Harley Street Capital Ltd v Tchigirinsky

[2005] EWHC 1897 (Ch); [2005] EWHC 2181 (Ch)
Chancery Division.
Peter Smith J.
Judgments delivered August 25, 2005.

Derivative claims—Disclosure—Derivative claim commenced—Conflicting evidence—Position of claimant and backers uncertain—Application to continue derivative claim—Court ordered report on alleged wrongdoing by defendants—Whether derivative claim should be allowed to continue—Claimant applied for disclosure of report—Whether report privileged—Hostile litigation—Whether freezing order against defendants should continue—Whether service on defendants outside the jurisdiction should be granted—Costs—Permission to appeal—Civil Procedure Rules 1998 (SI 1998/3132), r.19.9.

This was an application for permission to continue a derivative claim pursuant to r.19.9 of the Civil Procedure Rules ("CPR"), together with applications to continue a freezing injunction against three of the defendants and set aside permission to serve proceedings on two of the defendants out of the jurisdiction.

The claimant held shares in the company, "Sibir", which was an English public company listed on the Alternative Investment Market with 203 million shares. The company was controlled by the first defendant, "CT", who had a majority or controlling shareholding through the third defendant, "B", an Isle of Man company. CT was a director of Sibir. The claimant's derivative claim alleged that Sibir had been wronged and that CT through his control of Sibir was blocking the bringing of any claims on behalf of Sibir arising out of those wrongs. The alleged wrongs, in which CT was alleged to have been complicit, consisted of the dilution of Sibir's interest in a joint venture company, and the making of gratuitous payments to another company controlled and partly owned by CT in breach of fiduciary duty. On April 28, 2005, Blackburne J. granted a freezing order, made on an ex parte application, to restrain CT and B from disposing of any shares in Sibir, which was also joined as the fourth defendant. The order also gave the applicant permission to serve the claim form, particulars of claim and other statements of case out of the jurisdiction on CT and the second defendant, "AT", in Moscow and on B at its registered office in the Isle of Man. On May 12, 2005, the claimant applied for permission to continue its derivative claim pursuant to CPR, r.19.9. On June 17, 2005, CT, B and Sibir applied to set aside the permission granted on April 28, 2005, to serve proceedings on CT and B out of the jurisdiction. The defendants contended that the derivative claim brought by the claimant was not brought bona fide and should not be continued. To assist the court, the court suggested that an independent report be prepared and to this end the chairman of Sibir, who was independent from CT, instructed a firm of solicitors, who were assisted by leading junior counsel, to consider whether or not there was any justifiable allegation of wrongdoing that could be made as against CT or AT. The claimant asked for disclosure of the report and the defendants objected to its production on the basis that it was privileged, not relevant and that it would not be appropriate to provide the report to the claimant given the obscurity of the claimant's backers.

Held, **ordering that the report should not be disclosed, refusing to continue the derivative claim, setting aside the order for service out of the jurisdiction and discharging the freezing order:**

1. In relation to privilege and the report, there was an essential distinction between unopposed advice to the company in connection with the administration of its affairs on behalf of all of its shareholders, and advice to the company in defence of an action, actual

threatened or in contemplation by a shareholder against the company. (Arrow Trading & Investments Est. 1920 v Edwardian Group Ltd [2004] B.C.C. 955 considered.) It was not conceivably likely that Sibir's shareholders would support disclosure given their opposition to the claimant. The report was prepared in the context of a continued allegation of dishonest activity by CT both as regards the original dilution and an alleged subsequent cover up. It was asserted that this extended not merely to the dilution but also to misrepresentations being issued. The report was thus sought in the context of this hostile litigation and it was accordingly privileged. Further, the report was not relevant to the present proceedings: its purpose was to rebut the submission that CT was blocking any genuine investigation, but if the report showed there was no perceived basis for any claim against CT there could be no reason why he would block an investigation. There was no question of the claimant suffering any inequality of arms by reason of it not having access to the report. The reality was that the claimant's solicitors sought the report in a desperate attempt to find some more material to bring against the defendants or anybody else. Finally, given the shadowy nature of the claimant and its backers, it would not be appropriate for the report to be produced to it.

2. The evidence did not support the claimant's case that there was a link between CT and the officers of Sibir in the way in which the dilution had been discovered and investigated. At best there could only be incompetence and not a company conspiracy. The inadequacy of their actions was not sufficient of itself to sustain the claim absent any other material provided by the claimant. There was no credible material linking CT to any wrongdoing in respect of the dilution as alleged by the claimant. The claim in respect to allegedly gratuitous payments was hopeless in the light of the defendants' evidence. The derivative claim was not brought in a bona fide manner.

3. On the evidence the derivative claim was hopeless and not sustainable. The claimant's case failed entirely on the inadequacy of the evidence to justify any of the relief which it had already obtained. There was no basis for allowing the action to continue as to do so would be an abuse of the process of the court. The action should be struck out, the orders made for service out of jurisdiction set aside and the freezing injunction discharged.

4. The defendants sought costs on the indemnity basis. For an award of indemnity costs, the action and the circumstances must be outside the norm. It was difficult to see a case which was more outside the norm than this one. The action had been found to be an abuse of process; the position of the claimant was peculiar and mysterious; there was a lack of the bona fides of the claimant; the claimant's conduct was unacceptable; the action was commenced on an ex parte basis when there was no reason or justification for such ex parte application; the claimant acted in breach of undertakings given to Blackburne J. and the claimant was acting in breach of a court order. All of those cumulatively led irresistibly to the conclusion that the claimant should be ordered to pay the costs of the defendants to be assessed on the indemnity basis. There was no reason why Sibir's costs should not extend to the report. Sibir was entitled to its costs in any event: it was not merely a nominal defendant to the proceedings and it was quite proper for it to be represented.

5. The entirety of the claim was bogus and permission to appeal should be refused. The company should be granted its costs on the argument as to permission to appeal and permission to appeal in respect of costs should be refused also.

The following cases were referred to in the first judgment:

Arrow Trading & Investments Est. 1920 v Edwardian Group Ltd [2004] EWHC 1319; [2004] B.C.C. 955.
CAS (Nominees) Ltd v Nottingham Forest Plc [2002] B.C.C. 145.
Hydrosan Ltd, Re [1991] B.C.C. 19.

The following additional cases were referred to in the second judgment:

Company (No.001126 of 1992), Re a [1993] B.C.C. 325.
Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Apsden & Johnson (a firm) [2002] EWCA Civ 879.
Foss v Harbottle (1843) 2 Hare 461.

Anthony Trace Q.C., Daniel Lightman and Andrew Mold (instructed by Class Law Solicitors) for the claimant.

Jeffrey Onions Q.C. and Sa'ad Hossain (instructed by Ashurst) for the first, third and fourth defendants.

JUDGMENT

Peter Smith J.: Introduction

1. This judgment arises out of my hearing three applications:

(a) An application by the claimant ("C") for permission to continue its derivative claim (by application notice dated May 12, 2005) pursuant to the Civil Procedure Rules ("CPR"), r.19.9.

(b) For a continuation of a freezing injunction originally granted by Blackburne J. on April 28, 2005, against the first defendant ("CT"), the third defendant ("Bennfield") and the fourth defendant ("Sibir"). The freezing injunction originally obtained also against the second defendant ("AT") was continued against him until after judgment or trial. He has not appeared before me but if the other defendants are successful any relief also will fail against him in reality.

(c) An application by CT, Bennfield and Sibir issued on June 17, 2005, to set aside the permission granted by Blackburne J. on April 28, 2005, to serve proceedings on CT and Bennfield out of the jurisdiction. The basis for that challenge was that none of the provisions relied upon namely CPR, r.6.20(3), (8), (14) and (15) are fulfilled. For the point of doubt Mr Onions Q.C. who with Mr Hossain appears for those defendants stressed that they did not make any challenge to the decision to grant permission on the basis of forum non conveniens. Accordingly their challenge was solely on the basis of the jurisdiction to issue conferred under CPR, r.6.20. No formal application had been issued when the hearing started before me on Thursday June 16, 2005, although the skeleton arguments had flagged up such an application being contemplated. I directed the application to be issued by June 17, 2005, and it was so issued. Mr Trace Q.C. who with Mr Mold appears for C did not oppose the issuing and short notice of the application which ultimately was heard by me on Tuesday June 21, 2005, and further on August 23, 2005.

2. Further as is the wont in cases like this further evidence was served by both parties during the course of the hearings updating events that occurred during the hearing and in the light of questions raised by me in submissions made by the parties. No objection was taken by either party to late service of the evidence during the hearing.

Previous applications

3. The first application was the hearing on April 28 before Blackburne J. This application was made ex parte and no letter before action was sent.

4. The application was to restrain CT, AT and Bennfield from disposing of any shares in either Sibir or Bennfield unless £30,000,000 was paid into court.

5. In addition the order gave C permission to serve the claim form, particulars of claim and other statements of case out of jurisdiction on CT and AT in Moscow and Bennfield at its registered office in Ramsey, Isle of Man.

6. The justification for proceeding ex parte was stated to be that there was a real risk that those defendants would dispose of their assets set out in the affidavit of Stephen Alexander dated April 28, 2005 (he being a partner in C's solicitors, Class Law Solicitors LLP).

7. There was in my view no basis for suggesting that any of the respondents would have acted as alleged in the application. Further I do not see why (for reasons which will appear when I examine the evidence) a letter before action detailing the complaints that apparently concerned C should not have been sent following the Sibir shareholders meeting on December 21, 2004.

8. In addition there were a number of criticisms that could be made against Class Law in respect of their actions on behalf of C. At the hearing I indicated that those criticisms would not in my view be sufficient to persuade me that I should not continue the freezing order for that reason *alone* unless Mr Onions Q.C. sought to persuade me to the contrary. He set out reasons why in the skeleton argument (paras 112 *et seq.*). I will deal with the questions of non-disclosure when analysing the evidence. Equally there is no significant delay in my view. In any event it is not suggested that the defendants have suffered any prejudice by reason of such delay.

9. The major factors appear to be the breaches of the undertakings.

10. C failed to serve its application under CPR, r.19.9 as soon as practicable. It was only served on May 12, 2005, after an unless order was made against it.

11. Secondly, it undertook to provide a bank guarantee in the sum of £25,000 by May 6, 2005. It failed to do so and applied for a variation to put money into court after the time had expired. On May 12, 2005, Pumfrey J. described these failings as "a fairly lamentable history", they are lamentable but as I have said given the nature of the claim and the serious implications of not granting injunctive relief these are failings which to my mind have no significant impact on the overall view I should take on the merits of C's claim and the defences.

12. As part of the undertakings it undertook to serve Bennfield as soon as practicable with its affidavit in support and exhibits, claim form and application notice of continuation order under CPR, r.19.9 application. As at the date of the hearing only the freezing order itself has been received by Bennfield in the Isle of Man. This is significant but is technical. I say that because Ashursts, who represent the first, third and fourth defendants, have received the documentation without prejudice to the challenge to the jurisdiction in the usual way. It is not suggested that Bennfield, either has been prejudiced by this.

13. Finally in the context of service, for service in Russia all the documentation provided to Blackburne J. apparently had to be translated. This not surprisingly caused significant logistical delays. However sympathy is muted because it was clear that C's solicitors were aware of this before they made the application (transcript p.56).

14. The delay in serving the defendants is unacceptable in my view. Parties are entitled to be served with the evidence relied upon against them as soon as possible. There is no excuse for this as Mr Trace Q.C. frankly conceded. It contrasted significantly with Class Law's website which on the very day the order was made contained details of the order and a sub-site where anybody who accessed it (and thus on its terms became inadvertent "supporters" of C's actions) were provided with copies of all the court material. It simply cannot be right for complete strangers to be better informed than the defendants.

15. Had there been any difficulty on the part of the defendants in responding to the claims brought by C these breaches might well have been significant.

16. There was a further breach in my view of the order of Mr Briggs Q.C. made on May 24, 2005.

17. The next hearing was May 12, 2005, before Pumfrey J. This was the return day of the ex parte order obtained before Blackburne J. It was ineffective. The freezing order was continued against AT until trial and the others were continued by consent until after judgment on the

applications on the effective return date. Directions were given for hearing of the CPR, r.19.9 application return date of the freezing order setting aside permission to serve out of the jurisdiction for the first available date after June 13, 2005, to be expedited. An unless order was made in respect of the issue of the r.19.9 application.

18. On May 16, 2005, the defendants other than AT sought further fortification of the cross-undertaking in damages by seeking an increase from £25,000 to £10,000,000 on the grounds especially stated that no information had been provided by the claimant to show that it has assets within the jurisdiction or that the ultimate funder is resident in the jurisdiction. That application was heard together with an earlier application issued May 12, 2005, by those defendants requiring information as to the nature of the entity RPM which appeared to be the prime mover behind the C's claim and the nature of the funding arrangements supporting that entity. Mr Briggs Q.C. heard both applications on May 20, 2005, and delivered a judgment on May 24, 2005. He refused the application to fortify the undertaking in damages on the basis that there was no evidence to show that the defendants' shareholding had been diminished in value (being the only asset effectively frozen). On the hearing of the application for information he ordered that the claimant should provide full answers to Ashurst in relation to:

(a) Who are the officers members of the Regional Public Movement in Defence of Civil Rights ("RPM")?

(b) What are the names of the officials of RPM instructing Class Law Solicitors LLP?

(c) Who is funding Harley Street Ltd/RPM?

(d) Who is the source of the £25,000 undertaken by Mr Alexander to be paid into the court?

19. C was ordered to provide that information by May 27, 2005. Paragraph 2 of that order prevented the information from being disclosed by Ashurst to anyone other that counsel. The reason for this is that there were fears expressed that anybody seen to be associated with C's claim in Russia could be subject to violence at the behest of CT. This is a theme which appears in the evidence in support of C culminating in Mr Alexander's third witness statement produced during the course of the final day of the hearing on June 21, 2005. In para.7 of that witness statement he refers to the apparent arrest of a Russian lawyer who had identified himself in C's evidence by a local prosecutors office in Moscow. Unidentified sources have allegedly suggested to Mr Alexander that this was done at the instigation of CT. It is impossible for me on affidavit and witness statement evidence where all the information is provided on a hearsay basis to come to any conclusion as to the record of CT whether as to fraud or violence or otherwise. He disputes all these matters.

20. However to protect against potential fears it was obviously right of Mr Briggs to make an order restricting disclosure. When reference was made to those matters in court the hearing during that period took place in private.

21. C's solicitors replied pursuant to the order on May 27, 2005. Their answers are as follows (in order to preserve the identity of people I have edited those matters out):

(a) RPM does not have a formal membership due to the peculiarities of its legal form of organisation, nor does it have "officers" such as directors or secretary, instead it has "permanently functioning managing body" known as the Council. Then various founding and council members were then provided giving names only.

(b) All of those founding and council members instructed Class Law.

(c) Funding including the sum of £25,000 paid into court on May 9, 2005, had been provided by way of loans from a Cypriot company which does not appear to have any connection with any of the issues before me.

22. In my view that is a failure to comply with the order of Mr Briggs Q.C. The answer contradicts with the unredacted part of the constitution provided to Ashursts. For example

art.9.1 required RPM to provide annually personal data of directorships and art.13.2 (of the constitution) required it to report to the state registering authority the current location of the governing bodies composition and personal data of the directorship.

23. RPM has failed to comply with its obligations in that it appears not to exist at all in any public record document. Nor have the defendants' solicitors been able to discern its existence by extensive internet searches affecting events or organisations connected with Russia. The defendants therefore are no further advanced in their understanding of the backers after Mr Briggs's order than they were before it.

24. In a further belated attempt to comply the defendants were handed in court a letter dated June 21, 2005, from Class Law. That letter changed the details of the information of the members distinguishing between supporters and council members (but not advancing the defendants' solicitors knowledge at all).

25. It is said that instructions were received from RPM via interpreters but they did not receive specific instructions from any particular member. I infer from that, that C's solicitors had not had any direct contact with anybody at RPM whatsoever.

26. The letter said that the Cypriot company lent money to RPM to finance the litigation. They did not know its activities and contended that Ashurst were not entitled to know the details of the loan facility to C. I disagree. The clear intent behind Mr Briggs' order was identification of bases of funding. If moneys were lent terms were required to be given.

27. No information has been provided in respect of the Cypriot company.

28. The fourth item stated that RPM was founded at the end of 2003 and that the proceedings were a culmination of many months of research conducted in secret by RPM since September 2004 leading to Class Law being instructed in December 2004.

29. The position concerning C is even worse. Until the last day Mr Trace Q.C. was unable to say who were the officers of C who were instructing the solicitors and then him. Ultimately he informed me that the instructions were received from a Mr Stone, a chartered accountant. He appears to be the founding officer of C when it was formed off the shelf on September 10, 2002. Mr Stone is its only director (I note he holds 46 other directorships). According to the last return dated September 10, 2004, it has one issued share also held by Mr Stone and that represents the total capital. It acquired the shares in Sibir (200 £1 shares out of the total share capital of 203,000,000) after the shareholders' meeting of December 21, 2004. It acquired the shares solely so far as I can see for the purposes of commencing this action. It has not itself of course suffered any diminution in value of its shareholding by reason of the allegations made against the defendants because it acquired them after the acts complained of allegedly took place and the share price was (if at all) correspondingly affected before it purchased.

30. Mr Onions Q.C. submits with some justification that it is impossible to see who is behind the present action.

31. Further in various attempts to drum up support Class Law have posted details of the action on their website. In addition they tried to call shareholders' meetings to set up an action group (nobody apparently attended). They have written to every shareholder and they have provided lists of people who support. However those people who express support did so in response to a letter from Class Law saying that support would not cost them as they were "professionally funded". Further people were deemed to be supporters by accessing the website. It is clear from the evidence obtained by the defendants that a substantial number of the shareholders identified as supporters not only did not support but opposed the application. No other shareholder has applied to join the action to support it. It was made clear before Blackburne J. and is a stance before me that the application is only made by C as holder of 200 shares. Even if the residual supporters are included the total amount of shareholders apparently concerned amounts to 0.28 per cent of the shareholding in Sibir. This is an insignificant

amount. Mr Onions Q.C. submits that C lacks bona fides and that is a factor, which can be born in mind in whether or not to permit it to continue with the application under CPR, r.19.9.

Background

32. I have set out above the status of C.

33. RPM is apparently a human rights organisation formed in Russia. It was said in the evidence in support of the application made before Blackburne J. that it is a not-for-profit organisation which is said to pursue concerns about the way in which Russian business is conducted. That does not appear from its constitution but it remains shrouded in obscurity. Equally Mr Alexander's attendance at the shareholders' meeting on December 20, 2004, was as a representative of Bank of New York Nominees Ltd (not on behalf of C who at that time did not hold any shares). Bank of New York Nominees is not a claimant nor a supporter. Mr Trace Q.C. told me on instructions on the last day of the hearing on the basis of Mr Alexander's third witness statement of the same date that Bank of New York was a nominee company for an institutional shareholder. Mr Alexander was apparently introduced to them by a unidentified broker but they did not wish to become involved in litigation as a main participant. I have already observed they did not become involved in any capacity.

Sibir

34. The applications relate to assets belonging to Sibir or wrongs allegedly done to Sibir. It is an English public limited company listed on the Alternative Investment Market with just over 203 million shares. CT owns a substantial shareholding. According to C it is something in the order of 52 per cent whereas the defendants say it is 43.82 per cent. C's figure is based upon the document, prepared on behalf of Sibir for the meeting of December 20, 2004. According to that after the various transactions that took place on that day Bennfield's percentage would be 52.84 per cent. That is the basis on which I approach the evidence before me. CT is therefore in a position to control Sibir. I suspect even with 43.82 per cent he would be in a position to exercise control also.

35. As at June 7, 2005, its traded share price was 199.5 pence amounting to a total share value of approximately £405,000,000. That value contrasts its earlier value. When trading in the shares resumed in December 2004 following its suspension in April 2004 the shares were £2.16 which was 23 per cent from its previous close (i.e. April) but up from the opening price of £1.71. The same report being a report from Aton Capital speculated that if its original 50 per cent interest in Sibneft-Yugra ("SY") were restored the value would increase to between £2.70–£3.90. The original 50 per cent interest in SY is the major part of C's claims in this case.

36. CT's interest in Sibir dates from 2000. He is a director of Sibir.

37. AT is his brother and was a director of Sibir from October 10, 2001 to September 11, 2002.

38. As part of the transaction in 2000 when CT through Bennfield obtained a controlling interest in Sibir it in return gained control over an open joint stock company Evikhon ("Evikhon") and an open joint stock company Uygrneft ("Uygrneft"). These were both Russian oil companies. Sibir maintains presently an 82 per cent interest in Evikhon and 99 per cent interest in Uygrneft. Prior to 2000 Uygrneft principal assets were oil fields in Russia. In order to exploit fields Sibir established a joint venture between Uygrneft and Sibneft ("Sibneft"). It is a major Russian oil company controlled by Roman Abramovich who is known in this country principally for his ownership of Chelsea Football Club.

39. A joint venture agreement was established whereby Sibir arranged to procure that the licenses to exploit the Uygrneft oil fields were transferred to a Russian based joint venture company Sibneft-Yugra LLC ("SY").

40. A joint venture arrangement was entered into whereby Uygneft and Sibneft would be entitled to a 50 per cent stake in SY. Sibneft was to provide the financing for SY and when it obtained a positive cashflow and repaid to Sibneft the financing it would receive profits divided equally between Sibneft and Uygrneft. SY was to be managed by a board of directors with equal representation of Sibneft and Sibir which was to have access to any information relating to the activities of SY. Sibneft was to be responsible for the operational management of SY provided it did not contradict plans approved by a board of directors. The representation of Sibir's interests at Uygrneft and SY level, at all material times was carried out by a Mr Matevosov who was a Sibneft executive. In addition a Mr Cameron was nominated to the SY board as chairman from January 12, 2001. In practice Mr Matevosov exercised control so far as I can see over the operations of SY which involved a development of the fields pursuant to the licenses. He has a significant role in one of the two claims brought by C.

41. Mr Cameron was also on the board of Uygrneft and is an executive director in Sibir. The other directors are a Mr Betsky, Urs Haener and Stuart Detmer. CT is a non-executive director. Mr Cameron features significantly in this if only by virtue of his inactivity. The same can be said of Mr Betsky.

Moscow oil refinery dispute

42. This is not directly germane to the issues before me but is relevant to understanding the actions of Sibneft/Mr Abramovich as alleged in these proceedings. The Moscow refinery is the only refinery within 200 kilometres of Moscow. Accordingly it is important. The main shareholders in November 2001 were Tatneft, the City of Moscow (through the Central Fuel Company "CFC") and Lukoil. The latter as well as being a major shareholder (38 per cent) was the largest supplier of crude oil. The operation was not profitable because it was not run in a commercial manner but was instead run to serve Lukoil's financial interest. The Mayor of Moscow in January 2001 appointed CT to turn round the Moscow refinery and to protect the City of Moscow's interest. He was appointed President of CFC. Lukoil later that year sold their shares to Sibneft when by law they should have offered them to the other shareholders. Thereafter a battle for control of the Moscow refinery developed with many court cases. The dispute became heated and hostile and was resolved in December 2002 the effect of which Sibneft and the City of Moscow shared refining capacity equally. CT represented the City of Moscow in that dispute with Sibneft. It is asserted that Mr Abramovich in April 2004 told the Mayor of Moscow that the reason he diluted Uygrneft's interest was to pay CT back for blocking his attempts to take over control of the Moscow refinery.

43. Bennfield is an Isle of Man company through which CT in effect holds the shareholding in Sibir.

44. Sibir the fourth defendant has been joined because the relief sought by C is a derivative action alleging that Sibir has been wrong that CT through his control of Sibir is blocking the bringing of any claims on behalf of Sibir arising out of those wrongs. It is said that the reason why CT is so acting derives from the fact that he is involved in the wrong doings.

The wrongs

45. There are said to have been two wrongs suffered by Sibir. The first is that as a result of general meetings of SY shareholders on September 28, 2002, SY's share capital was increased from R10,000 to R100,000. Sibneft took up its rights to increase its stake to R50,000 (50 per cent), Uygrneft however did not take up its rights. Its shareholding therefore remained R5,000 (i.e. 5 per cent). The remaining 45 per cent which it did not take up was taken up by offshore companies all of which appear to be controlled by Sibneft.

A 46. On February 4, 2003, a further general meeting of SY was held. At that meeting the three offshore companies transferred their shares to three further offshore companies. Also the share capital of SY was proportionally increased to R520,000. Sibneft took up its right to take its share up to R260,000 (50 per cent). The other three participants increased their stakes to R85,000 (16.34 per cent each). Uygrneft's stake remained at R5,000 (now 1 per cent).

47. It is impossible to understate the damaging effect of these transactions. On the first one it is asserted that an associate of Mr Abramovich, a Mr DL Davidovich who was given a letter of B attorney to act on behalf of Uygrneft by Mr Matevosov, failed to vote against the proposals. By his failure to act the dilution occurred. By the time of the second meeting in the light of the earlier dilution Uygrneft's interest was already down to 5 per cent.

48. Before me it was stated that the 50 per cent shareholding in SY represents hundreds of millions of dollars. That can be seen from the Aton report which I have made reference above which virtually doubles the value of Sibir if that 50 per cent shareholding is restored.

C 49. It is said by all the parties in the action before me, that this was a fraud perpetrated by Sibneft/Mr Abramovich. The oddity is that neither party in the present proceedings before me have sued Mr Abramovich nor has Sibir or Uygrneft sued him in the several sets of proceedings commenced to challenge the share transactions in Russia and the other jurisdictions where the offshore companies are to be found. It is true that in April this year somewhat belatedly Sibir instructed Lord Grabiner Q.C. about possible proceedings and D further consultations are in train. Of course this is nearly three years after the first transaction took place. No interim relief has been sought to freeze the effect of the resolutions pending hearings. It is said that no such applications were necessary because the oil fields were not coming on stream.

50. Despite these events happening in September 2002 and March 2003 the defendants maintain that they did not become aware of them until February 2004. This is a claim which I E will evaluate further in this judgment. Hereafter I shall refer to this claim as the "SY dilution".

The Magma claim

51. OJSC Magma Oil Company ("Magma") is a Russian company beneficially owned by Sibir. According to C, during 2004 Magma made payment totalling at least $36,000,000 to the Moscow Oil Company ("MNK"), that company is controlled and owned partly by CT. It is alleged by C that MNK was established in 1999 by the Mayor of Moscow to improve the F structure of Moscow's fuel and energy complex. I have already adverted to this above. However that did not proceed. Ultimately a decision was made in 2002 to reorganise MNK into the Moscow Oil and Gas Company ("MOGC"). There are reports in a document described as a news ticker from Moscow Oil refinery 2003 that in December 2003 MNK ceased to exist and was replaced by MOGC. C therefore contends that if MNK ceased to exist in December 2003 it means it could not have sold oil to Magma and means that Magma paid $37,000,000 for G nothing. This C contends is a flagrant breach of fiduciary duty committed by CT because he is beneficially interested in MNK, the recipient of this apparently gratuitous payment.

52. In the light of that document alone led Mr Alexander (note none of the people on whose behalf he acts) to draw an inference (para.92):

> "given [CT's] connection with MNK and his position as a director of Magma the only reasonable conclusion is that the payments made from Magma to MNK amount to H siphoning off by [CT] for his personal benefit of the funds in reality belonging to Sibir through its 95% subsidiary".

53. Given those wrongs and the failure on the part of Sibir controlled by CT to bring proceedings against CT, C claims to be able to bring a derivative action on behalf of Sibir.

54. I go on to analyse the evidence C relied upon for his ex parte application in the respect of the two wrongs.

Analysis of SY dilution

55. I have set out the apparent circumstances as to how the dilution occurred.

56. Nothing happened about the dilution as regards Sibir until April 19, 2004, when Sibir announced the suspension of its ordinary share capital and its convertible loan notes pending clarification of certain arrangements in relation to a 50 per cent interest in SY.

57. In a further press release issued on June 1, 2004, Sibir stated that the board of MOGC on April 15, 2004, had advised Sibir that it had discovered that Uygrneft's interest in SY had been diluted from 50 per cent to 1 per cent. The press release contained a statement that the board intended to pursue with the utmost vigour the restoration of Uygrneft's 50 per cent shareholding in SY. In addition in Sibir's accounts to December 31, 2003 (signed off June 30, 2004) this commitment to restoration was reaffirmed.

58. On July 22, 2004, a further press release was issued. This arose from statements made on behalf of Sibneft. When the matter was first raised in April 2004 a representative for Sibneft said that as far as they were concerned Sibneft shareholding was and remained 50 per cent. He declined to say who owned the other 50 per cent however saying "you will have to ask Sibir". That answer was technically correct because the other 49 per cent is held by offshore companies, not Sibneft. However on July 19, 2004, Sibneft's 2003 annual accounts were published and showed Sibneft claimed to hold a 99 per cent share in SY (which had been acquired for a nominal consideration). At a conference Sibneft apparently said the interest was acquired as part of a larger deal with Sibir's shareholders covering a broad range of assets. In the press release CT denied this and Mr Cameron reaffirmed Sibir's commitment to pursue the recovery of the 50 per cent share with "utmost vigour".

59. By that time Uygrneft had bought proceedings against SY (issued May 21, 2004). They were unsuccessful in those proceedings but the court of third instance has apparently ordered a re-trial which is scheduled to take place later this month. On June 23, 2004, further proceedings were brought against the offshore companies. The results initially were mixed. One has been lost, one has been won and the other one remains unresolved. Finally on June 26, 2004, further proceedings were issued against the offshore companies in Russia. These claims have been discontinued as the result of proceedings before the arbitration court referred to above. By the time of the adjourned hearing before me on August 23, 2005, all the Russian proceedings had been lost.

60. Criticisms have been made of the proceedings. C contends that these are not genuine proceedings and are merely designed to give an impression of being vigorous about what has happened without any serious intent to prosecute them. A similar observation is made concerning the steps taken in this jurisdiction: so far "too little too late" is the observation.

61. I am not convinced with these submissions. The first set of proceedings were commenced six weeks after the discovery on April 15, 2004. At that time it is not suggested that it had been revealed to the public precisely what had happened (see the press release April 15, 2004) the other proceedings appear to have been commenced well before any doubts were raised. Indeed it is significant that before C became involved in the affairs of Sibir no one had apparently queried CT's involvement and the steps Sibir was taking. It is true that neither Sibneft nor Mr Abramovich are party to these proceedings brought by Sibir/Uygrneft. However it appears that the arguments being maintained in those proceedings are technical. It is not unheard of for a person who has suffered a wrong to attempt to correct it by technical actions rather than to bring in allegations of fraud, which might amount to a distraction. Equally it is submitted that it is significant that neither Mr Abramovich nor Sibneft has been brought into these proceedings. Thus it is said these proceedings are "soft" because what was done with the agreement of CT and not with CT as a victim.

62. The difficulty with this submission is that C in the present proceedings does not sue either Sibneft of Mr Abramovich. It was suggested that that was a consideration for the future and that an allegation of fraud should not be lightly made. As their position was not clear suing them might well be premature.

63. There is an oddity here. If Sibir has been deprived of a substantial asset one would expect prima facie relief to be aimed at the recipients of the property wrongfully removed. This is the more so given its value both now and in the future. The proceedings instituted by Sibir are designed to achieve that in that the share dilutions are sought to be set aside. C's actions within this jurisdiction are not as we will be seeing from an examination of the pleaded claims.

64. Since the last hearing on July 13, 2005, Sibir commenced proceedings in the British Virgin Islands against the companies who had initially or subsequently acquired an interest in SY as a result of the dilution and others (Sibneft and Mr Abramovich). It obtained without notice orders relating to the interest in SY. Those orders were apparently discharged on July 22, 2005, on the basis of confidential and sealed undertakings and a substantive hearing has been fixed for September 22, 2005, with an estimate of three days at which issues of jurisdiction application to strike out and the relief obtainable will be determined. C's solicitors in a letter dated August 22 suggested the present proceedings be stayed until the conclusion of these proceedings. The defendants refused to agree to such a stay.

65. In addition as part of its submissions C contended that Sibir was not pursuing matters properly because it had a claim against CT and he was in control of Sibir and thereby blocked any genuine investigation. Accordingly at my suggestion Sibir through the chairman of Sibir (independent of CT and the present solicitors representing the defendants) instructed Macfarlanes to consider whether or not there was any justifiable allegation that could be made as against CT or AT. Macfarlanes wrote on July 6, 2005, summarising what they were to do and they apparently prepared a large and extensive investigation assisted by leading junior counsel interviewed a large number of witnesses and were provided with a large number of documents. In addition they obtained expert assistance in relation to certain aspects of their work. All current and former officers were interviewed and a report was prepared. That report is alleged to be privileged but the chairman of Sibir has written to me (and Class Law and the defendants' solicitors, Ashurst) on August 18, 2005, saying that he is satisfied that no prima facie case of wrongdoing can properly be asserted in legal proceedings against CT, AT or Bennfield. The proceedings had been adjourned pending receipt of that report and came on to be considered by me further on Tuesday August 23, 2005.

66. This was an allegation that CT was still controlling Sibir and all the other officers in Sibir for the purposes of continuing the allegedly fraudulent actions in (1) instigating the dilution, (2) covering up existence of the dilution, and (3) misleading shareholders in the various announcements that were made including the announcement of November 26, 2004, which C particularly relied upon as I set out further in this judgment.

67. On the hearing of August 23, 2005, Mr Lightman who by then was appearing for C applied for disclosure of the report. In the alternative he submitted that I should read the report and consider it but without being necessarily bound to accept its conclusions. The defendants objected to the production of the report for three reasons. First, they argued that the report was privileged. Secondly, they argued that it was not relevant and thirdly, as a matter of discretion it would not be appropriate to provide the report to C given the obscurity of C and its backers.

68. I declined to order production of the report and decided it was not necessary for me to see the report. In my view C's application was a final desperate throw to trawl through another document in a micawberist approach in a hope that something or anything might turn up to bolster its case.

69. I can deal with the submissions shortly.

Privilege

70. Mr Lightman submits that the assertion that the report is privileged ignores the fact that C is a shareholder. As such it is entitled to see the company documents to which litigation professional privilege attaches provided it does not relate to hostile litigation between him and the company. The situation is the same whatever the size of the company and regardless of its

size. This is the general rule, see *Re Hydrosan Ltd* [1991] B.C.C. 19 at pp.20–21 *per* Harman J. and *Arrow Trading & Investments Est. 1920 v Edwardian Group Ltd* [2004] EWHC 1319; [2004] B.C.C. 955 at para.24 *per* Blackburne J.

71. Finally in this context Mr Lightman relies upon *CAS (Nominees) Ltd v Nottingham Forest Plc* [2002] B.C.C. 145 *per* Evans-Lombe J. and Adrian Zuckerman, *Civil Procedure* (2003, Lexis-Nexis UK), para.15.76.

72. Mr Lightman submits that Sibir is merely a nominal defendant in the present proceedings which are derivative proceedings and as such the litigation is not against it. In the *Arrow Trading* case the petitioners had brought a Companies Act 1985, s.459 petition complaining about minority oppression being the removal of their representatives from the board and the major complaint is to the payment of high levels of remuneration which included it was alleged a substantial element of disguised distribution. The main allegation of course was that by the removal of the petitioner's representatives they no longer participated in such payments. The relief sought was a buy-out order adjusted to take into account the allegedly excessive remuneration. The application was for all documents including communications between the company and its lawyers in respect of its decision to participate in the proceedings. A claim to privilege failed. Blackburne J. drew an essential distinction between advice to the company in connection with the administration of its affairs on behalf of all of its shareholders and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company. The application was not opposed by the shareholder respondents. The defendants in the present case had not had time to consult with the significant number of shareholders which supported their stance as against C's claim but I cannot conceive it is likely that they would support given their opposition to disclosure to C.

73. I do not accept that the advice is given otherwise than in connection with the present dispute. I have set out earlier in this judgment (para.65 above) how Macfarlanes came to be instructed. It was in the context of a continued allegation of allegedly dishonest activity by CT both as regards the original Dilution and the alleged subsequent cover up. It was asserted that this extended not merely to the dilution but also to misrepresentations being issued (in particular that of the November 26, 2004, announcement). In my view the advice is sought in the context of this hostile litigation and it is accordingly privileged. Equally in the *CAS* case (another s.459 petition) the advice was sought concerning the board decision to support the transactions which were challenged. Once again in the present case it is in the context of potential causes of action that could be brought against Sibir for fraudulent misrepresentation and how those allegedly fraudulent representations were allegedly orchestrated by not only the defendants but all the other officers involved which is in issue.

74. It was submitted by Mr Trace Q.C. that all of the subsequent actions were an orchestrated campaign by CT to cover up his alleged wrongdoing. The purpose of the report was to deal with that submission by having an independent mind look at the position. That has happened. I do not see how it can be necessary to look at the report unless it is also going to be alleged that the conspiracy is being carried on by Mr Guinness and the newly created independent team. There is absolutely no suggestion that that is the case. All that I need is the conclusion that no further investigation is required. Absent a challenge to the bona fides of the new team I see no point in investigating their reasoning.

75. Accordingly I conclude that the report is privileged and that C is not entitled to inspect the same.

76. If I am wrong in that regard it seems to me that the report is not relevant to the present proceedings. Its purpose was to rebut the submission that CT was blocking any genuine investigation. An independent investigation has taken place and it has been concluded by Mr Guinness that there is no basis for any claim against CT. If there is no perceived basis for any claim against CT there can be no reason why he would block an investigation. The conclusion of the report is sufficient (unless which is not the case) it is a allegedly further act of the conspiracy.

77. Finally Mr Lightman submitted that the report having been disclosed to the defendants equality of arms required it to be disclosed to C. Mr Onions Q.C. on instructions said that the report had not been disclosed to Mr Cameron, Mr Betsky or Mr Chalva Tchigirinsky. It is true that corrective witness statements have been prepared which put the date of knowledge potentially back to February 2004 rather than at April 2004 only Ashursts and their counsel have seen the report. When they saw the report they realised that the primary evidence of the date of discovery of the dilution in the original evidence before me puts the date back wrongly to April 2004. There was earlier material which had been discovered by the report which was overlooked. It was of course therefore incumbent upon the defendants (as Ashurst and Mr Onions Q.C. clearly recognised) to correct the factual errors. Had they not done so and had the report subsequently come to light that failure to correct the evidence would have been deployed against them. The report has not been deployed by the defendants as part of their defence to the case; all that has happened is that corrections have been made to errors in previous witness statements. There is no question of C therefore suffering an inequality of arms by reason of it not having access to the report. The reality is that C's solicitors seek the report in a desperate attempt to find some more material to bring actions against the defendants or anybody else. Class Law solicitors in para.4 of their letter dated August 22, 2005 said:

> "The refusal to agree an adjournment coupled with your recent failure to disclose to our client and the High Court the independent report ... suggests that the report contains possible grounds for further civil actions for the loss suffered by Sibir due to [SY's dilution] against persons other than Sibneft or related parties which the current board of Sibir is not willing to bring for improper reasons."

In other words once again allegations are being made of a wide-ranging nature and C through Class Law continued to assert that the board generally is acting improperly. Paradoxically in the sixth paragraph complaint is made about the refusal of the board of Sibir to seek independent legal representation when in fact that is precisely what it has done.

78. Finally, I accept Mr Onion Q.C.'s third submission given the shadowy nature of C and its backers it would not be appropriate for the report to be produced to it.

79. For all of those reasons I decline to accede to C's application.

November 26, 2004, announcement

80. This letter was sent by Sibir to its shareholders. Its purpose was to inform them of what had happened to Sibir's interest in SY. This is the most important piece of evidence relied upon by C in support of its allegations. The announcement C contends was diluted at the insistence of CT to hide his role and also to conceal the time frame that has lapsed between the transactions and their apparent discovery. C obtained this document (one of a small number of documents) from somebody who is alleged to be an insider of Sibir whose identity cannot be revealed because that person believes that if revealed his life would be in serious danger. It is said by C that the material removed from the draft is significant. First, there is removal to an assurance given by AT to CT that nothing untoward had happened to SY, it is also said that the expressed dates of the meetings which led to the dilution have been removed. It is said that all of this is a major part of C's case, namely that the letter was diluted at the insistence of CT to hide what had happened. This reached the level of C's supplemental skeleton argument alleging all of the releases and the letter of November 28, 2004, were fraudulent. Mr Trace Q.C. said that fraud was the deliberate concealment (at the instigation of CT) of CT's role and benefit arising from the dilution. It is of course difficult at first sight to see what benefit accrues from a huge reduction in the value of such a substantial asset given his shareholding. The benefit is alleged to accrue from a separate transaction which I will refer to later in this judgment.

81. The extensive reliance upon this draft letter is to be shown from its treatment in para.46 in the particulars of claim. C has no evidence to show that CT was responsible for the alteration of the text of the letter. It is a matter of "inference" only (para.46).

82. In fact there is no evidence to show that CT had a role in the changing of the draft. The evidence is to the contrary. That evidence shows that the draft was changed by Sibir's lawyers Jones Day Goulden. Attached to Mr Cameron's first affidavit is an internal email in Jones Day. That shows Sarah Moore commenting on the draft letter and amending it so that (a) it comes from the whole board, (b) is not libellous, (c) is less emotional, and (d) it is easier to verify. Attached to the email is the blackline version showing all the deletions. Whilst it is not immediately apparent what the thought processes of Ms Moore are under those four categories when one examines the deletions I do not see how it can be said in the light of that that CT suppressed the draft letter. Mr Trace Q.C. said it was all very suspicious and required further investigation but the plain fact of the matter is that privilege was waived and it was open to C if it wished to ask for clarification of the instructions received by Jones Day and the like. It chose not to do so.

83. In the light of that evidence I conclude contrary to C's contention that there is no basis for inferring CT exercised control so as to change the effect of the draft letter. I should also observe in passing that CT in his affidavit deposed that he was not happy with the changes but he was not able to do anything about it.

84. The significance of the draft and CT's role in it in C's eyes is shown in an examination of the transcript of the ex parte hearing (pp.6–11). Much is made of the changes culminating in Mr Trace Q.C. telling Blackburne J. that (p.11):

> "you have the fact that we are talking about years, this very major loss to the company that takes place in 2002. Nothing happens until 2004. You then get this announcement that is very anodyne really, and still nothing has happened. . ."

He returned to that theme at p.17 for example where he informed Blackburne J. that "everyone was told that there had been a dilution but as far as we were concerned something was going to be done about it. But absolutely nothing has happened". That is not a correct picture given the extent of the proceedings already commenced by Sibir to which I have already made reference in this judgment. Further the suspicion of concealment raised in Mr Trace's submissions based on the draft falls away when the circumstance of the change of the draft are revealed.

CT's motivation for participating in dilution

85. It is not readily apparent why CT would participate in a dilution which has a direct impact on the value of his shareholding in Sibir. This is the more so when as the defendants' evidence shows he has made further investments in Sibir since the dilution occurred.

86. In addition the time frame is significant. As appears from para.73 and following of Mr Cameron's first affidavit in the summer of 2003 Sibir entered into negotiations with MOGC which involved it transferring part of its shareholding in Uygrneft (whose sole asset was its SY shareholding) in return for a 28.09 per cent share to MOGC in exchange for 55 per cent share in it. As has been compellingly pointed out by Mr Onions Q.C. it is extremely unlikely that CT having allegedly diluted the value of the shareholding to 1 per cent for his own benefit would then attempt to deceive the other interested party in MOGC, namely CFC, by trying to foist on it an asset which was worth a fraction of what it was worth before then.

87. There are justifiable and significant criticisms that can be made of Sibir and its officers concerning the dilution and its lack of discovery (a point to which I shall refer to later in this judgment). But some clear benefit accruing to CT to explain the SY dilution in terms conferring a benefit on him has to be provided.

88. The justification is alleged to be found in another transaction. That justification is to be found in the development of a business centre in Moscow known as "Balchug Plaza".

Balchug Plaza

89. C's case is based on examination of press reports and statements by agents which are summarised in para.63 and following of Mr Alexander's first affidavit. It is said that the

development took place between two companies, ST Group, which acquired the land in 1996, and CMI Development, which provided the finance. CMI Group is a company controlled by Mr Abramovich. It is said that CT and AT were interested in ST Group. According to a statement by Jones Lang LaSalle (based on a statement by a consultant to the development) this was the largest land deal worth an estimated $140,000,000. The transaction in question was the sale by ST Group of its 50 per cent interest in Balchug Plaza to CMI in late 2004.

90. The only evidence which shows that CT is interested in ST Group is a list of directorships to be found in the Moscow Oil Refinery's fourth quarter 2004 quarterly report which shows that CT is a director of the ST Group from 2002–2004. No evidence has been produced by C showing how this report was prepared who prepared it and upon what material it is prepared. In fact CT says he sold his interest to AT in April 2002. Part of that transaction involved AT removing himself from Sibir and he resigned as a director on September 10, 2002. I will refer to this agreement further in this judgment.

91. On the basis of the above material Mr Alexander swore in para.68 of his first affidavit as follows:

> "If ... Sibneft was responsible for defrauding Sibir of its interest in [SY] then it is incredible that [CT] and [AT] would continue to work together with Sibneft... Instead the only reasonable inference to draw is that the dilution of Sibir's interest in SY form part of a lager deal between those in control of Sibneft and [CT] and [AT]. [CT] and [AT] must have allowed the dilution to take place and have not sought to reverse it (in any effective way) in order to defer their own business interests. Such an action is a clear breach of duties ... and has caused significant loss to Sibir and thus it's minority shareholders".

92. That is the platform for the allegation that CT fraudulently participated in the dilution of Sibir's interest in SY. The allegation is bereft of substance. There is no evidence put forward showing any connection between the two transactions. By that I mean there is no evidence showing how ST Group was favourably treated in respect of the Balchug Plaza whether that benefit occurred in 2002 or later if so in what way. There is no evidence showing beyond the one page Moscow Oil Company document to which I have referred that CT was involved in ST Group at the time. There is no evidence showing what financial benefits accrued by reason of this arrangement *to be measured against the loss occasioned by the dilution of Sibir's interest in SY*.

93. As I have said above CT contends that he was no longer involved in ST Group. He exhibits to his affidavit a hand written agreement dated April 22, 2002, whereby it is recorded that he and AT agree to a division of their businesses Sibir and ST Group and that holdings in the joint venture with BP and Mtsensk Foundry. It is contemplated that a legal agreement would be drawn up but the thrust of the agreement is that AT will transfer to CT 230,000,000 shares in Sibir with a valuation at $40,000,000. Clause 2 provides that he will further transfer the shares owned by him in another company with a value of $10,000,000. Thirdly, he agrees to transfer his 32 per cent shares in ST BP mutually valued at $10,000,000.

94. In exchange for those valuations totalled at $60,000,000 CT will transfer his interest in amongst other things ST and will pay the remaining $30,000,000 over a period of 18 months in equal instalments.

95. This is a remarkably informal document as Mr Trace Q.C. said. He points out that no legal document has been prepared and no other surrounding documentation has been produced which would be necessary to implement the transactions. The only fact other than the document revealed by the defendants is that AT resigned as a director to Sibir on September 10, 2002.

96. When pressed Mr Trace Q.C. contended the document was a forgery.

97. I am doubtful as to the weight I should attach to the document itself. There is no other material provided by the defendants to attest to its genuineness (it is not even witnessed). Were

that the only document alone I would not be persuaded that there was no issue as to CT's involvement continuing in the ST Group. However that doubt is overwhelmed by all the other factors that I referred to above.

98. The premise upon which Mr Alexander makes the case is a false one. It assumes its own case. It assumes that CT knew about the dilution. With that assumption it correctly suggests that it is unlikely that having been defrauded by Mr Abramovich allegedly he will continue to do business with him. Yet that is an essential premise. The flawed logic is in the assumption that CT knew about the dilution. If he did not know about the dilution there would be no surprise about him continuing in business with Mr Abramovich.

99. I accordingly reject C's contention that there is any credible evidence which shows a connection between the Balchug Plaza as a justification for CT wounding himself by participating in the SY dilution at an earlier time.

100. That is well demonstrated by the exchange that took place between Blackburne J. and Mr Trace (p.35 of transcript):

> "Mr Justice Blackburne: So that has put $140 million into – is this right, or is it half that? $140 million has gone to the Tchigrinskis – is this right? – for their share in the Balchug Plaza Project.
>
> Mr Trace: I am not certain we can say that. What we do know is that it sold its 50 per cent interest. The 140 million is just what the report credits the overall value of the deal is. We cannot say what has been paid to the Tchigirinskis. Your Lordship asked me that before, and we are just not in a position to say.
>
> Mr Justice Blackburne: And what was the land supposed to be worth?
>
> Mr Trace: I do not have the details of that.
>
> Mr Justice Blackburne: No.
>
> Mr Trace: That is why I fairly accepted early on that we cannot point to what the actual benefits are, but there must have been some. At the very lowest, there appears to be lease payments.
>
> The same report also commented that:
>
> It needs to be emphasised that according to the information available to Moscow realtors, Sibneft leases from ST Group the building, which is currently occupied by the company. By moving to Balchug Plaza business centre, belonging to the developer close to Sibneft shareholders, the company will completely depart from Mr Chavla Tchigirinski's structures, whose relations with oil company shareholders are not friendly at all. Mr Tchigirinskiy charges Sibneft with dilution of the shares of Sibir Energy, controlled by him, in the oil producing Sibneft-Yugra LLC from 50% down to less than 1%. Relations between Mr Tchigirinski and Sibneft and its shareholders worsened because of the conflict around Moscow Refinery, the operational control over which Sibneft tried to wrestle in 2001-2002 owned by city authorities and Sibir Energy.
>
> It is certainly curious that on the one hand it is said that there are disputes between Mr Tchigirinski and Sibneft, and at the same time there seem to be transactions entered into between the two of them."

101. C's position is no further advanced before me. It is unable to identify any benefits accruing to CT allegedly in exchange for this dilution.

102. The case in this regard therefore lacks credibility. The only other matter upon which reliance Mr Trace could place was the defendants' evidence concerning the discovery of the dilution.

Late discovery of the dilution

103. This too was a significant feature of the ex parte hearing. I have already referred to the reference to the draft letter dated November 26, 2004, that is the first basis relied upon before

A Blackburne J. (transcript p.6) as to why CT knew about the dilution much earlier than apparent. The second was one of inference. Mr Trace said (p.7) that:

> "It just beggars belief My Lord. This is a major project belonging to this PLC and to suggest that they did not know about this for 2 years just seems extraordinary. When you couple with that the fact that this letter actually says they got no co operation in September 2002 . . ."

B Blackburne J. similarly was surprised (transcript p.55).

104. That was at the ex parte stage without the benefit of any input by the defendants. The evidence which details the discovery of the fraud (or rather the non-discovery of the fraud earlier) is to be found in Mr Cameron's affidavit. As I have said he was a director of all of the relevant companies. Under the terms of the SY agreement information was to be provided by the Sibneft representatives to Uygrneft and thus Sibir. That line of information it was said ceased in September 2002. The time line is once again significant (the Moscow Oil Refinery dispute broke out in August 2002). Despite that clear connection Mr Cameron took no steps to enforce the requirement to obtain information he suggests in para.63 of his affidavit that Sibir was concerned as to not antagonise Sibneft. This is a difficult motivation for doing nothing because it is CT that's being affected by the Moscow Oil dispute not Sibir. The later evidence has corrected the available material. It reinforces the fact that Mr Cameron and Mr Betsky have been somewhat lax.

D 105. As I have said above the day-to-day reporting requirement was to be satisfied by Mr Matevosov. On September 10, 2002, Sibir convened a meeting of the board of directors of Uygrneft and resolved to remove Mr Matevosov. That was shortly before the first dilution (September 28, 2002). Despite that decision he was not actually removed until February 26, 2004. The only apparent explanation for this delay in implementing the decision was because Mr Matevosov avoided meeting and "eventually other business pressures simply took precedence and we did not complete the removal and appointment". Mr Matevosov was acting of course on behalf of Sibir's interest but was an appointee of Sibneft. I find it extraordinary that it took so long to remove him especially in the context of the Moscow Oil dispute. Unlike Mr Cameron I would have thought that given that dispute the ceasing of the information ought to have had a significance which caused Sibir concern to such an extent so that it would do something. The opposite appeared to happen. Nothing was done so as not to rock the boat.

F 106. I have already observed that in August 2003 (by which time both dilution meetings had taken place) MOGC became interested.

107. It is said that MOGC discovered the transaction in March 2004 when it was carrying out a due diligence exercise. It discovered from a document lodged in the public registry that the shareholding had changed. Mr Onions Q.C. was unable to explain to me why Sibir had not found this out itself. This is significant. Mr Cameron says that he first heard rumours that Sibneft had procured the dilution in December 2003 he having been told by Sibir's finance G director Alexander Betsky that Ernst and Young auditors of both Sibir and Sibneft had told him that Uygrneft did not own all of it's shares in SY. He asked Mr Betsky to investigate further. Mr Betsky reported that investigation back by the saying the auditors had "clammed up". Mr Betsky in para.18 of his affidavit said that Mr Cameron asked him to find out as much as he could but "I was unable to get further information". He fails utterly to say what further information he sought. He does not refer to the "clamming up" conversation with Ernst and H Young. Mr Cameron does. It is extraordinary in my view that when the auditors raised the point and then clam up that does not cause concern within the offices of Sibir. Equally I find it disturbing that Mr Betsky does not detail what steps he took to find the information and the result of those steps. MOGC appeared to have found it quite easily by looking at public record documents. The casualness might be forgivable for a small asset but this represents a substantial asset of Sibir worth according to the case before me hundreds of millions of dollars. At a board meeting on April 1, 2004, of Sibir apparently there were dinner table rumours

reported of a dilution. Still nothing happened. It is only apparently after MOGC's revelation that Sibir's board believed for the first time something was happening.

108. All of this is quite extraordinary.

109. Subsequent to the disclosure whilst Sibir has caused the commencement of the proceedings in Russia I was told, by Mr Onions Q.C. that no steps had been taken to interview either Mr Davidovich or Mr Matevosov. This too I find extraordinary.

110. Mr Cameron offered to resign. His resignation was not accepted.

111. The question is what is to be made of all of this. If C had some independent evidence of worth showing CT's involvement then an inadequate explanation of the type proffered by the defendants could at this stage have been said to have been corroborative of C's evidence. However the actions themselves are not in my view capable of being relied upon by C as a sole basis for inferring CT participation. The evidence on its own is equivocal. It can on one level demonstrate incompetence to a marked degree by a number of senior officers. There is no suggestion however that CT was involved in any of this and C's case requires me to believe in effect that both Mr Cameron and Mr Betsky are participators in a cover up under the pressure of CT in his wrongful acts. I am not prepared solely on the basis of the inadequacy of their explanations to conclude they have behaved in such a way. Given the conclusions of the report there is nothing to cover up. It follows that the inactions do not support C's case.

112. During the hearing I have expressed concerns about the inadequacy of this evidence and the lack of steps taken from September 2002. A number of possibilities were canvassed. One was adjourning the hearing and direct a meeting of Sibir's shareholders to whether they supported the action. Mr Trace expressed a willingness on the part of C to abide by the result of such a meeting. I did not think it appropriate to order a meeting at this stage given the delay and the costs of such a meeting.

113. The second matter I canvassed was the independent investigation referred to above by the chairman of Sibir's board appointing independent lawyers to investigate all of these matters and advise Sibir. Somewhat unusually Sibir is represented by the same lawyers that represent CT and Bennfield. That is unusual in cases of this nature.

114. At the conclusion of the hearing on June 21 I gave the defendants time to consider their position. If they wished to appoint independent lawyers and those lawyers wished to make representations I indicated (with the concurrence of Mr Trace Q.C.) that the hearing would be reconvened for that evidence to be heard.

115. However they did not do so. Mr Guinness wrote to me indicating that his conclusions following the investigation supported the defendants as it really removes any possible linkage between CT and the officers of Sibir in the way in which the dilution has been discovered and investigated. At best it can only be incompetence and not part of a company conspiracy.

116. I therefore conclude that the inadequacy of their actions is not sufficient of itself to sustain C's claim absent any other material provided by C. For the reasons set out above there is in my view no credible material linking CT to any wrong doing in respect of the SY dilution as alleged by C in its evidence before Blackburne J. and before me.

Magma

117. In my view C's claim in respect to the Magma payments in the light of the defendants' evidence is hopeless. It is based primarily on the statement that MNK had ceased to exist. The evidence of Mr Betsky shows that far from ceasing to exist a whole series of documented transactions have taken place which he authorised personally. Given that evidence Mr Betsky too must be condemned as a participator in a defrauding of Magma to the extent of $37,000,000. There is no evidence showing that and the documentation speaks for itself.

118. C sought to counter that by providing further material in Mr Alexander's fifth affidavit on June 13, 2005. This material was again said to be provided by the insider. In paras 11, 16 and

17 he exhibits board minutes (without significant comment) purportedly of MNK. These board minutes cover a period after Mr Alexander said it ceased to exist in his first affidavit. This evidence therefore is completely destructive of C's primary case that it ceased to exist. Further as Mr Onions Q.C. pointed out in his submissions it is significant that the insider (if there be an insider) provides documents which undermine C's case and supports the defendants case as to the continued operations of MNK. C has not suggested that the insider supports its case either. There has been no attempt to produce a statement from C. Nor is there any evidence produced as to what C believes is going on. The production of these documents show how inadequate C's case is. They are produced for a purpose other that advancing the claims as advanced before Blackburne J. and set out in the particulars of claim.

119. It is now said that CT is involved in MNK and that therefore he is self dealing as regards the oil transactions. This claim was first intimated by Mr Trace in the oral submissions. It does not appear in the evidence nor the skeleton arguments. It is not pleaded. It requires far more than this to justify adjourning the proceedings so as to enable C to present a claim on a completely different and un-notified basis.

120. It cannot therefore in my judgment be used as a platform for continuing to hold the injunction. It cannot be used to support the application to carry on the derivative action because it does not feature in the particulars of claim. Nor can it be used as a basis for supporting an application for service out of the jurisdiction for the same reason. It would be quite wrong to allow C to try and salvage the present action by this late implied suggestion. If there is anything in it no doubt C on proper notice can issue a fresh action if it is so advised.

The pleadings

121. The particulars of claim requires careful consideration.

122. In para.46 the allegation that ST knew the shares had been diluted long before 2004 is set out. C is unable to provide any express evidence justifying such a contention. The contention is that (a) from the November 26 letter when compared with the November 26 draft (particulars (1–7)), and (b) the Balchug Plaza transaction (items (8) and (9)).

123. It is alleged (item (11)) that it was to be inferred that the dilution of Sibir's interest in SY was brought about as consideration for Mr Abramovich providing funding for the Balchug Plaza. That is different from the evidence to which I have already made reference. There is no evidence which justifies that inference and no justification in the paragraph justifying inference whatsoever. The Particulars in the paragraph (like the evidence) fails to identify in what way CT was advantaged by the giving up of this valuable asset.

124. The breaches of duty in respect of the SY dilution are to be found in paras 48–49. The former is an allegation of falsely causing Sibir to be portrayed as a victim of fraud by Sibneft "so that [CT] and [AT] could enter into the Balchug Plaza transaction".

125. Alternatively it is suggested in para.49 that in allowing the dilution to occur and omitting to take any steps to reverse the same there was a conflict. This is dependent on establishing that CT had any role in that. As I have said above the evidence is completely lacking.

126. In para.50 eight breaches of duty are attributed to CT. The first six are allegations of negligence. The seventh is misleading the shareholders as to the "proper circumstances" surrounding the dilution and eight is a failure to seek redress. For the reasons that I have set out above none of these is sustainable.

127. In para.51 it is contended that he derives substantial benefits from those breaches personally and or through Bennfield which it is alleged is a knowing recipient of such benefit and or through the knowledge of CT as knowingly participated in such breaches.

128. When one looks at the prayer for relief there is a claim for damages or equitable compensation payable to Sibir reflecting the loss caused to Sibir by the dilution and the Magma

wrongdoing. A claim is also made for an inquiry/account as to what profits have been made by the defendants from the Magma wrongdoing and the failure to prevent the dilution and/or to seek redress once the dilution had occurred. There is no prayer for relief for profits arising from the dilution which is contrary to the evidence filed on behalf of C. There is a claim for payment or restitution as to such sums as found upon taking the account and inquiry.

129. Finally para.62 contains an averment that Sibir is unable to take action because it is under control of CT. It asserted requests had been made to the management of Sibir that the circumstances be investigated but have gone without reply. This was a point also made to Blackburne J.

130. Whilst it is true there was no reply to the letter which sought answers to questions it is plain that a meeting took place between Mr Fennalls, the chief executive of Strand Partners Ltd, Sibir's advisors, and Mr Alexander on January 17, 2005. Mr Alexander referred to the meeting but not its details on the basis it was a without prejudice meeting. I do not see that there was any without prejudice privilege that attached to that meeting. Mr Fennalls has deposed that at the meeting whilst he describes it without prejudice and off the record he sought a list of the people for whom Mr Alexander was asking and he confirmed he would provide it. There was a debate over whether there had been investigations and asked Mr Alexander to come back with evidence of wrong-doing whereupon he would investigate it. He deposed that Mr Alexander did not come back to him on either point. Somewhat belatedly in his third witness statement served on the final day of the hearing Mr Alexander said that Mr Fennalls' note of that meeting was incomplete (Mr Alexander apparently did not take one because it was on a without prejudice basis). He then appears implicitly to acknowledge that he agreed to come back but says he did not do so because he did not receive information concerning Sibir's case against Sibneft and because he believed the two draft versions of the November 26, 2004, letter had been drafted in Mr Fennalls' office. In my view to give Blackburne J. the impression that a letter sent in early January remained unanswered was not a full and frank disclosure of what had gone on. It is clear given Mr Alexander's lack of challenge that as far as the defendants were concerned they were waiting for further material to be put to them. I do not find his answers as to why he did not come back to them convincing.

131. This case demonstrates in my view the need to consider very carefully whether or not to proceed ex parte. It seems to me that on the analysis of the answers provided by the defendants had these been raised by C in letters before action they would have been provided with material which gave a complete answer to the claims intimated by them.

132. I note that the particulars of claim is verified by Mr Alexander on behalf of the claimant. I presume that is Mr Stone but that remains in doubt given the fact that for example Mr Trace Q.C. did not know until day three who was providing instructions on behalf of the claimant. This too is unsatisfactory. There is nobody on behalf of C who has asserted any belief in the allegations made. Mr Alexander draws inferences from a provision of documents in questionable circumstances. This is reinforced by paras 6 and 7 of C's supplemental skeleton. This skeleton is in support of C's application for permission to serve out of the jurisdiction but it seems to me that the allegations in 6(I-IV) are new allegations of negligence or fraud. I do not accept that they appear in the particulars of claim as presently pleaded. There is in any event nothing in these for the reasons that I have set out earlier in this judgment. The damage alleged in para.6 (VIII) is a different damage to that claimed in the particulars of claim. It is alleged in this reply that the damage is the issue of shares to Bennfield as approved by the extraordinary general meeting as opposed to the more realistically of diminution in the value of Sibir's interest in SY. The reason for the change of damage if course is to provide a justification for obtaining permission to serve out of the jurisdiction. It is difficult to see how *Sibir* has sustained a loss measured by the reference to the issue of extra shares in it to Bennfield. The loss is sustained by the other shareholders whose shareholding is consequently diminished in value. It would on that analysis provide a direct action by shareholders. However C of course has not

A suffered any such loss because it purchased after the issue was approved. This shows the confusion of C in the way in which it puts the case. It is a moving feast to deal with difficulties as and when they arise and lacks cogency for that reason.

133. These changes and the lack of verification of the particulars of claim are matters of concern. They (and other matters) lead the defendants to assert that C lacks bona fides in presenting its claim.

B

Attack on C's bona fides

134. The defendants contend that the claim brought by C is not brought bona fide. This submission involved a number of areas of consideration.

135. First, it is submitted that there are serious doubts about C's motives. The defendants point to the manner of the acquisition of the shares. There appears to be no point in C acquiring shares because the acquisition was after the events occurred. It paid a price which reflected the C market price *after* those actions had been made public. No officer of C has provided any evidence showing why C is interested. Indeed it was by no means clear that any officer of C was actually giving instructions until late on in the case. The manner in which the litigation was financed was provided unwillingly and still remains obscure. Why the Cyprus company should be interested in lending (on terms that have been withheld) £25,000 to C to enable it to conduct this litigation has been concealed from the defendants and the court.

D 136. The actual moving force behind C's application is apparently an organisation RPM which too is completely shrouded in mystery. Of course if there are doubts about safety that is a legitimate reason for providing material in a way which does not expose the persons in question to the risk of violent or other intimidation. However no steps have been made to provide any evidence from anybody in RPM with any kind of protection whatsoever. It is difficult to see what RPM is and why it is interested in Sibir to such an extent that it creates this litigation.

E 137. There is a similar lack of bona fides in respect to the insider allegedly from Sibir. Once again there is no attempt to provide evidence from him at all with any kind of protection. He or she has apparently provided a small number of selective documents which lead to inconsistent conclusions (see earlier in the judgment).

138. C's solicitors tried to generate an active support for this action from the shareholders in Sibir. They have singularly failed despite calling for a number of meetings (no shareholders attended the last one). No shareholder has agreed to support the action to an extent to become F co-claimant. No shareholder has offered financial support as far as I am aware. The list of shareholders who have support has dwindled to an infinitesimally small shareholding in Sibir. It is by no means clear that those shareholders entirely support the claim because of the way in which Class Law's website operates when accessed. By accessing the subsite one is deemed to be a supporter. The defendants obtained affidavits from a number of shareholders who no longer wish to be regarded as "supporters" by thus accessing the website.

G 139. The claimant's solicitors appear to be trying to generate a piece of litigation for purposes which appear obscure. They appear to have tried to generate enthusiasm for this action and I have already commented adversely on their posting of material on the website before serving it on the defendants.

140. The defendants cannot point to who is the true backer. C could reveal the true backers but has chosen not to do.

H 141. I am not persuaded that the claims brought by C are being brought in a bona fide manner. This too I count against C.

Conclusion on the material before me

142. It seems to me that the claim is hopeless. That is reinforced by the failure of anybody on behalf of C coming forward who could be regarded as a legitimate person interested in

bringing these claims. I have observed as to the criticism of the defendants' evidence but as I have already said that does not in my view lead me to a conclusion that C's claim is sustainable whatever the threshold of proof required. In my view on the evidence before me there is no claim in the way in which the claimants have brought them which is sustainable.

143. That is enough to discharge the order that Blackburne J. made as continued and (if the defendants wish) to accede to an application to the proceedings to be struck out either under CPR, Pt 3 or CPR Pt 24.

144. These principles involved wide-ranging legal submissions. The arguments were deployed extensively by both parties and I mean no discourtesy to the comprehensive arguments when I say that I am not going to deal with those in this judgment. It is not necessary for me to deal with them because it seems to me C's case fails entirely on the inadequacy of the evidence to justify any of the relief which it has already obtained. Further, on the material before me I can see no basis for allowing the present action to continue as to do so would be an abuse of the process of the court and I will exercise my overruling powers under the CPR to strike out the action. In so doing of course I will revoke the orders that Blackburne J. made for service out of jurisdiction.

145. Finally in this context I should observe that if the matter reached the question of granting an injunction given the minimal interest of C in the shareholding of Sibir and its financial non-existence and the mystery surrounding the fortification of its undertaking in damages I would not have been minded to grant it any interim relief as against the defendants. I am not convinced there is any monetary claim nor any monetary claim which is not capable of being satisfied by these defendants if the action had been allowed to continue. The whole manner of the attendance of the meeting in December, the formation of C and the subsequent attempts by the claimants' solicitors to obtain support is in my view unacceptable. It all turned on non-existent evidence and is brought on behalf of people who simply cannot be identified in any credible way. The cornerstone to the allegations are wrongdoings against CT assisted by all the other significant officers in Sibir. On the evidence before me there is no justification for any such conclusion and that is reinforced indirectly by the extensive investigations apparently taken by Macfarlanes on behalf of Sibir under the confidential direction of its chairman.

146. For all of those reasons I will therefore refuse C's application to continue its derivative claim, discharge the freezing injunction granted by Blackburne J. and accede to the defendants' application to set aside the permission granted by Blackburne J. for service out of the jurisdiction.

147. In addition I also determine that it is appropriate to strike out the proceedings as being an abuse of the process of the court and I will invite an application for inquiry on the undertaking of damages if the defendants wish to make such an application.

148. I will hear representation to costs when this judgment is handed down.

(*Application to continue derivative claim refused. Freezing order discharged. Application to serve out of the jurisdiction refused*)

JUDGMENT

Peter Smith J.:

1. Arising out of my judgment, I have a number of applications for costs. The first one is by the defendants for their costs to be assessed on the indemnity basis. I have been referred to the leading authority of *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Apsden & Johnson (a firm)* [2002] EWCA Civ 879 paras 12, 15 and 19 *per* Lord Woolf, and para.39 *per* Waller L.J.

2. For an award of indemnity costs, the action and the circumstances must be outside the norm. It is difficult to see a case, in my view, which is more outside the norm than this one. Seven reasons are given in Mr Onions' skeleton argument as to why this is outside the norm. They are, first, that the action has been found to be an abuse of process; secondly, the position of the claimant is peculiar and mysterious; thirdly, the lack of the bona fides of the claimant; fourthly, the unacceptable conduct of the claimant; fifthly, the action being commenced on an ex parte basis when there was no reason or justification for such ex parte application; sixthly, the fact that the claimant acted in breach of undertakings given to Blackburne J.; seventhly, the fact that the claimant was acting in breach of the order of Michael Briggs Q.C.

3. All of those cumulatively lead, in my view, irresistibly to one conclusion, that the claimant should be ordered to pay the costs of the defendants to be assessed on the indemnity basis.

4. The next argument is whether or not the report which was obtained should form part of the costs. Mr Onions has corrected my understanding of the exchange. The exchange was between him and me about the costs consequences but Mr Trace, who is not noted for his silence in matters where it is appropriate, did not object to my observations that there would be costs consequences if the report was included. Had he done so, then I would have considered at that stage whether or not it was appropriate to make an order because I would not necessarily have made an order the fourth defendant go to the expense of incurring costs as a result of this litigation which it would have no prospect of ever recovering. It seems to me plain that the claimants tacitly acknowledged that the costs of the exercise would be recoverable if the defendants were successful in the action. Of course, if the report had turned out to be favourable from the claimants' point of view, they would have deployed that report as evidence in support of their case. They took the risk, in my judgment, that the report would not be favourable and there is a costs consequence. I see no reason why, as a matter of principle, the fourth defendant's costs should not extend to the report.

5. Mr Lightman objects to any costs being recoverable by the fourth defendant, the company. He says, which is quite true, that in a normal s.459 case or a normal *Foss v Harbottle*-type case (*Foss v Harbottle* (1843) 2 Hare 461), the company is there as a nominal defendant. I do not accept that in the present case the role of the fourth defendant was merely that of a nominal defendant. It seems to me to be clear that very serious allegations were being made against the company: see, for example, the press announcement of November 26, 2004, which was extensively relied upon by the claimants as being a fraudulent document issued by the company. There were other factors which Mr Onions identified in his response, and all of those in my view, when I consider the observations of Lindsey J. in *Re a Company (No.001126 of 1992)* [1993] B.C.C. 325, means that I should conclude that this was not in reality a shareholder dispute. It was an action brought by a nominal claimant with a £1 shareholding, formed solely for the purpose of buying shares to raise this litigation. In the litigation a host of allegations were made against the conduct of the defendants which I have found to be completely unjustified. I do not know the motive for the action, but what I can say is I do not believe for one minute the motivation of the claimants was alleged to be as a concerned shareholder in the fourth defendant. That is self-evident from the matters that I have set out in the judgment, and the overwhelming opposition from the shareholders on the other side.

6. This case therefore was not the norm. In my view, given the serious nature of the allegations against the company as well as the individuals, it was quite right that the company had an opportunity fairly to be heard on these applications to deal with these serious, unfounded allegations.

7. The criticism that was made by the claimants was that the same legal team represented the individual defendants and the fourth defendant, thereby, it was said, furthering the conspiracy and in effect preventing the fourth defendant from presenting an independent view. It is in that context that the Macfarlanes report has to be considered, to deflect the criticism of the innocent

nominal company, allegedly, singing the same tune as the alleged fraudulent wrongdoers. All of this shows that there can be no basis for suggesting, as I have said, that this is a normal case.

8. For all of those reasons, in my view it was quite proper for the company to be represented by Ashurst and Mr Onions, and it was quite proper for the company to assume a joint and several liability for the costs. I therefore reject Mr Lightman's second submission.

Later

9. I refuse permission to appeal. Although Mr Lightman presents his submissions in an attractive way, I am not persuaded anything he said justifies the granting of permission to appeal. There is nothing to investigate about CPR, r.19.9 or any other of the evidential thresholds such as service out of the jurisdiction and granting of an injunction, all of which were extensively canvassed before me at the substantive hearing. The reason for that is because the claimant's case is so evidentially poor and non-existent that, whatever the threshold, the claimant has not reached it. That is the conclusion I made which is summarised in para.116 of my judgment in relation to the major claim concerning the SY dilution.

10. For the avoidance of doubt, the Magma claim is even weaker. As I have concluded, I do not believe there was any legitimate material to put before the court, and the claimant failed to produce any legitimate material. It is true that the defendants' officers have been incredibly lax about the loss of a substantial interest but, as I concluded, absent any other supporting material, and with the benefit of the removal of the alleged control of the fourth defendant by virtue of the commissioned report, that evidence cannot of itself provide a justification for the claimant's actions.

11. It follows therefore that the entirety of the claim was bogus and that is why it was dismissed.

12. All of those reasons show why permission to appeal should not be granted on the primary claim.

13. In respect of the costs, Mr Lightman helpfully provided me with the authorities on the guiding principles, and I have concluded that on the facts of this case it was appropriate for Sibir to have costs as a result of a full participation in this action. I can see no error of principle, having had the principle so cogently cited to me by Mr Lightman, and I believe I followed it, so I refuse permission to appeal in respect of the costs also.

(*Costs on an indemnity basis. Permission to appeal on primary claim and on costs refused*)