured that a series of steps be taken whereby the value of the oil payments was paid by UTN to Taiz and Tekhnoprogress and then siphoned out of Taiz and Tekhnoprogress in fraud of their creditors and in particular S-K

> and Tatneft, by way of the Oil Payment Siphoning Scheme. In summary the basic elements of the fraudulent scheme were as follows: (i) the Defendants gained (or participated in gaining) control over Avto, Taiz and Tekhnoprogress; (ii) they caused (or participated in causing) UTN to inject the monies owed to S-K, and ultimately to Tatneft, into Taiz and Tekhnoprogress; (iii) they caused (or participated in causing) Taiz and Tekhnoprogress to enter into two series of sham share purchase and sale transactions, only days apart, first to convert the UAH-denominated funds into USD, and second to siphon the USD funds into offshore companies which they controlled; and (iv) they subsequently arranged (or participated in arranging) for Taiz, Tekhnoprogress and Avto to be put into bankruptcy. [emphasis added]

97. Paragraph 88 of the RAPoC, where the "unlawful acts" are pleaded, states:

> "Tatneft relies on the following facts and matters as constituting relevant unlawful acts committed by the Defendants or some of them under the general or principle of Russian law for the purposes of Article 1064: (i) after taking over Taiz and Tekhnoprogress, they caused them to breach their contractual obligations to pay the oil money upstream to Avto by diverting the money offshore through the two rounds of sham share transactions connected with purchase of shares of various junk companies; and/or, (ii) taking over and procuring the bankruptcy of Avto, Taiz and Tekhnoprogress as pleaded at paragraphs 76 to 80 above; and/or (iii) further and in any event, in carrying out the Oil Payment Siphoning Scheme, the Defendants were not engaged in legitimate and lawful business activity but rather in a dishonest scheme to deprive S-K of substantial payments for oil that had been supplied by it through the contractual chain. Such scheme involved the misappropriation of funds for the Defendants' own financial benefit through fraudulent sham transactions as described above and the procurement of the bankruptcy of Avto, Taiz and Tekhnoprogress for the purpose of defrauding S-K and ensuring that it would not be paid the monies that were lawfully due to it. As a matter of Russian law, the infliction of harm through such a dishonest scheme is unlawful for the purposes of Article 1064 (iv) the role of the Defendants in the said unlawful conduct is to be inferred from the facts and matters set out at paragraphs 80A-80E, 81 and 82 above. [emphasis added]

98. Although the pleadings now set out Tatneft's case, as discussed above, the test for knowledge is not whether a claimant can plead its case under the English rules of pleadings. On the evidence of Professor Asoskov (referred to above) it is only necessary to have sufficient knowledge to articulate a case which sets out the elements of the tort: the wrongful act, the harm caused and the link (causal nexus) between the wrongful act

and the harm. I therefore do not accept that the violation of rights is the Oil Payment Siphoning Scheme as defined in the Particulars of Claim.

99. The following description is set out in paragraph 55 of the RAPoC:

> "In 2009 Bogolyubov and Kolomoisky, with the assistance of the other Defendants, procured that a series of steps be taken whereby the value of the oil payments was paid by UTN to Taiz and Tekhnoprogress and then siphoned out of Taiz and Tekhnoprogress in fraud of their creditors and in particular S-K and Tatneft, by way of the Oil Payment Siphoning Scheme"

It meets the description of the elements identified by Professor Asoskov in that it refers to the existence of an asset dissipation scheme and knowledge that as a result of the unlawful acts (siphoning out funds in fraud of creditors) SK would not be in a position to receive funds for the oil that had been supplied.

100. In paragraph 55 Tatneft sets out four paragraphs which it states are a "summary" of the "basic elements of the fraudulent scheme". In my view paragraphs (i) (ii) and (iv) can be seen as articulating the elements of the tort in that they refer to gaining control over Taiz and Tekhnoprogress, causing UTN to inject the funds and placing the intermediaries into bankruptcy. However as discussed above, it is not necessary to articulate the "means" by which the defendants caused the harm provided that the claimant can identify the causal nexus. Thus in my view it is not necessary for the claimant to have knowledge of the details of how the funds had been transferred through the Ukrainian and offshore companies in order to know of the relevant violation of rights. Paragraph (iii) is therefore in my view not necessary in order to have knowledge of the relevant violation of rights provided that there is knowledge of the causal link. If the claimant knew of the payment out of the intermediaries for the benefit of the defendants and the causal link between the payment out of the intermediaries and the harm to SK, it did not need to know about the mechanics of the payments through the sham transactions. It was sufficient if the claimant knew that there had been a misappropriation of funds by diverting money from Taiz and Tekhnoprogress for the defendants' own financial benefit.

101. It is also important to establish the key dates: knowledge of SK has to be established prior to 23 March 2013 (i.e. 3 years before the issue of the claim).

102. At paragraph 838 of its closing submissions, Tatneft submitted that SK did not have any knowledge of the Scheme or the defendants' involvement until the conversation between Mr Gubaidullin of SK and Ms Savelova of Tatneft in April 2013 and did not have *"sufficient knowledge to advance the present claims"* until Ms Savelova gave further details to Mr Gubaidullin in May 2015. It is Tatneft's case that SK discovered that the payments had been made by UTN in late 2011 following a letter from the criminal investigator but the fact that SK learnt of the payments did not give it enough knowledge to bring a claim. (Paragraph 850 and 851 of the closing submissions).

103. It was submitted for Tatneft that much of the defendants' cross-examination in relation to limitation was *"shooting at a false target"* i.e. whether Tatneft had enough knowledge to bring its own claim prior to 23 March 2013 and the actual issue is whether

SK had the necessary actual or constructive knowledge to start time running before that point. (Closing submissions A15)

104. I accept that the issue is whether SK had the necessary knowledge but, in the circumstances, where reliance is placed on what Tatneft knew and could communicate to SK, it is relevant and logical to consider first the knowledge of Tatneft and then the knowledge of SK. I propose therefore to address the issue of knowledge in 2 stages:

i) Stage 1-When did Tatneft have "knowledge" of the core elements of the Scheme (as identified above)?

ii) Stage 2-When did SK have actual knowledge of the violation of its rights?

Approach to evidence

105. The events with which the court is concerned occurred in 2007-2015. The claim was first lodged in 2016. This means that witness statements date in some cases back to 2016 but even these statements were seeking to recall events which in some material instances had occurred 5 or more years before. When giving oral evidence witnesses were being asked to recall conversations that occurred as far back as 2008. In relation to the issue of limitation the problem is particularly acute as the court is concerned to determine the knowledge of Tatneft and SK at particular dates and is seeking therefore to draw conclusions as to knowledge of particular facts when it is unlikely that a witness will recall such level of detail even if an event is recalled. Further in this case the witnesses had the additional disadvantage in that there appears to be almost a complete absence of documentary evidence in the form of letters and emails (both external and internal) between SK and Tatneft relating to the material issues before the court to assist their recall and the court's determination of the issues- there are almost no emails before the court which relate to relevant events and in addition there is a dearth of corporate minutes and other internal records. The reasons for, and the significance of the absence of these documents to the issue of limitation are considered below, but the starting point must be that purely due to the passage of time the court must consider the contemporaneous documents that do exist and will place more weight on these documents than the testimony of witnesses (particularly oral testimony) many years later. This appears to me to be self-evident but to the extent authority for this approach is required it is to be found in the judgment of Leggatt J in *Gestmin SGPS v Credit Suisse (UK)* [2013] EWHC 3560 (Comm).

106. It was submitted for Tatneft that, notwithstanding the passage of time since the events in question, this did not mean that witness evidence did not serve an important function and that whilst a witness may not remember the details of a particular conversation or event, human memory can be more reliable in relation to matters such as the person with whom a witness struck a deal or the person for whom the witness acted over a period of time. It was submitted that therefore whilst Mr Maganov of Tatneft may not remember what he said on a particular occasion, he is more likely to remember whether he spoke to Mr Gubaidullin "*often or rarely*" and whether he shared his knowledge on the scheme with SK (paragraph 975 of Tatneft's closing submissions).

107. Whilst I accept that a witness may recollect general dealings or even a specific matter, this has to be subject to the overall assessment of the credibility of the particular witness and the likelihood that the witness has correctly recollected the event in issue. The

credibility of the individual witnesses is considered below and the reliability of the evidence in the context of the particular issues is considered below.

108. In addition, the court will have regard to the background context or what Tatneft referred to as *"inherent probabilities"* insofar as this can assist the court on the issue of knowledge.

109. Finally, the court will consider whether it is appropriate to draw adverse inferences either from the absence of certain witnesses and/or the absence of documentation.

Stage 1- when did Tatneft have knowledge of the core elements of the Scheme (as identified above)?

110. It was submitted for Tatneft that:

i) obtaining access to the case files in the Second Criminal Complaint in early 2012 was a "breakthrough".

ii) by the time these case files had been properly considered, Tatneft had sufficient knowledge to make allegations against Mr Kolomoisky and Mr Ovcharenko only in the BIT arbitration in August 2012 that are materially the same as the allegations it now makes against those defendants in these proceedings (paragraphs 852 and 853 of the closing).

Contemporaneous documentary evidence

111. The principal material documents in my view in relation to the issue of Tatneft's knowledge are as follows:

i) telegram from Mr Minnikhanov 25 June 2009.

ii) Second Criminal Complaint; letter of 23 September 2009 to Ministry of Interior.

iii) Reply on Jurisdiction in the BIT proceedings 30 September 2009 and Rejoinder 14 December 2009.

iv) January 2010 record of interview of Mr Maganov in 1st Criminal Complaint.

v) 29 March 2010 letter from Mr Minnikhanov to the Prime Minister of Ukraine.

vi) Memorandum of April 2010 from Mr Syubaev.

vii) 3 February 2011 (draft) letter from Tatneft to the President's aide.

viii) 15 June 2011 Claimant's Memorial on the merits in BIT arbitration.

ix) Joint Criminal Complaint signed December 2011.

x) February 2012 record of interview of Mr Maganov**.**

112. There are also various press reports which are relied upon by the defendants. Whilst I have regard to the evidence of these reports the weight which I attribute to these reports varies as it is not clear in all instances the extent to which a particular article has been

read by an individual. However, I do attach weight (as discussed below) to press articles that were expressly relied upon by Tatneft in its pleadings in the BIT arbitration.

Witness evidence

113. The evidence of the following witnesses who gave live evidence is material to the issue of Tatneft's knowledge:

i) Mr Syubaev; and

ii) Mr Maganov.

Credibility of witnesses

Mr Syubaev

114. Mr Syubaev was the Head of the Strategic Planning Department at Tatneft at the relevant time and is now a member of the management board of Tatneft. His duties at the relevant time included supervising Tatneft's investments in UTN.

115. It was submitted for Tatneft that he was a cooperative witness who *"made every effort to assist the court"* and his oral evidence was consistent with his written evidence (paragraph 949 of closing submissions).

116. I do not accept that his oral evidence was consistent with his written evidence or that he made every effort to assist the court. He confirmed in cross examination that his witness statement was written by lawyers (who had previously interviewed him for that purpose) and not by him [Day 4 p11]. This limits the value of that evidence not only because on occasion he appeared not to know what was in that statement but somewhat surprisingly, despite having expressly adopted the witness statements in evidence in chief, could not confirm that it represented his evidence.

117. The following exchange took place:

> "Q…The fact that S-K, under the 2007 commission agency contract, was also obliged to cover the debt from its own funds in case the ultimate buyer did not pay for the oil delivered was the reason why you did not wish to take an assignment from S-K of its rights against UTN?
>
> A. As far as I remember, the principal reasons were in fact tax matters and accounting matters.
>
> Q. Yes, you see, I was just reading to you paragraph 55 of your witness statement...
>
> …
>
> Q. Just before you look at it, I want to ask you this: this witness statement, which was drafted by lawyers, to what extent have you taken the time to check that it actually represents matters within your knowledge and represents your evidence?

A. I can't answer to this.

Q. You can't answer?

A. I don't even know how to answer this question." [Day 4 p68]

118. A further example of his ignorance of his witness statement and apparent prevarication occurred on Day 5 [page 40] in this lengthy exchange to a question:

> "Q. It is correct, isn't it, Mr Syubaev, that by the time that you had -- in June 2009, when you discovered that the payments either had been or were to be made by UTN to Taiz and Tekhno and that the intermediaries had changed hands, it's true, isn't it, that at that stage you were convinced that there was no intention that these monies should be repaid to Tatneft? You were convinced of that fact, weren't you?"
>
> A. Mr Howard, firstly we did not discover that the payments had been made. We received information that was worrying for them about the payments, that the payments were either made or could be made. Secondly, talking about my degree of confidence, then, yes, with a high degree of confidence I was leaning towards an opinion that, well, it's unlikely that there are some bona fide intentions -- that there are no bona fide intentions.
>
> Q. And you were convinced that there was no intention to repay the money to Tatneft, weren't you?
>
> A. Yes, with a high degree of likelihood I doubted that the point was to repay Tatneft.
>
> Q. I'm sorry, I missed that.
>
> A. I had no grounds to suppose that that was made for that particular intention, in my judgment --
>
> Q. Do you agree with me that you were convinced there was no intention to repay the monies to Tatneft?
>
> A. With a high degree of likelihood I doubted that there was such an intention.
>
> Q. I wonder why you're finding it difficult. I was actually just reading out your witness statement which is at {B1/5/10}, paragraph 40. Those are the words you have set out there in the middle of the paragraph. You say: "We were convinced that there was no intention to repay the money to Tatneft."
>
> A. Yes, but -- I might have used different words, but I said the same thing.

> Q. Right. So you stand by what's in your witness statement despite all the fencing we've had; correct?
>
> A. Yes."

119. It is possible that this particular exchange may result from difficulties arising through interpretation (which, as submitted by Tatneft, may excuse or explain his apparent evasiveness). I also note that whilst Mr Howard criticised this witness for not answering questions the court intervened on one occasion on the basis that some of the questions put in cross examination were very lengthy and general [Day 6 p25].

120. However, in my view there can be no general reliance by Tatneft by way of mitigation or explanation on the need for interpretation. It was not evident from his answers that he misunderstood material matters and before Mr Syubaev was sworn, the court expressly told Mr Syubaev that if he was asked a question and he did not hear it clearly or did not understand the question, he should make sure that he asked for the question to be put again.

121. In my view no such explanation can account for the following inconsistency between his witness statement and his oral evidence: [Day 6 p117]

> "Q. Yes. So when you heard that money was being paid by S-K's debtor, UTN, to the assignors to S-K, Taiz and Tekhnoprogress, you must have thought that S-K had an interest in being told about that, a financial interest in being told about that?
>
> A. I can't tell you that I thought about it. First of all we didn't learn. We received information --I personally received this information from Maganov, who in turn received it from Mr Fedotov, regarding possibly made or possibly planned payments.
>
> Q. Yes. Are you telling us that the thought never crossed your mind or, as far as you're aware, the mind of Mr Maganov that this information should be given to S-K? Is that what you're telling her Ladyship, that thought never crossed your mind?
>
> A. This thought never crossed my mind."

122. This is to be contrasted with the relevant paragraph of his witness statement (paragraph 64 of his first witness statement) which counsel directed him to which stated:

> "Tatneft did not inform S-K of the alleged payments supposedly made by UTN since the information in possession of Tatneft was unofficial and Tatneft had no proof that the payments were actually made by UTN."

123. In my view this was an attempt by Mr Syubaev to support Tatneft's case that Tatneft had not told SK of the payments but its credibility is thrown into doubt by the inconsistent nature of the evidence.

124. Of greater concern on the issue of credibility is the evidence of Mr Syubaev in relation to the bankruptcy of SK.

125. Mr Syubaev gave the following evidence in relation to the link between the assignment of the claims by SK in 2015 and the liquidation of SK:

> "Q. You see, what I'm trying to find out is whether you can cast any light on the fact that S-K's business gets transferred to Neftetradeservice, S-K is left as a shell company in 2014 and then, in 2015, S-K assigns its claims to Tatneft and then S-K goes into liquidation. Are you able to explain to us the relationship between these different events?"
>
> A. I have no explanation as to how these events are related. All I can say is there are certain things that I was aware of and those were that Suvar-Kazan - again with the caveat that I'm speaking on the basis of my knowledge. I do not have any additional documentary evidence -- that they ran into financial difficulties after the 2008 crisis. So far as I knew -- and once again to the extent of my knowledge only -- S-K's financial problems were mainly related to their real estate and property development business. So far as I know -- and I can assume that for a certain period of time that was what many other companies in financial difficulty were doing -- Suvar-Kazan were trying to turn the company around, to achieve some rehabilitation. After that, after having presumably exhausted all the possibilities, they made the decision to go into liquidation and they went bankrupt -- they initiated bankruptcy proceedings." [day 6 p50] [emphasis added]
>
> "… In 2015 Tatneft became aware of S-K's intention to wind the company up. That's number one. Number two, Tatneft became aware of the bankruptcy proceedings. S-K's accounting department still showed S-K's payable vis-a-vis Tatneft in their books because S-K had some actionable rights, a chose in action against Ukrtatnafta, because the oil shipments had not been paid and also because that debt still appeared on the books of S-K as a liability. And, thirdly, after the liquidation and after the winding-up of the company, there was no way these claims could have been pursued, the lawyers suggested that the assignment agreement should be entered into…" [day 6 p54] [emphasis added]

126. After this cross examination had been completed, on 4 December 2020, documents relating to legal advice given by Akin Gump (lawyers acting for Tatneft) over which privilege had previously been asserted, were disclosed following an order from the court on 27 November 2020 ordering inspection of documents comprising:

> "All legal advice provided to Tatneft by Akin Gump prior to SK's liquidation in May 2015 as to the reasons for and/or scope of the assignment of claims by S-K to Tatneft."

127. In closing it was submitted for Tatneft that the hiving off of the business of SK to Neftetradeservice in October 2014 and the advice from Akin Gump on 28 October 2014 that SK should be put into liquidation were "*not necessarily causally connected*". [Day 42 p179]

128. Whilst this submission on its narrow construction dealing with the hiving off of the business may have some substance, it cannot detract from the key point that emerges from the disclosure, namely that Akin Gump advised Tatneft to put SK into liquidation and the assignment was part of a carefully orchestrated plan to bring the claim in these proceedings. It appears to be accepted by the submission made for Tatneft that Akin Gump did in fact advise that SK should be liquidated and, more significantly, is contrary to the evidence of Mr Syubaev who (as set out above) positively asserted that Tatneft *"became aware of SK's intention"* to wind up the company and of the bankruptcy proceedings and "after the winding up" the lawyers suggested that the assignment agreement should be entered into.

129. The documents disclosed of the advice of Akin Gump are unambiguous. In a PowerPoint presentation dated 28 October 2014 in relation to the proposed claim against the defendants in relation to the Scheme, the conditions (for damage to occur and limitation to commence) are stated to include:

> "Suvar must assign all rights of claim against UTN to Tatneft..."
>
> "Preferably Suvar should be liquidated or at least bankruptcy proceedings should be initiated against Suvar"

130. This was repeated in substance in a more detailed presentation of the same date also disclosed.

131. These materials show that the evidence of Mr Syubaev to the court was untrue. Even if the court were wrong to infer that Mr Syubaev was evasive in the earlier answers referred to above and they should be attributed to difficulties of say translation, there was no misunderstanding in respect of the case advanced by Mr Syubaev in cross examination that he had "*no explanation*" as to how the assignment and liquidation of SK were related and that the idea of the assignment only occurred to Tatneft after the liquidation. In my view this evidence is shown to be false by the disclosure of the Akin Gump materials.

132. Further this disclosure shows that his evidence in his first witness statement in 2016 and which was adopted for the purposes of this trial was also false. In that witness statement at paragraph 92 he stated:

> "In May 2015 I learnt from Tatneft's lawyers that S-K's members had adopted a decision to wind the company up due to the deplorable financial condition - S-K's net equity had been negative for three years, and the law required the members to so decide. This was not a surprise for me, as I remember, sometime in towards autumn of 2014 Maganov informed me of his call with Korolkov during which the CEO of S-K told him about the unavoidable liquidation of the company. In this regard, Ms. Boulton's allegation in para. 131 of her Affidavit that "S-K's

> liquidation may have been equally convenient for Tatneft" appears to be odd and unfounded. As I have already said, Tatneft's pursuance of S-K's liquidation was not in the best commercial interests of Tatneft, although Tatneft had had such an opportunity for several years."

133. Mr Syubaev confirmed the truth of his witness statements and even if it was drafted by lawyers adopted it as his evidence. He is a member of the management board of Tatneft. I am unaware of any reason which would suggest that this evidence was anything other than an attempt to conceal the steps that were taken to bring this claim through SK and none was offered in closing submissions (other than the limited submission referred to above).

134. Although I acknowledge that it is possible for witnesses to lie in relation to some matters and to give truthful evidence on other matters, for the reasons discussed above, I approach his evidence both written and oral with considerable caution and look for corroboration from the written contemporaneous documentation.

Mr Maganov

135. Mr Maganov is the General Director and Chairman of the Management Board of Tatneft. In 2009, Mr Maganov was the First Deputy General Director of Tatneft and the Head of the Department of Realisation of Oil and Oil Products ("DROOP").

136. It was submitted for Tatneft that Mr Maganov was keen to give a "*full and open account*" of his recollection but that cross examination was an experience that he struggled with. It was submitted that this was because he was a mining engineer who had worked his way up to the top of a large Russian company, was nervous in giving evidence and wanted to make sure he got his point across. Further that he was unable to deal with points of detail because he operated at a much "*higher level of generality*" (paragraph 960 of Tatneft's closing submissions). It was submitted that he was "*fundamentally an honest witness*".

137. Initially the court was concerned that Mr Maganov had not understood questions: for example, after the following exchange the court intervened to ask Mr Maganov to focus on the question and for Mr Howard to keep questions as simple as possible.

> "Q. Right. And as I understand it, in that role [Mr Karpov] would be the person therefore who would be dealing on a regular basis with representatives of S-K; is that right?
>
> A. My Lady, if we look at the process, the way in which we worked, Suvar-Kazan was not part of the day-to-day operations of DROOP."

138. However as cross examination continued, he appeared to adopt an approach of challenging the questions asked as illustrated for example by the following exchange:

> "Q…You see, Mr Syubaev says that Tatneft had stable and reliable partnership relations with S-K. Is he right to say that?

> A. Tatneft had contractual relationships which were built on the good faith performance of the obligations by the parties.
>
> Q. Very good. Just so I can be clear about it, firstly, is Mr Syubaev correct to say that Tatneft had stable and reliable partnership relations with S-K? Is he right or is he wrong? Can you please answer that directly?
>
> A. I need to understand what Mr Syubaev meant by it when he said, "partnership relationships" or "partnership". I am a proponent, you see, because I was dealing with trading as a counterparty -- I am a proponent of counterparty because in our relationship with Suvar there were never any documents where we would refer to ourselves as "partners". At least I've never signed anything of the sort. We had contractual relationship." [Day 10 p21]

139. This could be characterised as the attempt by a witness to be cautious in answering questions and because, as he stated in cross examination, he was nervous. [Day 10 p24] He certainly gave rambling answers to questions and often appeared to answer a previous question in response.

140. For the purposes of writing this judgment and in the light of the closing submissions, I have read with care the transcripts of his evidence. However, the transcripts merely confirm my impression at the time which was that Mr Maganov was not a nervous or garrulous witness in an unfamiliar environment but a witness who on occasions was choosing not to answer the questions which were put to him. For example:

> "Q …Now, let's then see the upshot of the conversation [with Gubaidullin re BIT proceedings] that you are describing [in his witness statement]. The comfort, insofar as it was comfort to S-K, was that what you were indicating was, whilst you were trying to pursue matters in the BIT arbitration, you would not pursue S-K for the debt. Is that the comfort you were giving them?
>
> A. No, the comfort consisted in the fact that I recommended that they do enforce their debt. I expected them to do all that they had to do with a view to do that and we would not be trying to enforce.
>
> Q. Yes. You would not be trying to enforce, as you put it, during the course of the arbitration proceedings. Stop there for a moment. That is right, isn't it?
>
> A. Which arbitration proceedings are you referring to, sir?"

141. It was submitted for Tatneft that Mr Maganov was not trying to be obstructive but was merely seeking clarification or that it may have been an issue of translation (para 961.2 of Tatneft's closing submissions). I reject that submission: when the evidence is read in context it is clear that Mr Maganov was being asked about the conversation with Mr Gubaidullin and the BIT proceedings which he referred to in paragraph 47 and 48 of

his witness statement. However, to try and ensure the question was clear to Mr Maganov, the court intervened to ask Mr Howard to put the question again and Mr Maganov again did not answer the question.

> "Q. Mr Maganov, in your witness statement you say that you told Mr Gubaidullin words to the effect that Tatneft would not pursue S-K during the course of the arbitration proceedings against Ukraine. Does that remain your evidence?
>
> A. In the course of our arbitration proceedings, BIT or the other one, how could I raise claims vis-a-vis Suvar within the framework of those proceedings? That's what I don't understand.
>
> Q. Mr Maganov, we have been discussing --
>
> "A. Not in my wildest dreams would I be able to do that."

142. Faced with what appeared to be a deliberate refusal to understand or answer the question, despite the lengthy exchanges which preceded this and provided the context for Mr Maganov to understand the question, the court asked Mr Howard to move on. [Day 10 p88]

143. Another example in my view of an unwillingness to answer even the most straightforward question was as follows:

> "Q. Mr Maganov, as I understand your evidence, Mr Gubaidullin informed you that UTN had not paid for the oil; correct -- at the end of October 2007; correct?"
>
> A. Yes.
>
> Q. Right. And at that stage we know that S-K approached Tatneft -- the legal department of S-K approached the legal department of Tatneft to get assistance in recovering the oil debt. Were you aware of that, that your legal department and S-K's legal department were cooperating to seek recovery? Were you aware of it or not? Just tell us one way or the other.
>
> A. My legal department, do you mean the oil sales department or the department headed by Mr Syubaev? Which department do you mean?" [Day 10 p63]

144. This approach continued [Day 11 p15]:

> "Q. At every single stage in the BIT arbitration and indeed in the criminal investigations, Tatneft was saying that the payments had in fact been made, just as indeed Ukraine was saying in this document; do you agree or disagree with that? Please answer the question directly.
>
> A. Before I answer the question I'd like to clarify, please, Mr Howard. What do you mean "every stage", by "every stage"?

> When you say "every stage", from what period of time to what period of time? And stages, please, connected to what events? Because in my head I associate the word "stage" with a certain event. Event, and then let's go stage by stage, please."

145. Another example was when Mr Maganov was asked whether, as alleged in the BIT arbitration, Tatneft had suffered loss as a result of the oil siphoning scheme whereby the oil monies were paid to Taiz and Tekhnoprogress and siphoned out. Mr Maganov replied by saying that he hadn't seen all the documents of the BIT arbitration and knew nothing about "*the tactics, the words, the formulations*". [Day 12 p97] It was submitted that it was not unreasonable for Mr Maganov to ask for documents which were being referred to (paragraph 962 of Tatneft's closing submissions footnote 1437). In my view it was clear at the time (as the court indicated) and is clear from the transcript that it was not necessary for Mr Maganov to be taken to any documents in order to answer the question but he chose not to do so.

146. Mr Maganov also gave answers which were inconsistent with his witness statement and which may have been designed to support Tatneft's case. For example, his witness statement said:

> "44. At the end of October, we (my colleagues and I at Tatneft) were increasingly worried about whether the outstanding debt would be paid to Tatneft. We also understood that in the event of a delay of payment, S-K may be subject to sanctions for violation of currency legislation. The fine could be large. I was afraid that there could also be negative consequences for the reputation of Tatneft. I therefore gave instructions to Mr. Karpov and Mr. Gaifutdinov (then the Deputy Head of the URNiN) to take this issue under their control and to deal with it. At about the same time, as I recall, Mr. Gubaidullin called me and said that UTN had not paid for Tatneft's oil delivered in August-October 2007.."

147. In cross examination Mr Maganov said:

> "Q… but the first sentence is dealing with whether you would be paid at all, is it not?
>
> A. I did not even think that there was a possibility that people can just up and go away with the money, steal the money and fail to pay. As I say in my paragraph 44, we understood that in the event of a delay, Suvar-Kazan can face sanctions because of the violation of the currency regulations and that they could be liable to pay a penalty. So if you read this in context, you will see that I'm referring to a delay in the payment of the debt. I was really worried that they would not pay us and then that would expose us. We would face the risk of having to pay a penalty."

148. This oral answer in my view clearly contradicted his witness statement and was an attempt to bolster Tatneft's case.

149. Mr Maganov also gave evidence which was shown to be contradicted by contemporaneous documentary evidence. The most notable example of this was when in cross examination Mr Maganov was asked who else within DROOP would have known about the payments to Taiz and Tekhnoprogress. His evidence was that he did not inform anyone and nobody should have known about them. [day 10 p115]

150. He was then taken to an interview which Mr Karpov gave in 2012 to the investigators in which Mr Karpov stated that he had found out about the payments from Mr Maganov. Mr Maganov's evidence was that he should not have told Mr Karpov and he did not remember discussing it with him. [Day 10 p119]

151. Ms Bagautdinova had also given evidence to the same effect to the investigators namely that she learnt of the payments from Mr Maganov.

152. Mr Maganov insisted that he did not discuss it with them and it was confidential information which they should not have told anyone and they did not. [Day 10 p120]

153. Mr Maganov was upset by this evidence of what had been said in the interviews and said so. It was put to Mr Maganov that he was upset because this was evidence that Tatneft's case to deny SK's knowledge was contrived. Mr Maganov denied this. He said:

> "No, no. This is not what I'm -- I'm upset that I might have said something or thought something which, alas, does not coincide with what is said in the police minutes. I'm upset that I didn't know something. That's what I'm upset by."

154. He maintained that the information was confidential and everyone had been warned accordingly. However, there is no mention of such warnings in his written evidence. [Day 10 p128] Further Mr Syubaev's evidence was that he did not give any "*direct instructions*" limiting what employees could tell SK but there was a "*general internal rule*". [Day 4 p66]

155. It was submitted for Tatneft (paragraph 964 of the closing submissions) that Mr Maganov showed genuine surprise at this evidence. Mr Maganov did appear to be both surprised and upset by the documentary evidence but the court cannot be sure whether this was because his recollection had been shown to be inaccurate or whether more fundamentally it operated against the case advanced by Tatneft.

156. Tatneft submitted (paragraph 1006) that the fact that Mr Maganov forgot that he may have told his subordinates about UTN's payment does not mean that his recollection that he did not tell SK is unreliable. However, in my view it is relevant because taking this evidence at its highest, even if this was his genuine belief, his memory was clearly at fault and thus it would seem that others at Tatneft were aware of the payments and the matter was not kept confidential as Mr Maganov asserted.

157. This has a bearing on the inherent probabilities of Tatneft having communicated the relevant details to SK and counters the submission (paragraph 963 of Tatneft's closing submissions) that his experience within Tatneft and of working with SK *"put him in a good position to assist the court on the overall nature of the dealings between the two companies"*. Whatever the general position concerning dealings between the two

companies, the court is concerned with whether particular information relating to the elements of the Scheme was communicated and his evidence that the information regarding payments to Taiz and Tekhnoprogress was not communicated internally has been shown to be wrong. In the light of this, the court infers that Mr Maganov's evidence as to whether the information was communicated to SK may also therefore not be reliable.

158. Another example of where, in my view, the evidence of Mr Maganov was contradicted by the contemporaneous documents is when he was asked about the telegram from Mr Minnikhanov to the Prime Minister of Ukraine in June 2009. His evidence was that in effect what was described in the telegram was deliberately exaggerated and Tatneft were merely seeking to get to the bottom of the situation. This explanation appears to be contradicted by the terms of the telegram itself. The relevant evidence is as follows:

159. Mr Maganov confirmed in cross examination that although he did not prepare the telegram, he knew about it.

> "Q. Yes, and it reflected your state of knowledge and understanding at that date. Please do answer that question.
>
> A. The telegram reflected our hypothesis, the riskiest scenario, and sometimes we allowed ourselves to elaborate and augment things a bit, not to allow the risk. It's usual customary practice.
>
> …
>
> A. At the time the telegram was formed as a request of Premier Minnikhanov to get to the bottom of the situation, what was happening there, who is paying whom, on the basis of what contracts, because at the time, as far as I remember, the situation arose that there was a reassignment to Tatneft, and Kremenchug plant of Ukrtatnafta did not owe Taiz, Avto and Tekhnoprogress. That is the essence of our concern…" [Day 10 p102]

160. This characterisation that it was just a request to "*get to the bottom of the situation*" in my view is not borne out by the telegram itself which states:

> "…I BELIEVE IT IS NECESSARY TO CONDUCT NEGOTIATIONS ON THE LEVEL OF THE PRIME-MINISTERS OF UKRAINE AND THE REPUBLIC OF TATARSTAN IN ORDER TO SUPPRESS THE ACTIVITY OF THE UNLAWFUL MANAGEMENT OF UKRTATNAFTA, JSC WHICH VIOLATES THE INTERESTS OF ITS SHAREHOLDERS"

161. It was submitted for Tatneft that Mr Maganov was unable to deal with points of detail because he operated at a much "*higher level of generality*". However even if this is correct as a broad proposition for someone of his seniority, I do not accept his characterisation of the limitation issue in these proceedings and the knowledge of SK as "*legal minutiae*". [Day 11 p70]

162. His evidence in relation to the issue of limitation was that he was not aware of the "*time-bar-related*" issues until Mr Howard raised it in the course of cross-examination. [Day 12 p100]

163. I do not set out the exchange *verbatim* but I reject the submissions made in closing submissions for Tatneft that Mr Maganov was in any way confused about the question. Mr Howard put the question in effect three times including taking Mr Maganov to his (first) witness statement (at paragraph 53) where Mr Maganov stated that:

> "I have been told that it is an issue in this litigation how much I and others at Tatneft knew of the defendants' involvement in the raid and of the defendants' involvement in the oil payments siphoning scheme. I set out below details of my knowledge and, where applicable, the extent of my interactions with various individuals at SK…"

164. Mr Maganov's oral evidence on this point was in my view improbable and incredible not only in the light of his witness statement but more significantly in view of the fact that Mr Maganov is Chairman of the Management Board of Tatneft and Tatneft is spending very substantial sums in these proceedings to sue the defendants in respect of which limitation is one of the principal defences relied upon by the defendants.

165. In cross examination Mr Maganov said that he did not know what "*making a civil claim*" meant [Day 12 p21]. I find that inherently unlikely as the head of a major corporation. His explanation was that it was not within his job description or that he was a mining engineer. However, despite his initial categorical denial, he then accepted that he "*understood the gist*" that he had "*the right to bring an action*". There was an attempt by Tatneft in closing submissions (paragraph 961.4) to excuse this initial denial by submitting that *"making a civil claim"* is a defined term in Russian criminal procedural legislation. There was no suggestion in cross examination that any procedural aspects of Russian law were relevant to this straightforward question and the submission merely draws attention to another exchange in cross examination which did Mr Maganov no credit. In similar vein he also said in cross examination when asked whether he was aware that Tatneft was designated as an aggrieved party, that legalese was not his "*forte*" and he was confused [Day 12 p27], despite having used the term "*aggrieved party*" in paragraph 76 of his own witness statement where he stated:

> "Upon termination of the criminal investigation, Tatneft, in its capacity as the aggrieved party, was given access to the case files."

166. I have already set out above in relation to the evidence of Mr Syubaev, the material evidence which emerges from the documents now disclosed relating to advice given by Akin Gump on the transfer of claims and the liquidation of SK. A further significant matter to be taken into account in assessing the evidence of Mr Maganov is his evidence in this regard.

167. His evidence was that he had "*no idea why [SK] liquidated themselves*" and that:

> "Mr Korolkov phoned me, said they ran into some financial difficulties and that the liquidation of the company- -well they'll have to liquidate the company. That's it." [Day 12 p79]
>
> "Q. In this discussion you talked about transferring of claims didn't you from SK to Tatneft?
>
> A. I did not speak about it to Mr Korolkov, about the transfer of the chose of action. He just simply phoned me, said that they are experiencing financial difficulties and then they took a decision to liquidate. Why? I don't know. What was the purpose? I don't know."

168. Mr Maganov's evidence at paragraph 82 of his witness statement was as follows:

> "…in late 2014 and early in 2015, I became aware that SK was in serious financial difficulties. I recall a conversation with Mr Korolkov in the autumn of 2014. According to my recollection during this conversation Mr Korolkov said that the liquidation of S-K was unavoidable… I discussed this with Mr Syubaev who was working with Akin Gump. They concluded that if SK were to be liquidated, all claims SK had would need to be transferred to Tatneft. This specifically included the claims against the four individual defendants.

169. In the light of the disclosure of the advice given by Akin Gump and Mr Maganov's acceptance in his own evidence (above) that he discussed the matter with Mr Syubaev, it seems highly unlikely that Mr Maganov was unaware of the reasons why SK was liquidated and the evidence in his witness statement that it was only as a result of the decision to liquidate that Tatneft concluded that the claims needed to be transferred to Tatneft, is in my view false.

Conclusion on the evidence of Mr Maganov

170. In my view Mr Maganov understood what was in issue in these proceedings but at times sought to conceal it. Furthermore (contrary to the submissions) I do not accept that his background would have prevented him from giving full and frank evidence in these proceedings should he choose to do so: he holds a very senior position in Tatneft and having regard to his position and responsibilities in Tatneft both now and at the material time, I do not accept that he is, or was, anything other than fully abreast of the issues (as opposed to the fine detail or minutiae) both in these proceedings and (to the extent material) in the BIT proceedings.

171. Tatneft's counsel in closing submissions has made skilful and extensive arguments in relation to Mr Maganov's answers in cross examination (and indeed in relation to other witnesses). I do not believe that it is necessary to address every submission or example which Tatneft rely upon in defence of Mr Maganov's evidence (or other witnesses). My conclusion on this witness's evidence, having had the opportunity to hear and see him giving his evidence over several days, is clear and I have sought to set out examples above from his evidence which led to my overall conclusion on the witness.

172. I find that Mr Maganov did not give straight answers to questions in cross examination and on occasions he was evasive and/or gave evidence which contradicted not only his own witness statement but also the clear documentary evidence which was shown to him. Taking his evidence as a whole I am not satisfied that he gave, or sought to give, a *"full and open account"*. It was in the interests of Tatneft that he should present evidence which supported Tatneft's case, there are clearly instances where he sought to do this in the face of documentary evidence to the contrary and there is in my view a real likelihood that, irrespective of the true position, this is what he did on the material issues. Accordingly, I accord little or no weight to his evidence.

Ms Bagautdinova

173. Ms Bagautdinova was unable to give oral evidence as she contracted COVID and was unwell. Her witness statement is therefore admitted as hearsay.

174. In closing Tatneft observed (para 969 of closing submissions) that her evidence was *"largely not concerned with limitation"*. In assessing the weight to be given to that evidence, it is notable that her witness statement makes no reference to the evidence that she gave to the investigators that she learnt of the payments to Taiz and Tekhnoprogress from Mr Maganov. Nor does it make any reference to communications with SK although the evidence of Mr Syubaev was that within Tatneft DROOP headed by Mr Maganov would have had responsibility for communications with S-K.

175. In the absence of any opportunity for these omissions to be explained and given the lack of relevance of her written evidence, her witness statement does not provide any assistance in the resolution of this issue.

Contemporaneous documentary evidence relating to Tatneft's knowledge

176. I turn then to consider the evidence concerning what I regard as the principal contemporaneous documents which are relevant to the issue of Tatneft's knowledge.

Telegram from Mr Minnikhanov to Ms Tymoshenko, the Prime Minister of Ukraine, 18 June 2009

177. At the relevant time Mr Minnikhanov was chairman of Tatneft and Prime Minister of the Republic of Tatarstan.

178. The telegram in June 2009 read so far as material:

> "…ACCORDING TO OUR INFORMATION UKRTATNAFTA JSC HAS MADE SEVERAL MULTI-MILLION PAYMENTS DURING THE LAST DAYS TO THE ACCOUNTS OF THE COMPANIES TA1Z, LLC AND RP TECHNO-PROGRESS… PAYMENTS MADE TO THE ACCOUNTS OF TA1Z, LLC AND RP TECHNO-PROGRESS, LLC ARE UNLAWFUL AND HAVE FEATURES OF FINANCIAL MACHINATIONS AND CONSIDERABLY VIOLATE THE INTERESTS OF THE MAJOR SHAREHOLDERS OF UKRTATNAFTA, JSC. 1 BELIVE IT IS NECESSARY TO CONDUCT NEGOTIATIONS ON THE

> LEVEL OF THE PRIME-MINISTERS OF UKRAINE AND THE REPUBLIC OF TATARSTAN IN ORDER TO SUPPRESS THE ACTIVITY OF THE UNLAWFUL MANAGEMENT OF UKRTATNAFTA, JSC WHICH VIOLATES THE INTERESTS OF ITS SHAREHOLDERS" [emphasis added]

179. The evidence of Mr Syubaev was that the payments were unlawful because they were made to Taiz and Tekhnoprogress and not to SK (in accordance with the assignment and the Tatarstan judgment). His evidence was that they did not have certainty that the payments had in fact been made. [Day 5 p29]

180. He was asked in cross examination about the meaning of "*financial machinations*". He said there were three concerns: (i) Ukrtatnafta for over two years had not paid for the oil shipments that had been made; (ii) for UTN those intermediary companies could not be participants in the payments. They were not the true recipient, so that was unlawful; (iii) had they had the intention of acting bona fide, then presumably UTN would have had to pay the money to S-K. He said:

> "…because this is not something that actually happened from the information that we had received from Mr Fedotov. We believed that those payments had been suspicious." [Day 5 p33]

His evidence was that he understood that the payments were not bona fide.

181. He also confirmed that Tatneft understood that the intermediaries had no real or legitimate basis and that the payments would have had to be made with the authority of Mr Ovcharenko as chairman of the Management Board. [Day 5 p37]

182. In cross examination Mr Syubaev confirmed his evidence in his witness statement that the proposed payments were likely part of a scheme and he agreed that the scheme which Tatneft was inferring was to ensure that payments never went further up to Avto and SK. [Day 5 p41]

183. His evidence was that he would not qualify it as "fraud" but he said that the payments were of a "*dubious nature*" and the victim was SK and Tatneft because neither SK nor Tatneft had received money for two years.

<u>The letter dated 23 September 2009 to the investigator in the Ministry of Interior of the Republic of Tatarstan.</u>

184. The first criminal complaint was made jointly by Tatneft and the Ministry of Land and Property of the Republic of Tatarstan (as shareholders of UTN) in March 2008 and was directed against Mr Ovcharenko.

185. In the letter dated 23 September 2009 Tatneft requested that an investigation be conducted into:

> "the circumstances of a transfer from the account of [UTN] to bank accounts of [Taiz and Tekhnoprogress] of the money intended to repay the debt for Tatneft's oil supplied in 2007".

186. In the application letter it stated that payments were transferred to the accounts of Taiz and Tekhnoprogress with Privat Bank:

> "…As a result of illegal replacement of the management, in October 2007 Ukrtatnafta without any lawful grounds ceased to make payments to its counterparties for the oil received.
>
> As we learned, Ukrtatnafta resumed payments and transferred from its bank account No. 26004055234413 to the bank account of OOO Taiz No. 26003050007161 and the bank account of OOO Techno-Progress No. 26004050005797 with JSC Privatbank, Dnepropetrovsk, the money designated to pay for the oil supplied.
>
> Despite the payments made by Ukrtatnafta Tatneft never received the payment for the oil it supplied. We also know that OOO Taiz and OOO Techno-Progress by the judgments of the Poltava Commercial Court dated 21 August 2009 were declared bankrupt and their liquidation was commenced.
>
> Claims against Ukrtatnafta for payment for the oil supplied in the amount of over US$450 mln were assigned by OOO Taiz and OOO Techno-Progress to OOO Suvar-Kazan Company acting for Tatneft. The Arbitrazh Court of the Republic of Tatarstan found the assignment legal and the debt to be recovered. In view of such facts, payments to the accounts of OOO Taiz and OOO Techno-Progress inflict material damages upon Tatneft and contain elements of fraud." [emphasis added]

187. Mr Maganov's evidence in cross examination was as follows:

> "Q. Now, Mr Maganov, it is in fact plain from this document on 23 September that even before the reply was served on 30 September with its exhibit of two payments orders, Tatneft knew that the payments in respect of the oil debts had been paid to these accounts and it even knew the account numbers. Surely even you will not disagree with what we see on this piece of paper? Anything you'd like to say, Mr Maganov?
>
> A. This document definitely doesn't show the amount you have been quoting. I don't see the amount of money here. We had information about UTN's intention to transfer the funds. Of course we understand what kind of bank accounts can be involved because Mr Fedotov, who gave us this information, was financial director and continued to maintain his relationship. But as far as I understand from my lawyers, apart from those two small payment orders for insignificant amount, we did not have information about the full amount having been transferred until 2011." [Day 11 p23] [emphasis added]

Mr Maganov's interview to the investigator in January 2010

188. Mr Maganov was interviewed in January 2010. The record of that interview reads so far as material:

> "… However, in accordance with information provided by Ukrainian legal advisers to the international arbitration considering the lawsuit of Tatneft against Ukraine under the UNCITRAL procedure, it was revealed that in mid-June 2009, Ukrtatnafta CJSC had transferred the entire amount of debt in the amount of about 2.1 billion UAH to the accounts of Taiz LLC and Tekhno-Progress LLC (Poltava, Ukraine). At the same time, despite the existing contractual obligations, these funds had not been transferred to Tatneft OJSC or Suvar-Kazan LLC. I assume that a few months before the funds were transferred to the accounts of Avto, LLC and Techno-Progress LLC, these companies were acquired by Privat Group.
>
> I believe that the entire scheme of seizure of the refinery and the alleged "repayment" of the debt for oil supplied by Tatneft OJSC was planned by Kolomoyskyi I. V. and Ovcharenko P.V. This is also confirmed by the fact that funds were transferred to the accounts of Taiz LLC and Techno-Progress LLC opened in Privatbank CJSC as well as the accounts of the refinery. I became aware of this from banking documents submitted on behalf of Ukrtatnafta CJSC to the international court.
>
> In October 2009, Avto, Taiz LLC and Techno-Progress LLC were declared bankrupts under the lawsuits of one of the enterprises of the Privat Group – Optima-Trade LLC in Dnipropetrovsk. Now, on the basis of the decisions of the Commercial Court of Poltava region of Ukraine, the liquidation of these enterprises is pending.
>
> The payment by Korsan LLC for 18% shares in Ukrtatnafta CJSC in the amount similar to the amount of debt of the refinery to Tatneft OJSC is also one of the links in the illegal scheme conceived by Kolomoyskyi I. V. and implemented by Korban G.O., his assistant in the Privat Group who spoke at the auction when buying shares on behalf of Korsan LLC. [emphasis added]

Pleadings in BIT arbitration

189. The BIT arbitration concerned a claim for compensation brought against Ukraine in respect of Tatneft's rights as a shareholder in UTN and the claim for the shares was quantified at $610 million and the claim for the oil was $520 million. [Day 5 p59]

190. Mr Syubaev accepted that he had oversight of the BIT proceedings but his evidence was that the documents were "long and purely legal". [Day 5 p60]

191. In the document entitled "Reply on Jurisdiction" filed on 30 September 2009 by Ukraine in the BIT arbitration Ukraine stated that UTN had paid its debts in full to Taiz and Tekhnoprogress and in a footnote stated that the payments were made by 46 wire transfer orders.

192. At paragraph 275 of the Rejoinder dated 14 December 2009 filed by Tatneft in those proceedings it stated:

> "First, Taiz and Tekhnoprogress are Ukrainian owned and controlled entities that in 2009, through a series of opaque and suspect transactions, along with another Ukrainian entity, Avto, came under the control of Igor Kolomoisky and Privat Group - the principal partners and co-conspirators of Mr. Ovcharenko and his group of raiders - who now control the management of Ukrtatnafta and who are responsible for the orchestrated purchase at auction of shares seized from AmRuz and Seagroup. Thus, for Respondent now to argue that payment of hundreds of millions of dollars of debt for oil supplied by Tatneft has been made in full to two companies controlled by those who seized control of Ukrtatnafta and are attempting to own it outright is preposterous. Not a penny of the amounts allegedly paid by Ukrtatnafta under Mr. Ovcharenko's control has gone to Tatneft. Instead, all of these amounts apparently would have gone to Privat, a further flagrantly illegal misappropriation of Ukrtatnafta's funds which has caused harm to Claimant." [emphasis added]

29 March 2010 letter from Mr Minnikhanov to the Prime Minister of Ukraine

193. The letter in March 2010 stated in material part:

> "The Republic of Tatarstan greatly appreciates the intentions of the new political leadership of Ukraine to conduct a thorough analysis of the current situation surrounding Ukrtatnafta JSC and to take steps to restore law and order and the lawful rights of its Russian shareholders, which were materially breached as a result of the illegal corporate raiding actions taken against Ukrtatnafta CJSC starting in 2007.
>
> For its part, the Republic of Tatarstan is willing to provide comprehensive assistance to the Government of Ukraine in the process of its investigation of the circumstances surrounding the illegal takeover of Ukrtatnafta CJSC and subsequent illegal corporate raiding actions organized by the Ukrainian business group Privat, headed by businessman I. Kolomoisky (in collaboration with businessmen A. Yaroslavsky and P. Ovcharenko).
>
> …

> The raiders refused to pay for oil supplied to the Kremenchuk Oil Refinery from Tatneft OJSC's reserves in 2007, for a total of around $450 million, thereby effectively appropriating it.
>
> At the same time, in June 2009, Ukrtatnafta CJSC organised a financial transaction (which contained elements of fraud) to eliminate Ukrtatnafta CJSC's accounts payable for the supplied oil. Formally, payments were made to Ukrainian companies' accounts with PrivatBank, after which the funds disappeared. The beneficiary companies are now going through bankruptcy and liquidation procedures. [emphasis added]

Memorandum of April 2010

194. This is an internal Tatneft memorandum which Mr Syubaev said "*with a high degree of likelihood*" was known to him but that he would not have personally prepared. [Day 5 p79]

195. The memorandum read (so far as material):

> "…In the summer of 2009, Ukrtatnafta JSC made a number of multi-million [dollar] payments (around UAH 2.1 billion) to the accounts of the intermediary companies which delivered the unpaid oil to Ukrtatnafta JSC in 2007. Previously, the management of the illegally taken-over Ukrtatnafta JSC had accused these intermediaries of "tax evasion" and had in this way substantiated its refusal to pay for the oil.
>
> The payments were made to these companies' accounts open at PrivatBank. According to unofficial information, the Privat business group had preliminarily established control over these intermediary companies (acquired them) and is currently handling their bankruptcy and winding-up.
>
> Taking into account that
>
> - the perpetrators of the illegal takeover avoided paying for the Russian oil for more than a year and a half, having essentially embezzled it,
>
> - the rights of claim against Ukrtatnafta JSC regarding the payment for the previously delivered oil were assigned by the intermediaries to Suvar-Kazan LLC (of which Ukrtatnafta JSC was aware, insofar as it participated in the court proceedings),
>
> - the funds were sent to PrivatBank,
>
> - the Russian courts ruled against Ukrtatnafta JSC, compelling it to pay Suvar-Kazan LLC for the oil - the payments made to the intermediary companies' accounts are unlawful, show signs of

> financial fraud and inflict material harm on the interests of Ukrtatnafta JSC's main shareholders.
>
> Subsequently, at the end of June 2009, Korsan LLC acquired at an "auction" (at which it was the sole participant) 18% of shares in Ukrtatnafta JSC for UAH 2.1 billion - an amount close to the amount siphoned off from Ukrtatnafta JSC through "payment" for the oil. According to unofficial information, the "payment" for the oil to the Ukrainian intermediary companies and the acquisition by Korsan LLC of 18% of shares in Ukrtatnafta JSC constituted elements of a financial operation aimed at siphoning off funds from Ukrtatnafta JSC, the elimination of its disputed accounts payable, and also the transfer of 18% of its shares into the ownership of a company affiliated with the Privat group."

196. Mr Maganov's evidence was that he would not necessarily have read the document at the time and that it looked more like a "*reference document*" which was prepared for external use possibly for the Prime Minister's meeting or the press or government officials. [Day 11 p50]

February 2011 letter to the President's aide

197. This was a letter apparently to be sent by Mr Takhautdinov who was then Director General of Tatneft in February 2011. (It is a draft and unsigned but the contents are nevertheless relevant to Tatneft's knowledge at that time).

198. The letter stated that:

> "Highly significant witness evidence was given twice (in October 2009 and in March 2010) by the Ukrainian nationals Yu.V. Konov (a former director of Taiz LLC) and A.N. Vakhnyuk (a former director of TP TekhnoProgress LLC) in response to international requests for legal assistance from the Russian law enforcement authorities. The testimonies are particularly valuable in that they confirm the involvement of the Privat Business Group with the corporate raid of Ukrtatnafta JSC, while the witnesses are in no way connected with Ukrtatnafta JSC's Russian shareholders." [emphasis added]

15 June 2011 Claimant's Memorial on the Merits in the BIT arbitration

199. In relation to the Claimant's Memorial on the Merits in the BIT arbitration, Mr Syubaev said that it was a lengthy document which most likely he did not read. He assumed that it reflected Tatneft's position because it was drafted by Tatneft's lawyers. [Day 5 p105]

200. Mr Maganov was taken in cross examination to paragraphs 517 and 518 of the pleading:

> "517. Indeed, Ukrtatnafta - which is now controlled by the Privat Group and the Ukraine - refuses even to acknowledge the existence of the debt to Tatneft, given an alleged payment of that debt to Taiz and Technoprogress Research and Production. The

> pretense of this assertion of payment becomes evident if one considers that both of these companies had assigned their claims to Suvar-Kazan, Tatneft's commission agent, in early 2008, as Ukrtatnafta was well aware. Moreover, both of these companies, as well as Avto, the final Ukrainian intermediary through which Tatneft's oil deliveries had been made, were acquired by Igor Kolomoisky and the Privat Group in the course of 2009. In effect, Respondent has claimed that payment by and to companies all controlled by the Privat Group, from their right pocket to their left, satisfied the hundreds of millions of dollars in debt that should have been paid indirectly to Tatneft. The absurdity of such a defense needs no elaboration.
>
> 518. In reality, Tatneft has recovered nothing from any Ukrainian party. The only sums recovered, in the amount of US $105 million, were recouped pursuant to legal proceedings initiated by Suvar-Kazan, Tatneft's commission agent, in the Russian Federation, as discussed below. In short, the intermediaries acquired by Igor Kolomoisky and the Privat Group were simply utilized to simulate the repayment of Ukrtatnafta's debt to Tatneft, and, once their role in a patently self-serving scheme was complete, liquidated." [emphasis added]

201. His evidence was that they had no evidence and no proof.

Joint Criminal Complaint signed December 2011

202. The request for a criminal investigation to be opened stated that "*there is reason to believe*" that the directors of Avto, Taiz and Tekhnoprogress embezzled the funds that were supposed to be transferred to SK by way of the implementation of the Russian court decision thereby inflicting harm on Russian companies and the Russian Federation.

203. The case was terminated in February 2012 and Mr Syubaev's evidence was that Tatneft at that point was "*none the wiser as to who exactly was responsible*".

204. Mr Syubaev's evidence was that Tatneft only supposed or speculated that Mr Ovcharenko and the Privat Group headed by Mr Kolomoisky was behind it but they did not have documentary proof. [Day 5 p119]

205. This evidence, that Tatneft was "*none the wiser as to who exactly was responsible*", has however to be read in light of the evidence of the order to terminate criminal proceedings dated 27 February 2012 which in setting out the decision to terminate the criminal proceedings stated that the directors, Mr Konov and Mr Vakhnyuk, did not have an intent to cause damages by deceit to Tatneft or SK, and "*the persons acting on behalf of Privat group did not inform them of their criminal intent*". It also refers to a witness statement from Mr Maganov which "*confirmed that the persons acting on behalf of the Privat group had been involved in these actions*".

206. It said (so far as material):

"…Ukrainian citizen Yu.V. Konov, a former director of OOO Taiz was interrogated as witness in this case and testified that he had been instructed to become CEO of the said company, to open a new account with ZAO KB PrivatBank and to apply the funds received from ZAO Ukrtatnafta to purchase the shares by a lawyer representing Privat financial and industrial group…

Ukrainian citizen Yu.V. Konov, a former director of OOO Taiz was interrogated as witness in this case and testified that he had been instructed to become CEO of the said company, to open a new account with ZAO KB PrivatBank and to apply the funds received from ZAO Ukrtatnafta to purchase the shares by a lawyer representing Privat financial and industrial group…

Further, Yu.V. Konov and A.M. Vakhniuk acting for OOO Taiz and NP OOO Tekhno-Progress, respectively, confirmed their testimonies with copies of reconciliation statements for the period from 1 May 2007 to 20 May 2009 between their companies and ZAO Ukrtatnafta, statements of securities accounts of OOO Taiz and NP OOO Tekhno-Progress opened for the companies by OOO FK Gambit (Dnepropetrovsk, Ukraine) evidencing acquisition of shares of various Ukrainian companies.

In their witness statements V.A. Fedotov, First Deputy Chairman of the Management Board of AO Ukrtatnafta, and N.U. Maganov, First Deputy General Director of Tatneft, confirmed that the persons acting on behalf of the Privat group had been involved in these actions…

The subject matter of criminal proceedings No. 242927 certain materials in which were reviewed in separate proceedings and served as a basis for instituting these proceedings is the embezzlement by unidentified persons from among the executives of Privat, a Ukrainian financial and industrial group, of the property owned by Tatneft. Since 19 October 2007 ZAO Ukrtatnafta is part of the Privat group, and its CEO P.V. Ovcharenko reports to I.V. Kolomoisky and other persons which are the senior managers of this group. That is why repayment by ZAO Ukrtatnafta in 2009 of its debt to OOO Taiz and NP OOO Tekhno-Progress for the oil received in 2007 is a sham transaction used to cover up the earlier embezzlement of the oil.

Such actions designed to cover up embezzlement of oil include: purchase by unidentified persons acting on behalf of Privat group of OOO Taiz and NP OOO Tekno-Progress, appointment as their CEOs people who would act in their interests, transfer to accounts of such companies of the money, their use to fund the purchase of illiquid shares of Ukrainian companies, bankruptcy and liquidation of OOO Taiz and NP OOO Tekno-Progress.

> Yu.V. Konov and A.M. Vakhniuk, persons designated as CEOs of OOO Taiz and NP OOO Tekhno-Progress, did not have an intent to cause damages by deceit to Tatneft or OOO Kompaniya Suvar-Kazan, and the persons acting on behalf of Privat group did not inform them of their criminal intent… [emphasis added]"

Mr Maganov's witness interrogation on 20 February 2012

207. In his witness interrogation on 20 February 2012 by the criminal investigator, Mr Maganov said:

> "…However, in the middle of June 2009 CJSC Ukrtatnafta remitted the complete amount of debt of about UAH 2.1 billion to the accounts of Taiz Ltd. and NP Techno- Progress Ltd. (Poltava, Ukraine). With this said the above remittals were made in breach of the ruling issue by the Russian court and presence of additional proceedings. These payments could only be seen as fictitious. They were clearly made for the purpose of artificial liquidation of CJSC Ukrtatnafta's balance debt for the oil supplied by OJSC Tatneft. It is obvious that if the real purpose was to repay the debt to OJSC Tatneft in accordance with the existing liabilities, CJSC Ukrtatnafta could in accordance with the ruling of the Russian court directly pay the debt to Suvar-Kazan Ltd., which would ensure receipt of the payment by OJSC Tatneft. However the debt was transferred to the accounts of the intermediary companies Taiz Ltd. and NP Techno-Progress Ltd., after which the remitted funds disappeared. It is not yet fully clear, how the directors of Taiz Ltd. and NP Techno-Progress Ltd. used funds they received, but up till now nothing has been remitted either to OJSC Tatneft or Suvar- Kazan Ltd. At the end of 2009 ChMPKP Avto, Taiz Ltd. and NP Techno-Progress Ltd. were declared bankrupt under the claims submitted by Optima-Trade Ltd. There was information in the media that this company is a part of Privat group. At the end of 2010 these companies were liquidated. The said circumstances indicate that the funds, which were to be remitted to repay the debt for the oil delivered by OJSC Tatneft to Ukraine in 2007, were embezzled with the participation of both the senior of executives of Privat Group and the CEOs of Taiz Ltd., NP Techno-Progress Ltd. and ChMPKP Avto. [emphasis added]

Discussion on knowledge of Tatneft

208. As also set out above, whilst the issue is whether SK had the requisite knowledge, it is relevant to consider the knowledge of Tatneft. As discussed above, the test for knowledge is not whether the claimant can plead out its case but whether it has knowledge of the violation of its right. It is however convenient to consider Tatneft's knowledge by reference to paragraphs (i) – (iv) of paragraph 55 as pleaded in these proceedings, whilst noting, as discussed above, that in my view it was not necessary to satisfy the test of knowledge under Russian law for the claimant to have knowledge of

the means by which the defendants caused the harm provided the causal nexus is known.

(i) The Defendants gained (or participated in gaining) control over Avto, Taiz and Tekhnoprogress

209. Mr Syubaev's evidence was that Tatneft only learnt this based on the evidence of Mr Kolomoisky in the BIT proceedings (in March 2013). [Day 5 p78]

210. However, I do not accept his evidence on this issue for the following reasons:

i) Mr Maganov accepted in cross examination that after they learnt of the payments in the summer of 2009, they got the lawyers to investigate the status of the intermediaries and learnt that the ownership structure had changed. [Day 10 p128, 130] He also accepted that it was "*most likely*" that the financial machinations were the product of Mr Kolomoisky, Mr Ovcharenko, Mr Yaroslavsky and possibly others within Privat Group [Day 10 p132]. His evidence was:

> "Q…the payments from UTN to Taiz and Tekhno you full well understood could not have happened unless Mr Kolomoisky, Mr Ovcharenko, Yaroslavsky and anyone else who you regarded as involved in the raid had been behind it; correct?
>
> Yes." [Day 10 p135]

ii) In the Rejoinder in BIT proceedings in December 2009 Tatneft stated:

> "…Taiz and Teckhnoprogress are Ukrainian owned and controlled entities that in 2009, through a series of opaque and suspect transactions, along with another Ukrainian entity, Avto, came under the control of Igor Kolomoisky and Privat Group - the principal partners and co-conspirators of Mr. Ovcharenko and his group of raiders - who now control the management of Ukrtatnafta…"

Mr Syubaev confirmed that that represented a fair representation of his understanding at the time but said that Tatneft did not have any evidence to support that. [Day 5 p61, p63]

iii) In the April 2010 memorandum Tatneft said:

> "…According to unofficial information, the Privat business group had preliminarily established control over these intermediary companies (acquired them) and is currently handling their bankruptcy and winding-up."

211. The test is not whether Tatneft had evidence but whether it had knowledge and in my view the evidence including the investigations that Mr Syubaev carried out and the fact that it was asserted in the Rejoinder and the April 2010 memorandum is sufficient to infer that Tatneft had knowledge of this element.

212. I discuss further below whether, and if so when, Tatneft knew that all the defendants were involved.

(ii) They caused (or participated in causing) UTN to inject the monies owed to S-K, and ultimately to Tatneft, into Taiz and Tekhnoprogress

213. Again, there are 2 sub-issues here- when did Tatneft have "knowledge" of the payments and did Tatneft know the identity of the defendants (assuming that is an element that needs to be established on the part of SK).

214. Although Ukraine in the Reply on Jurisdiction in September 2009 referred in a footnote to the payments by UTN to Taiz and Tekhnoprogress being by 46 wire transfers, Mr Maganov's evidence was that he did not familiarise himself with the case materials; the lawyers were in charge of that. His evidence was that he only got confirmation that the payments were made in December 2011 when Ukraine showed Tatneft the transfer documents. [Day 11 page 13]

215. His evidence was that he did not have "*evidence*" but "*thoughts*" and that they had "*no proof*" that the payments had been made until the Ukrainian side showed them payment instructions in full. [Day 11 page 16]

216. In re-examination Mr Maganov was taken to the oral opening submissions for Tatneft in March 2010 in the BIT proceedings when counsel for Tatneft submitted that the only evidence that had been provided was that less than $4 million dollars has been paid and that the alleged payment in full of the Ukrainian intermediaries had not been substantiated because the allegation of Ukraine was based on only two examples of wire transfers. [Day 13 page 47]

217. Mr Maganov's evidence was that he was told in 2011 that Ukraine has disclosed all the payment instructions and the significance of the disclosure was that he became aware that:

> "[UTN] transferred the money to Tekhnoprogress and Taiz, Tekhnoprogress and Taiz are bankrupted and the money went away in an unknown direction…"[Day 13 p49]

218. However, this evidence has to be weighed against the following:

i) for the reasons discussed above, I accord little or no weight to the evidence of Mr Maganov.

ii) the initial information about the payments being made came to Tatneft from Mr Fedotov; Mr Fedotov at the time no longer worked for UTN but according to Mr Syubaev's first witness statement (paragraph 64) maintained contact with his former colleagues; I infer from the evidence that given his past relationship with Tatneft whilst at UTN, and the fact that the high-level telegram in June 2009 to the Prime Minister of Ukraine made reference to such payments, that Mr Fedotov was regarded as a reliable source and Tatneft was not therefore merely speculating about the payments;

iii) although Mr Syubaev's evidence in relation to the telegram was that Tatneft did not have "*certainty*" that the payments had in fact been made, there is further contemporaneous documentary evidence from which I infer that Tatneft believed that the payments had been made and its knowledge went beyond mere supposition or theory:

a) In the application to the Investigation unit dated 23 September 2009 Tatneft stated that payments were transferred to the accounts of Taiz and Tekhnoprogress with Privat Bank and were able to specify the bank account numbers. Mr Syubaev's evidence was that it was describing information received from a particular source and Tatneft did not have any documentary evidence of the payments. [Day 5 p54] However, as discussed above, the test under Russian law for the purposes of limitation is not whether there was evidence.

b) Mr Maganov in cross examination said that the letter in September 2009 was:

> "asking the law enforcement authorities to verify, to check the circumstances of these bank transfers. We are not asserting that the money had been transferred; we're asking for a verification or a check to be made."

In my view this interpretation of the letter is contrary to the natural meaning of the words which asked for an investigation into "*the circumstances of a transfer*" of "*the money intended to repay the oil debt*".

c) Further in my view Mr Maganov's evidence that Tatneft did not have information about the "*full amount*" having been transferred until 2011 is in my view contradicted by his own interview in January 2010. In Mr Maganov's interview he said:

> "…in accordance with information provided by Ukrainian legal advisers to the international arbitration considering the lawsuit of Tatneft against Ukraine under the UNCITRAL procedure, it was revealed that in mid-June 2009, [UTN] had transferred the entire amount of debt in the amount of about 2.1 billion UAH to the accounts of Taiz LLC and Tekhno-Progress LLC…" [emphasis added]

d) In cross examination when presented with his own evidence of what he had said in interview, Mr Maganov's evidence was:

> "Q. Yes, and you were telling the criminal investigator because that was evidence that you, Mr Maganov, in making -- in giving evidence to the criminal investigator, relied on. You were taking as a fact what Ukraine had said, correct?

> A. No. Everything that Ukraine was saying, I did not believe it was a fact. For me it was a gambit, a ruse, trying to mislead us, lead us down the garden path."

Mr Maganov suggested that his evidence in the interview was only to give "*some incentive to the law enforcers to begin looking for our funds*".[Day 11 p36] In my view this evidence was not credible: Mr Maganov refused to accept the obvious inference from the letter and sought to give an answer which fitted Tatneft's case on knowledge by making two unlikely assertions, namely that Ukraine was trying to mislead Tatneft in its pleadings in the BIT arbitration and that his evidence in interview referring to such evidence was thus deliberately inaccurate, a surprising course in an interview which as stated on its face could be used as evidence in criminal proceedings and for which he could be criminally liable if knowingly false.

e) Tatneft alleged in the September 2009 letter that the payments to Taiz and Tekhnoprogress inflicted material damage on Tatneft. The April 2010 memorandum also refers to the payments to the intermediaries being unlawful and inflicting material harm on UTN's shareholders.

219. Tatneft submitted that it had no certainty about the payments and it was merely supposition. For the reasons discussed I have found that the evidence of Mr Syubaev and Mr Maganov is not reliable and their evidence on this issue is not supported in my view by the contemporaneous documentation referred to above, where Tatneft repeatedly referred to the payments having been made and in respect of which Tatneft made applications for criminal investigations and for redress for non-payment of the oil debt in the BIT arbitration.

220. In re-examination Mr Maganov gave further evidence on why he did not think the money would be stolen: his evidence was that he assumed that the money could be used as "*a bargaining chip in negotiations with [Tatneft] as a way to split the shares that we had*" but it "*never occurred to me that people can simply come to a refinery and steal the money…".*

His evidence was that it was only in 2013 when Mr Kolomoisky gave evidence in the BIT proceedings that it was clear to Tatneft that there was an embezzlement scheme that have been put in place and the money had been stolen. [Day 13 page 43]

221. The veracity of this oral evidence has to be tested against the documentary evidence from which it is clear that Tatneft were of the view that the money had been stolen and there is no suggestion that it was a "*bargaining chip*": for example, the memorandum of April 2010 refers to the fact that payment had not been made at that point for over a year and a half "*having essentially embezzled it".*

222. As to whether and when Tatneft had sufficient knowledge that the defendants were behind the payments (assuming that is an element that needs to be established on the part of SK) that is discussed below.

(iii) Series of sham share purchase and sale transactions, only days apart, first to convert the UAH-denominated funds into USD, and second to siphon the USD funds into offshore companies

223. As discussed above, in my view it is not necessary for the purposes of limitation that SK should know the way in which the funds were transferred by the intermediaries through the offshore companies to Korsan but only the causal link between the wrongful act and the harm.

224. In the Rejoinder Tatneft stated:

> "Not a penny of the amounts allegedly paid by Ukrtatnafta under Mr. Ovcharenko's control has gone to Tatneft. Instead, all of these amounts apparently would have gone to Privat, a further flagrantly illegal misappropriation of Ukrtatnafta's funds which has caused harm to Claimant." [emphasis added]

225. In the April 2010 memorandum Tatneft drew a connection between the amount of the payment to the intermediaries and the amount paid for the 18% stake in UTN by Korsan:

> "Subsequently, at the end of June 2009, Korsan LLC acquired at an "auction" (at which it was the sole participant) 18% of shares in Ukrtatnafta JSC for UAH 2.1 billion - an amount close to the amount siphoned off from Ukrtatnafta JSC through "payment" for the oil. According to unofficial information, the "payment" for the oil to the Ukrainian intermediary companies and the acquisition by Korsan LLC of 18% of shares in Ukrtatnafta JSC constituted elements of a financial operation aimed at siphoning off funds from Ukrtatnafta JSC, the elimination of its disputed accounts payable, and also the transfer of 18% of its shares into the ownership of a company affiliated with the Privat group." [emphasis added]

226. Mr Syubaev's evidence was that the reference to amounts being transferred was only "*supposition based on unofficial information*". [Day 5 p83]

227. His evidence in cross examination was:

> "Q Yes, and I think, having read it, it's perfectly clear that as at 5 April 2010 Tatneft was setting out and your subordinate was setting out in this document all of the essential elements of what you, in these proceedings, describe as the "Oil Payment Siphoning Scheme"; correct?
>
> A. Yes. However, Mr Howard, I would like to mention that the coincidence of the sums, of the amounts, that are presumably transferred from UTN to the intermediary companies and the amount for which the 80% of shares were purchased, it's only a supposition based on unofficial information. There is no

> confirmation in this document. It's not mentioned here." [emphasis added]

228. Mr Maganov accepted in cross examination that Tatneft learnt in June 2009 that Korsan, an affiliate of Privat Group had acquired the 18% stake in UTN that had previously been held by Amruz and Seagroup and that the amount of money paid was similar to the amount of money owed by UTN to SK for the oil. He however denied that he understood or appreciated the coincidence between the amount being paid for the shares and the amount of the oil.

229. However, in his interview in January 2010 Mr Maganov appeared to accept the connection (although in cross examination he appeared to deny it). In the interview he stated that:

> "The payment by Korsan LLC for 18% shares in [UTN] in the amount similar to the amount of debt of the refinery to Tatneft OJSC is also one of the links in the illegal scheme conceived by Kolomoyskyi I. V. and implemented by Korban …"

230. In my view it is clear on the evidence that Tatneft knew that the monies had been *"siphoned off"* that is transferred from UTN to the intermediaries and then paid out as part of the Scheme to Korsan. In the Rejoinder Tatneft stated that:

> *"Not a penny of the amounts allegedly paid by Ukrtatnafta under Mr. Ovcharenko's control has gone to Tatneft. Instead, all of these amounts apparently would have gone to Privat, a further flagrantly illegal misappropriation of Ukrtatnafta's funds which has caused harm to Claimant."*

As stated in the April 2010 memorandum Tatneft knew that the "payment" for the oil to the Ukrainian intermediary companies and the acquisition by Korsan LLC of 18% of shares in Ukrtatnafta JSC *"constituted elements of a financial operation aimed at siphoning off funds from [UTN]"*. Further on the evidence Tatneft knew that the payment to Korsan of an amount similar to the amount of the debt was one of the "links" in the Scheme.

(iv) They subsequently arranged (or participated in arranging) for Taiz, Tekhnoprogress and Avto to be put into bankruptcy.

231. Mr Syubaev's evidence in cross examination was that in August 2009 he had learnt about the bankruptcies of the intermediaries and that they were initiated by Optima which he knew was part of, or associated with, the Privat Group. [Day 5 p49]

232. It is clear that Mr Maganov knew about the connection between Optima Trade and Privat Group: in his interrogation in January 2010, he stated:

> "In October 2009, Avto Taiz and Techno were declared bankrupts under the lawsuits of one of the enterprises of the Privat Group- Optima- Trade LLC…"

233. In the April 2010 memorandum it said:

> "…According to unofficial information, the Privat business group had preliminarily established control over these intermediary companies (acquired them), and is currently handling their bankruptcy and winding-up…"

234. Mr Maganov's evidence in cross examination in the context of the meeting with Mr Korolkov was as follows:

> "Q… In order to have told him about the bankruptcy proceedings by Optima Trade, you would necessarily have told him about Privat Group and the raiders' involvement in all of this, wouldn't you?
>
> A. Optima Trade, and that it's connected with Privat Group, I may have said that, although I think he knew it himself because that was a dominating story." [Day 11 p101]

The alleged significance of Mr Kolomoisky's evidence in 2013 in the BIT arbitration.

235. It was submitted for Tatneft that the evidence of Mr Kolomoisky in March 2013 in the BIT arbitration:

i) confirmed links between Mr Kolomoisky and the Scheme such as his own stake in Korsan;

ii) confirmed links between Optima Trade and Privat Group; and

iii) stated that Mr Bogolyubov and Mr Yaroslavsky had stakes in Korsan thus linking them directly with the Scheme. (paragraph 854 of Tatneft's closing submissions)

236. Mr Syubaev's evidence was that it was a "*revelation*" in that Mr Kolomoisky:

> "officially admitted that Mr Bogolyubov was his business partner, that, together with other business partners represented by Mr Yaroslavsky and Yaroslavsky's partners, he was the owner of Ukrtatnafta shares. He admitted that, as far as I remember, he knew about the payments made to Taiz and Tekhnoprogress and Avto. He admitted that Optima Trade was a company that is either a part of or affiliated with the Privat Group." [Day 6 p30]

237. As to the link between Korsan and Privat Group, this was known prior to Mr Kolomoisky's evidence as is shown by Mr Maganov's interview in January 2010. Mr Maganov referred in that interview to being told by Mr Ovcharenko in October 2007 that he represented the interests of Privat Group "*which has a share in [UTN] through Korsan LLC*". He also stated that:

> "The same information was confirmed by [Korban] who introduced himself as a representative of the Privat Group and Korsan LLC".

238. Mr Maganov then referred (in the same interview) to the purchase by Korsan of the 18% stake in UTN for 2.1bn UAH. He stated that:

> "I believe that the entire scheme of seizure of the refinery and the alleged "repayment" of the debt for oil supplied by Tatneft …was planned by Mr Kolomoisky and Mr Ovcharenko"

239. Further there is evidence in the form of an internal Tatneft report in May 2007 which states that Privat Group had become a shareholder in UTN through Korsan and makes the link with Mr Kolomoisky. The report said (so far as material):

> "Firstly, Privat group, which a few months ago had become one of the [UTN] shareholders through Korsan Ltd., as well as the commercial structures controlled by Yu.A. Boyko, Minister of Fuel and Energy. It is highly likely that Mr. P.V. Kolomoisky and Mr. I. L. Boyko are currently both business partners and political allies."

240. Describing the shareholders of UTN the report stated:

> "1.2% were acquired by the company affiliated with the Privat Group (Korsan Ltd.)."

241. I do not therefore accept that the link between Korsan and Mr Kolomoisky or Mr Kolomoisky's involvement in the Scheme was only learnt when Mr Kolomoisky gave evidence.

242. I have set out above the evidence which in my view shows that Tatneft knew about the payments to the intermediaries and believed that the monies had gone to Privat (including the March 2010 letter from Minnikhanov) and that Optima Trade was affiliated with the Privat Group. Mr Kolomoisky was identified in the March 2010 letter:

> "the illegal takeover of Ukrtatnafta CJSC and subsequent illegal corporate raiding actions organized by the Ukrainian business group Privat, headed by businessman I. Kolomoisky";

and in the Rejoinder:

> "…Taiz and Teckhnoprogress… along with another Ukrainian entity, Avto, came under the control of Igor Kolomoisky and Privat Group - the principal partners and co-conspirators of Mr. Ovcharenko and his group of raiders … who are responsible for the orchestrated purchase at auction of shares seized from AmRuz and Seagroup".

243. As to the fact that Mr Bogolyubov was Mr Kolomoisky's business partner and that Mr Bogolyubov and Mr Yaroslavsky had stakes in Korsan, this is discussed further below.

Knowledge of the identity of the defendants

244. Tatneft submitted that it was only in August 2012 that Tatneft had sufficient knowledge to make the allegations and the knowledge in August 2012 was only sufficient to make allegations against Mr Kolomoisky and Mr Ovcharenko.

245. Tatneft submitted that it was unaware of who was behind the Scheme and this led to the Joint Criminal Complaint against the managers of the intermediaries in December 2011.

246. In his witness statement Mr Syubaev said at paragraph 84:

> "As time passed by, Tatneft were still in the dark and there was a feeling that the criminal investigation was way too long. In December 2011 as part of the BIT arbitration Tatneft received from Ukraine copies of UTN's payment orders dated June 2009 to Taiz and Tekhnoprogress for the total amount owed for our oil. Now for the first time Tatneft had documentary evidence that the money in fact left UTN and reached the intermediaries but appeared to dissipate at their level which could not happen without involvement of their top managers. Such top managers could act either for their own benefit or for the benefit of third parties. Tatneft still had no information on how and where the money disappeared from the intermediaries, or indeed who exactly was involved in orchestrating its disappearance or benefiting from it. At this moment it became clear that it was necessary to investigate the role of the top managers as soon as possible so Tatneft's criminal attorneys recommended that we promptly file a relevant complaint with the investigation authorities." [emphasis added]

247. I do not accept on the evidence, the submission that in December 2011, Tatneft was unaware of who was behind the Scheme and this led to the Joint Criminal Complaint against the managers of the intermediaries:

i) That submission is not supported by the evidence of Mr Maganov in his witness statement (paragraph 72) where he said that the purpose of the criminal complaint was to "*clarify*" the position but did not state that the managers were believed to be behind the Scheme.

ii) The evidence of Mr Syubaev that Tatneft had no information as to who was involved in orchestrating or benefitting from the disappearance of the money is contradicted by the contemporaneous documentation:

a) the (draft) letter to the aide of the President of the Russian Federation in February 2011 stated that Mr Konov and Mr Vakhnyuk in their evidence:

> "confirm the involvement of the Privat Business Group with the corporate raid of [UTN]".

b) in the letter of March 2010 from Mr Minnikhanov, Tatneft referred to:

> "…the illegal takeover of Ukrtatnafta CJSC and subsequent illegal corporate raiding actions organized by the Ukrainian business group Privat, headed by businessman I. Kolomoisky (in collaboration with businessmen A. Yaroslavsky and P. Ovcharenko).…The raiders refused to pay for oil supplied to the Kremenchuk Oil Refinery from Tatneft OJSC's reserves in 2007, for a total of around $450 million, thereby effectively appropriating it."

c) In the April 2010 memo Tatneft expressly linked the perpetrators of the takeover (or raid) with the payments made to the intermediaries' accounts at Privat in circumstances where the rights against UTN had been assigned by the intermediaries to SK. Tatneft said:

> "…Taking into account that
>
> -the perpetrators of the illegal takeover avoided paying for the Russian oil for more than a year and a half, having essentially embezzled it,
>
> -the rights of claim against Ukrtatnafta JSC regarding the payment for the previously delivered oil were assigned by the intermediaries to Suvar-Kazan LLC (of which Ukrtatnafta JSC was aware, insofar as it participated in the court proceedings),
>
> -the funds were sent to PrivatBank,
>
> -the Russian courts ruled against Ukrtatnafta JSC, compelling it to pay Suvar-Kazan LLC for the oil - the payments made to the intermediary companies' accounts are unlawful, show signs of financial fraud and inflict material harm on the interests of Ukrtatnafta JSC's main shareholders."

248. The purpose of the Joint criminal complaint in December 2011 may well have been, as Mr Syubaev stated in his witness statement "*to investigate the role of the top managers*" but it was not, in my view, on the basis that Tatneft did not know who was behind the Scheme or that Tatneft believed that the managers of Taiz and Tekhnoprogress were responsible. As set out above, Tatneft carried out an investigation in 2009 and learnt that the ownership of the intermediaries had changed and in the BIT proceedings in December 2009 asserted that Taiz and Tekhnoprogress had come under the control of Mr Kolomoisky and Privat Group. There is no reason to infer that Tatneft had changed its mind and concluded that the managers were responsible for the Scheme rather than the defendants: that would be contrary to the view expressed in the letter from Mr Minnikhanov in March 2010:

> "the illegal takeover of Ukrtatnafta CJSC and subsequent illegal corporate raiding actions organized by the Ukrainian business group Privat, headed by businessman I. Kolomoisky (in

> collaboration with businessmen A. Yaroslavsky and P. Ovcharenko)")

and by Mr Maganov in his interview in January 2010 where he referred to the "*illegal scheme conceived by [Mr Kolomoisky]"*.

Knowledge of involvement of Mr Bogolyubov

249. There are a number of pieces of evidence from which, considered together, I infer that Tatneft had knowledge by February 2010 that Mr Bogolyubov was involved in the Scheme.

250. Firstly, after the raid Tatneft carried out an investigation into Privat Group.

251. In his witness statement Mr Syubaev said (paragraph 43):

> "…Ovcharenko also made it clear that that new power was Privat Group. Maganov was also told by Ovcharenko and by Korban, who arrived at the Refinery, that he needed to speak directly with Kolomoisky to solve the situation with the raid. I knew that Privat Group was a conglomerate of businesses headed by Kolomoisky. I also knew that PrivatBank, a major Ukrainian private bank, was connected somehow to Privat Group and Kolomoisky and that another major oil company in Ukraine, JSC Ukrnafta, was controlled by Privat Group. I was now shown the interview of Korban published in Ukrainska Pravda on 26 October 2007 where Korban stated that Bogolyubov is an equipollent partner of Kolomoisky. I have not read this article before I was shown it now. I shall say there was no need for me and I believe anyone in Tatneft to read all publications where certain information about the raid on UTN was mentioned since I and my colleagues had full knowledge of the raid and about individuals in whose interests UTN was took over. I was told by Maganov that when he was at UTN immediately after the raid that same Korban told him that he needed to speak directly with Kolomoisky to solve the situation. There was nothing that could lead Tatneft's management, Maganov and me into thinking that some Bogolyubov of whom none of us was aware was involved in the raid." [emphasis added]

252. Mr Syubaev confirmed that he carried out an investigation into who was involved.

> Q. "Did you at any stage carry out any investigation in relation to Privat Group?
>
> A. I think so, yes, to the extent that it was possible to do that based on media reports because that was the only source of information available to us -- I mean, from the various sources that were in the public domain." [Day 4 p43]

253. Mr Maganov in cross examination described Mr Syubaev and his department collecting the materials and Mr Syubaev "*trying to find out the nuances*" and "*analysing Privat Group*" [Day 12 p121].

254. Mr Maganov was asked in cross examination about the investigations that Tatneft carried out in relation to Privat Group. His evidence was that he knew about them and participated. He said:

> "…We were studying all the materials that were available to us, and part of the materials was discussed with Syubaev and conclusions were drawn..." [Day 12 p110]

255. Mr Maganov accepted that he knew Privat Group was behind the raid:

> "A…I had one meeting, and it was at 3.00 in the morning at the refinery, where I was surrounded by those thugs, all those goons, about 30 people with batons full of lead. And Mr Ovcharenko told me that they were there, together with Korban, and I think it was actually Korban, most likely Korban, who said that Privat Group was a partner of theirs, they said.
>
> Q. You I think say that what Mr Ovcharenko and Korban told you was that they and Privat Group were the new owners; correct? Is that right? That's what your evidence is, that that's what they told you; yes or no?
>
> A. I do not recall word to word exactly what they said about the new masters, but, in context, it was clear that Yaroslavsky, Ovcharenko and Privat Group were acting together. [Day 10 p50] [emphasis added]

256. The evidence therefore is that Tatneft knew Privat Group was behind the raid and knew that Privat Group was a "*conglomerate of businesses*" including PrivatBank.

257. Secondly, any investigation using public sources would show Mr Bogolyubov's role in PrivatBank and the evidence of Mr Syubaev was that he knew PrivatBank was a joint enterprise between Mr Kolomoisky and Mr Bogolyubov. At the material time Mr Bogolyubov was Chairman of the PrivatBank supervisory board. His role in PrivatBank was in the public domain: for example, Tatneft in its submissions (paragraph 360 of closing submissions) relied on an interview of Mr Korban (who according to Mr Maganov, introduced himself as a representative of the Privat Group and Korsan LLC at the time of the raid) in October 2007 where Mr Bogolyubov was said to be in charge of PrivatBank and the *"managing partner"*.

258. In cross examination it was put to Mr Syubaev:

> "Q. … The fact that PrivatBank was a joint enterprise of Mr Kolomoisky and Gennadiy Bogolyubov was also something that was extremely well known; do you agree?
>
> A. Yes, so far as I can recall, yes.

259. As to the ownership and control of Privat Group, Mr Maganov in his interview in 2010 was asked:

> "What can you say regarding Privat, the financial and economic group of enterprises of Ukraine?"

260. His answer was (in material part):

> "This group includes about a hundred of enterprises, most of which are located in Dnepropetrovsk (Ukraine). One of the owners of the enterprises that are part of the Privat Group is Igor Valeriyovych Kolomoyskyi. Kolomoyskyi I. V. is one of the co-owners of Privatbank CJSC in Dnepropetrovsk, which in turn owns Moskomprivatbank CJSC in Moscow. The enterprises of Kolomoyskyi I. V. is mostly engaged in metallurgical, gas and oil spheres. It was the Privat Group that organized and carried out seizure of Ukrtatnafta CJSC in Kremenchug (Ukraine) on October 19, 2007." [emphasis added]

261. Although Mr Maganov used the phrase that Mr Kolomoisky was "*one of the co-owners*" of Privat Group his evidence was that:

> "I did not know how many owners of Privat Group there were and it was of no interest to me." [Day 12 p121]

262. It was put to Mr Maganov that it was well known in the public domain that Mr Kolomoisky and Mr Bogolyubov were partners in the Privat Group. Mr Maganov's evidence was that he did not remember the surname of Mr Bogolyubov and it was not linked in his mind until the name was mentioned in the BIT arbitration. [Day 12 p114] His evidence was that if Mr Syubaev knew PrivatBank was a joint enterprise of Mr Kolomoisky and Mr Bogolyubov he did not understand why he ought to have known that.

263. He said:

> "… I knew that behind the expropriation of the asset was Privat Group, and to me Privat Group was associated in my head with Mr Kolomoisky first of all. Who else was behind it? I didn't know. There could be many of them. What is Privat Group? What is it, as a legal entity?..."[Day 12 p119]

264. His evidence was:

> Q. So in the whole period up to March 2013, you never looked up or sought to find out who the other owner or owners of Privat Group were; is that what you're asking her Ladyship to accept?
>
> A. Starting from the capture or the raid and up to 2013, I was trying to find out where our money was and I tried to recover the assets which were stolen from us by the Privat Group,

> Yaroslavsky, Ovcharenko and a number of other people that I named.
>
> Q. Well, you were trying to find out where your money was and recover assets, and as part of that exercise you would clearly have been intensely interested in who was behind the Privat Group?
>
> A. I tried, we tried to find out how to get our money back. At different periods of times we had controversial information about where our money was. They were pipe-stoving [sic] quite a bit and I was interested in the money. I am not interested in the people now, I am interested in the assets and money coming back to the company which money we invested in the Ukraine… [Day 12 p121] [emphasis added]

265. I have already discussed above the reasons why I give little or no weight to Mr Maganov's evidence in general. Further it seems to me that this evidence that he had no interest in who was behind the Scheme is inherently improbable in the circumstances. Tatneft's view was that a significant amount of money had been stolen, Mr Maganov said that it was a "*huge incident, a tragedy for us, the fact that we had been so cynically and rudely robbed*" [Day 10 p82]. He accepted that investigations were made by Mr Syubaev and that these were reported to him and this supports an inference that Tatneft were trying to establish who was responsible. In the circumstances it is improbable that Mr Maganov had no interest in who was behind Privat Group and that this was not part of the investigations by Tatneft.

266. I note that Tatneft sought in closing submissions to reject any knowledge by Tatneft in relation to Mr Bogolyubov's involvement by referring (indirectly) to Mr Maganov's interview in February 2012 where he referred to the "senior executives" of Privat Group. It was submitted that:

> "There are many senior executives of businesses associated with the Privat name and a generic reference of this sort cannot be sufficient to amount to knowledge that each of them was implicated in the wrongdoing..." [Day 41 p115]

267. Whilst Tatneft sought to explain individual references such as this, the court is looking at the totality of the evidence and the inherent probabilities and in concluding what may be inferred from Mr Maganov's use of that particular expression in the February 2012 interview, the court takes into account his reference to *"co-owners"* in the January 2010 interview and the other evidence.

268. Tatneft (again indirectly) dealt with this reference in the January 2010 interview by submitting that:

> "There's no basis in the evidence to say that it was, but even if it were, it could not be conveying knowledge of each owner being implicated and indeed no one has ever suggested that Mr Martynov, for example, was involved in the scheme. He's the person referred to in Mr Bogolyubov's third witness statement at

> paragraph 19 and was treated in the press, as my Lady will recall, as a co-owner of Privat at the time…" [Day 41 p116]

269. However, this submission is again seeking to focus on a single piece of evidence and not the totality of the evidence which implicated Mr Bogolyubov including the press articles relied on in the BIT arbitration referred to below.

270. It was submitted for Tatneft [Day 41 p121] that:

> "… if Mr Bogolyubov was relying also on a further point that the payments to Taiz and Tekhnoprogress were made to their accounts at PrivatBank…it is right that the payments were made to their accounts at PrivatBank and that was known to Tatneft although not to S-K. But …that does not begin to implicate Mr Bogolyubov in anything and it's not even a matter that we rely on in these proceedings."

271. In my view the evidence shows that the payments to the accounts at PrivatBank were viewed by Tatneft at the time as significant in demonstrating who was behind the Scheme and this supports an inference that knowledge of who was in control of Privatbank would have been one of the pieces of knowledge which led to knowledge of Mr Bogolyubov's involvement in the Scheme. The reliance by Tatneft on the involvement of PrivatBank in the Scheme was referred to by Mr Maganov in his interview in January 2010:

> "I believe that the whole scheme for the takeover of the plant and "sham" debt repayment for the oil supplied by OJSC "Tatneft" was masterminded by I.V. Kolomoisky and P.V. Ovcharenko. Evidence to the abovementioned is the fact that the monies were transferred to accounts of OJSC "Taiz" and "OJSC "Techno-Progress" opened with CJSC "KB "Privatbank", where not only the plant but also mentioned companies- intermediaries have accounts…" [emphasis added]

272. Further the fact that payments were made to accounts at PrivatBank was a key feature of the allegation of fraud made in the application to the Investigation unit in September 2009 which (as set out more fully above) stated:

> "In view of such facts, payments to the accounts of OOO Taiz and OOO Techno-Progress inflict material damages upon Tatneft and contain elements of fraud"

273. Mr Syubaev appeared to accept in cross examination that he was aware that, at least in relation to PrivatBank, it represented the activities of both Kolomoisky and Bogolyubov. The material exchange was as follows:

> Q. When anyone referred to Privat Group, you at the time would have understood that what they were referring to was the joint business activities of Kolomoisky and Bogolyubov; correct?

> A. For me, Privat was more closely related to Kolomoisky, in my perception." [Day 4 p42]
>
> Q. And trying to be fair, Mr Syubaev, I imagine you would say that you accept that since you were aware of Privat Group since even before 2004 and aware of their activities essentially through media reports, it is likely that you were aware that Privat Group represented the activities of both Kolomoisky and Bogolyubov, since that is something that was a matter of record in the press?
>
> A. Yes, I suppose so. I cannot confirm exactly when that became known to me, but that is mainly -- that mainly applies to PrivatBank. [day 4 p47] [emphasis added]

274. Although Mr Syubaev sought to suggest that he was *"mainly"* aware in relation to PrivatBank, I have already concluded for the reasons discussed above, that I approach his evidence with considerable caution and look for corroboration from the contemporaneous documentation.

275. Thirdly, Mr Bogolyubov was appointed (with others) to the Supervisory Board of UTN in February 2010 at the same time as Mr Maganov was replaced on the Board.

276. It was submitted for Tatneft that his appointment to the supervisory board of UTN in February 2010, and the "*speculative assumption*", as Mr Syubaev referred to it in evidence, that Mr Bogolyubov was likely to have an interest in Korsan, was not enough to give rise to knowledge of his involvement in the wrongdoing. It was further submitted that it did not give rise to suspicion either before the criminal files were analysed or afterwards, as shown by the fact that Mr Bogolyubov was not mentioned in the Second Memorial on the Merits in August 2012 and, even in Tatneft's oral opening of the BIT hearing on 18 March 2013, where the supervisory board membership was listed.

277. It was put to Mr Maganov in cross examination that he knew by February 2010 that Mr Bogolyubov had been appointed to the supervisory board of UTN to represent the interests of Privat. His evidence was:

> "I didn't take particular note of all the members of the board of UTN" [Day 12 p132]

278. I find this evidence improbable. As part of this change Mr Maganov was personally removed from the supervisory board of UTN and his evidence that he was in effect not interested in the membership of the Supervisory Board is not credible. As referred to above, it is clear from his evidence that he was personally very upset by the events at UTN (having on his account been effectively detained during the raid at UTN's offices) as well as seeking in his role at Tatneft to recover the oil debt.

279. (As recognised by Tatneft in closing submissions) Mr Syubaev appeared to accept that he was aware of the link between Mr Bogolyubov and Privat Group but asserted that it was only suspicion or speculation. Mr Syubaev's evidence (paragraph 44 of his second witness statement) was that Mr Bogolyubov's appointment to the Board only

"*reinforced our suspicions*" that Mr Bogolyubov (and Mr Yaroslavsky) was involved in the 2007 events and the 2009 payments.

280. Mr Syubaev's evidence was [Day 6 p88]:

> Q. And what would have been disturbing to you about Mr Bogolyubov's appointment was that he had been elected by the new shareholders and had been elected to represent the interests of Privat?
>
> A. Well, it wasn't disturbing. I just noted it. I noted the fact that Mr Bogolyubov was a member of the newly elected supervisory board. Pursuant to business practice, shareholders nominate their nominees to the supervisory board, therefore this nomination led us to assume that Mr Bogolyubov was an owner or a co-owner of the company which had put him forward to the supervisory board because one of the new companies was Korsan and therefore we came or could have come to that assumption.
>
> Q. So you assumed from this that Mr Bogolyubov was a co-owner of Korsan; correct?
>
> A. We made that speculative assumption, yes…"
>
> "Q. Yes. I'm inviting you to agree that it would have been quite disturbing news to you that a shareholder you considered to be unlawful had elected Mr Bogolyubov.
>
> "A. Insofar as disturbing news is concerned or any concern for that matter, let me just say that it was a spurious or even to a certain extent unexpected development, which only went to prove that the new shareholder is backed up by Privat and of course Mr Bogolyubov was one of the co-owners of that group…" [Emphasis added]

281. If evidence is required that this went beyond speculation, the knowledge of the change in the Supervisory Board (and the control by Privat representatives) is confirmed in my view by the contemporaneous evidence of the letter from Mr Minnikhanov as President of the Republic of Tatarstan to an aide to the President of the Russian Federation on 1 August 2010.

282. The letter referred to a general meeting of the shareholders of UTN in July 2010 and stated that:

> "According to the available information, Naftogaz of Ukraine NJSC initiated the holding of a general meeting of shareholders of Ukrtatnafta JSC for the purpose of changing the composition of the company's management bodies that were elected at the meeting of shareholders in February of this year (as a result of collusion between Privat group and the former management of

> Naftogaz of Ukraine NJSC who were removed in March of this year)….
>
> The main results of the meeting were the election of a new supervisory board of Ukrtatnafta JSC and the retention of positions by representatives of Privat group involved in the day-to-day management of the enterprise. That being said, whereas the board officially includes 6 representatives of the Ukrainian state and 5 representatives of Privat group, Privat group actually gained de facto control over the supervisory board, since at least 2 of the 6 state representatives have close ties to Privat group…" [emphasis added]

283. Even if the precise ownership of Korsan was not known, there is clear evidence that Tatneft regarded Korsan as a company "*affiliated with the Privat group*" (April 2010 memorandum) and linked the payment by Korsan for the shares in UTN to the Scheme:

> "The payment by Korsan LLC for 18% shares in [UTN] in the amount similar to the amount of debt of the refinery to Tatneft OJSC is also one of the links in the illegal scheme" (Maganov interview January 2010).

284. Fourthly there is the evidence of the press articles referred to in the First Memorial in June 2011.

285. It was submitted that Tatneft did not have knowledge of Mr Bogolyubov's involvement because he was not mentioned in the Second Memorial on the merits in August 2012 and, in Tatneft's oral opening of the BIT hearing on 18 March 2013, where the Supervisory Board membership was listed.

286. However, in the First Memorial dated 15 June 2011 Tatneft referred in footnotes to a number of articles which identified Mr Bogolyubov as a partner in Privat Group and pointed to Mr Bogolyubov's involvement in the Scheme. An article in 2008 "*A Privat war is ongoing*" referred to Mr Bogolyubov as "*Privat co-owner*" and was footnoted at 113 in the First Memorial. An article from March 2011, referred to at footnote 141, stated:

> "Despite the state owning 50% plus one share in the company, Ukrnafta has for years been effectively controlled by the shareholders of the country's largest lender PrivatBank, oligarchs Gennady Bogolyubov and Igor Kolomoisky, who are collectively referred to as Privat Group." [emphasis added]

287. An article in October 2007, an interview with Mr Korban in which he describes Mr Bogolyubov as an "*equipollent partner*" of Mr Kolomoisky was referenced in 7 footnotes including in the context of a section referring to the "forcible takeover" of the Kremenchug refinery by Mr Ovcharenko and "Privat".

288. Further reference to Mr Bogolyubov's involvement in the raid, is an article dated February 2008, footnoted at 115 and 116:

> "Privat took over the Kremenchug Refinery controlled by Tatnafta, last year. In May 2007 the shares of the Swiss company AmRuz Trading AG and American company SeaGroup International plc., which were carrying out the joint policy with the Tatarstan Ministry of Property and Land Resources, owning 28.9% of shares, and with Tatneft (8.6%), were disposed to the benefit of Naftogaz of Ukraine. And although LLC Korsan, affiliated with Privat Group owns only 1.2%, Kolomoisky and Bogolyubov managed to implant their own management in the enterprise." [emphasis added]

289. This particular footnote is to the following paragraph in the Memorial:

> "83. Privat's medium-term strategy to seize control over the Ukrainian energy industry in general and the oil market in particular, was widely known. To this end, Privat has repeatedly aimed at grabbing command over key assets necessary for the different stages of the energy production and distribution cycle. Seizing control over Ukrtatnafta was a pivotal step in this process."

290. These articles counter the submission by Tatneft that there were a number of co-owners of Privat Group and not all of them were involved in the Scheme such that references to *"co-owners"* by Tatneft do not implicate Mr Bogolyubov. It is clear from these articles that there were two partners who controlled Privat Group and they were Mr Kolomoisky and Mr Bogolyubov. Since these are footnote references to lengthy pleadings, the principals at Tatneft are unlikely in my view to have read all the articles. However, Cleary Gottlieb (who were then acting for Tatneft) would be aware of their contents and, given the numerous references to Privat and the role of Mr Bogolyubov in those articles and the clearly held belief of Tatneft that Privat Group was behind the Scheme, it is highly unlikely that Cleary Gottlieb would not have drawn Tatneft's attention to the fact that Privat Group was widely believed (and publicly reported) to be a partnership between Mr Kolomoisky and Mr Bogolyubov.

Conclusion on Tatneft's knowledge of Mr Bogolyubov

291. Mr Maganov's evidence was that Mr Bogolyubov was not "*disturbing*" for him specifically and until 2014 he didn't remember the surname. [Day 12 p136] In the light of the evidence (and having regard to my finding on the weight to be given to his evidence generally) I do not accept Mr Maganov's evidence that he did not know about Privat Group and who was behind it or his evidence that (in effect) he did not have knowledge for these purposes of Mr Bogolyubov until 2014.

292. On the evidence I find that Tatneft had information that went beyond speculation and amounted to *"knowledge"* that Mr Bogolyubov was involved in the Scheme by March 2010:

i) Mr Syubaev accepted that he carried out an investigation into Privat Group and based on media reports and what was in the public domain carried out an analysis into Privat Group.

ii) it is clear that publicly available information identified Mr Bogolyubov as Mr Kolomoisky's partner in Privat Group-although the press articles are only referred to in the First Memorial in June 2011 some date back to October 2007 and February 2008.

iii) in my view one can infer from the media reports that Mr Bogolyubov's role in PrivatBank would have been widely known and the involvement of PrivatBank was seen by Tatneft as part of the Scheme.

iv) the appointment of Mr Bogolyubov to the Board of UTN in February 2010 was "noted" by Mr Syubaev and I infer for the reasons discussed above would have been known by Mr Maganov.

Tatneft's knowledge of the involvement of Mr Yaroslavsky

293. The following evidence leads me to conclude that Tatneft had knowledge of Mr Yaroslavsky's involvement:

i) He was implicated at the time of the raid.

ii) He was named in the March 2010 letter.

iii) He was appointed to the Board of UTN.

Implicated in the raid

294. The evidence is that Mr Maganov telephoned Mr Yaroslavsky after the raid. In his first witness statement Mr Maganov said:

> "41. I was shocked by the news [of the raid]. I immediately called Mr Ovcharenko. I asked him what was going on, what this seizure meant and why our employees could not move freely. I demanded that our employees be released. I also later called Mr Yaroslavsky who, as far as I knew, was his business partner at the time when they had owned 1% of UTN' s shares."

295. Thus, it would appear from the outset that Tatneft thought Mr Yaroslavsky had some involvement. This appears to be borne out by a press article on 29 October 2007 which stated:

> "When asked in whose interests P. Ovcharenko acts, N. Maganov suggested that the Privat Group of Igor Kolomoisky and Alexander Yaroslaysky, his partner co-owner of Ukrsibbank, are behind all this." [emphasis added]

296. Asked about his telephone conversation in June 2008 with Mr Gubaidullin in which he referred to the criminal investigation having been initiated, Mr Syubaev accepted that he regarded Mr Yaroslavsky as being involved as one of the raiders and that the raiders were responsible for the misappropriation of the oil:

> "Q. Step two, you accept that everybody knew, both you and he, that the raiders were the people whom you regarded as

> responsible, namely Kolomoisky, Ovcharenko, Yaroslavsky and Privat Group; correct?
>
> A. Yes.
>
> Q. Therefore, it must follow that in this conversation, when one was talking about misappropriation of oil, the persons who you were presuming to implicate for the misappropriation were the so-called raiders. That must be right. Do you agree?
>
> A. Yes." [Day 4 p97]

297. Later when cross examined by Mr MacLean, Mr Syubaev's evidence was that: "*he did not rule out that these people [responsible for the raid] could be involved*" but his evidence was that Tatneft "*had no specific knowledge as to who stood behind that*" [Day 6 p116]

298. Mr Maganov accepted that Mr Yaroslavsky was involved:

> "Q…the payments from UTN to Taiz and Tekhno you full well understood could not have happened unless Mr Kolomoisky, Mr Ovcharenko, Yaroslavsky and anyone else who you regarded as involved in the raid had been behind it; correct?"
>
> Yes." [Day 10 p135]

299. I do not accept Mr Syubaev's evidence was that Tatneft "*had no specific knowledge"* as to who stood behind the raid on the basis that I have found him to be an unreliable witness and because his evidence is in my view not consistent with the contemporaneous documents such as the March 2010 letter and his appointment to the Board of UTN (referred to below).

Identified in the March 2010 letter

300. Mr Yaroslavsky is expressly mentioned by name in the March 2010 letter from Mr Minnikhanov to the Prime Minister of Ukraine in the context of the "*illegal takeover*" of UTN and the "*subsequent illegal corporate raiding actions*".

Appointment to the Board of UTN

301. Mr Yaroslavsky was appointed to the Supervisory Board at the same time as Mr Bogolyubov and for the reasons discussed above in relation to Mr Bogolyubov, in my view Tatneft and in particular, Mr Maganov would have been aware of his appointment.

BIT pleadings

302. Tatneft relied in closing submissions on the fact that Mr Yaroslavsky was not mentioned in the Second Memorial on the Merits in August 2012.

303. It was put to Mr Syubaev that in the BIT arbitration Tatneft's case was that Privat Group, Mr Kolomoisky, Mr Yaroslavsky and Mr Ovcharenko were responsible. Mr Syubaev's evidence in cross examination was that:

> "there were a number of events that allowed us to suppose, to speculate if [Mr Yaroslavsky] is behind it and that the Privat Group headed by [Mr Kolomoisky] is behind it. However we did not have documentary proof of that."

304. I note that in the Rejoinder in December 2009 Tatneft asserted that Taiz and Tekhnoprogress came under the control of Mr Kolomoisky and Privat Group and described them as "*principal partners and co-conspirators of Mr Ovcharenko and his group of raiders*". [emphasis added]

305. The claim in the BIT proceedings was against Ukraine and not the defendants and I do not accept that the absence of specific allegations against Mr Yaroslavsky in the BIT proceedings negates a finding of knowledge on the part of Tatneft.

Suspicion/speculation vs knowledge of the Scheme and the defendants

306. Mr Syubaev's evidence was:

> "A. I wanted, if I may, Mr Howard, to once more emphasise that Tatneft received certain information and acquired certain knowledge gradually, over several years, up to the hearing, the arbitrazh hearing. Tatneft had no confirmation and no specific knowledge as to whose interests this fraudulent scheme was serving and had served. Until that moment, Tatneft -- as you said at the last hearing, Tatneft was just receiving building blocks, but not the whole picture." [Day 6 p9]

307. Whilst Mr Syubaev and Mr Maganov repeatedly insisted they only had suspicions or speculated about the Scheme and the involvement of the defendants in the Scheme this is not borne out on the evidence.

308. I do not accept the evidence of Mr Syubaev and Mr Maganov concerning their level of "knowledge": I have found that the evidence of both witnesses is not reliable and to be given little or no weight and in my view their evidence is contrary to the natural inference to be drawn from the contemporaneous documentation. I note that the April memorandum refers to "unofficial information" in two places but when the totality of the evidence is considered, it is in my view clear that Tatneft had sufficient knowledge of the elements of the tort for the purposes of limitation by March 2010 even if they did not have *"evidence"* to support their knowledge:

    i) as discussed, the information about the payments came from Mr Fedotov and I infer from this and the numerous assertions in the documents referred to above that Tatneft had knowledge and not just suspicion that the payments were made.

    ii) the information about the control of the intermediaries was established by the investigation carried out by Mr Syubaev.

    iii) the link between Korsan and Privat Group was known and was not a mere hypothesis; and

iv) the connection between the amount of the payment to the intermediaries and the payment by Korsan to acquire the stake in UTN was one which was made by Tatneft.

309. As to knowledge of the defendants, the evidence is discussed above and in particular I note the letter of March 2010 to the Prime Minister of Ukraine in which Mr Minnikhanov referred to the involvement of Privat, "*headed by businessman Kolomoisky (in collaboration with businessmen A Yaroslavsky and P Ovcharenko)*" I thus note that Tatneft was prepared to identify three of the four defendants in external high level intra-governmental correspondence.

Conclusion on Tatneft's knowledge

310. For the reasons discussed I reject the submissions for Tatneft that (i) obtaining access to the case files in the Second Criminal Complaint in early 2012 was a *"breakthrough"* and it was only in August 2012 that Tatneft had sufficient knowledge to make the allegations and (ii) that the knowledge in August 2012 was only sufficient to make allegations against Mr Kolomoisky and Mr Ovcharenko.

311. I find on the evidence that on the balance of probabilities:

i) Tatneft had knowledge for the purposes of Russian law of the requisite elements of the tort by March 2010. (In my view the April 2010 memorandum is evidence of the state of Tatneft's knowledge but there is nothing to suggest the state of knowledge changed between March and April 2010).

ii) If it is necessary to know the identity of the defendants prior to 31 August 2010, Tatneft had knowledge of the identity of all the defendants by March 2010.

312. If for any reason I were wrong on either (i) and/or (ii), I find that Tatneft had knowledge of the requisite elements of the tort and the identity of the defendants by November 2011.

313. In relation to this alternative finding, I take into account the following evidence (discussed above) which relates to the period after April 2010 and which provides additional evidence as to the knowledge of Tatneft by November 2011:

i) The (draft) letter in February 2011 which confirms that by this date Tatneft was aware of the evidence of Mr Konov and Mr Vakhnyuk (given in October 2009 and in March 2010) and expressly states that the testimonies confirmed the involvement of Privat Group with the raid.

ii) the First Memorial in June 2011 which supports the evidence that Tatneft had knowledge that:

a) Privat and Mr Kolomoisky had acquired the intermediaries and then liquidated them once the Scheme was complete (paragraph 518):

> "In short, the intermediaries acquired by Igor Kolomoisky and the Privat Group were simply utilized to simulate the repayment of Ukrtatnafta's debt to Tatneft,

> and, once their role in a patently self-serving scheme was complete, liquidated."

b) The payment by the intermediaries was not to pay the debt to SK but was a "pretence" (paragraph 517):

> "…Ukrtatnafta – which is now controlled by the Privat Group and the Ukraine – refuses even to acknowledge the existence of the debt to Tatneft, given an alleged payment of that debt to Taiz and Technoprogress Research and Production. The pretense of this assertion of payment becomes evident if one considers that both of these companies had assigned their claims to Suvar-Kazan, Tatneft's commission agent, in early 2008, as Ukrtatnafta was well aware."

c) The payments went from and to companies controlled by Privat Group (paragraph 517):

> "In effect, Respondent has claimed that payment by and to companies all controlled by the Privat Group, from their right pocket to their left, satisfied the hundreds of millions of dollars in debt that should have been paid indirectly to Tatneft. The absurdity of such a defense needs no elaboration."

d) Mr Bogolyubov was involved in the raid and Privat Group (the articles footnoted as discussed above).

e) Mr Yaroslavksy was a shareholder of Korsan (footnote 143).

iii) the interview of Mr Maganov in February 2012 which I infer reflected his knowledge at November/December 2011.

iv) the testimony of Mr Konov dated 4 March 2010 which (according to the Eighth Witness Statement of Justin Williams dated 23 September 2016) showed that:

> "pursuant to agreements entered into by Taiz, shares in various companies acquired by Taiz were to be sold through LLC Gambit and the proceeds of such sales were to be transferred to Taiz's accounts, but they were not".

314. In relation to the testimonies of Mr Konov and Mr Vakhnyuk, I assume, since there is no evidence as to when Tatneft received details of the testimonies, that they had been received by the time of the February 2011 letter which expressly referred to the testimonies. I do not accept that there is any evidence which supports the submission (paragraph 1222 of closing submissions) that Tatneft did not have access to the contents of the interviews but was only aware of the "gist". Contrary to the submission for Tatneft, in my view the complaint made by Mr Konov as to the conduct of the interview does not show that Tatneft did not get access to the interviews from the criminal files (even if Mr Konov himself did not have access to the interview transcript).

Stage 2-Knowledge of SK

315. I turn now to consider the issue for the purposes of time starting to run in these proceedings, namely did SK have actual knowledge of the violation of its rights and if so, when. As noted above, the finding that Tatneft had knowledge of the elements of the tort and of the defendants prior to 23 March 2013 is relevant given the submissions that it is to be inferred that Tatneft told SK of its knowledge of the Scheme and the identity of the defendants. However, in determining whether SK had actual knowledge of the violation of its rights, the court also has regard to SK's own knowledge likely to have been derived from public sources.

Witness evidence

316. I have already made findings above on the credibility of the Tatneft witnesses, Mr Maganov and Mr Syubaev, and I consider their evidence on this issue in light of those findings. In addition, I note that Mr Syubaev's evidence was that as a general matter he was not responsible for communications with S-K: his evidence was [Day 4 p20]:

> "Q. So insofar as these proceedings are concerned with what representatives of Tatneft told representatives of S-K, you are not the appropriate witness because it was not part of your sphere of responsibility to communicate with S-K; correct?"
>
> A. Yes.
>
> Q. Can you tell me who within Tatneft would have had responsibility for communications with S-K?
>
> A. There was DROOP headed by Mr Maganov."

317. As to communications with S-K in relation to the issues now before the court his evidence was that he was not involved apart from the call in June 2008 [Day 4 p64]:

> "Q…you personally were not involved during the period from October 2007 to let's take April 2013 in any discussions with anybody from S-K other than the discussion that we'll come to that takes place in June 2008 when Mr Gubaidullin telephoned you about the criminal investigation; is that right?
>
> Yes, you're right."

318. I bear in mind this evidence when considering his evidence in his witness statement concerning the knowledge of SK.

319. As well as the evidence of Mr Syubaev and Mr Maganov, the evidence of the following witnesses who gave live evidence is material to the issue of SK's knowledge:

i) Mr Aleksashin; and

ii) Mr Gubaidullin.

320. The first aspect of the evidence to deal with is the evidence of Mr Aleksashin as it was submitted for the claimant that he was an honest witness and if the court accepted his evidence that was the end of the actual knowledge case against SK. [Oral closing reply Day 42 p95]

Mr Aleksashin

321. His evidence was that he worked for SK under a consultancy agreement from 2000 until 2017. In the period 2008 - 2013 the majority of his time was spent on SK business. Since August 2017 he has not worked for the Suvar group or for Tatneft.

322. He said that it was not his practice (or that of Russian lawyers) to keep a written record of clients' instructions or of oral advice. [Day 13 p72]

323. His evidence was that the legal team consisted of 4/5 lawyers plus Mr Abdullin as the head who reported to Mr Korolkov and/or Mr Gubaidullin. He said that he had never seen Mr Abdullin take notes.

324. Mr Aleksashin's evidence was that he was involved in obtaining the Tatarstan Judgment and the steps to enforce the Tatarstan Judgment in Ukraine (using Ukrainian lawyers).

325. It was submitted for Tatneft that:

i) he was a straightforward and cooperative witness and any discrepancies between his written and oral evidence were inconsequential.

ii) there was no rationale for Mr Aleksashin to lie to the court as he is a lawyer and no longer works for SK and the submission by the defendants that he would lie in relation to matters he was directly involved in but not hypothetical matters even if they harmed Tatneft did not make sense.

Discussion of credibility

326. Dealing with these submissions in turn, I reject the submission that he was a straightforward and cooperative witness. In my view his evidence in cross-examination on occasions appeared evasive and/or lacked credibility.

327. For example:

i) Mr Aleksashin was asked about reading in the press about the events at the refinery; he accepted that he read one article but denied that he had read other articles on the basis that firstly he said it was not within his "remit" to follow press publications and then that he did not have time to read the press because his work "*took up an awful lot of the time*". [Day 13 p98] Not only does it seem unlikely from a common sense perspective that he was so busy he could not read the press, it is also at odds in my view with his evidence in his witness statement that he learnt about that the BIT proceedings "*from the media*".

ii) In relation to the BIT arbitration, in cross examination he initially denied that he was aware of the scope of the BIT proceedings extending to a claim for the oil payment until taken to a statement to that effect in his witness statement:

"Q…But, as far as you understood, [the BIT arbitration] was simply a claim for compensation in respect of the shares; is that right?

A. Yes, compensation for the investment which Tatneft had been making into the refinery.

Q. Right. And it didn't include -- you didn't realise that it included a claim for the oil monies; is that right?

A. I don't remember it exactly. Perhaps it did include it.

But what I have noted, what I have kind of identified in my mind is the raid, the takeover and expropriation of Tatneft's holding.

Q. Right. You see, the reason I come back to it, because I'm a little bit puzzled. You've given a witness statement in these proceedings …

And you can see in that statement, which you affirmed 45 minutes ago, … you say:

"I first learnt about these proceedings from the media. I understood that Tatneft was seeking payment for UTN's takeover, expropriation of the Tatneft-owned UTN shares, and for the oil it had supplied." Was that statement true when you affirmed it 45 minutes ago?

A. Yes.

Q. So the position is, if we go back a stage, therefore, that you did understand that the BIT arbitration included a claim for the oil supplied, right?

A. Yes." [Day 13 p108] [emphasis added]

iii) On the role of the accountants at SK and the BIT arbitration he provided a lengthy explanation which appeared in my view to be evasive and without any credible foundation:

"Q…You've got these accountants you tell us about who were concerned about how much money was owed and the impact on S-K's finances, and you've told us that -- what that concern related to. Would you agree with this: that you would expect the accountants who were concerned to seek to follow up what was happening in the BIT arbitration, the nature of the claims, in order that they could properly consider the nature of S-K's exposure? Do you agree with that?

A. No, I don't agree with it altogether. The thing is, the accountants had their own body of work and their own

> authorities. They were not authorised or tasked with following any kind of proceedings, be it in the territory of Ukraine, with the participation of Tatneft, or in the territory of the Russian Federation, with the participation of S-K."

328. Mr Howard attempted to clarify the question and the exchange continued including the following:

> "Q If you're an accountant who is concerned about those matters, because the BIT proceedings were well known and the subject of media reports, and that they concerned a claim for the price of the oil supplied, you, as an accountant, would necessarily need to enquire, both of your management and of Tatneft's, of your counterpart's, what was the state of claim in relation to the BIT arbitration in order that you could understand the risks that your company was facing; do you agree with that?
>
> A. I can only say that if I were an accountant working in Russia, pursuant to Russian practice and legislation, an accountant works with documents.
>
> Q. Yes.
>
> A. At that time there was an understanding that S-K owed an amount of money to Tatneft and anything to do with hypothetical proceedings under BIT or any others, in the arbitrazh courts of Tatarstan Republic or whatever, the accountants could only reflect in the books any court awards or decisions or rulings that had anything to do directly with S-K.
>
> Q. You see --
>
> A. Any other legal documents or disputes where S-K was not a party, the accountants would not be interested in and that had nothing to do with them.
>
> Q. You see, interesting you're expressing that view. Accountants very often -- surely you know that - have to form a view, for the purposes of accounts, on liabilities. You do understand that, don't you?
>
> A. Well, accounting office has to reflect primarily documentation that is being brought to them." [Day 13 p114] [emphasis added]

329. In relation to the Joint Criminal Complaint in cross examination Mr Aleksashin was asked who was behind the payments to Taiz and Tekhnoprogress. His evidence was that he did not know and "*at the time I did not ponder it*".

330. The exchange continued:

> "Q. Yes. Well, I suggest that that is obvious nonsense, Mr Aleksashin, that anyone in your position who gets to -- recognises what I've already put to you, if one asks, "Well, why is UTN seeking to thwart S-K making recovery, who is behind it?", there is an obvious link with the fact that UTN had been taken over on 19 October 2007 by the so-called raiders. Do you seriously disagree with that?
>
> A. In the framework of this criminal complaint, we asked the authorities to investigate the activity of the managers of the intermediary companies so we assumed that those were the persons who misappropriated the funds." [Day 14 p59]

331. The evidence that he thought that the managers of the intermediaries "*misappropriated the funds"* is not credible in circumstances where he accepted that he had read about the events at the refinery, in effect the "raid", and he knew that a claim had been brought in the BIT proceedings in which "*Tatneft was seeking payment for UTN's takeover, expropriation of the Tatneft-owned UTN shares, and for the oil it had supplied".*

332. His evidence was:

> "A. … At that time a decision was taken in Ukraine of invalidity of the assignment agreement, so in fact the payment UTN made to the intermediaries was absolutely legitimate and lawful in my view and there were no grounds to see that the UTN management were the final beneficiaries of this embezzlement scheme. We just simply could not see that."

333. It is not credible in my view that Mr Aleksashin thought that the payments to the intermediaries were "*lawful*" in circumstances where SK was relying on the assignment by UTN to SK in seeking to enforce the Tatarstan judgment.

334. I also find it unlikely that he did not "*ponder*" who was behind the payments: his reaction after being given information about the involvement of the defendants said to be given to Mr Gubaidullin at the meeting with Ms Savelova in 2013 was, according to his evidence, to do a Google search on the defendants. There is no evidence that he carried out the search at that time but if that was his reaction to learning of the details, there is no reason why he would not have reacted in this way on learning of the payments.

335. There were also answers given in cross examination that conflicted with his witness statement where he gave answers in cross examination that appeared to be changed from the witness statement to fit the case advanced by Tatneft.

336. For example, when asked about "*discussions*" with Ms Savelova about enforcement of the Tatarstan Judgment he said it was merely that information was communicated to her. In his witness statement he said:

> "29. Following enforcement against the UTN Tatnefteprom shares in 2009, it was apparent to us at S-K that the bailiffs could hardly recover anything in Russia because UTN was not

> understood to have other assets there. At the time, Mr Abdullin and I discussed (internally, with our Ukrainian counsel, and separately with Tatneft) whether S-K should attempt enforcement in Ukraine. S-K analysed the prospects of enforcing a Tatarstan court ruling in Ukraine. Following this (and consultation with S-K's Ukrainian counsel), S-K concluded that it made no sense to attempt the enforcement of the Tatarstan court ruling in Ukraine given the political situation in Ukraine at the time, and the prior rulings of the Ukrainian courts to the effect that the assignment agreement was invalid." [emphasis added]

337. In cross examination Mr Aleksashin's evidence was that it was he who spoke to Ms Savelova; that after his conversation with the Ukrainian counsel he discussed the possibility of enforcement of the judgment in Ukraine with Mr Abdullin and then he communicated it to Ms Savelova. It was put to him that his witness statement says that in effect there was a discussion with Ms Savelova. He said that he did not see that his oral evidence was different from his witness statement. [Day 14 p15]

338. In my view this was a material difference and I infer one which would be obvious to Mr Aleksashin. His answer appeared to be designed to fit Tatneft's case.

339. Another example is in relation to the letter in November 2011. Mr Aleksashin's evidence in his witness statement was that:

> "36. Around November 2011, I found out from the investigator that in the summer of 2009, UTN had allegedly made payments for the oil supplied to Taiz and Tekhnoprogress. It sounded strange to hear about payments from UTN given I knew S-K had not received any money from the intermediaries. The investigator did not communicate to me any details. I shared this information with Mr Gubaidullin and Mr Abdullin. Before that conversation with the investigator no one had told me UTN had paid for the oil. I did not hear any rumours about it nor had I come across this information in the press or otherwise. No one from S-K mentioned it to me." [emphasis added]

340. In cross examination when asked about the reference to a "*conversation*" with the investigator in November 2011 Mr Aleksashin said he was referring to the written letter. When pressed Mr Aleksashin suggested a conversation might have followed a written reply. [Day 14 p31] He also accepted that the letter went to Mr Korolkov and he believed Mr Abdullin gave him the letter. [Day 14 p33]

341. The account in his witness statement that he shared the information with Mr Gubaidullin and Mr Abdullin did not accord with his oral evidence in which he accepted the documentary evidence of the letter which must have gone to Mr Korolkov and then was given to him by Mr Abdullin. When asked about the alleged reaction of Mr Abdullin and Mr Gubaidullin he said they were surprised and sought to justify the omission from his witness statement because it was "*obvious*". [Day 14 p38] He was asked who was designated to be interviewed in response to the letter of November 2011. He said that he did not recall even though he said he had prepared a reply. When pressed

his evidence was that he only prepared a reply that payments were not received and most likely someone else was tasked with designating an employee. [Day 14 p45]

342. It was submitted for Tatneft that challenging Mr Aleksashin's oral evidence for not referring to the reaction of Mr Abdullin and Mr Gubaidullin in his witness statement was merely a "*well-worn tactic*" on the part of counsel in cross examination (paragraph 1189).

343. In my view Mr Aleksashin's evidence was unsatisfactory in this regard. His failure to recall the precise order of events could have been due to the passage of time. However, he did not state that he had failed to remember matters (which would have been understandable given the passage of time) but sought to provide a different explanation and to provide a more detailed account which fitted the narrative advanced by Tatneft in these proceedings. Given the significance of the issue of knowledge of SK, it is striking that Mr Aleksashin made no reference to any reaction of surprise by Mr Abdullin in his witness statement but said in cross examination that he was "*genuinely surprised*" and Mr Gubaidullin was "*sincerely surprised*" [Day 14 p34, 35]; the purported explanation for its omission from his witness statement was in my view not credible in the circumstances.

344. Tatneft submitted that the allegation by the defendants that Mr Aleksashin would lie in relation to matters he was directly involved in but not hypothetical matters even if they harmed Tatneft did not make sense.

345. Mr Aleksashin was in my view evasive when he was asked about events which suggested direct contact or sharing of information between Tatneft and SK. Whilst I agree that he did agree with hypothetical scenarios put to him in cross examination he was always careful to state that the matter had not actually been communicated.

346. For example:

> "Q…If UTN had purported to discharge the debt that had been assigned by making payment of the sum due under the debt to Taiz and Tekhno, would that be relevant information for you to know when considering and advising on the question of enforcement of the judgment of Tatarstan in Ukraine?
>
> A. At that point in time we did not have such information.
>
> Q. I'm not at the moment asking whether you had the information. I'm asking you this -- I'm asking you a hypothetical at the moment. Assume that UTN had, in June of 2009, paid Taiz and Tekhno the amount of the assigned debt -- assume that -- do you agree that knowledge of that fact, if it were a fact, would be relevant information that you would need to know as a lawyer who was then considering whether or not you could enforce the Tatarstan judgment in Ukraine?
>
> A. If we had such information, then we would have analysed it and, yes, at a minimum it would have been interesting and curious." [Day 14 p12] [emphasis added]

347. Another example was the following:

> "Q. Now, can you tell me this: would it have been of interest to S-K to know that in June 2009 UTN was proposing to make, and indeed did make, payments to Taiz and Tekhnoprogress of the Ukrainian hryvnia sums representing and in respect of the oil debts which S-K claimed? Would that have been of interest to S-K?
>
> A. I think so. It would have been of interest for them to know that.
>
> Q. Yes. And can you tell us why that would have been of interest?
>
> A. For the simple reason that at that time we had a trial against Ukrtatnafta for the failure to pay for the oil shipped. They were taking part in the proceedings in Tatarstan and later on they filed an appeal against that judgment. In the course of those proceedings, I think UTN would have had a vested interest in showing that the entire amount had actually been paid to Taiz and Tekhnoprogress, the intermediary companies.
>
> Q. Yes.
>
> A. But they did not do that." [Day 13 p121] [emphasis added]

348. A further example was as follows: It was put to Mr Aleksashin that Mr Gubaidullin said in his witness statement (at paragraph 172):

> "The S-K Legal Department addressed Tatneft's Legal Department with a query to analyse the potential outcome of the enforcement proceedings in Ukraine ..."

349. It was put to Mr Aleksashin that:

> "it is very difficult to imagine a discussion between them and you and other representatives of S-K where you're considering the question of enforcement of the Tatarstan judgment and they do not mention to you the fact that, as they understood it, UTN had or at least might have paid the debt already to Taiz and Tekhno?..."

350. Mr Aleksashin responded:

> "A. Well, I repeat once again, that would have been not very logical indeed.
>
> Q. Yes, so, as I understand it -- there are two possibilities really that we get to on the assumption, on the hypothesis, I'm putting forward. There are two possibilities. Therefore either they did mention these facts or, if they failed to mention these

> facts, they should have mentioned them because the failure to do so would, as you see it, be completely incomprehensible. Do you agree with that, that those are the possibilities?
>
> A. Yes, I agree.
>
> Q. I would suggest to you that, in fact, because it is really inconceivable that they didn't mention these facts and there would be no reason for them not to have done so -- that in fact they must have done so and that you were in fact or at least S-K was -- whether you were personally told of these facts -- they did communicate them. What do you say to that?
>
> A. No, Suvar-Kazan was unaware of these facts and had no inkling of them." [Day 14 p19] [emphasis added]

Conclusion on the evidence of Mr Aleksashin

351. Whilst Mr Aleksashin is a lawyer and therefore at the outset, I approached his evidence on the basis that he was likely to be truthful in his evidence to a court, the manner and nature of his evidence as discussed above leads me to find that he was not a reliable witness.

352. I infer that he was fully appraised of the issue of knowledge in these proceedings and whilst I cannot make any findings as to what may underlie his approach to giving evidence to this court, the manner and nature of his evidence leads me to conclude that he was seeking to avoid damaging Tatneft's case.

353. For the reasons discussed I do not accept that the limitation defence based on actual knowledge of SK fails by reason of his evidence. I take his evidence into account but the weight which I accord to that evidence on the material issues is limited and I accept his evidence only where it is consistent with the contemporaneous documentary evidence and the inherent probabilities which can be drawn from the surrounding circumstances.

Mr Gubaidullin

354. Mr Gubaidullin was the former Deputy General Director of SK who oversaw its oil department.

355. It was submitted for Tatneft that Mr Gubaidullin was a frank witness who did his best to assist during a long cross-examination which explored hypothetical premises on which he was properly unwilling to speculate. It was submitted that he adopted a literal approach to some questions which reflected his character and a concern to ensure he gave accurate answers. It was submitted that this explained his initial denial that he had been to witness training. It was accepted that his inability to give evidence on financial matters is unusual for an executive in an English company but submitted that there is no basis for doubting it and his reluctance to give recent turnover had just *"escaped his memory"*. It was submitted that when he gave evidence on matters within his knowledge, in particular communications between Tatneft and SK, the answers he gave were direct and convincing. (Tatneft closing submissions paragraph 952-959)

356. It was submitted for Mr Kolomoisky that SK (in the form of the successor company JSC Suvar Kazan) remains in an ongoing commercial relationship with Tatneft and Mr Gubaidullin was motivated by a desire to assist Tatneft in advancing its case.

357. In my view the evidence of Mr Gubaidullin at times strained credulity.

358. The first point, which was addressed by Tatneft in its submissions, was his evidence that he could not remember the turnover of the company for the last financial year nor could he give even a ballpark figure of whether it was $500 million, $1 billion or $1.5 billion. [Day 7 p65]

359. Mr Gubaidullin is now the director general of the company that succeeded to SK. I have considered the submission that this could have been a momentary lapse. Taken in isolation that would be a possibility if a witness was for example nervous at the start of his cross examination. However, when the exchange is read in context it evidences in my view a reluctance to answer a series of questions which it was clear were directed at the issue of the relationship between Tatneft and SK.

360. It started with the question:

> "… let's take the position of S-K from 1999 to 2014. Its main customer throughout that period of 15 years was Tatneft; correct?" [Day 7 p60]

The immediate response was:

> "The customer? Purchaser? Could you please specify?"

Having tried to clarify the issue for the witness, four questions later the question posed was:

> "… the provision of those services [under the agency contracts] by S-K to Tatneft was the principal area of S-K's business; correct?"

Mr Gubaidullin said: "no", that it was one of the businesses not the main business.

361. A further three questions were put and then Mr Gubaidullin was asked:

> "… in relation to these oil export services [provided by SK itself] Tatneft was obviously your principal customer for those services"

to which Mr Gubaidullin then agreed.

362. The questions about the relationship continued and Mr Gubaidullin was asked about the value of the oil that SK was dealing with in 2007 in terms of Tatneft's total sales volume. Mr Gubaidullin professed not to understand the question.

363. It was thus in this context that Mr Howard then asked what was the turnover of the current company with Tatneft for the last financial year. Mr Gubaidullin asked for clarification. Mr Howard said:

> "… I simply want you to tell us, in the last financial year, what was the value to your company in terms of commission of its agency agreement with Tatneft?..."

Mr Gubaidullin professed to need clarification, that he could not separate out the activity with Tatneft and that he could not provide the figure for the total turnover because it changed when he became director general. This led to an intervention by the court to clarify that he was being asked about the last financial year.

364. It was against this background and in this context that he was asked:

> "Q: Can you give us an idea of the order of magnitude of the turnover? Surely you must know that.
>
> A. Not to mislead anyone, again I would say I don't want to speculate because I definitely do not recall the figure.
>
> Q. So is this the position: you're not able to tell us, for instance, whether the turnover of your company in the last financial year was $500 million, $1 billion, 1.5 billion? You simply are unable to provide any information at all; is that your position?
>
> A. Yes. To be frank I do not remember." [Day 7 p67]

365. In addition to being unable to answer questions, there were examples of providing answers which flew in the face of commercial common sense: for example, when he was asked whether he understood that SK was required to provide a guarantee of payment for the oil to Tatneft. He replied:

> "My understanding when I saw the contract on the whole was that Suvar-Kazan was liable to Tatneft, i.e., the client, for the return -- the repatriation of the funds and for the payment with Tatneft. That was the general understanding. [Day 7 p120]"

366. When it was put to him that he used the term "guarantee" in his third witness statement he gave an elaborate explanation of what was meant which did not accord with the straightforward statement in his witness statement. Paragraph 15 of his third witness statement read:

> "…when Mr Maganov suggested that S-K act as Tatneft's commission agent, I understood that it would mean assuming the following obligations. First, S-K would be required to ensure that foreign currency proceeds for the supplied oil were transferred from the foreign buyer to S-K's account in a timely manner. I understood that late transfer of foreign proceeds would mean a violation of currency control laws and potential liability on S-K's part. Second, S-K was required to provide a guarantee of payment for the supplied oil to Tatneft. If that foreign buyer did not pay, then S-K was liable to Tatneft for any shortfall…" [emphasis added]

367. In cross examination he said:

> "To guarantee is a broad term. The way I use this term here, the term "guarantee", means that I understood, as the former exporter, that I was liable to the agent for the sale of the oil, for the receipt of the funds and I was liable for making payment for the goods supplied. That was the guarantee. That guarantee, however, does not fully express the sense that the word "guarantee" has in the banking sphere, where a bank issues a written guarantee and that guarantee can be used in order to create a certain piggy-bank(sic). This, to me, meant that I was responsible for the receipt of the goods from me as the commission agent and for the payment of the funds to the client. You can call it -- in Russian, we could call it a "guarantee", but that is a Russian expression that I would be using."

This was another surprising response in the face of the usual meaning of guarantee and its clear meaning in his own witness statement.

368. The credibility of the following evidence must be in doubt in light of the disclosure of the Akin Gump advice:

> "Q. You see, what it has the appearance of is that there was a pre-arranged scheme where S-K is allowed to transfer its business out of S-K to Neftetradeservice, allowing the shareholders -- that is you and your associates --to retain for yourselves the value of the business rather than that being used to discharge any liability to any creditors. That's what it looks like. Do you have any comment on that?
>
> A. I disagree with you wholeheartedly, Mr Howard, because we did not discuss that topic. I did not discuss the topic of transfer of the business with Tatneft to any other company and decision of my transfer and -- of my department's transfer to a new company and entering into a new agreement with Tatneft was made purely within our companies; i.e., with the management of Suvar-Kazan. And Tatneft -- I did not discuss this issue with Tatneft." [Day 7 p103]

369. It is possible that the evidence in his answer was accurate and that he personally did not discuss the transfer of the business with Tatneft and the decision to transfer the business was ultimately made by SK (and not Tatneft) but the question was whether there was a pre-arranged scheme and in the light of the disclosure of the Akin Gump advice this is not the answer of a frank witness who was seeking to help the court. It is at best evasive and at worst dishonest.

370. Of equal concern to the court is his answer to the question "*whether he had been to witness training*". [Day 8 p103] Initially he did not reply directly but when the question was put again he said "*No*". When the trial resumed on the following Monday it became apparent that Tatneft's lawyers had written to inform the defendants that Mr Gubaidullin had attended a witness familiarisation course. It was put to Mr Gubaidullin that he had

attended a witness familiarisation course with Bond Solon [Day 9 p5]. Mr Gubaidullin replied:

> "A. Oh, is that what you meant? Bond Solon for me is a training because when you said "preparation" or "training", which is -- I thought of Tatneft lawyers. When I started asking them questions, they said to me, "We can't train you. We can't prepare you. We can arrange a training course for you". So you asked me for preparation and I automatically thought that my lawyers would have been training me, which they didn't; whereas yes, indeed, I attended a training. We had a role play, we were told how to behave, how to speak clearly and we had a role play -" [emphasis added]

371. Tatneft sought in closing submissions to attribute this initial denial to a "*literal*" approach by Mr Gubaidullin to questions asked and a misunderstanding possibly by giving evidence through an interpreter. I reject these submissions. The question was posed twice and therefore translated twice. Mr Gubaidullin could have sought clarification in relation to this question if he was in any doubt as to the meaning, as he had done only moments before in relation to a question about the conversation in 2013 thus prompting Mr Howard to ask the question as to whether Mr Gubaidullin had been to witness training:

> "Q. And, as I understand it, Ms Savelova gave you this information without any prompting on your part.
>
> A. I'm not sure I understand the question.
>
> Q. Right.
>
> "A. It's not very clear. Who would have prompted what to whom?"

372. Further even in his subsequent admission he referred to it as a *"training course*". His initial denial and subsequent attempt to explain it, does not suggest that this was a frank witness but a witness who was prepared to lie, I infer, when he thought that it might reflect adversely on his evidence.

373. It was submitted for Tatneft that Mr Gubaidullin was a frank witness who did his best to assist during a long cross-examination which explored hypothetical premises on which he was properly unwilling to speculate. In my view there were examples where his answers to such hypothetical questions gave the appearance of being designed to address and support Tatneft's case. For example, in the following exchange where he sought to address the issue of what steps it would have been reasonable for SK to take in the context of constructive knowledge, when no such question had been posed:

> "Q. Now, if the position was in September 2009 that …the Tatneft individuals to whom you spoke -- if they knew that the oil debt had been paid by UTN to Taiz and Tekhno, you would expect them to have told you that, wouldn't you?

> A. If we are discussing the events of 2009, then I might have hoped to learn some facts that I would have known something about. Now you're talking about payment --some kind of payments about Taiz and Tekhno. In 2009 I had no inkling about it, I had no idea about it, so it would have been illogical from my part to put a question to them to say, "What is it that you know?". [Day 8 p86]

374. Another example of an instance where, when a hypothetical question was posed which had an obvious answer, his evidence was in my view evasive and not (as submitted) borne out of a desire to avoid speculation was as follows: [Day 9 p12]

> "Q.… let me suggest to you: it is utterly obvious that if UTN had paid Taiz and Tekhno sums representing the assigned debt, knowledge of that fact of payment would be highly relevant to S-K if it was seeking to enforce the assigned debt in Ukraine. Do you agree or not?
>
> A. I am unable to assess this now because the rights to claim from UTN was assigned by these companies to us. We claimed from UTN. What it looked like, how it would have looked like, it's hard for me to imagine, to be honest."

The exchange continued with Mr Gubaidullin not answering the question posed and eventually counsel was forced to move on.

Conclusion on the evidence of Mr Gubaidullin

375. When assessing the credibility of the evidence which Mr Gubaidullin gave in relation to communications between Tatneft and SK, I have regard to the whole of his evidence including the matters discussed above and reject the submission that the answers he gave were direct and convincing in this regard. In my view he was a partial witness who was not only evasive but on occasion less than frank in his evidence to the court and I attach little or no weight to his evidence.

Overall conclusion on witness evidence

376. It was submitted for Tatneft (paragraph 847 of the closing submissions) that the *"consistent evidence"* of the witnesses for Tatneft and SK was that the information picked up by Tatneft and its *"theories"* as to who was responsible was not passed on and this evidence stood up under cross examination.

377. This was undoubtedly a case where the consistency of the case on the degree of knowledge of Tatneft and the limited nature of the communications with SK presented by the witnesses was striking: the witnesses for Tatneft, Mr Maganov and Mr Syubaev sought to present a case that they only had theories and speculation and not knowledge for the purposes of limitation. The witnesses for SK were equally consistent in supporting Tatneft's case that SK did not have knowledge.

378. However as discussed above I find that these were not reliable witnesses who sought to assist the court but to a greater or lesser degree were evasive and, in some instances, as

referred to above, have been or are likely to have been untruthful in their evidence to the court.

379. Given the unreliable nature of the witness evidence on this issue together with the absence of relevant documentation showing communications between SK and Tatneft, the court is bound to have regard to the inherent probabilities which it can draw from the documents that are before the court and such of the evidence of the witnesses which in my view is credible having regard to the contemporaneous documents. The court also has regard to the absence of witnesses who may have given relevant evidence.

Witnesses not called

Relevant legal principles

380. It appeared to be common ground that the principles were set out in *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, at page 340:

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

381. Further the court was referred to Cockerill J in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm). I note the following at 154 of the judgment:

> "In my judgment the point can be dealt with relatively briefly thus:
>
> i) This evidential "rule" is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.
>
> ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the "missing" witness would have material evidence

> to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.
>
> iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of: a) the overriding objective; and b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial…"

382. The application of those principles to individuals in this case who were not called to give evidence is discussed below in the context of the evidence which it is submitted such individuals could have given.

Absence of Ms Savelova

383. In relation to Ms Savelova there was an application part way through the trial to admit her witness statement and for her to be called as a witness. This was refused for the reasons set out in the judgment dated 13 November 2020 [2020] EWHC 3250 (Comm).

384. It is clear that she had material evidence to give on the issue of knowledge. Mr Williams (paragraph 225 of his first witness statement) said:

> "Mr Rybalkin and others in my firm's Moscow office have also interviewed Ms Savelova. Mr Rybalkin has informed me and I believe that Ms Savelova has indicated it is her understanding that Tatneft informed no one at SK as to what information was obtained by the criminal investigation, albeit she did discuss this with Mr Gubaidullin when she and Mr Gloushkov met him in around May 2015. Ms Savelova's understanding is that the first time anyone from Tatneft informed anyone at SK that any of the Defendants may have been involved in causing the oil monies not to be paid to SK was when she spoke to Mr Gubaidullin in around late April 2013, some weeks after Mr Kolomoisky had given his evidence in the BIT Arbitration on 25 March 2013". [emphasis added]

385. In particular it seems to me that she could have given highly relevant evidence concerning the discussions with SK to enforce the Tatarstan Judgment in Ukraine, the decision to file the joint criminal complaint in 2011 and her alleged conversation in the street with Mr Gubaidullin in April 2013.

386. In relation to enforcement of the Tatarstan Judgment, there is the evidence for example of Mr Syubaev in his witness statement (at paragraph 74):

> "…Lawyers of Tatneft and S-K jointly looked into the situation. As I was informed by Savelova S-K's lawyers again sought assistance from Tatneft's lawyers on this issue. As I remember, Tatneft even sought advice from a Ukrainian law firm. The

> forecast was pessimistic…S-K and Tatneft jointly decided not to seek enforcement of the Russian court judgment in Ukraine."

387. Similarly, Mr Aleksashin in his first witness statement (paragraph 29) referred to discussions with Tatneft:

> "…At the time, Mr Abdullin and I discussed (internally, with our Ukrainian counsel, and separately with Tatneft) whether S-K should attempt enforcement in Ukraine…"

He also referred (paragraph 30) to requests for documents:

> "In 2009, I was contacted by Ms Savelova from time to time and other members of the Tatneft legal team to provide documents. I did not know why Tatneft might have needed those documents. I had no discussions with the Tatneft lawyers about Tatneft's intentions regarding recovery and about its litigation strategy. I did not know anything about this…"

388. As to the meeting in 2013 this is relied upon by Tatneft as referred to above. Mr Syubaev's evidence in his witness statement was:

> "90. In April 2013 Maria Savelova, the Head of Legal of the Strategic Planning Department, told me that she accidentally met Gubaidullin and she shared, with him the news about Kolomoisky's testimony and siphoning of the oil payments which came as a great surprise to him. Maria also told me that Gubaidullin was very surprised by the news, since before that time he believed, based on our joint complaint filed with the investigation authorities in 2011, that the top managers of the Ukrainian intermediaries had been responsible for the theft."

389. Applying the relevant test as to whether the court is entitled to draw adverse inferences from her absence:

i) Tatneft accepted in its submissions to the court on the application to admit her evidence that Ms Savelova could give relevant and important evidence (see, for example, [27] of the judgment).

ii) As to the reason for her absence, it was submitted for Tatneft in oral closing [Day 38 p11] that if the explanation as to why she was not put forward as a witness earlier is not accepted, then Tatneft can be criticised for not having put her forward in April or June this year but cannot be criticised for trying to shield her from cross-examination. In the light of the findings in my earlier judgment I do not accept this submission. As stated as [23] and [24] of the judgment:

> "[23] However, even if the court were to assume that concerns for her safety lay behind her previous failure to provide a witness statement, it is not apparent that anything has changed in this regard which would provide a credible explanation as to why she

> is now willing to give evidence and which would therefore support the stated explanation for the original failure.
>
> [24] Having heard the relevant references by counsel to Ms Savelova's absence in the course of the trial, I have difficulty accepting that any express or implicit criticism of either Tatneft or her in relation to her failure to give evidence would outweigh her stated concerns for her personal safety, if they are genuine. I am not, therefore, satisfied that there was a good reason for the failure."

iii) As stated in *Magdeev*, it is necessary for a party to set out clearly the point on which the inference is sought. These are as follows (paragraph 78 of closing submissions for Mr Kolomoisky):

a) that Ms Savelova, and in turn Tatneft, had knowledge of the oil payment siphoning scheme and who was responsible for this by no later than September 2009.

b) that Tatneft had access to the materials in the Criminal Case Files on a rolling and contemporaneous basis as and when they were generated, and in any event well before March 2012; and

c) that Ms Savelova would have shared Tatneft's knowledge of the scheme and the Defendants' involvement in it with S-K, including with Mr Abdullin, in particular in the context of discussing the pursuit by S-K of the oil debts from the contractual debtors and considering the enforcement of the Tatarstan Judgment in Ukraine.

390. As also stated in *Magdeev* (quoted above), if the court is satisfied as to these matters, the court then has a discretion whether to draw an adverse inference from the absence of a witness and will exercise its discretion not just in the light of those principles, but also in the light of the overriding objective; and "*an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial…*".

391. In my view this is not a case where the evidence has developed during the trial such that the significance of Ms Savelova's evidence has only now become apparent. It has always been clear that she would be a witness with material evidence to give and (as found in the earlier judgment on the application to give evidence) there is no good reason for her original failure to give evidence or her apparent change of heart. In my view an adverse inference is to be drawn in the circumstances from the absence of Ms Savelova that goes to strengthen the evidence on the issue of whether Tatneft had knowledge of the Scheme and whether it is likely that Ms Savelova would have shared Tatneft's knowledge of the Scheme and the defendants' involvement in it with S-K, particularly in the context of discussing the enforcement of the Tatarstan Judgment in Ukraine.

Absence of Mr Korolkov

392. Mr Korolkov gave an account in a witness statement in 2016 of his meeting with Mr Maganov in December 2011 but no notice was served by Tatneft under section 2 of the Civil Evidence Act 1995 that Tatneft was proposing to adduce hearsay evidence and he was not called to give oral evidence.

393. Mr Gubaidullin's evidence in cross examination was that Mr Korolkov ceased to be involved in the Suvar businesses towards the end of 2018 and he spoke to him recently and he is "*seriously ill*". [Day 7 p80]

394. No explanation has been given as to the nature of the illness which has led to Mr Korolkov being unable to attend as a witness: there is only a bare assertion in response to a question in cross examination. No supporting evidence has been produced.

395. It was submitted for Tatneft that the evidence of Mr Gubaidullin that Mr Korolkov was ill was unchallenged and it was "*unreal"* to suggest that Tatneft should produce medical evidence as he was a witness that was not within its control. [Day 38 p12]

396. In written closing submissions (paragraph 973.3) Tatneft noted the evidence of his illness in cross examination and submitted that:

> "In any event he would not likely have been a material witness, since he was not the executive in charge of S-K's oil department (that was Mr Gubaidullin) and anything he could have given evidence on was already addressed by other witnesses."

397. I do not accept that submission: in my view Mr Korolkov clearly "*might be expected to have material evidence to give on an issue in an action*" namely SK's knowledge and in particular the letter of November 2011 and the meeting in December 2011. Mr Gubaidullin's evidence in his witness statement was that the receipt of the Joint Criminal Complaint was the first time that anyone at S-K had learnt about the payments to Taiz and Tekhnoprogress by UTN in June 2009 but the contemporaneous evidence of the letter in November 2011 addressed to Mr Korolkov would suggest otherwise. Mr Korolkov would have been best placed to address this issue, Mr Gubaidullin having been apparently unaware of the letter and away from the office at the time of the meeting.

398. The failure to give notice in accordance with the Civil Evidence Act does not affect the admissibility of the evidence but may be taken into account by the court as a matter which adversely affects the weight to be given to the evidence (section 2 (4) of the Civil Evidence Act).

399. In considering whether to draw an adverse inference it is unclear whether Tatneft could have adduced documentary evidence as to Mr Korolkov's current state of heath. He is not an employee of Tatneft and on the evidence no longer works for SK.

400. However, no explanation has been provided by Tatneft as to why no notice was given under the Civil Evidence Act and when Mr Korolkov became "*seriously ill*" (as asserted by Mr Gubaidullin now to be the position).

401. As referred to above, if the reason for the witness's absence or silence satisfies the court then no adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

402. In my view, given the evidence, I accept that Mr Korolkov may be ill and accordingly I do not draw an adverse inference from his absence at the trial but in the circumstances where the court has not had the matter properly explained, I attribute little weight to the evidence in his witness statement except where it is supported by other evidence which I find reliable.

Absence of Mr Abdullin

403. Tatneft submitted that it was not in a position to adduce evidence from Mr Abdullin because he is under house arrest for an unrelated matter and not contactable. Mr Aleksashin's evidence (paragraph 11 of his witness statement dated 29 April 2020) was that his understanding was that he was *"not now available to testify."* In cross examination Mr Gubaidullin said that Mr Abdullin was facing claims from Suvar Group that he was accused of illegally misappropriating property. [Day 7 p81]

404. Mr Gubaidullin in his witness statement referred to a meeting in 2016 with Mr Abdullin and gave evidence about what he said. It is unclear why no witness statement was taken from him at that time (as was the case for example with Mr Korolkov who made a statement in 2016).

405. It was submitted for Tatneft that there was no need for it to call Mr Abdullin concerning the preservation of documents as this was addressed by other witnesses. However, it is clear that Mr Abdullin would have had material evidence to give: Mr Aleksashin, as discussed above gave evidence that he and Mr Abdullin had discussions with Tatneft's lawyers and that Mr Aleksashin would not have been party to all the discussions. The evidence of Mr Abdullin would also have been relevant to receipt of the November letter.

406. In my view no satisfactory explanation has been provided for Mr Abdullin's absence. Mr Aleksashin's evidence was based on his “understanding” but Mr Aleksashin no longer works for the Suvar Group. Mr Gubaidullin did not provide a satisfactory explanation in circumstances where the reason for Mr Abdullin’s inability to give evidence appears to lie in claims brought by Suvar.

407. In the circumstances I infer against Tatneft that Mr Abdullin would have given evidence that Tatneft shared knowledge of the Scheme and the defendants' involvement with Mr Abdullin in the context of considering the enforcement of the Tatarstan Judgment.

Absence of documents

Tatneft documents

408. It was submitted for the defendants that Tatneft has suppressed relevant disclosure and the absence of contemporaneous documents is "*stark and cannot be accounted for simply on the basis of the admitted disclosure failings*" [Day 39 p2]

409. It was submitted for Tatneft that this is not a case of a complete absence of documents and Tatneft has disclosed "*tens of thousands of documents*". [Day 41 p150]

410. In my view there is a striking dearth of internal documents and external communications between Tatneft and SK relevant to the issues. In particular no emails have been disclosed passing between S-K and Tatneft in the period October 2007 to March 2010 in relation to recovering from S-K's contractual debtors the contractual indebtedness for the supplied oil nor in relation to pursuing the enforcement of the Tatarstan Judgment in Ukraine. Tatneft have confirmed that no documents evidencing communications between S-K's and Tatneft's legal representatives in the period 1 October 2007 to 31 December 2010 have been withheld from inspection on the basis of privilege.

411. There are also no documents recording the content of the discussions and meetings between S-K and Tatneft.

Failure to preserve documents

412. It was submitted for the defendants (paragraph 37 of D2 closing submissions) that:

> "The sheer extent of the missing disclosure is extraordinary. Notwithstanding that Akin Gump LLP have acted for Tatneft since at least September 2014, something has gone very wrong in relation to Tatneft's preservation of documents and thus disclosure."

413. It was accepted for Tatneft (paragraph 27 of closing submissions) that litigation was first in reasonable contemplation in September 2014 but that "*unfortunately*" document retention policies were not put in place until July 2015.

414. In accordance with PD31B where litigation is in contemplation, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. Paragraph 7 expressly provides that:

> "As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved include Electronic Documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business."

415. Initially Tatneft put in place document retention policies from July 2015 in relation to four custodians (Ms Savelova, Mr Syubaev, Mr Maganov and Mr Glushkov). This was extended to other custodians in 2016.

416. However according to Tatneft (as set out in its disclosure statement):

> "As part of a routine exercise to reduce the size of certain individuals' mailboxes by Tatneft's IT department, in 2017 the IT department inadvertently deleted all emails held in the mailboxes of Maria Savelova and Nurislam Syubaev up to the

> end of 2015. Only those documents dated 2016 and 2017 were not deleted…"

417. Tatneft was unable to retrieve the deleted emails and although some emails could be disclosed where retained in other accounts this did not apply to external emails.

418. It was submitted for the defendants that the deletion in 2017 of all Ms Savelova's and Mr Syubaev's emails in relation to the period prior to 2015 shows *"(at the very least) a complete failure of Tatneft's disclosure preservation policies*" and that:

> "the obvious inference in relation to such significant deletion of two separate accounts, and where no Tatneft witness has been produced at trial to properly explain and be tested as to how such deletions came about, is that this was deliberate."

419. It was submitted for Tatneft (paragraph 31 of closing submissions) that the deletion of these emails was "*an unfortunate error*". It was further submitted that Tatneft has provided "*clear explanations*" of the circumstances in which the documents came to be deleted.

420. It was common ground that the relevant legal principles in relation to the loss or destruction of documents were set out in the Court of Appeal decision in *Malhotra v Dhawan* [1997] 8 Med Law 319. As stated in the judgment of Morritt LJ:

> "For Mr Malhotra reliance was placed on the broad principle expressed in the Latin maxim omnia praesumuntur contra spoliatorem. However, it was accepted that the true principle was not as extensive as the maxim would suggest for not everything is to be presumed against the destroyer."

421. Morritt LJ indicated the following limits on the application of the principle:

> "First, if it is found that the destruction of the evidence was carried out deliberately so to as hinder the proof of the plaintiffs claim then such finding will obviously reflect on the credibility of the destroyer. In such circumstances it would enable the court to disregard the evidence of the destroyer in the application of the principle…
>
> Second, if the court has difficulty in deciding which party's evidence to accept, then it would be legitimate to resolve that doubt by the application of the presumption. But, thirdly, if the judge forms a clear view, having borne in mind all the difficulties which may arise from the unavailability of material documents, as to which side is telling the truth, l do not accept that the application of the presumption can require the judge to accept evidence he does not believe or to reject evidence he finds to be truthful."

422. The first issue therefore is whether there has been deliberate destruction of documents. I do not accept that Tatneft has provided satisfactory evidence to the court concerning

the deletion of these email accounts relating to two of the four custodians initially identified, in circumstances where document retention policies were in place. Tatneft has provided further details in correspondence (letter of 9 October 2020) but the (hearsay) explanation made only in correspondence that the IT specialists had "*forgotten about the litigation hold*" is an unsatisfactory explanation particularly in circumstances when only four custodians were initially identified in relation to this major litigation brought by Tatneft. Tatneft's evidence (paragraph 15 of Mr Lloyd's sixth witness statement) that Akin Gump did not instruct the investigators to investigate how the data came to be deleted as this was not a requirement of the court order, whilst strictly correct, does not assist the court or provide an explanation of how in the circumstances the data came to be deleted.

423. However, it was not put to Tatneft's witnesses that there had been deliberate destruction of Tatneft documents.

424. I find that there is insufficient evidence to make a finding of deliberate destruction by Tatneft.

425. In closing submissions Tatneft accepted the second principle, namely that if the court has difficulty deciding which party's evidence to accept, it would be legitimate to resolve that doubt by the application of the presumption. [Day 41 p163] However, Tatneft submitted that, contrary to the submissions for Mr Kolomoisky, the second principle did not apply where only one party has relevant evidence and that is being challenged.

426. For the defendants it was submitted that, even where the destruction is not deliberate the court can take this into account where documents would be expected to exist and to have been produced. It was submitted that this is a relevant factor in assessing what occurred. [Day 39 p55]

427. I accept that the third principle means that if the court accepted the evidence of the witnesses for Tatneft and SK that SK did not communicate relevant information, the court is not required by the operation of the presumption to reject evidence that it finds truthful. However, the court is here concerned with the second principle and in my view, it is not correct to characterise this case as one where only one party has relevant evidence. It is the case that the testimony of witnesses on the issue of knowledge are all witnesses called by Tatneft. However, the court is weighing the testimony of the witnesses for Tatneft as well as the contemporaneous documentary evidence which does exist and the other relevant background circumstances to reach a conclusion as to whether it is likely that SK had the relevant knowledge. Accordingly, where the court is weighing whether the evidence as a whole establishes that SK is likely to have had knowledge of relevant matters, in my view the presumption operates as a factor which the court can take into account in assessing what has occurred.

428. Tatneft referred to the authority of *Earles v Barclays Bank* [2009] EWHC 2500 (QB) and it was submitted that it was instructive because as there was no evidence the documents were deliberately withheld or destroyed and this had not been put to the bank's witnesses, no adverse inference was drawn. It was submitted that the situation is a fortiori here, where "*Tatneft has made every effort to search for and recover documents that have been lost*".

429. In my view it is clear from the Court of Appeal in *Malhotra* that the presumption is not limited to situations where the destruction is held to be deliberate and the question of whether an adverse inference is to be drawn depends on the circumstances. The question is not whether Tatneft has made every effort to search for documents that have been lost but why they were not preserved once litigation was contemplated.

SK documents

Notes of meetings and advice

430. The evidence of Mr Aleksashin was that he did not make notes of meetings. His evidence was also that Russian lawyers do not have a "*tradition and practice*" of keeping a record of instructions and that if a client was given oral advice and is "*happy with the advice received*" no record is kept of that advice. [Day 13 p72] His evidence was also that he never saw Mr Abdullin make notes during the period Mr Aleksashin worked with him.

431. It was Mr Aleksashin's evidence (paragraph 52 of his witness statement) that "*important documents*" were preserved in hard copy not electronic form and that if electronic documents existed, they would have been stored locally on employees' computers and not on a sever/document management database. His evidence was that SK did not make any notes to the file or anything of that sort which were preserved electronically. [Day 14 p82]

432. Mr Aleksashin in cross examination said that the company offices were "*quite small*" and there was no need for departments or employees to exchange emails and that "*all discussions took place in the course of in person one on one meetings".*

433. I have found in assessing the credibility of Mr Aleksashin's evidence that Mr Aleksashin was a witness who sought in his evidence in cross examination to avoid damaging Tatneft's case. Whilst it might be credible to assert that a particular conversation was not noted, or that notes of advice had not survived over the years, to explain the absence of supporting documentation it seems to me unlikely that there were in effect no written records either of advice or conversations at all made by lawyers working for SK because that was not the practice: this seems to me to be unlikely both as a matter of inherent probability of a lawyer advising a business and against the finding in relation to the overall credibility of Mr Aleksashin. It also seems to me that even in a small office where discussions took place face to face it is unlikely nothing of what was discussed or decided was committed to writing.

Deletion of SK emails

434. Tatneft accepted that data collected from SK was "*not complete*" and there has been a loss of electronic records over the years. It was submitted (paragraph 49 of Appendix 12 of Tatneft closing submissions) that there is no scope for any allegation that the data loss was deliberate or contrived.

435. Tatneft submitted in summary that (paragraph 46 of Appendix 12 of closing submissions):

i) Tatneft did not have control of SK’s documents.

ii) little thought was given by SK (Mr Gubaidullin) to electronic documents because important documents were printed out.

iii) Mr Gubaidullin changed his computer twice but in May/June 2015 did not request a full transfer of data because he considered all important documents had been printed out and he was unfamiliar with the English disclosure regime.

iv) "many" of the communications described by Tatneft's witnesses about the recovery of oil monies took place in meetings or phone calls and it was not "common practice" within SK legal department to send internal emails.

v) in the autumn of 2014, the computers including emails and servers were transferred to SK's successor, Neftetradeservice, and then in June 2015 to Suvar Kazan but the electronic records were "lost over time" as devices and IT systems were upgraded and employees left the Suvar Group.

436. I infer from these submissions that that there were email accounts in existence after the dissolution of SK which were transferred to Suvar Kazan and could have been preserved and thus would have been available in these proceedings. I note that a search was carried out in 2020 following an application by Mr Kolomoisky and emails of Mr Gubaidullin were identified.

437. Even if it was not *"common practice"* to send internal emails this does not preclude the existence of external emails and whilst Tatneft's witnesses refer to telephone conversations and meetings, their evidence has not been accepted to be reliable and it is inherently unlikely that there were no email communications and indeed Tatneft do not go so far as to submit that all such communications between SK and Tatneft would have been by telephone or face to face.

438. As to why the email accounts were not preserved, it would appear to be accepted that the accounts of Mr Aleksashin and Mr Abdullin were deleted when they left Suvar Group in 2017. The emails of Mr Korolkov were also not preserved. The question therefore is how this was allowed to happen.

439. It is accepted for Tatneft that at a meeting Mr Gubaidullin was asked by Ms Savelova to preserve documents but it was submitted that the email system was "*rudimentary*" and it was therefore "*not surprising*" that "*little thought*" was given to electronic records. Further it was submitted that Mr Gubaidullin's focus on hard copy documents and failure to consider electronic documents stemmed from a lack of familiarity with the English disclosure regime.

440. I do not accept this explanation. The evidence of Mr Larizadeh of Akin Gump (paragraph 56 of his 14th witness statement) is that SK had meetings with Tatneft and with its lawyers at which it was told of the need to preserve documents:

> "Without waiving any privilege, I understand from RGP as follows:
>
> 56.1 Ms Savelova and Mr Gloushkov have confirmed to RGP that, as stated in Akin Gump's letter dated 11 October 2019 (pages 106 to 119), at the May 2015 meeting which Mr

> Gubaidullin discusses in his witness statement (see paragraph 207 of Gubaidullin 1), Ms Savelova and Mr Gloushkov asked for Mr Gubaidullin's assistance, including in relation to potentially appearing as a witness.
>
> 56.2 Once Mr Gubaidullin agreed to help Tatneft, Ms Savelova and Mr Gloushkov asked Mr Gubaidullin to preserve and not delete documents relevant in any way to UTN and to the performance by S-K of its obligations as a commission agent of Tatneft which he could have held, and also to assist in ensuring that S-K's documents relevant in any way to UTN and to S-K's performance of its obligations as a commission agent of Tatneft were preserved and not deleted.
>
> 56.3 Mr Gubaidullin confirmed at that meeting that such documents would have existed in the form of hard copy documents, would have been kept, and continued to be kept by S-K and potentially S-K's former employees.
>
> 56.4 Mr Gubaidullin in turn asked Mr Suntsov, Mr Shmelev, Mr Abdullin and Mr Aleksashin to preserve and not delete documents relevant in any way to UTN and to the performance by S-K of its obligations as a commission agent of Tatneft, to the extent they were in possession of such documents.
>
> 56.5 In addition, towards the end of 2015, from around mid-October until the end of December 2015, lawyers from the Moscow office of Akin Gump had a number of meetings with Mr Gubaidullin. Without waiving any privilege, I understand from Mr Rybalkin (then partner at the Moscow office of Akin Gump) that in those meetings the necessity that all former employees and representatives of S-K (including Mr Gubaidullin) should preserve documents relevant to UTN was reiterated. Mr Gubaidullin confirmed that they were indeed aware of that, and had been preserving and would continue to preserve such documents." [emphasis added]

441. Although the witness statement refers to confirmation by Mr Gubaidullin that "*hard copy*" documents would be preserved, I find it extremely unlikely that any instructions from experienced litigators such as Akin Gump would not have made clear the scope of the need to preserve documents in both hard copy and electronic form. If there were any misunderstanding on the part of SK in this regard, responsibility for this lies with Tatneft.

442. The difficulty with the submission that electronic records were "*unfortunately lost over time"* is that the evidence is that SK was asked to preserve documents in 2015 and it was accepted for Tatneft that computers were transferred to Suvar Group. It is unclear why therefore the email accounts were deleted in respect of employees who left SK after 2015. As set out above, I do not accept that the need to preserve emails would not have been made clear to SK. Mr Aleksashin appeared to accept that he had been asked by Tatneft to provide relevant emails: he stated in his witness statement that:

> "…As part of this litigation, Tatneft's lawyers asked me to provide documents and/or emails that might be relevant to this dispute. I identified no such material, and communicated this to Tatneft's lawyers…"

However, in cross examination his evidence was that he did not conduct any search of electronic documents held by SK. [Day 14 p80]

443. This further calls into question why if he was asked to provide relevant emails before he left SK, emails were not provided to Tatneft or were deleted when employees left after SK had been told to preserve documents.

Adverse inferences

444. It is "*recognised*" by Tatneft (paragraph 54 of Appendix 12) that electronic data is missing from SK's legal department. It is submitted that the scope of the missing documents is "*likely to be overstated*".

445. It was submitted for the defendants (paragraph 47 of D2's closing submissions) that the court can conclude that the missing categories of documents did exist and the court should draw adverse inferences and conclude that the documents would have evidenced (amongst other things) that:

i) actual knowledge of the scheme was shared by Tatneft with S-K in (at the very least) the period June 2009 to March 2010;

ii) nothing new was learned by Tatneft from its review of the criminal case file in March-August 2012, Tatneft already having knowledge of the oil payment siphoning scheme and the Defendants' responsibility for it;

iii) S-K knew of the scheme and the role of the Defendants in this.

446. It was submitted for Tatneft that the court has to assess the evidence both by the contemporary record that exists and by its absence; however, it was submitted that there should not be an inference that whole classes of documents existed and were adverse to Tatneft. [Day 41 p168]

447. In my view in relation to the documents which are known to have existed and have been destroyed i.e., the email accounts of Ms Savelova and Mr Syubaev and of Mr Abdullin and Mr Aleksashin, in weighing the evidence the court can have regard to the presumption that the documents which were destroyed (in this case emails relating to the period June 2009 to March 2010) did exist in favour of the defendants. On the evidence discussions took place between SK and Tatneft's lawyers in relation to recovery of the oil debt and the enforcement of the Tatarstan judgment and yet no documentary evidence in the form of emails have been disclosed. It is not credible that no emails were exchanged.

448. In relation to the other documents, for the reasons set out above, I do not accept the evidence of Mr Aleksashin that there would have been no notes of meetings or advice kept at SK. However, it seems to me that the position that this court finds itself in relation to such documents is as set out by Adrian Beltrami QC sitting as a Judge of the

High Court in *Aegean Baltic Bank SA v Renzlor Shipping Limited* [2020] EWHC [2851] (Comm) at [34]:

> "…It is one thing to draw an inference that the evidence of a missing witness would or might be adverse. It is another to speculate that there exists a document which is adverse. Absent at least a reason to believe that such a document does exist, this would be going too far. Nonetheless, in considering the documentary record in the trial bundle, I must always remember that that record is incomplete, that the Defendants have not furnished their disclosure and that the Bank and the Court have been prevented, by the Defendants' conduct, from finding out whether documents do exist which might be adverse to the Defendants' case. At the very least, I would expect the benefit of any doubt to be firmly in the Bank's favour."

449. It seems to me that I would be speculating as to whether SK had notes of meetings or advice which would have been adverse to Tatneft. However, the explanation for the absence of such documents is one which I do not accept. Accordingly, in relation to such documents I bear in mind that the court has not seen such documents and the benefit of the doubt is in favour of the defendants.

Defendants' submissions on SK's knowledge

450. The defendants submitted in oral closings that there are four possible routes by which SK had acquired actual knowledge of the Scheme and the identity of the defendants:

i) September 2009-March 2010 at the time of considering enforcement of the Tatarstan Judgment in Ukraine;

ii) in the course of dealings between the accounting department of Tatneft and SK;

iii) following receipt of the November 2011 letter;

iv) during the conversation between Mr Maganov and Mr Korolkov at their meeting in December 2011.

September 2009 -March 2010

451. Mr Gubaidullin accepted that there were discussions with Tatneft in 2007-2008 which led to the 2008 Assignment Agreement and then discussions in 2009/10 about enforcement in Ukraine of the Tatarstan Judgment. His evidence was that he was not involved in the discussions but the lawyers reported them to him. [Day 8 p33] He did not believe any notes or records existed of those discussions.

452. Paragraph 172 of Mr Gubaidullin's witness statement stated:

> "Without waiving any privilege, at my meeting in August 2016 with Mr Abdullin and Mr Aleksashin Mr Abdullin told me the following. The S-K Legal Department addressed Tatneft's Legal Department with a query to analyse the potential outcome of the enforcement proceedings in Ukraine in order to recover the rest

> of the indebtedness from assets of UTN located in Ukraine. Mr Abdullin and Mr Aleksashin informed me that the local Ukrainian counsel was dealing with it. As I know the bundle of documents requested by the local counsel in order to initiate the enforcement proceedings in Ukraine was gathered and sent to him. At that time, however, Tatneft's lawyers, the S-K Legal Department and the local counsel having analysed the situation came to a joint opinion - the enforcement of the Russian decision in Ukraine was hopeless at that time: first, due to political situation in Ukraine; and second, due to the existence of a conflicting Ukrainian court decisions invalidating the 2008 Assignment Agreement. It was a decision taken by S-K and approved by Tatneft's lawyers not to pursue further the enforcement of the decisions because there were no prospects." [emphasis added]

453. As referred to above (when assessing his credibility) Mr Aleksashin sought to depart from his written evidence that he and Mr Abdullin discussed with Tatneft whether SK should attempt enforcement in Ukraine. However, for the reasons discussed in relation to his evidence generally, in my view, he was a witness who was seeking to avoid damaging Tatneft's case and this was an example where he sought to do so. In my view therefore, it is likely that there were discussions, as stated in his witness statement, and this is consistent with Mr Gubaidullin's evidence that Tatneft's lawyers and SK's lawyers "*having analysed the situation*" came to a "*joint opinion*" and from which I infer that they discussed the issue and did not independently merely reach the same view.

454. Tatneft submitted that there were discussions only as to the "*mechanics of enforcement*" (paragraph 1100 of its closing submissions). Tatneft rely on the evidence of Mr Gubaidullin that these were "*specific discussions*" and "*not some kind of general discussion".*

455. I have discussed above the evidence of Mr Aleksashin on this issue. The discussions according to his written evidence followed the enforcement against the Tatnefteprom shares and were whether S-K should attempt enforcement in Ukraine:

> "…At the time, Mr Abdullin and I discussed (internally, with our Ukrainian counsel, and separately with Tatneft) whether S-K should attempt enforcement in Ukraine. S-K analysed the prospects of enforcing a Tatarstan court ruling in Ukraine. Following this (and consultation with S-K's Ukrainian counsel), S-K concluded that it made no sense to attempt the enforcement of the Tatarstan court ruling in Ukraine given the political situation in Ukraine at the time, and the prior rulings of the Ukrainian courts to the effect that the assignment agreement was invalid…"

456. I do not accept that there is any basis to infer that these discussions can be characterised as only the *"mechanics of enforcement"* if this is meant to limit the scope of the discussions to refer to enforcement by for example, bailiffs. Tatneft accepted (paragraph 1102) that "*coordination between SK and Tatneft*" was justified as Tatneft

was the "*ultimate beneficiary*" of any enforcement. However, there is no basis to infer (as submitted) that the coordination was limited to Tatneft's "*greater expertise*" in litigation. In order to enforce the Tatarstan Judgment and assess the likelihood of success of enforcement in Ukraine, the fact of the payments to Taiz and Tekhnoprogress having been made were highly relevant to the prospects of enforcement in Ukraine as they were contrary to the assignment of the debt to SK and the basis for the Tatarstan Judgment.

457. In this regard I note that Mr Maganov accepted in cross examination that the payment to Taiz and Tekhnoprogress was an impediment to any steps SK might seek to take in Ukraine to recover in the Tatarstan Judgment and the assignment describing it as making enforcement "*futile*" (although his evidence was that he only had assumptions and speculation to support that). [Day 11 p84]

458. Tatneft accepted that there are no written records of these discussions but submitted (paragraph 1101) that this is *"unsurprising"* as they took place in 2008-2009 more than six years before the commencement of proceedings. However, this ignores the fact that litigation was in contemplation in 2014 and the absence of documents is considered further below.

Background and context to any communications in the period September 2009 -March 2010

459. The following factors in my view are relevant to this issue as forming part of the background and context to the communications in the period September 2009 -March 2010 between Tatneft and SK.

Reports in the media concerning the takeover/raid and the link between the takeover and the Scheme

460. Mr Gubaidullin's evidence in cross examination in relation to the raid was:

> Q "…If we just take the position by the end of October…you knew, as I understand it, that there had been a takeover of the refinery and Mr Ovcharenko and Mr Kolomoisky and Privat Group were, as you understood it, behind that; correct?
>
> A. First of all I understood that Privat Group was behind it and that was reported in the media …"
>
> Q These matters relating to what happened at the refinery were reported widely in the Russian and Tatar media. That's right, isn't it?
>
> A. Yes.
>
> Q. And because of your involvement in the supply of the oil to UTN, you were obviously interested in reading about these things; correct?
>
> A. Well, what was in the media available to me, yes, and I was reading the newspapers; I was looking through them." [Day 8 p6] [emphasis added]

461. Mr Aleksashin was also aware of the media reports of the events in 2007:

> Q "…The UTN takeover or raid occurred in October 2007 and was widely reported in the press in Tatarstan. You were aware of that, weren't you, that it was widely reported?
>
> A. Yes. In the mass media and -
>
> Q. Yes.
>
> A. In the local mass media, yes." [Day 13 p94]
>
> Q "…A lot of what you learnt, you learnt from the press and media reports at the time; is that right?
>
> A. Yes, correct.
>
> Q. Yes. And this was a very widely reported event in Tatarstan at the time; correct?
>
> A. Yes."

462. Mr Maganov said there was "*a public story. It was very important indeed*." [Day 12 page 66]

463. It was submitted for Tatneft (paragraph 1047 and following of closing submissions) that any "*meaningful factual investigation*" for limitation purposes must start after the Scheme took place as SK cannot have knowledge of any violation of its rights before it occurred. Whilst I accept this latter proposition is self-evident, I do not accept that the court should disregard what SK knew about the takeover in October 2007 and UTN's non-payment as this forms part of the background for SK's knowledge of the violation of its rights, in particular in knowing who was likely to be behind the Scheme.

Discussions concerning contractual enforcement

464. The discussions concerning enforcement of the Tatarstan judgment in 2009-2010 took place against a background of cooperation and discussions between the lawyers at Tatneft and SK from the end of 2007 and in 2008.

465. Mr Gubaidullin's evidence was that there were initial discussions at the end of 2007 followed by "*regular discussions*" and "*regular calls*" to "*brainstorm ideas and discuss options as to how best to recover the money owed to S-K, and ultimately to Tatneft*". In his witness statement he said

> "110. Without waiving any privilege, I can say that at my recent meeting with Mr Abdullin and Mr Aleksashin in August 2016 Mr Abdullin he told me the following.
>
> 111. Once it became clear that UTN was not going to voluntarily pay for the supplied oil at the end of 2007, Mr Abdullin as Head of the S-K Legal Department approached Ms Savelova and discussed the possibility of Tatneft's lawyers providing legal

> assistance to S-K and potential cooperation between the S-K Legal Department and Tatneft's lawyers. The purpose of this would be analysing the difficulties faced by both companies in recovering payments for the supplied oil. Mr Abdullin might have told me about the details of that at the time, but I did not recall any details of how the cooperation between the lawyers of S-K and Tatneft began.
>
> 112. In the end of 2007, or the beginning of 2008, as a result of and further to that initial discussion mentioned above, there were regular discussions between Mr Abdullin, lawyers from the S-K Legal Department, Mr Vadim Aleksashin (who as I mentioned was S-K's attorney, with whom S-K worked on a regular basis and who was instructed to assist with the debt recovery efforts) and Tatneft's lawyers. There were regular calls to brainstorm ideas and discuss options as to how best to recover the money owed to S-K, and ultimately to Tatneft in the circumstances where only Taiz and Tekhnoprogress had direct contractual relationship with UTN. That professional support was beneficial to S-K as it could benefit from the larger legal resources of Tatneft, both in terms of numbers and experience, which Tatneft had in general and with regards to peculiarities of the Ukrainian legal landscape with which Tatneft already had been acquainted, in comparison to the S-K Legal Department. The cooperation was also beneficial to Tatneft, as by assisting S-K in the analysis of potential steps which could have been undertaken by S-K to recover the contractual indebtedness for the oil it was essentially assisting itself as S-K would have the obligation to pay any money it recovers under the S-K/Avto Contract to Tatneft under the 2007 Commission Agreement (bar its own commission fee). That cooperation, in trying to find the best options for S-K to recover the contractual indebtedness for the supplied oil, continued until the beginning of 2010." [emphasis added]

466. As set out above, his evidence is that the "*cooperation*" continued until the beginning of 2010. For reasons discussed above, I do not accept as reliable Mr Gubaidullin's evidence that these conversations were limited to recovering the contractual indebtedness.

BIT arbitration

467. SK knew about the BIT arbitration as early as Spring 2008 from the press and this prompted a conversation between Mr Gubaidullin and Mr Maganov in Spring 2008.

468. Mr Maganov's evidence was that he had no notes of the discussion: his evidence in cross examination was that he did not remember the details but that he had a memory of the conversation. [Day 10 p71]

469. In his witness statement he said:

> "48. During that conversation, Mr Gubaidullin expressed some concern over S-K's outstanding obligations towards Tatneft and asked whether Tatneft would be pursuing S-K for the outstanding unpaid oil monies from UTN. I told Mr Gubaidullin that the arbitration proceedings were brought against Ukraine and largely concerned the breach of Tatneft' s rights as a foreign investor in Ukraine. He did not ask for any more details, nor did I provide them. I said to Mr Gubaidullin words to the effect that Tatneft would not pursue S-K during the course of the arbitration proceedings against Ukraine but this was on the basis that I expected S-K to be doing whatever it could to recover monies from Avto and UTN for the oil supplied. I believe I reported that conversation with Mr Gubaidullin to Mr Syubaev immediately after it took place." [emphasis added]

470. Mr Maganov told Mr Syubaev that he had a conversation with Mr Gubaidullin. Mr Syubaev's evidence in cross examination was:

> "A. So far as I understand, he got on the phone because he read something about that and he wanted Mr Maganov to share further details on that with him.
>
> Q. Mr Syubaev, why do you think Mr Gubaidullin was interested in details of the BIT arbitration? Can you provide any assistance on that?
>
> A. No, I cannot assist you on that. I have no explanation. I think it was an important event, an important development, that obviously attracted the attention of Mr Gubaidullin and I think that would explain the reason why he got on the phone to Maganov.
>
> Q. Because it would be important to S-K if Tatneft had another means of recovering the oil debt or compensation in respect of the oil debt, would it not?
>
> A. Most likely so, yes." [Day 4 p114] [emphasis added]

471. I do not accept Mr Maganov's evidence that, even though he has no notes, he can recall what was said in a conversation in 2008: this seems inherently unlikely given the passage of time and I also take into account my general findings on the reliability of his evidence. Accordingly, I do not give weight to his evidence that he did not provide any "*details*" of the proceedings to Mr Gubaidullin.

472. Mr Aleksashin's evidence was that he learnt about the BIT arbitration from the press. Mr Aleksashin's oral evidence that he did not know the BIT arbitration related to a claim for the oil was subsequently withdrawn, as discussed above, and merely serves to highlight that it is likely that SK did know that there was a claim for the oil money in the BIT proceedings.

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473. It is also accepted that there was a conversation in June 2008 between Mr Syubaev and Mr Gubaidullin. According to the evidence of Mr Gubaidullin, SK was contacted by the investigator and documents had been seized from SK by the police. This prompted the call to Tatneft by Mr Gubaidullin.

474. This is the only conversation Mr Syubaev recalled with representatives of SK. [Day 5 p17]

475. Mr Gubaidullin's evidence in his witness statement (paragraph 63) was as follows:

> "As far as I remember, sometime in June 2008 when S-K became aware of the investigation, most likely from the investigator, Gubaidullin called me and asked to clarify the reason for the investigation. I did not go into detail. I only said that the criminal case had been initiated on application filed by Tatneft and the MLPR in connection with, inter alia, infringement of Tatneft's rights as a shareholder of UTN and misappropriation of Tatneft's oil (i.e., not against specific individuals). Tatneft was neither required nor entitled to inform S-K of the progress of the investigation, as pursuant to the Russian laws the information about an investigation must be kept secret. Moreover, there have been no results of the investigation to date - the investigation was stayed. I told Gubaidullin that I fully understood that S-K was not to blame for the non-payment of oil and that Tatneft still had no intention to recover the indebtedness for oil from S-K, at least, while the arbitration against Ukraine, which could take a while, was pending. I, however, made it clear that S-K was to undertake all possible steps to recover the contractual indebtedness and to transfer the funds to Tatneft in terms of performance by S-K of its obligations under the 2007 commission agency agreement." [emphasis added]

476. Mr Gubaidullin confirmed that he had no notes of the conversation. [Day 8 p57] However he said that he called Mr Syubaev in response to the lawyers telling him that criminal proceedings had been initiated by Tatneft and the Department of Land and Property and documents had been seized by the police from SK. (This accorded with paragraph 129 of his witness statement).

477. At paragraph 130 of his witness statement, he said:

> "Mr Syubaev told me that the investigation had been initiated by Tatneft and the Ministry of Property of the Republic of Tatarstan in connection with infringement of their rights as shareholders of UTN and misappropriation of Tatneft's oil. Mr Syubaev and I also discussed briefly whether Tatneft had plans in the near future to demand from S-K payment of outstanding amounts for supplied oil. Mr Syubaev explained to me that Tatneft was undertaking independent steps in an effort to resolve the issue with UTN, including as part of the BIT arbitration against

> Ukraine (which could, as he said, last for several years), and was not planning to claim the outstanding amounts from S-K during this time. Mr Syubaev repeated what Mr Maganov previously told me in terms of Tatneft's recognition that the issue with payment was not the result of S-K's fault. I must say that this came as a relief. I briefly informed Mr Korolkov of the results of my call with Mr Syubaev." [emphasis added]

478. His evidence was that there was no mention of Privat or Mr Kolomoisky in relation to the misappropriation of oil. [Day 8 p64]

479. Mr Gubaidullin's evidence is that he did not go into the details of the investigation. However, I have found that he is an unreliable witness and it seems to me that he could have mentioned details of what had happened. Even if he did not share details at this time, his evidence is relevant as to the significance of the BIT arbitration to SK (discussed below).

480. Mr Syubaev's evidence in cross examination was as follows:

> "Q. Yes. And if we just apply a little bit of common sense, S-K or Mr Gubaidullin would have been bound to say to you in the course of this conversation, "Well, if the oil has been misappropriated, who stole it?"; that would be the obvious question, wouldn't it? Did he ask you that?
>
> A. I don't recall that he put me that question and our level of relationship did not presume, at least that's the way I see it, such detailed investigations and questions on his part.
>
> Q. It's hardly a matter of detail, Mr Syubaev. Someone representing your partner, if you said, "The oil has been misappropriated", would necessarily follow up with the question, "Who do you think stole it?" That's just basic common sense. Do you agree?
>
> A. I don't agree with the premise, first of all, that I was meant to tell Gubaidullin all of this and, secondly, I had to share my speculation. There were no facts so I didn't have to share my speculation…" [Day 4 p95]

481. However even if Mr Syubaev did not discuss who was behind the misappropriation of the oil, he accepted that it would have been understood by SK. His evidence in this regard was as follows:

> "Q. …Your position, as you explained to him, was, "We have initiated a criminal investigation for misappropriation of oil". That's true, step one; correct?
>
> A. Yes.

> Q. Step two, you accept that everybody knew, both you and he, that the raiders were the people whom you regarded as responsible, namely Kolomoisky, Ovcharenko, Yaroslavsky and Privat Group; correct?
>
> A. Yes.
>
> Q. Therefore it must follow that in this conversation, when one was talking about misappropriation of oil, the persons who you were presuming to implicate for the misappropriation were the so-called raiders. That must be right. Do you agree?
>
> A. Yes." [Day 4 p98] [emphasis added]

Conversation between Mr Maganov and Mr Gubaidullin in September 2009

482. Although Mr Maganov sought to suggest in his evidence that contact between SK and himself was minimal, there is evidence of another known conversation between Mr Maganov and Mr Gubaidullin in September 2009. At the end of September 2009 SK successfully enforced the Tatarstan judgment against the Tatnefteprom shares and after that Mr Maganov spoke to Mr Gubaidullin.

483. In his witness statement (paragraph 66) Mr Maganov's evidence was:

> "…I recall that Tatneft employees reported to me receiving a part of the money that had been recovered by S-K. The same was reported to me by Mr Gubaidullin. I congratulated him and thanked him for his efforts. We did not discuss any other matters."

484. However in the course of cross examination Mr Maganov changed this account and said:

> "…I think that I said, "We have an enormous amount of work ahead of us":…"

485. His evidence was:

> "Q. I would suggest to you that it is utterly obvious that an emotive person like you -- indeed, anyone in this position -- speaking to a representative of S-K whom you had known for something like 15 years, that you would have told Mr Gubaidullin what you had discovered in the summer of 2009, not least because you were angry and shocked by it, and in any event because it's just the sort of thing that any normal person would discuss with their counterpart, particularly a counterpart who was vitally interested. What would you say to that?
>
> A. My Lady, I spoke with Mr Gubaidullin and when I was preparing my witness statement with my lawyers I most certainly recalled and I remembered that I thanked him as a manager. And secondly, I imagine that I would have tried to say to him, "Look,

> we've got a long way to go until this matter is settled fully". It is unlikely that at such a positive moment I would have spent the time venting my anger, when I'm giving this good news…" [day 11 p65]

486. Mr Maganov accepted that this telephone call was "*an opportunity*" to tell Mr Gubaidullin what he believed and knew about the oil siphoning scheme, that his evidence was based on his recollection but he had no documents.

487. Mr Aleksashin, when asked about the position in the summer of 2009 when SK was taking steps to have the Tatarstan Judgment enforced in Tatarstan against the Tatnefteprom shares, accepted that it would have been of interest to SK to know that in June 2009 UTN made payments to Taiz and Tekhnoprogress in respect of the oil debts which SK claimed. Mr Aleksashin said that UTN would have had a "*vested interest*" in showing that the entire amount had been paid to Taiz and Tekhnoprogress but they did not do that. [Day 13 p121]

488. His evidence was:

> "Q…if Tatneft knew in the summer of 2009 that UTN was proposing to make and making payments to Taiz and Tekhnoprogress of these sums, that was something which, from your perspective, definitely and obviously they should have told you about; do you agree?"
>
> A. I think so. But I cannot sit in judgment for Tatneft in terms of whether or not they knew that. Suvar-Kazan at that time did not know that and no one conveyed that knowledge to us, because it would have fundamentally changed the whole situation." [Day 13 p123]

489. For the reasons discussed above I do not regard Mr Aleksashin's evidence that SK was not told about the payments as reliable and look to the other evidence as to the inherent probabilities.

<u>Ongoing significance of BIT arbitration</u>

490. According to Mr Syubaev, apart from providing the joint criminal complaint to SK in 2011, Tatneft never informed SK of its knowledge and belief. [Day 6 p12]

> Q "… The trigger for the enquiries in 2008 was, as you understood it, S-K's concern that it was liable for the price of the oil, and it was seeking, through Mr Gubaidullin, information about these two things, the BIT arbitration and the criminal investigation, which potentially had an impact on their liability. That's right, isn't it?
>
> A. Yes. S-K expressed concern, as embodied in Mr Gubaidullin.
>
> Q. Yes. Now, having expressed concern in 2008, as I understand it, you say that S-K, for its part, never ever, over the

> following five years, asked any further questions. That's right, isn't it?
>
> A. Yes."

491. Mr Gubaidullin's evidence was that after that conversation he did not ask any questions about the BIT arbitration on the basis that he would be informed when a decision was reached. [Day 8 p56]

492. I do not accept the evidence of these witnesses that SK made no further enquiries. Firstly, I have found these witnesses to be unreliable and secondly their evidence on this issue is, in my view, not credible in circumstances where SK is liable for the debt but according to the evidence has been told that it would not be enforced whilst the BIT proceedings are on ongoing.

493. It was submitted for Tatneft (para 839 of closing submissions) that SK was not investigating all possible avenues to recover the monies owed because Tatneft never expected to recover the money from SK and SK knew and proceeded on the basis that Tatneft was looking to recover the money elsewhere.

494. Tatneft relied (paragraph 1086 of closing submissions) on the evidence of the comfort letter in July 2008 which stated:

> "In view of the non-participation of Suvar-Kazan Company LLC in the resulting debt for oil supplied and the actions taken by Suvar-Kazan Company LLC to recover the overdue debt from the Ukrainian debtors, OJSC TATNEFT does not envisage submitting any monetary claims and legal actions against Suvar-Kazan Company LLC in connection with the failure of the Ukrainian counterparties to meet their obligations to pay for the oil."

Tatneft submitted that this was "*an open-ended reassurance*" not limited to the duration of the BIT proceedings. Tatneft sought to draw a distinction between the *de jure* debt which was not released and the *de facto* position that Tatneft did not intend to, and given SK's financial position, could not enforce the debt.

495. This was a distinction which Mr Syubaev made in cross examination when taken to a letter from Mr Karpov, the deputy head of DROOP, to S-K on 10 September 2008.

> Q "…If you read it, you'll see it makes it clear that S-K remains liable to Tatneft for the full $439 million. Do you see that?
>
> A. Yes.
>
> Q. Does that reflect your understanding as well, including after your conversation with Mr Gubaidullin, that S-K, as far as Tatneft was concerned, remained liable for the debt?
>
> A. De jure, indeed so." [emphasis added]

496. However the submission based on the comfort letter in July 2008 has to be contrasted with the evidence of Mr Maganov, Mr Syubaev and Mr Gubaidullin that Tatneft told SK that Tatneft was not intending to enforce the debt whilst the BIT proceedings were ongoing.

497. In his witness statement (paragraph 48) Mr Maganov said:

> "I said to Mr Gubaidullin words to the effect that Tatneft would not pursue S-K during the course of the arbitration proceedings against Ukraine but this was on the basis that I expected S-K to be doing whatever it could to recover monies from Avto and UTN for the oil supplied."

Whilst Mr Maganov was there referring to his conversation in early 2008, there is no suggestion in the written evidence of this distinction between *de facto* and *de iure*.

498. Mr Syubaev in his witness statement (paragraph 63) stated:

> "…I told Gubaidullin that I fully understood that S-K was not to blame for the non-payment of oil and that Tatneft still had no intention to recover the indebtedness for oil from S-K, at least, while the arbitration against Ukraine, which could take a while, was pending. I, however, made it clear that S-K was to undertake all possible steps to recover the contractual indebtedness and to transfer the funds to Tatneft in terms of performance by S-K of its obligations under the 2007 commission agency agreement." [emphasis added]

499. In my view any comfort given by Tatneft concerning enforcement was only whilst Tatneft saw the possibility of recovering the oil money from Ukraine through the BIT proceedings. I do not accept that SK believed that Tatneft would not enforce the debt after the BIT proceedings ended if Tatneft were unsuccessful. On the evidence SK understood that it remained liable for the oil debt. The evidence of Mr Aleksashin in cross-examination was:

> "Q…was it your understanding throughout that that debt to Tatneft was a real liability of S-K's?"
>
> A. Yes, of course.
>
> ….
>
> Q. …No one ever said to you that, "This isn't really anything we need to worry about"; at all times the accountants and other management who you dealt with were concerned about this debt. That's right, isn't it?
>
> A. Yes, of course." [Day 13 p105]

500. Mr Syubaev also accepted in cross examination that the debt was not waived.

> "Q. Now, in relation to the issue as to whether or not S-K or Tatneft was going to hold S-K liable for the debt, in the conversation that you had with Mr Gubaidullin, you told us that you were not in a position to waive or forgive that liability; correct?
>
> A. Yes, of course I was not in the position to do that. I did not have the authority.
>
> Q. Yes, and you never did waive or forgive that --
>
> A. Not only did I not have the authority, I had absolutely no grounds to say that I was able to relieve them of that liability…" [Day 5 p18]

501. I also take into account the evidence that the debt between Tatneft and SK was reconciled on a regular basis in the accounts and the fact that it was claimed in the insolvency of SK.

502. Tatneft itself conceded that a US$430 million debt would have *"remained of concern"* (paragraph 1092 of closing submissions).

503. On the evidence it seems to me unlikely that SK having made enquiries about the BIT arbitration in Spring 2008, would not have been interested and concerned to know its progress.

Alleged confidentiality and sensitivity of the investigations and recovery steps

504. It was submitted for Tatneft that there was a good reason why Tatneft would not have passed on information given "*an understandable desire to avoid the unnecessary proliferation of sensitive information as to its investigations and recovery steps*" (paragraph 848.2 of the closing submissions).

505. Mr Maganov's evidence in connection with the BIT proceedings was that he would never have shared privileged information with SK. [Day 10 p93] His evidence concerning the fact that he had apparently told Mr Karpov and Ms Bagautdinova about the payments was that:

> "A. That information was confidential. It was definitely confidential. It had to do with the criminal investigation and everyone had been warned that no leaks were allowed. That information had to be kept confidential…"

506. In re-examination he said that the information was confidential, that they asked SK what information they needed to perform the tasks and restricted a lot of information and tried to prevent any leaks. He said that he demanded from his colleagues that they adhered to the strictest confidentiality and "*bring to the minimum any contacts, any communication*". [Day 13 p53]

507. As noted above, Mr Syubaev's evidence did not confirm Mr Maganov's evidence that warnings had been given: his evidence was that he did not give any "*direct instructions*"

limiting what employees could tell SK but there was a "*general internal rule*". [Day 4 p66]

508. It was submitted for Tatneft (paragraph 1036) that it was inherently improbable that confidential information would have been freely shared with SK or anyone else without there being a good reason to do so. It was submitted that information was only disclosed to SK on a "*need to know*" basis.

509. I do not accept the submission that considerations of confidentiality would mean that elements of the Scheme were not shared with SK in the period to March 2010:

i) There was good reason to share information with SK: information about the payments to Taiz and Tekhnoprogress would be highly relevant to SK when considering enforcement of the Tatarstan Judgment in Ukraine.

ii) The confidentiality obligations in the BIT proceedings would not preclude disclosure of any matters relating to the Scheme known by Tatneft; although it was submitted (paragraph 1027 of closing submissions) that Mr Maganov passed on only *"high-level information"* as to the nature of Tatneft's claim, Tatneft implicitly accepted that notwithstanding any such confidentiality obligations, Mr Maganov did pass on some information about the BIT proceedings to Mr Gubaidullin in his call in Spring 2008; further there were press articles referring to the events at the refinery and to the BIT proceedings which to that extent were not therefore confidential.

iii) As set out above, Mr Maganov originally said in cross examination when asked who else within DROOP would have known about the payments to Taiz and Tekhnoprogress, that he did not inform anyone and nobody should have known about them. When he was shown documentary evidence that Mr Karpov and Ms Bagautdinova had also given evidence to the investigators that they learnt of the payments from Mr Maganov, Mr Maganov said that the information was confidential. This is not an explanation which is advanced in his witness statement and I do not accept this evidence as reliable. Not only have I found that Mr Maganov is not a reliable witness there is no mention of any such confidentiality until after his evidence was shown to be wrong about telling Mr Karpov and Ms Bagautdinova about the payments and it is inconsistent with information having been passed in the street in 2013 in the alleged conversation with Mr Gubaidullin by a Tatneft lawyer (Ms Savelova) who would have been aware of any such strict confidentiality regime. Although Mr Maganov suggested in cross examination that Ms Savelova acted in breach of the confidentiality obligation, I do not accept his evidence which in my view was an attempt to manufacture an explanation to support his new evidence on a confidentiality regime.

iv) it is clear on the evidence that Mr Maganov did tell his subordinates who Tatneft submitted were junior level employees not involved in the recovery of the oil debt and thus in my view with no apparent "need to know".

Nature of contractual and commercial relationship between SK and Tatneft

510. Tatneft refers to the *"inherent probabilities"* in the context of the case and the nature of the contractual and commercial relationship between Tatneft and SK. (Closing submissions paragraph 980)

511. In this regard the defendants rely on the continued commercial dealings between SK and Tatneft.

512. By contrast it was submitted for Tatneft that it was not a relationship of *"equals"* or a partnership where information was likely to have been shared freely. It was submitted that SK was "*a commission agent with a specific job to do.*" (Closing submissions, A 22)

513. Whilst the relationship between SK and Tatneft may not have been one of equals, in the context of the enforcement of the Tatarstan Judgment there was a joint interest in the enforcement of the Tatarstan Judgment. Further I do not accept that the likelihood of information having been shared can be ruled out because the relationship was that of principal and commission agent: the evidence, as discussed above, is that the lawyers worked together over the steps to recover the contractual debt and then discussed the prospects of enforcement of the Tatarstan Judgment in Ukraine.

514. Having regard to the known contact between the lawyers over a period of years and the evidence of conversations between principals, the court has to consider the likely nature of the interaction between the individuals concerned having regard to the significance of the events at UTN and the element of "*human nature*" referred to below.

515. In its closing submissions (paragraph 1039) Tatneft dismissed the concept of "*human nature*" and submitted that it:

> "cannot be used as a substitute for proper analysis of the nature of the relationship between Tatneft and S-K".

516. It seems to me that "*human nature*" cannot be ignored and it is credible that individuals at SK and Tatneft who were dealing with each other from 2007 to early 2010 may well have talked about the events at UTN and the Scheme bearing in mind the evidence as to its prominence in the media and the significance to both Tatneft and SK. In this regard the court takes into account Mr Maganov's evidence when asked whether the right to enforce the debt due to Tatneft was very important for Tatneft. He replied:

> "…This is scandalous, a huge amount of money, there was a public story. It was very important indeed." [Day 12 p66] [emphasis added]

517. In relation to Optima Trade and Privat Group, Mr Maganov's evidence referring to his conversation with Mr Korolkov in December 2011, was:

> "Optima Trade, and that it's connected with Privat Group, I may have said that, although I think he knew it himself because that was a dominating story." [emphasis added]

518. It was submitted (paragraph 1046) that SK had no reason to scour the press or the internet for information on who was responsible for a fraud about which it knew nothing. However, this too is to ignore the element of "*human nature*": Mr Aleksashin's evidence (in his witness statement) was that he learnt of the involvement of Mr Kolomoisky, Mr Ovcharenko, Mr Yaroslavsky and Mr Bogolyubov when Mr Gubaidullin reported on his meeting with Ms Savelova in 2013. When asked in cross examination what steps he took in the light of this information, his evidence was that he did a Google search on the defendants. [Day 14 p76].

519. I accept that by contrast Mr Gubaidullin said that he did not use the internet in 2007 and "*never searched for anything*". [Day 9 p94] However this was another surprising answer by Mr Gubaidullin and unlikely to be true: I have found him to be a witness who on occasion was less than frank in his evidence to the court and I think it is highly unlikely that in 2007 "*he never searched for anything*".

520. Even if I were wrong in relation to Mr Gubaidullin, Mr Aleksashin clearly did use the internet to search for information on the defendants (he says in 2013) and there is no reason why if SK learnt of certain elements of the Scheme, SK would not have carried out a similar search prior to 2013 and would have found out the identity of the defendants. Mr Aleksashin's evidence was:

> "Q. And if you did this Google search that you claim to have done, you would have discovered, if you say you didn't know it before, that these individuals and certainly at least three of them were immensely wealthy and well-known Ukrainian oligarchs and billionaires. You would have discovered that, wouldn't you?
>
> A. Yes, definitely." [day 14 p77]

Absence of witnesses

521. Ms Savelova and Mr Abdullin at SK, lawyers who were involved in the discussions which are known to have taken place have not given evidence. As noted above, Mr Aleksashin's evidence was that he knew that Mr Abdullin was dealing with Ms Savelova and that Mr Abdullin would have had dealings with Ms Savelova (and others at Tatneft like Ms Sultanova or Mr Gloushkov) with which he was not involved and was not in a position to talk about. [Day 13 p80]

522. For the reasons set out above I draw an adverse inference from the absence of Ms Savelova and Mr Abdullin that goes to strengthen the evidence on the issue of whether Ms Savelova would have shared Tatneft's knowledge of the Scheme and the defendants' involvement in it with SK particularly in the context of discussing the enforcement of the Tatarstan Judgment in Ukraine.

Absence of documents to evidence the communications between the lawyers which did take place.

523. As discussed above in relation to the email accounts of Ms Savelova and Mr Syubaev and the emails of Mr Aleksashin and Mr Abdullin, in weighing the evidence the court can have regard to the presumption that the documents which were destroyed (namely emails between S-K's and Tatneft's legal representatives in the period 1 October 2007

to 31 December 2010) did exist and would have been supportive of the evidence in favour of the defendants.

Conversation in the street between Ms Savelova and Mr Gubaidullin in April 2013

524. Tatneft submitted that SK did not have any knowledge that the funds had been "siphoned off" through sham transactions for the defendants' own benefit (paragraph 838 of closing submissions) until the conversation with Ms Savelova in April 2013 and did not have sufficient knowledge to advance the present claims until May 2015.

525. The evidence of Mr Gubaidullin about this "meeting" in his first witness statement was as follows:

> "Towards the end of April 2013, when I was in Moscow on business, I accidentally met Ms Savelova on a street. Here I should explain that at that time I came to Moscow in connection with my work for Efremov Kautschuk GmbH, whose Moscow office had just recently been relocated close to Ms Savelova's office. I would sometimes run into her on the street during my business trips to Moscow. I was acquainted with Ms Savelova as she had been working at Tatneft for some time, dealing with corporate matters concerning UTN, so we usually exchanged a couple of words if we ran into each other. When I ran into her again this time we had a quick catch up and she mentioned certain developments that had taken place during Tatneft's BIT arbitration against Ukraine."

> "200. Ms Savelova told me that she had attended the hearings of the arbitration during which Mr Kolomoisky, one of the major Ukrainian oligarchs, gave oral testimony. I understood from that conversation that Mr Kolomoisky's testimony pointed to the possibility that he and his associates had been directly involved in the siphoning of funds owed to S-K and ultimately Tatneft. In particular, I remember Ms Savelova mentioning that Mr Kolomoisky practically admitted that the Privat Group and Mr Yaroslavsky, another Ukrainian oligarch, were behind the reinstatement of Mr Ovcharenko and after his reinstatement they were directing UTN's operations and decisions. Ms Savelova also mentioned that Mr Kolomoisky confirmed that Privat Group controlled in some way the bankruptcy of the Ukrainian intermediaries. That meant that the Defendants together could have caused UTN to make payments to the Ukrainian intermediaries in 2009 and then make the monies vanish into air." [emphasis added]

526. In his third statement Mr Gubaidullin gave further evidence about this meeting:

> "58. As I explained in RVG1, 23 in April 2013 I had a chance meeting with Ms Savelova in the street in Moscow. I do not recall the exact date. The meeting was shortly after the hearings in the BIT arbitration, which I learned about from Ms Savelova.

> The office of Efremov Kautschuk was close to her office so I would bump into her from time to time. This was one such occasion. We exchanged pleasantries.
>
> 59. Ms Savelova then told me that there had been some dramatic developments in the BIT arbitration. She said that fairly recently she had attended the hearings and that in one of them Mr Kolomoisky had given oral evidence. She told me that Mr Kolomoisky had practically admitted that the Privat Group were behind the reinstatement of Mr Ovcharenko and following his reinstatement he had been directing UTN's operations and decisions. Additionally, that Mr Kolomoisky and others had effectively stolen the money which UTN had paid in 2009. That was why it had never been paid to S- K.
>
> 60. My recollection is that the discussion with Ms Savelova lasted about 10-15 minutes. I remember her giving me the brief overview outlined above. I am not sure whether she told me that all four individuals were involved. I do remember that Mr Kolomoisky and Mr Ovcharenko were mentioned, as was the Privat Group..." [emphasis added]

527. When asked to explain why Ms Savelova chose to tell Mr Gubaidullin, Mr Syubaev said in cross examination:

> "First of all, I think that it's not surprising because Mr Gubaidullin was aware of the course of international arbitration proceedings and, secondly, Mr Kolomoisky's evidence and confessions were indeed surprising and unexpected for us." [Day 6 p37]

528. When asked by Mr Howard how Mr Gubaidullin was aware of the course of the proceedings Mr Syubaev sought to withdraw the statement accusing him of *"nit-picking"* and stating that Mr Gubaidullin was not aware of the details and the course of the BIT proceedings. [Day 6 p38]

529. The evidence of Mr Aleksashin in his witness statement was (paragraph 40):

> "…I had not heard of any of the Defendants before except for Mr Ovcharenko (who I knew was the Chairman of UTN's Management Board, who was involved in the raid) and Mr Kolomoisky (who I only knew from the media to be a Ukrainian oligarch). At the time, I was not even aware that the defendants in this litigation had been involved in the theft, and I only learned of this when Mr Gubaidullin reported on his meeting with Ms Savelova in 2013. It was only then that I learnt of Mr Kolomoisky, Mr Ovcharenko, Mr Yaroslavsky and Mr Bogolyubov's involvement."

530. Mr Aleksashin was asked in cross examination why Mr Gubaidullin would have reported the meeting to him. His evidence was:

> "…It was new information for him, it was news to him, and so in principle I think he shared that information so that I also have some understanding and have some knowledge that those four individuals had been involved in the theft of oil. [Day 14 p76]]

531. However, he accepted that, other than doing a Google search on the defendants, he did not impart the information to anyone and SK did not conduct any investigation as to how they could bring a claim against the defendants. He rejected the proposition that this was part of a contrived story to create a false narrative as to SK's knowledge.

532. Mr Gubaidullin's evidence was that he shared the information with Mr Korolkov and Mr Abdullin because it was "entirely new information". [Day 9 p56]

533. Mr Maganov referred to the conversation in his witness statement (at paragraph 80):

> "…Mr Syubaev and Ms Savelova kept me informed on most issues. They never mentioned SK, so I do not believe they had any contact with the individuals at SK during that time [2012-2014] except for Ms Savelova's chance conversation with Mr Gubaidullin in April 2013."

534. Mr Maganov's explanation of why this chance meeting would had been reported to him was that perhaps it was because they were not meant to communicate and rules were violated. [Day 12 p51]

535. It is notable that in its written closing submissions Tatneft placed reliance on this meeting but made no reference to the fact that it took place in the street.

536. The evidence of Mr Gubaidullin concerning the alleged meeting, in my view, is significant in several respects:

i) Tatneft submitted that it would not disclose confidential information except on a "need to know basis". Yet if true, this is evidence that Ms Savelova was willing to disclose information to SK about the Scheme in the informal setting of a chance meeting in the street without any apparent "need to know" as the evidence of Mr Aleksashin was that SK took no action in response to this disclosure.

ii) Tatneft submitted that SK and Tatneft had a professional relationship which was not *"overly close"* (paragraph 985 of closing submissions) However, Mr Gubaidullin's evidence supports an inference that in fact relations between certain individuals at Tatneft and SK were not as distant as Tatneft's submissions would suggest. As one might expect given the history of dealings between the individuals, they "*usually exchanged a couple of words if we ran into each other*".

iii) Further despite Mr Maganov's evidence that he wanted to avoid leaks and the confidentiality of the BIT proceedings, and the submissions for Tatneft that:

> "As with all employees of Tatneft, but especially in her capacity as a lawyer, Ms Savelova would have been alive to the issues

> regarding sharing of information…" (paragraph 995 of closing submissions)
>
> Ms Savelova was apparently willing to discuss "*dramatic developments*" in the BIT proceedings (which had not then concluded) for 10-15 minutes in the street including identifying Mr Kolomoisky and Privat Group.

537. There is no contemporaneous documentary evidence to support the evidence of Mr Gubaidullin to whose evidence I attach little or no weight. Mr Maganov's evidence that he was told of the conversation is not credible: not only do I not accept the reliability of his evidence generally but he did not advance a credible reason why he would have been told of this "chance meeting". His explanation in cross examination that Ms Savelova had breached confidentiality does not in my view withstand scrutiny given that as discussed above, I do not accept his oral evidence that Tatneft imposed a confidentiality regime and I accept the submission (referred to above) that in her capacity as a lawyer, Ms Savelova would have been alive to the issues regarding sharing of information and thus had such a regime been in place she would be unlikely to have shared confidential information in the street.

538. Even if a conversation did take place, I have already rejected the alleged significance of Mr Kolomoisky's evidence in the BIT arbitration. As discussed above, Tatneft already had knowledge of these matters before April 2013. I also do not accept Mr Aleksashin's evidence on this issue: if SK had learnt new information, some reaction from SK is to have been expected.

539. Further Ms Savelova did not give evidence and for the reasons set out above I draw an adverse inference from her absence as a witness that she had already discussed the matter in the context of enforcement of the Tatarstan Judgment.

Supposition and hypotheses

540. It was submitted for Tatneft (paragraph 1021 of closing submissions) that if there was no good reason why Tatneft would have passed on its thinking to SK, this applied all the more so when what was available to Tatneft was not facts supported by evidence but hypothesis and suspicion. In particular it was submitted in relation to the April 2010 memo that Tatneft merely "*suspected*" the position to be as set out in the memo and it could not be said that the matters set out were enough to start proceedings against unidentified defendants (paragraph 1175). Accordingly, it was submitted that it was "*not plausible*" to think that Tatneft would have shared its "*unevidenced conjectures*" (paragraph 1176).

541. I have already made findings about the credibility of the witnesses including Mr Syubaev and Mr Maganov and thus I do not see it is necessary to set out the many instances in which they advanced the position of Tatneft that it only had suspicion or hypotheses.

542. I have also rejected for the reasons set out above, the submission in relation to the April 2010 memorandum that Tatneft merely *"suspected"* the position to be as set out in the memorandum. I have also set out above the evidence that led to me conclude that Tatneft had knowledge of the identity of the defendants.

543. In my view the knowledge of Tatneft went beyond mere "*conjectures*" and as discussed above, for the purposes of limitation under Russian law did not need to be supported by evidence.

Conclusion on knowledge of SK prior to 31 August 2010

544. As to whether SK had knowledge of the alleged violation of its rights prior to 31 August 2010, it seems to me that discussions on the enforcement of the Tatarstan Judgment took place between the lawyers for SK and lawyers for Tatneft after the enforcement against the UTN Tatnefteprom shares in the summer of 2009. According to Mr Gubaidullin the "*cooperation*" continued until the beginning of 2010. As discussed above, those discussions took place against the background and context of:

i) reports in the media concerning the takeover/raid and the identity of the perpetrators which, on the evidence, were read by SK;

ii) previous discussions between SK and Tatneft concerning contractual enforcement;

iii) knowledge that the BIT arbitration was taking place and the claim for the oil monies against Ukraine;

iv) SK's involvement in the First Criminal Complaint.

545. It seems to me that against this background, there was ample opportunity for Tatneft to have shared its knowledge of the Scheme and given the relationship and the circumstances discussed above, it was of significance and interest to SK to know about the Scheme both in the context of the possibility of enforcement of the Tatarstan Judgment in Ukraine and more widely in relation to its liability for the debt. In my view it is likely that Tatneft's knowledge was shared with SK during the period to March 2010.

546. Having regard to the likelihood of Tatneft's knowledge being shared with SK during the period to March 2010 and the knowledge of SK itself, I find that for the purposes of time starting to run under the Russian law of limitation, SK had actual knowledge of the alleged violation of its rights by March 2010.

547. If I were in any doubt about this conclusion, it is strengthened by the adverse inferences which I draw from the absence of Ms Savelova and Mr Abdullin as witnesses in these proceedings and the destruction of the email accounts of Ms Savelova, Mr Abdullin and Mr Aleksashin.

548. If (contrary to my finding) it was necessary as a matter of Russian law for SK to have knowledge of all the defendants prior to 31 August 2010, I find that it is likely that Tatneft's knowledge of the defendants was shared with SK during the period to March 2010.

549. Having regard to the likelihood of Tatneft's knowledge of the defendants being shared with SK during the period to March 2010 and the knowledge of SK itself, I find that SK had actual knowledge of all the defendants by March 2010.

Knowledge of SK by December 2011

550. However if I were wrong that SK had actual knowledge of the alleged violation of its rights by March 2010 and (if required) all the defendants by March 2010, in my view SK would have had actual knowledge of both the alleged violation of its rights and the identity of the defendants by the end of December 2011, taking into account both SK's own knowledge acquired since the raid in 2007 and the inferences to be drawn from the evidence as to (i) the probability of contact with Tatneft following receipt of the letter dated 24 November 2011 (the "November letter") and (ii) the conversation between Mr Maganov and Mr Korolkov in December 2011, as discussed below.

551. The November letter was a letter addressed to Mr Takhautdinov of Tatneft and Mr Korolkov of SK dated 24 November 2011. It read:

> "In connection with the investigation of criminal case No. 242927, initiated under Article 160(4) of the Criminal Code of the Russian Federation, I kindly request that you:
>
> 1) Inform me whether Tatneft OJSC and Suvar-Kazan Company LLC have received any payments since 12 June 2009 from [UTN], Taiz LLC, NP Tekhno-Progress LLC or any other company towards the repayment of outstanding debt under Agency Agreement No. 13-ZN/126-1 dated 26 January 2007 and Contract No. 3-0407 dated 23 April 2007 respectively.
>
> 2) Designate an employee of your company to be examined as a witness regarding the circumstances surrounding [UTN]'s transfer of funds during the period 12-17 June 2009 to the accounts of Taiz LLC and NP Tekhno-Progress LLC as repayment of outstanding debt for oil supplied in 2007."

552. Mr Gubaidullin's evidence was that the receipt of the joint criminal complaint was, the first time that anyone, as far as he knew, at S-K had learnt about the payments to Taiz and Tekhnoprogress by UTN in June 2009. [Day 8 p110]

553. Mr Gubaidullin's evidence in his witness statement (paragraph 188) was:

> "I remember that sometime around the end of December 2011 Mr Korolkov informed me that Mr Maganov of Tatneft had visited him while I was out of office (I do not now remember the exact reason for my absence, probably I was away for business) with a request to co-sign the hard copy of joint request to initiate the criminal proceedings against the General Directors of the Ukrainian intermediaries. Out of the request Mr Korolkov found out that in 2009 UTN had actually made the payments which were due to S-K under the 2008 Assignment Agreement but instead of making those payments to S-K they were made to Taiz and Tekhnoprogress. When I returned to the office Mr Korolkov shared this information with me. I was shocked by this news. I could not believe that UTN had made those payments; I thought UTN was just sitting on the money and was avoiding payment to

> S-K, and ultimately to Tatneft, as a result of its reliance on the Ukrainian court decision which declared the 2008 Assignment Agreement invalid." [emphasis added]

554. Mr Gubaidullin was taken in cross examination to the November letter which he said he had not seen before and he *"speculated"* that the letter never came to SK. [Day 8 p114]

555. The letter was in fact exhibited to Mr Aleksashin's witness statement (referred to at paragraph 36) in which he stated that he had shared the information with Mr Gubaidullin and Mr Abdullin, although in cross examination Mr Aleksashin's evidence was that the letter would have gone first to Mr Korolkov and then to him from Mr Abdullin.

556. As referred to above (when dealing with credibility), in his witness statement Mr Aleksashin appeared to describe a conversation that he had with the investigator and that he then shared the information with Mr Gubaidullin and Mr Abdullin. In cross examination he sought to depart from that account and suggested that a brief conversation took place after receipt of the letter. For the reasons discussed I do not find Mr Aleksashin to be a reliable witness on this issue.

557. Tatneft submitted that SK first learnt about the payments having been made following the letter in November 2011 (paragraph 850 of closing submissions).

558. I note that this submission conflicts with Mr Gubaidullin's evidence to the court both prior to his cross examination that it was only on receipt of the criminal complaint that SK learnt of the payments and his evidence in cross examination in which he sought to suggest that SK had not received the letter.

559. It was submitted for Tatneft that his evidence was merely the hallmark of "*genuine recollection*" and the important point was that the information that there had been a payment was clearly new and that was a genuine recollection. [Day 38 p17]

560. For the reasons discussed above in relation to the credibility of Mr Gubaidullin I do not accept this explanation. I infer that Mr Gubaidullin's evidence was not reliable on this issue and further raises the issue as to why this letter (which was an exhibit to Mr Aleksashin's witness statement) was not addressed in his evidence. It casts significant doubt on his evidence that he was "*shocked by the news*" in December 2011 as he asserted in his witness statement.

561. Mr Aleksashin said in cross examination that Mr Abdullin and Mr Gubaidullin were surprised by the news in the letter. In his witness statement Mr Aleksashin's evidence was merely that he thought payments from UTN were "*strange*" and that he shared the information with Mr Gubaidullin and Mr Abdullin but made no reference to any action being taken in response to the news (other than replying to the investigator) referring only to the meeting in December 2011 as the next event. If his evidence that all three were surprised by the news were correct and (as referred to above) he omitted reference to their surprise because it was "*obvious*", one would expect SK to have responded to the news in some way.

562. In relation to the likelihood that SK learnt of the Scheme at the time of the November letter, the apparent absence of reaction to the letter leads me to infer that it was not a surprise to SK to be asked to provide an employee to give evidence about the payments by UTN to Taiz and Tekhnoprogress in 2009. This may explain why for example Mr Gubaidullin had no recollection of the letter being received and Mr Aleksashin's recollection of who at SK first learnt about the investigation was shown to be inaccurate. This therefore tends to support my primary finding that SK had knowledge of the Scheme prior to November 2011.

563. The alternative is that if SK did learn of the payments for the first time when it received the November letter, it is likely in my view that SK would have reacted to the letter (which required SK to designate an employee to provide evidence) by contacting Tatneft for more information.

564. It was submitted for Tatneft that it was not possible on the evidence to reach a conclusion on whether there was a call following receipt of the letter and what was discussed. It was submitted that the evidence was that neither Mr Aleksashin nor Mr Gubaidullin contacted Tatneft although it was accepted that Mr Gubaidullin did not recall the letter. It was submitted that if there had been a discussion with Mr Abdullin, Mr Aleksashin would have known about it as he was the person dealing with all UTN related matters. [Day 38 p17]

565. In relation to the November letter Mr Aleksashin accepted that he could not say whether the content of the letter was news to Mr Korolkov. [Day 14 p39] When asked to explain why if it was news, no one contacted Tatneft, his evidence was that he did not have the *"remit"* to discuss it with Tatneft and he could not say whether the management of SK contacted Tatneft. [Day 14 p31]

566. Mr Aleksashin was asked about the Tatneft lawyers that he and Mr Abdullin dealt with in the period 2007-2014. His evidence was that he knew that Mr Abdullin was dealing with Ms Savelova and that Mr Abdullin would have had dealings with Ms Savelova (and others at Tatneft like Ms Sultanova or Mr Gloushkov) with which he was not involved and was not in a position to talk about. [Day 13 p80]

567. Mr Gubaidullin accepted that hypothetically:

> "it is quite possible that somebody would have made an attempt to call Tatneft, perhaps Mr Korolkov himself to find out what had happened or he would have asked myself or his lawyers to do this" [Day 8 p121]

568. Mr Maganov accepted that the lawyers could have had a conversation with SK and that would have "*made sense*" but said that the lawyers would not have talked in terms of hypothesis.

569. His evidence was:

> "So if we then apply our minds to the meeting that you had with Mr Korolkov in December, we've seen, firstly -- let's see if we can agree this - the background to the meeting must have been

> the letter of 24 November 2011, which must have provoked discussions between S-K and Tatneft. Do you agree?
>
> A. It ought to have caused the discussions between the lawyers, if those discussions did not take place before.
>
> Q. Yes, and just to pick you up on that, the discussions between the lawyers -- you said "if [they] did not take place before". Your position, and as today the most senior person we're going to speak to from Tatneft, is that there should have been discussions, throughout the period from 2009 up until 2011 and indeed following, there should have been discussions between Tatneft's lawyers and S-K's lawyers; that's right, isn't it?
>
> A. They could have happened." [Day 11 p130] [emphasis added]

570. Asked about the meeting in December 2011, Mr Maganov's evidence in cross examination was that SK could have learnt from the lawyers prior to the meeting:

> "Q… Do you agree it is highly unlikely you could have had a discussion with him where you didn't explain the full history as you understood it?
>
> A. I said that, as far as I remember, I hadn't explained anything to Mr Korolkov, in detail or otherwise. What Mr Korolkov might have known from his lawyers - or perhaps our lawyers that were preparing this joint complaint talked to the lawyers of Suvar." [day 11 p107] [emphasis added]

571. There are no documents which evidence that a conversation took place following receipt of the November letter but the court can draw inferences as to the inherent probabilities.

572. Tatneft submitted (paragraph 979) that a conversation was inherently unlikely in view of:

i) the nature of the commercial relationship between Tatneft and SK;

ii) the nature of the interactions between Tatneft and SK;

iii) the likelihood of a claim by Tatneft against SK;

iv) reasons why Tatneft would not have told SK what it knew or suspected.

573. Tatneft submitted that it was not conceivable that SK could come to Mr Syubaev, a senior executive within one of Russia's biggest oil companies for a "*running commentary*" on Tatneft's recovery efforts (paragraph 993).

574. Dealing with those submissions:

i) Mr Maganov's evidence was that it was not *"easy"* to put a call through to him; Mr Gubaidullin's evidence was that he did telephone Mr Maganov although he said it was *"very seldom"*. In considering the likelihood of whether the November letter prompted a call to Tatneft, the court has regard to the evidence of past conversations between SK and Tatneft when SK wanted information: when learning of the BIT arbitration, the conversation between Mr Maganov and Mr Gubaidullin, and when learning of the first criminal complaint, the conversation between Mr Gubaidullin and Mr Syubaev as well as the conversation between Mr Maganov and Mr Gubaidullin in September 2009 after SK successfully enforced the judgment against the Tatnefteprom shares. I do not accept therefore that the *"nature of the interactions"* would support an inference that no call would have been made in the circumstances.

ii) I do not think that the *"likelihood of a claim"* is relevant in these circumstances. SK received a letter asking SK to provide an employee to give evidence about the payments in a criminal investigation. Even if SK was not expecting the debt to be enforced against SK at that time, I infer that the involvement in criminal proceedings and the need to give evidence in those criminal proceedings would be sufficient in my view for SK to seek further information.

iii) As to the nature of the commercial relationship between SK and Tatneft, as discussed above, in my view the history of the dealings between them to recover the oil debt supports the likelihood of a call.

iv) Further I have regard to the element of *"human nature"* discussed above from which I infer that Tatneft employees are likely to have told SK about the Scheme and the defendants in any such conversation.

575. Mr Gubaidullin's evidence on the events of November 2011 is in my view unreliable for the reasons set out above. Mr Korolkov has not been cross examined and made no reference in his witness statement to the letter but asserted that he learnt of the payments at the meeting. That evidence is not consistent with the contemporaneous documentary evidence of the letter.

576. I have found that Mr Aleksashin was not a reliable witness. In any event on his evidence, there could have been a conversation by Mr Korolkov or Mr Abdullin and Mr Aleksashin would not necessarily have been aware of this.

577. In my view it is likely therefore that, if SK did not know before November 2011 that the payments had been made to Taiz and Tekhnoprogress, the letter from the investigator would have prompted SK to contact Tatneft for information.

578. It was submitted for Tatneft that even if a conversation took place, it would not have contained all the details of the Scheme and the defendants:

i) lawyers at Tatneft would not have shared more with SK than the criminal complaint; and

ii) Mr Maganov's suspicions as to the involvement of Privat were "*unsupported hypotheses*".

579. However, the evidence before the court in this regard was as follows. It was put to Mr Maganov that:

> "… if Tatneft's lawyers had spoken to S-K's lawyers, as you would expect they would have done, and if they had spoken to them honestly, in answer to a question, "What is this all about?", they would inevitably, if they were acting honestly, provided an account along the lines of the account that you gave to the investigator in February 2012. Do you agree? [emphasis added]

Mr Maganov responded:

> "I think so, yes." [Day 11 p133]

However, he then sought to qualify that answer by saying that:

> "… they would have said that the money is transferred to Avto and Taiz; that Avto and Taiz are either bankrupted or are in liquidation, initiated by the company Optima, which means that the money went somewhere with the help of the management of Avto and Taiz, and we need to know where the money is gone. That's what I was saying "yes" to, to this particular text of my witness statement."

580. It was put to Mr Maganov that he was seeking to retract his evidence because it was fatal to Tatneft's case. He said that there was nothing about Privat Group in the interrogation and when taken to the relevant passage (set out above) said that it was "*a supposition, an assumption*".

581. In his witness interrogation on 20 February 2012 by the criminal investigator, Mr Maganov referred to:

i) the *"fictitious payments"* to Taiz and Tekhnoprogress in breach of the ruling of the Russian court.

ii) the bankruptcy of the intermediaries through claims submitted by Optima Trade which according to the media was part of Privat Group.

iii) the embezzlement of the funds with the participation of the executives of Privat Group.

582. It was submitted for Tatneft that by the end of 2011, SK was aware of the payments by UTN and the bankruptcies of the intermediaries but had no knowledge of what had happened to the monies beyond the inference that they had been paid out and did not know the identity of the perpetrators (paragraph 1208).

583. As discussed above in relation to Tatneft's knowledge, the evidence is clear that Tatneft was aware of the link to Korsan, the coincidence of the payment for the stake in UTN and of the identity of the shareholders in Korsan.

584. Tatneft had identified Mr Kolomoisky, Mr Yaroslavsky and Mr Ovcharenko by name in for example the letter of March 2010 and the involvement of Privat Group was

mentioned in a number of documents and had been confirmed by the evidence of Mr Konov and Mr Vakhnyuk. Mr Bogolyubov and Mr Yaroslavsky were identified in footnotes in the Memorial on the Merits in June 2011.

585. I infer that if Tatneft gave information to SK on a call this would have included the knowledge it had of the elements of the Scheme and the identity of the defendants.

586. Mr Maganov gave evidence that whilst he thought Privat Group was behind the Scheme, this was only his view and not one shared by the lawyers.

> "… I had my own dominant thought, and from the very start I wrote everywhere what I thought, in all the statements. And I agreed with you today, I agreed with you yesterday that I supposed that it was Privat Group that was behind it all; and moreover, everywhere I stated it. And the group in Tatneft was also working on this particular version.
>
> Q. Yes. So I think it follows --
>
> "A. But to say -- but to say that my position was prevalent and the only one in Tatneft would be wrong. Syubaev had access to the director general and the lawyers also were in contact between themselves…" [Day 11 p132]

587. I do not accept the evidence of Mr Maganov that his view was not shared by others in Tatneft or by its lawyers: it seems to me that his *"view"* that Privat Group were behind the Scheme accords with what was being advanced for and on behalf of Tatneft in the BIT arbitration (for example in paragraphs 517 and 518 of the First Memorial on the Merits in June 2011 set out above).

Meeting between Maganov and Korolkov in December 2011

588. The application to open a criminal investigation stated:

> "…Notwithstanding the court's decision and the enforcement proceedings, instead of paying the debt recognised by the court and payable to Suvar-Kazan LLC, in around the summer of 2009, Ukrtatnafta CJSC started making payments to TAIZ and TECHNO-PROGRESS. To date, no payments have been made to Suvar-Kazan LLC (with the exception of the amount received as a result of the enforcement proceedings). Furthermore, as we later became aware, bankruptcy proceedings subsequently commenced for Avto, TAIZ and TECHNO-PROGRESS, and they were subsequently wound up. Thus, there is reason to believe that the directors of Avto, TAIZ and TECHNO-PROGRESS embezzled the funds that were supposed to be transferred by way of the implementation of the Russian court's decision, thereby inflicting harm on Russian companies…"

589. The evidence of Mr Maganov was that he did not recall having discussed anything about the Scheme with anyone at SK prior to the meeting in December 2011. [Day 11 p96]

590. As to the meeting itself Mr Maganov in his witness statement gave the following account:

> "72. I believed that it made sense for Tatneft and S-K to make a joint application. I visited Mr Korolkov at his office to sign the joint application for a case against the managers of the intermediaries. I mentioned to him then that the monies owed for the oil had been paid by UTN to the accounts of the Ukrainian intermediaries in the summer of 2009 and that these sums had been stolen. I did not know who exactly these sums had been paid to and I thought the investigating authorities could help to clarify this by questioning the managers of these companies. We had no other way to proceed. I took the complaint document with me but I do not recall discussing its contents in detail. Mr Korolkov agreed to it and signed it in my presence." [emphasis added]

591. When asked about what he had said to Mr Korolkov, Mr Maganov's evidence was as follows:

> "A. I don't remember it word for word, I don't remember exactly what I said, but this is a short description of my conversation with Mr Korolkov. I'm sure we didn't discuss anything in great detail. I said to him that the money had been transferred and never came to us; that most likely the money had been stolen because the bankruptcy proceedings have been started by Optima Trade and money had gone somewhere. And the purpose of the conversation was that we need to apply to the law enforcement authorities with this complaint so that they investigate and find out where the money had gone. But I won't be able to tell you word for word what was said at that conversation." [Day 11 p101] [emphasis added]
>
> "Q… In order to have told him about the bankruptcy proceedings by Optima Trade, you would necessarily have told him about Privat Group and the raiders' involvement in all of this, wouldn't you?
>
> A. Optima Trade, and that it's connected with Privat Group, I may have said that, although I think he knew it himself because that was a dominating story." [Day 11 p101]

592. It was put to Mr Maganov that he told Mr Korolkov "*the gist*" of what Tatneft was saying both in his interview and in the BIT proceedings to which he replied:

> "Short gist, of course; otherwise, it would have been impolite. I didn't explain it in detail. But in short, of course I could have done and probably said." [Day 11 p142]

593. The relevant exchange in cross examination was as follows:

> Q. "Yes. Let's just agree this: by 2011, for the past two and a half years since you'd first had intelligence about these payments, you had concluded that Privat Group and the raiders were behind it, and you had made that case repeatedly in the arbitration and in the criminal investigations; that's right, isn't it?
>
> A. We knew and saw through these payment orders that money left Ukrtatnafta and how -- and you were quite right to say that we assumed that this money couldn't leave UTN without the raiders. They were the owners, they bossed the place about. Money left: it went to accounts, to certain structures. The amounts suspiciously coincided with the amount of money paid for -- as you said - for Korsan. So I think there was this suspicion. But how this money flowed, who stood behind these companies, specific money transfers, I was indeed trying to find all this out when we were asking for criminal investigation to start. That's when I was personally involved in this and talked to Korolkov and the others.
>
> Q. Yes, Mr Maganov, you see, I'm not asking you about why you were starting the criminal investigation; I'm asking you about the discussions with Mr Korolkov. And what I would suggest to you is that it is really obvious that in the discussion that you had with Mr Korolkov, about which you have given an extremely terse account in your witness statement, it is obvious that you told him what -- you told him the gist of what we see Tatneft was saying both in your interview and in the BIT proceedings. That must be right?
>
> A. Short gist, of course; otherwise it would have been impolite. I didn't explain it in detail. But in short, of course I could have done and probably said." [Day 11 p142] [emphasis added]

594. Mr Maganov was asked in re-examination about the reasons that he might not have told Mr Korolkov everything he knew about the case. He said that as the manager of Tatneft he did not see it was necessary to tell everything that he knew and he came to him with one purpose that the lawyers requested that he go there and sign the joint criminal complaint. Further he said when he did go to Kazan he was always short of time and he did not think the event was "*such a significant one*" to explain more than he did. [Day 13 page 50]

595. Mr Korolkov's evidence was as follows (paragraphs 39 and 40 of his witness statement):

> "39. In December 2011 N.U. Maganov visited me at my offices which was unusual. I do remember that for some reason R.V.

> Gubaidullin was not in the office at that moment. N.U. Maganov told me that the money owed for the oil delivered had been paid by UTN to the accounts of Ukrainian intermediaries in the summer of 2009 and had been subsequently stolen from their accounts, and the intermediaries themselves had been driven to bankruptcy. N.U. Maganov also indicated that obviously, the vanishing of the funds from the accounts of the intermediaries was impossible without the involvement of those companies' management. Tatneft therefore had decided to file a complaint to the investigation authorities requesting that they initiate criminal proceedings in connection with embezzlement of funds for oil by directors of Ukrainian intermediaries. N.U. Maganov asked that S-K join Tatneft in filing the criminal complaint since neither Tatneft, nor S-K had received the oil monies. N.U. Maganov had brought the prepared criminal complaint with him and we signed it together. I briefly read the document before I signed it. Once R.V. Gubaidullin was back at the office I informed him of what had happened during my meeting with N.U. Maganov. I did not discuss my signing of the criminal complaint with R.V. Gubaidullin before I signed it and I did not personally study the text of the criminal complaint in detail before signing it. So far as I was concerned I was simply going to provide some assistance to Tatneft in resolving this matter. We had already done what we could to recover the oil monies and S-K was not looking to pursue further civil claims against anyone.
>
> 40. At the time that I signed the complaint, I had not seen any of the arbitration materials against Ukraine and knew nothing of what Tatneft was saying in that process. If Tatneft did have any suspicions that someone from Taiz's or Technoprogress' management may be behind the embezzlement of the oil funds, nobody shared those suspicions with me. I did not know or think that it was any of the Defendants in this case, and Tatneft did not say that they thought it was. The criminal complaint only referred simply to the managers of the Ukrainian intermediaries. I cannot speak for Tatneft but if I had had any reason to think that any of the Defendants were responsible I would have asked N.U. Maganov to name them in the criminal complaint." [emphasis added]

596. The evidence of Mr Aleksashin was that in the joint criminal complaint they asked the authorities to investigate the activity of the managers of the intermediaries so "*we assumed that those were the persons who misappropriated the funds*".

597. It was put to him in cross examination that it was obvious that the directors of the intermediaries were not acting independently of those behind UTN but his evidence was that it was "*obvious to us that misappropriation was perpetrated by the managers*". [Day 14 p59]

598. Mr Gubaidullin also said that they thought that "*most likely the managers had embezzled the funds*" and that he did not make the link with the payments by UTN. His evidence was:

> "Q. And so what we're to understand, is it, is that you have a dispute with UTN, who are refusing to pay you, but at the same time as that dispute is going on, just coincidentally, the managers of Avto, Taiz and Tekhno, who have been paid the 2.1 billion, they, as it were, commit an independent wrong whereby they embezzle the money and it's got nothing whatsoever to do with those who are in control of UTN? Is that your position that you say you understood, that this was completely unrelated to the disputes with UTN and the raid? Is that what we should understand?
>
> A. At that time I didn't link anything." [Day 9 p46]

599. I have already found that the evidence of Mr Gubaidullin should attract little or no weight and that Mr Aleksashin's evidence is unreliable. In my view the suggestion that SK thought there was some unrelated wrongdoing by the directors of Avto, Taiz and Tekhnoprogress was unlikely and implausible. Mr Gubaidullin's evidence that Mr Korolkov only found out about the payments made to Taiz and Tekhnoprogress from this meeting is contradicted by the contemporaneous documentary evidence of the November 2011 letter.

600. It was submitted for Tatneft in oral closings that Mr Maganov's evidence that he gave the *"short gist"* was an answer after a lengthy cross examination and was a *"slender basis"* for a finding that:

i) Mr Maganov's suspicions in respect of Privat were shared with Mr Korolkov;

ii) any particular individuals were mentioned, given that the February interview of Mr Maganov cites no names and merely has a reference to senior executives at Privat. It was submitted that Mr Maganov's evidence in cross examination was that Mr Bogolyubov was "not on his radar". [Day 38 p31]

601. It was further submitted for Tatneft that the fact that Tatneft was able to make the assertion in the BIT arbitration did not mean that SK in a short and informal conversation with Mr Maganov had enough information to bring proceedings against these defendants. [Day 38 p37]

602. It was submitted for Tatneft that there is no reason to think that Mr Maganov would have told Mr Korolkov anything material beyond what was in the Second Criminal Complaint (paragraph 1203 of closing submissions).

603. Mr Maganov did not deny that a conversation took place in which some details were shared. Mr Maganov's evidence was that he did not remember the details.

604. In my view:

i) Although Mr Maganov said that he was short of time and he went just to get SK to sign the criminal complaint, his oral evidence that he would have given Mr Korolkov the *"gist"* of what he was saying in the interview and the BIT proceedings is consistent in my view with the fact that Mr Maganov himself went to Mr Korolkov's office to get him to sign the joint criminal complaint. If no explanation was needed to be given to SK and the signature was a formality, I infer that this meeting, acknowledged to be an unusual event, would not have happened and that someone more junior would have been sent to SK's offices to obtain a signature.

ii) The fact that it was a *"short conversation"* does not mean that SK was not given sufficient information to amount to knowledge for the purposes of limitation. Mr Maganov did not recall the length of the conversation but even if short, he accepted there was time to provide the *"gist"* and it was not necessary for him to provide evidence to SK at this meeting for SK to be able to have the requisite knowledge.

iii) The submission that it was an *"informal conversation"* does not appear to be relevant. It was a meeting at which the subject matter was the non-payment of the oil and the fact it had been stolen. It was formal in the sense that Mr Maganov a senior person at Tatneft travelled to see Mr Korolkov to get SK to sign a joint criminal complaint.

iv) There is no reason why if Mr Maganov told Mr Korolkov about the Scheme, Mr Maganov would not have said who he thought was behind the Scheme. Mr Maganov was very upset by what had happened: as noted above, his evidence was that it was a "*huge incident, a tragedy for us, the fact that we had been so cynically and rudely robbed*". Tatneft had identified Mr Kolomoisky, Mr Yaroslavsky and Mr Ovcharenko by name in, for example, the letter of March 2010, and the involvement of Privat Group was mentioned in a number of documents and confirmed by the evidence of Mr Konov and Mr Vakhnyuk. In paragraph 78 of his witness statement under the heading *"2012-2014: BIT arbitration and Mr Kolomoisky's evidence"* Mr Maganov stated:

> "I am aware that we alleged that Mr Ovcharenko, Mr Kolomoisky and Privat Group may have been involved in a number of unlawful events…"

v) The evidence of Mr Maganov is that Mr Korolkov already knew that Privat Group was involved with the bankruptcy of the intermediaries.

vi) Mr Korolkov's account of the meeting suggests that he had no knowledge of the involvement of the defendants but he makes no reference to the involvement of Optima or its links with Privat which Mr Maganov suggested he would have known. Further in my view his account of the meeting is unreliable as he makes no reference to the November letter from which he would have learnt of the payments to the intermediaries which he says in his witness statement he was told by Mr Maganov at the meeting and of course his evidence was untested at trial.

vii) Although Mr Maganov's evidence is that he said to Mr Korolkov that the "*money had gone somewhere*", Mr Maganov, as discussed above, had identified the link to Korsan's purchase of the UTN stake as "*one of the strands of the Scheme*" as early as January 2010 and in the Memorial on the Merits in June 2011 (paragraph 517) Tatneft described the payments by and to companies "*all controlled by the Privat Group*" as having moved from "*their right pocket to their left*". It was an integral part of the Scheme and recognised by Tatneft that the amount paid by UTN to the intermediaries and then paid out of the intermediaries was similar to the amount used by Korsan to purchase the stake in UTN.

viii) Whilst the February interview of Mr Maganov cites no names and merely has a reference to senior executives at Privat, this does not mean that Mr Maganov did not have knowledge for the purposes of limitation as to the identity of the defendants. It is clear on the evidence that he knew who controlled Privat Group and I do not accept that Mr Bogolyubov was "not on his radar": as discussed above, in addition to what he would have been told by Mr Syubaev following his investigation into Privat Group, Mr Maganov referred in his interview in January 2010 to "co-owners" and would have been aware of Mr Bogolyubov's appointment to the Supervisory Board of UTN.

605. As to the significance of what was said in the BIT pleadings it was submitted for Tatneft that there was no evidence that Mr Maganov had seen or read the BIT pleadings. [Day 38 p30]

606. Mr Maganov's evidence [Day 12 p38] was that documents in the BIT proceedings were not translated *"especially"* for him and said that he only understood (in effect) the barest outline of the claim. He said he understood that:

> "We went to the international arbitration against the government of Ukraine asking for our stolen investment to be returned to us by way of assets, shares and turnover capital that existed at the refinery."

607. It is unclear whether Mr Maganov was placing emphasis on the answer that documents were not translated *"especially"* for him. I note that Mr Syubaev said he could not recall which documents would have been translated into Russian but he did confirm (as one might expect) that "*the most important*" of the documents in the BIT proceedings would have been translated. He said the lawyers would have decided which documents required the attention of the top executives. [Day 5 p72]

608. In paragraph 78 of his witness statement under the heading "*2012–2014: BIT arbitration and Mr Kolomoisky's evidence*" Mr Maganov stated:

> "I am aware that we alleged that Mr Ovcharenko, Mr Kolomoisky and Privat Group may have been involved in a number of unlawful events…"

609. When asked in cross examination how he was able to make this statement, he said that this evidence was based on his knowledge which was derived from his communication with "*our lawyers*". [Day 12 p42] After some prevarication he eventually said that:

> "…Lawyers reported to me, they told me about the arbitration proceedings, they told me in general terms about documents that they were drawing up, and my knowledge derived from my contacts with the lawyers."

610. The evidence that lawyers reported to him and told him *"in general terms"* about the documents is consistent with what one would expect where Mr Maganov is responsible for the BIT proceedings. Accordingly, even if Mr Maganov had not read the BIT pleadings (or translations), in my view the lawyers would have reported to him and given him knowledge of the key elements of what was being asserted and who was believed to be behind the Scheme. The question is not therefore whether Mr Maganov had seen or read the pleadings in the BIT arbitration but whether if he told Mr Korolkov the gist of the Scheme he had knowledge of the elements of the claim and the involvement of the defendants. In my view Tatneft's lawyers would have shared their knowledge with Mr Maganov such that he would have been aware of the substance of the allegations in the BIT proceedings.

611. Even if Mr Maganov did not mention to Mr Korolkov the individuals behind Privat (which in my view in the circumstances is highly unlikely) I find it likely that SK would have carried out a search to discover the identity of the defendants. I have already referred to the evidence of Mr Aleksashin who in this context in cross examination was asked who was behind the payments to Taiz and Tekhnoprogress and his evidence was that he did not know and "*at the time I did not ponder it"*. As discussed above I do not accept this evidence as credible not least given his own evidence that he asserted he carried out a Google search when told the news in 2013.

Knowledge in May 2015/March 2016

612. It was submitted for Tatneft (paragraph 857 and 858 of closing submissions) that it was only at a meeting in May 2015 that Mr Gubaidullin was told by Ms Savelova and Mr Glouskov of the elaborate fraud and that it was only "*shortly before*" bringing proceedings that Tatneft considered it had the material necessary to commence proceedings.

613. As discussed elsewhere the test for knowledge for the purposes of limitation does not require *"evidence"* and in my view Tatneft already had sufficient knowledge of the siphoning of the funds for the benefit of the defendants prior to May 2015. Accordingly, even if Mr Gubaidullin learnt additional details at this time (and I note that his evidence at paragraph 207 of his witness statement merely stated that he was told that Tatneft had *"documentary evidence"* concerning the fraud) I do not accept that SK did not as a result have sufficient knowledge until this meeting.

614. Similarly, whilst I note the evidence of Mr Williams (paragraph 4 of his 1st affidavit dated 15 March 2016) that "*some of the evidence necessary to commence proceedings has only come to light in the last few weeks*" this has to be weighed against the information that was already known to Tatneft and the finding of this court as to what is necessary in terms of *"knowledge"* for the purposes of limitation under Russian law. As set out above Professor Asoskov's evidence was that a claimant cannot rely on the fact that it needed to gather more evidence about the case in order to allow it to prove matters at the trial in order to delay the start of the limitation period.

615. In particular in relation to the siphoning of the funds, Mr Williams stated in his eighth witness statement that he was instructed that Tatneft became aware of certain documents and information including the interview of Mr Konov following a review of the criminal files between March and May 2012.

616. It would appear from the February 2011 letter (as discussed above) that Tatneft already had seen interviews of Mr Konov which refers to evidence given in interviews in October 2009 and in March 2010.

617. Tatneft appears now to accept this but seeks to mitigate the significance of the interviews by submitting that the contents had not been made available to Tatneft but only the *"gist"*. As discussed above I do not accept the evidence supports such an inference.

618. Further it would appear from the materials disclosed as to the advice given by Akin Gump such as the PowerPoint presentations dated 28 October 2014 that the tasks at that stage were collecting *"documented evidence"* of various matters such as the involvement of Mr Bogolyubov, Mr Kolomoisky and Mr Yaroslavsky and of the companies involved in the *"embezzlement of shares and funds"* and the cash flows. The steps involved in the Scheme sufficient to establish knowledge are set out in those materials but in my view have not changed in any material respect from Tatneft's knowledge in 2010.

Conclusion on knowledge of SK by December 2011

619. If I were wrong that SK had actual knowledge of the alleged violation of its rights by March 2010 and (if required) all the defendants by March 2010, for the reasons discussed above, I find that SK had actual knowledge of both the alleged violation of its rights and the identity of the defendants by the end of December 2011. In my view it is to be inferred from the evidence that it is probable that SK contacted Tatneft following receipt of the November letter and thus (when taken with SK's own knowledge at that time) acquired actual knowledge of the alleged violation of its rights and the identity of the defendants but if I were wrong on that, I find that SK had actual knowledge of the alleged violation of its rights and the identity of the defendants following the meeting with Mr Maganov in December 2011.

Is it an abuse of rights for the defendant to be allowed to rely on limitation as a defence?

620. Mr Kulkov's evidence in his report was as follows:

> "798. Case law indicates that pursuant to this principle a defendant in specific cases may be prevented from relying on a limitation defence (i.e., expiry of a limitation period) where the expiry was caused by its own abuse of rights preventing a claimant from seeking judicial protection.
>
> 799. The legal commentaries elaborate on the matter of interplay between abuse of rights and the statute of limitations as follows: "If individuals or legal entities abuse their civil rights, a court may, by virtue of Article 10(2) of the RCC, refuse to grant protection of their respective rights. This provision is fully

> applicable to the right of defence (regardless of its legal characterisation), in particular, to such method of defence as invoking the expiration of the limitation period by the defendant."
>
> 800. Case law shows that to rebut a limitation defence by relying on Article 10 the claimant must demonstrate that it was precluded from issuing a claim in time as a direct result of the defendant's bad faith actions. In such situation, the commencement of limitation would be deemed to begin from the moment those circumstances ceased to exist.
>
> 801. Otherwise, there are no grounds to reject an argument on the expiration of a limitation period. Further, not every action carried out in bad faith would preclude a defendant from invoking the expiration of a limitation period, but only those that essentially and directly prevented a claimant from filing a claim. In other cases, where the alleged abuse of rights did not prevent the claimant from filing the claim in time, a court would apply the limitation period in order to maintain the stability of civil relations." [emphasis added]

621. In the joint statement the position was stated to be as follows:

> "Both Experts, with qualifications made below, are in agreement that:
>
> 64.1 In certain instances, a defendant may be precluded from relying on a limitation defence (i.e., expiry of a limitation period) based on the principle of prohibition of abuse of rights.
>
> 65. The Experts have the following qualifications to the above conclusions and have different opinions on the following issues:
>
> (i) Conditions which must be satisfied for the application of the rule in paragraph 64.1 above
>
> 65.1 Mr Kulkov is of the view that in order to rebut a limitation defence by relying on Article 10 of the Civil Code the claimant must demonstrate that it was precluded from issuing a claim in time as a direct result of the defendant's bad faith actions.
>
> 65.2 Professor Asoskov is of the view that there is no test of "direct result" which is proposed by Mr Kulkov. The court will refuse to accept the limitation defense in any situation where the defendant acted contrary to the principle of inadmissibility of abuse of right (Article 10 of the Civil Code), including by way of concealing available information or documents. If the court finds that the Defendants acted in bad faith and influenced the ability of the Claimant to file its claim on time, the Defendants

> would be precluded from relying on the limitation defense." [emphasis added]

622. In his supplemental report Mr Kulkov said:

> "793. The abuse of rights exception is therefore limited mainly to the situation when the claimant was aware of the breach of his rights but was nonetheless prevented by abusive conduct of the defendant from bringing any claim to enforce those rights. Although it is, in principle, possible that concealment of information could amount to such an abuse of rights, it would be unusual that such concealment would prevent the claimant from bringing a claim in circumstances in which the claimant had knowledge of the violation of its rights. There are three reasons for this.
>
> 794. First, the abuse of rights exception cannot be relied on where a claimant says it could not resort to judicial protection sooner because it had insufficient evidence to prove its claim. A lack of evidence would not prevent the issuing of a claim, and where the claimant lacks necessary evidence, it may be obtained with the assistance of the court (see paras 690-702 of this Report).
>
> 795. Secondly, the rules on abuse of rights do not impose a self-reporting obligation on the defendant. In other words, the defendant's failure to disclose the alleged tort committed by him does not prevent the defendant relying on limitation. Otherwise, the position would be that limitation would never begin to run in a claim which was disputed, because the defendant's failure to admit the claim would amount to concealment. Rather, there could only be a relevant abuse of rights where the defendant concealed some specific fact necessary to the commencement of a claim which it had an obligation to disclose.
>
> 796. Thirdly, it follows from the principle that the allegedly abusive conduct must actually have precluded the bringing of a claim that only those representations that were relied upon by the claimant could potentially affect limitation. Representations that were not believed and relied upon are irrelevant, because they could not preclude the claimant from bringing his claim.
>
> 797. Therefore, in this case a statute of limitation defence could not be denied to the Defendants merely because the Claimant might rely on abuse of rights. It may only be denied if it is proved that the Defendants by their actions directly caused the Claimant to be unable to submit its claims earlier. The fact that certain details in relation to the alleged Oil Payment Siphoning Scheme are said not to have been easily ascertainable would not be such a ground." [emphasis added]

623. Tatneft submitted (paragraph 934 of closing submissions) that:

> "It is plain, and Mr Kulkov accepted, that, if this was the legal position pre-September 2013, a defendant could be guilty of an abuse of right if he relied on a limitation defence despite having taken steps to conceal his participation in the wrongdoing."

624. This submission in my view fails to reflect the substance of Mr Kulkov's evidence which was that in such a case it could be an abuse of right where the concealment had the effect of causing the claimant to miss the limitation period. His evidence was:

> "Well, am I right in understanding your question that if the defendant was deliberately concealing its identity to cause the claimant to miss the statute of limitation, so such behaviour of the defendant could be an abuse of right?
>
> Q. Yes, that's correct. Yes, that's what I'm asking.
>
> A. I agree." [Day 32 p18] [emphasis added]

625. Similarly, the submission that Mr Kulkov accepted that concealment by the defendant of his involvement is a relevant factor in the application of the principle (paragraph 935) does not reflect the substance of his evidence. The relevant evidence was:

> "Q. …I think you would accept –– well, you are accepting there that concealment of the defendant of his participation can be a relevant factor in assessing whether it's an abuse of right to rely on a limitation defence.
>
> A. Yes, but just please pay attention to why I consider this exception as a very narrow one. So I provide three reasons in the paragraph 794 and further on. So the first reason is that:" ... the abuse of rights exception cannot be relied on where a claimant says it could not resort to judicial protection sooner because it had insufficient evidence to prove its claim." So lack of evidence is not an excuse.
>
> "Secondly, the rules on abuse of rights do not impose a self–reporting obligation on the defendant. In other words, the defendant's failure to disclose the alleged tort committed by him does not prevent the defendant relying on limitation …. And third reason:" ... it follows from the principle that the allegedly abusive conduct must actually have precluded the bringing of a claim ... " Well, so, yes, I agree –– a good example could be if the defendant actively and deliberately trying to conceal its identity or trying to conceal any –– the harm caused or consequences of the harm, so in order to prevent a claimant from identification of the harm." [emphasis added]

626. It was submitted for the defendants (D3 closing submissions paragraph 342) that Tatneft has not identified any acts of concealment let alone any acts that caused SK to be unable to issue a claim within the limitation period nor was this put to the witnesses.

627. It was submitted for Tatneft that the Scheme was designed to carry out a fraud and conceal the defendants' involvement. Tatneft relied on:

i) the fact that the Management Board of UTN did not know that the payments were not to pay for the oil;

ii) the source of funds for the payment was concealed;

iii) the monies were not simply paid to Korsan but were siphoned off through *"a highly complex series of sham sale and purchase agreements"*.

628. I have found on the facts that Tatneft had knowledge of the elements of the claim. In particular, any lack of knowledge on the part of the Management Board of UTN had no bearing on Tatneft's knowledge of the payments and the unlawful nature of the payments. As early as June 2009 Tatneft referred to the payments to the accounts of Taiz and Tekhnoprogress as unlawful and having features of financial machinations. The source of the funds for the payment is not an element of the tort for the purposes of knowledge. Similarly, as discussed above, Tatneft had made the link to Korsan and coincidence with the amount paid for the stake in UTN by January 2010 when Mr Maganov was interviewed and is also evident from the April memorandum so any lack of knowledge of the intervening steps did not affect the ability of Tatneft to bring its claim within the limitation period.

629. Tatneft also submitted that the defendants had sought to conceal their involvement in the Scheme and referred to statements (including by Mr Kolomoisky) denying their involvement. However, the evidence of Mr Kulkov was to the effect that failure to disclose the alleged tort committed by him does not prevent the defendant relying on limitation. As Mr Kulkov said, otherwise the position would be that limitation would never start to run if the defendant's failure to admit the claim amounted to concealment.

630. Even if I were to accept Professor Asoskov's formulation of the test, in my view the evidence does not support a finding that the actions of the defendants "*influenced the ability*" of Tatneft to file its claim on time such that the defendants would be precluded from relying on the limitation defence. The examples relied on included the following:

i) that Mr Ovcharenko was reported in Ukrainian Kommersant as saying that the proceeds from UTN's June 2009 share auction would be used to repay the debts owed "*to the Tatar shareholders (UAH 2.4 bln)*" whereas it is Mr Ovcharenko's own case that he never intended the "*Tatar shareholders*" to be repaid;

ii) Mr Ovcharenko lied in an interview with the Kremenchug Investigative Department by saying that UTN's debts to Taiz and Tekhnoprogress had not yet become due (when in fact the payments had already been made) and that he was not personally connected to Korsan;

iii) Mr Ovcharenko falsely stated that the objective of the auction of the shares was to enable UTN to effect a modernisation of its refinery. In fact the objective was

to generate funds to repay the UAH 2.24bn in loans from PrivatBank which enabled the payments to Taiz and Tekhnoprogress.

631. In my view as discussed above, Tatneft from as early as June 2009 believed that a fraud had occurred and the source of the payment (and repayment) by UTN was not an essential element of the claim. As also referred to above, Tatneft was aware of the link between Privat Group and Korsan by 2008.

632. The limitation period starts to run when the claimant had knowledge and not when it was in a position *to "start proceedings"*. In my view on the facts of this case there is no abuse of rights under Russian law to allow the defendants to rely on the limitation defence.

Public policy

633. It was submitted (paragraph 945-948 of Tatneft's closing submissions) that a finding by this court that the Russian law on the limitation period pre-2013 started to run before the claimant had knowledge of the defendants should result in that law being disapplied as contrary to public policy.

634. The defendants referred the court to the dicta of Lord Neuberger in *Morrison v ICL Plastics* [2014] UKSC 48 at [54] and [55]:

> "54. Sixthly, there are policy issues. Both parties advanced arguments based on policy, and I am unimpressed with those arguments in this case. The imposition of prescription and limitation periods inevitably involve balancing competing public and individual interests. In particular, it involves balancing the public interest in valid claims being litigated and legal wrongs being righted with the public interest in claims not lingering over the heads of potential defenders and claims not being difficult to dispose of justly due to their antiquity. Similarly, it is an area which throws up another, familiar, tension: on the one hand, it is desirable to have general and clear rules about limitation, even if they occasionally appear to produce a harsh result; on the other hand, it is sometimes appropriate to have specific exceptions to avoid too many unfairnesses. I see no particular policy reasons for adopting either interpretation in the present case, as each of them seems to me to result in a defensible and appropriate outcome.
>
> 55. Seventhly, and connected with the sixth point, there is the alleged unfairness on a potential pursuer if time runs against him from the date he knows of the injury, even though he may not know of the identity of the person who caused the injury or what the cause of the injury was. In my view, the legislature could perfectly reasonably have assumed that in almost every case, five years from the date of discovery of loss, injury or damage would represent plenty of time for the injured party to discover all he needs to know to bring proceedings. The fact that there may be a very rare case where five years may not be enough is simply

> an example of the inevitable consequence of the compromise which limitation law involves. After all, even under the interpretation favoured by Lord Hodge there could be potential unfairnesses in individual and unusual cases, sometimes to pursuers and sometimes to defenders."

635. I accept the submission for the defendants that ultimately, it is a matter for each legal system to strike a balance between the competing public and private interests that are engaged by the limitation of claims. As Leggatt J stated in *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB) at [827]:

> "Private international law is founded on principles of comity and mutual respect and on the recognition that in many areas of law different approaches may be reasonably taken. That is obviously true in the field of limitation law, which involves striking a balance between allowing claimants to assert their legal rights and protecting defendants against stale claims. Different legal systems may legitimately strike this balance in different ways. An English court should for this reason be very slow to substitute its own view for the solution adopted by the foreign legislature."

636. Tatneft submitted that its objection is not to the three-year period under Russian law but rather to the alleged trigger for such period being the knowledge of the harm, absent knowledge of the perpetrators. Unlike the claimants in *Alseran* it was submitted that the illogicality and unfairness of the Defendants' position applies regardless of whether the harm was mild or severe.

637. It was submitted for Tatneft that a law which provides that time starts to run before a claimant is in a position to properly plead a claim (and indeed could expire before that point) would be manifestly contrary to public policy. It would mean that the more dishonest the defendant, the more likely it is that the law would allow him to get away with it.

638. Tatneft submitted that in *Gotha City (A Body Corporate) v Sotheby's (An Unlimited Company)* The Times, 8 October 1998, Moses J accepted that it may be possible to discern a public policy that a defendant should not be entitled to obtain the benefit of deliberate concealment where that concealment has resulted in an action becoming time barred; and in *Durham v T&N Plc* (unreported 1 May 1996) the Court of Appeal considered it strongly arguable that a limitation period which ran from the date of sustaining personal injury irrespective of whether the claimant did (or even could) know of his injury at that time would be contrary to public policy.

639. However, I accept the submission for the defendants that time started to run on an Article 1064 claim only once the claimant had actual or constructive knowledge that it was the victim of a tort. In many instances, such knowledge would coincide with the knowledge of the proper defendant. In other cases, the claimant, aware it had been caused unlawful harm, was on notice to use the limitation period to identify the proper defendant. That is not fundamentally unjust. In this case I have already discussed the issue of whether the defendants' actions amounted to deliberate concealment and in my view, this is not a case where concealment has resulted in an action becoming time barred.

640. In my view the finding above that the Russian law on the limitation period pre-2013 started to run before the claimant had knowledge of the defendants should not result in that law being disapplied as contrary to public policy.

Conclusion on limitation

641. In the course of closing submissions counsel for Tatneft invited the court to "*stand back*" and look at the case. It was submitted that the defendants put Tatneft to the "*vast expense of proving their fraud*" in the absence of admissions or the documents. Counsel observed that it was *"striking"* that the defendants were asking the court to draw adverse inferences from failings in Tatneft's disclosure when Tatneft had disclosed tens of thousands of documents. [Day 41 p150]

642. As discussed above, the merits of this case do not affect the issue of limitation. Although there was a dispute as to where the burden of proof lay for the purposes of Russian law on limitation, this is not a case where the outcome is dependent on the incidence of the burden of proof.

643. I have dealt above with the detailed submissions made for Tatneft in respect of the witnesses who gave evidence, the individuals who did not give evidence, the absence of certain documents and the documentary evidence which does exist. I have set out my reasons for my findings in respect of these individual areas and the factors which have led me to my conclusion on limitation.

644. It is however worth standing back and considering the case on limitation as presented by Tatneft as a whole. It is correct that there is no single document or single witness which the defendants can point to which establishes their case on limitation. However, there are certain striking features of the case:

i) Firstly, this is not a case where the court has discounted the evidence of a particular witness as unreliable but a case where all four witnesses called for Tatneft on limitation have been found to be evasive, unreliable and in some instances likely to be not telling the truth. Against that background as discussed above, they nevertheless presented a *"consistent"* narrative of *"speculation"* and *"theory"* when it appeared that their assertions that Tatneft and/or SK lacked knowledge conflicted with the evidence of the contemporaneous documents. One might ask why the witnesses presented such a consistent picture. Unfortunately, I have to infer that to a greater or lesser extent they had decided, either individually or collectively, to give evidence which sought to advance Tatneft's case.

ii) Secondly there is the absence of key witnesses: Ms Savelova, Mr Abdullin, Mr Korolkov. Again, much time and effort has been spent explaining the reasons for the absence of each individual. But what is striking in this context is not the absence of a single witness but the collective absence of several key witnesses.

iii) Thirdly, the absence of documentation particularly correspondence between SK and Tatneft in the period 2009-2010. The detailed arguments have been addressed above but the striking feature is the extent of the missing documentation: it is not that one key document is missing which noted a meeting or that the email account of one individual has been lost. The striking feature is

> that the email accounts of several key individuals, Ms Savelova, Mr Syubaev, Mr Aleksashin and Mr Abdullin, have all apparently unfortunately and accidentally been lost in separate incidents and for different reasons at Tatneft and SK.

645. Standing back, it is the coincidence in each and all of these factors that is a striking feature of Tatneft's case on limitation.

646. The court's conclusion on limitation and knowledge does not depend on its findings in relation to any one witness. In my view the conclusion on knowledge is clear based on the inferences that can be drawn from the contemporaneous documentary evidence that is before the court and having regard to the background circumstances. It is impossible for the court to be certain that Tatneft and SK had knowledge on a particular day but in my view, there is no doubt on the evidence before the court, that SK had actual knowledge for the purposes of limitation of both the alleged violation of its rights and all the defendants before 23 March 2013.

647. The adverse inferences which I have drawn in respect of the absence of Ms Savelova and Mr Abdullin and the absence of the emails referred to above merely serve to strengthen the conclusion reached on the evidence which is before the court.

648. If, however I had been in any doubt about my conclusion on limitation having considered in detail the evidence, that would have been dispelled by standing back and taking into account the totality of the striking features of Tatneft's case on limitation.

Other issues

649. I have dealt with the issue of limitation at length because I am clear on the evidence that it is a complete defence to this claim. In the light of my findings, I do not need to consider the case based on constructive knowledge of SK. I also do not consider it necessary to address the numerous other issues raised, both of fact and law, in this case. I propose only to deal with one other Russian law issue namely harm.

Harm

650. Article 1064 provides:

> "General Bases of Liability for the Causing of Harm
>
> 1. Harm caused to the person or property of a citizen and also harm caused to the property of a legal person shall be subject to compensation in full by the person who has caused the harm...
>
> 2. The person who has caused harm shall be freed from compensation for the harm if he proves that the harm was caused not by his fault. A statute may provide for compensation for the harm even in the absence of fault of the person who caused the harm.
>
> 3. Harm caused by lawful actions shall be subject to compensation in the cases provided by a statute. Compensation for harm may be refused if the harm was caused at the request,

> or with the consent, of the victim, and the actions of the person who caused the harm do not violate the moral principles of society."

651. Article 15 of the RCC governs the measure of compensation under Article 1064:

> "Compensation for Losses
>
> 1. A person whose right has been violated may demand full compensation for the losses caused to him unless a statute or a contract provides for compensation for losses in a lesser amount.
>
> 2. Losses means the expenses that the person whose right was violated made or must make to reinstate the right that was violated, the loss of or injury to his property (actual damage), and also income not received that this person would have received under the usual conditions of civil commerce if his right had not been violated (forgone benefit). If the person who has violated a right has received income thereby, the person whose right has been violated has the right to demand –along with other losses –compensation for forgone benefit in a measure not less than such income." [emphasis added]

652. I propose to address the issue of "Harm" in terms of the closing submissions. Other arguments of Russian law were raised in opening submissions in relation to harm which are not necessary to address.

653. In closing submissions Tatneft formulated the issue as follows:

> "416 Article 1064 itself refers to the causation of harm to an individual (i.e., personal injury) or to the property of an individual or a legal person. Property for these purposes can include contractual rights. The critical dispute between the parties prior to the trial was whether Article 1064, read together with Article 15, also allows a claimant to claim financial or economic losses or whether, in every case, the claimant must identify a specific item of existing harmed property. As set out in detail below, it is now very clear indeed, in particular from the important concessions made by Mr Kulkov in his oral evidence, that Tatneft is right to say that Article 1064 includes claims for economic loss or "economic benefits foregone" as the Court of Appeal put it. Tatneft has therefore proved at trial the Russian law case which underpinned the conclusion of the Court of Appeal that Tatneft had a "good arguable case" under Article 1064." [emphasis added]

654. It seems to me that this submission elides the issues of whether Article 1064 allows a claimant to recover for economic losses and whether a claimant can claim under Article 1064 for *"economic benefits foregone"*.

655. The issue was clearly put in the claimant's opening submissions when the latter issue was expressed as follows:

> "260.1 …on Professor Asoskov's evidence, Tatneft has a good claim under Article 1064 if the Scheme caused S-K financial loss (which it did). That is so even if the true analysis is that S-K's only contractual right as at June 2009 was a right to be paid directly by UTN. Whether that contractual right was formally "harmed" by the Scheme does not matter if it is established that the Scheme in fact caused financial loss to S-K." [emphasis added]

656. Thus, Tatneft's case is that SK does not have to show that it had a contractual claim to the payments from Avto, but Tatneft can still claim under Article 1064 because SK has suffered economic loss caused by the Scheme.

657. Tatneft expressed the issue as follows in the opening submissions:

> "260.2. Putting it another way, Tatneft has, on the basis of Professor Asoskov's evidence, a good claim under Article 1064 if (i) S-K's contractual right to be paid by UTN was not itself harmed by the Scheme but (ii) the Scheme nonetheless caused financial loss to S-K by causing it not to receive economic benefits that it had a legitimate expectation of receiving in the ordinary course of business but for the Defendants' unlawful actions. Once again therefore, what matters is the causation analysis based on the facts as they actually were in mid-2009 (including the Ukrainian Judgment)." [emphasis added]

658. The key point is that Tatneft thus asserted that even if the contractual claim of SK is a claim against UTN pursuant to the 2008 Assignment Agreement, under Russian law SK has a claim because it had a *"legitimate expectation"* of receiving economic benefits.

659. In its written closing submissions Tatneft did not engage with the "legitimate expectation" argument expressly. As noted above Tatneft appeared to elide the issues of whether Article 1064 includes a claim for economic loss "or economic benefits foregone". Tatneft relied on (paragraph 451 of its submissions):

i) the broad definition of harm in the *Ivkin* case which it submitted included both damage to property and financial losses; in *Ivkin* the Russian Supreme Court said:

> "As follows from the meaning of Article 1064 of the Civil Code of the Russian Federation, harm is construed as any depreciation of tangible or intangible benefits protected by law, any unfavourable changes in benefits protected by law, which can be either pecuniary or non-pecuniary (intangible)."

ii) the judgment in *Fiona Trust* [2010] EWHC 3199 (Comm) which it submitted shows that harm includes damage to property and financial losses such as lost

profits and that it is a question of fact whether the claimant has suffered harm; in *Fiona Trust* Andrew Smith J said at [96]:

> "There is no dispute that "harm" within the meaning of Article 1064 includes both damage to property and financial losses such as lost profits. It is a question of fact whether a claimant suffers "harm", and in particular whether, if a claimant entered into an "uncommercial" contract, such as a charterparty at an excessively low rate of hire, he suffers "harm" for the purposes of bringing a claim against a third party under article 1064…."

iii) that this was *"consistent"* with Professor Asoskov's evidence.

iv) that this was consistent with the 2020 Commentary on the Civil Code edited by Professor Karapetov (the "Karapetov Commentary") that recognises that *"pure economic losses"* can be recovered.

660. For the defendants it was accepted that *Ivkin* was a wide definition, but it was submitted that whilst Article 1064 does allow claims for economic or financial loss, it is not correct to say that the non-receipt of a payment that you expect to receive is a type of financial loss. [Day 40 p71] It was submitted that:

i) it is necessary to show the violation of a right and Tatneft seeks to circumvent this;

ii) there are no examples in Russian law of cases where liability has been imposed on a defendant where all that the claimant has suffered is a defeated expectation;

iii) the Karapetov Commentary does not reflect the current law but identifies possible developments in the future.

Expert Evidence

661. The relevant sections of the joint report are set out at paragraph 15 as follows:

> "1.2.1. Is it necessary for specific harmed tangible or intangible property to be identified? If so, what constitutes "property "?
>
> 15. Both Experts, with qualifications made below, are in agreement that:
>
> 15.1 The elements of a claim under Article 1064 of the Civil Code are harm, unlawfulness, causation and fault
>
> 15.2 Russian law is based on the principle of "general tort" ("general delict").
>
> 15.3 The notion of "property" is reflected in Article 128 of the Civil Code, which contains the following list: "The following are objects of civil-law rights: things, including money, commercial paper and securities; other property, including property rights; work and services; protected results of intellectual activity and

> means of individualization equated to them (intellectual property); non-material values" Under this Article, property rights include contractual rights.
>
> 15.4 In certain situations, harm to the property may mean harm to property rights (including contractual rights) …"

662. At paragraph 16.2 Professor Asoskov sets out his qualification to the above statement concerning legitimate expectation:

> "Professor Asoskov is of the view that, even where it is not possible to identify assets or property rights (including contractual rights) on which harm has been inflicted, the Russian case law and doctrine recognise that a tort claim is available, where the claimant's legitimate expectations not to incur financial losses as a result of another person's unlawful acts, have been breached. In this situation, harm is understood as any negative change in the value of the claimant's existing property or the property which the claimant expects to receive. This approach is a logical consequence of the principle of "general tort" ("general delict")" [emphasis added]

663. It was submitted for the defendants that Professor Asoskov's analysis of the case law confused claims involving claims for economic loss which involved a violation of rights and claims to protect a legitimate expectation (which did not). In cross examination Professor Asoskov was asked to identify any cases which state that it is sufficient that a claimant has a legitimate expectation of financial benefit. His evidence was that:

> "…Russian judges prefer to write in simpler terms, so they say there had been a financial loss…"

664. Tatneft did not identify or rely upon any authorities in closing submissions to support the submission that legitimate expectation suffices for the purposes of harm under Article 1064.

665. Tatneft relied on extracts from the Karapetov Commentary including the following:

> "In cases of abuse of other rights that do not arise out of an existing relationship in regard to obligations, what the party acting in bad faith violates is not so much a specific right but rather a lawful interest of the affected party.
>
> It is a matter of tort and recovery of pure economic loss. Pure economic losses shall be recovered from a person whose wrongful (including bad-faith) conduct did not cause any damage to the health, personal immunity, honor and dignity, business reputation, property or other absolute rights of the affected party but consisted in directly causing purely economic losses (both costs and lost profit). Financial losses to be recovered were not caused by the infringement of the claimant's

> absolute rights but were sustained by the claimant directly as a result of wrongdoing…"
>
> "Fourth, when dealing with tortious liability one must bear in mind that a classic delict (tort) consists of infliction of harm on the affected party's personal and property rights, whereas the harm itself means violation of such right (e.g., an absolute right of ownership, or personal non-property right to physical integrity). However, recent years have witnessed a brisk development of the pure economic loss doctrine whereby a tort claim seeks compensation of losses incurred by a person as a result of the wrongful (including, expressly dishonest) conduct of another person, who however in the strict sense of this word has not violated any specific personal or property right of the affected party. Such situation arises, for example, in case of a deceit during negotiations, or employment of other bad-faith methods of negotiation, and in a number of other situations. In these situations, compensation of losses does not seek to protect any specific violated right, but rather a lawfully protected interest. The basis for compensation of losses here lies in the direct engineering of financial losses borne by one person through unlawful acts of the other person, rather than the suffering of losses as a consequence of direct interference with any of the latter's absolute or relative rights…" [emphasis added]

666. In reliance on these passages Tatneft submitted (paragraph 462) that these are statements as to what Russian law actually is and the commentator is expressing the view that there can be liability where the defendant has not violated any specific absolute or relative right provided the defendants' unlawful actions have inflicted financial loss.

667. Tatneft also relied on the statement in the Court of Appeal judgment in relation to the defendants' summary judgment application [2017] EWCA Civ 1581 at [23]:

> "Harm can include economic benefits foregone"

It was submitted that Tatneft had:

> "proved at trial the Russian law case which underpinned the conclusion of the Court of Appeal that Tatneft had a "good arguable case" under Article 1064."

668. The context in which that statement was made by the Court of Appeal needs to be considered. The court said:

> "23 …The alleged harm suffered by S-K is the fact that it never got paid as a result of the defendants' allegedly unlawful conduct. "Harm" can include economic benefits foregone; Tatneft asserts that S-K is entitled to be paid for the oil which it has sold; the pleading, in paragraphs 85-89, is saying that the

> benefit of that debt has been foregone and S-K has suffered harm as a result…
>
> 24 The judge was correct to say that Tatneft had in paragraph 48 pleaded the 2008 Assignment Agreement as having terminated the obligations up the contractual chain but it had also pleaded the effect of the Ukrainian Judgment that the assignments were unlawful and invalid by Ukrainian law which would have left the contractual chain intact. All of this is contained in the narrative part of the pleading (paragraphs 13-82) before the assertion of liability under Article 1064 of the RCC….It then pleads causation in paragraph 89:-
>
> "But for the acts and omissions of the Defendants pleaded above comprising the unlawful acts, UTN would have paid Taiz and Tekhnoprogress what it owed them for the Tatneft oil sold and delivered in accordance with the agreements pleaded above, who in turn would have paid Avto and Avto would have paid S-K. As a matter of Russian law, it is an actionable wrong under Article 1064 of the RCC for a person to cause another person to breach his contractual obligations to, or not to pay his debt to, a third person, and the loss sustained by that third person is recoverable as damages by him pursuant to Article 15 of the RCC." [emphasis added]

669. It is, in my view, clear that the Court of Appeal were considering Tatneft's case that SK had a contractual claim either against UTN under the 2008 Assignment Agreement or against Avto but it was not addressing the issue of whether if SK did not have a contractual claim against Avto or, (as expressed by Tatneft in opening and referred to above) even if the true analysis is that S-K's only contractual right as at June 2009 was a right to be paid directly by UTN, it could nevertheless bring a claim under Article 1064.

670. It is clear that the Court of Appeal were only deciding that at that stage Tatneft had not *"nailed its colours to the mast"* and therefore the pleadings in asserting that the money should have reached SK by either one route or the other did not suffer from any *"fundamental inconsistencies"* and thus the case should not be struck out on that basis. At [25]:

> "25. In these circumstances it is clear enough that Tatneft's claim relates to sums that ought to have been (but were not) paid for the oil to S-K. Tatneft has not nailed its claim solely to the mast of the 2008 Assignment Agreement but is saying that the money for the oil should have reached S-K by whatever route was appropriate. If the defendants want to rely on the 2008 Assignment Agreement as a matter of defence and to say that UTN's debt was discharged by payment to Tekhnoprogress and Taiz, that defence can be pleaded and can be tried but the claim (that payment for the oil was stolen by the defendants) cannot now be said to be bound to fail. Indeed one wonders if the defendants are likely to plead that Tatneft's claim is destroyed

> by the assignment when the position may well be (1) that it was the defendants themselves who procured the Ukrainian courts to hold that the assignment was invalid and (2) that the consequence of that plea would be that the contractual chain remained inviolate." [emphasis added]

671. In my view the Court of Appeal decision does not provide support for Tatneft's contention that as a matter of Russian law a claim can be brought under Article 1064 where the claimant does not assert a contractual breach but only a legitimate expectation of an economic benefit. The Court of Appeal were not considering this argument.

672. I note that Tatneft do not now plead a case that the 2008 Assignment Agreement was valid or invalid. In the context of submissions on arguments raised by the defendants on the basis of estoppel/abuse Tatneft stated (paragraph 611 of closing submissions):

> "…the short point in relation to all of the abuse allegations is that Tatneft has not pleaded that the 2008 Assignment Agreement was invalid and cannot therefore be guilty of making that allegation abusively."

673. As to the *Karapetov* commentary Tatneft did not include in its extracts reproduced in its closing submissions the following passage (although it was included in part in Professor Asoskov's report):

> "What can be done in other situations where abuse of one person's rights does not produce indirect consequences like violation of another person's relative or absolute right but still causes that person to suffer losses? It appears that in such situations recovery of losses is also possible provided a case can be made for a tort claim for compensation of pure economic losses. A reference to a violated right as a condition for recovery of losses is made in Article 15 and in Article 1064(1) of the Russian Civil Code, but it does not prevent courts from gradually developing a practice of recovery of purely economic losses, which are not a consequence of an initial interference with certain absolute or relative rights of the claimant, through delictual (tort) claims. In such situations, losses are recovered when a person's unlawful acts cause damage to another person's legitimate interests, resulting in financial losses incurred by the latter. The provision of the paragraph in question shall have an extensive interpretation: damages shall be recovered also in those cases when an obvious abuse of right has been aimed against a particular affected party causing a violation of their legitimate interest of not incurring financial losses as a result of such abuse. Effectively, it would be reasonable to imply a violation of a legitimate interest in inviolability of one's property." [emphasis added]

674. In considering the state of Russian law, it was notable in my view that in placing reliance on the Karpetov Commentary in its closing submissions, Tatneft referred to Mr

Kulkov's view, as expressed in his Kekhman Report and affirmed in cross-examination that:

> "commentaries such as the Karapetov Commentary, although not binding as a source of law, are accorded "great weight", especially when the law is silent on a particular point." [emphasis added]

675. In my view the *Karpetov commentary* sets out a proposition which is not supported by case law and I infer that it does not represent the current state of the law but is a statement as to the possible future development of the law.

676. I note that although Professor Asoskov relied in his (fourth) expert report on a further commentary from Professor Sukhanov in 2019 in particular from Chapter 13 by Alexander Yagelnitsky (Professor Asoskov's assistant in preparing his report for these proceedings), Tatneft do not appear to rely on this in closing submissions.

Conclusion on harm

677. In my view had it been necessary to decide the point, I would have held that *"harm"* for the purposes of Article 1064 does not extend to a claim by SK based only on financial loss caused by the non-receipt of economic benefits which it had *"a legitimate expectation"* of receiving.

Overall Conclusion

678. In summary as set out above I find that:

i) Prior to 1 September 2013, in order for time to start to run under Article 200(1) of the RCC, it was sufficient if a claimant knew or should have known of the violation of its right, and it was not necessary that the claimant knew or should have known of the identity of the proper defendant.

ii) S-K had actual knowledge of:

a) the alleged violation of its rights; and

b) (if, contrary to my finding above, it was necessary as a matter of Russian law) the identity of the defendants as proper defendants

prior to 31 August 2010.

iii) If I were wrong on that, S-K had actual knowledge of

(a) the alleged violation of its rights and

(b) the identity of the defendants as proper defendants

prior to 23 March 2013 (being the date three years before the issue of the Claim Form on 23 March 2016).

iv) The defendants are not prevented from pursuing a limitation defence on the basis that it would be an abuse of rights under Russian law for them to do so.

v) The application of the three-year limitation period under Russian law means that Tatneft's claim is time-barred and that limitation period should not be disapplied as incompatible with English public policy.