BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 2010/0103

BETWEEN:

FRAUNTELD MANAGEMENT LIMITED

Claimant

and

FEATHERWOOD TRADING LIMITED

Defendant

Appearances: Mr Jeffrey Elkinson and Ms Dawn Smith for the Claimants
Mr Paul Stanley QC and Mrs Hazelann Hannaway-Boreland for the Defendant

JUDGMENT

[2012: 25, 29, 30, 31 May; 19 June]

(Unjust enrichment - whether total failure of consideration – proper law of transaction – whether subject to BVI law or Russian law – whether recovery available under BVI law – whether recovery available under Russian law)

[1] **Bannister J [ag]:** The Claimant ('Fraunteld') is a Cypriot registered company which is used by a significant Russian conglomerate headed by Mr Igor Albertovich Kesaev ('Mr Kesaev') and to which I am going to refer, without implying any particular legal structure or relationship, as 'the Mercury group,' to hold property and facilitate transactions. It is common ground that it can be described as a Special Purpose Vehicle ('SPV'). I do not think that there was any direct evidence as to the business of the Defendant ('Featherwood') but it is a BVI registered company and the impression given at trial was that it, too, is an SPV used for similar commercial purposes by its ultimate owner, Mr Armen Garnikovich Eganyan ("Mr Eganyan').

Introduction

[2] It is common ground that on 17 October 2007, pursuant to a payment order given by Yuriy Vladimirovich Poletayev ('Mr Poletayev'), to whom Fraunteld had granted a power of attorney, Fraunteld transferred the sum of US$13,132,595.78 from its account at the Moscow branch of Raffeisen Bank Austria ZAO to an account of Featherwood at Alpha Bank in Cyprus. I shall refer to this sum as 'the US$13 million.'

[3] Fraunteld says that that this transfer was part payment for sums due from the Mercury group pursuant to an agreement made in August 2007 between Mr Kesaev and Mr Eganyan for the sale of 26% of the issued shares of OAO Moscow Vine and Cognac Company 'KiN' ('KiN') then in the name of Alexey Yureyevich Belkin ('Mr Belkin'), to a company or companies in the Mercury group to be identified in due course for the sum of US$15 million. Fraunteld says that the US$13 million represented the balance of the US$15 million after the rouble equivalent of some US$1.8 million had been paid on 19 September 2007 pursuant to two written agreements, each dated 20 August 2007, made between two Mercury group companies as purchasers and Mr Belkin as seller ('the SPA's'). The first, between a company called Westbusiness LLC ('Westbusiness') as buyer and Mr Belkin as seller, provided for Westbusiness to pay 2,887,035 roubles for 849,128 KiN shares. The other, between Mr Belkin as seller and NDC Mercury ('Mercury') as buyer, provided for Mercury to pay 42,094,400 roubles for 12,380,706 shares. It is common ground that the shares agreed to be sold under these two agreements amounted in aggregate to about 26% of KiN's issued share capital. Depending upon the exchange rates to be applied, the aggregate of the two rouble payments of 19 September 2007 and the dollar payment of 17 October 2007 may, or may not, together add up to US$15 million. It is, however, accepted by Mr Paul Stanley QC, who appeared together with Mrs Hazelann Hannaway-Boreland for Featherwood, that the amounts can be made to add up to approximately US$15 million, but with a margin of error, as I understood him, of some US$150,000. In short, the aggregate of the three payments is somewhere in the broad region of US$15 million, but cannot be said to equal that precise figure with any certainty.

[4] Fraunteld says that no shares were ever transferred to Westbusiness or Mercury (or to any other Mercury group entity), either pursuant to the agreement made between Mr Kesaev and Mr Eganyan in August 2007 or pursuant to a replacement agreement reached between the parties in July 2008 providing (among other things) for the purchase by Mercury group interests[1] from shareholders of KiN represented by or associated with Mr Eganyan of 7.93% of the issued share capital of KiN. Fraunteld therefore claims return of the US$13 million on the grounds that the consideration for which it was paid has wholly failed, so that, in modern terminology, Featherwood has been unjustly enriched at Fraunteld's expense.

[5] Featherwood's primary case is that the SPA's comprised the entire agreement between the parties for the sale and purchase of the 26% of KiN shares. It says, therefore, that as at 17 October 2007, when Fraunteld paid the US$13 million to Featherwood, the Mercury group was under no further obligation in respect of the agreement for the sale of the 26% which had been reached in August 2007. It is common ground that the SPA's were rescinded on 19 September 2008 and that the 45 million roubles paid under them was returned between about October 2008 and January 2009.

[6] By way of explanation for the admitted receipt of the money, Featherwood says, now, that the US$13 million was transferred on the instructions of Mr Kesaev for services provided to him by Mr Eganyan or others acting with him and which were of such a nature that Mr Eganyan is exposed, should these matters become public, to the risk of prosecution in Russia or elsewhere. Mr

[1] it is not possible to be more specific than this since the parties are not identified by name. The purchasers are identified as the holders of 50% of an associate company of KiN referred to at trial as UVKP. Although no direct evidence of the underlying transactions was adduced at trial, it was common ground that this was a reference to Mercury interests which appear to have purchased, variously, 50% or 51% of UVKP's issued shares from a company called RusKapital.

Eganyan says that he cannot divulge the nature of those services, partly for fear of prosecution in Russia and elsewhere and partly for fear of unspecified harm being inflicted upon himself and his family by unidentified persons and for unidentified reasons should he do so.

The pleadings

[7] In its amended statement of claim Fraunteld pleads that it is beneficially owned by Mr Kesaev. It pleads that in the course of 2007 there were negotiations between Mr Kesaev and Mr Eganyan which resulted in three agreements: (1) the two SPA's and (2) an oral agreement of even date made between Fraunteld and Featherwood under which it was agreed that the US$13 million would be paid by Fraunteld to Featherwood as an additional payment for the shares comprised within the SPA's. The amended statement of claim goes on to plead that no shares were ever transferred pursuant to the SPA's because the sale shares were subject to freezing orders. 'As a result', it is pleaded, the parties to the SPA's terminated them and the money payable under each was returned, but the US$13 million was never returned. A demand for repayment was made on 15 July 2010 not having been satisfied, Fraunteld claims restitution on the ground of total failure of consideration.

[8] Featherwood's original defence denied certain particular averments, admitted the SPA's and denied the agreement about the additional US$13 million. It set up an alternative explanation for the payment of that sum by pleading an agreement in writing dated 8 October 2007 between Featherwood and Fraunteld under which Featherwood agreed to sell to Fraunteld the entire issued share capital of a Cypriot registered company called Haberfield Engineering Limited ('Haberfield') for US$13 million, which Featherwood admits having received. Given that the shares of Haberfield were allegedly held by nominees ('Mittlemar'), completion was claimed by Featherwood to have been effected by Mittlemar attorning to Fraunteld.

[9] In an amended defence filed on 27 July 2011 Featherwood denied the existence of the agreement for payment of the US$13 million by way of additional consideration but admitted that that sum was transferred on 17 October 2007. It has indicated that 'it no longer seeks to prove' the facts pleaded about the Haberfield agreement.

[10] The amended defence went on to plead, correctly, that the SPA's were expressly governed by Russian law and that if there was a separate agreement for payment of the US$13 million, it, too, was governed by Russian law, as was Fraunteld's restitutionary claim. It was then asserted that any restitutionary claim fell within Article 1102 of the Russian Civil Code; that any such claim lay with the principal; that Fraunteld could have no such claim since it was acting as agent for the Mercury group or Mr Kesaev; that any such claim could be made only against the principal who had received the benefit; that Featherwood received the money as agent for Mr Eganyan and in such circumstances no claim could lie against Featherwood; that under Article 1109 of the Russian Civil Code no claim in restitution will lie if the money was paid pursuant to an obligation known by the payer to be ineffective. It was further pleaded that the parties' obligations in respect of the sale of the 26% were defined by the SPA's and that no oral variation (sc the obligation to pay the US$13 million) could be effective unless in writing; and that all matters relating to the transaction

were compromised by the termination agreements of 19 September 2008 and the repayment of the rouble consideration. Not all of these defences were pursued at trial.

[11] In an amended reply, Fraunteld pleaded that Article 1102 has no application, since it applies only to claims that are non contractual in nature, whereas Fraunteld's claim in respect of the US$13 million was contractual. It pleaded that the agreement for additional consideration did not amend the SPA's and in any event was made between different parties. Article 1109 had no application, since Fraunteld knew that it was obliged to comply with the obligation to pay the US$13 million. Finally, it is pleaded that the termination agreements terminated the SPA's but left the agreement to pay the US$13 million unaffected.

The evidence

[12] Mr Kesaev gave evidence for Fraunteld. He described how he first met Mr Eganyan in around 2004 when he was introduced to him by a Mr Loginov, who owned an alcoholic drinks company called SoyuzPlodoImport ('SPI'), for which a Mercury entity acted as distributor. SPI was in a branding dispute with KiN and at Mr Loginov's invitation Mr Kesaev had brokered a deal which settled the dispute by Mr Kesaev agreeing to enter into a distribution joint venture between the Mercury group and KiN. As I understood it, the implication was that Mr Eganyan was content to forget the branding quarrel in exchange for the perceived benefit of being involved in a joint venture with Mercury.

[13] Mr Kesaev then described how in 2007 he was on holiday on his yacht in the South of France when some time around mid-August he was telephoned by Mr Loginov, who told him that a unique opportunity involving Mr Yeganyan and KiN was available and that it was essential that he, Mr Kesaev, should look at it. He told Mr Kesaev that it was urgent. It was agreed that Mr Loginov should join Mr Kesaev on his boat together with Mr Yeganyan and Mr Nikolai Nikolaevich Evseev ('Mr Evseev') who were both on holiday in the South of France at the same time. Mr Evseev was at that time General Director of KiN. Nothing further seems to have been said by Mr Loginov in that telephone conversation, but at the meeting Mr Kesaev was told that there was a serious problem with a large minority shareholder, Bank of Moscow, which was managing a 43% stake in KiN held for the City of Moscow. Bank of Moscow was aggrieved that KiN was not declaring dividends, the insinuation being that Mr Eganyan was working 'on the black' by not declaring profits. At the same time and, as I understood it for the same reason, the Russian tax authorities were investigating KiN and Mr Evseev as General Director of KiN was bearing the brunt of that.

[14] The suggestion was that the Mercury group should remove the thorn from the side of Mr Eganyan and Mr Evseev by buying out the Bank of Moscow and taking a 51% position in KiN. As a first step, the Eganyan interests, which held approximately 51% of KiN, would sell half of that – 26% - to the Mercury group. Mercury would then buy out the Bank of Moscow and adjust its resulting 69% holding by transferring 18% 'back' to the Eganyan interests for nothing. By this rather

circuitous route the Mercury group would acquire 51% of KiN and Mr Eganyan and Mr Evseev would be rid of the Bank of Moscow.

[15] An obvious weakness in the proposal was that it was impossible for it to be known whether the Bank of Moscow would be willing to sell or, if it would, at what price. Nevertheless Mr Kesaev, who knew Mr Borodin, President of the Bank, was willing to take the risk. He thought, by the light of nature as an experienced businessman, that KiN was probably worth some US$100 million. He agreed there and then and on this basis to pay US$15 million for the 26% stake. He was unable to say where this figure originated from but was sure that that was what was agreed on the boat. He described it as a ticket to war – meaning that he was paying to have a tussle with the Bank of Moscow. There was no discussion as to the identity of the shareholder(s) from whose holding(s) the 26% would be derived. Although at some stage the Mercury group went on to acquire some 50% of a sister company of KiN referred to at trial as UVKP, Mr Kesaev was sure that that deal formed no part of the discussions on the boat. Immediately agreement had been reached, Mr Kesaev telephoned Mr Borodin and arranged to meet him on his return to Moscow. He also told his Finance Director, Mr Rischenko, and Mr Kobzev, of the Russian law firm Jus Aureum, of which the Mercury group was an established client, of the basic agreement for the purchase of the 26% and instructed them to take the transaction to completion. Mr Kesaev left the details to them, but he told them that Mr Eganyan had asked for some US$13 million to be paid offshore. Mr Kesaev said that he had no trouble with that as such arrangements are, he said, common in Russian business transactions.

[16] Mr Kesaev described a subsequent meeting with Mr Borodin at which nothing seems to have materialised, although Mr Borodin is said to have warned Mr Kesaev about having anything to do with Mr Eganyan. Mr Kesaev never bought the Bank of Moscow shares. He said that this was because without the 26%, which was never transferred, all he would have obtained from Bank of Moscow was a minority holding and was not interested in acquiring that. He was not asked why, in that case, he was prepared to buy the 26% in the first place. It was part of Mr Eganyan's evidence that he had a meeting with Mr Kesaev in September 2007 at which an oral agreement was made for the provision by him to Mr Kesaev of the unspecified services which he says provided the consideration for the payment of the US$13 million, but whose nature Mr Eganyan is unable to divulge. Mr Kesaev accepted that a meeting took place at around that time, at which Mr Eganyan inquired about what progress was being made with the Bank of Moscow. Mr Kesaev was adamant that there was no agreement at the September meeting about payment of US$13 million for services to be provided by Mr Eganyan.

[17] Mr Eganyan's evidence was that he had attended the meeting on Mr Kesaev's yacht, but that it had discussed only the acquisition of the stake in UVKP. He referred to a subsequent pre-emption rights waiver which he gave for the transfer of a stake in UVKP held by an entity referred to as RusKapitalto the Mercury group. He said that it was not he who had sought Mr Kesaev's help in relation to KiN's difficulties. It was rather Mr Evseev who had done that. Mr Eganyan could not explain why in that case he had told an investigator of the Organised Criminal Economic Activities

Investigation Department of the Investigation Committee of MVD on 31 May 2010 that it was he, Mr Eganyan, who had asked for Mr Kesaev's help in relation to a possible hostile takeover bid that was being mounted and which, clearly, would have meant an approach to the Bank of Moscow. Nor did Mr Eganyan explain how the purchase of shares in UVKP would help Mr Evseev in his difficulties with the Russian tax authorities.

[18] Mr Evseev said that it was he, not Mr Eganyan, who had approached Mr Kesaev for help. He accepted that he considered it a good thing for Mercury to be associated with KiN and that he knew that it was Mr Kesaev's intention to approach Mr Borodin. He said that the purchase was to be for a nominal consideration, by which I infer he meant the 45 million roubles payable under the SPA's.

[19] Another witness was Mr Zaur Asevovich Askenderov ('Mr Askenderov'). Mr Askenderov is a member of the Russian Parliament and had been acquainted with Mr Eganyan and was also a member of UVKP (but not of KiN). He took over as General Director of KiN from Mr Evseev in November 2007. He, too, was vacationing in France in August 2007 and was telephoned by Mr Eganyan who explained that he had had a meeting with Mr Kesaev and that he was going to buy a 26% stake in KiN in order to solve the problems with Bank of Moscow. Mr Eganyan asked Mr Askenderov to attend a meeting together with Mr Kobzev. Mr Askenderov then called Mr Kobzev and asked him to attend on behalf of Mercury to agree in principle the acquisition of 51% of each of KiN and UVKP which he undertood already to have been agreed between Mr Kesaev and Mr Eganyan. The three met at a café on the beach and discussed 'technical matters' concerning the purchase of 51% of KiN and UVKP. Mr Askenderov said that he did not discuss the price of the KiN shares with Mr Eganyan, but that an approximate price of US$15 million was mentioned during the discussions, which lasted for about an hour.

[20] Mr Kobzev's evidence was that he had attended the meeting at the beach café with Mr Eganyan and Mr Askenderov at the request of Mr Askenderov and after having been instructed by Mr Kesaev to do so. He had been told by Mr Kesaev to structure a transaction on the basis that Mercury group was going to acquire 26% of KiN and 51% of UVKP. He had been told by Mr Kesaev by telephone before the meeting at the beach café that the price of the KiN shares was to be US$15 million, but Mr Kobzev could not remember the price of the UVKP shares – though he thought it was between twenty five and twenty six million roubles. Mr Kobzev assumed there had been a meeting between Mr Kesaev and Mr Eganyan to agree this, but he was not at that stage told anything about it, nor about the proposal to buy out the Bank of Moscow nor about the proposal for an eventual 49/51% split.

[21] According to Mr Kobzev, Mr Eganyan's concerns expressed at the meeting at the beach café were that the purchasing entity should be publicly associated with the Mercury group and that part of the purchase price should be paid offshore. An amount was to be fixed under the written SPA's (for

which the purchasing companies had yet to be identified)[2] and the balance would be transferred offshore. Mr Kobzev said that Mr Eganyan was in a hurry.

[22] As already stated, the SPA's were executed on 20 August 2007 and the 45 million roubles payable under them was paid on 19 September 2007.

[23] On 22 August 2007 the Russian Federal Service for Financial Markets ('FSFM') froze KiN's share register. As I understand it, while registrations could not take place, the order did not prevent transfers from being made. However, on 14 September 2007 a Mr Maksimov obtained a freezing order from the Russian Courts freezing dealings with the sale shares, which were in the hands of Mr Belkin, fronting for Mr Evseev. Mr Maksimov was in dispute with Mr Evseev over a sum of approximately US$1 million and the freezing order, as I understand it, was in aid of that claim.

[24] On 3 September 2007 Westbusiness, at an EGM chaired by Mr Poletayev, resolved to approve the transaction contained in the SPA. It is to be assumed that NDC Mercury adopted the same procedure.

[25] The payment order by which Fraunteld instructed the Raffeisen Bank to transfer the US$13 million to Featherwood is dated 17 October 2007 and bears the bank's stamp of that date. It was signed by Mr Poletayev and his evidence was that he was in the United Kingdom at the time and that the document, already completed by staff at Mercury, was brought to him by a courier for his signature. On being handed the document, Mr Poletayev says that he telephoned Mr Kesaev for confirmation that it was in order for him to sign it and having received that confirmation he signed the document and handed it back to the courier. Since the bank would not have stamped the transfer order until it had received the signed version, the likelihood is that Mr Politayev signed it before 17 October in sufficient time for it to be couriered to the bank in Moscow by 17 October.

[26] In his witness statement Mr Poletayev says that from his discussions at the time with Mr Kesaev he knew that this payment was part of a Mercury group transaction for the purchase of shares in KiN. He was asked when he had had discussions with Mr Kesaev about this payment. He said that he had first discussed it some time around the end of August 2007, when Mr Kesaev told him that he planned to acquire shares in KiN. He said that the next discussion about the matter took place when he had received the payment order. In that conversation, Mr Poletayev said that Mr Kesaev said no more than that it was in order for him to make the payment. He said he knew nothing about any agreement of 17 October 2007, as mentioned in the payment order. He was asked in re-examination to confirm how many KiN shares were to be purchased, to which he replied twenty four or twenty six per cent, settling for twenty four per cent.

[27] It was Mr Kobzev's evidence in cross examination that on 17 October 2007 the FSFM lifted its order freezing KiN's register. He said that it was for that reason that the transfer from Fraunteld to

[2] Mr Kobzev explained that there were two purchasers in order to avoid complications under Russian anti-trust legislation

Featherwood was made on that day. Mr Poletayev was not asked in cross examination whether the execution of the payment order had anything to do with the lifting of the FSFM order, which is hardly surprising since he was cross examined before Mr Kobzev gave this evidence.

[28] When Mr Kesaev was asked why he instructed this payment to be made when he knew that the sale shares were frozen at the instance of Mr Maksimov, his answer was that he is a silly person who trusts people and who sometimes gets punished for it. He said he was not a rational businessman, by which I understood him to mean that he is prone to act on impulse.

[29] It is at this point that I need to deal with the so-called Haberfield agreement. There is in evidence a document dated 8 October 2007. It purports to provide for the sale by Featherwood to Fraunteld of the whole issued share capital of Haberfield for a price of US$13,132,595.78 – the exact sum transferred on 17 October 2007. The details of the receiving bank are completed. It bears the signature of Mr Eganyan for Featherwood and what purports to be the signature of Mr Poletayev for Fraunteld. It is common ground that the later signature is a forgery.

[30] Mr Kobzev's evidence was that the body of the document was a precedent taken from the files of Jus Aureum and that he had sent it to Mr Eganyan as an example of how an offshore payment might be structured. He had, however, taken the trouble to purchase Haberfield off the shelf on 27 September 2007 and accepted that he had filled in the receiving bank's details and that he may have filled in the fictitious 'price.'

[31] A Ms Tatiana Petrovna Lavrova, who is Mr Eganyan's sister in law, gave evidence as to how this document came to the hands of Mr Eganyan. She said that she received it as an attachment to an email, which she has not kept. It already bore the 'signature' of Mr Poletayev. She said that she sent it to Alpha Bank. She did not explain why she had done so.

[32] Mr Eganyan said that he signed the document and sent it to Alpha Bank. He said that it was purely technical and was required by the bank to support its receipt of the funds. He accepted that his earlier evidence that the US$13 million payment was for the acquisition of Haberfield was completely false.

[33] It was Mr Kobzev's evidence that Mr Maksimov's freezing injunction was lifted on 8 November 2007. Mr Maksimov won his case against Mr Evseev, so that Mr Belkin had to return the frozen shares to Mr Evseev and was thus no longer able to transfer them pursuant to the SPA's. Although a considerable amount of time was devoted at trial to the possibility that other shares could have been used to satisfy Mr Belkin's obligation under the SPA's, the fact is that they were not and matters remained for a time in suspension.

[34] On 14 July 2008 a so-called co-operation agreement was entered into between persons holding 50% of the shares of UVKP (assumed on both sides to mean members of the Mercury group) and the (unidentified) holders of 9.77% of the issued capital of KiN (assumed to be associates of Mr Eganyan). It was signed by each of Mr Yeganyan and Mr Kesaev. Under this agreement Mercury

was to buy out the Bank of Moscow's 43% holding in KiN before 1 April 2009 and the Eganyan parties were to sell 7.93% of Kin to NDC Mercury for US$9.2 million within 15 days after the shares were released from all incumbrances. The evidence did not disclose the nature of any such incumbrances, nor, to the extent that there were any, whether and, if so when, they were released. The agreement contained references to a sale of a 51% interest in UVKP as well, although it appears to be accepted that at least a 50% interest had already been acquired by Mercury pursuant to the discussions at the beach café in August 2007. The price for the 51% holding in UVKP was stipulated to be US$1.8 million. There is a provision in the agreement that if any money had been paid 'ahead of schedule' it would be credited against the Mercury parties' payment obligation under the agreement. Mr Kobzev said that that was the nearest that Mr Eganyan would let him get to inserting a provision in the agreement that US$13 million had already been paid and was outstanding. That was not put to Mr Eganyan in cross examination.

[35] The co-operation agreement also contained an obligation upon Mercury to provide KiN with US$100 million in working capital and provisions for an elaborate profit sharing agreement, the latter to take effect as from 1 October 2007.

[36] Mr Kesaev said that he was unaware of the US$9.2 million price for the 7.9% of KiN. He made it clear that the price was a matter of indifference to him. If he bought out the Bank of Moscow the purchased shares, together with the 7.93% being acquired under the co-operation agreement, would give him the 51% for which he had been contracting all along, albeit by another route. He made clear that the consideration was in practice the same US$15 million that had been agreed from the outset. He agreed that here might be a balance to be refunded, although Mr Kobzev's evidence was that any surplus would go towards the capitalisation obligation. Mr Kesaev considered that the co-operation agreement replaced the agreement reached on the yacht in August 2007.

[37] So far as the evidence goes, none of the provisions of the co-operation agreement was performed. Mr Kobzev's evidence was that Mr Kesaev had told him around November 2009 that it was no longer possible for the Eganyan parties to transfer the 7.9%.

[38] There is then silence until 15 July 2010 when Mercury unsuccessfully demanded the return of the US$13 million. These proceedings were issued on 6 August 2010.

Analysis

[39] Mr Stanley QC submits, and I accept, that it is for me to decide on a balance of probabilities whether Fraunteld discharges the burden of proof. The fact, for example, that Mr Eganyan admits to having lied during these proceedings is irrelevant if Fraunteld's account of what happened is not proved.

[40] I start, therefore, with the evidence of Mr Kesaev. I have no hesitation in accepting it as a truthful account of what was agreed on the yacht in August 2007. Mr Kesaev gave his evidence clearly,

confidently, and without hesitation. The amount of the agreed price (US$15 million) was corroborated, although admittedly at one remove, by Mr Askenderov. Although he was not present at the meeting on the yacht, he testified to the fact that the figure was used at the beach café meeting. There is a discrepancy, it is true, because Mr Kesaev said that the UVKP shares were not discussed on the yacht, whereas Mr Askenderov said that his understanding was that the US$15 million covered both the UVKP shares and the KiN shares. I do not find that surprising. These events happened some little while ago and it appears that some details of the negotiations about the KiN shares and UVKP shares may have become elided. No written agreements dealing with the acquisition of any UVKP shares, apart from the co-operation agreement itself, were put in evidence.

[41] Mr Stanley QC says that I should not accept the evidence of Mr Kesaev. He says that Mr Kesaev had done no due diligence, and so was in no position to put a realistic value on the shares. But Mr Kesaev said that he had a 'hunch' that the company was worth about US$100 million and given what is known about Mr Kesaev's business activities I do not find it surprising that he would be able to take a back-of-an-envelope view about the value of what was obviously a well known, albeit not a listed, Russian company. It was certainly known to Mr Kesaev, since he had brokered the distribution joint venture at the behest of Mr Loginov. Similarly, I would find it hard to believe that Mr Kesaev would interest himself in a company with a capitalisation – on the assumption that the price payable under the SPA's represented a fair value for 26%[3] - of perhaps not much more than US$8 million. Mr Stanley QC points out that neither the intention to purchase the Bank of Moscow holding nor the readjustment to achieve the ultimate 49/51 split is pleaded. He says that it is inconsistent with Fraunteld's witness statements. It is true that these matters are not pleaded, but they are not material to the claim in unjust enrichment made by Fraunteld. They are part of the commercial background. It is true that they do not appear in Mr Kesaev's witness statement, but then very little does appear in it. I take account of these matters but it does not seem to me that they preclude me from accepting what Mr Kesaev told the Court about the original agreement as true.

[42] Mr Stanley QC says that the terms of the SPA's are incredible if the true price was not the US$1.8 million stipulated, but instead US$15 million. He points out that Mr Belkin could have been compelled to hand over the 26% upon payment of the US$1.8 million alone. That is true as a matter of contract. No escrow or similar protective arrangements seem to have been sought or provided. But the fact that Mr Evseev was prepared to chance his arm in this way (they were in reality his shares) may have any number of explanations. I am not prepared to disbelieve Mr Kesaev simply because the result is to make Mr Evseev appear in this respect imprudent. He was on his own account under great pressure at the time as a result of the tax investigation. As for the fact that Mr Belkin gave a power of attorney on 13 September 2007 to enable the shares to be registered, before the full purchase price had been paid, there seems to be nothing in this point.

[3] this of course can only be a very rough and ready check, since a minority (even if a 'blocking' minority) would likely attract a discount from a pro-rated value

On 13 September 2007 nothing whatsoever had been paid, yet the power of attorney was granted nevertheless.

[43] Unsurprisingly, Mr Stanley QC relied heavily upon Mr Kesaev's insistence on paying the US$13 million on 17 October 2007 before the Maksimov injunction had been lifted and before (as I find) the news that the FSFM order had been rescinded was known to Mr Kesaev I have already said that it seems clear from Mr Poletayev's evidence that he must have signed and sent off the payment order before 17 October 2007. I agree with Mr Stanley QC that Mr Kobsev's attempt to rely on the lifting of the FSFM order was opportunistic and I reject Mr Kobsev's evidence that the making of the payment had anything to do with the fact that the order had been annulled. Mr Kesaev's explanation for the timing of the payment was that he is a silly person who acts irrationally. Mr Kesaev is very far from silly and clearly highly rational. This was the weakest part of his evidence.

[44] Despite this unsatisfactory explanation for the timing of the payment, I am satisfied that it was made in payment for the KiN shares. First, from start to finish of his evidence Mr Kesaev was adamant to the point of being indignant that the US$13 million was paid for shares which he had never received. I would find it a very strong thing to reject that evidence on the basis of the circumstantial criticisms made of it by Mr Stanley QC. Secondly, I find it difficult to envisage that payment for dubious services provided or to be provided to Mr Kesaev by Mr Yeganyan should be made in so specifically precise an amount as US$13,132,595.78. That figure has all the look of a balancing payment. It does not look like a one off payment for services of a type which cannot be revealed for fear of provoking prosecution – the only other explanation now on offer. Mr Stanley QC said that it might be the dollar equivalent of a round sum in some other currency. That, of course, is possible but I think it is more likely that such a payment would have been a round sum in whatever currency had been chosen for the making of the payment. In the payment order the US dollar had been specifically selected as the currency of the transaction. There is nothing to suggest that the payment could not have been made in some other currency had that been desired.

[45] Then there is the evidence of Mr Poletayev. Although in cross examination he admitted that Mr Kesaev's final instruction was an unadorned request that he sign the payment order, Mr Poletayev said in his witness statement that he knew that the payment was part of the transaction for the acquisition of the KiN shares. As skillfully as Mr Stanley QC cross-examined Mr Poletayev on this point, he was never made to withdraw his statement that he knew that the payment related to the acquisition of KiN shares.

[46] The Haberfield document seems to me to be in large part a red herring. I do not accept that Mr Kobzev generated and produced this document to Mr Eganyan as an example of typical transfer machinery. Mr Eganyan would not have been interested. The most simple and most obvious explanation is that it was provided to Mr Eganyan for the reason given by Mr Eganyan himself – to provide regulatory cover to Alpha Bank in Cyprus for their receipt of the funds. Such cover was, *ex*

hypothesi, not available in respect of the oral agreement made on Mr Kesaev's yacht, so that it was evidently thought necessary to invent a fictitious transaction to explain the remittance of the money. It was later seized upon by Mr Eganyan to support a false reason for the making of the payment, but its significance for present purposes is that the agreement was expressed to be for the purchase of shares. The payment order of 17 October 2007 was also said to have been in respect of a share sale transaction, although the date specified for the underlying contract was clearly fictitious. The fact the Haberfield agreement refers to shares in a Cypriot registered company is consistent with Mr Kesaev's evidence that Mr Eganyan wanted that part of the transaction kept offshore. Of course, the parties might have used a fictitious share sale agreement as cover for the provision of nefarious services (the only other explanation advanced for the making of the payment) and I certainly do not think great reliance can be placed upon this evidence. But the fact is that these documents are more consistent with a share sale than with any other sort of transaction.

[47] For all these reasons it seems to me to be more probable than not that the US$13 million represented the balance of the US$15 million purchase price for the KiN shares.

[48] The subsequent entry into the co-operation agreement does not seem to me to change the underlying commercial purpose of the payment. It was clear from the evidence that Mr Kesaev regarded the co-operation agreement as a substitute agreement covered by the payments that had already been made and as another way of acquiring a 51% stake in KiN. He said that it was presented to him by Mr Kobzev as such. As a matter of law[4] the entry into the inconsistent co-operation agreement must of itself have discharged the agreement of August 2007. It is true that when the SPA's were formally terminated and the consideration payable under them was returned all that was returned were the rouble payments that had been made on 19 September 2007. It might be said that the fact that no demand was then made for the return of the US$13 million is consistent with Featherwood's case that the money had not been paid for the purchase of KiN shares. But at the date when the repayments were made, the co-operation agreement was still on foot. Mercury still had until 1 April 2009 to buy out the Bank of Moscow and the KiN shares were still to be transferred to Mercury in consideration of US$9.2 million. So that Mr Kesaev had a good reason at that stage for not calling for repayment of at any rate the whole of the US$13 million until it became clear that the Eganyan parties were not going to deliver the KiN shares, something which Mr Kesaev told Mr Kobzev became apparent in November 2009.

[49] It is true that the Mercury group did not perform its obligation under the co-operation agreement to buy out the Bank of Moscow, but in my judgment that obligation and the obligation of the Eganyan parties to transfer the 7.93% of Kin shares were concurrent conditions and accordingly the fact that the Bank of Moscow shares were not acquired did not relieve the Eganyan parties from their obligation to transfer the KiN shares. Even on the assumption that it did, the Eganyan parties could have had no right to retain the US$13 million. Even if they had a claim for specific

[4] i.e. BVI law. No Russian law was pleaded on this point

performance or in damages under the co-operation agreement, the existence of such a claim would not give them a right to appropriate and retain the US$13 million.[5]

[50] It is true that between November 2009 and the letter of demand there was some delay, but I do not think that that is sufficient to call in question my finding that the US$13 million was paid for the acquisition of KiN shares. No such shares have been provided, whether pursuant to the original agreement or under the co-operation agreement. It is clear that they never will be.

[51] I prefer the evidence of Mr Kesaev, Mr Askenderov and Mr Poletayev to that of Mr Eganyan and Mr Evseev wherever there is a conflict between their account of events. I find that an oral agreement was reached in August 2007 between Mr Kesaev, on behalf of the Mercury group, and Mr Eganyan, in the presence of Mr Evseev and Mr Loginov, for the acquisition by Mercury companies to be nominated at a later date of 26% of the issued share capital of KiN, to be transferred out of holdings belonging, loosely speaking, to Mr Evseev for a consideration of US$15 million. I find that it was further agreed that part of the US$15 million consideration should be paid offshore. I also find that it was part of that agreement that Mercury should acquire a holding of 43% in KiN from Bank of Moscow and that following that acquisition persons or entities associated with Mr Eganyan should end up with 49% of KiN and Mercury should end up with 51% by means of gratuitous transfers from the combined Mercury/Bank of Moscow holdings. I find that the SPA's were concluded in part performance of that agreement. I find that Mr Kesaev procured the transfer in October 2007 of the US$13 million from Fraunteld to Featherwood in completion of the obligations of the Mercury entities pursuant to the August 2007 agreement and that the payment to Featherwood was accepted by Mr Eganyan and his associates as available to discharge that obligation. I find that the co-operation agreement of 14 July 2008 discharged the August 2007 agreement and the SPA's. Finally, I find that the US$13 million was intended between the parties to the co-operation agreement to stand ready to meet the cash obligations of Mercury under that agreement and that the consideration to be provided to Mercury by the Eganyan parties pursuant, initially, to the agreement of August 2007 and, subsequently, pursuant to the co-operation agreement in substitution for the original agreement, has wholly failed.

Unjust enrichment

[52] Fraunteld pleads that, acting by its lawyers and agents, Mr Kobzev and Mr Rud,[6] it made an oral agreement with Featherwood[7] on or about 20 August 2007 that there would be a payment of US$ 13 million for 26% of KiN in addition to the sums payable under the SPA's. As I have said, it then pleads that because no shares were ever transferred, the SPA's were terminated and the consideration payable under the SPA's was returned, but the US$13 million was not returned. In

[5] again, no Russian law was pleaded in relation to these matters

[6] Mr Rud was a lawyer with Jus Aureum who was active on the part of Mercury in these transactions but who has since retired

[7] the pleading says that the agreement was reached between Fraunteld and Featherwood and/or Mr Eganyan, as second defendant, but since he is no longer a party, the allegation is presumably to be treated as an allegation of agreement between Fraunteld and Featherwood alone

those circumstances, it is said that Featherwood is obliged to return the US$13 million on the basis of total failure of consideration.

[53] Mr Stanley QC submits that if there was a contract between Fraunteld and Featherwood, it must have been governed by Russian law and he submits that in that case the claim cannot succeed under provisions of Russian law governing entitlement to sue, the efficacy of oral contracts and the principles of restitution. Fraunteld submits that the proper law of the transaction is BVI law and that Russian law has no application. Fraunteld accordingly does not rely upon any Russian law in support of its claim, although in its reply it pleads to the provisions of Russian law relied upon by Featherwood in its amended defence. In those circumstances it seems to me that I must decide first what is the proper law of the transaction relied upon by Fraunteld in its amended statement of claim, the alleged oral agreement of 20 August 2007.

[54] There is no evidence that Fraunteld and Featherwood ever entered into an oral agreement on 20 August 2007, as pleaded, or at all. Neither Mr Kobzev nor Mr Rud was an agent of Fraunteld and neither had anything to do with the actual making of the payment on 17 October 2007. No consideration is pleaded in support of the alleged agreement, such as to impose any obligation upon Featherwood to return the money if no KiN shares were ever transferred under the SPA's. The pleading fails to link the non-performance of the co-operation agreement, which was the proximate cause of the failure of consideration, to the claim in unjust enrichment.

[55] In his closing submissions Mr Stanley QC points out, rightly in my judgment, that there is no evidence of a contract between Fraunteld and Featherwood at all. All there is a payment made by a Cypriot registered company through the Moscow branch of an Austrian bank to an account of a BVI registered company at a bank in Cyprus. If there was no contract, then under the default provisions of Rule 230 in **Dicey, Morris & Collins, The Conflict of Laws, 14th Ed** ('Rule 230'),[8] the proper law for determining a claim in unjust enrichment will be the law of the place where the enrichment occurred. That place was Cyprus. No evidence of Cypriot law has been adduced and neither party contends for Cypriot law, so that if that is the correct analysis, BVI law must govern the transaction by default.

[56] Fraunteld relied only on BVI law. It did not specifically rely upon the default provision of Rule 230. I do not think that that causes any difficulty. From start to finish it has been Fraunteld's contention that Russian law did not apply, because the transaction was 'offshore in nature.' I agree with Mr Stanley QC that that is a hopelessly inexact way of putting the point, but when combined with Fraunteld's final position in closing submissions, to the effect that a contractual analysis may be ultimately artificial (as I have found it to be), it seems to me to be a sufficient, albeit clumsy, way of arguing for the principle encapsulated in the default position of Rule 230.

[8] Mr Stanley QC referred to Rule 230 in his submissions, without addressing the default provision

BVI law

[57] For the purposes of BVI law it is irrelevant whether the nature of the relationship between Fraunteld and Featherwood was or was not contractual. It is well established that the existence of a contractual relationship is not essential to a claim in unjust enrichment.[9] All that is required is that, at least, the claimant should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment and that the enrichment should have come about because of the loss.[10] Or as Lord Steyn put it in the last cited authority: (1) Has D been benefited or enriched? (2) Was the enrichment at the expense of C? (3) Was the enrichment unjust? (4) Are there any defences?

[58] In the present case Fraunteld's payment to Featherwood cannot sensibly be described as a gift. It is the fact, however, that Fraunteld expected to receive no benefit for itself in consequence of the making of the payment. In particular, Fraunteld did not expect to benefit from the contractual arrangements which were the motive for the payment. In commercial terms, it lost nothing itself as a result of the failure to deliver the shares. A bank, for example, which makes a payment on the instructions of its customer to a counterparty to a simple contract with the customer clearly cannot recover the money from the counterparty if the counterparty fails to provide the bank's customer with the benefits which the counterparty had promised to provide in consideration of the payment. That is because the counterparty has not been unjustly enriched at the expense of the bank. Is Fraunteld in any different position?

[59] In my judgment, it is. In making such a payment on the instructions of its customer, the bank has no interest in the outcome.[11] It makes the payment because that is what its relationship with its customer requires it to do. In the present case the evidence shows that Fraunteld, to which must be imputed the thought processes of Mr Poletayev, expected the payment to result in the acquisition by the Mercury group of shares in KiN. It did not make the payment with the intention that Featherwood, or those behind Featherwood, could apply it exactly as they pleased and whether or not the shares were delivered. Fraunteld would not have made any payment at all to Featherwood had it expected that to be the outcome. It is for these reasons that the payment was not a gift.

[60] Although the probability is that Fraunteld was put in funds to enable it to make the payment, there is no evidence that the transferred money did not belong to Fraunteld at the moment of transfer. The position, therefore, is that Featherwood has received a payment from Fraunteld which it would not have received and knew that it would not have received had Mr Eganyan and Mr Evseev not promised Mr Kesaev that the Mercury group would obtain 26% of KiN in consequence. In refusing to deliver any shares in KiN, Featherwood is, in my judgment, enriched in the amount of US$13

[9] **Roxborough v Rothmans of Pall Mall** [2001] HCA 68
[10] per Lord Clyde in **Banque Financiere v Parc (Battersea) Ltd** [1999] 1 AC 221
[11] I ignore payments made in relation to commercial credits and similar multi-party arrangements

million of Fraunteld's money. That enrichment is unjust, because Featherwood knows that the money was not transferred to it as a gift for it to spend it as it pleased. It was transferred in anticipation of the due performance by those behind Featherwood of the promise made by Mr Eganyan and Mr Evseev on Mr Kesaev's yacht. That promise having failed, both as originally made and as superseded by the co-operation agreement, Featherwood knows in conscience that it has no basis for retaining the money. That makes its retention of the money unjust.

[61] Any arguments based upon principles of agency are, in my judgment, misplaced so far as BVI law is concerned. Although I shall have to deal in a moment with the consequences of the manner in which Fraunteld has put its case, it seems to me that in a non-contractual relationship, such as that pertaining between Fraunteld and Featherwood, it is irrelevant whether the person providing the payment is acting on behalf of another in providing it. The question is whether the defendant is unjustly enriched at the expense of another. If that is the position, as it is here, it is not for the person who is unjustly enriched to point to the person at whose immediate expense it has been enriched and say that another person would make a better claimant. The law of principal and agent is a subset of the law of contract. Where, as here, no contract is being enforced, the law of agency has no framework within which to operate and accordingly has no application, just as it is has no place in the law of gifts and voluntary conveyances. What might be the position as between Fraunteld and the Mercury group is *res inter alios acta* so far as Featherwood is concerned. Nor is there any risk of double recovery. If this claim is satisfied by a judgment in these proceedings, the Mercury group could not mount a second claim on the grounds that in paying the money Fraunteld had been acting as its agent. That is because even if it could be said that Fraunteld made the payment as a favour or service to Mercury or at the direction of Mercury, that would not make Mercury a principal in any *contractual* transaction between Fraunteld and Featherwood, so as to give rise to a contractual obligation on the part of Featherwood upon which Mercury could base a claim against it. For all these reasons, satisfaction of the present claim would not, in my judgment, leave the Eganyan parties exposed to a further claim in respect of the same money. If, after having obtained judgment in these proceedings, entities in the Mercury group attempted to mount claims based upon breaches of obligations under the various contractual relationships into which the parties entered, I decline to believe that the Courts of the Russian Federation would lack the apparatus necessary to see to it that the Mercury group did not make a double recovery in respect of the US$13 million.

[62] A difficulty arises because the amended statement of claim pleads the transaction under which the US$13 million was paid to Featherwood as an 'agreement' in a manner which looks very like the assertion of a contract and because in its reply Fraunteld positively asserts that its claim is contractual. Fraunteld's written submissions, both in opening and in closing, largely rest on the law of unjust enrichment, but the contractual analysis is never completely abandoned. Fraunteld fails, in my judgment and for the reasons which I have given, to prove any contract at all and I am concerned that if I give it judgment based upon (a) a failure to prove the contract for which it contends and (b) reasoning which positively depends upon there being no contract, I shall be

giving Fraunteld something which it has never claimed and to which, accordingly, it should not be entitled. I have been very much exercised about this, but I have come to the conclusion that it should not be a bar to relief. Claims consist of the proof of facts, not of legal labels. Although its pleaded legal analysis of the facts is wrong, in my judgment Fraunteld has pleaded and proved the facts upon which it needs to rely in order to recover on the basis which I have outlined above. It is true that the amended statement of claim does not plead the co-operation agreement, but it is pleaded in the amended defence and dealt with in the reply and, correctly, no point was taken that it was not open to Fraunteld to found argument upon the fact of the co-operation agreement. In my judgment, therefore, and despite their deficiencies, Fraunteld's pleadings are no bar to its recovering under BVI law on the basis of unjust enrichment.

Russian law

[63] In case I am wrong about the proper law to be applied in this case, I should address the question under the only rival system advanced, that of the law of the Russian Federation.

[64] Expert evidence of Russian law was given by Mr Alexander Muranov, of Muranov, Chernyakov & Partners in Moscow and by Professor Peter B Maggs of the University of Illinois. They are agreed that the only route to making a claim in unjust enrichment under Russian law is Article 1102 of the Russian Civil Code. The Russian law experts did not consider (or, if they did, they have not disclosed their reasoning or conclusions) whether as a matter of Russian law the rules governing dealings between principals their agents and third parties have any application outside a contractual context. Mr Muranov says that in the context of the Russian law of unjust enrichment, when it comes to identifying the person with the right to claim, the question is (I paraphrase) from whose pocket has the benefit been conferred upon the defendant. Mr Muranov cites authority in support of this proposition. Mr Stanley QC tried to persuade Mr Muranov that those authorities had nothing to do with agency, but Mr Muranov's response was that they dealt with title to sue, not the law of agency, and that in a proper case an agent may sue a person who has been unjustly enriched at his expense.

[65] In his separate report Professor Maggs assumed[12] that in making the payment Fraunteld acted as delegate/agent for Westbusiness, Mercury and/or Mr Kesaev and proceeded to apply the provisions of Article 971 of the Russian Civil Code on the basis of that assumption to give his opinion that Fraunteld would have no right to recover in unjust enrichment under Russian law. In the joint report, disagreeing with Mr Muranov, Professor Maggs says that where there is a contract of agency under which the agent acted in the name of and used the money of the principal, the 'rights and duties arise directly for the principal.'[13] He goes on to say that the important issue is whether Fraunteld used its own funds or funds belonging to any principal which may have stood behind it and whether it used its own name or that of any principal in making the payment. In the

[12] in paragraph [20]
[13] a citation from Article 971

former case, Professor Maggs says that Fraunteld is the correct claimant; in the latter, the proper claimant would be the (unidentified, so far as the evidence in this case goes) principal.

[66] I prefer the evidence of Mr Muranov on this point. His evidence goes to the question of entitlement to sue in unjust enrichment, whereas Professor Maggs does not specifically deal with agency in the context of unjust enrichment. Furthermore, I find it hard to understand how, under a system of law which denies claims in unjust enrichment which have their origin in contractual relationships, the law of agency can have any bearing on the identity of the party with the right to claim under Article 1102. Even if the principles set out by Professor Maggs apply to an unjust enrichment case of this type, there is no evidence that Fraunteld used money beneficially belonging to another or that it made the transfer in anything other than its own name.

[67] On this basis I find that Fraunteld is entitled, as a matter of Russian law, to maintain a claim for unjust enrichment in its own name. Neither of the experts expressed the view that, if Fraunteld does have a claim under Article 1102, Featherwood is not the correct defendant.

[68] The Russian law experts agree that Article 1102 does not apply if the retained property which is sought to be recovered has been acquired as a consequence of a 'transaction.' In the present case the US$13 million was not transferred as a result of a transaction, as I understand that term to be used by the experts. It was a payment unsupported by any consideration and was not made as a result of any enforceable arrangement between Fraunteld and Featherwood. I therefore find that as a matter of Russian law Article 1102 is engaged. For the same reason, Russian law principles as to the efficacy of oral contracts do not arise.

[69] On the other hand, Article 1109(4) provides that where a payment is made by a person who is proved to have known that he was under no obligation to make it or who made it for charitable purposes, the payment may not be recovered under Article 1102. In his separate expert report, Mr Muranov discusses this provision using the language of gift and cites a decree of The High Arbitrazh Court of the Russian Federation of 27 April 2011 to the effect that the Court noted[14] that by transferring the disputed sum the claimant did not have the intention to gift it to the defendant or to grant it to charity. In his separate expert report Professor Maggs says that the Arbitrazh Courts (which would have jurisdiction in this matter on the basis, as I have found, that the proper parties to the dispute are two corporate entities) treat Article 1109(4) as denying recovery only when the payment is shown to have been by way of gift (in other words, they give no separate meaning to the words relating to payments made in the absence of existing contractual obligation). In their joint report[15] the experts say that Article 1109(4) applies where a person gives property to another person even though he knows that he is not obliged to. They go on to say that 'in both cases', where transferring property for charitable purposes and when transferring the property knowing about the absence of obligation, the person has the same intention – to transfer the property without receiving anything in return.

[14] I infer, in the course of making a particular decision, although I may be wrong
[15] at paragraphs [19] and [20]

[70] The sense I derive from these passages is that the experts agree that Article 1109(4) prohibits the recovery of gifts ('where a person *gives* property to another person even though he knows he is not obliged to' – emphasis added), which is consistent with the views expressed by each expert in his separate report. I therefore find that Article 1109(4) will apply only where the property sought to be recovered was transferred by way of gift. There is no suggestion in any of the reports that the words 'give' or 'gift' when used in the experts' reports bear anything other than their ordinary English meaning. When applied to a transfer of money, I therefore find that they connote a gratuitous and unconditional transfer which leaves the transferee free to deal with the money as its own and as it pleases in whatever circumstances.

[71] The payment of the US$13 million was not of this character. It was made for a purpose, known to Featherwood, which prevented Featherwood in conscience from dealing with the money as its absolute property if that purpose was not fulfilled. It was not a gift.

[72] I therefore find that as a matter of Russian law Article 1109(4) does not apply to preclude Fraunteld from recovering the US$13 million under Article 1102. The experts are agreed that if Article 1109(4) does not apply Fraunteld can recover under Article 1102 if it can show that it has suffered loss due to unjust enrichment. The view of Professor Maggs in his separate report is that Fraunteld has a *prima facie* claim unless barred by Article 1109(4). I therefore find, on the basis of the facts found elsewhere in this judgment, that if Russian law is the proper law of the transaction Fraunteld has a good claim under that law for the recovery from Featherwood of the US$13 million.

Conclusion

[73] For these reasons, this claim succeeds.

Commercial Court Judge

19 June 2012