Neutral Citation Number: [2012] EWHC 3586 (Comm)

Case No: 2006 FOLIO 1267

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2012

**Before** :

**MR JUSTICE CHRISTOPHER CLARKE**

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**Between :**

| | |
|---|---|
| **NOVOSHIP (UK) LIMITED** *and others* | **Claimant** |
| **– and –** | |
| **(1) VLADIMIR MIKHAYLYUK** **(2) WILMER RUPERTI** **(3) SEA PIONEER SHIPPING CORPORATION** **(4) PMI TRADING INC** **(6) YURI NIKITIN** **(7) AMON INTERNATIONAL INC** **(8) HENRIOT FINANCE LIMITED** | **Defendant** |

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**Dominic Dowley QC, Charles Dougherty and Laura Crowley** (instructed by **Ince & Co**) for the **Claimants**
**Mr Mikhaylyuk did not attend**
**Nigel Eaton** (instructed by **Holman Fenwick Willan**) for the **2nd – 4th Defendants did not attend**
**Steven Berry QC and Nathan Pillow** (instructed by **Lax & Co**) for the **6th – 8th Defendants**

Hearing dates: 16th, 17th 21st – 24th, 28th – 31st May, 12th and 13th June, 2nd – 5th July

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# Judgment Approved by the court
# for handing down
# (subject to editorial corrections)

**If this Judgment has been emailed to you it is to be treated as 'read-only'.**
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## MR JUSTICE CHRISTOPHER CLARKE:

1. This action concerns the activities of the First Defendant, Mr Vladimir Mikhaylyuk ("Mr Mikhaylyuk"). He was from 1 September 1997 employed by the First Claimant, Novoship (UK) Ltd ("NOUK"), as its Deputy Chartering Manager and from 1 December 1999 as Commercial Manager. On 18 October 2002 he was appointed Acting General Manager, whilst remaining Commercial Manager, and on 23 May 2003 he was formally appointed General Manager, in which position he remained until 24 March 2006, when he was dismissed. He was appointed a director of NOUK on 5 November 2003 and remained one until his dismissal.

*The Claimants*

2. NOUK acted, at the times with which this action is concerned, as the agent and manager of a number of one-ship companies, including the second to fifteenth Claimants. All the Claimants are indirect subsidiaries of JSC Novorossiysk Shipping Company ("NSC" or "Novoship") a company incorporated in the Russian Federation. NOUK's issued share capital is held by Intrigue Shipping Inc ("Intrigue"), a Liberian company, which, itself, is wholly owned by NSC. NSC is now majority owned by OAO Sovcomflot, a shipping company incorporated in the Russian Federation which is wholly owned by the Russian State. The Group has one of the largest tanker fleets in the world.

*Personnel at NSC*

3. From November 2001 until 14 October 2005 the President of NSC was Mr Tagir Izmaylov. Mr Vladimir Sakovich was from 27 October 1995 to 12 October 2007 Senior Vice President of NSC responsible for overall supervision of the chartering of the NSC fleet. He was a member of the NSC Executive Board from 24 May 1993 to 12 October 2007, a director of Intrigue from 6 March 2002 to 15 October 2007, and a Director of NOUK from 12 November 2001 to 10 January 2006. Mr Vladimir Oskirko was until the end of December 2003, when he left to join a start up venture, the Vice President of Finance and Planning. He was, also, a member of the NSC Executive Board and a director of Intrigue and NOUK. He returned to NSC in December 2005 and was a Vice President from January 2006.

4. The Claimants allege that Mr Mikhaylyuk dishonestly solicited and received bribes for himself and others during the course of his employment in connection with four areas of chartering business in respect of which they have the following claims:

    a) The PDVSA Charter claims;

    b) The Henriot Finance Charter claims

c) The Stena Charter claims

d) The Tula Charter claims.

*The Defendants*

*Mr Mikhaylyuk*

5. The Defendants may be divided into three groups. First there is Mr Mikhaylyuk. He is resident in this country. He has filed extensive pleadings and several statements, which appear to have been professionally drafted. He also submitted a response to the Claimants' opening. But, although he appeared at a directions hearing shortly before the trial, he has not been present at any stage during the trial itself. He claimed to be unwell but he has declined to seek an adjournment of the trial or to provide any medical evidence. He has put in his witness statements but has not been prepared to be cross examined on them. Whilst I have had regard to what is said in those statements, they are worth very little in circumstances where his evidence raises many questions and he has denied the Claimants the opportunity of asking any of them.

*The Ruperti defendants*

6. Next there are Mr Wilmer Ruperti, the Second Defendant and two Panamanian corporations of which he is the beneficial owner and controller namely Sea Pioneer Shipping Corporation ("Sea Pioneer"), a Panamanian company, which is the Third Defendant, and PMI Trading Inc ("PMI Trading"), also a Panamanian company, which is the Fourth Defendant. Mr Ruperti is a Venezuelan businessman who owns and controls a number of companies including Maroil Trading Inc, Nautica Shipbrokers C.A., Interpetrol & Trafigura de Venezuela S.A., which in late 2004 became Interpetrol S.A. and Wisteria Enterprises Ltd. Other Ruperti companies are Suramericana de Transporte Petroleo S.A. and Global Shipmangement Inc. Another company is Maritima Altair-Petromar ("Maritima"), which appears to have been related to Mr Ruperti in some way and to have acted either as an intermediary between Mr Ruperti or his companies and PDVSA (see para 11 (ii) below) or as a broker for PDVSA. The Ruperti defendants have filed extensive pleadings and supplied (but not put in evidence) witness statements. But none of them has taken any part in the trial.

*The Nikitin defendants*

7. Thirdly, there is Mr Yuri Nikitin, the Sixth Defendant, and two British Virgin Island companies owned and controlled by him, being Amon International Inc ("Amon") and Henriot Finance Ltd ("Henriot"). Henriot is a wholly owned subsidiary of Standard Maritime Holding Corp, a British Virgin Islands company owned and controlled by Mr Nikitin. Another such company is Premium Nafta Products ("PNP") of which Henriot is said to be a sub-division.

8. Mr Nikitin has sought refuge in this country. He is the subject of criminal proceedings in Russia which have been proceeding for some 6 years but are still at the investigative stage. He has successfully resisted extradition to Russia as has Mr Mikhaylyuk.

9. According to a report for the Board of NSC dated 2 September 2005 prepared by Mr Sakovich, as from April 1999 several cargoes owned by PNP were transported on Novoship vessels from the Baltic to various destinations (including the USA). Between 1999 and 2003, some 36 vessel chartering agreements were concluded and executed. During the same period, PNP time chartered a number of Sovcomflot vessels, transferring some of its cargoes to them. In late 2002, PNP informed Novoship of its intention to time charter additional tonnage under the same scheme. There was talk of PNP time chartering a product tanker of 40,000 tonnes. Mr Sakovich said that there were no doubts on the market that PNP was a first class charterer as a result of which NSC sanctioned NOUK's negotiations about the time charter for *The Trogir* (see para 13).

10. As will become apparent the Nikitin defendants rely on these matters as an indication of a reason why Mr Ruperti should seek an introduction to someone like Mr Nikitin. He was a name in the Russian oil cargo market.

## *Summary of the claims*

*The PDVSA charter claims*

11. The Claimants contend as follows:

    i) Mr Mikhaylyuk solicited and received bribes in connection with the charters of five vessels, namely (i) the *Marshal Chuykov,* (ii) the *Moscow Kremlin,* (iii) the *Moscow Stars,* (iv) the *Sorokaletie Pobedy* and (v) the *Adygeja* ('the PDVSA vessels'). These vessels were owned by the Second, Third, Fourth, Ninth and Tenth Claimants, which are all Liberian companies and wholly owned subsidiaries of Intrigue. Bribes were paid by or on behalf of the Ruperti Defendants:

        a) to a Nevis company called Mirador Shipping Inc ('Mirador Shipping') in the sum of $ 217,100;

        b) to another Nevis company called Pulley Shipping Limited ('Pulley Shipping'), which is said to be beneficially owned and controlled by Mr Mikhaylyuk in amounts totalling $ 1,491,000; and

        c) to the Seventh Defendant, Amon, Mr Nikitin's company, incorporated in the British Virgin Islands, in sums totalling some $ 410,379.

These are the payments which the Claimants have identified. The Claimants contend[1] that the payments made were in fact likely to have been very much greater, but they have not been able to discover how or when such further payments were made. They claim that the arrangement in respect of Mr Nikitin was that Mr Ruperti would pay him 1.25% of the hire on the PDVSA vessels and they claim to recover that amount.

The defendants contend that any payments to Amon were payments for introductions effected, or to be effected, by Mr Nikitin of Mr Ruperti or his companies to significant players in the Russian oil cargo market.

ii) Instead of arranging charters of the PDVSA vessels directly to Petroleos de Venezuela SA, the Venezuelan State company, or one of its subsidiary companies (collectively "PDVSA"), Mr Mikhaylyuk and Mr Ruperti secretly arranged for the PDVSA vessels to be chartered to PMI Trading. They were then sub-chartered (or sub-sub-chartered) to PDVSA by Sea Pioneer, Mr Ruperti's company, at a substantial profit. Hereafter I refer to the charters ostensibly with PDVSA but in fact with PMI Trading as "the PDVSA charters".

12. The Claimants claim that, as a result of these matters, they are entitled to seek:

i) from the Ruperti Defendants, an account of the profits made by the Ruperti Defendants from the PDVSA charters; alternatively damages; alternatively the bribes ($ 2,118,100). The amount of profits was said to be $ 56,640,451.35 in total and the damages an equivalent figure. The Ruperti defendants are debarred from disputing the figures which are set out in Schedule 3 to the Particulars of Claim because they have failed to plead a response to it and they are deemed proved: see para 3 of the order of Teare of 30 March 2012. There is now an amended Schedule 3 with a figure of $ 57,847,602.35;

ii) from Mr Mikhaylyuk, damages in the same amount; alternatively the bribes; and

iii) from Mr Nikitin and Amon an account, and payment, of the sums received by Amon, namely $ 410,000.

*The Henriot Finance charter claims*

13. The Claimants contend that at the same time that Mr Mikhaylyuk was soliciting and receiving bribes for the benefit of himself and Mr Nikitin in connection with the PDVSA charters, he was negotiating charters of vessels to Henriot Finance, which is owned and controlled by Mr

[1] In this and other places a reference to "the Claimants" is a reference to the relevant Claimants in whose favour the causes of action arise.

Nikitin. The vessels in question were (i) the *Trogir;* (ii) the *Kuzbass;* (iii) the *Kaspiy;* (iv) the *Moscow University;* (v) the *Moscow River;* (vi) the *Kaluga* and (vii) the *Kazan* ('the Henriot Finance vessels'). With the exception of the *Kuzbass* and the *Kaspiy* these were owned by the Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Claimants, which, save for the Eleventh Claimant, which is Maltese, are all Liberian companies. All of these Claimants are wholly owned subsidiaries of Intrigue. The *Kuzbass* and the *Kaspiy* were owned by other subsidiaries of Intrigue which have since been sold.

14. The Claimants contend that the corrupt relationship between Mr Mikhaylyuk and Mr Nikitin created or evidenced by Mr Mikhaylyuk's solicitation of secret payments to Mr Nikitin's company Amon in connection with the charters of the PDVSA vessels placed Mr Mikhaylyuk in a position of conflict of interest, with the result that the Claimants are entitled to impugn the Henriot Finance charters. They seek an account of the profits made by Henriot Finance and Mr Nikitin. These amount to approximately $ 109,000,000.

*The Stena Charter claims*

15. These claims concern charters of vessels to Stena Bulk AB ('Stena') through the brokers Odin Marine Inc ('Odin Marine')[2]. The Claimants allege the following:

a) Mr Mikhaylyuk was paid bribes by Odin Marine in connection with such charters. These bribes (totalling some $ 1,228,000) were paid to Pulley Shipping. The Claimants seek recovery of the bribes from Mr Mikhaylyuk;

b) From 2003, Mr Mikhaylyuk and Odin Marine made false provision in the charters for the payment of 'address commission'[3] to the charterers, Stena, when, as they knew, Stena did not require address commission. The sums deducted from the hire payments by way of address commission were not paid to Stena (or retained by it) but were diverted for the benefit of Mr Mikhaylyuk or others. The Claimants seek an account of such payments to Mr Mikhaylyuk. These amount to some
$ 803,000.

[2] Odin Marine was, at one stage, the Fifth Defendant in the proceedings, but the claims against it were settled.

[3] The term 'address commission' is used to describe a commission paid by an owner to a charterer (or by a ship seller to a ship purchaser). In practice it operates as a reduction of the amount which the charterer has to pay the owner for hire. It can also be a means of rewarding individuals connected with the charter either legitimately or illegitimately, or be taken as representing a cost of administration which can be set off against tax.

c) The charters had originally been negotiated on behalf of the owners by their brokers ACM Shipping Limited ('ACM Shipping') in 1997-8 and were renewed in 1999 and 2001. When the charters were renewed again in 2003, Mr Mikhaylyuk and Odin Marine kept such renewals secret from ACM Shipping and so deprived them of continuing commission on the renewals. When ACM Shipping discovered that the charters had been renewed without their involvement, they sought payment from the owners of the commissions which they maintained were due to them. The owners settled ACM Shipping's claims. The sums incurred in investigating these matters form a further head of claim against Mr Mikhaylyuk. The amount of this claim is some £ 55,000.

*The Tula Charter claims*

16. The Claimants allege that, when fixing the time charter of a vessel called the *Tula* in February 2004, Mr Mikhaylyuk dishonestly solicited payments for his own benefit from the charterers of $ 400 per day. The Claimants allege that such payments (totalling at least $ 158,000) were made into an account in the name of Mirador Shipping, pursuant to Mr Mikhaylyuk's instructions to the brokers involved. They claim an account of such monies from Mr Mikhaylyuk.

*The Compromise Agreement claim*

17. This claim arises out of the compromise of unfair dismissal proceedings which Mr Mikhaylyuk brought against NOUK following his dismissal in March 2006. Under that compromise, Mr Mikhaylyuk received a severance payment of £ 140,000 and costs of £ 11,750. The Claimants contend that the settlement was reached as a result of fraudulent misrepresentations made by Mr Mikhaylyuk and they seek the return of the monies paid pursuant to the settlement.

*The Sorokaletie Pobedy claim*

18. Tamara Shipholdings SA ("Tamara"), the ninth Claimants, who are the owners of the *Sorokaletie Pobedy* have a claim for damages on the basis that they were deceived by Mr Ruperti into believing that PDVSA was not paying hire on account of the vessel not having the necessary approvals from Oil Majors, when in fact there never was any charter between Tamara and PDVSA and the charter by Sea Pioneer to PDVSA had come to an end. They claim to have lost the additional hire that they would have earned if they had not been deceived.

*The history of the proceedings*

19. This action was commenced in 2006. At that time NOUK was the only Claimant and Mr Mikhaylyuk the only defendant. The only claims

advanced were those in relation to the Tula payments to Mirador Shipping and the Stena Charter payments to Pulley Shipping. The remaining Claimants and Defendants have been added by a series of subsequent amendments.

20. There have been previous proceedings against Mr Nikitin in respect of the Henriot Finance charters. In 2010 a set of four proceedings was tried by Andrew Smith J. Two of those proceedings ("the Fiona Trust" and the "Second Fiona" Actions) were brought by Sovcomflot's subsidiary Fiona Trust & Holding Corporation and numerous other Sovcomflot subsidiaries. The third set of proceedings ("the Intrigue Action") was entitled *Intrigue Shipping Inc and others* v *H Clarkson & Company Limited and others* Claim No 2007 Folio 482 ('the Intrigue action'). I refer to the case as a whole as *Fiona Trust v Privalov* [2010] EWHC (Comm) 2583 or simply *Fiona Trust.*

21. In *Fiona Trust* the claim advanced in relation to the Henriot Finance charters was that these charters had been the product of a corrupt relationship between Mr Nikitin and NSC's President, Mr Izmaylov. The judge found that there was no such corrupt relationship. The Claimants do not seek to appeal this finding.

22. The judge did, however, find that two further claims against Mr Nikitin (one of which also involved Amon) succeeded. These were claims in relation to commissions which had, without the knowledge of NSC or Intrigue, been obtained and diverted to Mr Nikitin's companies (Amon International and Milmont Finance) on the sale and purchase of vessels. Mr Nikitin introduced the brokers Clarkson's and Galbraith's to Mr Izmaylov. Clarkson's acted as NSC's purchase brokers and paid Milmont over $ 17 million out of their commission on 30 purchases. Galbraith's acted as NSC's sale brokers, and on the purchase of the *Four Stream* and negotiations to alter the terms of purchase of four Aframax vessels. Galbraith's diverted to Amon over $ 7 million of commission. This was done, the judge found, without the authority of NSC or Intrigue and dishonestly: see paras 591-658; 1488-1508.

23. The dishonesty lay in the fact that the address commissions on purchases were not disclosed to the buyers, were not paid to them and were shared between the brokers and Mr Nikitin. On sales Galbraith's deceived NSC about the reasons for the level of commission charged and did not disclose the payments to Mr Nikitin, who was, himself, found to have been dishonest: para 1504.

24. Mr Steven Berry QC for the Nikitin defendants prays in aid the fact that that of which Mr Nikitin was acquitted in the Fiona Trust action (bribery of Mr Izmaylov and, also, Mr Skarga – see para 78 below) was similar but that of which he was convicted (sharing in commissions) was different to what is alleged against him in these proceedings. The Galbraith's and Clarkson commission arrangements were the subject of numerous documents including agreements between Galbraith's and Amon and invoices from Amon referable to

each transaction; the payments were specified percentages paid at the time of the instalments to which they related; they were approved by Galbraith's board and, according to the judgment, resulted in loss to the Claimants - characteristics not present in the case against Mr Nikitin in respect of the Henriot Finance charters. The case was not based on what Mr Berry characterised as nebulous inferences as to the basis upon which payments were made. The bribery of Mr Privalov that Mr Nikitin was found to have effected was based on admitted and documented payments.

25. Mr Nikitin was also acquitted of dishonesty in relation to an arrangement for him to receive commission from Mr John Sawyer, a finance broker, consisting of 50% of the remuneration of the latter from refinancing deals with commercial banks in respect of the Novoship fleet, on account of having introduced him to Mr Izmaylov: *Fiona Trust* para 659. The judge rejected Mr Nikitin's evidence that he had no prior understanding with Mr Sawyer that he would be paid for the introduction to NSC. Mr Nikitin introduced Mr Sawyer having only met him once before (having been introduced to him by Mr Privalov). The allegation had been that Mr Izmaylov was party with Mr Nikitin to a dishonest scheme to divert commission paid by NSC to Mr Sawyer. These payments were not the subject of any invoices.

*Mirador Shipping and Pulley Shipping*

26. Mr Mikhaylyuk denies that he has any legal or beneficial interest in or control of Pulley Shipping and denies that the payments made to Mirador Shipping were for his benefit or that he knew anything about them. Mirador Shipping is a company owned and controlled by Mr Maxim Androsov, a Russian citizen who is an employee of Navitank AB, who are brokers in Sweden. He had previously been employed by an NSC subsidiary – Novoship Sweden. He was, as Mr Pinniger (see para 28 below) confirmed, a friend of Mr Mikhaylyuk. In April 2005, on Mr Mikhaylyuk's instructions, Pulley Shipping entered into a commission agreement with Navitank whereby Navitank would pay a 0.25% commission on all freight/deadfreight/ demurrage earned and received from fixtures of vessels fixed with Pulley Shipping's support.

*Pulley Shipping*

27. I am quite satisfied that Pulley Shipping was a corporation forming part of an "*asset protection structure*" (as Mr Pinniger described it) created on Mr Mikhaylyuk's instructions and for his benefit (and that of his family) with a view to providing a hiding place for assets so that they would be both safe from discovery or seizure and available for his use.

28. That this is so is apparent from documents obtained from Mr Mikhaylyuk's computer, and from Hamilton Trust Company (Nevis) Ltd ("Hamilton Trust"), who were Pulley Shipping's agents in Nevis, and from the evidence of Mr Ian Pinniger, a founder and director of Hamilton Trust, who gave evidence pursuant to a witness summons and whose evidence I accept. The sequence of events is as follows.

29. Fiduciary Management Limited is a Jersey company established by Mr Pinniger which assisted individuals to arrange offshore companies and trust structures. It had a number of Russian clients the majority of whom were involved in shipping and broking. Mrs Jill Tausney was a senior administrator there.

30. On 30 January 2003 Mr Mikhaylyuk consulted Mrs Tausney in connection with establishing an offshore bank account, a Jersey Trust and a Nevis company. He sent her an email which said:

> *"It was nice talking to you this afternoon. Meantime decide to inform my mobile number: +07768 980819.'*

31. She replied to him on 31 January 2003:

> '*Thank you for your telephone call and email yesterday and I note that you have been referred to us by Dmitri*[4].

[4] The underlining in this and other citations in this judgment is not in the original.

> *'Our company provides a comprehensive range of trust and corporate services and once a suitable structure has been established we can establish an offshore bank account. A trust can be created to protect the assets of the company and any other assets you may wish to introduce to the trust i.e., portfolio of shares, interests in other companies, etc. I enclose an information sheet on trusts for your reference.*
>
> *'To enable us to proceed further you will need to take professional tax advice and provide details of the purpose of the structure. If you did not have a legal adviser then I suggest that you contact Mr Charles Pike of Withers law firm situated at 16 Old Bailey, London EC4M 7EG—Tel: 020 7597 6000—Fax: 020 7597 6543.*
>
> *'In order to comply with the regulations we are required to hold the following documents before we proceed with the establishment of the structure(s) ……*

32. "*Dmitri"* is a reference to Mr Dmitri Dyrtchenko, who was an employee of Navitank. Mr Pinniger's evidence was that he was introduced to Mr Mikhaylyuk in January 2003 by Mr Androsov or Mr Dyrtchenko, who were existing clients of Hamilton Trust. In the light of Mrs Tausney's email it was probably Mr Dyrtchenko (see also para 44 below). Mr Pinniger met Mr Mikhaylyuk in NOUK's London offices in the summer of 2003 and explained to him the concept of using a company owned by a trust for the benefit of his family.

33. On 15 April 2004, Mr Chris Morton, a director of Hamilton Trust, sent an e-mail to Mr Mikhaylyuk:

> '*I spoke to Ian today and gather that you are ready to move forward with the formation of the structures. We have since reserved the names, The Veer Trust and Pulley Shipping Ltd that you have chosen. We will arrange for both to be formed tomorrow.*
>
> *'Once the company is established, we will make arrangement to open the bank account with the Bank of Nevis and providing access by way of a corporate credit card . . . .'*

*The events of 16 April 2004*

*The incorporation of Pulley Shipping*

34. On 16 April 2004 Mr Morton caused Pulley Shipping to be incorporated in Nevis. Pulley Shipping designated Hamilton Trust as its Registered Agent and Hamilton Trust, acting by Mr Morton, accepted such designation. Mr Mikhaylyuk signed a letter prepared by Hamilton Trust dated 16 April 2004 in the following terms:

> ***"RE: PULLEY SHIPPING LIMITED (INCORPORATED IN NEVIS)***
>
> *'I confirm that upon my instructions you formed the above company.*
>
> *'I also confirm the following:*
>
> *All assets provided to the Company are derived from a legitimate source."*

There then followed confirmation of a number of other matters.

*The Declaration of Trust*

35. The shares in Pulley Shipping were owned by The Veer Trust which was also formed on 16 April 2004 by a Declaration of Trust of that date. The Declaration named the "Settlor" as Hamilton Corporation, on whose behalf Mr Pinniger signed, and the "Trustee" as Hamilton Trust, on whose behalf Mr Morton signed.

36. The Initial Property of the Trust Fund consisted of $ 3,600. The Beneficiaries were defined as :

> *"i* *all and any of the persons specified in the Third Schedule hereto* [this was a children's charity in Surrey selected by Hamilton Trust]
>
> *ii* *such other persons as are added to the class of Beneficiaries in exercise of the power conferred upon the Trustee by clause 9 hereof..."*

37. Clause 9 provided that the Trustee should *"have power at any time during the Trust Period to add to the class of Beneficiaries such one or more persons as the Trustee shall in its absolute discretion determine"*. Clause 11 provided that the Trustee should have the additional powers, discretions, rights and immunities set out in the Regulations contained in the First Schedule. Para 3 of that Schedule provided that the Trustee *"shall not be bound or required to interfere in the management or conduct of the business of any company wherever resident or incorporated in which this Settlement shall be interested although holding the whole or a majority of the shares carrying the control of the company"* so long as the Trustee had no actual or constructive notice of dishonesty or misappropriation on the part of the directors.

*The Letter of Wishes*

38. Mr Mikhaylyuk signed a letter of wishes (in Hamilton Trust's standard form) addressed to Hamilton Trust dated 16 April 2004 in the following terms:

***"THE VEER TRUST DATED 16TH APRIL 2004***

***(HEREINAFTER CALLED "THE TRUST")***

*I confirm that upon my instructions you formed the above Settlement by declaring yourselves Trustees of the initial Trust Fund.*

*1 While there is vested in you complete discretion as to the investment and disposition of the Trust Fund and as to the exercise of your powers as Trustees, I should like to give some indication as to my preferences in relation to the conduct of the Trust and in so doing I fully appreciate that your discretion is absolute and confirm that this letter is not intended to bind you in any way.*

*2 During my lifetime I should like you to be guided by my preferences with regard to the investment and distribution of any income and whether any capital sums should be paid to the beneficiaries and, if so, to which beneficiaries.*

*3 In the event of my death I hereby appoint as my successor in relation to all matters concerning the Trust, and with all powers conferred by paragraph 2 above, the following persons in order of succession, namely:-*

*(a ) SVETLANA MIKHAYLYUK* [his spouse]

*(b ) EKATERINA MIKHAYLYUK* [his daughter]

*(c ) PETR MIKHAYLYUK* [his son]

*(d ) The closest other relative of mine living at the appropriate time.*

*4 In the event of my death I should be grateful if you would divide the Trust Fund into three notional sub funds, one each for the benefit of the following persons:-*

*(a ) SVETLANA MIKHAYLYUK*

*(b ) EKATERINA MIKHAYLYUK*

*(c ) PETR MIKHAYLYUK*

*[...]*

*8 None of the provisions of this letter are binding upon you and grant no rights whatever to any of the beneficiaries for the time being under the trust.*

*9 It is also my intention that you may refrain from making distributions of capital or income to beneficiaries who indicate, after consultation with them, that you should do so.*

*10 In asking you to comply with any person's wishes or requests I do not expect you necessarily to do so if you are not satisfied that the person concerned is of sound mind.*

> *11 I may from time to time during my lifetime give you further indications of my preferences in regard to the Trust and you will no doubt wish to have regard thereto."*

39. The Minutes of a Meeting of the Board of Directors of Pulley Shipping dated 20 April 2004, signed by Mr Morton, as Chairman of the Meeting, recorded a resolution that banking facilities be arranged with the Bank of Nevis International Limited with the Authorised Signatories of Hamilton Trust as the persons with signing powers on the account. A set of minutes of a further Meeting of the Board of Directors, also dated 20 April 2004 and, again, signed by Mr Morton as Chairman of the Meeting recorded the following resolutions:

> ***'THAT** Mr Vladimir Mikhaylyuk be appointed as an Investment Advisor to the company to provide advice on other potential business ventures and to enable the company to cover his out of pocket expenses the company applies for a US$ dollar Business Card; and*
> ***THAT** the Directors of the company apply to Bank of Nevis International Ltd of Charlestown, Nevis for this facility.'*

40. In relation to the setting up of the bank accounts, Mr Morton had sent an e-mail to Mr Mikhaylyuk on 16 April 2004:

> *'Subject: Re: Pulley Shipping Ltd & The Veer Trust*
>
> *Dear Vladimir,*
>
> *We confirm that the two above-mentioned structures have been established today (certificates attached).*
>
> *To establish banking facilities with the Bank of Nevis the following information is needed to satisfy their compliance requirements.*
>
> - *Nature of Business*
> - *Source of Funds*
> - *Reason for opening account*
> - *Expected annual account turnover*
> - *Principal Owner's Home Address*
>
> *We have started the account opening process and with the above information along with faxed copies of the compliance documents will have it finalised without delay*
>
> *Please also complete the attached credit card application (complete the first half of the employee section only and sign areas where it states Employee Signature) and return the original by courier with the other documents.*[5]

41. Mr Mikhaylyuk replied on 19 April 2004:

[5] The sending of the e-mail on 16 April 2004 to an e-mail account of Mr Mikhaylyuk at Yahoo! was not successful. It was successfully sent on 19 April 2004.

"*Please find following answers to questions:*

- *Nature of Business*

*Ship's management and Brokerage, shares trade, asset management*

- *Source of Funds*

*Broker's commissions, Profit from shares trade, management fees*

- *Reason for opening account*

*to manage shares, equities, asset*

- *Expected annual account turnover*

*USD 400,000*

- *Principal Owner's Home Addess*

*122 Brangbourne Road,*

*Bromey, Kent*

*UK*

*BR1 4LQ*[6]

*Hope you have received all papers via fax by now.*

*please let me know if further info required"*

*The opening of Pulley Shipping's account in Nevis*

42. On 20 April 2004 Pulley Shipping applied to the Bank of Nevis to open an account. A "*Business Customer Information Questionnaire*" stated that the *"principal owner*" of Pulley Shipping was Mr Mikhaylyuk and the expected annual turnover on the account was $ 400,000.

43. In connection with the account a number of documents were submitted to the Bank of Nevis, including copies of Mr Mikhaylyuk's passport, driving licence and telephone, water service and council tax bills for his private residence. These included a reference for Mr Mikhaylyuk dated 27 April 2004 from Barclays Bank Plc, 9 Portman Square, London, addressed to Mr Dyrtchenko of Navitank. This reference appears to have been sent by fax from Fiduciary Management to Hamilton Trust and/or Mr Morton and the following was written on it when it was forwarded to the Bank of Nevis:

> '*If necessary, kindly verify authenticity by calling Barclays, London. Client's initial concerns were confidentiality and anonymity hence letter addressed to business associate in Sweden. Account approved July 2004.'*

[6] This was Mr Mikhaylyuk's address.

44. Mr Androsov provided a reference on Navitank writing paper which Mr Morton sent to the Bank of Nevis International under cover of a letter of 17 May 2004 in which he wrote:

> *'**PULLEY SHIPPING LTD***
>
> *'We attach copy of professional reference from Navitank AB on Mr Vladimir Mikhaylyuk, beneficial owner of above referenced company. Please note Mr Mikhaylyuk was referred to us by Mr Dyrtchenko, Director of Navitank AB, a reputable shipbroking house in Stockholm and our mutual customer since 2002.'*

Mr Dyrtchenko also provided a reference on Navitank paper.

*First payment to the Pulley Shipping Bank Account*

45. The opening credit on Pulley Shipping's account at the Bank of Nevis International was in the sum of $ 80,000 received from Mirador Shipping on 19 July 2004. These funds were, according to Mr Pinniger's evidence, transferred on the instructions of Mr Androsov who said that the payment was:

i) a refund for certain payments made into Mirador Shipping's bank account on the instructions of Mr Mikhaylyuk totalling $ 48,698; as well as

ii) a debt owed by Mr Androsov to Mr Mikhaylyuk.

The first three *Tula* payments received (see para 592 below) were $ 24,365,
$ 12,365 and $ 11,965 ($ 20 having been deducted in each case by the Bank for bank charges from the sums of $ 24,385, $ 12,385 and $ 11,985 transmitted by Itochu Petroleum Corporation ("IPC") the *Tula* charterer). The total debited to IPC was, thus, $ 48,755, which, after bank charges, meant that $ 48,695 was received. I infer that it is these three payments which make up the $ 48,698 to which Mr Pinniger refers. (The reason for the $ 3 discrepancy is unknown). Mirador Shipping also received further Tula charter commission payments (making 9 in all) on the instructions of Mr Mikhaylyuk.

46. This tallies with para 11.2. of Mirador's defence to proceedings brought against it by NOUK in Nevis to the effect that the 9 Tula payments (see para 592 below), including the 3 listed in the previous paragraph were paid into Mirador's account "*at the direction of Mr Mikhaylyuk. Mirador gave permission for temporary use of the account only pending opening by Pulley of its bank account"*; and with a written account given by Mr Androsov, although he claims that the $ 80,000 comprised the first 4 Tula payments (even though the fourth was only received by Mirador on 26 July) as well as another debt owed to Mr Mikhaylyuk.

47. It also fits in with an e-mail from Mr Mikhaylyuk to Mr Morton of 9 July 2004 in response to an e-mail from him of 7 July providing details of wiring instructions for a transfer of at least $ 40,000:

> *"Thanks for your message from yesterday, duly noted. Meantime have arranged something (should be double what you've asked), hope it should be in today or Monday. Thanks for your help."*

48. The Bank of Nevis provided Mr Mikhaylyuk with a Pulley Shipping corporate credit card. Sums due as a result of his use of the card were debited to Pulley Shipping's account.

49. On 6 September 2006, Pulley Shipping, acting by Mr Morton, sent the Bank of Nevis a Source of Funds Declaration, a Certificate of Incumbency, a Banker's Reference and scanned certified copies of Mr Mikhaylyuk's passport and driving licence (the originals were sent later under cover of a letter dated 13 September 2006). The Source of Funds Declaration stated that the beneficial holder of Pulley Shipping was The Veer Trust of which the Settlor was Mr Mikhaylyuk – a recognition of the person for whom Hamilton Corporation was acting - and the beneficiaries were (i) Mr Mikhaylyuk's wife - Svetlana Mikhaylyuk; (ii) Mr Mikhaylyuk's daughter - Ekaterina Mikhaylyuk; and (iii) Mr Mikhaylyuk's son - Petr Mikhaylyuk.

*Pulley Shipping's accounts with Investec Bank in Guernsey*

50. The Minutes of a Meeting of the Board of Pulley Shipping on 1 July 2004 record that the Board resolved that banking facilities for Pulley Shipping be arranged with Investec Bank in Guernsey. In a letter of 1 July 2004 from Mr Morton to Investec Bank asking them to open a USD Private Interest Current account for Pulley Shipping he described Mr Mikhaylyuk as the "*underlying individual*" and the beneficial owner of Pulley Shipping.

51. On about 12 October 2005, Pulley Shipping opened two United States dollar accounts with Investec Bank. These accounts were numbered 01570701 and 01570702. On or about 24 May 2006 Pulley Shipping opened a sterling account with Investec Bank (account no 1570703). Account 1570701 was opened with a credit balance transferred from Pulley Shipping's Bank of Nevis account of $ 1,500,000.[7] Investec Bank's records showed that the authorised signatories on Pulley Shipping's accounts were Hamilton Trust, Mr Pinniger and Mr Morton, and that the '*Principal Owner*' was Mr Mikhaylyuk.

52. On 5 July 2006, Investec Bank sent an e-mail to Mr Morton at Hamilton Trust asking the reason for a payment of £ 200,000 from Pulley Shipping's account to Vigor Transport Limited ('Vigor

[7] This followed a discussion between Mr Morton and Mr Mikhaylyuk: see the manuscript note of 7 October 2005.

Transport'). Vigor Transport was a further Nevis company incorporated on Mr Mikhaylyuk's instructions on 24 May 2006. Mr Morton replied by e-mail dated 5 July 2006:

> *'This payment represents an inter-company loan. Both companies are owned by the Veer Trust; settlor—Mr Vladimir Mikhaylyuk.'*

*Pulley Shipping accounts with Standard Bank in Jersey*

53. On 14 July 2006, Pulley Shipping opened a United States dollar account and a sterling account with Standard Bank, of Standard Bank House, 47-49 La Motte Street, St Helier, Jersey JE4 8XR. This followed a discussion between Mr Pinniger and Mr Mikhaylyuk at a review meeting on 17 May 2006 when the need for a GBP debit card for him was discussed. On 1 June 2006 Mr Mikhaylyuk was sent forms (bank documents, Board Resolution and Debit Card Application form) to complete in relation to the debit card. The e-mail of that date to him begins "*As you are aware, we are trying to establish a GBP account with Standard Bank, Jersey. We forwarded to the bank the copy of your passport we had on file but it expired on 22nd June 2004*". Standard Bank's records show that Mr Mikhaylyuk was the 'Settlor' of Pulley Shipping and/or The Veer Trust.

54. By the end of 2006, Mr Mikhaylyuk had withdrawn or charged some $ 200,000 on his Pulley Shipping credit card with the Bank of Nevis. Mr Mikhaylyuk has not produced any documents to show that these payments were in any way related to any expenses incurred on behalf of Pulley Shipping.

55. This material shows that the Veer Trust and Pulley Shipping were established on Mr Mikhaylyuk's instructions and operated for his benefit (or that of his immediate family) and no one else. The effect of the arrangements was that his connection with the Trust and Pulley Shipping would be concealed. He was not named as the Settlor in the settlement, although the settlement was on his instructions[8]. He was not the Trustee. To the outside world there was, thus, no apparent link between him and the Trust and Pulley Shipping, which the Trust owned. But he was able to access Pulley Shipping's funds directly by use of the credit card.

56. In reality Mr Mikhaylyuk was, as several documents stated, the beneficial owner of Pulley Shipping which he used for his benefit, and he was able to control what happened to its assets. Pulley Shipping received payments from Odin Marine totalling $ 1,228,898.20 and from Sea Pioneer totalling $ 1,491,000 which were used solely for his benefit: see paras 70, 405 and 536 below. Payments made from the account to cover credit card

[8] However, in some of the internal documents he is described as the Settlor, and that is how he described himself in para 6 of his affidavit of 30 March 2009 and para 8 of his witness statement of 6 April 2009 in these proceedings. Mr Pinniger in his evidence confirmed that the settlor was intended to control the disposition of monies in Pulley Shipping's bank account.

expenditure were dressed up as out of pocket expenses incurred or likely to be incurred in the performance by him of his duties as investment advisor to Pulley Shipping (which does not appear to have made any investments) pursuant to an Investment Advisor Agreement of 20 April 2004. Had it been necessary to do so Mr Mikhaylyuk could readily have arranged for himself or a nominee to be named as a beneficiary and to have the assets of the Trust (being Pulley Shipping or money derived therefrom) paid to him or as he directed. Hamilton Trust would have complied with his wishes unless they were manifestly illegal.

57. The use of these "*asset protection structures*" is not necessarily dishonest. They may be a means of accumulating funds free of tax. But they are also well suited to the receipt and concealment of dishonest payments. In the present case they fulfilled that function. A person who looked at the company register would see that Pulley Shipping was owned by a trust. That would tell him practically nothing. Even if he gained sight of the Trust Deed that would not reveal the real beneficiary or the real settlor. He would find no reference to Mr Mikhaylyuk.

*Mr Mikhaylyuk's case in respect of Pulley Shipping*

58. Mr Mikhaylyuk's case is that he had no legal or beneficial interest in Pulley Shipping and no control over it or its assets. In an affidavit sworn on 13 December 2006 he said that he was unaware where documents referring to Pulley Shipping might be found and did not know the name or contact details of the beneficial owner of the company nor any of its bank account details. These statements were, as he knows, untrue.

59. In his defence in these proceedings and his fifth witness statement Mr Mikhaylyuk says that he was introduced to Mr Pinniger in mid 2003 and some 6 months later held discussions with him about possible investment opportunities for Hamilton Trust and those for whom it acted. In about April 2004 Mr Pinniger told him that those for whom Hamilton Trust acted had been impressed with the advice that he had provided and wanted to receive further advice on shipping matters and wanted him to be given the opportunity to participate as an investor in suitable future deals. After further discussion it was agreed that any fees to be paid as a result of advice he had already given to others, or would give in the future, would be paid to Pulley Shipping which Mr Pinniger would set up. Pulley Shipping would be owned by the Trust which Hamilton Trust would set up and would be free to use that money as it saw fit but was under an obligation to pay Mr Mikhaylyuk fees pursuant to an Investment Advisory Agreement dated 20 April 2004 and was to make funds available for use as expenses in future advisory and consultancy work. Mr Mikhaylyuk was to be afforded the opportunity to participate as an investor in one or more future projects in which Pulley Shipping might be involved on terms to be agreed. Mr

Pinniger explained that this was the most tax efficient way of dealing with remuneration for advice given.

60. In his Further Information of July 2007 Mr Mikhaylyuk says, inter alia, that he does not know what business if any was carried out by Pulley Shipping and that no money had been paid to him personally (although funds were made available for use in respect of business development expenses) and that Pulley Shipping had not "as yet" been involved in any projects.

61. In relation to the 16 April 2004 Letter of Wishes signed by him, referred to in para 38 above, Mr Mikhaylyuk pleads in para 34 xiii of his Defence:

> '. . . . *The creation of the Trust was made by the Hamilton Corporation without participation of Mr Mikhaylyuk . . . . It is denied that the Veer Trust was created on the instructions of Mr Mikhaylyuk and that he was the Settlor of the Trust. As to the letter dated 16 April 2004, Mr Pinniger handed Mr Mikhaylyuk a draft of this letter (backdated to 16 April 2004) on or about 4 May 2004 and explained that this was a formality required for Hamilton Trust's internal files pursuant to its compliance obligations and asked Mr Mikhaylyuk to sign it. Although the letter referred to Mr Mikhaylyuk's wife and children as being beneficiaries it was not draft[ed] by Mr Mikhaylyuk and was presented to Mr Mikhaylyuk by Mr Pinniger who, Mr Mikhaylyuk assumes, drafted it. Mr Pinniger presented the letter as part of the "paperwork" needed to enable Mr Mikhaylyuk's family to benefit from the activities of Pulley in a tax efficient way. The circumstances in which the Veer Trust came to be incorporated are not admitted. (See also Paragraph 29 of this Re-Amended Defence)."*[9]

Mr Mikhaylyuk also says that the Bank of Nevis International, Investec Bank and Standard Bank accounts were set up without his participation: see paras 34 viii and xiv on page 17 of his Defence.

62. This account is, as Mr Mikhaylyuk must know, manifestly false. The true position is as explained and evidenced in paras 34 ff above and 63 below.

63. Mr Pinniger's evidence confirms what the documents vouch, namely: (i) that the Trust and Pulley Shipping were formed on Mr Mikhaylyuk's instructions; (ii) that Mr Pinniger considered Mr Mikhaylyuk and his family to be the beneficial owners of Pulley Shipping; (iii) that the Bank account in Nevis was set up with his full

[9] In paras 186 and 187 of his fifth witness statement Mr Mikhaylyuk says that in May 2004 Mr Pinniger asked him to sign some documents as a formality which were said to be for internal use. He understood that The Veer Trust was settled by him but was under the full control of the Hamilton Trust and that those who represented the Veer Trust created Pulley Shipping.

knowledge and consent and he was provided with a US dollar credit card; (iv) that Mr Mikhaylyuk was free at any time to change the letter of wishes; and (v) that Hamilton Trust would normally act in accordance with the letter and any request for payment unless known to be illegal. The account summarised in para 59 was completely untrue. Hamilton Trust did no more than provide offshore vehicles for Mr Mikhaylyuk. It was not necessarily aware what business, if any, was carried out by any companies which it incorporated. It is not, itself, in the shipping or investment business (although some of those for whom it provides its services are). Payments made to Pulley Shipping were made as a result of Mr Mikhaylyuk directing the payment. The Investment Advisor Agreement (a common feature of these structures) allowed Mr Mikhaylyuk to be paid his expenses and any fees which were agreed; but no fee rate or salary was ever agreed.

64. In March 2007 Mr Mikhaylyuk asked Hamilton Trust to set up a further company and trust – Brink Transport Ltd owned by the Rim Family Trust. On 24 March 2010 Hamilton Trust resigned as Registered Agent for Pulley Shipping, Vigor Transport and Brink Transport Ltd and as Registered Agent for the Veer Trust and the Rim Family Trust.

65. Mr Mikhaylyuk's knowingly untruthful account of his involvement in Pulley Shipping is illustrative of how he seeks to fashion his evidence to fit undeniable facts so as to produce an account which might be consistent with honesty on his part. It also causes me to be sceptical of explanations which he has given in respect of other aspects of the case.

*Mirador Shipping*

66. Mirador was incorporated by Mr Morton in Nevis on 3 December 2002. Hamilton Trust was its registered Agent. Its beneficial owner was - as a Bank of Nevis Account Opening Fact Sheet signed by Mr Morton records - Mr Androsov. Mr Pinniger had known him since November 2002 and had helped him settle a trust and had incorporated a few companies, of which Mirador must have been one. The Bank of Nevis International opened an account for Mirador Shipping – numbered 8291982 – on 4 March 2003.

67. I am satisfied that the Mirador account was used by Mr Mikhaylyuk as a home for monies that he had dishonestly obtained and was so used because it was not until July 2004 that the Pulley Shipping account with the Bank of Nevis was operational. The account was the recipient of the *Tula* payments, which started in May 2004 and continued until September 2005 and totalled $ 158,340 before charges[10]. The first $ 80,000 in the Pulley account in

[10] Although the first of the *Tula* payments was in May 2004—after the date on which Pulley Shipping was incorporated—the payments were demanded by Mr Mikhaylyuk earlier, in February 2004, before Pulley Shipping was established, and the details of Mirador Shipping's bank account were provided by him at that time.

Nevis was partly composed of the first three of those payments, which had been paid to Mirador on Mr Mikhaylyuk's instructions: see para 45 above. The Mirador account was also the recipient of $ 217,100 ($ 216,995 after bank charges) paid in May 2003 by Wisteria Enterprises Ltd ("Wisteria"), Mr Ruperti's company, in connection with the PDVSA charters.

68. The Mirador account was closed down in January 2007, shortly after the Claimants obtained a freezing order, on Mr Androsov's instructions.

69. I turn then to consider the claims in detail.

## *The PDVSA Charters*

*The Claimants' case*

70. The Claimants allege that Mr Mikhaylyuk arranged a series of charters in connection with which secret payments were made by or on behalf of the Ruperti Defendants to three companies. The companies concerned and the amount of payments that have been traced are as follows:

a) Mirador Shipping: 1 payment of $ 217,100;

b) Pulley Shipping: 3 payments totalling $ 1,491,000; and

c) Amon International**:** 3 payments totalling $ 410,379.

The payments to Mirador Shipping and Pulley Shipping were, it is said, for Mr Mikhaylyuk's benefit. The payments to Amon International were for the benefit of Mr Nikitin but were solicited and arranged by Mr Mikhaylyuk. The Claimants infer that substantially greater amounts were paid. It has not been suggested that NOUK or any of the ship owning Claimants were aware of these payments.

71. In addition it is said that Mr Mikhaylyuk and Mr Ruperti concealed from Mr Mikhaylyuk's principals the true identity of the charterers of the vessels. So far as they were concerned the charters were to PDVSA Marketing International, a genuine PDVSA company. In fact the vessels were chartered to PMI Trading, the fourth defendant, a Ruperti company, and the vessels were then sub-sub-chartered by Sea Pioneer, the third defendant, to PDVSA Petroleo S.A. or some other PDVSA company at a substantial profit. The Ruperti defendants have not produced any documented charters between PMI Trading and Sea Pioneer. The explanation proffered by their solicitors in correspondence is that the charters were "*internal contracts which are not evidenced by documents*".

72. The vessels in question and their owners are as follows:

| Vessel | Owner | Recap date | Period |
|---|---|---|---|
| *Marshal Chuykov* | Cally Shipholdings Inc | 1.11.02 | 3 months |
| *Adygeja* | Tuscany Maritime | 19.12.02 | 12 months + 12 in CHOPT |
| *Sorokaletie Pobedy* | Tamara Shipholdings SA | 30.1.03 | 3 months. Extended for 12 months from April 2003 and then for 3 years from April 2004 |
| *Moscow Kremlin* | Vital Shipping Corporation | 24.2.03 | 6 months. Extended for 2 years from September 2003 and then for a further 3 years |
| *Moscow Stars* | Dainford Navigation Inc | 6.5.03 | 24 months. Extended in May 2005 for 3 years |

73. The Claimants' primary case is that each of these charters was tainted by a dishonest and corrupt relationship which existed between Mr Mikhaylyuk and Mr Ruperti. That corrupt relationship was the product of or is evidenced by:

a) Mr Mikhaylyuk's secret and dishonest solicitation of substantial payments from Mr Ruperti:

(i) for his own benefit (by way of payments to Mirador Shipping and Pulley Shipping); and

(ii) for the benefit of Mr Nikitin (by way of payments to Amon); and

b) the Ruperti Defendants' dishonest making of such payments.

These payments were kept secret from Mr Mikhaylyuk's principals, who neither knew of them nor approved them. The Claimants contend that, in so acting, Mr Mikhaylyuk acted in dishonest breach of the fiduciary duties he owed to the Claimants and that the Ruperti Defendants dishonestly assisted in such breaches of duty. The Claimants also contend that Mr Nikitin (and through him Amon) knew that in soliciting or arranging the payments to Amon Mr Mikhaylyuk was acting dishonestly and in breach of his fiduciary duties.

74. In those circumstances, the Claimants claim to be entitled to:

i) an account from Mr Mikhaylyuk of all sums received by himself, by Pulley Shipping, by Mirador Shipping and by Amon and payment of all sums found due;

ii) an account from Mr Ruperti and Sea Pioneer of all sums paid to Mr Mikhaylyuk, to Pulley Shipping, to Mirador Shipping and to Amon and payment of all sums found due;

iii) an account from Mr Mikhaylyuk, Mr Ruperti, PMI Trading and Sea Pioneer of all profits made in connection with the PDVSA charters and payment of such profits to the Claimants;

iv) against Mr Mikhaylyuk and the Ruperti Defendants, damages or equitable compensation for (on the part of Mr Mikhaylyuk) breaches of contract and dishonest breaches of fiduciary duty and (on the part of the Ruperti Defendants) dishonest assistance in Mr Mikhaylyuk's breaches of fiduciary duty and (against all) damages for conspiracy; the Claimants' case is that, had there not been the interposition of PMI Trading and Sea Pioneer in the chartering chain, the hires which PDVSA paid to Sea Pioneer would have been paid (by PDVSA) to the Claimants; thus the loss and damage suffered by the Claimants is, in effect, equivalent to the profits made by the Ruperti Defendants;[11]

v) an account from Mr Nikitin and Amon of all sums received by Amon from Mr Ruperti or any of his companies and payment of all sums found due;

vi) damages or equitable compensation from Mr Nikitin and Amon for dishonest assistance in Mr Mikhaylyuk's dishonest breaches of fiduciary duty and damages for conspiracy.[12]

*Mr Mikhaylyuk's case*

75. It is Mr Mikhaylyuk's case that the sub-chartering arrangements were known to and approved by Mr Mikhaylyuk's superiors at NOUK and NSC. The Claimants deny this. However, they submit that, if they prove that secret payments were made by Mr Ruperti to Mr Mikhaylyuk or Mr Nikitin, questions of knowledge of the sub-chartering arrangements within NOUK or NSC are irrelevant.

## *The law*

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[11] The Claimants' pleading is that the charters to PMI Trading were:

> '. . . substantially below market rates or, at least, substantially below the rates which Mr Mikhaylyuk and Mr Ruperti knew that PDVSA would pay . . . .'

(See para 25(10).1 of the Particulars of Claim.)

The Claimants do not maintain the allegation that the charters were at substantially below market rates, although Mr Lawrie (the Claimants' chartering expert) notes that they were, for the most part, at the bottom of the range of market rates. However, PDVSA paid (in general) more than these rates. The Claimants submit that it is to be concluded that, had the Ruperti companies not been interposed in the chartering arrangements, PDVSA would have paid the higher rates to the Claimants.

[12] The Claimants contend that the loss and damage to them was the same as the sums wrongfully paid to Amon, on the grounds that, had those monies not been paid to Amon they should and would have been available to the Claimants by way of increased hire charges.

*Standard of proof*

76. The allegations made against all the defendants are allegations of dishonesty and serious wrongdoing. In order to succeed the Claimants must prove that those allegations are more likely to be true than false: *In Re H (Children) (Care Proceedings: Standard of Proof (CAFCASS intervening))* [2009] 1 AC 11. In deciding whether or not the Claimants have shown that those allegations are well founded the Court will take account of the nature of the allegations, since "*Fraud is usually less likely than negligence. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established": In re H (Minors)* [1996] AC 563, 586 per Lord Nicholls of Birkenhead, who made clear that the impact of this proposition would differ from case to case. The Court will have regard, inter alia, to the inherent probabilities.

77. One of the matters to which it is right to pay some regard is that in *Fiona Trust* Mr Nikitin was found by Andrew Smith J:

i) to have paid some $ 3 million in bribes to Mr Privalov (paras 1316 and 1440);

ii) to have been privy to the dishonest diversion of commissions in relation to the Clarkson's, Galbraith's and Norstar business (paras 1489 – 1508);

iii) to have forged documents (paras 1405 ff); and

iv) to have given dishonest evidence.

As I have said, Clarkson's were used as Sovcomflot's sale and purchase brokers and NSC's purchase brokers. Galbraith's were used for the most part as NSC's sales brokers. Commissions were paid by the sellers and buyers to the brokers and by them to Mr Nikitin's companies - Milmont and Amon. Amon was set up for the purpose of receiving the Galbraith's commissions. Someone who has done that might, the Claimants submit, more readily be thought to have engaged in dishonesty in other respects.

78. There are, however, some limitations on the significance of these findings. Firstly they were made in an action which I am not trying. Secondly, there were a number of schemes where Mr Nikitin was alleged to have acted dishonestly on the basis that Mr Skarga (the Director General of Sovcomflot) or Mr Izmaylov had acted dishonestly. Andrew Smith J rejected those contentions because he was not satisfied that the latter two had been dishonest (para 1488).

*Mr Mikhaylyuk's contractual duties.*

79. Mr Mikhaylyuk owed contractual duties to NOUK under his employment contract. Clause 7.2 provided:

> *7.2 The Executive [i.e Mr Mikhaylyuk] shall devote to the Employer [i.e, NOUK] the whole of his time and attention and shall use his best endeavours to promote the interests of the Employer during their normal working hours and beyond.*

80. In addition his Job Description provided:

> *1 The General Manager has the overall responsibility to optimise the net earnings of the Ships under management for the benefit of the principals.'*

*Fiduciary Duties*

81. In his capacity as a director and general manager of NOUK Mr Mikhaylyuk, as he admits, owed fiduciary duties to NOUK.

82. A fiduciary is someone who has undertaken, or is obliged, to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of the fiduciary is one of loyalty to his principal, who is entitled to the fiduciary's single-minded loyalty. This core obligation encompasses a duty (a) to act in good faith, (b) not to make a secret profit out of his trust; (c) not to place himself in a position where his duty and his interest may conflict; and (d) not, in relation to his principal's affairs, to act for the benefit of himself or a third party without the informed consent of his principal. See *Bristol & West Building Society v Mothew* [1998] Ch 1 *per* Millett LJ at page 18A to C; *Bowstead & Reynolds on Agency* (19th ed,) at paras 6-033 and 6-038.

83. There will be a breach of the fiduciary's duty in respect of a transaction if the fiduciary's duty and interest conflict, or if there is a realistic possibility that they might: *Imageview Management v Jack* [2009] 1 Lloyd's Rep 436 per Jacob LJ at para 6 - 8. In order to avoid being in breach the fiduciary must show that he gave full and proper disclosure of the nature and extent of his interest and that thereafter his principal gave his fully informed consent. It is not sufficient simply to disclose the existence of some interest or to say something that would put his principal on inquiry. Nor is it enough to establish that, if permission had been sought, it would have been given. See Bowstead *& Reynolds on Agency* (19th ed,) para 6-055[13]; *Crown Dilmun v Sutton* [2004] 1 BCLC 468 at paras 137 and 179 to 180; *Bristol & West v Mothew* at page 18D**.**

[13] Confirmed as an accurate statement of the law in *Hurstanger v Wilson* [2007] 1 WLR 2351 *per* Tuckey LJ at para 35.

84. Mr Mikhaylyuk also owed fiduciary duties to the one-ship-owning Claimants i.e. the 2nd to 15th Claimants. NOUK were their agents and Mr Mikhaylyuk was required and trusted to act in their interests.

85. It would be a plain breach of Mr Mikhaylyuk's duty of loyalty to accept bribes or secret commissions or do anything else which would or might compromise him in respect of his duty to obtain the best available price and terms for his and NOUK's principals.

86. A principal is entitled to seek equitable compensation or an account of profits against a fiduciary who is in breach of duty.

87. As to an account of profits:

> "*the "no conflict" rule is neither compensatory nor restitutionary: rather it is designed to strip the fiduciary of the unauthorised profits he has made whilst he is in a position of conflict*": *per* Jonathan Parker LJ *Murad v Al-Saraj* [2005] EWCA Civ 959 [108].

A fiduciary is liable to account for any profits made within the scope and ambit of a fiduciary duty which conflicts or may conflict with his personal interest. Such liability does not depend on whether the person to whom the duty was owed could or would himself have made the profit or suffered any loss: *Murad v Al-Saraj* [59] [80] ("*The liability arises from the mere fact of a profit having, in the stated circumstances [i.e. by use of a fiduciary position], been made*"); Lord Russell of Killowen in *Regal Hastings v Gulliver* [1967] 2 A.C. 134, 144G-145A. Liability does not depend on fraud or lack of good faith, although the existence of fraud may be relevant to the question of whether any allowances should be made in the taking of an account for the fiduciary's skill and labour.

*Dishonest assistance*

88. In order to establish a claim under this head the Claimant must show that there has been a breach of trust or fiduciary duty which the defendant has dishonestly procured or assisted: see *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 392 (*per* Lord Nicholls); *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 61 (*per* Andrew Smith J). There is no need for the trustee or fiduciary himself to have been dishonest (although that will often be the case).

89. Nor is there any need for the breach of fiduciary duty to involve property held on trust: *Fyffes v Templeman* [2000] 2 Lloyds Rep 648, *per* Toulson J at pages 668 to 670; *JD Wetherspoon v Van de Berg* [2009] EWHC 639 (Ch), *per* Peter Smith J at paras 510 to 518; *Fiona Trust v Privalov* at para 61 (per Andrew Smith J). These are all first instance decisions. I agree with their reasoning and regard the proposition as consistent with the nature of the claim as explained in *Royal Brunei Airlines*.

90. If there has been dishonest assistance, it is necessary to identify what breach of trust or duty was assisted, and (insofar as there is an inquiry into loss) what loss may be said to have resulted from that breach of trust or duty. The dishonest assistant will be liable to make equitable compensation for the loss. It is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of the breach of trust or fiduciary duty or the resulting loss. See *Grupo Torras v Al-Sabah (No 5)* [2001] Lloyd's Rep PN 117 CA, para 119, endorsing Mance LJ's first instance judgment; and *Casio Computer v Sayo* [2001] EWCA Civ 661, *per* Tuckey LJ at para 15 and Pill LJ at para 52**.**

91. In assessing dishonesty the question is whether what was done was what an honest person would have done in the defendant's circumstances. The Court looks at what the defendant knew or what he suspected, but about which he consciously decided not to make further inquiries which might lead to knowledge. It then looks to see whether, in the light of that knowledge or suspicion, the transaction in which the defendant participated was one in which he could, applying normally acceptable standards, honestly participate: See *Royal Brunei Airlines v Tan* [1995] 2 AC 378 PC, at pages 390 and 391-*("honesty is an objective standard")*; *Barlow Clowes v EuroTrust* [2006] 1 WLR 1476 PC, *per* Lord Hoffmann at para 10 ("*If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards"*); *Abou-Rahmah v Abacha* [2007] 1 Lloyds Rep 115 CA, *per* Rix LJ at paras 14 and 16, Arden LJ at paras 59 & 65; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314.

92. It is not necessary for the defendant to know (or even suspect) the existence of a trust or of facts giving rise to a trust. It is sufficient if the defendant knows or suspects that the transaction is such as to render his participation dishonest. It is no answer to say that he thought the purpose was, for example, tax evasion or money laundering. See *Barlow Clowes v EuroTrust* (above), *per* Lord Hoffmann at para 28; *Abou-Rahmah v Abacha* (above), *per* Rix LJ at paras 32 and 37 to 39; *Agip v Jackson* [1990] Ch 265, *per* Millett J at 295**.**

*Account of profits*

93. Recent authority establishes that the principal is entitled to an account of profits not only against the fiduciary but also against the dishonest assister, as an alternative to equitable compensation. See *Fyffes v Templeman*, [2000] 2 Lloyd's Rep 643, at 668 *per* Toulson J; *Murad v Al-Saraj* [2005] EWCA Civ 958 at para 69 (*per* Arden LJ) and at paras 118 to 120 *per* Jonathan Parker LJ; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1589 – 1601]; *Tajik Aluminium Plant v Ermatoy (No 3)* [2006] EQHC 7 [23]/*Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at para 392 (*per* Christopher Clarke J); *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 62 to 66 (*per* Andrew Smith J).

94. In taking the account against a fiduciary, the court adopts a broad approach and is not limited to profits which directly result from the transaction so as to exclude profits which can be said to be the result of another event such as the movement of the market. This is because the court does not enter into an investigation as to what would have happened if the fiduciary had complied with his obligations – see *Murad v Al-Saraj* [2005] EWCA Civ 958 at para 76 (*per* Arden LJ); *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 67 (*per* Andrew Smith J). I shall consider later whether identical considerations apply in the case of an assister.

*Which profits?*

95. A further question arises, namely whether the principal is entitled to an account from the agent in respect of the profits made by the third party. The Claimants contend that they are entitled to an account of profits from Mr Mikhaylyuk in relation to (i) the profits earned by Mr Ruperti or his company in respect of the PDVSA charters and (ii) the profits earned by Mr Nikitin in respect of the Henriot Finance charter profits.

96. The Claimants submit that, in a dishonest assistance case the assister is liable to account not only for his own profits but also for the profits made by the fiduciary. A decision to that effect has been made by the British Columbia Supreme Court in *Canada Safeway v Thompson* [1951] 3 DLR 295 and by Judge Richard Seymour QC in *Comax Secure Business v Wilson* (21 June 2001, unreported QBD). If the dishonest assister is liable to account for profits made by the fiduciary then, by similar reasoning, say the Claimants, the fiduciary should be liable to account for the profits made by the dishonest assister. Both the assister and the agent's profits are made as part of a common enterprise.

97. In *Ultraframe (UK) Ltd v Fielding & Ors* [2005] EWHC 1638 (Ch) Lewison J, as he then was, considered these two cases. Having done so he said this:

> *"1600 I can see that it makes sense for a dishonest assistant to be jointly and severally liable for any loss which the beneficiary suffers as a result of a breach of trust. I can see also that it makes sense for a dishonest assistant to be liable to disgorge any profit which he himself has made as a result of assisting in the breach. However, I cannot take the next step to the conclusion that a dishonest assistant is also liable to pay to the beneficiary an amount equal to a profit which he did not make and which has produced no corresponding loss to the beneficiary. As James LJ pointed out in Vyse v. Foster (1872) LR 8 Ch App 309:*
>
> > *"This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or*

> *damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon. It is simply on the ground that the Court finds that he actually made more, constituting moneys in his hands "had and received to the use" of the cestui que trust."*
>
> *1601 I was not referred to any authority binding me so to hold; and I decline to do so."*

98. Mr Dominic Dowley, Q.C., for the Claimants, submitted that there was no sound basis for distinguishing between losses suffered or profits made as a result of a joint enterprise.

99. I prefer the view of Lewison J. The difference between losses suffered and profits made is that wrongdoers responsible for losses should prima facie be made to pay for them since the innocent party has suffered the losses and they have caused them. But the disgorgement of profits made which are not the counterpart of losses suffered requires the existence of some equity to require it. If a fiduciary acquires a profit as a result of his breach of fiduciary duty equity will regard the profit thus derived as due to the person to whom the duty was owed, for which the fiduciary must account. The same applies to a profit derived by the dishonest assister from his assistance in a breach of fiduciary duty. But there is no equity to compel someone who has not made a profit from his breach, or dishonest assistance in that of another, to account for a profit which he has not made and which does not represent a loss which the principal has suffered.

100. I do not therefore regard the Claimants as potentially entitled as against Mr Mikhaylyuk to an account of profits not made by him but by the Ruperti or Nikitin Defendants or to recover the amounts paid to Amon. The contrary conclusion appears to me, as it did to Andrew Smith J in *Fiona Trust* at para 1486 (iv), to be inconsistent with the decision in *Regal (Hastings) v Gulliver* [1967] 2 A.C.134 that Mr Gulliver, a director of Regal, was not liable to account for the profits made by the owners of shares when they were sold when he was never, himself, a true shareholder, the shares in his name being beneficially owned by another. Mr Dowley submitted that the position is different where, unlike as in *Regal*, the fiduciary has been dishonest. But there is nothing in the judgment to indicate that dishonesty would have made a difference unless it led to the conclusion that the shares, and hence the profits on their sale, were his; nor am I persuaded that, in principle, it should do so.

*Conspiracy*

101. The Claimants advance claims for conspiracy to injure using unlawful means. The elements of legal liability for conspiracy by unlawful

means are (1) a combination; (2) to use unlawful means; (3) with intent to injure the Claimant. See *Lonrho plc v Fayed* [1992] 1 AC 448; *Clerk & Lindsell on Torts* (20th edition, 2010), paras 24-090 to 24-111.

102. In relation to the requirement of combination:

i) In order to establish a combination it is sufficient if two or more persons combine with a common intention. There is no need for any explicit agreement. The existence, extent and scope of the combination (if any) is to be inferred from the overt acts. It is rare to be able to establish precisely when any agreement or combination began or when various conspirators were recruited. See *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 (Nourse LJ, paras 111 and 112); *Derksen v Pillar* (17 December 2002) Michael Briggs QC (para 33(2)).

ii) It is not necessary for all the conspirators to join the conspiracy at the same time, but they must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert when the acts complained of were carried out. See *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 at para 111.

103. In relation to the requirement for unlawful means:

i) There is no requirement that the unlawful means be actionable at the suit of the Claimant - *Revenue and Customs Commissioners v Total Network* [2008] 2 All ER 413, *per* Lord Walker at para 94.

ii) Unlawful means can include, amongst other wrongs, tort (*Total Networks v Revenue & Customs Commissioners* [2008] 2 All ER 413, *per* Lord Walker at para 91), breach of fiduciary duty (*Sphere Drake Insurance v Euro International Underwriting* [2003] Lloyd's Rep IR 525 at 541 to 542 *per* Thomas J, paras 85 to 88) and breach of contract (*Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 at 319e *per* Nourse LJ at para 130). See also *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 69 (*per* Andrew Smith J).

iii) The Claimant must establish an intention to injure but this need not be the defendants' predominant purpose, and the intention will normally be inferred from the primary facts. If the defendants intend to injure the Claimant and uses unlawful means to do so, it is no defence in itself to show that their primary purpose was to further or protect their own interests. See *Kuwait Oil Tanker v Al Bader* (above) at pages 311j and 315j (Nourse LJ, paras 107 and 120-1); *Lonrho v Fayed* [1992] 1 AC 448, at pages 463-468, *per* Lord Bridge.

*Bribery*

104. In *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 Slade J defined a bribe as follows (at page 575):

> '*For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.'*

105. A bribe was defined even more succinctly by Leggatt J, as he then was, in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries* [1990] 1 Lloyd's Rep 167 at 171, as:

> *'A commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal.'*

106. The essential character of a bribe is, thus, that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal. The bribe may have been offered by the payer or sought by the agent. There is no need to establish dishonesty or corrupt motives. This is irrebuttably presumed - *Re A Debtor* [1927] 2 Ch 367 at 376 (*per* Scrutton LJ – "*the court ought to presume fraud in such circumstances*"). A bribe encompasses not just a payment of money but the conferring of any advantage or benefit, and may be an actual benefit or merely the promise of a benefit held out by the payer or an expectation of one[14]. The motive for the payment or inducement (be it a gift, payment for services or otherwise) is irrelevant. In *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 73 Andrew Smith J contemplated that moonlighting for a person engaged in transactions with the principal might well give rise to a conflict between the agent's interest and duty and that the reward for his services might count as a bribe.

107. The payments (or other benefits) do not have to be made directly to the fiduciary. Bribes may be paid to third parties close to the agent, such as family members or discretionary trusts, or simply to those whom the agent wishes to benefit. The test is whether the payment (or other benefit) puts the fiduciary in a real (as opposed to a fanciful) position of potential conflict between interest and duty.

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[14] For an example in relation to an 'expectation' being sufficient, see *Panama and South Pacific Telegraph v India Rubber* (1875) LR 10 Ch App 515 at 528 where the plaintiffs made a contract for the laying of telegraph cable with the defendants and Mellish LJ thought it obvious "*that if at the time when the contract was made* [the plaintiffs' engineer] *had the expectation that he would get a favourable contract for the laying of the cable* [from the defendants]… *it was quite impossible that he could be a proper person to advise the Plaintiffs company as to the proper form of their contract with the Defendants".*

108. The recipient of the bribe (or the person at whose order the bribe is paid) must be someone with a role in the decision-making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal. There is, however, no need to show that the payer intended the agent to be influenced by the payment or whether he was *in fact* influenced thereby. There is an irrebuttable presumption as to both, and that the principal has suffered damage in the amount of the bribe - *Hovenden & Sons v Milhof* (1900) 83 LT 41 CA *per* Romer LJ at page 43; *Industries & General Mortgage Co Ltd v Lewis* (above) at *per* Slade J at pages 576 to 578; *Mahesan v Malaysian Housing Society* [1979] AC 374 PC at pages 380E and 383A-C; *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119, *per* Lawrence Collins J at para 53**.**

109. The payment need not be linked to a particular transaction - *Daraydan Holdings v Solland International* (above) at para 53; *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 73 (*per* Andrew Smith J). It is sufficient if the agent is tainted by the bribery at the time of the transaction between the payer of the bribe and payee's principal. If that is so, the agent's conflict of interest means that the principal has been deprived by the other party to the transaction of the disinterested advice of his agent and is entitled to a further opportunity to consider whether it is in his interests to affirm it. It follows that subsequent transactions may be tainted by payments linked to an earlier transaction between the parties, or by a payment not linked to any particular transaction. "*If a secret payment is made to an agent, it taints future dealings between the principal and the person making it in which the agent acts for the principal or in which he is in a position to influence the principal's decisions, so long as the potential conflict of interest remains a real possibility"*: see *Fiona Trust* at para 73.

110. The underlying rationale for the strict approach taken by the cases is that a principal is entitled to be confident that an agent will act wholly in his interests.

111. The agent/fiduciary and the payer of the bribe/secret commission are jointly and severally liable not only to account to the principal for the amount of the bribe but also in damages for fraud[15] for any loss suffered by the principal. Consequently, the agent and the third party payer are jointly and severally liable to the principal (1) to account for the amount of the bribe in restitution as money had and received; and (2) for damages for any actual loss suffered by the principal from entering into the transaction in respect of which the bribe or secret commission was given or promised. But these are alternative remedies and the principal must elect between the two remedies prior to final

[15] The fraud claim for the actual loss suffered as a result of the bribe is sui generis: no representation or reliance is necessary. As Steel J stated in *Petrograde Inc v Smith* [2000] Lloyds Rep 486 at 490: '*The [damages] claim based on bribery is not a species of deceit but a special form of fraud where there is no representation made to the principal of the agent let alone reliance.'*

judgment being entered: *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374, 383 (*per* Lord Diplock); *Petrotrade v Smith* [2000] 1 Lloyds Rep 486 at 489-490 (*per* David Steel J); *Bowstead and Reynolds on Agency* (19th Edition), at para 6-087. In the present case the Claimants have elected for damages in relation to the PDVSA charters.

112. There is a dispute as to whether or not an account of profits is available in principle as a remedy for bribery. The Nikitin defendants submit that it is not. The issue is of little significance if the briber is also a dishonest assister.

## *The facts*

### *The background*

113. From 1996 onwards there was a series of time charters, and continuations thereof, in respect of vessels owned by Novoship companies to PDVSA companies such as PDVSA Petroleo y Gaz S.A. The broker acting for Novoship was ACM Shipping. From April 1999 onwards there were several voyage charters to PDVSA companies. The details of those charters are set out in Schedule 2 to the Claimants' Reply to the Ruperti defence.

114. The taking of vessels on time charter by PDVSA almost came to a halt in 2000. Part of the problem was the difficulty in obtaining Oil Major approvals, especially in the absence of cargoes. But on 7 September 2000 there was a 6 + 6 months (in charterers' option) charter of the *Aleksandr Pokryshkin* and on 26 October 2001 a further charter of the same length of one of four different Novoship vessels. Between 30 April 1999 and 4 October 2002 there were some 9 voyage charters to PDVSA including one of the *Sorokaletie Pobedy* on 2 September 2002 and one of the *Marshal Chuykov* on 4 October 2002.

115. These charters were valuable to NSC because the vessels in question (the *Aleksandr Pokryshkin,* the *Marshal Bagramyan,* the *Sorokaletie Pobedy* and the *Marshal Chuykov*) were "Pobeda-type" panamaxes which have relatively high fuel consumption. They were not easy to market and were unacceptable for some terminals because they were longer than a standard panamax of 750 feet. They did not comply with the latest construction requirements for tankers in the industry and their technical condition was such that Oil Major approval was not easily forthcoming.

### *The false documentation*

116. It is apparent from the evidence that Mr Mikhaylyuk and the Ruperti defendants created two sets of documents relating to the PDVSA charters. The recaps on NOUK's files showed the charterer to be "*PDVSA Marketing International (PMI)*" or "*PDVSA*". I refer to the relevant documents below.

*Marshal Chuykov*

117. The e-mail final charter recap on NOUK's files for the *Marshal Chuykov,* dated 1 November 2002 had as its subject:

> '*M. Chuykov/**PDVSA Marketing Int**[16] t/c/p.25.10.2002 – FINAL RECAP'*

and stated:

> '*FINAL RECAP*
>
> *BEING ALL SUBJECTS LIFTED, WE ARE PLEASED TO RECAP HEREWITH TERMS AND CONDITIONS OF FIXTURE BETWEEN **MESSRS PDVSA MARKETING INTERNATIONAL (P.M.I). A**S CHARTERERS AND MESSRS. NOVOSHIP AS AGENTS TO OWNERS "CALLY SHIPHOLDINGS INC", AS FOLLOWS . . . .*'

The corrections to lines 1-7 of the Shelltime 4 charterparty, the terms of which were to be incorporated, referred to the Charterer as "*PMI S.A*." The recap also provided for the following additional clause:

> *'9) NOTICES*
>
> *OFFICIAL NOTICES RELATING TO THIS TIME CHARTER PARTY SHOULD BE SENT TO THE FOLLOWING PARTIES:*
>
> *OWNER: **SURAMERICANA DE TRANSPORTE PETROLERO***
>
> *CHARTERER: **PDVSA PETROLEO SA'***

SURAMERICANA DE TRANSPORTE PETROLEO ("Suramericana") is a Ruperti company. PDVSA Petroleo S.A. is a genuine PDVSA Group company.

*Adygeja*

118. In the case of the *Adygeja,* the NOUK version of the e-mail recap dated 19 December 2002 provided:

> *'WE ARE PLEASED TO RECAP HEREWITH TERMS AND CONDITIONS OF FIXTURE BETWEEN **MESSRS PDVSA MARKETING INTERNATIONAL (P.M.I). AS** CHARTERERS AND MESSRS NOVOSHIP AS AGENTS TO OWNERS "TUSCANY MARITIME SA", AS FOLLOWS . . . .*

Lines 1 - 7 of the Shell Time 4 charterparty were to be corrected to specify the Charterer as PDVSA Marketing International P.M.I and the Owner as Suramericana de Transporte Petrolero. The recap had the same references in additional Clause 9 to Suramericana de Transporte

[16] The bold in this and other citations is not in the original.

Petrolero as Owner and PDVSA Petroleo S.A. as charterer as the recap for the *Marshal Chuykov* referred to in the preceding paragraph.

*Sorokaletie Pobedy*

119. In the case of the *Sorokaletie Pobedy* NOUK's copy of the e-mail charter re-cap provided:

> *'Subject: S.Pobedy/**PDVSA Marketing Int**. t/c/p. 15.01.2003 – FINAL RECAP*
>
> *. . . .*
>
> *BEING ALL SUBJECTS LIFTED, WE ARE PLEASE TO RECAP HEREWITH TERMS AND CONDITIONS OF FIXTURE BETWEEN **MESSRS PDVSA MARKETING INTERNATIONAL (P.M.I).** AS CHARTERERS AND MESSRS NOVOSHIP AS AGENTS TO OWNERS "TAMARA SHIPHOLDINGS SA" AS FOLLOWS . . . ."*

The corrections to Lines 1-7 of the Shell Time 4 charterparty specified the charterer as PMI S.A. There was, also, a reference in Clause 9 to notices being sent to the following parties:

> "*P.M.I/SURAMERICANA DE TRANSPORTE PETROLERO*
>
> *PDVSA PETROLEO S.A.."*

*Moscow Kremlin*

120. In the case of the *Moscow Kremlin,* the e-mail charter recap on NOUK's files (dated 24 February 2003, timed at 15:31 and sent by Mr Francisco Morillo, an employee at Interpetrol Trafigura de Venezuela, Mr Ruperti's company, to Mr Mikhaylyuk) provides as follows:

> *'Subject: 'Moscow Kremlin'/**PDVSA** – Corrected Recap*
> *. . . .*
> *ACCOUNT **PDVSA***
>
> *VESSEL MT 'MOSCOW KREMLIN'*
> *OWNERS VITAL SHIPPING CORP*
> *. . . .*
> *9) NOTICES*
> *OFFICIAL NOTICES RELATING TO THIS TIME CHARTER SHOULD BE SENT TO THE FOLLOWING PARTIES:*
>
> *OWNER: VITAL SHIPPING CORP . . . .*
>
> *CHARTERER: PDVSA . . . .'*

Thus, the reference to Suramericana had been removed and replaced by a reference to the owner, Vital Shipping, the third Claimant.

*Moscow Stars*

121. In the case of the *Moscow Stars,* the recap of 6 May 2003 on NOUK's records was as follows:

> '*Subject: 'Moscow Stars'/PDVSA – c/p 25.04.2003 – Recap*
>
> *BEING ALL SUBJECTS LIFTED, WE ARE PLEASED TO RECAP HEREWITH TERMS AND CONDITIONS OF FIXTURE BETWEEN MESSRS* ***PDVSA MARKETING INTERNATIONAL (P.M.I).*** *AS CHARTERERS AND MESSRS NOVOSHIP AS AGENTS TO OWNERS "DAINFORD NAVIGATION INC" AS FOLLOWS . . . .*'

As in the case of the recap for the *Moscow Kremlin,* the clause 9 notice provisions did not refer to the owner as Suramericana but as Dainford Navigation, the 4th Claimant, and referred to the charterer as PDVSA. The amendments to lines1-7 of the Shelltime 4 charterparty provided for them to include:

> *CHARTERER: PDVSA MARKETING INTERNATIONAL PMI*
>
> *SURAMERICANA DE TRANSPORTE PETROLERO.*'

122. It appears that the reason for the reference to Suramericana de Transporte Petrolero as owner in the notice clause (No 9) in the *Marshal Chuykov* charter was that the form of recap with that clause was adapted from the recap which Mr Ruperti had agreed with PDVSA for the *Marshal Chuykov*: see the e-mail (M2/219) from Mr Richard Small of the brokers Maritima to Mr Francisco Morillo on 25 October 2002 which contained that clause.

123. According to Mr Mikhaylyuk the references in the charter recaps on NOUK's files to PDVSA Marketing International were false. Senior Management, including Mr Izmaylov and Mr Sakovich knew that the charters were really with PMI Trading. He was told by Mr Oskirko to create documentation referring to PDVSA because that would be more acceptable to the banks.

124. Mr Mikhaylyuk's account does not tally with the sequence of the charter negotiations. Thus, in relation to the *Marshal Chuykov*, Mr Mikhaylyuk had negotiations with Mr Ruperti and Mr Morillo in which *PDVSA Petroleo S.A.* was named as the charterer. A recap in an e-mail from Mr Ruperti to Mr Mikhaylyuk was printed out and put on file: see the email of 22 October (M2/203), which appears to be an adaptation by Mr Ruperti of what he had received from Maritima, who were acting as brokers for PDVSA, or intermediaries between Mr

Ruperti and PDVSA. An email from Mr Morillo of 25 October (M2/214) was sent to many individuals in the NOUK chartering department passing on a message from PDVSA Petroleo S.A. nominating an inspector. But at some stage thereafter documents were produced or altered so as to produce a charter to a company with PMI in its name. The sequence of emails is tortuous and it is not clear to me that all relevant emails have been disclosed by the Defendants.

125. The Ruperti defendants have disclosed a recap with no date or addressee from Maritima, where the hire is $ 13,750 per day and Wisteria is named as the bare boat owner and PDVSA Petroleo S.A. as the charterer (M2/216). The recap also refers to a 1.25% commission to be paid by bare boat owners to Maritima.

126. There is then an email of 25 October 2002 from Maritima to Mr Morillo where Suramericana de Transporte Petroleo are named as the bare boat owners and PDVSA Petroleo S.A. the charterer (M2/219) in the body of the email and in one of the attachments. The hire is $ 13,750 with a 1.25% commission to Maritima. This e-mail was forwarded to Mr Ruperti.

127. The 25 October email was forwarded by Mr Morillo to Mr Ruperti for a second time on 28 October 2002 (M2/237), and by Mr Ruperti to Mr Mikhaylyuk. But the email from Maritima now refers to "*PDVSA Marketing Intewrnational (P.M.I.)*" (sic) as charterer and Messrs Novoship (sic) as owners; and the rate is $ 12,000. The corrections to the Shelltime form naming Suramericana de Transporte Petroleo as the Bare Boat owner and "*PDVSA Petroleo S.A*." as the charterer in the amendment to Lines 1-7 remain as before (M2/243). So the introduction of a PMI entity appears to be from Mr Ruperti (and not from Mr Mikhaylyuk on Mr Oskirko's instructions). In this email Mr Ruperti is effectively setting out the charter that he wants in order to be able to charter out to PDVSA and the name he wants the charterer to appear to be.

128. On 29 October (M2/257) Mr Morillo sends the 25 October Maritima recap (as amended on 28 October with *PDVSA Marketing Intewrnational (P.M.I.)* as charterer) to Mr Ruperti with a rate of $ 12,152 instead of the previous figure of $ 12,000. Mr Ruperti sends it to Mr Mikhaylyuk on the same day (M2/274).

129. On 31 October (M2/293) Mr Mikhaylyuk sends the recap back to Mr Ruperti adding "*as Agents to Owners "Cally Shipholding Inc*" after "*Novoship*".

130. The version of the 31 October email produced by Mr Ruperti to the Claimants two years later in December 2006 (M2/311) refers to the charterers as "*PMI Trading Inc*". That this is an altered copy of the 31 October email appears from the fact that it has a spelling mistake in the subject heading where there is a gap between the "OC" and the "TOBER" of October. This error crept into Mr Ruperti's emails to Mr

Mikhaylyuk of 28 October (M2/237) and 29 October (M2/274) and Mr Mikhaylyuk's email to Mr Ruperti of 31 October (M2/293).

131. On 1 November Mr Morillo sent Mr Mikhaylyuk the 31 October recap referring to the now correctly spelt "*PDVSA Marketing International (P.M.I.)*" as the charterer, although the amendment to lines 1-7 of the Shelltime 4 terms refers to the Charterers as "*PMI S.A*.". Mr Mikhaylyuk printed it off and put it in the file. Before he did so he changed the Subject line from referring to "*PDVSA Petroleo SA*" as charterer to "*PDVSA Marketing Int*". This variation does not fit well with a wish to create the (false) impression that the charter was with PDVSA. In that case it would have made more sense to change the charterer to PDVSA Petroleo SA with no reference to PMI. In fact the use of the name PDVSA Marketing International (P.M.I.) allowed Mr Mikhaylyuk and Mr Ruperti to face both ways and represent the charterer as an emanation of PDVSA or PMI as occasion required.

132. It is unlikely that the version of the 31 October email referred to in the penultimate paragraph was changed from "*PMI Trading Inc*" back to "*PDVSA Marketing International (P.M.I.)"* before it was sent to Mr Mikhaylyuk on 1 November. It is more likely that the change to PMI Trading took place at some later date to establish that PMI Trading was the true charterer.

133. What this sequence of events shows is that matters were proceeding on several levels. On one level there were communications from Maritima, which was the intermediary with PDVSA Petroleo S.A., to Mr Ruperti or Mr Morillo, where the specified bare boat owner is a Ruperti company. At another level there are communications between Mr Mikhaylyuk and Mr Ruperti where *PDVSA Petroleo S.A.* is the charterer and the owner is unspecified. Then the email recap from Maritima is recast on Mr Ruperti's side and sent to Mr Mikhaylyuk so as to make "*PDVSA Marketing International (P.M.I.)*" the charterer (which was the name used in subsequent charters) and Novoship/Cally Shipping the owner.

134. If a charter to PDVSA was to be drawn up because a charter to PMI would be unacceptable to the banks, it would seem more likely that the negotiations would begin with PMI as charterer and that a charter with PDVSA would be raised as cover at a later stage; rather than that they should start with a charter with PDVSA and that steps should then be taken to make the charter appear to be made with PDVSA Marketing International (P.M.I.).

135. The use of that name meant that the charterer, although it was not PDVSA Petroleo S.A., appeared to be a genuine PDVSA company – as PDVSA Marketing International S.A. is believed to be - which had entered into the charter through Mr Ruperti's company Nautica (the broker of the *Marshal Chuykov*). In fact, as Mr Mikhaylyuk and Mr Ruperti well understood the true charterer was not any genuine PDVSA company but was PMI Trading (which could, if need arise, be

said to be the company referred to in the charter) and the charter with a genuine PDVSA company was entered into by Sea Pioneer[17].

136. Mr Mikhaylyuk's account is also belied by the evidence as to how NOUK became aware that the charters were in fact charters to PMI Trading: see below.

*The discovery of the true charterers*

137. Mr John Salmon joined NOUK in 2006 as Commercial Manager after Mr Mikhaylyuk's dismissal. His evidence was obviously truthful and I accept it. He became concerned to see whether the charters would permit the management of the vessels to be transferred from NOUK in London to NSC in Novorossiysk. A meeting was arranged in Caracas for 11 May 2006 with Interpetrol, Mr Ruperti's company, which Mr Salmon then believed to be PDVSA's brokers. It was attended by Mr Ruperti, Mr Hernandez of Interpetrol, Mr Stephen Gollar, Mr Simon Jones and Mr Salmon of NOUK. That meeting took place but nothing of significance for present purposes occurred.

138. Mr Mikhaylyuk learnt of the proposed meeting with alarm. On 3 May 2006 he emailed to Mr Ruperti, using the "Misha Fu" account. This was a secret password protected e-mail account in which Mr Mikhaylyuk is referred to as Misha Fu and Mr Ruperti as Father Angelus (see para 198 below) in these terms:

> "*'please note that Novoship management are trying to look into the time-charter on their vessels with PDV, therefore, please make sure that PDVSA do not open ANY information as the same is P&C, and if Novoship wants to have then everything is reflected in the originally agreed recaps. Please ask PDVSA not to disclose anything, as you have to be the only source of information.*
>
> *please keep me inform on the process.*
>
> *it is understood that they had cut out all brokers with whom I was working, and are trying to deal with the same charterers through different people.*
>
> *I do expect they will try to make deals with PDVSA direct as well"*

139. I infer (i) that Mr Mikhaylyuk was keen to avoid NOUK discovering that the charters were not directly with PDVSA, as would be likely to happen if NOUK made contact with PDVSA; and (ii) that the "*originally agreed recaps*" were those which named PDVSA and not PMI Trading as the charterer.

[17] The Ruperti defendants disclosed a number of documents pursuant to the order of Tomlinson J of 19 February 2010 which are said to be all the documents they have in respect of the charters of the vessels in question, which include charters by Sea Pioneer to PDVSA Petroleo S.A..

140. Later in 2006, Mr Julian Brown, who was in the Chartering Department of NOUK, was informed by a broker, Mr Gareth Jones, of Trafalgar Shipping, that there was a suggestion in the market that the PDVSA vessels were operating under sub-charters at a higher rate than agreed by NOUK. Mr Salmon was surprised by this suggestion and found it very difficult to understand what was going on. He raised his concerns with Mr Lebedev, then the General Manager of NOUK, and Mr Simon Jones.

141. On 27 September 2006, NOUK was copied in on an e-mail from PDVSA to Sea Pioneer which read:

> *'PER T/C C/P DATED 01/NOVEMBER/2004 WE HEREBY AS CHARTERERS GIVE MESSRS. SEA PIONEER OF SHIPPING AS BAREBOAT OWNERS OF MT MARSHAL CHUYCOV THIRTY DAYS NOTICE OF REDELIVERY'*

142. On 29 September and 9 October 2006 Mr Barriga, an NOUK ship operator, e-mailed Mr Hernandez of Interpetrol to ask (29 September) whether this was only a termination with Sea Pioneer or (9 October) whether it was a notice from PDVSA to Interpetrol or PDVSA to Owners. It is not clear why exactly he wrote in those terms. Mr Salmon was not aware at the time that he had done so. Mr Salmon was confused by the notice and made contact with Mr William Parra of PDVSA by telephone and e-mail on 9 October 2006 and suggested a discussion of the relationship between Sea Pioneer and PDVSA. It appears to have been thought that Sea Pioneer might be some part of PDVSA.

143. Mr Gareth Jones put NOUK in touch with a Venezuelan broker, Mr Andres Duarte of Duarte Vivas & Associados C.A. who provided information concerning the chartering arrangements. The information was to the effect that there was a "black hole" of information on the charterers' side; that the fixtures were carried out by a former PDVSA Chartering team; that new staff only had some short communications extending the charter periods of 4 of the vessels; and that they revealed the disponent owners to be Sea Pioneer.

144. There was then a meeting on 7 November 2006 between (i) representatives of PDVSA, (ii) Mr Salmon, (iii) Mr Lebedev and (iv) Mr Vittorio Faustini (a colleague of Mr Duarte) in Caracas. The NOUK note of the meeting states:

> '*It was established through an energetic but amicable exchange that:*
>
> *1 PDVSA have chartered all current (and possible previous vessels) through Sea Pioneer Shipping as disponent Owners of Novoship owned vessels.*
>
> *<u>There are no direct contracts between Novoship and PDVSA which are legal documents.</u>*

> *2 Novoship (UK) have no direct contracts with Sea Pioneer. The belief is that the contracts are with PDVSA (Marine/PMI/etc) since 2001/2002?. PDVSA produced apparent evidence of a contract whereby they chartered from Sea Pioneer. This of course could not be verified/checked at the time.*
>
> *3 Novoship (UK) apparently 'employed' Interpetrol/Sea Pioneer as an agent or broker in discussions/negotiations with PDVSA (from 2001 until current?).*
>
> 4. *PDVSA have apparently never received direct invoices from Novoship, only from Sea Pioneer. Novoship receive payment via Sea Pioneer, monthly.*
>
> *5 The address which Novoship uses for monthly invoicing has been closed as from 2002/2003?.*
>
> *6 Payment is made to Novoship via Sea Pioneer (Interpetrol?) on a monthly basis in the assumption they are acting as agent/broker, for which they get paid 1/1.25% commission. This is the NSC understanding.*
>
> *7 Advised PDVSA to pay no more freight invoices to Sea Pioneer issued as of current date until situation clarified.*
>
> *8 Invoices/names and addresses/e-mails were shared with PDVSA panel and an agreement made to allow more freedom of such data/information in order to solve the situation.*
>
> *9 Agreement made for both parties to consider situation for 2 days and for a proposal to be discussed/agreed directly thereafter.'*

145. On 24 November 2006 Mr Salmon faxed to Mr Ruperti at Interpetrol (with a copy to Mr Gilmer Gonzalez, at PDVSA) as follows:

> '*As a result of enquiries into the employment of the above mentioned vessels [ the Moscow Kremlin, the Moscow Stars and the Marshall Chuykov] it has now become apparent to us that the arrangements for the vessels employment have no proper legal basis.*
>
> *Owners of the vessels were under the impression that the vessels were on time charter to PDVSA directly, however it is clear that PDVSA does not consider it has direct contact with the Owners, but rather with Sea Pioneer Shipping and the Owners have no contractual relations with Sea Pioneer Shipping.*
>
> *In these circumstances, and in the absence of any feasible explanation from Interpetrol or others Owners appear to*

*have no alternative but to regard the previous arrangements for the vessels as void and of no further effect.*

*Clearly, the situation between all parties needs to be resolved on a mutually satisfactory basis urgently so that legitimate and properly documented arrangements can be put in place'.[…]*

146. On 26 November 2006, Mr Ruperti replied as follows:

*'We have read your communication dated November 24, 2006 and now we provide with the following:*

***1. CONTRACTUAL ARRANGEMENTS BETWEEN THE PARTIES***

*On or about December 2002, PMI TRADING INC hired in Time Charters the vessels Moscow Kremlin, Moscow Star and Marshal Chuykov. The employment of the vessels was fixed between our side (PMI TRADING INC) and NOVOSHIP as agent for the Owners of the above mentioned vessels. Terms and conditions in force for the employment of the vessels are in recaps and hard copies of the final contracts are in our possession. Needless to say that Sea Pioneer Shipping Corporation on behalf of PMI TRADING INC has been paying on time and without delays the hires for the employment of the vessels.*

*We hope that the above clarifies to you the contractual arrangements between NOVOSHIP as agents for Owners of the vessels and PMI TRADING INC as Charterers.*

***2. FACTS***

*We also believe pertinent to remind you the facts surrounding the present contractual relationship between NOVOSHIP as agents for Owners of the vessels Moscow Kremlin, Moscow Star and Marshal Chuykov and PMI TRADING INC.*

*On December of 2002, there was a general strike in PDVSA (Oil Industry in Venezuela) which involved the immobilization of the vessels owned by PDVSA. In order to avoid disruption of Oil Supply, we started negotiations with NOVOSHIP to hire oil tankers to be employed with PDVSA. NOVOSHIP being a Russian Corporation and being Russia a friend Nation of Venezuela, NOVOSHIP accepted to employ the vessels but strongly requested that a company of our interests assumed the contractual obligations, specially the payment of hire. Accordingly, PMI TRADING INC and NOVOSHIP as agents for Owners of the vessels entered into time charters for the vessels Moscow Kremlin, Moscow Star and Marshal Chuykov.*

*[…]*

> ***4. VISIT TO PDVSA***
>
> *We have learned that you visit PDVSA in recent past days and most likely this visit overcame the arguments stated in your communication. Also discussing with PDVSA our matters, we considered it a violation of the implied confidentiality of our contractual arrangement.*
>
> *We also notice that you copied in your letter dated November 24, 2006, to PDVSA, Attn Mr Gilmer Gonzalez. We have also learned that you met with him when you visited PDVSA. We do not understand, why you involved this person in this issue (raised by you), since, to the best of our knowledge, Mr. Gilmer Gonzalez, is not an authorized officer in PDVSA to discuss chartering matters, which must have been discussed with us and not with PDVSA . . . .'*

147. On 24 November 2006, when he received Mr Salmon's fax, Mr Ruperti had sent a copy of it to Mr A Chavez at PDVSA with the following e-mail (in translation):

> '*Dear friend, look at this claim. I am very sorry, Gilmer Gozalez is still unduly harming the country and my company, and does so with the (disinterested?) help of Andres Duarte and the broker Luis Correa . . . all this performance makes me want to cry. Let me remind you what happened in 2002-2003:*
>
> *the Russian ships were the ones who broke the naval blockade that took place in the country in December 2002. In a meeting at the Miraflores Palace with the military high command and then with Mr Ali Rodriguez Araque, and Mr Rafael Ramirez, I decided to break this blockade. At the time, I made it clear that the Russian fleet could succeed in breaking the blockade and they allowed me to charter, together with the chartering desk, all the vessels that I could . . . . the only drawback with the Russians was the way they guarantees payment of their freight and in a meeting at PDVSA, in their own offices, under the pseudonym of Captain Fausto, Mr Ali Rodriguez Araque and to the contingency authorized me to carry out the transaction this transaction. In summary, I entered into long-time charters with the Russians and took the risk at all levels. However, Gilmer Gonzales and other malicious appetite for too much trouble, is causing a major problem because, as you will see, the Bolsheviks want to remove the vessels. Gilmer Gonzales wants to weaken the position of PDVSA vessels around the time of the elections . . . tomorrow is another day.*
>
> *PS: the attachments are self-explanatory. . . as I mentioned to the Minister of Energy and Petroleum, please give him so he can see that what I mean.'*

148. Mr Salmon replied to Mr Ruperti's letter of 26 November 2006 on 28 November 2006 requesting sight of various documents. On 1 December 2006 Mr Hernandez sent:

i) A recap of the charter for the *Moscow Kremlin* apparently sent on 24 February 2003. In contrast to the recap on NOUK's files (see para 120 above), this provided as follows:

> '*Asunto: 'Moscow Kremlin' PMI/PDVSA – Corrected Recap*
>
> . . . .
>
> *ACCOUNT* *PMI TRADING INC*
>
> . . . .
>
> *9) NOTICES*
>
> *OFFICIAL NOTICES RELATING TO THIS TIME CHARTER PARTY SHOULD BE SENT TO THE FOLLOWING PARTIES:*
>
> *OWNER: VITAL SHIPPING CORP . . . .*
>
> *CHARTERER: PMI TRADING INC . . . .*
>
> *PDVSA . . . .'*

This e-mail recap was not in NOUK's records.

ii) An e-mail exchange of 24 February 2003, apparently following on from the sending by Mr Mikhaylyuk to Mr Ruperti of a recap in the terms set out in para 120 above, in which Mr Hernandez wrote to Mr Mikhaylyuk:

> '*Vladimir; Following our conversation please note that the account must be under the name of P.M.I. Trading Inc, in order to guarantee the payments in the due course.*
>
> *Please amend it accordingly.'*

And Mr Mikhaylyuk replied:

> '*Perfect, I will take care of it now*.'

This e-mail exchange was not found in NOUK's records.

iii) An e-mail recap of the charter for the *Moscow Stars,* dated 6 May 2003. Unlike the recap on NOUK's files (see para 121 above), this version was:

> '*Asunto: 'Moscow Stars'/**PMI TRADING INC** – c/p 25.04.2003 – Recap*
>
> . . . .

> *BEING ALL SUBJECTS LIFTED, WE ARE PLEASED TO RECAP HEREWITH TERMS AND CONDITIONS OF FIXTURE BETWEEN MESSRS. PMI TRADING INC (P.M.I). AS CHARTERERS AND MESSRS. NOVOSHIP AS AGENTS TO OWNERS "DAINFORD NAVIGATION INC." AS FOLLOWS: ACCOUNT **PMI TRADING INC**'*[18]

No such recap was among NOUK's records.

iv) Corporate documents relating to PMI Trading which showed that it was a Panamanian company incorporated in October 1996 with Mr Ruperti as one of its directors.

149. Mr Salmon responded to Mr Hernandez on 4 December 2006 asking for further information about PMI Trading and for details in relation to the *Marshal Chuykov*. Mr Hernandez responded on the same day, attaching to his response an e-mail charter recap for the *Marshal Chuykov.* This also referred to the charter being with PMI Trading, rather than to a PDVSA company:

> '*Asunto: MT MARSHALL CHUYKOV/ **PMI TRADING INC**. // T.C.P. DATED OC TOBER 25TH, 2002*
>
> . . . .
>
> *BEING ALL SUBJECTS LIFTED, WE ARE PLEASED TO RECAP HEREWITH TERMS AND CONDITIONS OF FIXTURE BETWEEN **MESSRS. PMI TRADING INC** AS CHARTERERS AND MESSRS. NOVOSHIP AS AGENTS TO OWNERS "CALLY SHIPHOLDINGS INC/", AS FOLLOWS ....*'

150. Mr Salmon's evidence confirms that NOUK holds no documentation referring to PMI Trading in its records. He asked the manager of NOUK's IT department to search the server for all e-mails sent to or from Mr Mikhaylyuk, but no copies of charters with PMI were located.

151. The likelihood is that the documents in 148 i-iii were concocted in 2006 when it became necessary to explain to Mr Salmon and others the involvement of PMI Trading and to show that it had always been intended by everybody to be part of the charter chain.

152. A further example of a document not on NOUK's files is a recap of 27 January 2003 apparently sent from Mr Mikhaylyuk to Mr Ruperti and by him to Mr Morillo in respect of a four month charter of the *Moscow University*, which the Ruperti defendants have disclosed. That vessel was never chartered to a Ruperti company initially. (In late June or early 2003 it was substituted for the *Moscow Stars* whilst that vessel

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[18] The page containing the notice clause was missing from this recap sent by Mr Hernandez.

was in dry dock.) The metadata for the document shows that it was probably created on 30 July 2003. Its purpose appears to have been to provide a spurious justification to Wisteria's bank (Insinger) for a payment to an entity called the Buena Vista Group in Montreal.

*Invoicing*

153. Until November 2006 (when the sub-chartering chain was discovered by Novoship) NOUK's invoices for the hire of the vessels had been addressed to:

> 'Messrs PDVSA Petroleo S.A.
>
> Edificio PDVSA
>
> Torre Oeste, Piso8-Oficina 8-037
>
> Ave Libertador, La Campina
>
> 1050 Caracas Venezuela
>
> Fiscal Address:
>
> PDVSA Petroleo S.A.
>
> Edificio PDVSA Servicios
>
> Ave Leonardo da Vinci Los Chaguaramos
>
> Caracas 1040, Venezuela.'

154. As Mr Salmon explains in his witness statement, in the main the invoices were sent via email to Interpetrol, Mr Ruperti's company. NOUK understood that they were then passed by Interpetrol to PDVSA for payment. He discovered from his discussions with PDVSA in November 2006 that the fiscal address did not exist and that the address was in fact closed from 2002/2003. Hire payments were received from Sea Pioneer or Wisteria.

*Communications between NOUK and representatives of the Ruperti Defendants*

155. A raft of communications passing between NOUK and representatives of the Ruperti defendants shows that those who were writing on behalf of NOUK were under the impression that PDVSA, and not any Ruperti company, were the charterers of the vessels, and that the representatives of the Ruperti companies were careful to maintain that impression. The communications in question are set out in the 48 paras of Annex 4 to the Claimants' opening. I do not propose to set them all out in this judgment. It is sufficient to cite some examples.

156. On 8 February 2005, Mr Gus Barriga of NOUK, sent an e-mail to Mr Hernandez, of Interpetrol concerning the non-payment of hire for the *Moscow Stars,* the *Sorokaletie Pobedy,* the *Marshal Chuykov* and the *Moscow Kremlin.* Mr Mikhaylyuk maintains in his defence that he had

explained to Mr Barriga the chartering structure for the *Marshal Chuykov* in November 2002, when the first charter was arranged. That cannot have been the case, because Mr Barriga wrote:

> *'PLEASE BE ADVISED THAT HIRE PAYMENT FOR THE MONTH OF FEBRUARY HAS NOT BEEN RECEIVED. WE KINDLY ASK YOU TO CONTACT PDVSA IN ORDER TO ENQUIRE WHEN THESE FUNDS WILL BE PAID.'*

There was no answer and the e-mail was re-sent by Mr Simon Jones of NOUK on 14 February 2005. He added:

> *'Please pass this matter to PDVSA and revert within today with remittance details.'*

He, also, was unaware of the sub-chartering chain.

157. There are many other communications from NOUK referring to the charterers as PDVSA. Communications from Mr Hernandez either failed to disabuse NOUK of the notion that the charters were with PDVSA or positively encouraged it.

158. Thus, by way of example, on 11 August 2005 Mr Hernandez sent an e-mail to Mr Barriga of NOUK:

> *'Subject: M/V SOROKALETIE POBEDY UNDERPERFORMANCE CLAIM PDVSA*
>
> *Quote:*
> *We hereby confirm on behalf of PDVSA that for the current C/P dated 15/01/03 with Addendums thereto the underperformance claim for above vessel's voyage loading Guayanilla on 19th March discharging Sriracha on 17th June 2005 is usd 244,022.98 in full and final settlement ....'*

159. On 12 October 2005 Mr Barriga wrote to Mr Hernandez with a corrected invoice for the *Moscow Kremlin:*

> *'PLEASE CONFIRM SAFE RECEIPT OF THIS MESSAGE, AND THAT CHARTRS. PDVSA HAVE BEEN INFORMED.'*

Mr Hernandez replied, on 13 October:

> *'Received . . I will send it to PDVSa and revert*.'

160. On 24 January 2006, Mr Barriga sent a notice to Mr Hernandez concerning the *Moscow Kremlin:*

> *'In compliance with the above vessel's governing Charter Party in reference to Dry Dock, Owners would like to give Chartrs. PDVSA thirty days notice to be able to carry out in water survey . . . .'*

He copied his e-mail to several persons at PDVSA. Mr Hernandez replied:

> *'Next time please coordinate this with us only. PLS do not send any email directly to PDVSA.'*

Mr Barriga replied: *'oops! Sorry Pls. let me know what they say.'*

161. On 21 April 2006, Mr Salmon wrote to Mr Hernandez:

> '*I have been trying to contact you in order to discuss the proposal I mentioned about transferring the operations on the pDVSA time charters from London to NSC in Russia. The technical management of the vessels are already there.'*

Mr Hernandez replied on 21 April:

> '*Regarding your question, about the technical management, So far PDVSA is agreed to move the TM to Russia as far the vessel keep doing well and the operations still done by London staff . . . .*'

Mr Salmon replied on 24 April:

> '*. . . . it is our wish to continue good relationships with PDVSA now and in the future and some discussions on this would be most helpful*.'

162. On 15 May 2006, following the 11 May meeting between Mr Jones, Mr Gollar, Mr Salmon, Mr Ruperti and Mr Hernandez in Caracas (see para 137 above), Mr Jones wrote to Mr Hernandez:

> '*You mentioned to me that hires for the four vessels (Marshal Chuykov, Sorokaletie Pobedy, Moscow Kremlin & Moscow Stars had been paid, as you had seen a swift. I'm advised that so far, no funds have been received. Would you be so kind as to check with PDVSA and revert.*
> *'I wanted to speak with you on Friday about this and regarding payments in general, but was informed that you were not in the office.*
> *'Generally, we find that whilst PDVSA always remit funds eventually, they are on average two and a half weeks late. This does give Owners a headache and we have been asked to advise on the interest aspect of the late payments.*
> *'We have no desire to become heavy handed with PDVSA as we believe that our relationship is mutually beneficial, but perhaps you can discuss this with them to relay Owners concerns and to see whether any improvements on payment time can be made in the future . . . .'*

Mr Ruperti's side cannot have revealed at the meeting that the charters were not with PDVSA, but with Mr Ruperti's companies.

163. Mr Jones sent a copy of this e-mail to Mr Carruyo of Global Shipmanagement Inc, a further company owned and/or controlled by Mr Ruperti on 16 May 2006. On 17 May Mr Hernandez replied (copying his reply to Mr Carruyo, Mr Barriga and Mr Salmon):

> '*Regarding your question please be aware PDVSA is releasing the payment yesterday – today and final set will be for tomorrow. I will chase PDVSA again to ensure about pauments. But Also as previous agreed with Mr Vladimir M, monthly hires can be pay between 10 upto 20 days of each month.*

164. Another example is to be found as early as 12 November 2002 when in an exchange of e-mails ("Subject: RR: M/V MARSHAL CHUYKOV C/P PDVSA 25/10/02 URGENT") Mr Morillo of Interpetrol said to Mr Barriga of NOUK, who was concerned about non-payment of an invoice of 30 October 2002:

> "*Please note that the funds were already transfer by a company named Wisteria on behalf of PDVSA…"*

165. There are several other instances of documents from Mr Mikhaylyuk to Novoship personnel which can never have been intended to be shown to banks where he is representing PDVSA as the charterer: e.g. M3/114/126; M4/205 & 207; M 5/1 and documents from NOUK personnel which show that they thought that PDVSA were the charterers: e.g. M3/1115; M4/293; M 10/24, 28, 43, 52.

*The explanations for the sub-chartering arrangements given by the Ruperti defendants and Mr Mikhaylyuk*

166. A number of different explanations have been given for the contractual arrangements.

*Mr Ruperti*

167. In his letter of 26 November 2006 (see para 146 above) Mr Ruperti said that Novoship agreed on the use of its vessels *Moscow Kremlin, Moscow Stars and Moscow Chuykov,* in order to break a General Strike in Venezuela in December 2002, but only on the basis that a Ruperti company assumed the contractual obligations in respect of hire. However, the initial charter of the *Marshal Chuykov* was at the end of October/beginning of November 2002 and the *Moscow Kremlin* and the *Moscow Stars* were chartered in February and April/May 2003.

168. A further explanation was given by Mr Ruperti at a meeting with Messrs Millan and Faustini of Unimar Shipping & Trading (Owners' representatives in Venezuela) on 13 December 2006 namely that PMI Trading was established in December 2002 during the General Oil strike because the PDVSA finance/payment system was shut down so that Mr Ruperti had to make several hire payments on behalf of Charterers PDVSA, and that the President of PDVSA was fully aware

of this temporary agreement between PDVSA/PMI/Novoship. He said that the invoices sent by Novoship were an attempt to re-establish direct payment from PDVSA to Novoship.

169. In their pleaded defence the Ruperti defendants allege that the Claimants were not able to charter the vessels directly with PDVSA because PDVSA would only charter vessels from approved companies (which involved an application for approval and a vetting process) and none of the Owners was approved, whereas Sea Pioneer was approved in the mid 1990s**.** It is said that the Ruperti defendants did not seek to conceal the arrangements from the Claimants and that insofar as Mr Mikhaylyuk did so, it was without their knowledge or involvement: paras 16, 17 and 21 of the Defence. It is the case of both Mr Ruperti and Mr Mikhaylyuk that this lack of approval was the result of allegations reported in the Venezuelan press that NOUK had been involved in paying bribes to agents or servants of PDVSA.

*Mr Mikhaylyuk's account*

170. According to Mr Mikhaylyuk's account the chartering arrangements were approved by senior management at NSC and NOUK – Mr Izmaylov, Mr Sakovich and Mr Oskirko; and known to others at NOUK.

171. Mr Oskirko was (as indeed he was) one of those in NSC management with whom NOUK staff were in contact and to whom NOUK reported and was responsible, together with officers and employees of NOUK, for NOUK's results. He reported to the Executive Board of NSC.

172. When the long term charters of NOUK vessels which had been entered into in 1998/9 came to an end in 2000 Mr Oskirko said that he feared that Owners would be unable to continue chartering to PDVSA because of the accusations in the Venezuelan press of their being involved in bribes paid out of unusually large commissions – 6.25% - which Owners had agreed to have included in the time charters to PDVSA. Mr Oskirko instructed Mr Mikhaylyuk to meet with PDVSA and Mr Ruperti to try to continue charters with PDVSA and/or develop other business with Mr Ruperti. Mr Oskirko also instructed Mr Mikhaylyuk to cut out ACM from the Novoship business saying that he believed that Mr Amato of ACM was paying bribes to Mr Sergei Burima, the Chief of the Fleet Commercial and Operations Department of NSC from 1993 to 2002, out of the large commissions included in the earlier charters of NOUK vessels to PDVSA.

173. In the event, between 2000 and 2002 Owners were, in respect of time charters, only able to extend the charter of the *Aleksandr Pokryshkin* and then fix the same vessel again to PDVSA: see schedule 2 to the Reply to the Ruperti defence. The continuing difficulty in getting PDVSA to charter direct from Owners was reported regularly by Mr Mikhaylyuk to Mr Oskirko between 2000 and 2002 and was also reported to Mr Sakovich and Mr Izmaylov. Eventually Mr Oskirko

instructed Mr Mikhaylyuk to explore the possibility of one of Mr Ruperti's companies chartering Novoship vessels at a rate acceptable to Novoship and then chartering them at a profit for Mr Ruperti's company so that Mr Ruperti could be rewarded in this way rather than through higher than normal commissions. In 2002 a possible joint venture between Novoship and Mr Ruperti was discussed between Novoship and Mr Ruperti.

174. When Venezuela was hit by severe strikes (in which staff of PDVSA participated) in December 2002 Mr Mikhaylyuk was instructed by Mr Izmaylov to provide as many ships as possible to enable the Venezuelan President to tackle the strike. He (Mr Izmaylov) said that Mr Frank (the then Minister of Transport) had asked Mr Izmaylov to provide this assistance and that Mr Frank, in turn, had been told that the request came from the top man in Russia (President Putin).

175. The chartering arrangements were not secret but approved. Some documents were produced on Mr Oskirko's instructions to create the impression that the charters in question were directly with PDVSA. This was not done in order to conceal the arrangements from NOUK or the owning companies. It was done in order to create the impression with the banks with which NOUK and NSC dealt that the charters in question were directly with PDVSA. Mr Oskirko considered this would be more acceptable to the banks than if the owners were chartering to relatively unknown companies.

*Conclusion*

176. I reject these explanations for the chartering being (and being known to be) with PMI Trading, and for the existence of recaps naming PDVSA, as implausible. None of them have been supported in the witness box. They are inconsistent as between themselves and also with;

a) the existence of many contemporaneous emails both internal to NOUK and sent by NOUK to Ruperti interests referring to PDVSA as the charterers and making no reference to PMI Trading or PMI, many of which can never have been intended to be shown to any bank;

b) the absence from the NOUK files of recaps showing PMI Trading as the charterer (which would need to be preserved as a record of the actual charters);

c) the fact that the Claimants did charter vessels directly to PDVSA from June 1996 to October 2002 without any PDVSA "approvals" of these vessels, including charters of the *Marshal Chuykov* and the *Sorokaletie Pobedy*;

d) the absence of any disclosure of documentation showing any application for approval by Sea Pioneer, any

participation in a vetting process, or any actual approval (which in Mr Mikhaylyuk's pleading was said to have been by an email which was being searched for but which had not been found); or any charters between Sea Pioneer and PDVSA prior to the charters with which this action is concerned;

e) the manifest falsity of the assertion by the Ruperti defendants that they did not seek to conceal the true nature of the arrangements and were not involved in the creation of false documents when they were involved in the sending of recaps referring to PDVSA Marketing International as the charterer and not PMI Trading e.g.:

i) the e-mail recap for the *Marshal Chuykov* sent to Mr Mikhaylyuk by Mr Morillo, and copied to Mr Ruperti, on 1 November 2002;

ii) the e-mail recap for the *Adygeja* sent to Mr Mikhaylyuk by Mr Morillo of Interpetrol on 19 December 2002, which Mr Morillo had received from Mr Ruperti; a final form of recap had been sent by Mr Mikhaylyuk (referring to 'PDVSA Marketing International (P.M.I).') on 18 December 2002 and Mr Ruperti returned it as Mr Mikhaylyuk requested;[19]

iii) the e-mail recap for the *Sorokaletie Pobedy* sent to Mr Mikhaylyuk by Mr Morillo (and copied to Mr Ruperti) on 30 January 2003;

iv) the e-mail recap for the *Moscow Kremlin* sent by Mr Morillo to Mr Mikhaylyuk on 24 February 2003 and copied to Mr Ruperti;[20] and

v) the e-mail recap for the *Moscow Stars* sent by Mr Morillo to Mr Mikhaylyuk on 8 May 2003 and copied to Mr Ruperti.

*Further consideration of Mr Mikhaylyuk's explanations*

177. As to Mr Mikhaylyuk's explanations, the press reports alleging bribery have not been produced. It was the evidence of Mr Sakovich of NSC that he did not recall that during times when there was a decrease in business with PDVSA this had anything to do with allegations of corruption against Novoship.

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[19] Mr Mikhaylyuk had asked Mr Ruperti for a recap on 16 and 17 December 2002 and then sent the draft on 18 December. The version returned on 19 December was the same as that draft except for an amendment to the Venezuelan ports clause.

[20] Mr Mikhaylyuk had asked Mr Ruperti for a recap earlier on 24 February.

178. Mr Oskirko recalls that in May 2001 Novoship thought they were losing business with PDVSA as other owners appeared able to establish joint ventures and pools with them: see his emails to Mr Mikhaylyuk of 2 May (referring to Pobeda vessels[21]) and 11 May 2001. But he did not recall the reason for it, if there was one. He also recalled rumours that PDVSA were anxious about allegations of corruption and rumours that Mr Sergei Burima (of NSC) had been paid bribes by ACM Shipping.

179. In an e-mail to Mr Oskirko dated 18 June 2001 Mr Mikhaylyuk referred to the fact that a broker (Oceanic Shipbrokers, who had been trying to get Novoship to work through them) had three years ago started bombarding PDVSA and others, e.g. the President of Venezuela, with letters saying that they could bring Novoship tonnage to PDVSA at much cheaper rates whilst the "corrupted" channel which PDVSA was using, namely the brokers Maritima-Altair were bringing losses and should not be used. At the last meeting with charterers in 2000 PDVSA had expressed concern about these letters and said that because of the pressure from Oceanic no one in PDVSA wanted to touch Novoship's vessels. Mr Sakovich of NSC had written to PDVSA on 30 May 2000 to say that Oceanic Shipbrokers had no authority to act on Novoship's behalf. His evidence was that he had no independent recollection of the letter which he thought was likely to have been prepared by Novoship's legal department.

180. Mr Oskirko did encourage Mr Mikhaylyuk to dilute the involvement of ACM, the brokers, in Novoship business. This is apparent from

    i) an e-mail from Mr Oskirko to Mr Mikhaylyuk dated 16 January 2001 in which Mr Oskirko wrote (in connection with prospective charters of the *V Chkalov* and the *Y Titov* to Stena Bulk):

> *'As there are two brokers please do your best to reduce total commission.*
>
> *I bring to your attention that ACM is still the only major broker with 56% of our total TC business in hands. I accept that in the past they had much more business. However we request you to do your best to spread our business between several first class brokers to enhance the access to the market*.'

    ii) e-mail exchanges on 23 and 24 January 2001 in which Mr Mikhaylyuk wrote to Mr Oskirko (on 23 January):

[21] These vessels had performed a number of short voyages which reduced the owners' ability to carry out maintenance. In addition there was a requirement by Oil Majors for approvals which Novoship vessels lacked: see Mr Sakovich's email of 24.6.02.

> *'As discussed before our contact in Venezuela, Mr Wilmer Ruperti, had advised us about this enquiry* [sc, an inquiry by PDVSA for two vessels for time charters] *beforehand and he told us that he want to work Novoship direct, excluding ACM, as he lost his trust in Mr Keith Amato. This is the worst thing in broker's world when someone does not trust another party and avoid dealing with him. I have to say that this is very delicate situation resulting from the relations in those above said gentlemen, which has nothing to do with us. As we can not afford ourselves to lose the business, we have no other choice now but to work excluding ACM while dealing with Mr W. Ruperti . . . .'*

to which Mr Oskirko replied (on 24 January):

> *'I agree that we should work Venezuelian business direct. Thus we reduce our commission/costs by 1,25% and what is more important we will meet the desire of our Customer.*
>
> *Understand that as far as the ships were re-delivered from the previous fixture all new deals to be considered as new fixtures. Thus there are no legal or any other consequences that we do not use the London broker any more.*
>
> *Herewith the Owners encourage you to do direct business not only with PDVSA but with other Clients as well to reduce our costs.'*

and Mr Mikhaylyuk responded (on 24 January 2001):

> '*We always try to reduce Owner's expense and any extra cost is always on my mind to be reduced. Thanks for Owner's encouragement which we are followed where possible, and for sake of good order, as the deadline for this offer is noon, should I treat your message as Owner's agreement to offer the ship directly to Mr. Wilmer Ruperti?*
>
> *[...]*
>
> *You absolutely right that we have no legal obligations related to ACM in connection with future business. The consequences will be there but only related to future relations with ACM as I don't think that broker will be happy on this occasion.'*

(This e-mail exchange was copied to Mr Sakovich, Mr Burima and Mr Shumilin.)

181. It is also the case that there were rumours, known to Mr Loza (who was then the President of NSC) and to Mr Oskirko, that ACM were making improper payments.

182. It is apparent, therefore, that there were rumours of bribery around. But it is also apparent from the chartering history that PDVSA remained prepared to charter from Novoship. One reason why the PDVSA time charter business dipped appears to have been PDVSA's preference that time chartered vessels should be Venezuelan flagged, so as to be useable in the cabotage trade. The Claimants are not aware of any charters providing for commission of 6.25% and the likelihood is that there were none. The charters listed in Schedule 2 of the Reply show, where they show commissions at all, brokerage commission usually of 1.25%. Some are higher; the highest being 3.75%. (1.25% to Novoship Sweden and 2.5% to one of charterers' brokers for division with another broker). The sub-chartering arrangements were not a substitute for previous very expensive commission arrangements.

183. It is true that in the period June to August 2002, a scheme was proposed which involved, at least in one version, the chartering for three years of the *Marshal Chuykov* [built 1984] to Suramericana de Transporte Petroleo, one of Mr Ruperti's companies, which would be responsible for re-flagging it to the Venezuelan flag (as PDVSA wanted), sub-chartering it to PDVSA and then re-flagging it to its original Liberian flag at the end of the charter. Under this scheme it was proposed that the Ruperti company would be liable in any event for the hire payable under the charter to itself, but would be entitled to keep the proceeds of the sub-charter to PDVSA. Another version involved chartering the vessel to a Novoship/Ruperti joint venture company which would then re-flag her and charter out to PDVSA. However, this scheme came to nothing, at least in part because the banks financing Cally Shipholdings, the owner of the vessel, would not agree to the joint venture. In the event the vessel was voyage chartered to PDVSA Petroleo y Gaz on 3 October 2002 without reflagging.

184. It is also true, as I have said, that Venezuela was hit by a general strike, extending to PDVSA staff including pilots, tugs and crews on their tankers, the fourth in 12 months, starting on Monday 2 December 2002. But this was well after the conclusion of the time charter for the *Marshal Chuykov* and cannot explain the arrangements in respect of that vessel.

185. The evidence of Mr Oskirko and Mr Sakovich, which I accept, was that they understood the charters to be with PDVSA and that they gave no instructions for the production of false documents to any bank – a course which, as well as being thoroughly dishonest, would have been fraught with danger because of the risk of discovery by the bank of the true position. No evidence was adduced by Mr Mikhaylyuk from Mr Izmaylov to the effect that he was aware that the charters were not with PDVSA but were made so to appear to satisfy the banks. There is no evidence of any bank's concern as to the identity of the charterer or of

the deployment by the Claimants to the banks of the fact that the charters were with PDVSA. It is apparent from the loan agreements with the banks that the only material restrictions for present purposes were that the vessels should not be let on demise or bareboat charter and, in some cases, should not be let for periods of more than 24 or sometimes 12 months without the banks' consent. Mr Oskirko's evidence was that he never discussed the identity of the charterers with NSC's 25 banks.

186. Further, if Mr Mikhaylyuk's account be right, it is difficult to understand (a) why the charterers are repeatedly referred to in internal communications at NOUK and between Mr Mikhaylyuk and NSC (Mr Izmaylov, Mr Sakovich and Mr Oskirko)[22], and in other documents, such as negotiating emails, as being with PDVSA, when these documents were not likely ever to be sent to or seen by banks; and (b) why Mr Ruperti, from whom or whose associates many of the documents referring to PDVSA as charterers emanate, should be a party to the deception of the Claimants' banks, if everything was above board.

187. As to (a), a particularly telling example is an e-mail of 2 April 2005 to Mr Mikhaylyuk (copied to Mr Izmaylov), concerning the extension of the *Moscow* vessels, where Mr Sakovich wrote:

> '*This is obvious that without new long terms contracts for our Aframax tankers we have to compete very hard on the market in the forthcoming future. We always keep in mind that PDVSA is one of most reliable Charterers for years and paying some premium for shuttle business in Caribs in order to bulk their own cargoes. So, we continue to maintain cooperation with well known and reliable clients.*
>
> *As agreed we have no objections for 3 years period instead of 5 years requested by Charterers for both vessels. The indicated hire rate at $28,000 pdpr looks rather attractive. But in any case please squeeze a bit our colleagues in PDVSA group and try to get the best achievable rates and terms . . . .'*[23]

*The offer in the email of 7 October 2002.*

188. On 7 October 2002 Mr Mikhaylyuk emailed Mr Ruperti to offer the *Marshal Chuykov* to PDVSA Petroleo Y Gas S.A. for 3 months + 3 months at Charterer's option. Mr Mikhaylyuk says that the offer to PDVSA was made on Mr Oskirko's instructions, because he did not have authority to offer a time charter exceeding 3 months in duration,

[22] Such as M3/114; M4/205/7; M4/293. See, also, M8/74; M10/24,28,43,52, and 150 – documents which show that people in NOUK other than Mr Mikhaylyuk thought PDVSA to be the charterers. The Invoices were addressed to PDVSA Petroleo S.A: see para 153 above.

[23] Further similar examples are at M1/255; M3/115; M5/104; M5/147.

even though Mr Oskirko knew that PDVSA would not contract direct with NSC/NOUK because of the bribery scandal.

189. Mr Oskirko has no recollection of any conversation about this charter although he accepts that he may have been involved in the process of its approval. I regard Mr Mikhaylyuk's account (not supported in the witness box), as incredible. The proposition that PDVSA would not contract direct with NSC/NOUK is not true. PDVSA had taken the *Marshal Chuykov* on voyage charter on 3 October 2002. Mr Oskirko, I am sure, did not understand that PDVSA would not contract direct and did not authorise the making of an offer which he knew had no prospect of being accepted. Whoever authorised the making of the offer (which was, indeed, beyond Mr Mikhaylyuk's authority – charters of more than 3 months' duration had to be approved by NSC) authorised the making of an offer to PDVSA by which it was then believed to have been accepted.

190. Mr Mikhaylyuk's defence pleads as follows in relation to the *Marshal Chuykov* in para 35 vi:

> 'd. *Mr Ruperti also reminded Mr Mikhaylyuk on 7 October 2002 that PDVSA would not contract with Owners direct and asked how Owners were planning to eliminate the high commission structure on any charter. One possibility discussed was for Owners to sell the vessel to Venezuelan buyers but for NOUK to be given technical management.*
>
> *e. On or about 10 October 2002, Mr Mikhaylyuk asked Mr Oskirko for instructions how to progress the transaction in view of the difficulty in getting PDVSA to charter direct from Owners. Mr Oskirko said that the idea of a sale was not acceptable to Owners because it would not be acceptable to the banks. <u>If PDVSA were not prepared to charter direct, he suggested chartering to a Ruperti company with a sub-charter to PDVSA.</u> However, he wanted the documentation to reflect a charter to PDVSA rather than to the Ruperti company. He said that a sub-charter by Ruperti to PDVSA would be a way of avoiding high commissions which had caused such controversy in the past. <u>Mr Oskirko advised Mr Mikhaylyuk that Mr Sakovich and Mr Izmaylov had agreed to this strategy.'</u>*
>
> *'f. On or about 17 October 2002, Mr Mikhaylyuk heard rumours on the market that PDVSA had fixed the vessel at $13,500 per day. Since no charter had been concluded at this stage either with Mr Ruperti or, to Mr Mikhaylyuk's knowledge, with PDVSA, Mr Mikhaylyuk asked Mr Ruperti to clarify. Mr Ruperti advised that*

*PDVSA were agreeing to charter the vessel from Mr Ruperti's company but that Mr Ruperti held the fixture on subjects, because obviously he had to conclude the charter with Owners first. Mr Mikhaylyuk then reported this conversation to Mr Oskirko who agreed that Mr Mikhaylyuk should finalise the charter with Mr Ruperti's company whilst ensuring that the paperwork indicated a direct charter to PDVSA.*

*g. The proposed charter to Mr Ruperti's company and the strategy behind it was also discussed by Mr Mikhaylyuk with Mr Izmaylov at a meeting on or about 17/18 October 2002. Mr Izmaylov said that he had already heard about this from Mr Oskirko and Mr Sakovich and had agreed with the strategy. He said that the overall strategy of getting back into the Venezuelan market by chartering to PDVSA through a Ruperti company had in fact been discussed by NSC top management (which Mr Mikhaylyuk understood was a reference to Mr Sakovich and Mr Oskirko) since the summer of 2002.*

…

*j. On 23 October 2002, Mr Ruperti told Mr Mikhaylyuk that the remaining subjects had been lifted and Mr Mikhaylyuk passed the information on to Mr Barriga. No mention of PDVSA was made to Mr Barriga and later, on 1 November 2002, Mr Mikhaylyuk explained the structure to Mr Barriga—in particular that the vessel had not been chartered to PDVSA but to Mr Ruperti's company who in turn had sub-chartered to PDVSA.*

*k. On 28 October 2002, Mr Ruperti advised that he wished to introduce the company Nautica as brokers to obtain a commission on the transaction of 1.25%. Mr Mikhaylyuk reported to Mr Oskirko who said that since Mr Ruperti's company would presumably be earning a profit from any sub-charter to PDVSA, any commission should be paid by Mr Ruperti's company and not by Owners. Accordingly, the hire was adjusted on Mr Oskirko's instructions from $12,000 to an unusually un-round charter rate of $12,152 in order to accommodate the request that a commission be included but at Ruperti's expense"*

191. I do not accept this account. The possibility of a charter to a Ruperti company had been considered in August 2002 and nothing came of it. Mr Oskirko does not recall the matter being raised again and I think it unlikely that it was. I accept his evidence that he did not give instructions that, if PDVSA were not prepared to charter direct, there

should be a charter to a Ruperti company and a sub charter to PDVSA (which would avoid high commissions) but that the documentation should reflect a charter to PDVSA. He cannot have advised Mr Mikhaylyuk that Mr Sakovich and Mr Izmaylov had agreed this strategy, which he and Mr Sakovich confirm was never in place. I do not believe that Mr Izmaylov discussed any such strategy on 17/18 October or at any other time. Nor was Mr Barriga made aware that the charterers were a Ruperti company: see paras 156 ff above.

192. On 1 November 2002 Mr Morillo emailed a recap to Mr Mikhaylyuk, copied to Mr Ruperti, in respect of the *Marshal Chuykov*, referring to PDVSA Marketing International (P.M.I) as charterer. Mr Mikhaylyuk pleads that the false reference to PDVSA was the result of instructions from Mr Oskirko. I regard this as untrue.

193. Mr Mikhaylyuk's defence also pleads that the charter of the *Sorokaletie Pobedy* was entered into with Mr Ruperti's company with the approval of Mr Oskirko, Mr Sakovich and Mr Izmaylov and that the extension of the charter in April 2004 was agreed by the latter two both of whom knew that the charter was in fact with Mr Ruperti's company. I do not accept this.

194. Mr Mikhaylyuk placed some reliance on an e-mail exchange of 2-3 March 2006 from Mr Burima to Mr Ruperti in which Mr Burima, who had left NSC in January 2002 and was now at Sovcomflot, invited Mr Ruperti to consider fixing a vessel to PDVSA for 3-5 years (as broker), adding that "*it would help to facilitate fixing directly to your good Co, later*". Earlier in the exchange Mr Ruperti had referred to the vessels which he owned as a small player in the Caribbean. Mr Ruperti replied "*OK send me the specs they normally fix 1 + 1 so what I normally do is I take the risk for the 3 years or 5".* This was, I assume, a reference to his pattern of hiring and sub-chartering to PDVSA. This response made no impact on Mr Burima who was not really interested in chartering to a Ruperti company and who had left NSC long before the chartering arrangements became an issue.

*Missing documents?*

195. Mr Mikhaylyuk contends that documents showing charters with PMI Trading, if they are not in NOUK's records, must have been dishonestly removed for the purpose of supporting a case against him. I regard this as implausible. Mr Salmon's evidence was that in late 2006 there were no such documents in hard copy or in electronic form on NOUK's server. He was, as I have said, plainly honest and had no reason to remove any documents. It is not clear to me who else might have done so at or before that time and for what reason. Further, when Mr Mikhaylyuk left in March 2006 he took with him a copy of the emails system on his computer which included emails sent and received by him. He should, therefore, have been able to retrieve any email recaps referring to PMI Trading. He has disclosed no such documents and when, pursuant to the orders of this Court, in March

2012, a copy of the system was provided to the Claimants no such documents were found upon it. Much the more likely explanation for the absence of any documentation mentioning PMI Trading from NOUK's files was that Mr Mikhaylyuk was concerned to see that there should be no such documentation – a situation which Mr Mikhaylyuk sought to preserve by his email of 3 May 2006: see para 138 above.

196. In short, I am satisfied that Mr Mikhaylyuk and Mr Ruperti so arranged matters in relation to the PDVSA vessels that the charters would appear, particularly to those who had to authorise them, to be with PDVSA when in fact they were with PMI Trading. This dishonest arrangement, which was kept secret from Mr Mikhaylyuk's superiors, enabled Mr Ruperti to have the vessels chartered by Sea Pioneer to PDVSA and to make sizeable profits thereby.

*The secret payments made by Mr Ruperti's companies*

197. The following payments are known to have been made:

a) 3 payments in 2003/4, totalling $ 410,379 to the account of Amon International Inc, Mr Nikitin's company, at Wegelin & Co, bankers in Switzerland. The payments were made, by either Sea Pioneer from an account (at any rate in relation to (iii)) at Regions Bank, or by Wisteria Enterprises Ltd, a Ruperti company incorporated in the BVI, from its account at First Caribbean International Bank (Cayman) Ltd in the BVI. The amounts received were as follows:

| | | |
|---|---|---|
| 27.02.03 | Sea Pioneer | $ 37,356.20[24] |
| 06.05.04 | Wisteria | $ 83,748.19[25] |

[24] This amount is the amount transferred less foreign (i.e. non Swiss) bank charges.

[25] This amount is $ 83,823.19 less bank charges.

| | | |
|---|---|---|
| 3<br>1<br>6<br>.<br>0<br>1<br>.<br>0<br>4 | Sea Pioneer | $ 289,200 |

The credit advice for (ii) had the dates: 29.02.03; 31.03.03; and 30.04.03 specified on it. The credit advice for (iii) had the reference "*Father Angelicos"* which Mr Nikitin said he did not recall noticing at the time and which would have been meaningless unless the code had been explained to him or he was familiar with the Misha Fu account[26].

b) a payment on 6 May 2003 of $ 217,100[27] to Mirador Shipping's account at the Bank of Nevis from the account of Wisteria Enterprises at First Caribbean;

c) 3 payments, totalling $ 1,491.000 in 2005 by Sea Pioneer to Pulley Shipping Ltd's account at the Bank of Nevis as follows:

| | | |
|---|---|---|
| (i) | 04.05.05 | $ 491,000[28] |
| (ii) | 12.08.05 | $ 500,000 |
| (iii) | 03.11.05 | $ 500,000 |

The Bank of Nevis credit slips included the words: "*Ref: All ships"*

*The Misha Fu account*

198. Mr Mikhaylyuk had a secret e-mail account – mishafu@yahoo.com - which was not on the NOUK email system. He communicated through this account under the alias "Misha Fu" with Mr Ruperti, whose alias was "Father Angelus", "Father Angelicos" or "Father Angelicus" .

[26] It probably did so because Mr Ruperti had forwarded the email of 12 January 2004 from "Misha Fu" to "Father Angelicos" (sic), which gave Amon's payment details, to Mr Fontana, Maroil's Chief Financial Officer.

[27] After charges the amount reaching Mirador's account was $ 216,955.

[28] Charges reduced each of these payments by $ 20.

199. The Claimants became aware of the existence of the Misha Fu account in May 2007 from an examination of data fragments retrieved from the electronic documents secured by the execution of the Search Order of 4 December 2006 ("the Search Order") against Mr Mikhaylyuk. They did not gain access to documents on the account until they were disclosed by the Ruperti Defendants in January and February 2011. It was this disclosure which led to amendments in May 2011 which included the joining of the Nikitin Defendants. What the Claimants have managed to obtain is plainly incomplete[29].

200. Mr Mikhaylyuk has not disclosed these documents (although he must either have, or have had, them) or any other documents from the Misha Fu e-mail account. He did not disclose the existence of the account in response to the Search Order, as he should have done. He claims to have forgotten the password to the account**.** On 1 July 2011 the Claimants obtained an order from this Court (Mr Justice Teare) which led to the provision of a few further e-mails from the account by Yahoo.

201. There is no evidence that Mr Nikitin, Amon or PNP was copied in on or supplied with copies of the e-mails sent from or received by this account.

202. The emails passing between Mr Mikhaylyuk and Mr Ruperti on this account are written in a form of code. For that reason they are, in some respects, not at all clear. Counsel for the Claimants and Mr Nikitin have made extensive submissions on what they do or do not signify. I set out below the relevant emails (without correction of mis-spellings) and discuss their significance.

203. By December 2002 the *Marshal Chuykov* charter had been agreed and the *Adygeja* charter was under negotiation.

*Communications about the Adygeja*

204. On 5 December 2002 Mr Mikhaylyuk, as Misha Fu, emailed Mr Ruperti as follows:

> *'Father Angelus,*
>
> *I managed to find a car which cost $11,500 with an extra cost for stereo/cd is $143 and for the leather seats $500. Do you think your freind will be interested to buy it? He can use it for 1 year plus 1 year with some extra milage. Please advise*
>
> *Good afternoon.*
>
> *Regards*
>
> *Misha Fu'*

[29] In one e-mail in January 2004 Misha Fu says "*Please confirm this e-mail, as all info has been lost on this box*", which may signify that some correspondence on the account had, even then, gone missing.

205. In Mr Mikhaylyuk's code reference to a "*car*" is a reference to a vessel. He accepts in his defence that the car/vessel to which this email relates is the *Adygeja* which was chartered on 19 December 2002 for 1 year at $ 11,500 and another year (in Charterers' option) for $ 11,600. The "*friend (sic) who [might] be interested*" is probably PDVSA.

206. Mr Mikhaylyuk says that he "*does not recollect*" Mr Ruperti agreeing to make a payment to Amon based on or related to any of the charters. He admits that the $ 500 referred to in this email, which is clearly a daily figure like the $ 11,500, was a request for payment for his advice to Mr Ruperti (unconnected with the charters) and that he was "*proposing that the method of payment be connected with the charters*". But he says that Mr Ruperti did not accept this and he did not pursue it.

207. 1.25% of $ 11,500 is $ 143.75. The Claimants suggest, in my view correctly, that the reference to the extra cost of $ 143 per day (for which Mr Mikhaylyuk gives no explanation) was to a payment to Amon of 1.25% of the hire; and that the $ 500 was a further payment for Mr Mikhaylyuk. 1.25% was the figure for address commission contained in the charter.

208. On Sunday 8 December 2002 Mr Mikhaylyuk (as "Misha Fu") sent a further e-mail to Mr Ruperti ("Father Angelus") from his private e-mail address:

> *'. . . thanks for good news from Friday, lets book it for 1 year plus 1 year in YOUR option. the list price is $11,600 (gross) but you have to pay for extra separetly: where 1.25% to be as per side letter, while other bit to be sent to another place. as I told you on Friday night I stop doing biz with another person to protect our agreement and get the bigger lot to happen further. this vehicle is not young but ready for the outside work. Please call me any time to discuss, even today, on Sunday. Please let me know if any other doubts you have but don't disclose to other players what we are doing otherwise there will be no success as other "sharks" will eat our "meat". As I said before, my boss is very serious about our future, ready to meet you and discuss further possibility. Of course for me it is a good news that our project have such a big support, but there is a danger he may start talking with you direct and no need in me. I don't think this is good scenario, as we done business for years and I'm sure there is plenty to do more as our relations are honest and open during this years . . . .*'

209. This email must, also, refer to the *Adygeja,* the $ 11,600 being the hire payable for the second year. The reference to "*1,25% as per side letter*" must have been to a letter providing for commission on hire: see para 214 below. The "*other bit to be sent to another place*" must refer back to the $ 500 "*leather seats*" in the 5 December 2002 email, which is an intended payment to Mr Mikhaylyuk.

210. Mr Mikhaylyuk was obviously concerned that, if word got out of what he and Mr Ruperti were doing, other individuals would want to share in the profits ("*other "sharks" will eat our "meat""*) and that direct contact between his boss, presumably Mr Izmaylov, might mean that he would be out of the picture and lose the opportunity to negotiate bribes with Mr Ruperti. Who the "*other sharks*" are is unknown but they are probably personnel at either NOUK or, more likely, NSC. Mr Mikhaylyuk has given no explanation of this phrase.

211. The references to "*I stop doing biz with another person*" and "*my boss is very serious about our future*" are also unclear. But they tie in with an email (not on the private e-mail account) from Mr Mikhaylyuk to Mr Ruperti of Friday 6 December 2002 where he refers to having been on subjects with *Adygeja* for $ 18,000 per day "*but I refused to extend subjects in order to have big business with YOU*" and said that he had "*managed to sell the idea to my President of cooperation with you on other double hull tankers and Adygeja was a part of the deal".*

212. On 9 December 2002 at 09:38 an email was sent from PNP, Mr Nikitin's company, to Mr Mikhaylyuk at his NOUK e-mail address giving details of Amon's postal address and details of its bank account at Wegelin & Co. Later that day Mr Mikhaylyuk forwarded the email to his home email address.

213. On 18 December 2002 Mr Mikhaylyuk (as "Misha Fu") sent to Mr Ruperti (as "Father Angelus") the content of PNP's email. To this Mr Ruperti emailed back "*what amount*".

214. On 6 January 2003, as part of the same e-mail chain, at 11.57.08 p.m. Mr Mikhaylyuk replied:

> *"Father Angelus,*
>
> *...*
>
> *'. . . please issue, sign and sent via courier to my home address SIDE LETTER as following:*
>
> *Quote*
>
> *Agreement*
>
> *It is mutually agreed between the Parties that Owners (Tuscany Maritime) and Charterers (PDVSA Marketing International) agree to compensate the AMON INTERNATIONAL INC for their efforts in arranging the deal, and hereby confirm to pay 1.25% commission on all hire earned throughout this Charter. The first payment to be done on January 07th, 2003, in the amount of $4,456 ($11,500 x 0.0125% x 31 days) for the period 15.12.2002-15.01.2003. The second payment to be done on January 15th, in the amount of $4,456 for the period 16.01.03-15.02.03, and each subsequent payment to be done on 15th of each month for 30 days in advance concurrent with hire. If*

*vessel is schedule for re-delivery by the end of the Charter commission payment to be adjusted accordingly . . . .'*

---

*PDVSA M I*

*on behalf of*

*Tuscany Maritime*

*15.12.2002*

*Unquote*

*Please feel free to amend the layout in order to reflect the agreement accordingly"*

215. The Nikitin defendants say that Amon had no involvement in the PDVSA charters and that Mr Mikhaylyuk and Mr Ruperti knew this. Mr Nikitin's evidence is that he had no knowledge of the charters. Mr Mikhaylyuk admits in his defence that Amon had contributed nothing to the arrangement of the charters. He puts forward no satisfactory explanation as to how he came to be suggesting a form of side letter which set out the compensation payable to Amon for arranging the deal in the form of a commission on hire. The Ruperti defendants admit the Misha Fu – Father Angelus e-mails but make no comment about the emails other than to say that no side letters were signed.

216. The natural inference (which I draw) from this sequence of communications is that Mr Mikhaylyuk was telling Mr Ruperti that, if he was to secure the *Adygeja* charter, it would be necessary for him to pay 1.25% of all the charter hire to Amon International ("*you have to pay for extra separetly where 1.25% to be as per side letter*") as well as making an additional payment to go elsewhere ("*while other bit to be sent to another place*"). This was the basis upon which he would get the vessel, under the corrupt arrangement which I have found to exist whereby the vessel would appear to be chartered to PDVSA but would in fact be chartered to PMI Trading and sub-chartered to PDVSA at a substantial profit. The 1.25% was neither broker's commission (none were involved) nor address commission for the charterer. It was to be an amount that had to be paid to Amon (albeit that it would be the same amount as the address commission).

217. The proposed side letter makes plain that the 1.25% ("*stereo/cd is $ 143*") payment is linked to the charter and the 5 December 2002 e-mail shows that the $ 500 ("*leather seats*") is as well. The side letter expresses the 1.25% as commission for Amon's efforts in arranging the deal and, even though Amon made no such efforts, there is no plausible reason for the linking of these sums to the charter if they were not to be a payment in connection with the securing of it.

218. Mr Mikhaylyuk maintains that the advice for which he was seeking payment was unconnected with the charters and that his advisory work was done with the knowledge and approval of his superiors. If that were so it is difficult to see why there would be any need for

communications about his remuneration to be conducted in code using a secret e-mail account and aliases or for the payment for advice (at $ 500 per day) to be linked to the charter and to last for the charter period.

219. The secrecy of these communications (and the requirement that the side letter be couriered to Mr Mikhaylyuk's home address) is, however, wholly consistent with the understanding of those involved:

i) that secret payments were to be made to Mr Nikitin through Amon as the price of getting the charter;

ii) that these payments and the corrupt arrangement for the making of them were dishonest and that negotiations for them between Mr Ruperti and Mr Mikhaylyuk should not see the light of day; and

iii) that they needed to be dressed up as a payment for Amon's (non-existent) assistance in arranging the charter deal, which could be used as an explanation, to Novoship or others, for making them.

220. No signed side letter has been disclosed or discovered and I cannot tell whether one ever was.

221. Mr Berry submits that the email of 9 December, which was sent 8 minutes after PNP had (at 09:30) approached Mr Mikhaylyuk to enquire about a time charter of the *Trogir,* is at least as likely to be initially related in some way to the proposed charter of that vessel. Such a conclusion would tie in with Mr Mikhaylyuk's evidence in *Fiona Trust* that he recollected that Mr Nikitin had asked for Amon to be named as a broker and asked someone else in the office to check up on that company but that person could find no information about it. This, he submitted, would explain the despatch of bank details. In the event no brokerage commission was agreed but an address commission of 1.25% was.

222. I do not accept this. There is no reference in the PNP email at 09:30 to the possibility of Amon being a broker. Amon was not a broker nor would Mr Nikitin have asked Mr Mikhaylyuk to use it as such. Amon was essentially Mr Nikitin under another name. It had been the recipient of the Galbraith's commissions. Sending details of Amon's Swiss bank account would not afford any information of value about its possible use as a broker; nor does it seem to me likely that, if Amon was being contemplated as a broker, its bank details would be provided at so early a stage and emailed by Mr Mikhaylyuk to himself at home the same day.

223. Mr Berry also points out that the Amon bank details were not sent on to Mr Ruperti until 18 December; that, if the Claimants' case was correct, the bank details were being sent out almost 2 months after the

supposed conspiracy; and that nothing was received by way of commission until 27 February 2003. Further the details were sent to Mr Mikhaylyuk's official email address. None of this, he submits is consistent with some illicit arrangement. It is at least as likely that the 9 December email related to the proposed charter of the *Trogir* but that the information in it was then used 10 days later so that Amon could receive honest payments from Mr Ruperti's companies.

224. I do not accept this either. The intervals of time referred to do not contradict the inferences that I draw from the sequence of correspondence (and its secrecy), which is that payments were being sought by Mr Mikhaylyuk for Amon in connection with, and as part of the price for, the charter of the *Adygeja.* The email chain from 18 December 2002 to 6 January 2003 shows that the amount which was to be paid to the Amon account related to that charter. Mr Ruperti was on any view a slow payer. Mr Nikitin was not demanding payment at this time and was someone for whom the relevant sums were of limited significance. The despatch of bank details to Mr Mikhaylyuk's office account (probably by Mr Pavlov) is not inconsistent with this. By themselves the details show nothing incriminating (and Mr Mikhaylyuk worked on a different floor from others). It is the content of those documents and their despatch of them by him to his home address on the same day that requires explanation.

*Communications about the Sorokalatie Pobedy*

225. The *Sorokalatie Pobedy* was chartered on 30 January 2003 for 3 months at
$ 13,000 per day.

226. On 17 January 2003, Mr Mikhaylyuk ('Misha Fu') sent from the Misha Fu e-mail address the following e-mail to Mr Ruperti ('Father Angelus'):

> *'. . . please issue, sign and sent via courier to my home address SIDE LETTER as following:*
>
> *'Quote*
>
> *'Agreement*
>
> *'It is mutually agreed between the Parties that Owners (Tamara ShipHoldings SA) and Charterers (PDVSA Marketing International) agree to compensate the AMON INTERNATIONAL INC. for their efforts in arranging the deal, and hereby confirm to pay 1.25% commission on all hire earned throughout this Charter. The first payment to be done on January 20th, 2003, in the amount of $5,037 ($13,000 x 0.0125% x 31 days) for the period 17.1.2003-16.02.2003. The second payment to be done on February 17th, in the amount of $4,875 for the period 17.02.03-18.02.03, and each subsequent payment to be done on 17th of each month for 30 days in*

> *advance concurrent with hire. If vessel is schedule for re-delivery by the end of the Charter commission payment to be adjusted accordingly . . . .'*[30]

227. The same considerations apply in respect of this communication as apply to the email of 6 January 2003.

228. In respect of these draft side letters Mr Mikhaylyuk claims that he misunderstood what Mr Ruperti intended. He thought that he intended to pay a sum equivalent to the 1.25% commission on some Novoship vessels as remuneration to Mr Nikitin for introductions, but, after he had drafted two agreements to that effect, Mr Ruperti said that he had misunderstood the position. So the agreements drafted were never signed; nor were they shown to or discussed with Mr Nikitin. What communication supposedly gave rise to that misunderstanding is unexplained. Nor is there any reference to a misunderstanding in the Misha Fu correspondence. I find this suggestion implausible.

229. Mr Berry submits (i) that there is no evidence that Mr Nikitin knew of the two side letters; if he had done so it is inexplicable that he would wish to include a justification for payment which was transparently false; (ii) that the fact that Mr Ruperti had to ask "*what amount* " shows that there cannot have been a simple agreement for the payment of 1.25% of hire and that the side letter must have been intended for a purpose other than to fix the amount actually payable to Amon, especially as (a) the first email with a side letter of 6 January 2003 provided for a first payment on 7 January and (b) the terms of the side letters which called for monthly payments were not followed. The letters can never have been intended to be performed in accordance with their terms. Mr Ruperti's question "*what amount*" is more consistent with his asking Mr Mikhaylyuk how much he owed or was expected to pay Mr Nikitin for introductory work. The side letters are likely to have been some sort of attempt to provide Mr Ruperti with a documentary cover story for the amounts he contemplated (or was thought to have contemplated) paying to Mr Nikitin.

230. I reject this. If the payments to be made were sums due for introductions effected under a bona fide transaction, it is implausible that the amount thereof would be calculated by reference to charters with which Mr Nikitin had nothing to do; and there was no need for secret and coded discussions or for the drawing up of letters which told a lie. No cover story was needed if the truth would do just as well. The documents show that the intention was that Mr Nikitin be paid 1.25% of the charter amounts and that these payments were to be made in connection with the charters. The fact that Mr Ruperti asked "*how much*" is not inconsistent with this and the fact that the answer to his inquiry was to send him a side letter shows that the sums specified in that letter were what was required to be paid. The fact that payment was not made monthly in accordance with the terms of the side letters

[30] The e-mail appears to have been sent twice.

is not surprising given that Mr Ruperti was, as I have said, on any view a late payer, and that the sums in question were of limited significance to Mr Nikitin.

*Communications about the Moscow Kremlin*

231. On 11 February 2003, Mr Mikhaylyuk sent Mr Ruperti an e-mail from the Misha Fu address:

> *'. . . as discussed the new car could cost aroud 30K but with expected level of discount it should be $28K net. where 1.5K is going back here, and 0.5K to you including middle man, so suggest to have "$28.3K with 1% to naut. deductable from hire". if you think this suit your budget, lets go for it.'*

232. This must be, as Mr Mikhaylyuk acknowledges in his defence, a reference to the proposed charter of the *Moscow Kremlin* which was chartered at $ 28,300 per day for 6 months on 24 February 2003 with 1% address commission "*on hire deductible at source*" – Nautica is not mentioned. That would mean just over $ 28,000 net.

233. Mr Mikhaylyuk accepts that the "1*% to naut. deductible from hire*" relates to commission demanded by Mr Ruperti (Nautica Shipbrokers being his company) and says that the reference to "*1.5k going back here*" was a reference to a payment to him that was asked for but not made.

234. The "*you*" refers to Mr Ruperti but it is unclear who the *"middle man*" is or, even whether the middle man was to get the whole of the 0.5K (the "*0.5K to you*" signifying the percentage which Mr Ruperti is to include the middle man for) or, as is, perhaps, a more natural reading, only to share in it. The Claimants suggest that, given the context, the middle man must be Mr Nikitin, which he denies, and that he was to get either the whole or some of the 0.5K. That would tally with Mr Nikitin getting either 1.25% or 1% of hire ($353.75 and $ 283 respectively). Mr Berry suggests that it means someone in the middle between Mr Ruperti and someone else, probably someone within PDVSA or between Mr Ruperti and PDVSA. Mr Mikhaylyuk gave no explanation in his pleading or witness statement. In his opening submissions he suggested that it was somebody in Venezuela connected to Mr Ruperti.

235. I do not find it easy to decode who the 0.5% was to be for. I do not regard the use of "*middle man*" in this obfuscatory correspondence as necessarily meaning someone between Mr Ruperti and PDVSA. It seems to me possible to interpret it as a man in the middle in the sense that he was to be the recipient of a payment from Mr Ruperti at one end on the direction of Mr Mikhaylyuk on the other and who was at neither end. In my judgment the likelihood is that the 0.5% includes something for Mr Nikitin.

236. The reference to "*a new car could cost around 30k but with expected level of discount it could be $ 28K net*" is also unclear. The Claimants suggest that Mr Mikhaylyuk was saying that the market rate which Mr Ruperti could get from the sub-charter would be $ 30,000 per day and that he was to receive a discount in order that he could pay commissions. Mr Mikhaylyuk pleads that this was a reference to the rate that a new vessel might command. It seems to me that the rate of $ 30,000 for "*a new car*" simply represents the total amount that would have to be paid in order to accommodate the commissions intended and that, given that the actual sub-charter rate was $ 34,000, $ 28,300 was less than what could be achieved.

*The payments*

237. As indicated in para 197 (a) above on 27 February 2003 Amon received $ 37,356.20 from Sea Pioneer. This payment followed an e-mail message from Mr Mikhaylyuk ('Misha Fu') to Mr Ruperti ('Father Angelus') of 25 February 2003 – subject "*another car*" - in the following terms:

> *'having been looking around found that there is a car which has 37,383 on the clock as of today. understood that its owner arriving back this week-end, so the car will not be in use and the figure above will be the same till the end of February.*
>
> *Please confirm same OK with you, to go ahead*.'

I infer that the difference of US $ 26.80 between the amount received and the amount in the email is accounted for by bank transfer charges.

238. Mr Mikhaylyuk admits sending this email (for which he offers no explanation) but says that he does not know if payment was made pursuant to it.

239. Mr Berry submits that this message is unlikely to be a statement of what is due up to the end of February on several vessels. It is a reference to a single entity ("*a car*"). It contains Mr Mikhaylyuk's "*understanding*" when the amount representing 1.25% or any other percentage of hire would be ascertainable. If the $ 37,383 represents commission on hire which accrues daily it makes no sense to speak of the amount owing as remaining the same from Tuesday to Friday. The figure on the clock is far more consistent with a reference to an amount then considered as owing to Mr Nikitin in return for his agreement to introduce Mr Ruperti to contacts in Russia. On that basis Mr Nikitin's absence until the weekend would explain why there would be no further increase in respect of the amount payable. Further the words "*Please confirm same OK with you to go ahead*" are inconsistent with a pre-existing agreement to pay a 1.25% or 1% commission on hire.

240. This sort of linguistic analysis might be compelling if one was interpreting open communications which were not intended to mask underlying reality. In context it is not appropriate. I interpret this coded

message as signifying that the amount due for commission in respect of the relevant vessels up to the end of February will be $ 37,383. This is dressed up as a discovery of a car whose mileage will not alter by that date because its owner is away. The reference to an amount on the clock is an indication that what is being dealt with is an amount that accrues from day to day. There is no suggestion that Mr Nikitin had been on some form of daily rate so that his absence for a few days would make a difference to what might be due. In context I do not regard the request "*Please confirm* etc.." as inconsistent with an arrangement to pay commission. It carries on the pretence that the writer has found a new car and constitutes a request for payment or for checking that the recipient agrees that that is what is due.

241. On 6 May 2003 Wisteria paid $ 83,823.19 to Amon and $ 217,100 to Mirador Shipping.

242. Mr Mikhaylyuk denies that the payment to Mirador was for his benefit and says that he does not know why the payment was made. But, as I have found, Mirador was the account into which, at this time, payments for Mr Mikhaylyuk had their temporary home.

*Renewal of the Moscow Kremlin*

243. In August 2003 the 6 month charter of the *Moscow Kremlin* was coming to an end.

244. On 28 August 2003 Mr Mikhaylyuk sent an e-mail to Mr Ruperti from his Misha Fu address:

> '. . . *having checked all possibilities can do following:*
>
> *18,500, including 1% back to a client here, 1,250 on top back to other clients here . . . .*'

245. This must, as I infer, refer to the extension (agreed by 1 September 2003) of the *Moscow Kremlin* charter for another two years from 7 September 2003 at $ 18,500 per day on the terms of the existing charterparty (which provided for 1% address commission deductible at source). The identity of the client referred to in the phrase "*1% back to a client here*" is unclear. Mr Mikhaylyuk gives no explanation. The phrase is not the same as that in the 11 February email ("*1.5K is going back here*") which was written when Mr Mikhaylyuk was in London. In August 2003 Mr Mikhaylyuk was in Russia but is unlikely to have referred to himself as a "client". Mr Nikitin was in St Petersburg.

246. Equally unclear is the identity of the "*other clients*" in the phrase the "*1,250 on top back to other clients here*" (for which Mr Mikhaylyuk also gives no explanation). It must be an additional sum "*on top*" which is to be paid to others. They are likely to include personnel at NSC in Moscow or, perhaps, NOUK. Mr Nikitin denies receiving any payment or benefit in relation to the *Moscow Kremlin* charters. But it

seems to me that he is likely to be either the "*client here*" referred to or, possibly, one of the "*other clients here*".

247. The 28 August e-mail continued as follows:

> "*seems above slightly higher than you gave me yesterday, would appreciate you can consider and confirm. also, as you proposed yesterday, it is agreed to increase addition to + 1,500 if the market allows/increases and you can do so.*"

248. I infer from that that Mr Ruperti had agreed to make a payment of at least
$ 1,250 and was being asked to make it $ 1,500 if the market allowed. The message is, also, an indication that Mr Ruperti had been paying in relation to earlier charters. If he had refused it would be odd to find Mr Mikhaylyuk asking for payment without any reference to difficulties in the past.

*The January 2004 payment to Sea Pioneer*

249. On 12 January 2004, Mr Mikhaylyuk ('Misha Fu') again sent Mr Ruperti ('Father Angelicos') details of Amon's Swiss bank account. Mr Ruperti responded: '*How much'*. On 15 January 2004, Mr Mikhaylyuk ('Misha Fu') sent to Mr Ruperti ('Father Angelicos') an e-mail in the following terms:

> *'have checked amon*
>
> *since 01.03.03-until 31.12.03*
>
> *it has done 289,200.'*

Mr Ruperti replied '*ok*' and forwarded Mr Mikhaylyuk's email to Mr Ludovico Fontana, who was the Chief Financial Officer in the Maroil group of companies.

250. Mr Berry submits that the question "*How much*" from Mr Ruperti, the need on Mr Mikhaylyuk's part to check, and the Ruperti "*ok*" are inconsistent with an agreement to pay secret commission but are consistent with the $ 289,200 being an ad hoc payment. Further the timing of the payment is consistent with the fact that Mr Ruperti had concluded some business with Sibneft using one of the Claimants' vessels which Mr Ruperti may have attributed to Mr Nikitin's introductions.

251. Sea Pioneer paid $ 289,200 to Amon International on 16 January 2004. The credit advice from Wegelin & Co refers to Father Angelicos. Mr Nikitin says that he does not recall noticing this at the time.

*What do the payments to Amon represent?*

252. The draft side letters in the emails of 6 and 17 January 2003 relating to the *Adygeja* and the *Sorokaletie Pobedy* refer to commission of 1.25%.

If the side letters represent the actual agreements, and if they were honoured in accordance with their terms, there should have been regular bi-monthly payments of 1.25% of hire earned in respect of those vessels, although that could be a fluctuating figure in order to allow for any off-hire periods and (possibly) counterclaims.

253. The Claimants have attempted to relate the known payments to Amon of (a) $ 37,356.20[31], (b) $ 83,748.19[32] and (c) $ 289,200 to 1.25% of the hires of the vessels by the Owners to (apparently) PDVSA.

254. This is not an exercise that works very well.

*Calculation 1*

255. Annex 1 to the Claimants' opening submissions takes, first, the invoices for the three vessels chartered out from October 2002 to February 2003. By taking 1.25*%* as the rate for the *Marshal Chuykov*, the *Adygeja* and the *Sorokaletie Pobedy* for that period (the last payment for the *Sorokaletie Pobedy* goes down to 17 March 2003) the Claimants reach a figure of $ 37,019.03. But this is *less* than the $ 37,356.20 received from Sea Pioneer on 27 February 2003 (and the $ 37,383 presumably sent). Mr Berry submits that a calculation based on 1.25% of hire might be *reduced* by off-hire or set offs but could not be *increased.* That is a submission of some force, although calculation error cannot entirely be ruled out, and it is possible that there was an additional amount for some unexplained reason.

256. Further the calculation includes nothing for the month of October 2002. This is because the Novoship invoice for that month, the figure which has been used for the Claimants' calculation, did not deduct the 1.25% address commission. But that would not, Mr Berry submits, mean that the 1.25% payable to Amon would reduce; and, if Mr Nikitin was party to the dishonest arrangement suggested, he would know that he was being short changed on his first instalment. Accordingly, it is said, the $ 37,019.03 should be increased by $ 4,709 (being 1.25% x $ 372,000 x 31 days), to make $ 41,669.03. That seems to me a point of lesser force since whoever calculated the sum payable to Amon may have been working off the invoices rendered to PDVSA; and Mr Nikitin is unlikely to have been concerned with the precise calculation.

*Calculation 2*

257. The next exercise that the Claimants have done is to take the hire for all five vessels from March to December 2003 (the December payment being hire in advance for January in the case of the *Marshal Chuykov*,

[31] This is the amount received. The amount paid is, I infer, $ 37,383. The deduction is, I infer, for bank charges.

[32] This, also, is the amount received. Wisteria was debited $ 83,823.19, The deduction is, I again infer, for bank charges.

the *Sorokaletie Pobedy* and the *Moscow Stars*) and to use a 1.25% rate in respect of three of them and a 1% rate in respect of the *Moscow Kremlin* and the *Moscow Stars*. The 1% figure has been taken because these two vessels were more expensive to hire and the address commission on the charters was 1%[33]. The amount of address commission is significant because it is, in effect a discount on hire, the existence of which provides the charterer with the wherewithal to make payments of the like amount to whatever recipient he chooses. This produces a figure of $ 296,785.68, which is relatively close to, but exceeds, the $ 289,200 paid by Sea Pioneer in January 2004 pursuant to the 15 January 2004 email.

258. This analysis leaves unexplained the payment by Wisteria of $ 83,823.19 on 6 May 2003, which, when added to the other two payments, represent an overpayment if the product of the $ 37,383, $ 83,823.19 and $ 289,200 was paid in respect of the period October 2002 to December 2003 and represents 1.25% on all hire.

*Calculation 3*

259. The Claimants have performed another exercise which takes the full days on hire for the first four vessels in February, March and April 2003 and have taken a figure of $ 200 per day in respect of the vessels other than the *Moscow Kremlin* and $ 500 per day in respect of the latter. This produces a total of $ 84,000. This exercise shows that it is possible to come close to the figure paid in May 2003 by assumptions about the monetary figures involved and the days in respect of which the payment is made. But it is impossible to know whether these assumptions are correct, or nearly so; or why, for instance, $ 200 or $ 500 may have been chosen (if they were). Different permutations of days and, in particular, amounts would produce a different figure.

260. I shall return to this subject after considering the account given by Mr Mikhaylyuk as to what the payments to Amon represent.

*The payment of $ 217,100 to Mirador Shipping on 6 May 2003*

261. I am satisfied that this payment (for which Mr Mikhaylyuk has no explanation) was a payment required by Mr Mikhaylyuk, made for his benefit, kept secret from his superiors, and paid by Mr Ruperti through Wisteria, in order to secure the arrangement whereby vessels were in fact chartered to PMI Trading (although appearing to be chartered to PDVSA) as a result of which Mr Ruperti was able to make profits on the sub-charter to PDVSA. In short, it was a bribe. It would still be a bribe if Mr Mikhaylyuk had not required it but simply been offered it.

[33] The commission on the other charters was 1.25% described in the case of the *Marshal Chuykov* as payable to Nautica, Mr Ruperti's company, to be deducted at source; in the case of the *Adygeja* as an address commission; and in the case of the *Sorokaletie Pobedy* as an address commission to be deducted at source.

262. I have reached that conclusion for a number of reasons. First, the arrangement whereby vessels were apparently chartered to PDVSA but in fact chartered to PMI and then by Sea Pioneer to PDVSA was a corrupt arrangement. This type of arrangement does not come free. Second, the payment was made from Wisteria's offshore account, which was the account from which Wisteria paid the PDVSA charter hire. Third, it was paid on the same day as the $ 83,823.19. It is somewhat implausible to think that one was a legitimate payment for services if the other was (as I think it was) the payment of a bribe. Fourth, it is apparent from the Misha Fu emails of 5 December 2002 and 11 February 2003 that Mr Mikhaylyuk had sought payments of $ 500 and $ 1500 per day for himself in connection with the vessels. As will become apparent, I do not accept that he was seeking payment for consultancy work which, for some reason, was expressed as connected to the PDVSA charters. There was no reason to link the two. Further, if he was charging $ 500 or $ 1500 a day, his charge for work which, at best, would be intermittent would have been enormous, even if it was calculated by reference to only 2 vessels.

263. I do not accept that Mr Ruperti rejected Mr Mikhaylyuk's requests for any payment. The e-mail communications give no hint of that; a stipulation for payment was made more than once (5 December 2002 and 11 February 2003); and the correspondence contains no hint of refusal to make any payment.

264. Fourth, Mr Mikhaylyuk claims that the Mirador account has nothing to do with him. That claim is a false one. The fact that he found it necessary to make it supports the conclusion that I have reached. The account was used to receive the bribes relating to the *Tula* charter (see para 589ff below) which, in turn, supports the conclusion that the $ 217,100 was also a bribe.

265. What is not clear is how the $ 217,100 figure was reached.

*Calculation 4*

266. The Claimants have performed a calculation in Annex 2 to their opening submissions which shows that the total full days on hire of the relevant vessels from October 2002 to the end of April 2003 is 483 days. 483 days at $ 450 per day comes to $ 217,350. That is, obviously not the same figure as $ 217,100 nor is it a whole multiple of $ 450. But I accept that the figures are too close for coincidence and that the $ 217,100 probably represents either a calculation of $ 450 per day per vessel from which, for some reason, $ 250 has been deducted or $ 500 a day (a rounder figure and the one sought in the 5 December 2002 email) with a greater deduction for some reason. Whether it does or not I am satisfied, for the reasons stated, that the payment was a bribe calculated by reference to a sum for each day of the hire of the vessels.

267. In their defence the Ruperti defendants plead that the payment was made at Mr Mikhaylyuk's request and was a reward for Mr

Mikhaylyuk (or those connected with him) promoting business opportunities in Russia for Mr Ruperti and his companies. The payments, it is said, were made in the amount and to the payee nominated by Mr Mikhaylyuk. So far as the Ruperti defendants were concerned the payments were not secret. Mr Ruperti's statement is to the same effect.

268. Insofar as this is a claim that the payment was made honestly for services rendered I reject it. The defence pleaded is half true. The payment was made at Mr Mikhaylyuk's request and in an amount and to a payee nominated by him; but it was paid as a secret reward for his services in respect of chartering the vessels in question to PMI Trading.

*The payments to Pulley Shipping*

269. Sea Pioneer made the following payments to Pulley Shipping:

a) $ 491,000 on 4 May 2005;

b) $ 500,000 on 12 August 2005; and

c) $ 500,000 on 3 November 2005.

These payments were the subject of further e-mails.

270. On 19 January 2005, Mr Mikhaylyuk (as Misha Fu) wrote an e-mail to Mr Ruperti as follows:

> '*hope you are getting better and by the time you are here you will be better.*
>
> *meantime, could you please arrange transfer of three payments ($155,450 + $174,500 + $ 161,050) for outstanding fees to the following new address:*
>
> *quote*
>
> *please find new wiring instructions for the Bank of Nevis International Ltd and please be guided accordingly.*
>
> *US Dollars to The Bank of Nevis International Ltd, Nevis*
>
> | | |
> |---|---|
> | *Pay:* | *Federal Reserve Bank* |
> | *For Account:* | *The International Bank of Miami, N.A.* |
> | | *121 Alhambru Plaza-Penthouse 2* |
> | | *Coral Gables, Florida, 33134* |
> | | *ABA No. 0670-01699* |
> | *Favour:* | *The Bank of Nevis International Ltd* |
> | | *A/C# 990000 420-06* |
> | *Final credit to:* | *A/C Name: Pulley Shipping Ltd* |
> | | *A/C #: 8292809* |

*unquote*

*will revert with news back to you tomorrow.'*

271. Mr Mikhaylyuk sent Pulley Shipping's bank details to Mr Ruperti again on 5 April 2005. Mr Ruperti forwarded the e-mail (twice) to Mr Ludovico Fontana, the Chief Financial Officer of Maroil. He also sent him Mr Mikhaylyuk's e-mail of 19 January 2005 containing the wiring instructions. The total of the 'three payments' ($ 155,450, $ 174,500 and $ 161,050) i.e. $ 491,000 was paid by Sea Pioneer to Pulley Shipping on 4 May 2005. $ 20 was deducted for bank charges.

272. On 14 July 2005, Mr Mikhaylyuk ('Misha Fu') sent an e-mail to Mr Ruperti as follows:

'*Subject: another round*

*Dear Father Angelicus,*

*how are you?*

*had not heard from you for a long time . . .*

*meantime could you please arrange another donation similar to the last done in order to try to follow the situation. please advise if you need details for it.*

*when am I going to see you?*

*missed you already.*

*take care*

*with personal regards*

*Misha Fu'*

Mr Ruperti replied:

'*Ok. With a strng flu since a week but better today*.'

273. Mr Mikhaylyuk replied on 18 July 2005:

'*Dear Father Angelicus,*

*thanks for your message, hope you'll recover soon completely.*

*when are you travelling to London if any at all ?*

*hope things are progressing your side. for sake of good order here is the details of address:*

*with personal regards,*

*Misha Fu*.'

The 'details of address' was an attachment with Pulley Shipping's bank account details at the Bank of Nevis International.

274. Payment was not, however, made immediately, and Mr Mikhaylyuk sent the following e-mail on 5 August 2005:

> '*Subject: another round*
>
> *My friend,*
>
> *good afternoon.*
>
> *while I was trying to get in touch with you all this time seems the situation became very bad for me personally.*
>
> *as you may recall it was sometime ago when I told you that all we discussed was agreed with people from the Capital in my country, and they were aware of all lots which supposing to be delivered.*
>
> *All this time I was telling them that I have good relations with you and everything is working and in place (which was not true but I thought I better to protect the business and though that You will sort it out as discussed).*
>
> *Unfortunately, this is not happening, and I'n now under huge pressure to present the results to them and was INVITED to go to the Capital for report . . .*
>
> *What can I say?*
>
> *I'm afraid personnaly as this is very dangerous situation for me. I have not much to present and despite my several appeals to you, nothing had happened.*
>
> *I ALWAYS tried to be honest with You, as you are my friend. I'm in trouble now, and seeking your help.*
>
> *I can understand that you have a lot of problems lately, and was not able to talk. At the same time, I was sending you messages trying to keep my side at least satisfied within minimum, but I lost all credibility and they do not believe my promisses anymore. . . Niether I have support toward the current business and they do not allow me to be flexible . . . in other words, - I'm loosing grounds.*
>
> *Found myself in a real bad position. Hope to see you shortly here to discuss.*
>
> *Need your urgent help.'*

275. On receipt of this, Mr Ruperti sent an e-mail to Mr Fontana at Global Shipmanagement/Lap Trading:

> *'Mandale 500,000 usd a misha fu urgente.'*

This sum was paid by Sea Pioneer to Pulley Shipping on 12 August 2005.

276. The next payment by Sea Pioneer to Pulley Shipping - also of US $ 500,000, made on 3 November 2005 - was preceded by an e-mail from Mr Mikhaylyuk to Mr Ruperti on 15 October 2005 as follows:

> '*Subject: Fri-14th*
>
> *Dear Father Angelus,*
>
> *got nothing from you as discussed.*
>
> *was it sent?*
>
> *regards,*
>
> *Misha Fu.'*

277. A further e-mail from Mr Mikhaylyuk to Mr Ruperti dated 21 January 2006 is in the following terms:

> '*Dear Father Angelicus*
>
> *good morning.*
>
> *it's been a while I've heard from you, so hope life is nice and goot to you and your family in 2006.*
>
> *would appreciate if you please let me know when you are going to be in London, hope to have a chance to see you.*
>
> *meantime could you please arrange another transfer as per last as I was requested by some people to pass their part to them, so kindly ask you to arrange same within next several months by making several transfer. will explain you more if we meet in London.*
>
> *meantime wish you all the best.'*

278. The documents disclosed do not reveal whether and, if so, to whom this further payment was made.

279. These payments totalled nearly $ 1.5 million. They are said by Mr Mikhaylyuk and the Ruperti defendants to represent payment for assistance given by Mr Mikhaylyuk to Mr Ruperti or his company, Maroil Trading, and to have been unconnected with the PDVSA charters or any Novoship business.

280. Mr Mikhaylyuk pleads that he provided Maroil with advice about opportunities to purchase ships. This was done without any agreement as to remuneration but, after the event, Mr Ruperti decided to make payments amounting to $ 1.49 million to Pulley Shipping. He says that he told Mr Oskirko and Mr Shumilin in around September 2000 and Mr Izmaylov in December 2001 about the requests for advice from, inter alia, Maroil and that they did not object to him undertaking such advisory work.

281. I do not accept this account, which has not been supported in the witness box, for a number of reasons.

282. First, it was the evidence of Mr Oskirko that he did not give any such consent and was not aware that any such consent had been given. Had it been up to him he would not have regarded it as appropriate for Mr Mikhaylyuk to be remunerated for advice given in relation to tankers, which it was his job to charter out. His evidence was that Mr Mikhaylyuk had, on one occasion, probably in late 2002, told him that he would like to work with third parties regarding the sale of two panamax vessels, which had been offered to NOUK and declined because the price was too high. Mr Oskirko did not give him consent and told him that he would need to discuss the matter with Mr Izmaylov, the President at the time.

283. According to Mr Mikhaylyuk, Mr Izmaylov gave such consent when they met in Washington. He says that he had prepared a 40 page report about the prospects for investing in new Panamaxes. Mr Izmaylov said that NSC did not have the funds to purchase them and agreed that he could present his report to third parties provided it did not conflict with his duties or was not against Novoship's interests. But he has not called Mr Izmaylov nor given oral evidence himself.

284. Mr Oskirko did not recall the conversation said by Mr Mikhaylyuk to have occurred in December 2003 when, according to Mr Mikhaylyuk, Mr Oskirko told Mr Mikhaylyuk that he hoped that he, Mr Mikhaylyuk, was receiving compensation for all his consultancy work to avoid the situation in which he, Mr Oskirko, found himself namely considering resignation on the basis of the size of his remuneration. (Mr Oskirko's evidence was that he resigned on account of the level of remuneration, the high workload, and his concern about Mr Izmaylov's "wrongdoings").

285. What he did recall was that on the day in December 2003 on which the Board of Novoship met to consider his resignation Mr Mikhaylyuk met him in Moscow and complained about the size of his (Mr Mikhaylyuk's) salary. Mr Oskirko said that he (Mr Oskirko) was to be paid more in his new job. Mr Mikhaylyuk offered him money to stay. This made him realise that Mr Mikhaylyuk was doing something wrong (because how else would he have the money to do so). Mr Oskirko was, however, about to leave NSC and did not take the matter any further. Mr Oskirko did not return to NSC until mid-December 2005, just a few months before Mr Mikhaylyuk was dismissed. It was, he thought, possible that Mr Mikhaylyuk had said he was doing consultancy work.

286. I am quite satisfied that Mr Oskirko never had the power to authorise Mr Mikhaylyuk to do outside work and that he never did so. Nor was he ever told what work Mr Mikhaylyuk was doing or its extent or anything about his remuneration. At most there was a passing reference to his doing outside work on the day of Mr Oskirko's resignation on the occasion when, to Mr Oskirko's shock, Mr Mikhaylyuk, whom he had previously thought to be honest, attempted to buy his support for the future.

287. Mr Vyvorotnyuk, who was from June 2004 the Head of the Commercial Department of NSC in Novorossiysk and who had been the Acting Head from November 2003, was also unaware that any consent had been given. I accept that evidence which seems to me inherently probable.

288. Second, it seems to me improbable that Mr Mikhaylyuk's superiors would have authorised him to receive so large a sum for advice. Mr Mikhaylyuk accepts in his response to the Claimants' opening submission (para 34) that he preferred not to tell his superiors the sort of money he was hoping for from his advice. He did not tell them about the scale of the remuneration he was getting. The sums in question were wholly disproportionate to his salary and bonus (and to any advice that he may have given). In 2005 his salary was £ 105,000 and he received £ 53,250 by way of bonus. Remuneration of nearly $ 1.5 million, even if his advice related to matters unconnected with NOUK's or NSC's business, itself creates a conflict of interest. On no view was there any informed consent.

289. Third, clause 18.1. of Mr Mikhaylyuk's contract of employment of 18 October 2002 provided:

> ***"18. Other Employment***
>
> *18.1 The Executive may not without the prior consent of the Chairman of the Board engage in any form of business or employment other than his employment with the Employer whether inside or outside his normal hours of work."*

I do not accept that Mr Izmaylov ever authorised Mr Mikhaylyuk to undertake the work he claims.

290. Clause 7.2. of the contract provides:

> '7.2 *The Executive [sc, Mr Mikhaylyuk] shall devote to the Employer [NOUK] the whole of his time and attention and shall use his best endeavours to promote the interests of the Employer during their normal working hours and beyond.'*

291. It is not suggested that this provision was ever varied. It is difficult to believe that the giving of advice worth nearly $ 1.5 million did not involve a breach of this clause.

292. Fourth, the Ruperti defendants and Mr Mikhaylyuk have given Further Information in relation to the work in question. On analysis, the work which Mr Mikhaylyuk says that he did appears (a) to be limited; (b) to be closely bound up with the interests of his principals; and (c) to be such as was (or should have been) done as part of his employment by NOUK and for the purpose of advancing Novoship's interest.

293. Annex 3 to the Claimants' opening submission contains a detailed analysis of the allegations of (i) Mr Mikhaylyuk and the Ruperti

defendants in relation to the reasons for the payments of $ 1,491,000 by Sea Pioneer to Pulley Shipping and (ii) Mr Mikhaylyuk concerning the reasons for the payments of $ 1,229,898 by Odin Marine to Pulley Shipping. In circumstances where neither Mr Ruperti nor Mr Mikhaylyuk have chosen to support their cases in the witness box I do not intend to lengthen this judgment by incorporating that analysis. It is sufficient to say that the analysis and critique contained in it appears to me to be well founded.

294. The documents referred to indicate that in the case of each piece of advice put forward by Mr Mikhaylyuk or by Mr Ruperti, either (i) there is nothing to show that any such advice was given or sought; or (ii) Mr Mikhaylyuk was acting on behalf of NOUK either (a) in arranging inspections by NOUK of vessels Mr Ruperti was considering purchasing, in the hope that NOUK would be offered the opportunity to manage such vessels on purchase, or (b) in looking out for VLCCs to use in a potential joint venture between Mr Ruperti and Novoship.

295. Fifth, no invoices or fee notes were ever rendered to Mr Ruperti or Maroil Trading or anyone else.

296. Sixth, the demands in the e-mails of 14 July and 5 August 2005 are not expressed in terms consistent with seeking remuneration for legitimate consultancy work or advice, the giving of which had been cleared with Mr Mikhaylyuk's superiors. The email of 14 July 2005 which led to a payment of $ 500,000 asked for "*another donation*". The email of 5 August 2005 was expressed in terms of some desperation which are inconsistent with a request for fees for advice: see the reference to an agreement with "*people from the Capital*", who were evidently expecting some payment; to Mr Mikhaylyuk being under "*huge pressure*" and in "*a very dangerous situation for me*" and to his "*trying to keep my side at least satisfied for the minimum*". The e-mail of 21 January 2006 asked for another transfer "*as per last as I was requested by some people to pass their part to them"*. Mr Mikhaylyuk's suggestion in his written opening (para 50) that the reference to "*people from the Capital"* was a false reference intended to put pressure on Mr Ruperti to pay is not credible. On Mr Mikhaylyuk's account the payment was for his extracurricular advice, as Mr Ruperti would have known. There would be no reason for people from the Capital to be pressing.

297. Seventh, the payments were made to a secret offshore account pursuant to requests made on a secret e-mail account. The credit advices contained the reference "*all ships*".

*What do the payments totalling $ 1,419,100 to Pulley Shipping represent?*

298. I am satisfied that these payments were payments solicited by Mr Mikhaylyuk for his benefit and that of others, and kept secret from his superiors, or at any rate those who were not themselves seeking bribes,

and paid by Mr Ruperti through Sea Pioneer, as a further price of, or reward for, the PDVSA chartering arrangements. As with the payment to Mirador Shipping these payments were bribes, and would have been so even if they had not been solicited.

299. I reach this conclusion for similar reasons as apply in the case of the payment to Mirador. I have rejected Mr Mikhaylyuk's account of the reason for the payments: see paras 261 ff. There was a corrupt arrangement to be paid for. The amount of the payments was disproportionate to Mr Mikhaylyuk's remuneration. The payments were made into the secret offshore bank account of Pulley Shipping in respect of his links to which Mr Mikhaylyuk has been untruthful. In his defence he says that:

> '*25 . . . . in 2005, Mr Ruperti of Maroil informed Mr Mikhaylyuk that he valued his work on the various projects he had assisted them with . . . . Thereafter, payments were made totalling US$1.49 million . . . .*'

This account is also untrue. It is plain from the emails in paras 208, 214, and 226 above that payments were demanded by Mr Mikhaylyuk.

300. In their defence the Ruperti defendants plead that the payments were a reward to Mr Mikhaylyuk for services rendered on his own account to Mr Ruperti in relation to the purchase of a number of vessels and were paid into Pulley Shipping's account at his request. As with the Mirador payment, the claim is half true. The payments were made as a reward for services rendered and were paid to Pulley Shipping at Mr Mikhaylyuk's request. But the services were favourable treatment for Mr Ruperti and his companies.

*The underperformance claim*

301. Mr Mikhaylyuk's assistance to Mr Ruperti was not confined to the making of favourable chartering arrangements. In 2005 he assisted him to advance a claim against his principals in the following circumstances.

302. In March 2005 the *Sorokaletie Pobedy* was fixed to Vitol for a voyage to the Far East, where she was to be put off-hire while she was dry-docked. During the voyage, there were complaints about the vessel's speed. On 11 April 2005, Mr Ron Hernandez wrote to Mr Barriga saying that the vessel was "*still too slow"*. On 21 April 2005 he complained about the speed again.

303. On 27 April 2005, Mr Hernandez sent an e-mail to Mr Mikhaylyuk complaining that the vessel could only reach 9.7 knots and that Vitol was complaining, that the vessel's consumption of fuel was '*really amazing'* and that the charterers had been '*hugely hit'*. He suggested "endorsing" the Vitol fixture to the owners.

304. Mr Mikhaylyuk replied the same day in an e-mail to Mr Hernandez and Mr Ruperti, using the Novoship e-mail address, in which, after saying that "*without prejudice cannot accept its content as it (i.e. the email above) is not and was not agreed or even discussed with Novoship*", he wrote:

> '*2) the current laden passage on the voyage . . . towards Singapore is coming under several factors, which makes the result somewhat dependable of:*
>
> *- bad weather on the sea passage*
>
> *- ocean currents*
>
> *- heating up the cargo as per the voyage orders . . . (contrary to your information)*
>
> *- long service in the Caribs where Hull and Propeller probably got heavy fouling (which will be checked in Richards Bay)*
>
> *- further investigation of vessel's performance/speed at Richards Bay*
>
> *3) vessels speed is subject to analysing which we are to revert at a later stage when completed, taking into account above factors.*
>
> *4) fuel oil consumption is all what it takes to steam through stormy weathers, strong opposite current and heating of the cargo. we also will have better understanding of the hull's fouling at Richards Bay.*
>
> *Needless to say, we are on your side and very sorry things are happening this way.*
>
> *It could be expected that the vessel's performance may have been affected by above factors, and the vessel should have been described in Vitol's Charter Party with bigger margins, but it is too late now. Even further I'm personally very sorry to hear you are suffering such losses, and of course ready to discuss with you any performance claim which you may reasonably have, taking into consideration but not limited to above said reasons. However, with due respect I cannot see a possibility to endorse this Charter Party on Novoship's account ....'*

305. On 3 May 2005, Mr Mikhaylyuk wrote to Mr Ruperti using the secret 'Misha Fu' account as follows:

> '*Wilmer,*
>
> *please find enclosed some claculation as I see it now. Please note that they will be considerably less after taking into account all the relevant factors (like weather, fog, etc.), but at least you have the starting point and you can ask further questions later on. Important thing is to establish your RIGHT*

> *to further claims, and to request results of Owner's calculation for verification.*
>
> *As you know we have a clause in the Charter that both Charterers and Owners agreed to negotiate first before going to Arbitrators, therefore, you please request Owners proposal for mitigating losses already now, while the actual damages can be determined after completion of voyage only.*
>
> *At this stage suggest you send to Owners following as per attached page.*
>
> *Please call to discuss*.'

The attached document - '*Sopo-PDVSA-Performance Claim.doc'* - was addressed to Mr Barriga from Mr Hernandez and gave details of the charterers' underperformance claim. It set out a calculation of the losses to be claimed as a preliminary $ 290,800 with a reservation of rights to claim further losses. Mr Hernandez was expressed as acting on behalf of "Charterers PDVSA".

306. On 10 May 2005, Mr Hernandez sent an e-mail to NOUK in the form suggested by Mr Mikhaylyuk (but with increased figures). Mr Mikhaylyuk suggested in his written opening that he was trying to "*nip the claim in the bud*" but it is apparent from the terms of the 3 May 2005 e-mail that this was not so.

*The house purchase*

307. The closeness of the relationship between Mr Mikhaylyuk and Mr Ruperti appears from the fact that on 19 January 2004 he (as "Misha Fu") offered Mr Ruperti the opportunity to buy his 3 bedroom house in Bromley which he said was worth £ 375- 385,000. On 20 January 2004 Mr Ruperti replied "No problem" and the purchase was subsequently completed in April 2004. There is no evidence that Mr Ruperti ever used it and it is an improbable residence for a Venezuelan millionaire. The Claimants were, prior to the trial, refused permission to amend to claim that this was a bribe and I do not treat it as such. It is, however, evidence of the closeness between Mr Mikhaylyuk and Mr Ruperti.

*The payments to Amon*

308. There is no evidence that Mr Nikitin had any hand in negotiating the PDVSA charters. Nor is there any evidence that he was shown the Misha Fu - Father Angelus e-mail correspondence. There is, however, no dispute that Amon International is Mr Nikitin's company and that it received the 3 payments referred to in para 197 above.

309. It is clear from the Misha Fu emails that Mr Mikhaylyuk specified the figures of $ 37,383 and $ 289,200 to Mr Ruperti as sums which he should pay Amon: see paras 237 and 249 above; and I infer that the same must have been true in respect of the $ 83,823.19. I note that that is what the Ruperti defendants say in their defence.

310. What is not clear is why Mr Ruperti was being required to pay (in effect) Mr Nikitin. In order to address that question it is necessary to consider the various explanations which have been given by those concerned.

*The pleaded explanations*

*Mr Mikhaylyuk*

311. Mr Mikhaylyuk denies that he solicited payments to Amon. He pleads that to the best of his recollection Mr Ruperti wished to be introduced to the Russian oil cargo market and Mr Mikhaylyuk approached Mr Nikitin to see if he would assist. Mr Nikitin wanted to be paid for any time and expense incurred and nominated Amon to receive payments from Mr Ruperti's companies. Mr Mikhaylyuk advised Mr Ruperti accordingly. Mr Mikhaylyuk could not recall what sums were paid by Mr Ruperti to Amon.

312. His witness statement is to similar effect. In it he says that he originally understood that Mr Ruperti had decided to pay Mr Nikitin a sum equivalent to commission on some Novoship vessels. After he had drafted two agreements to that effect, Mr Ruperti said that he did not intend to pay Mr Nikitin on this basis. He could not recall whether in the end it was Mr Nikitin or Mr Mikhaylyuk who suggested how much Mr Nikitin should be paid but, in the light of the email of 15 January 2004, he assumed that it was Mr Nikitin.

313. In para 37 of his defence Mr Mikhaylyuk gave an explanation as to why he had sent himself the email of 9 December 2002 with details of Amon's bank in Switzerland in the following terms:

> *'37 . . . . Mr Nikitin had told Mr Mikhaylyuk about Amon over the telephone and said that it was a broker company known to him which he would like the Claimant to consider using. Mr Mikhaylyuk requested details which were sent to him, and which he forwarded to his home email because he worked sometimes from home. Mr Mikhaylyuk made some checks and enquiries and concluded that Amon were not known in the market. He accordingly informed Mr Nikitin that the Claimant would not be able to use Amon as brokers.'*

This explanation, which reflects evidence which Mr Mikhaylyuk gave on Day 48 of *Fiona Trust*[34], is, as I have already indicated (see para 222 above), in my opinion false. Amon is not a broker company, but a shell company with no staff. The e-mail had been sent to Mr Mikhaylyuk in order to provide details of the destination for payments to Mr Nikitin.

[34] *" The only memory which I have with this regard is that Mr Nikitin suggested to use this company called Amon as a broker, and that's why he was sending me the details, because I said I didn't know about this broker. It was unfamiliar to me."*

*The Ruperti defendants*

314. The Ruperti defendants plead that these payments, like the payment to Mirador Shipping, were made as an incentive or reward "*to Mr Mikhaylyuk or those connected with him"* to promote potential business opportunities in Russia for Mr Ruperti and/or his companies. Mr Ruperti asked Mr Mikhaylyuk to look for, and/or to ask his contacts to look for, suitable business opportunities in Russia and "*Mr Mikhaylyuk made at least one introduction"*. In due course Mr Ruperti or his companies acted as a broker in relation to sales from crude oil producers in the Ural region to a company called Ruhr Oel which owned an oil refinery in Germany. Mr Mikhaylyuk nominated the payment amounts and the payee. The Ruperti defendants did not know that Mr Nikitin owned Amon and Mr Ruperti "*does not recall hearing of Mr Nikitin*".

*The Nikitin defendants*

315. The Nikitin defendants plead that the three payments were made to encourage Mr Nikitin to introduce Mr Ruperti or his companies to Russian cargo interests with whom Mr Nikitin had connections and contacts and/or to reward him for having done so. Mr Nikitin said that he could not recall (if he was ever told or knew) how the number and amounts of the Ruperti payments were decided upon or calculated; whether any figures were suggested by him or Mr Ruperti, and, if so, on what basis, and whether what was paid accorded with what he or Mr Ruperti suggested.

316. To the best of Mr Nikitin's recollection towards the end of 2002, he was approached by Mr Mikhaylyuk, whom he did not know very well, and whom he had met on perhaps 1-3 occasions. Mr Mikhaylyuk said that he had been asked by a South American contact to ask Mr Nikitin to introduce him to contacts in the Russian cargo market. Mr Nikitin told Mr Mikhaylyuk to inform his contact that he would be prepared to do so provided that he received something for his efforts, especially if they led to some business in Russia. Thereafter he must have been informed by Mr Mikhaylyuk that the contact was prepared to pay for the business introductions and must have been asked by Mr Mikhaylyuk to provide him with bank account details, which, being the details in respect to Amon, were provided in the email of 9 December 2002. He did not recall when he learnt Mr Ruperti's name or the names of his companies) or whether he ever spoke to Mr Ruperti directly prior to these proceedings.

317. According to his witness statement he did not recall telling Mr Mikhaylyuk of the amount of money that he expected Mr Ruperti to pay, although in the light of the Misha Fu correspondence in relation to the $ 289,200 he assumed that that figure came from him and was for his services from 1 March to 31 December 2003. He had no recollection of how that figure was arrived at and it may be that Mr Ruperti performed a calculation in accordance with some previously

agreed formula. He did not believe he was ever told or understood that the payments were calculated by reference to Novoship charters with Mr Ruperti's companies. In his statement Mr Nikitin said that he recalled that he did speak to some of his Russian contacts about Mr Ruperti, being, to the best of his recollection, Mr Smirnov of Kinex, Mr Janchev of Dukkar, and Mr Luukas. Mr Smirnov was, through Kinex, a major trader in oil products in St Petersburg. Kinex was the trading arm of Surgutneftgas, one of the biggest oil companies in Russia, whose chartering arm at the time was PNP, Mr Nikitin's company. Dukkar, of which Mr Janchev in Moscow was either the sole or the principal owner, was one of the largest private oil traders in Russia and had its own transhipment terminal in Murmansk. Mr Luukas was a major shareholder in the Pak Terminal in Estonia, and he had a trading arm. Mr Nikitin's evidence was that Mr Luukas and Mr Janchev had very good relations with Sibneft and that major Russian oil traders used the Pak terminal to ship their products.

*Discussion*

318. These are curious contentions. It is plain that, contrary to his pleading, Mr Mikhaylyuk *did* solicit payments. It is not entirely clear why he needed to make use of Mr Nikitin for the purpose of making introductions of Mr Ruperti to Russian cargo interests, given that, according to para 20.1. of his defence, in the second half of 2002 he "*used his contacts in Russia to effect introductions to a number of potential, major clients in [the Russian cargo] market, and gave advice "about the way of thinking in Russia*" to and for Stena. However, Mr Nikitin may have had a wider or more useful range of cargo contacts for Mr Ruperti's purposes, although nothing from Mr Ruperti (or Mr Mikhaylyuk) explains with any clarity the reason for the selection of Mr Nikitin.

319. If Mr Ruperti was paying Amon $ 400,000 for introductions to Russian cargo interests it is surprising that Mr Ruperti neither knew that Mr Nikitin owned Amon nor, according to his pleading, recalled hearing of him. That introductions of such value would have been effected in those circumstances is unlikely.

320. Further, if Mr Nikitin was being remunerated for business introductions for Mr Ruperti it is surprising:

    a) that payments were made in this manner and in these odd amounts;

    b) that on two occasions, at least, side letters were drafted providing for Amon to have commission on the hire of the *Adygeja* and the *Sorokaletie Pobedy* with the arranging of which Mr Nikitin had had nothing to do, as a result of which the letters were false;

c) that, as between Mr Mikhaylyuk and Mr Nikitin, neither is clear as to who specified the amounts to be paid or how they were calculated, especially when it is apparent from the 15 January 2004 e-mail (*"have checked amon"*) that Mr Mikhaylyuk was checking on the amount to be paid; and

d) that there should be no documentary record of or relating to the contacts or introductions made or the expense involved.

321. Mr Mikhaylyuk had a vague recollection that Mr Ruperti started to do business with Sibneft and possibly other Russian cargo interests towards the end of 2003, which he assumed Mr Ruperti attributed to recommendations that Mr Nikitin had made, although whether that was the result of his recommendations he could not say. Mr Ruperti obviously considered Mr Nikitin's assistance to be of value – hence the payments to Amon. Mr Nikitin said he had no knowledge or recollection of the payments being related to the PDVSA charters.

322. Mr Ruperti's witness statement (which is not in fact in evidence) referred, consistently with his pleading, to his interest in developing Russian business because of PDVSA's connection with a German oil refinery called Ruhr Oel and that one of his ideas was to export oil from the Urals region to the Ruhr Oel refinery. This may well be an incorrect reference to a type of Russian oil known as "Urals oil", which is from West Siberia, and of which Sibneft was a producer, or to the Urals group of companies which is linked to Kinex and therefore Mr Nikitin.

323. On 8 January 2004 Sibneft voyage chartered the *Moscow Kremlin* from Mr Ruperti for the carriage of a cargo of fuel oil from Tallinn, where Mr Luukus had his terminal, to the USA/Caribbean, a charter which earned freight of some $ 970,000 and demurrage of some $ 116,000. An NOUK memorandum of May 2006 records that Mr Ruperti informed NOUK personnel that he had secured a contract with Rosneft in Novorossiysk to transport 120,000 barrels of oil per day to a refinery in which PDVSA had a 50% interest in Germany, namely Ruhr Oel.

324. Mr Berry submits that the contracts referred to in the previous paragraphs lend support to the proposition that Mr Ruperti gained valuable business from Mr Nikitin's introductions, which may explain the large payment to Amon on 16 January 2004 and tie in with Mr Nikitin's vague recollection about Mr Ruperti obtaining business from Sibneft towards the end of 2003. I note that obtaining business from Sibneft is not something to which Mr Ruperti makes reference[35].

[35] Nor is there any relevant documentation disclosed by Mr Ruperti. But I do not regard that as significant because the disclosure given by Mr Ruperti after the claims against Mr Nikitin were introduced consisted only of an electronic search, using keywords, of a set of documents which were disclosed before those claims were made.

*Explanations in Fiona Trust*

325. In *Fiona Trust* Mr Nikitin was asked about the 9 December e-mail. The transcript reveals the following exchanges :

> '*Q Now, why were you sending Mr Mikhaylyuk Amon's bank account details at this time?*
>
> *A I don't have any clear recollection of the reasons. Maybe I might have in mind some kind of project or dealings, but I don't remember. I don't have any clear recollection, the reasons for sending this to Mikhaylyuk.*
>
> . . . .
>
> *MR JUSTICE ANDREW SMITH: Now, you answered in terms of: well, no, he [Mr Mikhaylyuk] didn't have anything to do with this arrangement* [i.e. the arrangement whereby Galbraith's diverted commissions to Amon International]. ***But does that mean, therefore, he can't have been arranging any payment at all into Amon's account?***
>
> ***A I don't recall, my Lord, any involvement of Mikhaylyuk in any payments.*** *So I simply—I don't remember. I believe there was no such payments which Mr Mikhaylyuk was arranging.*
>
> *MR JUSTICE ANDREW SMITH:* ***Was Amon used for anything other than in relation to the Galbraith's arrangement?***
>
> ***A This, my Lord, I don't remember. But mostly it was used for Galbraith's arrangement.***
>
> *MR JUSTICE ANDREW SMITH: But you don't remember whether or not it was used for anything else at all?*
>
> *A This I can't say for sure.*
>
> *MR JUSTICE ANDREW SMITH: It follows that you don't remember it being used for anything else? You don't remember it being used for anything else?*
>
> *A I don't remember it being used for anything else, so I can't say for sure.*
>
> . . . .
>
> *Q This is an email in which you are providing bank account details for Amon, isn't it?*
>
> *A It's correct.*

*Q Can you think of any reason you would have been providing bank details, other than because you envisaged a payment would be being made to that bank account?*

*A I can't recall. It may be that I had in mind some kind of project. I simply don't remember. It goes back to 2002.*

*Q Can you now think of any reason why you would have been providing bank account details, other than because it was envisaged that a payment would be made to that bank account?*

*A At this stage, I can't see any reason. But maybe at the time when this e-mail was sent, there was some – some ideas of a project were under discussion, that might be. But I don't remember anything.*

*Q Can I just ask you to keep that out, please, and go to bundle NE2, and go, please, at tab 6 to page 90. This is a witness statement which has been served of Mr Mikhaylyuk, in support of your defence of these proceedings. You have seen this before; yes?*

*A Yes, I have seen it at a certain stage, but I didn't re-read it recently. So I have just broad understanding.*

*Q Go, if you would, to page 97. At paragraph 26; it appears to say:*

> *"I understand that the allegations now made against Izmaylov and Nikitin include a reference to an e-mail from my office computer to my home computer of 9 December 2002."*

*... And he says:*

> *"That e-mail forwarded to my home computer an e-mail I had just received from PNP on my office computer, giving the banking details of Amon International (I sometimes forwarded material to my home computer in case I needed to work from home). To the best of my* ***recollection, the reason why PNP sent me these details was because Nikitin had indicated that he would like us to use this company as brokers."***

***Now, was that true? Had you told Mr Mikhaylyuk that you wanted Novoship to use Amon as brokers?***

*A This I can't recall. Maybe Mr Mikhaylyuk has got a better recollection. But it might be the case that in – in the circumstances where I'll be able to broke a deal, Amon could be used as the broker.*

> *Q Well, Amon wasn't a broker, was it, in any sense?*
>
> *A But in fact, I could broke the deal and – but Amon is just the company which is – which represented me.*
>
> *Q And there wouldn't be any need to send bank details if it was just a question of using the company as a broker, would it?*
>
> *A I don't have any clear recollection. If Mr Mikhaylyuk's recollection are better than mine, it may be the case. And it might be the case that I had in discussion with Mikhaylyuk that I can provide some assistance for their vessels to find – to find cargoes. It might be the case.*
>
> *Q Mr Nikitin, was this part of another secret scheme between you and Mr Mikhaylyuk and Mr Izmaylov to divert further commissions to Amon?*
>
> *A No, it's untrue.'*

326. This evidence was given some 7 years after the 9 December 2002 email. Mr Nikitin says that he was being asked questions on a different topic, namely commissions to Galbraith's, and whether Mr Mikhaylyuk was involved in them, and that he answered truthfully (a) that he could not recall the purpose of the e-mail and (b) that it was not a scheme between himself, Mr Mikhaylyuk and Mr Izmaylov to divert commissions to Amon (which was what the cross examination was leading up to). Mr Berry submits that his failure, in *Fiona Trust*, to recall why the 9 December e-mail was sent, whereas he does now, is unsurprising. He was presented with a single document in the course of a long cross examination relating to Galbraith's when he had not seen the Misha Fu correspondence, the payments by Sea Pioneer and Wisteria to Amon and all the other material now relied on.

327. I do not find this convincing. The reason for PNP sending the details of Amon's Bank account to Mr Mikhaylyuk was in issue in *Fiona Trust* and had been the subject of evidence from Mr Mikhaylyuk, who was called on Mr Nikitin's behalf[36]. That evidence was that PNP had sent him details of Amon's bank account because Mr Nikitin had indicated that he would like Novoship to use Amon as brokers, and that he had got someone in the office to check up on them. It was (as Mr Nikitin must have realised) untrue: see para 222 above.

328. Mr Nikitin is a very wealthy man with a broad range of interests and several companies, Even so, I do not regard it as credible that he could not, at the time of the *Fiona Trust* trial, recall any involvement of Mr Mikhaylyuk in payments to Amon nor remember that, as well as Amon

[36] In his own witness statement Mr Nikitin had denied that the email of 9 December 2002 had anything to do with the Galbraith's arrangements; and said that he could only assume that the email was sent because he had in mind some further business with Novoship through Amon which did not materialise.

being used to receive the Galbraith's commission, it had also received over $ 400,000 in payments from Mr Ruperti's companies. On the contrary it seems to me that Mr Nikitin was taking refuge in a supposed absence of recollection, and the suggestion that Amon was being looked at as a potential broker, in order to conceal the fact that Mr Nikitin was, through Amon, a recipient of payments from Mr Ruperti arranged by Mr Mikhaylyuk.

*The nature of the arrangements*

329. I return then to a consideration of the nature of the arrangements by which Mr Ruperti was required by Mr Mikhaylyuk to make payments to Amon. As to that there are, as it seems to me, only a limited number of logical possibilities.

330. The first is that these payments were payments for Mr Nikitin's services in finding contacts for Mr Ruperti. They were nothing to do with the chartering of the PDVSA Vessels. The two draft side letters may have been drawn up by Mr Mikhaylyuk, for Mr Ruperti's benefit, to make it appear that payments were being made to Amon as commission on two of the vessels. But it was up to Mr Ruperti how he chose to dress up his payments. He may have chosen to do so in this way in order to avoid problems with the banks in his making payments to Mr Nikitin or his companies such as might arise from inquiries relating to money laundering. He may have decided to use the address commission payable under these charters (which was in effect his money) as the measure of the reward he would give Mr Nikitin for helping Mr Ruperti and, therefore, found it convenient to express the payment as a commission. There may have been some other reason.

331. The second is that Mr Nikitin by some inducement or threat procured Mr Mikhaylyuk to make Mr Ruperti pay him through Amon. The inducement may have been the making of a money payment or the granting of some other benefit or the promise to do so. The threat may have been of any kind.

332. The third is that Mr Mikhaylyuk received neither inducement nor threat from Mr Nikitin. On the contrary he wished to confer a benefit on Mr Nikitin for some reason and the bribe that he solicited from Mr Ruperti consisted not of a payment to himself but a payment, as he directed, to Amon. In that case the question will arise as to the extent of Mr Nikitin's knowledge as to why he was being paid and what the payment represented.

333. In relation to the second and third possibilities it is necessary to determine whether the arrangement was, as the Claimants assert, that Amon was to be, and was, paid 1.25% of the hire in respect of all of the vessels; or whether it was paid only the sums which are known.

334. The fourth possibility is that the court can reach no conclusion and cannot, having regard to the seriousness of such an allegation, find,

even on the balance of probabilities, that there has been any dishonesty or bribery on the part of Mr Ruperti or Mr Nikitin in relation to the payments to Amon.

*Discussion*

*The first possibility*

335. I reject the first possibility which I do not find credible. If the arrangement was that Mr Nikitin was being rewarded (in advance or in retrospect) for procuring introductions, there was no need for these secret, coded and convoluted arrangements. Any money laundering or other problems with the bank could be resolved by truthful statements as to what the payments were for. The idea that Mr Ruperti chose to allocate (at any rate initially) his 1.25% address commission to remunerating Mr Nikitin (or that Mr Mikhaylyuk mistakenly understood that to be so) strikes me as fanciful.

336. Nor is it credible that $ 400,000 worth of introductions would have been made without (a) any documentary trace of, or relating to, the making of introductions or any expenses connected therewith, or of a link between such introductions and any resulting business; (b) any coherent explanation of the make-up of the three sums, or of the intervals at which they were paid, or of who stipulated the several amounts; or (c) anything like a fee note or invoice.

337. I did not find Mr Nikitin's inability to recall anything whatever about the calculation of these sums credible. If, which is implausible, he had, say, charged for the use of his jet, he would not, I think, have forgotten the occasion, even though he might not recall the amount. He was also unable, when giving evidence, to give any details of having performed similar services for others for reward although he suggested that given time and "*proper support of documents*" he might be able to do so.

338. Mr Berry submitted that the absence of invoices was more consistent with a loose arrangement for introductions in return for payment than an arrangement for commissions on charters, which one could expect to be invoiced. He pointed out that no invoices were rendered in respect of the commissions paid by Mr Sawyer, where Mr Nikitin was acquitted of any dishonesty.

339. I do not regard that point as compelling. The introduction of Mr Sawyer was a one off event. I regard the complete absence of (i) any contemporaneous written statement from Mr Nikitin or Amon of what had been done, or any claim from them for money, or any response; and (ii) any record of the incurring of any expense, or of any meeting or other communication with any contact, as casting doubt on the whole account. An absence of invoices for commission would not be particularly surprising if the commission documentation was intended as a mask for a bribe.

340. The proposition that the payments were remuneration for introductions does not tally with the Misha Fu emails. The e-mail of 6 January 2003 in relation to the *Adygeja* is a draft agreement for the provision of commission on the *Adygeja* hire. The 1.25% which it specifies is, in effect, one of the sums which Mr Mikhaylyuk required to be paid by Mr Ruperti in the e-mails of 5 and 8 December 2002 if Mr Ruperti was to get the charter. The idea that what is happening is that Mr Mikhaylyuk is expressing how much he (or Mr Nikitin) wanted Mr Ruperti to pay for Mr Nikitin's advice and assistance is unconvincing. Similar considerations apply to the email relating to the *Sorokaletie Pobedy*.

341. The figures of $ 37,383 and $ 83,823.19 are very specific figures which it is difficult to believe are rewards for making contacts for Mr Ruperti. Whilst the character of one payment is not necessarily determined by the character of another made at the same time, it is noticeable that both the latter figure and the $ 217,100 were paid by Wisteria on the same day. The $ 217,100 was, as I find, a bribe. That is some support for the other payment being a bribe as well. That Wisteria should on the same day have been paying a bribe and a fee for advice is too much of a coincidence. I realise that it can be argued that to regard the $ 83,823 as likely to be a bribe because the $ 217,100 was a bribe, and *vice versa* (see para 261), is to make an assumption in each case which is then used to support a conclusion in the other. But I regard the totality of the evidence in relation to both payments as indicating that they are bribes and as complementary.

342. The email of 15 January 2004 which led to the payment of $ 289,200 ("*since 01.03.03-until 31.12.03 it has done 289,200*") might mean that Amon ("it") in the person of Mr Nikitin had done work to the value of $ 289,200 but is more likely to relate to an amount due by reference to the activity of some inanimate object such as a vessel.

343. I bear in mind, also, that the Misha Fu account is concerned with what appear to be payments for improper purposes. Its contents include reference to secret payments, the provision of the draft performance claim, and a request to ensure that PDVSA does not reveal anything. The emails requiring payment of $ 491,000 and $ 500,000 (twice) to Pulley Shipping (wrongly disowned by Mr Mikhaylyuk) are requests for payoffs to go to Mr Mikhaylyuk and others.

344. Mr Berry submitted that it was necessary to recognize the realities of the oil trade and the position of Mr Nikitin. It would be no real trouble for him to recommend to his contacts someone recommended by Mr Mikhaylyuk. It could all be done by word of mouth. Mr Nikitin would not even have to know Mr Ruperti's name. He must, as he said in evidence, have been given sufficient information about either Mr Ruperti or his companies to be able to make a recommendation. He could commend Wisteria or Sea Pioneer (or Mr Ruperti) to his contact(s) and put Mr Ruperti in touch by giving him, through Mr

Mikhaylyuk, the contact's number or communication details; or he could give Mr Ruperti's details to his contact.

345. As to reward, he submits that the principle that Mr Nikitin should be paid was established. That done, the matter was, in truth, of minimal financial significance to a man who was worth, and dealing in, tens of millions. It is entirely unsurprising that many years later he should have very little recollection. Similarly Mr Ruperti may never have been told by Mr Mikhaylyuk the name of the person making the contact for him or, if he did, may well have forgotten it.

346. I do not regard these suggestions as convincing. Mr Ruperti was unknown to Mr Nikitin and vice versa. If he was seeking to enter the market for the transportation of Russian oil, he was a potential competitor. Mr Nikitin said that he would not necessarily be a competitor and that, judging from the fact that he agreed to make introductions, he must have concluded, although he did not remember, that he was not a threat. It seems to me, however, that a potential competitor, in respect of whom Mr Nikitin knew nothing[37] and in respect of whom it would be necessary to make a judgment as to what assistance by way of introductions should be given without prejudicing Mr Nikitin's interests, was an unlikely candidate for Mr Nikitin's assistance.

347. No evidence was adduced from anyone to whom any introduction was made. Mr Berry submitted that that point was not open to the Claimants because it was not established, by cross examination or otherwise, that the relevant personnel could have given evidence; and, in circumstances where Mr Nikitin was a fugitive from the Russian State, they might well be reluctant to give evidence in any form. But it seems to me it was for Mr Nikitin to give some grounds for supposing that those who could vouch for his introduction were inhibited from doing so. No suggestion was made that any of them had been approached to assist.

348. I also do not find it plausible:

a) that despite Mr Nikitin receiving more than $ 400,000 for making contacts for Mr Ruperti, the two of them had minimal knowledge of each other before these proceedings;

b) that Mr Nikitin could not remember any detail of what he had done; and

[37] In his oral evidence he said that his recollection was of Mr Mikhaylyuk speaking of a contact and he did not now recollect (as opposed to reconstruct) whether he had been told either the contact's name or where he was from.

c) that Mr Nikitin was wholly prepared to let Mr Ruperti decide what to pay.

349. At the trial another suggestion was, in the light of Mr Mikhaylyuk's evidence, floated by Mr Berry for the 9 December 2002 e-mail, namely that Mr Nikitin, through Mr Pavlov[38], sent the bank details to Mr Mikhaylyuk to enable a commission to be paid on the charter of the *Trogir* then under consideration. For the reasons I have stated that seems to me implausible also.

*The second possibility*

350. The case pleaded by the Claimants is that Mr Nikitin was aware that Mr Mikhaylyuk was acting in breach of his fiduciary duties and that there existed from at the latest 9 December 2002 a corrupt relationship between the two of them, each of whom knew that, in soliciting or arranging the payments to Amon, Mr Mikhaylyuk was acting in dishonest breach of his fiduciary duties. They submit that the court should infer that Mr Nikitin was paying one or more bribes or conferring some secret benefit on Mr Mikhaylyuk. Alternatively it is to be inferred that Mr Nikitin had some hold over Mr Mikhaylyuk e.g. because he possessed some secret information about Mr Mikhaylyuk which the latter feared Mr Nikitin would reveal (including, once the payments started to be made, the fact of payment) and that Mr Mikhaylyuk required the Ruperti payments to be made to Amon in order to buy Mr Nikitin off.

351. Mr Berry submits that the suggestion that Mr Nikitin bribed Mr Mikhaylyuk to get Mr Ruperti to pay Amon is implausible. Any monetary bribe paid by Mr Nikitin would have to be less than the amount to be paid to Amon by Mr Ruperti since, otherwise, Mr Nikitin would derive no benefit from the exercise. In those circumstances Mr Mikhaylyuk would have arranged that the (greater) amount to be paid by Mr Ruperti would be paid to himself. And he would have ensured that he was not first paid months after Mr Nikitin (the payment to Mirador being in May 2003 and the first payment to Amon in February 2003). There is no evidence of any other sort of benefit that Mr Nikitin might have offered to confer; nor of any threat that he could make to Mr Mikhaylyuk which would explain why Mr Mikhaylyuk should arrange for payment to Amon. So far as the evidence goes Mr Nikitin and Mr Mikhaylyuk had had little contact with each other.

352. As to the suggestion that Mr Nikitin/Amon was to be, or was, paid 1.25% of the hire on all the vessels, the evidence, Mr Berry submits, does not support that inference for the following reasons:

a) The Misha Fu correspondence contains nothing that could relate to the hire of the *Marshal Chuykov*. The e-mail of 8 December 2002 refers to 1.25% as per side

[38] It was Mr Nikitin's evidence that Mr Pavlov probably sent the e-mail on his instructions. I have no evidence from him [see para 366].

letter but that is likely to be a reference to the draft contained in the e-mail of 6 January 2003 and the phrase in that e-mail "*Please feel free to amend the layout in order to reflect the agreement accordingly*" suggests that this was the first draft letter;

b) The figures do not work (see paras 255 ff). When the Claimants seek to match payments to commissions on hire the figures in the various exercises should tally, but they do not. The amount due should certainly not be less than the amount paid;

c) The exercise also required the making of unfounded assumptions. Thus in respect of the period March to December 2003 the Claimants need to postulate that only 1% was paid in respect of the *Moscow Kremlin* and the *Moscow Stars* but 1.25% for the others, in order to come near the $ 289,200 paid to Amon on 16 January 2004. That is an exercise without evidential support carried out in an unsuccessful attempt to make the figures tally;

d) If Amon was to be paid 1.25% of the hire due on vessels chartered to Mr Ruperti's company, you would expect the payments to be made semi-monthly or monthly, and not in three markedly different slices;

e) Both Mr Mikhaylyuk and Mr Ruperti would know what the figures were because they knew the charter rate and could apply 1.25% to it. And yet in the e-mail of 25 February 2003 Mr Mikhaylyuk, having put forward the US $ 37,383 figure says "*please confirm same OK with you, to go ahead*". In the email of 18 December 2002 Mr Ruperti asks "*What amount*" and in that of 12 January 2004 he asks "*How much*"; and

f) Mr Nikitin denies all knowledge of the amounts paid to Amon having anything to do with the charters of the vessels.

*The third possibility*

353. Mr Mikhaylyuk may have offered neither bribe nor threat. Instead Mr Nikitin may have sought to favour him for some reason and to get Mr Ruperti to do so as part of the price of obtaining some or all of the PDVSA charters. This would be consistent with the fact that it was Mr Mikhaylyuk who procured the payments from Mr Ruperti.

*The fourth possibility*

354. Lastly it may be that there are so many unanswered questions that it is not possible fairly to reach a conclusion as to what the true position is likely to have been. Rejection of the first possibility does not mean that the court must adopt the second or the third, particularly when the latter two involve dishonesty. Mr Berry urged on me that I was not bound to reach a conclusion, and that I should not reach a conclusion adverse to the Nikitin defendants when so much of the Claimants' case depended on inference. Whilst I accept the need for caution in drawing inferences (and feel no compulsion to do so) I also recognise that any conclusion in a case such as this, where defendants are alleged to have acted in a secret conspiracy and communicated, insofar as they did so in writing, through a secret account and in code, is inherently likely to be built on inference. The question is what inferences can safely be drawn.

*Conclusion*

355. I am satisfied that the payments which Mr Mikhaylyuk required Mr Ruperti to make to Amon were commissions payable on the hire of the PDVSA vessels, which Mr Ruperti was required to make in order to secure those vessels. I include in the term "commissions" both a percentage of hire and a flat rate for each day on hire or any other payment related to the hire of the vessels.

356. I have reached that conclusion for the following reasons.

357. First, I have rejected the claim that these payments were made to reward Mr Nikitin for seeking or obtaining contacts for Mr Ruperti. That means that the account which Mr Nikitin has given both in this action and in *Fiona Trust* (and that given by Mr Mikhaylyuk and Mr Ruperti) is not truthful. There must be some other explanation which they have sought to cover up and not to reveal, because, as I infer, of its dishonest character.

358. The most likely explanation is that these were commissions on the hire in respect of the PDVSA vessels, which had to be kept secret because they were being paid by Mr Ruperti at the behest of Mr Mikhaylyuk, and were, thus, payments made by a third party on the direction of the agent of the principal with whom the third party was dealing. For that reason they were discussed in the secret Misha Fu e-mail account which was used by Mr Mikhaylyuk and Mr Ruperti to deal with payments for the benefit of Mr Nikitin (Amon), Mr Mikhaylyuk and others.

359. Mr Mikhaylyuk went to considerable lengths to prevent the Claimants obtaining access to the Misha Fu account. He failed to identify it in his affidavit of 13 December 2006 sworn in response to the Search Order. I infer that he did so because he realised that it revealed the dishonest activity in which he was involved.

360. The draft side letters in respect of the *Adygeja* and the *Sorokaletie Pobedy* show that commissions were intended to be paid on hire in respect of those vessels. I regard it as wholly unlikely that, although these were drafts which related the payment to Amon to the charters of those two vessels, there was, in truth, no such link other than that either (i) Mr Ruperti intended (or was understood to have intended) to use the address commission as a measure of what he should pay for introductions, or (ii) Mr Mikhaylyuk or Mr Ruperti wished to disguise a payment for contacts in this way.

361. Whilst I cannot be satisfied that Mr Nikitin was aware of the contents of the Misha Fu account it seems to me that he must have been aware of the proposal to make Amon the beneficiary of commission on hire on the PDVSA charters. The suggestion that such a proposal occurred without Mr Nikitin's knowledge (and, therefore, that of Amon) is implausible. There would have been no reason for Mr Mikhaylyuk and Mr Ruperti to keep it from him.

362. I do not accept that the draft side letter in the e-mail of 9 January 2003 is likely to have been the first draft. The e-mail of 8 December 2002 refers to Mr Ruperti having "*to pay for extra separetly where 1.25% to be as per side letter*". I regard that as likely to be a reference to a side letter already in existence, at least in draft (or at the very least proposed) in respect of the *Marshal Chuykov*. It is noticeable that Mr Ruperti did not have to ask what side letter was being talked about.

363. I realise that there is nothing else in the Misha Fu correspondence which is before me, that appears to relate to the *Marshal Chuykov*. But it is very unlikely that the Court has all the Misha Fu correspondence or all the communications on the subject matter of that correspondence. The opening e-mails do not appear to be the beginning of communications on that subject matter and the correspondence is itself spasmodic. Nor is there a record of all the communications between Mr Mikhaylyuk and Mr Ruperti in relation to payments. They communicated extensively by telephone.

364. I regard it as of some significance that on 9 December 2002 Mr Nikitin gave details of the account of Amon, which was the company set up to receive the commissions dishonestly diverted from Novoship companies under the Galbraith's arrangements. I infer that Amon was again being used to receive commission on hire. I also regard it as of some significance, although far from conclusive, that, as appears from this judgment, Mr Mikhaylyuk, once he became General Manager took to dishonesty on a large scale and that Mr Nikitin has been found to have been dishonest by Andrew Smith J in significant respects.

365. Mr Berry urged on me that the fact that this e-mail was sent to Mr Mikhaylyuk's NOUK office account, where it could be traced, was fundamentally inconsistent with it being part of a dishonest scheme. I do not find that compelling. The only information contained in the e-mail is Amon's bank details. These are by themselves innocuous. If

they were to be provided in writing (as would be normal) they had to be sent somewhere. Mr Mikhaylyuk does not appear to have provided Mr Nikitin with access to the Misha Fu account and, if he did not, the natural email address to which to send the information was Mr Mikhaylyuk's NOUK office address. If Mr Mikhaylyuk provided details of that address, which seems likely, he could well think that they could safely be sent to his account, on his computer in his private room on a different floor from other staff. The e-mail could be passed off as innocent, as, indeed, Mr Mikhaylyuk claims it to be.

366. Mr Nikitin's evidence is that the email would have been sent by Mr Pavlov on his instructions. He cannot recall why it was sent but his reconstruction is that it was to specify an account for the receipt of his remuneration for introductions. The need to reconstruct is somewhat surprising and his evidence by way of reconstruction cannot prevail over the inferences to be drawn from the other evidence.

367. Mr Mikhaylyuk has said that he recalls that it was sent because Mr Nikitin asked for a brokerage commission on the *Trogir* charter negotiations which were opened eight minutes earlier. He, Mr Mikhaylyuk, rejected that, because nobody had heard of Amon. I have already rejected this account.

368. The negotiations for the *Trogir* which began 8 minutes earlier started as follows:

> *"WE ARE, PREMIUM NAFTA PRODUCTS LTD., NOW LOOKING FOR A TANKER ABT 40,000 DWT WHICH WE GOING TO FIX ON TIME-CHARTER BASIS FOR 1 YEAR + 1 YEAR CHARTERERS OPITON.*
> *ESTIMATED HIRE 12.500 USD PDPR.*
> *YOUR KIND ATTENTION TO OUR OFFER WILL BE APPRECIATED."*

The contact person was then described as Mr Pavlov. Whilst it is possible that there was a conversation which included a request for commission within the next 8 minutes, there is no reference in the documents to commission having ever been discussed and, in particular, none in Mr Mikhaylyuk's e-mail report the same evening to Mr Izmaylov, Mr Sakovich and Mr Oskirko. Mr Pavlov was not called.

369. If commissions were intended to be paid in respect of the first three vessels (or two of them) the strong likelihood is that they were intended to be paid in respect of all five PDVSA vessels, since they were all vessels purportedly chartered to PDVSA but in fact chartered to PMI Trading. It was the existence of this profitable arrangement for Mr Ruperti which best explains why Mr Mikhaylyuk should require, and Mr Ruperti should make, the payments which Mr Mikhaylyuk demanded; and why the payments should be related to the vessels which were the subject of the arrangement.

370. Payments were demanded on 25 February 2003 and 15 January 2004 for a specific period ("*till the end of February*" and "*since 01.03 – until 31.12.03*") which is consistent with the payments being based on charter hire. Payments were in fact made which look as if they are percentages of unrounded amounts such as are to be found on hire statements.

371. As I have said, the reference in the coded message of 25 February to "*37.383 on the clock..and the figure above will be the same till the end of February*" strongly suggests a figure (such as commission on hire) which is accruing every day and which will be in that amount at the end of February.

372. The suggestion that this is, or may be, a coded reference to the amount of the debt owed to or claimed by Mr Nikitin, which was not going to increase because Mr Nikitin was not arriving back somewhere until the weekend (which would have been Saturday 1st March) and would not, therefore, be doing anything on the contact front is implausible. The subject of the email is "*another car*" which, in Mr Mikhaylyuk's code, means another vessel. There seems to me no good reason to suppose that it also means "*another debt*" and Mr Mikhaylyuk does not suggest anything of the kind.

373. I do not regard the use of the single expression "*another car"* as the subject as inconsistent with the idea that the $ 37,383 was a figure due in respect of a number of vessels to date. The single "subject" is necessary in order to add verisimilitude to the coded reference to finding a "*car which has 37,383 on the clock*", which can be taken as signifying the amount due in respect of a number of vessels chartered. It also seems to me highly unlikely that Mr Mikhaylyuk was concerned to make clear that Mr Nikitin would not be working for Mr Ruperti between Tuesday 25 and Friday 28 February 2003 since on no view was he being remunerated by a rate per day. Lastly "*please confirm same OK with you to go ahead*" is perfectly capable of being regarded as a request for confirmation that payment will be made (as it was) rather than a request to know whether Mr Nikitin should continue to look for contacts.

374. Similarly the credit advice for $ 83,823.19 relates to 29.2.03; 31.3.03; and 30.4.03 which is likely to represent amounts due for February March and April 2003 or, possibly, the months beginning with those dates, as would be the case for payments based on a charter. It could represent monthly figures for introductions (or the promise of introductions) but Mr Nikitin does not suggest that he was paid a monthly fee.

375. The $ 37,356 and $ 83,748 payments were recorded on three lists of commissions compiled in late October and December 2003 and January 2004 by Ms Malysheva who provided administrative services

to Amon and Mr Nikitin, but who has not given evidence[39]. (Mr Nikitin said that she said that she remembered nothing about the spread sheets – whether she had no such recollection is a matter which only she knows and which she has not confirmed.) The first email attaching spread sheets is to Mr Privalov and refers to the "*attached full version of commission list (not only concerning Clarksons and Galbraith's)*". The lists contain details of the commissions fraudulently diverted under the Clarkson's and Galbraith's schemes and also includes the two payments to which I have referred[40]. That Ms Malysheva lists them with other commissions and does not in her email display any ignorance of what they are is entirely consistent with these payments being known to be commissions. The spread sheets do not appear to be lists of unreconciled items or fees.

376. The entries have the notation "*???*" against them. Mr Nikitin suggested that that was because when the monies came in Ms Malysheva did not know what they represented, in which case she would have asked him. The likelihood, as it seems to me, is that the entries of the payers (Sea Pioneer and Wisteria) and the "???" have not been properly aligned to the right hand side so that the question marks should be in the "Due" column, and signify ignorance of the due amount and not that Mr Nikitin and Ms Malysheva had no idea what the monies represented when they came in. (I accept that the fact that the "Due" figures were in italics probably signifies that she was not aware what sum was due.) On the contrary it seems to me likely that they were both aware that the payments were commissions (hence their inclusion in a spread sheet of commissions) and that Mr Nikitin, at least, was aware that they were commissions on hire which he was to receive from Mr Ruperti.

377. Mr Berry suggested that later spread sheets probably did have the entries removed or clarified once it had become clear (e.g. after the large payment in January 2004) what the payments were. There is no evidence of that. Mr Berry submitted that that may be because the relevant entries are available to the Claimants but have not been produced. He relied on the inability of Mr Nikitin to access all his documents (in particular because, after seizures in 2004 and 2005 by the Russian prosecutors, his computers and hard drives have not been returned to him and it is unclear whether all the hard copy documents seized have been returned[41]). The existence of such entries is, nevertheless, no more than speculation.

378. As I have said, the $ 37,356.20 is sufficiently close to 1.25% on the hire of the first three vessels down to the end of February 2003 to make coincidence unlikely. It seems to me entirely possible that whatever calculation was made included nothing for October 2002 because the

[39] There is also a further list in January from Mr Privalov.

[40] They also contained commissions paid to Amon by Mr Sawyer, NSC's financial adviser, on commissions that he had earned in respect of which the claim against Mr Izmaylov failed because he was found to have had no knowledge of them.

[41] The Amon Defendants also have no access to their contemporary emails via Russian or Swiss ISPs.

Novoship invoice for October 2002 did not deduct 1.25% address commission and because someone on Mr Ruperti's side was calculating payment by reference to the invoice. The second payment of $ 83,823.19 is described in the credit advice as covering 29.02.03, 31.03.03 and 30.04.03 which is most likely to relate to monthly hire. The $ 289,200 is pretty close to a figure from March to December 2003 produced by using 1.25% for three and 1% for two vessels, which may have been the rates that the parties were choosing to apply.

379. Against that the figures do not tally. The $ 37.383 paid ($ 37,356.20 received) is not the same as $ 37,019.03 or $ 41,728 (the figure reached by adding $ 4,709, being 1.25% x $ 12,152 x 31 on the October 2002 hire of the *Marshal Chuykov)*. The $ 83,823.19 paid ($ 83,784 received) approximates to a figure of $ 84,000 but that requires you to assume lump sum commissions of $ 200 or, in the case of the Moscow Kremlin, $ 500 per day. The Claimants' calculations leading to $ 37,019.03 cover the February hire for the *Sorokaletie Pobedy* but the credit advice for the $ 83,748.19 refers to 28.2.03. The $ 289,200 is only close to a figure for March to December 2003 if you assume different percentages for two of the vessels. If you add all the three figures together the sum paid is still about $ 50,000 more than 1.25% of hire on all the vessels down to December 2003, even assuming that you include commission on the October 2002 hire for the Marshal Chuykov[42].

380. I have considered whether (i) these undoubted discrepancies, coupled with the Claimants' acceptance that their attempts to work out what the figures signify do not establish how the figures were in fact calculated, and (ii) the timing of the payments (nothing until February 2003 and then an interval until May 2003 and January 2004) should cause me to reject (or, at least, not to find proved) the idea that the figures represent commission on the vessels. I decline to do so.

381. Because of (i) the secrecy surrounding the arrangements; (ii) the fact that not all the Misha Fu correspondence has been obtained; and (iii) the absence of proper explanation as to the exact make-up of these payments from either the payer or the recipient, each of whom should be in a position to explain them, the picture is opaque. But I regard the considerations set out in paras 357ff as cogent reasons for drawing the inference, which I do, namely that the amounts paid to Amon represent commission which was agreed to be paid on all of the PDVSA vessels, including the *Marshal Chuykov*, especially in the absence of any plausible alternative. The strong likelihood is that all the payments made are of the same character as the payment contemplated by the draft side letters and sought by Mr Mikhaylyuk's emails, namely commissions on hire which Mr Ruperti was required by Mr Mikhaylyuk to make to Amon.

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[42] Using 1.25% commission instead of 1 % in respect of the *Moscow Kremlin* and the *Moscow Stars* would add $ 33,325.

382. If the payments made were payments of commission on hire, required by Mr Mikhaylyuk or offered by Mr Ruperti in respect of the PDVSA charters, it is not necessary for the Claimants to establish exactly how they were, or were supposed to be, calculated. That calculation may have varied. It may have contained errors or duplication. I bear in mind, also, that the arrangements for payment, whatever they were, were neither tidily organised nor punctiliously performed. The payments were made at irregular intervals, and on calculations made some time after the events to which they relate. Mr Ruperti had, both in respect of these payments, and more so in respect of the payments to Pulley Shipping, to be prompted to pay. In those circumstances some miscalculation or even overpayment would not be surprising.

383. Mr Berry described the $ 83,823.19 figure as the 13th chime on the clock. It is, however, a discordant note for each side since, whether the payments be commissions or fees for services, there are separate payments covering the same period so that there is apparent double counting. In my judgment the sum in question is either, when taken with a payment made on 16 January 2004, over 9 months later, simply an overpayment of commission or a payment by way of commission which was agreed to be additional to the other payments. I do not accept that it is a payment for introductory services.

384. I do not regard the fact that on two occasions Mr Ruperti asked what amount or how much he had to pay as casting doubt on my conclusion. Whilst he could, no doubt, have worked out what 1.25% (or any other percentage) of total gross hire was for any given period, it is not particularly surprising to find him asking Mr Mikhaylyuk, who was the demander of payment, what he should pay. On the first occasion the reply that he got was the production of the side letter calling for 1.25% (wrongly specified as "*0.0125%*") of the daily hire. That reply not only told him the amount but also provided a draft of the commission agreement proposed.

385. On the second occasion when he was asked "*how much?*" Mr Mikhaylyuk replied "*have checked Amon*". It is not clear from that whether he meant that he had checked *with* Amon (which might suggest that Amon was having some input into either (a) the amount to be paid or (b) the calculation of an amount due under some previously agreed formula) or that he had checked the amount *due to* Amon. What is clear is that this was a calculation of what was due in respect of a 10 month period, which is consistent with a commission on hire, but which I find difficult to square with a reward for contacts, given that Mr Nikitin was not engaged on a fee or retainer payable per month (or any other period) nor was he engaged month by month in producing contacts or introductions.

386. Further, the Misha Fu communications, whilst referring (in code or otherwise) to commission in respect of hire make no mention in any form of the existence, nature or value of any services by way of

introductions rendered to Mr Ruperti, or the basis upon which they were to be remunerated.

387. The above conclusion leaves unanswered the question whether Mr Mikhaylyuk procured Mr Ruperti to pay Mr Nikitin because he (Mr Mikhaylyuk) (a) had received some benefit, or the promise or expectation thereof, from Mr Nikitin; (b) had been blackmailed or threatened by him; or (c) wished to confer some benefit on Mr Nikitin as a result of, or with a view to, some deal between the two of them or them and others.

388. It seems to me unlikely that Mr Mikhaylyuk was offered money by Mr Nikitin to arrange for Mr Ruperti to pay him money, the amount of the former being presumably less than the amount of the latter. No trace of any such payment or the receipt thereof has been found despite (i) the considerable investigations made by the Russian prosecuting authorities, which have included the seizure of Mr Nikitin's computers and documents and the obtaining of banking information from Wegelin and Co the results of which have been made available to the Claimants; (ii) various investigations carried out at the Claimants' behest[43]; and (iii) Mr Nikitin's disclosure of Amon's banking records (although that is not conclusive).

389. But I cannot tell whether (i) Mr Nikitin provided or held out the prospect of some other benefit to Mr Mikhaylyuk; or (ii) made, or constituted, some threat to him, or put him under some pressure, which, in either case, resulted in Mr Mikhaylyuk getting Mr Ruperti to make these payments; or whether, on the other hand (iii) Mr Mikhaylyuk was seeking to benefit Mr Nikitin because of some advantage that he thought to gain thereby, either in the form of a deal or otherwise. I am, however, satisfied that it must have been one of these three alternatives and probably either the first or the last.

390. I, also, infer that Mr Nikitin knew that the money coming to Amon was coming from Mr Ruperti's companies, and that the charters in respect of which commission was being paid were charters to Mr Ruperti's company. I regard it as wholly improbable that whereas Mr Mikhaylyuk and Mr Ruperti knew what the monies paid to Amon represented, Amon and Mr Nikitin did not.

391. Mr Berry submitted that, if an agreement was made between NOUK on behalf of an owner and a Ruperti company as charterer, providing, say, for a 1.25% address commission it would be legitimate for Mr Ruperti then to agree with the owners that a 1.25% commission be paid by him to anyone he chose e.g. to Mr Nikitin for services. He might do this as a convenient formula, treating the address commission as what, in

[43] See paras 222 – 230 of *Fiona Trust.* Some of the conduct of the investigators commissioned appears to have been unlawful: see the judgment of Langley J of 9.2.07 on an application by Nr Nikitin and Mr Skarga against the private investigators and Richards Butler who were coordinating investigation activities.

effect, it was, namely money in his hand, and earmarking it for the payment in question. This could account for the draft side letters which, however, did not come to fruition because, it is suggested, 1.25%, the amount of the address commission, was not actually what Mr Ruperti intended to pay; or, even if that was his original intention, he changed his mind: hence the figures do not work. This sort of arrangement would not amount to a bribe of Mr Mikhaylyuk. The payment would not be part of the price of the charter, but a convenient method by which Mr Ruperti could calculate what he owed Mr Nikitin for his services.

392. This is theoretically possible but, to my mind, wholly implausible. As I have said, I find it impossible to accept that the side letters referring to commission on hire were drafted because Mr Ruperti wished to earmark his address commission for payment in respect of introductions. I also find it difficult to understand why owners should be expressed to be under an obligation to make payments (in the form of a percentage of hire) to Amon for services which it had never rendered to them and when the payment was to come from the charterers. It is also difficult to suppose that Mr Ruperti would be prepared to pay a sum equivalent to his 1.25% address commission without any idea of what, if anything, Mr Nikitin was going to produce. In any event earmarking of commission does not reflect what occurred. The requirement by Mr Mikhaylyuk for Mr Ruperti to make the payment was, subject to the qualification in para 395 below part of the negotiations for the charters, not an agreement made after they had been negotiated as to the disposition of the address commission provided for in them.

393. Mr Berry also relied on the fact that, in respect of the *Marshal Chuykov*, Mr Mikhaylyuk and Mr Ruperti negotiated a daily rate of $ 12,000 net to Owners (not said by the Claimants to be an improper rate) without initially making provision for commissions. Then Mr Ruperti requested a 1.25% commission to Nautica, his company. Mr Mikhaylyuk agreed to that provided that the hire was $ 12,152 so that the Claimants would continue to receive $ 12,000 net[44]. Accordingly the commission was money which Mr Ruperti was entirely free to use as he wished, and was not lost to the Claimants.

394. Mr Ruperti was in one sense entirely free to use address commissions allowed to him/Nautica as he pleased. Since the commission was to be deducted at source (see the Recap of November 1 2002) the commission in effect represented a discount on the hire and an amount that did not have to be paid. What he was not lawfully entitled to do was to use his money to pay a secret commission at Mr Mikhaylyuk's behest to Mr Nikitin.

[44] The purpose of this is, itself, unclear. The net result of a daily rate of $ 12,000 and one for $ 12,152 with a 1.25% commission was essentially the same for owners and for Mr Ruperti.

395. In relation to the *Marshal Chuykov* it is not apparent when the arrangement, as I find likely to have existed, for payment of what was probably 1.25% commission to Mr Nikitin was first mooted or arranged. The introduction of an address commission of 1.25% for this charter came late in the day – on 28th October. It may be that it had by then been agreed or proposed that 1.25% commission would be paid as Mr Mikhaylyuk required, or that may have happened later either in order to give effect to an understanding that commission of some kind would be paid or as a new agreement. As is apparent from the emails which related to the *Adygeja* and the *Sorokaletie Pobedy*, in respect of those vessels, the requirement for 1.25% was specified in advance.

396. Mr Berry also suggested that one possibility was that Mr Ruperti may simply have wanted a document which gave some sort of cover for any payments he made to Amon/Mr Nikitin for introductions and that an agreement of owners and charterers to pay 1.25% of hire would do the trick. I do not find this any more convincing. Any payment which was in fact for introductions to Amon, which had no part in arranging the charters, could not realistically be represented as a commission on hire as a reward for doing so, and there is no good reason why owners should have been prepared to subscribe to such a falsehood. Nor would cover be needed if the transaction was bona fide.

397. He also suggested that the original intention may have been to attribute the 1.25% address commission to paying Mr Nikitin; and that that was superceded by the decision to use the commission side letter as a cover for any consultancy payments. I do not, however, find this hybrid any more convincing.

398. The payments contemplated by these letters were not, so it appears, paid on their specified dates. Mr Berry submits that that shows that the documents were never intended to take effect in accordance with their terms and ties in with the proposition that they are a false indication of the reason for such payments as were made to Amon. They cannot support a case of fraud against Mr Nikitin.

399. I disagree. It seems to me that the letters accurately reflect the fact that payments to Amon related to and were what Mr Ruperti was to pay for the PDVSA charters.

400. I also reject as fanciful the notion floated by Mr Berry that Mr Mikhaylyuk might have been requiring the payments as a condition of the charters simply in order to ensure that Mr Ruperti honoured his obligations towards Mr Nikitin.

401. I have not ignored Mr Berry's submission that the Claimants' case as to what was actually going on and as to:

    i) why Mr Mikhaylyuk was procuring bribes to be paid to someone other than himself;

ii) why Mr Ruperti was paying bribes to obtain old Russian tonnage at market rates; and

iii) how Mr Nikitin, who did not know Mr Ruperti, became involved in a request for or the receipt of illicit payments, the request for or receipt of which might place him in difficulties with Mr Izmaylov;

was unacceptably vague; and that the "nil return" from the extensive investigations made into the affairs of Mr Mikhaylyuk and Mr Nikitin of evidence of any payment by Mr Nikitin which could, even plausibly, be said to amount to a bribe meant that the Claimants' case was unsustainable. But the considerations that have caused me to reject the contention that the payments were for contacts dressed up as commission and the matters to which I have referred in the preceding paras have driven me to the conclusion that I have reached.

402. On the other hand I am not satisfied that payments were made to Amon or to Mr Nikitin beyond the three payments that are known. They may have been. But there is no evidence of actual payment. The bank records of Sea Pioneer and Wisteria, the most likely recipients, do not reveal any other relevant payment. Further, Mr Ruperti was not a regular payer. He had in 2005 to be strongly urged to pay Pulley Shipping. In addition the fact that there is no complete correlation between 1.25 % (or 1.25% and 1%) of hire and the payments received suggests that the arrangements were somewhat haphazard. It seems to me at least as likely that the known payments to Amon are the totality of such payment to Amon or Mr Nikitin's interests.

403. Mr Dowley submitted that, in the light of the Misha Fu correspondence and, in particular the side letters referring to 1.25% commission, the evidentiary burden had shifted to Mr Nikitin to dispel the inference that 1.25% was being paid on all the PDVSA charters, although he accepted that in the light of the calculations I might come to the conclusion that the commission on the *Moscow Kremlin* and the *Moscow Stars* was only 1%. The fact that the Claimants have not found any record of the additional payments does not mean, he submits, that they were not made.

404. Tempted though I was by this approach, I am not persuaded that the evidence is strong enough to make it just to conclude that, absent other evidence from Mr Mikhaylyuk or Mr Nikitin, the payments actually received were either 1.25% on each vessel or 1.25% on the three vessels other than the *Moscow Kremlin* and the *Moscow Stars* and only 1% on them.

*The claims arising out of the PDVSA charters*

*Against Mr Mikhaylyuk and the Ruperti defendants*

405. Mr Mikhaylyuk received, through Mirador (his temporary bank account for this purpose) $ 217,100 from Wisteria; and $ 1,491,000

from Sea Pioneer through Pulley Shipping, whose funds he controlled and which was a vehicle established for his benefit. Wisteria and Sea Pioneer were the alter egos of Mr Ruperti who directed the making of the payments. Mr Mikhaylyuk directed Mr Ruperti to make payments to Amon International Inc. of $ 37,383 and $ 289,200 which were paid by Sea Pioneer, and $ 83,823.19, which was paid by Wisteria.

406. All of these payments were bribes i.e. payments kept secret from NOUK and the ship owning companies and made to or at the direction of Mr Mikhaylyuk who owed contractual and fiduciary duties to NOUK and fiduciary duties to the ship owning companies of which he was in breach by reason of requiring them.

407. These payments were made in connection with the PDVSA charters and were the means, or part of the means, whereby Mr Ruperti secured the putting in place of the dishonest arrangement whereby the vessels appeared to have been chartered to PDVSA but were in fact chartered to PMI Trading and then sub-chartered by Sea Pioneer to PDVSA. Both Mr Mikhaylyuk and Mr Ruperti knew that the bribery and the secret sub-chartering arrangements (a) were dishonest; and (b) involved Mr Mikhaylyuk in a breach of his contractual and fiduciary obligations. By causing the payments to be made and by putting into effect the sub-chartering arrangements Mr Ruperti dishonestly assisted Mr Mikhaylyuk in that breach.

408. In those circumstances Mr Mikhaylyuk is liable to pay damages for his breach of contract and equitable compensation for his breach of fiduciary duty. Further Mr Mikhaylyuk, Mr Ruperti, Sea Pioneer and PMI Trading ("the Ruperti defendants") are liable in damages for conspiracy since they have combined to use unlawful means, namely breach of contract and fiduciary duty, procurement of breach of contract, dishonest assistance and fraud, with intent to injure the relevant Claimant, so as to cause damage. The relevant Claimants are NOUK and, in relation to each vessel, the relevant ship-owning company.

409. In addition the Ruperti defendants are liable to account, as dishonest assistants to the relevant Claimants for the profits made on the sub-charters. But Mr Mikhaylyuk is not bound to account for the profits on those charters made by persons other than himself.

410. In the present case the losses suffered and the profits made are, in my judgment, the same. The losses are the difference between the hire which PDVSA paid to Sea Pioneer and the amount of hire received by the relevant owners, since, as I infer, but for the interposition of PMI Trading and Sea Pioneer the vessels would have been chartered out to PDVSA at the rates which PDVSA paid to Sea Pioneer.

411. The damages to which the relevant Claimants are entitled against Mr Mikhaylyuk and the Ruperti defendants, and the amounts that are due upon the taking of an account of profits, are as follows:

| Claimant | Vessel | Amount |
|---|---|---|
| NOUK<br>Cally Shipholdings Inc | *Marshal Chuykov* | $ 9,799,132.86 |
| NOUK<br>Vital Shipping Corp | *Moscow Kremlin* | $ 18,523,265.58 |
| NOUK<br>Dainford Navigation Inc | *Moscow Stars* | $ 16,344,010.55 |
| NOUK<br>Tamara Shipholdings SA | *Sorokaletie Pobedy* | $ 8,465,020.39 |
| NOUK<br>Tuscany Maritime SA | *Adygeja* | $ 4,716,572.97 |
| TOTAL | | $ 57,847,602.35 |

*Liability to account*

412. I am satisfied that the liability to account applies to all the Ruperti defendants for the following reasons.

413. If a fiduciary diverts the profits derived from his breach of duty to an offshore company which he alone owns and controls, in which nobody else has a beneficial interest and whose only apparent function is to make and receive payment, it is likely to be regarded as his alter ego: *Gencor ACP Ltd and others v Dalby and others* [2000] 2 BCLC 734. In the present case PMI and Sea Pioneer were each an alter ego of Mr Ruperti. They were his creatures and the means whereby he made, and concealed, the profit that resulted from his dishonest assistance in Mr Mikhaylyuk's breach of fiduciary duty. In those circumstances, Mr Ruperti is, in my judgment, accountable for the profits he has made even though they may have been made by or through one or more companies which are his alter ego. They are a device to conceal the fact that it is he who is deriving profit from his dishonest assistance: *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1172 at [23]. Equity requires both the dishonest assister and the company he uses to make a profit from such assistance to account for the profits.

414. Mr Ruperti is, therefore, liable to account for the profits even though they may have, prima facie, been made by one of his creature companies.

415. In the present case the exact route by which Mr Ruperti made his profits is uncertain because a number of matters are unclear e.g. (a) whether PMI Trading itself ever paid anything (indirectly) to the ship owners or reimbursed anyone who may have done so; (b) whether Sea Pioneer ever paid anything (and, if so, what) in respect of hire to PMI Trading (or anyone else); and (c) whether Sea Pioneer had any liability for hire not paid. Since both PMI Trading and Sea Pioneer are Mr Ruperti under another name, Sea Pioneer did not need to pay PMI Trading in order for Mr Ruperti to make his profit. All that was required was for the PDVSA hire to go to one Ruperti company and the (lesser) hire payable to owners to come from that company or another Ruperti company.

416. I do not think it is necessary, or possible, for the court to make findings on precisely how the profit was made. On the account given by the Ruperti defendants PMI Trading was the charterer and Sea Pioneer the sub-charterer pursuant to some internal arrangement. It is not clear whether any hire was in fact paid or payable by Sea Pioneer to PMI Trading. It was not suggested that there was any uplift in any hire that was due to be paid by Sea Pioneer above that paid to owners by PMI Trading. If there was no uplift Sea Pioneer would have made the profit. But if PMI Trading received from Sea Pioneer the full PDVSA hire PMI Trading would have made the profit. It may be that PMI Trading paid indirectly the charter hire due to the ship owners (which appears to have come directly from Sea Pioneer or Wisteria) and that Sea Pioneer received the charter hire from PDVSA and that no payment passed between them. Or, as I think most likely, it may be that PMI Trading paid and received no hire at all and Sea Pioneer paid the hire due under the charters with PMI Trading and received all the hire due from PDVSA.

417. In circumstances where (a) PMI Trading and Sea Pioneer have been used by Mr Ruperti to make a profit from his dishonest assistance and to conceal and avoid liability for that assistance; (b) PMI Trading and Sea Pioneer are the alter egos of Mr Ruperti; but (c) as a result of the concealment of the true position it is not possible to tell exactly how the profit was made, it seems to me that all three of Mr Ruperti, PMI Trading and Sea Pioneer should be liable to account. Both companies are Mr Ruperti in disguise and, if he chooses to hold a mask before his face in this way, neither he nor the companies can complain if the court treats the profit as having been made by the Ruperti defendants jointly.

418. The relevant Claimants had an alternative claim against Mr Mikhaylyuk and the Ruperti defendants for the amount of the bribes paid by Mr Ruperti being (according to their claim) the $ 217,100 paid to Mirador , the $ 1,491,000 paid to Pulley Shipping and the amounts paid to Amon (which they claim were, *in toto*, 1.25% of the hire of the PDVSA vessels. They have, however, elected for the much larger damages claim.

*The damages claim in respect of the Sorokaletie Pobedy*

419. The charter of the *Sorokaletie Pobedy* between Sea Pioneer and PDVSA came to an end by 31 May 2006. The relevant charter appears to be the 1 year charter (+ 1 year in Charterer's option), between Sea Pioneer and PDVSA Petroleo S.A. expressed to be applicable since 11 May 2004 at M 15/32/283.

420. The documents show that thereafter Mr Ruperti (through Mr Ron Hernandez of Interpetrol, Mr Ruperti's company) repeatedly represented to NOUK and thereby to the *Sorokaletie Pobedy's* owners, Tamara Shipholdings, (a) that there was an extant charter between the owners and PDVSA under which the vessel could be put off hire and (b) that the reason for non-payment of hire by PDVSA to owners was

the lack of approvals from Oil Majors in respect of the vessel, which, PDVSA contended, entitled PDVSA to put the vessel off-hire. These representations were false. There never had been such a charter and the charter from Sea Pioneer had come to an end, which was why PDVSA had ceased to pay hire.

421. In response NOUK and the owners continued to press for payment instead of withdrawing the vessel and seeking alternative employment. The *Sorokaletie Pobedy* was not, in the event, withdrawn until 8 August 2006.

422. The relevant communications are set out in Annex 4 to the Claimants' opening. It is unnecessary to set them all out in this judgment. The following citations are sufficient to show the nature and extent of the false representations made.

423. On 17 May 2006 Mr Hernandez replied to an NOUK e-mail asking about payment by PDVSA as follows:

> '*Regarding your question please be aware PDVSA is releasing the payment yesterday – today and final set will be for tomorrow. I will chase PDVSA again to ensure about pauments. But Also as previous agreed with Mr Vladimir M, monthly hires can be pay between 10 upto 20 days of each month.*
>
> *'Also; Something PDVSA is REALLY worry is about the majors approvals on the vessels…"*

424. On 23 May 2006, Ms Anne-Maree Behm of the West of England Ship Owners Mutual Insurance Association wrote to '*PDVSA c/o Interpetrol de Venezuela'*, copying her letter to Interpetrol de Venezuela for the attention of Mr Ruperti, in connection with the unpaid hire for the *Sorokaletie Pobedy,* and also referring to unpaid hire for the *Moscow Stars* and the *Moscow Kremlin*:

> *'We are the Managers of the West of England with whom Owners have an entry for the above vessel and would be grateful if you could pass this message on to Charterers, Messrs PDVSA . . . .*
> *'. . . . should funds totalling US$2,151,687.47 not be received by Members by close of business on Thursday 25th May, they will have no option but to proceed against Charterers under the terms of the relevant Charterparties.'*

425. On 23 May 2006, Mr Hernandez sent an e-mail to Mr Jones of NOUK, copied to Mr Ruperti, Mr Salmon and Mr Lebedev:

> '*Due to a type mistake the transfer was sent it back to PDVSA, from the bank yesterday.*

> *'However; the money was wired again today with the right details and amount . . . .'*

426. Mr Jones replied on 24 May (copying his e-mail to Mr Ruperti, Mr Salmon and Mr Lebedev):

> '*Owners confirm with thanks, receipt of funds.*
> *'We hope that future payments will be made correctly and in good time, to avoid nasty situations such as interventions of third parties ...*

427. On 30 May 2006, Mr Barriga of NOUK wrote to Mr Hernandez (copying his e-mail to Mr Jones) in connection with the *Sorokaletie Pobedy*:

> '*The master of above vessel indicating that he received a call from Mr Helide Chavez from PDVSA to –re-deliver the vessel after completion of discharging operations in Bonaire.*
> *'We have no information about this. Plus according to governing C/P this contract is not due until 30th April 2007 plus minus thirty days. Owners have to receive thirty days notice. So far none received*.'

428. Mr Hernandez replied (with a copy to Mr Jones):

> '*This is an internal procedure between the companies.*
> *'But one thing is true, vls is not tradeable since non majors and PDVSA is really wonder about next schedules.'*

429. In fact, as Mr Hernandez must have known, the charter between PDVSA and Sea Pioneer came to an end on 30 May when the vessel was redelivered by PDVSA. The final hire to 31 May 2006 was due by 1 May 2006 (as the last Sea Pioneer invoice shows).

430. Mr Barriga replied to Mr Hernandez:

> '*Thks. for your explanation Ron. Please advise operators in PDVSA to copy this office with delivery messgs. to other PDVSA trading company.*
> *'Please rest assured that we will do our utmost to obtain Major approvals for this vessel in the near future . . . .'*

Later the same day, Mr Barriga wrote to Mr Hernandez:

> *'VESSEL HAS RECEIVED NO INSTRUCTIONS FROM PDVSA REF. NEXT VOYAGE. VESSEL COMPLETING DISCHARGING OPERATIONS IN TWO HOURS AT BONAIRE, AND WILL DRIFT OFF BONAIRE (NO ANCHORAGE PLACE HERE) UNTIL ORDERS RECEIVED TO PROCEED TO LOAD PORT.*
> *'PLS ADVISE PDVSA OPERATIONS TO EXPEDITE ORDERS TO THIS VESSEL.'*

Later that day, Mr Carruyo instructed the Master to proceed to Amuay for orders.

431. On 31 May 2006, the Master of the *Sorokaletie Pobedy* sent to Mr Barriga the text of a fax received from Mr Ronald Perez of PDVSA:

> *'WE PDVSA AS CHARTERERS OF REFERRED VESSEL INVOKE "OFF HIRE CLAUSE".*
> *'DUE TO VESSEL'S TIME CHARTER HAS FINISHED THE VESSEL WILL BE CONSIDER OFF HIRE SINCE 30 MAY 2006 TO 14:45 . . . .'*

432. Mr Barriga sent this to Mr Hernandez and Mr Ruperti with the following message (copied to Mr Jones):

> '*This vessel has yet to receive voyage instructions from PDVSA. Owners are rather worried about this messg. received from PDVSA mr Ronald Perez.*
> *'Can you explain what is going on here. According our records this vessel is on time charter until 30th April 2007 with PDVSA. Why is Mr Ronald Perez placing the vessel OFF hire?*
> *'Please clarify this situation.'*

433. Mr Hernandez replied to Mr Barriga and Mr Ruperti (with a copy to Mr Jones):

> '*Basically; the main thing is the majors approvals. The vls was trading in the Caribbean, and PDVSA has been asking since the beginning for approvals for the last year or so and so far the vls has not been even inspected by anyone, and terminals now do not want the accepted the ship.*
> *'However; We are dealing with this. I will keep you posted*.'

434. On 6 June 2006, Mr Barriga wrote to Mr Fernandez, with a copy to Mr Jones:

> '*Please ask PDVSA when June hire will be paid . . . .*'

On 7 June 2006, Mr Hernandez replied:

> *'We have met Mr Lebedev and Mr Sergei here in Greece all was really good and for the short future we will develop more business between the parties.*
> *'Regarding the hires I will find out from PDVSA what going to the payments, them I will revert to you.*'

On 8 June 2006, Mr Barriga wrote:

> '*Can you pls give us an answer to your enquiries with PDVSA ref payment of invoices for June Hire.'*

And Mr Hernandez replied:

> *'Since Pdvsa has change the chartering manager and money will be done next week.'*

435. In fact, as Mr Hernandez knew, PDVSA would not pay any monies, the charter between PDVSA and Sea Pioneer having ended on 30 May 2006.

436. On 12 June 2006 Mr Barriga wrote to Mr Hernandez:

> *'Well, today is next week, and funds not yet received. Can you pls. find out from PDVSA when they will transfer payment . . . .'*

Mr Jones wrote on 13 June 2006 to Mr Hernandez, copied to Mr Barriga:

> *'WITH THE GREATEST RESPECT, ALL WE HEAR ARE PROMISES FOLLOWED BY NO PAYMENTS. WHEN DO YOU REALLY CONSIDER THAT THE FUNDS WILL BE REMITTED BY PDVSA?'*

On 16 June 2006, Mr Barriga wrote to Mr Hernandez, copied to Mr Jones:

> *'THIS IS TO CONFIRM OUR TEL CALL IN WHICH YOU ADVISE THAT PDVSA HAS TRANSFERRED FUNDS YESTERDAY THURSDAY 15TH JUNE IN RESPECT OF HIRE FOR THE MONTH OF JUNE 2006'*
> *'WE HAVE CHECKED WITH OUR BANK A FEW MINUTES AGO AND THERE ARE NO FUNDS RECEIVED FROM PDVSA.*

On 19 June 2006, Mr Barriga wrote again:

> *'PLS. ADVISE PDVSA THAT FUNDS FOR JUNE HIRE REF ABOVE VESSEL [the Sorokaletie Pobedy] ARE NOT YET RECEIVED . . . .'*

437. On 20 June 2006, Mr Hernandez wrote to Mr Barriga (with a copy to Mr Jones):

> *'I just talk to PDVSA and they say the payment has not been booked since owners failed to comply with majors approvals. Mr Vladimir M agreed by writing to PDVSA about the majors more than two years ago, and nothing happened. As you well [know] when this vls when to Singapore PDVSA has a such a bad time to bring her back in that time owners again confirm the majors approvals. As you can see we have been telling PDV something we have not deliver yet.'*

438. Since the charter between Sea Pioneer and PDVSA had terminated on 30 or 31 May 2006, PDVSA cannot have spoken to Mr Hernandez in

the terms stated, saying that they were not paying because of a lack of oil majors' approvals. Mr Hernandez wrote to that effect, knowing it to be untrue, in order to conceal from NOUK and the owners the fact that the *Sorokaletie Pobedy* had secretly been sub-sub-chartered to PDVSA by Sea Pioneer.

439. Mr Barriga replied:

> '*Owners are very surprised and concerned that PDVSA has declared this vessel off hire, and retained payment of hire for the month of June without giving proper notice.*
>
> *'We refer to your reply dated 30th May advising that PDVSA instructions to re-deliver the vessel were only "internal procedure between the companies".*
> *'Owners kindly refer Charts PDVSA to the governing C/P for this vessel in particular to the period of hire to be completed on 30th April 2007 plus/minus thirty days. The Governing C/P is specific about this . . . .*'

Mr Hernandez replied:

> '*Vladimir M, sent by writing the agreement for majors approvals, also all of you are aware about the majors since more than two years and nothing happened.*
> *'As I told you is an internal procedure between the companies but PDVSA has not a change to allocate the vls since non approvals.*
> *'If you remember when the vls when to Singapore owners promoted to get majors approvals and nothing happened we have been telling PDVSA about the majors for more than two years. Also when Mr John/Mr Simon came over two months ago we told them about the problem.'*

440. Mr Barriga asked Mr Hernandez to send the writing by Mr Mikhaylyuk to which he referred. Mr Hernandez forwarded on 21 June 2006 an e-mail exchange purportedly dated 22 October 2003 between Mr Mikhaylyuk and Mr Ruperti at Trafigura. Each e-mail was headed 'RE: PDVSA TIME CHARTER REQUIREMENT'. Mr Ruperti's e-mail read:

> '*Please Vladimir, remember all the vessel must have at least two majors approval each Russian Vessel. It's really necessary in order to keep PDVSA satisfied.'*

Mr Mikhaylyuk's e-mail in response was:

> *'Yes, We are agreed to your email below, and contract will be revised accordingly. We will have surveyor in those ships to get them fully approved by majors*.'[45]

441. The Claimants say, and I do not doubt, that there is no trace of this exchange in NOUK's files and that the contracts had not been revised in the manner suggested. When the charter of the *Sorokaletie Pobedy* was extended in 2004, the documents show that the extension proceeded on the basis of the '*original c/p and addendum no1'* and did not mention any requirement for oil majors' approvals. I have grave doubts as to the authenticity of this exchange, which is likely to have been created at a later date and, even if it is genuine, did not itself amount to a variation of any charter with PMI Trading.

442. On 27 June 2006, Mr Barriga sent an e-mail to Mr Hernandez:

> *'Can you pls send this messg. to Chartrs. PDVSA, requesting that they reply soonest today.*
> *'To: PDVSA Chartrs of M/V Sorokaletie Pobedy*
> *Dear Sirs*
> *Owners of M/V Sorokaletie Pobedy note that the vessel is not receiving voyage orders from Chartrs. PDVSA, and that allegedly the vessel has been put off hire.*
> *Owners kindly asking the date from which Chartrs. have allegedly place this vessel off hire, and a copy of the re-delivery Statement.*
> *Owners would like to point out that if such re-delivery has taken place at this time it would constitute a repudiatory breach of the current Charter.*
> *Owners, also note that vessel's level of gas oil on board is dangerously low, well below the safety margins as recommended by Company's policy.*
> *Owners therefore are ordering 100. mt of gas oil DMA to be supplied to this vessel urgently on account of Chartrs. of this vessel PDVSA.'*

443. Later on 27 June 2006, Mr Hernandez sent Mr Barriga, with copies to Mr Salmon and Mr Lebedev, the following which purported to be a message from PDVSA:

> '*Dear Mr Barriga,*
>
> *'Many thanks for your message below.*
> *'On about two year ago was incorporated a clause to the Charter Party of the Sorokaletie Pobedy requesting major approvals from Owners to put the vessel on hire (two at least).*

[45] When he received this e-mail exchange between Mr Mikhaylyuk and Mr Hernandez, Mr Barriga copied it to Mr Jones with the message:

> '*I have never seen this document, also I have never seen a contract C/P being altered to read . . . vessels will maintain majors approvals.'*

> *Up to the date, this has not been accomplished by Owners, thus breaching the charter party and now Charterers are exercising its right to put the vessel off-hire. We have been trying up to the date to handle this situation with charterers but now Owners have to obtain major approvals in order to have the vessel on hire again.*
> *'Last year vls performance a really poor voyage to the far east and once against charteres promise to have the vessel inspected by surveyors and so far nothing have been done.*
> *Regards,*
> *PDVSA.'*

444. No such message can have come from PDVSA (who considered that they had re-delivered the vessel at the expiry of their charter from Sea Pioneer on 30 May 2006). I conclude that this message was concocted by Mr Hernandez and Mr Ruperti in order to conceal from the Claimants the fact that PDVSA had not contracted with the Claimants and that the Sea Pioneer charter with PDVSA had expired.

445. On 29 June 2006, Mr Barriga sent an e-mail to Mr Ruperti, copied to Mr Hernandez, Mr Jones, Mr Salmon and Mr Lebedev:

> *'Could you please forward following messg to PDVSA Chartrs of Sorokaletie Pobedy*
>
> *Dear Sirs:*
> *We refer to your email of 27th June. We understand that you are now not claiming the vessel has been redelivered and that you maintain it is merely off hire. Please confirm that this is your position by return. In any event, we reiterate our position as set out in the fax to you from Mr Kirkman of the West of England of 23rd June*[46] *. . . .*
> *As such, the outstanding hire must be paid by close of business tomorrow 30th June London time. You must be in no doubt that owners will commence arbitration proceedings by appointing first class London Lawyers on Monday 3rd of July should hire not have been paid as required.'*

Mr Ruperti replied:

> '*Mr Terekhin*
>
> *Mr Lebedev*
>
> *It's so sad been is this situation after more than 10 years doing great business between the parties. What is happening now is really embarrassing for me and the forthcoming deals We are working to increase the relationship and make Novoship more powerful, such as the deal in Russia to lift 200.000 bbls/daily of crude oil and to do the management on the new builds*

[46] This had claimed that the vessel was not off-hire.

> *asphalt carrier and so on. As you can see the relationship can be badly affected due to this issue.*
>
> *As a matter of fact we have not received any feed back at all from owners to propose to PDVSA an amicable solution or what so ever. I am pretty sure if owners would like to talk about with me and charteres, same could be sorted in an easy and faster way. We shall do in stead of appoint lawyers is to talk a bit with PDV and try to arrange something fair to each side and avoid unnecessary disputes. As you well know I am available to help you out all the time as always.*
>
> *I hope owners thing a litter bit about what going on and all the business we are risking.*
>
> *Finally; feel free to contact me at any time.*'

446. Further correspondence followed in which NOUK demanded payment of hire.

447. On 8 August 2006, NOUK, on behalf of Tamara Shipholdings, served notice of withdrawal of the *Sorokaletie Pobedy.* The notice was addressed to PDVSA Marketing International (PMI) c/o Interpetrol de Venezuela and e-mailed to Mr Hernandez.

448. As is apparent from the previous paragraphs the owners delayed withdrawing the vessel from the charterers and seeking alternative employment for the *Sorokaletie Pobedy* (as they would have been entitled to do) as a direct result of the false representations as to the continuance of the non-existent charter by them to PDVSA. They are entitled to recover as damages a sum equivalent to the amount of hire which they would have received on the open market during the period when they were deprived of earnings on that account, namely in June, July and the first 8 days of August 2006. I am satisfied from the evidence of Mr Lawrie, who produced a report and supported it by oral evidence, that the rate which the *Sorokaletie Pobedy* would have achieved during that period was $17,250 per day. That figure is derived from a comparison of the rates of hire obtained in the market for similar vessels in April and October, making allowance for the movements in the market over the period April to October, taken with Mr Lawrie's estimate of average spot TCE rates for the vessel over the period May to August 2006. It is a sensible, and in no sense an excessive estimate.

449. Tamara Shipholdings S.A. is thus entitled to recover the sum of $ 1,362,750. It appears to me that the judgment should be against Mr Ruperti and not also against Sea Pioneer and PMI Trading since the latter two companies were not involved in the deception. But I am prepared to hear further argument on that question.

*Against Mr Nikitin and Amon International*

450. NOUK and the relevant ship owning Claimants seek to recover from Amon International and Mr Nikitin the bribes which Mr Mikhaylyuk directed to Amon International. I am satisfied that they are entitled to recover the sums shown to have been received by Amon namely $ 37,356.20, $ 83,748.19 and $ 289,200. These sums represent a commission on the charter hire of the PDVSA vessels which Mr Ruperti paid to Mr Nikitin at Mr Mikhaylyuk's direction as part of his bribery of Mr Mikhaylyuk. I am satisfied that Mr Nikitin must have been aware that he was being paid a secret commission and that in receiving it he was dishonestly assisting Mr Mikhaylyuk in a breach of his fiduciary duties to NOUK and the relevant companies. He is, accordingly liable to account to them for those sums.

451. As I have said I am not satisfied that any further payments were made to Amon.

452. In my view, judgment should be given in favour of NOUK and the five ship owning companies without any apportionment of the total sum as between the ship-owning companies themselves. Obviously no more than the total of the sums is recoverable.

*The Henriot Finance claims*

453. Shortly after the charter of the *Marshal Chuykov* (Recap 1.11.02) and the *Adygeja* (Recap 19.12.02), there began a series of charters to Henriot Finance Limited, a Nikitin company.

454. The vessels and charters in question were the following:

i) The *Trogir,* a product carrier, which was chartered on 8 January 2003 for one year at $ 13,000 per day plus one year at $ 13,500 per day. This charter was extended on 4 October 2004 for one year at US $ 17,000 per day, with a charterer's option of a further year at $ 17,000 per day;

ii) The *Kuzbass,* a Suezmax, which was chartered on 11 September 2003 for one year at $ 18,750 per day with a charterer's option of a further year also at $ 18,750 per day;

iii) The *Kaspiy,* a Suezmax, which was chartered on 11 September 2003 for one year at $ 18,750 per day with a charterer's option of a further year also at $ 18,750 per day;

iv) The *Moscow University*, an Aframax, which was chartered on 2 February 2004 for two years at $ 18,500 per day plus one year at $ 18,750 per day;

v) The *Moscow River*, an Aframax, which was chartered on 2 February 2004 for two years at $ 18,500 per day plus one year at $ 18,750 per day;

vi) The *Kaluga*, an Aframax, which was chartered on 30 March 2004, for three years at $ 20,800 per day; and

vii) The *Kazan*, an Aframax, chartered on 30 March 2004, for three years at $ 20,800 per day.

455. As is apparent from the timing the first two PDVSA vessels were chartered out before the *Trogir* and the remaining three between the *Trogir* and the *Kuzbass* and *Kaspiy.*

456. The Claimants contend that there was, at the latest by December 2002, i.e. before the charter of the *Trogir,* a corrupt relationship between Mr Mikhaylyuk and Mr Nikitin arising from Mr Mikhaylyuk's solicitation of monies from Mr Ruperti for the benefit of Mr Nikitin. Each of them knew that in seeking and obtaining such payments from Mr Ruperti Mr Mikhaylyuk was acting in dishonest breach of his fiduciary duty to his principals. Mr Mikhaylyuk's superiors – Mr Izmaylov, Mr Sakovich and Mr Oskirko – were unaware of this relationship, and, accordingly, Mr Nikitin and Henriot Finance are liable to account for the entirety of the profits made on these charters.

457. In order for this claim to get off the ground it is necessary for the Claimants to establish that Mr Mikhaylyuk had a role in the negotiation of these charters. As is apparent from what follows he had a major role.

*The Trogir*

458. The *Trogir* was a handymax coated product carrier owned by the eleventh Claimant, Trogir Shipping, and managed by NOUK. She was chartered to Henriot Finance for one year, with an extra year at Henriot Finance's option in January 2003[47].

459. On 9 December 2002 at 09:30 Mr Nikitin e-mailed Mr Mikhaylyuk offering $ 12,500 per day for two years and naming Mr Sergey Pavlov, of Mr Nikitin's PNP as the Contact Person. At 09:38 he sent Mr Mikhaylyuk the Amon International bank details. Mr Mikhaylyuk reported Mr Nikitin's offer to Mr Izmaylov, Mr Sakovich and Mr Oskirko on the same day. Mr Sakovich replied on 11 December 2002:

> " *Owners will consider any possibility with money level just above usd 13000 pd.'*

460. On 12 December 2002 Mr Mikhaylyuk offered PNP the *Trogir* for two years at $ 13,750 for the first year and $ 14,250 for the second year. Mr Pavlov replied on 16 December 2002 offering $ 12,750 and, the following day, 17 December 2002, Mr Mikhaylyuk replied '*after long discussion with Owners*' with a counter-offer of $ 13,250 per day for

[47] For a description of the circumstances surrounding these negotiations, see paras 1206 to 1212 of Mr Justice Andrew Smith's Judgment in *Fiona Trust*.

the first year and $ 13,750 per day for the second. Mr Pavlov responded on 18 December 2002 with an offer of $ 13,000 per day for the first year and $ 13,250 for the second and Mr Mikhaylyuk then offered $ 13,000 for the first year and $ 13,500 for the second, to which Mr Pavlov eventually agreed. On 19 December 2002 Mr Mikhaylyuk sent a recap "*subject owners board management approval within 5 working days after fixing all terms*" to Mr Nikitin and Mr Pavlov and the terms were the subject of further negotiations.

461. On 3 January 2003, Mr Mikhaylyuk wrote to Mr Izmaylov, Mr Sakovich and Mr Oskirko:

> '*Re: 'Trogir'/PNP – Possible t/c*
>
> *While we were trying to negotiate the best rate, seems we get our maximum terms and with only one outstanding clause left, we went on subjects on the following terms:*
>
> *period 1 year + 1 year in CHOPT*
>
> *$13,000 +$13,500 pdpr. plus*
>
> *$3,000 monthly for comm. repres. purpose*
>
> *delivery: 1 sp UKCont/Med*
>
> *outstanding term: Charterers insist on 'Compulsory' pilotage only for their account while we will pay pilotage where same is not mandatory (for example Baltic Straights, Dardanelle) which is a lot of money for us. In all t/c fixtures we never had it as such is a big exposure for an owner.*
>
> *'Just to remind that BEP[48] for 2003 is $12,567, and Owners Board approval is declarable till COB time January 05th, 2003, while Charterers subjects are declarable before COB January 06th, Monday.*
>
> *'Please consider above, give Owners comments and authorise in order to complete the deal in time.'*

462. On 4 January 2003, Mr Sakovich replied:

> *'Owners confirm the rates and main terms you negotiated. We will be fully satisfied if you try to get hundred dollars more for the first year (at least try). We would never agree to the 'compulsory' pilotage only for charterers account. Please insist on our usual clause. As soon as you get pilotage clause as needed, please complete the deal on the bss terms/conditions you are on subjects*.'

463. Mr Mikhaylyuk replied on 6 January 2003:

> *'Thanks for Owners confirmation, in line with which we made another attempt to get +$100, but all in vain – not achievable.*

[48] 'BEP' is 'break-even point'.

> *We still arguing on 'compulsory' pilotage, and in accordance with Owners' authority do not confirm the deal, therefore had no other choice but to move Charterers subs till COB London time January 08th, 2003. Will keep you informed on the progress*.'

464. There were further negotiations between Mr Mikhaylyuk and Mr Pavlov regarding the terms of the charter, which was finally concluded with a charterparty date of 8 January 2003.

465. On 23 December 2003 Henriot Finance exercised its option for a further year and asked for a further option for a further year. Mr Mikhaylyuk wrote to Mr Jones to say that he was not confirming the further option for a further year as he needed clearance from the Owners. Shortly afterwards, he wrote to Henriot Finance declining the extra twelve months at the rate offered ($ 13,000) because the market rate was, he said, $ 15,000 or more.

466. On 20 September 2004 Mr Mikhaylyuk sent an e-mail to Mr Izmaylov and Mr Sakovich in the following terms:

> '*please note that Charterers Henriot Finance are considering to extend the employment of this vessel and are asking if Owners would consider 1+1 years time charter in direct continuation of present charter. during all the period there were neither problems with hire payment nor any disputes, and Charterers seems happy with performance.*
>
> *after long discussions we managed to obtained from them their final fixing figures, therefore please find following:*
>
> *period 1 year CHOPT 1 further year*
>
> *in direct continuation (anniversary January 28th 2005)*
>
> *hire $17,000 pdpr (for each year)*
>
> *otherwise as per existing terms and conditions.*
>
> *Charterers Subjects 7 days after Owner's confirmation.*
>
> *as per discussions we had tried to have 2 years straight but they are refusing categorically, so I think that we probably have to work along these lines now. we understood there are several different forecasts for the next 6-12-18 months, with more or less steady rates, while due to number of newbuildings the market is expected to go down thereafter. so if the worst scenario 6 months is to take place then we are protected and will have steady income to support our cashflow.*
>
> *would appreciate if you please consider this business opportunity, give Owners opinion, and in case agreeing to above please authorise accordingly to complete negotiations in due course.*

*please let me know if further information required.*'[49]

467. On 22 September 2004 Mr Sakovich replied:

> '*Owners thank you for the developing of the next long term business opportunity. The terms/conditions and the rate $17,000 pdpr obtained during negotiation seems to be acceptable for us.*
> *Taking into account the different market forecasts for this segment of the market, we need to protect the steady income and support our cashflow.*
> *Owners authorise you to complete the negotiations on the basis of final fixing figures as outlined in your message. Please advise the Charterers accordingly and keep us posted.'*

468. After further negotiations over the terms, the renewal was agreed on 4 October 2004.

*The Kuzbass and the Kaspiy*

469. The *Kuzbass* and the *Kaspiy* were two Suezmax tankers owned by two Novoship subsidiaries, Kuzbass Shipping Limited and Kaspiy Shipping Limited. These two companies were sold by *Intrigue* under an agreement dated 4 March 2005 and were not claimants in *Fiona Trust*. The two vessels were each chartered to Henriot Finance on 11 September 2003 for 1 year at a rate of US $ 18,750 per day plus a charterers' option of a further year also at $ 18,750 per day[50].

470. The *Kuzbass* and the *Kaspiy* were managed by NSC and not by NOUK. However, Mr Mikhaylyuk was requested by Mr Izmaylov to conduct the negotiations for their charter to Henriot Finance, when he happened to be in Novorossiysk.

471. Mr Nikitin first expressed interest in these two vessels in an e-mail of 25 August 2003 from Henriot Finance to Mr Mikhaylyuk. The price offered was $ 18,000 per day per vessel for a 1 year charter with a further year at the charterers' option. On 28 August 2003 Mr Mikhaylyuk (who was then in Russia and at NSC's offices[51]) sent an e-mail to Mr Senshin in the technical department at NSC:

---

[49] At para 1259 of his Judgment in *Fiona Trust* Mr Justice Andrew Smith made the following findings which are relevant to Mr Mikhaylyuk's role in relation to this charter:

> '1259 . . . . *There is no documentary evidence of negotiations such as are referred to in the e-mails, but Mr Mikhaylyuk insisted in cross-examination that they took place. He concluded that he could not persuade Henriot to pay more for the vessel, and he did not think that he could obtain a higher rate of hire from another charterer. The Claimants suggested that Mr Mikhaylyuk had not had "long discussions" with Henriot and that the rate had already been agreed between Mr Nikitin and Mr Izmaylov. As with the similar allegations made about other charters, there is no evidence to support these allegations, and I reject them.'*

[50] Mr Justice Andrew Smith dealt with these charters at paras 1213 to 1241 *Fiona Trust*.

[51] He had come from London on 12 August 2003 for business followed by a holiday and returned on 3 September: paras 1201 and 1219 *Fiona Trust*.

> *'as understood there is an interest for 1+1 years t/c on these two suezmax from one of Russian Client, therefore in order to comply with Mr Izmaylov's instruction for us to work this requirement, please arrange full t/c description ... and Q-88 to be submitted to us.'*

Mr Mikhaylyuk also sent an e-mail to Mr Nikitin and Mr Pavlov:

> *'thanks for your msg, noted. having checked with Owners seems there is an interest to consider such an opportunity, so Owners authorised to indicate as following . . . .'*

He then offered rates of $ 18,500 per day for the first year and $ 19,500 per day for the optional second year.

472. Henriot Finance countered on 29 August 2003 with an offer for $ 18,100 per day for the first year and $ 18,500 for the optional second year.

473. On 1 September 2003 Mr Mikhaylyuk reported by email to Mr Izmaylov and to Mr Sakovich:

> '*As per Owner's instruction we have conducted negotiation on possible time-charter of two Suezmax vessels, and can report as following:*
>
> *-spot market is rather weak at the moment and TCE during August was at around $14,000 per day nearly in all areas.*
>
> *-t/c market has been falling and for ice-class ships was reported at low $20,000 pdpr. While it is usual paid a premium for ice class, the normal ships obtained much lower levels.*
>
> *- due to considerable delay with Iraq oil export there may be further low oil supply for this year and next year as well, thus some weak rates expected on the market.*
>
> *Having worked with PNP (Henriot Finance – Chartering Arm) this requirement for two suezmax ships for 1+1 year in CHOPT we managed to get following terms for fixing:*
>
> *hire: $18,500 – first year*
>
> *$18,750 – optional year*
>
> *comm/repr: $3,000 per months*
>
> *comm: 1.25% address*
>
> *. . . . Charterers advised that if Owners are not interested in above they will look at another ships.*
>
> *Taking into account the current situation seems reasonable to consider such business possibility. Could you please advise if Owners are ready to accept above, give your comments and authorise accordingly in order to complete negotiations.'*

474. Later on 1 September, Mr Oskirko replied to Mr Mikhaylyuk's e-mail confirming agreement with Mr Mikhaylyuk's suggestions:

> '*thank you very much for your message below. Based on your information herewith we confirm the Owners agreement with your suggestions*.'[52]

475. Recaps were sent by Henriot Finance to Mr Mikhaylyuk on 2 September 2003, and, with further details, on 5 September, and from Mr Mikhaylyuk to Henriot Finance later on 5 September. The latter recap stated that the agreement was between Henriot Finance and NOUK as Agents to the two owning companies.

476. On 5 September 2003 Mr Mikhaylyuk sent an e-mail to Mr Senshin:

> *'as discussed I understgood that you have instruction from Mr Izmaylov to liase with myself enabling conclusion of this biz. Moreover I have confirmation from Mr Izmaylov to go on subs, and work terms but obviously without information from chartering dept in Novorossiysk have no possibility to complete the deal. if you do not have enough authority to liase please let me know in order same can be arranged*.'

477. After various further exchanges and extension of subjects, the fixtures were concluded on or about 15 September 2003 (with a charter party date 11 September 2003).

478. The options for the second year were declared on 5 July 2004.

*The Moscow University and the Moscow River*

479. The *Moscow University* and the *Moscow River* were Aframax tankers owned by Fancy Maritime SA and Canyon Maritime Corp and managed by NOUK. They were chartered to Henriot Finance on 2 February 2004 for two years at US $ 18,500 per day with an option for a third year at $ 18,750 per day. The negotiations for these charters were as follows.

480. On 20 January 2004 Henriot Finance sent an e-mail to Mr Mikhaylyuk (at NOUK) saying that it was looking for two Aframax vessels for a two year charter with prompt delivery at a rate of $ 18,000 per day. Mr Mikhaylyuk replied '*having checked with Owners on possible candidates'* on 21 January 2004 offering the *Moscow River* and the *Moscow University* at rates of $ 20,000 per day for two years with an

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[52] In para 1224 of his Judgment in the Fiona/Intrigue matter, Mr Justice Andrew Smith found that:

> '*1224. Mr Oskirko had spoken with Mr Izmaylov before sending this reply, and there is no credible evidence that he disagreed with Mr Mikhaylyuk or questioned whether the terms should be accepted. Mr Oskirko authorised the fixtures in his e-mail of 1 September 2003, and I find that he did so because he considered them to be in NSC's interest and because, as Mr Mikhaylyuk put it, he was "appointed as in charge" of these fixtures, and not, as he claimed, simply because he was instructed by Mr Izmaylov to authorise them.'*

optional third year at $ 21,000 per day. On 22 January 2004, Henriot Finance offered $ 18,250 (first 2 years) and $ 18,500 (optional year). Mr Mikhaylyuk countered with $ 19,000 (first 2 years) and $ 20,000 (optional year). On 23 January 2004, Henriot Finance offered $ 18,500 and $1 8,750[53].

481. On 26 January 2004 Mr Mikhaylyuk sent an e-mail to Mr Izmaylov in the following terms:

> *'as discussed during last week we continue negotiations with PNP for 2 (two) "Moscow"-type aframax tankers for period of 2 (two) years plus 1 (one) optional year straight t/c. While Charterers expressed their ideas to fix around $18K for prompt delivery, we have conducted very difficult negotiations and managed to get following from Charterers for fixing:*
>
> *"Moscow River" and "Moscow University"*
>
> *period: 2 years plus 1 year in CHOPT*
>
> *hire: $18,500 pdpr – during 2 years*
>
> *$18,750 pdpr – optional one year*
>
> . . . .
>
> *This business could help to protect the cashflow within next two years and allow the new building programm to continue with 8 aframax deliveries over next 2 years. There is strong anticipation on the market that due to numbers of ships to be delivered the rates would not be that firm as they are now, therefore, hedging could cover such uncertainty of the future.*
>
> *Would appreciate if Owners can consider this proposal and authorize accordingly to complete negotiations. Please advise if Owner's Board is in agreement to such deal enabling us to lift subject on time.'* [54]

482. On 28 January 2004, on the instructions of Mr Izmaylov, Ms Zhanna Spasova (Head of NSC's Department of Economics and Finance) replied to Mr Mikhaylyuk:

> *'President approval your message.'*

A few changes to the terms were subsequently discussed and the subjects were lifted on 2 February 2004.

483. At para 1244 of *Fiona Trust*, Mr Justice Andrew Smith made the following findings:

> '*Mr Izmaylov did not dispute that, as is reflected in the words "as discussed"* [in Mr Mikhaylyuk's e-mail of 26 January

[53] A full recap on subjects was sent by Mr Mikhaylyuk to Henriot Finance on 27 January 2004.

[54] Mr Izmaylov's handwritten approval may be seen at **N3/80.**

> 2004] *(and possibly the reference to checking with the owners), he spoke to Mr Mikhaylyuk about these proposals. Mr Izmaylov wrote to Ms Spasova (who had taken over some of Mr Oskirko's responsibilities when he left NSC at the beginning of 2004, but had no responsibility for chartering matters) a note at the top of a printed copy of the e-mail, which reads (in translation), "Confirmed, taking into account the amounts and "programme""*[55]*: the "programme" was the newbuilding programme to which Mr Mikhaylyuk had referred. Mr Izmaylov was involved in approving these proposals at the stage of negotiations because Mr Sakovich was on holiday. In cross-examination he said that he gave his approval on the basis of what Mr Mikhaylyuk told him and his own views of the market . . . .*'

484. The options for a further year were declared in October 2005.

*The Kaluga and the Kazan*

485. The *Kaluga* and the *Kazan* were two further Aframaxes, which were owned by Kaluga Shipping Inc and Kazan Shipping Inc. They were chartered to Henriot Finance on 30 March 2004 at a rate of $ 20,800 per day for three years[56]. The negotiations for the charters were as follows.

486. On 24 March 2004 Mr Mikhaylyuk sent Henriot Finance two offers, one for the charter of the *Kaluga* the other for the charter of the *Kazan*. In each case the offer was for a three-year charter at $ 20,800 per day. Mr Mikhaylyuk repeated the offers the following day, with corrections and the offers were conditionally accepted on 26 March 2004 by Henriot Finance.

487. On the same day Mr Mikhaylyuk sent an e-mail to Mr Izmaylov and Mr Sakovich as follows:

> *'As discussed over the telephone and after a week of hard negotiations we managed to put vessels on subjects on following conditions:*
>
> *KALUGA and KAZAN*
>
> *Acct Henriot Finance*
>
> *period 3 years*
>
> *hire $20,800 pdpr plus $3,000 monthly comm/repres.*
>
> *. . . .*

[55] The translation in the present case reads "*In light of the timeframe and the "programme", I think this should be approved".*

[56] Mr Justice Andrew Smith dealt with these charters at paras 1251 to 1254.

> *In view of the market development this rate is a good hedging against any possible fluctuation and gives us coverage for the next three years on the aframax tonnage newbuildings against their delivery program (within next 2 years). we think that such rates could be rather beneficial to Novoship, therefore, would appreciate if Owners could give consideration to this business opportunity, and authorise accordingly enabling us to complete the deal.'*

Mr Sakovich replied on 29 March 2004, with a copy to Mr Izmaylov:

> *'During performance of previous time-charters there were no any delays with hire payment and non supported claims from Charterers side. Owners lift their subs for proposed deal to guarantee earnings for next three years ....*'

488. At para 1253 of his Judgement in the Fiona/Intrigue actions, Mr Justice Andrew Smith made the following findings:

> '*1253 [The Claimants] also argued, as I understand their submissions, that because there is no written record of any negotiations, the inference is that there was no "hard week of negotiations" and the e-mail is misleading. While it is possible that Mr Mikhaylyuk was exaggerating the efforts that he had made, there is, in my judgment, no proper basis to reject his evidence that he had had negotiations with Henriot before he put forward the offer of 24 March 2004. It would be remarkable if there had not been negotiations, and there is no evidence to support any contention that they were conducted by someone other than Mr Mikhaylyuk. I reject the suggestion that Mr Nikitin and Mr Izmaylov had agreed between themselves upon the rate for these charterers before the e-mail of 24 March 2004 or at any time.'*

*Mr Mikhaylyuk's role.*

489. It is apparent from the matters set out above that Mr Mikhaylyuk was acting on behalf of NOUK and the relevant ship owning companies in relation to the Henriot Finance charters. He carried out the negotiations for the charters and recommended their execution to NSC management. He was in a position to influence and did influence the making of the agreements.

490. In respect of the *Trogir* the Claimants accepted in *Fiona Trust* that she was chartered at a rate within the market range and Andrew Smith J found (1212) that there was nothing unusual about the terms of the charter or how the fixture was concluded. Indeed Mr Mikhaylyuk was doing well for owners in obtaining $ 13,000 a day for a year when the *Tikhvin* and *Temryuk* were chartered at the same rate for 6 months, when the *Trogir* was worth, according to Mr Sakovich, about $ 500 to $ 1000 less (because she had less cargo tank covering) and the charter

was for longer (which would normally imply a lower rate). Mr Nikitin said that from his experience of chartering this vessel Mr Mikhaylyuk was doing everything he could to get good rates.

491. The other charters are no longer said (as they were in *Fiona Trust*) to have been entered into on uncommercial terms, nor are the ship owning companies said to have suffered loss by entering into them. Mr Mikhaylyuk appears to have acted in owners' best interests. In respect of the *Kuzbass* and the *Kaspiy* Andrew Smith J found that the rates were lower than the rates that the market was generally commanding but that there were genuine and cogent reasons that would explain why NSC accepted them. In respect of the *Moscow University* and the *Moscow River* he found that the rates were at the lower end of the market range and that there was nothing to suggests that Mr Mikhaylyuk had been dishonest or in breach of his duties. He reached a similar finding in relation to the *Kaluga* and the *Kazan*.

492. As it happened Mr Nikitin judged the future of the market well and as a result the charters of the vessels were profitable.

493. In those circumstances, is he or Henriot Finance under any liability to account for the profits that have been made?

*The submissions on behalf of Mr Nikitin and Henriot Finance*

494. Mr Berry submitted that, in order for there to be a liability on the part of Henriot Finance/Mr Nikitin to account for the profits made on the Henriot Finance charters it is necessary to show that there was a potential conflict between the interests of Mr Mikhaylyuk and his duty to his principals *in relation to those charters*. But the Henriot Finance charters and the PDVSA charters are different sets of transactions. Even if it be the case that Mr Nikitin, through Amon, was the beneficiary of the money that Mr Mikhaylyuk required Mr Ruperti to pay Amon as the price of securing the PDVSA charters, that affords no basis for saying that there was a realistic possibility of a conflict of interest in relation to the Henriot Finance charters. The money payments went in the wrong direction for that to be so. In ordinary course the briber *pays* the agent. He does not *receive* payment from him. Far from Mr Mikhaylyuk being beholden to Mr Nikitin and, thus, tempted to favour him or his company, the position was the other way round. Mr Nikitin, as the beneficiary of Mr Mikhaylyuk's largesse would, if anything, be beholden to favour Mr Mikhaylyuk and his principals.

495. Knowledge by Mr Nikitin, if he had it, that, in relation to the PDVSA charters, Mr Mikhaylyuk had received a bribe would not affect the *Henriot Finance* charters. In relation to those charters Mr Mikhaylyuk was not receiving any benefit or incentive to favour Mr Nikitin, as he was in respect of the PDVSA charters in the case of Mr Ruperti. If Mr Nikitin was not bribing Mr Mikhaylyuk in relation to the *Henriot Finance* charters, there was no reason why he should have any liability

at law or in equity in respect of those contracts. Bribery by someone else in relation to other contracts (whether known to him or not) was irrelevant to those charters.

496. The fact that no bribes were offered to Mr Mikhaylyuk in relation to the Henriot Finance contracts meant that he had no incentive to act contrary to his duty, was not subject to any conflict of interest and was, as Mr Berry put it, free to allow his duty to guide him. If he had sought bribes in relation to the PDVSA charters, the absence of bribes in relation to the Henriot Finance charters would, if anything, incline him against Mr Nikitin's interests.

497. In order for Mr Nikitin to be liable he would have to have been guilty of some dishonest assistance of Mr Mikhaylyuk's breach of fiduciary duty in relation to the *Henriot Finance* charters. Given that the charters were at commercial rates, with decisions being approved by executives in NSC, Mr Nikitin cannot be said to have known that he was assisting Mr Mikhaylyuk in any breach of fiduciary or any other duty, or even been reckless as to whether he was or not.

498. Further, in order for there to be liability in dishonest assistance there has to be a direct causative link between the act or acts of dishonest assistance and the profits in question. This is to be contrasted with the fiduciary, himself, who must account for all of the profits made while he was acting in a position of conflict of interest. The distinction arises because it is the fiduciary who owes the duty of loyalty and may retain no profits made while he breached that duty. The dishonest assister owes no such duty and is only liable for profits which have resulted from his dishonest assistance.

499. In the case of the *Henriot Finance* charters there was no such link. In the case of dishonest assistance, unlike in the case of bribery, there is no presumption of inducement, let alone a presumption that dishonest assistance in relation to one set of transactions has any causative effect in relation to a completely different set.

500. In this connection he referred me to the following passage in *Snell* 30-079 in relation to dishonest assistance:

> *"If a defendant is proved liable, then he may be required to compensate the trust for losses following from his assistance, or possibly, to account for the profits which accrue to him as a result of his assistance. These two kinds of liability follow from the premise that the defendant is held liable to account as if he were truly a trustee to the claimant."*

And 30-081:

> "*As to profits, the existence and nature of the defendant's liability remain uncertain. It seems clear, at least, that the defendant should not be required to hold a profit resulting from*

> *his wrongful assistance on constructive trust, enforceable by proprietary remedy, unless it accrued to him through use of the claimant's own property. But in principle this limitation should not preclude a personal liability to account for a profit, provided that the claimant proved a sufficiently direct causal connection between the defendant's assistance and the alleged profit accruing to him. On this view, the defendant should only be accountable for profits which he has made personally, as a result of his assistance."*

501. In the present case, he submits the profits which were made were profits on the sub-charters to which any dishonest assistance had no direct causal connection. It was not the making of the charters that made the profit but Mr Nikitin's accurate or fortunate forecast of the upward movement of the shipping market, which many others had foreseen would go in a different direction. As a result he made a profit on the sub-charters when the market rose. When those sub-charters were made any dishonest assistance in relation to the charters was simply past history and Mr Nikitin was no longer in anything equivalent to a fiduciary position. Further, if there had been no dishonest assistance (if there ever was any) the charters would have been made on the same or very similar terms, from Novoship or elsewhere, and the resulting profits on the sub-charters would have been made. Simple "but for" causation was not enough.

502. Mr Dowley submitted that the causal connection must be with the breach not the assistance. He directed my attention to the decision of the Court of Appeal in *Grupo Torras v Al Sabah [No 5]* [2001] 2 Lloyd's Rep 117:

> *"Paragraphs 13 and 14 of the Notice of Appeal criticise the judge's approach to causation, arguing that GT failed to establish a causal link between any acts or omissions on the part of Mr Folchi and the loss which the judge found GT to have sustained. However, we think the judge was right when he said:*
>
> > *"' ... the requirement of dishonest assistance relates not to any loss or damage which may be suffered but to the breach of trust or fiduciary duty. The relevant enquiry is ... what loss or damage resulted from the breach of trust or fiduciary duty which has been dishonestly assisted. In this context, as in conspiracy, it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of trust or fiduciary duty or the resulting loss'.*
>
> *This is the essence of accessory liability clearly spelled out by Lord Nicholls in Royal Brunei".*

*Conclusions*

503. Mr Berry's submissions were powerfully and cogently expressed; but I do not agree with them.

504. Mr Mikhaylyuk required Mr Ruperti, as the price of the PDVSA charters, to make secret payments to Amon and thus, in effect, Mr Nikitin. Mr Nikitin must have been aware that he was receiving a secret and illicit commission in respect of those charters. Exactly why Mr Mikhaylyuk required these payments to be made to Amon/Mr Nikitin is unclear. But, whether it was because Mr Nikitin gave or promised Mr Mikhaylyuk some benefit or because Mr Nikitin had some hold over Mr Mikhaylyuk or because Mr Mikhaylyuk wanted to confer some benefit on Mr Nikitin as part of some deal, actual or prospective or for some other reason, the making of the payment was (as Mr Nikitin must have realised) part of a dishonest arrangement whereby an agent, Mr Mikhaylyuk, secured from a third party, Mr Ruperti, in connection with the making of charters with the agent's principals, the making of a payment in favour of Amon, the benefit of which might otherwise have accrued to his principals, in breach of the fiduciary duty which he owed to them. Mr Mikhaylyuk was thereby favouring Amon and Mr Nikitin and preferring his interests over those of his principals.

505. The likelihood is that Mr Nikitin was well aware that the payment by Mr Ruperti of commission to him was the price for Mr Ruperti obtaining the PDVSA charters and that he agreed with Mr Mikhaylyuk that he should get Mr Ruperti to pay these commissions.

506. But Mr Nikitin would have been dishonest even if he had only known that Mr Ruperti had offered, rather than been required, to make these secret commission payments, or was prepared to do so at Mr Mikhaylyuk's request; or if, contrary to my view, Mr Nikitin was ignorant of the PDVSA charters and only aware, as he must have been, that the money was a secret commission on some form of Novoship business.

507. The Henriot Finance charters, which began to be entered into shortly after the first PDVSA charters were agreed, were, themselves, agreed in the same 16 month period (October 2002 to January 2004) during which the payments to Amon by Mr Ruperti of commissions on the PDVSA charters were sought and made. By reason of the requests for, and the making of, such payments there was a realistic possibility of a conflict between Mr Mikhaylyuk's duty to his principals and his personal interest preventing him from acting with complete loyalty towards them. Having already been prepared to favour Amon, and, therefore, Mr Nikitin once in this way he would be tempted, or have an incentive or be prepared, to favour them again either for the reason he had done so in the first place or some other reason. At the lowest there was a risk that he would do so, such that his principals could not rely on his single-minded loyalty.

508. An ordinarily honest person in the position of Mr Mikhaylyuk would realise that he ought not to be contracting on behalf of his principals with Mr Nikitin's company without their consent, given after they had been informed of what had occurred in relation to the PDVSA charters and that, without that consent, he could not honestly do so. An honest person in the position of Mr Nikitin would realise that he could not honestly contract, through Henriot Finance, with Mr Mikhaylyuk's principals without their knowledge of what had occurred.

509. In those circumstances Mr Mikhaylyuk was in breach of his fiduciary duties to NOUK, and to each of the relevant ship owning companies, in negotiating and recommending the Henriot Finance charters. Such breach was dishonest although that is not an essential ingredient of a claim against Mr Nikitin. Mr Nikitin dishonestly assisted Mr Mikhaylyuk in that breach of duty because he negotiated the Henriot Finance charters, when he knew:

    i) that Amon, his alter ego, had dishonestly received the secret PDVSA charter commission payments made by Mr Ruperti at Mr Mikhaylyuk's direction (and had thereby assisted Mr Mikhaylyuk in the latter's breach of fiduciary duty); and

    ii) that, in negotiating the Henriot Finance charters with Mr Mikhaylyuk and arranging for Henriot Finance to enter into them, he was continuing a relationship which was corrupt in inception and had not been cleansed.

510. It had not been cleansed because, as he must have known, Mr Mikhaylyuk had not (or it was highly probable that he had not) revealed to his superiors that he had required Mr Ruperti to make the payments to Amon, let alone received their informed consent to continue dealing with Mr Nikitin in those circumstances. Mr Nikitin must have known (i) of Mr Mikhaylyuk's conflict of interest (which was obvious to a party to the corrupt relationship); (ii) that Mr Mikhaylyuk could not be trusted to act with complete loyalty to his principals; and (iii) that there was a real possibility that he might be minded to favour Mr Nikitin or his companies in the hope of benefit or for the avoidance of detriment, which at this stage could include any detriment that might arise if the fact that Mr Mikhaylyuk had procured Mr Ruperti to pay Amon in relation to the PDVSA charters became known.

511. Henriot Finance, to which is to be attributed Mr Nikitin's knowledge, assisted Mr Mikhaylyuk's breach of fiduciary duty by entering into the charters in the circumstances that I have described.

512. Put more shortly, the Henriot Finance charters were negotiated between (i) an agent (Mr Mikhaylyuk) who had been bribed in connection with a separate but contemporaneous set of transactions which the agent had carried out while acting for the same principal (NOUK); and (ii) a third party (Mr Nikitin) whom, in the first set of

transactions, the agent had caused his briber (Mr Ruperti) to pay. In such circumstances the beneficiary of the bribe, and now third party, must account for the profits that have resulted from charters which were negotiated by the agent. The fact that in the second transaction the agent is acting for a different set of associated ship owning companies makes no difference.

513. As to causation, the question is whether the dishonest assister is in a similar position, so far as his profits are concerned, as the fiduciary is in respect of his.

514. I was invited not to order Mr Nikitin and Henriot Finance to account in the light of the decision of Toulson J, as he then was, in *Fyffes v Templeman* [2000] 2 Lloyd's Rep 643. In that case, whilst holding that the briber of an agent may be required to account to the principal for the benefit obtained from the corruption of the agent, the judge declined to order an account against the briber because, as he held, the claimant would have entered into the service agreement into which it did enter but on somewhat more favourable terms. The difference in terms was covered by the claim in damages, for which he gave judgment, and it would, he held, be inequitable to order an account of the profits made since it was no more than the ordinary profit element in a service agreement of the relevant kind.

515. In *Murad v Al Saraj* [2005] EWCA Civ 959 the majority of the Court of Appeal considered this approach inconsistent with the principle laid down in *Regal (Hastings) Ltd v Gulliver:* [1967] 2 AC 134n and other authorities, which had not been cited to Toulson J, and precluded by them. *Regal* involved a claim against a fiduciary and is thus, so far as concerns a case against an assister, *obiter*. In respect of a claim against a fiduciary it would be inconsistent with *Regal* to decline to order an account on the ground that the principal would have entered into the transaction in any event. By contrast *Fyffes* concerned a claim against a briber, and, thus, an assister. But the majority did not treat that as a material difference.

516. The basis on which an account of profits is ordered *against a fiduciary* is not to compensate the principal for the losses he has suffered or to make some form of restitution. Its purpose is "*to strip a defaulting fiduciary of his profit*" *per* Arden LJ in *Murad* [56]; and Jonathan Parker LJ [108]. If the conduct complained of falls "*within the scope and ambit of the duty*" [112] (e.g. if the agent has made a profit in the course of his agency in circumstances where there is a potential conflict between interest and duty), then the liability to account arises. There is no additional need to show that the profit was obtained by the fiduciary "*by virtue of his position*": *ibid* [57][62]. This is a "*stringent liability on a fiduciary as a deterrent – pour encourager les autres*" [74].

517. Accordingly, as Arden LJ said [67]:

> *'. . . the fact that the fiduciary can show that that party [the beneficiary] would not have made a loss is, on the authority of the Regal case, an irrelevant consideration so far as an account of profits is concerned. Likewise, it follows in my judgment from the Regal case that it is no defence for a fiduciary to say that he would have made the profit even if there had been no breach of fiduciary duty.'*

518. It seems to me that the same should apply to the assister in respect of whom the need for deterrence is similar. If the basis of ordering an account against a fiduciary is that

> "*it would be contrary to equitable principles to allow a person to retain a benefit that he gained from a breach of his fiduciary duty, it would appear equally inequitable that one who knowingly took part in the breach should retain a benefit that resulted therefrom*"; Gibbs J in *Consul Development v DPC* [1975] 132 CLR 373,397.

519. In the present case, a sufficiently direct casual connection between the assistance and the profit is to be found given that the profit from the deployment of the vessels the subject of the Henriot Finance charters could not have been earned unless those charters had been entered into, and is, thus, a profit which results from Henriot Finance entering into those charters – which, itself, constitutes the dishonest assistance given to Mr Mikhaylyuk's breach of fiduciary duty.

520. Thus, for the reasons set out in paras 504 ff Mr Mikhaylyuk was in breach of his fiduciary duty when negotiating the Henriot Finance charters, and Mr Nikitin and Henriot Finance dishonestly assisted that breach. The latter two are liable to account for the profits made by them from these charters. It is no defence to say that the charters were at commercial rates and not disadvantageous to the owners; or that, if there had been no breach of fiduciary duty, they would have been made anyway and at the same rates or that Henriot Finance would have made the same profit anyway by the charter of other vessels.

521. Further, it seems to me that, if Mr Mikhaylyuk's principals had known of the payment of bribes by Mr Ruperti, paid to Mr Nikitin via Amon, the Henriot Finance charters would not have been made. It was also, in my judgment, Mr Mikhaylyuk's duty to disclose those bribes – see *Crown Dilmun v Sutton* [2004] 1 BCLC 468, *per* Peter Smith J [181], citing his earlier decision in *Tesco Stores Ltd v Pook* [2003] EWHC 823 (Ch).

522. I turn to the question whether a) an account of profits may be ordered in respect of a cause of action for bribery and whether b) any presumption of inducement applies to dishonest assistance.

523. As to the former, I do not propose to reach any conclusion in relation to the Nikitin defendants. In respect of the PDVSA charters there are

claims both in bribery and dishonest assistance. Amon was party to the bribery in the sense that it received the money. But, in respect of those charters, it was not the briber nor did it (or Mr Nikitin) make any profit for which they should account. In the case of the Henriot Finance charters Mr Nikitin and Henriot Finance were not bribers but dishonest assistants to Mr Mikhaylyuk in respect of his breach of duty and are liable to account for the reasons set out above. It is unnecessary to decide whether they should also account on another basis.

524. As to the latter, it does not seem to me that any presumption should arise in this case. Whatever may be the position in respect of the dishonest assistant of the briber in respect of the transaction to which the bribe *directly* relates, liability in respect of the Henriot Finance charters depends on whether, when they were entered into, there was, in the light of what happened in relation to the PDVSA charters, a realistic prospect of a continuing conflict of interest and duty or whether that possibility no longer existed, e.g. because of the passage of time or a difference in circumstances. That is a matter of assessment, not presumption.

525. Lastly, Mr Nikitin and Henriot Finance cannot pray in aid Mr Nikitin's commercial acumen in chartering long term as a reason not to have to account. He made large profits because he judged the market well but that does not alter the fact that the source of those profits was the chartering of vessels through a bribed agent by his company when he, via another company, was the beneficiary of the bribe.

526. In those circumstances, as I hold, Mr Nikitin and Henriot Finance are liable to account to NOUK and to each of the relevant ship owning companies in respect of the vessels other than the *Kuzbass* and the *Kaspiy* (which were under the management of NSC), and to NOUK in respect of those two vessels, for the profits made by Mr Nikitin and Henriot Finance on the Henriot Finance charters and to pay what is due on the taking of the account.

527. In my judgment that entitlement also extends to NOUK in respect of the *Kuzbass* and the *Kaspiy* since in arranging these charters Mr Mikhaylyuk was still acting as an employee of NOUK. He had, as General Manager of NOUK, arranged the hire of the *Trogir* and he was asked by Mr Izmaylov to assist in that capacity in the fixture of these two vessels when on holiday in Russia. He was never at any material time an employee of any Novoship Group company other than NOUK. The relevant e-mails were sent from his NOUK address and signed by NOUK "*as agent only*". He availed himself of a chartering report from the chartering department of NOUK in fulfilling his task. He received no reward from NSC. In carrying out this task Mr Mikhaylyuk was acting as an employee and agent of NOUK, and owed it fiduciary duties, even though NOUK, through him was acting for the ship-owning companies which were subsidiaries of Intrigue and, like NOUK, indirect subsidiaries of NSC.

528. Accordingly, in negotiating the charters of these two vessels, he owed fiduciary duties to NOUK. As a result those who dishonestly assisted him in the breach of those duties are liable to account to his principals for the profits made thereby. It is no bar to NOUK recovering the profits that Mr Mikhaylyuk and NOUK may also be liable to the owners of the two vessels; or that NOUK could not have earned the profit itself.

529. The account must be against Henriot Finance, who were the immediate earners of the profit, and also against Mr Nikitin, who was the architect of the dishonest assistance effected through him and Henriot Finance, which was both his *alter ego* and the company which he chose as the immediate destination of the profits. It is not necessary to determine where, as between those two, the profits have ended up. That does not mean that the Claimants are entitled to recover twice: only that both are accounting parties. I decline, however, for the reasons set out in paras 97 - 100 above to make an order against Mr Mikhaylyuk since the profits on the Henriot Finance charters are in no sense his.

530. I recognise the severity of this conclusion in circumstances where the Henriot Finance charters are not said to have been entered into at below market rates. It results from the fact that the English Courts have steadfastly set their face against bribery and corruption, whose prevalence in cases coming before this Court shows no sign of reducing, and have, for that purpose, fashioned draconian remedies whose intended effect is to deprive those who are party to bribery, whether as briber or beneficiary of the bribe, of any profit from transactions which its taint pollutes, which may not be limited to the transaction in respect of which the bribe was given in the first place.

531. It has not been suggested to me that I should make any allowance for Mr Nikitin's skill and judgment in deciding to enter into the Henriot Finance charters, and I do not propose to do so.

532. I do not accept that it would be inequitable to require an account of profits on the ground that a claim for the confiscation of the profits is being pursued in criminal proceedings in Russia and for compensation in the amount of those profits in civil proceedings and that bank accounts of some of Mr Nikitin's companies including Henriot Finance have been frozen in Switzerland at the behest of the Russian State and that the English Court had dismissed an application to extradite Mr Nikitin to Russia. The remedy of an account is the relief to which, after a full trial, at which Mr Nikitin and Henriot Finance have been ably represented, I have concluded that the Claimants are prima facie entitled and I do not regard them as having done anything of such a nature as to disentitle them to it.

533. At the beginning of the trial I declined to stay the proceedings as an abuse of the process of the court for the reasons that I then gave. The points then relied on in favour of a stay fare no better if deployed in support of the contention that there should be no account of profits.

534. The profits themselves are considered in reports from two accountants: Mr Andrew Grantham (on behalf of the Nikitin Defendants) and Mr Dominic Wreford (on behalf of the Claimants). There is a very large measure of agreement between them. The outstanding issue is essentially in relation to certain items of principle, such as whether certain items of expenditure should be included as expenses in calculating the profits earned by Henriot Finance, when they were paid for by other companies controlled or owned by Mr Nikitin. I am told that, when I have resolved those matters, it will be possible for the accountants to determine the appropriate figure. My conclusions on those issues are set out in the Appendix hereto.

*The Stena Charter claims*

535. These claims relate to the following four vessels ("the T vessels"):

i) the *Timashevsk,* owned by the Fifth Claimant, Timashevsk Shipping Inc;

ii) the *Taman,* owned by the Sixth Claimant, Taman Shipping Inc;

iii) the *Tver,* owned by the Seventh Claimant, Tver Shipping Inc; and

iv) the *Troitsk,* owned by the Eighth Claimant, Troitsk Shipping Inc.

536. The Claimants advance the following claims:

a) First, they allege that, in connection with these (and other) charters[57], substantial payments were made by Odin Marine Inc ("Odin Marine") to Pulley Shipping for the benefit of Mr Mikhaylyuk. $ 1,228,898.20 was paid during the period 24 September 2004 to 23 January 2006.

b) Second, they say that $ 803,355.20, being 1.25% of the hire of the T Vessels, was dishonestly diverted from the Claimants for the benefit of Mr Mikhaylyuk under the pretence that such monies were required to pay address commissions to the charterers, Stena[58]; and

c) The third part of the claim concerns a claim made against the Claimants by their former brokers ACM Shipping Ltd ("ACM Shipping"), resulting from Mr Mikhaylyuk's actions.

[57] The other charters in question are charters of the *Tikhvin,* the *Tikhorestsk,* the *Tomsk,* the *Tambov* and the *Temryuk* each of which was chartered to Stena on various dates from 2001 to 2004 with Odin Marine acting as Stena's brokers. These vessels are not part of the present claim.

[58] See Schedule 2 to the Particulars of Claim.

*The 1999/2000 Charters*.

537. In 1999 and 2000, the T vessels were chartered to Stena Bulk AB ("Stena"). In the cases of the *Timashevsk,* the *Taman* and the *Tver,* the charters were dated 17 December 1999 and were for an initial period of 3 months. This period was extended by addenda until 2003. The charter of the *Troitsk* was dated 5 May 2000 and was for an initial period of 6 months. This charter was also extended until 2003[59]. In each case, the broker acting for the owners was ACM Shipping and the broker acting for the charterers was Odin Marine.

538. Each of these charters provided for the payment of commission as follows:

> *'A brokerage commission of 1.25 percent is payable by Owners to ODIN MARINE, INC and 1.25 percent to ACM SHIPPING LTD on all hire payments earned under this Timecharter Party.'*

*The 2003 charters*

539. The T vessel charters were all renewed by charters dated 3 July 2003 for a period of 18 to 24 months, at the charterers' option.

540. These renewals were negotiated by Mr Mikhaylyuk, on behalf of the owners, and Odin Marine, in the person of Mr Per Tetzlaff, on behalf of Stena. ACM Shipping was not involved in the renewals and the fact of the renewals was not communicated to them. The significance of this is that, in the normal way, a broker who has negotiated a charter and is entitled to commission as a result is regarded as entitled to commission on any renewal or extension of that charter. The 2003 renewals omitted mention of any commission for the benefit of ACM Shipping. Instead of the commission clause set out in the penultimate paragraph, the 2003 charters contained the following:

> '*A total commission of 2.5% (Address commission and brokerage commission of 1.25% to Odin Marine, Inc) to be deducted from freight.'*

*The 2005 renewals*

541. The charters were all renewed again by time charters dated 7 April 2005. The charters were for periods of 30 to 36 months, at the charterers' option. Each of these charters was negotiated between Mr Mikhaylyuk and Mr Tetzlaff. Each charter included the same commission clause as before, including the 1.25 per cent address commission.

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[59] StenTex LLC signed the charters as agents for Stena Bulk AB.

542. Mr Oskirko's evidence is that he was told by Mr Tetzlaff of Odin Marine in July 2006 that Odin Marine had made payments to Mr Mikhaylyuk and that Mr Mikhaylyuk had told him that the payments were made on the instructions of "senior Novoship management". When he met Mr Tetzlaff in September 2006, Mr Tetzlaff gave him a written document setting out Odin Marine's version of the relationship between Novoship and Odin Marine. Included in that document was the following statement:

> '*Pressure was put on us at Odin for some time to "change" the way we did business, we were directed by Novoship Management, which I will expand upon at our meeting, that there were certain procedures to follow and no business could be approved at board level without some understanding of compensation. We disclosed this to Stena as well, who did not participate other than knowingly allowing Odin to provide funds against invoices for part of the commissions earned.*
>
> . . . .
>
> *'As per your request, we have enclosed copies of invoices in reference to payments made.'*

Mr Tetzlaff provided Mr Oskirko with a series of written payment requests on NOUK headed writing paper which appeared to have been signed by Mr Mikhaylyuk. There were twenty-two such requests, the first dated 5 January 2004 and the last dated 20 January 2006. A list of these is set out in Schedule 1 to the Particulars of Claim. The total of such requests was for $ 1,211,183.07.

543. In 2007, after the present proceedings were commenced, the Claimants obtained documents from the Bank of Nevis International, pursuant to an Order of the High Court of Nevis. The statements of Pulley Shipping's account which were provided showed that, from September 2004 to 23 January 2006, twenty payments were made by Odin Marine to Pulley Shipping. The total of such payments was $ 1,228,898.20. In the case of 13 of the payment requests the payments tally exactly and the date of the payment is very shortly after the request. In 8 cases the request does not tally exactly with any payment. The total amount requested and the total amounts paid differ by $ 17,715. However, in an e-mail in September 2006 Mr Tetzlaff said that the first instructions were sent by computer some years ago (and recorded on computers which were no longer retained) and in recent years verbally and that they had a practice of accumulating commissions (and deducting their own commission) and paying the balance as instructed which would prevent them linking payments to particular periods. In those circumstances the fact that the total paid is more than the requests and that some of the requests do not tally with a specific payment is not surprising.

544. After Mr Mikhaylyuk was dismissed, Odin Marine stopped paying Pulley Shipping and started accumulating the sums, ultimately paying them to NOUK.

545. The Claimants originally contended that the signatures on the payment requests were those of Mr Mikhaylyuk. They now accept that the signatures are forgeries; although whether they were created on Mr Mikhaylyuk's instructions or by Odin Marine, using NOUK paper, so as to justify payment is unclear. The actual forger is unknown.

546. I am, however, quite satisfied that Odin Marine paid the sums which it paid to Pulley Shipping for the benefit of Mr Mikhaylyuk and that such payments were kept secret from and unknown to Mr Mikhaylyuk's principals. As I have found, Pulley Shipping was established by Mr Mikhaylyuk and operated for his benefit and Mr Tetzlaff's September document confirms that which is, in any event, apparent, namely that these payments were bribes.

547. Although the charters for the T vessels, when renewed in 2003 provided for an address commission to charterers of 1.25%, Stena had not requested and did not require, receive or retain address commission. That that is so is apparent from what is set out in the following paragraphs.

548. On 30 December 2006, Mr Oskirko contacted Mr Klas Eskilsson, the Vice-President and Head of Stena Bulk USA, in connection with the charters. He e-mailed Mr Eskilsson to ask for a meeting to discuss the T vessel charters and offered to forward a letter with details. On 3 January 2007 Mr Eskilsson replied, agreeing to a meeting and asking for the letter. The letter from Mr Oskirko was dated 28 December 2006. In it Mr Oskirko asked for an explanation about the payments to Pulley Shipping. Mr Eskilsson replied on 12 January 2007 that Stena was very much concerned and would revert as soon as Stena had had an opportunity to look into the matter. He suggested that they meet as soon as possible.

549. There was then a meeting in London on 2 February 2007, at which Mr Eskilsson said that Stena did not know anything about any agreement or arrangements in relation to address commission and that Stena had transferred the full amount of the hire to Odin Marine. After this Mr Oskirko wrote to Mr Eskilsson the following e-mail on 5 February 2007:

> *'Thank you very much for your time and information you have provided at the meeting in London. I hope you are back to the office safe and sound.*
>
> *'<u>May I ask you please to confirm at your earliest convenience that neither Stentex LLC nor Stena Bulk were involved into the payment of the address commissions related to various TC/P concluded with respect to T-Class product tankers</u>?*

*'Se we can ask Odin for further explanations.'*

550. Mr Eskilsson replied on 7 February 2007:

> '*As I mentioned during our meeting, we have not been involved in payment of address commissions as referred to in your mail.'*

551. Mr Oskirko wrote to Mr Eskilsson on 7 February 2007 and asked him to confirm (among other things) that Stena had not received any address commission on the charters. Mr Eskilsson replied by e-mail dated 23 February 2007:

> *'I refer to our E-mail exchange of early February and your letter of February 7. As explained when we met and in my E-mail of February 7, we have not been involved in payment of address commissions in relation to these charters*.'

552. I see no reason not to accept, as I do, what Mr Eskilsson says in these e-mails, which were the subject of a notice under the Civil Evidence Act.

553. After these e-mails, Mr Eskilsson and Stena declined to answer further questions. This appears to have been, at least in part, because they feared that Stena might be subject to a claim.

554. Stena did, however, provide Novoship with a copy of the 2003 charter of the *Troitsk* which was in their possession. This has the following commission clause:

> *'47 COMMISSION*
>
> *A total commission of 2.5% payable to Odin Marine, Inc. for division, to be deducted from freight."*

Thus, in Stena's copy of the charter, which Mr Oskirko said was obtained from Stena after the issue had arisen, there was no reference to address commission, whereas in the Novoship copy the commission clause was as set out in para 540 above. This is confirmation that Stena were not expecting address commission for themselves on the charter[60].

555. Although Stena did not ask for and were not expecting payment of address commission on the charter, address commissions were, nevertheless, deducted from the hire paid to the owners. The Claimants are not aware of what became of them. They submit, and I agree, that the proper inference to be drawn is that Mr Mikhaylyuk and Mr Tetzlaff both knew that Stena did not require address commissions and included a term providing for payment of address commissions with

[60] In paras 155 to 159 of his fifth witness statement, Mr Mikhaylyuk denies any knowledge of this Stena charter.

the purpose of diverting the monies for their own benefit, or at least for the benefit of Mr Mikhaylyuk. In order to do that and, at the same time keep the total commissions at a reasonably acceptable level of 2.5 per cent, Mr Mikhaylyuk and Mr Tetzlaff cut ACM Shipping out of the renewals, thus saving ACM Shipping's 1.25 per cent.

556. The Claimants accept that it is possible that the address commissions were used to fund part of the payments totalling $ 1,288,898.20 to Pulley Shipping's account. But they point out that the figures do not tally since the total address commission on the four T vessels at 1.25% amounts to only $ 803,355.20. There were, however, 5 other T vessels which were chartered to Stena on various dates from 2001 to 2004 in which Odin Marine acted as Stena's brokers, commission on which may contribute to the larger figure.

557. The Claimants have settled their claim against Odin Marine and I have not, therefore, received any evidence from that company. Odin Marine had, however, previously filed evidence in these proceedings in the form of a witness statement by Ms Jane Seatree of Holman Fenwick & Willan dated 9 June 2009.

558. That statement, made on the basis of discussions with Mr Tetzlaff and Mr Jaffe (Odin's US Counsel), stated that it was Odin Marine's position that Stena were fully aware of the arrangements for paying Pulley Shipping and authorised Odin Marine to do so, and that Odin Marine believed that the payments to Pulley Shipping were legitimate and had been sanctioned by NSC/Novoship and that Pulley Shipping was an entity used by NSC/Novoship for the purpose of remunerating NSC/Novoship's management. The payments to Pulley Shipping were funded by Stena out of Stena's address commission. Payment requests were received on Novoship's notepaper. She exhibits one of the requests with the forged signature.

559. I do not regard it as established that Stena knew of the arrangement to pay Pulley Shipping. But, even if they did, it would still constitute a bribe. Nor do I accept Mr Mikhaylyuk's contention that Stena insisted on the inclusion of a provision for address commission when ACM ceased to be broker.

560. I am not, however, satisfied that $ 1,228,898.20 and $ 803,355.20 are wholly separate. It seems to me unlikely that Mr Mikhaylyuk arranged for Pulley Shipping to be paid the 1.25% so-called "address commission" on the "T" vessels, which would come from Odin Marine, who were paid the full hire by Stena, together with additional amounts totalling $ 1,228.898.20. It is more likely that the scheme was for Stena to pay the full amount of hire to Odin Marine on the footing that, so far as Stena was concerned, Odin Marine was entitled to 2.5% brokerage for division. In the event 1.25% of that would stay with Odin Marine and Pulley Shipping would be paid from the other 1.25% (although whether they were paid the full 1.25% is not clear).

561. That would be consistent with Miss Seatree's statement where she says:

> "*I am informed by Per Tetzlaff that in the period before June/July 2006, Stena paid over the address commission to Odin together with the other sums due to Odin and Owners, and the relevant amount to be paid to Pulley was then paid out of that address commission.*
>
> *The remainder was later repaid to Stena."*

562. The reason why it is not possible to tell where the $ 803,355.20 went is because that figure is simply a calculation of 1.25% of the hire on the four T vessels the subject of this action. The $ 1,228,898.20 which Pulley Shipping is known to have received is likely to include that figure. If there was a separate payment of $ 803,355 it would in all probability have been paid to Pulley Shipping but there is no trace of that. It is also difficult to see where it would come from unless Odin Marine was not to receive 1.25% brokerage.

563. Novoship's records contain hire statements from Stena forwarded by Odin Marine in advance of each payment, which, in the period prior to mid 2006 during which the 2.5% commission was paid to Odin Marine, for the most part do not refer to address commission. There are, however three exceptions. The June 2005 statement for the *Timashevsk,* the July/August 2005 statement for the *Tikhvin* and the December 2005/January 2006 statement for the *Tikhvin* do refer to address commissions. Why these statements referred to address commission and the others did not is unclear.

564. What is clear is that Mr Mikhaylyuk, in arranging for payments to be made to Pulley Shipping by Odin Marine (whether with or without the knowledge of Stena) and in allowing Pulley Shipping to accept them, acted in breach of his fiduciary duties and is liable to account to the Claimants for the $ 1,228,898.20 paid. It is not possible to separate out the amounts due to the 5th, 6th, 7th and 8th Claimants, the owners of the relevant vessels. Mr Mikhaylyuk's liability is to account to them and NOUK for that sum. He is not, however, in my judgment bound to account for $ 803,355.20 in addition.

565. Mr Mikhaylyuk pleads that the payments made by Odin Marine to Pulley Shipping were payments made to reward him for advice which he gave to Stena. I reject this suggestion which, as before, was not supported in the witness box for the following reasons.

566. Mr Mikhaylyuk has provided no documentary evidence of ever having been asked for any advice by Stena. There is documentary evidence connecting him with a possible sale of vessels to Stena, including four new build vessels under construction in Croatia ("the Uljanik tankers") - but this related to Novoship business and shows that Mr Izmaylov was involved in the discussions. As I have said, I regard the critique

made by the Claimants in Annex 3 to the Claimants' opening submission of the suggestion that Mr Mikhaylyuk was being paid for advice to Stena unrelated to the Claimants' business as well founded. It is wholly implausible to suppose that Mr Mikhaylyuk was giving Stena advice worth over $ 1.2 million, a sum many times his annual salary from NOUK. Mr Sakovich, Mr Oskirko and Mr Vyvorotnyuk were unaware that Mr Mikhaylyuk was authorised to work for Stena, let alone to work for this sort of reward, and I am satisfied that he was not. It is difficult to see why any such authority should ever have been given since Stena was a competitor of the Claimants.

567. Further, there is no documentary evidence of any work product, no record of any advice and no written communication with any third party relating to such advice. No evidence has been produced from Stena (or Odin Marine) of any advice given to them. If advice was being given to Stena it is unclear why payment came from Odin Marine. No invoices were ever rendered by Mr Mikhaylyuk himself and he has been unable to explain how the payments were calculated**:** see his Further Information, Answer 36. If these payments were what they are said to be he would have known something about that. The amounts paid look much more like a proportion of something such as a monthly hire payment. Although the requests for payment on NOUK paper do not bear Mr Mikhaylyuk's true signature the likelihood is that they were either produced on his direction or with his knowledge to give cover for the payment or by Odin Marine in an attempt to justify the payments. There would be no need to produce false documents if the payments were bona fide in respect of genuine consultancy work. The payments were made to Pulley Shipping, Mr Mikhaylyuk's secret offshore account. No tax was paid in respect of them. Mr Mikhaylyuk said that he did not believe that to be necessary, which is difficult to accept given that he was based in England. Odin Marine only ceased to make payments shortly before Mr Mikhaylyuk left. The last payment was on 26 January 2006.

568. In short these payments were bribes. Mr Mikhaylyuk accepts in para 34 of his opening statement that he kept the scale of his payments secret. Even if he had revealed that he was receiving some payment (which he did not) and obtained consent to do so, the scale of his remuneration, unrevealed, would have given rise to a conflict of interest and would, in any event, have meant that he had never obtained his principals' fully informed consent.

569. Accordingly Mr Mikhaylyuk is bound in equity to account to NOUK and the relevant ship-owning Claimants for $ 1,228, 898.20 which is money had and received to their use and which NOUK is also entitled to receive as damages or equitable compensation

*The ACM Shipping Claim*

570. On the footing that the 2003 renewals were extensions of charters which ACM Shipping had originally been instrumental in arranging,

ACM Shipping expected to be entitled to continued brokerage on the renewed charters, even if not involved in the renewals.

571. Mr Ware was a broker in NOUK's chartering department. His evidence is that at the time of the 2003 renewals Mr Mikhaylyuk told the Chartering Department that he intended to cut ACM Shipping out and asked that no-one outside the department be told. He says that Mr Offred Shaw, a member of the department who died in 2006, and others in the department, told Mr Mikhaylyuk that this could not be done as ACM Shipping were entitled to their commission. Later he found out that Mr Mikhaylyuk who had sole responsibility for the renewals of long term charters had done this anyway. The evidence of Mr Funder, an assistant in the Chartering Department, whose function was to input charter details into the company's online database from the charter recap, was that, when in 2003 he learnt that ACM Shipping had been cut out, he made clear to Mr Mikhaylyuk that this was irregular and unethical. That was his view and that of Mr Ware. I accept their evidence.

572. On 21 October 2003 ACM Shipping learnt from an email from Mr Daniel Probyn of Novoship that the charters of the T vessels had been renewed and extended. Mr Tetzlaff asked Mr Mikhaylyuk what was going on and he replied that a young operator had sent the message out and he was furious about it. He asked if Mr Tetzlaff could sort the matter out and, if not, proposed an agreed termination of the charters, followed by a spot voyage fixed to a charterer selected by Stentex with a different name followed by a new charter in direct continuance of the spot voyage for each ship in order to "*settle the situation*". In an email of 12 November 2003 Mr Mikhaylyuk observed *"we may be liable for a lot of money if this broker proves we cut him out"*.

573. Mr Mikhaylyuk's pleaded case in relation to the cutting out of ACM Shipping from the charters is that he does not admit that ACM Shipping were or would claim to be entitled to brokerage commission on the 2003 charters and he denies that he concealed the 2003 charters from ACM Shipping.

574. In his fifth witness statement, Mr Mikhaylyuk says that the 2003 charters were new charters entered into as a part (Part B) of a transaction which also involved the sale to Stena of the Uljanik tankers (Part A) and that the two elements of the transaction were dependent upon each other, in the sense that either both would go ahead or neither would. He says that Mr Oskirko specifically told him not to use ACM Shipping. In the event, according to Mr Mikhaylyuk, the sale transaction was not agreed by the time the charters expired and therefore the charters were extended until October 2003 (at which point the sale transaction was completed) and Stena then suggested that the charters be backdated to July 2003 to cover the period between the end of the previous charters and October 2003 and Mr Oskirko agreed to this. Mr Mikhaylyuk also says that ACM Shipping were not entitled

to brokerage on the 2003 charters because they were included as part of a new deal.

575. It is fairly plain from the contemporaneous documents that the charters in question were regarded as renewals or extensions. They were to take effect for two years in direct continuation of the expiring charters and were agreed by 7 July 2003 (see the recap of that date[61]) albeit with a right to cancel should charterers not lift their BOD subjects on Part A. There is a further recap on 27 October 2003 on the same terms save that the period is 18 months, maximum 24 months in charterers' option.

576. Mr Mikhaylyuk claims that ACM Shipping was cut out on Mr Oskirko's instructions. Mr Oskirko had told him to cut ACM Shipping out in 1999 as a result of allegations that Mr Amato of ACM Shipping was paying secret commissions to Mr Burima of NSC[62]; and there had been a continuing campaign on Mr Oskirko's part to remove them. This does not tally with the contemporaneous correspondence. Mr Oskirko's e-mail of 16 January 2001 calls for the spreading of business between several brokers at a time when ACM Shipping accounted for about 56% of the group's time charter business: see para 180 (i) above. This was not an instruction to cut ACM Shipping out completely. Mr Oskirko simply wanted NSC to be less dependent on a few brokers. Mr Funder's evidence was that the chartering department of NOUK was unaware of any instruction to cut ACM Shipping out.

577. In his 24 January 2001 e-mail to Mr Mikhaylyuk (see para 180 (ii)) Mr Oskirko agreed that they should work Venezuelan business direct because Mr Ruperti had lost trust in Mr Amato, saying:

> '….*Understand that as far as the ships were re-delivered from the previous fixture all new deals to be considered as new fixtures. Thus there are no legal or any other consequences that we do not use the London broker any more…..*'

As that expression of understanding and Mr Oskirko's evidence shows, he did not intend there to be a breach of any obligations owed to the broker ACM Shipping.

578. Mr Oskirko's evidence was that he did not recall discussing ACM Shipping in connection with the 2003 charters at all, since he was involved with the sale part of the transaction rather than the charters. His involvement was limited to confirming on 8 May 2003 to Mr Mikhaylyuk, on Mr Izmaylov's instructions, owners' agreement to the terms. This is consistent with the correspondence which shows that the

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[61] L7/227.

[62] Mr Oskirko confirmed that he was aware of rumours to that effect at some stage. They were not the reason that he wanted to reduce ACM involvement in Novoship business. Mr Burima's evidence is that any such allegation is untrue; he received no payments from ACM Shipping. He also says that he cannot recall hearing of such an allegation.

cutting out of ACM Shipping on renewal in 2003 was decided on before Mr Oskirko's involvement in the negotiations between Mr Mikhaylyuk and Mr Tetzlaff: see L7/18, 21, 26 (the first reference to commission being 2.5% including 1.25% address), and 30, none of which were copied to Mr Oskirko.

579. When ACM Shipping found out about the charter renewals they took a strong line in seeking to recover the commission. Mr Salmon considered that the matter should be settled.

580. Counsel's opinion was obtained. In March 2006 he thought that owners were vulnerable in respect of commission in the period down to 27th October when the Part A and Part B negotiations concluded and there was a recap including Part B. But he thought that they were not open to a claim for commission on the new charters commencing on 27 October 2003 because the court would find that the new charterparties were genuine new ones and not extensions of the old.

581. In April 2007 he thought that advice over optimistic and that there was a real prospect of the court deciding that the charterparties had been renewed. He regarded the correspondence at para 572 above as very damaging and evidence of a deliberate attempt to squeeze ACM Shipping out (which it was) and observed that the fact that there were two recaps, one in July and another in October, had not been satisfactorily explained in conference and remained unexplained.

582. The Settlement Agreement was dated 2 August 2007. Under its terms, NOUK agreed (i) to pay ACM Shipping $ 200,000, comprising (a) $ 81,900 by way of commission already invoiced by ACM Shipping for the period 2 July 2003 to 26 October 2003, amounting to $ 20,475 in respect of each vessel; and (b) $ 118,100 *in lieu* of interest; and (ii) to assign brokerage commission to ACM Shipping on their next intended time charter of the *NS Lion* at 1.25 per cent on $ 29,000 per day over three years. NOUK also agreed that, if the charter were extended, ACM Shipping should be paid commission on the extension and to arrange that the value of the commission was guaranteed for the full three year period, thus totalling US $ 396,937.50.

583. The Claimants accept that there is no basis for claiming amounts which, if ACM Shipping had not been cut out, they would have had to pay. The settlement was for less than those sums. Their claim is for the £ 50,965 expended in legal fees in investigating, and negotiating a settlement of, ACM Shipping's claims.

584. In my judgment the Claimants are entitled to recover the £ 50,965. These costs were incurred because, in breach of his duty, Mr Mikhaylyuk cut ACM Shipping out without authority (Mr Oskirko not wishing to cut down on brokers if that involved legal consequences) in order that he could enrich himself with the commission that would otherwise be paid to them.

585. I have not been addressed at any length as to whether the chartering arrangements from 2003 onwards are truly to be regarded as renewals or extensions on the one hand, or entirely new contracts on the other, or as to the entitlement of ACM Shipping to commission on a renewal or extension, even if they played no part in it, and it is not necessary to reach a conclusion on that question. It was plainly the view of the chartering department that they would be so entitled, that that was the practice, and that, if ACM Shipping were cut out and learnt about it they would make a claim, as they did. That must also have been the view of Mr Mikhaylyuk since he took care to disguise from ACM Shipping the fact that they were to be cut out, and to devise a plan for an intermediate voyage charter, to avoid having to pay commission or face a claim.

586. In those circumstances NOUK is entitled to recover the cost of dealing with the claim as damages for breach of fiduciary duty and conspiracy with Odin Marine to injure NOUK and their principals by cutting ACM Shipping out. The 5th, 6th, 7th and 8th Claimants are entitled to judgment for £ 12,741.25, since the relevant ship owning claimants are bound to indemnify NOUK, their agent. Their exposure to the claim arose because of Mr Mikhaylyuk's breach of duty.

587. The question arises as to whether credit should be given against that sum for the profit (in a sense) made by settling with ACM Shipping in an amount representing less than they would have been paid if they had not been cut out. I answer that question in the negative. The cost of investigation of the merits and dealing with the ACM Shipping claim is a quite separate head of loss. In *R & V Verisischerung AG v Risk Insurance* [2006] EWHC 1705 Tomlinson J, as he then was, held that it was not open to the defendants to set off against a claim for management time and other costs of investigation the profits that were said to have been earned as a result of the Claimants being bound to a business to which the conspiracy in question related. The conspiracy was designed to ensure, by unauthorised Addenda to certain Binders that Risk Insurance obtained a larger commission than the Binders contemplated.

588. NOUK is entitled to judgment for the £ 50,965. It seems to me to be NOUK and not any of the 5th, 6th, 7th and 8th Claimants which is entitled to judgment since it was NOUK which paid the sum and incurred the liability.

*The Tula payments*

589. The *Tula* was a vessel owned by Tula Shipping Inc, a Liberian subsidiary of NSC. She was managed and operated by NOUK. She was chartered to Andorra Services Limited ("Andorra Services") under a charter dated 25 February 2004 for twenty-four months at a rate of $ 16,350 per day.

590. The brokers who acted on behalf of the owners were Argent Shipping Limited ("Argent"). Mr Iain Rennie, who worked for them at the time, gave evidence, pursuant to a letter of request, by video link from Singapore, where he currently works in a job with no connection with the Claimants. I found him an honest and reliable witness, who was most unlikely to have been mistaken or to have misunderstood what occurred, not least because his account, which has remained consistent since 2006, placed him in a somewhat uncomfortable position. His evidence explains how the charterers came to make payments of $ 400 per day to the Bank of Nevis International account of Mirador Shipping at the request of Mr Mikhaylyuk.

591. His account, which I accept, was as follows:

i) The *Tula* was marketed by Argent at Mr Mikhaylyuk's request. Kingfish Services Limited ("Kingfish"), a ship broking company, indicated in January 2004 that its client (Andorra Services) was interested in a 24 month charter. Negotiations followed but there was no indication that owners would require any additional payment.

ii) On 13 February 2004 Mr Mikhaylyuk telephoned Mr Rennie telling him that unless an additional $ 400 per day was paid to an account to be advised, owner's management would not '*lift their subjects*' – i.e. formally approve the charter. Mr Rennie made a contemporaneous note of this call which specifically refers to the $ 400.

iii) This information was passed on to the prospective charterers through Kingfish, who agreed to make the additional payment. Thereafter the deal was concluded and on 25 February 2004 the vessel was fully fixed for the account of Andorra Services. The charterparty was assigned to Itochu Petroleum Corporation in 4 June 2004.

iv) Shortly after the fixture, Mr Mikhaylyuk telephoned Mr Rennie to provide him with the bank account details of Mirador Shipping for the payment of the $ 400 per day. These were passed to the charterers.

592. Mirador Shipping's bank statements in respect of its account with the Bank of Nevis International in 2007 show a series of payments to Mirador Shipping from IPC (USA) Inc starting on 4 May 2004 and ending on 1 September 2005. A list of these payments (totalling $ 158,340) is at para 11.1 of the Particulars of Claim.

593. In his Defence, Mr Mikhaylyuk denies that he instructed Mr Rennie to inform the prospective charterers that, unless they agreed to pay $ 400 per day, the owners would not lift their subjects. He denies having any interest in Mirador Shipping or using it to receive any funds on his behalf and says he believes it is a broker. No explanation beyond that

has been given as to why Mirador should have been receiving these payments. I have already found that Mirador was Mr Mikhaylyuk's temporary bank account[63]. As Mr Pinniger's evidence explains, he was told by Mr Androsov that the $ 80,000 transfer from Mirador Shipping to Pulley Shipping on 19 July 2004 was in part a refund of three payments totalling $ 46,698 which were paid into Mirador's bank account on Mr Mikhaylyuk's instructions. This is the total of the first 3 payments by IPC in relation to the *Tula*.

594. Mr Mikhaylyuk further pleads that, if any payments were made to Mirador Shipping, they were not made in compliance with any requirement or instruction or request from him[64]. He also says that Mr Rennie telephoned *him* in Spring 2004 to ask what he knew about Mirador Shipping and that he provided Mr Rennie with Mirador Shipping's bank details, which he found on the Claimants' systems. I find this account implausible not least because Mr Rennie had no reason to ask about Mirador, which was not a broker, and sending him such details would tell him nothing about the company.

595. Mr Rennie's evidence was that the suggestion that he telephoned to enquire about Mirador Shipping in Spring 2004 is a complete fabrication. He first heard about Mirador Shipping when Mr Mikhaylyuk gave him the account details for the payment of the commissions.

596. Mr Mikhaylyuk was dismissed from his employment with NOUK on 24 March 2006. According to Mr Rennie, he was approached in early April 2006 by Kingfish Services Ltd ("Kingfish"), the brokers to whom Argent had marketed the *Tula* in relation to the extension of the *Tula* charter. On 25 April 2006 Argent received an email from Kingfish stating "*it has been advised that US$400 per day payable to Mirador Inc is no longer payable and is not payable from August 2004 onwards*". Mr Rennie passed the message on to Mr Salmon and Mr Ivanov of NOUK.

597. Before doing so he contacted Mr Ivanov by Yahoo Instant Messenger. The exchange between Mr Rennie and Mr Ivanov, which fully supports Mr Rennie's evidence, was as follows:

> *'ibrennie2000: A MESSAGE WILL BE COMING TO YOU THAT WILL CERTAINLY STIR THINGS UP. THERE WAS AN EXTRA COMMISSION AS INSTRUCTED BY VLADIMIR THAT WAS BEING PAID TO A CERTAIN MIRADOR SHIPPING. IPC WANT CONFIRMATION THAT THIS HAS*

[63] Mr Mikhaylyuk says that Mirador Shipping was not, to the best of his recollection, involved in any deals in which he was involved. However, the evidence of Mr Ware is that commission on another fixture was paid to Mirador Shipping with Mr Mikhaylyuk's knowledge, in circumstances where the charter was almost concluded and Mirador Shipping had not been involved in the negotiations.

[64] See sub-para 8.2 of Mr Mikhaylyuk's Defence.

*CEASED AND THAT NO PAYMENTS ARE DUE FM AUG 2004 (WHEN CHARTERERS STOPPED PAYING IT)*

*genviva2000: sec*

*genviva2000: if they are not paying that from aug 2004, why they asking a confirmation now?*

*genviva2000: and why u put this to chartering e-mail? assume it was something p&c?*

*ibrennie2000: BECAUSE SOMEONE MAY COME BACK SOMETIME DOWN THE LINE AND DEMAND PAYMENT FROM IPC*

*ibrennie2000: SOMETHING HAD TO BE PUT OFFICIALLY IN WRITING. JOHN SALMON HAS BEEN COPIED THE SAME MESSAGE*

*genviva2000: basis what? anything in c/p?*

*ibrennie2000: THE COMMISSION WAS DEMANDED BY VLADIMIR OTHERWISE THE ORIGINAL DEAL WOULD NOT GET CLEARANCE AND HE DID NOT WANT IT REFLECTED IN C/P.*

*genviva2000: was demanded when?*

*ibrennie2000: AT THE BEGINNING OF NEGOTIATIONS BACK IN 2004*

*genviva200: but understand chrts gut the vsl and nevr paid this money, i.e didn't paid from aug 2004*

*ibrennie2000: STARTING PAYING IT AS INSTRUCTED AND FROM WHAT I GATHER STOPPED DOING SO (UPON THEIR OWN DECISION) AUG 04*

*genviva2000: then i understand nothing. they don't pay as from 2004, and asking to confirm it's no need to pay.*

*genviva2000: definitely nothing to pay on this t/c.*

*ibrennie2000: GOOD – CAN YOU CONFIRM THAT IN WRITING PLEASE. CHARTERERS NEED PEACE OF MIND THAT NO-ONE IS GOING TO DEMAND THIS MONEY AT A LATER STAGE. THANK YOU FOR YR UNDERSTANDING.*

*ibrennie2000: SHOULD YOU WISH ME TO CALL JOHN SALMON TO EXPLAIN ALL I AM MORE THAN HAPPY TO DO SO*

*ibrennie2000: SPEAK GENNADIY*

*genviva2000: iain, i'm sorry, but i can't undestand, who and how can demand for paying these money. i never heard of them and what someone agreed with someone, thus i can't send any messages confirming of non-payment of money which were never agreed in writing. just tell chrts not to pay.*

> *genviva2000: even if this money was due for sharing with some big bosses in russia. u never know.*
>
> *ibrennie2000: I HEAR YOU – I AM SENDING IPC THE FOLLOWING 'definitely nothing to pay on next t/c if extended or last t/c in arrears regarding mirador shipping.'*
>
> *genviva2000: sure*
>
> *ibrennie2000: thanks gennadiy.*'

598. Mr Rennie says he understood (I am sure correctly) the reference to the payment being "*something p&c*" as meaning it was private and confidential. He plainly understood that the $ 400 was likely to be a bribe to someone. It was apparent to me that when giving evidence he was aware that his acquiescence in the making of the payments might have given rise to questions in relation to his conduct and that of his then firm. He had, therefore, no incentive to give evidence of a corrupt payment unless it was true.

599. After the exchange, Mr Rennie was telephoned within an hour by Mr Mikhaylyuk (who had by that stage already been dismissed from NOUK, although Mr Rennie was not aware of that) who asked him to retract the Yahoo message. Mr Rennie said that the message would not be retracted and could not be because it had already been passed to the principals (meaning NOUK). Mr Mikhaylyuk made at least two further calls over the next couple of days seeking the retraction of the message. Mr Mikhaylyuk threatened that if the message was not withdrawn NOUK would no longer do business with Argent.

600. Mr Mikhaylyuk accepts that he telephoned Mr Rennie. He says that he was told by a broker (whose name he claims to be unable to recall) [65] that allegations had been made by Argent Shipping that side payments had been made to him in relation to the *Tula*. He alleges that Mr Rennie suggested that monies had been paid pursuant to a side letter (for which Mr Rennie was asked but which he was later unable to produce). He also alleges that it was Mr Rennie who wanted the message to be stopped from reaching NSC management as he was concerned that this would harm Argent's business with NOUK, and that Mr Mikhaylyuk agreed to help.

601. Mr Rennie' evidence, which I accept, is that he made no allegation that any payments were made pursuant to a side letter – no such side letter ever existed – or that he said that he wanted the message withdrawn.

602. Mr Mikhaylyuk says that he spoke to Mr Lebedev on behalf of Mr Rennie in order to stop the message and that Mr Lebedev said the message had already been passed to NSC. Mr Oskirko's evidence is that Mr Lebedev informed him that he was contacted by Mr Mikhaylyuk by telephone and then on the way to Waterloo station from

[65] In Answer 4 of his Further Information.

NOUK's offices and Mr Mikhaylyuk asked him not to disclose Argent's message to NSC[66].

603. As I have said payments totalling $ 158,340 were made by IPC to Mirador Shipping's Bank of Nevis International account. These payments continued until September 2005. It is likely that the reference to 2004 in the message of 24 March 2006 is a mistake for 2005 with the 1 September payment representing payment for August.

604. This evidence shows, as I find:

i) that Mr Mikhaylyuk secretly and dishonestly prevailed upon the charterers of the *Tula* to pay $ 400 per day to Mirador Shipping's account for his own benefit (or for the benefit of others); and

ii) that, in so acting, Mr Mikhaylyuk was acting in dishonest breach of the fiduciary duties he owed to NOUK.

605. Accordingly, Mr Mikhaylyuk is in equity bound to account to NOUK for the $ 158,340 bribe which is money had and received to their use and which NOUK is also entitled to receive as damages or equitable compensation. The Claimants do not seek to recover any further amount even though it may be the case that further payments were made in accordance with the original demand.

*The Compromise Agreement*

606. Mr Mikhaylyuk was dismissed by NOUK on 24 March 2006. He then began proceedings for unfair dismissal. Those proceedings were compromised on the terms of an agreement dated 27 June 2006 (the 'Compromise Agreement'). Under the Compromise Agreement, Mr Mikhaylyuk received a severance payment of £ 140,000 in full and final settlement of all claims that he might have against NOUK and any associated company and costs of £ 11,750.

607. Clause 12.2 of the Compromise Agreement provided as follows:

> '*12.2 [Mr Mikhaylyuk] warrants and represents that he is not aware of anything which he has at any time done or failed to do which amounts to a repudiatory breach of any express or implied term of the Employment which would (or would have) entitled [NOUK] to terminate the Employment without notice or payment in lieu of notice.'*

608. This warranty was broken and this representation was false to Mr Mikhaylyuk's knowledge. The bribery that I have found established in

[66] See para 35 of Mr Oskirko's witness statement, referring to para 57 of his affidavit sworn for the purposes of the application for a freezing order and a search order against Mr Mikhaylyuk in December 2006.

the case of the PDVSA, Stena and *Tula* charters was a repudiatory breach of his obligations of fidelity. NOUK was entitled to rescind the Compromise Agreement, which it has done. It is entitled to a declaration to that effect and the return of the monies paid thereunder namely £ 151,750. It is also entitled to recover those sums as damages for breach of warranty since the payments were made on the faith of a promise that he had not been guilty of repudiatory conduct in which case the payment would have been what NOUK was prepared to settle the claim for, on that footing, whereas, because of the breach, the claim was worth nothing.

*Political motivation*

609. Mr Mikhaylyuk claims that the proceedings against him are politically motivated and have been brought because he refused to give false evidence against Mr Nikitin and Mr Izmaylov. The Court is not in general concerned with political motivations (a somewhat elastic concept) unless they cause it to doubt the accuracy or credibility of evidence or the reliability of its conclusions. I am satisfied that the claims which I have accepted are founded on reliable evidence, much of which is documentary, and on inferences which are sound in the absence of evidence in the witness box from those who could be expected to give evidence in rebuttal.

610. I should also record that Mr Mikhaylyuk has made a series of accusations against a number of the Claimants' witnesses, which are false. Thus he has asserted that Ms Rebecca Axe, a partner of Ince, falsely manufactured an attendance note as to what he told her on 16 January 2006 and that Mr Clive Zeitman, the independent supervising solicitor in relation to the Search Order, allowed important evidence to go missing in the course of the search. Mr Mikhaylyuk has also claimed that Mr Rennie has invented the entire story of the demand for a bribe and that Mr Pinniger was not instructed to set up Pulley Shipping. Having heard the evidence of Ms Axe, Mr Zeitman, Mr Rennie and Mr Pinniger I am satisfied that these suggestions are completely false.

611. Mr Mikhaylyuk also alleged that he discovered that Mr Funder's salary from NOUK was paid in part into an offshore account and that, when confronted with this, Mr Funder said that Mr Oskirko had authorised it and Mr Mikhaylyuk should mind his own business. In fact, as Mr Funder told me, Mr Mikhaylyuk was present when Mr Shumilin offered him this method of payment when he joined NOUK. He also alleged that Messrs Sakovich, Oskirko and Burima authorised a suspiciously high rate of commission of 3.75% when the documents show that the rate of commission for each broker when there was one was no more than 1.25%. He also alleged that Mr Oskirko had done private work for Drewey when this was, as Mr Oskirko explained, work done after he had left NSC,

612. None of these smears prove the Claimants' case which is established by other means. But they cast doubt on the veracity of Mr Mikhaylyuk's tale.

*Documents*

613. It is apparent from the disclosure in these proceedings that, when he left, Mr Mikhaylyuk took with him a large number of the Claimants' documents. In principle the Claimants are entitled to the return of these documents either because they are the Claimants' documents or because Clause 7.1. of the Compromise Agreement required him to confirm that he had returned to NOUK all documents (whether originals, copies or extracts) belonging or relating to NOUK.

*Summary*

614. In short I have decided the following:

a) in respect of the PDVSA charter claims:

i) the 1st. 2nd. 3rd, 4th, 9th and 10th Claimants are entitled to judgment against Mr Mikhaylyuk and the Ruperti defendants for the amounts set out in para 411 above in respect of the PDVSA chartering arrangements;

ii) the 9th Claimant is entitled to judgment against Mr Ruperti for $ 1,362,750 in respect of the loss of hire on the *Sorokaletie Pobedy*; and

iii) the 1st, 2nd, 3rd, 4th, 9th and 10th Claimants are entitled to judgment against Amon and Mr Nikitin for $ 410,304.39, being $ 37,356.20 + $ 83,748.19 + $ 289,200, the amounts received by Amon from Sea Pioneer and Wisteria.

b) in respect of the Henriot Finance claims: the 1st, 11th, 12th, 13th, 14th and 15th Claimants are entitled to judgment against Mr Nikitin and Henriot Finance in amounts to be determined in accordance with this judgment in respect of the profits on the Henriot Finance charters.

c) in respect of the Stena claims:

i) the 1st, 5th, 6th, 7th and 8th Claimants are entitled to recover from Mr Mikhaylyuk judgment for $ 1,228,898.20 in respect of the payments made by Odin Marine to Pulley Shipping; and

ii) the 1st Claimant is entitled to judgment against Mr Mikhaylyuk for £ 50,965 and the 5th, 6th, 7th and 8th claimants are entitled to judgment against him in the sum of £ 12,741.25 in respect of the costs of the dispute with ACM Shipping;

d) in respect of the *Tula* claims the 1st Claimant is entitled to judgment against Mr Mikhaylyuk for $ 158,340 in respect of the payments made to Mirador Shipping by the charterers of the *Tula.*

e) in respect of the Compromise Agreement the 1st Claimant is entitled to recover judgment against Mr Mikhaylyuk for £ 151,750.

615. The figures set out above are in respect of principal. I invite counsel to draw up an order to give effect to these findings. I wish also to consider whether that order should contain express provision to prevent any interpretation, where judgment is given for the same sum to more than one party, whereby there could be double or multiple recovery.

616. I shall hear counsel on the question of interest.

## APPENDIX

## THE PROFITS ON THE HENRIOT FINANCE CHARTERS.

1. There is a large measure of agreement between the expert accountants for both sides – Mr Andrew Grantham for the Nikitin Defendants and Mr Dominic Wreford for the Claimants - who have sought to identify the profits arising as a result of the charters of the vessels in question taking into account (a) operational expenses and (b) overheads involved in operating the vessels.

2. There is a dispute as to the extent to which account should be taken of "non-operating income" i.e. income which is only indirectly related to the charters such as interest earned on revenue in a bank account.

3. The profit figures for Henriot Finance on the Intrigue vessels other than the *Kuzbass* and the *Kaspiy* have been calculated as follows:

    a) Mr Andrew Grantham (for the Nikitin Defendants): $60,205,865; and

    b) Mr Dominic Wreford (for the Claimants): $61,942,826.

    Some of the items of dispute are small and the Claimants have sensibly accepted Mr Grantham's treatment of items where the difference between the experts is less than $ 20,000.

4. I deal with the disputed items by reference to the Joint Memorandum of the Experts.

    *Joint Memorandum Item C 12 The "M" & "P" items*

5. These are amounts, such as expenses, which are said to have been paid on behalf of Henriot Finance by Milmont (the "M" items) or PNP (the "P" items), and which, it is said, Henriot Finance therefore owes to Milmont or PNP. The items are recorded in Henriot Finance's 'Transaction Listing' (see para 4.24 of Mr Wreford's first report) as amounts owed to Milmont and PNP. The amounts in dispute are $ 644,437 in respect of the "M" items (in respect of which there are, for the most part, debit invoices from Milmont to Henriot) and $ 195,111 in respect of the "P" items.

6. Mr Wreford points out that these items, although they are included in Henriot's *unaudited* balance sheet as loans from third parties, are not included in the *audited* consolidated balance sheet of Standard Maritime (which is Henriot Finance's holding company) and says that he would expect them to be included as amounts owed to related parties if they were valid debts owed by Henriot Finance to Milmont and PNP. He infers that the audit process determined that Henriot Finance never, or no longer, had such a liability.

7. Mr Grantham says that he understands that the obligations do exist. He says:

    a) That the reason these items were not included in the audited Standard Maritime accounts as loans from related parties was because the PNP and Milmont bank statements were not sent to the auditors in Switzerland who were only provided with bank statements for each of the companies to be included in Standard Maritime's consolidated financial accounts (which Milmont and PNP were not). Hence the auditors were not notified of the payments made by Milmont and PNP on behalf of Henriot; and

    b) That the failure to send the bank statements to the auditors was an oversight and the position was "corrected".

8. It seems to me that these items should be allowed. They appear on the Transaction Listing and were included in the unaudited balance sheet. In the light of Mr Grantham's explanation (albeit second hand and in part obscure since the "correction" appears to constitute no more than sending the auditors the statements they did not previously have) I decline to treat their absence from the audited accounts as indicating a considered or justified decision that the debts were not due. I note that, in his report, Mr Wreford notes (para 4.47) that the narrative of the items in the Transaction Listing is consistent with the costs being those that should be borne by Henriot.

9. I have considered whether these items should be excluded because of their age on the footing that the amounts due are unlikely to be paid. I do not think it would be right to do so on (check 'on' or 'now'?). The amounts in question appear to be legitimate operational expenses. Henriot Finance, Milmont and PNP are all Nikitin companies. If one Nikitin company has been slack in claiming from another, the likelihood is that that is because, essentially, they are all Mr Nikitin's creatures. If, however, the items in question are all, as they appear to be, legitimate operational expenses, I do not think that a court of equity should ignore them in determining the profits for which Mr Nikitin should account.

*Joint Memorandum Item C13: The "A" items due from the Claimants*

10. The "A" items are marked as 'accruals' in the Transaction Listings, *i.e.,* income said to have been earned. The dispute between the parties is whether these amounts are due from the Claimants and therefore whether they should be treated as income in the account of profits. The amount in dispute is $ 359,392.

11. This is a barren controversy. If the sum is due from the Claimants to Henriot Finance they have no inclination to pay it and Henriot Finance is unlikely to sue them for it. If the sum is not due or recoverable it will not increase the profits. If it is due and recoverable it will, if paid by the Claimants, increase the profits for which Henriot Finance is liable to account. It will thus be due back to the Claimants.

12. The Claimants submit that I should short circuit the matter and order (a) that any sums due to be paid by the Claimants to Henriot Finance in respect of the charters should be added as income as and when they are paid to Henriot Finance with the result that the same amount should be disgorged back to the Claimants as part of the accounting for the profits.

13. I propose to do something like that. I shall order (i) that any sums due to be paid by any of the Claimants to Henriot Finance should be treated as income of Henriot Finance which, if paid, would increase the profit for which Henriot Finance is bound to account to the Claimants and (ii) that the relevant Claimants may set off any such liability against their entitlement to an account.

*Joint Memorandum Item C 15 The other "A" items*

14. The amount in dispute is $ 165,030.

15. The first dispute under this head relates to broker's commission of $ 50,207.

16. These are said to be commission amounts due on charters that have ended. In respect of some of those charters, no commissions have been paid to brokers at all; in respect of others, some payments were made. The items in dispute represent the difference between the amounts that were apparently payable under the charters and the payments that have actually been made.

17. The experts' positions are as follows:

    a) Mr Wreford says he cannot determine whether any of these amounts (some of which date back to 2003) are still likely to be paid to the brokers; and

    b) Mr Grantham says that there is no evidence that Henriot Finance is not liable for these amounts.

18. The table at para 4.10.21 of Mr Grantham's supplemental report shows that some items date from 2003 (the table includes amounts attributable to Sovcomflot vessels as well as Novoship vessels). The Nikitin Defendants have not produced evidence to the effect that they have been chased by the brokers for these amounts, or that there is any claim to them, or that they are intending to pay such amounts.

19. Given that these items have remained unpaid for this period of time, the inference that I draw is that it is most unlikely that they will be paid to, or claimed by the relevant third parties. Moreover, in relation to the oldest amounts ($ 19,507.58 from 2003, $ 34,206.12 from 2004 and $ 202,715.85 from 2005) it is likely that some or all of these will be time-barred (assuming an English law 6 year limitation period) and therefore irrecoverable in any event.

20. In those circumstances I conclude that these commissions should not be taken into account in reduction of profits.

21. The balance under this heading is $ 114,823.

22. This is the difference (subject to rounding) between the amount said to be owed by Henriot Finance to ST Shipping and that owed by ST Shipping to Henriot Finance (see the Joint Memorandum and Mr Wreford's supplemental report at paras 4.39 to 4.42). As Mr Wreford explains at paras 4.61 to 4.64 of his first report and para 4.40 of his supplemental report, these items are said to be expenses which relate to charters that have concluded in March and April 2007. His concern is that, given the age of the items and the fact that they have not been paid nor any invoice received, they may not remain payable by Henriot Finance.

23. Mr Grantham says that the non-payment has arisen because the final invoice has not been received from Novoship for the *Moscow University* as a result of which Henriot is unable to determine the final amount owed to ST Shipping.

24. If the amount due is likely to be paid to ST Shipping then it should be treated as an expense, and a court of equity should not deprive Henriot Finance of the funds needed to do so. If it is never to be paid (in breach of Henriot Finance's obligations to ST Shipping) the amount unpaid represents a further profit. In those circumstances I propose to order that the $ 114,823 is not to be treated as an expense to be set off in calculating the profits, unless within a period that I shall specify Henriot Finance pays that amount to ST Shipping and then produces evidence of such payment to the satisfaction of NOUK or the Court.

*Joint Memorandum Item C 16 The Seabreeze commissions*

25. These are 'A' items (*i.e.,* amounts listed in the Transaction Listings as due, but not paid) which are said to be due from Henriot Finance to the broker, Seabreeze. These items represent the differences between the commissions due to Seabreeze according to the charters and the amounts actually paid to Seabreeze. The issue is whether the amounts not paid are in fact payable to Seabreeze. The amount said to be due is $ 185,899.

26. Mr Nikitin gave evidence in his statement in *Fiona Trust*, at para 840, that in September 2004 Mr John Betty left Sovchart, Sovcomflot's

chartering subsidiary in Geneva, and set up a ship broking company called Seabreeze, to which one of the companies connected with him contributed capital and took a half share of the profits. Seabreeze ceased trading in May 2007[67].

27. The documents indicate that there was an agreement or arrangement between Henriot Finance and Seabreeze that Henriot Finance would get a 50 per cent discount on Seabreeze's commissions. Thus

    i) Mr Wreford found an invoice from Seabreeze to Henriot Finance referring to a '*50% shareholder's discount'*. That invoice was paid.

    ii) Mr Wreford also identified a further Seabreeze invoice for Henriot Finance (he also found one for Remmy International, another of Mr Nikitin's companies) which had attached statements dated 27 April 2007 in respect of commissions on multiple sub-charters. The invoices contained the narrative "*Commissions earned as per the attached statement*". The statements dealt with payments said to have accrued as far back as October 2004. The statements and invoices were for 50% of the amounts which would be payable according to the Charterparties. Mr Wreford describes in his supplemental report how, once the sum claimed in the relevant 27 April 2007 statement had been paid by Henriot Finance (as it was), there were no further monetary transactions with Seabreeze by Henriot Finance.

28. Mr Wreford's analysis thus shows (i) that Seabreeze invoiced Henriot Finance (under the invoice to Henriot Finance referred to at para 27 ii above) for commission that was only 50 per cent of the contracted commission in respect of charters where the commission remained unpaid in full, and (ii) that Henriot Finance subsequently paid an amount corresponding to the amount claimed in the statement. The April 27 statement did not include any amount in respect of brokers' commission contained in invoices that had been previously raised but where the invoiced amount was not paid in full: see Mr Wreford's supplementary report, paras 4.18 to 4.19, and Appendix C.

29. The statement of April 2007 (like the similar statement for Remmy International) has all the hallmarks of a final statement between the parties for the outstanding amounts. They were paid in full, and no further requests for payment by Seabreeze have been received.

30. The likelihood, as I infer from this material, is that there was an agreement or arrangement whereby Henriot Finance would pay only half of the commission apparently due (on the face of the sub-charters) to Seabreeze. This is what was referred to as the "*shareholder's*

[67] There was also a statement from Mr Betty in which he said, at paras 4 to 5, that he ran Seabreeze between September 2004 and 2007 and that the profits were split between himself and Mr Nikitin.

*discount*", which is unlikely to have been applicable to a single invoice. What it is likely to have been is a reflection of, or a short cut to achieving, the profit-sharing arrangement under which Mr Nikitin received 50 per cent of Seabreeze's profits. As a result the balance could not now be claimed by Seabreeze. There is, also, no evidence that these sums are still regarded by either party as due and payable by Henriot Finance to Seabreeze[68].

31. Accordingly, these amounts should not be included in the account.

*Joint Memorandum Item C 19 Management fees to parties related to Henriot Finance*

32. These items relate to payments made by Henriot Finance to companies which appear to be related to Mr Nikitin. The amount in dispute is $ 444,496.

33. The dispute relates to payments made by Henriot Finance to (a) Henriot SPB, (b) Astrosea Shipmanagement and (c) Global Marine Logistics. It is accepted by the Defendants that Henriot SPB and Astrosea Shipmanagement are related to Henriot Finance (see Mr Grantham's supplemental report, para 4.12.5), but it is said that Global Marine Logistics is not. Of the $ 444,496 Global Marine Logistics accounts for $ 110,205: see the table set out at para 4.43 of Mr Wreford's supplemental report. It is said by Mr Nikitin to be owned by a Mr Gustov.

34. The Claimants accept that these amounts should be included as expenses in any accounts of profits of Henriot Finance. But they say that they should not (save for the Global Marine Logistics amounts) be included in the account of profits of Mr Nikitin, because such payments served to increase the profits of other entities in which he is interested.

35. I do not agree. There is, in my judgment, an insufficient basis upon which to infer that these amounts were not rendered in respect of bona fide management services and legitimate operating costs. The fact that Global Marine Logistics does not appear to be a Nikitin company suggests that the three companies all provided such services. If the payments were for legitimate operating expenses, they are not to be treated as pure profit for the entities involved. It is not clear what, if anything, is the profit element on such charges and I do not propose to guess.

*Joint Memorandum Item C 20 Non operating interest and financial income items.*

36. The amount in dispute is $ 437, 242.

[68] Even if they were, that would result in Seabreeze having an increased income and therefore increased profit, 50 per cent of which it would pay back to Mr Nikitin in any event. In relation to the account of Mr Nikitin's profits, any such amount would have to be taken into account.

37. These amounts are items of income identified by Mr Wreford that are not direct profits from chartering, but are indirectly related to the charters such as interest on revenue kept in a bank account and other financial income. The experts agree that these non-operating items predominantly derive from monies earned on the profits from chartering activities.

38. The Claimants submit that such items fall within the category that Lawrence Collins J had in mind in *CMS v Simonet* [2002] BCC 600 [97] when he said that, in identifying the profit for which an account should be rendered, one should take into account other benefits derived from the business obtained:

> *"For example, other contracts might not have been won, or profits made on them, without (for example) the opportunity or cash-flow benefit which flowed from contracts unlawfully obtained."*

39. As Mr Wreford explained (in his first report, para 4.378) these amounts are not a complete reflection of the benefit obtained by Mr Nikitin from the profits from the charters. The profits, some of which appear to have been distributed to Standard Maritime, are likely to have been used by Mr Nikitin, for other ventures which may themselves have been profitable. Accordingly the Claimants say that these particular items should be included in the account and the court should also make an award of interest.

40. I am satisfied that these amounts should be included. They constitute monies which Mr Nikitin has derived from the profits from the charters and he is liable to account for the profits he has made, whether directly or indirectly.

41. I shall consider the question of interest at the hearing at which the form of the order is determined.

*The Kuzbass and The Kaspiy*

42. Mr Grantham and Mr Wreford each provided a further report relating to profits made on the *Kuzbass* and the *Kaspiy*, the two vessels chartered to Henriot Finance which did not form part of the *Intrigue* proceedings. They produced a joint statement dated 14 March 2012. Although there are a few differences in their respective approaches, they both agree that the total operating profit in respect of the two vessels is $ 47,314,030[69].

43. In Mr Wreford's case, this is subject to items which could increase the total profit calculated namely (a) interest and other income and b) management fees.

[69] This comprises $ 25,978,126 in respect of the *Kuzbass* and $ 21,355,904 in respect of the *Kaspiy.*

44. The first item raises the same issue as is referred to in paras 36ff above, namely whether income derived from profits should be taken into account. In my judgment the answer is "Yes" and there should be included the figure set out in the joint statement namely $ 137,234, giving a total profit for the two vessels of $ 47,451,264.

45. The second item raises the same issue as is referred to in paras 32ff above and I give the same answer. The additional amount of $ 75,983 (for Henriot SPB and Astrosea Management) is to be included as an expense in the account of profits in respect of Mr Nikitin.

46. I understand that the experts will, in the light of these findings, be able to determine the figure for profit.