Tuesday, 29 November 2011

(10.15 am)

MRS JUSTICE GLOSTER: Yes, Mr Sumption.

DR ILIA RACHKOV (continued)

Cross-examination by MR SUMPTION (continued)

MR SUMPTION: Good morning, Dr Rachkov.

When we broke yesterday, I was asking you about the implications for simple partnership agreements of the rules about common ownership. I think we'd established that if one is going to have a simple partnership agreement, that could only validly be achieved by doing it in defined shares. You can't have joint ownership. That's right, isn't it?

A. We discussed what are the essential terms of the simple partnership contract, and I confirmed that it is important to make a concluded simple partnership contract to agree on the contribution which are aimed at achievement of a lawful goal.

Q. Yes. But I think you also accept, don't you, that joint ownership of assets is possible only in cases where it's provided for by legislation which do not include partnership cases?

A. That is correct.

Q. So that if you have a simple partnership agreement, the partnership assets have got to be held in defined

shares, not jointly; the other form of common ownership?

A. The shares must not be defined from the very beginning but they can be defined by application of Russian law.

Q. Well --

MRS JUSTICE GLOSTER: When you say "must", you mean do not need to be, do you?

A. Do not need to be.

MR SUMPTION: So you're suggesting, are you, that it's possible for the parties to make an agreement that they will have defined shares but without saying what those shares are?

A. No, I'm not saying this.

Q. In that case I don't quite follow what you are saying.

Suppose that three parties come together and decide to have a simple partnership agreement. Now, their shares in the partnership assets can't be joint, I think we've established that; they have got to be what in Article 244 is called share ownership, ie ownership of a share, isn't that right?

A. Yes, the property which the parties contribute or which arises as a result of their joint activity must be their shared ownership.

Q. Now, for that purpose surely the parties have got to agree what their shares are going to be?

A. I disagree with that statement.

Q. Well now, let's suppose that three parties come together and make an agreement to have a partnership but they do not agree what their shares are going to be, okay? And let's suppose that before they've done anything else, they come to you as their legal advisers and say, "Is this a valid agreement?" What's your advice?

A. I will ask them whether or not they defined the contributions, not the shares.

Q. All right.

A. Ie what is the property, or are there efforts which they would like to unify to pursue their joint activity?

Q. And suppose they tell you that the answer to that question is that they're not contributing anything in money, they are simply contributing their various skills, and they don't yet know what the value of those skills will be, it will all depend on how the business turns out. What advice do you give them?

A. I will ask what the goal of their joint activity is, and, if they do not contribute any money or other tangible assets, that this is the goal which governs what they must do. If they are professionals, they do well understand what must be done, what is necessary and sufficient, to achieve this goal.

Q. Well, that's not always the case, is it? Let's take the facts as alleged in this particular dispute, Dr Rachkov.

You have an agreement, according to Mr Berezovsky, that his contribution is going to be in the form of lobbying and raising money, but you have no agreement about how much lobbying is going to be required, how much money is going to be raised, how long it's going to take and so on.

So in that situation, how do the parties establish what the relative value of their contributions is?

A. The old Roman said "sapienti sat". This means that those who are professionals, they do understand well, they do it not for the first time, I guess, what should be done to achieve the goal.

In this particular case I think the goal was quite clear, this was establishment of Sibneft as a legal entity and privatisation of its shares with a particular result, and the result is that the control over Sibneft is jointly held by those two or three persons who are the partners to the joint activity contract. This means that each of them was under the obligation to do whatever is objectively necessary and sufficient, as I said, to achieve this particular goal.

And this is the case with all contracts which deal with nontangible assets or nontangible property, if you wish, which are not things or money. You cannot predict from the very beginning what each of the parties shall

do each single day. There are virtually no self-executing agreements, neither in Russian law nor in English law. That's why a reference must be made to performance on the one hand and to default rules of Russian law on the other hand.

Q. I will come to the question of default rules in a moment, but if you cannot predict how much work and how much skill and effort will be required of each of the partners, you cannot, I suggest, know what their shares will be if you are allowed to have a valid partnership agreement in which the shares depend entirely on what's going to be put into the enterprise. Do you follow my question?

A. I do follow your question, Mr Sumption. I insist that there is a big difference between the terms "contributions" and "shares", and the cases on which I base my opinion, which we can have a look at if you wish, they say that in many cases the parties unified their efforts without saying for sure what exactly must be done.

Whatever is necessary and sufficient to achieve a proper, lawful, economic goal must be done by each of the partners. That's my opinion.

Q. If the position is that the parties do not agree their respective shares in the common property and cannot

predict in advance how much work will be required of each of them, I suggest that there is no way in which you could advise them, the day after they had made their agreement, whether it was valid or not. What do you say?

A. If your question is about how I would advise the simple partners or the future simple partners, of course I, as a practising lawyer, would prepare a written agreement which spells out as many details as possible, which is very clear and very detailed and spelled out so that everybody knows what exactly must be performed.

However, if the performance shows what exactly they did, and nobody objected against, what is the problem?

MRS JUSTICE GLOSTER: Can I just be clear. Is this a summary of your propositions: there's no necessity to quantify the contributions from the start because the parties or the partners have got to do whatever is necessary to achieve the economic goal. And there's no necessity to fix the shares in the partnership assets from the start?

A. Correct, my Lady, with one small caveat. If the partners agreed to unify money or maybe other tangible property, maybe this is important to say, at least either what is the total amount of the money which is necessary to run the joint activity, for instance, they

agree that the total fund available to the joint activity must be 100 rubles, and there are only two partners, then default rules of Russian law allow to determine that each of them must contribute 50 rubles.

The other possibility is that they agree that the funds available must be 100 rubles but they do not agree -- sorry, the amount, they did not agree on the total amount, but there are two partners and the share of one partner or the contribution of one partner is clearly defined, 50 rubles. This means that the other party must also contribute 50 rubles. That's how Russian law operates.

MRS JUSTICE GLOSTER: No, my question to you was, am I to record your first proposition as being that there is no necessity to quantify the contributions from the start?

A. In this particular case, it is not necessary.

MR SUMPTION: Dr Rachkov, what I suggest to you is that, if you do not sufficiently define in advance either your shares in the common property or the amount that each party is going to put in, you do not have a valid partnership agreement. I think you reject that proposition, do you?

A. Having regard to what I said before, I only agree that the contributions must be not defined, but the parties must agree to contribute something. In this particular

case they contributed their efforts, their business skills, business reputation rather than money. This means that each party was under the obligation to do whatever is necessary and required objectively to achieve this lawful economic goal.

Q. Now, you mentioned default provisions and there is a default provision of the Civil Code, is there not, providing that in the absence of agreement shares are treated as equal?

A. Yes, not only shares but also contributions are treated equal. "Contributions" is translated into Russian as "vznosy". Before you have a share, you have to have the contributions.

Q. Contributions; which article of the Civil Code are you thinking of, 1041?

A. I refer more to the Russian legal literature to which I referred in my reports, which indicates that, in accordance with the Civil Code of 1964 and in accordance with the fundamentals, unless the parties otherwise agreed, their contributions were to be equal.

Q. I'll go back to that issue because I certainly can't find that in those parts of the Civil Code but we'll come back to it.

Can I ask you to look at Article 245, which is at G(A)4/4.02/45. Now, is sub-article 1 the relevant

default provision regarding the parties' respective shares in the common property?

A. Correct.

Q. That provides that:

"Shares shall be considered equal if the shares of the participants in share ownership cannot be determined on the basis of a statute and have not been established by agreement ..."

Now, do you agree that the default provision, that default provision, cannot apply where the parties have expressly agreed that their shares in the common property are not to be equal?

A. Yes.

Q. Now, if there is an agreement between all the partners that the partnership shares are not to be equal, but no agreement between all the partners about what their unequal shares are to be, would you agree that the default provision cannot help?

A. I would not agree. I would like to refer to the information letter of the Presidium of the highest arbitrazh court, or Supreme Arbitrazh Court, as you may call it, of the Russian Federation, which I used in my report. It says -- actually it deals with the following case --

MRS JUSTICE GLOSTER: Hang on, can I just have the paragraph

in your report?

A. I need then my reports, please.

MRS JUSTICE GLOSTER: Just because I would like to --

MR SUMPTION: Yes, I think it would be helpful if you kept the volume with your reports open in front of you so you can refer to it whenever you need to.

A. Thank you for your recommendation.

MRS JUSTICE GLOSTER: Are we in your fourth report?

A. I am now looking at my reports just to make sure that I find the proper information letter.

(Pause)

This is my fourth report, paragraph 178 G(A)1/1.01/61.

MRS JUSTICE GLOSTER: Thank you.

A. And there, in paragraph 2 of the information letter, the Presidium of the Supreme Arbitrazh Court of the Russian Federation had to do with the case where two parties allegedly agreed on their shares in the shared property. Later on they contributed maybe the property, which deviated from this initial agreement, and the court had difficulties with defining the shares. And the court of the first instance said, based on especially Article 245 of the Civil Code, the shares are equal.

The court of the upper instance, however, indicated that the court of the lower instance must determine what

exactly was contributed, what is the valuation of this, and only if it is impossible to define it then the shares are deemed equal. That's shortly what the court says.

MR SUMPTION: Well, Dr Rachkov, I was trying to establish with your assistance how helpful Article 245.1 is in a situation where the parties have expressly agreed that the shares are not to be equal.

Now, do you agree that if the parties have expressly agreed that the shares are not to be equal then you cannot apply a default rule which says that they are to be equal?

A. No, I do not agree. In the case to which I refer, the parties also argued before the court that their shares were unequal.

Q. Well, would you please look at the provisions of the Code which you quote in the previous paragraph of your report, paragraph 177 G(A)1/1.01/61. Do you see the reference to Article 1042 which in fact came into force in the following year?

"The contributions of partners shall be assumed equal in value unless otherwise follows from the contract of simple partnership or the circumstances of the case."

Now, do you agree that under Article 1042, if the

terms of the parties' agreement or the circumstances of the case show that the contributions here are not to be equal, then the result is that the default rule does not apply?

A. I think the wording of Article 1042 is self-explanatory and says just what it says.

Q. Well, that's not terribly helpful of you, Dr Rachkov, I want to understand whether you say, in the case of contributions and a contract governed by Article 1042, if the parties or the circumstances show -- sorry, if the agreement or the circumstances show that the parties intended that the contributions should not be equal, then the default rule doesn't apply.

On the face of it, that's what Article 1042 says, do you disagree?

A. No, I cannot deny what Article 1042.2 says. You are right, if the parties agreed from the very beginning that their shares must be unequal, their shares must be unequal, and they must contribute the property which is in accordance with this agreement.

Q. And would you accept that that is a feature of all of these default terms relating to partnership terms: default terms are terms that apply in the absence of agreement on something else, isn't that right?

A. In principle that's correct, yes.

Q. So if the parties have agreed that their shares in the common property are not to be equal, you can't apply a default term which says that they are; that must follow surely?

A. If the parties said that their shares are not equal but did not agree what exactly their shares are, then the default rules apply.

Q. Well, let's have a look at the information letter which you referred to a moment ago and which you refer to in your report. You'll find it in bundle G(A)2/1 at flag 19 G(A)2/1.19/239.

Now, is this the case that you were referring to, or the information letter you were referring to?

A. Yes, this is the information letter I'm referring to.

Q. Do you accept that this information letter was not dealing with a case where the parties had agreed or the circumstances showed that the shares in the common property were not to be equal? That's not the situation that was being considered?

A. It can be both. The description of the case does not say it correctly. The description says, however, that both parties insisted in the first instance that the shares are not equal. This may be an index to the fact that they agreed that the shares should be not equal.

Q. That's a reference to the submission that they were

making to the court, isn't it? It's not a reference to the terms that they had originally agreed?

A. Since I didn't see the contract, I cannot insist that they agreed for sure that their shares must be equal or not equal.

Q. Now, if you look at the reasoning, and I'm looking at the English text on page 241 G(A)2/1.19/241, you will see that they refer to 1042 of the Civil Code, which was the relevant provision at that time, and to 245.1 as well, that is about a third of the way down on page 241; do you see that?

A. Yes, I do.

Q. They then say in the paragraph that immediately follows that reference:

"The cassation court overruled this decision and sent the case back for reconsideration by the lower court to determine the amounts of [the] contributions ... The court stated that in accordance with Article 1043 of the Civil Code, the property contributed by [the] participants of the contract, and [the] products resulting from the joint activity, are treated as shared property unless otherwise stipulated by the law or the joint activity contract or unless otherwise follows from the nature of the obligation."

So are they saying that if the agreement or the

circumstances show that the shares were not to be equal then 1043 would not apply? That's what they're saying, isn't it?

A. No, I think that one paragraph below you will see that -- this is just -- well, I need to refer to English translation, sorry:

"The court lawfully decided that the transformation station is an object of common shared property of the parties, and the shares of the parties shall be determined with reference to Article 245 of the Civil Code."

Q. Yes, well, that was what they decided in that case, but the general principle is set out in the previous paragraph, which is that you apply 1043 unless the parties have agreed otherwise or the circumstances show that it was not intended that they should be equal. That's the principle that's being applied, isn't it? And in this case, they were equal because the parties in the circumstances didn't suggest otherwise?

A. Pardon me, can you please repeat the question?

Q. If you look at the paragraph immediately under the reference to Articles 245.1 and 1042 --

A. Yes.

Q. -- that is setting out the principle, isn't it, namely that 1043, which is one of the default provisions,

applies:

"... unless otherwise stipulated by the law or the joint activity contract or unless otherwise follows from the nature of the obligation."

So the principle that is being applied here, surely, is you apply the default provision unless the terms of the agreement or the circumstances show it was not intended that they should be equal. That's what's being said, do you agree?

A. I think I agree, yes.

Q. Right. If you look at the final paragraph on this page:

"Where monetary assessment of contributions of the parties is impossible, and the parties did not reach ... agreement on this issue, it is to be assumed ... in accordance with Article 1042 and Article 245... the contributions of the participants and the shares in ownership of common shared property are deemed equal."

That again is qualified by saying "where the parties did not reach an agreement on this issue", isn't it?

A. Yes. And in this particular case, if you have a look at the paragraph which is at -- third paragraph from the bottom, there is an indication that in this particular case the parties did not agree on how to determine their shares. That's why --

Q. Yes.

A. -- the court must apply in this case 245 and 1042.

Q. Now, if you take a case different from the one referred to in this information letter, where the parties have agreed that the partnership shares are not to be equal but haven't agreed on what their unequal shares are to be, one thing seems clear, and that's that you can't apply the default provision, isn't that right?

A. It depends on the specific situation we are speaking about. I cannot answer your question with "yes" or "no".

Q. Well now, suppose that Mr Abramovich, Mr Berezovsky and Mr Patarkatsishvili had agreed in 1995 that Mr Abramovich was to have 50 per cent and that Mr Berezovsky and Mr Patarkatsishvili were to have 50 per cent between them held in common, but with no agreement about how Mr Berezovsky's and Mr Patarkatsishvili's 50 per cent was to be divided up between the two of them.

Do you follow what I'm asking you to assume?

A. I do follow.

Q. Right. Now, do you agree that in that situation there would be no agreement about the partnership shares of anybody other than Mr Abramovich?

A. Yes, Mr Abramovich's shares would be defined.

Q. And do you agree that the default provision could not be

applied in that situation because the parties would have expressly agreed upon an unequal share since each of Mr Patarkatsishvili and Mr Berezovsky would necessarily have less than Mr Abramovich; do you agree?

A. No, I don't agree, I think here the default rule applies. Unless you can prove that Mr Berezovsky and Mr Patarkatsishvili agreed on other distribution of their shares than 25/25 per cent, the rule is that their shares are equal, based on Article 1042 and 245 of the Civil Code.

Q. That would mean, would it not, that each of the three of them was to have 33 and a third per cent of the common property, that would be the effect of the default rule, wouldn't it?

A. If the parties did not agree on their shares then indeed each participant or each partner would have one third in that shared property.

MRS JUSTICE GLOSTER: I think you're at cross-purposes.

MR SUMPTION: I think I may be.

Let us go back to my hypothesis. The hypothesis I'm asking you to assume is that Mr Abramovich was going to have by agreement 50 per cent, and Mr Berezovsky and Mr Patarkatsishvili were going to have 50 per cent between them but with no agreement about how much each of Mr Berezovsky and Mr Patarkatsishvili were going to

have individually. Do you understand?

A. Yes, I do.

Q. Now, in that situation, do you say that the default rule would apply so that they each get a third or not?

A. No.

Q. No. So what do you say the default rule means in that situation?

A. The default rule is that, if we have three simple partners out of which the share of only one partner is defined, and this share is 50 per cent, then the remaining 50 per cent are allocated to each of the two remaining partners in equal shares.

Q. Well, that is not what Article 245, the relevant default rule, appears to say, does it?

A. I think it does.

Q. What it says is that:

"Shares shall be considered equal if the shares of the participants in share ownership cannot be determined on the basis of a statute and have not been established by agreement of all its participants."

If you have a single agreement between three people, and that agreement provides that two of them are to get less than the third, but it doesn't say how much, you can't apply the default rule just to the two whose shares are not defined, can you?

A. I think I can.

Q. Well, do you accept, I think you do, that a partnership, a simple partnership, is not a legal entity?

A. A simple partnership is not a legal entity.

Q. Does it follow from that that a partnership as such cannot be a partner in another partnership?

A. Say it again, please.

Q. A partnership as such cannot be a partner in another partnership?

A. I'm not sure, I did not check this question. I don't see any reason why it should not.

Q. Well, if Mr Abramovich, Mr Berezovsky and Mr Patarkatsishvili entered into a simple partnership agreement, wouldn't it have to be on the basis that the partnership comprised the three of them individually, because any partnership that might exist between Mr Berezovsky and Mr Patarkatsishvili would not itself be a legal entity?

A. The question consists of two parts. Maybe you can split it and then I can answer each of them.

Q. Well, if Mr Abramovich, Mr Berezovsky and Mr Patarkatsishvili entered into a simple partnership agreement, would it not have to be on the basis that the partnership comprised the three of them individually?

A. That's the most logical answer, yes.

Q. Well, is there any other answer?

A. There can be also other answers.

Q. What other answers that are at least arguably relevant to this case?

A. It can -- I can imagine, but this is also a more hypothetical idea of me, that a simple partnership which is not disclosed to a third partner enters into such an agreement.

Q. You see, Dr Rachkov, if you have a single partnership agreement between three individuals, Mr Abramovich, Mr Berezovsky and Mr Patarkatsishvili, and the individual shares of only one of them is defined, then I would suggest that there is no agreement about the shares of all three partners, and no default rule that is capable of being applied unless you treat as the other partner to Mr Abramovich a separate partnership comprising Mr Patarkatsishvili and Mr Berezovsky.

A. Is this a question?

Q. Yes, that's what I am suggesting to you. What is your comment on that?

A. My comment is that if three individuals entered into simple partnership contract and, in this simple partnership contract, the share of only one of them is defined, this is sufficient to have a valid and concluded simple partnership contract because the

undefined shares of two other partners can be defined by reference to Articles 1042 and 245 of the Russian Civil Code.

Q. Well, in 1995 it would have to be 245, wouldn't it?

A. Indeed.

Q. Now, what I suggest to you is that you could only apply the default rule to equalise the shares of Mr Berezovsky and Mr Patarkatsishvili if you treated them as being parties to a separate partnership agreement, and if you said that the partners themselves -- the partnership itself then contracted with a separate partnership agreement with Mr Abramovich.

Sorry, that's rather involved. Would you like me to say it again?

A. No.

I think you are wrong in saying this because the law does not say this. The law does not require that a simple partnership between Mr Berezovsky and Mr Patarkatsishvili shall be a party to another simple partnership agreement with Mr Abramovich. It can be, but there is absolutely no must in that.

Q. Can we return to the question of contributions. I think you've agreed in your evidence, and indeed in the joint memorandum, that the contributions of partners to a common goal may consist of either property or

services. That's common ground between the experts, isn't it?

A. Yes.

Q. Now, am I right in thinking that in accordance with the general principle that we discussed yesterday afternoon, whether it consists of property or services, the agreement has got to sufficiently define the contribution to make it possible for the court to enforce it?

A. Primarily the parties should make a contract which allows them to perform the contract properly. And, as a secondary task, indeed to allow the court to enforce the contract.

Q. So that if one of the parties complains to a court that one of the other parties has not contributed what he ought to have contributed, the court has got to be presented with terms sufficiently clear to see what the other party should have done. Is that right?

A. Yes.

Q. Now, you do not accept, as you have told us this morning, that agreement on the amount or value as opposed to the nature of each partner's contribution is an essential term of the agreement. You don't accept that, do you?

A. The amount is not necessary.

Q. Or the value?

A. The value neither.

Q. Now, you cite various decisions in support of this view at paragraph 219 of your fourth report, if I'm not mistaken G(A)1/1.01/74.

Would you agree that of the three cases which you cite in this paragraph, the first and third are cases in which it was held unnecessary for the parties to agree the amount of their contributions because, in the absence of agreement, of contrary agreements, the default rule applied; was that what was decided in those two cases?

A. Yes, we can say that way.

Q. Right. In the second case I don't think it is clear whether that was so or not, the case seems to have been decided on the facts, and it doesn't seem to answer the point one way or the other, would you agree?

A. No, I think all these cases dealt with an argument either from the claimant's side or from the defendant's side that a simple partnership agreement shall be declared by the court non-concluded because the parties failed to agree on certain essential terms. So the court's task was to identify what the essential terms of a simple partnership contract are. And in all these three cases, the court came to the conclusion that the

amount, and as well the valuation, the contribution, is not important to be an essential term and to make a concluded contract.

Q. In the first and third cases that was explicitly on the basis that the default rule applied, was it not?

A. I think it was on the basis of the default rules.

Q. Now, if you turn on in your sixth report to paragraph 90 G(A)1/1.03/201, you cite a number of other cases between paragraphs 90 and 93, and later in that report between paragraphs 107 and 109, where you deal with textbook authority.

Can you confirm that in paragraphs 90 to 93 and 107 to 109 you are dealing with cases in which the default rule applies, specifically Article 1042?

A. In 90 to 93, yes, I refer to the cases which dealt with the default rule of 1042 --

Q. And is the same true of the reference that you offer at 107 to 109 to scholarly opinion G(A)1/1.03/206? That's also dealing, isn't it, with the application of the default rule?

A. I think that's correct.

Q. Specifically Article 1042?

A. Article 1042, correct.

Q. Yes. Now, Article 1042, if we can just remind ourselves of its terms, if you go back to G(A)4/4 at flag 2, which

I think you probably still have on your table, you will find Article 1042 at page 73 of the bundle numbering G(A)4/4.02/73. Now, that's the article that came into force in March 1996, isn't it?

A. Yes.

Q. That deals specifically with the default rule relating to contributions?

A. Yes.

Q. And that was enacted, wasn't it, in order to ensure that contracts where the parties failed to agree contributions would not be treated as non-concluded?

A. Correct, because in the '90s you can imagine that many people had many needs and unified their property to achieve certain goals, to construct something or to engage in entrepreneurial activity. So the simple partnership contracts were very widespread but, of course, sometimes people are negligent to spell out many provisions in their contracts.

Q. Does that suggest that in the absence of the default rule, when parties failed to agree the value of their contributions, their agreement would have been treated as non-concluded?

A. Not necessarily. If the parties performed the agreement, the performance improves the defaults or the errors which were committed before when the parties

failed to agree on certain essential terms.

Q. So subject to your argument about performance, which I'm going to come to in due course, you agree with the proposition but you reserve the point about performance?

A. If there were no default rules and if the parties failed to agree it on the essential terms, provided these terms were actually essential, yes, the contract is not concluded, and if -- the contract was not performed, of course.

Q. Before part 2 of the Civil Code came into force in March 1996, was there a default rule equivalent to Article 1042 relating to contributions?

A. There was at least a scholarly opinion that the Civil Code of 1964 of the Russian Federation and the Fundamentals of 1991 proceed from the assumption that if parties did not define their contributions, the contributions are equal.

Q. There is in fact no provision, is there, in the Fundamentals or the Civil Code of 1964 to that effect?

A. Well, I need to get back to the Code of 1964 and the Fundamentals of 1991.

Q. Yes, of course, by all means do that. You'll find the relevant provision of the Code of 1964 -- well, let's go to the Fundamentals first. If you take G(A)7/3 you'll find I think the whole of the Fundamentals behind flag 4

G(A)7/3.4/227.

I think you will need to go to Article 122 and thereabouts; I'm actually saying that for the benefit of my Lady since I'm sure you know already.

MRS JUSTICE GLOSTER: I've got it.

MR SUMPTION: Now, can you point us in the Fundamentals to a default provision equivalent to 1042, ie relating to contributions?

A. No, I cannot point at such a provision in chapter 18 of the Fundamentals of 1991.

Q. That's the relevant chapter, isn't it?

A. It should be the relevant chapter, yes.

Q. Would you like to turn back in the same bundle to flag 2 where you'll find the 1964 Civil Code. I think if you go to Article 38 you will find a provision relating to joint activity agreements, although of course I don't want to -- sorry, chapter 38, Article 434, which is at page 157 G(A)7/3.02/157.

Chapter 38 comprises Articles 434 to 438. Is this the relevant part of the 1964 Civil Code dealing with simple partnership agreements?

A. Yes, this is the relevant chapter.

Q. Can you point us to a default provision equivalent to 1042, ie dealing with contributions, in chapter 38?

A. Excuse me, did you say I did point you at the relevant

default rule?

Q. No, can I ask you, please, to tell us whether we find, in chapter 38 of the 1964 Code, a provision equivalent to 1042 of the current Civil Code, namely a default rule relating to contributions?

A. I don't see such a provision.

Q. No. In fact, before March 1996, when part 2 of the Civil Code came into force, there wasn't a default rule relating to contributions, was there?

A. It looks like there was not.

Q. And if the default rule didn't exist at the relevant time for the purposes of the contract, then the law does require the parties to have agreed the value of their respective contributions, doesn't it, in the absence of a default rule?

A. No, I don't think so.

Q. Why not?

A. Because you cannot point at any article which requires so.

Q. Well, we've seen the analysis that you have offered us in your report of the reasons why, in your view, one does not need to have an agreement on the value or amount of the contributions. Your analysis is critically dependent on the existence of a default rule, and the authorities you refer to refer to Article 1042.

That's correct, isn't it?

A. It is not fully correct. My analysis is dependent not only on the absence or presence of default rules. My analysis is also primarily dependent on the performance.

Besides, as well as I cannot show you neither in the Fundamentals of 1991 or the Civil Code of the Russian Soviet Socialist Federative Republic any default rule which I can find in the Civil Code of 1994 (sic) et cetera, you cannot point at any provision which requires the valuation of the property. However, I can point at the commentaries of authoritative authors of the 1960s which are contained in the supplemental bundle which say that the contributions of the parties are presumed equal.

Q. That isn't however a provision, as you've accepted, that one finds in the relevant parts of the Code?

A. No.

Q. Now, the contributions of the parties to the acquisition of control over Sibneft, according to Mr Berezovsky's evidence, are set out at paragraph 97 of his witness statement, his principal witness statement, and I wonder if you could be given bundle D2, flag 17, paragraph 97, where Mr Berezovsky sets out what he says were the agreed roles of each of the parties, okay D2/17/217?

A. Yes.

Q. Now, point (a) in that paragraph says that Mr Berezovsky was going to be responsible for:

"... lobbying for the assets to be included as part of the 'loans for shares' programme."

Do you see that?

A. I do.

Q. Now, can you help us on how a Russian court would set about enforcing that?

A. Indeed, and I recognise that in my reports the Russian courts may have problems with specific performance of this provision and may not be in a position to render an order "You, Mr Berezovsky, must lobby," if there are no other evidence which indicate what exactly -- or what, as milestones at least, he must done.

MRS JUSTICE GLOSTER: Could you tell me which paragraph of your report, please, Dr Rachkov?

A. I need to find it, my Lady.

MR SUMPTION: I think it's in your fourth report.

Which paragraph did you have in mind, Dr Rachkov?

A. I'm looking.

MRS JUSTICE GLOSTER: Can you help, Mr Rabinowitz?

MR RABINOWITZ: My Lady, we're also looking.

MR SUMPTION: I'm being told it may be --

A. I don't think it's in the fourth report.

MR RABINOWITZ: The sixth report.

MR SUMPTION: I see, in that case I apologise for...

If you want to have a look at your sixth report, which is the other place where you deal with this general area, I mean, I wondered whether you had in mind paragraph 217 of your fourth report, Dr Rachkov, but you'll have to tell us G(A)1/1.01/73.

A. Yes, this is the correct paragraph, and I repeated this idea also in my sixth report, that what Mr Abramovich would be entitled to if he fails to request a specific performance from Mr Berezovsky to claim for losses on the basis of Article 15 of the Civil Code.

Q. Well, what you say here is that if Mr Berezovsky:

"... did nothing at all, he would be in breach of contract, and would be liable to compensate Mr Abramovich ..."

But your evidence a moment ago was that the Russian courts might have problems with specific performance of Mr Berezovsky's obligation to lobby and might not be in a position to render an order, "You, Mr Berezovsky, must lobby"; that is your evidence, isn't it?

A. Yes.

Q. Now, if you have a partnership agreement in which the whole contribution of one party is to engage in lobbying and there is nothing that the other parties can do to get an order requiring him to lobby, then how does the

partnership work? Do you say that the other partners go ahead and do the lobbying themselves and then claim damages for the cost of doing it; is that your evidence?

A. No, my evidence is that each partner must act in good faith and reasonably and in the interest of the partnership. As I said before, each partner must do whatever he is capable to do in accordance with the distribution of the roles to achieve the goal which is set before this simple partnership. This means that if he does not fully understand what he shall done, he must consult with the other partners and they may meet another additional agreement. However, I think here the parties well understood who shall do what.

And because Mr Berezovsky was apparently not for the first day in the business, he did understand what he must do in terms of lobbying.

MRS JUSTICE GLOSTER: Let's leave aside the facts, what I'm interested in is the law.

Can you explain to me, if the contract is simply that B would lobby at the highest political level and seek finance for the project, that's the terms of these obligations. How -- and I'm looking at paragraph 217 of your fourth report G(A)1/1.01/73 -- how does the court identify, if that is simply the obligation on B, whether or not he is in breach of contract if he does a bit of

political lobbying but A says you've not done enough of it?

A. Then this is clearly a violation of his contractual obligations and Mr Abramovich is entitled to sue Mr Berezovsky.

MRS JUSTICE GLOSTER: No, I'm not talking about the facts of this case. I'm just talking about a simple case where there is an agreement on the part of B to lobby at the highest political level but no agreement in the terms of the contract, let's assume it's a written agreement, but no definition in the written agreement as to what the lobbying is going to involve, how much lobbying, of which people. How does the court identify in circumstances where B has done a bit of political lobbying, but A contends that B has not done enough, how in those circumstances does the court identify whether B is in breach of his obligations?

A. It's a difficult question, and also for a Russian --

MRS JUSTICE GLOSTER: What's the answer to it?

A. The answer is that indeed the court must look at all the evidence and say what, in a comparable situation, is done. For instance, if I'm going to a restaurant I order for some food, I have no clue what exactly must be done to prepare this food. However, I would like to have this, to be served with this particular food. So

this situation can be compared with this hypothetical case of lobbying.

So we have a particular goal which must be achieved, this means that Mr Berezovsky, or this hypothetical Mr B, must do whatever is objectively required to achieve this particular goal, for instance, meet with those people and not with some other people; highest political level means of course the president, prime minister, and not for instance --

MRS JUSTICE GLOSTER: So am I right, is your proposition that the court itself would look at all the facts and determine the obligations of B under the political lobbying contract?

A. I would say so.

MRS JUSTICE GLOSTER: And wouldn't say "This contract is uncertain"; the court would actually identify for itself the obligations of the party simply by reference to the goal, is that right?

A. Yes, I think so. The court is not -- I mean, if we are speaking about the Russian court, the court is in a temptation, if you want, to decline the cases just because they are uncertain. But this does not mean that -- this is not what the Russian law says. The Russian law says contracts must be upheld and contracts must be -- there is a principle of stability of

contracts. Therefore, to me, the first thing the court in Russia, applying Russian law, must do is try to identify whether all the essential terms were agreed upon. If they were, then there is no question about non-concluded contract.

MRS JUSTICE GLOSTER: You've said that, but what I'm interested in, is the simple hypothetical example of an unspecified political lobbying obligation, your evidence seems to be, or your view seems to be, that the court itself will define the obligation by reference to the goal.

A. Yes, that's what I'm saying.

MRS JUSTICE GLOSTER: Yes, I see. Thank you.

MR SUMPTION: Another possibility, Dr Rachkov, is that there are some obligations which are so uncertain in their scope that it is impossible for the court to know how far the relevant partner had to go in order to attain the goal; that's another possibility, isn't it? Russian law accepts that that may be the case, doesn't it?

A. Can you explain your proposition, please?

Q. Let me put it again. Russian law does acknowledge the possibility, doesn't it, that some obligations may be assumed in such vague and uncertain terms that they are incapable of being enforced; there are such obligations in Russian law, are there not?

A. I think so, yes.

Q. Right. Now, what I suggest to you is that an obligation to lobby for the assets to be included as part of the loans-for-shares programme is exactly that sort of obligation. It is so vague that it is impossible for a court to decide how diligent Mr Berezovsky needed to be and whether what he did was actually sufficient. What do you say?

A. I can only repeat what I've said before. So if the goal is clear enough, and the goal is clear enough here in this particular case, besides there is a certain deadline by which the parties want to have this company established and to get control over it, there is a certain way in which this control might be obtained, ie through loans-for-shares programme. There were precedents before so many Russian oligarchs were lobbying with exactly the same results. So there was a certain market, if you wish, for these lobbying services. Why should this contract be not clear enough?

Q. You see, you agree, Dr Rachkov, don't you, that the simple partnership agreement must define the obligation with sufficient certainty such that it is objectively ascertainable and a court can adjudicate whether the obligation has been complied with; you agree with that, don't you?

A. I agree with that.

MRS JUSTICE GLOSTER: Where do we find that?

MR SUMPTION: We find that in paragraph 21, subparagraph 4 of the joint memorandum at 61 D2/17/217.

Can we turn to point (b):

"Badri and I would raise funds for the project."

There's a similar problem about this, isn't there? There's no agreement about what sort of funds, whether bank loans, whether equity, how much, none of that is agreed. How does a court enforce (b)?

A. Here again, apparently it doesn't mean that these particular persons will obtain money from banks as loans, so I can suppose that neither of them was a party to a loan contract, or even gave some personal guarantees. I can only imagine that the actions of each of Mr Berezovsky and Mr Patarkatsishvili will be driven by this ultimate goal to make sure that the state gets the money which it wants to get in exchange for the pledge over the shares.

Q. Well, let's have a look at (c):

"Badri would lead commercial negotiations with key business counterparties."

Does the court have to decide who the relevant counterparties are and which of them are key?

A. I think the court must ask of course both parties what

they think about who key business counterparties is. However, if these are just business counterparties, that's quite clear. So each of the companies which were merged into Sibneft had a certain number of suppliers and a certain number of customers. Besides, there were groups which might have been interested in getting control over Sibneft too. I can imagine that these all are the groups which are described with a very brief sentence:

"Badri would lead commercial negotiations with key business counterparties."

Q. You see, Dr Rachkov, no agreement is alleged in this case that any of the partners would make any personal financial contribution. What I suggest to you is if the parties are not promising to contribute money or assets, and their sole contribution is services, they must, to make a valid agreement, define their obligations more precisely than anything one sees in paragraph 97. What do you say?

A. In an ideal world I would agree with you, it is very good to have a determined obligation. But, in reality, their life is richer than our imagination. Therefore I think the parties, it is sufficient to agree that efforts will be combined and, as I said before and can repeat again and again, the efforts are driven by the

goal. The professionals do understand what they must have done to achieve a particular goal.

Q. Well, they may understand, may they not? Or they may not?

A. I think if they are professionals they do understand. If the client comes to me and asks for some legal services, I do understand what I shall do. Then I can offer to the client a kind of menu, if you wish, and the client says, "Okay, I want the soup and the starter but not, for instance, the dessert." That's how it works in the life.

Q. Mr Rozenberg gives an example of a contract which is too vague to be enforced. He says take the example of a contract to build a two-storey building, just that. "I will build for you a two-storey building," with no further definition of the building.

Do you agree that if the parties agreed no more than that the contract would not be sufficiently defined?

A. That contract would not be sufficiently defined unless the parties performed it and I can derive from the performance what kind of storey was -- sorry, what kind of two-storey building was constructed.

Q. And that would be so, notwithstanding that it might be a contract between professional builders?

A. It might be so because -- even in that case, yes.

Q. Now, I want to turn from the terms relating to contributions towards the acquisition of control over Sibneft, which is what Mr Berezovsky is dealing with in paragraph 97, to a slightly different subject, namely the contributions required of these parties to the acquisition of ownership of Sibneft shares thereafter. Do you follow the difference?

A. Yes, I do.

Q. Now, I'm therefore addressing any possible acquisition of Sibneft shares when the 49 per cent of Sibneft was privatised or when the 51 per cent retained by the state was sold after the loan default.

MRS JUSTICE GLOSTER: Would that be a convenient moment if you're going on to another topic?

MR SUMPTION: Yes.

MRS JUSTICE GLOSTER: Very well. Ten minutes.

(11.30 am)

(A short break)

(11.45 am)

MR SUMPTION: Dr Rachkov, I'm now dealing with the question of contributions to the acquisition of shares, rather than the acquisition of control through the loan-for-shares auction.

I think you agree, don't you, that the parties to a simple partnership agreement must have agreed upon the

common goal?

A. Yes.

Q. And also that the common goal must be sufficiently defined in the agreement to enable the court to know what the subject matter of that agreement is; you agree with that too, don't you?

A. I do.

Q. Therefore the simple partnership agreement would not extend beyond the common goal that had been agreed? Would you agree with that?

A. I would agree with that, maybe with a small reservation that the performance may of course extend this goal beyond what was agreed initially.

Q. I see. In other words, it might be implicit, if the parties all got together and did something else, that they were doing it on the same terms as the originally agreed goal, is that right?

A. Depending on the specific circumstances of the case, it may be that.

Q. But what we're dealing with is effectively an amendment of the scope of the partnership agreement by conduct?

A. You can say this way. I think especially when legal entities are created it is natural that the persons who entered into a simple partnership contract to create such legal entity do not stop their joint activity once

the legal entity is created but continue to pursue this goal in its extended version.

Q. Well now, suppose that there was no agreement at all between these individuals about whether or not to acquire ownership of shares in Sibneft, okay? That's what I'm asking you to assume. Would you agree that in that case the acquisition of shares in Sibneft could not be regarded as part of the common goal?

A. It may be so, but you said what was not agreed, you didn't say what was agreed.

Q. Well let us suppose that there was an agreement that the parties would do the things described in paragraph 97 of Mr Berezovsky's witness statement that you saw earlier this morning, okay, that they would do those things for the purpose of acquiring control over the state's 51 per cent retained share in Sibneft in the loans-for-shares auction. Let us suppose that the parties agreed that, okay?

A. Okay.

Q. Now suppose, as well, that they agreed absolutely nothing about whether or not to acquire ownership of shares in Sibneft if and when the state actually sold its shares; do you follow me?

A. I do.

Q. Now, on that hypothesis, would you agree that the

acquisition of shares in Sibneft could not be regarded as part of the common goal?

A. I think the broader definition is acquisition of control. If the parties acquired shares directly, this is the most classical way of acquiring control.

Q. Well, in 1995, at any rate in the later part of 1995, it was appreciated that there was going to be a loans-for-shares auction which would not itself involve the sale of any shares to anybody, okay?

A. Yes.

Q. You know that, don't you?

A. Yes.

Q. Right. Now, let us suppose that the parties agreed that they would exercise their skills in order to ensure that there was a loans-for-shares auction, right, and that they would exercise their skills in order to win the loans-for-shares auction to acquire control of the state's shares as pledgees and security for a loan, right? Let's suppose that was the deal, all right?

A. All right.

Q. And let's suppose that there was absolutely no agreement about what was to be done if and when the state subsequently sold its shares, okay?

A. Okay.

Q. Now, what I would suggest to you, for you to comment on,

is that in that situation the acquisition of shares in Sibneft could not be regarded as part of the common goal because there would have been no agreement about it at all.

A. I don't know. In accordance with Article 431 of the Russian Civil Code, the court must look not only on the literal wording of the contract but also at what the parties actually intended; and it may well be that the parties, because they are accustomed to use some words without understanding the meaning of these words -- as we learned in the past, the parties used the word "trust" without fully understanding what it actually means and without having the same word in the Russian legal language, so the court must identify what the real intention was.

Because a reasonable human being would never participate in any auctions for the right to be the pledgee of shares without having some further and forward-looking goals.

Q. Well, that's a question of fact, isn't it? It depends on the facts of each case.

A. Absolutely.

Q. I'm not asking you about the facts, that's why I'm putting these hypotheses to you, to find out your opinions on the relevant law.

Now, 431, which you referred to, is the general article of the Civil Code which deals with the interpretation of contracts, doesn't it?

A. Correct.

Q. You'll find that in bundle G(A)4/4, flag 2, page 63 in the bundle numbering G(A)4/4.02/63.

A. Can you please repeat the flag?

Q. Flag 2.

A. Thank you.

Q. Page 63 in the bundle numbering on the bottom right. 431, that's the article you were referring to a moment ago I think?

A. Yes.

Q. Now, am I right in thinking that the basic rule, the primary rule of interpretation is that the:

"... court [is to] take into account the literal meaning of the words and expressions contained in it, the literal meaning of a term of a contract, in case the term is not clear, shall be established by comparison with the other terms and the sense of [a] contract as a whole.

So that first paragraph of 431 is the basic rule, isn't it?

A. It is the basic rule.

Q. The second paragraph deals with what happens if the

application of the first paragraph does not enable the court to decide the contents of the contract, okay?

A. Yes.

Q. The reference you gave us a moment ago to the real common will of the parties, that is something that only arises for consideration so far as the literal meaning of the words, read in their context of the agreement as a whole, doesn't give you the answer?

A. Yes, the purpose of this second paragraph of Article 431 is to replenish the gaps in regulation which necessarily occur because you cannot predict 100 per cent, well, what shall happen in the next few months, for instance. The cases where it is possible to make such a contract are very, very rare.

Q. If the parties have agreed that their goal is to have a loans-for-shares auction, and to succeed in that auction, there is no basis, is there, on which the court could say that their goal was actually wider than that and extended to buying shares subsequently unless the parties had subsequently agreed to broaden the goal. Would you not agree with that?

A. I can agree with you to some extent, but I also can stress that the court will ask why the parties intended to participate in such a loans-for-shares auction. The pledgee is just a provisional position, and it was

commonplace in Russia that to acquire shares in exchange of loans granted to the state was a way to circumvent, if you want, the regular privatisation rules.

Q. Well, there was a privatisation in this case of 49 per cent anyway.

A. I agree, yes.

Q. So there was no need for circumventing anything.

A. Yes, but the position of the pledgee secured that you were managing the company over time, and to get a kind of informal priority to acquire the shares, because you were then in charge of running the auction to sell the shares.

Q. The court might enquire whether it was rational for the parties to limit their objective to acquiring control in the loans-for-shares auction, but if the court received a rational explanation of why that served the parties' purposes, then it would not look for some wider goal that the parties hadn't agreed, would it?

A. It's just our speculation whether the court will or will not. I insist that the court will of course ask the court and the parties what is the real intention of participating in this procedure.

Q. Only if the meaning of their words doesn't give you the answer to that question. I think you've agreed that.

A. Yes. If the -- correct. If the wording, the literal

wording and the systematic interpretation or construction of the contract does not allow to find out the real will of the parties.

Q. And when you refer to the systematic interpretation of the contract, do you mean by that the interpretation of the words in the context of the contract as a whole?

A. Yes.

Q. In accordance with what the first paragraph says?

A. I do.

Q. Thank you. Now, suppose, to put another hypothesis to you, that the only agreement that the parties made about acquiring ownership in Sibneft shares was that it would be left to Mr Abramovich to decide whether or not to acquire them, at what price and on what terms, okay? That's what I'm asking you to assume the parties agreed, right?

A. Right.

Q. Would that constitute -- would that be enough to make the acquisition of Sibneft shares part of the common goal of the partnership?

A. It may be enough. I don't know what else the parties agreed. Maybe they --

Q. Well, I'm asking you to assume they agreed nothing else about the acquisition of shares other than that Mr Abramovich would decide whether to acquire the shares

and on what terms and at what price.

A. This means that the parties believed in Mr Abramovich's professionalism, that anyway he must act in good faith and in the interest of the simple partnership. So if after -- or when making the decision on whether or not to acquire the Sibneft shares, and by which particular way, Mr Abramovich acted not in the interests of the simple partnership, or not in good faith or both, then it will be a clear violation of the simple partnership contract.

Q. If Mr Abramovich had no obligation to acquire ownership of any shares in Sibneft under the terms of the agreement, but decided to do it anyway, how would the court decide whether he had bought them for himself, or bought them for himself and his partners together?

A. I think the court will be driven by what was the common interest of the partners. If the partners -- and clearly the interest of the parties was to -- the partners was to acquire control of whatever kind over Sibneft, and Mr Abramovich acquired the shares in his own name, that would be a violation of the simple partnership contract.

Q. Dr Rachkov, I think you agreed yesterday that you have to have sufficient certainty about the predmet, or subject matter, of the contract, and that the predmet of

the contract was the sum total of the obligations under it, okay?

A. What kind of obligations, excuse me?

Q. Well, you I think agreed yesterday, and I'm virtually quoting from the joint memorandum, that the predmet or I think subject matter of a contract must be agreed with sufficient definition and certainty, that's true, isn't it?

A. The predmet or the subject matter or the subject or object of the contract must be determined or determinable.

Q. Yes. I think your definition of the predmet, as I think you confirmed yesterday, is that it is the obligations that flow from the contract?

A. Yes.

Q. Now --

A. It's the actions of the parties to the contract, described in a way which allows them to start performing.

Q. The actions which they are obliged to perform.

A. The actions which they are obliged to perform. As I said, the predmet and other essential terms of the contract are there to allow the parties to understand what they must do, when, vis-a-vis which persons.

Q. Right. Now, I'm going to ask you to assume that

Mr Abramovich had no obligation under this agreement to acquire ownership in any shares in Sibneft, okay?

A. Okay.

Q. And I'm going to ask you to assume that there was no agreement about what contribution, either in services or in money, would be made by anyone else, okay?

A. Yes.

Q. Now, are you suggesting that if that is the situation then the acquisition of shares in the company can be regarded as part of the goal of the partnership?

A. You said about what was agreed -- what was not agreed, but again you didn't say what was agreed. Therefore I --

Q. Let me help you. I am assuming that there was an agreement of the kind described in paragraph 97 D2/17/217 of Mr Berezovsky's witness statement relating to the loans-for-shares auction, okay? So let's assume there was an agreement about that.

The point of these questions is I want to discover what your views are about the application of Russian law principles to a subsequent acquisition of shares in Sibneft, so the assumption I'm going to ask you to make is this: assume there is an agreement to procure the loans-for-shares auction to happen and to do one's best to succeed in the loans-for-shares auction, but assume

that under the terms of that agreement Mr Abramovich has no obligation to acquire ownership of shares in Sibneft, and Mr Berezovsky and Mr Patarkatsishvili have not agreed anything about contributing to the cost, okay? That's what I'm asking you to assume.

Now, you wouldn't suggest, would you, that in that situation the acquisition of shares in Sibneft was part of the common goal of the partnership?

A. I need again to refer to Article 431, what was the real intention and the real common will of the parties? Because, to me, being a reasonable man, it would be just nonsense why the parties should enter into such a contract.

Q. That depends on the facts, doesn't it?

A. What is the economic benefit for them to enter into such a contract, especially for business purposes?

Q. Mr Rachkov, I could answer that question but I'm not going to ask you questions about the facts, nor are you giving evidence about the facts, or what would be reasonable business. I simply want to understand your evidence about Russian law.

A. But Russian law is not unreasonable either. Russian law is very logical and very reasonable.

Q. We all understand that, and my Lady in due course will apply the rules of Russian law as established by expert

evidence to the facts that she determines. That's why I'm not asking you to deal with it, okay?

A. Sure. I don't.

Q. Now, just assume that the result of applying the proper processes of interpretation is that the court concludes that there was an agreement to participate in the loans-for-shares auction, but Mr Abramovich had no obligation to acquire any subsequent shares, and there was no agreement about the other two making any contribution to the cost of acquiring subsequent shares, okay? That's what I'm asking you to assume.

Now, if you make that assumption, then do you agree that the acquisition of shares in Sibneft cannot be regarded as part of the goal of the partnership?

A. I cannot agree with that because I know too small information about what else happened. I can only say that what the parties contributed to the joint activity, and what they -- each of them acquired as a result of joint activity, is their joint property.

Q. Dr Rachkov, what you appear to be doing is trying to argue out of the hypothesis which I'm asking you to assume.

It should be a very simple matter. If Mr Abramovich had no obligation to buy these shares, and Mr Berezovsky and Mr Patarkatsishvili agreed nothing whatever about

contributing to the cost, it must stand to reason that the acquisition of shares cannot be treated as part of their common goal because there were no obligations of anybody in relation to the acquisition of shares. You must agree that, surely?

A. Yes, and I agree with that.

Q. Now, suppose that the agreement was that none of the partners, except for Mr Abramovich, was going to participate in the management of Sibneft, okay? This is another hypothesis I'm putting to you about a different aspect of the agreement. Now, do you say that that would constitute a partnership for the joint exploitation of Sibneft's business if it was all being done by Mr Abramovich?

A. If that is how the roles were divided, if the partners believed that only one of them, and especially Mr Abramovich, is the most suited person to run the business, to manage the company, that's fine. So that's his contribution to this simple partnership.

Q. But if only one person was going to run Sibneft, then the exploitation of Sibneft surely cannot be regarded as a partnership obligation?

A. Can you explain, please, what you mean by exploitation of Sibneft.

Q. Well, the exploitation of Sibneft's business for the

purpose of generating profits. If that was all going to be done by Mr Abramovich, is there any contribution, any relevant contribution, involved from the other two?

A. Can you please formulate your question?

Q. I thought I'd done so but I'll try again.

Let us suppose that in relation to the exploitation of Sibneft's business, after control of it has been acquired, the agreement is simply that Mr Abramovich is going to get on with it, and neither Mr Patarkatsishvili nor Mr Berezovsky is going to do anything about the subsequent exploitation of Sibneft's business. If those are the facts, is it your position that the exploitation of Sibneft's business after the loans-for-shares agreement could be part of the scope of the partnership agreement?

A. Excuse me, I do not fully understand the term "exploitation". Maybe I need to ask Russian interpreter to say it to me in Russian.

MRS JUSTICE GLOSTER: Just before you go there.

Mr Sumption, does this hypothesis include the factors in paragraph 97?

MR SUMPTION: Yes, it does.

Did you follow the question and answer that I gave to my Lady? Take that into account.

A. The problem is that I do not understand the term

"exploitation".

Q. Yes, what I mean by exploitation --

A. In Russian, exploitation has a very bad meaning, exploitation of a human being by a human being, that's what the Communists said, excuse me for this.

Q. I understand. It sometimes has that meaning in English as well.

What I mean by exploitation is the running of the business so as to generate profits.

A. As I said, if the roles are distributed in a way that one party undertakes efforts to achieve a specific goal which is assuming -- or acquisition of control over Sibneft, and the other party's role is more active after the acquisition has been done, because that party is a professional in the oil sector, knows how to extract oil, how to refine it, how to sell it, how to structure the transactions, I don't see any problem why such a simple partnership agreement would fail.

Q. Would you agree at any rate with this much, that if there was a dispute between the parties as to whether the partnership agreement, whether the goals of the partnership agreement included running the business for profit after the loans-for-shares agreement, it would be some indication that it did not include it that the whole of the job was being done by one party, wouldn't

it?

A. I'm afraid I cannot answer this question. It's really up to the parties to agree what the distribution of the roles is, how big or how small the efforts of either of them is.

The simple partnership contract is a contract which is called "fidutsiarnyj doveritelnyj", fiduciary in Russian. This means that of course you can never have fully equal shares because one partner undertakes maybe more efforts today, the other undertakes more efforts tomorrow. That's just human, to have a contract where the roles are distributed in a way that the person who is more suitable to do the strategic decisions is responsible for those, and the person who is more, how to say, able to run the daily business is engaged in daily business. It's how law firms as well run.

I can be a partner in charge of business development because I'm not in a position to sit down for more than one hour and to write some papers, but I can be not able and incapable to do any business development. It's better to advise clients instead.

Q. My question was directed to ascertaining the relevance of different functions when you have an issue as to how wide the goal was, but I've asked my question and we've got your answer.

Now, you may recall that earlier this morning I asked you about whether an obligation to engage in political lobbying was sufficiently certain. I want now to ask you about a different aspect of that obligation, namely whether it is consistent with Russian legal public policy. Do you understand the subject that I'm moving on to?

A. I think I do understand.

Q. Now, do you regard political lobbying as a valid and lawful contribution to a simple partnership agreement?

A. If the political lobbying constitutes efforts, business skills, business reputation and other types of contribution which are described in Article 1042 of the Russian Civil Code, yes.

Q. I mean, it's not actually business skills one is talking about, is it? It's political skills?

A. Connections.

Q. Right. Well now, can I ask you to look at a case which both you and Mr Rozenberg comment on, the Makayev case at G(A)4/7, flag 93 G(A)4/7.093/1.

MRS JUSTICE GLOSTER: Mr Sumption, it would help me if you could identify the paragraph in the report where Dr Rachkov deals with this case.

MR SUMPTION: Deals with?

MRS JUSTICE GLOSTER: This particular case you're going to

now.

MR SUMPTION: Yes, I will -- Mr Henshaw will produce that in a moment.

MR RABINOWITZ: It's paragraph 129 in his sixth report, it's behind tab 3 G(A)1/1.03/211.

MR SUMPTION: Have you got bundle G(A)4/7, Dr Rachkov?

A. Yes.

Q. You should turn to flag 93 if you haven't already done so. Now, this is a decision of the constitutional court of the Russian Federation, and that is a court of the highest possible authority in Russia, isn't it?

A. It's -- well, Russian court system is three-fold. It consists of the Constitutional Court, the whole system of arbitrazh courts and courts of common jurisdiction. So I wouldn't say the Constitutional Court is somewhere on top of the Russian court system, it is only in charge of comparing laws with the constitution and saying whether or not these laws are constitutional.

Q. Yes. There are, in other words, a number of separate hierarchies, each with their own highest court, and the Constitutional Court is the whole system, is that the point you're making? It's the only court -- it doesn't have subordinate courts, or does it?

A. It does not have subordinate courts, and there were cases when the arbitrazh court, the highest arbitrazh

court, or the Supreme Arbitrazh Court, rendered judgments which were not fully in line with the opinions expressed in the resolution of the Constitutional Court.

Q. But the decisions of the Constitutional Court are regarded as carrying very considerable authority, are they not?

A. Yes, but this is a very general statement. The Constitutional Court deals, as other courts do, with specific cases. So in the specific case we are speaking about, the question is whether or not specific articles of the Civil Code of the Russian Federation are in line with the Russian constitution.

Q. Yes. Well now, would you agree -- first of all, this case is about lawyer's contingency fees, isn't it?

A. Yes.

Q. And it was held, was it not, that a regulation which forbade contingency fees for lawyers representing clients in court was consistent with the constitution? That was the decision, wasn't it?

A. No, it was not that decision. The decision was that Articles 779 and 781 of the Civil Code are consistent with the constitution.

Q. What did those articles say?

A. Perhaps we shall have a look at these articles. I don't know whether they are reproduced in the bundle.

Q. Well, the point is very simple, isn't it? There was a provision of the Civil Code which said you couldn't charge contingency fees for representing clients in court. And the lawyer, Mr Makayev, was saying that's unconstitutional. That was what the argument was about, wasn't it?

A. Not really. No article of the Civil Code says you cannot as a lawyer charge a contingency fee to your clients.

Q. Well, let's have a look at the text. The opening paragraph at the bottom of page 1 of the bundle numbering G(A)4/7.093/1, a commercial services agreement:

"Under a commercial services agreement the contractor as instructed by the customer undertakes to render services to take certain action while the customer undertakes to pay for services."

If you look at the top of page 3 of the report G(A)4/7.093/3, the effect of the relevant provisions of the Civil Code is summarised in the first full paragraph on the page. If you look at the first paragraph beginning:

"Therefore, in this case the issue under review by the Constitutional Court... is the provisions of... 779... and 781..."

If you look at the last words of that paragraph:

"... the point hereby contested is that in light of their interpretation in current judicial practices these provisions do not allow for awarding the contractor's claim for payment should this payment be made conditional [on] a future decision by a court."

Okay?

A. Yes.

Q. So what was being said in this case was that there was a rule in the Civil Code which had been interpreted as meaning that a lawyer couldn't charge a fee conditionally on the outcome of the case. That was the way the Civil Code had been interpreted, wasn't it?

A. One can say this way, yes. I interpret it in a bit different way.

Q. That's certainly the point that's being made in this judgment of the constitutional court. And the issue in this case was whether a rule that prevented a lawyer from charging conditionally on the outcome of the case was consistent with the constitution. That was the question the court posed itself, wasn't it?

A. Excuse me, the court does not evaluate the provisions of private contracts. The court only says this is the rule of the Civil Code. I was asked to compare this provision with the Russian constitution, that's all.

The court did not --

Q. That's exactly what I thought I was putting to you.

Dr Rachkov, would you agree that the question at issue in this case was whether a rule of civil law preventing lawyers from charging fees conditional on the outcome of the case was consistent with the constitution. That was the issue, wasn't it?

A. You can make that way, yes.

Q. Thank you. Now, can we look at the reasoning of the court in holding that it was consistent with the constitution.

If you look at paragraph -- there are a number of reasons given, but if you look at paragraph 2.1 at the bottom of page 3, you will see:

"Public relations arises in the process of providing legal services are interconnected with the discharge by appropriate government bodies or officials of their constitutional obligation to ensure that every individual may have access to legal services and be able to retain competent legal counsel for the purpose of taking legal action..."

Now, with that introduction, if you turn over the page to paragraph 2.2 on page 4 G(A)4/7.093/4, do you have a highlighted version?

A. Yes.

Q. Right. The first bit of highlighted text at the beginning of 2.2 sets out, does it not, the general rule:

"At the same time, due to the permissive nature of civil regulations, persons who wish to obtain legal counsel may use their own discretion when deciding whether entering into a commercial service agreement may be desirable or necessary, to use the most suitable way of receiving such help and since the Constitution of the Russian Federation and the law do not stipulate the contrary, agree on mutually acceptable ... terms."

So the general rule, is this right, is you can reach agreement on the terms on which a service is obtained as you like, that's the starting point?

A. Yes.

Q. They then consider what limitations may be justifiable on that right. If you look at the next chunk of highlighted text starting "At the same time" you have the proviso, don't you?

"At the same time the Constitutional Court of the Russian Federation emphasised that the freedom of contract that is protected under the Constitution must not negate or diminish other recognised human or civil rights or freedoms; it is not absolute and may be restricted; however, imposition of such restriction and

the nature thereof must be based upon the Constitution of the Russian Federation that stipulates that federal law may restrict human law, civil rights or freedoms only to the extent that such restrictions may be necessary in order to protect pillars of constitutional order, morality, health, rights and lawful interests of other parties, as well as ensure proper defence and security of the country ..."

Now, you then have what I would suggest is the critical part of the reasoning on this:

"The freedom of contract also has objective limits that are determined by the fundamentals of constitutional order and public policy. In particular, it concerns the inadmissibility of expansion of contractual relations and the principles underlying them on those areas of social activity that are related to the realisation of governmental power. Since the governmental authorities and their officials ensure realisation by the people of its power, their activity (both of itself and [in] its results) may not be subject to private civil law regulation, as well as the realisation of civil law rights and obligations may not predetermine specific decisions and actions of the governmental authorities and their officials."

Now, would you agree that the particular public

policy which is being referred to in that paragraph, and which contingency fees would have contravened, was the public policy against allowing private persons to make contracts whose subject matter is the activity of a court or of some other organ of the state; would you agree with that proposition?

A. I think it's a very generic statement.

Q. Yes.

A. The purpose of this resolution of the Constitutional Court was this: you may know that the mass media report a lot about corruption in Russian courts, and you may know that corruption is also contained in such contracts which provide for contingency fees. This means that a Russian judge may agree with an advocate of the claimant or of the defendant to get paid in a sum of X, and, of course, the services of the Russian lawyers must also be remunerated. To fight against the corruption, the Constitutional Court rendered this decision. That's the background.

Q. Yes.

A. I think -- I do not fully understand how it is related to our case but I'm happy to discuss this case to you.

Q. Well, I'm going to ask you some further questions about this case. It is for my Lady to decide how the principles are to be applied to our particular facts,

but I would just like to understand the legal principle.

Now, the legal principle is, and I quite see your point that this is designed to ensure that contracts are not entered into which are liable to be used for corrupt purposes; that's your point, isn't it?

A. Yes. But, excuse me, in this particular case where I speak about corruption in the courts, the Constitutional Court learned how corruption actually lives in Russian courts and built an obstacle to that.

Q. Except it's not limited to the courts, is it? Because if you look in the paragraph that I've just referred you to, what it is saying is that their activity -- well, let's look at the whole of the last sentence:

"Since the governmental authorities and their officials ensure realisation by the people of its power, their activity [that is to say the activity of governmental authorities and their officials] may not be [the] subject [of] private civil law regulation, as well as the realisation of civil law rights and obligations may not predetermine specific decisions and actions of the governmental authorities and their officials."

MR RABINOWITZ: It says:

"... may not be subject to private law," not "of".

MR SUMPTION: All right, fine:

"... may not be subject to private civil law

regulation, as well as the realisation of civil law rights and obligations may not predetermine specific decisions and actions of the governmental authorities and their officials."

The point I'm putting to you, Dr Rachkov, is that this principle is explicitly not confined to contracts which have as their subject matter, or which depend upon, decisions of the courts; it also extends to contracts which have as their subject matter, or are subject to, decisions of other governmental authorities. That's right, isn't it?

A. No, it is not right, and I can explain why.

There are law firms in Russia which render services in connection with the public sector. For instance, a company wants to get a licence, there are clear rules on what type of documents must be provided, what is the contents of these documents, what is the form? Must it be -- you don't listen to me, do you?

MRS JUSTICE GLOSTER: I'm listening, that's what matters.

MR SUMPTION: I am too, forgive me.

A. The legal services are aimed at getting a licence, the documents are prepared without any corruption and, of course, the agreement is if the state authority delivers the licence to carry out certain business activity, which is subject to licence of course, then the law firm

gets paid. Or, as another alternative, if the state authority delivers the licence with a delay, the firm gets paid in a lesser amount, ie the law firm is penalised for the behaviour of a third party.

There is nothing about corruption. And I disagree with Mr Sumption's proposition that this extends to all types of contracts which involves any public service. If there is nothing wrong, nothing illegal about -- to have contracts which deal with the public services but still provide either for a contingency fee or a cap fee or a premium if the work resulted -- of a law firm, for instance, resulted in getting a licence on time, because it is important for the business and crucial to get the licence as soon as possible, without any corruption though.

Q. Dr Rachkov, would you agree that this case applies to any payment obligation to a service provider which is expressed to turn on the outcome of a specific decision by a judge or a state official?

A. By a judge, yes; by state official, no.

Q. What I've just said to you is read out from your sixth report. Would you like to have a look at paragraph 132 G(A)1/1.03/212?

A. Yes.

Q. What you wrote here was:

"More generally, Makayev only applies where a payment obligation to a service provider is expressed to turn on the outcome of a specific decision by a judge or state official."

A. Okay, Mr Sumption, I agree, you caught me.

What I meant I just explained. It presumes that the contingency fees do not or may not be used to pay bribes to officials, whether it is the judge or other state officer.

Q. Now, what you summarise here in that paragraph is in fact exactly what is being said, isn't it, in the last paragraph which is highlighted on page 4 of the bundle G(A)4/7.093/4, namely that this rule applies to the decisions and actions of governmental authorities and their officials?

A. I'm afraid I have nothing to add to my explanations before. As I said, the questions or the situations where legal services are rendered in connection with the behaviour of the state officials are very widespread.

What -- the aim and the background of this resolution of the Constitutional Court is to try to exclude the situations where bribes are paid to judges. The court said, basically, that if you have such a contract it is unconstitutional. What does it mean? A law firm may well enter into such a contract but this

contract will not have any protection in court. It's like gambling.

MRS JUSTICE GLOSTER: Just a second, can I understand this. Did this case on your evidence deal exclusively with the issue where the contingency fee agreement with the lawyer envisaged a payment being made to a judge, or was it simply dealing with the issue in isolation, namely contingency fees for lawyers are illegal?

A. Yes, my Lady, the resolution of the Constitutional Court deals with a very specific situation where a law firm says to the client, "Look, I will work for free for you. If the judgment is rendered in your favour then I will get X." That's what the Constitutional Court wants to prohibit because -- but the real background is, as I said, to fight against corruption. In many --

MRS JUSTICE GLOSTER: Is judicial corruption something that's referred to in this judgment?

A. I need to look again at it. Maybe it is not, because maybe in this particular case there was no corruption because the names of the firms which are involved and the lawyers who were acting do not give an idea of whether or not there was any situation of corruption. But I can refer to the Russian press which commented on this decision --

MRS JUSTICE GLOSTER: No, I'm just asking in the actual

judgment itself whether there's any reference to what you -- I mean it's obvious, one would have thought, that any contractual provision that includes payment to a judge is a corrupt unenforceable agreement. But just looking at the principle, it seems to be stated more widely, that is to say any contingency fee.

A. Of course, any resolution of the Constitutional Court on the merits deals with more reasons than just one, or at least these cases are very rare when only one situation is addressed.

The other situations are, for instance, the Constitutional Court does not want lawyers to invite clients to litigate just as gambling, you know. You do litigate, if you win, that's my legal fee, and this is what you get out of this case.

Because you may know that Russian courts are overloaded, if we have a look at the arbitrazh court of the city of Moscow --

MRS JUSTICE GLOSTER: There are two views, aren't there, on whether contingency views are a good idea, one is access to justice, the other is the gambling or other downsides of contingency fees.

But I'm not, as it were, focusing on that. I just want to know whether in this particular case there's any reference to judicial corruption or not?

MR SUMPTION: My Lady, I can tell your Ladyship that on the text there is not.

MRS JUSTICE GLOSTER: On the text there isn't.

MR SUMPTION: But we accept that part of the mischief of it was judicial corruption.

MRS JUSTICE GLOSTER: Yes.

MR SUMPTION: So that on that particular point there is nothing between Dr Rachkov and myself.

Dr Rachkov, to clear this up --

A. Can I ask you a question, Mr Sumption, because it looks just ridiculous(?).

You said there is no mention of corruption. Do we need a mention of corruption? Is it not enough that it said independence of justice? The independence of justice means, among other things, that no corruption must be there in Russian courts.

MRS JUSTICE GLOSTER: Right, well you're agreed on that so we can move on.

MR SUMPTION: Dr Rachkov, as I understand your evidence, and I think this may resolve my Lady's question as well, at least I hope so, the point about contingency fee agreements, they weren't considering an agreement between the parties which expressly said "I will pay you if you win and you will pay part of that to the judge"; their point was that you cannot have agreements which

have the potential to operate in that way even if the actual term doesn't say so, is that right?

A. Yes, that's right.

Q. Now, would you agree that this public policy against agreements which have the potential to operate in a corrupt way is just as significant when talking about other state officials as when talking about judges?

A. If it involves corruption, yes.

Q. That is why the principle, as expressed in the last highlighted block on page 4, is expressed to apply, just as your paragraph 132 is, not just to judges but also to state officials.

A. Yes, I can't deny that the Constitutional Court itself refers to governmental authorities and their officials.

Q. Now, you refer in your report, Dr Rachkov, to the dissenting judgments which accompanied this majority judgment of the Constitutional Court. The reference is paragraph 130 of your report, your sixth report G(A)1/1.03/212.

A. Yes.

Q. Now, I'm going to ask you to look at a couple of those judgments. First of all, these are what are called side opinions, is that right?

A. A dissenting opinion, yes.

Q. Yes. A side opinion is given by a judge who differs

from the majority either as to the result or as to the reasoning, is that correct?

A. Yes.

Q. But the dissents do not affect the authority of the majority decision, do they? They are still the decision of the court?

A. Of course, the decisions are taken by majority. However, this dissenting opinion is quite important because it derives -- if you speak about judges, Kononov's opinion, he rendered many dissenting opinions in the past, and besides in this particular case he was the so-called reporting judge, that means that he was more in a position than other judges to evaluate all aspects of this case. And he actually came to the conclusion that it really depends on the specific situation whether or not the contingency fee can be admitted or must be prohibited.

Q. I understand that he differed from the majority. There are in fact three side opinions or dissenting -- well, there are three side opinions, and I think I'm right in saying, but correct me if I'm wrong, that two of them disagree with the result and one of them agrees with the result for additional reasons, is that correct?

A. Do you mean all three opinions or only one of them?

Q. No, sorry. Two of them concur with the result but give

additional reasons and one of them, Kononov, disagrees with the result, is that correct?

A. Yes, but --

Q. Let's just deal with one thing at a time.

Judge NS Bondar whose side opinion starts at page 8 G(A)4/7.093/8, he agreed with the result and added observations of his own, is that correct?

A. Yes, and we must look at what exactly or what observation exactly he was meaning here.

Q. Judge Gadzhiyev, who starts on page 13 G(A)4/7.093/13, also agreed with the result but added observations of his own?

A. Yes.

Q. Judge Kononov, who starts at page 15 G(A)4/7.093/15, disagreed with the result and the reasoning?

A. Yes.

Q. Now, if we can just look, for example, at the side opinion of Judge Gadzhiyev who agreed with the result but added further observations. On page 14 G(A)4/7.093/14, just below halfway down the page, you will see a paragraph which begins:

"This conclusion is also corroborated in para[graph] 2.2 of the Resolution where it is stipulated that the freedom of contract may have its natural limits set by the basic premises of constitutional order and public

peace."

And he is referring to 2.2 of the majority judgment, isn't he?

A. Yes, maybe he does. Let me have a look at the Russian wording of the separate opinion of Judge Gadzhiyev.

Q. Of course. (Pause)

A. Yes.

Q. Now, in the paragraph that I just referred to, which in English starts just below halfway down page 14, Judge Gadzhiyev seems to be pointing out that the rationale of the rule set out in paragraph 2.2 of the majority judgment must apply not just to for-profit agreements for legal services but to all civil agreements, because that's what he says, isn't it?

"In this case, using this public law argument, the Constitutional Court of the Russian Federation means all civil agreements in their entirety rather than just for-profit agreements for legal services."

That's the point he's making, isn't it?

A. Yes, and this confirms what I've said before. Sometimes agreements between law firms or other alone-standing lawyers and their clients are abused to pay bribes to officials and that's why Judge Gadzhiyev, who comes from Caucasus -- you may know that Caucasus is especially vulnerable to corruption out of other Russian regions --

he knows this from his personal life maybe, how it worked, because his relatives are also in Caucasus. He heard these stories. That's why he want to expand this reasoning for other situations, and quite right from my opinion.

Q. Now, if we look at the side opinion of Judge Kononov --

A. Are we through with Judge Gadzhiyev's separate opinion?

Q. Sorry?

A. Are we through with Judge Gadzhiyev?

Q. Yes, we are, but I don't want to stop you referring to some other passage in it if you think it relevant.

A. I think there is an interesting statement in item 2 which is on page 14 G(A)4/7.093/14, English text:

"To conclude, I believe it would be prudent to note that the issue at hand has no perfect solution, since any of the potential ways to resolve the problem would still be rife with serious social disadvantages.

"Prohibiting the use of contingency fees in agreements for legal services would have the following draw-backs."

He lists the draw-backs:

"One criterion less for assessing the quality of legal services rendered."

This means that sometimes the case is so difficult but on the other hand it is so interesting for the

lawyers but yet the claimant has no funds to pay the lawyers, then the lawyer says, "Okay, I agree to work with you for free provided that, depending on the result, I get certain percentage", and there is nothing wrong about this.

Second:

"No additional remuneration for the service provider, which would promote equal pay for unequal effort."

I think that's a statement which supports that really you need to differentiate between various agreements for legal services.

Third:

"The parties would have an incentive to keep the transaction 'under the table'."

So I think it's just a simplification to say that either all agreements on provision of legal services in courts or, more broadly, as you do, all agreements on rendering legal services or even more broadly, which you still do, all agreements which involve public services are illegal because they contain some type of contingency or success fee.

Q. Dr Rachkov, what Judge Gadzhiyev is saying in that second paragraph of his side opinion is simply that this is a difficult question on which there are policy

arguments for both possible answers, but he considers that the balance of policy advantages lie in preventing success fees. That's what he is saying, isn't it?

A. I don't know whether he actually says this. He says that if there is a contingency fee in a legal service contract for provision of services in court, then such contract may be unenforceable, like gambling.

Q. Well, if you look, what he says is -- he begins paragraph 2 by saying that there is no perfect answer. He then lists, as you've pointed out, three disadvantages -- or three advantages of contingency fees. He then says:

"On the other hand should the use of 'success fees' in agreements be allowed, this may give the service provider an incentive to try to obtain a favourable decision for the service recipient by any means whatsoever."

That, no doubt, is a veiled reference to corruption?

A. It's an allusion to corruption.

Q. Yes. So what he is saying is that, in spite of the fact that from some points of view contingency fees may be okay, nevertheless the balance of advantage and disadvantage suggests that they should not be allowed. That's what he is saying, isn't it?

A. Yes, but he says at the end of his opinion that the same

economic result may be achieved by other means which are not contrary to the Russian constitution or the Civil Code. And actually, by doing so, he gave a kind of recommendation to the Russian legal community and also its clients explaining how they can, if you want, circumvent this prohibition of success fees in legal services contracts for representation in courts. I don't know whether the Constitutional Court played a very positive role by doing so because if a sophisticated law firm has a look at Judge Gadzhiyev's opinion, I think this statement seriously undermines the stability and the credibility of what the court as a whole said.

Q. Dr Rachkov, what Judge Gadzhiyev is pointing out is that it would be possible to regulate fees in such a way that they would not have the vice of giving opportunities for corruption. That's what he is saying, isn't it?

A. You can construe that way. I construe it in a way that Judge Gadzhiyev gave a recommendation on how you can be compliant with the law on the one hand but still achieve the same economic result on the other hand. I don't speak about corruption though.

Q. Now, Dr Rachkov, you suggest, I think, in your sixth report at paragraph 135 G(A)1/1.03/212, that the Makayev decision should be read in the light of the

informational letter of the Supreme Arbitrazh Court. Would you like to turn to paragraph 135 of your sixth report, you refer to information letter 121 of the Supreme Arbitrazh Court.

Now, I would just like to understand what you are saying about this letter. As I understand it, and you must correct me if I'm wrong, what this informational letter says is simply that if a lawyer has entered into a contingency fee arrangement which is unenforceable because of the Makayev principle, that lawyer can still recover a reasonable fee for his time and trouble even if he can't recover the contingency fee; is that what it's saying?

A. It is difficult to say that way, because you see that information letter does not refer at all to the resolution of the Constitutional Court.

I think if you have a contract on provision of legal services in court containing a contingency fee, and if this particular provision is unenforceable, then indeed the default rule applies, which is the market value of the services is the indication for the remuneration.

Q. Well, we can see what it says, can't we, in the first paragraph which you quote in paragraph 135 G(A)1/1.03/212.

"Where the amount of remuneration to be paid to a

representative, and the obligation to pay that remuneration was dependent on the results of the court proceeding, the claim on compensation of trial costs shall be granted subject to a valuation of its reasonable limits."

Then there's a reference in the subsequent parts to hourly rates, user charges and so on. All that this information letter is saying is that if you do enter into a contingency fee agreement, that won't stop you from recovering your fees on an acceptable non-contingency basis. That's right, isn't it?

A. No, not really.

The case was about the following: the law firm got paid by its client. The client is entitled, if the decision is rendered in favour of the client, to get these costs reimbursed upon the court's judgment from the losing party, in accordance with the Arbitrazh Procedural Code of the Russian Federation --

MRS JUSTICE GLOSTER: Why is this issue relevant to anything I've got to decide in relation to Russian law, this particular addition?

MR SUMPTION: I believe not, but since Dr Rachkov --

MRS JUSTICE GLOSTER: What's the relevance of what you're saying in paragraph 135 to the issues of Russian law that I've got to decide?

A. It really depends on what Mr Sumption wants to say on the Constitutional Court resolution.

MRS JUSTICE GLOSTER: No, you tell me why you think it's relevant for me to look at this case so that I can understand what the point is, because I don't at the moment.

A. I only wanted to say that if a condition, an essential term or an allegedly essential term is missing from the contract, ie the contingency fee cannot be agreed, this means that it deems nonwritten in that contract, then the services are paid by reference to the market value of these services, ie by reference to the effort --

MRS JUSTICE GLOSTER: I see, you're saying it doesn't affect certainty or enforceability of the contract, because you just have a quantum meruit substitute.

A. That's what I wanted to say, yes.

MRS JUSTICE GLOSTER: I understand.

MR SUMPTION: Now, let us assume that you have a contract with a politician, okay? The contract says -- the politician is a personal friend of the president and of some of the president's closest advisers, let's just assume that, shall we? And assume that a contract is made with that politician under which he agrees to persuade the president and his advisers to issue decrees which will give him and his business associates an

opportunity to make large sums of money out of state assets. Now, would you agree that that is a contract with a potential for corruption?

A. I would agree with that.

Q. Would you agree therefore that such a contract is likely to be directly contrary to the principle of public policy identified in Makayev, by the majority?

A. If the -- yes. I mean, if the characteristic features of the crime, corruption, are combined, yes, this is a crime.

Q. Now, I want to turn, if I may, to the subject of the rules of Russian law about the circumstances in which an agreement must be recorded in writing. Now, I think you acknowledge in your report, don't you, that the parties may intend an agreement or arrangement, which they make, not to be legally binding? That is a possible situation in Russian law, is it not?

A. It is a possible situation.

Q. They don't have to expressly agree, do they, that their arrangement will not be legally binding; it's enough if the circumstances objectively show that they didn't intend it to be legally binding, would you agree?

A. Yes, besides such contract must have no pecuniary character, ie if no property is transferred between them or to a third party, if this is for instance an

invitation to have a joint walk, then this is definitely not a civil law contract which is enforceable.

Q. An invitation to have a joint, and I missed the next word?

A. Walk. To walk outside.

Q. I see, right.

Well, the parties can surely agree to have an arrangement under which a contract, or an arrangement under which significant financial consequences follow but which they don't intend to be legally binding, can they not?

A. Yes, at the end of the day everything depends on what the parties intended and what they actually did afterwards.

Q. Of course. Now, would you agree that one circumstance which would tend to suggest, and I'm not saying it would be conclusive, but one circumstance which would tend to suggest that the parties didn't intend an arrangement to be legally binding is that they did not record it in writing?

A. No, I disagree with that.

Q. Now, I'm not suggesting to you that all contracts which are not made in writing are not intended to be legally binding, all I'm suggesting to you is that when the court comes to look at what the objective circumstances

are, the fact that the parties did not reduce their agreement to writing may be one of them.

A. May be, excuse me?

Q. The fact that the parties did not reduce their agreement to writing may be one of the circumstances which the court would consider in deciding whether they intended it to be legally binding?

A. Yes, the court may consider this as one of the other circumstances.

Q. Now, I want, against that background, to turn to the effect of Articles 161 and 162 of the Civil Code, which you'll find at G(A)4/4, flag 2, pages 29 and 30 G(A)4/4.02/29.

Before I ask you about the details of these provisions, I'm right, am I not, in thinking that the Civil Code is a code of substantive law? It's not a code of procedure?

A. In principle the Civil Code is a code of substantive law, but Russian doctrine and also court judgments do recognise that some provisions are of procedural character and nature.

Q. Well, what they recognise is that some provisions of the Civil Code may have procedural consequences, that's right, isn't it?

A. No, they say explicitly these are procedural rules.

Q. Can you look at 161, please.

A. Yes.

Q. "The following must be made in simple written form, with the exception of transactions requiring notarial certification ..."

That's a reference to transactions which are dealt with separately in Article 165, isn't it?

A. Yes.

Q. So leaving aside contracts requiring notarial certification, there are categories of contracts listed here which require written form. The second of them is:

"Transactions of citizens with one another for a sum over ten times the minimum monthly wage established by a statute and, in cases provided by a statute, regardless of the sum of the transaction."

Okay?

A. Okay.

Q. Now, would you agree that the transaction alleged by Mr Berezovsky to have been made in this case is a transaction of citizens with one another for a sum over ten times the minimum monthly wage established by statute?

A. Yes.

Q. Now, this is a provision that deals with the circumstances in which an agreement must mandatorily be

in writing, is it not?

A. Although the word "must" is used in Article 161, it does not mean that this is a real must, because it is not sanctioned by negative -- or by heavy negative legal consequences if the form is not complied with.

Q. Well, that's dealt with by 162, isn't it, "Consequences of Nonobservance of the Simple Written Form of a Transaction"?

A. Exactly.

Q. "Nonobservance of the simple written form of a transaction shall deprive the parties of the right, in case of a dispute, to rely for confirmation of the transaction and its terms upon the testimony of witnesses, but shall not deprive them of the right to adduce written and other evidence."

Okay? That's the consequence of noncompliance, isn't it?

A. Yes.

Q. Am I right in thinking that the object of this provision is to protect people against being held bound by high value transactions without some indisputable acknowledgement that they are bound, such for example as their signature on a written agreement? It's a protective provision, isn't it?

A. It is a protective provision. Russia is, at least in

accordance with its constitution if not in the reality yet, a state of law insofar -- a state of rule of law, insofar as the main goal of the law is to give certainty and stability to the civil relations. Therefore clearly to have a stability you need to -- better to have a written contract than oral one.

Q. Yes, but this is a provision which has a social purpose, it's not just a rule for the efficient conduct of court proceedings?

A. What do you mean by this?

Q. What I'm suggesting to you, and what I think you've acknowledged, is that this is a provision -- let me break it up. This is a provision which has a social purpose?

A. Yes.

Q. In other words, it isn't a rule which is designed simply for the efficient conduct of disputes in court?

A. Yes, it has a broader role.

Q. Now, the consequence of noncompliance with 161 is that you can't prove the agreement by the evidence of witnesses. We've agreed to that?

A. Yes, we agreed -- you mean -- well, two things cannot be proven by witness statements. It's the mere fact that the transaction was entered into and its conditions. But, for instance, you can prove by witness statements

the subsequent performance of the transaction.

Q. Well, what I think you say in your fourth report, and I've got in mind paragraph 151, is, as I understand it, your evidence is that although a party cannot produce witness evidence, he can produce "explanations", and I'll ask you in a moment to expand on what "explanations" are. That's right, that's what you're saying at 151, isn't it G(A)1/1.01/54?

A. Yes.

Q. Is it right that explanations are essentially submissions made by or on behalf of a party to a court? They're not evidence of witnesses, they are arguments and submissions made to a court, is that correct?

A. It is correct in a way that we have an umbrella notion of evidence in Russian procedural law which encompasses written evidence, oral evidence, statements of witnesses who are not parties to the trial nor third parties, so it's a separate role. And we have oral or written explanations of the parties which may be contained in the statement of claims or other documents or oral statements submitted to the court.

Q. Now, are explanations governed by the Arbitrazh Procedural Code, Article 81?

I'm not trying to test your memory, Dr Rachkov. If you turn to G(A)2/1, flag 8, you'll find the arbitrage

Civil Code. Sorry, the Arbitrazh Procedural Code.

A. Thank you, it is not necessary. I frequently -- I am in arbitrazh courts.

Q. Well, I would like to ask you to look at it anyway so as to give my Lady the opportunity to do so.

MRS JUSTICE GLOSTER: You've got it at paragraph -- it's Article 81 we're looking at, is it?

A. Yes.

MRS JUSTICE GLOSTER: You've got it at paragraph 150.

MR SUMPTION: There's also Article 88 which I wanted to compare with it.

If you just look at G(A)2/1, flag 8, we can see both articles together. Article 81 deals with explanations by a party of the circumstances known to him which may have significance, and is that contrasted with what we see on the following page, Article 88, "witness evidence", just as you described G(A)2/1.08/194?

A. Yes.

Q. And these are the two procedural code provisions which identify the two types of material?

A. Yes.

MR SUMPTION: My Lady, there's not going to be a convenient moment.

MRS JUSTICE GLOSTER: No. Very well.

Dr Rachkov, I told you yesterday evening, but you

mustn't discuss your evidence with anybody or the case over the luncheon break, okay.

THE WITNESS: Okay.

MRS JUSTICE GLOSTER: Thanks very much. 2.05.

(1.02 pm)

(The short adjournment)

(2.05 pm)

MRS JUSTICE GLOSTER: Yes, Mr Sumption.

MR SUMPTION: Dr Rachkov, I was asking you when we broke to look at Articles 81 and 88 of the Arbitrazh Procedural Code, which identify and describe witness evidence and explanations. The witness evidence is dealt with by Article 88, and can you confirm, I think it's in sub-article 3, that witness evidence is, in principle, to be given orally but the court may propose that the witness set out his evidence in writing G(A)2/1.08/194.

A. This is correct.

Q. The evidence that he has given orally, in writing, when he has already given his evidence, is that right?

A. This is correct.

Q. In that case, is it right that both the oral evidence and the written version are witness evidence, as the term is understood in Russian law?

A. Yes.

Q. Now, could you please take bundle G(A)4/4 at flag 5. You won't need for the moment bundle G(A)2/1, so if you want to get rid of some of the stuff on your desk, feel free.

If you would like to get rid of G(A)2/1 and turn to G(A)4/4, which I think you may have from an earlier stage of the evidence. In flag 5 of 4/4 if you've got that.

A. No, not yet. Oh, 4/4, excuse me.

Q. It's 4/4, flag 5. This is the Code of Civil Procedure.

I'm referring you to this because it contains provisions about explanations by parties and third parties in section 68, page 98 of the volume G(A)4/4.05/98.

That provides, in subsection 1:

"Explanations by parties and third parties of facts known to them that are significant for proper consideration of the case are subject to verification and evaluation together with other evidence."

Now, is the effect of that that if you make a point by way of explanation, it's got to be verified before the court can treat it as a statement of fact that it can rely on, is that right?

A. If there are other evidences, then indeed the oral explanations must be compared with those, and the judge

comes to the conclusion whether or not it is true what is said in oral explanations.

Q. Yes, but isn't the effect of section 68.1 that if a party gives an explanation, in the technical sense of the word, if he wants that taken into account by the judge in deciding what the facts are, he's got to verify it by producing evidence to support it?

A. It depends on the contents of explanations. If explanations relate to notorious facts which are known to everybody, then of course the judge does not need to double-check it.

The other situation is, for instance, if the defendant being in court does not object, which means that he accepted this explanation.

Q. But if a party wishes to give evidence of facts known particularly to him, and not notorious, then unless the other side don't object the rule is that he has got to verify his explanations by evidence, isn't it?

A. If there are such evidences, yes, of course.

Q. Well, if there aren't, then he can't verify it at all, isn't that right?

A. It really depends on the specific case, what exactly is explained.

Q. Isn't the rule very simple: an explanation is basically a submission, it's not evidence. If you make an

explanation to the court which involves asserting some fact, you've got to prove it by producing some evidence; it's as simple as that, isn't it?

A. No. In accordance with Russian classification of evidences, oral explanations are evidences.

Q. Well --

A. However, of course, the judge in every particular case needs to weigh it and to identify what is the weight of such evidence as explanation.

Q. Well, oral explanations, Dr Rachkov, are not evidence, are they? That's why in the Arbitrazh Procedural Code they are dealt with separately in distinct Articles, 81 and 88, and why in the Civil Procedure Code there's a provision saying that explanations have got to be verified by evidence.

MR RABINOWITZ: Before the witness answers this, my learned friend may not have this to his mind, but, in fact, the experts have agreed in the joint memorandum that they are evidence. This is at paragraph 12.4, page 5 of bundle 6/1 G(A)6/1.01/5.

MR SUMPTION: Well, my learned friend is quite right to say that I don't have that to my mind but let me have a look.

MRS JUSTICE GLOSTER: What paragraph?

MR SUMPTION: It's paragraph 12, sub-4.

MR RABINOWITZ: Page 5.

MR SUMPTION: I'm not sure that my learned friend's point is right, with respect, because what is said here is that:

"Such explanations are a type of evidence, but they are not ... 'witness evidence', and ... are not precluded by Article 162.1."

Then the next sentence says:

"As noted below, however, it is disputed whether the parties' explanations have any independent weight (absent any documentary or physical proof)."

MRS JUSTICE GLOSTER: It's as clear as mud to me.

Perhaps you can help me, Dr Rachkov. Just explain to me what an explanation is.

A. It can be any statement concerning the factual circumstances surrounding either the situation, how the parties came to a contract. It can be an explanation on what the contract says in the -- to the best of the parties' knowledge and belief.

For instance, if the parties use the word "trust" in their contract, it may be that one party understands this word in one way and the other party understands it in another way. But it may also well be that both parties did figure out something common under the word "trust", although this word is not used in the Russian law, in the written law adopted by the parliament.

MRS JUSTICE GLOSTER: But is it a submission -- Mr Sumption, I think is suggesting to you that it could be a submission.

A. Unfortunately I'm not familiar with the rules of procedure in England so I cannot --

MRS JUSTICE GLOSTER: Forget English law. There is a contract which says A trusts B to pay some money into C's bank account. Is an explanation something that A gives as to why he entered into that agreement?

A. For instance, yes.

MRS JUSTICE GLOSTER: Which is his reasons for entering into the agreement.

A. Correct.

MRS JUSTICE GLOSTER: Is a proposition put by A's lawyer as to what, as a matter of law, is meant by that provision, an explanation?

A. It can be anything. It can be any explanation of whatever kind --

MRS JUSTICE GLOSTER: So it can be a legal explanation as well as --

A. It can be a legal explanation. It can be a legal --

MRS JUSTICE GLOSTER: So a legal argument put forward by A's lawyer as to what those words mean, a contract which says A trusts B to pay some money into C's bank account --

A. Correct.

MRS JUSTICE GLOSTER: -- is an explanation?

A. It is an explanation. It can also be an explanation to the effect that the parties did not conclude a contract because such and such essential terms were not agreed upon. It can be an explanation to the effect that one party believes that the contract was concluded but is invalid. It can be an explanation that the contract was concluded, is valid, but was not performed, or was not duly performed.

MRS JUSTICE GLOSTER: So it can mean an explanation of a factual matter as well as the statement of a legal proposition?

A. Yes.

MR SUMPTION: Suppose we have --

A. I can maybe, just to give an idea of what explanations are: an explanation is there to help the court understand the factual background on the one hand, but on the other hand identify the legal provisions which are applicable to construe the legal provisions, to apply them to the facts as described by the parties.

Q. Suppose you have a pure question of fact, there is an issue in the case, let's suppose, about whether an agreement was made between A and B as to whether A would sell B his car, all right? One party says this

agreement was made orally on such and such a day. I said "Will you sell me your car for $1,000," and he said "Yes," right? The other party says, "I wasn't there at all and I've never made an agreement like that."

So you have a pure question of fact, right? Now, can a party address the court without witness evidence by way of explanation and say, "I made this agreement on such and such a day", can he do that?

A. The court will not agree with this position so -- of course, anyone can do anything, but clearly if there is no performance, and the court cannot understand whether or not the contract was concluded or was not concluded, the explanation is meaningless in this particular case.

Q. Yes. So if you have an issue about whether an agreement was ever made and, if it was made, what the parties agreed, what they said, you can't just give an explanation without evidence, can you? You've got to produce evidence to support it?

A. Yes, you must evidence as a claimant everything which you say, whether as a matter of fact or as a matter of law, unless the burden of proof is imposed on the other party.

Q. And if you have an agreement which is not in writing and of which there is no documentary evidence, then the only

way that you can do that, surely, is to produce witness evidence?

A. It may well be if the agreement, as concluded orally, presumed or provided for certain payments. You can also produce the payment order, an excerpt from the bank account, which indicates that the payment was actually credited to the bank account of the recipient party.

Q. Yes, I can see that sometimes you may have an oral agreement of which there is documentary evidence. But if we suppose that there is an oral agreement, and there is no documentary evidence of the agreement, then the only way you're going to be able to prove it is by witness evidence; that's right, isn't it?

A. Not necessarily. I have a very interesting case in front of me, maybe you can have a look at bundle G(A)7/1, and there is a last flag, which is 23. It's G(A)7/1 G(A)7/1.23/248.

Q. Right, where should we be looking? Which flag is this?

A. It's 23. I'm not sure whether I shall give a brief description of this case?

Q. Yes, if you want to rely on it.

A. Well, the claimant was layering flooring in a private flat of a customer without having entered into a written agreement before. The claimant said that the agreement was that he gets paid 200 rubles a square metre, whereas

the defendant said she wants to pay only 50 rubles per square metre. Besides, there was apparently an argument about whether or not an agreement at all was entered into.

The claimant tried to produce an audio record in the court of the first instance. However, the court of the first instance decline to listen to this audio record. That's why the court of the upper instance decided that, on the one -- well, the court of the upper instance decided to return the case for re-examination to the very low level because this was the third instance already.

The case went through the justice of the peace, which is the lowest level of the Russian justice of the common jurisdiction, and then went on to Chkalovsky district court of Nizhny Novgorod region, and landed at the end of the day with the Nizhny Novgorod oblast or region court.

So I think this gives a clear indication that the explanations of the parties may well serve as an evidence which is taken into account together with other evidences, and is not less valuable than another type of evidence, namely a written one.

Q. Well, what this decided was that under two specific provisions of the Civil Code, I'm looking at page 252 of

the bundle numbering G(A)7/1.23/252, an audio recording of the alleged agreement was regarded as evidence?

A. Yes, by the court of the final appeal instance though.

Q. Yes. Well, it was regarded as evidence equivalent to written evidence, wasn't it?

A. I'm not sure it was regarded as equal to the written evidence. Believe it or not, there is no hierarchy of evidences in Russian law. It may well be that a claimant files a claim to the court and the defendant does not appear and then, of course, the claimant -- the court can only rely on the evidences, including written ones, including explanations, provided by the claimant.

Q. Well, what this appears to have decided is that there was a specific provision for the admission of evidence on such an issue contained in two articles of the Civil Code, namely 55, part 2, and 77. That's what it actually decided, isn't it?

A. No. I think the court tried to figure out whether there is anything else than simply an oral contract plus controversial statements from both parties whether or not the oral agreement was made; and, second, what the price of the services was, of the works was. So that's why the court -- it was important for the court to listen to the audio record which was provided by the

claimant actually.

Q. Now, that is effectively a form of witness evidence, isn't it? What you are doing is proving an audio recording of somebody speaking? That's the basis on which this was admitted?

A. Unfortunately not. The written evidence is something else than audio or video record.

Q. Well, this wasn't written evidence --

A. In accordance with the Russian civil procedure and arbitrage procedure.

Q. This wasn't written evidence, was it? It was an audio recording?

A. It was not written evidence.

Q. No. You, as I understand it, suggest that any document can provide documentary evidence of an agreement and be admissible, notwithstanding 161 and 162.

For example, you give the example in your sixth report, paragraph 59 G(A)1/192. You say that because a newspaper is a document, a newspaper report may provide documentary evidence of an agreement, is that your evidence?

A. It can be in evidence if it contains facts which are not a lie, for instance --

Q. Which are not?

A. Which are not a lie, so --

Q. Which are not untrue?

A. Yes, which are not untrue, correct.

Q. How do you establish whether they are untrue?

A. The court evaluates the evidence based on its internal perception, on its experience, on whether or not the documents are related to the case. For instance it may well be that -- and happens actually in court -- claimants or defendants try to provide the court with completely unrelated documents, then the court says, "Okay, I think this is not related to this case, it's not important for me to decide".

There can also be documents which are obtained by many undue methods, then this evidence can not be used either. But in general, the purpose of Russian legal provisions regulating the evidence is to make sure that the court has a very clear picture on what happened and what kind of law must be applied and how.

Q. You see, pursuing your newspaper example, suppose that a person wishes to give -- a party to an action wishes to give his own witness evidence to say there was an oral agreement, and the court says, under 161.2, "I'm sorry, you can't give evidence of this agreement because the value exceeds ten times the statutory minimum wage."

Now you're not suggesting, are you, that if the party is told that, he can go away and give an interview

to a newspaper, and then produce the newspaper as a documentary record of the agreement, or are you suggesting that?

A. No, no, I'm not suggesting that.

Q. You say that Article 161 is classified, as a matter of Russian law, as procedural?

A. Yes.

Q. That is part of your evidence, is it not?

A. Correct.

Q. Now, I've put it to you, and you've answered this, that it is part of a code of substantive law, to which your answer is "In principle, yes, but there are some things in the Civil Code that would be counted as procedural," and I've also put it to you, and I think you agreed, that this one has a social and not just a procedural purpose?

A. Definitely. The requirement to enter into a written contract has many purposes. One of them is that the state knows what its citizens agreed upon, that the citizens pay taxes, and how shall the state understand what was agreed, which money was transferred where, if there is no written contract?

Q. Now, you're not, as I understand it, or perhaps you are, suggesting that you can get round the social purpose of 161.2 simply by tendering your account of the facts by

way of submission; you're not suggesting that, are you?

A. I'm afraid I don't fully understand your question.

Q. Perhaps I shouldn't have used the word "submission".

You're not suggesting, as I understand your evidence, that you can get round Article 161, sub-article 2, of the Civil Code simply by giving your account of the facts by way of explanations instead of by way of witness evidence?

A. Maybe not, but I can give you an example, which is not produced as a judgment here but I can easily produce this judgment to the court.

We as a law firm entered in July 2008 into an agreement for provision of legal services with a major Russian development company whose shares were traded at that time at the stock exchange. I was commanded to attend the premises of that, of the management of that company in Moscow, and they pushed me a lot under time pressure to render the legal advice as soon as possible. I did so. We generated appropriate legal fees. However, we did not enter into a written contract because of lack of time.

Later on, when we issued an invoice, the client said there was no oral agreement, no services were rendered, nothing. However, we filed a claim with the Russian court, the defendant did not appear, the defendant did

not produce any evidence. We evidenced what exactly was rendered in terms of services, so I provided email exchange which was, however, mostly unilateral, so a few emails which I got back from the client, mainly sending minutes of meetings of its board of directors to me. One of the points in the objections of the former client was that there was no agreement, the court granted our claim in both instances. This is a development of this year.

Q. So the position in that case was that first of all you had documentary evidence, and, secondly, there was no objection to your deploying it from the other side because they didn't appear; that's right, isn't it?

A. No, they provided written objections to the court.

Q. But you had documentary evidence?

A. I had some documentary evidence, and this shows that the Russian court relies on the totality of evidence available.

Q. If a particular oral agreement is being made, for which the only evidence is the recollection of witnesses, you can't prove it in a Russian court, can you?

A. No, you cannot.

Q. In your evidence, as we've established, you say that this is a rule of procedure. Is it right that the question whether it is procedural or substantive has

never actually been decided in a Russian court, so far as anyone can discover; is that right?

A. To the best of my knowledge, it was not, yes. I mean, maybe it's so commonplace that there is no need to decide on it.

Q. Well, one reason for that, I imagine, is that in a Russian court it wouldn't matter whether it was procedural or substantive because it would be the law in either case which a Russian court would apply. So it's not something a Russian court would ever have to decide?

A. Yes, I agree with you.

Q. On the other hand, a foreign court might have to decide it, or a Russian court might have to decide it when receiving evidence of a foreign law because of the distinction between substantive and procedural law in private international law. You understand that, don't you?

A. I understand it.

Q. Now, would you agree that the consensus among legal scholars in Russia is that Article 161 is a substantive rule?

A. No, I disagree with that. I think the consensus among Russian scholars is that the rule to the effect that agreements cannot be evidenced by witness statements, if the agreements are oral, is of procedural nature.

I refer to such authorities as Professor Molchanov, Professors Mozolin and Masliaev, and these are paragraphs 152, 153 of my fourth report G(A)1/1.01/54.

Q. Would you agree that Professor Lunts is a highly respected academic authority on these matters?

A. In which matters, excuse me?

Q. On questions of procedure and contract?

A. No, I wouldn't agree with that. Professor Lunts was a specialist of Soviet time in private international law. He died maybe more than 20 years ago when the old Soviet rule applied.

Q. Well, the rule about proof of contracts is in fact older than the Civil Code of the 1990s, isn't it?

A. Maybe so. I don't know the wording by heart. I can imagine that it is, yes.

Q. Can we look at Professor Lunts's book, G(A)7/2, flag 1. Now, the reason I'm referring you to Professor Lunts is that he is the one Russian scholar that we have found who appears to deal with this precisely in the context of private international law, looking at the classification for the purposes of private international law G(A)7/2.01/1-4.

MRS JUSTICE GLOSTER: Just remind me, Mr Sumption, under English PIL rules, is it for this court to characterise the rule, or is it for this court to have regard to how

the foreign law characterises the rule?

MR SUMPTION: My Lady, it is for this court to classify the rule by enquiring what is the nature and purpose of the rule and how it functions, but for that purpose it is relevant to consider what the consequences are and how it is classified in the foreign system. It is not conclusive how the foreign system classifies it, because the foreign system may be applying criteria which would not be recognised as valid by an English court.

MRS JUSTICE GLOSTER: I see. At the end of the day I have to make my mind up, but it's informed by how it's classified as a matter of the domestic foreign law.

MR SUMPTION: Among other matters, yes. In our submission, your Ladyship will need to look at the purpose, nature and consequences of this and take a view, as a matter of English private international law, that the foreign law's approach to it is relevant in that exercise.

MRS JUSTICE GLOSTER: Yes, I see.

MR SUMPTION: Dr Rachkov, if you've got there the extract from this textbook open, in the first paragraph of paragraph 6 G(A)7/2.01/3, the first block of highlighted text, is the professor making the point that a provision of the Code preventing the parties from relying on witness evidence may simply be the procedural consequence of a substantive rule of law?

Just read through it and tell me whether you agree with that summary. (Pause)

A. And the summary is? Can you repeat, please, because I was reading the --

Q. Of course. Have you read that first block of text?

A. Yes, I did.

Q. As I understand it, and correct me if I'm wrong, the point that the Professor is making here is that the provision of the Code, which prevents parties relying on witness evidence, and he is referring to the older Soviet codes here, may simply be a procedural consequence of a substantive rule of law.

Do you agree that that's what he's saying?

A. Yes, the procedural consequence of the substantive rule of law.

Q. Now, in the second paragraph, the part immediately under the highlighted block of text, is Professor Lunts making the point that the exclusion of witness evidence under a foreign legal system would be respected in a Russian court if it had a substantive purpose. He cites as an example Article 1341 of the French Civil Code.

A. I don't think he mentions a Russian court, he gives an abstract case.

Q. Yes, but this is a textbook, isn't it, on Russian rules of private international law?

A. It is a textbook on Russian civil procedure, international civil procedure, or not Russian, international civil procedure.

Q. Well, it's specifically directed to the position in Russia, isn't it?

A. Well, it was written in, whatever, 1976, to deal with the Civil Code of the then Russia which was part of the Soviet Union.

Q. I understood it to have been written in 2002. It may be an up-to-date edition.

A. It is just a reprint of a book which was written in 1976.

Q. Well, it refers to the Fundamentals of Civil Legislation, Article 125, which was promulgated in 1991?

A. Yes, but Professor Lunts has a co-author whose name is Marysheva, and of course, because the book was printed in 2002, there was some update with references to them.

Q. In England we use a book called Dicey, Morris & Collins, notwithstanding that Dicey has been dead for about 100 years.

The point that is being made in the block of text between the two highlighted blocks is that:

"... in accordance with Article 125 of the Fundamentals of the Civil Legislation [when] the form of a document is governed by foreign law, it is impossible

to admit the witness testimony if according to this foreign law the witness testimony may not be accepted instead of or in disproof of the written document, as for example it is provided for by Article 1341 of the French Civil Code."

Now, what that is saying is that if you had an equivalent provision to Article 161 in a foreign legal system which it was sought to rely on, and a contract for example governed by that foreign legal system was being deliberated on in a Russian court, the Russian court would apply the foreign code equivalent of 161 as if it was a substantive rule. That's the point he's making, isn't it?

A. That's apparently the point he's making.

Q. You see, 1341, I don't know whether you're familiar with other systems of civil law apart from the Russian one, Dr Rachkov?

A. Yes, with German law.

Q. Yes. Well, I think the same applies in the German Civil Code. It's a very common principle, isn't it, in the civil law systems, French, German, Swiss, for example, that there are provisions that above a minimum value threshold, oral evidence is not admissible to establish an agreement; that's quite a common principle, isn't it?

A. I'm more familiar with the substantive law than

procedural law of Germany, and in accordance with the material -- with the substantive law of Germany, if an entrepreneur sends an offer to the other entrepreneur, and the other entrepreneur remains silent, the offer is accepted.

Q. Let's look at the example which Professor Lunts, or perhaps it's Marysheva, actually cites, which is Article 1341 of the French Civil Code. You'll find that in flag 3 of the same bundle. And it is substantially the same as Article 161, isn't it?

There's an English translation if you would prefer to read it in English.

MRS JUSTICE GLOSTER: When you say the same bundle?

MR SUMPTION: Flag 3 of 7/2. Does your Ladyship have that?

MRS JUSTICE GLOSTER: Flag 3 of 7/2.01?

MR SUMPTION: In my bundle it's flag 3, and the page reference is G(A)7/2.03/11.

MRS JUSTICE GLOSTER: Thank you.

MR SUMPTION: That's the English translation of Article 1341 of the French Civil Code which provides that:

"An instrument before [notaries] or under private signature must be executed in all matters exceeding a sum or value fixed by decree [currently 5,000 francs or 800 euros], even for voluntary deposits, and no proof by witness is allowed against or beyond the contents of

instruments, or as to what is alleged to have been said before, at the time of, or after the instruments, although it is a question of a lesser sum or value."

Now, 1341 therefore is like Article 161, although there are some differences between them, a provision excluding witness evidence in relation to transactions above a minimum value.

That's the kind of thing which Professor Lunts and Dr Marysheva are suggesting would be classified as substantive by a Russian court?

A. It may well be that they classify that way, but I do not fully understand what the relation of the French Code Napoleon, for our case, is. That's the first remark.

And the second remark is, as I understood the French wording, because I'm fluent in French as well, the contents of this rule is broader than the Russian one. The Russian law only says the mere fact of the transaction and its terms may not be evidenced by oral statements. Other facts can well be evidence, for instance performance.

Q. You're quite right that the French rule is in that respect broader than the Russian one, but what they have in common is that they exclude witness evidence to establish the existence or terms of an agreement above a certain value threshold, and that in a Russian court,

I suggest to you, would be regarded as a substantive rule, and gives one some guidance as to how the Russian courts would classify 161, sub-article 2, if they ever had to decide that question. Do you agree?

A. No, I don't agree. I think it's a far-reaching conclusion.

I refer in my sixth report to a number of not least authoritative sources, like Zhuikov and Treushnikov, "Commentary to the Civil Procedural Code", this is paragraph 61 G(A)1/1.03/193; to a commentary of Professors Abova and Kabalkin, which also say that this rule is procedural; to the commentary of Grishaev and Erdelevsky. So I think there are at least three very alternative sources which confirm the correctness of what I've said.

Q. But the only context, surely, in which this would ever have to be decided is an issue of private international law?

A. Is it a question?

Q. Yes. I'm asking you whether you disagree with that?

A. I do not understand which role the private international law can play here. We have an agreement which was entered into between two Russian citizens. The agreement was to be performed in Russia. So there is no space to me to apply private international law.

The private international law answers basically the question which law shall be applied? Shall it be Russian law? Shall it be a foreign law? I do not see how and why any foreign laws in(?) Russian shall be applied to the 1995 or 1996 agreement.

Q. I'm not going to debate with you the question whether the matters I'm asking you about are relevant. That's a matter in due course for my Lady. But it arises, if I may just inform you, from the fact that although these matters are governed by Russian law, they are being determined by an English court.

Now, can you think of any other context in which it would matter whether a rule of Russian law was procedural or substantive, except private international law context?

A. Whenever a dispute arises between parties to a contract this rule applies, and whenever these parties are Russian citizens who entered into a contract which is governed by Russian law.

Q. Can you look at the final paragraph in the extract from Professor Lunts's book G(A)7/2.01/3:

"In regard to such cases of close connection between the procedural provision and substantive law, DI Polumordvinov in the mentioned book reasonably notes that non-admission of the witness testimony for proving

existence and content of some civil law transactions provided in the legislation of several states (USSR, English-American and Romanic countries) represents a direct consequence of those legal forms which determine the form of transaction. If the court, he denotes, admits proving [of a contract] by means of witness testimony, it would violate the substantive legal norms of that foreign state which it is obliged to apply resolving the dispute on merits."

Now is the point being made here this: that if the rule in question, and we're talking about Article 161, sub-article 2, reflects a rule of legal policy, then one would expect it to be applied in any court which was applying the foreign law in question, in this case Russian law; isn't that the point that's being made?

A. It may well be. I think it's always difficult to comment on some excerpts which are taken from a book, which in turn refers to an excerpt from a second other book.

I don't know who Polumordvinov is and what exactly he says in the context of his work.

Q. Well, neither do I know who he is, but I am suggesting to you that that is the opinion expressed by this book, because it endorses Mr Polumordvinov's view and explains its implications, doesn't it?

A. It may well be, yes.

Q. Now, if we turn to Professor Zhuikov, who is one of the authors that you say we should be referring to in this context. Could we look at paragraph 92 of your fourth report, G(A)3/1, flag 2, page 93 G(A)3/1.02/93.

A. Can you repeat the --

Q. This is not your fourth report, forgive me, this is Mr Rozenberg's fourth report, but it contains a quotation from Professor Zhuikov.

You haven't got it yet, I'm sorry, I should have waited.

At G(A)3/1, flag 2, page 93, paragraph 92, Mr Rozenberg quotes from Professor Zhuikov. Just to identify him, he is currently, is this right, the deputy chairman of the Russian Supreme Court, is that correct?

A. I think so, I'm not very up-to-date, but he was for a while at least, yes.

Q. Now, his work is being quoted here:

"Admissibility of evidence [he says], as a rule of proof in the civil law procedure, is connected first of all with the existence of the norms of substantive (civil) law regarding determination of the scope of possible evidentiary materials in a specific case. Certain types of evidence may be excluded by norms of substantive law from the list of [admissible] sources of

information about legally meaningful facts."

Now, is Professor Zhuikov making the same point here as Professor Lunts is making in the book that I've just referred you to, namely that some procedural rules reflect substantive rules of law?

A. It may well be. Can I please ask to provide me with the annex to this statement by Mr Rozenberg?

Q. You mean the text he's referring to?

A. Yes, Professor --

Q. You'll find it in tab 26 of MAR4, which I think is in -- you'll need G(A)4/2 I think.

Sorry, let me just find the reference for you. It's 4/5 I'm told. You want tab 26 in this bundle, which is G(A)4/5.26/68.

A. Can I also please ask to provide me with my own report and annexes to the sixth report, please?

Q. By all means. Which one do you want?

A. The same. So I mean Mr Rozenberg indicates a commentary but translated it only up to clause 6, and I would like to refer to clause 8.

Q. Yes, by all means. But can I just, while that is being fetched, invite your attention to paragraph 5 which is the passage quoted by Mr Rozenberg?

A. Yes, I understand this paragraph.

Q. Yes. Now, is the point that is being made by

Professor Zhuikov in this passage that a rule of procedural law may reflect a norm of substantive law?

A. I understand what Professor Zhuikov says: a rule of procedural law can reflect a rule of substantive law, which means that -- excuse me, which means that apparently he wants to say this is a commentary to the Civil Procedure Code, not to the Civil Code. He wants to say by this that the Civil Procedural Code may contain some substantive law rules, not vice versa.

Q. Right.

A. Can I now refer to mine?

Q. Yes, by always means. Are you looking for flag 31?

A. Correct.

MRS JUSTICE GLOSTER: Can somebody give me the reference, please?

MR SUMPTION: It's G(A)2/5.31/139.

A. What he says there is:

"Civil procedural rules are contained in many substantive acts: Civil Code of the Russian Federation, Housing Code [and so on]. So, for example, according to Article 162 of the Civil Code of Russian Federation disregard of the simple written form of a transaction divests the parties, in the event of a dispute, of the right to refer the witness evidence in support of the transaction and its conditions, but does not divest them

of the right to produce written and other evidence. By its legal nature, this rule is a civil procedural rule regulating the admissibility of evidence in the civil process."

Q. If you look at 7/2.02/7, you will see another extract from Professor Zhuikov's commentary.

A. I'm afraid there is nothing inside.

Q. Do you have 7/2, flag 2? Do you not have a flag 2 in that?

A. Yes, flag 2, I do have.

Q. Is that another extract from the Civil Procedure Code of Professor Zhuikov, his commentary on it rather?

MRS JUSTICE GLOSTER: Are we still in GA?

MR SUMPTION: Yes, it's G(A)7/2. Do you have that?

A. Yes.

Q. Does Professor Zhuikov cite Article 162 as an example of a norm of substantive law or a consequence of it? If you look at the highlighted text on page 7:

"In addition, norms of substantive law establish other rules having significance for the civil legal proceedings: on admissibility of evidence; on presumptive (prima facie) evidence and burden of proof; on who is the proper claimant in a case; on the right of a court, if the interests of justice so require, to go beyond the subject and grounds of a claim ...

"The following norms may be given as an example.

"According to Section 1 of Article 162 ... failure to conclude a transaction in the simple written form shall in the case of a dispute deprive the parties of their right to refer to witness testimony in order to confirm the transaction and its terms, though shall not deprive them of the right to adduce written and other evidence."

Then various other examples are given.

What Professor Zhuikov appears to be saying is that Article 162 in fact reflects a substantive rule(?) of law. Do you agree that is what he is saying?

A. That this is what I'm saying, what he is saying?

Q. You both say that, do you?

A. No, I don't say this, and he doesn't say it either.

Q. What do you understand him to be saying when he says:

"In addition, norms of substantive law establish other rules having significance for the civil ... proceedings..."

A. This means exactly what I said before. This means that the Civil Code, which basically contains substantive law, can also contain procedural rules, and Article 162, paragraph 1, is one of these examples, that this is a procedural rule of law.

Q. The point is actually very simple, isn't it, Dr Rachkov?

Article 161 is a substantive rule of law, Article 162 is a procedural consequence of that substantive rule of law. Article 161 therefore falls to be applied by any court applying Russian law?

A. Yes.

Q. Do you disagree?

A. No, I agree with that.

Q. Thank you.

A. I would not call Article 162, paragraph 1, a procedural consequence of the substantive rule, I would say it is a procedural rule of law, but it's just, I don't think there is a big difference between you and I.

Q. Well, we are at any rate agreed that Article 161 is a substantive rule of law?

A. 161 is a substantive rule of law.

Q. I understand. Now, can we deal briefly, Dr. Rachkov, with your point about subsequent performance which you have mentioned on a number of occasions this morning, and which I said I would come back to you.

Is the basis of -- first of all, it's common ground I think between you and the other experts that the way in which the parties have performed, or appear to have performed an agreement may be evidence of what its terms were; is that a point that you agree with the other experts upon?

A. Yes, it can first indicate whether or not the contract was concluded based on Article 438, paragraph 3, of the Civil Code. It can also indicate what the parties agreed and how they performed this agreement.

Q. Well, if we look at joint memorandum, paragraph 24 --

A. Can I please ask someone to provide me with the joint memorandum.

MRS JUSTICE GLOSTER: You have rather a lot of bundles there. Would you like to get rid of some?

MR SUMPTION: Yes, I apologise for that. If you could keep bundle G(A)4/4 in front of you and for the moment I suggest we dispose of the others.

Now, paragraph 24 of the joint memorandum G(A)6/1.01/9, I understand it to be:

"... agreed that where both parties have performed a contract without dispute, and there is evidence of such performance, such evidence shall be taken into account by a Russian court when assessing whether or not a contract was concluded.

Now, that's the proposition on which the experts are agreed, isn't it?

A. Correct.

Q. Is the basis of that Article 431 of the Civil Code, which we referred to for another purpose this morning, which refers in the second paragraph to subsequent

performance as evidence of the terms of an alleged agreement?

A. It's not only 431, it is also 438, paragraph 3, in connection with 434 paragraph 3. So 431, 434 --

Q. I'm just looking for 438 which is not in the extract that I ...

Now, if we look at one of the other propositions that's agreed, if you look back at the joint memorandum, you will see that at 25.3 it's agreed:

"At a minimum... the performance of the contract may shed light on the content of their original agreement in accordance with Article 431."

That of course does not summarise the whole of your view, but that's a proposition on which you agree with the other experts?

A. Yes, since I subscribed to this joint memorandum, that's what I think.

Q. Now, does it follow from that proposition that subsequent performance may enable the terms of the original agreement to be defined with greater precision than would otherwise have been possible without it?

A. Yes, the performance clarifies what was agreed upon, yes.

Q. Now, does that mean that subsequent performance may give certainty to a contract which would otherwise have

lacked it?

A. Yes.

Q. Now, suppose that a contract was non-concluded because an essential term wasn't agreed or wasn't sufficiently defined, okay? Suppose that. Would you agree that subsequent performance cannot save that contract unless it shows that the essential terms were in fact agreed or sufficiently defined?

A. No, I don't agree with what you are saying, Mr Sumption. The idea is that -- imagine there is an essential term which was not initially agreed. However, despite this fact, the parties started performing their contract as they understood that contract, and the specific performance replenished the gap in regulation of the contract. There are many cases to which I refer in my report which indicate that it happens quite often in Russia, maybe due to some negligence of the parties to the contract, that they do not agree on something.

For instance, there was a case where the parties entered into a construction contract. In accordance with the rules of Russian law they must agree on, for instance, the technical documentation which must be provided by the customer or the contractor. However, they did not. Still the contractor constructed the building using the technical documentation which he

developed without any consent of the customer, and the customer accepted this, the result of these construction works.

So the court came to the conclusion that although indeed the contract was not initially concluded due to the lack of this essential term, later on, due to the performance, the contract was cured, if you want, by the subsequent performance.

Q. Presumably the juridical basis of that was that the parties subsequently, by conduct, entered into a more specific agreement than they originally had, is that right?

A. Well, it was a bit more complicated. As I said, the customer did not approve the technical documentation for the construction of the building in advance. He just accepted the result of the works.

Q. Yes. Well, what that means is that the parties subsequently conducted themselves in a way that added to the obligations that they originally undertook. Is that correct?

A. It was an amendment to the initial agreement in a way that they replenished the provision which was lacking in their initial contract.

Q. So by their conduct, they amended the original agreement, and the amended agreement had the certainty

that the original one lacked?

A. Yes.

Q. Now, if I can refer you back to the joint memorandum which I think you've still got open in front of you, paragraph 25(2) at G(A)6/1.01/9. This is the part where the experts all agree that:

"The principle [of relying on subsequent performance] can only apply, if the performance makes it possible to define the essential term which was otherwise undefined."

That's a proposition that you agree about, isn't it?

A. Yes.

Q. Now, does that mean that if the parties behave in a way that is consistent with a number of possible different terms, then the subsequent performance isn't going to help much. Do you follow my point?

A. Not really.

Q. Okay, let me try to put it again. Let's suppose that you have an agreement which is non-concluded because some specific and essential term has been left undefined, all right? Let's suppose that the parties subsequently behave in a way that is equally consistent with their having agreed two or three different things. In other words, you can't identify the term which is implicit in their behaviour because it is consistent

with quite a number of terms, do you follow my example?

A. I can hardly imagine what do you mean, so how does it work in practice?

Q. Would you agree that the subsequent conduct has got to be unambiguous? It's got to be conduct which points to a particular term having been agreed and nothing else?

A. Yes, the subsequent conduct must identify the essential term which was not agreed upon initially.

Q. Yes. So if, for example, the parties were to make a payment to each other, and those payments were equally consistent with there being profit shares, or krysha, just to take a random example, you wouldn't be able to determine from the subsequent performance which was the right answer, would you?

A. I'm really in troubles. I do not understand, what do you mean by krysha exactly?

MRS JUSTICE GLOSTER: Give a more simple example, not related to the facts of this case.

MR SUMPTION: Okay. If you have a contract and the parties have not agreed, let us say, the price of a car, let us suppose for example that I am alleged by my local church to have bought off them a car for £1,000, and the only evidence is that I paid them £1,000.

Now, I say that that was my annual contribution, my annual gift to the church's funds. They say, "No, it's

the price of the car." Now, that's an example, isn't it, of a situation in which the performance alleged is ambiguous? It might be performance, it might not, depending on a whole host of other facts; do you agree?

A. In principle I agree. I would however have a look at your payment order, what you've indicated as the purpose of your payment order.

Q. I'm sure you would, but that is an illustration, perhaps a slightly artificial one, of the point which is being made by all three experts at 25.2, isn't it, which is that the principle of relying on subsequent conduct can only apply if the subsequent conduct enables you to demonstrate -- if the subsequent conduct was referable to a particular term and there's no other explanation of it?

A. Yes, but in your example, imagine there was an announcement at the church that they are selling their car at £1,000, who pays first gets the car. You were the first. What is wrong about it? Unless you've indicated in your payment order that this is your charity contribution.

Q. I quite see that, as with any example, if you add enough further facts you may make it less ambiguous, but whatever you do, the facts have got to point unambiguously to the parties having agreed a particular

term. That's right, isn't it?

A. Yes, that's right.

Q. Thank you. Now, can we just turn briefly to sui generis agreements. This is dealt with at paragraph 62 of the joint memorandum which indicates that there is quite a large measure of common ground G(A)6/1.01/19.

Now, can I just ask you this: a sui generis agreement, does that simply mean an agreement which does not belong to some specific category provided for by the Civil Code?

A. Yes.

Q. And a contract which doesn't satisfy the requirements of the Civil Code relating to a simple partnership agreement may sometimes be valid as a sui generis or unclassified contract, is that right?

A. That's right.

Q. Now, suppose that an alleged partnership agreement is non-concluded because some term which is essential for a partnership agreement is either missing or insufficiently defined, okay? Suppose that. Would you agree that the alleged agreement can only be valid as a sui generis agreement if the relevant term, although essential to a partnership agreement, is not essential to a sui generis agreement?

A. The question is too complicated, can you please shorten

it a bit?

Q. Let's suppose that you have an agreement which is said to be a partnership agreement, okay? And let's suppose that it is non-concluded because there is some term, essential to a partnership agreement, that is either missing or insufficiently defined, all right?

A. All right.

Q. Now, that could only be valid as a sui generis agreement if the essential terms required for the validity of a sui generis agreement were different, do you agree?

A. Different or less.

Q. Yes.

A. For instance, I can give you a good example. The partners entered into a joint activity agreement or, as I call it, a simple partnership contract but there was nothing but this as indication. So on the top there was just a title, "Joint Activity Contract" or "Simple Partnership Contract".

From the content however you derive only one obligation, to keep the information exchanged confidential and, second, if one party discloses this information without the prior written consent of the other party, this may be sanctioned with a contractual penalty of X. Then a joint simple -- sorry, a joint activity agreement, ie simple partnership contract,

failed if the contributions were not agreed upon, but the confidentiality agreement survived.

Q. Yes, well --

A. And this is an example of sui generis agreement, because confidentiality agreements are not regulated explicitly by Russian Civil Code.

Q. Well, I'll can see that, but that's an illustration where you have an agreement covering the larger number of matters, and it's not valid as a partnership agreement, but some obligations may be independently binding. That's the analysis of the example you've just given, isn't it?

A. Well, it is a sui generis agreement which creates rights and obligations on both parties, and also the liability if one of the parties does not perform this agreement.

Q. Well now, in the present case, the question which arises is if you take all the terms said to have been agreed as a partnership agreement, and assume that they're not valid as a partnership agreement because they don't include essential terms, and the question is: can you take all those terms and then say they are valid as a sui generis agreement?

Now, what I'm suggesting to you, and I think you agree with this, is that they can only be valid as a sui generis agreement if the requirements of certainty

for a sui generis agreement are less exacting than those for a partnership agreement; the terms that are essential are fewer, for example?

A. The sui generis agreement can be more detailed and it can be less detailed. It just has another subject matter, another object, than simple partnership contract.

Q. All right. Suppose the parties intend that their agreement should be a partnership agreement and nothing else, but they do not reach agreement on the essential terms for a partnership agreement, okay? Just suppose that. Now, do you accept that that agreement can't be valid as a sui generis agreement because the parties intend that it shall be a partnership agreement?

A. Here I must agree with you, yes. If they do understand what a simple partnership agreement is, which they are obliged to understand even if they are not lawyers, but they use these words, and there is no doubt that they use it in the proper meaning, then there is no simple partnership contract.

Q. Indeed there's no contract of any sort on that agreement, is there? There's no sui generis contract either, is there, because if the parties have agreed "We intend to make a partnership agreement," and they understand what that means, then you can't reclassify it

as a sui generis agreement, can you?

A. No, I think you are right, unless, as I said before, the performance shown that still they performed something, so then you need to classify what the performance was. Was it unjust enrichment if there was no contract, or if there was a contract but not a simple partnership contract?

Q. Well, subsequent performance may show that the parties implicitly changed their legal relationship later.

A. And their intention as well maybe.

Q. Okay. Now, would you also accept that an agreement must have sufficient certainty to enable the court to enforce it, whether you call that agreement a partnership agreement or a sui generis agreement?

A. Yes, I agree with that.

MR SUMPTION: My Lady, I'm going to turn to a completely different subject. Would your Ladyship like to break at this stage?

MRS JUSTICE GLOSTER: I'll take the ten minute break now, thank you.

(3.23 pm)

(A short break)

(3.40 pm)

MR SUMPTION: Dr Rachkov, just to recap on one small point, you mentioned on a couple of occasions earlier this

afternoon Article 438, sub-article 3, do you recall that?

A. Yes.

Q. That's not actually in the materials in any of these bundles, it must be just about the only proposition of Russian law that isn't. Am I right in thinking that 438.3 is about offer and acceptance?

A. Yes, it's about offer and acceptance.

Q. And what it says is that an offer can be accepted by conduct subject to certain conditions?

A. Yes.

Q. Thank you. Can we turn to Article 434 of --

MRS JUSTICE GLOSTER: Perhaps you would let me have a copy of it?

MR SUMPTION: We will. I am going to have a copy of the article translated and then I will endeavour to agree the translation with the other side and add it to the existing extracts.

MRS JUSTICE GLOSTER: I think it's in the -- isn't it all translated anyway in the Code?

MR SUMPTION: It's not unfortunately because we only have extracts of the Code and this isn't an article --

MRS JUSTICE GLOSTER: I thought the book that Dr Rachkov has has got it in the English as well?

A. I have only the Russian version, but I'm sure the --

MR SUMPTION: My Lady, I've no doubt --

A. -- counsel team has a very good translation by Professor Osakva(?) on which the court can rely.

Q. There are plenty of translations on the internet and in print and we will have no difficulty in supplying an agreed one.

MRS JUSTICE GLOSTER: In agreeing one, fine.

MR SUMPTION: But Dr Rachkov, there is an issue between you and Dr Rozenberg about whether Article 434 of the 1964 Civil Code applies. But you accept, do you not, that if Article 434 of the Civil Code, the '64 Civil Code, applies, it excludes simple partnership agreements made for entrepreneurial purposes and confines them to partnerships for personal needs, is that a proposition you accept, if it applies?

A. If it applies, yes.

Q. We can basically for the record, and so that my Lady can see the text, see Article 434 at G(A)4/4, flag 3.
I think that's one of the bundles you've got with you G(A)4/4.03/83.

MR RABINOWITZ: It's at 4/4.02 as well.

MR SUMPTION: It's at page 83 of the page numbering in the bundle.

Now, if you've got Article 434 in front of you at page 83, have you Dr Rachkov?

A. Yes.

Q. There's more than one restriction in this article, isn't there? What it says is that:

"Under a joint activity contract the parties undertake to act jointly in order to achieve a common economic goal..."

And various examples are given.

Then there are two restrictions, are there not? The first is:

"Citizens may conclude a joint activity contract only to meet their own personal domestic needs."

That's the restriction that you've just given an answer about, yes?

A. Yes.

Q. Then there's another restriction:

"Joint activity contracts between citizens and socialist organisations are not permitted."

Now, am I right in thinking that "socialist organisations" refers to a category of legal entity which, in the original 1964 Civil Code, was included in Article 24, is that right?

A. I'm afraid I'm not that fluent in the old Civil Code.

Q. No. Well, I'm not surprised, but if you would like to take bundle 7/3.

MRS JUSTICE GLOSTER: State collective farms go back a bit,

don't they?

MR SUMPTION: They do indeed, and I think it's going to be common ground that that particular restriction is no longer germane.

If you look at Article 24 in 7/3, flag 2, page 99 G(A)7/3.02/99, am I right in thinking that "socialist organisations", as referred to in Article 434 of the '64 Civil Code, is a reference to the organisations listed here in Article 24?

A. Yes, it looks like this.

Q. Yes. Is it right that those are the old-style Soviet categories of legal entity which ceased to be relevant once the Fundamentals of Civil Law were promulgated in 1991?

A. Not really. By that time, there were already some other enterprises, including joint stock companies and limited liability partnerships as they were called at that time, and limited liability companies as they are called now.

Q. Yes.

A. So besides -- the legal entities under the Soviet rule had a special legal capacity, which means that they were only entitled to engage into the activity which was indicated in their charters, unlike the current theory which presumes that any commercial legal entity, ie joint stock company or limited liability company, is

entitled to engage into any business activity unless there are any restrictions in the charter of such company.

Q. Did there come a stage when "socialist organisations" ceased to be a recognisable legal category?

A. Yes.

Q. And if so when did that happen?

A. Frankly, I'm not -- at that time I was 16 years old, when the Soviet Union break away, so I can't say for sure when exactly it happened, but this was for sure before 1992 I guess.

Q. Yes, I see. So by 1992 at the latest, "socialist organisations" was a legally redundant category?

A. Yes, it became obsolete.

Q. So that the second prohibition in 434 would have no relevance after 1992?

A. Yes.

Q. Now, Article 434 never did affect partnership agreements between citizens and legal entities other than socialist organisations, did it?

A. No, I don't think so.

Q. It regulates joint activity contracts between citizens, that means natural persons, doesn't it?

A. Correct.

Q. It doesn't matter whether they are Russian citizens or

not?

A. In Russia, the domestic regime applies to foreigners as well, and also to stateless persons.

Q. So for "citizens" we can read, for practical purposes, "natural persons"?

A. Correct.

Q. So 434 never did regulate joint activity agreements a citizen on the one hand and a legal entity on the other. It once regulated joint activity agreements between citizens and socialist organisations but ceased to do so from 1992. Is that correct?

A. I think so, yes.

Q. So what we are concerned with is simply whether any continuing effect was to be given in 1995 to the provision that says that:

"Citizens may conclude a joint activity contract only to meet their own personal domestic needs."

That's the question we're concerned with, isn't it?

A. I think you are concerned with this question.

Q. Yes. Well now, I think it's common ground that once part 2 of the Civil Code came into force in March 1996, Article 434 was of no relevance at all. I know that there's an issue as to what happened before, but the parties are agreed, aren't they, or the experts are agreed that after 1996 there is no doubt that even the

restriction on citizens concluding joint activity agreements disappeared?

A. After 1 March 1996, yes.

Q. So what we're concerned with is the status of that provision in 1995. Now, do you agree that there was no legislative act which formally abrogated Article 434 before 1996?

A. Yes, I agree, and there is a very good explanation why. Because the residual old-fashioned Soviet law was so great in its -- was so voluminous that it was just impossible for the parliament to work 24 hours a day to abolish abolish abolish old Soviet rules. That's why there was a general conclusion, to which the then Russian Parliament came, that the Soviet laws, whatever level it has, applies only to the extent it does not contradict the Russian constitution of 1993, the laws adopted by the Russian Federation on the basis of the constitution, the Fundamentals of 1991 and the first part of the Russian Civil Code.

Q. Yes. So essentially the question we're concerned with is whether there is anything inconsistent with the prohibition of joint activity agreements between citizens other than to meet their personal domestic needs in, one, the constitution, two, the Fundamentals, and three, part 1 of the Civil Code?

A. Plus of course the international treaties to which Russia was a party at that time, including the international covenants on civil rights and so on, so there are two authoritative sources for that.

Q. I don't think you suggest in your report that international treaties had any bearing on the application of 434 to this partnership agreement?

A. I didn't mention them explicitly because they're not that self-executing, but at least it indicates that Russia from a certain period of time adhered to a standard which is in all civilised nations, as the charter of the UN says.

MRS JUSTICE GLOSTER: Dr Rachkov, can you tell me where in your fourth or your sixth report you deal with this?

A. I deal with Article 434 in my sixth report and actually it starts on page 3 G(A)1/1.03/180. This is bundle G(A) --

MRS JUSTICE GLOSTER: I've got it, thank you.

A. And this is paragraph 6, and the forthcoming.

MRS JUSTICE GLOSTER: Thank you.

MR SUMPTION: As I understand your evidence, Dr Rachkov, the two laws which you think are inconsistent with this prohibition in Article 434 are articles of the constitution, in particular Articles 8 and 34, and the Fundamentals, in particular Article 9.2. Is that

correct?

A. And the Civil Code as well. For instance, it's Article 9.

Q. When you refer to part 1 of the Civil Code which particular provisions of part 1 do you have in mind?

A. This is Article 9.

Q. Article 9 of the Civil Code?

A. Of the first part of the Civil Code.

Q. I see. Can we just deal with the constitution first. Would you turn to bundle G(A)2/1, flag 2, please. Now, if you've got the constitution in flag 2 open, could you turn to Article 8 first of all, please. I'm going to consult it in the English version which is on pages 45 and 46 of the bundle numbering G(A)2/1.02/45.

Now, that provides that:

"In the Russian Federation the integrity of economic space, free flow of goods, services and financial resources, support of competition, and ... freedom of economic activity [are] guaranteed."

And:

"... municipal and other forms of property shall be recognised ..."

The other provision is, I think, Article 34, which is at page 51 of the English version G(A)2/1.02/51:

"Everyone shall have the right to use freely his

[or] (her) abilities and property for entrepreneurial and other activity not prohibited by law.

"Economic activity aimed at monopolisation and unfair competition shall not be permitted."

Before I ask you about this, can I refer you to the Fundamentals, Article 9.2 --

A. Excuse me for interrupting you, Mr Sumption. We can also refer to Article 35 of the constitution which deals with the right of private ownership, and actually says that everyone is entitled to use his or her property as well as solely and with other parties or persons.

Q. Yes, I understand that. So those are the provisions that I think you identify as relevant under the constitution, is that right?

A. Yes.

Q. Now, if we can just turn to the Fundamentals, which are in G(A)1/1, flag 3. Sorry, forget that reference, I will refer it to you in the original text.

In bundle 7/3, there's an English translation of the whole of the Fundamentals which will save us having to jump about. And on page 231, we find Article 9 of the Fundamentals of Civil Law G(A)7/3.04/231. Article 9.2 provides that:

"A citizen may hold belongings in ownership; inherit property; engage in entrepreneurial and any other

activities not prohibited ...; set up legal persons independently or together with other citizens; conclude transactions not prohibited by law; choose the place of residence ..."

And so on.

Broadly summarising the position, these articles that we've looked at, and the constitution and the fundamentals of civil law, would you agree that they are all essentially saying that, in the post Soviet system, citizens have the freedom to engage in commercial activity and to own and dispose of property? That's broadly what they are -- those are the rights they are creating?

A. Yes, this is the right which they are creating in accordance with standards as they are for instance set by -- also by international treaties like European Convention on Human Rights and the like.

Q. I understand.

A. Protocol number 1, for instance, to it, Article 1.

Q. You mentioned a moment ago Article 9 of the Civil Code, part 1. The reference to that is G(A)4/4, flag 2, page 7 G(A)4/4.02/7. That is the provision that says that citizens and legal persons can exercise their civil law rights at their discretion but are not obliged to exercise them.

A. No, they are not obliged. On top of this you can please refer to Article 18, Mr Sumption, which describes --

Q. To Article?

A. 18.

Q. Of the Civil Code?

A. Yes, which describes in more detail what legal capacity of citizens is.

Q. Yes.

"Citizens may have property by right of ownership; inherit and will property; conduct entrepreneurial and other activity not forbidden by a statute ... make any other transactions not contrary to a statute and participate in obligations ..."

That essentially repeats what we have already seen in the Fundamentals of the Civil Law at 9.2, doesn't it?

A. Yes, correct.

Q. Would you agree that the fact that you are allowed to engage in commercial activity and own property does not mean that you can necessarily do it through a simple partnership?

A. You can do it by making any contract, including simple partnership contracts.

Q. Well, Dr Rachkov, are you not confusing two separate things? You can have a law, as we in England have laws, which confer a general right to carry on business

activities, but it doesn't follow that you can necessarily do it through a company or a partnership or some other form of legal organisation; that's right, isn't it, as a matter of logic?

A. I do not confuse these two things.

Q. Well, would you not accept that laws conferring a general right to carry on business activities and own property can exist side by side with laws regulating the use of companies or partnerships for that purpose?

A. In theory, in an abstract country, yes.

Q. In a what sort of country?

A. In an abstract country other than Russia, yes.

Q. Well, in principle, there's nothing inconsistent, is there, between a general right to carry on business and own property, and a regulation which says that certain kinds of business and certain kinds of property cannot be operated or owned by a company or a partnership. There's no inherent inconsistency in that, is there?

A. There is no inherent inconsistency.

Q. No. Well now, Article 434, the relevant prohibition, is a specific provision limiting the purpose for which partnerships can be created or used. It's a specific provision which says you can only use it for domestic needs, that's what it says?

A. No, it is not what it says. It was maybe the case as

long as the Soviet rule existed but I think it ceased to exist and to apply in that way starting from 1986. Recently Russia celebrated the 25th anniversary of the introducing of the law on individual labour activity, which was the starting law adopted in 1986 to allow private initiative. So starting from that moment --

Q. Dr Rachkov, you've misunderstood my question.

MRS JUSTICE GLOSTER: Let him finish his answer.

A. Starting from that moment, this particular prohibition was not in activity any longer, in operation.

Later on the state broadened and broadened even more and more the private initiative giving the right to engage into banking activity, so for instance the individuals were allowed to create banks, to create legal entities and so on. So that's the answer to your question, Mr Sumption.

MR SUMPTION: Well, it isn't actually the answer to my question because I understand that your view is that 434 doesn't apply anymore, but what I wanted you to confirm was what 434 actually means, okay? Now, what I suggest to you is that Article 434 is a specific provision which says that joint activity contracts can only be made for the purpose of meeting the parties' personal domestic needs. That's what it says, isn't it?

A. Taken by word, it's what it says.

Q. And if it applies, that's what it means? I know you say it doesn't apply, but if it applies that's what it means?

A. It's very straightforward and, if it applies, it is that it means, yes.

Q. Yes. Well now, there is no inherent inconsistency, is there, between a law which says that citizens can carry on any business activity and own property and another law which says that they can't do so through a joint activity agreement except in order to meet their own personal needs?

A. Indeed. Russian law can be construed that way. However, in Russian law, there are two very important rules as in many other systems. The first is lex posterior derogat legi priori, which means that a law which was adapted afterwards and regulated the same subject matter applies to the relationships which arose later.

The second is lex specialis derogat legi generali, so I think starting from the moment when all this loss allowing private initiative were adapted, Article 434, second paragraph and the like could not be applied any longer.

Q. Well, would you agree, Dr Rachkov, that even after the coming into force of part 2 of the Civil Code in 1996,

some restrictions on the permissible use of partnership still existed even though there was a right to own property and engage in business activities? Would you agree with that?

A. Which particular limitations do you mean?

Q. Well, let's have a look at Article 1041 of part 2 of the Civil Code which you will find in G(A)4/4, flag 2, page 73 G(A)4/4.02/73. At least that's where -- yes, you'll find the bilingual version of it there. Under Article 1041, sub-article 2, it is provided, isn't it, that:

"Only individual entrepreneurs and/or commercial organisations may be parties to a contract of simple partnership concluded for the conduct of entrepreneurial activity."

Now, would you agree that, notwithstanding that there is a general right to engage in economic activity and own property in Russian law, there are nevertheless, even now, restrictions on the uses that they be made of simple partnerships. Would you agree with that?

A. I agree.

Q. Now, this particular provision is concerned with contracts of partnership concluded for an entrepreneurial activity, and says that the parties can only be individual entrepreneurs or commercial

organisations, that's its effect, isn't it?

A. Yes.

Q. As I understand it, correct me if I'm wrong, being an individual entrepreneur is a formal status, isn't it? You have to register as one?

A. Yes, sole entrepreneurs are registered in the same manner as legal entities in Russia.

Q. That is the effect, I think you'll agree, of Article 23, which I believe has been added to the provision but you can probably tell us that from memory?

A. Yes, this is Article 23.

Q. It's in the same tab. Now, would you accept that this question, whether Article 434 still has some application, was the issue which came before the Federal Arbitrazh Court for the East Siberian circuit in the Salata case in 2004? Would you agree that that was the question which they were asked to decide?

A. Yes, there was one case which is referred in Mr Rozenberg's report which is Salata, yes.

Q. Well, I'd like to ask you to look at that. It's at G(A)4/6, flag 77. Now, I think we've agreed that this was the issue in this case, and the way that it was resolved I think can be seen on page 139 of the bundle numbering G(A)4/6.77/139 where there's a highlighted block of text.

A. Yes.

Q. I think the most efficient way of dealing with this is to invite my Lady to read the highlighted block of text, and the witness to remind himself of it.

MRS JUSTICE GLOSTER: Very well. (Pause)

MR SUMPTION: Has your Ladyship --

MRS JUSTICE GLOSTER: Yes, I've read that.

MR SUMPTION: Can I first of all ask you to note this was about a contract which was made in April 1995, so therefore at about the time that the so-called 1995 agreement in this case is said to have been made and, in any event, before part 2 of the Civil Code came into force the following year. That's right, isn't it?

A. It looks like that's right.

Q. Yes, and would you agree that what the court did in this case was to treat the contract as invalid because, under section 434 of the 1964 Civil Code, citizens could only conclude a joint activity agreement for the purpose of satisfying their personal needs, and this was a partnership agreement relating to an unfinished storage building.

A. Yes.

Q. In the last paragraph of the highlighted text:

> **"The provisions of Section 434... do not contradict Section 122 of the Principles of Civil Law..."**

That's the Fundamentals, isn't it?

A. Yes.

Q. "... which were in effect at the time when the disputed relations arose, and are consistent with Section 1041(2) of the Civil Code of the Russian Federation, under which parties to the simple partnership contract concluded for the purpose of doing business may be only individual entrepreneurs ... (or) commercial entities."

Would you agree that this case, if correct, does appear to suggest that Article 434 did have continuing application to agreements made in 1995?

A. No, I do not agree.

Q. Why is that?

A. In my sixth report, I refer to approximately seven or eight different cases where judgments were rendered on contracts of simple partnership entered into before the second part of the Civil Code entered into force.

Q. I'm going to come to those in a moment but at the moment I'm just asking you about the effect of this case.

Do you agree that the effect of this case -- and we'll look at the other materials in a moment, but the effect of this case is that Article 434 did have a continuing application to simple partnership agreements in 1995?

A. I think this is a too broad statement. I think only in

this particular case one of the Russian courts decided that Article 434 of the Civil Code of 1964 did not contradict Article 122 of the Fundamentals. However, if you look at the very substance of this contract, what happened? This company, which was the claimant, was inactive since 1998. Besides, it was in bankruptcy proceedings. That means that the choice which the court had in front of it was the following.

Either the property is returned into a bankrupt estate of this company and is distributed among maybe a lot of creditors, or this property is away from this company, at least to the extent a share in it belongs to the defendant who actually filed a counterclaim, and stays with that.

I think the court, after having got the evidence, who spent actually how much money, who did what to perform this contract, and take into account also the public interest, decided that, on the basis of all these circumstances, the contract shall be declared invalid.

Frankly, this indication is not needed in this. So I think the court could have rendered its judgment without any indication whether or not Article 434 is or is not in compliance with Article 122 of the Fundamentals.

Q. Well, let's just look at what the court actually

decided --

MRS JUSTICE GLOSTER: Just before you go there. Tell me, this circuit court, the East Siberian Circuit Federal Arbitrazh Court, what level is that in the hierarchy?

A. This is the final appeal instance. Actually this court judgment has no precedential value, it's not the judgment of the Presidium of the highest arbitrazh court, it is just a case by case decision.

MRS JUSTICE GLOSTER: So it has no precedent value?

A. No.

MR SUMPTION: My Lady, that is true, as I understand it, in Russia as in most civil law systems of all courts below the level of the court of cassation, and I entirely accept that this decision, like many of the decisions though not all of them, is below that level.

At the same time, Dr Rachkov, this is some relevant evidence, isn't it, about what Russian law is, although I quite accept it's not conclusive?

A. It is not conclusive. It is only one case without any precedential value.

Q. Well now, if we just look for a moment at what it decided. You're quite right to say that the issue in this case was whether property was going to be employed to satisfy a company's debts to its general creditors or whether part of it was going to go into the hands of the

claimant.

A. That's obvious.

Q. Yes. And the claimant's claim to have part of this property treated as his own depended on whether he had entered into a valid partnership agreement. That's right, isn't it? He was relying on a partnership agreement?

A. Yes, among other things.

Q. Yes.

A. And besides, I must say, the claimant's interest, maybe the court decided in that way because the court said, "Look, the claimant is not deprived of the right to raise a claim based on the unjust enrichment." So even if the contract falls away, it's still the claimant who, if he has actually spent some money, is entitled to recover this money. However he will not be entitled to get a share in the real estate, he will only be one of potentially many creditors and will not get 100 per cent of what he spent but only an appropriate share.

Q. I .understand that, Dr Rachkov. But the way in which they arrived at that conclusion was to say that the claimant could not rely on the joint activity agreement that he was founding his claim on because, under section 434 of the 1964 Civil Code, it wasn't a contract for personal domestic needs and was therefore not a

valid partnership agreement; that's what they said, wasn't it?

A. Yes, but why do you speak about the citizen? The citizen has nothing to do with that. This was a dispute between a mixed partnership on the one hand who claimed that it spent some money to construct the store, and an open joint stock company which was in the situation of bankruptcy.

The claimant said, "I spent so much money, I now need my property," but he wasn't able to evidence what exactly he spent, how much, how was it documented. He simply said in the court that, well, he bought something but without proving it with any written evidence.

In Russia, there is a requirement that legal entities in principle must transfer money wireless, so without any cash payments, and here, there is no evidence in here. Besides, if we need to -- if we really want to understand what happened in this particular case we need to analyse also the lower courts' judgments. Maybe they say something about it. I don't know.

Q. Dr Rachkov, do you agree that one of the things that this case decided was that the alleged joint activity agreement was not valid?

A. One of the conclusions to which the court came was

indeed that the simple partnership contract is not concluded.

Q. Yes.

Do you agree that the ground on which they reached that decision, as recorded in the middle of the highlighted block of text on page 139, was that in accordance with section 434 of the 1964 Civil Code:

"... citizens may conclude a joint venture contract only for the purpose of satisfying their personal... needs."

And that means:

"... the latter's participation in the construction of residential buildings, apartments, and garages. Participation in a contract for joint construction of a store building does not constitute satisfaction of personal domestic needs... it is an indication of the intentions of the citizen... to be involved in business aimed at earning [a] profit..."

Do you agree that the reason why this particular joint activity agreement was not valid was that it was not a contract for the purpose of satisfying personal domestic needs; that's what they say, isn't it?

A. I think it's common sense that if a building of a store is erected, it is not to satisfy someone's personal needs.

Q. And that's why this particular joint activity agreement was not valid, isn't it?

A. This is one of the arguments on which the court relied, yes, because it didn't find any better grounds. However, I must draw your attention, Mr Sumption, to the paragraph which says -- well, actually I have the Russian wording in front of me because this is my mother tongue, it is for me better to understand it, but my free translation is as such:

"The defendant got the construction permit to construct the store, the defendant got the right to use the land beneath it, besides it spent money to construct. Whereas the defendant did not -- was not granted the land, was not granted the construction permit, and he didn't prove the fact that he spent anything to construct the store."

Q. Could you please turn to your sixth report in bundle G(A)1/1, starting at page 178, and to the part of your sixth report where you refer to a number of decisions which you say go the other way. I think you're referring to what we see between paragraphs 28 and 38 of your sixth report. Do you see that?
G(A)1/1.03/178

A. Correct.

Q. Now, do you agree that these decisions are all earlier

than the Salata decision?

A. They are all earlier, but they are -- or some of them at least are of equal legal force and some of them even of -- well, I don't see whether there was a claim which was -- yes, one claim was dealt by the Supreme Court and one of them was dealt by the Presidium of the Supreme Arbitrazh Court which are -- well, upper courts as compared to a simple Federal Arbitrazh Court of the Eastern Siberian circuit.

Q. I understand that.

Do you agree that none of the cases to which you refer in these paragraphs referred to or considered Article 434 of the 1964 Civil Code?

A. No, I do not agree with that.

Q. Can you identify which ones you say did refer to or consider Article 434?

A. Can I please ask to provide me with the bundle which contains annexes to my sixth report?

Q. You will I think find that in 2/5.

A. Yes, 2/5.

MRS JUSTICE GLOSTER: Tab?

MR SUMPTION: Well, the witness is going to take us to the ones that he says he wishes to refer to.

A. For instance, the case which is in this bundle, it's in flag number 9, the case is as follows, an individual

entrepreneur --

MRS JUSTICE GLOSTER: Can you just identify the name of the case?

A. It's K v State Tax Service of Petrozavodsk.

MRS JUSTICE GLOSTER: Yes, thank you.

A. So what happened there, the claimant acquired the car, he believed that this was based on a simple partnership contract which was entered into between him and another firm before the second part of the Civil Code came into force. So he relied on this fact. And the question of whether or not Article 434 applies was implicitly raised by him apparently. It is not mentioned in this judgment, that is true, but this indicates that by that moment this particular provision of Article 434 was not applicable any longer.

MR SUMPTION: Well, you agree that 434 is not mentioned in this decision?

A. Yes, 434 is not mentioned in this decision.

Q. Right. Now, when you say that it is implicit in it, is there any particular passage which you say is an implicit reference to 434?

A. Let me see. (Pause)

I think I based my conclusion on the absence of Article 434 in this judgment, it was not relied upon by the defendant or by the claimant, therefore I came to

the conclusion that Article 434, paragraph 2, does not apply.

Q. Well, can I suggest to you another reason why Article 434 was not mentioned.

A. Sure.

Q. This case concerned an alleged partnership agreement between a natural person and a legal entity, didn't it?

A. Correct.

Q. And I think we agreed at the outset of our discussion of Article 434 that Article 434 had never applied to partnership agreements between a natural person and a legal entity. That's right, isn't it?

A. That's right.

Q. So Article 434 was inapplicable on its own terms to the partnership agreement considered here, that's right, isn't it?

A. Yes, that's right.

Q. And the same is true, isn't it, of all the other cases that you referred to between paragraphs 28 and 38, they're all about alleged partnership agreements between citizens and legal entities? You can see that actually from the summaries that you give in your report?

A. Yes, but as I said before, any attempt to say that these contracts were not concluded failed, and I'm sure the courts analysed, among other things, the arguments that

Article 434 may apply. Whether it was that part of the article which deals with the prohibition to meet personal needs, or with the prohibition to contract with what was called before socialist organisations, this is of secondary importance to my mind.

Q. Well, it's actually pretty critical, isn't it, Dr Rachkov? Because the reason why Article 434 was not considered in any of these cases is that Article 434 had never applied to contracts between natural persons and legal entities; it had at one stage applied to contracts between natural persons and socialist organisations but that, as you've explained, was gone by this time. That's why 434 was not relied on here, isn't it?

A. I see what you mean. However, as I explained yesterday, any contract on formation of a commercial legal entity in Russia is also deemed a joint activity or a simple partnership agreement. This means that if two individuals enter into such a contract to form, for instance, a limited liability company in Russia, or a joint stock company, then this is a simple partnership contract. We all understand that this is not a contract to satisfy one's personal needs. On the other hand, it is not a contract to engage in entrepreneurial or business activity. These contracts were upheld.

I refer to flag 10 of exhibits to my sixth report,

this is to me a very authoritative regulation of the plea notes of the Supreme Court and the highest arbitrazh court of the Russian Federation dating back in 2 April 1997 which says, among other things, that such a contract is a simple partnership contract.

So the courts implicitly recognised, without need to indicate, that Article 434, second paragraph applies. Because by that date it was just common sense that you don't need to indicate all the many thousands of rules which do not apply, which became obsolete, just because they were overruled by new law.

Q. Dr Rachkov, you yourself point out at paragraph 30, when referring to this case, that it concerned an agreement between a citizen and a legal entity, and I thought we'd agreed that the prohibition we are concerned with in Article 434 only applies to simple partnership agreements between natural persons.

A. I'm afraid we're speaking about different cases, Mr Sumption. I referred to flag 10 in the bundle, which is called G(A)2/5, claimant Russian law exhibits G(A)2/5.10/26. This deals with a case whether or not contracts on creation of legal entities constitute a simple partnership contract or something else.

Q. Who were the parties to the partnership agreement being considered in the case at flag 10?

A. It is not indicated.

Q. Right. But it matters very much, doesn't it, who the parties were if one is to know whether 434 applies?

A. I disagree. If we follow your logic, Mr Sumption, then all legal entities which were established in Russia before 1 March 1996, between individuals only, without any participation of legal entities, were invalid or otherwise unlawful, because these agreements were entered into not to meet the personal needs of the persons who are parties to the contract.

Q. Dr Rachkov, that depends on your view, about which I cross-examined you yesterday, that foundation agreements and agreements to set up and operate limited companies are joint activity agreements, and that is a point which I have suggested to you, I know you don't accept this, is, as a matter of Russian law, wrong?

A. It is not wrong under Russian law. Under Russian law it's recognised since many years, and maybe the first time when it was explicitly said, this is this regulation to which I refer, dated 2 April 1997, that such contracts are simple partnership contracts.

Q. Dr Rachkov, are you aware of any Russian court decision at any level which upholds a joint activity agreement between natural persons made before 1 March 1996 which was not for satisfying domestic needs?

A. There are many. However, this question was maybe not dealt with as the basic question, so I imagine the parties claimed that the joint activity agreement to form a joint stock company was not or was not duly performed. That's why the court based its opinion on the fact that there was such a contract, it was concluded, it was valid, so that's why there was no need for the court to deal with this question which you asked me.

Q. Well, you say that there are many such cases, but the examples that you include between paragraphs 28 and 38 do not include a single one because none of them are alleged partnership agreements between natural persons.

MRS JUSTICE GLOSTER: Do you accept that or not?

A. I accept only that, of course, the documents which I provided are exhaustively contained in this folder but, as I said, there are many court cases where the law was applied on a dispute arising out of a simple partnership contract, ie a contract on formation of a limited liability company between individuals, and the court upheld these contracts.

MR SUMPTION: I'm not going to go over that ground again. This depends on your view that contracts to create or operate a company are simple partnership agreements, and that's an issue on which you and Dr Rozenberg are in

difference.

A. But how can you deny it, Mr Sumption, if I refer to the regulation --

MRS JUSTICE GLOSTER: Well, that's a matter for me, not a matter for him to answer.

A. Good.

MRS JUSTICE GLOSTER: I think that's enough for today.

MR SUMPTION: My Lady, I was going to suggest that.

MRS JUSTICE GLOSTER: How much longer are you going to be with this witness, Mr Sumption?

MR SUMPTION: I think I will be most of tomorrow morning. What I've got to cover is the subject matter of the amendment made at the opening of the trial about the aluminium agreement made in 1999 as alleged.

I've then got to cover the two articles relied upon as providing for an extension to the limitation period in relation to the intimidation tort, which is a completely different aspect of Russian law. That will take me, I suspect, until about midday tomorrow.

MRS JUSTICE GLOSTER: Yes.

MR SUMPTION: Possibly a little longer.

MRS JUSTICE GLOSTER: Right.

MR SUMPTION: Now, I was going to suggest, if your Ladyship would be agreeable to this, that your Ladyship might be prepared to sit at 10 o'clock tomorrow in the hope of

completing the expert evidence this week. I have discussed this with my learned friend, and I think his position is that he would be perfectly happy to deal with it, and possibly to deal with it on that basis for the rest of the week as well, if necessary.

MRS JUSTICE GLOSTER: I'm always happy to sit early. The problem is I've got a meeting with Lord Saville at 9.30 tomorrow which I've already pushed back for my own personal reasons from 9.00 to 9.30. I'm now fixed to do that at 9.30, and I've got something else before that.

So if I can conclude my meeting with him by 10 o'clock, I'll be here. So shall we say not before 10.00?

MR SUMPTION: My Lady, yes.

MRS JUSTICE GLOSTER: I've also got to hand down a judgment but that's the work of a minute, and I can do that with all you here because it's not subject to counsel's submissions.

MR SUMPTION: Yes.

MRS JUSTICE GLOSTER: But I'll say I'll certainly sit not before 10.00 but if I'm a bit late, please excuse me.

Right, so 10 o'clock tomorrow and, again, don't talk about the evidence you've given or email or communicate in any way about it.

THE WITNESS: Sure.

MRS JUSTICE GLOSTER: Thank you very much. Not before 10.00.

(4.33 pm)

(The hearing adjourned until Wednesday, 30 November 2011 at 10.00 am)

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