Thursday, 1 December 2011

(10.00 am)

MRS JUSTICE GLOSTER: I'm sitting with a marshall today, a student.

MR RABINOWITZ: My Lady, I thought it might be sensible to give your Ladyship an indication of where we are timetable wise. I'm likely to go through the day with Mr Rozenberg and indeed tomorrow morning.

I've told my learned friend Mr Adkin that the view we're taking in relation to Professor Maggs is that I don't propose to go through with Professor Maggs what I've gone through with Mr Rozenberg. I think that would just tax everyone's patience.

MRS JUSTICE GLOSTER: Not mine, Mr Rabinowitz.

MR RABINOWITZ: Of course not, your Ladyship's patience is infinite.

That may mean that we don't have anything for Professor Maggs, or very little. On that basis, there is at least a prospect that we will finish the evidence tomorrow. It rather depends -- I understand that the history evidence won't take very long. But if we don't finish tomorrow, it looks as if we'll certainly finish on Monday.

MRS JUSTICE GLOSTER: Yes, fine.

MR RABINOWITZ: But we will be, I think, all day with

Mr Rozenberg, at least.

MRS JUSTICE GLOSTER: Very well.

MR MIKHAIL ROZENBERG (continued)

Cross-examination by MR RABINOWITZ (continued)

MR RABINOWITZ: Good morning, Mr Rozenberg. We were talking about essential terms, the relationship between essential terms and default rules. What I would like to do, if I may, is to ask you to look at a recent decision of the Presidium of the Supreme Arbitrazh Court. It's the decision in Delex which you will find in bundle G(A)7, tab 6. The English begins at page 41.

MRS JUSTICE GLOSTER: G(A)7/1, is it?

MR RABINOWITZ: It's G(A)7/1, sorry I may have just said G(A)7. G(A)7/1, tab 6. G(A)7/1.06/41

Does your Ladyship have it?

MRS JUSTICE GLOSTER: Yes, I have it.

MR RABINOWITZ: It's a decision, very recent, of 5 April 2011, as you see. You will also see, Mr Rozenberg, if you look at who the members of the Presidium were, that they included Professor Vitryanskiy, do you see that?

A. Yes, I can see it.

Q. And then, about a third of the way down the page, just under the section which begins "Having heard", we see what the claim is about. The court says this:

"Delex LLC filed a claim with the Moscow Arbitrazh Court against Cassiopeia LLC seeking to recover 6,000,000 rubles in [principal debt] under the 16 January 2007 Loan Agreement... as well as 2,455,890 rubles and 41 kopecks in interest accrued on the loan for... 17 January 2007 to 8 June 2010 (subject to changes [made] to the claims and the waiver of the default interest and penalties)."

So we see from that, do we not, that Delex is suing Cassiopeia for repayment of a loan plus accrued interests. Do you see that?

A. Yes.

Q. Then right at the bottom of the page there is a break, and then you see a section beginning "Having examined the merits of the arguments", do you see that, just at the bottom of the page?

A. In Russian it's on top of the next page.

Q. Okay. In the next paragraph the court says this, it's at the bottom, certainly in the English, of page 41, going over to page 42:

"As was established by the courts, Partner (the lender) and Cassiopeia (the borrower) entered into Loan Agreement [number] ... 16 January 2007, under which the lender extends to the borrower a loan totalling 6,000,000 million rubles at the interest rate of

12 per cent per annum."

So the loan agreement is one, as you see, made between Partner and Cassiopeia, do you see that?

A. Yes.

Q. Then in the next two paragraphs, in the English the first two paragraphs on page 42, the court says this:

"By its payment instruction... of 17 January 2007, Partner transferred the amount in question to the transactional account of Cassiopeia.

"The defendant does not dispute having received the funds under the Loan Agreement."

Again, pausing there, I think this tells us, does it not, that the lender, Partner, advanced the loan money and the borrower, Cassiopeia, accepted that it had received the money, yes?

A. Yes.

Q. Still at the top of page 42, in the next paragraph we see how Delex comes into the picture. The court explains this:

"Under the receivables assignment agreement dated 31 July 2009, Partner transferred its receivables under the Loan Agreement to Orbita, which in turn assigned these receivables to Delex under the receivables assignment agreement dated 1 October 2009."

So in effect Delex has taken assignment of the loan,

correct?

A. Correct.

Q. The court then continues as follows:

"Believing that the loan became due for repayment off 16 April 2007 and that the borrower defaulted on the obligations, Delex filed this claim with the arbitrazh court."

Nothing that unusual so far.

Let's then see how the dispute arose, so the court says in the next three paragraphs this:

"As part of the case files, the claimant presented a photocopy of Loan Contract Number 03/01-07 of 16 January 2007, which states the loan repayment date as 16 April 2007.

"The defendant furnished the court with a photocopy of the same Loan Agreement stating the loan repayment date as 16 April 2027.

"Neither the claimant nor the defendant has been able to furnish the court with the original copy of the Loan Agreement."

So what appears to have happened, Mr Rozenberg, is this: the claimant, Delex, presents the court with a copy of the loan agreement which says that the date for repayment is 16 April 2007, and that is a date which has elapsed by the time the matter has come to court,

yes?

A. Yes.

Q. And the defendant then comes up with a different copy of the same loan agreement, and that has a repayment date of 2027, 20 years into the future. And, if that were the position, then plainly the loan would not have --

A. Due.

Q. Be due, exactly that. And neither party can produce the original loan agreement.

A. Right.

Q. We can see how the lower courts resolved the situation. If you then just look at the next paragraph beginning "The first instance court", about a third of the way down page 42 in the English:

"The first instance court dismissed the defendant's arguments..."

Can you just read that to yourself. (Pause) Just the bit about the first instance court.

A. I think it's a very good resolution.

Q. Well, I'm not sure which resolution you're talking about, but just looking at the first instance court --

MRS JUSTICE GLOSTER: Just a second, are you talking about the resolution by this court or by the earlier courts?

A. The final resolution of the Presidium, I find it very substantiated, reasonable, and actually that's -- the

first impression is that the decision explains in details why such a resolution should take place.

MR RABINOWITZ: Yes. So just seeing what the earlier court has done, what the first instance court does is it looks at the assignment agreement and it sees that the assignment agreement also referred to the repayment date as 16 April 2007 and, on the basis of that, it concludes that the claimant's version is right, that is to say that the repayment date had arisen already, correct?

A. That's what they state.

Q. And then you see that the appellate court, the court to which they appeal from the first instance court, took a different view and it concluded that the claim failed because the photocopies could not be accepted as evidence, and on that basis said the claimant had failed to prove the defendant's obligation to repay. That's what the second court did, did it not?

A. Right.

Q. And then you get the appellate court's position, and it's dealing, obviously, with a situation where you have two copies showing different repayment dates. And just seeing what the court does, if you go to about two-thirds of the way down, just looking at the approach of the Presidium, you see:

> **"The position of the appellate and cassation courts**

is erroneous."

A. Yes.

Q. "A loan agreement [it says] may not be deemed to be non-concluded when there is proof that the loan amount has been transferred to the borrower, while the parties disagree on the repayment date. The legal relationship arising between the parties out of this agreement is subject to the provisions of Article 810(1) of the Civil Code, under which the loan amount must be repaid by the borrower within thirty days of the lender's demand where the agreement does not establish the repayment date or states that the loan shall be repaid on demand."

Can we just look at the reasoning here. The first thing that you see the Presidium says is that you can't deem a loan contract concluded where the loan funds were actually transferred to the borrower, even though the parties disagreed on the repayment date.

Do you agree that that's what they say?

A. That's what they say.

Q. And do you agree with that as an approach? I think you already indicated that you do.

A. Yes.

Q. So it's upholding the contract as a concluded contract even where the parties disagree on a fairly fundamental matter, do you agree?

A. Well, they disagree on this matter because the original was lost. It's a question of evidence, I understand, because nobody argues that there was disagreement at the moment of conclusion of the agreement.

Q. Well, they're in a position where they don't know what the position is on that. They have one version saying 2007 and another version saying 2027, and what they conclude is that in circumstances where they're unable to resolve the position, they can nonetheless uphold the contract in particular; yes, do you agree with that?

A. Right.

Q. The second thing the Presidium says in relation to the repayment date is that the default rule in Article 810(1) applies:

"... under which the loan must be repaid within 30 days of the lender's demand where the agreement does not establish the repayment date ..."

Do you see that?

A. I see the text.

Q. Well, you see the text and you've already indicated that you agree with its reasoning, correct?

A. Yes.

Q. What that case shows, Mr Rozenberg, is that where the parties try to deviate from a default rule, but either fail to reach agreement, or even where they do reach

agreement but something goes wrong, a default rule can apply, correct?

A. It's not quite clear for me what you mean saying something goes wrong.

Q. Well, plainly there was an agreement at some point in relation to the loan repayments date, at least the parties thought they had agreed it, but there was something defective about that because one party was saying 2007 and the other party was saying 2027. In those circumstances, something has gone wrong with the attempt to agree a repayment date. They may have agreed it but something has gone wrong, in the sense that neither of them can establish that that was agreed. Do you follow?

A. I do.

Q. What the court is doing in those circumstances, where something has gone wrong, even though the parties thought or understood that they'd agreed it, is to apply the default rule; do you agree?

A. I agree that the Supreme Arbitrazh Court indicated that, in the absence of the original agreement, the court found this way of resolution of the case. But I see no sign in this court act that there were disagreements at the moment of the conclusion of the agreement, and it's unclear whether the parties agreed at the moment of

conclusion of the agreement what should be the provision of the contract.

Q. Well, at a minimum, it appears that both parties had a view as to when the repayment date should be because one party produces a version which says 2007 and the other party produces a version which says 2027, correct?

A. That's correct.

Q. And notwithstanding this apparent attempt, even on that basis, to deviate from the default rule, what the court is willing to do in those circumstances is to apply the default rule, do you agree with that?

A. I agree with the remark that there was no deviation connected with conclusion of the agreement. It was not deviation, but I would say different interpretation of the agreement concluded long ago, simply because of the fact of the absence of the agreement.

If you allow me, my Lady, I will remember yesterday's example when the agreement was destroyed in fire and still the parties tried to find the resolution of the dispute through the court. And actually, as I understand in such situation, the key point is not what was the behaviour of the parties and the arguments of the parties at the moment of the conclusion of the agreement, but rather evaluation of all the evidence in their entirety. That's what always Russian courts do.

And the fact that in connection with banking activity, which usually is very strictly regulated in Russia, and courts try to avoid to the maximum possible extent unclear situations when rights and obligations connected with transfer of monetary funds remain unclear.

In this situation, my understanding is that this reference to Article 110, paragraph 1 (sic), of the Civil Code of the Russian Federation shall be understood not in connection with negotiations of the parties at the moment of conclusion of the agreement and deviation from the default rule, but in light of necessity to apply correctly the existing material law to resolve the dispute in light of the available evidence.

Q. Mr Rozenberg, there's no doubt that the court is trying to resolve the dispute in light of the available evidence, that is indisputable.

You said one thing in that answer, which I'm not sure was an answer to my question, and that, I think, reflected something I put to you yesterday which is that the courts seek to uphold contracts which have been performed and not allow them to, in a sense, be invalidated, correct?

A. In the general sense, when everything is crystal clear, the courts have just -- I would say there is a trend in Russian court practice that courts prefer to uphold

contracts which are performed when there are no dispute between the parties that it was really the performance of this agreement.

Q. Right, that's very helpful. But I just want to go back to my question because I'm not sure that you did answer my question. Because is this not a case where it is perfectly clear that the parties did not intend or expect the default rule to apply? One party produces -- neither party, on the version of the contract that it produces, has a provision which ties in with a default rule, which is 30 days from demand; would you agree at least with that?

A. Your question is rather long, but the beginning, as far as I remember, at the beginning of your question you said that there was no intention to deviate from the default rule, am I correct?

Q. Well there was an intention to deviate from the default rule, that's very clear. Neither party is putting in this contract a provision which reflects the default rule, which is that there will be repayment 30 days from a demand.

A. If I am correct, when the contract was concluded, there was not even such an issue, deviation of the default rule. When the contract was concluded both parties, according to the explanations in the court of the first

instance, knew what was the term, simply the evidence is different today because the agreement was destroyed, like in your example yesterday when it was destroyed in fire.

There is no agreement today, but at the moment of the conclusion of the agreement both parties explain they knew what was the term, and there was -- nobody even ever mentioned the default rule when the contract was concluded.

Q. I entirely accept that, they didn't mention a default term, but they each asserted a term which was inconsistent with the default rule, correct?

A. They brought their evidence today to the court, which is different, but it doesn't mean that there was discussion, and actually nobody alleges that there were negotiations or discussions at the moment of the conclusion of the agreement.

Q. Mr Rozenberg, I think I've given you a sufficient opportunity to deal with this. I suggest to you that this is a clear case where the parties had plainly intended that the default rule should not apply, but something has gone wrong so as to mean that the court is not in a position where it can give effect to what either party intended should apply, and that, in those circumstances, the default rule applies.

Do you agree with that or do you disagree with that?

A. My Lady, correct me if I'm wrong, but courts in Russia resolving a dispute go step by step. First step, to identify what was the will of the parties when the agreement was concluded. It's clear that the will of the parties was to have agreement specifying all the terms, and it's clear that, at the moment of conclusion of the agreement, the parties did reach agreement on all the terms, and there was nothing unclear at that moment. And neither the party nor the creditor -- either the creditor or the borrower had in mind that the default rule should apply. At the moment of the conclusion of the agreement everything was clear.

Am I correct?

Q. Well, that's a very interesting point. You are saying that the parties did reach agreement on all the terms and nothing was unclear at that moment. Then what happens, Mr Rozenberg, on your analysis, what happens next?

A. And next some time expired and the original agreement was destroyed.

Q. So it becomes impossible to rely upon or determine what the original agreement on that term was, correct?

A. That's correct.

Q. And then, in those circumstances, the court applies

a default rule?

A. That's correct.

MRS JUSTICE GLOSTER: What would have happened, and this is maybe a bit artificial, this example I'm about to give you, but what would have happened if the claimant had sued on the basis of the default provision, said to the court, "Well, I know there's a disagreement between the defendant who says the loan is not payable until 2027, and I'm saying it's repayable in 2012, there therefore is a dispute between us, I'm relying on the default provision and I'm serving my demand in 2011."

Would the courts have allowed, in those circumstances, the claimant to have recovered on the basis of 30 days from the demand by virtue of the default provision, or would the court have said, "Well, your case is that the loan is repayable in 2011, and on any basis you're going to have to wait until then until you demand your money back."

I'm just not quite clear how this default provision, as it were, comes in to the picture.

A. I understand that there are several possibilities here. The first, regarding declaring the agreement non-concluded because of a default rule, cannot apply if at least one of the parties insists on specifying the term, and therefore the term becomes essential. The

other side disagrees, and maybe there is a silent agreement that default rule should apply, nor one of the parties prevails in this disagreement at the moment of the conclusion.

If such evidence were presented to the court, and it would be clear for the court that, from the very beginning, there was unclear which party prevailed in the negotiations, and it would be at the same time crystal clear that both parties disagreed regarding application of default rule at the moment of the conclusion of the agreement, then the court probably had no choice, would have no choice, and would have to declare the agreement non-concluded in such situation.

But in the situation when both parties agreed that the agreement was perfectly valid at the moment of conclusion, that all the terms were specified and there was no essential term for which the default rule should apply in that moment; next question before the court is how to evaluate this evidence, either to prefer one version about 2011, or the version of 2027, or the third option which the court choose that, according to the -- you say -- counsel says default rule, but according to this dispositive norm, to apply the legislation allowing the payment on demand.

In this situation, when it was clear that there is

no legal basis to declare the agreement non-concluded, number one, because nothing was wrong at the moment of the conclusion of the agreement, second, as I understand, there was no objective basis for the court to prefer one or(?) the second version of the agreement, otherwise I understand it would be necessary to acknowledge that there is a forgery, or just other consequences would take place.

But in this situation, the court simply applied the rule allowing to pay the loan on demand because there was no other legal basis in this -- in light of this evidence, in light of these circumstances. We always say that of course it's necessary to check, to investigate very carefully, all the circumstances of the case, but on the surface it looks here that this is the only possibility to issue a substantiated decision and not to put anybody in a very unfair situation.

Because first there is no basis to make a conclusion that the decision -- that the contract was non-concluded, and as we agreed with counsel, to the extent possible when the circumstances allow or Russian courts prefer not to declare agreements non-concluded, but at the same time to rule that only in 2027 the time for repayment should come, although it contradicts apparently some other available evidence mentioned here

in the decision. The court chose the best way how to resolve the dispute, in my view.

MRS JUSTICE GLOSTER: Okay, I think I've got the picture. Thank you very much. I think we can move on.

MR RABINOWITZ: I'm going to move on to a slightly different topic, if I may. We've discussed the issues of essential terms, and the next topic I would like to consider with you is what happens when the parties agree a contract but one of the terms which they agree is void or invalid. And the question is: does the rest of the contract survive or does it fail?

You agree, I think, that this is an issue covered by Article 180 of the Civil Code. Can we just turn that up, bundle G(A)4/4, tab 2, page 33 G(A)4/4.02/33.

Just looking at what Article 180 is about "Consequences of Invalidity of Part of a Transaction". It says:

"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."

Then can we just look, if we may, at what you and Dr Rachkov have said in the joint memorandum, paragraph 28 of that. It's bundle G(A)6/1, tab 1, page 10 G(A)6/1.01/10.

We can see where the agreement is and where the disagreement is about this. So paragraph 28, page 10, and just looking at the first two sentences of paragraph 28:

"It is agreed that, where part of a contract is invalid, other parts of the contract may survive if it is possible to suppose that... a contract would have been made without the inclusion of the invalid part (Article 180). Surviving part of the contract must contain all essential terms for a contract to be concluded."

That seems straightforward enough. There is, is there not, a factual question whether the parties would have made the contract without the invalid term, and a legal question whether the surviving contract contains all essential terms for a contract. If both questions are answered affirmatively, the surviving part of the contract stands, correct?

A. Yes.

Q. In paragraph 29, just staying with the joint memorandum, we see that you and Dr Rachkov disagree as to whether the severability principle in Article 180 can ever apply where an essential term is invalid. You say it cannot while Dr Rachkov says it can. Is that correct?

A. It is correct.

Q. Then can I just put to you a hypothetical example just to test your position on this point. Let us suppose that I agree to lease your property with an option to buy it at the end of the lease, okay? So it's a lease of the property, but we're also wanting to agree an option that I be able to buy the property at the end of the lease. Let us suppose also that we agree all essential terms for a lease, okay?

A. Okay.

Q. We also agree all essential terms for the option, for the sale option, but one of those terms is void.

A. Yes.

Q. Now, as a matter of fact, in this hypothetical example, we would both have been happy to enter into the lease contract on the same terms even without the option to buy at the end. Let us just suppose that that is the case, okay?

A. We can suppose anything, of course.

Q. All right, thank you for that. My family then move into the property and we live there happily for a period of time, but the option fails because one of its essential terms are void. All right? Do you say that in this example you can evict me and my family from the property on the basis that the failure of the option to buy causes the failure of the lease as well, even though the

lease contains all essential terms for a lease, and we would both have signed the lease on the same terms even without the option to buy?

A. I understood at the beginning that it was not an essential term.

Q. No.

A. That option to purchase.

Q. No, we agree a lease and an option. We agree all the terms, all the essential terms of the lease and we agree all the essential terms of the option, but the option part of it fails because an essential term is void. The factual hypothesis, the hypothetical, involves an assumption that we would have been happy to enter into the lease even without the option. Do you say that the lease fails because an essential term of the option has failed so that the option has to fall away?

A. The crucial point here is the beginning. We agreed all the essential terms, and one of the essential terms was this option. It was also integral part of the whole agreement.

In other words, I would never enter into this agreement without this option because I would like to have a tenant, potentially a buyer. Am I correct?

Q. Mr Rozenberg, you're changing the facts that I gave you. The facts that I gave you were that we agree a lease

with an option to buy at the end. The other fact that I gave you is that we would have been happy to agree the lease without the option. We agree all essential terms of the lease part of it and all essential terms of the option part of it, but there is an essential term of the option part of it which fails so that, in a sense, the option part of it would have to fall away. Do you say that as a consequence of that the lease part of it also becomes invalid?

A. It's not quite clear for me what and how reflected in the agreement is that we would both be happy if this option would not work. In other words, we would agree about lease even without an option. How to prove it, and is it included in the agreement, because it seems to me that it's really an essential term.

Q. Well, Mr Rozenberg, you accepted that for the purposes of Article 180 there's a factual question as well as a legal question, and the factual question is whether we would have been happy to agree the lease without the option. And I've put to you a hypothetical example in which that is the case.

A. Normally all leases, not all of course, the majority of leases are concluded without such option. The vast majority of leases. Therefore if the parties agreed this term in addition to the lease, on the surface it

appears that it's an essential term of the agreement. However, you added that it was not. If it's indicated in the agreement somehow that actually it doesn't matter for the seller -- I'm sorry, for the landlord at least, then the position would be that the failure with this option does not invalidate the whole agreement.

However, what I understand, it really was the essential term, and, as a result, the landlord has a tenant who will never become a buyer though he would prefer to have a tenant, potential buyer. Therefore, my view is legally, if there is no indication that parties clearly confirmed that it doesn't matter for them whether the option remains or not, then the failure of the option is fatal for the whole agreement.

Q. Mr Rozenberg, it may be that you have misunderstood or confused what we are talking about when we talk about essential terms.

Let us just be clear. The option is not an essential term of the lease agreement. An option agreement has its own terms: for example, how much has to be paid if you're going to exercise the option, when you have an entitlement to exercise the option.

The lease agreement has its own essential terms, okay?

What the parties have agreed is, if you like,

a mixed agreement in the sense that it contains both a lease and an option to buy at the end. So the option is not an essential term of the lease, and we know that because, in the example I gave you, I have made clear that both you and I would have been happy with the lease, happy to enter into the lease, even if there wasn't an option.

Now, I will put the example to you one more time. If the option part of that contract fails because an essential term of that option is void for some reason, do you say that the lease as well becomes invalid, even though all essential terms relating to the lease aspect of that agreement are valid and have been agreed?

A. My Lady, since it's for the court to evaluate evidence, I understand that in this example it's crystal clear that it was irrelevant for the parties at the moment of the conclusion of the agreement whether the option would fail or not, and therefore the conclusion is that the failure of the option is irrelevant and the lease agreement remains valid.

MRS JUSTICE GLOSTER: And that's just applying Article 180?

A. Yes.

MR RABINOWITZ: And that is so even if the reason that the lease -- the option part of it fails is because of a failure in respect of an essential term of the option

part of that contract, correct?

A. I understood from the counsel that at the beginning, at the moment of the conclusion of the agreement, it was not the situation, when in the mixed contract the option was an essential term. It was indicated that, for the parties, it was not the necessary element of the mixed agreement.

Q. Mr Rozenberg, again, I think you're mixing up what we mean when we talk about an essential term.

An option is a separate contractual obligation. It contains its own terms. And the lease has certain terms which may be essential. The hypothesis that I'm putting to you is that the parties would have entered into the lease without the option and that the option fails because an essential term in relation to the option part fails.

Do you accept that on the basis of applying Article 180 the lease agreement will still stand?

A. I think I gave the answer. I can only confirm that if in a Russian court it would be established that without an option such agreement would never be concluded, then the failure of the option would be fatal. If however, according to what the counsel presented, it was clear that both parties were perfectly happy, even without the option entering into the lease, and the lease was

crucial, then the failure of the option doesn't matter.

MRS JUSTICE GLOSTER: I think I've got the point you're making and I've got the answer the witness has given.

MR RABINOWITZ: Thank you, my Lady.

All right. I'm grateful for that, Mr Rozenberg. Now, we've been dealing with a situation where part of a contract fails because it contravenes the law and is therefore void. Can we consider the situation where the parties agree a contract but one term fails for uncertainty. The question is: does the rest of the contract survive in those circumstances; okay?

Now, can we just look at what the joint memorandum says on this point, it's again bundle G(A)6/1, tab 1, page 11, paragraph 30 G(A)6/1.01/11.

Just looking at paragraph 30, this says as follows:

"It is disputed whether it is possible for part of a contract to be non-concluded and for another part of the contract to survive."

You set out your position at subparagraph 1 of paragraph 30, you say:

"Mr Rozenberg maintains that this is not possible. Mr Rozenberg says that a part of a contract cannot be non-concluded (it can only be invalid), and the absence of an essential term makes the whole agreement non-concluded. Mr Rozenberg maintains that if the

parties intended to make a mixed contract, then the essential terms for each contract must be agreed or the mixed contract as a whole (both parts) is non-concluded. However, Mr Rozenberg considers that the concept of a mixed contract is not relevant for [present purposes]."

Perhaps you can glance at what Dr Rachkov says about this:

"Dr Rachkov maintains that [it] is possible. Again, for example, the parties agree a mixed contract of sale and loan. If the parties fail to reach agreement on an essential term for the loan contract, but reach agreement on all essential terms for the sale contract, and would have made the sale contract even without the loan contract, then the sale contract will be concluded and the loan contract non-concluded. In effect, the rule in Article 180 applies in that situation by analogy."

All right? So that's the difference between you.

Perhaps I can just go back to my hypothetical example and give you an opportunity to respond on this slightly different set of facts. Again, let us suppose that I agree to lease your property with an option to buy it at the end of the lease and, again, we agree all essential terms of the lease but we fail to agree all

essential terms of the sale option. Again, as a matter of fact, we would have both entered into the lease contract on the same terms even without the option to buy at the end.

Do you say, in this example, that you can get out of the lease and evict me from the property, if I've already moved in, on the basis that the failure of the option to buy causes the failure of the present lease?

A. I'm very sorry, but what is the difference with the example we already considered?

Q. In the first example we dealt with a situation where an essential term of the option was void. Here we're dealing with the situation in which an essential term of the option is simply not agreed. Do you say the result is different because we're dealing with a not agreed situation as opposed to a void situation? Or do you say that the outcome is the same?

A. I think you just read, my position is that the essential terms for each contract must be agreed or the mixed contract as a whole is non-concluded. This situation is essentially clear.

Q. So I just want to be clear about what you're saying, Mr Rozenberg. You're saying that in a situation where we have, as in my example, a lease and an option where the parties would have been very content for the lease

to be concluded without the option, the lease has all the essential terms agreed but there is a non-concluded essential term in the option, you say that the lease also will fail?

A. Again, I think we already had this problem in the first example. First you say both parties would be happy without the option, and then you say it was essential for the parties to have this option.

Q. No, that's not what I said at all. I said --

A. If it's irrelevant for the landlord whether there is option or there is not option, then the terms of the option are not essential terms, as I understand.

MRS JUSTICE GLOSTER: Can I just be clear, Mr Rozenberg. Using the language of Article 180, is a transaction invalid if terms haven't been agreed, or does "invalidity" reflect something else?

There's not a reference here to contract, one is looking at a transaction. Is invalidity something like a licence not being granted, or some other provision being ineffective, or does invalidity include a non-agreed transaction? I'm not quite clear what is meant by invalidity here.

A. The invalidity means that something happened not in connection -- probably not in connection with the will of the parties, because the licence was not obtained or

was recognised invalid, for example, or something else took place. As a result at least some actions which were supposed to be performed on the basis of this transaction will not be performed, and the question is whether the parties in any event would enter in this transaction.

By the way, even the question with the loan suggested by my colleague Dr Rachkov is not bad. For example, it's something nice to have, for example, to have a loan in addition to the sale of a car, but even without a loan parties would, for example, carry out the sale in any event. And with this loan, invalidity of the loan because of let's say currency problems, absence of the licence, of the creditor and so on, then would not invalidate the sale agreement because parties would like to enter into the sale agreement regardless of the part of the agreement which became invalid.

And I agree with this if the invalid part was not essential, in other words if the purchaser would not have money to purchase this car, and the loan was substantial, essential for the purchaser, then invalidation of the loan would kill the whole transaction.

It was nice to have, but in the absence of this loan the purchaser would find money somewhere else, maybe

with a high interest, but still would like to purchase this car, then invalidation of this part of the whole contract is not a deal killer, and then transaction remains.

Therefore 180 clearly states that if the court will come to a conclusion that even without the invalid part the transaction would be entered and carried out, then invalidation of a part doesn't matter.

MRS JUSTICE GLOSTER: But is invalidity directed at contracts that are not concluded at all because there's no certainty of terms?

A. It would bring to the conclusion that it would be non-concluded, again, if it would be clear that without the invalid part parties would never enter into this contract.

MRS JUSTICE GLOSTER: So invalidity can extend to contracts which are not concluded because a term is uncertain?

A. Because the term is uncertain.

MRS JUSTICE GLOSTER: Yes I see.

MR RABINOWITZ: Mr Rozenberg, I have to say, that is an answer that is helpful for my position but in all honesty I'm not sure that that's right.

MRS JUSTICE GLOSTER: I was only asking the question.

MR RABINOWITZ: No, indeed, and my Lady got an answer which I can tell your Ladyship is helpful to our case.

MRS JUSTICE GLOSTER: I can see that.

MR RABINOWITZ: But I'm not sure that that's right, Mr Rozenberg, and can I just suggest something to you because I don't want this to go off on a false basis, although perhaps I should happily grab that.

Is there not a difference in Russian law between something being void or voidable and simply being non-concluded in the sense that the parties did not reach an agreement on a term?

A. Just again, my Lady, to be clear that the words are used correctly, because here the words -- a lack of clarity whether the parties would agree or not agree from the very beginning.

If the understanding is that intention of the parties was clear, that they would like to have the whole agreement performed, and one of the part became invalid, then in this situation it's clear that there was no situation when the agreement would be non-concluded.

Therefore, to avoid any misunderstanding, I have to say that in this situation invalidation of the part which was crucial for the parties leads to invalidity of the whole contract.

Q. I don't want to --

A. If I was understood in a different way I'm sorry, but

this is the clear statement of the law.

Q. Let me see if I can cut through this.

A. In other words, the question whether the agreement would be concluded or not depends on the evaluation of evidence from the point of view of will of the parties at the moment of the conclusion of the agreement.

If both parties understood that the whole agreement will be concluded, shall be concluded, there is no default rule, nothing is unclear, and one of the parts of the transaction becomes later invalid, not because of the parties, then the invalidity of the part of the transaction leads to invalidation of the transaction if it's clear that the parties would never have entered into the transaction without the invalid part.

MRS JUSTICE GLOSTER: Yes, I see.

So he seems to be agreeing with you that there is a difference, Mr Rabinowitz.

MR RABINOWITZ: For my Lady's note, Article 166, which your Ladyship will find on page 31 of G(A)4/4, deals with void and voidable G(A)4/4.02/1.

MRS JUSTICE GLOSTER: It's just the use of the word "invalid".

MR RABINOWITZ: Indeed, and your Ladyship will see at Article 166 that it says a transaction is invalid if it's void or voidable.

MRS JUSTICE GLOSTER: Right, thank you. That's the point I wanted.

MR RABINOWITZ: I thought that was the point.

MRS JUSTICE GLOSTER: I think it's common ground that that wouldn't include something that is merely not concluded.

MR RABINOWITZ: Yes.

Our position is, as is clear from what Dr Rachkov says, we say Article 180 applies by analogy, and that is the point I've been trying to put to Mr Rozenberg, having dealt with that.

Mr Rozenberg, rather than taking up more time on this, can I just ask you this. I gave you the hypothetical example of the lease and the option, and the option being invalid -- well, in the first case, invalid in relation to an essential term, and in the second case non-concluded because there wasn't agreement on essential term.

Your position is that it doesn't matter. In both cases the position is that the lease agreement fails as well because of the problem with the essential term in the option agreement, is that right?

A. Just -- the key point was that if all the parties would never have entered into the agreement without the invalid part then it would be fatal for the agreement.

Q. And if they would have entered into the agreement, that

is to say the lease agreement, regardless, then you accept that it would be valid, the lease agreement, do you?

A. This was the first suggestion of the counsel where I was a little bit misled that the party would be perfectly happy without the option, if I remember correctly.

Q. In those circumstances, you would accept that it would be valid, the lease agreement, yes?

A. If this is not the essential term, yes.

Q. Thank you for that.

Now, I want next to look at partnership contracts. We have been dealing with some general concepts but we now need to apply them to the particular contract we're concerned with here, which is a partnership contract. And a partnership contract or a joint -- what is it, a joint activity contract, is a particular type of contract in Russian law, correct?

A. A joint activity agreement, in parenthesis, a simple partnership, that's what we are talking about.

Q. And our concern is to understand what essential terms and default rules apply for a joint activity or partnership contract, and whether the 1995 agreement was sufficiently definite and complete to be a concluded and binding partnership contract, okay?

A. Okay.

Q. Now, can we look at what you and Dr Rachkov say about this matter in the joint memorandum, bundle G(A)6/1 again, page 11 G(A)6/1.01/11 paragraph 31.

You can see that the heading is "Simple partnership contract, also called joint activity contract".

Then we see at paragraph 31 that you and Dr Rachkov actually agree a number of points. Subparagraph 1, you agree:

"A simple partnership contract is the same as a joint activity contract. Both these words are used [in] Article 1041 to name the contract [described by that Article]. Dr Rachkov generally refers to this as a 'partnership contract' and Mr Rozenberg as a 'joint activity agreement', but these two... mean the same [thing]."

Then subparagraph 2, you agree:

"At the relevant times a partnership contract was provided for by Article 122 of the Fundamentals (which applied in the period from 1 January 19395 to 1 March 1996) and Article 1041 of the current Civil Code (which applied from 1 March 1996)."

So just making sure that we're clear about this, when the 1995 agreement was made, the relevant provision of the law relating to the partnership contract was Article 122 of the Fundamentals, correct?

A. Yes.

Q. And it's common ground that the Fundamentals were a mini Civil Code put in place in the early 1990s as part of the transition to a market economy in Russia, that's right, isn't it?

A. Yes.

Q. Article 122 of the Fundamentals was supplemented by the general rules in Articles 1 to 454 of the Civil Code, including Article 432 which we've looked at, because these articles had already come into force in 1995, correct?

A. Yes.

Q. But the rules on particular contracts in Articles 455 to 1109 of the Civil Code didn't come into force until 1 March 1996. At that point, Article 1041 would have replaced Article 122 of the Fundamentals, correct?

A. Yes.

Q. Now, that all sounds terribly complicated, and you raise a specific point about the continued application of the 1964 Civil Code which we'll get to. But so far as essential terms are concerned, in fact the complications don't need to concern us because in fact you and Dr Rachkov agree that Article 122 of the Fundamentals was essentially similar to Article 1041 of the Civil Code; they're basically the same in that regard, are

they not?

A. Yes, they're very close.

Q. We actually see this if you look at page 12 of the joint memorandum, if you look at subparagraph 4 G(A)6/1.01/12.

A. Yes.

Q. You see that you say that:

"The essential terms for a partnership contract are the same under Article 122 of the Fundamentals as under... 1041 of the current Civil Code."

So can we look then at the provisions of the Fundamentals. Can you go, please, to -- it's actually in J2/6, tab 32.

MRS JUSTICE GLOSTER: There isn't a tab 32 in J2/6.

MR RABINOWITZ: Sorry. The reference I have here is J2/6 --

MRS JUSTICE GLOSTER: I've got 38.

MR RABINOWITZ: 38, sorry. J2/6.38 at tab 32. It's page 182 J2/6.38/182.

These are the exhibits to your second report, and if we look, we can see what Article 122 says, "Agreement on Joint Activity", it's the first two sentences:

"Joint activity without formation for this purpose of a legal entity shall be established under the agreement between its participants. Under [a] joint activity agreement (simple partnership agreement) the

parties (participants) undertake to pool their contributions, integrate their efforts and act jointly in order to achieve [a] common business objective or other objective not contrary to... law."

Okay?

A. Yes.

Q. Now, perhaps we can look at Article 1041 of the Civil Code, just to see the extent to which that has got any differences. G(A)4/4, tab 2, page 73 G(A)4/4.02/73.

A. I have the Civil Code here, it's not a problem. Okay, Article 1041.

Q. 1041. On the left-hand side of the page, you see Article 1041 entitled "The Contract of Simple Partnership". Just looking at the first paragraph:

"Under a [simple partnership contract] (a contract on joint activity) two or more persons (the partners) undertake the duty to join their contributions and act jointly without the formation of a legal person to acquire profit or achieve another purpose not contrary to a statute."

So both of these provisions speak of the parties agreeing to pool or join their contributions and integrate their efforts and undertake joint activity in order to achieve a common business objective or goal or other objective or goal not contrary to law, correct?

A. Correct.

Q. Now, if we then go back to the joint memorandum, page 11, just to look at paragraph 31(3) G(A)6/1.01/11.

A. Yes.

Q. At the bottom of page 11 you can see that you agree that:

"A partnership contract envisages a joint activity of the partners towards a common goal without formation of a legal entity. This common goal must be [a lawful one]."

If you go over to page 12 and you look at subparagraph 5 at the top of the page, you see that you agree also that:

"All essential terms must be sufficiently defined. It would not be sufficient for the parties literally to agree to 'combine... contributions and act in pursuance of a common goal' without any detail."

So we all agree, do we not, that the parties must agree more detail than that?

A. Yes.

Q. Then just looking at subparagraph 6, you address the concept of a contribution which the party must agree to make, and you agree again:

"The concept of 'contribution' is very wide.

A party can contribute property or skills, efforts or services. It is not essential [you say] that property be contributed. There is nothing objectionable about a partnership contract in which each [party] agrees to contribute only efforts or services."

Correct?

A. Yes.

Q. Then just looking at subparagraph 7, you address the concept of a joint activity which the parties are to undertake, and you agree also this:

"The agreed activities may be the same as the contributions made by either party, particularly where the contributions are made in the form of skills or efforts. In this case, the term on contributions and activities of the partners will coincide. Such term must be sufficiently defined."

So where the parties are to contribute efforts, I think what you're agreeing here is that those efforts may also comprise their agreed activities provided that they are sufficiently defined, correct?

A. Yes.

Q. Now, thus far you and Dr Rachkov agree, but if we then look at paragraph 32, we can see that you dispute the precise nature of the essential terms of a partnership contract.

Now, to some extent there is agreement between you, because you both agree that a partnership contract must reach a sufficiently defined agreement on, first, the parties' contributions, secondly, their joint activities, correct?

A. Yes.

Q. And third, the common goal that those efforts are directed towards.

Where you disagree is on how precisely these matters must be defined, and we see that in paragraphs 32 and 33 of the joint memorandum. It really relates to the certainty of what the parties are to do and the goal that they seek to define, correct?

A. Yes.

Q. While we're on paragraph 32, just looking at paragraph 32(1)(d), you say that the essential terms for partnership contract include:

"The shares the parties will hold in the common property, in case the parties did not wish them to be equal."

So your suggestion here, Mr Rozenberg, is this right, is that the shares the parties will hold in the common property are not necessarily an essential term but will become so if the parties do not intend their shares to be equal. And in that event, you say, their

respective shares are an essential term which must be agreed or the contract will fail?

A. Yes, because if there is no agreement between the parties reflected in the agreement but the default rule works and there are no objections against it, it's not necessary for the parties to determine the shares.

Q. Right. And we come back to the question of default rules because you accept, I think, that there are default rules governing the shares of the party in the common property.

Let's just have a look at what you say, if you go to paragraph 37, which is on page 15 of the joint memorandum G(A)6/1.01/15, just looking at paragraph 37(2), you say:

"It is agreed that the Civil Code provides default rules by which, unless the parties agree to the contrary or unless otherwise follows from the circumstances or legislation ...

"The parties will hold an equal share in the common property..."

And you refer there to Article 245, correct?

A. Yes.

Q. Then you each add an observation:

"Mr Rozenberg observes, however, that where the parties decide to depart from this default rule but fail

to finally agree otherwise, the default rule will not apply."

And we've talked about that already.

"Dr Rachkov observes, as noted above, that the default rule will only not apply if the parties have made clear that they must reach agreement on that term before there can be a contract."

So just pausing there, the position appears to be this, that there is a default rule which provides that the parties will hold an equal share in the common property, correct?

A. Correct.

Q. That is the default rule to be found in Article 245 of the Civil Code, which is numbered less than 454, and which therefore applied in 1995 when the 1995 agreement was made, do you agree?

A. Yes, because at that time the only legal basis for this was Article 245. Articles of the part 2 were not in effect yet.

Q. And third, I suggest, the mere fact that the parties tried but failed to reach agreement on their respective shares does not make this an essential term. The default rule can still apply. Do you agree?

In other words, they try and agree what the shares are going to be but they fail to reach agreement, in

those circumstances the default rule can apply?

A. Now I'm trying to be more careful because from the counsel's statement it's unclear whether the parties tried, failed and agreed that the default rule should apply, or tried, failed but still insist that the shares should not be equal. In other words, disagree with the application of the default rule. This is the key point.

Q. All right. This goes back to the general point we've already discussed I think, Mr Rozenberg, and I'm not going to get into that again.

As I've already indicated, and as Dr Rachkov has made clear, our case is that the default term would only become an essential term -- I'm not going to go into it. You know what my position is.

Can we look at what other default rules may apply to a partnership contract, and can we look, if you're still on page 15 of the joint memorandum, at paragraph 37, subparagraph 1. And here you agree that the Civil Code applies another default rule, namely the value of the parties' contributions will be deemed equal. But do you see that that is at Article 1042.2; do you see that at 37.1?

A. Yes.

Q. If we just look at paragraph 33 of the joint memorandum for the moment, at the bottom of the page, subparagraph

33(1)(b), you say that one matter which the agreement must define is:

"Evaluation or value of contributions (primarily if contributions comprise intangible assets, or services)."

So I think you're saying, are you, that a term on the evaluation of contributions is an essential term for which, under the Civil Code as it applied in 1996, there is a default rule, correct?

A. In what paragraph are you reading this?

Q. Paragraph 33(1)(b), you talk about how precisely the parties' contributions must be defined, and you say that the contributions must include:

"Evaluation or value of contributions..."

Do you see that?

A. Yes.

Q. And then if you go back to page 15, looking at 37(1), you say that:

"The value of the parties' contributions will be deemed equal ..."

My point to you is that there is a default rule which applies in those circumstances, that's reflected in your paragraph 37(1), is it not?

A. The law states that the contributions shall be deemed equal on value otherwise established by the agreement of the parties or by the concrete circumstances. This

article was not in fact at the moment of 1995 agreement, but now it exists, I agree.

Q. Indeed.

A. And I indicated why I double-checked what counsel said. I checked what in 33 was said because I indicate here that Mr Rozenberg maintains that the agreement as required by Russian courts must define.

Then just the following text, because it was based, for the '95 agreement, on the court's practice, but still Article 1042 was not in fact at the moment of '95 agreement.

Q. Mr Rozenberg, I wasn't trying to catch you out with Article 1042.2 and when it applied. It is a default rule under the Civil Code and, as I think I said, since the article has a number higher than 454 we know that it didn't apply in 1995?

A. Correct.

Q. In fact, it only applied from 1 March 1996, correct?

A. Yes.

Q. And that then gives rise to this question, whether there was prior to this in 1995 any corresponding default rule here, correct? That is the issue?

That is the issue, isn't it, Mr Rozenberg? We know that Article 1042 is a default rule but that it only applied from March 1996. Now, the question is whether

there was in 1995 a corresponding default rule, that is where you and Dr Rachkov disagree, is it not?

A. As far as I remember, we both agreed about the shares. It was not quite clear about the basis maybe for Mr Rachkov in his cross-examination, but my view is always that for the shares, the default rule was always 245 in the absence of any other default rules in the Fundamentals.

Q. Indeed, Mr Rozenberg, but we're not dealing with shares here, we're dealing with contributions, which is why we're looking at 1042.1, which only applies from March 1996. And there is an issue as to whether, notwithstanding that 1042.1 only applied from March 1996, there was nonetheless a default rule that would have applied in 1995, do you understand?

A. I remember that the only default rule which applied to the partnership agreement for shares and contributions was 245, and there was also Article 437, as far as I remember, of the old Civil Code regarding profits and losses. But I don't have under my hand the old Civil Code.

Q. All right.

Mr Rozenberg, I want to show you some materials which are relevant to the question as to whether there was a default rule in relation to contributions that

applied prior to 1995 and therefore would have applied to the 1995 agreement.

One gets, I suggest, some assistance on this from some of the old books which deal with this issue and I want to show some of those to you. Can we start, please, by looking at what Professor Sukhanov said in his 1993 textbook. You will find that at G(A)7/1, tab 11. The English starts at page 99 G(A)7/1.11/99.

Let me ask you this about Professor Sukhanov, Mr Rozenberg. He is, is he not, another senior jurist who was one of the architects of the Civil Code, correct?

A. Yes.

Q. So let's just see what he says, page 99 in the English, and if you turn, please, to 98.001 G(A)7/1.11/98.001, just so that you can see that he is the author of chapter 46, which is what we're going to look at, as well as the editor of this book. Okay?

MRS JUSTICE GLOSTER: Mr Rabinowitz, please may you identify for me the paragraph in the joint memo where the dispute between the parties in relation to the default rule, or the application of any default rule prior to 1996 is identified?

MR RABINOWITZ: Paragraph 54.2 G(A)6/1.01/18.

MRS JUSTICE GLOSTER: 54.2, thank you.

MR RABINOWITZ: It's a rather opaque reference to this, my Lady.

MRS JUSTICE GLOSTER: That doesn't seem to me to be addressing it.

MR RABINOWITZ: I think the point came out of Dr Rachkov's evidence yesterday relating to the fact that there was this default rule. I think you'll recall I took him in re-examination to some of the materials.

MRS JUSTICE GLOSTER: Yes, okay. So it's not actually addressed --

MR RABINOWITZ: It's not sufficiently clearly addressed in the joint memo for me to be able to point you to something which says very clearly that this is the issue.

MRS JUSTICE GLOSTER: Yes, okay.

MR RABINOWITZ: I apologise for that.

Now, if you have 7/1 at page 98.001, I think I've already made this point with you, you see that Professor Sukhanov is the author of chapter 46 as well as the editor of this book, called "Civil Law in Two Volumes". Do you see that?

A. Yes.

Q. And if you go to page 100, please, do you see in the middle of the page the paragraph beginning "The participant", do you see that?

A. Yes.

Q. He says this, and bear in mind obviously this is his 1993 book, Mr Rozenberg:

"The participant to the contract is allowed to provide any property as a contribution: cash funds, securities, goods, real estate or the rights to use it, items of intellectual creativity (patents, know how etc.). Moreover [he says], the participants' contributions are not obliged to be equal, although they are assumed to be so unless there is a special agreement to this effect."

Then he says:

"But in any event it is vital that they are precisely defined because this consequently defines the size of the share in the profits or losses."

So what Professor Sukhanov is saying is that the parties' obligations are not obliged to be equal although they are assumed to be so in the absence of special agreement, do you see that?

A. Yes.

Q. And so, again, what Professor Sukhanov appears to be saying, is he not, as far back as 1993, is that there is a dispositive rule or a default rule by which the contributions of the parties are assumed to be equal. That is correct, is it not?

A. Unless there is a special agreement to this effect, yes.

Q. So you agree with me?

A. Yes.

Q. And then, just looking at the next paragraph, Professor Sukhanov says as follows:

"The contribution of a participant of a partnership may also be expressed in terms of various services provided by the participant for the common objective, including labour and activities requiring special knowledge and so [on] and so forth. Because each participant is obliged to provide a defined property contribution for the common objectives, it is impossible for a situation to arise whereby one of the participants would be denied the receipt of a part of the profit, or on the contrary the imposition of a part of the losses."

Just focusing on the last sentence here, Professor Sukhanov appears to be saying that it is impossible for the situation to arise where one of the parties would be denied either the receipt of part of the profits or the imposition of part of the losses, and the reason is, is it not, of course, because the dispositive rule, the default rule of equality, will apply if the parties do not establish for themselves how they will share the profits and losses of their joint venture, do you agree?

A. I understand of Professor Sukhanov whether it will be impossible for such a situation to arise, not because the default rule exists and assigns at least some share in the contributions to everybody, but simply because each participant is obliged to make contributions to provide some concrete property as a contribution. This is the sense of the statement.

Q. Well, that's fine, but if they haven't agreed what the contribution -- what the value of their contribution is, then the dispositive rule will apply and the value of their contributions will be said to be equal. That's what Professor Sukhanov says in the first paragraph that we looked at?

A. In the first paragraph, contributions are not obliged to be equal but they are assumed to be so unless there is an agreement, that's correct.

Q. So that's the position from 1993.

And can we just very briefly see what the Soviet scholars said on this topic. If you've got bundle 7/1 there, can you go to tab 3, please. The English starts at page 18, it's a commentary of 1973 G(A)7/1.03/18, the Russian is at page 15 G(A)7/1.03/15.

You can see that the work, "Soviet Civil Law", you can see that the work is edited by Professor Krasavchikov, do you see that?

A. Yes.

Q. If you turn to page 19, however, in the English, you can see that chapters 30, 34 and 44 were written by VF Yakovlev, do you see that?

A. VF Yakovlev.

Q. And this is right, isn't it, that he became Professor Yakovlev and he served as the distinguished chairman of the Supreme Arbitrazh Court between 1992 and 2005?

A. There is no such position, distinguished chairman. He was chairman of the Supreme Arbitrazh Court.

Q. He was chairman and he was distinguished, very well.

Can we just look at page 19.001 G(A)7/1.03/19.001. I just want you to see that chapter 44 was written by Professor Yakovlev, it's the "Joint Activities" chapter, do you see that?

A. Yes.

Q. Okay. Now, let's just see what he says. If you look at page 21 G(A)7/1.03/21 in the English, and the heading is, if you're following in the Russian, "The duty of the participants in the contract."

A. 21, right?

Q. And this is dealing with joint activities contract, page 21.

A. Yes, I've found it.

Q. So he's dealing with joint activities contract, and this is what he says in relation to the duties of the participants in the contract:

"The [duties] of the participants in the contract consists in general of taking part in joint activities in order to achieve the business aim set by the contract. Specific participation in joint activities may consist of making contributions in cash or other property, performance of work in the field of production or organisation, covering the costs provided by the contract, [or] a combination of all or some of these forms of participation in [the] joint activities."

This is really in line with the point upon which you and Dr Rachkov agree, that contributions can either be property or work, yes?

A. Yes.

Q. Then in the next paragraph Yakovlev says this:

"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. If [the] property is transferred for the needs of [the] joint activities only for its use or operation, but not as the joint property of the participants in relations, the

amount of the contribution is determined not by the value of the property but by the value of the service rendered."

So the author here, Yakovlev, is confirming that even under the 1964 Civil Code the dispositive rule, or the default rule, was that the amount of the contribution of each party was to be assumed equal, do you agree?

A. That's what I can read. I cannot find quickly this rule in 1964, but maybe --

Q. But that seems to be what he is saying?

A. That's what he is saying, yes.

Q. All right. My Lady, we started at --

MRS JUSTICE GLOSTER: That would be a convenient moment?

MR RABINOWITZ: Indeed.

MRS JUSTICE GLOSTER: Very well. I'll take 15 minutes.

(11.28 am)

(A short break)

(11.47 am)

MR RABINOWITZ: Mr Rozenberg, can we go to the joint memorandum again, at page 17, paragraph 50 this time G(A)6/1.01/17.

You see at paragraph 50 in the middle of the page, we see that it's agreed that:

"Where a partnership contract has been concluded,

property contributed by the partners, and property emerging as a result of the joint activity, is common property unless otherwise provided by legislation or the parties' agreement."

It may just be worth seeing what you say about this in our fourth report. Can you go, please, to bundle G(A)3/1, tab 2, page 113 G(A)3/1.02/113.

Just looking at paragraphs 153 and 154, you say:

"Under Article 124 of the Fundamentals, monetary funds or other contributed property of the parties to the agreement, as well as property created or acquired as [a] result of their joint activity, shall be their common property.

"Similarly, pursuant to Article 1043 of the [Russian] Civil Code, contributions made by the partners to the joint activity, and property [created or] acquired ... as a result of [their] joint activity, is common property of the partners unless otherwise provided by statute or agreed."

I think I'm right in saying that the property created or acquired as a result of the joint activity, which is common property, includes profits and income for the joint activity, correct?

A. Fruit of revenues, as indicated in the law, yes.

Q. That's equivalent to profits and income.

A. Yes.

Q. Very good.

Now, just going back to the joint memorandum, bundle 6/1, page 17. Can we just look at paragraph 54 of that, please G(A)6/1.01/17.

Just looking at subparagraph 1 of paragraph 54, you see that:

"It is agreed that...

"Profits received by the partners as a result of the joint activity or from the use of common property are to be distributed proportionately to the value of the partners' contributions or, prior to 1 March 1996, their share in the common property unless [otherwise agreed]."

So profits and income are to be distributed proportionately, and let me just suggest this. So after 1 March 1996, when part 2 of the Civil Code came into force, they are to be distributed proportionately to the value of the parties' contributions. And prior to then, in 1995, they are to be distributed proportionately to the parties' share in the common property. Correct?

A. Yes.

Q. We know that the default rule for both contributions and common property is that the parties will share equally, the parties can agree upon another division but that is the default rule, we've seen that, yes?

A. Yes.

Q. So the position is, is it not, in 1995 and in the following years, the default rule is that profits and income are to be distributed equally unless the parties agree on a different share or division; that's right, isn't it?

A. It is correct.

Q. Thank you. Now, what I want to look at next is how precisely the contributions, activities and goals of the partners must be defined, and if you have the joint memorandum, can I ask you, please, to go back to page 12, paragraph 33, towards the bottom of page 12 G(A)6/1.01/12.

We see there that there is a dispute between you and Dr Rachkov as to how precisely the parties' contributions must be defined. At subparagraph 1 you refer to three matters which you say must be defined. At (a) you say:

"The amount or numeric characteristics of [the] contributions (where the contributions are to be not services, but countable things)".

Then at (b) you say:

"Evaluation or value of contributions (primarily if contributions comprise intangible assets or services)".

Then at (c) you say:

"The order, timing and process of their making [and that's the partners' making] of contributions (if they cannot be made simultaneously with [the] conclusion of [the] agreement)."

One can see from paragraph 33(2) that Dr Rachkov doesn't agree with you about these matters. Can you just read to yourself what he says. (Pause)

A. Yes.

Q. So Dr Rachkov accepts that the parties must agree how or what it is they will contribute, but he doesn't agree that they must define the order, timing and process by which they will do so. He also doesn't accept that they must define a value for their contributions; that's right, isn't it?

A. Right.

Q. Just looking at paragraph 34, page 13, we see that you and Dr Rachkov dispute how precisely the agreed activities must be defined. We see there is a reference back to the heading "Certainty of essential terms" so we know that this has to do with essential terms.

If we go back to page 8, just to remind ourselves of what you say about this, it's paragraph 21 G(A)6/1.01/8. You see that you and Dr Rachkov agree certain things about essential terms, and subparagraph 1 you agree that:

"The parties must [agree] the essential terms of the contract with sufficient certainty to define [their obligations]."

Correct?

A. Yes.

Q. And then subparagraph 2 you further agree that:

"The contract must impose an obligation, and under Article 307, an obligation must be to undertake (or to refrain from undertaking) a 'defined act'."

Yes?

Then in subparagraph 3, we see that you agree that a defined act may refer to a defined activity or a course of conduct, correct?

A. Yes.

Q. Then you add this proviso, you say:

"... provided that, in Mr Rozenberg's view, in case of a dispute a court is able to establish what specific steps were envisaged under such obligation."

Then just looking at subparagraph 4, we see that you and Dr Rachkov agree that:

"The agreement must define the obligation with sufficient certainty such that it is objectively ascertainable (and a court can adjudicate) whether the obligation has been complied with."

A. Yes.

Q. Okay. And looking then at paragraph 22, just following this through to paragraph 22, still on page 8, we see that:

"It is disputed whether the joint activity or simple partnership agreement in particular must set out (or make it possible to identify) prescribed steps or specified acts that the parties are required to perform as an essential term of a joint activity agreement."

And in subparagraph 1 you state your position and you say this:

"Mr Rozenberg maintains that this is necessary, although if the steps that the parties are required to take can be derived from the nature of the activity that they are obliged to perform, then it is unnecessary to spell them out. However, where those specific steps are not clear from the nature of the activity ([that is] a description of a skill or service without particular steps), they must be expressly identified."

Just to make sure I understand what you're saying, Mr Rozenberg, you are saying I think this. First, that the contract may provide for the parties to pursue a defined activity or course of conduct, and the specific steps which the parties are required to take need not be spelled out, provided that those steps would in any event be clear from the nature of the agreed

activity, correct?

A. Yes.

Q. But you say that where those specific steps are not clear from the nature of the agreed activity, and you give the example of a description of a skill or service without particular steps, then you say the specific steps must be expressly identified in the agreement, is that right?

A. Right.

Q. And I think you also say, and I have in mind what you said at paragraph 33(1)(c) at page 13, that the agreement must therefore expressly identify the order, timing and process by which the parties are to make their efforts, is that what you say?

A. Yes.

Q. Again, can we just look at the way you put this in your report. If you go to G(A)3/1, tab 2, your fourth report, page 153 G(A)3/1.02/153, it's paragraph 300(a). We see that you say in the first sentence, dealing with the question of whether there was an agreement as to contributions, you say:

"As to Mr Berezovsky's supposed contribution, an agreement to 'lobby' or to 'raise finance' is not, in my view, sufficient."

Then you carry on and you say this:

"Mr Rachkov concedes (as he must) that if there was a valid agreement and the Claimant failed to perform his contribution, he would be liable in damages pursuant to Article 15 of the... Civil Code."

In fact I'm not sure that is what Dr Rachkov is saying but that doesn't matter for present purposes.

But just going on with what you have to say in this paragraph, you say in the last three sentences:

"But it would be impossible for a court to assess damages in relation to such an obligation; it is not sufficiently objectively definable. In addition, it goes without saying that such an obligation could never be specifically enforced. Consequently, it was not sufficiently precise to form the subject matter of a binding agreement."

Can we just take this in stages, Mr Rozenberg. In the first sentence, you say that damages could never be assessed in relation to an obligation to lobby or to arrange finance, correct?

A. For a court it looks like an impossible task to define, in the monetary form, damages in case of failure to perform such obligation.

Q. All right. So I think what I suggested to you was correct.

Then in the second sentence, you are saying that

such obligations could never be specifically enforced, that's right, isn't it?

A. Yes.

Q. So what you then say in your third sentence is that consequently such obligations are not sufficiently precise to form the subject matter of a binding agreement, is that a fair summary of your view?

A. Yes.

Q. And we see that you elaborate on this earlier in your report, in fact if you go back to page 148, paragraph 277 G(A)3/1.02/148, you see the paragraph beginning "Clearly":

"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."

So a further point I think you are making here, and it's the last sentence, is that it is impossible to

determine an objective standard by which performance of an agreement to lobby could be measured; is that what you're saying?

A. Yes.

Q. Now, you deal with the same point, if we can just briefly look at it here, in your second report, that's bundle J2/5, tab 37 at page 131, paragraph 74, please J2/5.37/131. Do you have that? Paragraph 74.

If we just pick that up --

A. I'm afraid in this report I cannot find paragraph 74.

Q. Are you behind tab 37, page 131? (Pause)

So what you say, I'm just picking it up in the middle of that paragraph:

"Clearly, the obligations of Mr Berezovsky and Mr Patarkatsishvili could not have been enforced through the judicial system (the court could not bind Mr Berezovsky to use his high level connections to ensure privatisation of Sibneft through the issuance of the respective Decree or rule that Mr Patarkatsishvili hold his business contacts to achieve the said goal), which additionally proves absence of any legal meaning thereof."

In paragraph 75 you say:

"Therefore, it is clear that the contributions of Mr Berezovsky and Mr Patarkatsishvili would not be

recognised as legally meaningful under Russian law, and, as such, they cannot recall within the categories mentioned in Article 1042 of the ... Civil Code regulating contributions to the joint activity agreement, namely 'money, other property, professional and other knowledge, skills and expertise, and also business reputation and business contracts'."

I think there is a typo in paragraph 75, that should presumably say "business contacts" rather than "business contracts"?

A. Of course, business contacts.

Q. Then in paragraph 76, I think you summarise your view, you say:

"To summarise, the alleged 1995 Agreement did not and could not give rise to any enforceable obligations between the parties and, therefore, as a matter of Russian law, it could have no legal nature and/or force, and could not possibly give rise to [the] joint activity agreement under Russian law."

To sum up what you're saying, Mr Rozenberg, it is, is it not, at least on this point, that an agreement to lobby or to raise finance is not legally meaningful and cannot be a contribution to a partnership contract because, you make three points, you say first it is impossible to identify precisely how the agreement

should be performed, correct?

A. Yes.

Q. And then you say, secondly, the obligation could not be specifically enforced if the promissor refuses to make their agreed contribution, correct?

A. Yes.

Q. And third, you say it's impossible to determine an objective standard by which the performance of such agreement could be measured, that's your third reason, correct?

A. It's impossible to assess, to evaluate the amount of damages if they are not performed, that's correct. In addition, later, I also specified some important points regarding contribution in the form of lobbying services because again such contribution cannot get any protection in the court in case of dispute.

Q. Yes, I was about to show you that. If you go to page 149, I think in the same report, paragraph 123 J2/5.37/149, you see you say:

"In the doctrinal view of Russian ... law, 'service is a means to satisfy individual need of a person, which is connected with non-material result of the performer's actions, permitted by current law and order, on a paid basis'."

Then you say this:

"Under Russian civil law services which go beyond the framework permitted by the law (such as the services of a paid killer, to give an extreme example) or services which do not have civil law contents (such as the services of, say, a fortune teller) may not be subject to legislative regulation applicable to civil law services..."

Yes? That's what you say?

A. Yes, yes, and the next, mm-hmm.

Q. I certainly do not disagree with you that a paid killer is not entitled to be paid for his services, but can we look at your suggestion that a fortune teller would not be entitled to payment for, let's assume it's her services.

MRS JUSTICE GLOSTER: That's a sexist assumption, Mr Rabinowitz.

MR RABINOWITZ: We'll make it his services then. I could make some other assumptions about that which wouldn't, no doubt, go down well.

Let's take the fortune teller, shall we, Mr Rozenberg, because I have some difficulty with your suggestion that a fortune teller or indeed a lobbyist or a person who arranges finance is not entitled to payment for their services. Again, I wonder if we can test this with a hypothetical example.

A. About the person who arranges finance, I didn't say this. I indicated that since it was absolutely unclear what kind of raising finance would be performed, this specific obligation is unenforceable. And also I didn't indicate that it's contrary to law, like in case with lobbying services.

Q. All right, we'll come to those points, but let's just deal with the fortune teller. Let us suppose that a fortune teller agrees to tell my fortune in return for £10. He is to tell me my fortune and then I am to pay him £10. Okay?

A. Okay.

Q. If the fortune teller breaks his promise and refuses to tell me my fortune, I can quite see that it may be impossible to identify what fortune he would have told me and that I may be unable to show that I've suffered any particular damage from his failure to tell me my fortune. I can see that it may, in those circumstances, be difficult or impossible for me to obtain a court order compelling him to tell me my fortune. I can see all of that, Mr Rozenberg. But the position is quite different, is it not, where the fortune teller has in fact told me my fortune, yes?

A. What is the question? You paid -- in the first situation you paid money and the fortune teller received

money and didn't tell you anything.

Q. And in that situation, where he doesn't tell me anything, I can quite see it would be difficult to go to court and get an order compelling him to tell me my fortune.

A. No, it's clear, at least under Russian law, it's necessary to go to the police and it's a fraud and you will get the money.

Q. I'm sure that's so.

But the position is different, is it not, Mr Rozenberg, where the fortune teller has in fact told me my fortune.

A. Right.

Q. Yes?

A. Yes.

Q. Because once the fortune --

A. But "yes" doesn't mean the end of the story. The position is different, and then what?

Q. Let's just see if it's different, or how it's different.

Once the fortune teller has told me my fortune then I would suggest that I would become obliged to pay him the agreed price of £10, do you agree?

A. This is the problem with Russia. If you voluntarily pay money to the fortune teller it's fine, nobody will be prosecuted. But if you refuse, then the fortune teller

will have problem because his or her services will not be recognised as obtaining court protection in Russian courts, and he or she will stay without money.

MRS JUSTICE GLOSTER: I suspect fortune tellers get their money upfront, don't you?

MR RABINOWITZ: They may well do that, my Lady. I've never used him or her.

A. Moreover, in the worst case scenario, if the court will see that it's done on a systematic basis then there may be some troubles for the fortune teller, but it's another story.

Q. Let's take a different example because fortune tellers are obviously treated specially.

Let's take a different activity. Let's take a situation in which you meet me and you say to me "I hear you have an interesting life, I will give you £10 if you tell me your story, your life story", okay? Now, again, before the contract is performed it may be difficult for anyone to ascertain what that story will be, but let's assume that, in fact, I do tell you my story, it may not be as interesting as you hoped, but I do tell you that story, and I then want the £10 from you.

Do you say in those circumstances that a Russian court would have any difficulty in saying, "The contract

has been performed, you have to pay the £10"?

A. As far as I understand, it's something like agreement either to prepare some kind of memoirs or to give an interview or to prepare something else for publication, I see nothing wrong here.

Q. And that would be so even if you had no idea what my telling you that story was going to involve, whether that was going to be a long story or a short story, you had no idea what the content of that story was going to be?

A. It's the same like obligations to build something in your courtyard or to do some other work. Of course ideally the agreement should specify everything to get court protection later in case of problems, but it depends on the concrete case. If nothing were specified, he will face problems obviously in the court.

Q. You see, I suggest to you, Mr Rozenberg, that activities like that, whether it be story-telling or indeed lobbying, and I understand your other objections to lobbying, or arranging finance, certainly once they have been performed they are capable of constituting the subject matter of a contract and giving rise to a contractual payment obligation, do you agree or not?

A. Some payment obligations, if it was agreed with sufficient certainty, yes. But if it was as vague as

you described, just an interview or some recollections without any specification, then chances are high that such agreement will be considered as non-concluded.

Q. Well, what I'm suggesting to you is this, Mr Rozenberg, that in order for an agreement to be performed, and to give rise to binding payment obligations, it is not necessary that it should have been possible at the outset to identify the specific steps that the parties were required to take, at least with any greater precision than "You will tell me my (sic) story" or "You will do the lobbying" or "You will arrange finance"?

A. It depends, it's impossible to make such general conclusion because otherwise we will come to a strange result that, for example, interview in one sentence, "I had a wonderful life", period. And then the request to be paid would be sufficient and enforceable. Everything depends on concrete circumstances.

But ideally, the more precise your agreement is the higher your chances are for obtaining court protection in case of dispute. If everything is performed, everything goes without problems, it's fine and we all understand the court will not be involved. But if you anticipate that there may be problems, then ideally you go to a lawyer and prepare a comprehensive and very clear agreement.

Q. I think, just picking up on what you said, I think you accept that if everything is performed and there is no dispute about the fact that it has been performed, then that will get the protection of the Russian law, correct?

A. I said that if everything was agreed without dispute and performed without dispute, and all the parties are happy, then there is no basis for the involvement of the court. But whether everything was legal or not quite, it's an additional question like with the fortune teller.

Q. All right, that's very helpful.

Can we just look at one or two authorities on this. Can I ask you, please, to go to bundle G(A)4/5 at tab 36 G(A)4/5.36/125.

At tab 36, Mr Rozenberg, you I hope have informational letter number 48 of the Presidium of the Supreme Arbitrazh Court. I think this is exhibited to your fourth report. The English is at page 125, I think the Russian starts at page 127 if you prefer to see it in the Russian.

A. Yes, of course.

Q. Again I think you agreed that information letters of this kind play an important role in the understanding and interpretation of Russian law?

A. Yes.

Q. So can we just look at what this letter says. It's entitled, "On certain issues of judicial practice arising when disputes are considered relating to contracts for the provision of legal services".

If you look at section 1:

"In accordance with section 779 of the ... Civil Code under a contract for the paid provision of services the contractor undertakes on the instructions of the client to provide services (perform certain actions or conduct certain activities), while the client undertakes to pay for those services."

Then if you look at the next paragraph:

"In considering disputes it is necessary to proceed from the fact that the said contract may be deemed concluded if it lists specific actions that the contractor is obliged to perform, or indicates the specific activities which he is obliged to conduct."

So the Presidium is saying, is it not, that a contract for services may be deemed concluded if it either lists specific actions that the contractor is obliged to perform or it indicates specific activities that he is obliged to conduct. Do you agree?

A. Yes.

Q. And then looking at the next sentence of the same

paragraph:

"In cases where the scope of the contract is defined by an indication of a specific activity, the range of possible actions by the contractor may be determined on the basis of negotiations that preceded the conclusion of the contract and correspondence, established practice in the mutual relations between parties, normal... practice, subsequent conduct of the parties, etc."

Perhaps we can just break down what the Presidium seems to be saying here. Firstly saying that the contract may be deemed concluded if it indicates a specific activity to be performed, even if that activity may be performed in a range of possible ways, do you agree?

A. Yes.

Q. Second, it is saying that the range of possible actions can be determined on the basis of prior negotiation or discussions, or established practices, or normal business practices, or the subsequent conduct of the parties. Again, I take it you agree with that?

A. Yes, there is even a reference to the appropriate article of the Civil Code. Hard to argue about.

Q. Now, the existence of a range of possible actions shows that it may be a matter of judgment for the service provider to choose from within that range which specific

steps to take. That is true, is it not?

A. It's true, but it's clear from this letter that if still actions and terms are not sufficiently defined, it may be up to the court to decide what had to be done.

Q. Well, indeed, but you'll accept at least this, that the range -- the existence of a range of possible actions shows that it may be a matter of judgment for the service provider to choose from within that range which specific steps to take? (Pause)

Isn't that obvious, Mr Rozenberg?

A. For me not quite clear. Could you please indicate what concrete words state this?

Q. I'm not saying the words state this; I'm saying it follows from what they've said.

The existence of a range of possible actions, which is what they're contemplating here as a contract involving, shows that it may be a matter of judgment for the service provider to choose from within that range of possible actions what specific steps to take. You may be engaging a person in the sort of activity where there are a range of ways in which he can deal with it and it's a matter of judgment as to what way he chooses to deal with what you've engaged him to do?

A. I think if it's more or less standard activity, some more or less standard services for a customer, it

doesn't matter what concrete steps a lawyer would choose, even in preparation for litigation, for example. But if it really matters, and something unusual is anticipated, I think both parties should agree what concrete steps shall be taken, shall be chosen, to avoid any misunderstandings and, in the worst case scenario, court dispute in the future.

Q. Indeed, I was actually going to give you that very example.

If you engage a lawyer to appear for you, to argue your cause in some matter to try to get you a particular result, you don't have to specify in advance exactly what it is you say he should do in order to get that cause, which witnesses to call, which evidence he should adduce. You leave it to him, having engaged him to conduct that activity, to choose within the range of activities what exactly he will do in order to get you what you want. Correct?

A. Yes. In general, yes.

Q. Now, can we then look at section 2 of this letter, towards the bottom of page 125, and the first sentence says:

"According to section 781 paragraph 1 of the ... Civil Code, a client is obliged to pay for the services provided him within [the] deadlines and in accordance

with the procedure indicated in the contract."

Then the next paragraph:

"In considering disputes relating to payment for legal services rendered in accordance with a contract, arbitrazh courts must be guided by the provisions of section 779 of the ... Civil Code, according to which a contractor may be deemed to have properly fulfilled his obligations in performing the actions... indicated in the contract."

So the Presidium is saying here that in the context of disputes of a payment for legal services, the court should be guided by this provision of the Code under which the contractor is to be deemed to have properly fulfilled his obligations if he's performed the activities indicated in the contract, that's right, isn't it?

A. Yes.

Q. So again, Mr Rozenberg, the question for the court is whether the contractor has done what he promised, do you agree?

A. It's up to the court.

Q. Indeed, it is up to the court so I think you are agreeing. The court must decide whether the contractor has done what he promised, correct?

A. Right.

Q. Then in the next sentence the Presidium says:

"At the same time one should proceed from the fact that refusal by a client to pay for services actually provided to him is prohibited."

A. Right.

Q. So where services have been provided they must be paid for appears to be what they are saying, correct?

A. Yes, presuming that of course there were no violations of the agreement of the service provider.

Q. Indeed, and presumably they were the contracted-for services?

A. Right.

Q. If we then look at the next paragraph at the bottom of the page and on to page 126:

"At the same time [the] contractor's claim for payment of remuneration should not be allowed if the claimant bases said claim on a contract term making the payment amount for services dependent on a judgment by a court or government body which is to be arrived at in [the] future."

So what the Presidium seems to be saying here is that the contractor can't include a contract term which makes his fee dependent on a judgment by a court or government body which is obviously to be arrived at in the future, correct?

A. Just any claims regarding favourable court or governmental decisions are not enforceable in courts, correct.

Q. And what it appears to be prohibiting here are legal success fees, correct?

A. It's not only legal success fees, because other state authorities are mentioned. Therefore I understand, and according to this paragraph, it's not only legal services fees, just any contracts which put the remuneration in connection with favourable decisions, either of courts or other state authorities, are legally meaningless.

Q. You may say that, Mr Rozenberg, and indeed you do say that about Makayev, but it's perfectly plain that this is an information letter on certain issues of judicial practice arising when disputes are considered relating to contracts for the provision of legal services. That is what this is about, is it not?

A. This is the heading, but this paragraph does not mention legal fees and clearly indicates that any claims connected with favourable decisions of state authorities will not get court protection. This particular paragraph doesn't mention legal fees. Sometimes it happens the main issue considered here are legal -- payments for legal services, but the last paragraph is

a little bit broader.

MRS JUSTICE GLOSTER: Could I ask you this, an agreement with an architect that he will get paid a contingency fee in the event that the local authority gives planning permission, is that illegal under this provision?

A. As I understand, it's illegal.

MR RABINOWITZ: I suggest to you, Mr Rozenberg, that is completely wrong and we will deal with that when we get to Makayev. I'm going to suggest to you that you have expanded Makayev out of all natural proportions but we will come to that when we get to Makayev.

A. Just to avoid any misunderstanding, I understood your question, my Lady, that the remuneration of architect, we leave aside his professional work as architect, will depend directly on the favourable decision of local authorities regarding some construction issues.

MRS JUSTICE GLOSTER: Yes, I have an agreement with an architect to build my house, I have a fixed fee of $50,000 plus a percentage increase in the event that the planning permission is favourably granted by the local authority or the planning authority.

A. Still generally I confirm my question only with just specification. It's entirely at the discretion of the local authorities or simply there is some provision, regulation that if the architect prepared everything

correctly, then such licence or approval shall automatically be done?

MRS JUSTICE GLOSTER: No, let's say it's --

A. It's a discretion --

MRS JUSTICE GLOSTER: -- putting up blocks of flats on green belt or something like that so it's a discretionary --

A. Discretionary. This is the key point because the same -- like in an agreement between a construction company and a person who will allegedly contribute their licence to carry out construction in the centre of the city, for example, and again it's at the discretion of the mayor's office, it's not automatically done if the project is very good, then again such terms which connect the remuneration with favourable decision which is at the discretion of the governmental authorities will be illegal.

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

MR RABINOWITZ: You're introducing discretion into your answer there, Mr Rozenberg, "Discretion. [That's] the key point". But do you say there is a basis for that in Makayev? Where's the discretion in Makayev? You're dealing with a case which is simply the application of the law.

A. First of all I use the word "favourable" but "favourable" means based on connected with favour which

is discretionary. You may do favour to somebody or you may deny favour, and this is discretionary because there are some functions of governmental authorities which, using legal terminology, should not be unreasonably denied if you prepare all the documents correctly. You have to get your new passport if your old passport expires, for example, and there are some organisations which carry out clerical work, collecting necessary papers, doing paperwork and submitting later all the papers to the governmental authorities in order to get the passport, which practically automatically will be issued.

Or in order sometimes to do the -- to give approval for let's say just replenification of your apartment, there are some regulations. You want, instead of let's say three rooms, to have two rooms. Again, in the past, it was sometimes discretionary. Now there are certain regulations and it's clear that it cannot be considered as favourable decision and, therefore, organisations preparing all necessary paperwork are entitled to get payment just for their work, not for the favourable decision but for their work because, if the work is done properly, then their approval shall be done automatically. The same to some extent just may apply to companies which prepare documents for obtaining visas

in foreign embassies.

MR SUMPTION: Can I just point out that there's a rather important missed type in the [draft] transcript at 84, line 11 which might be better sorted out at this stage than later. The last word on line 11 I do not think is what the witness said but perhaps that can be clarified.

MRS JUSTICE GLOSTER: Can you look at it, please, Mr Rozenberg, line 11 of [draft] 84.

A. "... cannot be considered as favourable decision..."
"... will be illegal".

MRS JUSTICE GLOSTER: Yes, thank you.

MR RABINOWITZ: Mr Rozenberg, we'll come to Makayev in due course but while we're on this document, let me ask you this. Makayev is a case, at least on its face, dealing with legal services as indeed is the informational letter. It's right, isn't it, that you haven't been able to identify a single case outside of the legal services area to support your contention that any contract which involves a success fee being paid in order to achieve a particular result, take the example of the architect, is prohibited as a matter of Russian law?

A. I don't think there are many cases because, frankly, in such situations participants of these transactions or arrangements -- they are mostly called this way in

Russia -- never go to courts because they understand that instead of civil law matter they may have to deal with the criminal law matter.

Q. Why, Mr Rozenberg? Take my Lady's example of the architect who gets a slightly enhanced fee if, as a result of his activities, there is planning permission granted for a particular part of what he's going to do. Why should he be worried about the criminal law, just because of such a contract?

A. Because when it's done on the basis of discretion, a party, the service provider, who would like to have such arrangement, will probably expect -- unfortunately, my Lady, I have to guess but I'm trying to explain why there are so few cases of this kind in courts. So the person who insists on including such provision in the agreement expects that discretionary decisions of governmental authorities will always be in his or her favour. Unfortunately, taking into account the widespread corruption, especially in the construction area in our country, just there is a serious reason to anticipate that somebody among governmental authorities is expected to help this architect if he or she is so confident that all discretionary decisions will always be favourable, because otherwise it doesn't make sense for him to include this provision.

Again, this is very(?) commonplace, I would say, in a country where unfortunately corruption is not exception. Therefore, cases when some remuneration depends on favourable decisions are extremely, extremely rare, I would say. It's not the situation when parties would like to go to courts.

Q. You seem to be suggesting that the only time anyone would ever include a fee which provides a benefit for having achieved a particular result is where they have some corrupt intention in mind. Might it equally not be possible, Mr Rozenberg, that such an arrangement would be made in circumstances where the service provider knows that he will have to do a great deal of work to achieve a particular result and that, if that result is achieved, it will be of enormous benefit to his client? No corruption at all.

A. It's better to concrete -- just concrete cases. I was asked first why such cases are very rare and indeed, in my practice, I can hardly remember any civil law agreement where parties would like to have a clause which would put remuneration in dependence of a favourable decision of governmental or court authorities. Let's put the court aside, of course, it's the success fee and in general in law firms it's not greeted(?) but --

MRS JUSTICE GLOSTER: I'm not understanding you. If you could just look back at [draft] page 88, lines 8 and following. You say, "I can hardly remember any civil law agreement where parties would like to have a clause...", can you just explain what you mean by the following lines from 12 onwards?

A. Well, a clause which would put remuneration in dependence, making remuneration dependent on a favourable decision of governmental authorities.

MRS JUSTICE GLOSTER: So you're saying you've not come across --

A. No.

MRS JUSTICE GLOSTER: -- agreements where there is a provision for a success fee or a contingency fee dependent on a favourable decision by government authority?

A. By governmental authorities, yes, correct. Therefore I have serious reason to anticipate that, in the absence of corruption, if parties understand that it's impossible to predict whether decision will be favourable or not favourable, they never include such clauses since the key point for remuneration is performance of work and performance of work -- due performance of work does not depend on the favourable or unfavourable decision of authorities.

MRS JUSTICE GLOSTER: I suppose it's possible, if they did have such an agreement with their architect, they wouldn't put it in a written agreement anyway?

A. They could put it in the written agreement, but if everything goes well, just of course it's possible to pay; but in case of dispute, such clause would never be enforced and it's, by the way, one of the reasons why nobody does it. But another reason, as I said, because mostly parties understand very well what is the basis for remuneration, good work or good connections with favourable -- with appropriate people, let's say, in governmental authorities.

MR RABINOWITZ: We'll come to deal with what Makayev says. But just on the information letter which we have open at the moment, can I just ask you this: the Presidium in this letter is not prohibiting lawyers, or indeed anyone else, from recovering fixed fees which are due regardless of a case, that is correct, is it not? Regardless of the outcome of the case?

A. Of course legal work, like any other work, shall be paid.

Q. Shall be paid?

A. Shall be paid.

Q. So I think you're agreeing with me?

A. Perform legal services shall be paid, nothing to discuss

as I understand.

Q. And there's nothing wrong with charging a fixed fee regardless of the outcome?

A. A fixed fee for the work?

Q. Yes.

A. Regardless of the outcome.

Q. Yes.

A. Of course and what is dealt with, I think it's clear.

Q. The reason -- Mr Rozenberg, there's a difference between saying work shall be paid for, and saying that the work shall be paid for by reference to a fixed fee. Do you follow? It could be an hourly rate, in which case there wouldn't be a fixed fee, but there is nothing here in this information letter, I think you will agree with this, where the Presidium says you cannot agree a fixed fee in respect of work which will be payable regardless of the result of the case?

A. Fixed fee is not prohibited in this case, like in any other services agreement.

Q. Good, thank you.

Just lastly on this, can we look at page 126 G(A)4/5.36/126. We just see -- I don't think I need to bother with that. We can put this away.

I want to go back, if we can, just to talk about the question of certainty of contract, and I want to

consider a hypothetical example again with you, if I may. Let us suppose that Mr B agrees with Mr A that in return for a fixed fee he would lobby the state to create and privatise a company that would own shares or assets in a state enterprise, the energy enterprise, okay? So what they agree is lobbying in return for a fixed fee, all right?

Mr B doesn't guarantee that his lobbying will succeed, he promises to try and persuade the state to do what they want, and he was to be paid this fixed fee regardless of whether his efforts succeeded. And let us assume, because I don't want this to be clouded by other things, that it was written down and it was intended to be binding and it was entirely certain.

Let me ask you this: do you agree that this would be a concluded contract under which Mr B agreed to perform a defined activity lobbying the state for a defined purpose?

A. As far as I remember, lobbying is not indicated in legislation -- in legislative acts. Usually what we understand is some activity connected with drafting legislation, organising publications, proposing some changes in legislation, and it has some general aspect. It's not connected with one concrete decision because, with one concrete decision, it's unclear what concrete

work shall be done.

Services, when they are legal, when we do not speak about using personal connections in order to get quick and easy favourable decision of governmental authorities, services mean concrete work, there should be some substance. If in order to achieve some goals including, let's say, privatisation, it's necessary to prepare some kind of draft legislation, draft regulation, maybe to organise some meetings, conferences, discussions, publications, to persuade people who later either make pressure, or just somehow contribute to adaption of changes in the legislation. Then these kind of services, if you call them lobbying, would be perfectly legal, but if you speak about finding the right person who will arrange the favourable decision for a concrete amount of money, then in my view still it will be illegal(?), but maybe you didn't explain all the details of the work which is anticipated to be performed. Because I think the key point here is what concrete work will be done under the label of services, ie lobbying services.

MRS JUSTICE GLOSTER: Do you have political lobbyists in Russia?

A. We don't.

MRS JUSTICE GLOSTER: You don't?

A. We don't.

MRS JUSTICE GLOSTER: So for example if you had a, I don't know, grain and food trades association, who wanted to lobby for a change in an act of parliament, would they be at liberty to pay somebody to talk to politicians, to publish in the newspaper the need for a change to some law?

A. As I said, we don't have regulations regarding this. When I said we don't, I mean we do not have official legal forums for it. In practice, of course there are groups, social groups, industrial groups who try to promote favourable changes in legislation --

MRS JUSTICE GLOSTER: And presumably they're paying someone to do that, aren't they?

A. Just, again, if somebody carries out publications, organises meetings, conferences, these payments are perfectly legal. But, of course, again there is financing of political parties by oligarchs, for example, and then it sometimes becomes questionable.

But there is no legal basis regulating such activity, therefore I had to answer your question, my Lady, whether we have political lobbyists, it's not an activity which have concrete legal forums, like for example lawyers' activity or advertisement agencies' activities and so on.

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

MR RABINOWITZ: Dr Rachkov says, as you know I think, Mr Rozenberg, that there are political lobbying firms in Russia, as indeed there were in 1995. Do you recall him saying that, paragraph 217 of his fourth report?

A. I read that Mr Rachkov mentioned lobbying firms which do concrete work, but I don't want to argue about words. I understand that there is no legal basis for activity of individuals who achieve favourable political decisions or favourable political changes.

Q. You see, what you agreed with me about the information letter was that there was nothing there which prevented a fixed fee being paid regardless of the result, do you remember that?

A. Yes.

Q. And the example I've put to you is of Mr B agreeing to be paid a fixed fee regardless of the result of his lobbying activity. Do you follow?

A. I do.

Q. So do you agree that you could have a concluded contract under which Mr B agreed to perform a defined activity, lobbying, for a defined purpose? Because I think you gave a long answer but I'm not sure you actually answered my question.

A. I guess to answer your question we have to have real

substance of the services, because lobbying does not specify, does not define anything in the context of Russian existing legislation.

Q. Well, you say in the context of Russian existing legislation, and it may be that you're referring here to contracts which are named in the Civil Code, is that what you're referring to? That there is no named contract of lobbying in the Civil Code?

A. This is included too.

Q. Yes, because you accepted, I think, in the joint memorandum that the fact that a contract is named or unnamed doesn't mean that it can't -- sorry. The fact that a contract is an unnamed contract doesn't make it any the less a contract, correct?

A. Correct.

Q. So the fact that you don't have legislation specifically identifying lobbying as an activity is really neither here nor there?

A. It's important because in the absence of any legal definitions you have to specify sufficiently what kind of work the service provider is expected to do. Because if we write that it will be legal services, it's clear, transportation service, it's clear. If you write lobbying services, it needs to be clarified.

Q. It needs to be clarified because there are a range of

possible activities that could be carried out, correct?

A. It should be clarified in the range, I would say, the volume of activity which is expected to be paid under the label "lobbying services" should be determined.

Q. We saw earlier from the authority that I've just taken you to that it is perfectly possible to have an activity specified in an agreement where there is a range of ways in which that activity could be carried out. Do you remember that?

A. And we both agreed that the court will assess whether it should be remunerated.

Q. Indeed, the court will assess it. But the mere fact that there is a range of ways in which this activity could be carried out doesn't make it a non-contract, do you agree?

A. I understand that you speak about enforceable contracts, because a contract may be unenforceable, and in order to have an enforceable contract for lobbying services it should be crystal clear what kind of services shall be provided and on what basis they will be paid.

Q. Now, assume for the purposes of this hypothetical example that Mr B in fact carried out certain activities, okay, so that it was possible for a court objectively to determine whether Mr B in fact performed his side of the bargain.

A. Theoretically we can assume it, and I think I gave examples of lobbying activity which may be subject of a civil law contract, like drafting new legislation, organising publications, meeting and conferences and so on. Such type of services, such type of works which should be paid on the basis of a contract within the agreed amount are not illegal.

Q. In a situation like that, the court would be able to decide whether Mr B has actually lobbied the state as he had agreed he would?

A. I think the correct answer would be not whether Mr B lobbied the state but whether Mr B performed the services connected -- just indicated in the agreement, ie drafting legislation, organising publications, meetings, conferences and so on. Then it would be possible for the court to assess the evidence available.

Q. Very good. It's also possible, I think you would agree, in a situation like the one I've described in my example, that there may in fact be no dispute about the matter. That's to say that Mr A may accept that Mr B did what he promised and that the result was in fact achieved.

A. If there is no dispute then there is no need to go to the court.

Q. I think also that you will accept that the public policy

prohibition against success fees that we see in the information letter, and indeed as we see in Makayev, would certainly not apply to the example I've given you where the fee was a defined fee and it was agreed to be payable whether or not the activity succeeded?

A. If there were only services and not some use of personal connections to achieve certain results, definitely it would not contradict the public policy.

Q. All right. Now so far we've considered examples, in this hypothetical example, of a contract for services when the fee is fixed, okay? But, of course, the parties may agree another form of quid pro quo, the parties may agree that the person providing the services should not be paid a fixed fee but should instead share in the fruits of the services, yes?

A. Provider of services will share in the fruit of the services. It will be a complicated scheme but preliminarily I see nothing wrong here.

Q. Nothing wrong with that. Thank you for that, that is very helpful.

Can you just give me one moment, Mr Rozenberg, please. (Pause)

Now, I want, if I can, next to just pick up something that you say in your fourth report at paragraph 333, G(A)3/1 at tab 2 G(A)3/1.02/162. It's

page 162. You say at paragraph 333:

"As I have explained above, there are some circumstances in which Russian courts have held that, although a joint activity agreement would have been considered non-concluded at its inception, the fact that the parties have performed that agreement without demur prevents them from arguing that they should not be bound by the agreement."

Then in paragraph 334 you say that the principle does not apply in this case. And we will look later at the reasons that you give.

Can we just turn back in this report to page 105, please, paragraph 125. Here you point out what Dr Rachkov says, and you say:

"Mr Rachkov contends that where the parties have performed the contract without dispute, Russian courts have confirmed that the contract will be deemed concluded regardless of whether the original agreement omitted essential terms, or was too vague or insufficiently defined."

In the next paragraph you say this:

"I accept that where it can be demonstrated that a contract has been fully performed, the documentary evidence of its performance may be taken into consideration by a Russian court when assessing whether

a contract is or is not concluded. I therefore accept the validity of the principles espoused in Babenko ... Zhilischnik ... and Sokolniki. In my view those cases were [rightly] decided."

I wonder if we could just have a look at Babenko to see exactly what it is deciding. Could you please go to bundle G(A)2/2, tab 29.

So the English starts at page 61 and if you look at the second paragraph, you can see what the claim was about G(A)2/2.29/61:

"Sole trader NF Babenko ... applied to [the] arbitrazh court with a claim against sole traders ... Chebatkov, ... Ryagin, ... Volvich, [and] ... Gorbov for a voidance of joint activity agreement of 1 [February] 2006."

Then in the third paragraph, we see that third parties, the Federal Tax Service of Russia and a Mr Antonyan were invited to take part in the case. Do you see that?

A. Mr Antonyan was participate -- yes.

Q. In the fourth paragraph we see it says:

"By the decision of 24 [March] 2008, upheld by the Court of Appeal ruling of 3 [July] 2008, the claim was dismissed."

In effect what was happening was that Babenko was

trying to get a joint activity agreement declared as non-concluded and he succeeded in the lower court. Do you see that?

A. Yes.

Q. Sorry, he failed in the lower court, I'm sorry. They upheld the joint activity contract.

A. In the first and appellate courts, the claim was dismissed.

Q. So Babenko failed.

Then we see that the court says this:

"The reason for the decisions was that the agreement had been performed from the time of its execution, and no uncertainties had arisen for the parties as to the scope of the agreement in the course of its performance. Sole traders [usually] made their contributions, and there is not dispute as to the type, size of the contribution and terms of profit allocation. There are no grounds for [the] voidance of the agreement."

So this is right, isn't it, the reason for the decision of the lower courts was, as you see, that the agreement had been performed and that, at that time, there were no disputes which had arisen as to that performance, yes?

A. Yes.

Q. Then in the next paragraph, we see that Mr Babenko

appealed and he said that the parties had not agreed the essential terms, translated here as "substantial terms". You see:

"In his cassation appeal ... Babenko ... is asking to reverse the decision and the appeals court ruling, and issue a new court decision satisfying the claim. The appellant notes that [the] contents of the agreement do not amount to a simple partnership agreement which in law gives grounds to a joint property. The intended joint activity and joint obligations cannot be identified from the terms of the agreement. Neither the scope of activity nor actions required to achieve the intended goal are identified. Agreement of 1 [February] 2006 does not contain substantial terms [I suggest that is essential terms] related to [the] size and features of contributions by simple partnership members, or to joint property, terms of profit allocation, terms of administration of the joint business of the partners."

So he was saying, was he not, that a number of what he said were essential terms had not been sufficiently agreed, correct?

A. Yes.

Q. Then at the top of page 62 G(A)2/2.29/62, we see in the last sentence of that top paragraph that Mr Babenko also said that:

"Cash payments, as per debit slips, to ... Babenko and other members were made on the basis of independent freight transportation agreements, not a simple partnership agreement."

Do you see that? So there were payments which had been made and Babenko were saying: these payments reflect not a simple partnership but rather the fact that people were being paid for independent freight transportation agreements. Do you see that?

A. I want to check it in Russian to be sure that the translation is correct. (Pause)

Babenko claimed that the basis for payments were independent agreements of transportation but not the simple partnership.

Q. Indeed. So in this sense at least bearing a similarity to this case, payments were being made, there was a dispute as to really whether the payments reflected the fact that there was a partnership or whether they reflected in fact simply a different arrangement at all, namely independent transportation agreements. Do you agree?

A. Yes.

Q. Yes. And then two paragraphs further down, we see that the Federal Tax Service opposed Babenko's appeal; in other words the Federal Tax Service considered that

Babenko's partnership contract was a fully concluded contract?

A. In Russian, I see that the Federal Tax Service considers that the decision of the court of first instance and of the appellate court are legal and justified and asks(?) not to cancel them.

MR RABINOWITZ: Yes, I think you're agreeing with what I put to you.

Now, in order to see -- my Lady, I'm about to go to -- it's not a convenient moment but it will take too long to get to a convenient moment.

MRS JUSTICE GLOSTER: Okay, I'll rise now and sit again at 2 o'clock. Thank you very much.

You mustn't talk to anybody about your evidence over the break.

THE WITNESS: I know.

(12.58 pm)

(The short adjournment)

(2.00 pm)

MR RABINOWITZ: Mr Rozenberg, we were dealing with Babenko which I hope you still have open, 2/2 G(A)2/2.29/62.

A. Yes.

Q. I think we had just had a look at the top of page 62, where one sees that Mr Babenko was disputing whether the payments he received were made pursuant to a joint

activity agreement, and he was claiming they were on the basis of an independent freight transportation agreement.

In the middle of page 62, you see it says this:

"North Caucasus Circuit Federal Arbitrazh Court, having considered the case, arguments of the cassation appeal, having heard the persons involved in the case, believes that the appeal cannot be upheld for the following reasons."

In the next paragraph the court summarises the terms of the joint activity agreement. As you see it says:

"As shown by the materials in the case, on 1 [February] 2006 the parties executed a joint activity agreement whereas members of simple partnership undertook to join efforts and act jointly to achieve common business goals -- transportation of freight to Krasnodar Krai."

Krasnodar Krai is Krasnodar province, is that the right?

A. Krasnodar region.

Q. Just carrying on with the same paragraph:

"The same of the simple partnership -- SV Chebatkov ST. According to paragraph 1.3 of the agreement the partnership is set up for the term of 2 years. The agreement is valid from the time of its execution until

1 [February] 2008 ... According to paragraph 2.1 of the agreement members of the partnership undertake to contribute cash and other assets to support its activities."

So it appears from the last sentence that the parties are to contribute cash and other assets to support the partnership contract. It does not appear from this at least, Mr Rozenberg, that the partnership contract defined the parties' contributions any more precisely than that, correct?

A. Correct.

Q. So just looking at this, the contract did not for example define the amount of the contributions or the size or value or order, timing and process by which they were to be made, or at least the federal court did not consider these matters to be relevant or material, correct?

A. Yes.

Q. If we look then at the next paragraph, towards the bottom of page 62, we see that the court says:

"NF Babenko ST, believing that this simple partnership agreement is void, filed a claim to arbitrazh court. In his claim Babenko referred to the vagueness of the scope of the agreement, absence of terms related to types, times and terms of

contributions, lack of certainty as to the common purpose of the partnership."

Those, of course, are very similar to the objections that you make in your reports about the contract in this case, Mr Rozenberg, correct?

A. Not quite.

Q. Okay.

A. The big difference is that in this case the court referred first to the agreement in writing which was executed in February 2006, and indicated that during two years this agreement in writing was performed in a way which makes impossible to dispute the performance as Mr Babenko does, because there are documents confirming that all activity, joint activity, took place and the payments were done with the reference to the agreement of February 2006, what makes allegations of Mr Babenko that performance really did not correspond to the agreement baseless.

In other words, two main points are indicated here. The agreement in writing, which is rather clear, and the payments with reference to this agreement. In other words, the performance is done according to the agreement and cannot be disputed anymore. In this situation, even the issue of contributions which were not specified enough has nothing to do with allegations

of Mr Babenko that payments were different in comparison with the agreement. This is the difference.

Q. All right, well we'll see if that really is a difference in this case, Mr Rozenberg.

The point I was really putting to you at the moment was about the vagueness scope of the agreement, absence of terms related to types, time and terms of contributions. I'm not suggesting that's the only point you make about the 1995 agreement, but this is similar to the point you make about vagueness of terms. You say in this case some of the terms were too vague, it didn't specify types, times and terms of contributions, et cetera. That is all I was trying to put to you here. Do you follow?

A. I did, but if there were not written evidence in the case of Babenko, maybe the vagueness would be fatal as well. It's hard to guess.

Q. We will see that in fact the agreement in Babenko wasn't clear as to why the contributions were being made, that is why there was a dispute as to whether those payments were being made because of an independent freight agreement or because of a simple partnership, do you follow?

A. In the case of Babenko, after two years of performance which could not be put in question, because written

evidence confirmed even the monetary transfers, just exactly in accordance with the agreement and written reference to this agreement.

In this situation -- I can show you that in Russian just it's indicated that in the payment orders on the basis on which Chebatkov paid the correspondent portion of the profit as basis for the payment is indicated the agreement of February 2006.

Q. It wasn't only written agreements. The court also took into account, you can see this at page 63 G(A)2/2.29/63, the explanations provided by the partners. It took into account all of these matters in trying to work out what it was that the agreement was about, whether it was a simple partnership agreement or in fact an independent transportation agreement that led to these payments being made.

A. It's the obligation of the court to assess all the evidence available, including --

Q. Indeed.

A. -- explanations of the parties.

Q. Indeed, and it did that. And despite the fact that there was a potential ambiguity, having taken into account all of the evidence, it concluded that there was a binding agreement here, a simple partnership, correct?

A. According to the civil legislation, some ambiguity can

be sometimes fixed on the basis of the investigation in the court of the performance if this performance is not questioned in -- is not disputed.

Q. Indeed.

A. As I understand, the conclusion of the court here is that this vagueness could not affect the final resolution because it was clear that during two years everything was performed strictly in accordance with the agreement, and during these two years there were no disagreements.

Q. That was in fact very much the point I was going to make to you, Mr Rozenberg. Because what we have here is a case where, on its face, you have an agreement which is vague as to the scope of the agreement, there are terms which are absent, and the court says, "Well, given that it has been performed, and it's been performed for a period of two years, none of these points are of any relevance at all." I don't want to overstate it, none of those points is sufficient to treat this contract as an invalid contract. Do you agree that is what this case says?

A. That is what the court said.

Q. Just on the point about what it was that the court took into account, if you for example look at page 63, you can see that the court says on page 63:

"The courts established also that documents disclosed in the case [and then there's a list of documents] (debit slips, cash book statements, invoices, explanations by sole traders...)"

The explanations by sole traders that are referred to there related to the explanations that had been given to the tax authorities previously, do you recollect that?

A. Just in this sentence, the court states that it took into account both explanations by sole traders and tax audit materials.

Q. Yes, but in fact some of the explanations by the traders that they're taking into account were explanations that had been given to the tax authorities when they first investigated; that's right, isn't it?

A. Apparently, yes. I didn't have a chance to look at the materials of the case.

Q. Just looking at the next paragraph, if you're on page 63:

"Having established from explanations provided by the partners and payment documentation that the sole traders had contributed their vehicles and their labour to the simple partnership, and that during performance of the agreement... no disputes about type and size of contributions, terms of allocation of profit from joint

activities had had arisen between the parties, the courts correctly concluded that there were no grounds for voidance of the disputed agreement, and rightly dismissed the claim."

So this is an illustration, is it not, that where you have a contract which is actually performed with no disputes at the time as to what needs to be done, one can't later come along and say, "Well, that is an invalid contract because you didn't agree sufficiently some term or other," correct?

A. More important that not only you did agree sufficiently because, according to the allegations of the claimant, it was not sufficiently agreed, but more important that when the court considers the case there is sufficient evidence that it was performed according to the agreement as it was concluded.

Q. But provided the court is satisfied that it was performed, the fact that at the outset there were gaps doesn't matter, in the sense that it's not a sufficient basis to treat the contract as an invalid contract.

A. Sometimes, when it's relatively simple and the numerous documental evidence confirms the performance, I agree with you.

Q. All right. Thank you very much.

Now, I want to move on to the next question which is

whether what the parties agreed was valid. We've dealt with certainty, and this is going to deal with the issue of lobbying.

I would like to start with your view that, quite apart from certainty, lobbying cannot ever be a valid contribution to a partnership agreement.

We touched on this this morning, and we've looked at information letter number 48, but I want, if I may, to look at the analogy you draw between that situation and the present case.

Can we begin by looking at how this is dealt with in the joint memorandum. It's G(A)6/1, tab 1, page 13, we're looking at paragraph 35 G(A)6/1.01/13.

A. Yes.

Q. In subparagraph 1(a) you say, it's the first sentence:

"Mr Rozenberg maintains that lobbying is not capable of being a contribution under a joint activity agreement protected by Russian law as this transpires from the position of the RF Constitutional Court, which provides that those who lobby may not claim remuneration for doing so which depends on a favourable government decision, as such remuneration will not be subject to civil law protection."

This is a reference, is it not, to Makayev, correct? That's the Constitutional Court decision that you're

referring to?

A. Yes.

Q. Before we go to Makayev, which we will do, I just want to explore a little further what you say here.

Could we please go to paragraph 306 of your fourth report, bundle G(A)3, tab 2, page 155 G(A)3/1.02/155. If you have paragraph 306 there, just looking at the first sentence you say this:

"Finally, a contribution to a joint activity agreement may, of course, consist in utilising business contacts (subject to the comments I made earlier about vagueness)."

So here you were accepting that, subject to your point about vagueness, using business contacts can be a valid contribution to a partnership contract, correct?

A. Just the whole paragraph I think deserves to be read.

Q. I will go through the whole paragraph, I just want to take it bit by bit, if I may.

A. Yes.

Q. So do you agree that you accept here, subject to your point about vagueness, that using business contacts can be a valid contribution to a partnership contract?

A. I agree, I confirm.

Q. Just looking at the second sentence, you say:

"I disagree, however, that lobbying services are

capable of being such a contribution under Russian law."

Then in the next sentence you say:

"It has been held that a party who rendered services the remuneration for which depended on a favourable governmental decision (in that case a success fee arrangement for lawyers was considered) may not claim any compensation for these services under Russian... law. This is the conclusion of the..."

And that's Makayev again, is it not?

A. Correct.

Q. Then you set out a paragraph from Makayev which you say expresses the Constitutional Court's conclusion in that case, and you can read that to yourself, if you will. (Pause)

A. Okay, we read it yesterday.

Q. All right. So let me be clear that I'm going to suggest that this is not in fact the actual conclusion of the Constitutional Court at all. We will look at Makayev, but the actual conclusion that the court reached was that the current law prohibiting legal success fees, that is information letter number 48, is constitutional. Do you accept that?

A. Where Constitutional Court ruled that the activity of governmental officials represent execution of people's will and is not subject to civil law regulation, and

therefore civil law contracts, which make dependent civil law rights and obligations on favourable decisions of governmental officials, including courts, cannot get court protection. In other words, it's a clear statement of the court that a situation when money or some material benefits follow the favourable decision of governmental authorities, cannot be considered as legal and subject to court protection. It's a clear fight against corruption and I cannot add anything.

Q. The only point I was trying to make to you, Mr Rozenberg, is this: you suggest that this is the conclusion of the Constitutional Court, and what I'm suggesting to you is the conclusion of the Constitutional Court is much narrower. The conclusion of the Constitutional Court -- this may have been part of its reasoning, but the conclusion of the Constitutional Court was that the current law prohibiting legal success fees, and that is information letter number 48, is constitutional.

A. First of all, let's make clear that if we try to interpret somehow the Arbitrazh Court decision as contradicting the Constitutional Court ruling, under Russian law decisions of Constitutional Court are highest legal value. Strictly speaking, even decisions of the Parliament can be put in doubt by the

Constitutional Court.

And of course the Supreme Arbitrazh Court cannot, on the rule, cannot prevail in case of disagreements, though I don't see any disagreement by the way, but just in case, if you do, if you'll find any disagreement between the Supreme Arbitrazh Court and the Constitutional Court, then according to the law on Constitutional Court, my Lady, the decisions of the Constitutional Court of the Russian Federation have the highest legal force regarding all individuals, governmental and other authorities and organisations in the Russian Federation. Therefore, whether we can interpret this way or that way, the decision of the Supreme Arbitrazh Court is irrelevant.

However, how I understood the decision of the Supreme Arbitrazh Court is that it doesn't mean that the parties cannot agree between themselves about the terms, and in any event, their fees for legal services shall be awarded. But the Supreme Arbitrazh Court never ruled that courts should uphold claims for additional compensation for success in litigation. And, moreover, I notice that even the Arbitrazh Court decision, besides courts, governmental officials were also indicated, like in the reasoning of the Constitutional Court.

Therefore, I am sorry if we spent so much time on

it, but my position is firm and clear that monetary remuneration or other material benefits in civil law agreements cannot depend on the favourable decisions of governmental authorities. And only one of the cases which may take place in real life regarding these circumstances is the success fee arrangements between lawyers and clients. But both the Constitutional Court and Supreme Arbitrazh Court ruled much broader, in my view, that works and services shall be paid, but additional remuneration dependent on the success in courts or success in governmental offices has no legal protection in courts and otherwise.

Q. Mr Rozenberg, that was a very long answer to a question I don't think I asked. I wasn't beginning to suggest that the Supreme Arbitrazh Court and the Constitutional Court decisions were inconsistent, in fact I was suggesting that they were inconsistent (sic).

But actually all I was making was a very narrow point, maybe not even one worth making, which is that you have expressed this as the conclusion of the Constitutional Court, whereas I say it is not the conclusion of the Constitutional Court. The conclusion -- it's part of its reasoning, I'm not disputing that, but you have taken one paragraph of reasoning in isolation from the rest of the judgment and

put it in your report and called it the conclusion. That is what you have done, and I think you've commented on that already.

What I would like to do, however, is just take you to a passage of the judgment of Judge Bondar in Makayev itself where he comments on the approach that you have taken to this.

If we can go to Makayev, it's bundle G(A)4/7, tab 93 at page 8 G(A)4/7.93/8. Now, Judge Bondar was one of the judges who decided with the majority of the Constitutional Court, so he's not a dissenting judge, but he wanted to issue a side opinion expressing his own view. You can see at page 8 he says:

"Having voted for the final conclusion [of the] Constitutional Court..."

Do you see that?

A. Yes. I prefer to look at it in Russian.

Q. All right, I'm sure.

If you go to page 9 G(A)4/7.093/9 Judge Bondar expresses his separate reasoning. And just looking at the bottom of page 9, do you see he says -- perhaps we should pick it up from the paragraph before:

"Before we proceed to analyse the above issues that bears upon the true content and significance of the conclusions reached in the Resolution with respect to

'success fees', the following should be noted. One may not discern the true meaning of this -- or any other -- Resolution of the Constitutional Court of the Russian Federation without considering the fact that any decision by the Constitutional Court is a unified, wholesome act of constitutional justice whose inner structure and content are predicated upon the logic of constitutional and legal arguments of essence to successful assessment of specific legal norms contested in particular cases; taken together, they determine the final conclusions that form the core of any decision of the case."

Then he says this:

"Consequently, it would be a mistake to interpret the legal position stipulated in the Resolution as a mere sum total of separate statements or raise each of these statements to the level of an independent legal position of the Constitutional Court."

What Judge Bondar is saying is that it is a mistake to take a separate passage made in the reasoning and elevate it to the level of an independent legal position of the court. Would you agree that that's what he's saying?

A. I think that reading the following sentences is the idea that Mr Bondar doesn't object against the reasoning in

general, but simply states that absolute prohibition against success fees may be questionable.

But, by the way, success fees is the trigger for the consideration of the whole issue and -- though in the opinion of Mr Bondar has no legal consequences because the majority clearly ruled in favour of the resolution. And moreover, Judge Gadzhiyev even emphasised stronger the importance of such approach in light of necessity, broadly speaking, to fight against corruption.

But what Mr Bondar says is I think understandable, that total prohibition of success fee maybe is too strong approach. I would like to state that, in my view, it's probably the softest situation regarding dependence of material remuneration in civil law contracts on favourable decisions because, clearly, success fee follow professional efforts, are connected with professional art of those who perform services. And very often we can assume that it's the result of work and clearly has nothing to do with using of personal connections and so on. But even in this situation, the Constitutional Court preferred to be more severe than maybe from the point of view of equity and fairness, one should think, and apparently Mr Bondar thinks this way.

Still the Constitutional Court considered that in

order to fight clearly against corruption and regarding success fees, it's necessary to be very strong and severe.

MRS JUSTICE GLOSTER: Mr Rozenberg, it would help me if your answers were a bit shorter, I know it's difficult when you're discussing legal concepts, but if you could kind of peg your answers to the questions I'd be grateful.

A. I will shorten it immediately. I'm sorry, simply I was asked so many times about this decision, therefore since before lunch we already discussed it I thought that I have to answer it.

MR RABINOWITZ: At the moment I'm just asking about Judge Bondar.

A. But very shortly I can say that regarding other governmental officials who are mentioned both -- other governmental authorities, besides courts, mentioned both in the Constitutional Court decision and in the Supreme Arbitrazh Court, it's absolutely clear that with decisions in such cases, professional efforts usually have nothing to do with the results and, therefore, application of this decision is rarely(?) substantiated and necessary in light of the explanation of the Constitutional Court.

Q. Judge Bondar was the presiding judge in this Constitutional Court, was he not?

A. Frankly I did not pay much attention to it --

Q. You can see that if you go to page 1.

A. -- but it happens sometimes that the presiding judge only has dissenting opinion.

Q. He's not dissenting, Mr Rozenberg, he is with the majority but he wants to make it clear that people do not take this case out of context. He makes it clear in the first part of his judgment, beginning at page 8, he says:

"Having voted for the final conclusion ..."

He wants to say something. Do you see that?

A. I think that the necessity not to take out of context is reasonable, and what is the question to me?

Q. You accept that it's reasonable. He's specifically warning in the context of this case that you shouldn't take reasons out of context and elevate them to the status of a legal principle, and that is what I suggest you have done here.

A. My understanding is that it's connected with absolute prohibition against success fees.

Q. Well, maybe it is connected with that, and that is what he's concerned should not be understood by this judgment, because he doesn't want it to be elevated outside of the context in which he's dealing with it.

A. Is that a question?

Q. Well, I think I've got your answer to that question, but if you want to respond to that don't let me stop you, if you can make it short.

MRS JUSTICE GLOSTER: Mr Rozenberg, are you saying that his statements here about the fact that there may be circumstances in which success fees are acceptable is limited to success fees in legal cases?

A. That's what -- how I read it.

MRS JUSTICE GLOSTER: Yes, I see.

MR RABINOWITZ: So in a case, Mr Rozenberg, let's see if we can understand that. In a case specifically concerned about success fees relating to legal services, you say Judge Bondar warns against elevating this to a principle which prohibits success fees in legal cases, but you say he wasn't saying anything about the possibility of elevating success fees in a context not before the court, that is to say in the context of any other governmental decision; is that what you say we should understand Judge Bondar as saying?

MR SUMPTION: Maybe the witness should be invited to read the whole of that eight-line question.

MRS JUSTICE GLOSTER: Could you read the question, please, Mr Rozenberg, on the screen.

A. "So in a case, Mr Rozenberg, let's see if we can understand that. In a case --"

MRS JUSTICE GLOSTER: I think it might be easier, Mr Rabinowitz, if you break the question down.

MR RABINOWITZ: I will do that.

Your answer to my Lady's question, Mr Rozenberg, appears to suggest that when Judge Bondar warns against extending the principles in this case too far, what he is warning against is extending the principles of this case to all legal success fees. Is that what you're saying?

A. Again I understand that I cannot take too much time of the court, but I understand the conclusion of Mr Bondar as the following G(A)4/7.93/10:

"Therefore, in and of itself (ie, by the letter of it) the final conclusion made by the Constitutional Court does not preclude the use in Russian legal system of alternative regulatory models for paying legal fees that do not directly follow from yet are not excluded by the constitution of the Russian Federation."

Therefore my view is -- maybe I am wrong and I have to study this opinion again, my view is that it is only regarding legal fees in the legal system, it is not regarding favourable decisions of other governmental authorities.

Q. So you're saying that whilst he's qualifying this prohibition in relation to legal services, he is not

qualifying it in relation to any other services involving any other governmental decision. Is that what you're saying?

A. My understanding, though it doesn't mean that I agree with Mr Bondar, but my understanding that he was concerned that this resolution, though he doesn't argue about the reasoning, may affect alternative methods of payments of legal fees which have some justification in his view.

MRS JUSTICE GLOSTER: Can I just be clear, as I understand it, you're saying that the decision of the majority extends or is not limited to the illegality of contingent legal fees but extends to other fees which are dependent upon the decisions of state authorities?

A. Yes, my Lady.

MRS JUSTICE GLOSTER: But so far as what Judge Bondar is saying about his concern that this case shouldn't be taken out of context, you're saying that his concerns are only addressed at contingency legal fees?

A. Yes, absolutely correct.

MRS JUSTICE GLOSTER: Thank you.

MR RABINOWITZ: Right. Thank you for that.

Now, this point that you make here is not a point that you raised in the reports you submitted in the strike-out in 2008 and 2009, is it, Mr Rozenberg?

A. What I remember in my report, I was emphasising the decision, and the principle that favourable decisions are not covered by civil law regulations. I try to be very short, we already spent so much time. But correct me if I'm wrong, I thought it was clear from the report.

Q. I think in this report it's clear. My point is this is not a point you had previously taken until this report, but I'm not going to spend --

MRS JUSTICE GLOSTER: Mr Rabinowitz, do we really need to go back and make the point? You can make the point in submission if you think it takes me further.

MR RABINOWITZ: All right. I think we have Makayev in front of us, I'm not sure I need to go through the detail of this with you, Mr Rozenberg, but let me just be very clear on what I am going to submit. I am going to submit that it is abundantly clear from the reasoning of the Constitutional Court in this case that it was dealing with a specific context, that is to say legal services, and that what the court was concerned about was the public policy relating to access to legal services. Do you follow?

A. I do, but I disagree.

Q. I understand that you disagree. What I am also going to be submitting is that it is clear from every other passage in this report -- and I don't want to take up

time going through it because the court has gone through this -- that there was a specific focus in this case on legal services, and that the specific focus on legal services is simply inconsistent with the way in which you say we should interpret this case. But you disagree with that?

A. Unfortunately I have to disagree because all such cases considered by the Constitutional Court are initially connected with concrete facts and circumstances. But decisions of the Constitutional Court are usually much broader, and this is the case, because the trigger was the issue of success fees in representation of clients by lawyers, and the result was the conclusion applying to any remuneration following favourable governmental decisions.

Q. What I do want to show you in Makayev is just another passage from Judge Bondar which you can see if you go, please, to page 12 under point 2.3 of Judge Bondar's opinion. So G(A)4/7, [tab 93], page 12 G(A)4/7.093/12. It's point 2.3.

Judge Bondar is dealing here with the ability of federal legislators, if they wish, to legislate for implementing some form of contingency fees, which he plainly thinks they can do.

If you then go to the paragraph which begins "This

conclusion", do you see that paragraph?

A. Yes.

Q. He says:

"This conclusion is also corroborated by the fact that in the case under review the Constitutional Court set about to verify constitutionality of 'success fees' from the standpoint of a particular agreement subject to civil law, namely, a commercial service agreement, and therefore, the legal opinion stipulated in the Resolution can hardly be considered universal and apply to all possible types of civil agreements for legal services or the entire scope of appropriate [regulations] in the society in general."

Do you see that, Mr Rozenberg? Second paragraph from the end of page 12.

A. Yes, I can read it.

Q. So you have Judge Bondar here expressly confirming his view that the decision in Makayev is limited to success fees in legal services contract, and:

"... can hardly be considered universal and apply to [other] possible types of civil agreements for legal services or [to other types of contract] in general."

A. In the first place, even Judge Bondar put the legal services, and speaking about entire scope, I don't see that he mentioned specifically governmental officials.

It's a very broad statement and probably there is some reasoning here, I don't want to argue, but my view is that still we have to follow the resolution adapted by the majority of judges.

Q. You see, Mr Rozenberg, I suggest that this contradicts your view that Makayev can be applied by analogy to partnership contracts involving neither legal services nor success fees, but you presumably do not agree with me?

A. Of course I do not agree because for theoretical analysis it's interesting to read the opinion of Judge Bondar, but, as lawyers, we have to analyse only the resolution of the Constitutional Court.

Q. Okay, now we can leave Makayev and legal success fees. Can you go next, please, to bundle G(A)7/1 at tab 9. At tab 9 you should, I hope, have the decision of the Supreme Arbitrazh Court in the case of Kitoi, do you have that?

A. Yes.

Q. The Russian begins at page 87 G(A)7/1.09/87 and the English at page 89 G(A)7/1.09/89.

You can see from the top of this report that this decision, Kitoi, was decided on 9 December 2009, so nearly three years after Makayev. Makayev was decided on 23 January 2007, yes?

A. Yes.

Q. So on page 89, just looking at the third paragraph, we see that the claim was by Kitoi, LLC Kitoi, against Mr Bukhaev for a declaration of ownership of 60 per cent of an uncompleted extension to a shop in the city of Ulan-Ude, correct?

A. Yes.

Q. Then in the next paragraph, immediately below the words "The Court established", we see that:

"The claim was upheld by [three levels of lower court]."

Do you see that?

A. Three courts, yes.

Q. Then just picking this up about three quarters of the way down the page you see that the Supreme Arbitrazh Court says this:

"Having studied the arguments in the appeal and the judgments in the case, the judicial panel of the Supreme Arbitrazh Court concluded that the case should not be referred to the Presidium of the Supreme Arbitrazh Court due to lack of grounds for supervisory review..."

So what it appears is happening here is that the judicial panel of the Supreme Arbitrazh Court is refusing permission to appeal to the Presidium and is in effect upholding the lower court's decision which

granted Kitoi's claim, correct?

A. Yes, it's a very widespread situation, they mostly reject such petitions, and it's very rare when the Supreme Arbitrazh Court takes the case for reconsideration.

Q. Right. We can see what the facts of the case are if you look at the next paragraph:

"When examining the case, the courts established that a simple partnership contract was concluded between Kitoi and Bukhaev on 27 April 2007, [according to] which they undertook to [pool] their contributions and act jointly in order to build the 'Extension [to] the Kedr Shop' and also agreed that the facilities built as a result of their activities be deemed to be in [joint] shared ownership: Bukhaev to hold a 2/5 stake and Kitoi to hold a 3/5 stake in the [joint] shared ownership of the facilities."

So what was happening here was the parties made a partnership contract. What they agreed to do was to act jointly to build an extension to I think it's a Kedr shop, and they agreed that they would hold it in agreed shares, Bukhaev was to have 40 per cent and Kitoi 60 per cent, yes?

A. Yes.

Q. If you go to the bottom paragraph on that page, you can

see that the court sets out the terms of the contract, clauses 1.2.1 and 1.2.2 of the contract:

"... the parties indicated that Bukhaev's contribution would be: the right to lease a plot of land with a designated cadastral number for the construction of the facilities, design estimate documentation for the facilities, drafted at his expense, and the necessary arrangements and technical conditions, and Kitoi's contribution would be: obtaining formal permissions for the construction --"

Mr Rozenberg, can you just push your mic up a little bit.

"... Kitoi's contribution would be: obtaining formal permissions for the construction of the facilities and its commission into operation, and the construction of the facilities at Kitoi's own expense and using [his] own materials."

So it's clear from that that Kitoi's contribution, as you see, was to be obtaining of formal permissions, and there were two permissions, first for the construction of the facilities and then for their commission into operation, yes?

A. Yes.

Q. And the formal permissions that Kitoi was to obtain would be governmental, would they not?

A. They would be issued by some state officials.

Q. Yes.

Then in the next paragraph on page 90 G(A)7/1.09/90 the court says:

"During the examination of the case no evidence was presented to indicate that [the above] contract between the parties had been [adjudged] illegal or invalid or terminated in accordance with due legal process."

Then in the next paragraph it says:

"On 11 July 2008, Bukhaev registered his ownership rights to the uncompleted and disputed facilities."

Now, it may be worth, if we can, just going to the lower court judgment to see what Bukhaev had to present to register his ownership rights.

In bundle G(A)7/1 can you go, please, to tab 19. At tab 19 you see the first instance decision in Kitoi, the English starts at page 174 G(A)7/1.19/174.

Then if you turn to page 177 G(A)7/1.19/177 you can see just below the middle of the page the following, you see the paragraph beginning:

"From the explanations of the representative of the third party ..."

A. Yes.

Q. "... the Directorate of the Federal Registration Service for the Republic of Buryatia, it follows that State

registration of the right of ownership of the incomplete construction work took place on the grounds of the documents produced by ... Bukhaev: the decision of the Property Management Committee of Ulan-Ude on making [the plot] available on lease, the lease contract ... the construction permit ... the project documentation for the work and the technical passport of the 15 April 2008."

So what one sees from that is that Bukhaev, when he registered his ownership, he presented a construction permit dated 22 April 2008, do you see that?

A. Yes, yes.

Q. And so it seems likely, does it not, that Kitoi actually performed its promise and obtained the construction permit, correct?

A. Yes, but I understand that it's just routine paperwork in rather big volume which is subject, of course, to evaluation. And I mentioned earlier that some work in preparation of passports, visas, other documentation, which mostly is not discretional because here we don't see any competition between Kitoi and some other applicants regarding formal registration or formal documents concerning construction work. I see no inconsistency with the public order in this case.

Q. Well, it was always possible that the permission would

be refused, Mr Rozenberg, that must be a possibility? If you need permission and you have to apply for it, that must be a possibility?

A. It looks like in this case it would be refused if documentation is not prepared properly. It's not the situation when the mayor decides whether to give this plot of land to this applicant or to that applicant.

I frankly see here no favourable governmental decisions which could be issued this way or that way, like in court disputes for example.

Q. Well, Mr Rozenberg, the favourable government decision here was the grant of the permit, and plainly it was a permit which could be refused, correct?

A. Theoretically visas can be refused and passports can be refused, but if all documents are prepared properly usually it doesn't happen. And I understand here the situation is more important whether it's discretional or not, and it looks like it's not discretional, to issue the permit if construction is prepared according to the existing regulations.

Q. But the point you make about it being clear that he would get what he wanted, the same could be made for a legal case, Mr Rozenberg. You could have a case in front of the court where, as long as you turn up with the right documents, you will get the order that you

want if the law is applied. But on your interpretation of Makayev, you can't have a legal success fee even for that sort of arrangement, isn't that right?

A. I understood even the opinion of Judge Bondar in a different way, it mostly applies not decisions which are absolutely clear, because if there is practically nothing in the dispute, and I can hardly imagine why Commercial Court would consider something which is crystal clear, as you say, there is always some discretion. But in Bondar case, the key point is that Judge Bondar considered that it may depend on professional level of performance of services, but --

Q. You see, Mr Rozenberg -- sorry, I don't want to interrupt you. Carry on.

A. To make it short, I think it's clear that the meaning of the Constitutional Court decision is fight against corruption. If you see that it's a routine documentation which has to go through a registration process then there is no basis for application of this Constitutional Court decision.

Q. You see, Mr Rozenberg, what I suggest is that you appreciate that Kitoi, decided three years after the Constitutional Court case Makayev, is completely inconsistent with your interpretation of what Makayev represents because, if you are right about what Makayev

represents, and it extended, for example, to the contribution that one is making towards a partnership, Kitoi could never have been decided in the way that it was.

Do you want to comment on that?

A. I'm afraid we were already told that it's better to be short here, and again I can only say that in this case I say my indication that it was a favourable governmental decision which could be issued in a different way, because what is the basis to reject the proper documentation submitted for construction permit?

If I fill out properly all documents for the new driver's licence, of course it's the governmental official's decision, but there is no basis to reject the petition. And in such situations, in my view, the Constitutional Court's decision is not applicable.

Q. But you could have corruption even in a situation like that, Mr Rozenberg, you could have someone who, for whatever reason, doesn't want a Kedr shop built there, and they pay a government official to refuse it. There might be opposition.

This case is not saying: well, it depends on whether there's any opposition to it; it's saying there is nothing wrong with this being a contribution to the partnership.

A. As far as I can see, this issue was not even the focus of the court dispute regarding Makayev.

Q. Can we just go back to the Supreme Court decision in Makayev at G7/1 tab 9, page 90 G(A)7/1.09/90.

We saw I think that Mr Bukhaev had registered the Kedr extension in his own name without telling the registration service about the partnership contract. So what was happening in this claim was that Kitoi was suing for recognition of its 60 per cent share in the Kedr extension, do you remember that?

So what I want to show you, Mr Rozenberg, is what the court says at page 90 happened in the lower court. You see it says:

"The first instance court concluded that there were grounds to recognise a 3/5 stake of the joint shared ownership of the uncompleted facilities in favour of Kitoi on the basis of the terms of the contract concluded between the parties on 27 April 2007 and the circumstances of the case which the court established, concerning the performance by the parties to this contract of their obligations. Those terms correspond to the provision of Article 7.3 of [a law on investment activities in RSFSR], which defines the rights of joint ownership of the subjects to an investment process in uncompleted facilities."

Then the next paragraph:

"According to the terms of the contract, after the facilities are commissioned, the facilities are to be apportioned and the actual floor space to be allocate today each of the parties is to be determined, taking account of their respective contributions. An analysis of the arguments in the application for supervisory review revealed that they do not establish the grounds provided for by Article 304 of the... Code."

So what happened here, Mr Rozenberg, was that Kitoi obtained the construction permit and commenced construction. While the construction was still underway, Mr Bukhaev registered the uncompleted building in his sole ownership, and Kitoi's claim was for recognition of its 60 per cent share in the uncompleted building. And that claim was granted because the partnership contract was valid and because the law of 1991 permits ownership of uncompleted property under construction. Do you agree?

A. And the court indicated it as the basis for the judgment.

Q. Yes.

A. Yes, I agree.

Q. And so -- I don't need to deal with that, I've put that point to you already I think. All right, I've already

suggested to you that Kitoi is inconsistent with what you say Makayev says and I'm not going to go back to that.

I want to consider next with you the concept of a silent partnership. Can I ask you, please, to go to bundle G(A)7/1, tab 22 at page 225 G(A)7/1.22/225. If you're at page 225, on the bottom of the left-hand side, going over to the top of the right-hand side, you should have Article 1054.

A. Yes, "Silent Partnership".

Q. That's right. Can we just see what it says:

"A contract of simple partnership may provide that its existence will not be revealed to third persons (a silent partnership). The rules provided by the present Chapter on the contract of simple partnership shall be applied to such a contract, unless otherwise provided by the present Article or follows from the nature of the silent partnership."

So, at least from 1 March 1996, it was possible to agree that a partnership contract would be kept silent from the third parties. That's right, isn't it?

A. After March 1996.

Q. Yes. Do you agree?

A. Yes, I agree.

Q. All right. And then just looking at subparagraph 2, do

you see it says:

"In relations with third [parties], each of the participants in the silent partnership shall be liable with all his property for [the] transaction that is he [concludes] in his name [and] in the common interests of the partners".

Then subparagraph 3:

"In relations between partners, obligations that have arisen in the process of their joint activity shall be considered common."

This is right, isn't it, where a silent partnership is agreed, each partner is liable to third parties for transactions concluded in his name and the common interest, but obligations are common as between partners and must therefore be shared as between partners?

A. Is it a question?

Q. Yes. Do you agree with that? Where a silent partnership is agreed, each partner is liable to third parties for transactions concluded in his name in the common interest, but obligations are common as between partners and must therefore be shared as between partners.

A. That's what the law says.

Q. So you agree. And the concept of a silent partnership suggests, does it not, that the shares may be registered

in the name of one partner who may owe obligations towards the silent partner, correct?

A. The shares would be registered in the name of one partner, and then what happens?

Q. He may owe obligations towards the silent partner.

A. But these are different questions. Silent partnership indicates that something is not disclosed, but registration of common property is a different issue.

Q. I'm just asking you whether the concept of a silent partnership suggests that you could have shares registered in the name of one partner, that's to say the non-silent partner, in circumstances where he may owe obligations towards his silent partner, which is to say the partner whose name is not --

MRS JUSTICE GLOSTER: I don't understand the question. I don't understand why share registration has got anything to do with the concept that's being discussed in this article.

MR RABINOWITZ: I'm going to skip that line if your Ladyship --

MRS JUSTICE GLOSTER: I can see what the article says.

A. Because -- I'm sorry, my Lady, there are special regulations regarding ownership and registration of ownership rights, and it has nothing to do with the concept of silent partnership. These are different

areas, and silent partnership cannot prevail if we consider rules regarding registration, either securities or real estate.

MRS JUSTICE GLOSTER: Can I just ask you this: this silent partnership rule we've just been looking at in Article 1054, if A has a contract with B, and C is B's silent partner, can A sue C under this article that says that the -- under Article 2 here, 1054.2.

A. Just A and B are partners and C is not?

MRS JUSTICE GLOSTER: No, A sues C. B is a partner with C. C is the silent partner. Can A sue C directly, or does A sue B who sues C for an indemnity?

A. It depends on the facts, but of course silent partnership does not prevent from being defendant in case of dispute, so there is no prohibition.

Moreover I would say that silent partnership means that they do not disclose some matters. But regarding ownership, by the way, and there is some publication, I think I indicated in my report, that regarding carry out ownership rights, it's impossible to follow completely the terms of silence because ownership shall be disclosed to third parties.

MRS JUSTICE GLOSTER: Yes, I see.

MR RABINOWITZ: Now, I want to ask you about split ownership and personal obligations, and I think we all agree that

you can't have split ownership as a matter of Russian law.

But what I want to explore with you is the circumstances in which you can have ownership in the name of one person, but that person is then subject to personal contractual obligations owed to another person, do you follow?

A. Personal contractual obligations may exist for an owner, for a non-owner, no question, no dispute.

Q. Yes. And among the obligations that the parties could agree in the circumstances is that, on demand, the party who is the registered owner of the shares will register the other person's co-ownership interests, that could be a personal contractual obligation which he could accept, yes?

A. It's a terrible problem. Of course not. Because what you are saying, if I understood the counsel correctly, I'm sorry, my Lady, is that the owner, legal owner, who has registered assets in this case, securities as I understand, may be obliged by a contract at the request of another person to transfer ownership title to this person.

Did I understand you correctly?

Q. Well, to register the other person's co-ownership interest, in other words instead of all the shares being

registered in his name alone, he will transfer -- he will produce a change to the register which reflects the fact that there is another owner as well. Why can't that be the subject of a contractual obligation?

A. Just if it is a purchase and sale, and it's clear that there will be transferal right, it's okay. But I understood you, if I am correct, that it will be done on a demand.

Q. There is an agreement that what will happen is that the person says at some point, "If I ask that you do this, you will do this"?

A. But "at some point" means at any moment, correct?

Q. Well, at a particular point in time, yes.

A. This means that the concept of ownership under Russian law is entirely violated. This means that a person is a legal owner of some property, registered owner. And though according to the law he has full right of possession, disposal and use of this asset, in reality he does not determine the legal destiny of this property. At any moment his ownership right will be terminated at demand, and this means that it will be a complete violation of Russian law, because the owner cannot be a little bit owner. The owner determines completely the legal destiny of the object of ownership. Only the owner decides at what moment he or she will

dispose of this property.

MRS JUSTICE GLOSTER: But if I have ownership of a car and I enter into a contract to sell you the car and to transfer your name to the vehicle title registry, why does that offend concepts of ownership? I own the car until you're registered but I enter into a personal obligation, not an in rem obligation, to transfer the car to you. Why is that a problem?

A. It's perfectly legal, my Lady, but this means that there is a purchase and sale agreement and the registration of the title may take some time, but it will, of course, happen. But what -- and the former owner, ie the seller, will not be the owner from the moment -- if it's a car, from the moment of conclusion of the agreement, it will take some time with registration.

With real estate, the transfer of ownership title will be registered, it also takes some time. But it doesn't mean that there is no purchase and sale agreement. What I understand, it's the agreement that one person remains legal owner and another person becomes de facto owner, and nobody knows at what moment --

MRS JUSTICE GLOSTER: No, I don't think that's what's being put to you. I think what's being put to you is that A is the owner of the property, let's say securities,

registered as the owner of the securities, but enters into a contract with B that because B has provided or will provide services to A, A will, at the request of B at any date in the future, register B on the title to the securities as joint owner with A.

Why does that offend notions of property?

A. Unfortunately it contradicts the law, because "at any moment of the future" means that during indefinite time there will be split ownership. A will be the legal owner and B will be the real owner. This means that indefinitely B will be the real owner covered by A's title, and the owner can be only the sole owner. And it seems to me that we have(?) agreed with Dr Rachkov that split ownership contradicts Russian law.

Otherwise, it's a violation of numerous laws regarding ownership, regarding legal capacity, regarding sham transactions. Numerous violations. I'm not sure that you will allow me to discuss it in details.

MRS JUSTICE GLOSTER: No, just a second, let me just see.

This is an agreement to have joint ownership on the register of securities, it's an agreement that B's name will be added to that of A and they will be joint owners, joint registered owners.

A. Excellent, no problem. Then they should go and register or agree about the moment in time when it should be

carried out. Usually, of course, in reasonable time to avoid any accusation that it's a fiction. But registered common ownership is allowed by law, and if they agreed that services will be provided, and for these services registered co-ownership shall take place, they should go and register, or may agree that it will be done.

MRS JUSTICE GLOSTER: Are you saying that if there is a fixed time for the performance of the obligation to register B's name, that's all right, but if it's an uncertain date, it's not all right?

A. Yes, that's correct.

MR RABINOWITZ: Can we just test that, Mr Rozenberg. Let's take the situation of an option. Let's say party A has 100 per cent of the shares in a particular company registered in his name, and he grants an option to party B, the option exercisable for a period of three years, which gives party B the right, if you like, to acquire the option, it doesn't really matter -- sorry, to acquire the shares, for a period of any time extending for three years, which will mean that if that option is exercised, A will have to transfer 50 per cent of the shares into B's name.

Do you say that that contradicts or conflicts with the principle of split ownership just because he has

a right which he can exercise at any time in those two years to require half the shares to be transferred to him?

A. I understand there will be an agreement of an option, of a purchase and sale agreement between two parties.

Q. There's an option there. Does that, in your view, offend against the principle of split ownership?

A. Usually either option or preliminary agreement on future purchasers and sale is allowed by law, but you specify the terms of this agreement and carry it out according to the terms.

What you said that at the month, in the indefinite future, the ownership title will be transferred. This is the split ownership, but not the preliminary purchase and sale agreement or option agreement.

Q. Well, I'm not entirely following that because, for the period of time during which the option is exercised but hasn't yet been exercised, the person has the right to exercise that option which would require half the shares to be registered in his name. Now, leave aside how specified or how detailed the contract is, do you say that that does or doesn't infringe against the principle of split ownership?

A. Broadly speaking, either with option or preliminary purchase and sale agreement, I understand that there is

an agreement between two individuals that, for some consideration, there will be transfer of ownership title, and the question is only when. Here, as I already answered, my Lady, it's perfectly legal.

Q. Why should it depend on the precise nature of the personal contract which gives rise to this right?

A. Because ownership title may and shall be transferred on the basis of concrete civil law transactions. It can be purchase and sale, it can be gift, it can be exchange trade, various bases, but then transfer of ownership title is perfectly legal.

But what you are suggesting is that A will be legal owner and B will be factual owner who will request the transfer of ownership title at request, at demand.

Q. I suggest I'm not suggesting that but I'm going to move on to something else.

Can you please go to bundle G(A)2/2 at tab 38, please. The English starts at page 183 G(A)2/2.38/183.

This is the work produced by Professors Makovsky and Khokhlov, do you see that?

A. Yes.

Q. It's the introduction to the Civil Code, and they were two of the architects of the Civil Code, were they not?

A. Many people claim they were architects.

Q. Well, maybe so, but would you dispute that Professor Makovsky was indeed one of the architects?

A. Indeed, he is a very reputable legal scholar.

Q. Thank you. If you go then to page 193 G(A)2/2.38/193, do you see the heading "What the Civil Code allows and what it requires"?

A. 193?

Q. 193.

A. Yes.

Q. They say this:

"The well-known phrase 'what is not forbidden is permitted' is applicable to the highest degree [of] civil legislation, for one of the basic principles of civil [law] is the principle of free disposition by each person of the civil law rights belonging to him.

"The Civil Code in essence opens with this principle, proclaiming in its first article that citizens and legal persons 'obtain and exercise their civil law rights by their own will and in their own interest[s]'... This principle is formulated even more precisely in Article 9, where it is said that citizens and legal persons 'at their discretion exercise the civil law rights belonging to them'... It is made concrete in a number of other provisions of the Civil Code that discuss the right of the owner of property to

take 'at its discretion ... any actions' with respect to this property..., on the impermissibility of compelling anyone to conclude a contract..., on [determination] by the parties of the terms of the contract at their discretion..."

Now, there are of course certain limits to freedom of contract, as the learned professors go on to point out in the next paragraph. But I take it you accept that freedom of contract was a fundamental principle of Russian civil law in 1995 and 1996?

A. I accept it.

Q. I think you agree that the parties are free to agree either a contract that is specifically named in the Civil Code, or a contract that is not specifically named in the Civil Code provided that the contract is not contrary to law; that's right, isn't it?

A. I fully agree.

Q. Can we just look at what Professors Makovsky and Khokhlov say about the English concept of a trust, if you go to page 262 G(A)2/2.38/262.

A. Yes.

Q. The heading "Entrusted administration of property"?

A. Yes.

Q. "Entrusted administration of property (Chapter 53 of the Civil Code). The contract of entrusted administration

of property and also entrusted administration of another's property on the basis of [legislation] are mentioned in [part 1] of the Civil Code..., which articles do not contain, however, any detailed rules on [these forms] of obligations that is new for Russia. In the Second Part of the Code, the rules on this contract are included as the analogue of a 'trust' -- an institution hasty borrowed from an entirely different legal system and unsuitable for full application outside this legal system. Unknown to the Russian law, the 'splitting' of the right of ownership between the two owners, on which the 'trust' is based, and the absence of special means for protection of 'entrusting' that lie at the [heart] of this institution have required the transfer of these relations to the plane of contract."

Do you see that?

A. **Yes.**

Q. **Can we just focus on the last sentence. So what the professors are saying is that the absence of any form of split ownership under Russian law required the transfer of relations that would, in England, be governed by trust to the plane of contract. Do you agree that that is what they're saying?**

A. **They mention chapter 53 of the Civil Code, and I know that, according to the rules regulating entrusted**

administration of property, the legal owner remains the legal owner, and the person to whom entrusted administration is assigned remains a manager, indicating in all transactions that he is acting only on the basis of the trust arrangement.

And therefore there is absolutely no distinction between legal and factual owner, there is a person who is managing the trust. Therefore splitting -- well, of course, it's a label. The authors indicate here "splitting", but splitting, according to Russian law, does not mean like it happens in English trust, as I understand, that the legal owner will act according to the instructions of the real owner. Under Russian law, the legal owner on the contrary gives instructions and the person who gets the property for trust always indicates that he is not the legal owner at all.

Q. Would you agree with this, that the contract of entrusted management, in which the owner transfers possession to an agent, is an example of relations between owner and agent that are governed by contract?

A. Yes, but frankly I don't see any splitting of ownership here, although the respected authors wrote about splitting. I'm afraid it's a confusing label about splitting.

Q. With respect, I don't think it's confusing at all.

I think what they're saying is: we don't have a trust concept in Russia, and therefore many of the things that you achieve by using a trust in -- he's obviously talking about England -- we deal with by use of the plane of contract. We obviously don't achieve the exact same result because we can't, because we don't want to split ownership. In effect what they're saying is you can achieve a lot of the same thing by using contracts, do you agree?

A. My main point is that in Russia the agent, as you say, is a person who has nothing to do with legal ownership, and he, on the contrary, even maybe sometimes without necessity, must indicate that he is not the owner, that he is only the manager, on each and every transaction, what is absolutely contrary to the concept of splitting ownership.

MR RABINOWITZ: My Lady, I'm about to move on to a different topic. Subject to your Ladyship --

MRS JUSTICE GLOSTER: That would be a good moment. Quarter of an hour, and I'll sit until 4.30.

MR RABINOWITZ: That would be very helpful, my Lady.

(3.22 pm)

(A short break)

(3.37 pm)

MRS JUSTICE GLOSTER: Yes, do start, Mr Rabinowitz.

MR RABINOWITZ: Mr Rozenberg, I'd like to turn next to your point that Article 434 of the 1964 Civil Code applied to invalidate the 1995 agreement.

Can we begin, perhaps, by going to your fourth report, bundle 3/1 at tab 2, page 70 G(A)3/1.02/70. At 3/1, tab 2, page 70, we see your point number 4. You say:

"The alleged agreement violates Article 434 of the 1964 Civil Code (as defined below) because it is not made to satisfy personal needs. Consequentially, the agreement, even if concluded, is void."

Can we just then remind ourselves of what Article 434 of the '64 Civil Code in fact provides. If you go to bundle G(A)4/4, tab 3 at page 83 G(A)4/4.03/83, do you have it?

A. Yes, I do.

Q. If you look at the last two sentences in Article 434 you see it says:

"Citizens may conclude a joint activity contract only to meet their own personal domestic needs.

"Joint activity contracts between citizens and socialist organisations are not permitted."

So there appear to be two prohibitions here, are there not? First, a prohibition on partnership contracts between citizens other than to meet their

personal needs and, secondly, a prohibition on partnership contracts between citizens and socialists organisations even if those contracts are purely to meet the citizen's personal domestic needs?

A. Yes.

Q. Now, the 1964 Civil Code was, of course, a Soviet Civil Code, and obviously the Communist authorities did not take kindly, at least in theory, to private individuals amassing vast wealth, that's correct, isn't it?

A. Broadly speaking, yes.

Q. And so, as we can see from Article 434, all the Soviets would allow citizens to enter into partnership contracts for was to satisfy their personal needs, and what they had in mind, presumably, was food on the table or a roof over their head, that sort of thing, yes?

A. I think that Soviet citizens had a little bit more than bread and a roof.

Q. I'm sure they did.

A. It's broad, of course.

Q. I think if there's one thing we can all agree on in this case, though, it's that the ambitions of Mr Berezovsky and Mr Abramovich were not limited to that?

A. I agree.

Q. So had the 1995 agreement been made in 1964 it would undoubtedly have been void as contrary to Soviet

prohibitions, that's clear, is it not?

A. I would say stronger. In this year, there was special article of the Criminal Code for private entrepreneurship.

Q. Right. Let's just do one thing at a time.

The question for us is whether these Soviet prohibitions continued to apply in 1995. Now, you're aware, are you, that Professor Sukhanov says that Article 434 of the 1964 Civil Code did not apply in 1995? I can show you an article.

Can you go, please, to G(A)7/1. I think you need out 7/1 and also 2/5 as well, because we need to look at both.

Tab 11 of 7/1. If you're in tab 11 of 7/1, could you go to 98.001, please G(A)7/1.11/98.001.

We've got out two volumes because we don't have the whole extract in one place unfortunately. I just need to show you something from 7/1 and then we're going to go to 2/5.

If you're at 98.001 you can see from that that this is the 1993 edition of Professor Sukhanov's book, do you see that?

A. Yes.

Q. And you can also see Professor Sukhanov is the author of chapter 46, among other things, top left-hand side; do

you see that?

A. Yes.

Q. And then if you go back to page 97.001 G(A)7/1.11/97.001, the English is at 98.001 G(A)7/1.11/98.001, you can see, and perhaps you can tell us, this is a chapter on joint activity agreements, correct?

A. Yes.

Q. All right. Now, unfortunately the page that I want to take you to is in another place, it's in 2/5. I just needed to show you that so that we could be clear on what I was showing you at 2/5.

In G(A)2/5, can you go, please, to tab 25 G(A)2/5.25/112.

MRS JUSTICE GLOSTER: Just for the record, I don't seem to have the page that's on the screen on my Magnum. I don't know why that is.

MR RABINOWITZ: 97.001.

MRS JUSTICE GLOSTER: I don't have 98.001, I don't know why not.

MR RABINOWITZ: I can tell your Ladyship you're not missing much, it simply identifies the date of the --

MRS JUSTICE GLOSTER: That's fine. I'm sure it will get on there some time, but just so you don't think I've got it.

What's the next document?

MR RABINOWITZ: More importantly is 2/5 at tab 25. If one goes to page 114 G(A)2/5.25/114 one has an extract from the relevant chapter in English. And what we have is Professor Sukhanov in 1993 saying as follows:

"Previously [partnership contracts] were distinguished on the basis of their participants, since the law did not permit the simultaneous participation in such contracts of legal entities and individuals (furthermore the latter, according to Article 434 of the Civil Code, were allowed to enter into such agreements only for satisfaction of their personal everyday needs, and not for commercial purposes). This was the direct consequence of fundamental differences in the legal regime regarding state and personal ownership. New civil legislation abolished these unjustified limitations, and accordingly the grounds for differentiating between such agreements fell away."

Do you see that?

A. Yes.

Q. So the first point to note is that Professor Sukhanov considers, and this is in 1993, that Article 434 at some point in time prohibited partnership contracts between citizens and legal entities, do you see that's the way he puts it?

A. It seems to me that he is focusing on it.

Q. So he says 434 was about prohibiting partnerships, among other things, partnership contracts between citizens and legal entities. And then it's plainly his view, you will accept this I think, writing in 1993, that Article 434 of the Civil Code had been abolished and no longer applied?

A. I'm ready to agree with you. It seems to me that here he attacks directly the agreements between legal entities and individuals which were prohibited entirely under the old Civil Code regarding individuals, it's in parenthesis, and for me it's not entirely clear although I'm ready to agree with you.

Q. You are ready to agree with me, thank you for that.

Perhaps we can just look at another commentary to see if that assists still further. In the same volume which is 2/5, can you go to tab 26 G(A)2/5.26/120.

MRS JUSTICE GLOSTER: Sorry, are you agreeing that that's his view, or are you agreeing with his view?

A. I agree that this view is a little bit unclear but I don't want to waste time, and I'm ready to agree that it may apply to both.

How it's read, especially in English, it looks like he is directly attacking the prohibition of joint activity agreements between individuals and legal

entities, which were completely prohibited by the Soviet Code. But in parenthesis it mentions -- and also, by the way, there was restriction regarding individuals and whether the following sentence applies to both, only to what -- besides parenthesis, it's not absolutely clear --

MRS JUSTICE GLOSTER: I see that, but do you agree with his view, with the conclusion he reached? Do you personally agree with the conclusion he reached?

A. Personally I don't agree.

MRS JUSTICE GLOSTER: Yes, I see.

MR RABINOWITZ: You don't agree.

I'm grateful, my Lady.

Let's have a look at another commentary then. If you go to tab 26, which I think is the next tab, the English begins at page 120 G(A)2/5.26/120.

This is a commentary by someone called Mr Saveliev, he's an author who you yourself cite in your fourth report, is he not?

A. Of course, yes.

Q. If you turn to page 121 G(A)2/5.26/121, do you see he also says:

"The Fundamentals also removed the prohibition under the former legislation on the simultaneous participation of citizens and legal entities in a joint activity

(simple partnership) contract."

A. Yes, it's correct.

Q. Do I take it that you would disagree with Mr Saveliev as well?

A. Yes, I respectfully disagree.

Q. All right.

Can we then just look at what you say in your report, G(A)3/1, tab 2, page 133 G(A)3/1.02/133, and I want to look at paragraph 220, please.

At paragraph 220, you say:

"Indeed, even today a citizen may not enter into a joint activity agreement for an entrepreneurial purpose unless he or she is a registered entrepreneur: see Article 1041 of the... Civil Code. This provision has been applied on many occasions to render an agreement in violation thereof invalid. Finally, it is striking that there is no Russian court decision upholding any joint activity agreements concluded between individuals for business purposes at the relevant time ([that is] in 1995...)"

So, am I right, your suggestion is that because even today a citizen cannot make a partnership contract for entrepreneurial purposes, therefore it is reasonable that in 1995 the old Soviet prohibitions continued to prohibit citizens from making partnership contracts for

anything other than basic supplies?

A. I'm afraid it's a simplification of my arguments. I realise that this question is not very simple and I respect other views.

But, as a lawyer, if asked regarding the law applicable at this moment, in 1995, I have to take into account two main factors. Number one, at this moment, Article 434 formerly was the only rule of the special part of the civil legislation regulating this type of agreements. The special part of the Civil Code was adapted and took effect only in 1996.

At this moment, this part was not replaced by anything, and the question was whether it contradicted or didn't contradict other normative acts which my respected colleague, Dr Rachkov, enumerated. I don't want to waste time on this.

So the question is: was Article 434 in effect at that time, or there was some vacuum, and practically no other article of the Civil Code regulated the joint activity or simple partnership agreements.

When such situation arises, usually the best guidance is the court practice. There are three court decisions, not one but three consecutive court decisions. The lower court, the appellate court and the cassation court. This dispute, Salata case, went

through all instances of the judicial system available at that time. And, by the way, even today, because the Supreme Arbitrazh Court interferes very rarely, and only when it disagrees; when the Supreme Arbitrazh Court agrees they do not show up on the picture.

In other words three courts, including the highest cassation court, ruled with reason, and we have this in the materials of the present case, ruled that Article 434 applies if the agreement is not concluded -- if the joint activity agreement with participation of an individual is not concluded for the personal needs. The courts indicated that, if it is for apartments, for parking places, for cars, for other personal needs, it's fine. If it's for systematically obtaining of profit in entrepreneurship then it's prohibited. This is what the courts said.

And second factor, the development of legislation. I can see, and I wrote about it, that in 1964 there were strong restrictions. After 1995, still there are restrictions, they look a little bit softer but still are rather severe because the most serious sanctions, complete invalidation of agreements if there is no registration of individuals participating in such transactions, it's broadly applied by Russian courts after 1995.

Since the whole legislation during the period in question developed gradually and in other areas, whether it's currency, bank accounts, other economic freedoms, there were more such shocking changes.

My view is that simply in the period in question, in 1995, joint activity agreements connected with entrepreneurial activity for individuals were available if such individuals were acting in some legal forms, and to have a form of legal entity to establish either limited liability company or closed type joint stock company with only one founder was quick and easy. Everybody knows it was practically the same procedure, like becoming registered entrepreneur.

Therefore, my understanding was that for fiscal purposes the legislators did not allow, in the period of question, the activity of individuals who are not registered at all. This was my conclusion though I agree that there may be different views.

Q. All right. Mr Rozenberg, I really don't want to stop you giving relevant evidence, but it would help if you try to make your answers a little shorter and responded to my question.

MRS JUSTICE GLOSTER: I think we've got the picture here. He's got his view and he accepts it's reasonable to hold an alternative view.

MR RABINOWITZ: An alternative view. All right.

I do need to explore I think with you, Mr Rozenberg, and I'm sorry that this will take time, but, you see, part of what you are saying apparently in paragraph 220 seems to relate to agreement for entrepreneurial purposes and registered entrepreneurs.

I just want to be clear that there is no confusion as to the concept of entrepreneurial activity, because this is a matter which arises not only in this context but it also arises in the context of limitation in Article 205 of the Civil Code, okay? So I just want to see if I can very quickly try and get rid of any confusion about this.

Can we just look, please, at bundle G(A)6/1, page 40, paragraph 127 G(A)6/1.01/127. In paragraph 127, this is in the context of 205, you say:

"... it is agreed that Article 205 cannot be applied at all where the claimant is an individual entrepreneur and the claim arises out of entrepreneurial activity."

Now, there is a dispute as to how this applies, and I just want to be clear that the authority which confirms this is expressed in precisely these terms and no wider.

Keep the joint memorandum to hand, but can you please take up bundle 4/3 and go to tab 103, page 63

G(A)4/3.103/63. We have here the Plenums of the Supreme Court and Supreme Arbitrazh Court producing a resolution. If you look at paragraph 12, you can see that in the first sentence they confirm that:

"A request by a party to [apply a limitation period] shall constitute grounds for the dismissal of the claim..."

In the second sentence of the same paragraph, they say that such a request:

"... does not prevent the court from considering an application by a claimant who is a citizen to honour the reason for missing the limitation ... period and to restore it, which the court may grant, provided the circumstances are proven as set forth in ... 205 ..."

I'm not worried about that for present purposes.

In the next paragraph they say this:

"The courts shall keep in mind that the limitation of action period missed by a legal entity, as well as by a claimant who is an entrepreneur for claims related to their business activities is not subject to restoration regardless of the reasons why it was missed."

I've emphasised the words "business activities", but it's right, is it not, that the Russian word which is used is the same word that appears in Article 23 of the Civil Code which I think Professor Maggs translates as

entrepreneurial activity?

A. I confirm.

Q. So just going back to the joint memorandum at G(A)6/1, page 40, paragraph 127 G(A)6/1.01/40, you agree that Article 205 cannot be applied where the claimant is an individual entrepreneur and the claim arises out of entrepreneurial activity; do you see that?

A. Yes.

Q. In paragraph 128 we see in subparagraph 1 that you say:

"Mr Rozenberg maintains that Mr Berezovsky may be considered to be acting as an individual entrepreneur since his alleged activity (and rights allegedly arising therefrom) was of economic nature, and that this would deprive him of the right to rely on Article 205."

Now, this concept of economic nature that you use there is slightly ambiguous. Can we just very quickly look at how you put it in G(A)3/1, tab 3, in your report, page 207, paragraph 51 G(A)3/1.03/51. Here you say:

"Furthermore, if one interprets the alleged 1995 Agreement as a valid joint activity agreement governed by Russian law..., the activity of the parties to such agreement would inevitably be deemed by a Russian court to be business or entrepreneurial activity."

Do you see that?

A. Yes.

Q. So having said in the joint memorandum that the alleged activity was of an economic nature, here you say that it would inevitably be deemed to be business or entrepreneurial activity?

A. Yes.

Q. Okay?

A. Because Article 434 did not indicate clearly that only entrepreneurship is prohibited. It indicated that everything except personal needs, and I word it in connection with this to indicate that activity which is business entrepreneurial activity is not activity for personal needs.

The same regarding statute of limitation, because legal entities are mentioned there, and the whole understanding is that whether it's connected with business activity.

Q. I just at this point want to understand whether you say that the 1995 agreement involved entrepreneurial activity as defined in Article 2 of the Civil Code? Because I suggest it isn't clear, and just looking at what the Plenum said in the document we looked at at 4/3, tab 103, you see the Plenum spoke expressly of "entrepreneurial activity", using the same Russian words as are used in Article 3.

A. I agree.

Q. 23, sorry.

A. I agree.

Q. But you say in the joint memorandum that the joint activity was of an "economic nature". And then you say in paragraph 51 of your fifth report that the joint activity would be deemed to be "business or entrepreneurial activity". So you add here the word "business".

A. Regarding the joint activity in connection with Article 434, it's not crucial, it's not critical. It's sufficient to determine whether this activity was aimed at personal needs or it was not.

Q. All right. Just let me ask you this: do you say that a partnership agreement to acquire a controlling shareholding interest in a company involves entrepreneurial activity as defined in the Civil Code on the part of the partners? Or do you say that it involves other kinds of economic activity aimed at generating wealth?

A. It is a difficult question and I wrote that it "may be considered" as entrepreneurial activity. We can read together the definition of entrepreneurial activity which is rather broad. The simple purchase of shares, of course, is not entrepreneurial activity, but how the

whole agreement and all the actions of the parties were formulated, it may give basis for consideration of this as entrepreneurial activity. So this question remains to be discussed.

Q. You see, Dr Rachkov is clear about this. Can you just go to G(A)1/1, tab 3, at page 188 G(A)1/1.03/188, do you see at paragraph 43 Dr Rachkov says -- I'm looking at the first sentence:

"Entrepreneurial activity is a narrower concept that economic activity, and does not encompass every activity that may be undertaken for commercial or business purposes."

Presumably you agree with that?

A. I agree.

Q. In the second sentence he says that both:

"... the Constitution and the Civil Code distinguish entrepreneurial from other economic activity."

Presumably you agree with that?

A. I think the first sentence is sufficient.

Q. Okay. But you don't dispute the second sentence, presumably?

All right, let's go over the page, page 189. If you look at paragraph 44, you'll see that Dr Rachkov says:

"Entrepreneurial activity is defined in Article 2 of the Code ..."

And he sets that out. If you look at the definition, it's actually set out here:

"Entrepreneurial activity is independent activity done at one's own risk directed at [the] systematic receipt of profit from the use of property, sale of goods, performance of work, or rendering of service by persons registered in this capacity by the procedure established by legislation."

Do you agree that acquiring shares in a company, being a shareholder, does not fall under this definition?

A. If Mr B and Mr A would come to purchase shares, and that's it, of course these actions should not be considered as entrepreneurial activity. With a broad activity, it's a question, but I don't want to insist. I wrote "it may be considered"; it's a question, it's of economic nature. It's not entirely clear, and frankly even all the activity under this agreement is not crystal clear.

Q. That's very fair.

A. Therefore I agree with you only that acquisition of share stock is not entrepreneurial activity, that's correct.

Q. That's very fair, Mr Rozenberg.

Can we just very quickly look at the constitution.

If you go to bundle G(A)2/1 at tab 2, please. The English, if you can go to page 51 of that G(A)2/1.02/51 you see that Article 34 at the top of the page says:

"Everyone shall have the right to use freely his (her) abilities and property for entrepreneurial and other economic activity not prohibited by law."

So that again draws a distinction between entrepreneurial activities and economic activities, I think you have agreed with that.

A. Of course, otherwise I would say no question at all.

Q. And the constitutional guarantee applies to each, does it not? Everyone has the constitutional right to use their abilities and property for each of those activities, entrepreneurial or other economic activities "so far as not prohibited by law".

A. If not prohibited by law, I fully agree.

Q. And where it says "so far as not prohibited by law", this does not mean, does it, Mr Rozenberg, so far as the Soviets did not prohibit it; that's not what the 1993 constitution means?

A. Three Russian courts ruled in a different way. And by the way, not long ago it was, not 1995 though, in connection with the facts which took place in '95, therefore I have to disagree.

Q. I just want to understand your position.

If a citizen went to the Constitutional Court in 1995 and said "I want to make a simple partnership contract to invest in a company to try to make a lot of money", this is in 1995, "I know I couldn't do this in Soviet times but can I do it now?" is it seriously your suggestion, Mr Rozenberg, that the Constitutional Court would reply "Sorry, you cannot do this, your Article 34 rights are limited by Soviet law and you will have to wait until we get around to amending them"?

Is that your evidence?

A. "I want to make a simple partnership", then according to the law in effect at that time he could register very quickly, within a week or two maximum, a limited liability company being one founder, or closed type joint stock company being one founder, with extremely small charter fund, it was just a ridiculous amount, and enter into any joint activity agreement, because then all his actions would be supervised by the tax authorities, no question.

This is the answer.

Q. All right. Can you put away 2/1, please, and go to bundle 2/4 at tab 8, page 50 G(A)2/4.08/50. This is the Constitutional Court decision in Kadet, and just looking at paragraph 3, which is the first paragraph you

see there?

A. Yes.

Q. "Article 8(1) of the Constitution... affirms freedom of economic activity as one of the foundations of the constitutional system. The principle of economic freedom constitutionally predetermines guaranteed powers comprising the basic content of the constitutional right to free use of one's abilities and property for entrepreneurial and other ... activity not prohibited by law. Exercising this right, enshrined in Article 34 (Part 1) of the Constitution..., citizens are entitled to determine the sphere of this activity and conduct the corresponding activity solely or jointly with other persons by means of participation in a business entity, partnership or productive cooperative, [that is] by means of the creation of a commercial organisation as a form of collective entrepreneurship, to select autonomously an economic business development strategy, use their property based on the guarantees of rights of ownership... [and then] and government support of fair competition... established by the Constitution of the Russian Federation."

So would you agree that what the Constitutional Court is here doing is affirming that citizens are entitled to determine the sphere of their

entrepreneurial or other economic activity, and to pursue such activity solely or jointly with other persons by means of a participation in a business entity or partnership?

A. I agree, but correct me if I'm wrong, but in here I don't see for example that it's necessary for an individual to be registered, and the resolution was issued in 2004. By that time it was easy to participate in joint stock -- I'm sorry, in the joint -- in the simple partnership, and still the registration was required, but the Constitutional Court cannot go into such details.

It's a broad definition and I agree with that, but we should understand that everything should be done on the basis of the existing laws and regulations with certain sometimes formal restrictions.

Q. You see, despite these ringing words of freedom, you're saying that citizens could not form a simple partnership contract with one another for much more than a sandwich or a basic commodity, is that your evidence?

A. I need to be very brief. I already said that creating, very quickly, a legal entity, it's an equivalent of registration later. A citizen could be engaged in very sophisticated forms of entrepreneurship, not only preparing sandwiches. Because otherwise, we have to

agree that this activity could be carried out without any supervision of the state authorities, what is inconsistent with the principles of Russian and I think any other country's legislation.

MRS JUSTICE GLOSTER: So you're saying that it would have been all right -- if the individual had registered as an entrepreneur that would have made it all all right?

A. Definitely registered as individual entrepreneur later, and in 1995, probably to have full guarantee, it would be better instead of being registered individual entrepreneur to be acting through a legal entity, not as individual but as owner of limited liability company or closed type joint stock company.

MRS JUSTICE GLOSTER: So in 1995, an individual couldn't have registered as an entrepreneur?

A. In '95 he already could, but for the purposes of 434 it remains unclear whether it would be sufficient.

MRS JUSTICE GLOSTER: Yes, I see.

A. But I say it's equivalent either to be registered as individual entrepreneur, or to register as a limited liability company, the only founder, the only owner, and very low charter fund, let's say equivalent of $100, no more. It was even lower at that time.

MR RABINOWITZ: Now, we saw, Mr Rozenberg, that you said in your fourth report, paragraph 220, that there is no

Russian court decision upholding any joint activity agreements concluded between individuals for business purposes at the relevant time, that's to say prior to part 2 of the Civil Code on 1 March 1996.

A. Only between individuals without legal entities, we never saw anything.

Q. You see, Dr Rachkov says that is not right, and can we just look at some of the decisions that he refers to. Can you go, please, to bundle 2/5 at tab 15, page 55 G(A)2/5.15/55, the Russian is at 52 G(A)2/5.15/52 and the English starts at 55.

This is a decision of the Supreme Court, as you see. It's B against S, you see that from the first substantive paragraph, just below the top. On page 55, below the heading "Established", we see that B, the founder of the company Respect, applied to the court with a claim against S, another founder and director of the company, for the compulsory registration of the transfer of ownership rights to a shop from S to the company Respect. Do you see that?

A. Yes.

Q. In the next paragraph, we see that the contract was a foundation contract made in 1993, and in the following paragraph we see that the wife of one of the parties applied to invalidate it. So that is what the claim was

about. Do you see that?

A. Yes.

Q. And there is no mention here of B or S being or needing to be registered entrepreneurs, correct?

A. Regarding entering into foundation contract.

Q. Yes, but do you see that there is no reference to them needing to be registered entrepreneurs?

A. But it's in connection of the entering in the foundation contract.

Q. Okay. If you then go to the last paragraph at the bottom of the page, you'll see that the court says as follows:

"In sustaining B's demand, the court proceeded from the fact that the joint economic activity contract and the creation of the limited liability company of 23 December 1993, concluded by the founders of the company -- S and B, contains a term in accordance with which the founders integrated their personal contributions for [the] joint economic activity, by depositing property in the form of a shop and car acquired by them for joint cash funds worth a total of 12 million-odd rubles, thus creating the company's authorised... capital."

So the court upholds the claim and proceeded on the basis that this was a joint activity contract, correct?

A. It's correct, but it's a bit confusion because, unfortunately, in some decisions of the Supreme Court and of the Supreme Arbitrazh Court, and of some writers, these agreements are also called joint economic activity agreements. However, these foundation agreements are not simple partnerships because we all agreed, as I understand, that the simple partnership is the joint activity without creation of legal entity. And these agreements are aimed at creation of legal entity and present a different category. We shall not be confused by this. They are subject to regulation of special norms regarding foundation of legal entities, either limited liability companies or joint stock companies, and of course they are not falling under the restrictions of Article 434.

I even remember that my respected colleague, Dr Rachkov, in one of his reports, indicated that joint economic activity agreements are not foundation agreements, that these are different categories.

Q. Well, can we just look at the document which you'll find at tab 10, G(A)2/5, tab 10, in the same bundle G(A)2/5.10/27.

A. Yes.

Q. This is a joint resolution by the Plenum of the Supreme Court and the Supreme Arbitrazh Court. Do you see it

says:

"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 bears no relation to the foundation documents..."

A. Yes. I said just I think two minutes ago that unfortunately both our supreme courts and some scholars created this confusion because, if we read carefully, and moreover understand carefully what it means, these are agreement on joint activity on the foundation of the company and it has nothing to do with simple partnership which are, on the contrary, aimed at joint activity without creation of any legal entity.

Q. Mr Rozenberg, if you look at tab 8, if you go to page 21 of tab 8, I just want to show you another reference to this sort of contract. This is the Presidium of the Supreme Arbitrazh Court of the Russian Federation resolution. Do you see tab 8, page 21? G(A)2/5.08/21

A. Yes.

Q. "The foundation agreement is a joint activity contract between the founders on the creation of the joint stock company and is of a civil law nature. Accordingly, the demand to have it recognised as invalid is a claim to have a civil law transaction recognised as invalid."

Do you see that?

A. Yes.

Q. So isn't that again recognition that a foundation agreement is a joint activity contract?

A. But I already said that, unfortunately, our supreme courts and some scholars created this confusion, and forgive me, I want to be extremely brief but sometimes some legal terms are used in different meanings.

There is an English term "security" which may be used as collateral, as pledge, and at the same time something like absence of danger, security. And the same here, there are joint activity agreements aimed at creation of a legal entity where joint activity agreements on foundation of a company. And there are other joint activity agreements, ie simple partnerships, which on the contrary are aimed at activity without creation of a legal entity.

Different rules should apply, otherwise it's simply impossible to understand. And by the way, Dr Rachkov wrote in one of his reports, we can go to it, that these are different categories. We cannot consider joint activity agreements on foundation of companies as equivalent of joint activity agreements, parenthesis, simple partnerships, aimed at activity without creation of legal entity.

MRS JUSTICE GLOSTER: Why can't you have a joint activity agreement for the formation of a company which comes to an end once the formation of the company has been done?

A. We can, of course, and it should come to an end when the formation is done, that is absolutely correct. But still it's a different category because customary requirements to joint activity agreements, the personal participation is needed, activities of all the partners, but not simply execution of payment, one-time payment of a certain amount. These requirements applying to joint activity agreements are not applicable to agreements on creation of a legal entity.

MRS JUSTICE GLOSTER: Yes, I see.

MR RABINOWITZ: You see, Mr Rozenberg, Dr Rachkov refers to a number of cases in which partnership contracts made in 1994 were upheld. I'm not going to go through them all. They include cases of partnership contracts between a citizen and a legal entity not simply for personal domestic needs, and that is in his report, his sixth report, at paragraphs 29, 30 and 31, one of those cases being a Supreme Court decision. He also refers to cases of partnership among citizens, plural citizens, as well as legal entities. That's at paragraph 32 of his sixth report. And that includes a case where 12 citizens were party to the contract. He also includes other cases in

which foundation contracts, which are a form of a partnership contract, were treated as potentially valid.

You, on the other hand, have cited a single case, Salata, in which the Federal Arbitrazh Court struck down a partnership contract made in 1995 on the ground of Article 434. I'm not disputing that is what happened in that case. But I think you also accept that Russian judgments, especially lower court judgments, can sometimes be inconsistent and wrong, correct?

A. I think in any country court decisions may be wrong.

Q. That is a very fair comment. Not this court of course.

So I would suggest, Mr Rozenberg, that Professor Sukhanov, Dr Saveliev and the Supreme Court decision I have referred to are all right, that the end of Communism was indeed an end of Communism, and that restrictions of the kind found in Article 434 were washed away by the new constitutional and civil law freedoms; you dispute that, do you?

A. If either you or Dr Rachkov would bring me at least one decision, if not upheld at the appellate or cassation level, at least one decision of any court considering just this legal issue, not in general questions of payments, tax issues and other problems considered in the cases you indicated, but just this particular issue, whether Article 434 was applicable or not at that time.

And this decision would contradict the Salata case decisions, I am ready to entirely agree with you.

So far no one case was brought whether this particular issue was in the focus of the dispute, and the Russian courts usually -- Russian judges, and I think it was indicated in your submissions, Russian judges have so many cases, you sometimes can see the list schedule of cases, just ten minutes for one case, 15 minutes for the second case, and 15 cases for one day. And if the question is --

MRS JUSTICE GLOSTER: We sometimes have that too.

A. So if the question is regarding the amount which should be paid, why should the judge to look for another job and consider some other issues? Especially if it's not raised by any party.

But when this issue was in the focus, three levels came to this conclusion. How can I as a lawyer ignore all this without getting any support anywhere? In court we cannot bring Professor Sukhanov's or somebody else's opinions. The judges will laugh at us.

MR RABINOWITZ: I'm sure they won't. But can I ask one last question about this, I just want to clarify exactly what you're saying.

We saw Article 434 had two prohibitions, the one prohibition was about individuals entering into

partnership with legal entities, correct? And the other prohibition was about individuals entering into partnerships with each other for anything more than basic needs, yes?

A. Yes, and the prohibition to enter into agreement with legal entities, as far as I remember, was indicated only regarding socialist organisations.

Q. Well, "legal entities" in fact is the way it's put by Professor Sukhanov and others. But you accept, I think, that so far as the first of those prohibitions is concerned, that had gone by 1995?

A. Of course. There were no socialist organisations anymore.

Q. Well, in fact it refers, as we've seen in the literature, to "legal entities". What I want to understand from you is: is it your case that it is only the second limb that somehow survived, the restriction on partnership on individuals for anything other than basic needs?

A. Individuals had to enter into joint activity agreements not for personal needs in forms of legal entities, that's correct.

MR RABINOWITZ: All right. I suggest to you that you're wrong and Dr Rachkov is right but we're not going to go round that one again.

My Lady, this is in fact a convenient moment.

MRS JUSTICE GLOSTER: Very well.

MR RABINOWITZ: I can tell your Ladyship, all I have left for Mr Rozenberg are the limitation issues. Depending on how it goes, it will take between one hour and three depending on how it goes, but I would expect, if we start at 10.00, we should easily finish in the morning. Overnight we will consider whether we need Professor Maggs at all.

MRS JUSTICE GLOSTER: Yes. You can deem having put all the points to him.

MR RABINOWITZ: That's my -- and I need to be clear with your Ladyship what the position is. Professor Maggs doesn't cover any other ground. In relation to two of the issues he suggests a further reason why he says his view is to be preferred. We need to take a view ourselves as to whether it really is necessary to go through that further --

MRS JUSTICE GLOSTER: But if, for example, in relation to a particular issue, he does say, "And there is an additional reason", it doesn't seem to me that I can be prevented from considering that reason.

MR RABINOWITZ: No, we're not for a moment saying that your Ladyship shouldn't consider it. But if for example it's in relation to an issue where we have identified

a series of reasons why that ultimate conclusion is wrong, then, in my respectful submission, it may not assist your Ladyship to hear us try and trash the further reason.

I'm not for a moment suggesting that the other side can't rely on Professor Maggs' further reason, but I suggest it just would not be an efficient use of time to go over all the same ground again.

MRS JUSTICE GLOSTER: Well, I can see that.

I'll hear from Mr Sumption.

MR SUMPTION: My Lady, I should point out that there is one aspect of Professor Maggs's opinion on which I would like to cross-examine him. In the circumstances, I do not think that it would be right for me to cross-examine him in an adversarial manner or using leading questions, I wouldn't propose to do that. But there is a particular aspect which Professor Maggs deals with, which other expert witnesses have not dealt with, on which I would like him to explain the basis of his view for your Ladyship's assistance.

So unless Professor Maggs is withdrawn by Mr Adkin, he may need to be called so that I may cross-examine him.

MRS JUSTICE GLOSTER: Right.

Mr Rabinowitz, I'll leave it to you, but I'm not

requiring you to go through the same exercise with Professor Maggs. I will take things as challenged.

If there's a different point, you can either leave it, as it were, for me to consider in the light of your reasons or you can challenge him, but I think that's a view you must take.

MR RABINOWITZ: I'm not suggesting that everyone says "That's fine," no one can rely on that at all, my Lady, that's very much the position.

MRS JUSTICE GLOSTER: You run the risk, but that's a matter for you, that if you don't challenge his additional reason, without that challenge I might be persuaded by it.

MR RABINOWITZ: I'm grateful, my Lady.

MRS JUSTICE GLOSTER: Yes, Mr Adkin.

MR ADKIN: My Lady, I'm grateful for that. That's precisely the approach that we propose to take as well. I quite understand that my learned friend doesn't want to replicate his cross-examination of Mr Rozenberg, but there are points that Professor Maggs addresses in his reports which are supplemental to those made by Mr Rozenberg. If my learned friend chooses not to cross-examine on those points --

MRS JUSTICE GLOSTER: Well, I'm not going to take them as accepted, I'm going to put them into the bucket and work

out what, at the end of the day, I consider the answer is.

MR ADKIN: **My Lady, exactly. And he fails to cross-examine, as it were, at his own risk.**

MRS JUSTICE GLOSTER: **Well I don't think he's failing; the arguments will all be there.**

MR ADKIN: **Chooses not to.**

MRS JUSTICE GLOSTER: **He won't by default have accepted them.**

MR RABINOWITZ: **That I think is certainly my position and I'm grateful for your Ladyship's indication.**

MRS JUSTICE GLOSTER: **Okay, so we're not going to finish the evidence this week, it doesn't look like.**

MR RABINOWITZ: **It depends on how much history cross-examination there is. I understand from Mr Sumption that he will be very short. Mr Gillis is dealing with Mr Sumption's history expert. I don't think he's going to be very long but he is very likely to be longer than Mr Sumption is, from the sounds of it.**

MR SUMPTION: **My Lady, I think I will probably be very roughly an hour with Professor Fortescue.**

Since, as I understand it, the point being made by my learned friends about Professor Service is that he doesn't say anything, it shouldn't take them very long to cross-examine on the subject.

MRS JUSTICE GLOSTER: Okay. Well, I'll sit at 10 o'clock tomorrow. I think, but I'm not sure, I may have a meeting before court but I'll try to be here by 10.00.

MR RABINOWITZ: I'm grateful, my Lady.

MRS JUSTICE GLOSTER: Again, don't talk about your evidence to anyone.

Very well. 10 o'clock tomorrow.

(4.32 pm)

(The hearing adjourned until

Friday, 2 December 2011 at 10.00 am)

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