Neutral Citation Number: [2017] EWCA Civ 1581

Case No: A3/2016/4376

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE PICKEN
[2016] EWHC 2816 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2017

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE DAVID RICHARDS
and
THE RIGHT HONOURABLE LORD JUSTICE HAMBLEN

- -

Between:

PJSC TATNEFT	**Appellant/ Claimant**
- and -	
1) GENNADIY BOGOLYUBOV **2) IGOR KOLOMOISKY** **3) ALEXANDER YAROSLAVSKY** **4) PAVEL OVCHARENKO**	**Respondents /Defendants**

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Lord Goldsmith QC, Mr Richard Millett QC, Mr Paul McGrath QC, and Mr David Davies (instructed by **Akin Gump LLP**) for the **Appellant**
Mr Ali Malek QC, Mr Matthew Parker and Mr Philip Hinks (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **First Respondent**
Mr Mark Howard QC, Mr Jonathan Adkin QC, Ms Ruth Den Besten & Mr Tom Ford (instructed by **Fieldfisher LLP**) for the **Second Respondent**
Mr Kenneth MacLean QC and Mr Owain Draper (instructed by **Mishcon de Reya LLP**) for the **Third Respondent**
Mr Tom Weisselberg QC (instructed by **Byrne & Partners LLP**) for the **Fourth Respondent**

Hearing dates: 25th, 26th & 27th July 2017

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Approved Judgment

Lord Justice Longmore:

Introduction

1. This is the judgment of the court to which all members of the court have contributed.

2. The Appellant ("Tatneft") appeals against the decision of Picken J dated 8 November 2016 by which he held that:-

    1) The applications of the Second Respondent, Mr Kolomoisky, and the Fourth Respondent, Mr Ovcharenko, to set aside the order permitting service outside the jurisdiction succeeded on the basis that there was "no serious issue to be tried";

    2) The applications of the First Respondent, Mr Bogolyubov, and the Third Respondent, Mr Yaroslavsky, for summary judgment succeeded on the basis that Tatneft's claims have "no real prospect of success";

    3) Tatneft's application for an amendment to the Particulars of Claim be refused as it raised a "new and time-barred cause of action";

    4) The Respondents' application for discharge of the Worldwide Freezing Order ("WFO") granted against them succeeded.

3. Tatneft also makes an application to amend its grounds of appeal and to file a supplementary skeleton argument and further applications (which were not pressed at the hearing) to adduce further evidence of Russian law and to rely on further materials.

4. The appeal hearing was a rolled-up hearing for permission to appeal and, if permission was given, of the appeal. We give permission to appeal.

Background

5. The judge set out the factual background at paragraphs 3 to 12 of the judgment. His detailed summary was derived from a Case Memorandum produced by the Respondents as well as the skeleton arguments produced by Tatneft. We adopt his detailed summary for the purpose of this judgment. What follows is therefore a brief summary of the salient facts.

6. Tatneft is one of the largest oil producers in Russia with 33.6% of its shareholding owned by the Government of Tatarstan, Russia. Tatneft supplied oil to a refinery owned by a Ukrainian company, PJSC Transnational Financial and Industrial Company 'Ukrtatnafta' ('UTN'). This oil was delivered directly to UTN's oil refinery but was sold by Tatneft through a chain of intermediary companies:-

    1) Tatneft sold the oil to its commissioning agent, a Russian company called Kompaniya Suvar-Kazan LLC ('S-K'), pursuant to a 'Suvar-Tatneft Commission Agreement' dated 26 January 2007;

2) S-K then sold the oil on to a Ukrainian company, Private Multi-Sector Production – Commercial Enterprise AVTO ('Avto'), pursuant to a 'Suvar-Avto Framework Contract' dated 23 April 2007;

3) Avto was commissioning agent for a Ukrainian company, Taiz LLC ('Taiz'). This arrangement was governed by a 'Taiz-Avto Commission Agreement' dated 19 April 2007; Taiz then either sold the oil directly to UTN (under what was referred to as the 'Taiz-UTN Contracts') or via another intermediary company, 'Tekhnoprogress' under the 'Tekhnoprogress-UTN Contracts'.

7. The Respondents to this appeal are four businessmen: (i) Mr Bogolyubov, a Ukrainian businessman; (ii) Mr Kolomoisky, a Ukrainian-Israeli businessman; (iii) Mr Yaroslavsky, a Ukrainian businessman; and (iv) Mr Ovcharenko. Mr Ovcharenko became chairman of UTN's management board in 2007. In February 2010, Mr Bogolyubov and Mr Kolomoisky were elected to UTN's Supervisory Board. At around the same time, Mr Yaroslavsky also joined UTN's Supervisory Board.

8. Shortly after Mr Ovcharenko became chairman, UTN's payments for the oil delivered to it ceased. On 26 November 2007, S-K commenced proceedings in the International Commercial Arbitration Court at the chamber of Commerce and Industry of the Russian Federation ('ICAC') in Russia against Avto for non-payment of sums due under the Suvar-Avto Framework Contract. Avto was not, however, in any position to pay given that it had not received payments pursuant to the contractual chain. On 18 April 2008 S-K entered into an agreement with Avto, Taiz and Tekhnoprogress pursuant to which Avto's obligation to pay S-K was terminated and the rights of Taiz and Tekhnoprogress to receive payment from UTN were assigned to S-K. This agreement is referred to as 'the 2008 Assignment Agreement'.

9. Further to the 2008 Assignment Agreement, S-K gave notice of the assignment to UTN and made a demand against UTN for 2,128,818,965.50 Ukrainian Hryvnia ("UAH"). S-K then issued proceedings against UTN in the Arbitrazh Court of the Republic of Tatarstan. By a written judgment dated 5 September 2008 ('the Tatarstan Judgment') the Arbitrazh Court concluded that UTN had given consent to the assignment and gave judgment for S-K, a decision that was upheld on appeal on 24 November 2008. Pursuant to the Tatarstan judgment, UTN was required to pay UAH 2,458,138,279.34 to S-K.

10. UTN, however, brought proceedings against S-K, Avto, Taiz and Teknoprogress in Ukraine. By a judgment given in September 2008 (upheld on appeal on 8 October 2008), the Ukrainian court concluded that the 2008 Assignment Agreement was invalid under Ukrainian law and for what it may be worth, Russian law. It is said that the effect of this judgment, referred to as 'the Ukrainian Judgment' was that S-K could only recover against UTN's assets in Russia and not against its assets in Ukraine, where the majority of the assets were situated. S-K was therefore only able to recover US$105.3 million against the assets held in Russia, pursuant to an enforcement order issued on 3 December 2008 ('the Russian Enforcement Order').

11. It was against this background that, on Tatneft's case, the Respondents engaged in the "Oil Payment Siphoning Scheme" ("the Scheme") in fraud of S-K and Tatneft. The essentials of the Scheme were described as follows in Tatneft's skeleton argument at the hearing below, as cited by the judge at [9]:

> "In bare essentials, it consisted of the Defendants acquiring control over Taiz and Tekhnoprogress in the first half of 2009, and then procuring a series of payments totalling 2.24 billion Ukrainian Hryvnia ('UAH') from UTN to those companies in June 2009. This represented purported payment for the oil by UTN. However, this UAH 2.24 billion never found its way to S-K, the seller of the oil. It was never intended to. Instead it was siphoned away in a series of sham share sale and purchase agreements whereby Taiz and Tekhnoprogress used the money purportedly to purchase at gross overvalue a series of shareholdings in worthless or fictitious 'junk' companies. The counterparties to these sham transactions were a series of Ukrainian and offshore companies of obscure ownership, although many of them are now known to be connected with D1 and D2 (as D1 now admits). Having paid away all the funds pursuant to the sham transactions, Taiz, Tekhnoprogress and Avto were then driven into bankruptcy based on minuscule debts."

12. The finale of the alleged Scheme involved UAH 2.24 billion being paid by UTN to Taiz and Tekhnoprogress following which the sums were transferred to another entity, 'Korsan'. On 12 May 2009, Tatneft's 18.296% indirect shareholding in UTN had been confiscated. On 30 June 2009, Korsan signed a sale and purchase agreement with UTN so as to obtain 18.296% of UTN's shareholding for UAH 2.1 billion. Accordingly, Korsan held the shares in UTN which were previously owned by Tatneft and, on Tatneft's case, had used the proceeds of the Scheme to fund that acquisition.

13. As the judge stated at [11]:

> "Accordingly, Tatneft argues, the end result was that the Defendants had used money that should have been paid ultimately to S-K and then on to Tatneft to acquire Tatneft's own confiscated shareholding in UTN: the money went back into UTN, leaving Korsan holding the shares in UTN previously held by Tatneft's affiliates, with the added advantage that UTN's oil money debt had been purportedly discharged by the payment to Taiz and Tekhnoprogress, so improving its balance sheet."

14. Tatneft brings this claim as an assignee of S-K under an assignment agreement dated 22 October 2015 – the 2015 "Compensation Agreement". This was entered into against the background of the pending bankruptcy of S-K. The scope of this assignment and whether it covers the claims made is in issue.

15. Tatneft applied for a WFO on 15 March 2016. The WFO was granted by Teare J at a without notice hearing the following week. Tatneft then commenced proceedings on 23 March 2016.

16. Tatneft's claim is advanced under Article 1064 of the Russian Civil Code ("RCC") claiming compensation for the harm allegedly caused to it by the Respondents' unlawful acts resulting in the non-payment or non-receipt by S-K of the sums due in

respect of the oil. Compensation is claimed on the basis of the US$439.4 million due to S-K from Avto under the Suvar-Avto Framework Contract less the US$105.3 million recovered pursuant to the Tatarstan Judgment, resulting in a claim of US$334.1 million plus interest.

The issues

17. The principal issues which arise on this appeal are:

    1) whether the judge was correct to hold that, even if the facts pleaded in the original Particulars of Claim were true, Tatneft had no real prospect of success in establishing at trial that the Respondents were liable to pay compensation under Article 1064 of the RCC;

    2) whether the judge was correct to conclude that the draft amendments to the Particulars of Claim involved the assertion of a new and time-barred cause of action which was in any event bound to fail as a matter of causation;

    3) whether Tatneft should have permission to amend its amendment application notice and grounds of appeal to contend that even if the draft amendments involved a new cause of action, permission to amend should be given pursuant to CPR 17.4 and, if so, whether such permission should be given;

    4) whether the judge was correct to hold that as a matter of construction of the 2015 Compensation Agreement the claim pleaded in Tatneft's original Particulars of Claim did not fall within it; and

    5) whether the judge was correct to hold that he would have in any event found that Tatneft had no real prospect of success in relation to the Third Respondent on the basis that the facts pleaded against him, even if true, could not establish his liability under Article 1064 or the RCC.

18. The judge dealt with issue (4) first but it is more logical, as Lord Goldsmith QC for Tatneft pointed out, to deal with the nature of the claim made by Tatneft before deciding whether the claim (whatever it is) falls within the 2015 Compensation Agreement.

Issue 1

Whether the judge was correct to hold that, even if the facts pleaded in the original Particulars of Claim were true, Tatneft had no real prospect of success in establishing at trial that the Respondents were liable to pay compensation under Article 1064 of the RCC.

19. Article 1064 provides:-

> "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.

> A statute may place a duty for compensation for harm on a person who is not the person that caused the harm.
>
> A statute or contract may establish a duty for the person who has caused the harm to pay the victim compensation in addition to compensation for the harm.
>
> 2. The person who has caused the harm is 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."

20. Tatneft's original particulars of claim set out the factual background of the Scheme as described above under the headings:-

    1) the forced takeover of UTN (paras 13-27);

    2) confiscation of Tatneft's direct and indirect shareholdings in UTN (paras 28-34);

    3) the chain of oil supply agreements (paras 35-45);

    4) the assignment to S-K of Taiz, Tekhno's and Avto's claims against UTN, (paras 46-49 stating among other things that the payment obligations under the contractual claim were terminated); and

    5) the Tatarstan and Ukraine Judgments (para 50-54).

    The pleading then gives particulars of the Scheme itself (paras 55-80) and the defendants' role in the Scheme (paras 81-82). After all this, it then asserts that each of the defendants is liable under Article 1064 of the RCC. It sets out the terms of Article 1064 and alleges that S-K suffered harm caused by the unlawful acts of the defendants (para 85-89), leaving it for the defendants to prove that they did not act intentionally or negligently in causing the harm.

21. Tatneft relied on two expert reports from a Professor of Law at the Moscow School of Social and Economic Sciences, Professor Boris Karabelnikov, who stated that Article 1064 set out a "general tort principle" of Russian law and that the facts set out in a statement of facts (which replicated the Particulars of Claim) constituted unlawful acts for the purposes of Article 1064 of the RCC. He said in paragraphs 23 and 29 of his witness statement:-

> "23. Having considered the actions committed by the prospective defendants listed in para 170 of the Statement of Facts or organized by them, I believe that under the "general tort" principle of Russian law these actions, or at least some of them, constitute unlawful acts for the purposes of Article 1064 of the Civil Code. In my opinion failure to pay the outstanding debts for the delivery of oil and the spending of money received from UTN in settlement of those debts for the purchase of shares of entirely unrelated companies of dubious value constitutes a manifest unlawful operation aimed at the infliction of harm to S-K (the infliction of harm is by itself a sufficient test for detection of unlawfulness of operations of the tortfeasors) and, also most likely, money laundering (since, according to the Statement of Facts, see paras 116-127, money paid for shares of various dubious companies were transferred under transactions (i) not exercised at arm's length (ii) undertaken for no good or valuable consideration and/or at an patent gross overvalue, (iii) undertaken for no discernible genuine commercial purpose and (iv) on occasions transacted out of order)…….
>
> 29. Based on the facts as set out in the Statement of Facts (see paras 128 to 134 describing abrupt bankruptcy of intermediary companies which owed money to S-K), I believe that it is clear that, but for the intervention of the prospective defendants, UTN's money that paid for the oil would have reached S-K, and S-K would have paid Tatneft. Therefore, a Russian court would, in my view, be likely to find that there is a causal link between the unlawful actions of the prospective defendants and the harm suffered by S-K and, gradually, Tatneft."

22. The judge did not attach any particular significance to Professor Karabelnikov's explanation of the "general tort principle" displayed in Article 1064 but, at the instance of Mr Ali Malek QC for the First Defendant, made a detailed inquiry into the requirements of "harm", "unlawful acts" and "causation". He held (1) that the pleaded "harm" was Avto's failure to pay its contractual debt but that the pleaded 2008 Assignment Agreement had terminated that contractual obligation and (2) that any unlawful act had not "caused" the pleaded harm since (a) there was no longer any contractual obligation up the chain of contracts and (b) S-K were just frustrated creditors who was never going to be paid anyway. As the judge put it:-

> "53. The inescapable conclusion, in the circumstances, is that the claim as put forward in the (unamended) Particulars of Claim is bound to fail and so has no 'real prospect of success'. Very simply, since Avto, Taiz and Tekhnoprogress had all been released from their contractual obligations pursuant to the 2008 Assignment Agreement, the Defendants cannot have caused Taiz and Tekhnoprogress "to breach their contractual obligations to pay the oil money upstream" (paragraph 88(i) of the Particulars of Claim) and the bankruptcies of Avto, Taiz

and Tekhnoprogress cannot have deprived S-K of "its claims against Avto". The Defendants cannot, therefore, have committed the "unlawful acts" which are alleged against them. In circumstances where the existing claim describes that "harm" as being S-K's contractual rights as against Avto, such rights having ceased to exist as a result of the 2008 Assignment Agreement, it is impossible to see how the claim as currently framed can succeed. The "harm" element is not made out. It is not open to Mr Millett QC simply to refer to the payments to Taiz and Tekhnoprogress in the abstract: if Taiz and Tekhnoprogress were under no contractual obligations 'up the chain', there can have been nothing unlawful about the steps allegedly taken by the Defendants. Nor can Tatneft have suffered the "harm" which it is alleged to have suffered since S-K had already discharged Avto (and Avto had already discharged Taiz and Tekhnoprogress) from any obligation to make payment in respect of the oil deliveries.

…

56. … I am satisfied that, in truth, there was never any prospect of S-K receiving the oil monies, and that S-K would have remained a “frustrated creditor” irrespective of the Oil Payment Siphoning Scheme …

57. …Tatneft's case must necessarily, therefore, entail the contention that such payments were intended ultimately to come to the Defendants, and not to find their way to S-K/Tatneft. It follows from this that S-K/Tatneft would have been in the same position as they have been ever since UTN stopped making payments 'up the chain' after Mr Ovcharenko took over UTN, regardless of whether the Oil Payment Siphoning Scheme took place or not. Causation is, accordingly, not made out on the basis of Tatneft's own pleaded case. As Mr Weisselberg QC pithily put it during the course of his oral submissions, “the factual background demonstrates that this was harm that was already being suffered, was always being suffered and the payments made as part of the alleged siphoning scheme made no difference at all to the harm that had been suffered by S-K”

…

63. … The Particulars of Claim in the present case, despite their length and detail, suffer from fundamental inconsistencies which simply cannot be, and certainly should not be, overlooked. The conclusion which I have reached has not entailed any sort of 'mini-trial'; it is merely the result of examining how Tatneft puts its own case.”

23. These conclusions, with respect to the judge, stem from a misappreciation of Tatneft's (perhaps unnecessarily lengthy) pleading. 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. This is also made clear by the terms of paragraph 55 which introduces the particulars of the Scheme:-

> "55. 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."

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. When it comes to that assertion, Tatneft explains in paragraph 87 that the reason it has a claim in US Dollars is that:-

> "(i) S-K's rights against Avto under the Suvar-Avto Framework Contract were denominated in US Dollars;
>
> (ii) the Assignment Agreement was a forced step for S-K, in mitigation of the harm that it was suffering by virtue of UTN's failure after October 2007, in breach of contract, to pay what it owed Taiz and Tekhnoprogress for Tatneft oil, and consequently did not and does not amount to an irrevocable

> election by S-K to abandon its US Dollar claims and rights against Avto and substitute them with UAH claims and rights against UTN, particularly in circumstances where UTN (it is to be inferred under the control or at the direction of the Defendants) successfully impugned the Assignment Agreement before the Ukrainian courts. In any event, the Defendants' unlawful actions in perpetrating the oil payment siphoning scheme were consistent and only consistent with the Assignment Agreement being of no effect, and followed not long after the Ukrainian judgments invalidating the Assignment Agreement."

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."

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.

26. Nor can we agree with the judge's decision on causation. He appears to be saying that the defendants are so fraudulent that, even if they had not concocted the pleaded scheme, they would have found some other way to ensure that S-K was never paid. As Lord Goldsmith QC put it, it would be grotesque if the defendants could evade liability for their fraud by saying they would have committed another wrong by ensuring non-payment. If that is really their case, they can tell the court that in the course of their defence. But for now, it must be arguable that, if the defendants had not entered into the Scheme designed to deprive S-K of the value of the oil payments, payments would have been made either up the contractual chain or by the assignment route.

27. We cannot therefore agree with the judge that the Particulars of Claim suffer from any fundamental inconsistencies. If they did, they could be struck out; the judge chose rather to give summary judgment in favour of the defendants who have submitted to the jurisdiction but it seems to us that on their true construction the Particulars of Claim state an arguable case and show (a) that there is a serious case to be tried as against the Second and Fourth defendants who have not yet submitted to the jurisdiction and (b) that there is a sufficiently real prospect of success for the purpose of setting aside the order for summary judgment.

Issue 2

Whether the judge was correct to conclude that the draft amendments to the Particulars of Claim involved the assertion of a new and time-barred cause of action which was in any event bound to fail as a matter of causation.

28. This involves consideration of the following issues:

1) Does the question of whether the amendments raise a new cause of action fall to be determined as a matter of English law or of Russian law?

(a) If English law, was the judge correct to conclude that the amendments raised a new cause of action?

(b) If Russian law, was the judge correct to conclude that the amendments raised a new cause of action?

2) Was the judge correct to conclude that the draft amended claim had no real prospect of success as it was bound to fail as a matter of causation?

Does the question of whether the amendments raise a new cause of action fall to be determined as a matter of English law or of Russian law?

29. It was common ground that Russian law applied to the substance of the claims made by virtue of the Rome II Regulation ("Rome II").

30. Tatneft submitted that the question of whether one Russian law claim involves the same cause of action as another Russian law claim can only logically be answered by reference to Russian law.

31. Further or alternatively, Tatneft submitted that Russian law applies pursuant to Article 15(h) of Rome II which provides that the law applicable to the claim, and not the *lex fori*, governs "the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation".

32. In our judgment, the judge was correct to hold that the question of whether or not the amendments raised a new cause of action is a procedural matter which falls to be decided by the procedural rules of the forum. It concerns what is meant by a "new claim" for the purpose of this court's procedural rules and the manner in which a claim must be pleaded.

33. As made clear in Article 1.3 of Rome II, it does not apply to procedure. Article 15(h) is not in point since one is not here concerned with "the manner in which an obligation may be extinguished" or rules of limitation, but with the English court's procedural rules in relation to pleadings. There was no dispute that the relevant limitation period, and when that period began to run, was a matter of Russian law.

Was the judge correct to conclude that the amendments raised a new cause of action as a matter of English law?

34. In considering whether an amendment raises a new cause of action it is the essential facts giving rise to the original and the new cause of action which need to be identified and compared.

35. This involves considering the facts at a high level of abstraction. As stated by Millett LJ in Paragon Finance Plc v D B Thakerar & Co [1999] 1 All ER 400 (CA) at 405f:

> "…only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction."

36. In Smith v Henniker-Major & Co [2002] EWCA Civ 762, [2003] Ch 182 at [94]-[96] Robert Walker LJ referred to this passage and summarised the approach to be followed in these terms:

> "…in identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading."

37. The judge directed himself properly in law in relation to this issue. He referred to the cases of Paragon Finance v DB Thakerar & Co [1999] 1 All ER 400 at 405 and Co-operative Group Ltd v Birse Developments Ltd [2013] EWCA Civ 474, at [19]-[22].

38. As the judge held at [92]:

> "….in order to determine whether a proposed amended claim is a new claim involves comparing "the essential factual elements in a cause of action already pleaded with the essential factual elements in the cause of action as proposed". The amendment will introduce a new cause of action if there is a *"change in the essential features of the factual basis"* relied upon."

39. In the Claim Form the claim is described as follows:

> "As part of, and in order to finance, the forced acquisition of the Claimant's shares in UTN, the Defendants orchestrated or procured or participated in the wrongful diversion of US $439.4 million (or its UAH equivalent) of cash out of Taiz and Tekhnoprogress, with the consequence that those up the supply chain (namely S-K and ultimately the Claimant) did not get paid."

40. The original Particulars of Claim were structured under various headings as already described. Under the heading "The Oil Payment Siphoning Scheme" the main elements of the Scheme were summarised in paragraph 55, as set out above.

41. Details of the Scheme were then set out in paragraphs 56-80. The Defendants' role in the Scheme was set out in paragraphs 81-82. The Defendants' Liability under Article 1064 of the RCC was set out in paragraphs 83-90. This section began with the following paragraph:

> "83 By reason of the facts and matters pleaded above, each of the Defendants is liable under Article 1064 of the RCC to compensate S-K, and by virtue of the S-K Tatneft Assignment Tatneft for harm caused by the Oil Payment Siphoning Scheme."

42. Article 1064 of the RCC was then set out in paragraph 84 and four necessary elements of such a claim were stated in paragraph 85 to be:

> "…(i) infliction of harm to the claimant, (ii) an unlawful act on the part of the defendant, (iii) causation between the act of the defendant and the harm suffered by the claimant, and (iv) guilt of the defendant (either intention or negligence)."

43. These four elements were then addressed in paragraphs 86-90 under headings which reflected each of them. It was the amendments to these paragraphs that the Respondents and the judge concentrated upon.

44. In relation to the four elements of Article 1064 claim paragraphs 86-89 were amended as follows:

> "(a) Harm
>
> 86 As set out above, rather than abiding by the Tatarstan judgments, the Defendants caused UTN to make payment of the oil monies to Taiz and Tekhnoprogress, a course of conduct consistent only with the invalidity of the Assignment Agreement. However, as pleaded above, the oil monies were then misappropriated by the Defendants before they could be passed up the contractual chain to S-K. Under Article 15 of the RCC, S-K is entitled to recover compensation representing the full amount of the debt that Avto ~~owed it but which it~~ failed to pay due to the unlawful acts pleaded below ~~above~~, namely the USD 439.4 million in oil monies less the USD 105.3 million recovered by way of enforcement of the Decision of the Arbitrazh Court of the Republic of Tatarstan dated 28 August 2008 (which S-K subsequently paid to Tatneft under the Suvar-Tatneft Commission Agreement), in total USD 334.1 million.
>
> …
>
> (b) Unlawful acts
>
> 88 Tatneft relies on the following facts and matters as constituting relevant unlawful acts committed by the Defendants or some of them under the 'general tort' 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 ~~via~~ to Avto ~~to S-K~~ 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) ~~by~~ taking over and procuring the bankruptcy of Avto, Taiz and Tekhnoprogress as pleaded at paragraphs 76 to 80 above;, ~~they deprived S-K of the full value of its claims against Avto under the Suvar-Avto Framework Contract (and in consequence any rights of recourse that Avto might otherwise have had downstream against Taiz and Tekhnoprogress, and that Taiz and Tekhnoprogress had against UTN, were rendered worthless);~~ 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.

(c) Causation

89 But for the acts and omissions of the Defendants pleaded above comprising the unlawful acts, UTN would have either paid S-K directly under the Assignment Agreement or else 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 (but for the unlawful Oil Payment Siphoning Scheme) would (consistently with having received the money from UTN and consistently with the position under Ukrainian law) 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.

89A Accordingly, S-K was lawfully entitled to payment for the oil supplied to UTN through the contractual chain, whether directly, pursuant to the Assignment Agreement and the Tatarstan judgments or indirectly via Taiz, Tekhnoprogress and Avto. By means of the Oil Payment Siphoning Scheme described above, the Defendants intended and ensured that S-K would not receive such payments and that they would instead be diverted and misappropriated for the Defendants' own benefit as aforesaid. In the premises, the Defendants caused S-K not to receive substantial payments to which, on any view, it was lawfully entitled and thereby caused loss to S-K in the amount of the payment not received. To the extent that they did not cause these events they connived in and/or facilitated them and thus

> participated in the unlawful acts for the purposes of articles 1064 and 1080 of the Russian Civil Code."

45. The Appellant submitted that both the original and the amended claims arise out of the same essential facts, namely the Scheme. Both claims are for compensation under Article 1064 in respect of that Scheme and no new facts are alleged in respect of the Scheme. The judge was wrong to characterise the Scheme as being merely a matter of context. The Scheme was and remains the essential factual basis of the claims made.

46. The Respondents submitted that, as the judge found, the amendments made to the pleaded elements of the Article 1064 claim reflect a change in the essential factual basis of the claim made. In particular, as the judge held at [98]:

> "…whereas the claim advanced in the Particulars of Claim has as its focus the *"wrongful diversion"* of the oil monies from Taiz and Tekhnoprogress and assumes that those monies would, but for the Oil Payment Siphoning Scheme, have found their way 'up the chain' to S-K, the proposed amendments add a claim based on the applicability of the 2008 Assignment Agreement, and so payment directly from UTN to S-K. It follows that the amendments focus not on any diversion of monies from Taiz and Tekhnoprogress but on the Defendants procuring UTN not to pay S-K. This is a different and necessarily new claim."

47. As the authorities make clear, what needs to be identified is the bare minimum of essential facts giving rise to the original and the amended cause of action.

48. In our judgment, the essential factual basis of the claim made is the Scheme. Tatneft's case is that the Respondents carried out the Scheme in order to defraud S-K of the value of the oil payments owing to it (paragraph 55). That gives rise to liability under Article 1064 for the harm caused thereby (paragraph 83).

49. The essential elements of the Scheme are set out in paragraph 55. It involved "the value of the oil payments" being paid by UTN to Taiz and Tekhnoprogress and the "siphoning out" of those payments from Taiz and Tekhnoprogress "in fraud" of S-K. The steps by which this was done are then set out in sub-paragraphs (i) to (iv).

50. Whilst paragraph 55 asserts that the oil payments were owed to S-K it does not specify whether that was pursuant to the chain of contracts or the 2008 Assignment Agreement. For the purpose of the claim there made that does not matter. What matters is that there was such an entitlement and that S-K was never paid, which is indisputable.

51. This case is consistent with the general tort liability under Article 1064 which is explained in the excerpts from the evidence of Professor Karabelnikov referred to above. As further explained in his first expert report:

> "59. According to this principle of "general tort", "*[t]he obligations arising from infliction of harm are based on the so-called general tort principle, whereby any person is prohibited from inflicting harm to the property or a person, and any infliction of harm to another person is unlawful, unless the person was authorised to inflict harm*". Operation of that fundamental principle does not depend upon

> existence of any additional piece of law specifically prohibiting certain actions or inactions….
>
> ….
>
> 63. On the basis of the facts contained in the draft amended Particulars of Claim and the Statement of Facts, the alleged Oil Payment Siphoning Scheme was a complicated and sophisticated scheme, it included many different elements, for example: (i) establishment of corporate control over different companies in breach of the corresponding provisions of applicable corporate law; and (ii) siphoning of money from Taiz and Tekhnoprogress by sham transactions. Irrespective of whether each of those elements could (or could not) be contrary to provisions of some specific norms of Ukrainian law (corporate, contractual, procedural), each of them qualifies as *unlawful as matter of Russian law* – for the simple reason that the Oil Payment Siphoning Scheme *was aimed at the infliction of harm* to S-K and hence was unlawful for the purposes of Article 1064. This is how the principle of "general tort" works: any harm is deemed to be unlawful, unless there is a proof submitted that the harm was caused lawfully….."

52. In summary, paragraph 55 sets out essential facts which are sufficient to found an arguable general tort liability under Article 1064. For the purpose of asserting such a cause of action it does not matter whether "the value of the oil payments" is owed to S-K under the contractual chain or the 2008 Assignment Agreement. It must follow that amendments which assert that the liability arises under the 2008 Assignment Agreement are not adding essential facts to such a cause of action.

53. The position is as summarised by Tatneft in its amended paragraph 54B:

> "….irrespective of the validity of the Assignment Agreement, and as the Defendants were well aware, S-K had a lawful right to be paid for the oil that had been supplied to UTN through the contractual chain, either directly, pursuant to the Assignment Agreement, or indirectly, through the intermediate companies in that contractual chain. By carrying out the Oil Payment Siphoning Scheme described below, the Defendants misappropriated UTN's payment for the oil for their own benefit and thus ensured that S-K would not be paid (thereby causing loss to S-K)."

54. It is correct to observe that the original Particulars of Claim go on in paragraphs 86-90 to assert a more particularised case under Article 1064 which focuses on S-K's right to be paid arising under the contractual chain. As the Respondents submit, and the judge found, there are differences between a case put on this specific basis and one put on the specific basis of a right to be paid under the 2008 Assignment Agreement. In particular, it may be said to be asserting a different "harm" (damage to a different contractual right) and this may affect the focus of the "unlawful acts", "causation" and "intention". As already explained, however, when the pleading as a whole is properly analysed, Tatneft has not nailed its claim to one contractual mast.

55. The Respondents and the judge emphasised that the original case operated at the level of Taiz and Tekhnoprogress whereas the amended case operated at the level of UTN in that it involved procuring that UTN paid Taiz and Tekhnoprogress rather than S-K. But Tatneft's case remains based on the Scheme and that operates at both levels, as

paragraph 55 makes clear, and it includes the payment made by UTN to Taiz and Tekhnoprogress, as set out in paragraph 55(ii).

56. Many of the Respondents' submissions on this issue were premised on the assertion that Tatneft has to advance a case which is either based on the validity of the 2008 Assignment Agreement or on its invalidity. It may so choose but it is not required so to do, nor has it done so. A coherent claim of liability under Article 1064 can be and is advanced irrespective of the validity of the 2008 Assignment Agreement, as succinctly set out in paragraph 54B.

57. The Respondents stressed that "harm" for the purpose of Article 1064 requires damage to property and therefore there is a need for that property to be identified. It was, however, accepted for the purpose of summary proceedings that a contractual right may be property. S-K is asserting damage to a property right regardless of whether that right arises under the original contract or the 2008 Assignment Agreement. Further, as already explained, "harm" can include economic benefits foregone such as the benefit of the debt owed to S-K. As set out in the first expert report of Professor Karabelnikov, his evidence is that harm includes financial loss such as not being paid for the oil delivered as a result of the Scheme:

> "62. Although I appreciate that it is a matter for the Court I can confirm that the "harm" suffered by S-K under the Tort Claim was the loss which was caused by the Oil Payment Siphoning Scheme. Individual elements of such scheme, such as contractual non-payment by Avto to S-K, should not be viewed and analysed in isolation without giving proper consideration to other elements of the scheme and the purpose of the scheme as a whole.
>
> ….
>
> 66. This Tort Claim is based on an undisputed fact that S-K was not paid for a significant part of the oil which it delivered to UTN, and hence suffered the harm, caused by the fulfilment of the Oil Payment Siphoning Scheme. It is a question of fact, not law, whether that scheme, allegedly operated by the Defendants, who were never parties to any contract with S-K, caused harm sustained by S-K by virtue of (i) the allegation of invalidity of the 2008 Assignment Agreement in the Ukrainian courts, or (ii) by siphoning of money from Taiz and Tekhnoprogress, or both, or by combination of any of the above actions with some others. To the extent causation of harm with no legal excuse by guilty or negligent actions of the Defendants would be proven, as a matter of Russian law the Defendants should be held liable for causation of harm to S-K."

58. The Respondents' underlying criticism that Tatneft's case in relation to the 2008 Assignment Agreement is contradictory and inconsistent lies ill in their mouths. It is their alleged vehicle, UTN, which has asserted the invalidity of the 2008 Assignment Agreement and obtained the Ukrainian Judgment to that effect. In these proceedings, however, it is the validity of the 2008 Assignment Agreement which the Respondents rely on to seek to defeat the originally pleaded claim. In any event, uncertainty as to the status of the 2008 Assignment Agreement is an unavoidable fact in circumstances where there is a Russian judgment upholding its validity and a Ukrainian judgment declaring its invalidity.

59. In conclusion on this issue, for the reasons outlined above, in our judgment the amendments do not involve the addition of essential facts to an existing cause of action and do not therefore involve a new cause of action.

60. In those circumstances, it is not necessary to consider whether the amendments raise a new cause of action as a matter of Russian law even if, contrary to what we have held above, Russian law is relevant. It was in any event unclear how Russian law was to be of any assistance since Mr Millett QC accepted that whether or not an amendment raises a new cause of action falls to be determined by reference to English law principles.

(2) Was the judge correct to conclude that the draft amended claim had no real prospect of success as it was bound to fail as a matter of causation?

61. The judge held at [100] that the proposed amended claim was bound to fail as a matter of causation as "UTN's alleged failure to make payment to S-K under the 2008 Assignment Agreement pre-dates the Defendants' alleged *"unlawful acts"* in 2009. Accordingly, even on Tatneft's own case, the alleged *"harm"* predates those allegedly *"unlawful acts""*. Further, "if and insofar as the violation of rights in the draft Amended Particulars of Claim are said to comprise the Defendants causing UTN to pay the oil monies to Taiz and Tekhnoprogress rather than to S-K, and that, but for such procurement, UTN would have paid S-K, this is a case which must fail in circumstances where, again on Tatneft's own case, UTN remained indebted to S-K under the 2008 Assignment Agreement despite the payments which it made to Taiz and Tekhnoprogress, and it is no part of Tatneft's case that the payments prevented UTN from being able to pay S-K directly".

62. Causation is essentially a factual matter and it requires a clear case for it to be determined summarily. As to the first point made by the judge, whilst the amended case relies on UTN's liability to pay S-K under the 2008 Assignment Agreement, the harm alleged still arises out of the Respondents causing UTN to make payment to Taiz and Tekhnoprogress and then misappropriating those monies. As to the second point, UTN's payment to Taiz and Tekhnoprogress purported to be in payment of the oil debt and so it was obviously not going to make any further payment. In so far as it remained bound to do so under the 2008 Assignment Agreement, that is an empty obligation in circumstances where UTN has a Ukrainian judgment declaring the 2008 Assignment Agreement to be invalid.

63. As to the point that S-K was and remained a frustrated judgment creditor and that the alleged Scheme changes nothing, this has already been addressed above.

64. In our judgment, the issue of causation raises a number of factual issues which cannot be decided summarily.

65. In conclusion on this issue, we consider that the judge was wrong to conclude that the draft amendments to the Particulars of Claim involved the assertion of a new and time-barred cause of action which was in any event bound to fail as a matter of causation and that the appeal should be allowed on this ground.

Issue 3

Whether Tatneft should have permission to amend its amendment application notice and grounds of appeal to contend that even if the draft amendments involved a new cause of action, permission to amend should be given pursuant to CPR 17.4 and, if so, whether such permission should be given.

66. In the light of our conclusion on Issue (2) it is not necessary to determine this issue. Ordinarily we would not do so, particularly given the need for permission, but it raises matters of law of some importance and so we proposed to address it briefly, even though it be *obiter.*

67. The legal issue which arises is whether under CPR 17.4 the court has jurisdiction to permit the addition of a claim which is barred by limitation pursuant to the governing law identified by Rome II (and the same issue would arise where the Rome I Regulation ("Rome I") governs and therefore applies to contractual as well as non-contractual claims). Although the point was not conceded before the judge, Tatneft did not argue to the contrary and the judge considered *obiter* that he had no such jurisdiction.

68. The Respondents object to the point being raised. In particular, they point out that it requires amendment both of the application notice and of the grounds of appeal; it involves matters which were unchallenged before the judge and an application which was not considered by him; it is raised very late and there is no good reason for the delay. These are formidable objections which in many cases would be determinative. In the unusual circumstances of this case we nevertheless propose to give permission to raise this further ground. Our reasons for so concluding are that the issue of the court's jurisdiction under CPR 17.4 only arose shortly before the hearing and, given the plethora of other issues which needed to be addressed, it is at least understandable that the matter was not as fully researched at the time as it could have been; it raises a pure issue of law; no prejudice has been suffered, and the point of law raised is one of importance. We are satisfied that having regard to all the circumstances the amendment should be allowed so as to enable the court to deal justly with the application to amend.

69. CPR 17.4(1) and (2) provide as follows:

> "(1) This rule applies where –
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1980;
>
> (ii) the Foreign Limitation Periods Act 1984; or
>
> (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.
>
> ….

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

…."

70. The Foreign Limitation Periods Act 1984 ("FLPA") provides so far as material as follows:

"1. Application of foreign limitation law.

(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter -

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings [subject to [sections 1A and 1B]]; and

(b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.

(3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(a) above whether, and the time at which, proceedings have been commenced in respect of any matter; and accordingly, section 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(a) above as it applies in relation to time limits under that Act.

….

8. Disapplication of sections 1, 2 and 4 where [the law applicable to limitation is determined by other instruments]

(1) Where in proceedings in England and Wales the law of a country other than England and Wales falls to be taken into account by virtue of any choice of law rule contained in [the Rome I Regulation or] the Rome II Regulation, sections 1, 2 and 4 above shall not apply in respect of that matter.

(1A) In subsection (1) the "Rome I Regulation" means Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations, including that Regulation as applied by regulation 5 of the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 (conflicts solely between the laws of different parts of the United Kingdom or between one or more parts of the United Kingdom and Gibraltar).

> (2) In subsection (1) the "Rome II Regulation" means Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations, including that Regulation as applied by regulation 6 of the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (conflicts solely between the laws of different parts of the United Kingdom or between one or more parts of the United Kingdom and Gibraltar)."

71. Prior to the introduction of s. 8 of the FLPA, pursuant to section 1(3) of that Act, s.35 of the Limitation Act 1980 applied to foreign limitation periods. S.35 allows for new claims to be deemed to be commenced on the same date as the original cause of action, notwithstanding that they would otherwise be barred by limitation. It only applies in the limited circumstances set out, which are reflected in CPR 17.4. Unless s.35 can be relied upon, there is no relation back and an amendment after the expiry of limitation would be refused as it would serve no useful purpose given the availability of the limitation defence.

72. Under s.8 of the FLPA, s.1 is disapplied where the law applicable to limitation is determined by Rome I or Rome II. Under Article 12.1(d) of Rome I and Article 15(h) of Rome II, the applicable foreign law governs limitation of actions. The Respondents submit that it follows that this is not a case where a period of limitation has expired under the FLPA. Nor is it a case where limitation has expired under CPR 17.4(1)(b)(iii). The consequence is that the court has no power to allow the amendment under CPR 17.4.

73. Before Rome I and Rome II came into force the English court could under CPR 17.4(1)(b)(ii) allow the introduction of a new claim governed by foreign law, just as it could in a case governed by domestic law. The effect of the Respondents' argument is that there has been a significant change in law following the introduction of Rome I and Rome II by which the court has been deprived of an important procedural power in cases governed by foreign law under the Rome Regulations. No reason for this change can be discerned from the statutory materials provided, nor have the Respondents been able to identify or even suggest any such reason. It is simply a lacuna.

74. Tatneft put forward two arguments which it submitted would avoid such a lacuna.

75. The first was based on the following passage in *Dicey, Morris and Collins* (15th edition) at 7-065 where it is stated that:

> "…Furthermore, in extending the application of the *lex causae* to rules relating to the commencement of the period of limitation or prescription, the Rome II Regulation adopts a different approach to that in s.1(3) of the 1984 Act, which applies the law of the forum to this matter. Hence, if the limitation period does not run under the relevant foreign law until, for example, a claimant reaches a specified age of majority or becomes aware of the facts which give rise to a claim, such provisions should be applied in the English courts. Beyond that, however, it may be thought that rules on when an action is deemed to have begun in an English court and rules relating to the introduction of new claims or the amendment of a statement of case in a pending action should be classified as

procedural in nature and hence outside the scope of the Rome II Regulation. If so, then s.1(3) of the 1984 Act will remain applicable to that extent."

76. The argument is that s.8 of the FLPA applies only to that part of proceedings in relation to which "the law of a country other than England and Wales falls to be taken into account". CPR 17.4 is a matter of procedure and neither Rome I nor Rome II apply to matters of procedure (Article 1(3) of the Rome Regulations). Whilst this is a logical and coherent approach it faces the difficulty of the very broad language of s.8 which would appear to disapply ss.1, 2 and 4 to the proceedings generally.

77. The second argument is based on the following passage from *Dickinson, The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* where it is stated as follows at 14.51-52:

> "14.51 ….Under s.1(3) of the 1984 Act, s.35 of the 1980 Act and the Civil Procedure Rules that give effect to it apply equally to foreign time limits which fall to be applied *under* the 1984 Act. Section 35 does not, however, apply to new claims brought following expiry of any foreign limitation period that applies under Act 15(h) of the Rome II Regulation. In the circumstances, it is unclear how the powers that the English court has to amend existing claims, by adding new claims or new parties, will apply to new claims falling within the scope of the Regulation. On a strict view, it could be argued that there is no possibility of an amendment to introduce a new claim or a new party after expiry of the primary limitation period otherwise than by reference to s.35 of the 1980 Act, which does not apply here. Even if the country whose law applies under the Regulation has a rule that enables its courts to allow such an amendment after expiry of the relevant time limit, that may be argued to be a procedural rule and to be beyond the scope of Art 15(h).
>
> 14.52 The Civil Procedure Rules, however, expressly permit amendments to introduce a new claim or to change the parties to an existing claim following expiry of a period of limitation under 'any other enactment which allows such an amendment, or under which such an amendment is allowed', and this has not only been upheld as a legitimate exercise of the rule making power but has also been construed broadly so as to be capable of referring to a limitation regime that does not either expressly or impliedly prohibit amendments of this character. On this basis, the counter-argument can be presented that a foreign limitation regime applicable under Art 15(h) ought to be treated, whether standing alone or coupled with the Regulation, as a relevant 'enactment' for these purposes so as to enable the English court to allow an amendment after expiry of the applicable foreign limitation period if (a) an amendment of this kind is permitted or, at the very least, is not expressly or impliedly prohibited under the applicable foreign law, and (b) the other conditions laid down by the Civil Procedure Rules are satisfied."

78. The argument is that Rome II and/or the RCC is an "enactment" for the purpose of CPR 17.4(1)(b)(iii) and are enactments "under which such an amendment is allowed" in the sense of not being prohibited.

79. We agree with the Respondents that the RCC is not an "enactment" for this purpose. The terms, structure and context of CPR 17.4 strongly indicate that it is domestic law enactments which are here being referred to.

80. The Rome Regulations are, however, directly effective in the United Kingdom and form part of UK law. As part of domestic law they naturally fall within the term "enactment" – see, for example, R v Sissen [2001] 1 WLR 902 in which a European Regulation was held to be an "enactment" for the purposes of s.170(2) of the Customs and Excise Management Act 1979.

81. There is also support in the authorities for the argument that in this context it is sufficient if the enactment does not prohibit the addition of the new claim. In Parsons v George [2004] EWCA Civ 912, [2004] 1 WLR 3264 this court was concerned with the equivalent wording to CPR 17.4(1)(b)(iii) which is to be found in CPR 19.5(1)(c), which addresses the addition of a new party after the expiry of a relevant limitation period. The court held that the court had the power to allow the addition of a party after the expiry of the limitation period specified by s.29(3) of the Landlord and Tenant Act 1954 as that Act did not prohibit a change of parties after that period had expired. In giving the judgment of the court Dyson LJ stated as follows:

> "34. In my view, there is a possible wider interpretation of sub-paragraph (c) which is consistent with the pre-CPR regime and the original version of rule 19.5(1) and which avoids the difficulty of having two different sets of rules for applications for permission to change parties after the end of a relevant limitation period. Incidentally, this wider interpretation also provides an explanation for the apparently curious feature of the sub-paragraph that it is expressed both in the active and passive sense: "any other enactment which allows such a change, or under which such a change is allowed." At first sight, there seems to be no difference in meaning between these two formulations.
>
> 35. In my judgment, it is possible to interpret rule 19.5(1)(c) as referring to any enactment which allows or which does not prohibit a change of parties after the end of a relevant limitation period. Plainly, something is allowed if it is expressly allowed. But there are many contexts in which it is a legitimate use of language to say that something is allowed merely because it is not prohibited. Thus, in a restaurant which does not prohibit smoking, it could properly be said (at least until recently) that smoking is allowed, even if there is no sign which says "smoking is allowed". People who visit restaurants expect to be allowed to smoke there unless smoking is prohibited, because smoking is an activity that is customarily carried on by those who visit restaurants. Smoking may be said to be an incident of restaurant life which is allowed unless it is prohibited. The same point can be made in relation to walking on lawns in public parks or gardens. On the other hand, it would be considered to be a strange use of the word "allow" to say that visitors to a restaurant are allowed to sing in the restaurant unless they are prohibited from doing so. Singing in restaurants is allowed only if it is expressly permitted. I suggest that the reason for this is that visitors to a restaurant do not need to be banned from singing in order to understand that they are not allowed to sing there. It cannot sensibly be said that singing is an incident of restaurant life which is allowed unless it is prohibited. These examples demonstrate that the context will determine whether it is a legitimate use of language to say that something is "allowed" simply because it is not prohibited."

82. Whilst reserving the right to challenge this decision should this case go further, for the purpose of this appeal the Respondents' position was that it can be distinguished on the grounds that Rome II is not an enactment which allows, in the sense of not

prohibiting, the court to permit the introduction of a new claim notwithstanding that it is time-barred. Rather, Rome II actively excludes from its scope entirely procedural matters including the question of whether or not an amendment can be added after the expiry of limitation. In these circumstances, Rome II is not an "enactment" for the purposes of the rule; or, even if it is, its silence cannot be read as a permission.

83. In our judgment, Rome I and Rome II can be regarded as a relevant "enactment" for the purpose of CPR 17.4(1)(b)(iii). Each is the enactment by reason of which the foreign limitation period applies. It is true that neither applies to matters of procedure, but that each makes evident and explains the absence of any prohibition. In our judgment, the reasoning of the court in *Parsons v George* can be applied here. It gives meaning to the words "under which such an amendment is allowed" which otherwise might be tautologous. In the present context, it also enables all proceedings before the English court to be dealt with consistently as a matter of procedure.

84. We are accordingly satisfied that the court has the power to allow a new claim under CPR 17.4. Under that rule it may only exercise that power if it is satisfied that "the new claim arises out of the same facts or substantially the same facts" as the original claim. Given our conclusion that it raises no new essential facts there is no difficulty in so concluding. Further, it was not suggested that the amendments required any further factual investigations to be made.

85. The Respondents further submitted that the amendment should be refused as it has no real prospect of success on the grounds of both causation and time bar. We reject the causation argument for the reasons outlined above. As to time bar, it was argued that for the new claim time ran from when payment ought to have to be made by UTN or when payment to Taiz and Tekhnoprogress was made. This was or should have been known to S-K long before the limitation cut-off date of 23 March 2013, being three years before proceedings were commenced. This, however, involves an oversimplification of the new claim made. As explained above, the Scheme is integral to both the original and the new claim. In those circumstances, the reasons given by the judge for concluding that the original claim was not bound to fail on limitation grounds equally apply to the new claim.

86. Finally, the Respondents submitted that the amendment should be refused as a matter of discretion. We would not have been so persuaded. In all the circumstances, it would not have been just to refuse to allow Tatneft to advance an arguable claim and thereby prevent it from advancing any claim. The Respondents would still have had their limitation defence open to them. If it is a good defence it would defeat the claim.

87. In conclusion on this issue, had it been necessary to determine the amendment application on this alternative ground, we would have allowed the amendment.

Issue 4

Whether the judge was correct to hold that as a matter of construction of the 2015 Compensation Agreement the claim pleaded in Tatneft's original Particulars of Claim did not fall within it.

88. The question here is whether any claims S-K may have had against the defendants have been transferred to Tatneft by the 2015 Compensation Agreement. This is an agreement "governed by the applicable laws of the Russian Federation" (clause 2.1) and relevantly provides:-

> "1.3 In discharge of part of the Obligations the Debtor on the date hereof shall transfer compensation to the Creditor, and the Creditor shall accept such compensation being the Debtor's Claim against TFIOC UTN in the amount of one billion six hundred fifteen million eight hundred fourteen thousand nine hundred seventy-six Ukrainian Hryvnas (UAH 1,615,814,976) in principal, plus all interest accrued and which may continue to accrue, arising under the following documents:
>
> 1.3.1. Deed of Assignment dated 18 April 2008 between LLC "Kompaniya "Suvar-Kazan" (currently LLC "Kompaniya "Fenix"), Private Multi-Industry Production and Commercial Enterprise Avto, registered in accordance with the Ukrainian laws (state registration number 13951872), Limited Liability Company TAIZ, registered in accordance with the Ukrainian laws (State registration number 32635669), and Research and Development and Manufacturing Limited Liability Company TEKHNO-PROGRESS, registered in accordance with the Ukrainian laws (state registration number 30601617);
>
> 1.3.2. Judgment of the Arbitration Court of the Republic of Tatarstan issued on 05 September 2008 in case No. A65-9070/2008-sg2-4;
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> 1.3.3. Enforcement Order No. 265221 issued on 03 December 2008
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> 1.4 The Claims transferred by Debtor to Creditor as compensation under the Agreement also include all other rights available to Debtor as of the time of execution of the Agreement and associated with and/or arising from the Claims and/or directly or indirectly related in any way to the non-payment of sums owed to the Debtor under any or all of the documents set forth in Clauses 1.3.1 to 1.3.3 hereof, including, but not limited to (1) the Debtor's right to require TFIOC UTN and/or any third parties to make any payments (a) by way of indemnification and/or liquidated damages (fines, penalties) caused by a default, delay or another undue performance; (b) in the form of interest payable for unlawful use of other people's money; (c) by way of reimbursement of litigation costs and other expenses related to the lawsuit; (2) the Debtor's claim against TFIOC UTN and/or third parties arising from damages caused and/or unjust enrichment; and (3) the Debtor's right to sue TFIOC UTN and/or third parties, and the Debtor's right to seek enforcement of obligations before competent authorities

> and/or file a criminal complaint against TFIOC UTN and/or third parties.
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> 1.5 On the execution date hereof the Debtor agrees to transfer to the Creditor the Claims and all rights referred to in Clause 1.4 of the Agreement under the Compensation Delivery and Acceptance Certificate. Simultaneously with the execution of the Compensation Delivery and Acceptance Certificate the Debtor agrees to deliver to the Creditor all documents within the possession of the Debtor relating in any way to the Claims assigned and all rights referred to in Clause 1.4 of the Agreement, including, but not limited to, documents set forth in Clauses 1.3.1 – 1.3.3 hereof."

89. The judge held at [35]-[38] that the claim contained in the unamended Particulars of Claim did not fall within clause 1.4 because framed as, in his view, it was by reference only to the contractual chain, it was not a claim in respect of a right available to S-K which was "associated with and/or arising from the Claims and/or directly or indirectly related in any way to the non-payment of sums owed" to S-K under the 2008 Assignment Agreement or the Tatarstan judgment including S-K's claims "against TFIOC UTN and/or third parties arsing from damages caused and/ or unjust enrichment". He recognised, however, (para 102) that the claim sought to be brought by Tatneft's proposed amendment was such a claim, since it was a claim:-

> "which, in contrast to the claim asserted in the Particulars of Claim, can legitimately be described as involving a claim against third parties which entails the assertion of S-K's "rights … associated with and/or arising from the claims and/or directly or indirectly related in any way" to the 2008 Assignment Agreement, the Tatarstan judgment and the Russian Enforcement Order."

90. Now that we have allowed the proposed amendments, it is plain that it is (more than) arguable that at least the amended claim falls within the 2015 Compensation Agreement.

91. We also consider it to be arguable that the unamended claim falls within the terms of the 2015 Compensation Agreement, since it is not framed by reference only to the contractual chain.

92. In the first place although "the Claims" transferred to Tatneft by clause 1.4 of the 2015 Compensation Agreement are the claims referred to in the second recital of the agreement, clause 1.4, in also transferring claims against third parties arising from damages caused, is plainly intended to extend the meaning of "the Claims" and is apt to include claims under Article 1064 of the RCC. Such claims need only be a right … "associated with … the Claims" and it seems to us to be well arguable that a claim, that S-K has not received the money (due to it by whatever route) for the oil supplied by it, is a claim to a right that is associated with "the Claims" against UTN referred to in the recital. It is also arguable (but perhaps less obviously so) that it is a claim to a right "directly or indirectly related … to the non-payment of sums owed to" S-K under the 2008 Assignment Agreement or the Tatarstan judgment. The use of the

word "indirectly" shows that it is the fact of non-payment that is crucial rather than whether such payment was due under one or other of two possible routes.

93. Secondly, even if all that were for some reason wrong, it must be remembered that the 2015 Compensation Agreement is governed by Russian law. Although the Russian principles of contractual interpretation are not dissimilar to, they are not the same as, English principles of interpretation. A Russian expert cannot tell an English judge what clause 1.4 of the 2015 Compensation Agreement means, but he or she can assist for the purpose of interpretation. Article 431 of the RCC provides:-

> "In the interpretation of the terms of the contract, the court shall take into account the literal meaning of the words and expressions contained in it. The literal meaning of a term of the contract, in the case the term is not clear, shall be established by comparison with other terms and with the sense of the contract as a whole.
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> If the rules contained in the first part of this Article do not allow the determination of the content of the contract, the real common will of the parties must be ascertained taking into account the purpose of the contract. All the corresponding circumstances shall be taken into account, including negotiations and correspondence preceding the conclusion of the contract, the practice in the mutual relationships of the parties, the customs, and the subsequent conduct of the parties."

94. Even if an English judge were to lean in favour of Picken J's interpretation on a literal construction of the document, it could hardly be said that clause 1.4 is "clear" within the second sentence of Article 431. If one has regard to "the sense of the contract as a whole" it seems to us eminently arguable that an entity on the verge of bankruptcy, as S-K was when the agreement was made, would hardly have intended to retain for itself one particular kind of third party claim when it was transferring other such claims to Tatneft.

95. If a judge was still left in doubt after that exercise, he would then have to ascertain "the real common will" of the parties. That would arguably allow in evidence from the parties as to what their own intention was and what they thought the intention of the other party was. Tatneft has produced some evidence of that in the form of a statement from Mr Syubaev who says (para 94) that he was part of the decision-making process in Tatneft and that he was "perfectly aware that the parties intended in particular to assign to Tatneft S-K's claims" against the defendants "in connection with the harm caused by them to S-K". Mr Weisselberg QC had various criticisms to make of that statement but it is enough, if the case gets this far, to say that, on Tatneft's evidence, there is a serious issue to be tried or a real prospect of success so as to require a trial.

Issue 5

Whether the judge was correct to hold that he would have in any event found that Tatneft had no real prospect of success in relation to the Third Respondent on the basis

that the facts pleaded against him, even if true, could not establish his liability under Article 1064.

96. The judge held that Article 1064 required proof of an "unlawful act" by the Third Respondent and that mere involvement in the Scheme was not sufficient. Although paragraph 55 of the Particulars of Claim alleged that Mr Yaroslavsky gave "assistance" the judge considered that nowhere in the original or amended Particulars of Claim were acts of assistance identified and that accordingly the claim against him had no real prospect of success.

97. A major difficulty with this analysis is that there is a dispute on the expert evidence as to whether involvement in the Scheme would be sufficient. The evidence of Professor Karabelnikov included the following:

> "61. Dr. Rachkov states in para 102 of his Report that proof of unlawfulness of the action of each Defendant in this Tort Claim requires that "each defendant must be shown to have actually done the harmful acts (including wrongful omissions to act) or some of them". I disagree. I understand that the specificity of this claim is that the Court would have to consider evidence proving the occurrence of the sophisticated Oil Payment Siphoning Scheme that involved participation of multiple persons (both physical and legal). As a matter of legal principle, participation of an alleged tortfeasor in the unlawful scheme qualifies as an unlawful action being a necessary element of tort under Russian law in accordance with the fundamental principle of general tort. It is also important to note that participation in the unlawful scheme may take different forms. For example, an individual tortfeasor's involvement may be either personal or through legal entities or individuals effectively controlled by him (or both) and in any manner (formally or informally). In those circumstances, the acts of those other legal entities and individuals would be taken into account in determining an individual tortfeasor's liability."

98. Although it was pointed out on behalf of Mr Yaroslavsky that there was no ground of appeal challenging the judge's "finding" of Russian law, this is the evidence, it was relied on in argument and it is obviously pertinent to whether Tatneft's claim has a real prospect of success. At this stage one is not concerned with "findings" of Russian law, but merely with whether the Russian law evidence raises an arguable factual case.

99. As to Mr Yaroslavsky's involvement, the pleading needs to be viewed as a whole, including the amendments. In outline, Tatneft's case is that he had a close association with the other Respondents (and in particular Mr Ovcharenko) both generally and specifically in relation to UTN; he allowed a corporate vehicle which he 25% owned, Korsan, to be used as part of the fraudulent Scheme; money which should have been paid to S-K for the oil was used to fund the purchase of that 25% interest; there is no denial that he received 25% of the benefit of the scheme or explanation of how that could have come about without his involvement in that scheme.

100. The pleading alleges Mr Yaroslavsky's involvement at the outset of the Scheme, at its culmination and the substantial benefit he derived from it. Thus, details are given of the extensive efforts made by Mr Yaroslavsky to get Mr Ovcharenko made Chairman of UTN, including lobbying of the President of Ukraine. It also includes references to

a statement by Mr Kolomoisky to the effect that in re-instating Mr Ovcharenko as Chairman "we were helping Alexander Yaroslavsky" and that the re-instatement was "to accommodate the interests of Yaroslavsky" (paragraph 27(iii)). It was immediately after this re-instatement that payment for the oil stopped.

101. The pleading also explains how Mr Yaroslavsky had been involved in Korsan from the outset and how it was the purchase of shares by Korsan from a company controlled by Mr Yaroslavsky that enabled Korsan "to gain a "toehold" in UTN, with the eventual aim of ousting Tatneft from UTN" (paragraph 19). In February 2010, he was elected to the supervisory board of UTN, along with the First and Second Respondents.

102. The pleading further alleges that Mr Yaroslavsky stated in an interview that he owned 28.4% of UTN, which equates to "almost exactly half of the stake acquired by Korsan and Viloris from UTN after the expropriation of the Tatar shareholding" (paragraph 82(vi)). It is pointed out that whilst Mr Yaroslavsky's defence says that this overstates his interest he does not state what it is nor does he deny that he has a substantial interest. There is therefore an arguable case that he was a 25% beneficiary in the Scheme and Tatneft is entitled to invite the court to infer that that must have been in return for something and that he was arguably a participant in the sense described by Professor Karabelnikov. It is correct that no specific acts on the part of Mr Yaroslavsky in relation to the implementation of the Scheme are alleged, but that is largely also true in relation to Mr Ovcharenko whose role was admittedly central to what is alleged. Mr Yaroslavsky was allegedly a close associate and mentor to Mr Ovcharenko, as well as being heavily involved in procuring his chairmanship of UTN and therefore the opportunity to play his alleged central role.

103. In our judgment, in the light of Tatneft's Russian law evidence, its amended pleading and the witness statement of Mr Williams which is relied upon, it cannot be said that the case against Mr Yaroslavsky has no real prospect of success and the judge was wrong to conclude otherwise.

Conclusion

104. For the reasons outlined above, we allow the appeal on Issues (1), (2), (4) and (5) and would have allowed the appeal on Issue (3), had it arisen.