**THE HIGH COURT**

**COMMERCIAL**

**Record no. 2016/9981P**

**Between:**

**TRAFALGAR DEVELOPMENTS LIMITED,**

**INSTANTANIA HOLDINGS LIMITED, KAMARA**

**LIMITED and BAIRIKI INCORPORATED**

**Plaintiffs**

**and**

**DMITRY MAZEPIN, OJSC UNITED CHEMICAL**

**COMPANY URALCHEM, URALCHEM HOLDING PLC,**

**EUROTOAZ LTD, ANDREY GENNADYEVICH**

**BABICHEV, YULIA BOLOTNIKOVA, BELPORT**

**INVESTMENTS LTD, MILKO EMILOV MINKOVSKI,**

**ANDROULA CHARILAOU, DMITRY KONYAEV and**

**YEVGENIY YAKOVLEVICH SEDYKIN**

**Defendants**

**Judgment of Mr Justice Robert Haughton delivered this 23rd day of November, 2017**

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**Introduction**

1. This is an application on behalf of the fourth named defendant, Eurotoaz Limited, and its director the fifth named defendant ("Mr Babichev") for the following orders: –

> (a) an order dismissing or striking out the action against each of them pursuant to Order 19, rule 28 of the Rules of the Superior Courts, or alternatively pursuant to the inherent jurisdiction of the court on the grounds that the action is frivolous, vexatious, effectually unsustainable and bound to fail, or alternatively as an abuse of the process ("the primary relief");
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> (b) insofar as Mr Babichev is concerned, an order pursuant to the inherent jurisdiction of the court staying the action against him on the grounds of *forum non conveniens*;
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> (c) an order pursuant to Order 63, rule 5 and/or 6 (1), or alternatively pursuant to Order 25, rule 1 and/or Order 34, rule 2 directing a preliminary issue as to whether the claims of the plaintiffs against these two defendants are barred by virtue of section 11 of the Statute of Limitations Act, 1957.

2. The proceedings were commenced by Plenary Summons dated 9 November, 2016, pursuant to order of McDermott J. made on 7 November, 2016, granting leave to issue and serve certain defendants, including Mr Babichev, outside the EU in the Russian Federation, and the seventh named defendant, Belport Investments Limited ("Belport"), in the British Virgin Islands. The defendants resident or based in the EU not covered by this order were Eurotoaz Limited (or "Eurotoaz") a company registered in Ireland, the second named defendant OJSC United Chemical Company Uralchem, a company registered in Cyprus (being the holding company of the third named defendant Uralchem Holding Plc ("UCCU")), the eighth defendant Mr Minkovski a resident of Bulgaria, and the ninth named defendant Ms Charilaou, a resident of Cyprus.

3. The Statement of Claim delivered on 9 November, 2016, recites that the plaintiffs are companies incorporated in various Caribbean islands and that together they own approximately 70% of the shares in OJSC Togliattiazot ("ToAZ"), a Russian company, which is a fertilizer producer and the largest producer of trade ammonia in Russia, and stated to be worth in excess of US$3 billion "but for the matters complained of herein". They claim damages for conspiracy, and for declaratory and injunctive relief in respect of same, arising from the alleged active participation of each of the defendants in an unlawful, corrupt and oppressive scheme to wrest control of ToAZ.

4. Before addressing the Statement of Claim in more detail it is important to note that Eurotoaz Limited by virtue of events in 1994 and 1995 claims to be entitled to 8.806% of the shares in ToAZ.

**The Statement of Claim**
5. This is the context in which the primary relief sought must be considered. It is a lengthy document running to 162 paragraphs. The most salient features of this allege the following:

> • that the defendants "in concert and on the basis of a shared understanding, committed a series of unlawful acts whose aim and purpose is to damage and/or injure the Plaintiffs by defrauding the Plaintiffs of their shares in ToAZ… by depriving the Plaintiffs of their Shares and/or substantially devaluing them and/or by infringing and/or damaging the property rights in the Plaintiffs' ToAZ Shares and/or preventing the exercise by the plaintiffs of the rights deriving from their Shares." (para. 2)
>
> • that a "Scheme" was implemented by the defendants "through concerted action and on the basis of a shared intention to carry out acts which are flagrantly unlawful, wrongful and oppressive and are designed to enable the Defendants or their nominees to acquire the Plaintiffs' ToAZ Shares at a gross undervalue" (para. 3).
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> • That the defendants by virtue of the Scheme were guilty of conspiracy to injure the plaintiff's "by unlawful means" (para. 4).
>
> • that the Scheme was led by the first defendant Mr Mazepin who controls UCCU which has a 9.9% shareholding in ToAZ. Paragraph 6 then pleads: –
>
> "The methods employed in the Scheme include the following unlawful actions, each of which was carried out for the purpose of defrauding the Plaintiffs of the Plaintiffs' ToAZ Shares:
>
> > (a) Making direct and indirect unlawful threats against shareholders and officers of ToAZ and persons perceived to be connected with ToAZ, to the effect that improper legal proceedings would be brought against them if the Plaintiffs' ToAZ Shares were not sold to the Defendants at an undervalue;
> >
> > (b) Repeatedly bringing multiple unfounded civil actions, *inter alia*, in the name of Eurotoaz Limited ("Eurotoaz"), a company registered in Ireland, against officers of and persons perceived to be connected with ToAZ in Russia, including fraudulent claims that Eurotoaz was entitled to shares in ToAZ;
> >
> > (c) Repeatedly making multiple unfounded criminal complaints in Russia, *inter alia*, in the name of Eurotoaz, against ToAZ officers and persons perceived to be connected with ToAZ in Russia;
> >
> > (d) Uttering false evidence and procuring and deploying false evidence against ToAZ, its officers and persons perceived to be connected with ToAZ, in criminal and civil legal proceedings referred to herein;
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> > (e) Producing forged or sham documents against ToAZ, its officers and persons perceived to be connected with ToAZ in such legal proceedings;
> >
> > (f) Procuring oppressive and unjust court orders against the Plaintiffs to include, *inter alia*, improper and unlawful freezing orders against the Plaintiffs' ToAZ Shares and dividends on false pretexts;
> >
> > (g) Procuring improper arrest warrants and Interpol Red Notices against officers and individuals perceived to be connected to ToAZ;
> >
> > (h) Illegally procuring the suspension of the Chairman of ToAZ from the board of ToAZ;
> >
> > (i) Purporting to remove ToAZ's lawful directors and replace them with nominees of the Defendants through unlawful means, namely the use of false evidence and/or documents;
> >
> > (j) Unlawfully purporting to pass Board Resolutions which would *de facto* empower the nominee Directors on the Board to dilute the ToAZ shares or misappropriate some or all of them; and
> >
> > (k) Putting undue and unlawful pressure on judges, criminal investigators, court-appointed experts, and judicial officers in Russia to make improper and unfounded adverse orders against ToAZ, its officers and shareholders.
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> • that the Scheme was intended to cause "such catastrophic damage to ToAZ and its business that the plaintiff would be forced to sell their Shares to the Defendants or their nominees at an undervalue" (paragraph 7 (a)), and that these methods were and continue to be utilised "to deprive the Plaintiffs of the rights attached to their shares on a "false pretext"" (para 7(c)).

• That the Scheme was primarily devised, orchestrated and directed by Mr Mazepin and that the participants were *inter alia* the defendants who were "all linked to Mr Mazepin" and who carried out their actions "in the clear knowledge and understanding of the illegal and improper purpose of the Scheme" (para 8).

• It is pleaded –

"10. The defendants are each guilty jointly and severally of the unlawful acts identified in respect of each of them. However, the unlawful acts were not committed as an end in themselves. They were committed by the defendants and each of them acting as an active participant in and not merely a facilitator of, the Scheme.

11. If the said acts or any of them were lawful, which is denied, they were nevertheless carried out with the wholly unlawful and singular aim of enabling the Defendants or their nominees to acquire the Plaintiffs' ToAZ Shares at the greatest undervalue achievable in the manner set out at paragraph 7 above. "

• At para 27 it is pleaded that Eurotoaz Limited "has been central to the Scheme… Has conducted a campaign of vexatious litigation based on false and/or sham evidence asserting variously that it holds and/or is entitled to the payment of dividends in respect of either 8.806% or 4.4% of the issued share capital in ToAZ… It is to be inferred on the basis of the facts and matters identified further herein, and on the basis of his own admission, that Mr Mazepin owns and controls Eurotoaz [Limited]".

• At paragraph 28 it is pleaded: –

"The Fifth Defendant Andrey Gennadyevich Babichev is a director of Eurotoaz, having been so appointed on 21 December 2011. Mr Babichev was the person responsible for submitting evidence to the Russian authorities in support of Eurotoaz's Campaign of Vexatious Litigation. At the time of filing the form B10 with Companies' Registry in Dublin, Mr Babichev gave a residential address in Voronezh, Russia. Mr Babichev is also an executive director of OOO Voronezhavia, an airline company based in Voronezh. OOO Securities InvestGroup, a 35% shareholders in OOO Voronezhavia, is a business associate of Mr Mazepin. Mr Babichev represents the interests of OOO SecuritiesInvestGroup on the board of OOO Voronezhavia. Mr Babichev thus has a commonality of business interest and a business relationship with Mr Mazepin. Mr Babichev has given his place of employment as 5-91, UI. Pechorskaya, Moscow, described as the representative office in the Russian Federation for Eurotoaz."

• At para 36 onwards the Statement of Claim describes the concept of "Raider Attacks" in Russia where typically a minority shareholder is targeted by "a series of improper civil and criminal lawsuits…repeatedly issued on behalf of or at the behest of the raider" and "unlawful pressures placed on judicial authorities to bring regulatory and tax prosecutions against the principals of the target; and searches and seizures of confidential information are made at the target's offices. Ultimately, the raider procures the freezing of the shares, dividends and cash in the target with the result that the business collapses and effective control is wrested from the owners of the target company." (Para 38).

• Paragraph 41 describes "The Renova Raider Attack 2005 – 2008" directed against ToAZ by a Mr Vekselberg, leading to the investigation of Mr Vladimir Makhlai, then chairman of the board of ToAZ. The raid failed, and on 8 May, 2009, an English court refused to extradite Mr V Makhlai. Following this it is pleaded that Mr Mazepin acting through UCCU acquired Mr Vekselberg's minority shareholding in ToAZ and set in train the Scheme.

• At paragraph 46 it is pleaded that "the defendants were willing to use any possible means in furtherance of the Scheme…", and the following is then pleaded:

"47. Each of the defendants has committed or permitted to be committed illegal acts in furtherance of the Scheme in the manner and at the times more particularly set out below.

48. Further and in the alternative, the defendants and each of them have acted in furtherance of a shared understanding to embark upon concerted action with an intention to injure and/or cause financial loss to the plaintiffs through the expropriation of the rights deriving from the Plaintiffs' ToAZ Shares for the benefit of UCCU and/or [the third named defendant] and/or Mr Mazepin".

• At paragraph 49 – 53 particulars are given of alleged "Threats issued by Mr Mazepin and Mr Konyeav", the 10th named defendant who is CEO of UCCU. It is asserted that these were issued between May 2012 and June 2013 to a Mr Zivy, a Swiss national involved in Swiss companies owning and controlling 10% of the shares in ToAZ, Mr Ruprecht, another Swiss national involved in the Swiss interest, and Mr Sergei Makhlai (son of Mr V. Makhlai), a U.S.A. resident who was Chairman of ToAZ until suspended on 24 September, 2015. At para 53 it is pleaded that these threats made explicit "that Mr Mazepin is prepared to use whatever means possible including, but not limited to, the procurement and deployment of false evidence in the prosecution of vexatious civil claims and the making of malicious and false criminal complaints to the Russian Investigative authorities in furtherance of the scheme to wrest control of ToAZ from the Plaintiffs."

• From paragraph 54 onwards it is alleged that the defendants or one or more of them participated, in furtherance of the Scheme, in "multiple civil claims and criminal complaints… against ToAZ". Paragraphs 56 – 67 particularise "Vexatious Criminal Complaints by Eurotoaz":

  ☐ "The First Eurotoaz Criminal Complaint", on 9 July, 2009, by one Mr Sedykin on behalf of Eurotoaz Limited to the prosecutor of Toglyatti under Article 165(3) of the Russian Federation Criminal Code and claiming to have been deprived of its rights as an alleged shareholder in ToAZ, asserting "that it had acquired 44, 541 shares in 1994, being 10% of the shares first issued". It is pleaded that this "was dismissed on 12 October, 2009, because the prosecutor found no wrongdoing". (Para 57).

  ☐ "The Second Eurotoaz Criminal Complaint" on 14 October, 2009, again lodged with the prosecutor of Toglyatti by Mr Sedykin, claiming that Eurotoaz Limited acquired its purported shareholding in ToAZ in an investment tender under "Agreement 7 – A1" made between Samara Oblast Property Fund and Eurotoaz Limited. It is pleaded that Agreement 7-A1 was in fact made by a joint Russia-Hungarian enterprise "Eurotoaz SVRP" ("Eurotoaz Hungary"), an entirely separate and different entity from

Eurotoaz Limited (para 58).

☐ "The First Eurotoaz Letter of Complaint to the Federal Service for the Securities Markets ("FSSM") dated 13 October 2009 whereby Eurotoaz Limited lodged a complaint with the South-East Region of the FSSM complaining about ToAZ's failure to provide Eurotoaz Limited with information from the ToAZ shareholders register. (Para 59)

☐ "The Second Eurotoaz Letter of Complaint to the FSSM" on 21 January, 2010, in a further letter complaining of deprivation of its rights as a shareholder, but alleging that Eurotoaz Limited acquired its shareholding not by way of Agreement 7 – A1, but by way of transfer from Eurotoaz Hungary, and that the holder of the registered shares in ToAZ ("ToAZ Invest") was notified of this transfer in a letter dated 25 November, 1995 (para 60).

☐ "The Third Eurotoaz Criminal Complaint". It is pleaded that on 14 February, 2014, Eurotoaz Limited initiated a new criminal complaint under article I159(4) of the Russian Federation Criminal Code alleging theft of property belonging to Eurotoaz Limited, namely its shares in ToAZ and related dividends, with damages claimed to exceed US $4 .7 million plus unpaid dividends.

☐ In paragraph 62 – 67 particulars are given of "False evidence deployed by Eurotoaz in the Second Eurotoaz Criminal Complaint". In para 62 it is alleged that Mr Sedykin as attorney on behalf of Eurotoaz in an investigative interview for the first time on 9 March, 2010, provided documents in the form of:

> (a) a purported letter dated 25 November, 1995, sent by Eurotoaz to ToAZ Invest (the entity responsible for maintaining the register of shareholders in ToAZ) noting the change in ownership and requesting a change in ToAZ's register of shareholders to record the transfer; and
>
> (b) a purported undated response from ToAZ Invest noting the transfer and that the shares had been reissued."

In para 63 it is pleaded that Mr Korolev, who was the Director of ToAZ Invest in November 1994, and who subsequently became a director of ToAZ, informed the Russian authorities at interview on 15 March, 2010, that "he had not seen the letter purportedly sent to him on 25 November, 1995, until February 2010, when it was submitted as evidence in the Second Criminal Complaint, and that he doubted that he had sent the purported reply, which lacked a reference number, date and stamp which is a matter of routine practices used in official correspondence."

☐ It is then pleaded as follows:

> "64. In his interview on 9 March 2010 with Russian investigative authorities investigating the Second Criminal Complaint, Mr Sedykin said he informed Mr Galantai, who he described as the owner of both Eurotoaz Hungary and Eurotoaz, of the work he had performed in relation to the claims of Eurotoaz. In a further interview on 19 May, 2010, Mr Sedykin made a number of assertions about the actions of Mr Galantai or his representative, but when asked whether he could contact Mr Galantai so as to ask him to attend an interview, he said he was unable to give notice to Mr Galantai. Mr Sedykin then refused to answer questions about how he communicated with Mr Galantai, claiming that he had received threats and was concerned for his own safety, although he admitted he had not reported such threats to law enforcement agencies.
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> 65. It is to be inferred that when it became apparent that Eurotoaz could not pass off Agreement 7-A1 as a genuine agreement made with it rather than Eurotoaz Hungary, it manufactured the purported letters of 25 November 1995 and the alleged response of ToAZ Invest in order to provide a false basis for asserting that Eurotoaz had an interest in ToAZ in the First Eurotoaz Criminal Complaint.
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> 66. The same methods – that is to say the creation of and reliance upon false or sham documents – employed in the Eurotoaz Complaints were also used by UCCU to support criminal proceedings against ToAZ and ToAZ Corp in connection with the Shareholder List Criminal Complaint, described in further detail below.
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> 67. Further, it is to be inferred that Mr Sedykin never had any contact with Mr Galantai, who on Mr Sedykin's story as outlined in summary at paragraph 64 above would always have known that Agreement 7-AI was made with Eurotoaz Hungary, not Eurotoaz."

☐ Next it is pleaded that in 2010 Eurotoaz Limited "conducted a campaign of vexatious civil litigation based, *inter alia*, on the same false evidence deployed in the Second Eurotoaz Letter to the FSSM, and para 69 onwards details "Eurotoaz's Campaign of Vexatious Litigation supported by false evidence". It is pleaded that –

> "69. Central to the Scheme was Eurotoaz, an Irish company owned by Benstock Finance Limited, a BVI company, but which is to be inferred in all the circumstances as beneficially owned by Mr Mazepin. Eurotoaz has conducted a campaign of vexatious and fraudulent litigation in an attempt to further Mr Mazepin's goal of obtaining a majority share in ToAZ.
>
> 70. The background to the Eurotoaz Campaign of Vexatious Litigation is that, in or around 1994, Eurotoaz Hungary acquired 44,541 of the issued shares in ToAZ. Eurotoaz Hungary was subsequently liquidated on 27 November 1995 but ToAZ was not notified of its liquidation at the

time, so that Eurotoaz Hungary remained on the share register of ToAZ."

☐ It is pleaded that Eurotoaz Limited was incorporated in Ireland on 29 March, 1995, that its directors are Mr Babichev and Mr Starikov and that its shares are held by Benstock Finance Limited, having the same registered office and agent as Belport, the seventh named defendant. It is pleaded that "there is objective reason to believe that" Eurotoaz Limited is controlled by Mr Mazepin, UCCU and Mr Sedykin, and beneficially owned by Mr Mazepin, and the matters relied upon are set out in para 73.

☐ What are said to be vexatious civil claims are then set out at paragraph 74 onwards.

☐ "May 2010 – The First Eurotoaz Civil Claim" - it is pleaded that this was brought against ToAZ and its registrar in the Arbitrazh Court of the Samara Region seeking an order that the share register be amended to replace Eurotoaz Hungary with Eurotoaz Limited. This claim was dismissed on 17 July, 2012, by the Supreme Arbitrazh Court, which upheld the ruling of the Eleventh Arbitrazh Court of Appeal, with the Supreme Court expressing the view that the real aim of Eurotoaz Limited had been to obtain the status of a shareholder in ToAZ rather than to correct a mistake in the register.

☐ Eurotoaz Limited sought to review the case upon the discovery of new facts, and on 15 December, 2015, a decision of the Arbitrazh Court of the Volga Federal District overturned the decision of the Eleventh Arbitrazh Court of Appeal. This in turn was appealed to the Supreme Court of the Russian Federation, where Eurotoaz Limited was unsuccessful.

☐ "October 2014 – the Second Eurotoaz Civil Claim". Despite the dismissal of the first civil claim, this second claim was filed with the Arbitrazh Court of the Samara Region seeking acknowledgement of shareholders rights for Eurotoaz Limited and the payment of dividends. As in the appeal in the first civil claim Eurotoaz Limited was represented by UCCU's lawyer, Ms. Shvedskaya. The claim was dismissed on 14 April, 2015. The appeal to the Eleventh Arbitrazh Court of Appeal was dismissed on 16 March, 2016, and a further appeal to the Arbitrazh Court of the Volga Federal District was dismissed on 21 July, 2016. On 16 August, 2016, Eurotoaz Limited submitted a further appeal to the Supreme Court of the Russian Federation.

☐ In para.s 82 – 84 it is asserted that Mr Sedykin must have known that the claims and evidence in relation to Eurotoaz Limited in respect of the criminal complaints and civil claims were false and sham in character and based on false or sham documents. In para.s 85 and 86 it is pleaded:

> "85. Eurotoaz and its director, Mr Babichev, pursued the Third Eurotoaz Criminal Complaint relying upon the alleged correspondence with ToAZ invest, which Mr Babichev must have known to be false. Mr Babichev alleged that he had been given documents about the civil and criminal cases by Dyerd Galantai, a previous director and shareholder in Eurotoaz, who it was said had in turn received the same documents from Mr Sedykin. Mr Babichev's allegation that Mr Galantai obtained documents from Mr Sedykin, which Mr Sedykin previously alleged he had received from Mr Galantai, must also be false, and must have been known by Mr Babichev to be false. Eurotoaz and Mr Babichev knowingly acquiesced or caused those false documents to be relied upon in support of the Eurotoaz Campaign of Vexatious Litigation against ToAZ.
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> 86. In the premises each of Mr Mazepin, UCCU, Eurotoaz, Mr Babichev and Mr Sedykin has acted unlawfully, in furtherance of a concerted action whose aim was to enable UCCU to acquire ToAZ shares at the greatest undervalue achievable. This was to be achieved, as set out above, either by means of a forced sale at a gross undervalue or by a Court ordered sale to a connected party, purporting to satisfy a judgment debt to UCCU."

☐ In para 87 it is pleaded that Eurotoaz Limited's "unlawful actions are continuing" and that "in 2014 further criminal complaints and, in 2015, further civil complaints arising out of the same demonstrably false factual allegations…" have been pursued.

☐ Para 88 pleads: –

> "88. The attempts by Mr Mazepin, (the third named defendant), UCCU, Eurotoaz, Mr Babichev and Mr Sedykin to continue to litigate matters already heard and determined upon by the Russian courts are unlawful and an abuse of process. *If lawful, which is denied, they are in furtherance of the conspiracy designed to injure or cause financial loss to the Plaintiffs by defrauding them of the Plaintiffs' ToAZ shares."* [Emphasis added].
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> It is apparent from the highlighted portion that the plaintiffs plead, in the alternative to the plea of conspiracy by unlawful acts, conspiracy by lawful means.

☐ Paras 90- 109 then set out particulars of "UCCU's Campaign of Vexatious Litigation Supported by False Evidence". These pleas do not name the fourth or fifth named defendants, although civil and criminal complaints initiated by UCCU in October 2011 relate to its efforts to obtain and inspect the ToAZ share register, and the general pleas in para.s 6-10 link all of the defendants back to Mr Mazepin.

☐ Paras 110 – 122 plead that, as a result of ongoing criminal complaints by UCCU under Article 159(4) of the Russian Federation Criminal Code, and a related potential damages claim in which UCCU allege damages of US $55 million, arising out of alleged diversion of funds from ToAZ, since 7 October, 2014, various orders have been obtained by the Russian authorities from Basmanny District Court in Moscow

freezing all dealings with the plaintiff's shares in ToAZ and declared dividend entitlements, and freezing 348 properties belonging to ToAZ.

☐ Paras 123 – 128 particularise criminal charges and Basmanny District Court detention orders in December 2014 against Mr V.Makhlai (permanent London resident; his extradition has been refused by a UK court), Mr Sergei Makhlai (U.S.A. resident since 1983), Mr Korolev (London resident), Mr Ruprecht and Mr Zivy (Swiss residents and nationals), and consequent Interpol Red Notices which it is asserted are politically motivated and the issuance of which was procured by Mr Mazepin, "being the very steps intimated by Mr Mazepin at Zurich Airport in June 2013". Para 129 particularises an order made by Basmanny District Court on 24 September, 2015, suspending Mr Sergei Makhlai from the board of ToAZ, to which he had been appointed chairman in 2011.

☐ Para 133 contains allegations of "unjust, procedurally unfair and improper conduct of transfer pricing tax cases" instigated against ToAZ by Mr Mazepin/UCCU.

☐ Paras 134 – 138 set out allegations of "improper influence of judicial authorities", citing one judge who lodged a complaint of "inappropriate pressure" in the context of the transfer pricing tax claim, and another judge dismissed from office in March 2006 after making two findings in favour of ToAZ arising out of the earlier "Renova raid", and relying on the refusal of the English court (Senior District Judge Workman) to extradite Mr V. Makhlai.

☐ Para.s 139 – 147 set out allegations that in November, 2015 Mr Sedykin on behalf of Mr Mazepin and/or UCCU forged sham minutes of ToAZ shareholders and board meetings, and other documents, purporting to replace the directors with Mr Sedykin and other "nominees of Mr Mazepin", to remove ToAZ Invest as a body managing the affairs of ToAZ, and forming a commission to "restore" ToAZ's shareholder register including the shares allegedly acquired by Eurotoaz.

☐ Para.s 148-150 plead loss and damage. Para. 148 asserts that the plaintiffs were deprived "of their rights of ownership" in the ToAZ shares. Para. 149 pleads that the "wrongful acts committed by the Defendants" caused –

> "(a) The *de facto* expropriation of the Plaintiffs' ToAZ shares which have been frozen and cannot be traded;
>
> (b) The loss of dividends which have been declared and which would otherwise be paid to them;
>
> (c) The catastrophic loss in value attributable to the Plaintiffs' ToAZ shares as a direct result of the effective removal of rights attaching to those shares;"

☐ They also claim that their shares have become unmarketable, and they have suffered "all but total loss of value" in a company "valued in excess of US$3 billion", and further loss due to the weakening of the rouble against the US dollar since 2014/2015 dividends were declared. They also plead the loss of legal costs expended on defending their interests.

☐ The reliefs claimed at para.s 152 and 153 are declaratory - that "the Defendants ….have wrongfully and unlawfully conspired to defraud and injure the Plaintiffs", and in the alternative at para. 153 that "the Defendants….in concert and on the basis of a shared understanding, carried out unlawful acts with the purpose or aim of injuring the Plaintiffs and are therefore guilty of conspiracy by unlawful means."

☐ Damages are sought for conspiracy, intentionally causing loss by unlawful means, and tortious interference with the Plaintiffs' contractual and business relationships.

☐ At para. 159 injunctive relief is sought to restrain wrongful acts or interference with the Plaintiffs' rights.

**Basis for primary relief**

6. This was pursued not on the basis that the statement of claim failed to disclose a cause of action (O19 r28), but under the inherent jurisdiction of the court on the basis that the claims were bound to fail. Central to the application are the affidavits sworn by Mr Babichev in which he asserts, contrary to what is alleged in the statement of claim, that Eurotoaz owns shares in ToAZ acquired by Transfer Order dated 25 November, 1995. He relies on documentation exhibited in his affidavits which he contends is authentic, and which it is contended demonstrably undermines the plaintiff's claims that false or sham documents were deployed in the civil and criminal claims in Russia to assert Eurotoaz's share entitlement. It is then asserted that the civil and criminal proceedings were brought in Russia with the legitimate aim of establishing this share entitlement, and that they have been initiated, heard and determined in accordance with the laws of the Russian Federation. It was asserted, and not contested for the purposes of this application, that the law of the Russian Federation applies to the present claim. On the basis of expert evidence it was asserted that there is no rule of law empowering a Russian court to strike out repeated claims upon the ground that they are an abuse of the process or under principles equivalent to those enunciated in *Henderson v. Henderson*. It was therefore argued that the "Raider attacks" comprising alleged campaigns of vexatious civil and criminal complaints could not form the basis of an action for damages for conspiracy.

**Basis for other reliefs**

7. Three further points were pursued in argument: first, the claims should be struck out either under O19, r28 or the inherent jurisdiction of the court because the plaintiffs cannot show any demonstrable loss, because the loss and damage claimed is reflective only and can only be claimed by ToAZ.

Secondly, it was contended that there is an abuse of process because of the overlap between these proceedings and defamation proceedings brought in the Irish High Court by ToAZ against Eurotoaz, record number 2010/7155P.

Thirdly, lack of disclosure to McDermott J. was raised. It was asserted that he was not informed of the discontinuance in May 2016 of

certain proceedings brought by ToAZ in Cyprus which overlap with the present proceedings. It was further asserted that the purpose of instituting these proceedings was to ground an application for freezing orders sought against Uralchem in Cyprus filed the day after the issue of the Plenary Summons herein, but this intention was not brought to the attention of McDermott J. on 7 November, 2016, when the application for leave to issue and serve out of the jurisdiction was moved. A number of other points were raised and these will be addressed to the extent necessary.

**Applicable legal principles**

8. There was a measure of agreement between the parties as to the principles that the court should apply in considering the application to dismiss. Counsel for the fourth and fifth defendants acknowledged that the onus was on them to demonstrate clearly that the plaintiffs' claims were bound to fail, and that the court must be satisfied that it can with confidence conclude that, irrespective of what might arise in discovery or at trial, the plaintiffs could not succeed. It was accepted that insofar as there is any conflict of fact, that must be resolved in favour of the party against whom the strike out application is being brought - see the judgment of Barron and Murray JJ. in *Jodifern Ltd v Fitzgerald* [2000] 3 IR 321. At p.333 Barron J. stated:

> "in my view, the defendant cannot succeed in an application to strike out proceedings upon the basis that they disclose no reasonable cause of action or are an abuse of the process if the court on the hearing of such application has to determine an issue for the purpose of deciding whether the plaintiff could possibly succeed in the action.
>
> The function of the court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter onto some sort of hearing of the claim itself…"

It was accepted that the defendants had to surmount a high threshold. However it was argued that the court should be willing to intervene where the relevant legal relationship is dependent upon the existence of documents. In *Salthill Properties Ltd v Royal Bank of Scotland* [2009] IEHC 190, Clarke J. (as he then was) stated:

> "3.9 So far as the general question of whether proceedings are, on their merits, bound to fail it seems to me that it is necessary to address the question which arose for debate between the parties as to the approach which the Court should take to the evidence as presented on an application to dismiss, such as that with which I am involved. It has often been noted that an application to dismiss as being bound to fail may be of particular relevance to cases involving the existence or construction of documents. For example, in claims based on written agreements it may be possible for a party to persuade the court that no reasonable construction of the document concerned could give rise to a claim on the part of the plaintiff, even if all of the facts alleged by the plaintiff were established. Likewise, a defendant in a specific performance action may be able to persuade the court that the only document put forward as being a note or memorandum to satisfy the Statute of Frauds, could not possibly meet the established criteria for such a document. More difficult issues are likely to arise in an application to dismiss when there is at least some potential for material factual dispute between the parties capable of resolution only on oral evidence. At this end of the spectrum, it is difficult to envisage circumstances where an application to dismiss as bound to fail could succeed. In between are a range of cases which may be supported to a greater or lesser extent by documentation.
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> …
>
> 3.12 It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr. Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court. A simple example will suffice. A plaintiff may assert that it entered into a contract with the defendant which contained certain express terms. On examining the document the terms may not be found, or may not be found in the form pleaded. On an application to dismiss as being bound to fail, there is nothing to prevent the defendant producing the contractual documents governing the relations between the parties and attempting to persuade the court that the plaintiff has no chance of establishing that the document concerned could have the meaning contended for because of the absence of the relevant clauses. The whole point of the difference between applications under the inherent jurisdiction of the court, on the one hand, and applications to dismiss on the factual basis of a failure to disclose a cause of action on the other hand is that the court can, in the former, look to some extent at the factual basis of the plaintiff's claim."

9. Clarke J. returned to the subject in *Lopes v Minister for Justice Equality and Law Reform* [2014] IESC 21, where he emphasised the distinction between the jurisdiction arising under O19, r 28 of the R.S.C. and the inherent jurisdiction: –

> "2.2… The inherent jurisdiction can be traced back to the decision of Costello J. in *Barry v Buckley* [1981] IR 306. However, that jurisdiction needs to be carefully distinguished from the jurisdiction which arises under the RSC, precisely because it would be inappropriate to invoke the inherent jurisdiction of the Court in circumstances governed by the rules. In that context, I said, at para. 3.12 of my judgment in the High Court in *Salthill Properties Ltd v Royal Bank Of Scotland* [2009] IEHC 207, the following:"

Clarke J. then set out paragraph 3.12 from that judgment as quoted above, and continued:

> "2.3 The distinction between the two types of application is, therefore, clear. An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely that they might appear, are as asserted, the case nonetheless is vexatious…If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked.
>
> 2.4 It is important to keep that distinction in mind. It is also important to note the many cases in which it has been made clear that the inherent jurisdiction of the court should be sparingly exercised. This was initially recognised by Costello J. in Barry v Buckley and by the Supreme Court in *Sun Fat Chan v Osseous Ltd* [1992] 1 I.R. 425. In the latter case, McCarthy J. stated that "generally the High Court should be slow to entertain an application of this kind." This point has been reiterated more recently in *Kenny v Trinity College Dublin* [2008] IESC 18 at para 35 and in *Ewing v Ireland and the*

*Attorney General* [2013] IESC 44 at para 27.

> 2.5 It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. It must be recalled that a plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties. Interrogatories can be delivered. Witnesses can be subpoenaed and can, if appropriate, be required to bring their documents with them. Other devices may be available in other types of cases. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan* (at p.428), that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance."

10. In two other recent decisions of the Supreme Court, Clarke J. emphasised limitations on the extent to which the court can consider documents, and the height of the bar faced by an applicant seeking a strike out. In *Keohane v Hynes* [2014] IESC 66 he stated:

> "6.9… it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

In *Moylist Construction Limited v Doheny* [2016] IESC 9, he stated:

> "3.6 Depriving the parties of a full trial in whatever form is appropriate to the proceedings concerned is a departure from the norm, and one which should only be engaged in when it is clear that there is no real risk of injustice in adopting the course of action."

He went on to state:

> "5.9 To use a sporting analogy, the "dismiss as being bound to fail" jurisdiction is intended to deal with the "slam dunk". It can, perhaps, also be used to deal with a number of separate points, each one of which is clearly also a slam dunk. But where, to take a further sporting analogy from a different sport, it might be necessary to refer to the TMO, even if only on the basis of the question which invites an answer as to whether there is any reason not to award the try, the case is not suitable for such a motion. To deal with such issues in such a motion is to slip into the error of giving the defendant the type of summary disposal which our procedural law does not provide for and which Murray J. cautioned against in *Jodifern*."

11. I am bound by these principles in approaching this application. While the court in considering documentation in a strike out application is generally asked to do so in the context of undisputed documents where there is some dispute as to construction or legal effect, the present case is unusual in that the plaintiff's base their claim on the vexatious deployment of what they claim to be false or sham documentation. The fourth and fifth named defendants assert that these documents are authentic and demonstrably show Eurotoaz's entitlement to shares in ToAZ. It does appear from the passage cited at paragraph 3.9 of the judgment of Clarke J. in *Salthill* that it may be appropriate for the court to consider "the existence or construction of documents". Accordingly, in the exercise of the inherent jurisdiction the documentation as presented by the defendants on affidavit will be considered.

**The documentary defence**

12. In his first affidavit dated 17 February, 2017, Mr Babichev exhibits a number of (purported) *copy* documents with translations from Russian relied upon to demonstrate Eurotoaz's entitlement to shares in ToAZ:

> i. Agreement No.7-A1 dated 15 June, 1994, whereby "Hungarian-Russian joint enterprise "Eurotoaz"" with an address in Budapest, Hungary purported to buy 44,541 shares being 10% of the share capital in ToAZ.
>
> ii. A schedule to i. above, headed "Investment Agreement" dated 20 June, 1994, between ToAZ and the Hungarian Russian joint enterprise "Eurotoaz Ltd" as Investor, on the basis of Agreement No.7-A1, recording that investments are to be made totalling $20 million, being $9 million in 1994, $7 million in 1995 and $4 million in 1996.
>
> iii. A Transfer Order dated 25 November, 1995, purporting to show that "Eurotoaz Limited" registered in Ireland on 29 March, 1995, and having a postal address in Switzerland "have formed and signed the transfer order…to transfer shares from "Eurotoaz", Hungary to "EUROTOAZ LIMITED", Ireland, in full, all 44,541 shares". The transferor is also referred to as "EUROTOAZ" (Budapest). "Galantai D." General Director, is the signatory for Eurotoaz Limited (Ireland).
>
> iv. Copy letter dated 25 November, 1995, to Mr Korolev from D. Galantai, General Director and Mr Baudet, Chairman of the Board, both of Eurotoaz Limited.
>
> v. A letter dated 24 January, 1996, purportedly signed by Mr Korolev as a director of "Financial and Investment Company "ToAZ Invest"", "being the registered keeper of ToAZ" to "Mr D. Galantai" of EUROTOAZ LIMITED informing him "on the basis of your letter dated November 25, 1995, shares of Hungarian – Russian joint enterprise "EURO-TOAZ" with postal address [in Budapest] are transferred in the register of shareholders to the personal account of "EUROTOAZ LTD" with postal address [in Switzerland]".
>
> vi. Certificate No. CO-17347 issued on 21 February, 1996, purporting to be a share certificate in respect of registered

shares in ToAZ granting voting rights in respect of 44,541 votes and referencing "EUROTOAZ LIMITED, DUBLIN, IRELAND" and "Letter of HRJE "EURO-TOAZ" dated November 25, 1995".

vii. A "Ruling" of a Criminal Investigator in the municipal district of Togliatti dated 18 February, 2010, to open an investigation in respect of the second criminal complaint. This document includes the sentence "On 27. 11. 1997 EUROTOAZ was dissolved, and EUROTOAZ LIMITED became the legal successor of this legal entity", and references the documents listed at v. and vi. above, and refers to an application by Mr Sedykin on 19 June, 2009, for information on the register of shareholders in Toaz.

Mr Babichev asserts that these documents are not disputed and demonstrate that Eurotoaz was a shareholder at some time prior to 25 December, 1997, when it is said Eurotoaz Hungary was dissolved. He then exhibits copies of two further documents:

viii. A report of implementation of the investment programme signed by V. Makhlai on behalf of ToAZ referring to an "Investment Agreement from June 20, 1994 between [ToAZ] and company "EUROTOAZ" the following investment programme is implemented", and then referring on the first line to a planned and actual investment of "1994 9.0 million USD". This document purports to be signed by "Galantai Diord" on behalf of "Eurotoaz Limited".

ix. An "Issue Prospectus" dated 7 October, 1997, purporting to list Eurotoaz Limited with an address in Switzerland as the owner of 8.806% of the shares in ToAZ.

Mr Babichev then relies on a third tranche of (purported) copy documents which he avers, at paragraph 34 of his first affidavit, were "found during the search in the apartment of the common law wife of the former head of ToAZ Mr Vladimir Makhlai":

x. A letter dated 18 February, 2015, from the Investigative Committee of the Russian Federation to the Arbitration Court of the Samara Region apparently forwarding copies of 12 listed documents into the Arbitration Court. Copies of these documents are then exhibited. It is only necessary to refer to some of these.

xi. The first purports to be a "Memo of the Hungarian – Russian joint enterprise "Euro-Toaz"" prepared by the Investigative Committee setting out the sequence of events and documents relied upon by the fourth and fifth named defendants to substantiate the ownership by Eurotoaz of shares in ToAZ.

In passing I note that this memo suggests *inter alia* that EuroToaz Hungary invested the shares in ToAZ in 1995; that in November 1995 it changed its name to "Eurotoaz Limited" and that EuroToaz Hungary underwent reorganisation.

xii. A memorandum concerning Eurotoaz Hungary and Eurotoaz Limited, detailing *inter alia* to whom documents were sent in respect of ToAZ meetings.

I note in passing that Euro-Toaz (Hungary) is named for years 1994 and 1995 (26.12.95), Eurotoaz Limited is named for years 1996 and 1997, and Euro-Toaz (Hungary) is named for 1998.

xiii. In copy Tables purporting to show the Register of Shareholders for ToAZ , the Table for 1996 lists "Eurotoaz Limited" with a Swiss address in Fribourg, the Table for 1997 lists "Euro-toaz" with the same address in Switzerland. In a further Table which bears no date but could be 1998 (if the sequence in which the documents are exhibited is followed), "SVRP Euro-Toaz" with an address in Budapest and Switzerland, is named as a shareholder. This would appear to be a reference to Euro-Toaz (Hungary).

xiv. Copy Annual Accounts of Eurotoaz Limited for the year ended 31 December, 1997, and subsequent years up to the year ended 2010. It appears that this company was struck off the register by the CRO for failing to make returns, and subsequently annual returns and accounts were prepared and signed by auditors Farrell Grant Sparks on 15 November, 2006, for the purposes of obtaining reinstatement. The auditor's opinion for the year ended 31 December, 1997, states: –

> "… The directors have provided certified share certificates and details of the investment in the Russian company, [ToAZ]. According to the certified share certificates Eurotoaz Limited holds 44,541 shares…of its common stock. However we have been unable to obtain independent third-party confirmation and especially confirmation from the entity invested in. Accordingly we feel that the evidence available to us was limited because we were unable to obtain a reliable, independent third-party valuation directly from [ToAZ], the company in which the investment was made. Had this information been made available to us we might afford a different opinion."

On the next page in qualifying their opinion, the auditors add: –

> "In respect solely of the limitation on our work relating to the assessment of the valuation of the investment we have not obtained all the information and explanations that we consider necessary for the purposes of our audit. As detailed in the directors report, the company intends to bring legal action to reclaim and enforce its rights as a shareholder of the Russian company [ToAZ], holding 44,541 shares, 10% of its common stock. The directors have prudently written the value of this investment down to nil until legal action has been finalised on this matter."

Identical opinions appear in the accounts for each year up to and including 31 December, 2006. These statements are dropped from accounts for the ensuing years. The audited accounts for the year ended 31 December, 2010, note that "Legal actions are in progress by the company to secure its shareholder rights" in ToAZ. Mr Galantai Gyorgy is a signing director on the accounts for the years 2009 and 2010, but not in respect of earlier years.

xv. An email sent on 29 September, 2006, to Aidan Scollard of Farrell Grant Sparks with attached translated Agreement No.7-A1 and Share Certificate dated 21 February, 1996 (documents i. and vi. listed above).

xvi. A Forensic Report of BSI Cybersecurity dated 4 September, 2017, prepared for the fourth and fifth defendants' solicitors Arthur Cox, concluding that the email of 29 September, 2006, was sent on that day and that the accompanying attachment was last modified on the 28 August, 2006.

xvii. Also exhibited are: a copy of the First Eurotoaz letter of complaint made by Mr Sedykin on behalf of Eurotoaz in a letter dated 13 October, 2009.

**Rejection of claim to strike out based on documentation**
13. For a number of reasons the defendants have failed to satisfy me that the plaintiffs' claims should be struck out based on this documentation, or the effect of this documentation as asserted by Mr Babichev in his affidavits, or the inferences that he asks the court to draw.

14. Order 40, rule 4 of the RSC provides –

> "4. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted…"

This is not an interlocutory application because, were the fourth and fifth named defendants to succeed, the entire proceedings as against these defendants would be struck out, and that would be a final order (subject only to appeal). This was not disputed and in my view accords with the decision of the majority of the Supreme Court in *Minister for Agriculture Food and Forestry v Alter Leipziger* [2000] 4 IR 32. Accordingly, it was incumbent on Mr Babichev to confine himself to such facts as he himself could prove, and to state his means of knowledge.

15. As he states in paragraph 37 of his first affidavit, Mr Babichev 's first involvement with Eurotoaz was in November 2011. He is not therefore in a position to prove any of the documents which it is asserted came into being before that date. Moreover, to state the obvious, the documents exhibited are copies – no original documents are exhibited. Further, Mr Babichev does not state his "means of knowledge" in relation to these documents. This applies equally to the third tranche of documents said to have been found during a criminal investigation search - he fails to state on oath who found these documents or how copies came to be in his possession.

16. As to receivability, and the admissibility of the documents, "the primary evidence rule" applies. This was explained by O'Flaherty J. in *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, at page 518 as follows:

> "The best evidence rule operates in this sphere and to the extent that the party seeking to rely on the contents of the document must adduce primary evidence of those contents, i.e. the original document in question. The contents of the document may be proved by secondary evidence if the original has been destroyed or cannot be found after due search. Similarly, such documents may be proved by secondary evidence if production of the original is physically or legally impossible."

17. This statement was adopted by Edwards J. in *The Leopardstown Club Ltd v Templeville Developments Ltd* [2010] IEHC 152, where he noted at paragraph 5.18 that "The primary evidence rule applies in the case of the document adduced either as original evidence or as testimonial evidence." He went on to observe:

> "5.19 It is also the case that, in most instances, before the contents of the document can be received in evidence the party seeking to adduce it must prove the authenticity of the document. This generally involves proving that it was written or signed by the person by whom it purports to have been written or signed. This can be done by calling the author of the document, or a person who was present when the document was created and who witnessed its execution. …"

18. While copy documents may be received in evidence in certain circumstances, nowhere in his affidavits does Mr Babichev lay the ground for the admission of copies of documents that are relied upon.

19. Moreover, many of the documents relied upon by the defendants contain hearsay. As Edwards J. stated in *The Leopardstown Club Ltd*:

> "5.15 Documents introduced as testimonial evidence are subject to the general rules of admissibility, particularly the hearsay rule and the opinion evidence rule. In this regard:
>
> (i) the hearsay rule serves to exclude any document which it is sought to rely on as evidence of the truth of its contents unless those contents come within one of the exceptions to the hearsay rule;
>
> (ii) if the document contains an expression of opinion by a non—expert it will not be admissible."

This applies most obviously to copies of memos said to have been obtained or to result from the search of the apartment in the course of the Russian criminal investigation.

20. Fundamentally therefore, the defendants have failed to adduce receivable and admissible documentary evidence to prove their case for a strike out. This is no mere technicality. There are express pleas in the statement of claim alleging that the documents relied upon to support Eurotoaz's shareholding claim, and to support in turn what are said to be vexatious civil and criminal complaints, are false/sham. In light of this it was incumbent on the fourth and fifth named defendants to adduce and prove receivable and admissible documentary evidence to support their case, and to satisfy the court as to the authenticity of this documentation on the basis of credible evidence. This they have singularly failed to do.

21. This finding would be incomplete without reference to the argument made on behalf of the fourth and fifth defendants that paragraph 65 of the statement of claim, taken in combination with the preceding three paragraphs, effectively alleges that Agreement 7-A1 and "purported letter of 25 November, 1995 and the alleged responses of ToAZ Invest" were "manufactured" in March 2010, yet the email sent to Farrell Grant Sparks on 29 September, 2006 contained two documents namely copies of Agreement 7-A1 and the Share Certificate (documents i. and xi.), and a copy of the Share Certificate was enclosed with Mr Sedykin's letter of complaint of 13 October, 2009. How, it is asked rhetorically, could these document have been forged in March 2010 if they existed in 2006 or October, 2009.

22. The Plaintiffs answer this in a number of ways. Counsel argued that the BSI Forensic Report verifying the authenticity of the email and attachments is not absolute in the opinion that it expresses. This is so; page 4 of the report identifies an anomaly in the underlying metadata, and notes that "software programs do exist which allow for the alteration of meta data in an email or other document type". There is thus some, albeit perhaps limited, scope for undermining this report on cross-examination should the plaintiff's wish to do so. Accordingly, the evidence adduced on this on behalf of the fourth and fifth named defendants is not a "slam

dunk".

23. Secondly, in an implicit acceptance that parts of the very lengthy statement of claim might have been too narrowly focused, counsel for the plaintiff's indicated that this could be dealt with by way of an amendment of the statement of claim, particularly paragraph 65, extending the pleas relating to the creation of false or sham documents back in time to the year 2006 or earlier (there is a suggestion in the Russian Federation court rulings that Mr Galantai/Eurotoaz was aware of alleged violation of its shareholder rights as early as 2004). No application to amend was pursued, but had I been of the view that the proceedings should be struck out as against these defendants but could be 'saved' by an amendment, I would have been disposed to consider granting a suitable amendment. It remains a matter for the plaintiff's as to whether they choose to apply for an amendment in the normal way.

24. Even if the copy documents were admissible, I would still not be persuaded that they constitute incontrovertible proof that the fourth defendant acquired a shareholding in ToAZ, or that it has an entitlement to a shareholding in ToAZ at the present time. Without pursuing this in any detail, as that is a matter for the trial court, the copy documents relied on are not universally consistent with acquisition by Eurotoaz Limited (the Irish registered defendant) as opposed to Euro-Toaz Hungary, or with the suggested dissolution of the latter company. The letter of complaint of Mr Sedykin dated 13 October, 2009, on its face also refers to inconsistent dates. These inconsistencies are repeated in other documents recording or concerned with the criminal complaints claimed to be part of the conspiracy. These and other inconsistencies and contradictions were highlighted in the affidavits sworn on behalf of the plaintiffs, including in particular those of Mr Korolev who was involved as General Director of Toaz in 1995/1996 in which he disputes the authenticity of the documents relied upon, and further detailed in oral submissions made by counsel on behalf of the plaintiffs. I find that they are such that it cannot be said that based on these copy documents the plaintiffs case is 'bound to fail'.

25. Moreover Mr Babichev, and before him Mr Sedykin, have failed thus far to persuade the Russian Federation courts, and in particular the Supreme Commercial Court which is the court of final appeal, of Eurotoaz's claim to be entitled to a shareholding. I take the decisions of these courts to be matters of public record. Copy judgments and translations have been exhibited.

26. The First Eurotoaz Civil Claim launched by Mr Sedykin and Eurotoaz in 2010 in the Samara Region Commercial (Arbitrazh) Court was ultimately determined by the decision of the Supreme Commercial Court on 17 July, 2012. In its decision at page 7 of the translation the Supreme Commercial Court noted that since 1995, Eurotoaz Limited had never exercised rights as the holder of ordinary shares in ToAZ by attending meetings or receiving dividends. The court found (at page 8):

> "Thus, in the present case the actual interest of the Irish company Eurotoaz Limited, which had for the first time advanced in court its claims to taking part in the administration of [ToAZ] and influencing its activities, is to acquire the shareholders status."

The court proceeded to consider this in the light of the Russian Civil Code relating to the Statute of Limitations. It held that Articles 208 and 304, which might have disapplied the Statute, did not apply. It held, at page 8 –

> "Therefore, a general three – year statute of limitations provided under Art. 196 of the Civil Code applies to the present claim of the Irish company Eurotoaz Limited for the return of the shares to its account, with such statute of limitations commencing under Art. 200(1) of the said Code on the day when the Irish company became or should have become aware of the violation of its rights."

Applying this to the facts, at page 9 of its judgment, the Supreme Court states: –

> "In the present case, the court of trial and the Court of Appeal found that on 15/11/2006 special audit reports for the years 1998 – 2005 had been prepared by auditors for the Directors of the Irish company Eurotoaz Limited, which stated that the company was going to file a claim for restoration and protection of its rights as a shareholder in [ToAZ] – the owner of 44,541 shares amounting to 10% of the total number of ordinary shares. It was pointed out by the auditors that the directors of the Irish company Eurotoaz Limited prudently wrote-off the value of these investments (shares) as zero until the time when said claim is determined.
>
> The aforementioned special audit reports are registered as part of the package of documents of 23/11/2006.
>
> Under such circumstances, the conclusions of the Court of Appeal that the information on the loss by the Claimant of the disputed block of shares was discussed by the latter's executive bodies, and that the Irish company Eurotoaz Limited became aware of the violation of its rights no later than on 23/11/2006, are correct.
>
> This claim was filed on 25/05/2010, that is past the statute of limitation.
>
> The expiry of the statute of limitations, as claimed by the Respondent, is a stand-alone and sufficient reason for dismissing the claim (Art. 199(2) of the Civil Code).
>
> Therefore, the Court of Appeal legitimately dismissed the claim as one filed past the statute of limitations."

27. In summary, the Supreme Commercial Court, which for this purpose accepted at face value the Eurotoaz audit from 2006, dismissed Eurotoaz's claim to a shareholding in ToAZ on the basis that such a claim was statute barred not having been brought within three years of its date of knowledge of violation of its rights in 2006.

28. I also note that in the context of the first criminal complaint, Mr Sedykin was interrogated on 9 March, 2010, and at the end he was asked:

> "Explain why, if the theft of the shares belonging to Eurotoaz Limited took place in 1997 – 1999, a claim about this was submitted to law enforcement bodies only in 2009, i.e. more than 10 years after the commission of the crime?
>
> E.Y. Sedykin's response: I am unaware of the reason for this later recourse to law enforcement bodies, because I have worked with Eurotoaz Limited only since June 2009."

29. It is evident from further court rulings exhibited that the Russian courts have raised issues over the authenticity of the documents relied upon by Eurotoaz/Mr Babichev/Mr Sedykin. From the Statement of Claim it will be recalled that in 2014 in the Second Eurotoaz Civil Claim, Mr Babichev sought to re-litigate the claim that failed in the first claim brought in May 2010. Eurotoaz lost before the Arbitration Court of Samara at first instance. From the exhibited Decision dated 21 April, 2015, it is evident that Eurotoaz based their

claim to be treated as a shareholder and to receive ToAZ dividends on the same copy documents relied on in the present case said to have been obtained as a result of the criminal investigations (instigated by Mr Sedykin and later by Mr Babichev). From the judgment it is clear that the court undertook a detailed review and analysis of all the documents relied upon by Eurotoaz. At page 7 of the translation of the Decision the court comments that "…the arbitration court cannot consider a fact proven if such fact is confirmed only by a copy of a document…". In its analysis of the documents at pages 8 and 9 the court refers *inter alia* to case materials, to show that Eurotoaz Ireland and Eurotoaz Hungary being the one entity, as "missing documents"; it details the requirement of information and signatures on a securities transfer order; it finds as fact that the "disputed transfer order is missing"; and it states that the letter from ToAZ-INVEST (document iii. listed earlier) was not original, and was missing the date and outgoing reference number. At page 8 it is stated:

> "Therefore, the court believes that since there is no entry in the register of [ToAZ] shareholders, and this letter has no legal force and fails to confirm circumstances referred by the Claimant to justify his claims".

The court found that the Prospectus did not assist Eurotoaz as it referred to "Eurotoaz Limited (Switzerland)" – not Ireland. On page 9 the court also found inconsistencies in names in the 'Report on Investment Programmes' when compared with Agreement 7-A1 and the Investment Contract dated 20.6.1994, and concluded that it couldn't take these copy documents into account as "confirming evidence". It further observed that no evidence had been submitted to confirm that the disputed shares had been paid for in full by Eurotoaz.

30. A recent decision of the Russian Federation District Court of Samara reinforces my views, and may lend some credence to the matters pleaded at paragraphs 139 – 147 of the statement of claim alleging forgery by Mr Sedykin. Mr Sedykin was prosecuted and found guilty before this court for crimes under the Russian Criminal Code for forging documents relating to general meetings and board meetings of ToAZ for personal gain and developing a criminal conspiracy for fraudulently acquiring ordinary shares in ToAZ and ToAZ property. In essence in October 2015 he forged documents to convene an annual general meeting of ToAZ, which he had no legal right to convene. This meeting took place on 22 November, 2015, with the participation of seven named persons "controlled and engaged" by Mr Sedykin. The meeting purported to pass fraudulent resolutions approving minutes, overturning dividends and remuneration decisions taken by the board in 2014, appointing Mr Sedykin as chairman, removing the existing management company and appointing a replacement general director, and various ancillary resolutions. This was immediately followed by a purported board meeting which passed similar resolutions implementing the fraudulent intent. Further acts of fraud took place thereafter in the preparation and signing of minutes. Using these documents Mr Sedykin misled a notary into certifying various documents and forms which were submitted to the Unified State Register of Legal Entities for registration of information about the head of ToAZ's permanent executive body. The false minutes were also used for committing the fraudulent acquisition of rights to ToAZ property. He was also found guilty of attempting to acquire the right to dividends in ToAZ using false pretences. Further elaboration of follow-up criminal acts and use of forged materials up to December 2015 is set out in the decision. Mr Sedykin was sentenced to a term of "four years of deprivation of freedom".

31. The lengthy judgment is revealing in two respects. First, the court had occasion to revisit Mr Sedykin's claims that Eurotoaz Limited has an entitlement to shares in ToAZ due to structural reorganisation of Euro-ToAZ SRVP. The court took substantially the same view as that taken by the Samara Commercial Court in its decision of 21 April, 2015. Secondly, it emerged that Mr Sedykin had an agreement with Eurotoaz since 2009 pursuant to which he is entitled to 50% of all shares and dividends of ToAZ recovered by his actions on behalf of Eurotoaz.

At page 30 Judge Giniyatullina stated:

> "It was established, however, in court that Euro-ToAZ SRVP was liquidated on 27.11.1995 by merging with Europe Ltd Trade Limited Liability Company and was transformed into ROMEX Industrial and Trade Company, a Hungarian limited liability company of the free custom zone which ceased to exist on 19.10.1998 through liquidation without legal successors.
>
> The court deemed as legally invalid the data set out in the letter dated 25.11.1995 presented by [Mr Sedykin] and signed by D. Galantai that "…due to structural organisation, Eurotoaz is transferred from Hungary to Switzerland to perform joint activity there and will officially be named Eurotoaz Limited"… under registration number 231172, since the documents available in the case do not attest to transfer, instead to reorganisation of Eurotoaz SRVP by merging with Romex and further liquidation.
>
> There are no auditor's reports added to the case or other documents, based on which one could conclude that [ToAZ] shares were transferred to the authorised capital of Romex which was formed by merging an industrial and a commercial limited liability company.
>
> [Mr Sedykin] provided the court with an affidavit in which he stated that on 21 November, 1995, an agreement of sale and purchase of 10% of [ToAZ] shares was entered into between the Irish company Eurotoaz Limited and Eurotoaz SRVP. On 21 November, 1995, another agreement was concluded on transfer of debt amounting to US $20,000,000 from Eurotoaz SRVP (Hungary) to Eurotoaz Limited, Ireland. However, Mr Sedykin has not provided the court with the following: agreement of purchase and sale of 10% of [ToAZ] shares dated 21.11.1995 between the Irish company Eurotoaz Limited and Eurotoaz SRVP and agreement dated 21.11.1995 on transfer of debt amounting to US $20 million from Eurotoaz SVRP to Eurotoaz Limited, Dublin, Ireland, as well as the evidence of their transfer to the register. In addition, the court has not accepted as a valid proof of title of Eurotoaz Limited, Dublin, Ireland, to the corresponding shares of [ToAZ]: a copy of Certificate No. SO-17347 dated 21.02.1996 signed by V.N. Makhlai, head of [ToAZ], and K.I. Tupeyeva, chief accountant of the enterprise, bearing the seal of [ToAZ]. [Mr Sedykin] has provided copies of documents to [ToAZ], from which it clearly appears that he had direct personal interest in positive outcome of the case in the interests of Eurotoaz Limited, Dublin, Ireland.
>
> According to contract of delegation No.0921 dated 21.06.2009 between Eurotoaz Limited, Dublin, Ireland, and [Mr Sedykin], if the title of Eurotoaz Limited, Dublin, Ireland to the above shares in [ToAZ] is recognised, 50% of them shall be handed over to [Mr Sedykin] free of charge. In addition, under this agency contract, 50% of dividends accrued on the shares in the period from 1993 to 2009. Under gift agreement No.0912/22 dated 22.12.2009 entered into between Eurotoaz Limited, Dublin, Ireland, and [Mr Sedykin], Eurotoaz Limited, Dublin, Ireland, gives as a gift to Sedykin ½ of the corresponding shares in [ToAZ]. That said, it was established by the court that Eurotoaz Limited, Dublin, Ireland has no evidence of title to the shares."

32. In light of this and the earlier civil judgments mentioned the assertion that the present proceedings are bound to fail against the

fourth and fifth defendants on the basis of the copy documents upon which they place reliance cannot be maintained.

**Arguments concerned with Russian Federation Law**
33. The parties relied on experts as to relevant Russian law. The fourth and fifth named defendant's expert was Professor Peter B Maggs, a US lawyer specialising in laws of the Russian Federation, who swore two affidavits/reports. The plaintiff's relied on Mr Vladimir Gladyshev, a practising attorney at the bar in Moscow who currently divides his practice between Moscow and London, who produced three reports. These reports range over various aspects of Russian law, but for the purposes of this application, as it proceeded before this court, they were relevant to (1) whether the making of repeated criminal and civil complaints, and undertaking repeated litigation of the same complaints, can ever be unlawful in the Russian Federation and/or the foundation for an action in tort; (2) whether an injunction restraining vexatious litigation granted by an Irish court at full hearing would be enforced in Russia, and (3) the question of "reflective loss". I will however touch first on the contention made by the fourth and fifth named defendants to the effect that the plaintiff's were not properly shareholders in ToAZ and as fiduciaries cannot pursue these proceedings.

**(1) Challenge to Plaintiff's *Locus Standi***
34. In paragraphs 48-49 of his first affidavit, Mr Babichev contends that the plaintiffs were not properly shareholders in ToAZ as holding companies were fiduciaries who cannot maintain these proceedings. This issue was not pursued in any serious way in the fourth and fifth named defendants' legal submissions. In his first report of April 2017 Mr Gladyshev deals with this issue stating that "in practice, a dispositive proof of the ownership of shares is in the extract from the registry that reproduces the inscription of shares" (paragraph 101). Mr Gladyshev states that he reviewed the shareholder register of ToAZ on 16 October, 2015, and concluded that it is clear from the register that between them the plaintiffs held approximately 70% of the shareholding. Mr Gladyshev deals at paragraph 108 with the status of the plaintiff as fiduciaries: –

> "…Unfortunately, Mr Babichev ignores the fact that the plaintiffs are the registered shareholders of Toaz as set out in the Shareholder Register. As such they are recognised under Russian law as the owners of approximately 70% shareholding. In any event, while Russian civil laws do not contain a defined term "beneficial owner" or any other common law trust terminology, Russian judicial practices recognise trusts as lawful legal entities projecting ownership rights recognisable and enforceable in Russia."

He therefore concludes and that the plaintiffs are recognised under Russian law as the owners of approximately 70% shareholding and as such are the appropriate plaintiffs in these proceedings. In the absence of any serious counterargument I accept this evidence and opinion as correct.

**(2) Whether campaign of vexatious/repeat litigation can form the basis of a claim for conspiracy or injunctive relief under the law of the Russian Federation**
35. It should be noted that the plaintiff's claims as pleaded in the statement of claim are not confined to reliance on the procurement and deployment of false or sham evidence in the prosecution of vexatious civil claims in Russia. Paragraph 88 of the statement of claim pleads–

> "88. The attempts of Mr Mazepin, Holdings, UCCU, Eurotoaz, Mr Babichev and Mr Sedykin to continue to litigate matters already heard and determined upon by the Russian courts are unlawful and an abuse of the process. If lawful, which is denied, they are in furtherance of the conspiracy designed to injure or cause financial loss to the plaintiff's by defrauding them of the plaintiff's ToAZ shares."

Accordingly, the plaintiffs have pleaded conspiracy by unlawful means, or in the alternative, if lawful means were used, conspiracy by lawful means designed to injure the plaintiffs.

36. In his first affidavit of 26 May, 2017, Professor Maggs was asked to comment on paragraphs 87 – 90 of the statement of claim, at paragraph 11 he states:

> "11. First, I would like to point out that the scope of *res judicata* in Russia is much more limited than in the United States, with which I am familiar. In the United States, once a case has been decided, further suits are barred not only with respect to the issues of law and fact that were litigated, but also with respect to any closely – related issue that could and should have been litigated. In Russia, in contrast, *res judicata* is much narrower. In the Arbitrazh courts, which have jurisdiction over cases involving shareholder rights, *res judicata* applies only with respect to subsequent litigation based on the same facts and the same legal issues and does not apply to subsequent litigation on different facts and different legal issues, even if these facts and legal issues could have been considered in the original litigation. The narrower scope of *res judicata* in Russia leads to repeated litigation in situations where such repeated suits in the United States would be viewed as barred by *res judicata* and hence frivolous or vexatious. This rule is related to a standard Russian pleading practice, that of bringing several related actions as separate suits rather than a single suit combining a number of claims."

37. In his earlier report of 6 April, 2017, at paragraphs 195 – 266 Mr Gladyshev addresses conspiracy generally under Russian law. He identifies the potential to sue for tortious conspiracy under Article 1080 of the civil code of the Russian Federation, taken together with Article 1064, and he cites an example of a case where a combination of these articles was invoked by the claimant in a case involving a conspiracy between private and state parties to strip assets from a company through a scheme. While the claim was rejected in the lower courts and the cassational courts, the highest Arbitrazh court allowed the claim and the cassational court provided guidance in the context of proceedings where harm is caused jointly by two or more parties: it is not necessary to establish that each individual tortfeasor had by itself directly caused harm, rather it was enough to establish a conspiracy to cause harm. Each participant in the conspiracy would be jointly and severally liable under article 1080 due to the mere fact of participation in the conspiracy (paragraph 235).

38. In his further report of 10 July, 2017, Mr Gladyshev takes issue with Professor Maggs' observations on *res judicata*, and whether the filing of several lawsuits in Russia in related matters is to be regarded as vexatious practice. He opines -

> "37. The issue of whether the two Eurotoaz cases, taken by themselves, are "vexatious" and, even if they are, can or cannot be "penalised" as a matter of Russian law, is irrelevant for the Russian law cases advanced by the plaintiffs.
>
> 38. The pertinent issue is whether the multiple civil law suits, involving both Eurotoaz and other named and unnamed co-conspirators in tort, together with other legal and extra- legal actions, that may be lawful or unlawful by themselves, form a factual matrix of abuse that, in turn, can be characterised as "harm caused jointly" under Article 1080 of the Civil Code.
>
> 39. Russian courts and doctrinal writings give a definitive answer in the affirmative to the question that is posed."

In paragraphs of 40 – 44 he then cites authority for this proposition in the form of the *Stroydormash* case.

39. In a supplemental affidavit/report of Professor Maggs dated 1 August, 2017, he takes issue with Mr Gladyshev's opinion. In paragraph 3 he states-

> "… I have been unable to find a single case and Mr Gladyshev has failed to cite a single case in which the plaintiff has suffered other consequences for vexatious litigation, such as an award of damages above normal costs or an injunction against future litigation. Further, I've been unable to find any case in which a Russian court, in any circumstances, has issued an injunction against future litigation. Thus Mr Gladyshev is suggesting that the Irish courts make two dramatic innovations in Russian law."

40. Mr Gladyshev in his third report dated 7 September, 2017, responds. He states, *inter alia*–

> "8… If, on the facts, it is found that the Respondents indeed have engaged in a bad faith behaviour, then, under Russian jurisprudence that I have cited and Professor Maggs does not contradict, such a finding would satisfy a key element that, under Russian law, has to be established in order for a tort claim to proceed – the element of illegality.
>
> 9. The remedy in tort in Russia is well-defined and unexceptional – full compensation of harm. The compensation for harm suffered is as a result of the totality of the harmful actions/omissions of the joint tortfeasors. The heads of damages are set out in Article 15 of the Civil Code and include directors, lost profits and disgorgement damages."

Mr Gladyshev elaborates on this theme with reference to examples and articles of the Civil Code. He also addresses the question of injunctive relief. At paragraph 18 he asserts that an injunction against future litigation afforded by an Irish court would not constitute a "dramatic innovation" in Russian law. He describes an injunction against future litigation as "a conservatory measure that may, or may not be adopted by a Russian court, under applicable Russian procedural statute" (paragraph 19). He states-

> "20. While the current Russian practice is not conclusive, no Russian court, so far, has rejected an application for an anti-suit injunction on principle. On general principles of Russian law, such an injunction would be enforceable. It is confirmed by multiple academic authorities. For example…"

41. It is abundantly clear from this reprise of elements of the experts' opinions as to applicable Russian Federation law that there are two opposing views. It is not the function of this court in this application to attempt to resolve these differences. These are disputes of law, and disputes concerning the application of the law to the facts, that are classically matters for the trial judge. First, it is sufficient for the Plaintiff's defence of this application that there is before the court an expert view of Russian Federation law such that repeated vexatious civil litigation along with other legal or non—legal actions undertaken by co-conspirators could be tortious under the Russian Civil Code, and could attract full compensation for harm suffered. Secondly, there is one expert's view that an Irish court at full hearing could grant an injunction restraining vexatious litigation, and that this could be enforced in Russia. These matters are not therefore grounds upon which the plaintiff's claims, or any of them, or any of the reliefs sought, should be struck out.

**(3) Reflective loss**

42. At paragraph 148 of the statement of claim the plaintiff's claim that the defendants have and continue to injure them by "depriving them of their rights of ownership in…ToAZ shares". In paragraph 149 they claimed that the conspiracy has caused them "catastrophic loss and damage" which is continuing and includes:

> "(a) the *de facto* expropriation of the plaintiff's ToAZ shares which have been frozen and cannot be traded;
>
> (b) the loss of dividends which have been declared and which would otherwise be paid to them;
>
> (c) the catastrophic loss in value attributable to the plaintiff's ToAZ shares
>
> as a direct result of the effective removal of rights attaching to those shares;
>
> (d) the catastrophic loss in value attributable to the effect of the Raidar Attack in ToAZ, its shares, its management and reputation in the marketplace rendering the plaintiffs' shareholding unmarketable and unsaleable which is entirely coterminous with the plaintiffs' continued shareholding;
>
> (e) the plaintiffs reserve the right to adduce further evidence of the quantum of losses arising in respect of their respective shareholdings. As set out above, the plaintiffs collectively own approximately 70% of the shares in ToAZ, a company valued in excess of US $3 billion and have suffered the all but total loss of value in those shares which shall include (but not be limited to) any loss suffered by the plaintiff's arising from or in connection with the restriction on their ability to deal with their shareholding; and
>
> (f) the loss arising as a result of the weakening of the rouble against the US Dollar resulting in the reduction of sums payable to the plaintiffs now gain sums declared due for payment in 2014 and 2015 respectively."

In paragraph 150 the plaintiffs also claim legal costs that they claim they have been forced to incur in order to defend themselves from the conspiracy.

43. Counsel for the fourth and fifth named defendants argued that these claims are reflective of losses suffered by ToAZ which could only be claimed by that company. Under Irish law, a shareholder cannot claim damages for diminution in the value of their shareholding caused by a wrong done to the company. This rule against shareholder recovery of reflective loss was recently summarised by Costello J., following the decision of the House of Lords in *Johnson v Gore Wood & Co* [2001] 1 AER 48, in *Alico Life International Limited v. Thema International Fund Plc* [2016] IEHC 363 where she stated:

> "98. Where a company suffers loss as a result of a wrong by third party, a shareholder in the company may also suffer loss personally as a result: For example, the value of the shares may be reduced as a result of the losses suffered by the company. If the loss would be made good if the company were to pursue and enforce its rights of recovery against the wrongdoer, the loss is referred to as reflective loss. However, a wrongdoer may owe a duty not only to the company, but also to the shareholder. In an action for breach of duty owed to him, the shareholder can recover damages for his personal losses, but not for loss which is reflective of the company's losses. The rule applies when a duty is owed both to the company and the shareholder in the company and both suffer loss as a result of the wrongdoing by a third party. The

issue is whether the loss is that of the company and whether the shareholder's loss is merely reflective of the loss of the company. If the shareholder's loss is merely reflective of the company's loss, the rule applies and the company's cause of action bars the shareholder's cause of action. If not, then the shareholder is free to maintain his own cause of action."

44. In his first report/affidavit Professor Maggs says of Russian law:

> "13. Third, Russia does not allow shareholders or creditors to recover directly in tort for an injury to the company in which they held shares. There is a very limited exception, in which creditors may sue persons who wrongfully caused a company's bankruptcy."

45. Mr Gladyshev responds in paragraphs 66 to 114 of his second report. He is critical of Professor Maggs approach. His opinion is summarised in paragraph 75 – 80:

> "75. Under the construct of Russian Civil Code, of there is a general legal entitlement, formulate in peremptory language, then any limitation of this entitlement must be set out in an explicit statutory rule.
>
> 76. There are several relevant peremptory entitlements. None of them excludes a claim for reflective losses.
>
> 77. The entitlements include the constitutional right to judicial protection, the peremptory rule of fill compensation of harm, an entitlement to defend one's right through a remedy of compensation of harm, and an entitlement to judicial recourse in all cases where one's rights and lawful interests have been infringed.
>
> 78. Increasingly, the right to sue for losses have been recognised in doctrinal writings and court practices in Russia. The availability of a reflective losses claim is of special pertinence in cases where, on the one hand, rights of shareholders have been clearly breached, but, on the other hand, a company they used to hold shares in for some reasons (e.g.. liquidation) is no longer obtainable.
>
> 79. In such cases especially, a judicial impediment of a reflective losses claim would result in an arbitrary denial of the general entitlements listed above and lead to wrongs going unremedied and genuine losses uncompensated. Under Russian law, this is a legal impossibility without an express statutory authorisation.
>
> 80. Most significantly, there is, to my best knowledge, not a single Russian court case where the reflective loss doctrine was successfully asserted to defeat a claim at all similar to the one made by the Plaintiffs here."

He then addresses these issues in more detail by reference to Articles of the Civil Code. He acknowledges in paragraph 99 that "Normally, the Russian courts might consider that the requirement of adequate compensation is best served by a claim for the company itself", and that they would allow a "classical derivative claim of the shareholder on behalf of the company, where the company is of a going concern", but he adds:

> "100. However, in cases where a company would not be able to bring a claim on its own, then there is nothing in Russian law that would prevent a reflective losses claim."

He then cites academic authority for this.

46. Professor Maggs in his second report reiterates his position, and places emphasis on paragraph 7(a) of the statement of claim in which the plaintiffs plead that the defendants' vexatious claims continue to cause such catastrophic damage to ToAZ and its business "that the plaintiffs will be forced to sell their shares to the defendants or the nominees at an undervalue because the shares are valueless in the hands of the plaintiffs". He does not however address the substantive points made by Mr Gladyshev, as Mr Gladyshev is quick to point out in his third report.

47. It must be questioned whether some of the heads of loss claimed could ever be characterised as reflective loss. If the plaintiffs were to prove an effective expropriation of their shares, that would clearly be their loss. The same would apply to a loss of dividends. Counsel for the fourth and fifth named defendants suggested that while these were frozen by the Basmanny District Court orders, they were not lost. Be that as it may, the mere fact that dividend payments have been suspended would give rise to the loss of the use of the money, and as the claim at subclause (f) suggests, weakening of the rouble may have resulted in a loss.

48. As to the other heads of loss, and in particular the claimed "catastrophic loss in value" of shareholdings, again the court is presented with a divergence of expert opinion as to how the loss and damage claim by the plaintiff's would be dealt with under the law of the Russian Federation. This conflict cannot be resolved at this hearing, and it would therefore be inappropriate for this court to strike out any element of the pleaded claims.

**Abuse of the process**

49. The fourth and fifth named defendants suggest that the order made by McDermott J. granting leave to serve outside the jurisdiction/EU should be set aside on grounds of material non-disclosure. This argument simply cannot be sustained on behalf of Eurotoaz because it is an Irish company and the court's jurisdiction is grounded under Article 4(1) of the so-called 'Brussels Recast Convention' (Regulation No. 1215/2012 of the European Parliament and of the Council). As far as Mr Babichev is concerned, I am satisfied that no clear basis has been established to demonstrate such abuse of the processes as would justify dismissing these proceedings. Moreover, no timely application was brought on his behalf to set aside the leave order. I also accept the submission made by Counsel for the Plaintiffs that the leave order was procedural in nature, as opposed to one affecting the rights and obligations of parties, and I have not been persuaded that there was a failure to refer McDermott J. to any matter material to his decision to grant such leave. I will however address the particular matters which it is said should have been disclosed.

50. Counsel for the fourth and fifth defendants argued that the claims in these proceedings 'overlap' with the defamation proceedings brought in this jurisdiction by ToAZ against Eurotoaz, which appear to have been dormant for some years. Mr Babichev at paragraph 50 of his first affidavit suggests that the claims are "essentially identical". Although there is some overlap in that the defamation proceedings concern publication of two letters also pleaded in the present claim, this argument is untenable because those proceedings are brought by a different party, namely ToAZ, and sound in libel causing damage to business reputation (as understood under the law of the Russian Federation), not the tort of conspiracy. Further, Mr Babichev is not a party to those proceedings.

51. Next it was argued that prior proceedings instituted by ToAZ in Cyprus should have been brought to the attention of McDermott J. These proceedings were discontinued on 30 May, 2016. There is some overlap between these discontinued proceedings and the

present claims. However, the pleaded Cypriot claim is for "recovery of damages for malicious detractive defamation, inflicted damage to the goodwill and good reputation of the company, discredit, insinuation…". Again this sounds in defamation, but the critical point is that ToAZ itself, and not its shareholders, brought those proceedings. On that basis alone, in my view, there was no obligation of disclosure as it is hard to discern how the fact of those discontinued proceedings would have been a relevant consideration to, or had any impact on, the decision to grant leave. It may well be that the defendants can at trial place some reliance on the overlap in terms of losses between those pleaded by ToAZ in the discontinued claim, and those pleaded by the plaintiffs as shareholders in ToAZ in the present proceedings, in support of a contention that the claimed losses are reflective of company losses, but that is another matter altogether. Furthermore there were five other plaintiffs in the Cypriot case – one of whom was Mr Korolev who swore affidavits in response to this application – but none of them are parties to the present proceedings. In fact none of the present plaintiffs were party to those proceedings. Finally, although there was some overlap of defendants, Mr Babichev and the sixth and tenth named defendants were not parties, and three companies and two individuals who are not named in the present proceedings were defendants in the Cypriot claim.

52. In his third affidavit Mr Babichev deposes to an application in these proceedings filed in the District Court of Limassol on 10 November, 2016, two days after the order of McDermott J. granting leave, in which the plaintiffs sought mareva type injunctions against the third named defendant (Uralchem Holding plc). That application was returnable to the Cypriot court on 13 January, 2017. It appears that within the same application (General Application no.428/2016) the same plaintiffs named Uralchem Holding plc as first respondent and three other Cypriot companies (not party to the present proceedings), also seeking mareva type injunctions against them. The reliefs sought are directed at assets held or controlled by the respondents in Cyprus and outside Cyprus, including shares held by the second named respondent in two Latvian companies. The affidavit evidence supporting the applications sets out the vexatious litigation complaints pleaded in the present case and relies, *inter alia*, on Mr Gladyshev's expert opinion that the facts asserted by the plaintiffs, if proven, would give rise to valid claims under Russian law against the defendants in these proceedings.

53. Noting that this intended application was not mentioned in any affidavit before McDermott J., Mr Babichev contends that it ought to have been disclosed to the court. Counsel for the fourth and fifth named defendants pursues this contention, arguing that the present proceedings were launched as a springboard for the applications in Cyprus.

> *[ The District Court of Limassol handed down its decision on 7 September, 2017, refusing the application on the basis that "…the losses allegedly caused to ToAZ, and the losses suffered by the Applicant shareholders merely reflect those losses", and "The Irish action is not promoted by ToAZ. Nor is it a derivative action on its behalf and for its benefit". I note in passing that the court applied the law as enunciated in Johnson v. Gore Wood on the basis that that was also the approach under Cypriot law and "Since no evidence has been produced that the corporate law is different than the law applied to the action, it is presumed to be the same as the Cypriot one". It does not appear that the District Court of Limassol was provided with the law of the Russian Federation on reflective loss equivalent to that provided to this court on this application by Mr Gladyshev on behalf of the plaintiffs ].*

54. I am of the view that the plaintiffs were perfectly entitled to pursue proceedings in Cyprus seeking interlocutory reliefs in aid of these proceedings, and no cogent reason has been suggested to explain why it is said that the intention to promptly seek *mareva* type injunctions in Cyprus should have been disclosed to McDermott J. Furthermore, the application in Cyprus involved three further Cypriot companies who are not party to the present proceedings, one of which was a holder of targeted shares in two Latvian companies.

***Forum non conveniens***

55. This argument was not, and could not be, made on behalf of Eurotoaz because it is an Irish company sued in this jurisdiction. That this court does not retain any common law discretion in respect of EU citizens or corporate entities is apparent from the decision of Dunne J. in *Abama v. Gama Construction Ireland Ltd* [2011] IEHC 308, affirmed by the Court of Appeal [2015] IECA 179.

56. However it was pursued on behalf of Mr Babichev on the basis that he is a Russian citizen who speaks no English, the conduct complained of is said to have occurred in Russia, and Russia is a more appropriate forum because the witnesses will be Russian, the documents will be in Russian and Russian law will apply.

57. In arguing that Ireland is an entirely inconvenient forum for the determination of the disputes which arise, counsel relied upon the test established by the Supreme Court in *Intermetal Group Limited v. Worslade Trading Limited* [1998] 2 IR 1 in which Murphy J. reviewed the relevant jurisprudence, in particular the UK Court of Appeal decision in *Re Harrods (Buenos Aires) Limited* [1992] Ch. 72, and at page 35 adopted as a correct statement of law certain passages from the judgment of Bingham LJ., which he considers at pp. 33 – 34 of his judgment:

> "Bingham LJ. (as he then was), delivering the judgment in which Stocker LJ. concurred, explained that his starting point in applying the doctrine of *forum non conveniens* was the principle formulated by Goff LJ. in *Spiliada Maritime Corp. v. Cansulex Ltd* in the following terms: –
>
> > "[T]hat a stay would only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of *all the parties* and the ends of justice." [emphasis added by Bingham LJ.]

Bingham LJ. then went on himself to comment (at p. 124) as follows: –

> "The words I have emphasised make clear, as does a reference to justice, that a broad overall view must be taken: the primary task is not to decide which forum is advantageous or disadvantageous to any particular party. The court should look first to see what factors there are, taking this broad overall view, which point in the direction of another forum (see p.477G): at that stage it is connecting factors (including convenience, expense, availability of witnesses, governing law, place of residence and place of business) which must be considered: see p.478 A-B. If it is shown that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action a stay will ordinarily be granted unless on a consideration of all the circumstances justice requires that a stay should not be granted: see p.478D".

58. *Intermetal* was cited with approval by Hardiman J. in the judgment of the court in *McCarthy v. Pillay* [2003] 1 IR 592 , where he observed at page 602 that "it also seems to be agreed between the parties at the meaning of the Latin word "*conveniens*" is more aptly rendered in English by the words proper or suitable than by the word convenient."

59. The onus was on Mr Babichev in the first instance to demonstrate that Russia is a more appropriate forum. In circumstances where he is a director and alleged to be a co-conspirator with Eurotoaz, this was a particularly heavy onus. While I would accept, for the reasons that he gives, that from his perspective Russia might be a more "convenient" forum, there are countervailing reasons that persuade me that it would not be a "proper or suitable" forum, and that granting a stay in overall terms would not achieve justice.

60. First, key witnesses in respect of whom arrest warrants issued by the Basmanny District Court remain extant would be unlikely to attend a trial in Russia because to do so would mean that they would run the very real risk of politically motivated criminal charges, arrest and detention. This would apply to witnesses such as Sergai Maklai (a US national), and Swiss nationals Messrs. Ruprecht and Zivy. Mr V. Maklai and Mr Korolev are also on Russian domestic and international "wanted" lists and were the subject of Interpol Red Notices and pre-trial detention orders issued by the Russian court. Both Mr Korolev and Mr V Maklai successfully contested extradition from the UK to Russia on the basis that they would not get a fair criminal trial. This difficulty with assembling witnesses alone is enough to persuade this court not to accept to Mr Babichev's argument.

61. I also note that in a statement made to the Investigating Committee in Samara on 11 February, 2014, Mr Babichev indicated that Mr D Galantai, who is said to have been a director of Eurotoaz in 1995 and signatory to certain alleged documents, hence a key witness for Eurotoaz, was based in Budapest but "he will not come" to Russia, but would provide information. If that is correct it may in fact be better suited to the interests of the fourth and fifth named defendants that these proceedings be heard outside of Russia.

62. Secondly, Mr Gladyshev's first report indicates that the system available for obtaining discovery in Russia is weak, limited and subject to the discretion of the court, and that disclosure can only take place on request made to the court, with examination at the court premises. There is no appeal from such decisions. He further states that there is no opportunity to obtain pre-trial depositions (which I take to include pre-trial witness statements of the sort required in the Irish commercial court) or to request interrogatories. Professor Maggs describes as "common practice in Russia" the filing of criminal complaints in an attempt to obtain evidence that could not be obtained through civil discovery, in aid of civil proceedings. In his third report Mr Gladyshev disputes that this is common practice and at paragraph 51 states –

> "Professor Maggs' argument that the practice of using improper criminal police raids as a substitute for civil discovery is widespread in Russia is fanciful."

It is obvious that documents are going to be of central importance both to the plaintiffs' claims but also to the defences likely to be raised in these proceedings. Full discovery of all documents and other records that are relevant and necessary for a fair disposal of these proceedings, of the sort that is routinely agreed or ordered under the procedures provided for in the Rules of the Superior Courts, is a strong reason for refusing Mr Babichev's application.

63. In the circumstances it is not necessary for this court to consider whether in other respects the plaintiff's would be unable to obtain a fair trial in Russia, although I would observe that for the most part the decisions of the Arbitrazh courts to date in respect of the litigation said to be vexatious have gone in favour of the plaintiffs.

**Preliminary issue on the Statute of Limitations**

64. In the Notice of Motion, the fourth and fifth named defendants in the alternative ask the court to direct preliminary issues under the Statute of Limitations, 1957. This relief is dealt with perfunctorily in written legal submissions but was not pursued in oral submissions. Apart from any issue as to whether Russian or Irish law of limitations applies, I am not satisfied on the basis of those submissions that this is an appropriate case in which to direct such a preliminary issue. Moreover, as there is no agreement between the parties on the facts or inferences that might be drawn from them, and potentially complex and mixed questions of fact and law may arise, this does not seem to the Court to be a suitable case for the directing of a trial of a preliminary issue on the Statute of Limitations.

65. Accordingly I dismiss the application in its entirety.