Wednesday, 30 November 2011

(10.00 am)

DR ILIA RACHKOV (continued)

Cross-examination by MR SUMPTION (continued)

MRS JUSTICE GLOSTER: Yes, Mr Sumption. Good morning.

THE WITNESS: Good morning.

MR SUMPTION: Good morning, Dr Rachkov.

It is I think accepted by you that the alleged agreement made in 1995, that the parties would be entitled to participate in each other's business ventures, in future business ventures, is invalid as a matter of Russian law. That's correct, isn't it?

A. That is correct.

Q. And that is, for the record, an agreement which is recorded in the joint memorandum, paragraph 70, subparagraph 2 G(A)6/1.01/22.

Now, the reason for that, as recorded in the joint memorandum, is that that particular part of the alleged 1995 agreement is too vague. That's correct, isn't it, in summary?

A. That is correct.

Q. Now, because it's too vague, it lacks the certainty required for an enforceable agreement to that extent?

A. Taken apart from any subsequent performance, yes, this is correct.

Q. Now, is that because in the case of the agreement, or is it in part because in the case of the agreement as to future businesses it was not clear what the partners would be required to do in order to acquire or run that business? Was that one of the reasons why it was too vague?

A. This is one of the reasons, yes.

Q. And it wasn't clear either, was it, what contribution they would be required to make to either funding or managing the business?

A. This is correct.

Q. Now, can you tell us why exactly the same objection does not apply to Mr Berezovsky's case that the 1995 partnership agreement extended to the acquisition of shares in Sibneft when the state came to sell first the 49 per cent and then the 51 per cent?

A. As I explained in my report, the important feature of the current case is its subsequent performance. That's why I believe on the basis of the facts as presented in the documents I was provided with that the specific performance indicated what the parties intended and what they did afterwards.

Q. So is it right that, but for your view that subsequent performance demonstrates what the parties agreed about the acquisition of the Sibneft shares, you would regard

the application of the 1995 agreement to the acquisition of shares as suffering from the same problem, ie excessive vagueness? If it weren't for the subsequent performance, that would have been your view?

A. Being a reasonable man, I would say of course if we don't have a written agreement it is extremely difficult to identify what the parties agreed upon and what they intended actually.

Q. Yes. But if it weren't for the fact that in your view one can identify the terms with sufficient certainty from the subsequent performance, you would regard the suggestion that the 1995 agreement applied to the subsequent acquisition of Sibneft shares as open to the same objection that you accept is valid in relation to future business. That's right, isn't it?

A. In principle this is right.

Q. Now, I think it's common ground that it follows from your view about the provision relating to future business that Mr Berezovsky would have no right to participate, no legal or contractual right to participate in the aluminium assets acquired in February 2000 unless there was some agreement after 1995 which gave him such a right; a fresh agreement?

A. No, this is not the conclusion to which I came in my reports. The conclusion to which I came in my reports

on the basis of the applicable Russian law on simple partnership contracts is that if the parties contributed some property to the joint activity, and if the parties generated some other property as a result of the joint activity, this is their joint shared ownership.

Q. Which joint activity are you talking about when you give that answer?

A. I'm speaking about the joint activity which was carried out on the basis of the 1995 agreement.

Q. Are you talking about Sibneft rather than the aluminium assets?

A. I'm talking about the property which was contributed by the partners to perform the oral 1995 agreement, plus all fruits and income generated on the basis of that agreement.

Q. Dr Rachkov, I think you may have misunderstood my question.

I am focusing on the acquisition of the aluminium assets in 2000, which was not part of the original alleged partnership agreement.

A. This is how you interpret the statements of fact, Mr Sumption.

Q. Dr Rachkov, in 1995, Mr Berezovsky alleges that there was a partnership agreement to acquire control of Sibneft and, he says, ownership of Sibneft. That's what

he says. Now, you have agreed that that agreement did not, as a matter of Russian law, effectively apply to any future business ventures, have you not?

A. No, I doubt I agreed this. What I said, and I'm continuing to say this, is that the property which was contributed by the partners to the joint activity, plus the property which was acquired by the partners as the result of their joint activity, constitutes their joint shared ownership.

Q. Well, what are the implications of that view for the aluminium assets acquired by Mr Abramovich in February 2000?

A. The implication is that if the shares acquired in 2000 in aluminium assets constitute income or fruits of the joint activity, then the partners are entitled to the appropriate shares in such joint shared property.

Q. Would there not have had to be some agreement to that effect?

A. I cannot deny that under Russian law, rights and obligations and liabilities arise either out of contracts or out of defaults, ie torts.

Q. Can we please look at your fourth report at paragraph 281 G(A)1/1.01/89. I'm referring you to paragraphs 281 to 284. At paragraph 281, you set out part of Mr Berezovsky's pleaded case as it then was. It

has been amended since. At paragraph 282 you set out in full paragraphs 250 to 263 of Mr Berezovsky's witness statement. Then at paragraph 283 you say G(A)1/1.01/91:

"In my opinion, these passages describe an agreement among Mr Berezovsky, Mr Abramovich and Mr Patarkatsishvili by which they would seek to acquire the Aluminium Assets on the same terms and in accordance with the 1995 Agreement. Their common goal was to acquire control of the Aluminium Assets, and the effect of the agreement was to bring the Aluminium Assets within the scope of their partnership contract."

Now, that is a conclusion you say that you draw from the passages of the pleading and the passages that you quote from Mr Berezovsky's witness statement, is that correct?

A. This is correct.

Q. Now, could you please, leaving that part of your report open, take bundle A1, which you won't have in front of you but I'm sure somebody will be good enough to provide it, at flag 2, at paragraph C59B, which is at page 26 A1/02/26.

Now, this is an amendment which was made to Mr Berezovsky's particulars of claim, it's on the bottom of page 26 and the top of page 27 --

A. Yes.

Q. -- after you wrote your report, and, as we understand it, an amendment that was based upon your report.

What I want you to do is to read paragraph C59B to yourself and tell us whether you, in your report, are supporting as a matter of Russian law the case which is made in that paragraph? (Pause)

A. I read this paragraph. I think nothing changes in what I've said before. So it looks like the parties at least, as the situation is described here, agreed to apply their 1995 agreement to further assets, ie aluminium assets, in the case at hand.

Q. You see, what this pleading is alleging is that in 1999 there was a further agreement between Mr Berezovsky, Mr Patarkatsishvili and Mr Abramovich to the effect that the 1995 agreement would also apply to the aluminium assets. That's what's being alleged. Now, is that the proposition that you are supporting at paragraph 283 of your report?

A. It is the proposition which I support in 283 and 284 of my fourth report.

Q. Right. Thank you.

A. With maybe, well, one small of caveat that there is a direct connection between these two agreements, so the agreement which was reached, if it was reached, in 1999

is a logical continuation of the agreement of 1995. It is not a new one agreement, it is, so to say, a supplement or amendment to some extent because any supplement is an amendment to the previous agreement.

Q. I see. Well now, can you tell us, please, which facts stated in the paragraphs that you quote at paragraph 282 amounted to an agreement, according to you, in 1999 to apply the 1995 agreement to the aluminium assets? Which facts are you identifying in that rather long quotation as amounting to such an agreement G(A)1/1.01/89?

A. It's the totality of this long quotation. But, for instance, here in paragraph 256 of the draft particulars, I mean the particulars of claim as -- no, sorry, witness statement, as they are quoted here.

"Badri and I raised the Bosov proposal with Mr Abramovich, as we considered we were obliged to do in accordance with our 1995 agreement with him."

Q. That's the essence of it, is it?

A. At the end of the day, this is the most characteristic sentence which, to me, indicates that when discussing this issue, first with Mr Abramovich and later on with his associates, Mr Berezovsky and Mr Patarkatsishvili proceeded from the assumption, and maybe said this explicitly, which I don't know, to Mr Abramovich.

Q. Well, I'm not going to ask you to comment any further on

the facts, I'm going to put to you a series of assumptions or hypotheses, Dr Rachkov.

Assume, please, for the moment that nothing was said to Mr Abramovich in 1999 about the 1995 agreement, and nothing was said by Mr Abramovich about the 1995 agreement in that year. On that assumption, do you say that there was an agreement in 1999 to apply the '95 agreement to the aluminium assets, on the assumption that nothing was said by either party or by any of the three of them about the 1995 agreement?

A. If nothing was said, no, there was no gesture, there was no written exchange, there was no understanding, common understanding, between the parties that whatever they did over the last five years or so, or four years, was their joint activity, then I would agree that there was no agreement to apply the 1995 agreement to the subsequent agreements.

Q. And assume that there was no agreement in 1999 about contributions, whether financial or of any other kind, on that assumption you wouldn't say, would you, that there was an agreement to contribute to the cost of acquiring the aluminium assets, if you make that assumption. Is that right?

A. If this assumption also includes that there was no 1995 agreement beforehand then maybe I would agree. However,

as I said before and as is stated in Russian law, joint activity presumes combining not only and not necessarily property, which can be tangible, but also efforts.

Q. But if there was in 1999, one, no reference at all to the 1995 agreement and, two, no agreement on a specific partnership and, three, no agreement about contributions to the aluminium assets, you wouldn't suggest that the partnership was by agreement extended to the aluminium assets, would you?

A. No, I would not. I base my opinion on Article 1041 of the Russian Civil Code which defines the contract of simple partnership and, clearly, the parties must either agree beforehand what their contributions are, which may be either property or efforts, business skills and so on, or they must show in the course of the performance of the agreement that they both agree on something.

Q. I want to turn now to the tort claim, Dr Rachkov, the intimidation claim.

I am not going to cross-examine you on the elements of the tort, on which there is a very large measure of agreement, certainly on all the points which seem to matter. What I do want to ask you about, however, is your opinion on the subject of the limitation period and the grounds on which it may be extended. Okay?

A. That is a very interesting question indeed.

Q. Well, I'm glad you think so, Dr Rachkov.

Can we please ask you to turn to chapter 12 of the Civil Code which I am looking at in bundle G(A)4/1, flag 5, page 30 and following G(A)4/1.05/30. Can we look first at Article 96 which in the -- hang on, sorry, Article 196, forgive me.

Now, just to establish the basic background to this, which I think is common ground but I think it will assist if we just agree about this, the general limitation period in Russian law is three years. Is that right?

A. That's right.

Q. And that's the effect of Article 196.

A. Yes.

Q. But as is pointed out in 197, laws may prescribe specific time limits which are different from three years for particular cases, and they may be longer or shorter than three years; that's correct, isn't it?

A. They are mostly shorter, yes.

Q. Yes. Now, it's agreed, isn't it, that no special time limit applies in this case which is why three years is the relevant time limit?

A. I think it is agreed.

Q. And there are special provisions, are there not, for a number of other types of claim, not relevant in this

dispute, which may be as short as two months?

A. Correct.

Q. It's also right, isn't it, that limitation periods in Russian law run from the time that the claimant knew or ought to have known the facts which violated his right?

A. That's the general rule.

Q. There are two provisions which you refer to as giving rise to a possible extension of the limitation period in this case, Article 205 and Article 10. I'm going to deal with them, if I may, in that order.

Article 205 is at page 32 in the English, and that provides G(A)4/1.05/32:

"In exceptional cases..."

Well, perhaps I might just pause to allow my Lady to read the whole of the provision before I ask about it.

(Pause)

MRS JUSTICE GLOSTER: Yes, I've read it.

MR SUMPTION: Dr Rachkov, the first point I want to ask you about, this is a provision that applies only in exceptional cases, isn't it?

A. I can't deny it.

Q. So there has to be some exceptional impediment to prevent the claimant bringing his action?

A. Yes, to lapse the period of limitation.

Q. Yes. Well now, the second point I want to put to you

is: is it right that the exception circumstance has got to be something amounting to a personal disability of the claimant, hence the words:

"... due to circumstances associated with the person of the claimant (serious illness, helpless condition, illiteracy, etc.)..."

Is that right?

A. Not really, no, it is not right.

Q. Does it not have to be due to circumstances associated with the person of the claimant?

A. Sure. If the period of limitation expired due to reasons which are connected with the personality or person of the claimant, an approximate list of such circumstances is indicated here, however it is not an exhaustive list, then the period of limitation can be restored by the court.

Q. I understand, and I wasn't intending to suggest to you that the list of conditions in brackets is an exhaustive list. Indeed it couldn't be, it says "etc".

What I was intending to suggest, and I don't think you differ from this, was that whatever the circumstances relied upon, they have got to be circumstances associated with the person of the claimant?

A. With the person or personality of the claimant.

Q. Right.

A. It's what -- "lichnyest"(?) may be translated in various ways into English, but in principle there is no disagreement between us, I believe, in what person or personality is.

Q. No, I don't think there is.

Thirdly, as a matter of causation, is it right that the exceptional circumstance associated with the person or personality of the claimant has got to have prevented the claimant from bringing his action within the limitation period? It's got to have causally had that effect, hasn't it?

A. Well, there should be a valid excuse, yes. I think so, yes.

Q. Well now, just to get this out of the way, the final sentence of Article 205:

"The reasons for allowing the time limit of the statute of limitations to expire may be recognised as compelling if they took place during the last six months of the time limit of the statute of limitations, and if this time limit is equal to six months or less than six months -- during the time limit of the statute of limitations."

Now, that says two things, doesn't it? First of all, it says that the exceptional circumstance

associated with the person of the claimant may be recognised as compelling only if it was operative for the last six months of the limitation period. Is that right?

A. Yes, at any moment within the last six months.

Q. Secondly, the final words of that last sentence are I think irrelevant to our situation because they deal with the situation in which the limitation period is six months or less, so we can forget about those final words, can we not, for present purposes?

A. We can for present purposes.

Q. Now I want to take you to some illustrative authorities so that we can see how far we are agreed about what is meant by exceptional circumstances due to the person of the claimant.

You cite the textbook, I think, of Maleina which we find at G(A)4/8, flag 5, page 38 and following G(A)4/8.05/38.

MRS JUSTICE GLOSTER: Mr Sumption, please may I have a reference to the paragraph in I think it's the fifth report of Dr Rachkov where he deals with this?

MR SUMPTION: He deals with it starting at page 56, so that's G(A)1/1, flag 2, page 164 of the bundle numbering G(A)1/1.02/164.

MRS JUSTICE GLOSTER: Thank you.

A. Excuse me, can I have my own reports, please? It's Rachkov 5, exhibit 41.

MR SUMPTION: Yes, of course. Could you be given bundle G(A)1/1 which has all your reports in it. I'm sorry, I didn't realise you didn't have them.

I'd like the witness also to be given G(A)4/8. Do you have G(A)4/8, Dr Rachkov?

A. Yes.

Q. Could you please turn to flag 5 in that bundle.

A. Yes.

Q. This is an article, I think, by Dr Maleina, and that's an author that you yourself I think cite and for whom you have a high regard, is that right?

A. That's right.

Q. She is an authoritative writer? He or she? Is it he or she?

A. She, yes. She's a specialist in personal intangible rights, such as, well, claims arising out of defamation, but I have no doubt that she deals also very well with these issues, since I am referring to her.

Q. Right. Well now, this provides, this work provides an illustrative list or discussion of instances in which the limitation period has been extended under Article 205, and I wonder if I could invite my Lady to read from the bottom of page 39 G(A)4/8.05/39, the

words:

"The period of limitation may be reinstated ..."

Up to -- well, the critical parts that I'm concerned with, but I don't want to be tendentiously selective, are that part up to the fifth line of the next page, and then the main section which I'm concerned with is the one that starts with the words:

"The second condition ..."

Just below halfway down page 41 and continues to the bottom of page 43.

MRS JUSTICE GLOSTER: Very well.

MR SUMPTION: Dr Rachkov, can I invite you just to remind yourself about what those parts of the work say.

(Pause)

MRS JUSTICE GLOSTER: Right, I've read that.

MR SUMPTION: Dr Rachkov, there's one particular example given here which I would just like you to help us about. Towards the bottom of page 43, you will see that Dr Maleina says:

"It would seem that the circumstances relating to the personality of the claimant should include his professional activities. It is evident that this is not the job performance itself but non-ordinary working situations that may be regarded as legitimate reason. Thus, the fact that the claimant was away on business

for a long period of time prevented him from making an appeal against the resolution of [a] general meeting of a limited... company and therefore, this fact was recognised as a ground for reinstatement of the period of limitation..."

There's a reference to a decision in 2006. Are you familiar with that decision, Dr Rachkov?

A. I read it for sure but I need to maybe find it again.

Q. I'm not going to ask you about the details or take you to it unless you would like me to, but it's right, isn't it, that when you are challenging a decision in court of a general meeting of a limited liability company, the relevant limitation period is only two months, isn't it?

A. I think it's two months only, yes.

Q. In that particular case, what happened was that the general meeting occurred at a time when the businessman in question was away on business and he didn't come back until it was too late to do anything about it --

A. No.

Q. Those are not the facts?

A. No, I don't think so.

Q. Well, let's have a look at the report in that case. Can we look at G(A)2/4, flag 9, page 61 G(A)2/4.09/61. Have you got that open, Dr Rachkov?

A. Yes, the Russian version.

Q. Now, we see that the limitation period was two months, from page 63, about three quarters of the way down the page G(A)2/4.09/63. And there's a reference to Article 205. If you look at page 63, you will see that the facts are set out towards the top of the page:

"... each member of the Company [has to be] informed ..."

And Mr Turchinovich received his notice on 15 February about the holding of a meeting on the 24th, seven days before the relevant date.

And if you look back at page 62 --

A. Nine days.

Q. Is it nine days?

A. 24 minus 15, it's nine days.

Q. Okay, I'm not going to argue with you about the difference between 7 and 9.

Page 62, the previous page --

MRS JUSTICE GLOSTER: It says seven days in the text.

MR SUMPTION: It does.

A. In accordance with Russian law, the general meeting of participants of a Russian limited liability company must be convened with a notice of 30 days, unless all participants otherwise agree.

Q. Yes. Well, that no doubt was part of the grounds on which Mr Turchinovich was complaining.

If we just look at the facts on the previous page, page 62, halfway down the page:

"As is evident from the documents and established by the court, on [24 February] there was an extraordinary general ... meeting ... with the following agenda ..."

And it's set out.

On the first page, you will see in the third paragraph under the word "Established":

"RV Turchinovich furthermore requested to reinstate the time [limit] permitted for appealing ... decisions of the general members' meeting which he had missed for good reason in connection with being on a business trip for the period 18 [March] 2005 to 26 [August] 2005."

A. So in fact he was absent not when the meeting was conducted.

Q. You're absolutely right about that. He was therefore absent for a little over half of the two-month limitation period. Okay?

A. Okay.

Q. Which was a particularly short one. I think two months is the shortest limitation period which exists in Russian law, isn't it?

A. It's very short indeed.

Q. Now, if you look at the last paragraph on page 43 of Dr Maleina's work G(A)4/8.05/43:

"The justifiable reasons are those which entail the absolute impossibility of filing a claim or which cause a practical impediment to apply to the court."

Do you see?

Would you accept that as a fair statement of the law, that paragraph?

A. It is a fair statement, but it is a too general statement. I think what she means is that, if there are such reasons which entail an absolute impossibility to file a claim, then they are of course valid grounds to restore the limitation period. But it doesn't mean that any reason should be that.

The reason connected with the personality of the claimant has a subjective character or a subjective nature, that's why the courts should always look at what is subjectively a valid reason for this or the other claimant.

Q. Well, it's not the law, is it, that anything which the claimant thinks prevents him from filing a claim is treated as relevant? The court has got to agree that it actually did prevent him, surely?

A. Yes, it is not what the claimant subjectively thinks, it is what he or she is subjectively prevented to do.

Q. Well, it's whether the court thinks it was impossible for the claimant to file in time.

A. If the court, on the basis of the evidence provided by the claimant, and maybe by the defendant, by third parties, comes to the conclusion that there are such grounds, yes, the court is entitled to restore the period of limitation.

Q. And the sort of impediment which is envisaged here is something that actually prevents the claimant from taking the administrative steps necessary to begin his action. That's right, isn't it:

"... a practical impediment to apply to the court."

A. I think if the practical impediment is one of the reasons connected with the personality of the claimant, yes.

Q. Right. Now, would you agree, generally, that the examples discussed by Dr Maleina between pages 41 and 43 of the bundle numbering are a fair body of examples of how Article 205 is applied by the Russian courts?

A. I think she lists a lot of interesting issues or cases where the question of period of limitation arose, and I think she described them very well.

I can also refer to a very interesting case where legal illiteracy of a claimant who lived in Ukraine, in relation to the Russian legislation, was recognised by court as a justifiable reason.

Q. I understand.

A. We can look at this case if my Lady wants.

MRS JUSTICE GLOSTER: Mr Sumption, this may be in dispute, but nevertheless perhaps you can assist me. Have I got to decide whether there was an impossibility or a practical impediment to Mr Berezovsky filing a claim in Russia or in England?

MR SUMPTION: In England, because your Ladyship is applying under the act a Russian limitation period and Russian principles of limitation to a failure to commence proceedings in England within the Russian limitation period.

MRS JUSTICE GLOSTER: Is that agreed, Mr Rabinowitz?

MR RABINOWITZ: My Lady, yes.

MR SUMPTION: It's also correct, and I think this is also common ground, that so far as the operation of limitation in the relevant foreign jurisdiction depends on an exercise of discretion by the foreign court, your Ladyship should exercise that discretion for yourself, but on the principles that would guide the foreign court.

MRS JUSTICE GLOSTER: Right, thank you.

MR SUMPTION: My learned friend nods, I'm grateful.

Now, if you just turn to another textbook which is cited by you and for which I think you have a high regard, this is the work by Mozolin at G(A)2/4, flag 30

G(A)2/4.30/229.

A. You don't like to discuss the case I'm referring to, Mr Sumption?

Q. Well, you've summarised the circumstances. I'm not sure that they are particularly close to those of Mr Berezovsky.

A. They are very close, because there the limitation period was lapsed which was equal to ten months. It looks like here in this case the period is 11 months.

Q. Right. Well, I'm going to come to that particular case in due course, but there is a difference upon it and I will get to that.

A. Of course there are no 100 per cent coinciding cases.

Q. Could you for the moment please turn to bundle G(A)2/4.

A. Yes, I'm here.

MRS JUSTICE GLOSTER: Tab?

MR SUMPTION: At tab 30, page 229 G(A)2/4.30/229. I think I'm right in saying this is a work that you cite, and it is a work again for which you have a high regard, is that right?

A. Yes.

Q. Now, that tells us that:

"According to Article 205... restoration of a missed period of limitation can only be allowed in the following circumstances. Firstly, a period of

limitation can only be restored in exceptional circumstances [and you've agreed to that] ... secondly, only by [the] court. Thirdly, the court must accept the reason for missed period of limitation as compelling."

I think you accept that, don't you?

A. "As valid justifiable" is maybe the more appropriate translation, but the word "compelling" is maybe not the wrong one.

Q. "Fourthly, [the] period of limitation can only be restored with respect to individuals... where compelling circumstances are related personally to the claimant."

You agree to that as well, don't you?

A. Related to the personality of the claimant in proper Russian, but I mean -- otherwise I agree, yes.

Q. This translation says:

"... related personally to the claimant", ie to the claimant and not to someone else.

A. The Russian wording says -- it just repeats the wording of the law, which is the reasonable, or the justifiable circumstances connected with the personality or person of the claimant. But I think the distinction is not that great.

Q. Okay. The work then goes on:

"In connection with this the Civil Code for the first time provides an approximate list of reasons which

could be taken into account for the purposes of [restoring the] period of limitation. In particular, those include illness of the claimant, incapacity, illiteracy of the claimant... Such circumstances as [the] claimant being on a business trip have also been taken into account in judicial practice [that's the case we have just been talking about]. Other compelling reasons are also possible. However, circumstances related personally to the defendant [that's the defendant rather than the claimant] are not taken into account..."

Is there anything in that paragraph which you would disagree with?

A. No, I cannot disagree with that, because this is the literal repetition of the wording of the Russian Civil Code which is, for me, the second important book after the Bible, so that's why I can't disagree with that.

Q. Yes, well, I'm not going to cross-examine you on the biblical authority for any of these propositions.

A. Thank you. I will be lost.

Q. I have been asking you questions mainly devoted to the exceptional character of the event relied upon. I want to ask you a little further about the personal character of the disability.

There are a number of cases, are there not, which

show that the sickness of the claimant may be a personal disability, as indeed the article says, but the sickness of his spouse, his or her spouse, will not be a relevant factor unless the claimant is required to give her continuous personal care. That's broadly right, isn't it?

A. That's broadly right. In one of the cases to which I refer, indeed the claimant says "The period of limitation must be restored because I was taking care all the time for my wife." But in the reality, the court learned that the claimant was not taking care all the time for his wife, he was working all the day, he was away from time to time, so that's why the court came to the conclusion that the claimant was simply lying.

Q. Yes. What the court found was that his wife's problem had not prevented him, since he wasn't the person who was ill, from filing his claim in time?

A. Yes, in this particular case. But there are also other cases when the claimant is so tied up with taking care for his wife, or other close relatives, that he is not in a position to take care for the claim.

Q. Yes. And the requirement that the disability should be personal, or should be due to the person or personality of the claimant, is satisfied in that case by the fact that the claimant was fully occupied in looking after

his wife, is that correct?

A. I think that's correct. What Russian courts try to achieve is that, of course, the claimant has the right to fair trial but, on the other hand, there is a certain period of limitation which is there to create more stability in the civil turnover. But I think in general the Russian courts of common jurisdiction apply very generously the restoration of limitation periods. It includes not only such reasons as sickness of a close relative, a serious sickness which actually prevents, it's not like just a headache within one day but a continuous heavy sickness. It can be an absence away from the home because the person is, for instance, imprisoned. I did refer to one of such cases. It may be a long business trip, what we already discussed. It may be legal illiteracy as I referred in one of the cases.

Q. What do you mean by legal illiteracy?

A. By a legal illiteracy I mean that there was a miner from Ukraine, of Russian origin though, so there is a Russian minority, which is not that minor, living in the eastern part of Ukraine, in Donetsk, which is also a mining region. He was working for a long time with Norilsk Nickel. So he got some shares and wasn't able to exercise certain rights as a shareholder. So the court

came to the conclusion that because he was a miner -- a mining worker, not minor but a mining worker -- he was not in a position to understand Russian law and its particularities and restored the period of limitation. Although the person, I must say, was not, so to say, illiteral (sic), he was a Russian native and he was able to read all these laws, spending maybe five years of his life understanding what they all mean.

Q. But you're not suggesting, are you -- I mean this was about, as I understand it, an impoverished mine worker in the Ukraine. You're not suggesting that a rich and powerful figure with access to all the advice that he might want would ever be able to say "I didn't realise the limitation period was what it is"?

A. I don't know. There are wealthy individuals who are illiteral, or legally illiteral. Their life is very rich than that what I can imagine.

Q. If somebody has all the means that he needs to find out what the relevant law is, he's never going to be able to say, is he, "The limitation period should be extended because I didn't realise it was only three years"?

A. No, I think -- I agree, this case looks very exotic. In Russian, real life, usually the courts say like this, "You don't know the law but it's your problem, so you should have known the law, you should have taken legal

advice." But still, as I explained, the same logic may be deployed in all other cases. For instance, a person being in prison can say, or the court can say to the person being in prison, "Look, you could have given, I don't know, a power of attorney to a lawyer to represent you," and actually one of the cases deals with such a situation.

Q. Could you please turn to bundle G(A)4/8, flag 8 G(A)4/8.08/58.

A. Yes.

Q. Dr Rachkov, when you've opened that, if I can just go back to the mine worker. Looking at the case, it seems to have been decided on a combination of three factors: one, he lived in a foreign state, namely the Ukraine; two, his legal illiteracy; and three, the significant territorial distance between him and the court. Is that correct? I can certainly take you to the case if you would like to be --

A. Maybe we should indeed look at the case. I remember well that these were the three reasons but I think there were even more than this.

For instance, he -- what happened in that case, my Lady, the shares of this -- the mining worker was entitled to get shares in Norilsk Nickel because the company was privatised, so he got some shares due to the

privatisation and moved to Ukraine later on, after he discontinued working at Norilsk Nickel.

His shares were fraudulently taken away by a person acting on the basis of a power of attorney. The signature of this mining worker was forged under the powers of attorney, which was recognised later on by the law enforcement agencies of Russia and Ukraine. However, among other things, because he went not to the court directly but to the local authorities in Ukraine and in Russia, to the Ministry of Interior, to the police, to complain, things went very slowly, so the period of limitation passed away.

This was one of the grounds why the period of limitation was restored in that particular case. And it is not only what Mr Sumption mentioned but it's much more.

Q. We had better look at the case then. Leave open the bundle you have just opened, please, and turn to bundle G(A)2/4, flag 11, page 76 and following G(A)2/4.11/76.

If you have got the case open -- Dr Rachkov, have you?

A. Yes.

Q. Right. Now, if you look at page 79 in the bundle numbering you will see, after an account of the facts,

halfway down the page G(A)2/4.11/79:

"... in his petition to revive the statute of limitations, the complainant state[s] that he lives in Ukraine, is inexperienced in legal matters, and is not familiar with the special legislation of Russia.

"At the session of the appeal court the representative of U explained that the complainant is a miner, who has extremely limited funds due to the economic situation [of the] Ukraine, and took measures to defend his infringed rights, and that time was lost in connection with the transfer of materials regarding [that's, I think, the company] by the agencies of the Ministry of Internal Affairs of Russia and Ukraine and the lack of a summary decision by the investigating authorities in relation to [the company]."

A. Yes, the documents relating not to the company but to the person who was allegedly acting on the basis of the power of attorney, but, as we learned from this case, forged the signature of this mining worker under the powers of attorney.

Q. Yes, but time was lost because of the delays by public authorities in transmitting relevant information, wasn't it?

A. Well, the literal wording is that.

Q. Right. The next paragraph says:

"The change in interstate jurisdiction [in] the criminal prosecution did not depend upon the will of the complainant and cannot serve as grounds to dismiss the defence of [his] civil rights."

What was the change in interstate jurisdiction of the criminal prosecution?

A. I don't know.

Q. You don't know, okay.

Now, the part that I was referring to a moment ago when I gave the three reasons which appeared to be relevant is the first full paragraph on page 80 G(A)2/4.11/80:

"Taking into consideration article 6 of the European Convention ... the appeal court deems reasonable the excuse that the complainant overran the statute of limitations due to conditions connected with the individual complainant [one] living in a foreign state, [two] and due to legal experience and [three, I'm adding the numbers obviously] significant territorial distance he was unable to defend his legal rights within the prescribed term and was deprived of his acquired property due to the fault of the respondents."

Those seem to be the reasons, do they not?

A. Yes, plus the court refers to the fact that the circumstances emerged or have taken place within the

last six months of the period of limitation.

Q. Right. Well now, I was going to ask you to look at the decision of the -- it's the cassation ruling by the St Petersburg city court at bundle G(A)4/8, tab 8 G(A)4/8.08/58. This is one of the cases about somebody claiming to extend the limitation period because his wife was unwell.

There are a number of cases like this, are there not, in which somebody was relying on the sickness of his wife?

A. Other ways around. The claimant was female.

Q. Or spouse. You're quite right.

The reason I'm referring you to this is that it contains a statement of principle and I'm going to ask you whether you agree with that statement. If you look at page 62.003, halfway down the page G(A)4/8.08/62.003:

"The court of first instance established that it follows from the Claimant's husband's medical documents that he received in-patient treatment during the periods from 1 February 2010 to 9 April 2010, from 7 June 2010 to 20 July 2010 and [then for a third period in July].

"Thus, the court of first instance came to the correct conclusion that it was not during the last six months of the limitation period that the Claimant's

husband was receiving in-patient treatment, as a consequence of which the Claimant could have submitted a claim from 2 August 2010 to the day of expiry of the limitation period..."

The next paragraph says:

"At the same time, as the District Court correctly concluded, a husband's illness is not grounds for [the] restoration of the limitation period, as it follows from the meaning of Article 205 of the Civil Code that the right to restoration of the limitation period and [the] recognition of the validity of the reason for which it was missed applied to circumstances inextricably connected to the Claimant's person, and not that of other parties. In addition, the Claimant has not produced evidence that, during the legally significant period, the Claimant's husband was in a state requiring constant care from another person."

Is there anything in the passage that I have just read which you would disagree with as a statement of the law?

A. I would not disagree, I would only stress that the most important sentence is the last sentence which you've cited.

The claimant failed to prove that her husband was in a state which was necessary for her to take care for

him. He was in a hospital, there was appropriate care for him when he was in hospital. At that time, apparently the court came to the conclusion that this lady could have filed a claim, and even indicated the time gap within which it could have happened.

Q. Yes. What I'm trying to get your assistance on, Dr Rachkov, is the principle that my Lady should apply to the rather different facts of this case. The actual legal principle is the one stated immediately before that sentence about the facts of this case where the court said:

"At the same time, as the District Court correctly concluded, a husband's illness [et cetera] ..."

Is not a ground, unless there is a circumstance inextricably linked to the claimant's person and not that of other parties. You accept, don't you, that that is a correct statement of the legal principle that is being applied to the various facts?

A. No, I do not accept that this is a correct legal principle. It is a correct statement in this particular case.

Q. Well --

A. You cannot say that whenever a husband is ill, and whatever the gravity of this illness is, the court must decline the application for restoration of period of

limitation. The cases are very various.

Q. I'm not suggesting that to you for one moment, Dr Rachkov. What I am saying is that the legal principle that applies is that a husband's illness is not grounds for the restoration of the limitation period in itself. You've got to show that the husband -- that the wife was actually taken up personally with caring for him, or some other factor affecting her, right? Do we agree on that?

A. This particular wife and this particular husband, yes.

Q. Yes. And the legal principle is, as is stated here, that:

"... it follows from the meaning of Article 205 ... that the right to restoration of the limitation period and recognition of the validity of the reason for which it was missed applied to circumstances inextricably connected to the Claimant's person, and not that of other parties."

Do you agree that that follows from the meaning of Article 205?

A. No, I do not agree that this follows from the Article 205 because the person does not live in isolation, there are many people around it, it may be friends, it may be close relatives, it may be animals(?) who prevented, or whose state prevented the claimant to

file the claim in due course within the limitation period.

Q. So do you say that this is a mistaken statement of the law by the cassation court of St Petersburg?

A. No, I cannot say this for this particular case, but I would not derive from this very generic conclusions on Russian law.

And by the way, this judgment has no precedential value, as I said.

Q. Well, that is true of all judgments below the top cassation level in Russia, isn't it?

A. Yes.

Q. But we still are entitled, are we not, to look at decisions for illustrative purposes as guidance to what Russian law is; you don't dispute that, do you?

A. That's true, but I wouldn't expand the importance of this particular judgment to the court practice in Russia in general.

Q. You see I suggest to you that the statement of principle here is in fact exactly what Article 205 says, we've looked at it. Do you not agree?

A. I can only say that the circumstances which are connected with the personality of the claimant can include also the conditions in which third parties are; it may be close relatives, it may be third persons, it

can be animals.

Q. Provided, would you agree, that the conditions of the third party have the effect of personally disabling the claimant himself from acting?

A. Can you give me an example?

Q. I'm asking you to agree that that is the principle.

A. No, but I can't agree with that.

Q. Sorry?

A. I cannot agree with that. It's a too general statement.

Q. Right. Well, we will have to agree to disagree on that.

If the various conditions of Article 205 are satisfied, do you agree that it does not follow that the limitation period is extended indefinitely?

A. I'm afraid I cannot understand your question.

Q. If the conditions for an extension are satisfied, the extension is not indefinite, is it?

A. The extension is not indefinite.

Q. The extension of the limitation period.

A. The extension of the limitation period is not indefinite.

Q. No.

What it means is this, isn't it: the claimant is allowed to bring his claim once the exceptional circumstance has ceased to be operative, even if that is after the expiry of the limitation period; that's the

effect, isn't it?

A. It is the effect, however plus a period of time which is objectively necessary and sufficient for this person to prepare the claim and to file the claim. If the case is so simple that the evidence can be gathered within one day or, another case, this whole time all the evidence was collected and the draft statement of claims was prepared.

So the only missing thing is a signature beneath the statement of claim, its filing with the court, then I would agree. Otherwise unfortunately -- or fortunately for you, Mr Sumption, but the Russian law does not indicate what is the period which the court can grant the claimant to file the claim, even if the period of limitation is lapsed. That's a problem a bit.

Q. Do you accept that the Russian courts have held that the exceptional circumstance must operate not only in the last six months of the limitation period but continuously thereafter up to the point where the claimant finally brings his claim?

A. No.

Q. Can we look at an illustration of that at bundle G(A)4/3. If you've got that bundle, I would like you to turn to flag 108, page 90 and following G(A)4/3.108/90.

Now, this was a case in which the Federal Arbitrazh Court for the Moscow circuit overturned the decision of a lower court to extend the limitation period on the grounds that the allegedly exceptional circumstance did not operate continuously up to the time of filing.

Could you please turn to page 91, the second page of the translation. I wonder if you would like to read to yourself from two-thirds of the way down page 91, the paragraph beginning:

"The Arbitrazh Court, having examined the indicated application..."

Until the end of the court's reasoning on this particular point which is about a third of the way down page 92, at the end of the paragraph which begins:

"Having established these circumstances..."

Perhaps you would just remind yourself of that.

(Pause)

A. I am through.

Q. Right. Now, I think this may have been the case that you had in mind earlier this morning when you referred to a case where the claimant was relying on the illness of his wife but it turned out he'd been carrying on his business in the ordinary way, notwithstanding the illness of his wife, was that right?

A. Yes, that's right.

Q. Now, if we just look at this case, on page 91, second paragraph from the end G(A)4/3.108/91:

"Here, a right to restoration of the statute of limitations arises if the circumstances connected with the person of the plaintiff that provide a basis for the court to declare them valid arose within the last six months of the statute-of-limitations period."

You accept that that is so in principle, do you not?

A. So far I accept.

Q. Then in the next paragraph:

"Thus, the reasons for missing the deadline of the statute of limitation that the plaintiff cites in the justification for restoring the period must be continuous in nature from 1 [January] 2002 ([the] date of its expiration [that's the expiration of the limitation period]) through [to] 24 [May] 2004 (... filing [of the] claim in the court)".

Do you accept that that is a correct statement of the law?

A. This may be a correct statement in this particular case but it is not a correct statement on Russian law, generally speaking.

Q. Well, it was because the claimant in this case could not satisfy that requirement that he failed, isn't it?

A. Yes, but besides there are many other requirements, so

it looks like -- you know, Russian courts do not like when people are lying to them, which happened here.

Second, if you have a look at the substance of the case, the case was as such: the claimant filed an application to withdraw from a limited liability company. This is one of the major draw-backs of the Russian company law which is feared by many, many foreigners when they engage in business in Russia. That's why many of them prefer to establish a joint venture with a Russian partner not as a limited liability company but as a joint stock company.

In a limited liability company until recently any participant could withdraw at any time, which means that the company is under pressure to pay the actual value of the share of that participant to such participant within a very short period of time. This may undermine the solvability of the company.

So -- but the case as such is quite simple. If I would be the judge I will of course decline the application for restoration of the period of limitation in this very case, because here the circumstances when the wife of the person was in need of the care ended at 1 January 2002. But the claim was filed on 24 May 2004, which means that this is a period of time comparable to the three-year limitation period in a very

straightforward and simple case, whether or not the company paid the actual value to a withdrawing participant and what its amount should be.

Q. Dr Rachkov, I'm not particularly interested in the application of the principle to facts which are very different from ours, I'm interested in getting your assistance in identifying what the principle is.

This court believed that the principle was that the justification must be continuous in nature from the expiration of the limitation period to the date of filing the claim in the court. That is a statement of legal principle. Do you say it's wrong?

A. I say it's wrong.

Q. You say it's wrong. Right.

A. I say it's wrong.

Q. Are you aware of other cases in which any other principle has been applied once the limitation period has expired? Or are you simply referring to the Urybin case which you mentioned, the 10-month case, a moment ago?

A. To save time I'm referring only to Urybin case, but I think the same applies in other cases whenever the period of limitation must be restored. So --

Q. Well we'll look at that --

A. -- the conclusion is that Russian law, although there is

a requirement that the circumstances preventing from filing a claim should have arisen within the last six months of the limitation period, there is no deadline within which, after the circumstances discontinued, the claim must be filed. It really depends on the nature of the claim. And, as I said, if the evidence is simply lacking nobody will file a claim and -- incurring additional costs and expenses. First all the evidence must be collected.

And if you compare this situation with the situation of a normal claim, in a normal case the claimant has three years to think about whether he is in a position to settle the case with a defendant amicably, whether there are any mediation possibilities, to gather the evidence, to engage in correspondence with the defendant and maybe third parties, and to think thoroughly about whether or not to file the claim, and to prepare it.

What is wrong about a person who is not in a position to file a claim to have the same period of time? So there is absolutely no rule on that in Russian law.

Q. Are you suggesting that the claimant has three years from the end of his disability to bring his claim, is that your suggestion?

A. It is not my suggestion because, as I said before, it's

really -- this question must be solved on a case by case basis. However, it is not unreasonable to think that in difficult cases it may well be three years.

Q. Your own evidence is that the claimant must bring his claim promptly once the exceptional circumstance has ceased to operate, isn't it?

A. Yes, but subject to the evidence which he or she must gather in the meanwhile.

Q. Well, let's turn to the exceptional circumstances alleged in this case, and I'm not asking you to discuss the facts but simply to proceed on certain hypotheses.

Mr Berezovsky says that he was aware of the violation of his rights in May 2001 but was afraid that if he sued Mr Abramovich while Mr Glushkov was still in Russia, Mr Abramovich would use his influence to prevent Mr Glushkov's release from prison or would influence his prosecution.

That's Mr Berezovsky's case, you understand that?

A. I understand.

Q. Now, I'm going to ask you to assume that that is true, okay? Would you describe that, I presume not, as a serious illness or a helpless state as far as Mr Berezovsky is concerned?

A. It is not an illness of Mr Berezovsky.

Q. It's not, therefore, one of the specific exceptional

circumstances mentioned on a non-exhaustive basis in Article 205, is it?

A. So it is not a physical, heavy illness, maybe it's a mental one; it's not a helpless state; it's not illiteracy.

Q. Now, you would not say, would you, that this particular alleged disability is even analogous to the exceptional circumstances which are mentioned in 205, would you?

A. What do you mean by analogous?

Q. It's not even similar.

A. No, it is not similar.

Q. Now, you recall the extract which we went through from Dr Maleina's work and the various examples that she gives: illness, need to attend to a sick family member, change of residence, residence abroad, long business trip; it's not analogous to any of those either, is it?

A. No, but Dr Maleina underlines that the list is not exhaustive. Dr Maleina tries, as any writer, to identify the most typical cases, but, as I said, the life is much richer than yours and mine and Dr Maleina's imagination.

Q. It's not a problem personal to the claimant, Mr Berezovsky, is it; it's about Mr Glushkov?

A. It may be a personal problem of Mr Berezovsky. I don't know how good or how confident, how friendly the

relations between Mr Berezovsky and third parties is.

Q. It's not a matter that made it impossible for Mr Berezovsky to give instructions to his solicitor to issue a claim form, is it? There's nothing in that assumed fact that a Russian court would regard as preventing Mr Berezovsky from giving instructions to an English solicitor to prepare and issue the claim, is there?

A. It's not quite right. I mean in Russian reality, and here I need to refer to the Russian reality, wealthy individuals were put under pressure to give up some property, and here I'm speaking about such cases as Woshinski(?), as Khodorkovsky, as, you know -- what is it, the name -- Gusinsky, who gave up their property, Galdovski(?), who gave up their property at undervalue because they were threatened and because they were put under pressure. Some of them were put in jail.

Q. Dr Rachkov, I don't want to debate the facts with you, but this alleged tort was committed in May 2001, and the Russian limitation period expired therefore in about May 2004, and for all but six months of that period Mr Berezovsky was out of Russia.

A. I can't deny it if these are the facts, which you know. I don't know all the facts, but maybe you are (inaudible).

Q. We shouldn't be debating the facts.

Now, are you aware of any case in which a claimant's fears for the consequences of bringing his action have been accepted as a reason for extending the limitation period?

A. The cases which I was able to identify do not contain such situation.

Q. No. Would it make any difference to the application of Article 205 if the claimant's concerns, although genuinely felt by him, were objectively unfounded?

A. If they were not -- if the feelings of Mr Berezovsky or an abstract claimant were not well-founded and genuine, then indeed there is no reason to restore the limitation period.

Q. So if he had a genuine but completely unfounded fear that, if he were to leave his house to go and file a claim, he would meet with ghosts or monsters on the way, that would be irrelevant?

A. I think it would be irrelevant, yes.

Q. Could we please have a look at a decision of the Federal Arbitrazh Court of Western Siberia at G(A)4/3, flag 95 G(A)4/3.095/1. It's the same bundle that we had open last, I believe.

A. What is the number of the flag? Can you repeat this?

Q. 95. This is the case of Mr Guseletov. Now, the

allegation -- have you got that? The allegation here was that the claimant was prevented from bringing his claim by a fear that, if he did bring his claim, the defendant would murder him.

If we just look at the reasoning, at the bottom of the first page of the extract, second paragraph up from the bottom:

"Having considered the arguments in favour of granting a revival [that's of the limitation period], the court found that there were no exceptional personal circumstances present (as set forth in Article 205...) that would warrant granting the motion to revive the limitation period. Having reviewed the medical documents submitted, the court found that they had failed to corroborate the claimant's inability to take procedural action in court (such as preparing the statement of claim, filing it in court, etc.). The claimant's assertion of discontinuity in the limitation period was denied."

Now, just pausing there, in that part of the judgment the court is saying, isn't it, that they had been presented with no medical evidence that suggested that the claimant's fear of being murdered was something that prevented him from preparing a statement of claim and filing it in court et cetera, ie taking the

practical administrative steps to start an action. That is the point that they're taking into account there, isn't it?

A. Yes, correct. I think Guseletov behaved in courts very strangely. So he said he wants to refrain or to prohibit a public hearing, and he filed several applications, so I have the impression that he was a bit crazy in saying something.

Q. Well I'm sure Mr Guseletov was a most eccentric person, but courts of law in Russia apply legal principles to particular facts, don't they?

A. Yes.

Q. If we can just look at the second page of this report, bottom of the page G(A)4/3.095/2:

"The court found that the claimant became or should have become aware of the violation of his rights... on 18 [October] ... at the latest, when along with Kuznetsov he was making decisions on issues within the authority of the general... meeting. [Mr] Guseletov filed his claim as to ... ownership ... in [January 2010] ... after the three-year limitation period had expired."

Then they set out Article 205.

After that paragraph:

"VV Guseletov asserts that he has failed to file

within the time allowed because on 18 [September]... he learned from law enforcement officials that ... Kuznetsov was conspiring to commit a crime (murder) against him, and he was so much affected by this that he could not file his claim in court prior to the expiration of the limitation period. As a matter of proof, the claimant submitted a ruling to bring criminal charges dated 18 [September]... and certain medical documents.

"Having considered the arguments in support of the motion... the court found that the claimant had failed to prove the special circumstances asserted therein.

"The documents in the case file contain no evidence to corroborate the assertion that the claimant has been in a state that prevented him to file on time for six months prior to the expiration of the limitation period.

"The court did not consider the claimant being under stress and in a state of confusion as a valid enough reason to miss the allowed filing window. The medical diagnosis in the documents... does not corroborate the assertion that the claimant has been gravely ill and incapacitated."

Now, there's a number of points about that that I want to ask you about. First of all, do you agree that the ground on which the court proceeded was that

a fear of being murdered was only a relevant factor if it could be shown that it produced a physical or psychological incapacity on the part of the claimant of the sort that you would expect to be established by medical evidence? Would you agree that that is what they said?

A. No, I don't derive such conclusions from this case, and I think it would be too creative to expand it to the Russian court practice in general.

Q. Would you agree that the first ground on which the court decided this case was that the claimant's fears for his safety was not established by medical evidence demonstrating that he was under a personal incapacity; do you agree that that was the first of their grounds?

A. I agree that the claimant did not provide the court with the documents deriving from a medical institution, and saying that he is in such an illness which prevented him from filing a claim on time.

Q. Now, would you agree that the second ground was that, in the court's view, the claimant's fears for his safety were not such as to prevent him from performing the various administrative steps necessary to bring his claim such as filing and drafting and so on? Do you agree that was the second ground upon which they decided this?

A. Well, the court does not mention such statement that the claimant has enough time to prepare the claim, and so on.

Q. Well, let's have a look at four paragraphs down, page 3 G(A)4/3.095/3:

"The documents in the case file contain no evidence to corroborate the assertion that the claimant has been in a state that prevented him to file on time for six months prior to the expiration of the limitation period."

A. Yes, but there is nothing said in that that he had enough time to collect evidence and so on. What is said is that, within the last six months of the period of limitation, the claimant was not in a state which prevented him from filing a claim.

What does it mean? Does it mean that he could not evidence that he could not go to the post office and file the claim? Maybe something else. Who knows?

Q. What they say in the last paragraph of the part that I referred you to is:

"Moreover, the court was correct to note that the reasons the claimant asserted had prevented him from filing before the limitation period... did not at the same time [prevent] him from personally managing a number of companies..."

In other words, he was perfectly capable of conducting his affairs.

A. Absolutely.

Q. And if he was capable of conducting his ordinary business, then there was no reason why he shouldn't be capable of filing a claim even if he thought he was going to be murdered by Mr Kuznetsov. That's what it decided, isn't it?

A. It is only decided that -- or it appears from the judgment to me that Guseletov tried to say some lies to the court, to say that he was so badly stressed that he couldn't do anything.

I think if he would be in such a state he would not be able to work, so that's why I think it was very imprudent from his part to lie to the court.

MRS JUSTICE GLOSTER: What's your evidence if, just through fear, he didn't file? So obviously there's some stress but he's not incapacitated, he goes and runs his business, he manages his affairs, but he's just frightened that something will happen to him or his family if he files proceedings against the defendant; is that enough to extend the period of limitation in your view?

A. I think this can be enough. I think clearly it all depends on the specifics of the case --

MRS JUSTICE GLOSTER: Okay. Let me just hypothesise to you that the specifics are he's perfectly well in himself but he is just frightened that if he files, the defendant will murder or kill him or members of his family.

A. If he knows the defendant so well that he understands that this might well happen, I think that's a valid ground to restore the limitation period.

MRS JUSTICE GLOSTER: Yes, I see.

MR SUMPTION: You see, this court appears to have been of a different view, because if you look at page 3, almost exactly halfway down the page G(A)4/3.095/3:

"The court did not consider the claimant's being under stress and in a state of confusion as a valid enough reason to miss the allowed filing window."

Because the medical evidence did not establish that the stress was such as to incapacitate him.

A. Yes, but stress and confusion is something else than a well-founded, or well-grounded and genuine fear.

Q. You see --

A. I am also in stress now when you are cross-examining me.

Q. I don't believe that for a moment, Dr Rachkov.

Now, what I suggest to you is that this case is a perfectly orthodox application of the relevant general principles of Russian law. Would you accept that?

There's nothing legally questionable about this analysis.

A. I think in this particular case the analysis is correct, but you cannot expand this reasoning to all other cases because the cases are many-fold.

Q. What I would suggest to you is that a state of stress and confusion on the part of the claimant is not enough to justify an extension of the limitation period unless it is such as to incapacitate the claimant from running his affairs.

A. Yes, and I can give you a very good example.

Q. First of all, would you accept that that, as a general statement of law, is a fair summary?

A. It's a fair summary, and I can give you an example.

When Hitler was just 20 kilometres away from Moscow, a famous Soviet composer Maxim Dunayevsky, who was a Jew, he was so in stress that he couldn't able -- he couldn't do anything for three years. He couldn't write any music, nothing.

This shows that people can, although Hitler did not promise to kill him personally, and the Hitler troops did not occupy Moscow at the end of the day, but he was in a position -- he wasn't simply able to do anything.

Q. I understand, and my Lady will in due course decide whether that would be a fair description of

Mr Berezovsky's condition between 2001 and 2007.

A. Well, but thanks to the situation, Mr Abramovich is not Hitler who threatened Mr Dunayevsky.

MRS JUSTICE GLOSTER: Well, let's get back to the principles of law, shall we?

MR SUMPTION: Now, in this case, Mr Glushkov left Russia in July 2006 but the claim form was not issued until June 2007, and it's in that context that you refer to the Urybin decision of the arbitrazh appellate court, that's right, isn't it?

A. Yes.

MRS JUSTICE GLOSTER: If you're going on to another case, I'm going to take a break for the shorthand writers.

MR SUMPTION: Yes, of course.

MRS JUSTICE GLOSTER: Ten minutes.

(11.35 am)

(A short break)

(11.50 am)

MR SUMPTION: Dr Rachkov, Urybin is the case about the legally illiterate miner living in the Ukraine which we referred to in another context earlier this morning.

I'm coming back to it because of your suggestion that this shows that you might have quite a long time to prepare your case and so on, and ten months was the gap in this case. That's the point you're making, isn't it?

A. I don't know whether in that particular case the claimant needed ten months to prepare his statement of claim, I just said that in an abstract case it may take time to prepare the statement of claim plus its annexes.

Q. Dr Rachkov, if you've got Urybin open, and I would like you to turn to page 80, which is the last page of the reasoning in the English text --

A. Can you remind me please of the binder?

Q. Sorry, it's G(A)2/4, flag 11 G(A)2/4.11/80.

You remember we had a discussion about the reasons for it, the disability is identified in the first full paragraph towards the top of page 80. And the dates in question, from where you get your ten months, are to be found in the second last paragraph before the words "Has Rule":

"The findings of the appeal court in relation to the statute of limitations not being overrun cannot be adopted since the complainant did not state the date of 9 [November] 2002 in the statement of claim ... when he learned of disposal of the shares."

So he learned of wrongful disposal of the shares in September 2002.

"... in the statement of claim ... when he learned of the disposal of the shares. The legal action was received by the court on 19 [July] 2006."

Now, where do we get the ten months that you refer to? Is that because you're taking three years from September 2002, and then measuring the time from September 2002 -- no, that doesn't work.

Where do you get the ten months, Dr Rachkov?

A. Yes, I can explain.

Three years from 9 September 2005 -- 2002, sorry, makes 9 September 2005.

Q. And it's the gap between that and July?

A. Yes, the gap between these dates.

Q. I understand. So that is the gap between the expiry of the limitation period and the filing of the claim, isn't it?

A. Yes.

Q. It is not the gap between the time when the exceptional circumstance ceased to operate and the time when the claim was filed, is it?

A. I don't know. This question is not addressed here.

Q. I see. So you cannot say that this case shows that you can have as much as ten months between the exceptional circumstance ceasing to operate and the claim being filed; this case does not say that, does it?

A. No, it does not.

Q. And indeed, if we look at what the disability was in the first full paragraph at page 80, namely the fact that

the individual complainant was legally inexperienced, living in a foreign state and so on, all of those are factors which, on the face of it, appear to operate right up to the moment where he began the claim. That's right, isn't it?

A. It may well be.

Q. Now, are you aware of any case, however complex, in which a Russian court has allowed a claim to be brought after the expiry of the limitation period when the exceptional circumstance had ceased to operate 11 months or more before the claim was filed?

A. I did not find this.

Q. No.

Now, I want to turn if I may to Article 10, and that we will find at G(A)4/4, flag 2. It's on page 7 of flag 2 G(A)4/4.02/7.

Have you got that, Dr Rachkov?

A. Yes.

Q. You're obviously very familiar with this, but if I may just ask you to open it so that we can remind ourselves of its terms.

"Actions of citizens and legal persons taken exclusively with the intention to cause harm to another person are not allowed, nor is abuse of a legal right allowed in other forms."

Then there's a reference to competition which we don't need to trouble about.

Now, this is the provision of the Russian Civil Code equivalent to the provision which we found in almost all other civil law systems about abuse of rights, isn't it?

A. I think so, yes.

Q. And the basis of the argument that you found on this, I just want to make sure I've correctly understood it. What do you say is the right that Mr Abramovich would be abusing if he relied on the limitation period in this case?

A. Nothing.

Q. Nothing? Would he not be abusing his right if he relied on the limitation period in this case, in your opinion?

A. If we take an abstract case, there is nothing. If we take the particulars of claim, as I was made familiar with, I think the abuse may consist in preventing by threatening the claimant to file the actions, to file this claim. That's the abuse of right.

Q. I see. So is the basis on which you say there may be an abuse of right, and obviously you're not expressing a view on the facts but on the legal principles.

A. Of course.

Q. Is the basis on which you say there may be an abuse of rights that Mr Abramovich's conduct, in making threats

to Mr Berezovsky, may have caused him to miss the limitation period; is that the basis of it?

A. That's the basis.

Q. So is this a form, or is the principle here that Mr Abramovich should not be allowed to apply the limitation period because he would be thereby profiting from his own wrong, is that the essential point that you say is an abuse of rights?

A. Well, yes, provided that all this is evidenced --

Q. Of course. But that's the legal principle that you're referring to?

A. That's the legal principle.

Q. Understood. The wrong in question being the threats made in May 2001, on his case?

A. Or continuant one.

Q. Well, would you agree that in order to succeed in this argument Mr Berezovsky would have to show at the very least that the threat said to have been made by Mr Abramovich in May 2001, and I can tell you that no threats are alleged after that, caused him to delay issuing his claim form until June 2007? Would he have to prove that?

A. What exactly?

Q. Sorry?

A. What must he prove, excuse me?

Q. Well, in order to succeed in this argument -- can I ask you to assume that no threats were made after May 2001, okay? Now, in order to succeed in this argument, would Mr Berezovsky not have to show at the very least that the threat made in May 2001 caused him to delay issuing his claim form until June 2007?

A. Maybe so.

Q. Well, is it so or not?

A. In Russian procedural law it looks a bit different. So first the claimant files the claim. The claimant is free to either file simultaneously or afterwards an application for restoration of the limitation period, but the claimant can also act the other way around. The claimant can wait until the defendant raises the objection that the period of limitation lapsed and only then file such application.

Q. Well, I'm not asking you about the procedure in a Russian court for establishing whether or not the limitation period should be extended, I'm asking about the underlying principle of law.

If you assume that the last threat was made in May 2001, would it be necessary for Mr Berezovsky, in order to be able to rely on Article 10, to show that the threat made in or before May 2001 caused him to delay issuing his claim form until June 2007? Would it be

necessary for him to establish that?

A. I think it is important, yes.

Q. Now, you cite by way of analogy Articles 179 to 181 of the Civil Code. I don't think you say that they are directly applicable but you say that one can get guidance from them.

A. Yes.

Q. Can we just look at those. I think the best place to find this is in your fifth report where you actually, I think, set it out verbatim. It's not in the extracts that I've been using. G(A)1/1, flag 2, page 163 G(A)1/1.02/163.

A. Yes.

Q. And at the bottom of page 162 and the top of page 163 you deal with this and you refer to Article 181.

Now, this is concerned, isn't it, with the running of the limitation period in cases of duress and fraud, is that right?

A. Which cases are you --

Q. 179 to 181 are concerned with that.

A. So we're speaking about the Civil Code of the Russian Federation, aren't we?

Q. Yes, I think we'll need to look at something which has 179 as well.

Forgive me for jumping around, my Lady.

Can you turn to G(A)2/1, flag 6, where we've got the whole of this section of the Code, and in particular page 118 G(A)2/1.06/118.

Now, is Article 179 of the Civil Code concerned with the invalidity of transactions made under the influence of fraud, duress, threats and so on? Is that right?

A. Yes.

Q. And the analogy that you are referring to is with the provisions relating to the running of time there, and Article 181 deals with time periods of limitations of actions under invalid transactions.

This is concerned with time periods of limitation of actions in cases where a transaction has been made under the influence of fraud, duress, threat et cetera, is that right?

A. Yes.

Q. Does Article 181 provide at sub-article 2 that:

"A suit for the declaration of an avoidable transaction as invalid and for [the] application of the consequences of its invalidity may be brought within a year from the day of the termination of the duress or threat under the influence of which the transaction was made... or from the day when the plaintiff knew or should have known of other circumstances that are the basis [of invalidity]."

So is it the position -- there is obviously a special time limit here, unlike the time limit that applies for a damages claim, relating to fraud, duress and so on, that's right, isn't it? There is a special time limit of a year which starts from the time that the threat ceases to operate, is that correct?

A. Yes, which can be well beyond the three-year period.

Q. Yes. The reason this doesn't apply directly is that when we're talking about a claim not for the recognition of a transaction as being invalid but a claim for damages for a tort, there is no special period of time which starts from the time when the threat ceased to be effective, isn't that right?

A. Yes.

Q. Now, the significant point about this, surely, is that this time period, so far as it's analogous, begins to run as soon as the influence of the threat or violence in question comes to an end?

A. In principle, yes. However, we need to understand whether this rule applies vis-a-vis the party to the transaction or third parties.

Q. Now, if we can go back to the article we're looking at, Article 10, I may ask you to address one other aspect of this particular issue G(A)4/4.02/7. Article 10.1 refers to:

"Actions of citizens and legal persons taken exclusively with the intention to cause harm to another person are not allowed nor is abuse of a legal right allowed in other forms."

Now, would you agree that there is a respected school of thought among Russian legal scholars that an allegation of abuse of rights requires proof that the party abusing his rights intended to use his rights for an improper purpose?

A. To which writers do you refer, Mr Sumption?

Q. Well, I'm asking you to agree generally that there are respected writers who take that view.

A. There are respected writers.

Q. Well, for example, Volkov takes it, does he not?

A. Let us have a look at Volkov.

Q. G(A)4/8, flag 16. G(A)4/8.16/84.

First of all, do you regard Volkov as a distinguished and reputable legal scholar?

A. Frankly I don't know him. Volkov is a very widespread Russian name, I simply don't know which Volkov it is.

Q. I see, so you know nothing about him.

A. No.

Q. What he says about this is:

"Subjectively, exercising a certain right 'wrongfully' implies certain blamefulness of the

relevant authorised person. Causing harm accidentally in the course of exercising a subjective civil law is not considered to be an act of 'wrongdoing' and shall be qualified under the laws of tort."

A little lower, after the page break:

"May any other forms of abuse of a right be manifested not intentionally but by negligence, or at least with [an] indirect intention...? An intention is different from a wish and/or motives by the fact that [a] person who expresses an intention has a goal clearly articulated for himself/herself. Abuse of right, unlike other offences, is carried out by ... means of right. This is what makes it so different, and this exactly 'model' is entirely built-in into the program formed beforehand in the offender's mind. The awareness of the means by which he/she would achieve the goal makes it impossible for the offender's mental process to go on other than in the form of direct intent. As one cannot chop wood without knowing the purpose of a wood chopper, one cannot abuse a right without being aware why a person uses such right."

Now, the translation isn't terribly fluent there but if we go down to the next sentence:

"Hence the conclusion: both chicane and any other forms of abuse of right may only be exercised by

a person with direct intent, i.e. deliberately. Actions performed unintentionally or by negligence must be qualified either in accordance with individual rules of the Civil Code ... or in the context of tort law."

MRS JUSTICE GLOSTER: I must say I'm mystified by the last sentence about the wood chopper.

MR SUMPTION: I don't think it's a close analogy, my Lady. It will not be featuring in our submissions.

But I think it's clear what the point being made is. The point being made is this, isn't it, Dr Rachkov: if the law confers upon you a certain right, and contrary to Article 10 you use a legal right that you undoubtedly have but for abusive purposes, you may be disabled from exercising your right.

The point that Mr Volkov is making is that since this is a rule that prevents you from relying on an undoubted legal right, you cannot accidentally commit an abuse of right, you can only do so intentionally.

Do you agree that's the point that he's making?

A. To some extent. In Russian law we differentiate between accidental causation of harm, and causation of harm at fault.

Q. And? I didn't hear that last word.

A. Causation of harm at fault. The fault consists of either intention or negligence, and in turn negligence

and intention may have two sub-forms, if you want.

So I wouldn't say that the first paragraph, which deals with accidental causation of harm, is somehow related to the case at hand.

Q. Well, what I'm suggesting to you, and this is certainly the view expressed by Mr Rozenberg, is that if you are going to be disabled from exercising a right conferred upon you by the Code, namely a right to rely on limitation on the ground of abuse of rights, nothing short of an intentional abuse of your rights will do.

Do you accept that?

A. I think it can be also negligence.

MR SUMPTION: I see. Those are all my questions, Dr Rachkov. Thank you very much.

THE WITNESS: Thank you.

MRS JUSTICE GLOSTER: Yes, Mr Adkin.

MR ADKIN: My Lady, I have a few questions.

Cross-examination by MR ADKIN

MR ADKIN: Dr Rachkov, I want to ask you some questions on behalf of the family defendants.

Do you agree that under Russian law you cannot amend or add to an existing contract if that existing contract is non-concluded or invalid?

A. Yes. This statement makes sense, I agree.

Q. You would agree, wouldn't you, that in resolving

disputes about whether a contract has been formed, the Russian courts do not apply laws retroactively, that is to say, they apply to the dispute the substantive law in place at the time of the making of the contract?

A. Russian law is more difficult than this. If you have a look at Article 2, paragraph 4 I guess -- no, it's Article 4, paragraph 2 -- which stipulates that if there was a contract made before the first part of the Civil Code entered into force, but certain rights and obligations have arisen out of this contract after that date, then the Civil Code applies to this these rights and obligations and liability.

Q. I understand. But subject to that qualification which arises out of the provision of the Civil Code, what Russian law doesn't do is apply to a contract, which was made, performed, concluded in 1992, the Civil Code which wasn't introduced until 1995?

A. Yes, in principle that's correct. Russian law, as any other -- or many other laws of other countries, has no retroactive effect, unless the law so provides.

For instance, if you have a look at 422 of the Russian Civil Code, it states that if after the contract was concluded some mandatory rules were introduced they apply anyway.

Q. I see. And you would also agree, would you, that in

resolving disputes before the Russian court, the Russian court will apply the procedural rules in place at the time of the hearing of the relevant court proceeding?

A. Yes, I agree with that.

Q. Please could you be given Professor Maggs's first report, and turn to paragraph 58, which is at bundle G(A)5/1.00/19.

A. Can you repeat the number of the flag, please?

Q. I don't think the flag has a number, it's just at the very front of the bundle.

You should there see the first expert report of Professor Maggs, and I would like you, if you would, please, to turn to page 19 of that report. Do you have that?

A. Yes, I do.

Q. Now, prior to the introduction of Article 161 of the '95 Civil Code, which I think we're all agreed came into force on 1 January 1995, the provision of Russian law which dealt with the nonobservance of the written form in contracts was Article 46 of the 1964 Civil Code. That is the article which is set out by Professor Maggs at paragraph 58 of his first report. Do you agree?

A. Yes, I do agree, with a small caveat that I'm not a specialist in historical law which applied at that time.

Q. I understand.

Professor Maggs tells us in this part of his first report that he has searched for cases involving the confirmation by witness testimony of an oral contract where the contract was formed before 1 January 1995, ie before the '95 Civil Code was introduced, but the case was heard after that date; do you understand?

A. I do understand.

Q. And he tells us -- and this is at paragraph 59 of his report -- that he has discovered two such cases, and that in both cases the court applied not Article 161 of the '95 Code, but Article 46 of the '64 Code, ie the predecessor provision. Do you see that?

A. I do see that.

Q. Now, I want, if I may, to look at these cases. They're both in the same bundle. The first is at tab 9. For the transcript that is G(A)5/1.09/89.

Now, this is a decision, as I understand it, of the Supreme Court, that's right, isn't it?

A. Yes, of the Supreme Court of the Russian Federation.

Q. And we see from the first large paragraph that it was heard in September 1998, and if we scroll until four paragraphs from the bottom, we will see that the lower court hearing was December 1996, and the intermediate court May 1997. In other words, all of the relevant

hearings in this case happened after the date of the introduction of the '95 Civil Code; do you follow?

A. Yes, I do.

Q. We also see, don't we, from the third substantive paragraph, the paragraph in the middle of page 89, that the relevant transaction with which this case was concerned occurred in May 1993. Do you see that?

A. Yes.

Q. And that was of course before the '95 Civil Code was introduced.

Now, turning over the page, we get to the conclusion of the Supreme Court. It disagreed with the court below, and it criticised the decision of the lower court because it said it had applied the wrong substantive law. We see that again in the middle of page 90, the paragraph that starts -- well, the first paragraph I should take you to is in the middle of page 90 and it says:

"The decision of the court, which is in violation of Art 197, as well as Arts 192 and 194 of the... Code of Civil Procedure, is based solely on the tentative testimony of the plaintiff, who has an interest in the outcome of the case."

Then two paragraphs below:

"In accepting the arguments of the plaintiff that

the transaction was concluded under the influence of fraud, the court did not referred [perhaps that should be 'was not referred' or 'did not refer'] to any evidence in support of this, the notary was not questioned and the substantive law -- Art 179 Civil Code -- was not properly applied, since on the date of these events -- 1993 -- the Civil Code (Part 1) of 1995 [had] not yet entered into effect."

Then if we go to the final paragraph on page 90, the court remits the case back to the lower courts for a fresh determination, and the Supreme Court says this:

"In the new proceedings it will be necessary to consider the above and issue a decision in accordance with the law, bearing in mind that by virtue of Art 46 [of the 1964 Civil Code] confirmation or denial of contractual clauses by testimony is not allowed, except in the cases specified by law."

So would you agree that what is happening in this case is that the Supreme Court is looking at a contract, looking in 1998 to the contract formed in 1993, and saying, in relation to the writing requirement: you have to apply the provision of the code in force in 1993, namely Article 46 of the 1964 Civil Code. That's right, isn't it?

A. I think it's a too generic statement. If you have

a look at the chronology, the contract was made in May 1993 but the claimant filed the claim in May 1994. In May 1994, of course the old Civil Code applied. That's why the court of the first instance which accepted this claim for trial, and rendered its judgments only in December 1996, applied the old Civil Code.

Besides, I think the credibility of the reasoning here is undermined largely by the mix-up of two various legal regimes. On the one hand, the court refers to Article 179 of the new Civil Code, which is on the second page; on the other hand, it refers suddenly to Article 46 of the old Civil Code.

Last remark. The wording of Article 46 of the Civil Code of 1964 is interchangeable with the wording of the current Article 162.

Q. Well, can I just pick up on what I understand the two points that you've made to be.

Firstly, you said there appears to be some confusion because it's referring to Article 179 of the new Civil Code. Now, if one goes to page 90, and I referred you to this paragraph a moment ago, what the Supreme Court appears to be saying in the paragraph starting:

"In accepting the arguments of the plaintiff ..."

Is that the courts below were wrong to apply

Article 179 of the new Civil Code because, at the date of these events, ie the contract, 1993, the new Civil Code had not yet entered into effect.

That's right, isn't it? That's what the court is saying?

A. I have difficulties in understanding this very awkward wording which the court used.

Q. Could we please look at the second decision, which is at tab 10. Again, this is a decision of the Supreme Court, as I understand it. I'm not sure one can see that from the face of the document, but we are told that by Professor Maggs in his first report G(A)5/1.10/95.

A. I think the number indicates that this is a judgment of the Supreme Court.

Q. Thank you.

And here, if one looks at the first paragraph, these proceedings were instigated in October 1999. Do you see that?

A. Yes.

Q. And if one looks at the fourth paragraph, we see what the proceedings were about, and they're about an agreement which was entered into in November 1990.

So this is a case, again, where we have a pre-'95 agreement and a post-'95 determination on that agreement.

And if we go over the page, please, to page 96 G(A)5/1.10/96 and look at the fourth paragraph up from the bottom of the page, the court says this:

"The rule on observance of the written form of a transaction --"

Sorry, do you have that, Dr Rachkov?

A. Yes, I do, yes.

Q. "The rule on observance of the written form of a transaction by legal entities with citizens in respect of housing and on the removal of rights of the parties in a dispute to refer the case to support the transaction on the evidence is contained in the Civil Code [this is the 1964 Civil Code] [at] Art ... 46, which was in force at the time of sale of the house."

So again, they're applying the pre-existing 1964 Code provision, Article 46 on simple written form, because that was the provision which was in force at the time of the sale of the house.

Do you follow, Dr Rachkov?

A. Yes, I do follow.

Q. What I suggest these cases show is that, because the court was applying the pre-1995 rule, notwithstanding that the cases were heard after the introduction of the '95 Civil Code, it indicates that the rule in question on simple written form is regarded by the Supreme Court

at least in these cases as substantive and not procedural. Do you agree?

A. No, I do not agree. I can draw your attention to the fact that in this judgment, the mix-up is even more -- is even heavier than in the previous one. In this judgment the court cites for instance here -- the English wording is, "In confirmation", it's page 96, second paragraph from the bottom:

"In confirmation of the contract of sale of the house between V and PC 'Kolorit', the court decision referred to the testimony of witnesses, whereas in accordance with Art 162 of the Civil Code non-compliance of the transaction with simple... form deprives the parties of the right in the event of dispute to refer to the confirmation of the transaction and its conditions as evidence ..."

And here the court refers to Article 46 of the Code of the RSFSR, which are, by the way, fully interchangeable between each other.

I also refer to, well, to the same page in the middle, the upper part of the middle:

"As stipulated in Art 161 of the Civil Code, the transactions of legal entities with each other and with citizens must be made in writing, except for transactions that require notarisation."

Q. Dr Rachkov, I think we can agree that they're interchangeable in this sense, that they contain largely the same provision to the same effect; but what I suggest to you is clear is that when the court considers what was actually in force at the time of the agreement, ie what is to be applied, it says it's Article 46. That is clear, is it not, from the fourth paragraph up from the bottom?

A. I disagree.

Q. Now, I want, if I may, to ask you some questions on a different topic.

As I understand it, it is your evidence that the general trend of legislation in Russia during the course of the '90s, if not beyond, was to liberalise the laws as they related to economic activity so as to permit individuals to engage in such activity with fewer and fewer restrictions.

Is that right? Have I understood your evidence correctly?

A. In general, this is right. However, later on, this freedom was more and more limited by the state. For instance, by introduction of licensing for certain business activities, by saying that individuals cannot do that, cannot do this, but only if they are sole entrepreneurs and registered as sole entrepreneurs they

can do such things.

But in general, starting from 1986, so right after the Perestroika was announced, this began with the law on individual labour activity, indeed the freedom to engage in business activity was enlarged more and more.

Q. Well, you're quite right, Dr Rachkov, I do want to ask you about the entrepreneurial provisions, but let me ask this.

I also understand it to be common ground that from 1 March 1996 onwards, when the second part of the Civil Code was introduced, simple partnership agreements concluded by individuals for the purposes of entrepreneurial activity could only be concluded by registered entrepreneurs, do you agree with that?

A. Yes.

Q. Now, do you say that there are any restrictions on individuals, any restrictions on individuals, entering into simple partnership agreements for the purposes of entrepreneurial activity immediately prior to 1 March 1996?

A. Immediately prior there was, at least to the best of my knowledge, no such limitation, because I disagree that Article 434, second paragraph of the old Civil Code, applied.

Q. I see. So your evidence, as I understand it then, is

this: until March -- from some stage in the 1980s, people were entirely free to conduct simple partnership agreements as individuals, but in 1996 that changed?

A. Yes, it was to some extent a further development of the idea which was already reflected in Article 434 of the old Civil Code of 1964. You may remember that the old Civil Code prohibited not only citizens from engaging into simple partnerships beyond their personal needs, it also prohibited them from contracting with legal entities, with socialist organisations as they were called before. So this is the logical continuation of this idea in the new reality, if you want.

I'm not sure whether I expressed myself comprehensively enough.

Q. No, that's helpful, thank you.

I think you said during cross-examination by Mr Sumption that you accept that Article 434 wasn't, as it were, formally annulled until the introduction of the second part of the '95 Civil Code on 1 March 1996, that's right, isn't it?

A. Yes, that's right. I also would like to draw your attention to a paragraph of my fourth report, it's paragraph 46, where I explain what the rule was

As I said, the Soviet Union was a great state, a big

one, and the corpus juris was so numerous that the parliament was simply not in a position to say, "Okay, these laws are old-fashioned, we abolish them, and these newer do apply."

So that's why the Solomon(?) decision was to say -- and which was actually done, the Supreme Soviet of the Russian Federation, which was, if you want, the permanent body of the Russian Parliament of that time, took a decision dated 14 July 1992 that the laws of the old Soviet Union, or old Russian Soviet Federative Socialist Republic, shall not apply if they are not in line with the newer law, ie Fundamentals.

And the explanation was that if there is something in the old Civil Code which is not 100 per cent reflected in the new -- in the Fundamentals, or new Civil Code, these restrictions do not apply.

Q. I understand. Well, I don't want to go over that ground again because I think it was covered by Mr Sumption.

What I want to do is put to you something which Professor Maggs says about this topic as it relates at least to entrepreneurial activity.

Could you please be given Professor Maggs' second report at G(A)5/2/6. Professor Maggs's analysis of this Article 434 issue is set out here, and I just want to take you through it.

Could you look, please, at paragraph 18, I think the easiest way of doing it is to take you to that, and 19.

MRS JUSTICE GLOSTER: What page?

MR ADKIN: That's page 6, my Lady, and page 7, where Professor Maggs sets out Article 23 of the first part of the Civil Code G(A)5/2/6.

Now, that sets up the situation in which a citizen is entitled to conduct entrepreneurial activity without the formation of a company but only from the time of registration as an individual entrepreneur. That's the effect of Article 23.1.

The effect of Article 23.3 is to apply the rules of the Code that regulate the activity of legal persons that are commercial organisations to entrepreneurial activity of citizens. That's right, isn't it?

A. Yes, that's the wording of the law.

Q. Yes. Now Professor Maggs explains, and do you agree, that the rules regulating commercial organisations, to which Article 23, sub-3 nods, were not contained in the first part of the Civil Code; they were introduced, weren't they, in the second part?

A. Excuse me, can you specify your question, please?

Q. The rules that regulated the activity of commercial organisations, at least in relation to joint activity agreements, were in the second part of the Civil Code,

weren't they?

A. Yes. The contract on simple partnerships you mean, yes.

Q. So in order to make sense of Article 23.1 and 23.3, as it stood in 1995, before the introduction of the second part of the Civil Code, one would either have to ignore the article in its entirety or apply analogous provisions from another source, pursuant to Article 6, which I understand is the article which allows the provision of law by analogy. Do you agree with that?

A. With what exactly?

Q. In order to make sense, Article 23 sets up a situation where a set of rules are to be applied to an entrepreneurial activity before those rules have actually been brought into force, yes?

A. Yes.

Q. So in order to make sense of Article 23, either one has to ignore it in its entirety, at least in 1995 before those other rules have been brought into force, or one has to look to some other set of rules which were already in existence or which one could apply by analogy?

A. To the best of -- not necessarily. To the best of my knowledge, the legal status of a sole entrepreneur or registered entrepreneur pre-existed 1995.

Q. I understand, but we're talking here about --

A. So that's why I don't understand why we shall apply analogy of law or analogy of reasoning here.

Q. Well, Article 23 does not allow -- let me start again.

Article 23 was in the 1995 first part, wasn't it?

A. Yes.

Q. And we've established that it referred to a set of rules which were not in the 1995 first part?

A. Yes.

Q. Now which set of rules do you say it was referring to?

A. Before 1 January 1995, there was a federal law that regulated the activity of legal entities and individual entrepreneurs, and there was a requirement that if the individuals -- the individual engaged in business activity, then he must be registered as a sole entrepreneur, or a sole trader, if you wish.

The purpose of that was that the state knows who is doing what to collect taxes, for instance, and so on. However, the definition of the entrepreneurial activity is contained in Article 2 of the Civil Code which stipulates -- this is just my translation.

The entrepreneurial activity -- it's Article 2 of the Russian Civil Code of 1994 -- the entrepreneurial activity is an independent activity run at one's own risk, aimed at the systematic gaining of profit from using property, sale of goods, performance of works or

provision of services by the persons who are registered in that capacity in accordance with the procedure established by the law.

As a matter of fact, only small traders who are well sitting(?) in the market were registered as sole entrepreneurs. None of Russian tycoons was registered as a sole entrepreneur.

Q. But the rules concerning contracts, as I understand it -- and I think you agree with this -- regulating a contract between legal persons that were commercial organisations were not in place in 1995, were they?

A. Yes, but there were other rules.

Q. There were other rules?

A. Yes.

Q. Now, what Professor Maggs says is that the appropriate way of dealing with Article 23 is as follows. Because there were no rules dealing with the regulation of contracts between legal persons that were commercial organisations at that time and, specifically, no rules dealing with the regulation of contracts for joint activity, he says that one applies by analogy, so far as concerns joint activity agreements, the rules of the 1964 Civil Code. Do you agree with that?

A. As long as --

Q. That question was a bit dense so if you want to take

some time to read it on the transcript, please feel free.

A. I'm afraid I still do not understand the substance of the question. What shall be applied by analogy to what?

Q. Well, he says that in order to make sense of Article 23 you need to apply by analogy the rules on joint activity contracts between legal persons that were previously in place, namely the rules contained in the 1964 Civil Code and in particular Article 434. Do you understand?

A. To the extent the Civil Code of 1964 did not contradict, as I said, the laws adapted since 1986, first in the Soviet Union and then in the Russian Federation, and these laws were numerous.

Q. What Professor Maggs says the upshot of that analysis is is that registered entrepreneurs could, in 1995, enter into joint activity agreements to pursue entrepreneurial activity without falling foul of the satisfaction of everyday needs(?) restriction in Article 434 of the 1964 Civil Code, but only if they registered as entrepreneurs according to Article 23.1 of the '95 Civil Code.

A. No.

Q. You disagree with that, do you?

A. I disagree with that. I can refer to the cases to which I tried to refer yesterday by -- unfortunately, I was pushed a lot but now I can refer to them.

MRS JUSTICE GLOSTER: No, you can't. You will be referred to them in re-examination.

A. Excuse me.

MRS JUSTICE GLOSTER: If Mr Rabinowitz thinks it's appropriate to do so, he can take you then. Unless Mr Adkin wishes to take you there?

MR ADKIN: My Lady, I don't. I've put the point I wanted to put.

Now, Dr Rachkov, I understand it is common ground, and you've affirmed this again this morning, that the purported term of the '95 agreement, the alleged '95 agreement that any future business between interests acquired by Mr Abramovich, Mr Berezovsky or Mr Patarkatsishvili would be shared between them was too vague to be legally binding. You agree with that, don't you?

A. In terms of contributions or in which terms?

Q. Let me remind you of what you say about this in the joint memorandum. If you could be handed please bundle G(A)6 and turn to tab 1, or the only tab, at page 29 G(A)6.01/29. I have in mind paragraph 82 which says:

"... it is agreed that the purported term of the 1995 Agreement described in C34.3, namely that any future business interests [the three] acquired would be

shared between them with 50% to be owned by the Defendant and 50% to be owned by Mr Berezovsky and Mr Patarkatsishvili, was too vague to be legally binding."

I understand that you say that it did give rise or there was a term which gave rise to an obligation for each party to inform the other, but this is correct, is it not?

A. Yes, this is correct. Plus you should look at the performance, if any.

Q. I understand.

Now, the consequences of the invalidity of part of a transaction are set out in the first part of the Civil Code at Article 180, aren't they?

A. Yes.

Q. I'd like, if I may, to turn to this. If you could be given, please, bundle G(A)2/1 at tab 6 at page 118. That's G(A)2/1.06/118:

"The invalidity of part of a transaction shall not entail the invalidity of the other parts of it if it is possible to suppose that the transaction would have been made without the inclusion of its invalid part."

Dr Rachkov, do you agree that what this means in practical terms is that, if the court concludes that a part of an agreement is invalid, it must decide

whether the parties to that agreement would nonetheless have reached that agreement if that part had not been included?

A. Yes, I agree.

MR ADKIN: My Lady, I have no further questions.

MRS JUSTICE GLOSTER: Right. Thank you very much, Mr Adkin.

Anybody else wishes to cross-examine?

MR MALEK: I have no questions.

MRS JUSTICE GLOSTER: Thank you.

Mr Rabinowitz, would you like to start now or at 1.50?

MR RABINOWITZ: Indeed. I may actually be able to finish.

MRS JUSTICE GLOSTER: Very well.

Re-examination by MR RABINOWITZ

MR RABINOWITZ: Dr Rachkov, on Monday, two days ago, you told my Lady that where parties enter into a contract with the purpose of creating a company, this was a so-called foundation contract. Do you recall that?

A. Yes, I do.

Q. You also said that this foundation contract was recognised by Russian court practice and legal literature as a simple partnership contract. Do you recall that?

A. Yes, I do.

Q. Now, can I ask you, please, to go to bundle G(A)1/1,

tab 3, which is where you'll find your sixth report. If you go to paragraph 34, I think it begins at page 186 G(A)1/1.03/186. Do you have that?

A. I do.

Q. You refer there, you say:

"Another form of partnership contract is a foundation contract, by which parties agree to create a company. The Plenums of the Supreme Court and the Supreme Arbitrazh Court have confirmed that this is a joint activity contract (partnership contract)..."

And then you cite something from that. Can I just invite you, please, to go to G(A)2/5, tab 10. You may have been taken to this by Mr Sumption. This is a joint resolution of the Plenums of the Supreme Court and the Supreme Arbitrazh Court and can you just -- the English is at page 27 G(A)2/5.10/27. Can you just read this to yourself. (Pause)

MRS JUSTICE GLOSTER: I don't think we have been to this.

MR RABINOWITZ: I beg your pardon?

MRS JUSTICE GLOSTER: I don't think we have been to this document. We may have been, I just haven't taken a note of it.

MR RABINOWITZ: I'm not sure that we focused on -- maybe we haven't. The bit I think in particular, Dr Rachkov:

"A contract on the creation of a company being

concluded by the founders of a joint stock company is a contract of joint activity on the foundation of the company [and then it says] and bears no relation to the foundation documents..."

Do you see that?

A. I do.

Q. Can you say whether or not this is the joint resolution of the Plenums that you had in mind?

A. This is the resolution that I had in mind.

Q. Thank you. You can put that away now, thank you.

Can I ask you next, please, if you could take up bundle G(A)4/6 and go to tab 63. I think this may have been what Mr Sumption took you to. This is Sukhanov's writing on the law of obligations. Can I ask you, please, to look at page 69 G(A)4/6.63/69 and in particular the penultimate paragraph of that page. You see it says:

"The goal for which a simple partnership is created should be common (joint) for all participants of a simple partnership agreement. At the same time it may be of commercial or non-commercial nature..."

Then you see the examples he gives:

"... (making profit, construction of apartment building, [and then this] formation of legal entity...)."

Do you see that?

A. I do.

Q. Can you say whether this is part of what you understand to be the writings and practice in Russia which reflects what you said about parties entering into a contract for the purpose of creating a company making a simple partnership contract?

A. Yes, this is the writing to which I refer when saying this.

Q. You can put 4/6 away. Can I ask you, please, to go to bundle 7/1. On Tuesday, yesterday, you said in answering Mr Sumption's questions that there was at least scholarly opinion that the Civil Code of 1964 and the Fundamentals of 1991 proceed from the assumption that if the parties did not define their contributions, the contributions would be equal. Do you recall that?

A. I do recall.

Q. Now, can I invite you, please, to go to tab 1 of 7/1, the English starts for relevant purposes on page 7. Well, it doesn't start, the relevant passage is on page 7 G(A)7/1.01/7.

This is, as you see from page 5 G(A)7/1.01/5, a work produced by Professor Ryasentsev?

A. Ryasentsev.

Q. Ryasentsev. I apologise to you and to him.

If you then go to page 7, do you see -- perhaps I should just get the date of this as well, I'm sorry. Can you help us as to when this book was published, page 4 G(A)7/1.01/4?

A. Yes.

Q. 1964?

A. 1965.

Q. 1965. Then going back to page 7 G(A)7/1.01/7, do you see the second paragraph --

A. Yes.

Q. -- on page 7:

"The amount of each participant's contribution is determined by the contract. If it is not determined in the contract, the sizes of contributions are assumed to be equal."

Can you say whether or not this was part of the scholarly opinion that you were referring to?

A. Yes, exactly.

Q. Can you then go to tab 2 in the same bundle, please, the English starts at page 11 G(A)7/1.02/11. Can you tell us whose work is this?

A. It's the work by Professors Ioffe and Tolstoi and Cherepakhin.

Q. And when was this published?

A. It was published in 1971.

Q. If you go to page 13 G(A)7/1.02/13, can you look in particular at the sentence at the beginning of the last paragraph of that page:

"The amount of each participant's contribution is determined by the contract. In the absence of direct indications in the contract, all the participants provide contributions of equal size."

Can you say whether this also is an example of the scholarly opinion to which you referred?

A. Yes, this was one of the examples to which I referred.

Q. Can you finally just go to tab 3. There is English at page 18 G(A)7/1.03/18, a work edited by Professor Krasavchikov, 1973. Can I ask you, please, to go to page 21 G(A)7/1.03/21 and can you look in particular at the section in the middle of the page beginning with the bold letters:

"The duty of the participants in the contract..."

A. Yes.

Q. Just read that, if you would, to yourself, in particular the second paragraph. You see it also says there:

"The amount of the contribution of each of the participants in joint activities in property or in work is determined by agreement between the parties. If not otherwise established by agreement, the amount is assumed to be equal for all participants."

Can you say whether this is another example of the scholarly opinion to which you referred?

A. Yes, this is another example to which I referred when saying that the Civil Code of 1976 proceeded from the assumption that the contributions are equal unless otherwise regulated in the contract.

Q. Now, today Mr Adkin was asking you about whether in 1995 only a registered entrepreneur could conclude a partnership contract. You disputed that and said that you wished to refer to a case or cases in your report. If you can do that quickly, can I invite you please to go to 1/1, tab 3, I don't want to tell you where you wanted to -- do you have it in front of you, Dr Rachkov?

A. Yes, sorry.

Q. Can you just identify what case or cases you were referring to, that you wanted to go to in answer to Mr Adkin's question?

A. Yes. Well, the most significant case to which I referred was that mentioned in paragraph 37 of my sixth report --

MRS JUSTICE GLOSTER: Sixth report?

A. Yes.

MR RABINOWITZ: Page 187, 1/1, tab 3 G(A)1/1.03/187, is that right?

A. Yes.

MRS JUSTICE GLOSTER: Just a second. So it's B v S in paragraph 37, is it?

A. Correct.

MRS JUSTICE GLOSTER: And CJSC in 38?

A. Correct, and why is it so significant to my opinion? Because it is the judgment which was rendered by the Supreme Court of the Russian Federation. It was based on a foundation contract dated 23 December 1993 and the court explicitly said that this is an agreement on simple partnership.

MR RABINOWITZ: I have no further questions, Dr Rachkov. Thank you very much.

MRS JUSTICE GLOSTER: Those are the cases you were referring to earlier, are they, when Mr Adkin was examining you?

A. Yes.

MRS JUSTICE GLOSTER: Very well.

Thank you very much indeed, Dr Rachkov, for coming and giving your evidence.

THE WITNESS: Thank you.

MRS JUSTICE GLOSTER: Very well, you may be released.

THE WITNESS: Thank you.

MRS JUSTICE GLOSTER: Right, 2 o'clock.

(The witness withdrew)

(1.00 pm)

(The short adjournment)

(2.00 pm)

MRS JUSTICE GLOSTER: Yes, Mr Sumption.

MR SUMPTION: My Lady, I call Mr Rozenberg.

MR MIKHAIL ROZENBERG (sworn)

MRS JUSTICE GLOSTER: Please sit down if you would like to.

Examination-in-chief by MR SUMPTION

MR SUMPTION: Mr Rozenberg, would you give the judge your full name, please?

A. My name is Mikhail Rozenberg.

Q. Have you got bundle G(A)3/1 in front of you, I think you're about to be given it.

Now, you have prepared three expert reports for this trial, your third, fourth and fifth reports. Can you confirm that those three reports are the documents that we find behind the three flags of this bundle?

A. I confirm it.

Q. And do those reports represent your opinion?

A. Yes, they do.

Q. And are they the evidence that you wish to give on the matters on which you've been instructed in this hearing?

A. Yes.

MR SUMPTION: Thank you.

A. Thank you.

Cross-examination by MR RABINOWITZ

MR RABINOWITZ: Good afternoon, Mr Rozenberg.

A. Good afternoon.

Q. In your reports you identify a number of reasons why you say the 1995 agreement, and indeed the 1996 agreement, are invalid and ineffective, and I'm going to ask you, to begin with, questions relating to the reasons that you have identified.

I would like to start, if I may, with your contention that because the agreement between Mr Abramovich and Mr Berezovsky was in oral and not in written form, that of itself makes it impossible for Mr Berezovsky to establish either the 1995 agreement or indeed the 1996 agreement, okay?

A. Yes.

Q. Can I begin this topic by seeing what you and indeed the other experts say about this in the joint memorandum, and if you can be given bundle 6/1, G(A)6/1, and keep it handy because we will be going back to it regularly.

G(A)6/1, there's only one tab, if you can go to page 5 of that, it's to see paragraph 12 which is where you deal with this topic G(A)6/1.01/5.

Just going through this, you see, looking at paragraph 12(1) that you and Dr Rachkov agree as follows:

"If the 1995 [agreement] and 1996 Agreements were made in oral form as alleged, Article 161.1 would apply

to them, with the consequence provided by Article 162.1."

So it's common ground, is it not, that the consequences provided by Article 162.1 apply to the 1995 and 1996 agreements?

A. Yes.

Q. We have Article 161 and 162. If you go to G(A)4/4 behind tab 2, page 191 of this exhibit -- sorry, I've given a bad reference. It's page 29 of that exhibit, 4/4, tab 2, page 29 G(A)4/4.02/29. Okay?

Just have that open because we will need to refer to it.

Just going back -- do you see it, Mr Rozenberg?

A. "Transactions Made in Simple Written Form"?

Q. That's right. So just looking again at the joint memo, and then just looking at subparagraph 2 to see what else is agreed, you also agree that the consequences of 162.1 are, and you say:

"Article 162.1 prevents the parties from referring to sviedetelskie pokazania or 'witness evidence' to prove the existence of the agreement [or] its terms."

Do you see that?

A. Yes, yes, I do.

Q. At the moment -- I mean, do look at the article if you want. At the moment I'm just looking at what you and

Dr Rachkov have agreed about this. It's right then that what Article 162.1 does is to prevent the parties from referring to witness evidence to prove the existence of the agreement and its terms, right?

A. That's absolutely correct.

Q. Then subparagraphs 3 and 4, where you set out what you agree the consequences of 162.1 are not.

In subparagraph 12(3), you agree that:

"Article 162.1 does not prevent the parties from referring to ..."

Evidence other than witness evidence.

You say in the first sentence:

"Article 162.1 does not prevent the parties from referring to other evidence to prove the existence of the agreement and its terms."

Correct?

A. Correct.

Q. Then you give some examples of the kind of evidence to which the parties may refer. You say:

"The parties are entitled to refer to documentary evidence or some other kind of physical evidence (such as records, photographs or videotapes etc) to prove these matters."

So, tell me if this is right: the claimants can rely, for example, on a tape recording of a conversation

between the parties at the time of the relevant events before the litigation arose?

A. No, other evidence, such evidence, is possible.

Q. And that would include a tape recording of a conversation between the parties?

A. It's not prohibited by law. It's possible.

Q. Indeed Professor Maggs in his report has actually referred to a case in which the court allowed admission of a tape recording of the parties agreeing to the contract terms. Are you aware of that?

A. Yes, that's what Professor Maggs wrote.

Q. And you would accept that that accords with Russian law?

A. I see nothing contradicting it so I can agree.

Q. Thank you.

Then just going to subparagraph 4, you agree this, just looking at the first three sentences of subparagraph 4 of paragraph 12 of the joint memo:

"Article 162.1 does not itself prevent the parties from referring to their own... explanations to prove the existence of the agreement and its terms. Such explanations are a type of evidence, but they are not... 'witness evidence', and they are not precluded by Article 162.1. As noted below, however, it is disputed whether the parties' explanations have any independent weight (absent any documentary or physical proof)."

A. Yes.

Q. So just pausing here, you appear to agree with the following. First, you agree that Article 162.1 does not itself prevent Mr Berezovsky from relying on his own explanations to prove the existence of the agreement and their terms, that's right, isn't it?

A. Yes.

Q. Secondly, you agree that Mr Berezovsky's explanations are a type of evidence; that's right, isn't it?

A. That's right.

Q. Yes. And third, you agree that Mr Berezovsky's explanations are not witness evidence within the meaning of Article 162.1 and so are not precluded by Article 162.1, correct?

A. Obyasneniya, it's written in Russian, but explanations, party explanations, are not prohibited of course. Actually they're required.

MRS JUSTICE GLOSTER: Can you just explain to me what an explanation is?

A. I would say that it's the type of evidence closest to witness statements but given by the parties. And from the point of view of procedural form, both in courts and in arbitrazh procedural courts, they look almost like witness statements, with the difference that witnesses are warned that they will have to bear criminal

liability in case of lying to the court, and parties are not informed about it.

And the second difference is that, of course, usually explanations of the parties are broader because parties reflect their position regarding the whole case, and witness evidence usually relates to particular episodes or particular parts which are important.

But from the point of view, form, and how it goes in courts, are just individuals explaining to the court, explain -- answering questions of lawyers whether they are parties, whether they are witnesses from the point of view of a person sitting in the courtroom.

It may look similar, but their legal weight, the importance of this evidence, is absolutely different because, first of all, both the Civil Procedure Code and the Arbitrazh Procedural Code require that evidence should be checked and evaluated in connection with other evidence.

And this brings the court to the situation when there is only one party's evidence and nothing else. It's important to verify this evidence and to evaluate in accordance with other evidence. But when there is at least one witness, it's already possible to evaluate the witness's evidence in connection with explanations of the parties.

MRS JUSTICE GLOSTER: So if, for example, one had an oral contract for the sale of a car between A and B, B says the contract was never made for the sale of the car, A said it was made, C is a bystander who heard the conversation. Is what A says and what B says explanation and what C says evidence?

A. Unfortunately the word "evidence" is used also regarding explanations, it's also a type of evidence. But you are absolutely right that C's statement -- because C is a witness, it will be witness evidence which, as I write, and I'm sure I confirm again, has much bigger legal weight because it's always possible to compare C's witness evidence at least with parties' explanations, with parties' evidence.

But in the absence of C, it's practically impossible for the court to compare the parties' explanations with any other evidence.

MRS JUSTICE GLOSTER: So all Article 162.1 would prevent, if it applied, would be to prevent C giving evidence of the conversation?

A. Correct. If this is a dispute regarding oral form of the transaction then C's -- if this agreement, sale of the car, was not in writing, if it was an oral agreement, then in order to confirm the existence of this transaction and of its terms it will be impossible

to refer -- actually it will be impossible to call C as a witness for confirmation of the circumstances.

MRS JUSTICE GLOSTER: But A and B can give their evidence as to whether the conversation took place or did not take place?

A. Yes.

MRS JUSTICE GLOSTER: But it's got limited weight.

A. Yes. But in the absence of C, and in the absence of any other evidence, it will be really a sad situation for the claimant, I would say.

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

Sorry, Mr Rabinowitz.

MR RABINOWITZ: So it's a rather narrow exclusion because it excludes -- it doesn't exclude evidence from the parties at all, you say, other than the fact that it's given a different name; it's in effect the evidence of the parties, it simply excludes the evidence of third parties?

A. It excludes the evidence of witnesses. Third parties sometimes participate in trials, it's a different story.

Q. All right. I think it's becoming a lot clearer, thank you, Mr Rozenberg.

A. My pleasure.

Q. I think it becomes even clearer if we go to your second report at J2/5, tab 37 and you go to page 113

J2/5.37/113. You have paragraph 27, do you see that?

A. Yes.

Q. And you say here:

"However, according to statutory rules of proof, each piece of evidence shall be evaluated by the court in conjunction with the other evidence in the case and no single piece of evidence has any predetermined value ..."

A. Yes, this is what the law says.

Q. So the law makes it clear that no piece of evidence has any predetermined value.

Then you say that this applies to evidence of subsequent conduct as much as anything else.

Then in paragraph 28, you continue as follows:

"Also, as follows from the Procedure Codes, a court may only accept evidence which relates to the case under consideration. The scope of evidence accepted is at the court's discretion and depends on the object to be determined by the court, to be established for the proper settlement of the dispute. Evidence that proves or disproves the circumstances related to the object to be proved will be related evidence. Accordingly, evidence unrelated to the object to be proved shall not be accepted by the court. Although of course this does not restrict the parties to the court proceeding from

submitting whatever evidence to the court that they believe to be relevant, the weight to be attached to, or the admissibility of, such evidence will be a matter for the court."

A. Yes.

Q. So again you're saying that there is no single piece of evidence that has any predetermined weight, and that the weight to be attached to the evidence, and indeed its admissibility, is a matter for the court, correct?

A. That's correct.

Q. Then if we turn to page 155 of this report, paragraph 142 J2/5.37/155, at the bottom of the page, you see you say here:

"I agree with Mr Rachkov at paragraph 79(5) of his report that the pleadings of the parties would be an admissible proof of evidence with respect to oral agreements; however, this evidence will not have any independent evidential [significance] ..."

Then you carry on at paragraph 143:

"Russian procedural law recognises the following types of evidence: written evidence and material objects, explanations (pleadings) of the parties, expert opinion, witness statements, audio and video recordings, and other documents and materials ..."

Then you cite various statutes.

"Therefore, witness statements and pleadings of the parties are different types of evidence, and since Article 162 of the Civil Code (which is a substantive rule of law, and not of procedure) restricts only witness statements from proof of an oral contract... it may be concluded that the pleadings of the parties are not restricted to be used as such."

I think you've explained to my Lady that where you're referring to explanations of the parties, it's not just their formal pleadings, it's what they actually say, the evidence that the parties give; correct?

A. That's correct.

Q. Thank you.

Again, I think you've confirmed this, but the parties' explanation, while you say that the parties' explanation have no independent evidential significance, you accept that they are a type of evidence which is different to witness evidence and which is not restricted by Article 162.1?

A. That's correct.

Q. Thank you.

We can see this distinction again if you go to Article 64.2 of the Arbitrazh Procedural Code. You'll find that at G(A)2/1, tab 8, page 192 G(A)2/1.08/192. The Russian starts earlier, the English starts at

page 192.

Again, this is making the point that this is all evidence, you see the heading "Evidence":

"Evidence may take the form of written and material evidence, explanations of the persons participating in the case... witness evidence, audio and video recordings..."

So again that emphasises the fact that this is all evidence, does it not?

A. Yes, yes, I agree. I confirm.

Q. In fact the only dispute between you and Dr Rachkov, this is right, isn't it, is over the weight that is to be attached to the explanations of the persons participating, the explanations of the parties. That's right, isn't it?

A. It is a very serious disagreement, that's correct.

Q. No, but that is the only disagreement though, isn't it?

A. Well, regarding all the issues, or regarding what?

Q. Regarding this particular issue relating to 162.1.

A. Well, I remember about substantive and procedural laws, there were some other disagreements, but it's a serious disagreement.

Q. This is the core of the disagreement in terms of the admissibility of the evidence. You say this is all evidence, it all goes in, but there is a dispute as to

the weight that is to be attached to the explanation of the parties?

A. I'm sorry, I disagree with the word "admissibility" because at least there is no dispute between Mr Rachkov and me that evidence of the parties, explanations of the parties, are clearly admissible. It's only regarding the witness statements.

Q. All right. Let's just see if we can clear up any confusion about this.

If you go back to your joint memorandum, and you go back to page 6, so bundle 6/1, if you look at paragraph 15 on page 6 G(A)6/1.01/6, we see how this dispute about the weight is described. Paragraph 15 says:

"It is disputed whether a party's explanation has any independent weight to prove an oral agreement or its terms in and of itself.

A. Yes.

Q. If we then look at subparagraph 1, we see that you and Professor Maggs state your collective position:

"Mr Rozenberg considers (and Professor Maggs agrees) that the parties' explanations or pleadings, independent of any other documentary or physical proof, have de minimis weight in a Russian court, and in a situation where an oral agreement is supported only by a party's

explanations such agreement cannot be established."

So that's your position, is it?

A. Yes, that's correct.

Q. Can you go to bundle G(A)7/1, tab 21 at page 186, please G(A)7/1.21/186?

A. Yes.

Q. Now at this tab, Mr Rozenberg, you should see Professor Maggs's book entitled "Law and Legal System of the Russian Federation", do you have that?

A. Yes, I can see it.

Q. Okay, thank you. I just want to show you what Professor Maggs says here about this and related topics and get you to comment.

On page 189 G(A)7/1.21/189 you can see that --

A. I'm sorry, it looks like it starts from 400.

Q. You need to be looking at the pages on the bottom right-hand side.

A. Yes.

Q. You can perhaps pick it up at page 187. Do you see, if you go to page 187, you should have just the page with the copyright date G(A)7/1.21/187.

A. 187 is actually the cover.

Q. Well, it's the inside cover perhaps.

Do you see that this book was dated 2009?

A. Yes.

Q. Then if I can ask you, please, to go to page 193, again using those same numbers. They're not that easy to read.

A. Okay, now I understand how it works.

Q. Very good.

A. 193.

Q. Please G(A)7/1.21/193.

You see Professor Maggs is dealing, just looking at the right-hand side, with aspects of the civil trial in Russia. If you then go over to page 194 --

A. Yes.

Q. -- just picking it up on the bottom paragraph on the left-hand side of the page, we see that Professor Maggs is talking here about the Civil Procedure Code and he says this:

"Current Art 12(2), by contrast, requires that the judge 'create the conditions for a complete examination of the evidence from all sides, the establishment of the factual circumstances and properly application of the law in the trial and decision of the civil case.' The evidence 'is to be presented by the parties.' If the evidence submitted by the parties is inadequate, the court may propose that the parties submit additional evidence and [that] the court, at the request of the parties, is to assist the parties in assembling that

evidence. An admission by a party is to be taken as true and is not subject to further evidentiary hearing unless the court finds that 'it was made for the purpose of concealing the circumstances of the case and [I think he must mean 'or'] was made by the party under the influence of fraud, force, a threat or a good-faith mistake'."

Do you agree with this so far, Mr Rozenberg?

A. Yes, even just absence of 'or', and here, because simply it's a direct translation from Russian. Yes, it's the law.

Q. Thank you. At the right-hand side of the page, we see in the paragraph at the top of the page that Professor Maggs also says this:

"At the same time the incidence of judicial control and activism during the trial are considerably greater than would be the case in a common-law adversarial trial. Thus, while the parties must prove their claims and defences, trial judges determine what issues are important, what evidence will be examined at trial and in what order witnesses are to be heard. Judges have the right to interrogate the witnesses and parties at any time and, in practice, often do so..."

Wouldn't that be nice, my Lady?

"... if they believe the parties are off the track."

That is right as well, is it not, Mr Rozenberg? The judge may interrogate the parties and witnesses and ask them questions?

A. They always do.

Q. They always do, thank you.

Then lower down --

MRS JUSTICE GLOSTER: There are obviously some lessons to be learned here.

MR RABINOWITZ: Lower on the right-hand side of the page, Professor Maggs has a section entitled "Elements of Proof at Trial" and one sees that he says this:

"The Civil Procedure Code lists the permissible means of proof: explanations of the parties and third [parties]; testimony of witnesses; documentary evidence; physical evidence; audio and video recordings and; conclusions of experts."

Then separately he says:

"Parties' Explanations. The oral explanations of the parties are not given under penalty of perjury, but are considered to be a form of proof the court must take into account along with the other evidence. Normally, the court will require other evidence, such as police accident reports, in addition to party explanations.

"Witness Testimony. Witnesses who are summoned by the court to appear at the trial must testify and

testify truthfully under penalty of the criminal law, unless they claim an exemption from the obligation to give evidence. Before taking testimony, the judge must warn the witness of these sanctions and their obligation to [tell the truth]... The witness's testimony begins when the judge asks the witness to state everything the witness knows about the matter in dispute. After this narrative account is given, questions by the parties are permitted, with the party at whose request the witness was called to testify asking questions first, followed by the other parties."

Can we just break down what Professor Maggs appears to be saying here, Mr Rozenberg. First he describes the explanation of the parties as a different form of witness testimony, do you see that?

A. Yes, that's what I said, it looks similar.

Q. Indeed. You agree with that, yes?

A. Yes.

Q. And second he says, and this is the first sentence of the paragraph entitled "Parties' Explanations":

"The oral explanations of the parties are not given under penalty of perjury, but are considered to be a form of proof the court must take into account along with the other evidence."

So what Professor Maggs appears to be saying here is

that the oral explanation of the parties are a form of proof which the court must take into account along with the other evidence, is that correct?

A. I wouldn't say so categorically because what does it mean, "the court must take into account"? Very often I can read in the judgments that the court does not take into account explanations of a party because these explanations contradict witness statements, other evidence and so on. Therefore, it depends what sense just we understand in these words.

But the key point here is that, of course, the law both now in Russia and in the Soviet times always released a party from criminal liability for lying and, therefore, the attitude of courts to parties' explanations is absolutely different in comparison with witness statements.

Moreover, the reason for releasing parties from criminal liability for lying to the court, and actually is reflected in some scholars' writings, is that it's clear for the court that parties have very strong personal interest in presenting their explanations and, therefore, it's practicably impossible to concede -- to evaluate them with the same attitude like witness statements and other evidence. This is the key point.

But, of course, to deprive parties from right to

give explanations, and to ignore them, would mean violation of law, and courts need to evaluate this type of evidence in connection with all the other evidence. But it's really a very special type of evidence.

Q. I think in the last sentence of that rather long answer you rather agreed with what Professor Maggs says. You may choose slightly different words.

Professor Maggs is not saying you have to take them into account in the sense that you have to accept everything that they're saying. What he's saying is that you have to have regard to them, not that you have to believe them, do you follow?

A. Yes, I do, simply very often it's like a cliché, just we can read in judgments that the court cannot take into account parties' explanation because it's not supported by other evidence, contradicts the following or the following evidence.

But from the point of view of just putting words in the right order, if you mean that to pay attention, taking into account, then of course the court must pay attention, but eventually may reject them.

Q. Of course they may reject it, Mr Rozenberg, but they have to have regard to it. They may plainly reject it because they may think "This is not supported by anything and I don't believe it," but they have to have

regard to it, as Professor Maggs says. Do you agree with that?

A. Yes. I keep repeating that the court must not only regard them but evaluate them.

Q. Absolutely.

A. The court must evaluate parties' explanations, the court cannot ignore them.

Q. Then just looking on to what Professor Maggs also says, and this is in the last sentence of the paragraph entitled "Parties' Explanations", he says:

"Normally, the court will require other evidence, such as police accident reports, in addition to party explanations."

So what Professor Maggs in this book seems to be saying -- or let me put that slightly differently, what Professor Maggs in this book does not say is that the parties' explanation must always be supported by independent evidence. He says the court will normally require other evidence to support parties' explanation. Do you agree with that, Mr Rozenberg?

A. Well, when we speak about civil cases, I think I would generally agree because, strictly speaking, this is the parties' obligations to prove circumstances on which they base their claims and objections. Therefore, the court normally and usually requires, but if nothing is

submitted it's the parties' fault.

Q. Okay. Then if we turn over, back to Professor Maggs's work, if you go over to page 195 G(A)7/1.21/195, and you look at the top right-hand side of the page, you see the paragraph beginning:

"Consistent with the civil law tradition..."

He says this:

"Consistent with the civil law tradition, Russia has few strict exclusionary rules of evidence. Since exclusionary rules of evidence are necessary to protect inexperienced jurors from being swayed by unreliable evidence, the use of professional judges obviates the need for them. In general, then, all relevant evidence will be considered for whatever probative value it might have. A related principle shared by both common-law and civil law systems is the principle of 'free evaluation' of all the evidence. Thus, no particular kinds of evidence have any predetermined weight or hierarchy of value."

So he says that there is no kinds of evidence with "any predetermined weight or hierarchy of value". Then he continues:

"This principle has some legal and practical limits, however ... For example, failure to put an agreement in writing will in some cases deprive the parties of the

right to rely on witness testimony as to its content."

If you look at footnote 269 on the bottom right, you can see there's a reference there by Professor Maggs to Article 162.1, so it's clear he has that provision very much in mind.

A. Yes, I can see.

Q. What Professor Maggs then says, I'm looking at the next paragraph --

MRS JUSTICE GLOSTER: Sorry, what page are you on?

MR RABINOWITZ: If my Lady has page 195, we're in bundle G(A)7/1, tab 21.

MRS JUSTICE GLOSTER: I'm still in Professor Maggs' work, am I?

MR RABINOWITZ: Indeed.

MRS JUSTICE GLOSTER: Yes, I am there. I was looking at the books and page numbers, I apologise.

MR RABINOWITZ: On the book page it's 411, my Lady.

MRS JUSTICE GLOSTER: No, I'm there, thank you. I've got it now.

MR RABINOWITZ: Right, we'll carry on then.

A. So far, mostly these are citations from the Civil Procedure Code and from the Civil Code.

Q. All right, let's just see what Professor Maggs then says, shall we?

So he's identified the fact that no kinds of

evidence have any predetermined weight or hierarchy of value, and the fact that there are some cases in which failure to put an agreement in writing will deprive the parties of being able to rely on witness testimony.

Then he carries on to say this:

"There are also intuitive tendencies towards an informal hierarchy of probative value that are perhaps universal. For example, documentary evidence tends to be favoured over testimony. Also, opinions of court-appointed experts may carry greater weight than witness testimony. In addition, party explanations are looked at with some skepticism. Similarly, while there is no prohibition against hearsay evidence, in general it is given little weight unless it is supported by other evidence."

So what he appears to be saying here, Mr Rozenberg, is this: first he is referring to what he calls intuitive tendencies which are perhaps universal -- I would say calls accurately -- intuitive tendencies which are perhaps universal. He is not referring to the rules of law but to the natural way in which judges assess evidence, correct?

A. That's correct, and I would support Professor Maggs's view because the law requires an impartial attitude of the court to all evidence and states that no evidence

has predetermined value. In practice, of course, some evidence, especially expert reports, and especially in some areas like, for example, medical knowledge, of course has much greater value than other evidence.

Q. Indeed, I don't disagree with any of that.

The second thing Professor Maggs does is he gives us an example: the natural tendency to favour documentary evidence over testimony. Do you see that?

A. Yes, especially in commercial disputes.

Q. Indeed. And again, you would describe that as a universal tendency and I don't think anyone would disagree with that.

Then he says, the third thing that one can find Professor Maggs saying here is that: party explanations are looked at with some scepticism.

Do you see that?

A. Of course.

Q. So he doesn't say that they will automatically carry no weight unless corroborated by independent evidence, he says they are considered critically, does he not?

A. He cannot say that they have zero weight because it would contradict the law. The law recognises explanations of the parties as evidence and requires to evaluate them, but scepticism and minimal weight, what is reflected in our joint memorandum, is the reality.

Q. So you agree, in fact, with the way Professor Maggs puts it here, don't you?

A. Generally I agree.

Q. Is it nonetheless your view that the parties' explanation carries no weight unless corroborated, which is the way you've put it in your report?

A. Unless supported by other evidence.

Q. So you say it carries no weight unless corroborated, no weight at all?

A. If it's not supported by other evidence it's practically zero weight.

Q. Well, practically zero weight, so close to no weight, yes?

A. Well, theoretically, if a party gives explanations and withdraws the claim though it has weight, but these are extreme situations.

But generally, from the point of view of evaluation of evidence, if there is only a party explanation and no other evidence, if the party explanation is not supported by other evidence, then from the point of view of evaluation of evidence, yes, it's practically zero weight.

Q. Right. But you wouldn't suggest, would you, that it would be okay for the judge to disregard the parties' explanations? That would be inconsistent, would it not,

with the judge's duty to consider all evidence?

A. Absolutely correct. The judge cannot simply ignore. The judge would write that, after having considered evidence, the court comes to the conclusion that parties' explanation is not supported by any other evidence and therefore it cannot be in the usual way(?) taken into account or taken into consideration.

Q. All right. I think the dispute between us is a lot narrower than I had understood it to be.

Perhaps we can just see really whether there is anything left in this particular dispute, Mr Rozenberg. Can I put to you a hypothetical example and just get your reaction to this.

Let us suppose that I go to work for my uncle who lives alone on his farm. I'm going to give you the story and then ask you to comment. I don't really have an uncle with a farm but let us suppose that I did and I worked on that farm.

After a number of months the farm burns down and all records are lost, okay? I say that my uncle owes me money for the last three months when I have worked on his farm, I say we had a written agreement but it burnt in the fire. My uncle denies having ever met me -- not uncommon in my case. I say that it isn't true, and under the judge's interrogation my uncle admits that it

isn't true, and he accepts that I have spent the last three months working on his farm. But he still denies that he owes me any money, he says I was working for him for free.

Now, the judge is convinced that my uncle is still not telling me the truth but no other evidence can be found because the fire burnt anything (sic), and there are no other witnesses.

Do you say that this is a case in which the Russian court is incapable of doing justice?

A. I wouldn't say. Of course it's a very interesting case, and thank you for giving such example, because the first question in Russia would be whether there was an employment agreement or a civil law agreement, whether you were working as employee in the company or if you were providing services on the basis of civil law contract, and different legal rules apply.

However, I understand that basically it was a civil law agreement, there were no other employees there, and he was not like a boss in the office, simply you were a contractor, something like that. If it was a civil law agreement, then after confession of your uncle who, as I understand, should be the defendant in this case, you brought a lawsuit against him, you didn't specify it but I understand that.

Q. He is the defendant in this case.

A. So then the party's explanation, I mean your claimant's explanation, is not the only evidence. Suddenly enough your explanation is supported by the confession of the defendant who agreed that you were working, and working for a long time, right?

Q. Well, that's as far as it got: he denied that he owed me any money, Mr Rozenberg.

A. No, but first he agreed that you were working for him?

Q. He confessed, as you put it, to that, yes.

A. Yes, it's very important, because then he should answer questions on what basis you were working a long time for free, and the question would be what kind of work you were performing.

And, of course, just judges in Russia and in the Soviet Union very often use -- were using, and are using, the wording like the explanation of the party, which contradicts explanation of the other party. It would be already regarding the evidence of your uncle. It doesn't look credible and appears to be something the defendant simply -- well, usually in Russia the word "invented" is used, but it means that the court does not trust him.

Therefore, in your story, it's not so simple and easy that in the absence of a written agreement it's

hopeless, then it will be necessary for your uncle to explain why a normal person agreed to work several months performing rather hard labour for free.

Q. And at the end of that rather long explanation, Mr Rozenberg, would you accept that the Russian court, with the judge who simply doesn't believe any explanation that the defendant, my uncle, gives, is able to do justice by coming to a conclusion, if this is the conclusion he is convinced is the case, that my uncle does owe me money, because there was a contract under which he had not paid me?

A. It's very difficult and practically impossible to imagine the situation you described, that it would be just absolutely no other evidence because probably, if it was a farm, there should be some records for the tax authorities, some --

Q. Yes, but they burnt down, Mr Rozenberg, that was the example I gave you. There was no evidence.

A. There is just a citation, I'm sorry, from a very popular Russian book that handwritings cannot be burnt, something always remains, there should be some other documents in the tax inspectorate, there should be some signs whether the production --

MRS JUSTICE GLOSTER: But stick to the hypothesis. What's your answer if you stick to Mr Rabinowitz's hypothesis?

A. If nothing remains, there are only explanations of the parties, and still the uncle could not explain why and on what basis a normal person, not mentally sick, preferred to work many months performing hard labour for free, then in my view chances are high that the judge probably would check what is the normal salary in this region for this type of work, and would probably award you some monetary remuneration, because otherwise simply the party's explanation, I mean the defendant's story, looks absolutely incredible.

MR RABINOWITZ: All right. Thank you very much for that. I think in the end we got to the result where you say the judge would do justice and would give the claimant his award.

Now, I want to change the facts --

A. I am sorry, of course I cannot guarantee, but that's what appears to me. The probability is high.

Q. I'm not asking you to guarantee anything, Mr Rozenberg, it was only a hypothetical example so it will never get tested.

MRS JUSTICE GLOSTER: Maybe the hypothesis should include the fact that the uncle had promised, or said he'd promised, the house to the nephew if he worked for free.

A. Ah, it would be different story.

MR RABINOWITZ: Then one would have an ambiguity.

But let's just go a little more slowly than that, shall we?

Let's consider the facts, that the facts are as follows, because I want to ask you about the degree of corroboration from supporting documents that you say is required, and I think, in light of what you said in answer to the previous question, I know what you will say.

So consider the facts as follows: once again I go to work for my uncle on his farm and we make a written agreement. Once again there is a fire and his business burns down and nearly all records are burnt. Okay? So this is getting closer to what you wanted to change my hypothetical example to be.

This time, however, I have bank accounts showing that my uncle has been paying me money for the past year, and that therefore undermines his story about me working for free. Presumably on those facts you would accept that the judge would be entitled to accept my explanation and grant my claim if he, the judge, was satisfied that I and not my uncle was telling the truth, given that the bank accounts corroborate my story and discredit his story?

A. As far as I understand, in this case, simply additional evidence appeared.

Q. Yes. Do you --

A. Of course I would say that chances are high in this situation for you to win the case if just everything remains the same and noted parties are involved, then nothing else affects my previous conclusion.

Q. All right. Then can we change the facts a little bit further, just to bring it a little bit closer to the facts of this case. It's still very, very far away, but a bit closer.

Let us suppose that my uncle admits that he hired me and admits that he owes me money, what he disputes is how much money he owes me. In particular, I say that when he hired me he agreed to pay me 10 per cent of the profits of the farm, he disputes that and says I was only entitled to a fixed salary.

Let us suppose that my bank statements show irregular payments, in other words payments not consistent with a fixed salary being paid. So assume that the bank accounts corroborate my story, first, that I was not an unpaid worker and, secondly, that I was employed but not at a fixed salary.

On these facts, would you accept that the judge was entitled to accept my explanations and grant my claim if the judge was satisfied that I and not my uncle was telling the truth?

A. Getting the truth, I have to check whether it was clear from the bank account that all the money was transferred directly by your uncle to your account.

Q. Then let's assume that to be the case. We're talking about payments coming from my uncle and they were of irregular amounts.

A. The uncle would be questioned by the judge and asked whether all the money he was transferring was only the salary or something else, and if something else, on what basis.

And if your uncle gives a credible story, in the absence of any other evidence, probably regarding amounts, the explanations of your uncle shall be taken into account because there is no other evidence.

However, if there is no explanation what else constituted these payments besides the salary, then probably chances are high that the court will share your view, your line.

Q. Okay. Now I want to add just a further piece of supporting evidence. Let us suppose the documents are recovered from the fire showing the profits made by the farm, and let us suppose that the payments which my bank account show my uncle has made to me happen to correspond to 10 per cent of those profits, the very percentage I am claiming. Presumably you would accept

that that would be sufficient to allow the judge to decide the claim based on her inner conviction of the truth, having heard only from the parties and this being the only evidence?

A. Again, the situation with the parties' explanation, as I said, is never simple. If there is only parties' explanation and nothing else, such explanation would fail, they have practically no legal value. If parties' explanation are supported at least by the other parties' explanation, like in the case with your uncle, and there is no other credible explanation of the facts, then chances are high that the court will take this as proven fact.

But in addition, if there are some documents, as I understand, which also confirm, and written evidence, as we read, has big importance in Russian courts, if in addition to your explanation, in other words, the court's judgment may look like statement that claimant's explanations are supported by -- partially by the defendant's explanations and also by the documents attached to the fire.

Q. All right. I'm going to change one more fact here and then I'm going to leave this.

Let us suppose that I find a voicemail message on my mobile from my uncle, in other words a recording, and it

says, this is what the voicemail says:

"Well done for the hard work, it's been a good year, I'm sure you will enjoy your share of the profit."

Presumably that also would be sufficient to allow the judge to decide the claim based just on that, and having heard from the witnesses, one of whom, me, he believes, and he doesn't believe my uncle, yes?

A. I'm sorry, you deserve some share of the profit, but the numbers would be indicated.

Q. Well, we're adding that to the evidence I've just referred to earlier where the bank account details show that my uncle has been paying me an amount which corresponds to 10 per cent of the profits.

A. It looks like you have a winning case.

Q. A slam-dunker.

A. Just one last question: I understand from the very beginning that the respondent, ie your uncle, never denied that the agreement in writing just was destroyed in fire, right?

Q. He did not dispute that.

A. He did not dispute it. Well, then just a situation where apparently there was no violation of law, all requirements of law were observed, the work was performed, and just from the record it looks like the uncle was satisfied, and there is no contradiction, no

contradicting evidence, then your chances are very high, I would say.

Q. Just to sum up this topic I'm going to suggest some conclusions and you can tell me whether you agree or disagree.

First, the supporting evidence that you say is necessary to corroborate a party's explanation need not expressly confirm every disputed fact?

A. Need not; I said I think that party's explanation always shall be supported by something, at least, as in your example, by the other party's explanation, but without such support just it will fail.

Q. Yes, but it doesn't need to confirm every disputed fact? None of the further pieces of evidence which I referred to in the examples expressly confirmed that I was hired on terms entitling me to 10 per cent of the profit of the farm, and yet each, I think you accept, was sufficient to allow the judge lawfully to decide the claim in my favour?

A. Yes, but we spoke about the decision either in your favour or a possibility to dismiss the claim.

But you mentioned every fact; usually courts are not obliged to analyse every fact if the case may be resolved without giving evaluation to every fact. The most important facts must be evaluated.

Q. Secondly, the oral form of the agreements does not prevent a party from seeking to establish those agreements by a combination of his own explanation, the other party's evidence and admissions, and documentary or physical evidence including tape recordings? Do you agree?

A. That's what in general the law states.

Q. Third, the judge is required to evaluate all of this evidence separately and together as a whole, and using his or her own inner conviction, based on a comprehensive, full, objective and first-hand study of the evidence available in the case, and if the judge is satisfied that an oral agreement was made, then the judge is entitled to find that as a fact, correct?

A. Yes, I think usually the key words, "in accordance with the law", are used, but it's correct.

Q. Fourth, Article 162.1 does not exclude the oral explanations of the parties or documentary or physical evidence, it only excludes witness testimony, and that only means the sworn evidence of non-parties; I think you've agreed with that already?

A. Yes, yes, we agreed.

Q. And fifth, Article 162.1 does not render an oral contract invalid, it simply excludes one form of proof, it restricts the range of evidence that may be admitted

in a Russian court, correct?

A. Just oral contract may be invalid in some instances clearly indicated in the law, like for an economic transaction, for example. But in general it's correct.

Q. Thank you. And sixth, Article 161 is a substantive rule which has only a limited procedural effect, correct?

A. I would agree it's not quite clear for me why only limited to some procedural effect, that's correct.

Q. All right, the procedural effect that we've been discussing.

A. Yes.

Q. Thank you very much.

All right, I think we can leave that topic and go on to another of the grounds that you identify for saying that the 1995 agreement was invalid or ineffective or incomplete, and that's intention to create legal relations.

Can we see what you say about this if we go to bundle G(A)3/1 at tab 2 where we have your fourth report, if you go to page 148 of that G(A)3/1.02/148.

Now, before we look at what you say here, Mr Rozenberg, I just want to be clear about this. My focus at this stage is on what you say about the question whether the parties intended their agreement to be legally binding. Of course, there is some overlap

with other topics, such as the topic we've just looked at, namely proof of oral agreements, and the topic we'll come to next, namely the certainty of the contract, but at this stage I am just on the question of whether the agreement was intended to be a legally binding agreement. Do you follow?

A. Yes, that's very important.

Q. Presumably you also understand that the position of Mr Berezovsky on this issue is that this is an issue in which your opinions and indeed Russian law are wholly irrelevant because the question whether the parties intended their agreement to be legally binding is a question of fact to be decided by my Lady in accordance with the ordinary English rules of evidence and proof. Do you understand that that's Mr Berezovsky's position?

A. Yes, that's clear.

Q. The lawyers for Mr Abramovich have a different position, as I understand it, and that is why I need to ask you some questions about it, okay?

A. I understand.

Q. Now, just looking, if you would, Mr Rozenberg, at paragraph 275, in paragraph 275, and I'm picking it up in the middle of this paragraph, page 148 of bundle 3/1 behind tab 2 G(A)3/1.02/148, you say:

"The limited consensus of the parties alleged in relation to certain projects, on the Claimant's case, fell far short of establishing a sufficiently precise, binding agreement. The alleged agreement is hopelessly vague and imprecise. I am strongly of the view that a Russian court would not enforce it and would not regard it as having been intended by the parties to create legally binding obligations."

Then in paragraph 276, you say this in the first sentence:

"First, the vague nature of the parties' purported obligations suggests a complete absence of objective intention to enter into a legally binding contract."

Then just looking at the last sentence of paragraph 276, you say:

"Reasonable commercial parties would not intend to be legally bound by a vague obligation to 'coordinate contacts' or 'raise funds' (as the Claimant alleges) because it is too difficult to give objective meaning to these activities."

Then just paragraph 7 (sic) if I may, you say here:

"Clearly, the purported obligations of Mr Berezovsky and Mr Patarkatsishvili could not have been enforced through the Russian judicial system; the court could not bind Mr Berezovsky to use his 'connections' to ensure

privatisation of Sibneft for his own benefit through the issuance of the August Decree or oblige Mr Patarkatsishvili to invoke his business contacts to achieve the agreed goal. It is impossible to determine an objective standard by which the performance of such obligations could be measured or damages for any non-performance assessed."

Now, in these paragraphs, Mr Rozenberg, you seem to be drawing two conclusions. Your first conclusion is that the 1995 agreement was too vague and incomplete to be a binding agreement, correct?

A. Yes.

Q. And your second conclusion is that because the 1995 agreement was, you say, vague and incomplete, it follows, you say, that the parties did not intend the agreement to be legally binding, correct?

A. Yes.

Q. Can I ask you this, does your reasoning apply in reverse? If the agreement was sufficiently precise and complete to be a binding contract and if it was in writing, would it follow that the parties did intend their agreement to be legally binding?

A. If it's in writing specifically precise and comprehensive, then of course I leave aside the questions of validity of certain provisions. But it

would appear that there is a sufficient basis for a conclusion that the party really had intention to be legally bound by this agreement.

Q. So you do say that your reasoning applies in reverse?

A. If the agreement is in writing and indicates in details parties' rights and obligations, yes, there is no basis for a conclusion that the participants of such agreement had any other goal rather than to enter into legally binding agreement.

Q. So it follows then, doesn't it, that your second conclusion about whether or not the parties intended their agreement to be legally binding actually adds nothing to your first conclusion? If the agreement is too vague and incomplete to be a binding agreement, then why does it matter whether the parties intended their agreement to be binding? Either way the agreement will fail, do you agree?

A. It's not quite clear for me because, usually, if parties prefer to conclude not an agreement but something what we call protocol of intent or letter of intent, they're satisfied by very vague and general wording of the planned actions and of the planned obligations. If they want to have the agreement legally binding, they prepare just something what can be legally enforced through the Russian judicial system as a rule.

Therefore, just the fact that there was no such agreement which could be enforced in Russian legal system brought me to conclusion that parties never wanted to be legally bound.

Q. And in that sense, Mr Rozenberg, your second point adds nothing because your second point is entirely predicated on your first point. In other words, you are saying, "I think that the agreement was vague and incomplete"; and because of that you're saying, "That tells me that there was no intention to create legal relations", correct?

A. Not precise, incomplete in the oral form. These facts, in my view, if considered by a court, would bring the court to a conclusion that there was no intention to create a legally binding agreement.

MRS JUSTICE GLOSTER: Can I just get away, for a moment, from your views as to the application of the principle to the facts and just concentrate on the principles. Is there a separate requirement under Russian law of an intention to create legal relations in order for there to be a binding contract?

A. Just the law is rather short. The law requires that the parties should agree on all essential terms in the form prescribed by law and this should be the basis for the conclusion that parties intended or that the will of the

parties was directed at conclusion of legally binding agreement.

MRS JUSTICE GLOSTER: But if -- again, going back to the agreement for the car. I agree to sell you a car and we agree the price and all the relevant terms, we shake hands on it but I say to you, "This won't be a binding contract, it's just binding in honour only", and you say, "Yes, I agree". There is no intention as a matter of English law to create legal relations there. Would Russian law take the same view?

A. If as you said "in honour only" and they agreed that it will be called even in Russia so-called gentleman's agreement. Gentleman's agreement, it's not a legally binding agreement. In honour only, usually translated --

MRS JUSTICE GLOSTER: So as a matter of law your evidence is that there is an additional requirement that there should be an intention to create legal relations?

A. The will of the parties should be directed, yes.

MRS JUSTICE GLOSTER: Likewise, if there is an agreement for the sale of a car, but on the shake of hands it's said, "Well, this is subject to a written contract", again that would be a situation in which there was no contract because there was no intention to create binding legal relations at that stage?

A. At that stage, absolutely correct, but with the plan to do it in the written form later.

MRS JUSTICE GLOSTER: Yes, but there wouldn't be a binding contract at that stage?

A. Not yet. Not yet.

MR RABINOWITZ: Can we just have a look at what you say at paragraph 278 of your report and I'm looking at the first sentence here G(A)3/1.02/149. You say:

"Secondly, had commercial businessmen intended that an agreement of this scale and significance be legally binding, they would have put it in writing."

Then you give your reasons for this conclusion. You say in the second sentence:

"Whether or not this was a mandatory requirement of Russian law (as I discuss below at paragraphs 340-343), the fact that they did not [put it in writing] indicates that they intended to rely on informal arrangements rather than on legal enforcement."

Then you say:

"Mr Rachkov himself states that '[r]elationships in Russia are often based on trust, and it is often thought that putting agreements in writing would undermine that trust, or suggest that such trust does not exist'. The difference between an informal understanding and a legally binding agreement is well known to Russian

commercial businessmen."

Then you say in the last sentence:

"Thus, the fact that the 1995 Agreement, which was purportedly concluded to establish multi-million dollar wealth between three individuals was concluded without regard to the basic requirement of Russian law to have significant agreements between individuals in writing, serves as clear evidence that the parties did not intend this agreement to be legally binding."

There is, I suggest, something of a contrast between your second sentence and your final sentence here, Mr Rozenberg. You see, in the second sentence, you seem to be saying that your opinion applies regardless of whether writing was a mandatory requirement of Russian law, correct? Do you see that? You say:

"Whether or not this was a mandatory requirement of Russian law..."?

A. Yes, yes, I can see it.

Q. If you look at the last sentence of this paragraph, you do appear to rely on what you say is the legal requirement to use written form. You rely on what you say is the basic legal requirement to have the agreement in writing in support of your opinion that the use of oral form is clear evidence, as you put it, that the parties did not intend the agreement to be legally

binding. Do you follow?

A. Yes.

Q. Can I just make sure I understand what you are saying. Do you mean to suggest, as the second sentence implies, that even if there was not a mandatory requirement of Russian law that the agreement be in writing, so even if Mr Berezovsky could establish his agreement in a Russian court and even if that agreement was sufficiently precise and complete to be a binding contract, even then nonetheless it remains your opinion that the use of oral form indicates that the agreement was not intended to be binding?

A. Frankly, as far as I remember, when I was writing it, I was concerned that it was not absolutely clear whether it could be considered a foreign economic transaction because of Mr Patarkatsishvili's Georgian citizenship and in this case it's clearly violating mandatory rules of Russian law. But even if it's not so, still my view was that the decision to ignore the mandatory rule of Russian law, the consequences of violating of which were not as serious as with foreign economic transaction, still were bringing me to a conclusion that there was no serious intention. That's why I wrote "whether or not it violates mandatory requirements", because at that moment still I thought that there is a chance that it

violates mandatory requirements which will bring to more painful consequences, it will destroy the agreement in any event.

However, the meaning I think is clear that whether this violation of mandatory requirement is the deal-killer or it's still possible somehow to survive the fact that such extremely important contract was, if not planned to be in writing, demonstrates that there was no intention to be legally bound by this agreement to conclude a legally enforceable contract.

MRS JUSTICE GLOSTER: Mr Rabinowitz, it may help you to cut this down, what I'm interested in at the end of the day, without disrespect to either expert, are the relevant principles of law.

MR RABINOWITZ: Indeed.

MRS JUSTICE GLOSTER: At the end of the day, although -- their conclusions as to the applications of those principles to the facts of their case and their views as to whether on the evidence here there was or was not an agreement, with respect to both experts, is irrelevant.

MR RABINOWITZ: I'm grateful, my Lady.

MRS JUSTICE GLOSTER: What I'm interested in is what are the relevant principles of law which I have to apply or may have to apply.

MR RABINOWITZ: In which case, as your Ladyship knows, that

is our approach. I shall skip the questions relating to --

MRS JUSTICE GLOSTER: So don't feel you have to challenge --

MR RABINOWITZ: No, I'm not going to.

MRS JUSTICE GLOSTER: -- his conclusions of applying the law to the facts.

MR RABINOWITZ: I am grateful for that, my Lady.

MRS JUSTICE GLOSTER: I'll take the break now. Ten minutes.

You mustn't discuss your evidence with anybody during the break.

(3.14 am)

(A short break)

(3.25 pm)

MRS JUSTICE GLOSTER: Yes, Mr Rabinowitz.

MR RABINOWITZ: I would like to turn to the next reason why you say the 1995 agreement was not valid or binding, and that concerns the topic of whether the 1995 agreement was sufficiently precise on all essential terms to be a concluded partnership contract.

And again, I want to start by making sure that we are clear on the concept of essential terms and default terms and the like. We'll come later to how these general concepts apply to partnership contracts in particular.

Can I ask you, again, to go in bundle G(A)6/1, the

joint memorandum, to page 3, paragraph 7. G(A)6/1.01/3.

At page 3, paragraph 7, we have what you and Dr Rachkov have agreed about, and in subparagraph 1 you agree that:

"Part 1 of the Civil Code (Articles 1-453) came into force on 1 January 1995..."

That's correct, isn't it?

A. Yes, of course.

Q. Then you say in subparagraph 2 that:

"Part 2 of the Civil Code (Articles 454-1109) came into force on 1 March 1996..."

So a helpful thing to remember when we are considering the 1995 agreement is that articles numbered 453 or less of the Civil Code applied in 1995, while articles numbered 454 or more did not apply in 1995 but only came into force later, correct?

A. Yes, that's correct.

Q. If you then go in the joint memorandum to page 6, paragraph 17 of the joint memorandum G(A)6/1.01/6.

A. Yes.

Q. We have here the heading "Terms of a contract" and in subparagraph 1 you agree that:

"The terms of [the] contract are determined by agreement of the parties ..."

In subparagraph 2 you agree that:

"Any contract is subject to mandatory rules of law which apply irrespective of the agreement of the parties ..."

And in subparagraph 3 you agree that:

"The contract may also be governed by 'default rules' which are rules specified by law and which apply unless the parties exclude their application by agreement ..."

Then over the page on top of page 7, you identify:

"Two examples of default rules which you say are Article 314.2 (time for performance) and Article 424.3 (price)."

You refer in this paragraph to a number of articles of the Civil Code. Can we just turn those articles up so that we're quite clear what a default rule looks like.

If you go to bundle G(A)4/4, tab 2, page 65 is where you get the beginning of Professor Maggs's translation, it has both languages.

If you go to page 54 G(A)4/4.02/54, you have Article 314, do you have that?

A. **Yes, I do.**

Q. **Headed "Time period for Performance of an Obligation". Subparagraph 1 says:**

"If an obligation provides for or makes possible the determination of the day of its performance or the period of time in the course of which it must be performed, the obligation is subject to performance at this day, or accordingly, at any time within the limits of such period of time."

So where the agreement provides for or makes it possible to determine the day of performance of the obligation in question, that is when the obligation must be performed by? That's right, isn't it?

A. Yes, that's correct.

Q. And then subparagraph 2 provides as follows:

"In cases when an obligation does not provide a time period for its performance and does not contain terms making possible the determination of this time period, it must be performed in a reasonable time period after the origin of the obligation."

So subparagraph 2 applies where the agreement doesn't provide, or make it possible to determine the time for the period of performance. And what it says is then the obligation must be performed within a reasonable period of time; do you agree?

A. Yes, absolutely.

Q. Then if we go to page 59, we can see Article 424, which is the other default provision that you and Dr Rachkov

referred to G(A)4/4.02/59. This one is headed "Price", at the top of the right-hand side, do you see that?

A. Yes, "Price".

Q. And then subparagraph 1 provides:

"Performance of a contract is paid for at a price established by [the] agreement of the parties."

Then subparagraph 3, if we can look at that:

"In cases when in a compensated contract a price is not provided and may not be determined proceeding from the terms of the contract, performance of the contract must be paid for at the price that, under comparable conditions, usually is taken for analogous goods, work, or services."

So what that means is that where the agreement does not provide the price, or make it possible to determine the price, performance is to be paid for at the price usually payable under comparable conditions for analogous goods, works or services, correct?

A. Yes.

Q. And those are two examples of default rules, are they not?

A. Yes.

Q. I think they're sometimes called dispositive rules?

A. Correct, dispositive, correct.

Q. Don't put Professor Maggs's translation away, but if you can just go back to the joint memo, page 7, under "Terms of a contract", I just want to look with you at subparagraph 4.

What you agree there is this: you agree that if a term of a contract is not established by the parties or by a default rule, the relevant term may be determined by a rule of commercial custom applicable to the relations of the parties. Correct?

A. Yes.

Q. So we've looked at paragraph 17 of the joint memorandum and that has told us in general terms, just looking at the subparagraphs in turn, first that the parties may agree the terms of the contract, that's subparagraph 1, yes?

A. Sorry, what paragraph?

Q. Paragraph 17 of the joint memo.

A. Yes, and subparagraph?

Q. 17.1 tells us that the parties may agree the terms of the contract?

A. "The terms of a contract are determined by agreement of the parties (Article 421.4)."

Q. So that's telling you that the parties may agree the terms of the contract, correct?

A. Of course.

Q. Then subparagraph 2 tells us that the contract may also be subject to mandatory rules, correct?

A. Yes.

Q. Subparagraph 3 tells us that the terms of the contract may also be defined by default rules, yes?

A. Yes.

Q. And also, this is subparagraph 4, that in some cases terms may be determined by rules of commercial custom, correct?

A. Yes.

Q. And then if we look, just so we can see what is common ground, at paragraph 18 of the joint memo, this is headed "Essential terms" as you see. What you agree in subparagraph 1 is this:

"Under Article 432, if the parties do not reach agreement on all the essential terms for their contract, that contract is... 'non-concluded'. It has not been formed. An essential term is therefore a necessary term, in that the parties must reach an agreement in order to give rise to a contract."

So what this is saying, you'll tell me if this is right, is that if a term is truly an essential term then it must be agreed before there can be a contract, correct?

A. Yes.

Q. Then in subparagraph 2 you agree that:

"Where a term, which is not essential, has not been agreed, that does not prevent an agreement from being concluded."

A. Correct.

Q. That means what it says.

A. Correct, correct.

Q. If it's not essential it doesn't matter if it hasn't been concluded, correct?

A. Generally, at least it doesn't prevent an agreement from being concluded. Whether it doesn't matter at all, that's maybe too strongly said.

Q. No, that's a very fair comment.

So it is important in any analysis to identify very clearly what terms are essential terms and what terms are not essential terms if what you want to determine is whether a contract has been concluded, correct?

A. Yes.

Q. And then in subparagraph 3, you also agree with Dr Rachkov that:

"In accordance with the last sentence of Article 432, there are three types of essential terms which must be agreed before there can be a contract."

First predmet, which is a subject or subject matter, I think it's sometimes called the object of the contract

as well in some translations, correct?

A. Yes, sometimes.

Q. Then:

"Terms identified bylaw as essential for contracts of the given type, or which are necessary having regard to the nature of the contract."

And then:

"Any terms which either party declares must be agreed in a contract."

Then in subparagraph 4 you agree:

"In order to be an essential term, a term must qualify under one of these three types. However, the terms that may be essential ([that is] the precise composition of essential terms) may be different for different types of contract."

And that makes sense, yes?

So in order to be an essential term, it has to be one of those three types. And I think what you're saying is that for different types of contract, different terms may qualify. Correct?

A. Yes.

Q. Okay. Now, can we just look at Article 432 of the Civil Code to be clear how it describes the three types of essential terms, and if you have G(A)4/4, tab 2, can you go to page 63 of that, please. G(A)4/4.02/63.

And on the right-hand side of the page, you have chapter 28, "Conclusion of a Contract", and then you have Article 432. Do you have that?

A. Yes, I do.

Q. Thank you. Then looking at subparagraph 1 and the second paragraph of this, this tells us what the essential terms are. It says, do you see that, subparagraph 1, but we go to the second paragraph there:

"The essential terms are those on the subject of the contract, terms that are named in a statute or other legal acts as essential or necessary for contracts of the given type, and also all those terms with respect to which by declaration of one of the parties an agreement must be reached."

And that reflects, I think, what we saw in the joint memo, yes?

A. Yes.

Q. Now, can we just look at what you say about these three types of essential terms in your reports. Perhaps we can look at paragraph 112 of your fourth report which you can find at bundle G(A)3/1 at tab 2, page 101 G(A)3/1.02/101.

So if you're there, paragraph 112, page 101:

"The first type of essential term is the 'subject matter' of the contract (in my view [this is you saying

this] this is the most appropriate translation of predmet). This refers to the nature of the obligation that each party is agreeing to perform, and the object at which such obligations are directed. So, in a simple sale of goods contract, the subject-matter of the contract will be the delivery of goods by one party, and the acceptance of and payment for those goods by the other party with the aim being to transfer money for goods."

So is this right: the subject matter of the contract is really a description of the nature of the obligation?

A. Yes.

Q. If you want to agree a contract for the sale of goods, then one party must agree to sell goods and the other party must agree to purchase and pay for those goods, correct?

A. Correct.

Q. Then if you go over the page to paragraph 114, you deal here with the second type of essential term, and you say, paragraph 114:

"The second type of essential term includes those terms that have been identified in the... Civil Code or other legal act as being necessary for a particular type of contract. I agree with Mr Rachkov that it is implicit in Article 432 that this second type of

essential terms may be identified not only from legislation but also from the nature of the contract."

And so what effectively you're saying about the second type of essential term is that this applies where there is legislation saying that a certain term is essential for a particular type of contract, or where it is obvious from the nature of the contract that this is the case, correct?

A. Yes.

Q. Then in paragraph 115 you say as follows, I'm just picking up in the second sentence:

"I note that Mr Rachkov relies on a statement made in the textbook, edited by Professor Sukhanov in support of the proposition that most contracts only have one essential term -- the subject-matter of the contract... This, of course, is true; but it is because the vast majority of civil contracts are very simple, and impose only one clearly definable obligation on each party."

Just pausing there, I think, just looking at this, therefore you accept that for the vast majority of civil contracts there are no essential terms other than the subject, that's what you say here, is it not?

A. Yes.

Q. Then just seeing what you carry on saying in the same paragraph:

"That is not to say, as I think Mr Rachkov seeks to imply, that there are very few other types of essential term applicable to more complex contracts, such as the one alleged in the present case."

We'll come in due course to look at partnership contracts and we'll see if there's anything terribly complex about them. I just want to stay with the general topic of essential terms for the moment, okay?

If you then go back to page 98, paragraph 105 of your report G(A)3/1.02/98.

A. Page 98?

Q. Page 98, paragraph 105. Just back a few pages. At paragraph 105 you say this:

"I agree with Mr Rachkov that an 'essential' term is, (as the name suggests) a necessary term. Default terms are the terms which fill a gap in a contract with respect to certain terms which could be agreed by the parties. Such default terms in legal literature are recognised as essential [terms]..."

You then quote a passage by Professor Vitryanskiy. Professor Vitryanskiy, is this right, is the deputy chairman of the Supreme Arbitrazh Court?

A. Yes.

Q. And the Supreme Arbitrazh Court is the top Russian Commercial Court, is that right?

A. That's correct.

Q. And as well as being a very senior judge, Professor Vitryanskiy is also a leading contract law scholar and a member of the group of senior jurists who wrote and designed the Civil Code, correct?

A. Yes, this is correct.

Q. Perhaps we can look at Professor Vitryanskiy's article. If you go to bundle G(A)2/3 at tab 40.

You're looking for page 21 in the English G(A)2/3.40/21, that's where the English starts.

I'm going to ask you to go to page 27 G(A)2/3.40/27, and if you have page 27, Mr Rozenberg, I think you do?

A. Yes.

Q. Do you see that towards the top of page 27 in the English, Professor Vitryanskiy says this:

"The second group of material terms --"

I think he uses "material terms" in the way that we're using "essential terms", yes?

A. "Material" and "essential" sometimes are two words used for translation of (Russian words). Essential terms, yes, material, of substance, essential.

Q. Thank you for that.

"The second group of material terms includes contract terms specified by a law or other legal acts as

being essential for contracts of the type in question."

We've seen that.

In the next paragraph, do you see he says:

"In numerous cases the Civil Code, in regulating various types of contract, specifies a range of essential terms for such contracts."

Again I think that reflects what we have already discussed.

Just going down to -- do you see the paragraph "Particularly noteworthy"?

A. Yes.

Q. "Particularly noteworthy are cases in which the legislator refers to essential terms of a contract and at the same time prescribes [dispositive] rules in the case of absence of the relevant clauses from the text of the contract."

What Professor Vitryanskiy is saying is that sometimes the legislature indicates an essential term for a contract, but at the same time it provides a default rule or dispositive rule which will apply where the term in question is missing from the text of the contract. Do you agree?

A. Yes, I agree.

Q. Thank you.

Then in the next paragraph, Professor Vitryanskiy

gives an example. He says:

"Thus under 339 ... of the Civil Code a pledge agreement must provide [not only] for the object of the pledge; its valuation; the substance, extent and [period of] performance of the obligation to be secured by the pledge [but] also an indication as to which of the parties is holding the pledged [parties]. However, in the section 3 of chapter 23 of the Civil Code we find [dispositive] rules which specify two of the three essential terms of a pledge: a rule to the effect that, unless a contract has prescribed otherwise, pledged property is to remain with the pledgor ... and a rule to the effect that, unless the contract has prescribed otherwise, a pledge secures a claim to the extent of its scope at the time it is granted and in particular interest, penalty, compensation for losses caused by delayed performance, and also compensation for necessary expenses of the pledge for maintenance of a pledged item and expenses concerning execution."

So what Professor Vitryanskiy is saying, is this right, is that although Article 339 provides that a pledge agreement must contain various essential terms, the Civil Code itself provides default rules covering some of those terms, correct?

A. Yes, I agree.

Q. So just because the Civil Code describes a particular term in a way that makes it sound essential, it does not follow, does it, that the term is truly essential in the sense that its absence will mean the invalidity of the agreement, and that is because there may be a default rule which applies even if the parties do not reach agreement on that term. Correct?

A. This you are citing?

Q. No, I'm putting something to you.

A. Because it looks like just you are going too far, saying that if there are terms which are default rules and still not agreed by the parties, am I correct?

Q. No, you're going much too far. We haven't got anywhere near there yet, Mr Rozenberg.

A. Maybe it was a very long question. I didn't find it in the text.

Q. Let me put the question to you. I think you were trying to see whether -- you thought I was quoting Professor Vitryanskiy.

A. Right.

Q. What I was suggesting to you arises from what Professor Vitryanskiy is saying is this: just because the Civil Code describes a particular term in a way that makes it sound essential, it does not follow that the term really is truly essential in the sense that its

absence will mean the invalidity of the agreement, and that is because there may be a default rule which applies even if the parties do not reach agreement on that term?

A. My general view is that if there is a term which either has to be agreed by the parties, or in the absence of agreement shall be understood according to the default rule, then in the absence of the agreement of the parties, and in the absence of their concern to apply the default rule, the absence of this term will bring the agreement to the situation when it will be non-concluded.

In other words, this term which, as you said, can be actually filled out by the default rule still will be essential. And by the way, Professor Vitryanskiy and Professor Braginskiy, Braginskiy wrote about such situation. I have one of the paragraphs in my report about it.

Q. All right. Let's just take this a little more slowly if we can, Mr Rozenberg.

We're positing a situation in which there is an essential term, for example the time for performance, and for whatever reason one party writes a letter saying "I want this done" or "I would like this done in three weeks", the other party says "I would like this done in

four weeks", and they never managed to come together and make an agreement about that. In those circumstances, you have a default rule which says:

"In the absence of agreement, a reasonable time."

Correct?

A. And nobody objects, or it's unclear?

Q. Let's assume the object is sorted out, we're just talking about that particular term, about the time for performance.

A. Because the key point here is the following: if there are no objections and this term is filled out as default rule by legislator, no problem. But if still parties did not agree the default rule will resolve the question, then it will be an essential term. That's what Vitryanskiy and Braginskiy wrote.

Q. Let's just be clear about what you're saying. Are you saying that you have to have an express agreement by the parties that the default rule will apply before it will apply. Is that your evidence?

A. You came from another end --

Q. Indeed.

A. -- because the situation here is the following. If the parties agreed that, in the absence of the agreement, the default rule will work, it's fine, and we can call this term nonessential. However, if the parties

disagreed, and one of them or all of them insist that some deviation from the default rule should take place and still there is no agreement, then this term will be essential.

Q. Let's just break that down, Mr Rozenberg, because you've posited two different situations there. You start off by saying that if the parties agreed that in the absence of agreement the default rule will work, it's fine.

Are you suggesting that what you need before a default rule will apply is an agreement by the parties that it will apply?

A. Actually the agreement is concluded when there is agreement on all essential terms, and if the parties object against the default rule, then this term becoming essential precludes the agreement from being concluded.

From this point of view, we can see that before the agreement is concluded it should be clear that parties do not -- at least do not object against the default rule.

Q. You see, Mr Rozenberg, you're jumping in a sense to the third issue. What you're effectively saying is that where parties insist -- one of the parties insist that you reach an agreement, for example on time, then that will be an essential term and you cannot have the default provision, okay? Because that's what the third

default -- sorry, the third essential term involves, one of the parties saying, expressly I suggest, that we have to make an agreement about time. Therefore, even if that weren't otherwise an essential term, it would become an essential term.

But what I'm positing with you is the situation in which neither party insists on that agreement, they try and reach agreement about a particular provision but they fail to do so in circumstances where there's a default provision. In those circumstances the default rule will apply, correct?

A. If I understood you correctly, that the parties did not reach agreement, the default rule applies and there are no objections from the parties against application of the default rule. Am I right?

Q. Correct.

MRS JUSTICE GLOSTER: Can we have a simple example, Mr Rozenberg, of where you say there wouldn't be an agreement and where you say there would be, because the default rules apply?

A. Yes, that's what I'm saying actually. Vitryanskiy and Braginskiy said the situation when there is no agreement between the parties and the default rule --

MRS JUSTICE GLOSTER: Go back to the example of a car, the sale of a car or the sale of a house or something. Give

me an example, a concrete example.

A. With the house, for example, just regarding the price, of course it's usually easier not with the house but with some goods --

MRS JUSTICE GLOSTER: Yes, let's do goods, goods is easiest.

A. -- which are sold in this region at the time, at the price which prevails at this period of time.

If there is by default rule just the price is established, and there are no objections of the parties against such price, or if you speak about the time what is indicated, counsel read the provision of the Civil Code just five minutes ago with time as indicated in the Civil Code, and there are no objections of parties, then this term is not essential and the agreement will be concluded.

MR RABINOWITZ: Perhaps I can put an example to you, Mr Rozenberg, and you can indicate your view about this.

Let's take the situation of the car. I want to sell you a car and I would like to sell it with delivery to take place next week. In fact, you would rather delivery took place in a month because you don't have the money, okay? So I say, "Here's my car, this is the price, I would like to transfer it to you next week." And you say, "Well, actually, I'm not happy about next week, I want next month."

Now, we know that the essential term -- there is an essential term of time, time for performance, yes? But we haven't been able to agree that essential term of time because I would like a week, you would like a month, correct?

A. Correct.

Q. In those circumstances, do you say the default rule applies or not? Let's just be clear what the default rule says, the default rule says performance within a reasonable time, correct?

A. Correct.

Q. All right. Now, in the situation I've given you, do you say that the default rule applies or that it doesn't apply?

Just say whether it applies or not and then give your explanation if you would.

A. If the default rule is indicated on the Civil Code, and there is (inaudible) time, and there are just following provisions, does not meet objections from the parties, the agreement is concluded, and there is no problem that initially they didn't reach any agreement.

MRS JUSTICE GLOSTER: But here it could be said there would be an objection from one of the parties because the purchaser of the car doesn't want the car delivered within a reasonable time, he wants the car delivered in

a month, which, let's say objectively, is not a reasonable time. Had the parties thereby, by implication, agreed that the default rules would not apply?

A. My understanding of counsel was that initially the purchaser who didn't have money raised objection, but eventually agreed with application of default rule.

MRS JUSTICE GLOSTER: No.

MR RABINOWITZ: No. Can I just --

MRS JUSTICE GLOSTER: Put it again, will you?

MR RABINOWITZ: -- with Mr Rozenberg suggest this.

The third default rule, Mr Rozenberg, is a rule which says that you'll have a default rule -- sorry, the essential term is a term -- you see this if you go in paragraph 18 of the joint memo -- is a term which either party declares must be agreed in a contract, correct?

A. Correct.

Q. So the party actually says, "This has to be agreed before we have a contract. I insist that we agree this term, otherwise there is no deal," correct?

A. Yes.

Q. And so in the scenario that we've been discussing, where I say, "Well I would like it to be a month," or a week, I think I had it, and you had it a month, unless we're in a situation where either of us is saying, "No,

I insist that it be in a week or we don't have a contract," we're not dealing with a third default term, are we?

A. If nobody insists, then the default rule may apply.

Q. Thank you.

MRS JUSTICE GLOSTER: But if they do insist --

A. If they do insist, and they do not agree with the application of default rule, the agreement is non-concluded, just because this term which becomes essential was not agreed. It was neither agreed between the parties nor replaced by the default rule.

MRS JUSTICE GLOSTER: But they don't have to specifically refer to the default rule in the example that's been given by Mr Rabinowitz.

A. Absolutely not.

MRS JUSTICE GLOSTER: He wants the car today, you say "I can only deliver it in a month's time," or "I can only pay for it in a month's time, I don't want delivery in a month's time," you don't have to mention the default rule for it to be disapplied?

A. Again, I am sorry, just -- my Lady, initially there are negotiations of an agreement, and during the negotiations, as I understand, they didn't reach an agreement. Then their proposal to have the default rule applied, either the proposal or the understanding that

the default rule will apply, did not meet any objections. Then the agreement will be concluded.

However, if a party which initially was insisting on something still objects against the default rule, or from the very beginning insists, as we used the word, insists on the other term, then the default rule cannot apply and therefore this essential term remains unagreed.

MRS JUSTICE GLOSTER: Yes.

MR RABINOWITZ: What one needs in order to have your third essential term is that one party must insist that that term is agreed before there will be a contract, correct?

Let me put it differently. It has the ability to elevate a term which wouldn't be an essential term into an essential term if one party insists that there be an agreement about that term before he will make a contract?

A. If there is a term on which one of the parties insists and still never agrees to have it in accordance with the will of the other party, there will be no agreement because this essential term will never be --

Q. It becomes an essential term because he insists on an agreement about it?

A. Of course. But since we mention the default rule, it means that at some stage there was a possibility to

apply the default rule. The parties actually at least either discussed or were ready to leave this clause silent, but if at the last moment still one of the parties objects against the application of the default rule, it makes the agreement non-concluded.

Q. You're just putting it in a slightly different way.

The fact that you have a negotiation where parties try and agree on a particular term but don't agree on a particular term, in other words, I would like the car to be red, you don't have a red car and would like it to be green, but I don't insist on it, that's probably not an occasion on which there would be an agreed default term.

The fact that I want something and don't get it doesn't make that an essential term. It is only if I say, "The only car I'm going to buy is a green car" that it becomes an essential term, correct?

A. Yes, correct.

Q. And the fact that in a negotiation I have said that is what I want, unless I've insisted upon that it does not make it an essential term, correct?

A. If you do not insist on the colour, it is not indicated in the law, it is not an essential term.

Q. All right.

I hope my Lady is a little the wiser for that.

MRS JUSTICE GLOSTER: Yes.

MR RABINOWITZ: Then if we just go back to the Civil Code, you can --

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

MR RABINOWITZ: Sorry, I'm just going to try to put my -- I'm not taking him to a particular reference. It's all in 4/4.02, my Lady, where --

MRS JUSTICE GLOSTER: Okay.

MR RABINOWITZ: Sorry, that's at bundle 4/4, tab 2, at page 63 G(A)4/4.02/63.

MRS JUSTICE GLOSTER: Thank you.

MR RABINOWITZ: Probably the clearest place to get this is in the joint memo, paragraph 18.

I'm going to put to you again, Mr Rozenberg, what I've just put to you in the hope that having cleared away some of the confusions it will be clearer.

Just because the Civil Code describes a particular term in a way that makes it sound essential, it does not follow that that term is truly essential in the sense that its absence will mean the invalidity of the agreement, and that is because there may be a default rule which applies even if the parties do not reach agreement on that term?

A. In general, yes, default rule just replaces the agreement of the parties, strictly speaking.

Q. Very good, thank you for that.

Now, we were looking at Professor Vitryanskiy's article, G(A)2/3, tab 40, page 27 G(A)2/3.40/27, and we then come in this article to the passage that you quote in your report at paragraph 105.

Having given the example of a pledge agreement Professor Vitryanskiy says as follows, this is at page 27, just below halfway:

"This example confirms the notion that the essential terms of a contract must not be considered as terms, the absence of which from the text of [the] contract leads to the contract being deemed not to have been concluded, and also ... the existence of definable essential terms of the contract, [that is] essential terms which are specified by dispositive rules where they are absent from the text of a contract."

Okay?

Can we just look at what Professor Vitryanskiy appears to be saying here. He is saying, is he not, that essential terms must not be considered as terms, the absence of which, from the text of the contract, will lead to the contract being non-concluded, do you agree?

A. Absence will not lead because default exists.

Q. Because of the default terms, that's right.

Now, can we then look at what Professor Vitryanskiy says in the next sentence of the same paragraph on page 27. This is a passage on which you comment in your report and we'll look at what you say in a moment.

He says this:

"True it should be mentioned that in a number of cases the legislature has become excessively distracted in relation to individual types of contracts by formulating a list of essential terms without considering possible negative consequences: increasing the risk of specific contracts drawn up by the parties being deemed non-concluded by reason of the absence of an agreement on various contract terms which have been declared (often invalidly) to be essential."

So what Professor Vitryanskiy appears to be saying is that the legislature sometimes formulated a list of essential terms without considering the possible negative consequences of this, namely the increased risk that contracts will fail due to the absence of agreement on those terms.

That is what he is saying, is he not?

A. Yes.

Q. Then, in the next two paragraphs he gives an example from the world of leasing, and I don't think we need to be concerned with that.

Then in the next paragraph he goes back to dealing with the general position rather than the particular example of leasing. He says, and I'm just looking at the first sentence, it's on page 28:

"In our view, the only element which is indisputable and obvious in relation to rule making of this kind is the conclusion that when these provisions on the essential terms of a lease agreement were formulated, no consideration whatsoever was given to the possible consequences of their application."

He continues then:

"For surely, after all, the question of deeming a contract non-concluded because of the absence from that contract of some essential term is, as a rule, raised by a party to a contract who is acting in bad faith in response to entirely well-founded attempts by a party acting in good faith to compel the other party to fulfil his obligations in the necessary manner, or to apply the prescribed sanctions [to] him."

Would you agree that Professor Vitryanskiy's view, as reflected in this passage, is that the argument that the contract is not concluded is one that, as a rule, is raised by a party to a contract who is seeking in bad faith to resile from his agreement?

That is his view, is it not?

MRS JUSTICE GLOSTER: Why is that relevant to anything I've got to decide, that particular view?

MR RABINOWITZ: Because --

MRS JUSTICE GLOSTER: It may or may not be the case.

MR RABINOWITZ: Well it may or may not be, my Lady, but what there is in the literature, in Russian law literature, is a view that one shouldn't be overzealous to find essential terms, and that is going to be one of the issues that your Ladyship is going to have to decide.

Do you agree that that is Professor Vitryanskiy's view?

A. This is Professor Vitryanskiy's view based on Russian court practice. Very often defence is raised on the basis of an argument that agreement was not concluded.

Q. Just reading on, he then says:

"In this regard, any unjustified extension of the range of essential terms, or inclusion in that range of various secondary or purely technical terms (for example, in respect of a list of additional services, procedure for accounting of property on the balance sheet and so on) adversely affects the position of a party who is fulfilling his duty under the contract in good faith and does not foster stability of contractual relations."

In effect what Professor Vitryanskiy is saying, is

he not, Mr Rozenberg, is that one should be cautious before allowing a contract to fail on the grounds that essential terms were not agreed?

MRS JUSTICE GLOSTER: But that must be fact dependent, Mr Rabinowitz, in any law, in any system of law? Whether or not there's a contract and whether or not somebody is acting in bad faith, in asserting the existence of the contract or denying its existence, must be totally fact dependent.

MR RABINOWITZ: That must be fact dependent, but what I submit is not fact dependent is what I've just put to the witness, that one must be cautious before allowing a contract to fail on the grounds that essential terms were not agreed.

That is the view of Professor Vitryanskiy.

A. I'm not sure that I share your view. Professor Vitryanskiy wrote that sometimes just a party which is not very cautious may really be at risk later if the contract will be considered by the court non-concluded, just even ideally this party would not like such an outcome, but the only recommendation is, yes, to be cautious and to prepare good and valid contracts.

Q. Is it not your own opinion, expressed in your own reports, that Professor Vitryanskiy's view was indeed,

I think as you put it, an exhortation to the legislature to permit less restrictive drafting techniques?

A. Professor Vitryanskiy expressed a view that, broadly speaking, sometimes Russian law is too formalistic. But it's true, there are many regulations, many specifications, including essential terms regarding some agreements. There are pluses and minuses, there are advantages and disadvantages. It depends, because sometimes it's better to be more specific. But Professor Vitryanskiy warns that it's necessary to pay attention to it. But of course it all depends on facts.

Q. All right. Let's have a look, if we can, at the information letter, recent information letter of the Presidium of the Supreme Arbitrazh Court.

Can you go to G(A)7/1, tab 7, please. The Russian begins at page 44 G(A)7/1.07/61, and the English begins on page 61 G(A)7/1.07/61.

Now, just before we look at this, I think you say in your second report that information letters of this kind play an important role in the understanding and interpretation of Russian law, is that correct?

A. Yes. They summarise the court practice with the implementation of --

Q. And as you see, this information letter is dated 13 September 2001 --

A. 2011.

Q. Sorry, 2011, thank you. Just looking at this, if you can look at paragraph 12 of the information letter, the Presidium describes a case as follows:

"The court granted the claim of [the] bank for recovery of a loan under a loan agreement and dismissed the counterclaim to declare the agreement [as] non-concluded, since the disputed agreement contains [terms] agreed by the parties on the loan amount and ... terms for its disbursement."

In the next paragraph we see what the claim was for:

"The bank filed a claim with the court against [the] joint stock company for the recovery of the loan amount, interest under the loan agreement for use of the loan, and penalties for late performance of the obligation to repay the loan."

So what one is dealing with here is a bank suing to recover the loan, plus contractual interest and penalties, correct?

A. Yes.

Q. Then just looking at the third paragraph we see that the defendant tried to get out of its bargain, and in particular to resist the claim for contractual interest and penalties, and the defendant's argument was that essential terms had not been agreed.

The third paragraph says this:

"The company, disagreeing with the claims for recovery of interest and penalties, filed a counterclaim to declare the agreement non-concluded, stating that the parties did not reach an agreement on essential terms of the loan agreement: the loan amount, the term and procedure for disbursement of the loan, and the [term] for repayment of the loan. Furthermore, the loan agreement [is] in violation of the provisions of Article 30 of the Law on Banks, [and] does not contain terms on the liability of the bank for breach of contract or the procedure for termination."

Then in the next paragraph the terms of the loan are provided, it says:

"Considering the claims, the first instance court found that a credit agreement had been concluded between the parties, which provided for issue of a loan in the form of a credit line up to 1,978,000 rubles. The parties agreed the credit limit under this agreement, providing for the loan to be disbursed in tranches on the application of the borrower, and furthermore that only one application could be submitted in a month for a sum not exceeding 440,000 rubles."

So the contract, is this right, provided for a credit line of nearly 2 million rubles to be disbursed

in tranches on the application of the borrower, with a maximum of one application per month, for up to 440,000 rubles a time, correct?

A. Yes.

Q. Now, we're not concerned with Article 30 of the law of banks so we can ignore the next paragraph.

But if we look at the paragraph that begins right at the bottom of page 61 and goes over the page, we see that the lower court had upheld the borrower's argument that the contract was non-concluded because it omitted material terms:

"However, the court considered [this is the lower court] the parties not to have reached agreement on other terms which the law treats as essential for loan agreements: terms on the time period and procedure for disbursement of the loan. The court came to the conclusion that this agreement cannot be considered concluded and that there were therefore no contractual relations between claimant and the defendant in relation to [the] repayment of the loan, and dismissed the bank's claim."

Okay?

Then just looking at the next paragraph in the English on page 62, we see that:

"The appellate court set aside the judgment of the

first instance court, [and] granted the claims of the [lender]... "

Do you see that?

A. Yes.

Q. The reasons given by the appeal court are set out in the last paragraph on page 62, and do read it for yourself, if you would.

A. Just the last paragraph, "The appellate court acknowledged"?

Q. Exactly. (Pause)

A. Yes, it's clear.

Q. So would you accept this, that the Presidium is saying -- in fact it's reflecting precisely what Professor Vitryanskiy said in his article. It's saying there are some essential terms which do not have to be expressly agreed because they're covered by default rules, correct?

A. In general I agree.

Q. And the fact that the parties have failed to express their will or reach agreement on such essential terms does not provide a ground to treat the contract as non-concluded, correct?

A. In this situation, I understand there were no objections of the parties to act within the credit limit.

Q. What happened here was they didn't reach agreement on an

essential term but there was a default rule which could apply, yes?

A. In the absence of agreement, the default rule applied and there were no objections of the parties against its application.

Q. All right.

Now, I want, if I may -- my Lady, I don't know what time your Ladyship --

MRS JUSTICE GLOSTER: I'm happy to sit until 4.30 if you wish to go on.

MR RABINOWITZ: I'm happy to go on given the amount we have to get through.

I want to focus, if I can, on the third type of essential term, and we've discussed this already somewhat. These are terms with respect to which, by declaration of the parties, or one of them, agreement must be reached, correct?

A. Yes.

Q. And can we go back then to the joint memorandum just to see what the difference is between you and Dr Rachkov in relation to this?

A. I remember this.

Q. Bundle 6/1, tab 1, page 7, paragraph 18 G(A)6/1.01/7.

A. 18.

Q. If you look under paragraph 18(3)(c), we've already

looked at the fact that it was agreed between you that:

"Any terms which either party declares must be agreed in a contract."

Is an essential term.

Then we have this:

"Dr Rachkov maintains, in this regard, that the third and last category of essential terms under Article 432.1 applies where a party has said that one, more or all [the] terms of the contract must be agreed before there can be a contract: such terms are, for this reason, essential terms, and until agreement is reached on them, the parties have not concluded a contract."

Then just looking down to paragraph 20, at the bottom of that page, we see that it's said:

"It is disputed whether a default term will necessarily become an essential term if the parties have tried but failed to depart from it."

Then we have Dr Rachkov explaining his position, subparagraph 1:

"Dr Rachkov maintains that such an attempt will make that term an essential term only if either party has made clear that agreement must be reached on that term before there could be a contract. Dr Rachkov maintains, in this regard, that the declaration must be made prior to the conclusion of the contract, and that, as noted

above, what is required is that either party must declare that the term must be agreed before there can be a contract."

So what Dr Rachkov is saying, is this right, is that in order for a default rule to become a type 3 essential term, one party must make clear that the parties must reach agreement on that term before there can be a contract between the parties, correct?

A. Correct, but I wrote in my report that mentioning a specific declaration is quite artificial expression.

In practice, and I cite legal scholars, it's sufficient to make clear for the other party that the party which does not agree with the default rule wishes something else. And the words "declaration", they do not work in practice.

Q. Let's just see the way you put it in the joint memorandum, if we look at subparagraph 2 on page 8 G(A)6/1.01/8, you say there:

"Mr Rozenberg maintains that an attempt to depart from a default rule without reaching agreement on that term makes that term an essential one (if it is not already an essential term), as the attempt evidences that the parties have agreed that the default rule will not apply. In his view, the assertion of a necessity to make any specific declaration/statement (oral or

otherwise as a separate announcement) in this context is quite artificial; what is necessary is an indication of any type that either party wishes to deviate from the default rule."

In order that we get a complete picture of what you're saying, this may have been what you were just referring to, can you go to your fifth report, bundle G(A)3/1, tab 3 at page 269. We're looking for paragraph 246 G(A)3/1.03/269.

This reflects what you've put in the joint memorandum, paragraph 246:

"If during negotiations either party expresses a desire to deviate from a relevant default rule provided in law, or raises an additional issue not reflected in law at all that must be included in a contract, it is clear that such terms become essential for the particular contract. As such, the term in question will have to be agreed between the parties to become a contractual term mutually acceptable to both parties (by virtue of Article 432...). An attempt to depart from a default rule would, in and of itself, evidence that the parties have agreed that the default rule will not apply, and, consequently, that this rule will not be applicable in the event that it is not agreed by the parties."

So --

A. "This situation would lead to a contract being non-concluded".

Q. Indeed.

So you say, do you, that if during negotiations either party simply expresses a desire to depart from a default rule, then the term in question becomes an essential term. And if an agreement isn't reached on it, the contract will be non-concluded and will fail entirely, is that your view?

A. Yes, either default rule applies without objections of the parties. If one of the parties wants, desires, as I wrote, desires to deviate from a relevant default rule, then either it's necessary to agree or the contract is non-concluded. This term becomes essential.

Q. So if, going back to the example of the time for delivery of a car, if I say in negotiations "I would like to deliver it in a week" and that is necessarily departing from the default rule because that would provide for a reasonable time, and you say, "Well, actually I would like it delivered in a month" and that again is necessarily, implicitly, an attempt to depart from the default rule, as you are saying a month rather than a reasonable time.

You are saying that if we don't reach agreement on

that, if we have a negotiation about it and we don't reach an agreement on it, the contract will fail because the default rule can't apply?

A. That's correct.

Q. Well, I suggest to you, Mr Rozenberg, that that is a very extreme position to take. Is it not obvious that the whole purpose of this default rule is to apply in circumstances where the parties do not in fact reach agreement on things like the time for delivery, time for performance?

A. My view is that the agreement cannot be concluded against the will of the parties. If the parties understand the application of the default rule will violate their will, object against it, it cannot be mandatory against their will.

And if you allow me, my Lady, I can refer to a very impressive citation of both Professor Braginskiy and Vitryanskiy in my fourth report.

Q. Before you do that, and I'm not going to stop you doing it, I just want to be again very clear what you're saying.

We're dealing here with a situation in which neither party says "I insist on this particular time for delivery", but they simply raise in the context of negotiation that what they want is a particular time for

performance, okay? So neither party says, "There is no contract unless we agree on what I say should be the time for performance," they simply raise in negotiation the time for performance, and they don't agree about that.

Your evidence is that merely by raising what they would like as the time for performance, that means the default rule can't apply?

A. The default rule cannot apply against the will of the parties.

Q. Mr Rozenberg, there's no point in simply repeating that. We accept necessarily, because this is what you've agreed with Dr Rachkov, that if either party -- this is what you say at paragraph 18 -- if either party:

"Any terms which either party declares must be agreed in a contract."

Then that party will become an essential term. I have put to you an example in which neither party is declaring that it must be agreed, they are simply raising what they want to happen without saying, "I will not enter" -- saying any words to the effect of "I will not enter this contract if we can't agree it".

A. I wrote in my report and in the joint memorandum that the word "declaration" used by legislator means expression of will, but not some specific statement like

in foreign relations, for example.

And since you said that the parties still never agree regarding the application of default rule, in my view it makes the agreement non-concluded. At least the parties should keep silent regarding the application of the default rule. As soon as one of the parties raises objections against application of the default rule, the contract becomes non-concluded. And as I said in my fourth report, as far as I remember it's paragraph 69.

Q. Mr Rozenberg, are you suggesting that the mere fact that parties try to negotiate about something for which there is a default rule, that is the same as raising an objection to the default rule applying, such that if they can't agree on this matter the contract fails?

A. There is no special procedure for negotiations. In considering whether the agreement was reached or not, courts, according to Russian law, check what was the will of the parties.

Q. But just go back to my example. Are you saying that the mere fact that the parties tried to negotiate about something, for example I write to you and say "I would like delivery to be in a month," are you saying that by doing that, that is the same thing as raising an objection to the default rule in a way that you say elevates my request that this be delivery in

a particular time, to the status of an essential term; is that what you're saying?

A. Basically yes, because application of default rule is a very important issue and actually mentioned rather frequently in Russian court practice. And it's clear that if parties did not agree, default rule applies. If there are no objections, it's fine, the agreement is concluded. If parties deviate, using this English word, or object against application of the default rule, and it's their will, then the agreement cannot be considered concluded.

Q. Perhaps we can just have a look at what Professor Vitryanskiy says about this. If you go, please, to G(A)2/3 at tab 40, the bottom of page 29, it's the article we were looking at earlier G(A)2/3.40/29. It's further on in the article.

Do you have page 29 there?

A. Yes.

Q. Do you see towards the bottom of page 29, Professor Vitryanskiy says this:

"And, finally, the fourth group of essential terms of a contract are made up of all those terms on which one of the parties indicates agreement must be reached."

Do you see he says that?

A. Yes.

Q. Now, he calls this the fourth group of essential terms, and that is because, I don't think you need to go back, but earlier, at pages 27 and 28, he split up the second group into two parts. But what he's referring to here is the same as your third type, is it not?

A. Yes, basically, yes.

Q. Then in the next paragraph, at the bottom of page 29, we see that Professor Vitryanskiy says as follows:

"Judicial and arbitrazh practice categorises as essential terms far from all the terms of a contract which were contained in an offer or acceptance at the time when the contract was being concluded. For these purposes it is required, in relation to a relevant term, that one of the parties should have directly stated the necessity of achieving an agreement, under threat of refusal to conclude the contract."

Just pausing there, Professor Vitryanskiy is saying that, for this type of essential term, it is required that one of the parties should have directly stated the necessity of achieving agreement on the threat -- on the term under threat to conclude the contract.

Do you agree that this is what Professor Vitryanskiy is saying; plainly it is what he is saying, is it not?

A. I think he uses the word "one of the parties should have directly stated". I said that one of the parties

disagreed with the application of default rule, or insisted on the term, but I think it's the same meaning.

Q. He says they:

"... should have directly stated the necessity of achieving an agreement, under threat of refusal to conclude the contract."

A. Right.

Q. Do you agree that Professor Vitryanskiy is right in this formulation?

A. This is my understanding of the situation.

Q. All right. Then maybe there's less between us than appears.

If you then look at what Professor Vitryanskiy goes on to say at the bottom of page 29 and over to page 30:

"In practice [this is the last two lines of page 29] it is not infrequently the case that in concluding a contract the parties have not settled differences, for example in relation to the size of a contractual penalty for failure to fulfil obligations, but have then fulfilled the terms of the contract. And only in the event of a dispute arising in relation to liability does one of the parties state that the contract should be regarded as not having been concluded, as at the time no agreement was reached on a contract term in respect of the amount of the penalty. In this case a contract is

to be deemed as having been concluded (but without a term in respect of the amount of the penalty), bearing in mind that when concluding the contract neither of the parties had made a statement that it was necessary to reach an agreement on the disputed term of the contract."

So this is in a sense a fairly straightforward example. One party wants something in relation to the contractual penalty to be paid, tries to negotiate this but fails, and they nonetheless perform their contract. He says the contract will be deemed concluded without the penalty term, do you agree?

A. My understanding that it's closely connected with the next sentence, that still it should be clear for both parties, for all the parties, that nothing is included accidentally or something is missing accidentally. And the procedure, how to raise objections, to make declarations, in my view can be considered as irrelevant. This is the key sentence:

"... as has been shown previously, the procedure for conclusion of contracts under Russian law precludes the possibility of 'accidental' entry of any terms into a contract, just as, conversely, it also precludes 'accidental' non-inclusion of any terms in a contract."

The will of the parties should be reflected in the

agreement.

Q. I'm sure that the will of the parties should be reflected in the agreement, Mr Rozenberg. The point is what is the consequence of not agreeing a particular term? And what Professor Vitryanskiy is plainly saying here is that you could have a negotiation in relation to a particular term and not reach agreement about it, and unless one of the parties -- and then the parties perform the contract. Unless it was an essential term, the fact that they haven't reached agreement on it will not matter?

A. If there was no deviation from the default rule, it will not matter.

MR RABINOWITZ: All right.

My Lady --

MRS JUSTICE GLOSTER: Very well.

Mr Rozenberg, you mustn't talk about your evidence overnight, do you understand, with anybody, or communicate with anybody?

THE WITNESS: I understand.

MRS JUSTICE GLOSTER: Very well.

10.15, 10 o'clock tomorrow, what do you want to --

MR RABINOWITZ: Mr Sumption plainly has a strong view. I'm happy to start at 10.00, my Lady.

MR SUMPTION: My Lady, I would suggest, if your Ladyship was

willing to start at 10.00, that would be wise because it would increase the prospect of finishing certainly the legal expert evidence and possibly at least a substantial part of the historical evidence by the end of the week.

MRS JUSTICE GLOSTER: Yes, very well. How much longer do you have?

MR RABINOWITZ: I have probably the whole of tomorrow, my Lady.

MRS JUSTICE GLOSTER: The whole of tomorrow, fine. Okay very well, 10 o'clock tomorrow.

(4.33 pm)

(The hearing adjourned until Thursday, 1 December 2011 at 10.00 am)

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