

Friday, 2 December 2011

(10.00 am)

MR MIKHAIL ROZENBERG (continued)

Cross-examination by MR RABINOWITZ (continued)

MR RABINOWITZ: Good morning, Mr Rozenberg.

A. Good morning.

Q. Can we first move to deal with the issue of the limitation period for claims arising under Article 1064.

If we can take up the joint memorandum, it's at bundle 6/1, tab 1, page 37 G(A)6/1.01/37. If you look at paragraph 116, you can see:

"It is agreed that the [basic] limitation period for a claim under Article 1064 is three years, and that the limitation period runs from the date on which the claimant knew or should have known about the violation of his rights."

If you turn over the page to paragraph 118, at the top of the page, you see it's also agreed as follows, just looking at the first sentence there:

"It is agreed that, when the court at the request of the defendant establishes that limitation period has elapsed, the claim must be dismissed unless the Court restores the limitation period under Article 205 or it is an abuse of right for the defendant to raise a limitation defence contrary to Article 10."

So this is right, isn't it: where a claim is brought outside the three-year limitation period, it will be dismissed unless either the court restores the limitation period under Article 205, or it is an abuse of right for the defendant to rely on a limitation defence contrary to Article 10?

A. Yes.

Q. Then just looking at the next sentence of paragraph 118 of the joint memorandum, we see that you summarise your position and you say:

"Mr Rozenberg maintains that the latter options may take place only in highly exceptional circumstances, where either impossibility of the claimant to timely apply to the court or defendant's intentional actions effectively preventing the claimant to do so are established."

Can we just look at what Article 205 says, and we have it set out in the joint memorandum and we may as well take it from there.

Paragraph 119, just read that to yourself if you would. (Pause)

A. Yes.

Q. You're familiar with that. So it applies, does it not, in exceptional cases, and that, I think, is something you agreed at paragraph 120, subparagraph 1 of the joint

memorandum. It applies:

"In exceptional cases [where] the court considers that the reason for the lapsing of the limitation period is justifiable by reason of circumstances connected with the claimant's person (a serious illness, a helpless state, illiteracy [and the like]) ..."

Then if the claimant is a citizen, an individual, the court may defend their right and grant the claim; is that correct?

A. Yes.

Q. Then we see in the last sentence that:

"The reasons for [missing] the limitation period may be... justifiable if they existed in the last six months of the limitation period..."

Correct?

A. Yes.

Q. Still staying with the joint memorandum for a while longer. If you look at paragraph 120, subparagraph 2, we see that you and Dr Rachkov agree that whether Article 205 may apply obviously depends upon the particular facts of the case, yes?

A. Yes.

Q. And then at subparagraph 3, you also agree that:

"Article 205 does not [provide] an exhaustive list of circumstances that could justify a restoration of the

limitation period."

A. Yes, the list is not exhaustive but gives some guidance to courts.

Q. Indeed. Now, again, if you look at paragraph 121, I just want to see what is in issue and what is not in issue. You identify what is in dispute, and you say, we see this at subparagraph 1 of 121:

"Mr Rozenberg maintains that [the] Russian courts are, almost without exception, only prepared to restore the limitation period where the claimant is seriously physically disabled or incapacitated in some other way. He maintains that the standard is a strict one: what must be shown is the effective 'impossibility' [you say] of a claimant applying to the court in time."

That's your position, is it?

A. Yes.

Q. It must be effectively impossible?

A. It should be the situation when the claimant has no choice.

Q. Okay. And we can see what Dr Rachkov says, just looking at subparagraph 2. If you read that to yourself, you see he sets out his position there. (Pause)

Then just looking at subparagraph 3 of 121, again this is your position. You say:

"Mr Rozenberg maintains that the invocation of

'stress' or 'fear' by the claimant where such 'stress' or 'fear' was allegedly caused by the defendant is inadequate to satisfy the test under Article 205, as supported by court practice. Otherwise, a limitation period could rarely be successfully invoked because a claimant would simply need to allege 'stress' coming from the defendant's action and preventing the timely filing of the claim."

This in fact reflects a point you make in your reports, and I wonder if we can just look at what you say there. G(A)3/1, tab 1, page 46, and I want to look at paragraph 147 G(A)3/1.01/46 of your third report.

At page 46, paragraph 147, just looking for the moment at the first sentence, you say:

"The invocation of 'stress' or 'fear' [you say] is inadequate to satisfy the test under Article 205."

Then you cite the case of Guseletov.

In the same report, if you then turn to page 51 so we can see what you said at paragraph 160, subparagraph (d), you see the last sentence of that G(A)3/1.01/51. You say:

"... the Russian court practice is clear that [the] mere assertion of 'fear' (even fear of one's own murder) [you say] is generally insufficient for the purposes of Article 205."

Now, can I just make sure that I understand what you are saying here, Mr Rozenberg. You are saying that if a person is incapacitated and unable to sue, then Article 205 may apply. But if a person is in fear, even if in fear of their own murder, then Article 205 cannot apply. Is that your position?

A. It's not only my position, it's the position of Russian courts, and the case of Guseletov confirmed it because in this case it's clear that a person seriously feared to be murdered, and there were correspondent materials of the law enforcement authorities confirming it. But at the same time the facts assessed by the court indicated that the person was not completely paralysed and incapacitated by this fear, and therefore there was still options in the behaviour of the person. Therefore for this person the court did not restore the missed limitation period.

Q. I'm not going to get into the facts of Guseletov with you at the moment. It's in fact a case where the person who he was worried about murdering him had actually been arrested prior to the period of limitation beginning to run. But what I want to do is just test your general proposition that this could be Russian law.

Let us just take an example, if we may. Suppose that I have a claim that I wish to pursue and that

before I issue the claim, towards the end of the limitation period, gunmen surround my house and they say that if I leave my house or telephone for help I will be shot. I am frightened and the house is isolated and I remain inside. The limitation period passes. Do you say that Article 205 will apply in that case?

- A. It's always for the court to assess the facts. What you described looks like a person was really victim of serious crime already in the process of being committed, not simply some threats but a real crime committed in reality, in the particular short period of time, and the person was completely incapacitated. There was no way to go to the police, there was no way to hide somewhere, just the person was practically paralysed by gunmen.

In this situation, the probability that the court may assess the facts differently in comparison with Guseletov case is high.

- Q. I think the short way of putting that answer is that you would say that Article 205 would apply in those circumstances?

- A. Again, it always depends on facts.

- Q. Indeed.

- A. If I correctly understood you, the person had no choice. The person was completely incapacitated by gunmen surrounding his house.

Q. Very good. Now, what if the gunmen do not in fact surround my house but they don't need to because they're notorious gangsters, well known for violence, and they simply issue a threat to me that if I sue their associate I will be tortured and then killed in a particularly horrible way, and as a result of this threat, and because I don't particularly want to be tortured or die, I heed this threat against me issuing the proceedings and the limitation period expires.

Do you say in those circumstances Article 205 would apply or not?

A. Again, it's always for the court to assess the facts, but the way how you describe the situation, in my view, looks similar with rather numerous situations in our country when there were various threats of people connected with criminal circles.

I don't have the court practice supporting the petitions to restore missed limitation period on the basis of threats. Threats, unfortunately, sometimes -- I wouldn't say widespread, but still take place not very rarely. And in my view, in this situation, a person has choices. It's possible to apply to law enforcement authorities to go somewhere, just -- it's necessary to assess the facts but, as you described, the person was not paralysed and incapacitated.

Q. So you are saying that in a situation in which there is a credible threat made that if I issue the proceeding I will be murdered, and as a result I'm in fear of being murdered if I issue the proceedings, you say that that is not a basis upon which Article 205 could apply. Is that your evidence?

A. Again, it depends on facts. If, after receiving this murder, the person didn't go to the police, didn't go to the hospital because of some mental problems, there are no certificates from the law enforcement authorities, from the medical establishments, the behaviour of the person proved that he or she continued doing business, going to the office, acting in some other ways, then only the threat of murder which, unfortunately, is not exceptional in my view and according to the existing Russian court practice, probably will not be sufficient.

But, of course, you ask me every time to act instead of judges, it's difficult. But preliminarily, the way how you described the situation, it doesn't look that the claimant was paralysed, incapacitated, but there is available evidence which would be sufficient basis for a court to restore the missed limitation period.

Q. I don't want you to misunderstand that example, Mr Rozenberg, because I think you might have.

The threat of murder is if the person issues the

proceedings, in other words, the threat relates to the issue of the proceedings. So it's perfectly possible for this person to go about their everyday life because a threat is only a real threat should he issue proceedings. But your evidence, I take it, is the same, is it, that Russian law would not allow Article 205 to apply?

A. It is, because otherwise a restoration of statute of limitation will not be exceptional. And the way you described it still leaves a lot of things unclear: why the person, after having received this threat, did not do anything and actually was not incapacitated if it was a really very serious threat.

Q. You see, I suggest that that is an extreme position and doesn't accord with Russian law.

Let me put another example to you, I think I can anticipate your answer but let me put it nonetheless. Let's assume that the threat in the case that I put to you, the example I've put to you, is not that they will murder me but that they will murder my wife if I issue these proceedings. Is your answer that that too is not exceptional and that that is not a sufficient reason to suspend the running of the limitation period, or to restore the limitation period?

A. Well, mostly the Russian law considers close relatives

as persons as valuable for an individual as his own life or health, and if just the spouses live together and there is no evidence regarding just hostility(?) or anything else of course, I think it doesn't matter whether the threat was issued regarding the husband or regarding his wife or his child. Still the question remains whether the person was totally incapacitated, for example, went to the police and found out that the police was in conspiracy with those who were threatening him and there was no way to go anywhere just to find some other options where at least the person didn't think about finding some options, then I'm afraid that according to the existing Russian court practice, chances are not very high that only allegations of murder will be sufficient.

In Russian courts, sometimes we see threats of murder connected with various transactions, various problems in offices. Only threat of murder itself, not confirmed by other very serious facts, usually is not sufficient. That's what I can tell you on the basis of the existing practice. And you do not provide other evidence regarding involvement of other criminals and real incapacitation of a person in your suggestions.

Q. You see, Mr Rozenberg, you seem to be suggesting that threats of murder are not an exceptional circumstance in

Russia, but you cite cases in the context of Article 205 in which parties have had difficulty complying with the limitation period because they've taken a business trip.

Are you suggesting that business trips are exceptional or more exceptional than threats of murder in Russia?

- A. I am afraid either you misunderstood me or you suggest something totally different because, in the first example, when the threat of murder was real and government surrounded the house, I readily accepted your example as basis for restoration of missed statute of limitation.

Your other examples looked familiar to me with many cases considered by Russian courts because, as I told you, threats of murder are not exceptional. From time to time they happen between commercial men in various situations, unfortunately even in day-to-day life sometimes between neighbours, between sometimes relatives, threat of murder takes place.

Russian court practice usually does not take the threat of murder itself without serious facts serving as additional evidence as basis for applying rules which, according to the law, are exceptional. If the law dictates that it's exceptional, it cannot be applied on day-to-day basis. And with threats of murder, again,

unfortunately, but in real life courts will have to do it rather often.

It depends on facts, this is my final word.

Q. Okay, we have your answer on that then.

Can I just stay with your fifth report in bundle G(A)3/1, tab 3, and can we look at paragraph 45, please, on page 205 G(A)3/1.03/205. This is one of the other points you make about the way you say Article 205 applies, and you say:

"Secondly, Article 205 expressly states that the reasons for restoring the limitation period must be connected with the claimant's 'person'. This has been underlined by the Russian courts on many occasions. It has been held, for example, that Article 205 cannot be invoked where the incapacity in question relates to the claimant's spouse or other third persons..."

Then you refer to a St Petersburg court decision and you then say this:

"Consequently, Mr Berezovsky cannot, in any event, rely on facts relating to Mr Glushkov to invoke Article 205 himself."

Again, can I just make sure I understand your view correctly. Now, I think you accepted that in my first example, where gunmen surround the house and threaten to kill me and as a result I don't leave the house, that

that would be a sufficient basis to invoke Article 205, correct?

A. In my view, if the threat was real and the person was incapacitated as you described, yes.

Q. All right. Let's assume that instead of me being in the house, again my poor wife is in the house surrounded by gunmen and they threaten to kill her if I go and start the claim.

Just assume for the purpose of these examples, Mr Rozenberg, that all of these threats can be supported by evidence. I don't want you to suggest that, you know, you can't support these threats: these are the facts, they have threatened that they will kill my wife if I issue these proceedings. Are you saying that because the person who is incapacitated, or the person who is the subject of the incapacity by virtue of being surrounded and whose life is at risk is my wife, that in those circumstances Article 205 cannot apply to me, however much I love my wife and would rather she was not killed?

A. I think I already gave the answer saying that, in many situations, courts understand that life of wife or child may be as valuable for a person like his own, and the question investigated by courts in this situation is whether the threat or the condition of spouse or child

really incapacitated the claimant.

There is one case where the spouse was seriously sick and it wasn't a question of whether the claimant loved the spouse. The question was whether the sickness required claimant's presence and really incapacitated him. The same here. Answering your question, it's necessary to understand for the court assessing the facts that this threat addressed to the spouse, or even the child, really incapacitated the claimant. There was no choice, he had to behave only this way.

Q. I see. So it isn't your evidence that something done to a third person could never be a reason, a justifiable reason, for me not issuing the proceedings? You're not suggesting that?

A. I understand, and in my view courts understand the same way, that a person may be affected by serious threat to a very close relative as well as to himself and may become incapacitated by this threat. Therefore threats, serious threats, real threats, to wife or child may incapacitate the claimant therefore affecting his personality, and missed period of limitation, in my view, must be restored in such situations.

Q. I follow. So it's a question of fact, and you look to see as to the effect that the position affecting the third party has had on the potential claimant?

A. Absolutely correct. I wouldn't say -- I wouldn't choose an extremely narrow approach saying that if the threat is amongst the relatives it doesn't affect the claimant. I agree.

Q. All right. Now, I just want to ask you about the suggestion that the test is one of effective impossibility, which is the way you put it in your report.

Do you accept that although you put it on the basis of effective impossibility, there are other commentaries and cases that put the test differently and, in particular, that they speak of circumstances creating a practical impediment or hindrance for the claim?

A. Practical impediment, practical obstacle, in my view creates impossibility, if it's a real obstacle.

Q. So you persist in saying it has to be actually impossible, do you, to issue the claim?

A. I understand the court practice I reviewed, and some scholars, that that's what moved Article 205. And again, though the list is not exhaustive but serves as some guidance, that's what Article 205 dictates to court.

Q. Again, I suggest that's an extreme position and is not supported by the commentators and certainly not by all the cases.

Can we just go to see what Professor Farshatov says about this. Can you go to bundle G(A)2/4 at tab 28 G(A)2/4.28/220. This is an extract from Professor Farshatov's work on "Period of limitation. Legislation: theory and practice", 2004.

In the middle of the page, you can see that Professor Farshatov, after identifying the elements of Article 205 and the fact that there is a discretion, says this:

"The above list of circumstances... is not exhaustive, and is subject to expansive interpretation..."

That is in the course of examining a particular case, other circumstances may also come to light which serve as grounds for restoration, in particular the death or loss of relatives, loss of or damage to property in connection with fires, terrorist acts or crimes.

This suggests that so far as Professor Farshatov is concerned, an expansive range of circumstances may potentially justify Article 205 applying. Presumably you agree with that?

- A. It's a very broad statement, very vague, so it's difficult to argue. But potentially, yes, again if the effect on the personality of claimant was as strong as

dictated by Article 205.

Q. You see also he gives examples of the death or loss of a relative being a sufficient basis, and, again, I take it you don't dispute that provided it has the requisite effect on the claimant, correct?

A. Absolutely correct. It depends on facts because sometimes a person is totally incapacitated by death of relative, and then one of English books, a trip to funerals(?) of the father, was the most pleasant event for the personage, so it depends.

Q. All right, you can put that away for the moment.

Can you go to bundle 4/8, tab 5 G(A)4/8.05/38.

This is an article by Professor Maleina on Article 205 and it's an article I think you cite in your report.

A. I think I remember it.

Q. In fact this is your translation of it, yes?

A. Not my personal translation.

Q. No, okay.

You see at the beginning of the article the professor writes of Article 205 that:

"The legislator speaks of possibilities to use this mechanism in 'exceptional cases'."

Then it says this:

"However, Article 205... is widely applied in the current court practice."

Presumably you accept that that is correct?

A. I'm sorry, because I was given the Russian text. What page in the English?

Q. It's page 38, it's the first --

A. The beginning, yes.

Q. Tell me if you want me to repeat the question.

A. Well, the beginning of the article is clear, and what is the question?

Q. You see that she says:

"The legislator speaks of possibilities to use this mechanism in 'exceptional cases'. However, Article 205... is widely applied in the current court practice."

My question to you was: presumably you don't dispute that?

A. It depends what she means. Broad, because, as I said, I remember this article. If you read the last sentence of this article it looks like it's a little bit in contradiction with this beginning of the article.

Maybe we need to be sure that the translation is correct.

Q. Don't worry, Mr Rozenberg, I'll go to that last sentence, and I suggest it's not in contradiction at all. But I don't yet, I think, have an answer as to whether you dispute what Professor Maleina says about

this being widely applied?

- A. Unfortunately I have to dispute it because, first, if the law indicates in 'exceptional cases', it's not quite clear for me why she wrote that it was applied broadly.

Of course, as counsel correctly indicated in the submissions, in Russia more than 1 million of commercial disputes are considered every year, and if you take even one tenth of per cent it will be already more than 1,000. Therefore several dozens of cases may look like broad application but, according to my practice and the practice of my colleagues preparing this report -- I even checked with my colleagues -- and we found out that nobody had in his or her practice restored missed statute of limitation.

The cases when the court recognised that the statute of limitation was missed I remember very well and I'm aware of them. But when it was restored we usually read in some publications. But neither I nor the lawyers whom I know ever had in their practice the case with restored missed limitation period. And now we read Maleina, who writes about a broad application. Before this, there was another article where it was indicated that the broad interpretation may take place. Unfortunately, it happens from time to time with scholars.

MRS JUSTICE GLOSTER: So you dispute the last sentence of that --

A. I dispute about broad application.

Again, if you take the whole of Russia maybe several dozens can be found, but if it's out of more than 1 million, it's just a small portion of per cent. And in the real practice of practising lawyers it's very difficult to find such cases.

I personally never have. I checked through 30 years of my practice, both in the Soviet Union and in Russia, I don't remember a single case where either at my petition or at the petition of the other side the missed statute of limitation was restored. Although I remember very well cases when this missed statute of limitation was confirmed -- applied by the court and the claim was dismissed.

MR RABINOWITZ: All right. That answer is clear.

Professor Maleina is in fact one of the writers that you cite yourself, is she not?

A. Yes.

Q. All right. For the reference, that's at your fifth report, paragraph 28, I'm not going to turn that up.

Can we just look at what else Professor Maleina says. If you go to page 41 G(A)4/8.05/41. Again I'm primarily focusing on Professor Maleina's focus on what

can constitute a justifiable reason, and she starts to deal with that towards the bottom of page 41, where she says:

"The third condition for reinstatement ... is associated with the estimation of the ground for missing the period of limitation."

The way she structures this article is to identify a series of grounds and then to comment on them. The first circumstance that she identifies here is state of health, and she says, this is the last paragraph on page 41:

"The courts take into account different diagnosis and conditions. The more so because there is no such diagnosis as 'a serious illness'. For example, the omission of the period of limitation was recognised legitimate because the copies of the contested decisions were served to the claimant when she was pregnant and had a high-risk pregnancy..."

Just pausing there, a high-risk pregnancy does not make it physically impossible to bring a claim, Mr Rozenberg.

MRS JUSTICE GLOSTER: Well, it all depends on the facts, doesn't it.

MR RABINOWITZ: Well, it does depend on the facts. What a high-risk pregnancy suggests is that there would be

stress associated with litigation and, because of that, the person who has a high-risk pregnancy is excused.

MR SUMPTION: With respect, my learned friend needs to refer the witness to the whole of the sentence and not just the first eight words of it.

MRS JUSTICE GLOSTER: Yes.

MR RABINOWITZ: I'm perfectly happy to look at that.

"... had a high-risk pregnancy (late gestosis and risk of premature birth) due to which she was constantly treated either in hospital or as a non-resident patient."

So she wasn't incapacitated in the sense that she couldn't get to where she needed to get, was she?

MRS JUSTICE GLOSTER: Well, it just depends, Mr Rabinowitz.

I just don't think this is going anywhere, whether this particular claimant could or couldn't. It just depends.

MR RABINOWITZ: All right.

MRS JUSTICE GLOSTER: I get the point you're making.

MR RABINOWITZ: Yes. I'm not going to labour the point.

MRS JUSTICE GLOSTER: Whether this particular lady was or was not able -- that's a Friday pun, I think.

MR RABINOWITZ: That's a Friday pun. All right.

A. If you allow me, my Lady, I can only add --

MRS JUSTICE GLOSTER: Make a point but make it briefly, please.

A. I make it very briefly, that usually it depends if medical documents submitted. If they indicate that the condition was very serious such evidence usually impresses courts in my view, in my practice. So if it was described as very serious condition it could work.

MR RABINOWITZ: Let me just go to the last sentence of this article which is the sentence that you like, Mr Rozenberg. Page 43, you see she says:

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

So she's treating these two things as different, do you accept that?

A. In my view the translation is clear enough because, in Russian, "absolute impossibility" means that it's really absolutely impossible, and "practical impediment" in this context is in line with that.

In other words, in my view, this last sentence to some extent contradicts the words about very broad application of Article 205.

Q. You see, I suggest the last sentence contradicts your position. Your position is that it has to be effectively impossible, and what the last sentence actually says is that, in addition to circumstances where it is impossible, Article 205 could also be

applied where there is a practical impediment.

Do you dispute that?

- A. I understand at least the Russian sentence that "absolute" covers the meaning of the sentence, and it's not something easy and not problematic. It indicates that it's really something exceptional, I mean in line with the wording of Article 205, and not leading us to the conclusion that broad application is justified.
- Q. Can we look at one or two cases, and I'm not going to take you to too many cases because in a sense what we're interested in is the principle rather than particular cases.

Can you go, please, to bundle G(A)4/2, tab 94, the case of Shirokikh G(A)4/2.94/298. We are not really interested I think in the claim itself, what we're interested in is the reasons why the limitation period was missed and whether that reason was regarded as justifiable, so let's just focus on that.

If you turn to page 299 G(A)4/2.94/299, halfway down the page, do you see the sentence beginning:

"The court established that LI Shirokikh learned of the resolution ..."

Do you have that paragraph?

- A. Yes. If I understand, this is the case regarding the resolution of the general meeting of shareholders.

Q. Correct.

A. And the issue relates to the missed limitation period for appealing, complaining against the resolution.

Q. Yes. And what I'm interested in, in this, Mr Rozenberg, is the last sentence here:

"The Arbitrazh court rightly did not acknowledge [the claimant's] bringing action to a general court to protect his labour rights, or his receiving outpatient treatment between 18.04.2003 and 30.04.2003, as exceptional events, because they could not be treated by the court as having hindered bringing action to the Arbitrazh court to seek [the] invalidation of the resolution of the shareholders' meeting."

The way the court appears to be putting it here is by asking whether these were matters which hindered the bringing of the claim. Do you say that is the court applying the wrong test because they should have asked, rather, whether it made impossible the bringing of the claim?

A. If you allow me, my Lady, just a small comment, because I'm not sure that we need to go too deeply in this case because general conclusions I made relate to commercial disputes. But with appeals, complaints, regarding either resolutions of shareholders meetings or sometimes even court decisions the practice is different.

The courts generally -- first, of course, the limitation periods are much shorter in these situations, and, second, courts do not consider restoration of limitation periods regarding resolutions of bodies governing the companies, or even sometimes court acts, as really putting at risk the stability and certainty of civil law relations, civil law rights and obligations.

I am ready to go much deeper regarding this concrete case, but I would definitely say that what I mentioned, speaking about my practice and practice of my colleagues, of course it does not relate to missed limitation periods regarding court acts and sometimes resolutions of shareholders meetings, courts are usually more liberal here, but if you suggest we can analyse more seriously the circumstances in this situation.

But generally, the approach that it's not the stability and certainty of civil law rights and obligations regarding general limitation periods, either three years or one year in commercial disputes, but regarding these relatively short periods connected with concrete decisions the approach is different.

Q. Mr Rozenberg, are you suggesting that the severity of the tests varies depending on the length of the limitation period, that sometimes it's a test of impossibility but for shorter periods you have some

different test, is that your evidence?

A. Regarding resolutions of shareholders meetings, the approach may be a little bit softer according to my observations. But I am not denying that the law should be observed, and let's check the facts how they are presented here. However, just I simply need to make clear what I said not to be misunderstood, because for decisions, concrete acts, either of governing bodies or courts, the approach is different in comparison with other disputes.

Q. I think you may be agreeing with what I'm going to put to you.

Isn't it in fact the case that the test is always the same but how it applies will depend on the facts of the particular case?

A. Well, again, what I remember from the court hearings I affected, usually the facts which are assessed are regarding resolutions of shareholders meetings, it's not whether the claimant was totally incapacitated and was in such serious condition, like with bringing other claims. But theoretically, the court may indicate absolutely the same grounds for rejecting or restoring the missed limitation period.

I am here to say what I observed, what I noticed during long practice. But let's see, we can go into

concrete facts if you wish. But mostly, it's again the assessment of facts, it's at the discretion of courts.

If I mention that, for example, medical documents impress courts, according to my practice. It's not clearly indicated in laws. But this is the conclusion I made, and other practice lawyers would confirm the same --

MRS JUSTICE GLOSTER: Right, I think you've given your answer on this question.

Please can you go on, Mr Rabinowitz.

MR RABINOWITZ: I'm just going to take you to one other case of a similar sort. In the same bundle can you go to tab 93, the case of Puls, O against Puls G(A)4/2.93/293.

If you're on page 293 at tab 93, if you look at the third paragraph, you see that the Arbitrazh Court had dismissed O's claim as being out of time. Do you see that?

A. Yes.

Q. Then in the next paragraph we see that this was reversed by the Court of Appeal.

Then if you go to page 294 G(A)4/2.93/294 over the page, just below the middle of the page, you have the paragraph beginning "As evidence of the validity", do you see that?

A. Yes.

Q. "As evidence of the validity of her reason for missing the limitation period, the claimant submitted medical statements ... which show that beginning 14 December 2001 and for a period of 7 months, O was prescribed a regimen of strict bed-rest, followed by ambulatory care from October 2002."

So it looks as though she was confined to bed for a six-month period followed by a period of ambulatory care.

Is ambulatory care care which doesn't involve, presumably, being confined to a bed, correct?

A. I apologise, but it's necessary to study documents in case of serious issues, medical expert may be called. It's the question of assessment of facts.

Q. You see, I entirely agree with that, Mr Rozenberg, we don't disagree about that. The question is whether there's some principle involved which really does suggest it has to be actually impossible.

Because this is a case where, although you could take a view that for as long as she was confined to bed it was actually impossible, once she was not confined to bed it might have been difficult for her to start the proceedings, and therefore there was an impediment to it, but it wasn't actually impossible. Do you agree

with that or not?

A. I think it's for the court to assess the facts and to decide whether it was impossible or not impossible, but...

Q. All right. Now, I'm not going to go through all of these cases because, as you say and I agree, it always depends on the facts, and we're just interested in the principle.

I just want to see if I need to take you to the St Petersburg case, I don't even think I need to take you to that. Let me just check about the St Petersburg case.

I think we've agreed that even a problem with a third person can be sufficient as long as it has the requisite effect on the claimant, you would say it means actually impossible, I would suggest the test is lower. But the point is you could have a situation in which something done to a third person could be a reason, provided it does really create a real problem for the institution of the claim?

A. As I answered already, unfortunately I had not such cases in my practice, but my reading of the law and of some court cases indicating that it's necessary to investigate what was the condition of the spouse, and whether the claimant had to stay with the spouse all the

time, indicates that the claimant may be perfectly healthy. But if his or her spouse needs care then the facts are and shall be assessed by courts as affecting the personality of the claimant.

Therefore, you call them third persons, I would say just persons close to the claimant may be taken into account.

Q. That's all I was going to ask you about Article 205, Mr Rozenberg, I think we've discussed the principles enough. Can we then just talk about abuse of rights and Article 10, please.

If we go to G(A)2/1, tab 6, page 105, we have Article 10 on the left-hand side G(A)2/1.06/105, it's rather small print, headed "Limits of Exercise of Civil-Law Rights", the first paragraph provides that:

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

The second sentence is concerned with competition and that doesn't concern us.

Then the second paragraph of Article 10 provides that:

"In case of failure to observe the requirements provided by Paragraph 1 of the present Article, the

court, commercial court, or arbitration tribunal may refuse the person protection of the right belonging to him."

So the idea is that you're not allowed to act exclusively with the intention of causing harm to another person, and nor are you allowed to abuse a legal right in other forms. That's Article 10.1, correct?

A. Yes, that's what the law states.

Q. If you do one of these two things, then the consequence is the court may deny you the protection of your right, correct?

A. Yes.

Q. Let's just see what you say about this in your joint memorandum because I think the dispute between you and Dr Rachkov here is very narrow indeed. Bundle 6/1, page 39 G(A)6/1.01/39.

A. Yes.

Q. If you look at paragraph 122, you see it says:

"It is agreed that Article 10 may be invoked by the claimant in rebutting the limitation period defence. Where this occurs, the court may prevent the defendant from applying the consequences of a limitation defence if the fact of abuse of right[s] by the defendant is established."

Do you see that?

A. Yes.

Q. So you accept that in principle a claimant may rely on Article 10 in rebutting a limitation defence, correct?

A. In principle, yes, the law gives a basis for it.

Q. Can we just then look at the circumstances in which you say this may occur. If you go back to page 38 of the joint memorandum and you look at paragraph 118, we looked at it in the context of Article 205 but let's just look at it with Article 10 in mind G(A)6/1.01/38.

Here you agree that:

"... when the court at the request of the defendant establishes that limitation period has lapsed, a claim [may] be dismissed unless the Court restores the limitation period under Article 205 or it is an abuse of right for the defendant to raise a limitation defence contrary to Article 10. Mr Rozenberg maintains that the latter options may take place only in highly exceptional circumstances, where either impossibility of the claimant to timely apply to the court or defendant's intentional actions effectively preventing the claimant to do so are established."

I think what you accept here is that where the defendant's intentional actions effectively prevent the claimant from bringing his claim in a timely manner, then Article 10 may be invoked?

A. Yes.

Q. Just to be clear about what you mean here, can we then go to paragraph 123 of the joint memorandum G(A)6/1.01/39.

A. Yes.

Q. You say at 123(1) that you maintain that:

"... for Article 10 to apply what is required is that the defendant, by his particular actions, intentionally prevented the claimant from timely bringing his/her claim. Mr Rozenberg maintains that this concept is applied by the courts extremely rarely in circumstances having nothing [to do] with the present case."

Again that's your acknowledgement that as long as there is intention that is enough.

I just want to take you to, if I can, your report at G(A)3/1, tab 3, page 213 G(A)3/1.03/213.

You say at paragraph 73, just picking up from where you say "I should clarify":

"... I should clarify [what I mean] when I speak of 'intention' I am referring to both 'direct' and 'indirect' intention. I do not mean that it need be shown in all cases that the abusing party specifically had it subjectively and consciously in his mind at the relevant time that his acts would cause the claimant to

miss the limitation period ('direct intention'). Rather [you say] it must be possible to conclude that a person in the position of the defendant would reasonably have foreseen ... that the claimant would be prevented from bringing the claim in time ..."

So I think what you're saying there is that if Mr Abramovich intimidated Mr Berezovsky and could reasonably have foreseen that this would cause Mr Berezovsky to miss the limitation period, then Article 10 would apply to exclude Mr Abramovich's limitation defence. Is that right?

- A. Well, I'm afraid this description is closer to negligence, but indirect intention means that the person was indifferent to the consequences, maybe the result will come, maybe it will not. But I think that it's just a broad view, a little bit I would say more liberal than the view of some scholars who think that, for Article 10, the direct intention is required.

My view that indirect is also possible; but indirect, it doesn't mean that committing intentionally some actions a person wants to reach only one concrete result. The person may be indifferent, understanding that these actions may bring to this result and may not. But it's difference between direct and indirect intention.

- Q. The expression you use here is "reasonably foreseen", and I take it you're not departing from that. As long as it can be reasonably foreseen that the person's act will have this consequence, you accept that that would be enough?
- A. It's one of the elements, but with negligence a person still would prefer to avoid the consequences, even if they can be reasonably foreseen. With indirect intention the person doesn't want to avoid the consequence, the person is simply indifferent regarding them.
- Q. The issue, as I understand it, between yourself and Dr Rachkov is that whereas you accept that as long as there is intention, direct or indirect, that is sufficient. Dr Rachkov says as long as there is a causal effect, or a causal relationship between the act of the defendant and the claimant's failing to sue, or incapacity to sue, that is enough. Is that --
- A. Unfortunately, it's not quite in accordance with the law which still mentions the word "intention" because, as you described, again it can be done by negligence. Only the result and casual (sic) link would be sufficient.
- But intention -- the law does not clearly mentions direct intention but still intention is required.
- MR RABINOWITZ: All right, Mr Rozenberg, thank you for that.

My Lady, I don't have any further questions for  
Mr Rozenberg.

MRS JUSTICE GLOSTER: Yes, thank you very much.

Mr Adkin?

MR ADKIN: My Lady, I have no questions for this witness.

MRS JUSTICE GLOSTER: Mr Sumption?

Re-examination by MR SUMPTION

MR SUMPTION: Mr Rozenberg, I wonder if you could be given  
bundle G(A)7/1, flag 6 G(A)7/1.06/38.

This is the case, you may recall being referred to  
it yesterday, of the lost original agreement and the two  
versions about the date of repayment of a loan.

Do you remember being referred to that case?

A. Yes, of course.

Q. I wonder if I can hand up -- we have had this uploaded  
on to Magnum but I'm not sure whether it's there yet --  
a copy of the article of the Civil Code that is referred  
to in this case. You will probably have it with you in  
another version. (Handed)

MR RABINOWITZ: It's actually G(A)7/2.05/17.

MR SUMPTION: Right, I'm grateful.

If you look at page 42 in the English version  
towards the bottom of the page you will see that the  
decision of the court was that the due date of the  
performance of this obligation must be determined in

accordance with the requirements of Article 810, sub-article 1. And you will find that Article there. Reading from the English, it's the second paragraph of Article 810, at sub-1:

"In cases where the period for return is not established [this is return of the loan monies] by the contract, or is defined as the time of demand, the sum... must be returned... within thirty days from the... receipt of [the] demands..."

Can you help us on which of the conditions for the application of this article to the loan agreement case in front of you was satisfied in this case? What was it in other words about the circumstances of this case that gave rise to the application of Article 810?

A. I think we need to read carefully what the court said:

"In the absence of the original loan agreement, the borrower is under the obligation to [repay] the loan considering that it has been proven that the lender has actually performed the obligation to extend the loan to the borrower and the due date for the performance of this obligation must be determined in accordance with the requirements of Article 110 (sic) section 1."

I think that here we cannot say that the agreement did not establish because the agreement existed.

Q. Yes. Have you finished your answer, Mr Rozenberg?

I don't want to --

A. Therefore the court came to a conclusion that the loan shall be repaid within 30 days from the request, from the demand of the creditor. I think on the basis of the demand, the court ruled that the loan shall be repaid.

Q. Understood. Now, the next question I want to ask you about concerns the principle set out in the Makayev case, which you were asked about, and in the information letter of the Presidium of the Supreme Arbitrazh Court.

For the transcript, the references are, in the case of Makayev, G(A)4/7, flag 93 G(A)4/7.93/1, and in the case of the information letter of the Presidium of the Supreme Arbitrazh Court, G(A)4/5, flag 36 G(A)4/5.36/125.

Now, I wonder if you can be given a copy of the transcript of evidence yesterday. It will come up on the screen but I want you to have the actual hard copy of the transcript so that you can feel free to move about if you want to.

You dealt with this in two places, the first being at pages [82] and following. If you look at page [82], you'll see that at the bottom of page [82], line [15], Mr Rabinowitz put to you a quotation from the information letter of the Presidium.

"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."

And you were asked questions about that. And at page 83, line [25], you will see your answer is:

"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."

Now, if you would turn on to page 117, in the same transcript, Mr Rabinowitz is here putting to you the decision of the Constitutional Court in Makayev, and you summarise the principle you extract from that at the bottom of page 117, line 23:

"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 [upon] favourable decisions of governmental officials ... 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."

Now, does this principle depend on the exact form of the money or material benefit that is going to be obtained depending on the favourable decision of the state official?

A. I don't think so. Just my word that:

"It's a clear fight against corruption and I cannot add anything."

Demonstrates that the form of material benefits may be different.

Q. Suppose that A and B enter into a contract, the effect of which is that B will try to procure a favourable decision from a state official and will only be paid if the favourable decision is made. How does the rule stated in the information letter and Makayev affect an arrangement of that kind?

A. Well, informational letter addressed still contingency fees arrangements, as far as I remember. Informational letter was narrower than the Constitutional Court decision, as far as I remember.

Q. Yes, and how does the principle set out in the Makayev decision affect an arrangement of that kind?

A. The Constitutional Court decision applies to much broader circle of situations connected not only with

legal fees but with activities of any governmental officials, and according to this decision, since we already discussed the law, just to be brief, where there is a corruption potential, where the consequence first favourable decision, and then some form of remuneration. In such situations, no court protection for those types of transaction. That's how I understand it.

Q. Now, suppose the agreement between A and B -- I'm going to slightly vary the facts. Suppose that the arrangement between A and B is that B will try to procure a favourable decision from a state official and A agrees that if and only if the decision of the state official is favourable to him, he will pay B a share of the financial benefit that he derives from the favourable court decision. How does the rule stated in the Makayev decision affect that sort of arrangement?

A. I think we have all conditions for conclusion that the Constitutional Court decision shall be applied directly and such transaction shall be considered invalid because the results, ie share in profit, just getting various material benefits later, will be in direct(?) dependence on the successful actions of B in obtaining favourable governmental decision.

MR SUMPTION: Thank you very much, Mr Rozenberg.

THE WITNESS: My pleasure.

MRS JUSTICE GLOSTER: Thank you very much indeed,  
Mr Rozenberg, for coming along and helping the court  
with your evidence.

THE WITNESS: Thank you.

(The witness withdrew)

MRS JUSTICE GLOSTER: Right, Mr Rabinowitz, it's  
Professor Maggs next?

MR RABINOWITZ: It's professor Maggs, he's Mr Adkin's  
witness.

PROFESSOR PETER MAGGS (sworn)

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

Examination-in-chief by MR ADKIN

MR ADKIN: Professor Maggs, could you confirm, please, that  
you have no electronic equipment or mobile phones on you  
at the moment?

A. I don't have any.

MR ADKIN: My Lady, as with the other experts,  
Professor Maggs would like, if he may, to have with him  
a copy of his translation of the Russian Civil Code.  
That's what's in the blue folder in front of him.

MRS JUSTICE GLOSTER: Yes, fine.

MR ADKIN: Could you be given bundles G(A)5/1 and G(A)5/2.  
Could you turn, please, to the front of G(A)5/1  
G(A)5/1.00/1. Is the document there your first report

in these proceedings?

A. Yes, it is.

Q. Now, I understand that there's one small correction you wish to make to that report. Could you please turn to paragraph 50 which you'll find on page 17

G(A)5/1.00/17.

A. Yes.

Q. I understand you want to make a correction to that paragraph, could you tell us please what it is?

A. Yes, the date "1995" there should be "2000".

Q. That's the date in the first line, is it?

A. Yes.

Q. Thank you. Could you please turn to G(A)5/2 G(A5/2/1.

A. Yes.

Q. There should only be one document in that bundle. Is that your second report in these proceedings?

A. Yes, it is.

Q. Do these two reports represent your true opinion?

A. Yes, they do.

Q. And are they the evidence you wish to give of the matters on which you've been instructed in these proceedings?

A. Yes, it is.

MR ADKIN: Please would you wait there, I think Mr Sumption will have some questions for you.

## Cross-examination by MR SUMPTION

MR SUMPTION: Just one matter, Professor Maggs, could I ask you to turn to bundle 5/2, your second report, please.

A. Yes.

Q. And to paragraph 25 G(A)5/2/9. In this paragraph, you're dealing with the respects in which you say the 1995 agreement failed to deal with essential terms, and the question I want to ask you is directed to (a), where you say that the common goal was in your view insufficiently defined. You say:

"The primary remedy in contractual disputes under Russian law is specific performance. A Russian court would therefore be looking for terms [which] they could turn into an order to perform the contract. I cannot see how a court could formulate such an order with regard to the common goal [in] the 1995 Agreement."

Can you please tell us, what is the juridical basis, or the source material, on which you base the opinion that you express in 25(a) about the attention that would be given to the possibility of specific performance as opposed to, say, damages?

A. Well, if one looks at Article 12 of the Code, in its list of remedies it places specific performance above compensation. But, secondly, if one looks at Article 15 of the Code, when defining compensation, it essentially

would be related to the cost of obtaining alternative performance. So on either case, we have to know rather precisely what needs to be done, whether to order it to be done or to try to figure out what it would cost to get someone else to do it, if indeed anyone else was available who could do it.

Q. Thank you. Are you aware of any case law which throws light on this, or is your view based on an analysis of the provisions of the Code?

A. It's based on analysis of the provisions of the Code, and also what I think was something of a hangover from Soviet custom, particularly in the early days of the post-Soviet regime, because Russia did not have a market economy. You generally could not go out in the market and buy a substitute performance, and I think that attitude continued for some time.

Q. How long do you think it continued?

A. That would be difficult to say.

Q. I'm not asking you for a precise date, but if you can give us some rough idea of how long you feel that attitude persisted?

A. I think certainly during the 1990s.

MR SUMPTION: Thank you very much, Professor Maggs.

MR RABINOWITZ: My Lady, on the basis indicated yesterday, I have no questions for you, Professor Maggs.

MRS JUSTICE GLOSTER: Right, Mr Malek?

MR MALEK: No questions, my Lady.

MRS JUSTICE GLOSTER: Right.

Well thank you very much indeed, Professor Maggs,  
for coming along and assisting the court with your  
evidence.

THE WITNESS: Thank you, my Lady.

(The witness withdrew)

MRS JUSTICE GLOSTER: Very well.

I'll take the break, Mr Gillis, I think.

MR GILLIS: That would be very helpful because I'm  
imprisoned by Russian law at the moment.

MRS JUSTICE GLOSTER: Then we can get onto some history.

Very well, ten minutes.

(11.18 am)

(A short break)

(11.33 am)

MR GILLIS: My Lady, I call Professor Fortescue.

PROFESSOR STEPHEN FORTESCUE (sworn)

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

Examination-in-chief by MR GILLIS

MR GILLIS: Could Professor Fortescue please be provided  
with bundles G(B)1/1 and G(B)6/1.

Professor Fortescue, just while people are getting

the bundles, could you confirm that you don't have a telephone with you or a mobile device?

A. No, I have no telephone or mobile device with me.

Q. Thank you. Could you please turn to G(B)1/1 at tab 1 and turn to page 1 G(B)1/1.01/1. Is that the front page of your first report?

A. Yes, it is.

Q. Could you turn to page 113 G(B)1/1.01/113, can you please confirm that that's your signature?

A. Yes, that is my signature.

Q. Then could I ask you to turn to tab 2 in that bundle at page 140 G(B)1/1.02/140?

A. It's numbered differently as best I can see.

Q. Is that the front page --

A. 140, sorry, I do see --

Q. I'm afraid there are an awful lot of numbers there at the bottom right-hand side.

A. I do see it, yes.

Q. Is that the front page of your second report?

A. Yes, it is.

Q. Then if you could please go to page 168 G(B)1/1.02/168, and could you please confirm that that's your signature?

A. Yes, that is my signature.

Q. Now, could I ask you to go back to page 142

G(B)1/1.02/142.

A. Yes.

Q. Do paragraphs 4 and 5 there set out corrections which you wish to make to your first report?

A. Yes, they do.

Q. Subject to those corrections, can you confirm that those two reports are true to the best of your knowledge and belief and that they represent your true opinion?

A. Yes, they are true and represent my true opinion, to the best of my knowledge.

Q. And could I just ask you then to pick up G(B)6/1, and at page 1 do you have the joint memorandum which sets out the views of yourself, Professor Service and Professor Bean G(B)6/1.01/1?

A. Yes, I do.

Q. Could you turn to page 26, please, G(B)6/1.01/26 and again could you confirm that that's your signature?

A. Yes, that's my signature.

Q. And could you confirm that the statements attributed to you in the joint memorandum are true to the best of your knowledge and belief and they represent your true opinion?

A. Yes, I do.

MR GILLIS: Thank you. If you could wait there, I think Mr Sumption has some questions for you.

## Cross-examination by MR SUMPTION

- MR SUMPTION: Professor Fortescue, your report is substantially based on journalistic sources, is it not?
- A. Substantially, yes.
- Q. You acknowledge that the quality of press reporting is variable, even in reputable titles?
- A. Yes, I do.
- Q. And would you agree that much of the material in newspapers is based on sources which are not attributed and difficult to verify?
- A. Not sure that I'd say "much", but, yes, a considerable proportion.
- Q. And much of it is derivative from other newspapers?
- A. That's certainly a phenomenon in Russian newspapers.
- Q. Much of it subsequently turns out to be wrong as further information becomes available?
- A. That does happen, yes.
- Q. In particular, would you agree that there is a very striking difference between historical facts as they emerge when archives are opened, and the facts as they appeared to be from newspaper reports at the time?
- A. No, I don't think I would agree with that.
- Q. You wouldn't?
- A. No.
- Q. Well, perhaps Australian history has a very different

pattern to English.

Would you agree that there is very little archival material for contemporary or near contemporary Russia which can be used to correct journalistic sources?

A. Yes, I would agree with that.

Q. Now, obviously, much depends on what issue one is talking about, but would you agree that the reliability of press reports is particularly difficult to assess when the papers are reporting something that is said to have gone on behind the scenes in government?

A. Yes, that does make it difficult.

Q. Now, the affairs of private individuals and companies they control in a society like Russia in the 1990s, would you agree that that is another area where it is particularly difficult to assess the reliability of press reports?

A. It is difficult but possible I believe.

Q. Well, you acknowledge, I think, in your report that newspapers are vulnerable to planted stories which suit the interests of their source?

A. They are certainly vulnerable to planted stories, and that's one of the tasks that a specialist in this field faces, to sort out those issues.

Q. Yes, but he often has nothing to go by beyond guesswork?

A. No, I think you have more to go on than guesswork.

- Q. Would you agree that planted stories are a particular problem with individuals who are keen on self-promotion, for one reason or another?
- A. Well, I don't think it's a particular problem. It's a problem that we face in this area of study.
- Q. And perhaps particularly also, where the newspaper in question happens to be owned by that person, planted stories are a particularly common phenomenon in that context, are they not?
- A. There are newspapers that are owned by individuals who have a reputation for planting stories, one of those newspapers I find reasonably reliable.
- Q. I see, even when the story looks as if it may have been planted by its proprietor?
- A. If it looks like it was planted by the proprietor we don't have a problem. We know it was planted by the proprietor and we take appropriate measures.
- Q. So you discount it?
- A. No, you don't always discount it.
- Q. I'm not saying ignore it; you apply a discount to the weight you place on it?
- A. Yes, I would say you apply a discount, but even a discounted source can provide valuable information. Even the fact that you know it's been planted can sometimes be valuable.

Q. Would you agree that another area which is particularly difficult to penetrate in the case of Russia in the 1990s is the shareholding structure through which rich Russian businessmen hold their shares; that structure is often deliberately opaque?

A. Yes, I'd agree with that.

Q. Would it be fair to say that, for all of these reasons, journalistic sources for the period covered by the present dispute have to be approached with extreme caution?

A. Well, with caution. I suppose whether it's extreme caution or not, but certainly with caution, yes.

Q. Well, let's take an example which is dealt with in your report, the relative political influence of Mr Berezovsky and Mr Abramovich in the late 1990s. In general terms, would you agree that without access to the individuals involved or to records of the inner workings of government, it is particularly difficult to assess how much influence is exercised behind the scenes by somebody with no official position?

A. It's difficult. It's possible to come to an opinion. It's difficult to know of course whether your opinion is absolutely true or not, but certainly it's what you do in the sort of job that I do that you form opinions with greater or lesser degrees of confidence.

Q. And the confidence is inevitably lesser when you are dealing without access to the individuals involved or to records of the inner workings of government; that is a factor which means that you have to have less confidence in your opinions, doesn't it?

A. I'm not sure that I'd agree with that. Sometimes I'm quite confident in my opinion even when I don't have access to people within government and the source.

Q. Even when you have no first-hand information about these workings and no records, is that right?

A. Yes, sometimes I'm quite confident.

Q. Yes. Well, you're obviously a very confident spirit, Professor Fortescue.

Could you have a look in your first report at paragraphs 70 and following G(B)1/1.01/21.

A. Paragraph 17?

Q. This is a passage of your report that appears under the heading "Mr Berezovsky's diminished influence in the late 1990s".

A. I'm sorry, can I interrupt, I must have the wrong paragraph. Could you please --

Q. Look at page 21 of G(B)1/1, flag 1.

A. Yes.

Q. Do you see paragraph 70?

A. Paragraph 70, yes I do.

Q. It's the first paragraph of a section of your report dealing with Mr Berezovsky's diminished influence, you say, in the late 1990s, and in this section you also express a view about the relative influence of Mr Abramovich, do you not?

A. Yes.

Q. Towards the end?

A. Yes.

Q. Now, what you conclude at paragraph 78 G(B)1/1.01/23 is that there was no reason to think that in 1998 and 1999, that:

"... Mr Berezovsky was in a stronger political position than Mr Abramovich, and there is some evidence to suggest that (albeit behind the scenes) Mr Abramovich actually exercised more influence than Mr Berezovsky in the Yeltsin administration."

Do you see that?

A. Yes, I do.

Q. Now, what is your evidence for that statement?

A. Mr Berezovsky was, first of all, clearly subject to ups and downs in his political situation. At times he was being told that he was likely to be prosecuted or indeed charges were being offered. At other times it did appear that he was, let's say, reasserting himself, but it was a very, very fluid situation as far as

Mr Berezovsky was concerned, seemingly depending to some extent at least on who was the prime minister at the time.

In terms of Mr Abramovich, let's say it was a steadier trajectory. It would appear that he had contacts, and I am, as you suggested before, relying on press reports on these matters, but he had good contacts within the administration. Nothing was happening to him that would suggest that he was in political difficulties.

Q. Well, I think we can agree that he wasn't in political difficulties, but from what material would it appear that Mr Abramovich was more influential than Mr Berezovsky in this particular period?

A. The press reports that we've been talking about.

Q. I see. Are those the press reports referred to in this section of your report where you deal with this subject, 70 to 78?

A. Yes.

Q. Well now, let's have a look at that, shall we? You start, I'm looking at paragraph 70 --

MRS JUSTICE GLOSTER: Mr Sumption, sorry to interrupt, but the section where Professor Fortescue deals with Mr Abramovich's influence in the late 1990s actually goes from 64 to 69 as well.

MR SUMPTION: Yes.

MRS JUSTICE GLOSTER: And there are quite a lot of press reports referred to there. I wouldn't want the witness to be confused.

MR SUMPTION: No, that is perfectly fair.

What you say, let's start at paragraph 64, shall we, Professor Fortescue G(B)1/1.01/19, you refer to the view of Mr Hoffman that:

"... by the time of [the] discussions in 1998 about replacing Prime Minister Chernomyrdin 'Roman Abramovich ... had become influential in Yeltsin's inner circle as well'."

That is a statement that Mr Abramovich had some influence. Are you able to assess from that statement what Mr Abramovich was in a position to do?

A. I wouldn't say that I could assess what he would be in a position to do. I would be able to suggest that he would be able to, if he had some interest in mind or something that he wanted to do, he could go to an influential person and try to have that brought about. I couldn't say what it was in every case that he might have wanted to do.

Q. You then quote a statement about Mr Abramovich acting for some time as the family's, the Yeltsin family's cashier or money man, and there were a lot of articles

to that effect, but you do not find them a sufficient basis, do you, for reaching a conclusion on the point?

I think you say that a bit later in your report.

- A. I think that's a pretty good case, as far as I'm concerned, of something that I think you referred to previously, that something appears in one place and has a sort of cascade effect, it's repeated over and over and over again.

In that particular case, reference to Mr Abramovich as being the Yeltsin family's cashier did come from one source, it was from Mr Khorzhakov in a press conference, and it was repeated over and over and over again.

Something you learn from looking at these press reports is you learn how much minor plagiarism there is in fact in newspaper journalism, very much the same words appearing over and over again. And certainly when you see that you do very heavily -- well, it depends on the original source, but you're aware that it comes from one source.

If you are genuinely doing this sort of research, clearly you're trying to get a sense that something you would put more faith in comes from a number of different sources. If there was somebody else who had worked in the Kremlin, who might also have their own personal agenda, but nevertheless if somebody else who worked in

the agenda (sic) said the same thing at a press conference, you'd give it a little more value. When only one person said it, you'd give it less value.

So in that particular case, as you point out, I say, I don't know whether it's true or not, but I don't feel particularly enthusiastic about that idea.

Q. Right. Now at paragraph 67 G(B)1/1.01/20, you quote somebody who suggests that candidates for posts in Mr Stepashin's cabinet were interviewed by people who included Mr Abramovich.

A. Yes.

Q. Is that something you believe?

A. I find that the actual account given by Mr Kasyanov, Mr Kasyanov was Mr Putin's first prime minister. At the time we're talking about he wasn't prime minister but he'd had senior positions in the government, first Deputy, Minister of Finance type levels, so he was an insider. He doesn't say there himself that he witnessed this, that he knew himself definitely, so it's hearsay on his part. Nevertheless I would have to say that that account that he gives of Mr Abramovich sitting there in an office in the Kremlin with a queue of people wanting to become ministers, or as candidates for ministers, and coming in and sort of being interviewed, I find that a little bit, well, hard to believe, to be honest.

Q. Right.

A. Having said that, I don't find it hard to believe that Mr Abramovich at the time was interested, had some awareness of who might become candidates for ministerial positions. He might well have rung them up or organised a meeting with them to discuss with them what their feelings were on different matters, to convey to them what his feelings were on different matters. And then he could well have gone to influential people within the Kremlin that he knew and said, "Look, you know, it seems to me that this person is a good candidate, this person seems to me to have some silly ideas on different things".

That version seems to me to be quite plausible. The way that Mr Kasyanov describes it, no, I don't think it could have happened in precisely that way.

Q. These things might have happened but you have no information to suggest that they did?

A. No -- well, I have information to suggest that they did, but that information is press reports and memoirs.

Q. That's why you say they might have happened rather than that they did?

A. Yes.

Q. Well now, you start the next section of your report by saying that you -- I'm looking at paragraph 70

G(B)1/1.01/21 -- by saying that:

"[You] do not know whether the [disputed] assertion in Disputed Statement 45, that from 1998, Mr Berezovsky had less contact with President Yeltsin's inner circle, is true. [It] is a question of fact which [you] cannot answer by reference to historical evidence."

Would you agree that that is not a promising start to an assessment of Mr Berezovsky's influence, whether rising or falling, in the late 1990s, if you do not have that knowledge?

A. I express -- well, I say I do not have that knowledge and that affects, needless to say, the way that I -- the degree of confidence with which I express matters, and it's open to other people to decide how much confidence they will approach what I say on these matters.

Q. Now, you go on -- just one point, Professor Fortescue. The quotation at paragraph 67 G(B)1/1.01/20, it's right, isn't it, that this quotation -- and I appreciate that you say you don't actually believe this particular statement, but it also doesn't in fact appear in the text written by Mr Kasyanov himself, does it? It appears in the introduction written by the journalist who was his co-author, Mr Kiselev, is that correct?

A. I don't know, I'd have to look at the source.

Q. Well, we can verify that for ourselves in due course.

A. Mm-hm.

Q. Moving back to the next section, paragraphs 71 to 75  
G(B)1/1.01/21.

A. Yes.

Q. You refer to the reverses which Mr Berezovsky  
experienced during the premierships of Mr Chubais and  
Mr Primakov?

A. Mr Chubais was not a premier but I understand what you  
mean.

Q. Yes, sorry, during that period of office.

Now, would you agree that although Mr Chubais is  
said to have got Mr Berezovsky dismissed from his  
position on the Security Council in November 1997,  
in April 1998, within a month of his departure, he was  
back in favour, Mr Berezovsky was back in favour, with  
a new appointment as executive secretary of the  
Commonwealth of Independent States?

A. First of all, I don't think I do say that Mr Chubais  
arranged to have Mr Berezovsky dismissed. I think that  
it was Mr Yeltsin decided to dismiss both of them, not  
one or the other --

Q. You're quite right that the decision would have been  
made by Mr Yeltsin, but I understand you to relate this  
to the disagreements between Mr Chubais and  
Mr Berezovsky?

A. Yes, that's correct.

Q. And it's right, isn't it, that within a month of Mr Chubais's departure, Mr Berezovsky was back in favour with a new appointment as executive secretary of the Commonwealth of Independent States?

A. Yes. And as I said before, his position at this time, and I suppose it's the nature of Russian politics at this particular time as well, things were very, very volatile and people's positions could change very quickly.

Q. Now, the executive secretaryship of the Commonwealth of Independent States was an influential appointment within the state, wasn't it?

A. Look, no, it wasn't very, very high in the pecking order, I think it's true to say.

Q. So wasn't high or it was?

A. It was not.

Q. It was, however, a function that meant that the occupant of that position was likely to have considerable involvement with the current problems in Chechnya; that's right, isn't it?

A. I'm sorry, I didn't quite hear what you said.

Q. That was a position that would require its occupant to occupy himself with the problems of the Russian State in Chechnya, would it not?

A. I'm not an expert, to be honest, on functions of the secretary of the CIS.

Q. You're not, right.

A. Because Chechnya is not part of the CIS so I'm not sure that that is in fact the case.

Q. Right. Well I'm relying, perhaps mistakenly, on what Mr Berezovsky himself says he did in that capacity, but if you're not an expert in that area I'm not going to test your knowledge any further.

Can we look at the further reverses under Mr Primakov. He became prime minister in September 1998, didn't he?

A. Yes.

Q. And was dismissed on 12 May 1999?

A. Yes.

Q. Are you aware, or were you aware at the time of your report, that in his previously unpublished evidence in his asylum application, and again in his evidence to this court, Mr Berezovsky said that some two to three days after being charged with currency violations and money-laundering by the public prosecutor, Mr Berezovsky went to see Mr Yumashev at the Kremlin in order to complain about Mr Primakov whom he believed had inspired that; are you aware of that?

A. I wouldn't say that I'm aware of it but I'm quite

willing to accept that that's the case. I could well understand that he would.

Q. It's an example, isn't it, of one of those quite striking facts which you do not find reported in the contemporary press but may tell you, when you find out about them, a great deal about how things were working?

A. If I found out -- if that was not recorded in the press at the time, and I can't guarantee that it wasn't -- it was subsequently revealed in the way that you said it was revealed, I wouldn't be surprised. I would have expected him to go along and make such a complaint at the time, and so I wouldn't be surprised to find out afterwards that he had done so.

Q. Would you have expected Mr Primakov to find himself dismissed within a fortnight of that meeting?

A. I would -- I wouldn't necessarily confidently say that the two were linked, if that was the implication that you were making.

Q. Well, his evidence was that he was a significant factor in bringing about Mr Primakov's dismissal, do you find that credible or incredible?

A. I find it plausible, yes, it's something to be considered.

MR SUMPTION: My Lady, the reference to that is Day 6, pages 138 to 143.

Now, that is, is it not, a fairly spectacular display of inside influence, you agree?

A. If that was exactly how things worked themselves out, yes.

Q. Now, there was some newspaper speculation at the time that Mr Berezovsky might have had a hand in Mr Primakov's departure, but would you agree that the details would not be known but for the evidence that Mr Berezovsky has given in the asylum proceedings and in his evidence in this action?

A. I'm sure that at the time in Moscow there was a lot of speculation along those lines, so there was -- well, I'll say no more than there was a lot of speculation at that time.

Q. Are you aware that the charges of money-laundering and so on against Mr Berezovsky, which were brought in April, shortly before Mr Primakov's departure, were subsequently in November dropped?

A. Yes, I'm aware of that.

Q. Does that surprise you?

A. No.

Q. Why not?

A. Sorry?

Q. Why not?

A. Why does it not surprise me? Because it was typical of

the use of charges, threatened charges against people at the time and subsequently, in the ups and downs of people's political careers, which as I said previously, were very volatile at this time.

Q. Now, you say at paragraph 77 of your report that the charges against Mr Berezovsky were resurrected whenever circumstances allowed it. Presumably you consider that circumstances did not allow it in November 1999 when these charges were dropped?

A. Yes, that would be a logical conclusion.

Q. And that was no doubt because of the very considerable influence that was still being exercised by Mr Berezovsky at that time?

A. We have to go back to the original assumption I think that Mr Berezovsky truly had a role to play and a serious role to play in the removal from power of Mr Primakov. I said that I found that a plausible position, but I couldn't say that I know with total conviction that that's the case.

Q. Let us assume that it is, okay? Would you agree that the circumstances which did not allow the charges to be proceeded with in November 1999, when they were dropped, were that Mr Berezovsky was in a position to exercise powerful influence behind the scenes over government officials?

- A. If we make that assumption, yes.
- Q. If we make the assumption about the dismissal of Mr Primakov, you agree?
- A. Hmm.
- Q. Is that right?
- A. Could you say it again, please?
- Q. I'm going to ask you to assume that Mr Berezovsky's evidence that he had a significant part in the dismissal of Mr Primakov is true, okay? Now, on that assumption, would you agree that the circumstances in November 1999, which resulted in the charges being dropped, are likely to have been that Mr Berezovsky was in a position to exercise powerful influence behind the scenes?
- A. I have to make the assumption, and think about what the consequences of the assumption is, but, yes.
- Q. Well now, that influence continued, did it not, until Mr Berezovsky fell out with President Putin in the following year?
- A. I'm just trying to think what other events happened in those periods, but --
- Q. Let me remind you that Mr Putin became acting president at the very end of 1999 as a result of the illness of Boris Yeltsin and that he was elected in his own right in I think April of 2000.
- A. March.

Q. March, you're quite right.

A. Incidentally Mr Yeltsin resigned, it wasn't because he was particularly ill, but we'll leave that aside.

Q. Well, that's a side-show.

A. Could you --

Q. Right, but would you agree that the influence of Mr Berezovsky persisted until he fell out with Mr Putin in 2000?

A. No, I wouldn't want to say categorically that his influence remained at that same level throughout that time, no.

Q. Do you not know one way or the other?

A. It was very volatile at the time and...

Q. Are you able to express an opinion on how, if at all, the degree of influence exercisable by Mr Berezovsky changed between November 1999 and the summer of the following year when he fell out with Mr Putin? If you don't know one way or the other I won't continue to ask questions on the subject.

A. No, I think his influence -- no, look, I'll say I don't know, because it's very hard to be certain whether these -- the influence, particularly at this time, was very, very uncertain, changed very, very regularly.

It would be -- I suppose if I sat down and reviewed the history absolutely carefully I might be able to come

to more careful conclusions. But, no, I would say that it's -- certainly he suffered a major reverse, of course, when Putin came to power. There's no doubt about that.

Q. Well, not immediately when Putin came to power I think but very shortly afterwards.

A. Shortly afterwards, yes.

Q. Now, would you agree that Mr Putin, whatever else one might say about him, is very much his own man and always has been since he was elected president?

A. Yes, I'd agree with that. I think we do tend to leap from that statement to saying that he never takes any notice of anything that anybody says and nobody can have any influence over him.

Q. I'm not suggesting that. Now, one thing is clear, is it not, that Mr Putin is a man who is not prepared to be pushed around by rich men?

A. He certainly wouldn't want to be, and a rich man would have to be very careful about trying to push Mr Putin around, yes.

Q. Yes. In particular, Mr Putin reacted, did he not, when he became president against the widely perceived fact that Mr Yeltsin had been pushed around by rich men? That was a widespread perception about Mr Yeltsin, was it not?

A. Yes, I would agree with that.

Q. Would it be fair to say that Mr Putin was anxious to demonstrate that he was not like Mr Yeltsin in that particular respect?

A. Yes, I'd agree with that.

Q. Now, you refer to Mr Putin's well-known assault on the oligarchs. Would you agree that his approach to the people who had made great fortunes in the 1990s was that he was not prepared to allow them to use their financial muscle to support opposition to the government?

A. Yes, I'd agree with that.

Q. Would you agree that oligarchs like Mr Khodorkovsky, Mr Gusinsky and Mr Berezovsky, who challenged the government, were generally imprisoned or driven into exile?

A. I don't actually -- with regard to Mr Khodorkovsky, I -- personally, it's not the standard view on these matters, but I believe that it wasn't just or even mainly his political activities, or purported or proposed political activities that led to the Yukos affair.

Q. I see.

A. In the case of Mr Gusinsky and Mr Berezovsky, where these people had major media holdings, I think there was a stronger political element to that. But with Mr Khodorkovsky, I think it was commercial issues,

taxation issues, not so much political.

Q. That is, I think you've just acknowledged, a controversial view which most people would not accept?

A. I'd have to say that, in recent years, the view that Mr Khodorkovsky was arrested and Yukos was destroyed for political reasons has become widespread, probably more widespread than it was at the time. It's one that I didn't -- I wouldn't say I rejected it out of hand, but I believe that taxation issues, getting the oligarchs to pay their taxes, to seize some assets, were a more important issue than Mr Khodorkovsky's political activities or proposed political activities.

Q. I see. Well now, those who stayed out of politics, among the oligarchs, like Mr Fridman, Mr Deripaska and Mr Abramovich, retained their wealth, or at least a significant part of it, did they not, under Putin?

A. Yes, we have to be careful here when we say "kept out of politics", what we mean. If we mean organising political opposition, saying nasty things about Mr Putin in your media outlets, if that's what I mean -- if that's what we mean by politics, yes. If we mean by politics, being involved in the policy process, I wouldn't agree with the statement.

Q. Surely the key to survival if you were a rich industrialist under Mr Putin was to keep a low political

profile?

A. Again, it depends on what you mean by political. If we are talking here about political in the sense of organising opposition, saying nasty things about Mr Putin in the media, yes.

Q. If we look at paragraph 96 of your first report, please, which is a part of your report in which you are dealing with Mr Abramovich's influence in the Putin administration. The relevant section starts at paragraph 94 G(B)1/1.01/28 and continues to paragraph 104.

A. Yes.

Q. Having dealt previously with his influence before Putin, you are now dealing with his influence after Putin's coming to power.

Now, you set out the propositions, with which you say you agree, at paragraph 95. And then, looking at the analysis, paragraphs 96 to 98, you cite some authors that you say support your view about Mr Abramovich's influence in the Putin administration, okay?

A. First of all, in those particular paragraphs, all I am saying is that there were such reports.

Q. Yes.

A. It is true that I go on and say that I think there is some truth to those reports, but what you're

particularly -- I am reporting those quotations there in 97, 98, not to support my view but to simply show that there were such views.

Q. I see. Well, if these are not the reason why you formed your views, then what reasons do you have?

A. As I said, I put those there as examples of the sort of reporting at the time. Certainly I would have formed my view on the basis of those sorts of reports, including those ones. There is actually a sentence in the Sakwa quotation that doesn't seem to me to be particularly believable, regarding coveting Norilsk Nickel, but those were the sorts of reports.

On the basis of those sorts of reports, and other such reports, I form the view that, yes, Mr Abramovich was -- had suggested that Mr Abramovich's influence with the Kremlin had increased in the first half of 2001.

Q. If you didn't believe or didn't attach importance to these reports, how did they lead you to that view?

A. As I said, there was one -- a few words in the report from Sakwa that I would not -- I find surprising, let's say. Those reports I presented as relatively typical reports of what was being said at the time, and then I formed my opinion on those sorts of reports, including many others that appeared at the time.

Q. Well, let's look by way of example at what Mr Sakwa

says. First of all, Mr Sakwa is a lecturer in politics at the University of Kent, isn't he?

A. Yes, he's a professor in politics at University of Kent.

Q. And he's the author of a number of published works on the oligarchs?

A. He's published a lot of works --

Q. One book and some articles?

A. Yes, that's correct.

Q. What you are quoting from is an article of 2008 in an academic journal. Perhaps we can turn that up, it's at G(B)2/7, flag 190. Could we please turn at flag 190 to page 156 where the article starts G(B)2/7.190/156. This is an article in the New Political Economy in 2008. At page 156, you see in the first paragraph there's a reference to a statement made by Mr Putin in the election campaign about:

"... the need to break the cosy relationship between big business and government. In early 2000 Putin had talked, in language reminiscent of ... Stalin's plan ... to 'liquidate the kulaks ...', of his aspiration to 'liquidate the oligarchs as a class', stressing the need to create a level playing field. His central idea was that special interests, above all the oligarchs, should be kept 'equidistant' from the government."

Would you agree that that can fairly be described as

being at least one of Mr Putin's central ideas?

A. Yes, I agree. However, I would qualify my agreement with that. If the interpretation of that statement is that the oligarchs -- no oligarchs any longer had any influence, I would not agree. Also I would not agree that it means that there was not in fact some -- there was not total equidistance between all of them so some nevertheless were closer than others.

Q. Well, some were in jail and some were in England and some were exercising influence; is that the point you're making?

A. That's the point that I'm making, yes.

Q. Does it follow from this particular central idea, as Mr Sakwa suggests, that:

"No longer were a select group of 'oligarchs' to have privileged access to the corridors of power or to hold the state hostage whenever the regime needed financial or other support."

That is a statement which you would endorse, is it?

A. No, it's not a statement that I fully endorse.

Q. I see. So you disagree with him on that point?

A. No. I think that overstates the extent to which Mr Putin wanted to remove rich business people from the policy process.

Q. Could we turn to page 159 G(B)2/7.190/159, please.

The first full paragraph in the page:

"Pervading the anti-oligarch campaign [this is Putin's campaign] there hung the suspicion that one set of tycoons was using the law and the presidency against another. In particular, Roman Abramovich, who in early 2000 had participated in the creation of a holding that controlled most of Russia's aluminium production, was known to covet Norilsk Nickel and Gusinsky's NTV. Other oligarchs, notably Mikhail Fridman at the head of the Tyumen Oil Company ... Oleg Deripaska and many more focused on developing their businesses and kept out of politics. They willingly accepted the new rules of the game, including clearing major initiatives with the Kremlin, and thus went on to become key figures in the new era. While business was now taken out of politics, politics entered ever more decisively into business. A new type of 'state oligarch' emerged, permitted to conduct business at home and, indeed, to go global as long as they recognised the Kremlin's claimed prerogatives."

Now, how much of that would you agree with?

- A. Again, it depends on what we mean by politics. Business was taken out of politics quite abruptly and brutally, if politics means organising political campaigns against Mr Putin, saying nasty things about him in the press.

If politics means being involved in the policy process, arguing for policy outcomes in your particular area of concern, I don't agree with that statement. The oligarchs were still very, very involved in the policy process regarding business and in very important areas.

Mr Putin -- I would say in those couple of -- first few years, up until the Yukos affair, and in some sense beyond, Mr Putin -- there was a period of cooperation and conflict. The cooperation at times was very, very close. For example, there was very, very major changes to the taxation laws in that period which required very close relationship between the oligarchs' major business, and Mr Putin and government policy makers. So we have to be careful here when we say "keep the business out of politics", it just does depend on what we mean by politics.

- Q. Now, admittedly, this paragraph is said to be no more than a suspicion, see the first line. So far as it carries any weight, it doesn't suggest, does it, that Mr Abramovich had any particular influence over Putin? On the contrary, what it suggests is that Mr Abramovich and other rich industrialists were allowed to do more or less what they liked in business provided that they stayed out of politics. That's what it's suggesting, isn't it, whether rightly or wrongly?

A. If politics means, as I've said before, organising political campaigns and saying nasty things about Mr Putin in the public arena, yes.

Q. Now, you also refer in the following paragraph of your report to an article by Paszyc and Wisniewska which is at G(B)2/6, flag 179 G(B)2/6.179/183.

Now, these two ladies are researchers, are they not, at an institution called the Centre for Eastern Studies which is based in Warsaw, is that correct?

A. Yes. Yes.

Q. This is an article, is it not, about certain major Russian industrial groups including, among others, Rusal?

A. Yes.

Q. It's not an article about political influence at all, is it, it's an article about industrial concentration?

A. It says -- the title is "Big business in the Russian economy and politics under Putin's rule".

Q. Yes, but reading the article, it is in fact about the way in which major industrial groups have been abled (sic), in the political climate that existed, to concentrate and increase their economic power?

A. Yes.

Q. Now, the paragraph from which you quote is at paragraph 3, which is on the bottom half of the first

page. Perhaps you would just remind yourself of that paragraph.

A. Sorry, I'm just getting back to the first page.

Paragraph 3 I think you --

Q. Paragraph 3 of the article.

A. Yes.

Q. Which is the summary, and it's the bit from which you're quoting.

A. Yes.

Q. Now, that paragraph in the context of the article as a whole is making the point, isn't it, that Mr Abramovich and others have been allowed to accumulate considerable industrial power, provided that they're not trying to turn it into political power independent of the Kremlin?

A. Yes.

Q. Now, if we turn on in your report to paragraphs 99 and 100 G(B)1/1.01/29, having cited those two sources, you go on to refer to persistent press reports that Mr Abramovich bankrolled the Kremlin, a proposition for which I think you accept there is no sufficient evidence?

A. That's correct.

Q. Now, is there any more to your suggestion that Mr Abramovich had significant political influence under

Putin than the sources which you cite in the following paragraphs, paragraphs 101 and 102?

A. Those are the -- I have those citations. I'm sure there are many more sources that I could have cited.

Q. Those are the best, are they?

A. I wouldn't even say that they are the best. Those are the ones that were chosen at the time.

Q. Let's have a look at them and see how far they take us.

Would you please turn to bundle G(B)2/2, flag 27

G(B)2/2.27/229. This is an extract from Mr Sakwa's book which was published in 2009, about a year after the article that we looked at a bit earlier.

A. Yes.

Q. Now, can you please identify -- I'm afraid it's a longish extract but you selected it which is why perhaps it's fair to ask you -- which bit of this extract of the book do you say supports your contention that Mr Abramovich was influential in Putin's Russia?

A. It's hard to read the photocopy here, I have to say.

It's -- perhaps if I could -- no, I don't --

Q. Well, I apologise for that and I entirely agree that it is, but if you can indicate the area of the extract that you had in mind, we may be in a position to ask you about it.

A. Yes, hang on. (Pause)

- Q. In your footnote, you refer to page 130 of the book, which is in the bundle numbering at page 234 G(B)2/2.27/234. These are a number of different extracts from the book. Does that help?
- A. Yes, I'm looking at page 130 and I don't see mention of independent influence over Putin including a close personal relationship.
- Q. I mean, as far as we can see, the only part of this extract which refers to Mr Abramovich is the first full paragraph to begin at page 130. But I wouldn't want to assert that too confidently if you have some other part that you want to refer to.
- A. I cannot. I can't remember offhand, if it's not on page 130 which is the one that I cite, where it might have come from in that source.
- Q. So would you agree that this particular work or at least the bits of it that we have that have been copied on your suggestion, they support the view that Mr Abramovich was able to avoid a disastrous falling out with the government of the kind that had destroyed Mr Khodorkovsky for whatever reason but they don't go any further than that?
- A. Could you repeat that question, please?
- Q. This work supports the view that Mr Abramovich was able to avoid a personally disastrous falling out with the

government of the kind from which Mr Khodorkovsky had suffered, but the book doesn't appear to go any further than that, does it?

A. I can't say on -- I can't remember everything that's written in that book, I'm sorry.

Q. I see. Could you please be given bundle G(B)2/3, flag 106. This is the next reference that you give in paragraphs 101 to 102. It's an article from Vedomosti. The English translation begins at page 299 of the bundle G(B)2/3.106/299.

A. Yes.

Q. Perhaps you could point us to the statement in this article that you say bears out your view about Mr Abramovich's influence under Putin. (Pause)

A. No, I can't find it there.

Q. You can't find anything there that bears it out?

A. No, I can't.

Q. Right. Well, let's look at the third and last citation that you give, G(B)2/4, flag 118. The English begins at page 41 in the bundle numbering G(B)2/4.118/41. This is an article by a Mr A Ryklin in a publication called Demokratiya. Can you tell us who Mr Ryklin is?

A. No, I don't know. He's just --

Q. So you don't know whether he's a person of any particular authority?

A. No.

Q. What is Demokratiya?

A. It's an online journal.

Q. Right. Now, can you tell us which parts of this article you had in mind as supporting your view about Mr Abramovich's influence?

A. Well, I think it's all about the relationship between Mr Putin and Mr Abramovich.

Q. What propositions do you extract from it that support your view?

A. It's suggesting that Mr Abramovich is able to get away with behaviour that other oligarchs are not able to get away with because of his relationship with Mr Putin.

Q. That is the view of Mr Ryklin, is it?

A. Yes.

Q. A man about whom you know nothing and whose authority you're not able to assess?

A. I wouldn't put a great deal of faith in that particular article, no.

Q. Did you identify these particular sources yourself or did somebody provide you with them?

A. I certainly know Mr Sakwa's book, "The Quality of Freedom", very well. I can only assume that the referencing went wrong this particular time. Certainly I found these sources myself.

Q. Right.

At paragraph 102 of your report G(B)1/1.01/29, you say by way of summary that you have seen no credible journalistic or academic writing which doubts that Mr Abramovich had influence over Putin.

Have you seen any credible or journalistic or academic writing which provides evidence that he did have such influence?

A. Certainly there's been a problem with the referencing here, and it is very difficult for me to say that these articles support the view that I'm putting forward. I should say as well that I expressed a view about Mr Abramovich's influence with some degree of caution, but, nevertheless, I'm confident that there are plenty of such sources.

Q. Let's have a look at your conclusion to this section at paragraph 104 G(B)1/1.01/30. You say that you would not find it surprising that Mr Abramovich was in a position to encourage state agencies, including the Kremlin, to "take steps helpful to him" if they were also beneficial to the Kremlin.

Is that a fair summary of what you're saying at paragraph 104?

A. Yes.

Q. What steps do you have in mind when you say that?

A. If I can set up a number of scenarios: I don't think Mr Abramovich could have come to Mr Putin and said, "Mr X is causing me problems, I know that Mr X is your good friend and a close ally, nevertheless I want you to help me take steps against him, to remove him as a competitor or whatever", I would find that quite implausible.

If Mr --

Q. And -- sorry, forgive me, I didn't realise you were continuing. Please go on.

A. If Mr Abramovich had come to Mr Putin and said "There's this Mr X, I don't think you know Mr X, or you're not interested in Mr X, he's a problem for me, can we do something about it, would you help me do something about it?", I think that would be probably unwise, an unwise thing to do in the case of Mr Putin, but I don't find it totally impossible.

Q. Right.

A. If Mr Abramovich came along to Mr Putin -- put it another -- no, I'll start again.

If Mr Abramovich knew that Mr X was causing Mr Putin considerable frustration and grief he could have two options, he could just say, "Okay, I'll leave things to go their own way and hopefully the outcome that I want will just simply happen because Mr Putin will take

measures on his own". The other possibility is that Mr Abramovich could have gone to Mr Putin and said, "Look, you know, Mr X is causing us both some grief, let's work together to do something about it", I find that quite plausible.

Q. Well, do you say that Mr Abramovich was in a position to encourage criminal proceedings against Mr Berezovsky and people associated with Mr Berezovsky by exercising influence with the Kremlin or its agencies? Is that your position?

A. I haven't engaged in that particular issue at all, no.

Q. I see.

Do you say that people generally believed that he was in a position to do that?

A. I wouldn't want to say that people generally believed, but it would certainly have been a widespread view.

Q. Well, I don't quite follow that. That appears to be a little internally contradictory; people didn't generally believe it but it was a widespread view, how widespread?

A. I couldn't say how widespread.

Q. Is it something that well-informed people would have thought, in your view?

A. Well-informed people might have been aware of the view, some would have thought it and some might not have.

I really can't comment.

Q. Is that a proposition that you can extract from any of the sources we've been looking at?

A. The particular sources that we looked at, I would say no.

Q. Can we turn to a slightly different subject covered in your report, Professor Fortescue, the loans-for-shares auctions.

Paragraph 131 of your report is where you make the point that I want to ask you about G(B)1/1.01/37.

What you say here is that in all cases of which you are aware, lenders who prevailed in loans-for-shares auctions ended up by acquiring large holdings of their own when the state's holdings were privatised or sold off by way of enforcement of security for the loans. Is that a fair summary of the point you are making?

A. No, the point I'm making -- perhaps I didn't quite understand your question, but the point I'm making in point 131 is that they were able to obtain shares through loans for shares, but they also obtained shares in other ways, and sometimes obtaining those shares in other ways provided them with the majority shareholding. Well, let's say obtaining shares through other ways plus obtaining shares through loans for shares provided them with a majority shareholding.

- Q. Are you under the impression, Professor Fortescue, that the loans-for-shares auctions were auctions in which it was possible for the successful bidder to obtain shares in the company in question?
- A. Yes, I --
- Q. That's your impression, is it?
- A. Yes.
- Q. So you're not aware that the loans-for-shares auctions were -- in fact what the successful bidder obtained in the loans-for-shares auctions was simply a pledge of the state's 51 per cent retained holding and a contractual right to manage the rights associated with that holding on behalf of the state?
- A. Yes, of course -- well, it wasn't always 51 per cent.
- Q. No, it wasn't.
- A. Obviously, clearly, the first stage of the loans for shares gave them that status that you've just described, and then the second stage, they obtained full ownership of the shares.
- Q. Well, you say the first and the second stage, the only stage of the loans-for-shares auction was an auction in which the successful bidder acquired, in the case of Sibneft for a period of three years, a pledge and a right to manage the rights associated with the state's holding of 51 per cent, and that was all, do you not

agree?

A. Could you say that again?

Q. The only right that the successful bidder obtained in a loans-for-shares auction was a pledge of the state's retained shareholding and a right to manage the rights of the state's shareholding on its behalf?

A. Yes. The result of the auctions were that.

Q. The sales by which the state transferred title to its shares were the separate sales in which the non-retained part of the state's initial holding was auctioned off, and that was a separate process, wasn't it?

A. No, the shares that were held in pledge were auctioned off in the second stage.

Q. Professor Fortescue, you may not be aware of the details, but let me summarise them and see how much you're familiar with them.

There are three stages, are there not? First, you have the loans-for-shares auction in which nothing is transferred, no property in shares is transferred, what is transferred is a pledge and a right of management.

A. Yes.

Q. Right. Then there is separately from that a sale of the non-retained shares, that's to say in the case of Sibneft the loans-for-shares auction conferred a pledge of 51 per cent, and in a separate process there was then

an auction of the 49 per cent that was being privatised?

A. Yes, okay.

Q. Then there's a third stage: if and when the state defaults on the loan --

A. Yes.

Q. -- then there is a realisation of the pledge which leads to an auction of the 51 per cent?

A. Yes.

Q. And those are three separate processes?

A. And the second process that you referred to might have been in between the first and the third, it might have been before the first, it might have been after the third.

Q. Indeed. Now, the suggestion has been made in this litigation on behalf of Mr Berezovsky that because all the other loans-for-shares auctions were followed by the acquisition by the lender of the actual title to substantial parts of the company's equity, then it is likely that Mr Berezovsky also did that.

Now, that's not a point that you make in terms in your report. Is it a proposition that you would support?

A. Could you say it again, please?

Q. The suggestion that has been made is that because all the other loans-for-shares auctions were followed by the

successful lender acquiring title to the shares, it is likely that the same was true of Mr Berezovsky, do you follow the point that's being made?

A. Hmm.

Q. Is that a point that you would support or is it a bit simplistic?

A. I haven't looked precisely -- well, I didn't see it as part of my function, to be honest, to look precisely at the Sibneft option, but, yes, I think that was likely.

Q. What do you think is likely?

A. That the same process would happen in Sibneft case as happened in the others.

Q. Well, when you say in your report:

In all the cases of which [you are] aware, the lenders who were successful in a loans for shares deal were also able to obtain further shares in the other sales so as to take ownership control ..."

When you say that, how large a sample are we talking about?

A. The major ones, the major loans for shares, the major resource companies that we're talking about.

Q. How many?

A. Well, if I look at my table, approximately seven.

Q. Well, there were only five cases, were there not, in which large stakes in companies that had been included

in the loans-for-shares programme were sold off by the state, they were Sibneft, Sidanko, Norilsk Nickel, Yukos and Surgutneftegas, would you agree? Five.

A. Yes. Five.

Q. In only two of those cases, is this right, namely Sibneft and Sidanko, were majority stakes sold off, would you agree?

A. In loans for shares?

Q. Yes -- well, no, majority stakes sold off of companies which had been included in the loans-for-shares scheme. Only in the case of Sibneft and Sidanko were majority stakes sold off in companies included in the loans-for-shares scheme?

A. Majority stakes sold off other than through loans for shares.

Q. Well, no shares were sold off through loans for shares itself, but if you take the companies included in the loans-for-shares programme, there were only two of them, a majority of whose shares were sold off in other sales.

A. I would just like to say one thing, it's just been for purposes of, well, convenience; when I say loans for shares, I do mean the two stages.

Q. Well, I'd like you to differentiate between them, Professor Fortescue, because the difference is actually quite important to the issues in this case.

A. Okay.

Q. We've agreed that there were three processes, there were the loans-for-shares auctions themselves and there were also what you refer to at paragraph 131 as the other sales through which it might be possible to obtain ownership control, okay?

A. Okay.

Q. I am differentiating between those two and I would like you to do so.

A. Can I just absolutely clarify, when I'm saying "other sales", I do not mean the sales of the shares that had been pledged. I mean sales of shares through other means, through investment tenders and so on and so forth.

Q. Well, there were two ways in which you could obtain ownership of shares in the companies included in the loans-for-shares programme, weren't there? Where a proportion of the state's shareholding was privatised, they were sold at auction and you could buy them at that auction, is that right? That was one way?

A. That was one way, yes.

Q. The other way, or another way, was that if the state defaulted on the loan which was secured by the pledge, there would then be an enforcement sale also by auction at which you could bid?

A. Again, I'm not absolutely confident that we're talking about the same thing. We did talk about those three stages and I'm clear on that. The second stage that you refer to, that is selling shares in ways that had nothing to do with loans for shares, they were through investment options, investment tenders, sometimes small proportions of shares were sold to workforces, under the general provisions of the privatisation programme.

Q. Yes.

A. So if we -- when we say loans for shares, we're talking about those initial options of the shares that were put up for sale through this programme.

Q. No, Professor Fortescue, we're not. Loans for shares were auctions of the right to make loans in return for a pledge of the shares. You agree?

A. Yes.

Q. Right. Now, I want to find out from you what your understanding is about the way in which you could obtain not just a pledge or a right of management but ownership of shares formally owned by the state.

A. Okay.

Q. One way was that you could bid in an auction for a proportion of the shares that the state had decided to privatise?

A. Yes.

Q. In the case of Sibneft, 49 per cent.

A. Yes.

Q. Agreed? Another way was that if the state defaulted on the loan --

A. Yes.

Q. -- as it, in most cases, did, you could bid in the sale of the shares that had been pledged which would then be sold by way of realisation of the security?

A. Yes.

Q. A third way I suppose is that you could buy them in the secondary market created by existing holders of privatised shares selling them, or by workers selling them if it was sold to the workers?

A. Yes.

Q. Right?

A. Yes.

Q. Any other methods?

A. Well, in that first category you referred to selling shares at auctions other than loans-for-shares auctions. There were other ways, investment tenders and so on, but I take your point. I think we are on the same wavelength.

Q. Okay. Well now, if you take the companies that were included in the loans-for-shares scheme, the companies in respect of which the state pledged part of its

holding in return for loans, right, there were only two of those companies, were there not, a majority of whose shares were in due course sold off by the state by whatever method, and they were Sibneft and Sidanko, do you agree?

A. Yes.

Q. Now, Mr Potanin's Onexim Group acquired Norilsk Nickel and Sidanko, did it not?

A. Yes.

Q. And Mr Khodorkovsky's Menatep Group acquired Yukos?

A. Yes.

Q. So we've got two oligarchs who provided loans for shares and who subsequently obtained a controlling stake in the companies which had been partly pledged to them, is that correct?

A. Yes.

Q. Surgutneftegas was acquired by its existing management, wasn't it, for red directors?

A. That's generally believed to be the case and I would certainly accept that as being the case.

Q. Right. So we've looked at how Mr Potanin acquired control of Norilsk Nickel and Sidanko, and how Mr Khodorkovsky got control of Yukos. Surgutneftegas was sold to the red directors, and the fifth case was Sibneft.

So the point being made about the likelihood of Mr Berezovsky acquiring ownership of shares is based, is it not, on just two examples of other oligarchs, Mr Khodorkovsky and Mr Potanin, agreed?

A. Yes.

Q. Now, are you really saying that because Mr Khodorkovsky and Mr Potanin prevailed in loans-for-shares auctions, and then went on to acquire controlling shareholdings of the relevant companies, Mr Berezovsky is likely to have done the same?

A. I'm not saying anything about what Mr Berezovsky is likely to have done.

Q. You're not?

A. No.

Q. I see. Would you agree that there was one significant difference between Mr Berezovsky's position and that of Mr Khodorkovsky and Mr Potanin, namely that Mr Khodorkovsky and Mr Potanin wanted to manage and build up the companies that they acquired? Would you agree that that was true of them?

A. I would say that's true of them.

Q. Mr Berezovsky, by comparison, had no particular desire to manage and build up an industrial group, did he?

A. I don't know.

Q. You don't know?

Now, one of the journalistic sources that you regard as particularly reliable is Chrystia Freeland, is that right?

A. Yes, I find it quite a good source.

Q. Yes, well you describe her as particularly good and reliable in paragraph 24.3 of your report.

A. Yes.

Q. Now, could you please turn to bundle G(B)4/1, please, at flag 7. This is her best known book I think, "Sale of the Century"?

A. Yes.

Q. About privatisation and loans for shares basically.

A. Flag 7, just a moment.

Q. If you've got flag 7 of G(B)4/1 you should be looking at an extract from that book.

A. I don't think I am.

Q. G(B)4/1.

A. Oh, I've got G(A).

Q. Well I'm not going to cross-examine you, you'll be glad to hear, about Russian law.

A. I did see that it was a Russian decree and I did get a bit nervous.

Q. I think we've all had quite enough of the Civil Code.

A. That looks better.

Q. Okay, flag 7, please?

A. Yes, I have that.

Q. Now, could we turn to page 46 in the bundle numbering G(B)4/1.07/46, page 128 of the book, I'm sorry, that this is rather small print too.

A. No, I can see that okay.

Q. Right. Now, this is a page, page 128 in the book numbering, which is about Mr Berezovsky. I won't ask you about his appearance, of which there is a rather odd description in the second full paragraph:

"Like most of the future oligarchs, by the late 1980s he had begun to dabble in the private sector. Like all of them, he built up his capitalist fortune using bricks -- often entire walls and buildings -- torn away from the decaying edifice of the Soviet State. But while most of Berezovsky's colleagues and competitors were empire-builders, hoping to found business dynasties which would endure for generations, he was a corporate nomad who danced from one venture to another, amassing money and influence along the way but always eventually pulling up his tent and moving on."

Is that an assessment of his business methods which you would endorse, or do you not know one way or another?

A. No, Mr Berezovsky has never been a major source of attention in my research and I certainly didn't write

about these aspects of his behaviour in my report.

Q. I see. Michael Ellman, is he another academic whose work you have a high regard for?

A. Yes, I do.

Q. Now, he identifies, doesn't he -- I think you refer to this at paragraph 265 of your report G(B)1/1.01/72 and you cite him in support of your view about the existence of a parasitic or predator state in Russia in the 1990s.

A. Yes.

Q. Mr Ellman identifies, doesn't he -- and perhaps we can turn to the work that you cite, it's G(B)2/6, flag 174 G(B)2/6.174/80.

This is an article entitled "The Russian Economy under [Yeltsin]". Mr Ellman cites a number of characteristics of what he calls the mutant economy of Russia under Boris Yeltsin. He lists them under the heading "Systemic change" where he says, four lines up from the bottom of the first page:

"Eight aspects of this mutant system were of particular importance."

Can I direct your attention to the first two which are summarised at the very bottom of page 80 and down to about halfway down page 81.

A. "Eight aspects of this mutant system were of particular importance", yes, I see that.

Q. The first two -- the first is:

"... the lack of an efficient state apparatus and the presence of a parasitic one. The collapse of the USSR and the creation of an independent Russia did not spawn an efficient state apparatus. Russia at the end of the [Yeltsin] era lacked a state that could reasonably be seen as [a] defender of the public interest. It had officials, who temporarily held particular positions, but they saw their offices largely as ... private fiefdoms from which they could temporarily enrich themselves. Appointments were frequently made for political or financial reasons and had little to do with technical or administrative qualifications."

He says later in that paragraph:

"This may be a major cause of the far greater ... depression in Russia than in Poland..."

Would you in general accept that characterisation of the Russian economy in the 1990s?

A. Yes. With only one, I think, qualification.

Q. Yes?

A. When it says "It had officials, who temporarily held particular positions..." and goes on, I wouldn't interpret that as meaning that all officials behaved in such a way.

Q. No, and I don't think that that's what Mr Ellman is saying.

The second characteristic that he identifies is:

"... the importance of opportunistic behaviour...

At all levels the important thing was control over economic resources (rather than formal ownership). In particular, the control over cashflow and the possibility of diverting it into one's own (foreign) bank account (or that of an entity under one's ... control) or using it to finance one's own luxury consumption was particularly important. It is characteristic of the situation that in 1998, prior to the 17 August crisis, the banks exported capital on a large scale, and immediately after the crisis transferred their remaining assets to other entities controlled by the banks' controllers, thereby robbing creditors."

Now, would you accept in general terms that the second characteristic which Mr Ellman identifies was a fair characterisation of the Russian economy in the 1990s?

A. Yes.

Q. Now, one of the non-journalistic sources on which you place particular reliance, Professor Fortescue, is a research paper of September 2000 written for the

World Bank by Joel Hellman and two of his colleagues.

Do you remember referring to that?

A. Yes, I do.

Q. Can we look at that at bundle G(B)2/6.

MRS JUSTICE GLOSTER: Give me the paragraph number in Professor Fortescue's report where he addresses this.

MR SUMPTION: It's G(B)2/6, flag 175 G(B)2/6.175/96. If I can just enquire of the witness who Mr Hellman is.

Is it right, Professor Fortescue, that the World Bank has for many years taken a particular interest in the economic effects of political corruption in opaque or closed political systems?

MRS JUSTICE GLOSTER: Sorry, Mr Sumption, I asked you the paragraph number in Professor Fortescue's report.

MR SUMPTION: I see. I'm sorry, my Lady.

MRS JUSTICE GLOSTER: It's just so that I can note it by the statement, the proposition he relies upon it for.

If you can't tell me now, tell me at 2 o'clock.

MR SUMPTION: Paragraph 35 G(B)1/1.01/12.

MRS JUSTICE GLOSTER: Thank you very much. In the first report?

MR SUMPTION: Yes.

My Lady, I think I'm going to be about five minutes, perhaps a little bit more with this witness. Would you like me to continue?

MRS JUSTICE GLOSTER: Yes, why don't you continue.

MR SUMPTION: Professor Fortescue, it's right, isn't it, the World Bank has for many years been interested in the economic effects of political corruption in opaque or closed political systems?

A. Yes.

Q. And they have a special section which has made a special study of this in different jurisdictions?

A. I'm prepared to believe you on that.

Q. Mr Hellman is a senior officer of the governance and public sector group of the World Bank which is concerned with these matters, is he not?

A. He was when that paper was written.

Q. Yes. Now, in dealing with the influence of wealthy businessmen over the government in Russia in 1990, I think that you have placed some emphasis on this particular paper?

A. Well, I cite it. I'm not sure that I give particular emphasis to it but I certainly cite it.

Q. Now, if you look behind flag 175 G(B)2/6.175/96, which is the article entitled "Seize the State, Seize the Day", Mr Hellman has developed, has he not, the concept of state capture as distinguished from petty administrative corruption.

If we look at page 99 of this article which is part

of the abstract G(B)2/6.175/99.

A. Yes.

Q. After the first break in the page:

"We unbundle the notion of corruption and in particular examine empirically the phenomenon of state capture on the basis of data from the 1999 Business Environment and Enterprise Performance Survey ... We contrast state capture with two other types of relationships between firms and the state -- influence and administrative corruption. Whereas state capture refers to the capacity of firms to shape and affect the formation of the basic rules of the game ... through private payments to public officials and politicians, influence refers to the same capacity without recourse to such payments. Administrative corruption refers to so-called 'petty' forms of bribery in connection with the implementation of existing laws, rules and regulations."

Now, that's a distinction which Mr Hellman is very well known for making when dealing with corruption, isn't he?

A. Yes.

Q. And his assessment is that Russia and the Ukraine have the highest state capture indices in all the regions studied in this paper, which essentially concerns

Eastern Europe. That's right, isn't it?

A. Yes.

Q. And is that an approach which you endorse? I understand from paragraph 35 that it is.

A. I'll have a look at paragraph 35 to make sure what it is that I endorse.

Q. You cite it, I think perhaps you need to look at 34 to 39, you are citing it in the context of the influence of the oligarchs over the Russian State.

A. Mm-hm, yes.

Q. Which I think you regard as a form of state capture in Mr Hellman's dichotomy, do you not?

A. Well, yes.

Q. You identify Mr Berezovsky as being prominent among the oligarchs responsible for state capture at paragraph 46, do you not?

A. Yes.

Q. Would you accept Mr Hellman's characterisation of state capture as a serious form of corruption?

A. State capture, yes, as he defines it, state capture, yes. I think that access and influencing of government is not necessarily corruption but, yes, I'd agree with that.

Q. But state capture of the sort Mr Hellman is talking about, and that you're talking about at paragraphs 34 to

39 and 46, that is a form of corruption, is it not?

A. Yes, I would say so.

Q. One last matter, Professor Fortescue, Chechnya is part of Russia, isn't it?

A. It is.

Q. Russia is a member of the Commonwealth of Independent States?

A. Yes.

MR SUMPTION: Thank you.

MRS JUSTICE GLOSTER: Right. Do you have any questions?

MR ADKIN: My Lady, I will have some questions.

MRS JUSTICE GLOSTER: Fine. I'll sit again at 2.05.

You understand, Professor Fortescue, that you mustn't speak about your evidence or the case with anybody, or communicate with anybody over the lunchtime?

THE WITNESS: Yes, I understand.

MRS JUSTICE GLOSTER: Very well. 2.05.

(1.03 pm)

(The short adjournment)

(2.05 pm)

MR SUMPTION: My Lady, before we resume, could I just raise a point on this morning's transcript which relates to [draft] page 42, line 7.

This is part of Mr Rozenberg's re-examination, and I asked him the question based on a hypothesis about

a financial benefit being dependent upon the decision of a state official. In line 7, the words "favourable court decision", the word "court" does indeed appear on the tape and therefore quite properly on the transcript. That was a mistake on my part.

I have discussed this with Mr Rabinowitz who agrees that it is obvious, and must have been obvious to the witness, that I wasn't talking about a court decision but a decision of the state official, see the earlier part, and he is content that the answer should be read on that footing without the need to recall Mr Rozenberg to clear up this particular glitch.

MRS JUSTICE GLOSTER: Let me just read the answer. I didn't pick it up at the time.

MR SUMPTION: No, neither did I, and I was pretty surprised when it was pointed out to me that the word "court" was there. But we have checked on the tape and I did indeed say that, not intentionally but I certainly said it.

MRS JUSTICE GLOSTER: Well, he picks up the words "in obtaining favourable governmental decision".

MR SUMPTION: Indeed. So I think it's common ground that the answer can be read as if the word "court" wasn't there which it obviously wasn't meant to be.

Mr Rabinowitz isn't here, but I discussed this with him this morning and no doubt the transcript of what

I've just said to your Ladyship will be drawn to his attention.

MRS JUSTICE GLOSTER: Mr Gillis, that is all right, is it?

Or you weren't party to any of these discussions?

MR GILLIS: My Lady, I wasn't a party to the conversation but I don't think I needed to be, and I'm very happy to take it on the basis that that's what was discussed and agreed.

MRS JUSTICE GLOSTER: Very well.

Nobody else has any objections? Very well, the transcript shall be deemed to be read in that way.

MR SUMPTION: I'm grateful.

MRS JUSTICE GLOSTER: Right, Mr Adkin.

Cross-examination by MR ADKIN

MR ADKIN: Professor Fortescue, could you please turn to paragraph 272 of your first report, which is at page 74.

For the transcript that is G(B)1/1.01/74.

Do you have that?

A. I have page 74.

Q. Paragraph 272 sets out various statements which relate to informal arrangements in 1990s Russia. Would you look, please at statement 14.

A. Yes.

Q. You agree with that statement, do you not? If it helps you, you deal with these statements at paragraph 274.

A. Yes, I agree.

Q. Now could you please turn to paragraph 276

G(B)1/1.01/75 which reads as follows:

"In his book, 'Violent Entrepreneurs', Volkov notes that if pressed former Soviet managers might turn to the arbitrazh court but, especially before 1996, new entrepreneurs were reluctant to do so and were more likely to turn to criminal protection or resolution in the event of disputes over their business arrangements."

I think you quote Volkov over the page.

Now, you've put that in your report, I assume that is because you agree with that?

A. I agree with particularly the part about the new entrepreneurs. I'm less certain myself in terms of my own knowledge about what former Soviet managers might have done.

Q. Okay, well don't worry for these purposes about former Soviet managers, let's just focus on the new entrepreneurs.

You've said elsewhere in your report that you consider the court system, that is the Russian court system in the mid-1990s, to have been corrupt and that the legal system at that time was uncertain, and that there were major problems at that time in enforcing court judgments even if they could be obtained. Is that

a fair summary of your evidence?

A. Yes, I think that's a fair summary.

Q. Now, am I right in assuming that a reason why new entrepreneurs in the early to mid-1990s used forms of protection and resolution of their differences outside the legal or court system is because they did not consider that the legal system in Russia at that time was effective to protect their interests?

A. Yes, that's correct.

Q. Now, I want to understand, if I may, how your conclusions on that relate to your conclusion that Russian businessmen during that time, that is to say the early to mid-1990s, often failed to document their arrangements. I think your evidence is that they held various assets in informal arrangements and they made their agreements orally. That's your evidence, isn't it?

A. Yes.

Q. Do you say that Russian businessmen at that time adopted an informal rather than legally documented approach to their arrangements because, amongst other reasons, they did not contemplate that disputes over their arrangements would end up being resolved by the courts?

A. Yes, because they weren't confident that the courts would deal with them properly.

Q. I understand. Could you turn, please, to paragraph 83 of your report which is at page 25 G(B)1/1.01/25.

A. Yes, I have it.

Q. You have that, thank you. You talk here about the period after the resignation of President Yeltsin on 31 December, and I think my learned friend touched on that in his cross-examination. You say that Putin was not elected president until 26 March 2000 or inaugurated until 7 May 2000. Accordingly, for most of that period, that is to say December '99 to 26 March or May 2000, Putin was acting president rather than president.

"However, it was all but certain that Putin would become President, and I do not think that the distinction made any significant difference to his authority."

Now, I want to understand, if I may, why you say it was all but certain during that period that Putin would become president, would be elected?

A. There was a high expectation that he would win the election. He was genuinely quite popular at the time. A party that he had supported had won a parliamentary election I think in December 1999, so even on, let's say, electoral grounds that we might understand in this country, it was expected that he would win. There would be those who thought that there might be other

considerations that would help him win regardless of his popularity.

Q. And when you say it would be expected, do you mean it was expected generally within Russia at that time that he was going to win the presidency, from the time that he took over as acting president at the end of 1999?

A. Yes, I would say that.

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

MRS JUSTICE GLOSTER: Thank you very much.

Mr Gillis.

Re-examination by MR GILLIS

MR GILLIS: Professor Fortescue, you were asked about journalistic sources and the difficulties of establishing the position without access to archives, do you recall that?

A. Yes, I do.

Q. And I think you indicated that, despite the fact that it was difficult, there were circumstances in which you could be confident with various degrees of certainty as to the factual position?

A. That's correct.

Q. Now, could you please explain to the court what is the analytical process that you apply to the journalistic sources that you looked at in order to determine whether or not you felt you could rely upon those sources?

A. The first thing to say of course is that I wouldn't rely, if I possibly could use other sources, just on journalistic sources, and usually there is something else that you can rely on, and I might come back to them after I've spoken about the journalistic sources. But if I looked at a journal article or, more commonly, a newspaper article, I would obviously look to see which newspaper it was published in, and there are some that I would regard with greater regard than others and more likely to be protected from some of the difficulties that we talked about previously, earlier today.

To some extent I'd look at the journalist. I mean, in my own field, I work much more in the mining and metals industry, and there are journals that I read regularly, and I come to rely on particular journalists. But I also would look at the format of the article.

I'll take the newspaper Vedomosti, because it is perhaps the best example of this practice, but others follow it the same way, but Vedomosti is almost formulaic in the way that it presents its articles. It will have a section where it presents purely factual material, it might be statistical, it might be references to legislation, so you have -- usually down the side of the article. Usually they will cite some sources, often those sources will be "unnamed Kremlin

source" or something like that, in the same way that we're used to in western newspapers. Sometimes, of course, those references to "unnamed Kremlin source" is just as frustrating as they are if you read the same thing in an English newspaper: well, what does that mean? We have to try and understand what it means.

Generally then there will be, let's say, the journalist's statement on what the -- the information that they're trying to get across, and I suppose that might be where some of the difficulties might be. Usually Vedomosti and most other newspaper articles, in what I would call the respectable newspapers, will then cite or quote some independent experts, quite often they will be people in a more politically oriented article, say, from a think-tank of some sort, or somebody well-known as a political commentator. If it was a more economics oriented type journal, very often they cite people who work for investment banks, investment bank analysts and so on and so forth.

So in that one article you have those -- you have something to go on. It's not just somebody blathering on, if I may use that word; you have something to go on on where they're claiming that the information and the interpretation came from.

Then hopefully you will read other newspapers that

will present things in the same way, and sometimes they say exactly the same thing, sometimes they say very different things. Obviously, if all the newspapers always said exactly the same thing, well, you probably wouldn't need to read very many of them, and you would suspect that there was something going on. But normally they do say different things, and then it's my task as an analyst to try and decide which is the most plausible, believable view.

As I said at the beginning of my answer, that's not the only sources that I rely on. Obviously you can learn quite a lot, not just factual material and things that are undoubtedly true, like President Putin said at a press conference, but the way that that official material is presented can give you insight into how believable the newspaper articles might be.

Also, I live in Australia and I get to Russia every now and then. I suppose I sit in Australia reading newspapers most of the time because I don't have any other great sources, also the official websites of the president and the prime minister and so on. I form a view, and when I go to Moscow, not in any terribly formal way I would say, but I just go along and I ask sometimes casually, they might not even realise that I'm trying to check up, I ask people that I think would know

about these things through personal experience or close links to those places, just to get a sort of check on whether the impression that I've already formed is correct or not.

So that's basically the way that I would go about forming an opinion.

Q. Thank you.

You were asked about the difficulties of establishing share ownership where there were opaque structures, do you recall that?

A. Yes.

Q. Could I ask you to turn to paragraph 152 in your first report which we have at page 41 G(B)1/1.01/41.

A. Yes.

Q. And the table there shows for each of those six companies which were involved in those loans for shares, can you see in relation to what you have described as being the "Winning group and bid, stage 1", and then the "Winning group and bid, stage 2", which we see at the top of the table.

A. Yes, I can see that.

Q. In relation to each of those companies, you've indicated the person who you have described as being the key individual?

A. Yes, that's correct.

Q. Can you see that?

A. Yes.

Q. Could you explain what you mean by "Key Individuals" there?

A. Those are the people who were presented -- presented themselves or were presented at the time as being, well, I think I can say the majority shareholders, the dominant person in those particular firms. And I would say that subsequent events, well, at the time we are quite confident that those were the right people, and certainly nothing happened subsequently to change our mind -- or change my mind, sorry.

Q. Could I ask you this: so far as you are aware, is there any body of opinion that suggests that these two stages, these were not the key individuals that were involved?

A. No. I know of no other opinion.

Q. Thank you. It was put to you that no businessman had a privileged position of influence with the Kremlin since President Putin came to power.

A. Yes.

Q. Are you aware of any examples of businessmen, and please leave aside Mr Abramovich because he's the specific subject of this dispute, are you aware of examples of businessmen who appear to have a privileged position and ability to influence the Kremlin?

A. During the Putin presidency?

Q. Yes.

A. Yes.

Q. Could you identify them and explain how you believe they have benefited from their relationship with the Kremlin?

A. The benefits that the oligarchs received -- and when I say oligarchs, I'm talking generally -- under Mr Putin, sometimes they were collective, such as changes to the taxation system, changes to resource legislation.

In terms of specific benefits to particular individuals, it's not always easy to identify, whether that was because they were friends or had a relationship to Mr Putin or not, or whether it was simply the way things went commercially. I would say in that period, Mr Putin did work to at least give the appearance that he was not giving particular preference to specific individuals, and most of the appearance of benefits were collective benefits.

Q. Are you happy to name individuals that you say fall within this category?

A. Yes, I would say Mr Potanin, I would say Mr Alekperov, I would say all those people who benefited ultimately from loans for shares, as one way of describing them.

Q. Now, you were asked, in the context of the suggestion

that Mr Abramovich had influence, you were asked to look at an article by Professor Sakwa.

A. Yes.

Q. Do you recall that?

Could you be provided with bundle G(B)2 and turn to tab 2, flag 27. You were asked to look at [book] page 130 G(B)2/2.27/234.

A. Thank you.

Q. You were asked what in this article supported your view that Mr Abramovich had influence with Putin. You were asked to read the first full paragraph, I think.

MRS JUSTICE GLOSTER: It's page 234 for the transcript.

MR GILLIS: I'm obliged, for the transcript it's page 234, and page 130 in the book.

I think you were asked to read the paragraph that began "Abramovich at this time", do you see that?

A. Yes.

Q. Could I ask you just to look towards the end of that paragraph?

A. Yes.

Q. About five or six lines from the bottom, which reads:

"In September 2005..."

Just read to the end of that.

A. Yes:

"In September 2005 --"

Q. I'm sorry, just read it to yourself, that will be fine.

A. Sorry. (Pause)

Yes, I've read it.

Q. Re-reading that last part, does that assist you at all in terms of what parts of this article you were relying upon for the purposes of your report?

A. Yes, I think that helps.

Q. Could you explain to the court why you say that?

A. Because it discusses Abramovich's relationship with the authorities and the benefit that he was able to achieve -- gain from that.

Q. Could I then ask you to go back to your report, which we have at G(B)1/1, and go back to paragraph 131 which we have at page 37 G(B)1/1.01/37.

A. Yes.

Q. You were asked about the loans-for-shares scheme and you referred to the two stages.

A. Yes.

Q. Could I just ask you to clarify what you were meaning by the two stages?

A. Yes. Again, what I call loans for shares, there were indeed two stages. At the first stage, companies bid for a certain -- bid to gain management rights over a certain number of shares that would be held in security by that company after the company had loaned

the state a certain amount of money, and until such time as that money was repaid that company would have management, operational management control, over those shares. I don't know the precise legal terms, I'm sorry, but we would say held as a security. The second stage came into operation if the loan was not repaid by the state, in which case those shares would be put up for auction in order to collect the money that could be used to pay off the debt.

As it happened in practice, the same company that won the initial auction, so held the companies -- held the shares, sorry, in security, and managed the companies on that basis, they won the option when the loans were not repaid. So at that stage they gained ownership of those particular shares.

Q. In the event of a default on the loan, such that there was to be a subsequent auction, can you assist with who organised that auction?

A. In each case, as it happened -- no, sorry, I'll start again.

The company that held the shares in security organised the auction.

Q. Thank you. Moving on, it was put to you by reference to looking at paragraph 129 of your report that only two of the loans for shares were of a majority stakeholder, and

that was the case of Sidanko and Sibneft, do you recall that?

A. Yes, I do recall that.

MR SUMPTION: No, what was actually put was that in only two cases was a majority of the state's holding disposed of.

MR GILLIS: I accept the correction.

Could I ask you to be provided with bundle E5, and could I ask you to turn to tab 14 and page 169.

A. I don't have the file yet.

Q. No, that's fine. So that's E5, tab 14, at page 169 E5/14/169. This is the witness statement of Mr Shvidler. Can I ask you to look at paragraph 17?

A. Yes.

Q. There, as you see, Mr Shvidler is suggesting that:

"... in the case of Norilsk Nickel, the 38 per cent ordinary voting shares put up for sale gave 51% voting control because its share capital included also non-voting preference shares".

A. Yes, I see what he said there.

Q. Are you able to indicate whether, to your understanding, what Mr Shvidler says there is correct or not?

A. That is my understanding, yes.

Q. You were asked some questions about state capture.

A. Yes.

Q. And it was suggested to you that in paragraphs 34, 39

and 46 of your first report, so maybe we can just turn those up G(B)1/1.01/12.

A. Yes, I have them.

Q. I think it was being put to you that in paragraphs 34, 39 and 46 of your first report, you were talking about state capture as described by Hellman, do you remember the article -- the working paper that we had looked at?

A. Yes, I do.

Q. Now, could you please look at paragraph 34, and could I ask you this. Do you there describe this as state capture?

A. No, I don't use the phrase there "state capture".

Q. And can I ask the same in relation to paragraph 39?

A. No, I don't use the phrase there "state capture".

Q. And paragraph 46?

A. No, I don't use the phrase "state capture" in that paragraph.

Q. Can I ask you whether, in those paragraphs, the oligarchs' influence which you're describing, were you describing that in the sense of state capture, in the specific sense defined by Mr Hellman in his report, or not?

A. No, I wouldn't say in that very, very specific sense, no.

Q. And then finally, Mr Adkin asked you about informal

agreements?

A. Yes.

Q. And difficulties in enforcing agreements through the courts because of the weaknesses in the legal system.

A. Yes.

Q. Are you able to assist, and say if you're not, whether businessmen regarded informal agreements of that nature, or oral agreements of that nature, as being binding or nonbinding?

A. I would expect that they considered them to be binding.

MR GILLIS: Thank you. I have no further questions.

MRS JUSTICE GLOSTER: Thank you very much indeed, Professor Fortescue, for coming along and giving your evidence.

THE WITNESS: Thank you, my Lady.

(The witness withdrew)

MS DAVIES: My Lady, we call Professor Service.

PROFESSOR ROBERT SERVICE (affirmed)

MRS JUSTICE GLOSTER: Do sit down.

Examination-in-chief by MS DAVIES

MS DAVIES: Professor Service, could you be given bundle G(B)3 and G(B)6, please. Starting in bundle G(B)3, could you turn to tab 1 at page 1 G(B)3/1.1/1, do you see the first page of your first expert report?

A. I do.

Q. If you could turn on in that tab to page 30, please, is that your signature?

A. That is.

Q. Then if you could turn to tab 2, you should see the first page of your second expert report G(B)3/1.2/36, and at page 38 do you see your signature?

A. On page 3 I see my signature.

Q. Page 3 of the internal numbering, page 38 of the right-hand corner?

A. I see, yes. Yes, indeed, yes.

Q. Can you confirm that the contents of both of those reports represent your true opinion?

A. I can indeed.

Q. If you could then take bundle G(B)6 at page 1 G(B)6/1.01/1, you should find the contemporary history experts' joint memorandum, do you have that?

A. Correct.

Q. If you turn forward to page 26, can you see your signature on that page?

A. I can, yes. Yes.

Q. Can you confirm that so far as opinions are attributed to you in this joint memorandum, they represent your true opinion?

A. I can confirm that.

MS DAVIES: Thank you very much, Professor Service. There will be some questions from Mr Gillis.

Cross-examination by MR GILLIS

MR GILLIS: Professor Service, good afternoon.

A. Good afternoon.

Q. Can I make it clear that no one doubts your expertise, but could I start by asking about your publications, and I think they are listed in appendix 2 of your report, so that's G(B)3?

A. Right.

Q. I think they're listed at page 34 G(B)3/1.1/34.

So can I just take this point quite quickly. You are the author of the Penguin History of Modern Russia, is that correct?

A. That is correct.

Q. And that's a general history of Russia from 1900 to the present day, is that correct?

A. Well, to the year 2009 when it was published. I'm not a futurologist.

Q. I accept that, and I think there were editions of the book in 1997, 2003 and 2009?

A. That's absolutely correct.

Q. In the most recent edition, is this correct, that the book now has three chapters running to about 50 pages which covers Russian history from the end of the Soviet

Union to 2009?

A. That's correct, and it has an afterword that rolls up the whole of the 20th century with the 21st century.

Q. Turning to your recent publications of books on specific subjects, I understand you have recently published a new book called "Spies and Commissars: Bolshevik Russia and the West"?

A. Yes, three weeks ago.

Q. So that's a book about the relationship between the Soviet Government and the western powers in the years up to 1917?

A. No, the book is about the years 1917 to 1921.

Q. I'm sorry. So it's in the years after 1917 but it doesn't touch post-Soviet history?

A. No, if you want my books -- my book that touches post-Soviet history, you would have to choose "Russia: Experiment with a People", which is specifically about that topic.

Q. That's what I was just going to come on to. But just looking through the rest of the published works, there was a biography on Trotsky in 2008, that's correct?

A. That's correct, yes.

Q. And before that you published a book called "Comrades! A World History of Communism", in 2007?

A. I did.

Q. There was a biography of Stalin in 2004?

A. That's correct.

Q. And in 2002 I think is when you published your only book which was focused specifically on post-Soviet Russian history, and that, as you said, is "Russia: Experiment with a People"?

A. That's correct, yes.

Q. Then going back, biographies on Lenin?

A. Yes.

Q. And in 1996 you published a history of the Russian Revolution from 1900 to 1927?

A. Well, it was the fourth edition of -- this is something I published years and years ago but that was its third edition, and I've now brought out a fourth edition, yes.

Q. And then before that you were engaged in a three-volume biography of Lenin?

A. Not quite correct. If you want to be absolutely pedantic about it, I didn't call it a biography because at that stage you couldn't get access to archives on Lenin, so I called it a political life. It was a study, in other words, of the political activity of Lenin. I do believe that archives and documents are important in the study of history.

Q. Well, we'll come on to that. Now, Professor Service, I'm not in any way suggesting that you don't have

relevant expertise on topics you address, but is it fair to say that, while you have written about post-Soviet history, the main focus of your writing has always been the Communist period, particularly Lenin, Stalin, and Trotsky, is that fair?

- A. I think if you look at my research over the period when I've had jobs, I have always had a commitment to looking at the whole of the modern Russian historical period as a whole. I'm very much against this chopping up of periods into little patches of time. It's very much my contention that in order to understand any number of years in modern Russian history you do have to have the big picture.

While it is true, however -- and I hope I'm not being too over-pedantic here -- while it is true that most of my books have been from the Soviet years, I was the co-founder of first the Soviet press group at the School of Slavonic Studies, and then of the post-Soviet press group, a group that met every single week to look at all of the newspapers that we could possibly get hold of in order to keep ourselves abreast with what was going on in the last years of the Soviet Union and the first years of the Russian Federation.

So I've always tried to unify a study of the contemporary Soviet or Russian scene with my earlier

interests. And I think this is the healthiest way of dealing with questions of Russian history.

MRS JUSTICE GLOSTER: The one that you've written relating to the post-Communist era is "Russia: Experiment with a People"?

A. That's correct. That's 1991 through to 2001/2002.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: Can I ask you this. In addressing the post-Soviet period which, as you've just indicated to my Lady, you do in "Russia: Experiment with a People", is it fair to say that Russian business and Russian economy is not something you've written about except really in passing, is that fair?

A. The -- I don't think it -- it may be fair, but I don't think it really reflects what the purpose of that book was, which was to suggest that my colleagues who were economists and my colleagues who were political scientists were missing the broad horizontal range of everything that needed to be considered when we were looking at Russian public life in those years.

So it was an attempt to bring together politics, economics, culture, security, international relations, the lot. Because in order to look at one thing in Russian history, you have to look at the other things on that historical range, so that it's certainly fair to

say that I didn't concentrate in that book on business, but business was very much part of the range of those interests.

Q. Can I ask you, is this right: in "Russia: Experimenting with a People", I think it's chapter 9, at pages 137 to 151, that's the chapter which is entitled "Economising on Reform"?

A. Yes.

Q. And it's that chapter, is it, that addresses economic reforms in Russia between 1991 and 2001?

A. Yes, that's correct, yes.

Q. So that's 15 pages on the topic?

A. I can see what you're driving at.

Q. No, please --

A. No, no, I don't object at all to your questions.

Q. No, Professor Service, I made it perfectly clear I respected your expertise, I just want to establish the extent to which this has been the focus of your writings.

A. You're absolutely correct. I'm giving you an open goal on this --

Q. No --

A. -- because I'm insisting that in order to understand one topic in Russian life, you have to look at all of them. And academics who demarcate the horizontal range miss

the big picture and miss the necessary discipline that is required in order to understand this huge, amazing country, Russia.

Q. So can I just check with you that there is no other writing that we should be looking at where you've been discussing Russian economic reforms and Russian business practices?

A. Well, apart from my journalism, that is correct.

Q. Thank you.

Can I just move on to indicate an area which I won't be addressing with you, and could I ask you to look at your first report at page 24.

A. Yes.

Q. Can you see at paragraph 54 G(B)3/1.1/24 you appear to express a conclusion about the credibility of Mr Abramovich's witness evidence, do you see that?

A. Yes, I do.

Q. Professor Service, I'm not going to ask you about that because those are matters for my Lady, do you understand?

A. I do, and that has been brought to my attention since I wrote the report, that I've somewhat trespassed over the boundary from being a historian into being a putative judge, and I have no intention of laying claim to that status or dignity.

Q. And equally so, Professor Service, you sometimes criticise Professor Fortescue for not having considered Mr Abramovich's evidence, and I'm not going to ask you about that either.

Can I ask you this: in your previous publications, is it not the case that you have expressed the view that Mr Berezovsky was one of those who benefited from the loans-for-shares scheme?

A. I don't know word for word what I've said about this, but it is certainly the case that in the 1995 to 1996 business politics, Mr Berezovsky seems to have derived commercial benefit from the intersection of politics and business.

Q. Could I ask that you be handed G(B)4/1, tab 16, do you have this?

A. Yes.

Q. This is your book, the Penguin History of Modern Russia. Could I ask you to turn to page 175, looking at the numbers at the bottom right-hand corner G(B)4/1.16/175.

It's the left-hand page which I was wanting to look at, which is page 532 in the book. Three lines from the top of the page you write:

"He [and that's Yeltsin] agreed a secret deal with Boris Berezovsky and a handful of other exceptionally

wealthy businessmen who were commonly known as 'the oligarchs' whereby they would receive a lucrative stake in state-owned mining enterprises in return for bailing out the state budget and financing Yeltsin's... campaign."

Do you see that?

A. I do.

Q. Was that not referring to the loans-for-shares scheme?

A. Yes, it was, yes.

Q. Could I ask you to look at another excerpt which is in "Russia: Experiment with a People".

My Lady, I'm afraid this excerpt is not in --

MRS JUSTICE GLOSTER: It doesn't matter, I can see it on the screen.

MR GILLIS: My Lady, I think probably not. What we've done is prepared a bundle of handouts, or hand-ups.

MRS JUSTICE GLOSTER: I hope they're going on Magnum.

MR GILLIS: They will do, my Lady.

(Handed)

My Lady, I don't anticipate that I'm going to have to put all of these hand-ups to the witness but it's just quicker to have them all before the court in one go.

MRS JUSTICE GLOSTER: What, these aren't on Magnum?

MR GILLIS: No, but they will be put on Magnum.

Could I ask you to turn to tab 1.

A. Yes.

Q. This is from "Russia: Experiment with a People", do you see that?

A. Yes.

Q. It's the second page, and we've sidelined the passage that we would ask you to look at.

A. I see that, yes.

Q. There you say -- I'm sorry, it's on the fifth page, so that will be page 296. There you say:

"Berezovsky's trading empire grew exponentially. His financial group diversified still further by setting up a bank and buying up properties in Switzerland and the United Kingdom. It also took a large stake in the fuel sector of the economy, especially gas and oil."

Now, again, am I right in understanding that that's a reference to what you then perceived to be Mr Berezovsky's participation in the loans-for-shares scheme?

A. Yes, that's what I then perceived to be the case.

I have more reservations about this now in the light of what I've read since I wrote that book nearly ten years ago, but you're absolutely right, that's what I said in that book at that time.

Q. But that's my Lady's juris task, not yours.

Could I now move on to discuss with you methodological approach. In your first report, is this right, you criticise Professor Fortescue's reliance on journalistic sources and memoirs, do you recall that?

A. I do recall that, yes.

Q. I think for the record that's at paragraphs 6 and 12 of your first report G(B)3/1.1/2.

I think we can also see this reflected in your comments in the joint memorandum, and could I ask you to look at that, which we have at G(B)6/1, and could you turn to paragraph 9 which is at page 5 G(B)6/1.01/5.

A. We're looking at paragraph 9, yes?

Q. Paragraph 9. This is recording your comments on historical methodology. In subparagraphs 1 and 2, I think you've pointed out that Professor Fortescue's first report was heavily based on contemporary press reports and memoirs?

A. Yes.

Q. You go on to say:

"It is true that, as yet, there is not much else available for the history of Russian high politics and big business in the period under consideration..."

Do you see that?

A. I do, yes.

Q. Professor Service, is this right, you do not go so far

as to suggest that historians examining the period should ignore journalistic sources and memoirs, do you?

A. No, I don't. Could I explain what I do mean?

MRS JUSTICE GLOSTER: Yes, please do.

A. I mean that we have to be particularly tentative about what we say about the 1990s. At the moment, my next project is a history of the ending of the Cold War, and for that purpose I've been looking at the Defence Ministry documents, the Foreign Affairs Ministry documents, the Party Secretariat minutes and documents, I've got all sorts of ways of checking whether the New York Times or Pravda or Izvestia offered reliable reports, whether memoirs written by Gorbachev's close confidants or Reagan's close associates are also reliable.

MRS JUSTICE GLOSTER: Sorry, just stopping you. The Defence Ministry and Foreign Affairs Ministry documents that you're looking at are Russian and American, or Russian or American?

A. They are -- I'm particularly picking out Russian, yes. Well, Soviet.

MRS JUSTICE GLOSTER: Soviet?

A. Soviet, yes. So that some of the things that I thought I knew about the history of 1985 to 1991, when I was tracking it on a weekly basis through newspaper reports,

through listening to television programmes where Gorbachev and Shevardnadze were speaking directly, I can now check these things out. And some of those things that I thought I knew tentatively in 1985 to 1991 I now know I didn't know. Because the real happenings were a little bit different. Sometimes they were quite the opposite.

Now, what's really striking about the 1990s is how much we are being asked to rely upon a few newspapers and upon the memoirs of politicians who are obviously providing accounts that are riddled with personal bias.

Now, this is just basic, basic historiographical scepticism. I'm not being fussy here. I repeated in my second report what I said in my first report because I really strongly believe this, that we must be tentative about what we think we know about the 1990s when all we have to go on are what politicians and businessmen want us -- want to let us get access to.

MRS JUSTICE GLOSTER: Right.

A. And when the newspapers are owned by people who have their own biases. I mean, this is just standard historical methodology. So I'm not saying anything that any serious historian would disagree with.

MRS JUSTICE GLOSTER: I think you've answered the question.

Go on, Mr Gillis.

MR GILLIS: Indeed. Thank you.

I think what you indicate in paragraph 9(3) is that you have to exercise much caution, I think is the phrase you use two lines from the bottom of the page on page 5 that we're looking at. When you're looking at journalistic sources you have to exercise much caution, is that correct? That's the correct approach?

A. I think that's putting it mildly. I think sometimes we have to say: this caution involves us saying that what we think we know is only provisional and highly tentative, especially when there are so many cases in recent Russian history where what we thought we knew proved not to be true.

Q. It may well be that you cannot know for certain until such time as one has access to all of the archives, if ever. But as I understand it, you're not suggesting that until that stage comes historians should simply ignore journalistic sources; you are suggesting they should exercise much caution?

A. I would probably go further and say that they should make clear that what they think they know is only a tentative judgment based upon exiguous sources.

Q. Turning over the page to page 6, at the top of the page, at subparagraph 4, you indicate that historians should take the same approach to memoirs, is that correct

G(B)6/1.01/6?

A. Yes. Yes, I do. And that's notwithstanding the point that for demur I use newspapers and memoirs. This is not a contradictory position, one has to use the bricks that are available, but sometimes the bricks crumble.

Q. Professor Service, is that for the reason really that you give at subparagraph 9(2), so that's going back to page 5 G(B)6/1.01/5:

"It is true that, as yet, there is not much else available for the history of Russian high politics and big business in the period under consideration..."

So I suggest to you that having exercised the appropriate caution, and having evaluated those sources against all the other material, it is inevitable that those sources will play an important part in the historian's evaluation of the issues, would you agree with that?

A. I agree with it with the important caveat that when the range of sources is so limited, then the conclusions have to be all the more tentative.

Q. And could I just quickly ask you to look at what you have said about newspaper reports and memoirs in your first report, so that's going back to G(B)3/1. And could you turn to paragraph 12 at page 5 G(B)3/1.1/5. About eight lines up from the end of paragraph 12 what

you say is:

"Consequently, my own working assumption is that newspaper reports and memoirs are more useful in conveying a sense of the historical pattern of attitudes and practices than in evidencing the details of a particular political event or commercial transaction."

Do you see that?

A. Yes, I do. Yes.

Q. Now, Professor Service, is this right, that while you say that that's your working assumption, would you accept that in your published works, and no doubt having exercised much caution, you've relied upon what could be described as journalistic sources to establish specific facts?

A. Alas, that has to be the case if we're to have any continuous narrative at all for the 1990s. Regretfully, that is the case.

Q. And could I maybe just show you one example. In the additional bundle that I've handed up, could I ask you to go to tab 1 at page 122, which I think is the second page. There you say -- can you see the sidelined passage:

"The Yeltsin family made plenty of money whenever the opportunity arose or could be made to arise. The president's daughter, Tatyana Dyachenko forged links

with the multimillionaire financier and ex-academic Boris Berezovsky."

Now, I assume that you would accept that that's a statement of fact, not a reflection of historical patterns or attitude, is that correct?

A. Yes. No, you're absolutely right there, and I can see what you're driving at.

Sorry, I beg your pardon, I'm meant to be addressing my remarks to the judge.

I can see the point of this link. This is a case of doing the best one can with the exiguous sources available.

Q. And I think we can see from footnote 7, and then if you go to page 358 in this tab, that what you're relying upon there is Mr Klebnikov's book "Godfather of the Kremlin", is that correct?

A. That's correct.

Q. And I think you've identified in your first report, this for the record is paragraph 65 G(B)3/1.1/28, that Mr Klebnikov is a journalist who you've identified in your first report as having been accused by some reputable historians of exceeding evidence in writing, but he's fundamentally a journalistic source, is that correct?

A. I think that's a bit unfair on the late Klebnikov. He

pushes his sources too hard. I think that Stephen Kotkin's reservations about Klebnikov's book are ones that I go along with, and that's why I put them into the first report that I wrote. In particular I think that there are materials that Klebnikov gathered that were very, very useful, but his interpretation was -- yes, it was on the sensationalist side.

Q. Professor Service, what I would suggest to you is that in your published works you're willing, no doubt having exercised much caution, to reach factual conclusions on the basis of journalistic sources?

A. I am.

Q. Do you agree?

A. Sorry to butt in on you there.

That is the case, I have done this. What I'm trying to indicate in my first and second report, however, is that underpinning this is a methodological scepticism that one can't always bring out in a book of the kind that I was trying to write, "Russia: Experiment with a People".

Q. Could I just ask you to look at Professor Fortescue's second report which we have at G(B)1/1, tab 2. He responds to your criticism as to his methodological approach at paragraphs 10 to 16, which we have at pages 145 through to 151 G(B)1/1.02/145.

Can you see that at paragraph 16, Professor Fortescue states that he has not accepted any source without critical analysis and he rejects your criticism. Do you see that? I'm sorry, if I'm rushing you. Would you like to read paragraph 16?

A. I haven't found it yet.

Q. I'm sorry, page 151 G(B)1/1.02/151.

A. There we are, yes I've got there, yes.

Could you possibly repeat the question?

Q. What I suggested to you is that there Professor Fortescue states that he has not accepted any source without critical analysis and that he rejects your criticisms. I just wanted to see that you saw that was what he was saying.

A. Yes, I see that he has said that, yes, I remember reading that, yes.

Q. Professor Service, what I would suggest is that, just as it was appropriate for you to rely, after critical evaluation, upon journalistic sources for the purposes of your publication, so too it was appropriate for Professor Fortescue to rely upon those sources after critical evaluation for the purposes of reaching the conclusions he expressed in his report. Would you agree with that?

A. I don't agree with that analysis, mainly because I think

that in my work on the 1990s I have tried to avoid pinning substantial acute matters of public policy or official practice on memoirs or newspaper reports. I've tried to -- you're right, in certain instances I have described events on the basis of those two types of report but I try to keep this to a minimum.

Q. And Professor Service, what I would also suggest to you is that, if you had been willing to engage in the critical evaluation of those sources, it ought to have been possible to reach agreement on various statements that remain disputed. But I assume you would disagree with that, would you?

A. I think I must draw attention to the fact that we spent two days in this joint meeting and we went through every single disputed statement, Professor Bean, Professor Fortescue and myself. We attempted as thoroughly as we could to come to agreements. But where there was a division of minds, we left it at that and agreed to disagree.

Q. Well, Professor Service, could we just start with -- I'm not going to go through all the disputed statements, obviously, but could we just start with transfer pricing.

Could I ask you to look at page 21 of the joint memo, so that's at bundle G(B)6/1, and at page 21,

G(B)6/1.01/21.

Could I ask you, unless you recall it, to read through section H, which is on transfer pricing. So we have the statements on paragraph 28 and 29, and it goes over the page where we see the Professor's comments at paragraph 48.

A. Oh, yes, I remember this. Yes.

Q. Now, the section is dealing with really four statements about transfer pricing, is that correct? Looking particularly at paragraph 29.

A. Yes.

Q. I'd suggest to you that they're setting out a very general introduction to the phenomenon of transfer pricing, is that correct?

A. I think the word "general" is very apposite here.

Q. Nowhere is it suggested that the mechanism identified applies universally or invariably, is that correct?

A. Well, typicality, to my mind, implies some kind of pattern being suggested.

Q. And these statements, they've both been endorsed by Professor Fortescue and Professor Bean, is that correct?

A. That is correct, but if I may enter yet again a reservation, having read the witness statements of Shvidler and -- Mr Shvidler and others, I came to the conclusion that there was extraordinary variety in the

way that these methods of transfer pricing were conducted.

And it's for that reason that I entered that caveat, and I'm sorry that it appears that I should have made, you know, a greater attempt to come to an agreement, but I saw my duty as being to say what I really thought.

Q. Well, undoubtedly it was and still is. But what you say at the end of paragraph 48 is that you say

G(B)6/1.01/22:

"... the evidential basis of these statements remains too weak to encourage confidence in generalisations of this nature."

Do you see that?

A. I do see that, yes, and I stand by that. I was very much taken with Mr Shvidler's evidence when I read it over the course of the summer. I was very, very persuaded that there was enormous -- you might almost say imaginative variety about the way that Russian businessmen sought ways to get their money abroad.

Q. But what I suggest to you is that certainly aspects can clearly be established as being evidentially correct or not. I mean, for instance statement 30, which refers to:

"Russia did not introduce legislation regulating transfer pricing until 1999 ..."

That's objectively verifiable, isn't it?

A. You have a point about the particular number there.

It's the whole bunching of this description of transfer pricing to which I took objection.

Q. Well, can we just look at what you've said in your first report about transfer pricing, so we have that at G(B)3/1, and it's at paragraph 40, which is at page 18 G(B)3/1.1/18.

At paragraph 40 you say:

"I have little to add to what Professor Fortescue writes about low tax zones, transfer pricing and capital flight in the two decades after communism. What must be borne in mind, however, is that within the general picture there was room for much variability."

Then you refer to what Mr Shvidler has said.

A. Yes.

Q. Professor Service, what I suggest to you is that the statement that you were being asked to agree or disagree was not trying to encompass all variations, it was just trying to indicate to the court typically how transfer pricing could be done.

What I would suggest to you is that what you have said in your report really provides no proper basis for continuing to dispute that these statements are fair and accurate. Would you comment on that?

A. Well, I fail to see the logic of that proposition. I've made it very clear in my first report, paragraph 40, that Mr Shvidler's fifth witness statement points up the variety of methods by which transfer pricing was conducted, and I allude to this in the joint report, my caveat in the joint report, to which attention is now being drawn.

Q. Well, what you're saying in your paragraph 48 in the joint memorandum is that the evidential basis of these statements remains too weak. So this is going back to page 22 in the joint memorandum bundle G(B)6/1.01/22.

Is it not fair to say that the statements that you were being asked to agree are accurate and there is an evidential basis for them, but of course there are many different ways in which it could be done?

Is that not fair?

A. Could I just ask for that very long sentence to be repeated?

MRS JUSTICE GLOSTER: Put the question more simply,

Mr Gillis, please.

MR GILLIS: What I was pointing out to you is that, in your paragraph 48 in the joint memorandum, bundle 6 at tab 1, you are saying that you believe that the evidential basis for the statements remains too weak. What I was suggesting to you is that a fairer and more accurate

approach, given what you're saying was the impact of Mr Shvidler's statement, would be to recognise that the statements about transfer pricing arrangement were fair and accurate, but simply to recall that there are many different ways in which this could be done, which is fundamentally, if you look at the first sentence, what Professors Fortescue and Bean have said.

- A. You are quite correct that there is evidence for a general pattern, but the extraordinary variety of transfer pricing has to be brought into play here.

I have been a touch on the fussy side in insisting that I didn't want to use the same phrasing that Professors Fortescue and Bean agreed upon, because they've got the same caveat basically as I have got and I wanted them to go for my phrasing and they stuck to theirs.

- Q. But in substance you don't disagree with how Professors Fortescue and Bean have put the point, is that right?

- A. Well, I would put it slightly differently, that I thought at the time that they basically agreed with me, and I wanted them to just simply say that in the words that I was proposing.

But this was a very amicable meeting that we had over two days and once or twice we just agreed to

disagree.

Q. All right. Well, Professor Service, I must move on.

Could I move on to loans for shares?

MRS JUSTICE GLOSTER: Should I take the break, Mr Gillis, is that a convenient moment?

Very well, ten minutes.

Don't talk about your evidence to anybody.

(3.22 pm)

(A short break)

(3.40 pm)

MRS JUSTICE GLOSTER: Yes, Mr Gillis.

MR GILLIS: Professor Service, I now want to look at loans for shares and discuss with you who was able to acquire interest in the valuable companies which were sold eventually under the loans-for-shares scheme.

So could you start by looking at the joint memorandum, which is G(B)6/1 and it's at page 15.

G(B)6/1.01/15. Could I ask you to read statement 2 and the comments at paragraphs 31 and 32. (Pause)

A. Ah yes. Yes, yes.

Q. And is this right, statement 2 is endorsed by Professor Fortescue, but in very brief summary your objection at paragraph 32 is that you don't accept that political influence or connection to the Yeltsin administration was necessary in order to succeed in the

loans-for-shares deal? And also that you are not satisfied that the loans-for-shares scheme was envisaged to lead to ownership of shares, is that correct? Is that what you're essentially saying at paragraphs 32 and 33?

- A. I'm saying quite a lot more than that. I'm objecting to this horrible word "oligarchs" that stops us thinking clearly about what was the relationship between business and politics in the 1990s and in the 2000s. This was a word that was introduced as a sort of shorthand, but it has started to involve us thinking that there was a very separate cast, a stratum of big businessmen who were qualitatively different from the other big businessmen. That's really important to challenge.

MRS JUSTICE GLOSTER: I see what you've said in your report about it and your comparison, I think, with the position in Greece.

MR GILLIS: Exactly.

MRS JUSTICE GLOSTER: I've read all of that.

MR GILLIS: I wasn't going to look at that at all.

MRS JUSTICE GLOSTER: That's why you put it inverted commas all the time?

- A. Yes, sometimes I've failed to do it, and I think that's a sin, I really ought to be consistent.

But the question I was asked was: is that what I'm

getting at in 31 and 32? I think if you look at what I say in my report, and what I say in 31 and 32, you can see that underpinning this is a challenge to the assumption that there was some sort of oligarchy, and that big businessmen of a particular kind, who had separated themselves off from the rest of the big businessmen in Russia, and were recognised as such by the politicians, that this was the case and that they were essentially or largely ruling Russia.

And this is just such a phenomenal misjudgment about what was going on, and that brings me back to what I said in my "Russia: Experiment" book. This is why I wrote a book, to challenge the standard orthodoxy of a lot of my colleagues in the 1990s when they were writing about politics and/or business.

So that's what I'm getting at in 31 and 32 and this is not a minor point.

MRS JUSTICE GLOSTER: Yes.

A. It's really essential for the understanding of politics and business in the 1990s and the year -- and the years that followed.

MR GILLIS: Professor Service, I was asking you about paragraphs 32 and 33, not 31, because I wasn't wanting to go into this question of whether it was a Greek concept of an oligarchy or just businessmen that

exercised influence. But let me move on.

A. Well, can I make a comment on that? That it's not a Greek concept, it's a concept that has spread to the study of politics in all of the centuries that have followed.

It's a meaningful word, that it's ruled by the few, and I do not think that these big businessmen ruled Russia. They had influence, they had influence in certain sectors, we always have to ask about the depth of that influence and the breadth of that influence, and we should just simply stop using the word until we are able to show that these few businessmen ruled Russia.

In fact, of course, they didn't. It was the politicians who set the commercial strategy for the government in the 1990s, the politicians were in charge. He was an incompetent, drunken, sickly ruler, Boris Yeltsin, but he and his fellow politicians, and the businessmen who became politicians temporarily, such as Boris Berezovsky, these were the people who were in charge.

It wasn't a business oligarchy and it's not a trivial point.

MRS JUSTICE GLOSTER: No, well, I think you've made it.

MR GILLIS: Thank you.

Can I now ask you to look at statements 3 to 6,

which are over the page, on page 16, and read paragraph 34 which has your comments and Professor Fortescue's comments G(B)6/1.01/16. (Pause)

A. Yes, I've read them.

Q. Statements 3 to 6 are endorsed by Professor Fortescue but, is this right, you're saying that you simply can't reach any conclusion at all about what happened in the various loans for shares deals?

A. Well, I'm coming back -- I'm sorry to be a total bore and I won't be quite as emphatic and noisy as I was a few minutes ago. The evidence for all of this is our beloved newspaper reports and ever-loved memoirs. We've got to be very, very cautious about it, about saying that we really know the history of the 1990s.

Q. But you are saying that you can't express any conclusions in relation to the various loans-for-shares schemes that are detailed in paragraphs 3 to 6; that seems to be what you're saying, is that right?

A. I'm saying that the full complexity of what really went on is still not so clear as to allow us to agree to this general description.

Q. Can I just ask you to look at what you said in your first report about loans for shares, and if you could go to G(B)3/1 at page 8 G(B)3/1.1/8, and it's paragraph 18.

A. Yes.

Q. Now, what you say there is:

"The account of the privatisation process given by Professor Fortescue offers more or less the conventional picture among analysts in... the West. There are certain aspects of that process, however, where there is room for amendment or expansion."

Now, am I right in saying that there you are commenting on paragraphs 105 to 167 of Professor Fortescue's first report where he comments on and endorses statements 2 to 6 which we've just been looking at?

A. I can't off-the-cuff remember the exact numbers. Is there any way of my checking that?

Q. Certainly. If you can take up G(B)1/1, and it's at pages 31 to 45 G(B)1/1.01/31.

A. Yes.

Q. If you can see page 31, at the top of the page, it starts with the title heading "The privatisation of Russian state owned assets in the 1990s and the loans for shares auction", which is the same title heading as we have above your paragraph 18.

A. Right.

Q. Professor Fortescue's report runs from paragraph 105 to paragraph 167, which goes through to page 46.

As I understand it, going back to paragraph 18 of your report G(B)3/1.1/8.

A. Yes.

Q. You're saying that Professor Fortescue offers a more or less conventional picture among analysts in the west, is that correct?

A. Yes. And then I say why I object to this picture, yes.

Q. All right, just taking it in stages. So at paragraph 18 then, you certainly aren't suggesting that there was anything which suggests that the statements in 2 to 6 were incorrect; because can I suggest you're endorsing what Professor Fortescue is saying and he is endorsing statements 2 to 6.

A. I intended to make an exposition there of how I think the relationship between business and politics ought to be understood in the 1990s, so I took the opportunity there to indicate that I think that the -- that by and large the politicians were in charge, and the impression given occasionally in Professor Fortescue's report is that it was the other way round.

Q. But Professor Service, if I can ask you to look at the remainder of this section in your report -- so picking up at paragraph 19 G(B)3/1.1/9, and it runs through to paragraph 33 G(B)3/1.1/14 -- where, as you discuss the concept of oligarchy, I would suggest to you that

there's nothing in that section of the report which suggests either that you believe or that there's any evidence to show that it was possible to acquire a company under the loans-for-shares scheme without political connection or influence. Would you accept that?

A. I think I do accept that. I don't think I contradict that anywhere in the report.

Q. And can I also suggest to you that in this section you do not give any suggestion that any of the facts set out in statements 3 to 6 about the acquisition of Yukos, Norilsk Nickel, Sidanko or Sibneft are incorrect, and that's correct as well, isn't it?

A. Now, we're going back to the joint report, are we?

Q. No, I'm looking at your report.

A. Oh, I'm sorry. So what would you like me to look at?

Q. Having generally endorsed Professor Fortescue's account at paragraph 18, then in paragraphs 19 through to 33, what I'm suggesting to you is that there is nothing there that suggests that any of the facts set out in statements 3 to 6 about the acquisition of Yukos, Norilsk Nickel, Sidanko or Surgutneftegas are incorrect, and would you agree with that?

A. I see what's being asked. Sorry, I've been a bit slow on the uptake there.

I at no point contradict this picture given in statements 3 to 6.

Q. Thank you.

Can we just look at what you say in your published works, and could I just ask you to be handed G(B)4/1, at tab 15, which I think is at page 145 G(B)4/1.15/145.

Are you at page 145?

A. I'm on 146 at the moment but I'm getting there.

Q. It's 145 in the bundle but it's actually page 146 in the book. So 145 at the bottom right-hand corner and then if you look at the -- it's page 146 in the book.

Can you see at the top of the page, it's picking up from the third line:

"Yeltsin could offer financial inducements ..."

Do you see that?

A. Yes.

Q. There you say:

"Yeltsin could offer financial inducements to politicians and administrators who could influence the result of the election in his favour.

"But there was a price to pay. As part of the deal, the oligarchs were given temporary ownership of the shares in the chief companies working in the lucrative mining areas. The nickel industrial sector was a particular attraction. These acquisitions became

permanent when the government predictably proved unable to pay off the loans on time. Thus the 'oligarchs', while rescuing Yeltsin, piled up the mountains of their wealth still higher and reinforced the dependence of the political establishment upon their favour."

Do you see that?

A. I do. I would like to say that if I ever had a second edition of this book I would not use the word "ownership" in the second line of that para. I'd use "managerial control".

Q. Instead of "temporary ownership"?

A. Yes.

Q. That would be fine, I can understand why you would wish to make that correction.

But what I would put to you is that there you are expressing the view that it was the oligarchs, and I don't want to get into a definitional debate about that, it was the oligarchs through their political connection with the Yeltsin administration who were able to acquire companies under loans for shares. Do you accept that?

A. The evidence is that those people who became known as oligarchs were the ones who made the most lucrative of the deals in this period, just before the election of 1996.

Q. But that now appears to be something that you refuse to accept in the joint memorandum when one goes back to paragraph 32. G(B)6/1.01/15

A. Ah, I see what the point is. I see what the point is.

Q. What you're now querying is:

"... whether the available evidence suggests that prior 'close connection to and political influence with the Yeltsin administration' were a prerequisite for the securing of the right to become a lender under the loans for shares ..."

A. I was merely driving at the point there that the connections between the businessmen who did make a profit out of the loans-for-shares scheme, generally speaking, were tight. However, whether this was the case for all of the deals that were done in that period, I don't think we have the evidence for that. The full evidence, in other words, for the business history of Russia in the 1990s is just not in yet.

Q. And can I suggest to you that you seem to express the view in your book that it was predictable that the loans would not be paid off and that the companies included in the loans for shares would be sold, do you accept that's what you were accepting in your book?

A. I would -- I could envisage another scenario in 1997 that the world oil price rocketed, that Boris Yeltsin's

health improved, that the politicians got a burst of energy, that they didn't actually have, as we know, in 1997, and that extraordinary ingratitude would have been shown by Boris Yeltsin because he had a history of doing this. So that I'm not sure, at all, that the evidence is strong enough for us to be able to say that this was a fixed set of deals from which there was no wriggling out.

Q. Well, what I suggest to you is that in your book you're indicating that you regard it as being predictable that the loans would not be repaid, but that's now something effectively you refused to agree in statement 33 of the joint memorandum, is that right?

A. I think that it was predictable if conditions didn't change. However, in the broader -- in the broader framework of the possibilities of the years after 1996 it might have been highly likely but it wasn't certain.

Q. No, all right.

And then, finally, you express the view that the acquisitions would become permanent as a result and therefore that it was the lenders who would be able to acquire ownership of the companies, is that correct? That's what you're indicating in the book?

A. That is correct, yes, that is what I'm saying in the book, yes.

Q. Then again that's something that you seem to be refusing to accept in paragraph 33 of the joint memorandum G(B)6/1.01/16?

A. I am indeed adding a caveat in the joint memorandum which is not in the book. I mean, this is the right of every scholar, to finesse his judgment in the light of more information as it starts to come in, but also more thoughts that one has about the subject about which one is writing. I mean, it's a rare scholar who has had the same opinion through the post-Communist years about contemporary Russia. I can't think of any of my colleagues who have held one single basic view all the way through.

Q. Well, Professor Service, I can understand you might want to qualify for exceptional changes in world oil prices or something like that, but will you not agree with me that in fact what is set out in the disputed statements here, at statement 2, as a summary description of the loans-for-shares scheme, is in fact not open to any serious political debate?

A. This is statement 2?

Q. Yes, so that's at page 15 G(B)6/1.01.15.

A. On page 15.

Well, of course, I'd have to have my usual rant about "oligarchs", so I would never have signed up to

that with that word in there. But quite apart from that, indeed the deals were beneficial for those businessmen who could participate in them.

Q. So is there any objection apart from the use of the word "oligarch"?

A. Well, it's not a small objection. I don't want to go over that again but --

Q. We understand the point you're making, take that as read.

A. I think that, as it stands, question 2, as long as it's not connected up to -- sorry, statement 2, as long as it's not connected up to statement 3, isn't implausible. But we grouped these statements together when we considered them and that's why I expressed reservations about signing up to them, and that's why Professor Fortescue and I disagreed.

Q. All right. Well, I'll come on to statement 3.

Can we just look at the details of the loans for shares in a little bit more detail. We have them set out at statements 3 to 6. But can we first just start by establishing that we don't disagree about what the loans-for-shares deals were, and can I ask you to look at Professor Fortescue's first report which we have at G(B)1, tab 1, and can you look at page 36 G(B)1/1.01/36.

Can you see, we have the table at the bottom of page 36 running over to the next page. There Professor Fortescue sets out what I believe is uncontroversial, namely the enterprises which were placed into loans-for-shares schemes. He shows 12 enterprises as having participated in the scheme. Do you see that?

A. I do, yes.

Q. Do you see that the largest asset measured by starting price was Norilsk Nickel, where a block of shares was provided as security at an auction with a starting price of \$170 million, do you see that?

A. Yes.

Q. Then we have Yukos for 150 million, and then Sidanko, Sibneft, Surgutneftegas. And then there are the ones where the starting bid was for \$50 million or less, and Lukoil, NLMK, and so on. Do you see that?

A. I do, yes.

Q. Now, I assume you don't disagree with any of that, is that correct?

A. I have no serious objection to any of that.

Professor Fortescue's expertise is greater than mine on these particular companies.

Q. All right. So now, what I would like to do is I'd like to just concentrate on the six biggest deals, which are

Norilsk Nickel, Sidanko, NLMK, Yukos, Lukoil and Surgutneftegas, because those are the ones -- plus NLMK, which are covered by statements 3 to 6 in the joint memorandum. Do you see that?

- A. I do. Can I make a comment at this point? Because I think it might hurry the inquisition along.

What I don't like about statement 3 there, or sub-statement 3, is the emphatic way in which it is said that only those with close connections to and political influence with the Yeltsin government were able to secure the rights. There's no evidence for this whatsoever.

- Q. I see.

- A. I hope that clarifies --

- Q. Professor Service, I think what we're now looking at, or what I was trying to look at, is statements 3 to 6 over the page at page 16 where we're dealing with the specifics of the various companies G(B)6/1.01/16.

- A. Right, I'm sorry. I thought we were dealing with statement 2.

- Q. No, I tried to move on from statement 2, just to look at the details of the companies in the loans-for-shares deals.

- A. I am not totally happy, as I've said, with statement 2.

- Q. No, well, I think we've got your answers on that.

As I say, what I want to do is look at the six largest companies, Norilsk Nickel, Sidanko, NLMK, Yukos, Lukoil and Surgutneftegas, because those, adding in NLMK, are the companies that are covered by statements 3 to 6.

A. Yes.

Q. As you can see from paragraph 34 in the joint memorandum G(B)6/1.01/16.

"Professor Fortescue agrees with these statements. [And you indicate that you have] difficulty with these statements as they stand since the extremely complex details of the business transactions are not yet available in public evidence and there was anyway much difference between one transaction and another; he adds that he anyway cannot see the relevance of the transactions to the current legal dispute."

Do you see that?

A. Yes, I do, yes.

Q. What I would like to do see if we can agree this: do you accept that in relation to all of those loans-for-shares deals, the person who won the auction to give a loan in return for control over the shares being offered, ultimately acquired the shares when in the event the state defaulted?

A. Yes, that seems to be the case.

Q. So can I just -- let's start just with Norilsk Nickel, Sidanko and NLMK, because these are the companies associated with Mr Potanin and Mr Prokhorov.

Is it right that you accept during 1995, during loans-for-shares auctions, the Interros group companies gained control of blocks of shares in Norilsk Nickel, Sidanko, the oil company, and NLMK, the steel producer?

A. My position is that we do not know the precise details of the business transactions that we're talking about here.

MRS JUSTICE GLOSTER: That's your main point?

A. That is my main basic point, and that these general statements about what actually happened in each of the loans-for-share deals aren't yet convincing because what documentation is available is too slim.

MR GILLIS: All right. Well, just having clarified what the dispute is, maybe I can show you some.

So is this right, that you're not willing to accept then that when the state defaulted on the relevant loans other Interros group companies acquired the blocks of shares which were under the management of those companies?

A. No, it's very clear that the end result is as you described, but the precise negotiating tactics and understandings I don't think we do yet know.

Q. Can I just clarify this with you: do you dispute that Interros and Uneximbank, which was part of the Interros group, were controlled by the oligarchs Potanin and Prokhorov?

A. Were controlled by the big businessmen?

Q. Big businessmen.

A. I don't dispute that.

Q. You don't dispute that last proposition.

Well, can I just show you some documents which are in the public record which I will suggest to you show that the factual position is really quite well established. And could I start by taking you to print-outs from the Interros and the Norilsk Nickel company website, and that's in the additional bundle at tab 2.

MRS JUSTICE GLOSTER: Mr Gillis, you're not going to complete your cross-examination of Professor Service this evening, are you?

MR GILLIS: No, I'm not.

MRS JUSTICE GLOSTER: I'm happy to sit until 4.30 but I don't see any point sitting until 5.00, it's been a long day.

MR GILLIS: No, my Lady. I wouldn't finish by 5.00.

Do you have tab 2 and can you see this as the print-out from the Interros website?

A. Yes.

Q. Could you please read the section which we have at the top of the page, entitled "Foreign Trade Consulting and Banking and Finance"?

A. Yes.

Q. They explain the foundation of Interros and Uneximbank and also that Mr Potanin and Mr Prokhorov became partners in those companies, do you see that?

A. I do.

Q. And then if I can ask you to come down that page to look at "Investment in Industrial Assets", and, again, the sidelined passage, can you see it then says:

"In 1995, during pledge auctions, Interros group companies gained control of blocks of shares of Norilsk Nickel, the Sidanko company and NLMK and then Northwest Shipping".

A. I see that, yes.

Q. Just to be clear, "pledge auctions" is a translation for the Russian expression of "loans for shares", is that right?

A. Yes.

Q. So would you agree with me that that makes it clear that the Interros group won the loans-for-shares auctions for those four companies; would you agree with that?

A. I don't know the status of this document, I'm afraid.

Isn't it a document by businessmen about themselves?

Q. So you wouldn't be willing to accept even something that was stated on Interros's own website?

A. Well, this is a methodological point again that the history -- I'm asked to give evidence here as a historian, I don't accept anybody's word, just because they say that something happened, without the kind of evidence to back it that does not come from the person who is saying it.

So there has to be a sort of -- in a perfect world, there has to be a multiplicity of sources to corroborate anything as having happened or not having happened.

I don't think this particular -- it's likely that this is true but why should we accept it?

Q. All right. Well, let's just move on.

Then coming down to the bottom of that page, it deals with the auction of the block of Norilsk Nickel shares under management. Can you see the bottom sidelined section on that page indicates that:

"In August 1997 a commercial tender with investment conditions was held. At this tender the block of shares of Norilsk Nickel was acquired by one of the Interros group of companies."

Do you see that?

A. I do see that, yes.

- Q. So I would suggest to you that that makes it clear that Interros also won the second stage auction to acquire the Norilsk Nickel shares.
- A. Yes.
- Q. Do you agree?
- A. This is what they're saying about themselves, yes.
- Q. All right.
- A. I would just add the reservation that the statements by big businessmen in Russia in the 1990s about what they did or did not do are riddled with cases of falsification, obfuscation and the rest of it. One has to be very, very careful about accepting anything from any of them.
- Q. But this is a print-out from the Interros website in November 2011. Now, even though it's the statement of what happened historically, are you still saying that you're not willing to accept this as evidence of what was happening in the loans for shares in relation to Norilsk Nickel?
- A. I have no specialist knowledge of that particular deal but I do have a fundamental, you might call it, philosophical scepticism that comes into play when I see statements by big Russian companies about themselves. This would be a lot more acceptable as a historical record if it was by someone else.

MRS JUSTICE GLOSTER: Mr Gillis, were there accounts of Interros for the period '95, published accounts?

MR GILLIS: I'll make enquiries.

MRS JUSTICE GLOSTER: Because if there were, and it will be a big if, then it will all be a matter of record, wouldn't it?

MR GILLIS: We'll make enquiries. It may well be that at that stage --

MRS JUSTICE GLOSTER: This may just be one particular line of enquiry, but --

MR GILLIS: My Lady, we'll make enquiries.

Could I just ask you then to turn over to tab 3, and I suspect I'll get the same reply.

Here we have the print-out from the Norilsk Nickel website and, again, you can see from the top of the page this is November 2011. In the middle of the page, can you look under the heading "RAO Norilsk Nickel was Born", and can you see there it says that:

"The control packet of shares, that's 38 per cent of the shares, or 51 per cent of the voting shares, was retained as state property, and in November 1995 was put forward at a mortgaging auction as a result of which Uneximbank became the nominal holder of the control packet of shares in Norilsk Nickel."

Do you see that?

A. Yes, I can see that. Yes.

Q. It goes on to say:

"On August 5, 1997 a commercial investment competition was held for the controlling 38 per cent. It was acquired by the investment company, Swift, which represented Unexim's interest."

Do you see that?

A. I do see that, yes.

Q. Again, are you not willing to accept that as establishing that, in relation to Norilsk Nickel, the company that acquired the rights of management under the loans for shares, ultimately ended up acquiring those shares on default?

A. I accept that this is likely to have happened but I don't think that a single source is a dependable way of establishing history beyond a set of tentative suppositions.

I hope I'm not being too fussy about that, but Russian companies have an appalling record of misleading -- big Russian companies have an appalling record of misleading the public about what happened in the 1990s.

Q. Well, as an expert in the area, are you aware of any sources which are indicating that anybody other than Interros ended up acquiring Norilsk Nickel?

A. No, I'm not. No.

Q. Can I then just turn to look at the position of Sidanko. Again, you've refused to agree to the statement in relation to Sidanko, which is statement 4, and can I ask you to turn over in the additional bundle at tab 4.

A. Yes.

Q. Again, this is a print-out, tab 4, it's a print-out from the Interros website. Can you please read the fourth paragraph which, again, has been sidelined:

"Having mobilised financial resources, the group, Unexim MFK, won the auction and received management of 51 per cent of Sidanko's shares. As per the auction conditions, shares were later purchased."

Then:

"At the beginning of 1997, MFK, whilst fulfilling obligations to the government, held an investment contest with commercial conditions and offered the aforementioned 51 per cent shares for sale. The block of shares was purchased by Interros oil company."

Do you dispute that or are you willing to accept it?

A. Well, I think if I could say ditto here for what we've already discussed in the previous segment, I would say ditto. This is a company talking about itself in a rather barren economy of Russia in the 1990s. It's...

Q. Again I would ask you, as an expert in the field, is

there any suggestion that anybody other than Interros acquired the Sidanko shares?

A. No, you're quite correct about that. That's the likeliest thing.

Q. And NLMK, can I ask you to turn to the fifth tab. Again, from the Interros website, and in the third paragraph, which again has been sidelined, can you see it indicates:

"By the mid-1990s, financial investors began consolidating large packs of NLMK. As such Unexim-MFK during pledge auctions received management, and later -- ownership of approximately 15% of MFK."

Again I would suggest to you that it makes it clear that it was the Interros group which won both stages of the NLMK loans-for-shares auctions and acquired the shares; would you agree?

A. Well, again, I would repeat that companies saying things about their own past history don't tend to have my automatic confidence. It's very, very likely to be the case that what you say is correct but, as historians, we're not in a position to be absolutist in what we think about the business history of the 1990s because the sources are so tenuous.

MRS JUSTICE GLOSTER: Were any of these companies obtaining capital from western sources?

A. I don't know.

MRS JUSTICE GLOSTER: I mean, were there any public prospectuses or anything of that sort? Were there any IPOs in relation to any of these companies?

A. For these companies in the mid-1990s, I simply don't know.

MR GILLIS: Professor Service, understanding your historian's caution of not wanting to commit yourself to a position until all available sources of evidence are available, and accepting that and understanding that, what I would still suggest to you is that there is ample evidence that Mr Potanin and Mr Prokhorov, having won the original loans-for-shares auctions, ended up with the ownership stakes in Norilsk Nickel, Sidanko and NLMK.

Subject to your caveat about all sources of information not being available yet, are you willing to accept that that's the position?

A. I'm afraid words have just been put into my mouth.

I have never today or at any other time said that you need all sources of information. That is an egregious misrepresentation of my position as a historian. I'm used to working with slender sources for some of the most contentious periods in modern Russian history. So it's simply not the case that I'm arguing for

a perfectionist position here, but I do think that if the evidence that we've been asked to look at is restricted to newspaper reports, memoirs and the glossy brochures of Russian companies, we're not really getting very far with historical assessment.

Q. But I think you have accepted in respect of Norilsk Nickel and Sidanko, and I'll ask the same question in relation to NLMK, no suggestion that anyone else other than the Interros group acquired NLMK?

A. That appears to be the case.

Q. All right.

Can I try and deal with Yukos and Mr Khodorkovsky more briefly. Again, this is the subject of one of the disputed statements, so I think going back to G(B)6/1, at page 16 G(B)6/1.01/16.

Can you see, if you look at disputed statements 3 and 6, you dispute the statement that Mr Khodorkovsky took control of Yukos under the loans-for-shares deal, you can see what it says there. And then you're disputing statement 6 that, in relation to Yukos, the individual or individuals who controlled the lender under the loans-for-shares scheme were able to acquire the government share when it defaulted on the loan and to take control of the company. So you're disputing that?

A. I'm looking now, I think possibly, at the wrong bit of the page.

You are want me to look at page 16, is that correct?

Q. Yes. Bundle 6.

A. Yes. And you want me to --

Q. Statements 3 and 6.

A. Under B?

Q. Under section B, yes "Details of other loans for shares..."

A. Well, I am being very, very fussy, yes.

In general terms, I think 3 and 6 are acceptable, but the extremely complex details of these business deals, I think, we do not yet have the evidence for them.

Q. But in terms of the Fundamentals, would you accept that Mr Khodorkovsky and his Menatep Group won the loans-for-shares auctions in respect of a shareholding of 45 per cent of Yukos, and that, in due course, Mr Khodorkovsky and the Menatep Group ended up owning that stake?

A. Whether it was exactly 45 per cent I have no means of knowing, but generally speaking, Khodorkovsky and Potanin, yes, won those deals.

Q. Thank you.

MRS JUSTICE GLOSTER: Choose your moment, Mr Gillis, will

you?

MR GILLIS: My Lady, that's probably a convenient moment.

I was going to move on to Surgutneftegas so that would be convenient.

MRS JUSTICE GLOSTER: Right.

Professor Service, I'm sure you've got better things to do at the weekend but please don't discuss your evidence with anybody or communicate with anybody about it or discuss the case.

THE WITNESS: I understand, yes.

MRS JUSTICE GLOSTER: You understand the point. Very well.

Mr Gillis and Ms Davies, what time do you want to start on Monday?

MR GILLIS: 10.15?

MS DAVIES: That's fine by me, my Lady.

MRS JUSTICE GLOSTER: How much longer do you think you're going to be with Professor Service?

MR GILLIS: I think I will be another hour and a half, possibly a little bit shorter. I will look at the transcript. I think I can see what Professor Service's response is going to be in relation to the other loans-for-shares companies so it may be that I can move more quickly.

MRS JUSTICE GLOSTER: Yes.

Mr Adkin, how long are you going to be with

Professor Service?

MR ADKIN: I don't anticipate having any cross-examination of Professor Service. There is then Professor Bean.

MRS JUSTICE GLOSTER: Yes, I've seen him sitting there patiently.

How long, Mr Gillis, do you think you're going to be with Professor Bean?

MR GILLIS: I think maybe an hour, an hour and a half, something like that.

MRS JUSTICE GLOSTER: So we should finish by lunchtime with a bit of luck?

MR GILLIS: Certainly by the end of the day.

MRS JUSTICE GLOSTER: Certainly by the end of the day.

MR GILLIS: My Lady, I'm cautious.

MRS JUSTICE GLOSTER: Okay, 10.15 then.

Apart from Professor Bean's statement, which I've read, there's nothing else?

MR GILLIS: My Lady, no.

MRS JUSTICE GLOSTER: So it's just Professor Bean. Will there be any submissions on Monday about anything?

MR GILLIS: I don't think so.

MS DAVIES: I don't think so, my Lady. If starting at 10.00 would improve the prospects of us finishing in the morning, may I just raise that as a proposal, so that we don't all have to troop back after lunch.

MR GILLIS: I'm perfectly content to start at 10.00 as long as it doesn't come with the condition that therefore we have to have finished by lunchtime.

MRS JUSTICE GLOSTER: No, no. Well, let's start by 10.00 if there's a chance then.

The only other thing is I would ask you, when you're preparing your closing submissions, if it is possible technically, to hyperlink the documents, if that's possible.

MS DAVIES: My Lady, certainly speaking for ourselves, in the draft in process we've been adopting the bracketing which should allow it. We do understand that there was a time lag between our opening getting hyperlinked but it is now hyperlinked on Magnum, we understand, as is the claimant's opening. So it may be that when you receive it from us next week it won't immediately be hyperlinkable but that with some technical assistance from Magnum we can make it so.

MRS JUSTICE GLOSTER: Yes, it doesn't need, so far as I'm concerned, really to be hyperlinked until the New Year, but it would be helpful if, come the New Year, it is hyperlinked.

MS DAVIES: We certainly have that in mind in the drafting process, and we're adopting the same bracketing for that reason.

MRS JUSTICE GLOSTER: Because it is extremely helpful.

Very well. Have a nice weekend.

(4.33 pm)

(The hearing adjourned until  
Monday, 5 December 2011 at 10.00 am)

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