

**Judgment 13/2003**

**Technocom Limited v  
(1) Roscomm Limited and  
(2) Mark Klabin  
Royal Court  
(Civil Action File 647)  
13<sup>th</sup> February, 2003**

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**Companies (Guernsey) Law, 1994 – ss 67A and 75 – allegation of wrongful conduct by director to the prejudice of the applicant – grant of interlocutory injunctions – principles to be adopted by the Court.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 13th day of February, 2003 before Andrew Christopher King Day, Esquire, C.B.E. Lieutenant Bailiff; sitting alone.

In the matter of:

TECHNOCOM LIMITED

Applicant

V

(1) ROSCOMM LIMITED

(2) MARK KLABIN

[(3) PLAIDERIE CORPORATE SECRETARIES LIMITED

Respondents

not a material party in these proceedings]

Whereas on the 19th day of April, 2002 the then Deputy Bailiff ordered the removal of the Second Respondent as Director of the First Respondent and restrained the Respondents all in accordance with the order appended hereto and whereas the then Deputy Bailiff varied the said orders on the 19th April, 2002 and the 30th May, 2002 also in the terms attached hereto, and whereas on 11th, 14th, 16th, 17th, 18th 21st October, 7th November and 12th December, 2002 the Lieutenant Bailiff heard Advocates J. P. Greenfield and St J. Robilliard Counsel for the Applicant and Second Defendant respectively, the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and

- 1.) Made various orders all in accordance with the order and schedules appended hereto discharging the said orders of 19th April, 14th May and 30th May, 2002 and removing the Respondent as Director of the First Respondent with immediate effect and the Lieutenant Bailiff;
- 2.) Awarded costs to the Applicant on a recoverable basis, with liberty to Counsel for the 3rd Respondent to apply for costs and the Lieutenant Bailiff;
- 3.) Ordered that the security for costs placed with the Court by the 1st and 2nd Respondents should continue to be held by the Court.

S. M. D. ROSS  
Her Majesty's Deputy Greffier



5. N.W.L Ltd. v Woods [1979] 3 AER 614; 1 WLR 1294
6. Shepherd Homes Ltd. v Sandham [1970] 3 AER 402
7. Locabail International Finance Ltd. v Agroexport [1986] 1 AER 901
8. Films Rover International Ltd. and others v Cannon Film Sales Ltd [1986] AER 772
9. Associated Portland Cement Manufacturers Ltd. v Tiegland Shipping A/S [1975] Lloyds Reports 581
10. Zockoll Group Ltd. v Mercury Communications [1998] FSR 354
11. Leisure Data v Bell [1988] FSR 367
12. Cayne v Global National Resources Plc [1984] 1 AER 225
13. Nottingham Building Society v Eurodynamics Systems plc [1993] FSR 468
14. de Falco v. Crawley Borough Council [1980] QB 460; [1980] 1 AER 913
15. Bravingtons Ltd. v Barrington Tennant [1957] R.P.C. 183
16. Church of Scientology v Miller, Court of Appeal, The Times, 23 October 1987
17. Re a Company [1984] 1 BCC 99, 262
18. Investors Compensation Scheme Ltd. v West Bromwich Building Society Ltd. [1998] 1 WLR 896
19. Schuler v Wickman Machine Tool Sales Ltd. [1974] AC 235

## **1. Background synopsis**

I would draw immediate attention to Appendix 3 (to this Judgment), as it provides helpful details of the many individuals and companies to whom and to which I will be referring. This is not a simple case. Accordingly, it is only fitting to express my gratitude immediately to Counsel for the kind and courteous assistance they have given me throughout, by their clear submissions and careful guidance through the abundance of paperwork that has been produced, amounting to at least sixteen affidavits and many hundreds of pages of supporting documents.

### **(i) The leading players**

The Applicant is a company incorporated in Eire. It has, since September, 1999, been effectively owned by Metromedia International Telecommunications Inc. (MITI), a US corporation, which in turn is a wholly owned subsidiary of Metromedia International Group Inc. (MIG), a publicly quoted Delaware company which operates, apparently, as a holding company for over fifty joint venture companies in eastern Europe, the former Republic of the Soviet Union and other, what are interestingly described as, “selected emerging markets”.

On the Applicant’s incorporation, in January, 1992, the two original founder shares were held for the benefit of the Second Respondent and a Mr. Boris Antoniuk, respectively. In November, 1994, PLD Telekom Inc. (PLD), then a Canadian registered company but now registered in the United States, purchased those two shares and, by the simultaneous issue of new shares to PLD, as also to Mr. Klabin and Mr. Antoniuk, acquired a majority 51% shareholding in the Applicant. In 1997 PLD increased its shareholding in the

Applicant to 80%, and during the course of 1999 completed the process of acquiring the whole of the issued shares in the Applicant, including the remaining interest of the Second Respondent. In the two earlier purchases by PLD of the shareholdings in the Applicant, that is in both 1994 and 1997, there were a number of associated agreements – shareholder agreements, option agreements, and consultancy agreements – which are of significance in this case, as also other matters relating to the parties. I will have to return to all of them in due course in more detail.

The completion of the purchase of the shares in the Applicant in 1999 took place at the same time as, and pursuant to, a merger between PLD and Moscow Communication Inc., (“MCI”), a wholly owned subsidiary of MIG, whereby MIG became, through MITI, the parent of the Applicant. That final purchase and merger was entered into conditionally, as evidenced by written documents dated the 18<sup>th</sup> May, 1999; completion of the transactions took place on the 30<sup>th</sup> September that year.

In 1994, the Applicant had a direct interest in four other companies, either in whole or in part. For the moment I need only mention two of them. The first is the First Respondent (“Roscomm”), a Guernsey company, which is owned by the Applicant as to two-thirds of its issued shares, and as to one-third of its shares by the Second Respondent through the medium of two other Guernsey registered companies, Commbel Ltd. and Anka Ltd. (an “in-house” company of the Third Respondent which provides corporate services and is a member of the Ansbacher Group) (“Ansbacher”).

Until my order of 19<sup>th</sup> April, 2002 (as amended on 14<sup>th</sup> May, 2002 for which see later) the Second Respondent was, for all material purposes and at all material times, the sole director of the First Respondent (though that factual statement is not to pre-judge the Applicant’s case that Mr. Klabin is in breach of his contractual obligations by being so). Because of the provisions of the First Respondent’s Articles of Association and Mr. Klabin’s one-third shareholding, and the provisions of the 1994 Guernsey Companies Law (which requires a three-quarters majority to carry any special resolution), Mr. Klabin’s position as sole director is well secured, at the least.

It must be emphasised that in 1999 PLD did not acquire the Second Respondent’s minority one-third shareholding in Roscomm.

The First Respondent owns 10% of the shares in ZAO Teleport-TP (“Teleport”) the second company to which at this stage I must refer. Teleport is a company incorporated in the Russian Federation which operates a telecommunications network, including a number of “earth-stations” containing satellite communications equipment. The Applicant directly owns 38.5% of the shares in Teleport, and a further 7.5% through another company registered in the Russian Federation, Technopark J.V (“Technopark”). The remaining 44% of the shares in Teleport are owned by Rostelecom (“Rostelecom”), a communications company in which a significant shareholder is partially state owned, also registered in the Russian Federation. Rostelecom provides interconnect telecommunication services and facilities, which services,

whoever the provider, appear to be a necessary adjunct to the business carried on by Teleport if it is to be maintained and developed. The Applicant, on the other hand, provides equipment necessary for the conduct of Teleport's satellite business, and, I understand, in 1994, 1996 and 1998 entered into lease agreements ("the Equipment Leases") for such equipment with Teleport. It is clear, therefore, that both Technocom and Rostelecom have potentially conflicting commercial interests in Teleport.

The First Respondent, as already intimated, controls the balancing interest in Teleport.

A further player I should mention at this stage is Helian International Corporation ("Helian"), a Panamanian corporation. Though the Second Respondent denies owning Helian, it is quite clear on the evidence before me, that the Second Respondent represented and acted for that company, and had much control over it.

**(ii) The basic issues**

A bitter dispute has arisen between the Applicant (which expression includes its owners) and the Second Respondent which revolves, inter alia, around the control of the First Respondent and consequently the balancing control of Teleport.

That dispute started to emerge at, about, the end of March, 2001, and thereafter escalated in intensity. Negotiations were entered into spasmodically during 2001, and certainly from October, 2001, but came to a halt in March, 2002.

The Applicant's case against the Second Respondent is based on two crucial allegations. Firstly, that with effect from the 30<sup>th</sup> September, 1999, as part of the overall agreement between PLD/MITI and the Second Respondent, he agreed to resign, and undertook to effect such resignations, from all directorships of the MITI Group, that is PLD, the Applicant, Teleport and the First Respondent. The last of those resignations, or undertakings, is strongly disputed by the Second Respondent.

Secondly, the equally crucial allegation of the Applicant against the Second Respondent is that since the middle of 2001, at the latest, it has had justifiable cause to be increasingly concerned and distrustful of his activities in respect, inter alia, of his control of Roscomm, and therefore that company's interest in Teleport. Those activities allegedly involve conflicts of interest and a demonstrable disregard for his fiduciary duties as sole director of Roscomm. That concern and distrust involves, inter alia, three documents central to this dispute ("the central documents"):-

- (i) A Services Agreement ("the Services Agreement") of the 12<sup>th</sup> August, 1995, between Teleport and Helian whereby monthly payments of \$48,000 were, and have continued to be, made by Teleport to Helian. The Applicant alleges that the Services Agreement was effectively terminated, in accordance with its controlling law (that of the Russian Federation) at the end of June, 2001. The Services Agreement is also relevant to :-

- (ii) An alleged pledge of shares (the “Helian Pledge” or “Pledge Agreement”) made on the 15<sup>th</sup> April, 1999, by the First Respondent in favour of Helian, that is to say, of Roscomm’s 10% shareholding in Teleport; and
- (iii) Alleged Bills of Exchange of the 15<sup>th</sup> January, 1999, by Roscomm in favour of Helian (the “Bills of Exchange”).

For his part, Mr. Klabin asserts that he specifically did not resign as a director of Roscomm in September, 1999; that there was and has been nothing sinister about any of the central documents or his conduct; and that in and from 1999 he held what is described as a “reserved position”, well known to the Applicant, in respect of his interest in Roscomm, and thereby in Teleport and the telecommunications business in the Russian Federation.

Thus the basic conflict is between the Applicant and the Second Respondent. Roscomm is merely an observer, the Third Respondent having even less interest in these proceedings.

**(iii) The central documents**

It is appropriate at this stage, I believe, to summarise the terms and effect of these three documents.

a) The Services Agreement

The first is the Services Agreement of the 12<sup>th</sup> August, 1995, between Teleport and Helian. The recitals record that Teleport, in accordance with the licence (by which I believe is meant its licence from the Russian Government) provides ILD communications services via its ground station and international telephone exchange, and is interested in expanding the number of its international operators; and that Helian performs the functions of financial and legal international trade consultant and was to prepare documents to attract international partners to Russia and thereafter to provide support. A monthly payment of US \$48,000 was to be paid to Helian for its services, which could be described simplistically as “project management services”. The governing law of the Agreement was that of the Russian Federation. The term of the 1995 Agreement was stated to be five years, but that in the event that the obligations to pay the banks for the “attracted loans” exceeded five years, the Agreement would be deemed to be extended automatically for at least ninety days after the date of the last payment under the loans. There has been much argument as to the term of the 1995 Agreement, and what loans, if any, were made available and taken up by Teleport which had been negotiated on its behalf by Helian.

Supplemental Agreement No 1, dated the 21<sup>st</sup> August, 1995, refers to specific services. By Supplemental Agreement No. 2, of the 5<sup>th</sup> January, 2000, the services to be provided by Helian were greatly expanded, or at least more specifically detailed.

The Agreement was purportedly terminated by Teleport by letter dated the 8<sup>th</sup> June, 2001, to which I must revert. I have seen opinions from both sides as to the validity of that purported termination, the essential argument appearing to me to be as to whether under the laws of the Russian Federation the Agreement made provision for “compensated services” or was an “Agency Agreement”, said to be an important distinction. The Applicant’s advisors say the former and that the termination was valid; Mr. Klabin’s advisors argue to the contrary.

Amendment No. 3 was produced with Ms Tarasenko’s affidavit of the 23<sup>rd</sup> May, 2002, being a document prepared by her (Ms Taresenko was effectively an employee of Mr. Klabin). It was executed on the 17<sup>th</sup> April, 2002. This amendment related to the provision by Helian of services relating to further network providers. Of most significance, perhaps, is the parties’ confirmation that the term of the main Agreement was until April 30<sup>th</sup> 2006, and that it could only now be terminated early on the parties’ agreement. This Agreement was signed by Mr. Mustafidi for Teleport (of whom much will be heard), and by Ms. Kataragyna as attorney for Helian.

b) The Pledge Agreement

The second agreement was the Pledge Agreement dated the 15<sup>th</sup> April, 1999, the authenticity and validity of which are very much challenged by the Applicant. The recitals recall that Helian and Teleport are parties to the Services Agreement dated the 12<sup>th</sup> August, 1995, as amended and restated, effective until January, 2006.

By Clause two, the Pledge Agreement provided that Roscomm undertook to pledge in favour of Helian the shares (as defined, namely the 10% shareholding in Teleport owned by Roscomm) as security for the proper fulfilment of the obligations of Teleport under the Services Agreement. Roscomm was to have the right to receive dividends on shares, but the right to participate in general meetings of the shareholders of Teleport was transferred to Helian for the full period of the validity of the Pledge. That right was to include, inter alia:- voting on all matters included in the agenda for a general meeting, and nominating candidates for election to the Board of Directors, General Director, and Auditing Commissioners, at Helian’s sole and exclusive discretion. By Clause 10, this Agreement was to remain in force until the complete and proper fulfilment by Teleport of all its obligations under the Services Agreement.

The Pledge Agreement was purportedly registered with Teleport soon after it came into being. Additionally, there is before me a copy of the resolution of the Directors of Roscomm (i.e. Mr. Klabin) with regard to this Pledge Agreement, not provided until the 17<sup>th</sup> September, 2001 (to which I will make further reference). The resolution was passed on the 15<sup>th</sup> April, 1999, and resolved that, as Helian had requested the Pledge Agreement as collateral and security for payments under the Services Agreement, the Pledge was accordingly approved. There was no reference to the Pledge Agreement in any of the minutes of the shareholders meetings of Roscomm which have been produced, notwithstanding that Technocom was its

majority shareholder, though it is true that the Director's actions do not require, by the Articles, approval at a shareholders' meeting.

c) The Bills of Exchange

The third set of documents are the Bills of Exchange, to which, again, no reference is made in the minutes of the shareholders of Roscomm; nor has there been produced any Director's resolution authorising them, or explaining their necessity (for Roscomm). These documents, according to Ms. Tarasenko, were created by her. There are twenty-eight documents described as Bills of Exchange, the contents of which are identical, save for their numbering and, in the case of one, a different amount. They are all dated the 15<sup>th</sup> January, 1999, and state that Roscomm guarantees unconditionally to pay under each Bill of Exchange the face amount of US \$144,000 directly to Helian. The Bill is to be made payable at sight within seven years from its date. On thirteen of these twenty-seven has been written "cleared" and a date then given. Those dates are almost exactly at three monthly intervals starting in June, 1999, down to March, 2002. US \$144,000 is, of course, three times US \$48,000, being the monthly payments due by Teleport to Helian under the Services Agreement. The existence of these Bills of Exchange was not made known to the Applicant until July, 2001; nor is there any evidence in the bank accounts of Roscomm which have been produced that these Bills of Exchange went through the Roscomm bank account. Potentially, these Bills of Exchange created a liability for Roscomm of just over US \$4,000,000.

**(iv) Procedural developments**

It was against that general background that the Applicant applied to this Court, *ex parte*, for injunctive relief, both of a mandatory and a prohibitory nature, against the three Respondents on the 12<sup>th</sup> April 2002. The application was supported by a lengthy affidavit of Mr. Brazell with numerous documents attached. I granted the application on the 19<sup>th</sup> April. That order, effectively in the same terms as applied for, is attached, for ease of reference, as Appendix 1. Immediately upon notice having been received, the Second Respondent, not unsurprisingly, applied to this Court to set aside all of my orders in their entirety, and that until determination, *inter partes*, of the appropriate injunctive relief to be granted, if any, the orders be suspended, to the intent that they had never been granted. Subsequently, on the 14<sup>th</sup> May, the injunctive orders of the 19<sup>th</sup> April were amended. That amended order is attached as Appendix 2. The current position is therefore as follows.

Mr. Brazell and a Mr. Mark Hauf, as representatives of the Applicant/MITI, have been appointed as Directors of the First Respondent, in addition to the Second Respondent; the First Respondent is restrained from selling, etc., or otherwise dealing with its shareholding in Teleport; the Second Respondent is restrained in his capacity as a Director of the First Respondent from exercising or purporting to exercise any rights attaching to the First Respondent's shares in Teleport, in particular those specified in Clause 2.3 of the Pledge Agreement (particularly voting rights at shareholders' meetings of Teleport); the First Respondent is

restrained from making or procuring any payment under or in connection with the Bills of Exchange; the Second Respondent in his capacity as a Director of the First Respondent is restrained from negotiating, etc., or otherwise dealing with the Bills of Exchange; and the Second Respondent is to cease and desist from holding himself out as having any authority to act for or on behalf of the First Respondent. Additionally, the Second Respondent has, as ordered, delivered up to Carl Brazell and Mark Hauf in their capacity as Directors of the First Respondent certified copies of:- the original share certificate(s) recording the First Respondent's shareholding in Teleport, certified copies of each and every original of the Bills of Exchange, certified copies of all and any original documents, including agreements, in the Second Respondent's possession, custody or power purportedly issued, signed or otherwise executed on or after the 30<sup>th</sup> September, 1999, by the Second Respondent for and on behalf of the First Respondent, and certified copies of all originals of the Pledge Agreement; together with an affidavit stating the current whereabouts of all the original documents referred to above and verifying that the documents, certified copies of which were to be produced, represent each and every document that currently exists or has ever existed or been issued, signed or otherwise executed on or after the 30<sup>th</sup> September, 1999, by the Second Respondent for or on behalf of the First Respondent.

For its part, the Applicant is restrained from selling etc., or otherwise dealing with its shareholding in the First Respondent; and its application to be authorised solely to represent the First Respondent at Board meetings of Teleport has been rejected.

The thrust of my decisions was that the activities of the Second Respondent should be restrained and controlled, and appropriate orders made, insofar as it was right to do so, in relation to the First Respondent, and that as far as Teleport was concerned the "ring should be held", as far as is possible ever to do so in such circumstances, between the alleged conflicting rights and interests of the Second Respondent and the Applicant (and its owners).

The Applicant has now commenced substantive proceedings in the Royal Court, the Cause being lodged on the 24<sup>th</sup> May, 2002. A copy of that Cause is Appendix 3 (which includes the two helpful Appendices – "defined terms" and "company structure chart"), together with the preliminary defences which were filed on the 28<sup>th</sup> June.

In addition, on the 28<sup>th</sup> June, 2002, Commbel Ltd. (the Guernsey company through which the Second Respondent owns his one-third shareholding in the First Respondent) filed an application ("the Commbel application") seeking relief from the Court under section 75 of the Companies (Guernsey) Law, 1994 (or under such inherent or other powers as the Court may have) to the effect that –

*"a) the Applicant be ordered to purchase Commbel Ltd's shares in Roscomm at a price to be determined by the Court; or*

- (b) *the Applicant be ordered to sell to Commbel Ltd. its shares in Roscomm, again at a price to be determined by the Court; and*
- (c) *such further or other order or relief as the Court may consider just and expedient.*”.

Consequent on my order of the 14<sup>th</sup> May, amending my order of the 19<sup>th</sup> April, Mr. Brazell and Mr. Hauf, the recently appointed directors of Roscomm, gave notice that a meeting of the Board of Directors of Roscomm would take place at 2 p.m. at the offices of Carey Langlois in Guernsey on the 29<sup>th</sup> May, 2002, of which Mr. Klabin was given notice and invited to attend. The resolutions for consideration at that board meeting were wide ranging. I do not intend to review them, save to say that they related, inter alia, to Mr. Brazell or Mr. Hauf being authorised to appoint Guernsey and/or London counsel in respect of any present, or advised legal proceedings; further, Mr. Brazell and Mr. Hauf, or either of them, were to be authorised as the only persons who could represent Roscomm and vote that company’s shareholding in Teleport at a shareholder’s meeting of the latter company.

In other words, though I do not want to put this too simplistically, the Applicant was effectively seeking to exercise control of Roscomm in matters, certainly the Teleport matter, which were and are central to this dispute, and thus circumvent the intention of my orders.

Accordingly, and not unexpectedly, Mr. Klabin on the 24<sup>th</sup> May applied to the Court seeking to restrain Roscomm itself or by its competent officers from calling and/or holding such a (or any) board meeting of directors until such time as this Court had made a final determination as to the status of the orders of the 19<sup>th</sup> April, as modified on the 14<sup>th</sup> May. As a result of hearing argument on this issue, I ordered on the 30<sup>th</sup> May that a board meeting of Roscomm could be held, but that the business which it could transact would be strictly limited; to the intent that the board could note the fact, and effect, of the legal proceedings which had been instituted against the company (and Mr. Klabin), together with authority to inform the company’s bankers that the accounts of Roscomm be closed and a new mandate be signed by Mr. Brazell and Mr. Hauf for filing with the bank.

For completeness, I must add that the Applicant has lodged security for costs as requested by the Second Respondent; and further, in relation to the current proceedings, the Second Respondent sought specific discovery of various documents referred to in Mr. Brazell’s first affidavit. That application I rejected, which decision, at any rate in the result, was upheld by the Court of Appeal.

I would make two further preliminary points at this stage.

Firstly, when I granted the *ex parte* injunction, and on its review, I had before me only the lengthy affidavit from Mr. Brazell, with its large number of documentary exhibits, but did not have the benefit of any evidence submitted by the Second Respondent, which I now have in abundance. Nevertheless, it is fair to say that the main thrust of the Applicant’s submissions and evidence remains as it was back in April.

Secondly, I am only too aware that the result of my existing orders means that the First Respondent is effectively prevented from carrying out any meaningful business (though further application can be made in that regard).

**(v) The nature of the relief sought by the Applicant**

a) Interim Injunctive

As already indicated, the Applicant seeks both mandatory and prohibitory injunctions, and thus the restoration in full of my order of the 19<sup>th</sup> April, 2002. It is necessary to identify that which is sought by the Applicant more precisely, though somewhat by way of repetition.

The first two injunctions (to which the third and fourth are consequentially linked) relate to the composition of the board of directors of the First Respondent, with the removal of Mr. Klabin and the appointment of Mr. Brazell and Mr. Hauf, the Applicant's nominees. They are in effect mandatory, in the sense that they seek to effect fundamental changes which carry the risk of grave injustice – the importance of which the legal authorities emphasise, to which I will later refer. In the same sense Order (6) is also mandatory, and must be taken together with the second part of Order (5), as the Applicant's nominees would be appointed to represent Roscomm in Teleport. The first part of Order (5) and Order (7) are prohibitory. By virtue of my order of the 14<sup>th</sup> May, Order (7) has been clarified and narrowed, in its restraint of the Second Respondent in relation to Roscomm's Teleport shares, to his capacity solely as a Director of Roscomm. Thus it would not restrain him in any other capacity, for example acting lawfully on behalf of Helian. Orders (8), (9) (about which similar comments in relation to the Second Respondent in relation to the Bills of Exchange are applicable as in respect of order (7)), and (10) are all prohibitory. Order (11) – which effectively only relates to Teleport – is mandatory (suspended for the moment). Orders (12) and (14) have been overtaken by events and are no longer in issue, save for the Applicant's continued interest in being provided with the originals of certain documents. Orders (13) and (15) are not now being pursued.

The mandatory Orders are the more important sought, as their effect would be to give the Applicant, through its nominees, complete control of Roscomm, and in particular in respect of its shares in Teleport and its rights relating thereto. Any order that this Court makes in these proceedings cannot affect any proceeding which may arise, here or elsewhere, in the future between Helian and Roscomm in respect of the Pledge Agreement, and indeed the Bills of Exchange. Nor can any order of this Court affect the position of Teleport under its domestic law (the Russian Federation), whether with regard to corporate governance or in relation to the Services Agreement and its termination or the Equipment Leases, for example.

b) Substantive

It is now necessary to relate the injunctive relief to that sought in the substantive proceedings. As far as the latter are concerned, they involve an action between Technocom on the one part, and Roscomm and Mr.

Klabin on the other part, though effectively only the latter is involved. I do not intend to review the Cause to any extent, as it is Appendix 3. It is, however, necessary to cite the relief which Technocom claims. That relief, based on all the extensive and serious allegations against Mr. Klabin contained earlier in the Cause, is as follows:-

*“AND TECHNOCOM CLAIM:*

- (1) An order restraining Roscomm*
  - (i) from selling, transferring, granting any form of security over or otherwise dealing with its shareholding in Teleport;*
  - (ii) from making or procuring any payment under or in connection with the Helian Bills*
- (2) An order removing Mr Klabin as a director of Roscomm and appointing Carl Brazell and Mark Hauf as directors of Roscomm*
- (3) An order restraining Mr Klabin (by himself, Helian, or otherwise) from exercising or purporting to exercise any rights attached to Roscomm’s Teleport shares; and appointing Mr Brazell and Mr Hauf as sole representatives of Roscomm in the conduct of Teleport’s affairs.*
- (4) An order restraining Mr Klabin (by himself, Helian or otherwise):*
  - (i) from holding himself out as being a director of Roscomm or as having any authority to act for or on behalf of the Roscomm;*
  - (ii) from enforcing, threatening to enforce, or assisting in the enforcement of the Helian pledge;*
  - (iii) from exercising or purporting to exercise any rights purportedly granted by the Helian pledge;*
  - (iv) from negotiating, authorising or procuring payment under or in connection with, or otherwise dealing with the Helian Bills*
- (5) An order requiring Mr Klabin to provide written notifications to Technocom, Roscomm, Teleport and such other third parties as may be specified that he has no authority to act for or on behalf of Roscomm.*
- (6) A declaration that Mr Klabin is unfit to be concerned in the management of a company, and an order prohibiting Mr Klabin from acting as a director.*
- (7) US\$3.57million by way of damages for breach of contract, and interest pursuant thereon pursuant to the Judgments (Interest) (Bailiwick of Guernsey) Law 1985, as amended, at such rate and for such period as the Court shall consider just.*
- (8) Such further orders and directions as may be necessary.*
- (9) Costs.”.*

I would make the following comments.

Order (1) is, of course, unnecessary, if order (2) (and others) were in due course to be granted. Order (2), by reference to the earlier paragraphs in the Cause, is effectively brought both under sections 75 and 67A of the Companies Law, and on the basis that Mr. Klabin had agreed to resign as a Director as from the 30<sup>th</sup> September, 1999. Order (3), as drafted, as also order (4), seeks to restrain Mr. Klabin in respect of the identified matters, not only as Director of Roscomm but under any authority he may have from Helian (or otherwise) in respect of those identified matters, and most particularly as far as Helian is concerned. Order (5), in effect only relating to Teleport, is consequential upon the earlier orders (2), (3) and (4) (i). Order (6) is brought under section 67A of the 1994 Law, and is linked to Order (2). Order (7) contains a claim for damages against Mr. Klabin of some US\$3.57 million for breach of contract – that loss arising from his failure to resign as a Director of Roscomm, and his continued assertion of authority to represent Roscomm and thereby preventing the Applicant from being in a position to exercise full and effective control over the affairs of Roscomm and Teleport. The alleged damaging events, it is asserted, as described in paragraphs 23-29 of the Cause, would not otherwise have occurred, in relation, for example, to the Helian Services Agreement, in turn connected to the Equipment Leases, and generally in relation to the affairs of Teleport.

It could well be, therefore, that if I provide the mandatory injunctive relief sought by the Applicant, the crucial claims in the substantive Cause could effectively have been determined; namely, who is to control Roscomm and thereby Roscomm's shares in Teleport. Counsel, I believe, do not disagree. That injunctive relief would not, in my view (as I have already indicated) determine the legal status of the Helian Pledge or Bills of Exchange, as between Helian and Roscomm, one of the two remaining material parts of the substantive claim. Additionally, I suspect that the Applicant might be unlikely to pursue its claim in damages. It is also worth repeating that if the injunctive relief with regard to the control of Roscomm was granted - so that in effect the substantive claim became otiose - it would at least provide an engine and rudder for Roscomm, should the validity, for example, as between Helian and Roscomm, of the Pledge Agreement become the subject of subsequent legal proceedings.

## **2. The relevant legal principles**

I must now consider the general legal principles by which I should be guided in considering the appropriateness, or otherwise, of granting injunctive relief pending trial.

The application is brought under section 1 of the 1987 Law. The relevant provisions of that Law provide as follows:-

*“1.(1) If proceedings have been or are to be instituted before the Court, the Court may by order, at any time before it makes a final judgment in the proceedings or before the proceedings are otherwise concluded, on the application of any person who is, or as the case may be, will be, a party to the proceedings (such person being referred to in this Part of this Law as “the Applicant”), grant*

*an injunction addressed to another person (such other person being referred to in this part of this Law as “the Respondent”) requiring the respondent to do or not to do anything.*

.....

*4. The Court shall not exercise any power conferred by section 1, (2 or 3) of this Law unless satisfied that it is just and convenient to do so.”.*

I am satisfied that section 1(1) of the 1987 Law applies to both prohibitory and mandatory injunctions; and in my view section 4 gives this Court an unfettered discretion as to whether or not to grant an interim injunction, subject always to the necessity for that discretion to be exercised judicially. The burden must rest upon an applicant of satisfying this Court that discretion should be exercised in its favour.

In the absence of any established local jurisprudence and binding authority, the Royal Court in recent years has turned to the English authorities for guidance (see for example Old Mutual) (1), and not least the White Book. These authorities indicate that the principles and guidelines to be applied to applications for prohibitory injunctions are different from, and less stringent than, those relating to applications for mandatory injunctions.

**(a) Prohibitory injunctions**

As the prohibitory injunctions sought in this case are of less significance than those of a mandatory nature, I will refer more briefly to the legal principles which I believe to be relevant to the former.

The leading case, of course, is American Cyanamid (2), and in particular the guidelines provided by Lord Diplock (at p.p. 510 d to 511 f). The White Book summarises the position, at (29/L/2), thus:-

*..., when an application is made for an interlocutory (prohibitory) injunction, in the exercise of the court’s discretion an initial question falls for consideration. That is –*

*1. Is there a serious question to be tried?*

*If the answer to that question is, yes, then further related questions arise. They are:*

*2. would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction? If not, where does the “balance of convenience” lie?*

*The first question indicates a threshold requirement....”*

The White Book indicates (at 29/L/3) the 12 key principles to be derived from the speech of Lord Diplock, and (at 29/L/4) addresses the question of the American Cyanamid (2) “threshold test”.

The White Book then (at 29/L/5 et seq) refers to the guidelines (all of which, it must be emphasised, are to be treated only as guidelines and not be construed as if they had been set in statutory provisions) relating to the adequacy of damages as a remedy, and the “balance of convenience”. Much assistance can be gained from the analysis of Browne LJ, in Fellowes (3), of Lord Diplock’s guidelines in an enumerated series (and said to be much relied upon by judges in subsequent cases). In the context of these two further stages of assessment, the White Book emphasises Lord Goff’s observations, in Factortame (4), on the analyses of Lords Diplock and Browne, and (at 29/L/8) that the “balance of convenience” is more fundamental, more weighty, than mere “convenience”, and is better described as the “balance of the risk of doing an injustice” (as per Lord Diplock in N.W.L Ltd.) (5). In which regard I would repeat section 4 of the 1987 Law, namely that an interlocutory injunction may be granted where it appears “*just and convenient to do so*”. Finally, reference is made to preserving the *status quo ante*, and in appropriate, though limited, cases the relative strength of each party’s case and, importantly, other special factors (as affecting the balance of convenience (see 29/l/11) which I equate with the balance of the risk of injustice).

**(b) Mandatory injunctions**

As I have already indicated, it is necessary to review what I consider in this case to be the relevant principles with regard to mandatory injunctions more extensively than those relating to prohibitory injunctions, for which I make no apology, not least out of deference to Counsel.

The authorities show that a stricter test is required in the case of mandatory injunctions than in the case of prohibitory injunctions. For which see:-

(i) Shepherd Homes (6) and the statements of principle of Megarry J (at pages 411 i to 412 e), and in particular at 412 b:-

*“Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case (a description emphasised in later cases) the court must, inter alia, feel a high degree of assurance that at the trial it would appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction....”*

and (ii) Locabail (7), where Mustill LJ (at p 906 G) stated, having just referred to the passage from the judgement of Megarry J cited above:-

*“It was pointed out in argument that the judgment of Megarry J ante-dates the comprehensive review of the law as to injunctions given by the House of Lords in American Cyanamid, but to my mind at least, the statement of principle by Megarry J in relation to the very special case of the mandatory injunction is not affected by what the House of Lords said in the Cyanamid case. The matter before the court is not only an application for a mandatory injunction, but is an application*

*for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such application should be approached with caution and the relief granted only in a clear case.”.*

The tests now seem to have been somewhat refined. Hoffmann J in Films Rover (8) provided detailed guidance to the approach of the court when considering an application to grant a mandatory interlocutory injunction (at p. 780 e to p. 782 g).

The facts in Films Rover (8) are stated in the headnote as follows:-

*“The defendant was an English company engaged in film distribution by means of financing and acquiring rights in films which it then distributed worldwide through sub-distributors in different countries. In order to effect distribution in Italy the defendant entered into a contract with R, acting on behalf of the Plaintiff, a company which R later incorporated in Guernsey for the purpose of the contract. Some time later, following a change in the defendant’s management, the defendant wished to renegotiate the contract with the plaintiff with a view to splitting the distribution proceeds between the defendant and plaintiff on terms much less favourable to the plaintiff than previously. The new terms caused a dispute to arise between the parties, and the defendant, claiming that the plaintiff was in breach of the contract, refused to send to the plaintiff dubbing material for certain films with the result that the plaintiff was unable to distribute them for exhibiting in Italy. The plaintiff accordingly issued a summons seeking, inter alia, an interlocutory mandatory injunction requiring the films to be delivered to the plaintiff. At the hearing of the application for the injunction the defendant contended that the court should not grant the application because the plaintiff had not established a high probability that it would succeed in establishing its legal right at trial.”.*

The headnote summarised the decision of Hoffmann J as follows:-

*“**Held** – In determining whether to grant an interlocutory injunction the question for the court was not whether the injunction sought was mandatory or prohibitory but whether the injustice that would be caused to the defendant if the plaintiff was granted an injunction and later failed at trial outweighed the injustice that would be caused to the plaintiff if an injunction was refused and he succeeded at trial. Where the injunction was indisputably ‘mandatory’ that same test applied to determine whether the case was normal (in which case the court was required to feel a high degree of assurance that the plaintiff would succeed at trial before an injunction would be granted) or exceptional in that because withholding an injunction carried with it a greater risk of injustice than granting it the injunction should be granted even though the court did not feel a high degree of assurance that the plaintiff would succeed at trial. Since (a) there was no difficulty about the formulation of the order in an enforceable form, (b) it was difficult to see how delivery of the films to the plaintiff would cause uncompensatable loss to the defendant, (c) failure to deliver the films would*

*cause loss to the plaintiff which might be very difficult to quantify and might also force the plaintiff to renegotiate the contract because of commercial pressure, and (d) in terms of preserving the status quo the process of distribution which had been set in motion ought not to be interrupted, there was in the circumstances a much greater risk of injustice being caused if the injunction was withheld and the plaintiff was right than if the injunction was granted and the plaintiff did not succeed at trial. Therefore it would be right to grant the injunction (see p 780 j to p 781 e, p 782 h, p 783 b and p 785 ac to g, post.”.*

Hoffmann J summarised the facts, the course of the dispute, and the earlier litigation, which included the decision of the Court of Appeal that there existed an arguable case, which could only be resolved at trial as to whether a contract existed. Hoffmann J then approached the claim for a mandatory interlocutory injunction (at p. 780 d):- *“on the basis that the plaintiff’s legal rights remain to be determined at the trial and that they are at least as likely to fail as to succeed.”*. Hoffmann J reviewed the jurisprudence relating to mandatory injunctions, drawing largely from the decisions in Locabail (7) and Shepherd Homes (6).

(At p. 780 j-781b) Hoffmann J stated:-

*“The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the “wrong” decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong” in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.”.*

Hoffmann J also stated (at p. 781g):-

*“In addition to all these practical consideration, there is also what might be loosely called a “due process” question. An order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring him temporarily to refrain from action. The court is therefore more reluctant to make such an order against a party who has not had the protection of a full hearing at trial.”* (a passage rightly emphasised by Mr. Robilliard).

At p. 781 h, Hoffmann J stated that there was sometimes a sense in which a mandatory injunction was needed to preserve the *status quo*. He then gave an example of charter party withdrawal cases (Associated Portland Cement) (9) and concluded (at p. 781 j): –

*“Although negative in form, these are (in the case of a time or voyage charter) mandatory in effect because they require the owner to continue to provide the ship. In these cases there is what might (at*

*some risk of oxymoron) be called a “dynamic status quo” which consists in the continuing use of the vessel on charterer’s business.”.*

He continued at p. 782 d: –

*“It is easy to construct other counter examples by way of exception to the proposition that mandatory injunctions are more drastic and irreversible in effect and involve greater expense and inconvenience if wrongly granted than prohibitory injunctions.”.*

Hoffmann J then explained why, in all the circumstances of that case, it would be right to grant the mandatory injunction – as summarised in the headnote which I have cited. With regard to the question of the *status quo*, Hoffmann J (at p. 785 G) said this:-

*“I have seldom known an application for interlocutory relief in which both sides have not claimed that they were seeking to uphold the status quo. Counsel for Thorn-EMI says that the films are in England and the status quo is that they should stay here. The negative undertakings which Thorn EMI have offered would preserve the position. Counsel for the plaintiff says that Films Rover is embarked on the process of distributing the three films in Italy and the status quo is to allow that process to continue. In this case I think that what I have called the dynamic status quo is commercially the more important and that the process of distribution which was set in motion in January 1986 should not be interrupted.*

*Finally, I return to the significance of the correspondence which I earlier examined in some detail. It strongly suggests that Thorn EMI under its new management regards breach of contract and litigation as (to adapt the well known aphorism of Von Clausewitz) the continuation of commercial negotiations by other means...*

*This seems to me to involve a substantial risk of a special kind of injustice. Denial of the injunction may enable a party to achieve a commercial objective by a calculated disregard of the basic principle of a civil society that “men perform their covenants made.”. The film world is tough and ruthless but not a state of nature. In weighing the risks of injustice which granting or refusing the injunction would entail, I have taken this qualitative consideration into account.”*

Lord Jauncey found Hoffmann J’s approach of assistance in Factortame (4) (at p. 683 A).

In Zockoll (10), Phillips LJ also extensively reviewed the authorities on the proper approach to an application for mandatory injunctions (at p. 364 to p. 366). He also concurred with the guidance given by Hoffmann J, and noted that the latter’s conclusions were consistent with the observations of Dillon LJ (at p. 372) in Leisure Data (11):-

*“The statutory authority, however, for the grant of mandatory and prohibitory injunction stems alike from section 37 of the Supreme Court Act, 1981. The court is required, as Lord Diplock pointed out in N.W.L. Ltd. v. Woods (5) (1979) 3 AER 614 at 625, to give full weight to the practical realities of the situation and weigh the respective risks that injustice may result from a decision one way or another.”.*

In the same case (at p. 376) Neill LJ referred, with approval, to the statement of Eveleigh LJ in Cayne (12) (at p. 232) that the broad principle is “*what can the court do in its best endeavour to avoid injustice?*” and to the statement of May LJ (at p. 237 in Cayne) (12) that “*the balance of the risk of doing an injustice*” better described the process involved.

Philips LJ in Zockoll (10) commended the concise summary of the principles, as being all the citation that in future would be necessary, as provided by Chadwick J in Nottingham Building Society (13), as follows:-

*“In my view the principles to be applied are these. Firstly, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be “wrong” in the sense described by Hoffmann J.*

*Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made rather than an order which merely prohibits action, thereby preserving the status quo.*

*Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.*

*But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if the injunction is refused sufficiently outweigh the risk of injustice if it is granted.”.*

Finally, Mr. Robilliard also drew my attention to de Falco (14), a case involving a mandatory injunction in which the Court of Appeal did not apply the Cyanamid principles.

c) **Delay**

On the importance of delay as a factor in determining whether or not to grant an injunction, Mr. Robilliard referred me to three cases, namely Shepherd Homes (6) (to which I have already referred for other purposes), Bravingtons (15) and Church of Scientology (16).

The facts in Shepherd Holmes (6) are stated in the headnote as follows:-

*“The company had bought and developed a housing estate in Glamorganshire. The estate was designed on an open plan with no fences or other erection in front of the building line. The estate was divided into 89 plots on 82 of which stood leasehold houses held under 99 year leases. It was the intention that the remaining 7 plots should be sold to purchasers to build their own houses. Each lease and conveyance contained a covenant prohibiting (inter alia) the erection of any fence or hedge in front of the building line. Early in September, 1969, the Defendant, who was the purchaser of one of the plots, on which he had built a house, erected a fence on his plot in front of the building line to prevent repeated incursions of sheep and some horses, which were causing considerable damage to his garden. On the 11<sup>th</sup> September, the company’s solicitors wrote to the Defendant’s solicitors to ask for the fence to be removed. On the 23<sup>rd</sup> October, the company issued a writ against the Defendant seeking a mandatory injunction that he forthwith demolish the fence erected in breach of the covenant. The company did nothing further until the 25<sup>th</sup> February, 1970, when it gave notice of motion in the same terms. By cross-motion, the Defendant subsequently moved for leave to apply to the Lands Tribunal under the Law of Property Act, 1925, section 84, and a stay of proceedings against him in the meantime.”*

Mr. Robilliard described this case as a “foundation” case on the question of delay, because the first of the two main reasons for refusing the motion for a mandatory injunction was that, and I quote from the headnote:-

*“(a) The company, without explanation, had delayed for more than five months after it had learnt of the erection of the fence and before it gave notice of motion;”*

As Megarry J stated (at p. 410a): –

*“In the absence of any explanation, I do not think it unfair to treat this tardiness as some measure of the company’s need for the injunction. Furthermore, the status quo for any reasonable period prior to the service of the notice of motion is that of the defendant’s fence being in situ, so that the injunction sought will disturb rather than preserve anything that can fairly be called the status quo.”*

The headnote in Bravingtons (15) is as follows:-

*“The Plaintiffs Bravingtons Ltd. had traded as jewellers for over a century. In August, 1956, the Defendant Barrington Tennant, using the name Barrington, opened a jewellers shop at 452, Strand, whose appearance was alleged to resemble that of a neighbouring shop of the Plaintiff’s. The Plaintiffs issued a writ in December, 1956, and moved for an interim injunction restraining the Defendant from carrying on business at 452, Strand, except under his full name “Barrington Tennant”.*

*Held by Upjohn J, (1) that it was doubtful whether the similarity of the shops would deceive potential customers, (2) that there had been undue delay by the Plaintiffs in taking action, and (3) that in view of these facts no interim relief should be granted.”.*

In Church of Scientology (16), the facts were that a Mr. Miller had written, and Penguin Books were to publish, a biography entitled “Bare Faced Messiah”, about Mr. L. Ron Hubbard the founder of the church, in which two photographs of him and extracts from his diaries and from certain letters written by or to him, were included. The church instituted proceedings to restrain the Defendants from distributing and publishing those photographs and diary extracts, and additionally sought an interlocutory injunction pending trial. The Times report summarised the findings of Fox LJ, giving the judgment of the Court of Appeal, thus:-

*“The judge, however, refused the application on the ground of the church’s delay in seeking relief. He was right.*

*In May 1987, the church was aware of Penguin’s intention to publish the book. The proof copies were available to it on August 5<sup>th</sup>. But the application was not made until September 29<sup>th</sup>, when the preparations for the publication were far advanced and disturbance of the arrangements was likely to cause the author and publishers the maximum embarrassment.*

*A plaintiff seeking interlocutory relief had to act with speed. As the judge remarked, a cursory glance at the book would have shown the church that substantial use was being made of Mr. Hubbard’s diaries and other archival material.*

*Although this was sufficient to dismiss the appeal on the grounds of delay, his Lordship went on to consider the other grounds.”.*

I would respectfully suggest that, on the facts in all three of those cases, the period of delay on the part of the plaintiff in instituting the interlocutory injunctive proceedings was such that, almost inevitably, an injunction in each case was likely to be refused. Nor can the particular facts and particular periods of delay in those cases assist me in regard to the present case, as each case must always be looked at on its own facts. Nevertheless, I fully accept the general thrust of Mr. Robilliard’s submission that delay must be an

important factor to be taken into account, if indeed I do find that there was any delay which can be properly criticised.

**d) Corporate governance**

I must also turn to Re a Company (17), a case to which Mr. Robilliard rightly and emphatically referred me, bearing as it does on the question of injunctions relating to corporate structure and governance. The headnote is as follows:-

*“By this motion the petitioner, David Edwin Lewis, a member of the company, sought injunctions to restrain two other members from voting either in person or by proxy on two resolutions to be proposed at an extraordinary meeting of the company. The matter arose out of a petition issued by Mr. Lewis which sought relief under sec. 75 of the Companies Act 1980 by the purchase of the petitioner’s shares and/or a just and equitable winding-up.*

*The company was formed in 1976 but had no active life until 1979. The shares were held one-third by Mr. Lewis and two-thirds by Mr. and Mrs. Bolton, the members the petitioner was attempting to restrain, out of 1,000 shares issued. Mr. Lewis began to work for the company in 1981. However, by 1982 differences had arisen between him and Mr. Bolton. Mrs. Lewis retired from the board at Mr. Bolton’s request. In April 1984 Mr. Lewis was removed from the board. Immediately after his removal the petition was presented. An extraordinary general meeting was convened to increase the company’s share capital from £10,000 to £1,000,000 and to give the directors power to allot the shares. The petitioner claimed that the effect of this would be to substantially water down his shareholding.*

*The petitioner submitted that he had an arguable case under sec. 75 which could enable the court at the hearing of the petition to order that a rights issue should not be made on the ground that it would be unfairly prejudicial to his interests.*

*The respondents argued that it could not be prejudicial ever to have a rights issue pro rata to all members at a moderate price, because no change in their interest was thereby effected. The respondents maintained that they had no intention to issue shares other than by a rights issue for cash at par pro rata to existing holders.*

*Held, granting the injunctions:*

*1. There was an arguable case that the court had jurisdiction under sec. 75 to restrain a proposed pari passu rights issue; therefore, there must have been jurisdiction upon the motion pending the hearing of the petition.*

2. *In cases brought under sec. 75 the position of the company should not be altered more than was essential between the presentation and hearing of the petition. This was a particularly powerful factor in contributories' petitions with more than the usual American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 force in preserving the status quo.*”.

Harman J, in giving judgment, observed that for a long time he had considered that the Respondent's proposition must be right, namely that it could not ever be prejudicial to have a rights issue *pro rata* to all members at a moderate price because no change in their interest was thereby effective. However, for the reasons which he proceeded to give, he came to the conclusion that it was arguable that such a rights issue might be unfairly prejudicial to the petitioner's interest, and that therefore there was an arguable case that jurisdiction existed under section 75 to restrain the proposed *pari passu* rights issue, and that, if that was so, then there must be jurisdiction upon motion pending the hearing of the petition. Harman J then observed:-

*“I would add that, as it seems to me, in cases of litigation under sec. 75 it is most desirable that the position of the company be not altered or disturbed more than is absolutely essential between the presentation and the hearing of the petition. The existing share structure, the existing contractual rights for present service contracts and so forth, should, in my judgment, be maintained as they are pending the determination of the litigation. There might be circumstances where change was essential, but if possible the existing position should be preserved. In my judgment, that is a factor which in these matters arising under contributories petitions is particularly powerful and has more than the normal “Cyanamid” force in favour of preserving the status quo, since it is the very nature of this matter that the status quo must affect the remedy which may be available.”.*

Mr. Robilliard rightly stressed Harman J's observations regarding preserving the *status quo* of the corporate structure pending final determination of the dispute.

#### e) **Construing contractual documents**

Both Counsel agreed that the approach I should adopt in construing contractual documents in this case is provided by the observations of Lord Hoffmann in I.C.S. Ltd. (18) (at p. 912 onwards), subject to the necessary proviso, on Mr. Robilliard's part, that I concluded the primary document in contention – the Second Respondent's alleged resignation letter of the 30<sup>th</sup> September, 1999 - was indeed a contractual document.

The observations of Lord Hoffmann are as follows:-

*“My Lords, I will say at once that I prefer the approach of the judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in*

*Prenn v. Simmonds [1971] 1 W.L.R. 138, 1384-1386 and Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.*

*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

*(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*

*(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

*(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.**

*(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock*

*made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederlerna A.B. [1985] A.C. 191, 201:*

*‘if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.’”.*

I must also add that the English authorities, which I would respectfully adopt, are clear that, in general, “*an agreement cannot be construed in the light of the subsequent actions of the parties*” (taken from the headnote in Wickman Tools). (19) As Lord Reid stated (at p. 252 C):-

*“I must add some observations about a matter which was fully argued before your Lordships. The majority of the Court of Appeal were influenced by a consideration of actings subsequent to the making of the contract. In my view, this was inconsistent with the decision of this House in Whitworth Street Estates (Manchester) Limited v. James Miller & Partners Ltd.[1970] AC 583. We were asked by the respondent to reconsider that decision on this point and I have done so. As a result I see no reason to change the view which I expressed in that case. It was decided in Watcham... that in deciding the scope of an ambiguous title to land it was proper to have regard in subsequent actings and there are other authorities for that view. There may be special reasons for construing a title to land in light of subsequent possession had under it but I find it unnecessary to consider that question. Otherwise I find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing light on its meaning. I would therefore reserve my opinion with regard to Watcham’s case but repeat my view expressed in Whitworth with regard to the general principle.”.*

All their Lordships agreed with Lord Reid in this regard. I would also quote a passage from the speech of Lord Wilberforce (at p. 262 A):-

*“In my opinion, therefore, the subsequent actings relied upon should have been left entirely out of account: in saying this I should not be taken to agree that the particular actings relied on are of any assistance whatever towards one or other construction of the contract. Indeed if one were to pursue the matter, the facts of the present case would be found to illustrate, rather vividly, the dangers inherent in entertaining this class of evidence at all.”.*

I would note one proviso, as advised by Lord Morris (at p. 260 F); namely, that the subsequent actions of the parties may be relevant to establish a new agreement between them or to the issue of estoppel (matters, together with waiver and/or acquiescence, to which Mr. Robilliard referred in argument).

I turn now to the two basic issues in dispute, namely the Applicant's allegation that on the 30<sup>th</sup> September, 1999, the Second Respondent undertook to resign as a director of the First Respondent, and secondly the Applicant's allegations as to the Second Respondent's conduct as such a director.

### **3. The letter of resignation of the 30<sup>th</sup> September, 1999, and its factual background**

To try and understand the background to this alleged written agreement by the Second Respondent to resign as a director of the First Respondent on the 30<sup>th</sup> September, 1999, I have relied for the most part on the documentary evidence, which is voluminous, as it provides the primary facts from which some inferences may be justifiably drawn when appropriate to do so. To a much lesser extent I take account of the interpretation which the parties themselves, in their affidavits, place upon these documentary written facts, whilst acknowledging Mr. Robilliard's submission that for the moment, in the absence of evidence from Mr. Hatt one can only see events "through a glass darkly", as such evidence, Mr. Robilliard says, could considerably enlighten understanding of what actually happened in 1999 between PLD (Mr. Hatt) and Mr. Klabin.

#### **(i) Share Sale and Purchase Agreement – 2<sup>nd</sup> November, 1994 (the "November 1994 Agreement")**

As already stated, the Applicant was incorporated in Eire on the 24<sup>th</sup> January, 1992, with an authorised share capital of one million Irish pounds, of which two were issued, one to Plicom Ltd. ("Plicom"), a company belonging to Mr. Klabin, the other to Elite International Ltd. ("Elite"), another Irish company, owned by Mr. Boris Antoniuk. That continued to be the issued share capital until the 2<sup>nd</sup> November, 1994. On that date similar agreements were entered into by, in effect, Mr. Klabin (through Plicom) and Mr. Antoniuk (through Elite) selling their respective one share to PLD. I am only concerned with the Agreement relating to Mr. Klabin. The consideration was stated to be US \$15,000,000.

The Agreement runs to some 51 pages, and contains many of what might be described as the usual clauses and warranties in such an agreement. Some of its contents I must refer to specifically.

Completion of the Agreement was subject to certain conditions (I summarise):-

- (a) the completion, execution and delivery of a Shareholder Agreement (involving Plicom, PLD, Elite, Technocom, Mr. Antoniuk and Mr. Klabin) and Option Agreements (respectively between Elite and PLD and Plicom and PLD);
- (b) the execution and delivery of various Consultancy Agreements;
- (c) extensions being granted by the Ministry of Communications of the Russian Federation of Licences N100 and N386 in relation to the operation of Teleport, for a period of 10 years;
- (d) the raising of the necessary finance by PLD;
- (e) no material breaches of warranties having occurred; and

- (f) the accounts being delivered to PLD, which were defined as being the audited balance sheets of the Company (Technocom) and Teleport as at the 31<sup>st</sup> December, 1993, as also the audited profit and loss accounts of the Company and Teleport as at the same date, together with directors' reports, etc.

Completion took place on the 28<sup>th</sup> December, 1994, when these various Agreements were executed.

I have not seen the Shareholders Agreement, but it is clear from subsequent documentation (e.g. the Agreement of the 26<sup>th</sup> November, 1997, to which reference will be made later), that it was the 1994 Agreement by which further shares were issued – 101 ordinary shares to PLD, 59 to Plicom and 39 to Elite, respectively, (a total of 199) together with 1,000 preference shares issued to PLD, giving PLD its 51% interest in Technocom.

The two Option Agreements were called, more precisely, Put and Call Option Agreements. As far as the Put and Call Option Agreement involving Plicom and PLD was concerned, it granted to PLD the right to purchase or procure the purchase of what are described as the Option Shares at the Option Price during the Option Period (with appropriate definitions). Conversely, Plicom was granted the right to require PLD to procure or purchase the Option Shares on similar terms. The other terms of the Put and Call Option Agreement I need not refer to, save to make two comments:- the Option Shares, the subject of the Option, were the shares in Technocom, beneficially owned by Plicom at the appropriate date; the Option Period is defined as the period commencing on the earlier of: (a) the date of publication of the audited results of the company for the year ending 31<sup>st</sup> December, 1998, and (b) 31<sup>st</sup> March, 1999, and terminating 90 days thereafter or 30 days after determination of the Option Price and notification of the same to the parties (if later).

There were two Consultancy Agreements involving Mr. Klabin. By the first Consultancy Agreement between Technocom, Plicom and Mr. Klabin, (“the Technocom Consultancy Agreement”) Plicom was to provide the services of Mr. Klabin as managing director of Technocom from the date that the November 1994 Agreement became unconditional (28<sup>th</sup> December, 1994). Subject to the terms of the Shareholder Agreement, Mr. Klabin's services would be provided to Technocom until the later of -

- (a) his voluntary resignation or retirement;
- (b) un-remedied material breach by Plicom or Klabin of its or his duties under the appointment;
- (c) the end of the Option period (as defined in the Put and Call Option Agreement of the same date between PLD and Plicom).

In return for Mr. Klabin spending such reasonable time as was necessary for him to carry out his duties as managing director, Plicom was to receive fees at the rate of US\$100,000 per annum (or such higher sum as might be agreed), paid monthly in arrears, with annual reviews. This Agreement, to be governed by English law, was signed on behalf of Technocom and Plicom by Mr. Klabin, as well as on his own behalf.

Under the second Consultancy Agreement, (not referred to in the November 1994 Agreement) between PLD, Plicom and Mr. Klabin (“the PLD Consultancy Agreement”), Plicom was to provide the services of Mr. Klabin as a consultant from the same starting date, and subject to the same conditions as to termination as in the agreement with Plicom; with the additional condition that this Consultancy Agreement would be terminated at the same time as the Technocom Consultancy Agreement was terminated. By virtue of this Agreement, Mr. Klabin was obliged to spend all reasonable time, up to a maximum of 45 days a year, on the affairs of PLD, for which he was to be paid £100,000 per annum, (or such higher agreed sum), monthly, reviewed annually. Again this Agreement was to be governed by English law.

I assume - I have heard nothing to the contrary - that the required extension of Teleport’s licences was granted by the Ministry of Communications of the Russian Federation.

The November 1994 Agreement contained extensive warranties, as one would expect. These warranties extended to what were defined as the “warranted companies”, and the “Group companies”. The Group companies are defined as the Company (i.e. Technocom) and any associate or subsidiary company of the Company and each of them, and including, for the avoidance of doubt the “warranted companies”. The “warranted companies” were defined as the Company (i.e. Technocom), Space Communication Services Ltd. (“SCS”), Rosh Communications, Roscomm Ltd. and Teleport TP.

Schedule 1 provides the following information with regard to the warranted companies. In relation to:-

- Technocom, that its directors were Mr. Klabin and Mr. Antoniuk, with the holders of the two issued shares being Plicom and Elite (as already stated).
- SCS, that it was a company which had its registered office at La Plaiderie, St. Peter Port, with an authorised share capital of US\$10,000, that the directors were Mr. Klabin and a Mr. Michael Smirnov, and that the 7,000 issued shares were owned by Technocom (previously they would appear they had been owned equally by Mr. Antoniuk, Mr. Klabin, Mr. Smirnov and a Mr. Konstantin Mustafidi - who is to feature regularly in this case).
- Rosh Communications, that it was a company with its registered office in Moscow, with an authorised share capital of 20,000,000 roubles divided into 200 ordinary shares of 100,000 roubles each; no information is provided as to the issued share capital or directors, but the company was apparently owned by Technocom.
- Roscomm Ltd., that at that time its two share holders were Anka and Topaz (the “in-house” companies of the Third Respondent) each holding one of the authorised 5000 £1 shares.
- Teleport TP, that it was a company registered in Moscow, with an authorised share capital of 2,000,000 roubles divided into 200 inscribed (sic) shares of 10,000 roubles each; the directors were Mr. Antoniuk and Mr. Mustafidi. Of the 200 issued shares at that time, Technocom owned 77 (i.e. 38.5%), J.V. Technopark owned 15 (7.5%), JSC Rostelecom owned 88 shares (44%), JSC Russian Exhibition Centre owned 10 shares (5%) and Roscomm owned 10 shares (5%).

I would make two comments on the November 1994 Agreement.

Teleport, through Technocom, was clearly of considerable interest to PLD. Why otherwise would it require Teleport's accounts as well as those of Technocom to be produced? And why should the extension of the Teleport licences for a further ten years by the Ministry of Communications of the Russian Federation be made a condition precedent of the Agreement?

Secondly, it is quite clear that the services of Mr. Klabin were important to PLD, either directly or as managing director of Technocom. Alternatively, of course, it might have been the price which Mr. Klabin extracted for selling his share in Technocom, to guarantee substantial future income. In which event, it was a price that PLD was prepared to pay.

**(ii) The Share Purchase Agreement, November 1997 (“the November 1997 Agreement”).**

We move forward to November, 1997. At that time, the directors of Technocom were Mr. Klabin, Mr. Antoniuk, a Mr. James R.S. Hatt (of whom more will be heard), a Mr. Joe Crouch and a Mr. Alan G. Brooks. Mr. Hatt was undoubtedly a representative of PLD, as were Mr. Crouch and Mr. Brooks.

On the 26<sup>th</sup> November, 1997, PLD purchased 29 of Elite's remaining 39 issued shares in Technocom, and 30 of Plicom's 59 issued shares. Both purchases were evidenced by Share Purchase Agreements, the one relating to Plicom being the one to which I will predominantly refer.

The parties were Plicom (as vendor) PLD (as purchaser) Technocom and Mr. Klabin. It was recorded in the recitals that Plicom owned its 59 ordinary shares subject to the Subscription and Shareholders's Agreement relating to Technocom dated the 28<sup>th</sup> December, 1994 (i.e. the “Shareholders Agreement”).

The sale and purchase of the shares was on PLD's reliance on the representations, warranties and undertakings made and given by Plicom. The consideration was US \$18,500,000. The Put and Call Option of 1994 was to be amended in a number of ways, the only one to which I need refer being the definition of the term “Option Period”. It was to be amended so that thereafter it was to be defined as *“the period commencing on June 30<sup>th</sup>, 1999, and terminating on the earlier of June 30<sup>th</sup>, 2019, or the date that the Put or the Call Option, as the case may be, is exercised”*.

More importantly, the Technocom Consultancy Agreement of the 28<sup>th</sup> December, 1994, (but not the PLD Consultancy Agreement) was to be amended in various material ways. The annual fee to be paid by Technocom was increased to US \$200,000, and it was to terminate once PLD had acquired all of Plicom's issued shares in Technocom. Mr. Klabin was to undertake additional duties.

Those additional duties included:- analysing and making recommendations to the Technocom board regarding all proposed installations of antennae or other facilities for Technocom's and Teleport's “satelink”

network; using his reasonable endeavours (without incurring any personal liability to make payments) to procure that Technocom's subsidiaries (which term specifically included Teleport, MTR-Sviaz and JV Technopark) kept up to date with their financial obligations to Technocom; assisting PLD in having the personnel appointed by PLD as Technocom's finance director and other managerial positions also appointed to act in the same capacity for the Technocom subsidiaries; and undertaking further extensive duties and responsibilities.

Those extra duties and responsibilities of Mr. Klabin are specified in Schedule III, and I refer to some of them:-

Where necessary, obtaining full and unequivocal certification from regional and/or local branches of *Gosvaznadzor* for the use of earth satellites within the Satelink system; providing additional management support, if requested, to the new Technocom sales and marketing group, such that they were able to function as the sales and marketing divisions of all the companies in the Technocom Group, which was specified, for those purposes, to include, but not to be limited to, Technocom, Teleport, MTR-Sviaz and Satelink, and the various associated joint ventures and partners (including SCS); promoting the continued support of Rostelecom for both the Teleport and the Satelink operations and, in that context, encouraging Rostelecom to ensure that the key executives in distant *electrosviaz*es understood that Satelink was the first choice carrier for both digital services and improved quality direct dialled calls, where Rostelecom had invited Teleport to provide such services; introducing Technocom and Teleport to new Telecom business opportunities, as Mr. Klabin's first choice, when he was approached as the first contact; and permitting representatives of Technocom and PLD to have reasonable access to the books and records of any of the following companies, to the extent that they were maintained or kept at premises to which Mr. Klabin had access - such companies being specified as SCS, Rosh Telecom, Roscomm, Portal and Teleport, with particular reference to dealings between such companies and other companies owned or controlled by Mr. Klabin, and, in the case of Rosh Telecom, ECI Telecom.

All of those additional duties were subject to this proviso, which I will cite in full:-

*“Provided that, in respect of all of the foregoing, Mr. Klabin shall not be obliged to take any action which is contrary to any applicable law or any decision of a board of directors, or any provision of the charter documents of the relevant company, and (a passage emphasised by Mr. Greenfield) shall not be involved with or responsible for the day to day operation and/or management of Technocom or any Technocom subsidiaries; and provided further that Mr. Klabin shall not be liable for any deficiency in performance in respect of the foregoing additional duties except in the case of wilful default or gross negligence.”*

For completeness, I should briefly mention that the consideration for the Share Purchase Agreement of November 1997, between Elite, Technocom and PLD, relating to the purchase of Elite's 29 issued shares

(out of 39) was the sum of US \$6,250,000, and the delivery by PLD to Elite of 1,316,240 of its common stock shares. (There were also minor amendments to Elite's Shareholding and Option Agreements).

What overall view can or should I take of the November 1997 Share Purchase Agreement? In my opinion, the strength of PLD's interest in extending its telecommunications business in the Russian Federation (and perhaps wider afield) is clear, including specifically the business of Teleport; and that Mr. Klabin was still considered to have an important (perhaps even greater) part to play in the realisation of PLD's ambitions in that regard. Indeed his major involvement until perhaps 2019 was envisaged by the extension of the Option period in the Put and Call Option of 1994. In the complex, perhaps inscrutable, developing business scene of the post-communist Russian Federation, Mr. Klabin was viewed as having important contacts and influence which, together with his expertise, were essential to PLD.

### **(iii) Completion of the purchase of Technocom and the Merger, 1999**

We now move forward to 1999. As I have already stated, two important corporate developments took place in that year. Firstly, Moscow Communications Inc., a Delaware corporation wholly owned by MIG, merged with PLD, following which PLD became a wholly owned subsidiary, through MITI, of MIG. Secondly, PLD completed its acquisition of the remaining shares in Technocom from Plicom (Mr. Klabin) and Elite (Mr. Antoniuk). Those conditional agreements were entered into on the 18<sup>th</sup> May, 1999. I feel sure it is safe to say that in the previous months many and lengthy negotiations had taken place between all the interested parties. Of those negotiations I know nothing, nor should I.

At paragraph 25 of his third affidavit (dated 21<sup>st</sup> October, 2002, which was preceded by an unsigned draft which appeared some time earlier in October) Mr. Klabin alleges that Mr. Hatt (clearly a senior executive in PLD and Technocom) requested Mr. Klabin in early 1999 to help Technocom overcome an alleged current financial crisis. The reasons for applying to Mr. Klabin for assistance, so Mr. Klabin says, were: (i) (interestingly, in my view) he was a director of Roscomm, and therefore, had an interest in improving the business of Technocom and Teleport; (ii) he had sufficient experience in telecommunications business, and (iii) he enjoyed the substantial confidence of Mr. Hatt and PLD.

Be that as it may, on the 1st February, 1999, Technocom gave a Power of Attorney to Mr. Klabin, effective for one year, such Power of Attorney not being assignable by Mr. Klabin ("the Technocom Power of Attorney"). It was signed by Mr. Hatt, who was therein described as the managing director of Technocom (Mr. Klabin having apparently previously resigned from that prestigious office, though remaining as a director, albeit with limited signing powers). The relevant contents of that Power of Attorney are as follows:-

*"Technocom Ltd. (the "Truster")... hereby entrusts to Mr. Mark Klabin... as head of the Truster's Moscow branch, to perform on behalf of the Truster the following acts in connection with the activities of the Truster on the territory of the Russian Federation:*

1. *to represent the Trustee in relationships with third parties, including without limitation all governmental organisations and institutions;*
2. *to perform all or any transactions in the Trustee's interest, within the Russian Federation, that do not conflict with or contradict the governing documents (including shareholder agreements) of the Trustee, the Statement of the Branch of the Trustee or existing law;*
3. (relates to tax matters);
4. *to make and sign on behalf of the Trustee any and all documents that are necessary for performing the Trustee's activities within the Russian Federation;*
5. *to represent the Trustee in all judicial proceedings....”.*

I remain puzzled as to why it was thought either necessary or desirable that Technocom grant this Power of Attorney in favour of Mr. Klabin, in view of his existing and extensive duties and powers on behalf of Technocom and PLD by virtue of the November, 1994 Consultancy Agreements (as amended in 1997). It should also be noted that it related to Technocom's activities in the Russian Federation.

There was also an undated notice to all Technocom/Teleport/MTR staff, signed by James Hatt as Chairman of Technocom, Chairman of PLD, and a board member of Teleport. The document was almost certainly issued about the same time as the Power of Attorney, i.e. February, 1999. In essence, it relates to a new business strategy for Teleport; Mr. Antoniuk was to leave, but Mr. Klabin had been appointed with immediate effect as both President of Technocom and Chief Financial Officer of Teleport.

Mr. Klabin further alleges that at, or about, this time Mr. Hatt offered him an annual fee of US\$300,000 for his supervisory services (whatever that may mean or entail), which has never been paid to him.

It should also be remembered that in the early months of 1999 two further documents, the essence of which I have already summarised, were allegedly completed, namely the Bills of Exchange granted by Roscomm in favour of Helian on the 15<sup>th</sup> January, and the Pledge of Roscomm's shares in Teleport in April, 1999, in favour of Helian, with all the purported rights thereby granted. I repeat that the authenticity of those two documents is very much challenged by the Applicant.

For present purposes (i.e. the construction of the resignation letter of the 30<sup>th</sup> September, 1999) I am ignoring them; for this reason. Their existence was not made known to the Applicant (and its owners) until July, 2001. Accordingly, they were not available or known to PLD at the time of the completion of the final purchase of Mr. Klabin's (Plicom's) shares in Technocom in 1999. They cannot, therefore, form part of the background knowledge which was available to the parties in the situation in which they were at the time of the contract, by which I mean both the May 1999 Agreement and Mr. Klabin's letter of resignation dated the 30<sup>th</sup> September, 1999. (For which see the observations of Lord Hoffmann as to the construction of contractual documents in ICS, both at (1) and generally).

I turn to the Merger Agreement (between PLD, MIG and MCI) and the acquisition by PLD from Mr. Klabin and Mr. Antoniuk of their remaining shares in Technocom, both completed, even if conditionally, on the 18<sup>th</sup> May, 1999.

I refer firstly to the Merger Agreement but merely to note that it was recorded that the subsidiaries of PLD included Technocom, the subsidiaries of which in turn were Teleport, Technopark, Roscomm and SCS, and that the management team of PLD was to continue in place for the time being in respect of the newly merged company with MCI.

I refer, secondly, to the agreement relating to the purchase of the remaining shares in Technocom, made pursuant to the Merger Agreement, which is described as the Plicom Option Modification Agreement (“POMA”), the parties being PLD, MIG, Technocom, Plicom, Elite, Mr. Klabin and Mr. Antoniuk. Its purpose, as recorded in the recitals, was as follows:-

*“WHEREAS the parties hereto desire to modify and then terminate (i) the Put and Call Option Agreement date December 28<sup>th</sup> 1994, as amended between the Company (i.e. PLD) and Plicom (the “Put Agreement”), (ii) the share purchase agreement, dated as of November 26<sup>th</sup> 1997, between Plicom, Technocom, the Company and Mark Klabin, (iii) the consultancy agreement, dated December 28<sup>th</sup> 1994, as amended between Technocom, Plicom and Mr. Klabin, (iv) the promissory note, dated November 26<sup>th</sup> 1997 executed by the Company in favour of Plicom (the “Note”), (v) the promissory note, dated the date hereof, executed by the Company in favour of Plicom (the “New Note”), (vi) the Subscription and Shareholder Agreement, dated December 28<sup>th</sup>, 1994, as amended between the Company, Plicom, Elite, Technocom, Mark Klabin and Boris Antoniuk (the “Shareholders Agreement”) and (vii) the consultancy agreement dated December, 28<sup>th</sup>, 1994, between the Company, Plicom and Mark Klabin (collectively, the “Agreements”);...”.*

Clause 1 of POMA states that notwithstanding anything to the contrary contained in any of the Agreements (i.e. those as defined), on the Closing date (as defined in the Merger Agreement) and in reliance on the representations and warranties and subject to the terms and conditions set forth in POMA, PLD was to purchase Plicom’s remaining 29 ordinary shares in Telecom for US\$8,750,000.

Various additional payments were to be made by PLD and Technocom (guaranteed effectively by MIG) of sums due as at the 30<sup>th</sup> June, 1999, to Plicom for itself, and/or as trustee for Mark Klabin, to the extent not then already paid, such sums being:-

- (i) *US \$50,000.00 (representing US \$25,000.00 x 2 for the first two quarters of 1999), together with an additional US \$25,000 for each quarter (or part thereof) commencing on July 1, 1999 until and including the Closing Date in respect of the PLD consultancy agreement;*
- (ii) *US \$49,999.98 (representing US \$16,666.66 x 3 for April, May and June 1999) together with an additional US \$16,666 for each month (or part thereof) commencing with July 1999 and ending*

- with the month in which the Closing takes place in respect of the Technocom consultancy agreement;*
- (iii) *US \$35,196.12 (representing US \$10,500.00 x 3 for the last quarter of 1998 and the first two quarters of 1999 plus US \$3,696.12 as expenses), together with an additional US \$10,500 for each quarter (or part thereof) commencing on July 1, 1999 until and including the Closing Date in respect of office expenses;*
  - (iv) *US \$360,000.00 in respect of the repayment of a loan to cover a settlement between Vimpelkom and MTR, subject to receipt by the Parent of a copy of a satisfactory complete release from Vimpelkom; and*
  - (v) *any sum paid by Plicom under the guarantees or undertakings referred to in Section 1(c) below.*

POMA, which was to be governed by the laws of the State of New York, then records (at Clause 1(c)) that MIG and PLD should procure that Plicom be released from any of its guarantees, (at (d)) that Plicom should deliver the necessary share certificate, and (at (e)), that *“all the Agreements shall terminate, be void and of no further force and effect”*. .

I would emphasise again that the reference to the termination of *“all of the agreements”*, necessarily included both the Technocom and PLD Consultancy Agreements with Mr. Klabin.

The completion date, or “Closing Date” as it was described, for both POMA and the Merger was defined in the latter as being when the necessary conditions had been fulfilled. That transpired to be the 30<sup>th</sup> September, 1999, the day when Mr. Klabin signed the crucial resignation letter.

Though, for ease of further reference, that letter is Appendix 4, nevertheless, I cite most of it. It is addressed to PLD, Technocom and Teleport.

*“Dear Sirs:*

*I hereby resign with immediate effect as (i) President and a director of Technocom Ltd. (“Technocom”) and (ii) a Director of Teleport-TP (together, the “Positions”), and relinquish any and all duties and rights of whatever nature which I may have, in such capacity, with PLD, Technocom, Teleport-TP or any subsidiary of PLD (collectively, the “Group”) (including, without limitation, under the Power of Attorney dated February 1, 1999, granted by Technocom), effective immediately.*

*I confirm and acknowledge that neither I nor any of my affiliates have any claims or demands outstanding against any member of the Group in respect of the Positions or their termination and that no member of the Group has any claims against or demands outstanding against me or any of my affiliates in respect of the same.*

*I will sign such documents (including bank mandates) and take such actions as are reasonably required by you hereafter in order to terminate my authority to execute cheques and other orders or directions to institutions holding funds of Technocom, Teleport-TP or any other member of the Group, and also to terminate my authority to execute agreements or instruments on behalf of, or which could have the effect of binding or committing Technocom, Teleport-TP or any other member of the Group; and I will upon request confirm to third parties with a need to know my lack of authority in these regards.*

*Without limiting the generality of the foregoing, I acknowledge that, from the date hereof, Technocom will no longer need or desire a presence in Vienna, Austria (which was clearly Mr. Klabin's principal business address) ... In addition, I shall direct the staff of the Vienna office of my associated companies to co-operate with PLD and Technocom at their expense in transferring any documents, software or other materials relating to the Technocom and the Group as PLD or Technocom may direct."*

Mr. Antoniuk (pursuant to his POMA by which he sold his remaining shares in Technocom) also signed a letter of resignation dated the 30<sup>th</sup> September, 1999. That letter was addressed to PLD and Technocom, and commenced in these terms:-

*"I hereby resign as a Director of Technocom Ltd. ("Technocom") and from any other position that I hold with Technocom or any other subsidiary or affiliate of PLD Telekom Inc. ("PLD") (collectively, the "Group") and relinquish any and all duties and rights of whatever nature which I may have, in such capacity or otherwise, with any member of the Group, effective immediately."*

Mr. Antoniuk's letter then recorded that, notwithstanding his resignation as a director of Technocom, etc, it was not to affect his Consultancy Agreement (technically Elite's), of the 28<sup>th</sup> December, 1994, with Technocom nor the Employment Agreement dated the 26<sup>th</sup> November, 1997, with PLD. He then confirmed and acknowledged that with the exception of the Elite and PLD Consultancy Agreements, all other agreements of whatever nature between him or his affiliates and any member of the Group were forthwith terminated with no outstanding obligations to him. He then undertook, as Mr. Klabin had done, to sign such documents, etc., as might be necessary to terminate his authority to execute cheques, etc., and to execute agreements or other instruments.

Clearly, Mr. Antoniuk's letter of resignation was in similar, but significantly different, terms from that of Mr. Klabin; and there was, of course, no reference throughout to Teleport.

A further document was drawn to my attention by Mr. Robilliard, which was not produced until after Mr. Brazell swore his fourth affidavit on the 7<sup>th</sup> September, 2002, both generally in response to Mr. Klabin's first affidavit of the 20<sup>th</sup> May, 2002, and specifically in response to the latter's assertion that he did not recall how the resignation letter came into being.

This document is a draft of Mr. Klabin's proposed resignation letter which was forwarded by lawyers acting for PLD to Mr. Klabin's London lawyers, Charles Russell. That draft is in generally similar terms to the one signed by Mr. Antoniuk, save that there is reference to Mr. Klabin resigning as the President of Technocom but no reference to any of the Consultancy Agreements; naturally enough, as, by virtue of Mr. Klabin's POMA, they were all to be terminated. In addition, Mr. Klabin's draft letter contained the same last paragraph as in the letter which he signed, namely relating to the offices in Vienna and the reference to transferring documents, etc., of any of the PLD subsidiaries.

The substantive differences, therefore, between Mr. Klabin's draft and actual letter are that in the latter there is reference to "The Positions", as defined, and regular reference to Teleport both in the substance of the letter and as an addressee. In both the Klabin letters reference was made to the Technocom Power of Attorney.

I should also refer, briefly, to yet a further document, that is a letter dated the 14<sup>th</sup> October, 1999, written by Mr. Klabin to Technocom Ltd., in which he asks that, in view of his resignation as president of Technocom and a member of the board of Teleport, effective from the 30<sup>th</sup> September, 1999, Technocom open a separate bank account for SCS either at Bank Winter or with any other bank for Technocom's exclusive use. (In the resignation letter of the 30<sup>th</sup> September, 1999, there was no specific reference to SCS or Roscomm). Someone from Technocom has noted in manuscript that it was interesting to see that Mr. Klabin had confirmed in writing that he was no longer President of Technocom or on the board of Teleport. The writer further remarked as to the need to ensure a replacement for him on the Teleport board, and indicated the belief that there should be three such representatives.

**(iv) Counsel's Submissions**

I turn to Counsel's submissions with regard to the meaning of the letter of the 30<sup>th</sup> September, 1999.

Mr. Greenfield argued that Mr. Klabin's interest in Roscomm must be placed in its proper context, namely that it reflected and derived from Technocom's interest in Roscomm. Mr. Klabin's position as sole director of Roscomm derived from the same source and reflected the same interest.

The background to the letter of the 30<sup>th</sup> September, 1999, was crucial. By virtue of POMA, Mr. Klabin was compensated for the sale of his remaining minority interest in Technocom, and he was to be paid the outstanding sums for the remaining period, prior to completion, of his Consultancy Agreements, which were to be unequivocally terminated in full.

Mr. Greenfield also sought to place some reliance upon the evidence of Ms. Sylvia Kessel in respect of a meeting which took place in New York on the 24<sup>th</sup> April, 1999, at which she alleges that Mr. Klabin unequivocally agreed to resign from all his roles in the "merged Group", including Roscomm. That

evidence is directly disputed by Mr. Klabin. I am disregarding that evidence, not least because it forms part of the negotiations which I am not to take into account, as opposed to the overall background.

The crux of the matter, Mr. Greenfield correctly argues, are the terms of the resignation letter itself. Those terms are clear, he submits, notwithstanding that there may be some difference between the draft first produced and that actually signed, as also between the letter which Mr. Antoniuk signed on the 30<sup>th</sup> September, 1999, the differences in the latter merely reflecting the different positions they held in relation to Technocom. With regard to the terms of the letter themselves, Mr. Greenfield argues, again in my view correctly, that the expression “any other subsidiary of PLD”, and thus “the Group”, must include Roscomm. With regard to the wording of the first paragraph, certain difficulties of construction may superficially present themselves; namely that “the Positions” are limited to Mr. Klabin’s presidency and directorship of Technocom and his directorship of Teleport, and that it is only in “such capacity” that he undertook to relinquish any and all duties and rights of whatever nature which he had in “the Group”. However, any uncertainty with regard to construing that paragraph is removed by examining the contents of the third paragraph (a legitimate exercise). The undertaking given by Mr. Klabin by virtue of that paragraph - to sign such documents and take such other actions as are reasonably required to terminate his authority to execute cheques and other orders or directions to institutions holding funds of any member of the Group, and to terminate his authority to execute agreements or other instruments on behalf of any member of the Group - is totally inconsistent with an interpretation that Mr. Klabin was to continue as the sole director of Roscomm. Additionally, Mr. Klabin undertook to confirm to third parties his lack of authority in those regards.

Additionally, if the true position was that Mr. Klabin was retaining a “reserved” or “entrenched” position as the sole director of Roscomm (for whatever reason) – the position strongly advanced by Mr. Robilliard – then his letter of resignation would have to have contained such a reservation. In fact, it is silent on the matter.

Mr. Robilliard advances equally powerful arguments to the contrary. In 1999, there was no contract, and no stated consideration, for the sale of Mr. Klabin’s shares in Roscomm to PLD. Nor was there any reference to his directorship of Roscomm, a position he had held since the autumn of 1994, and which was not affected by either the November 1994 or November 1997 Agreements. It had to be remembered that Technocom only had a small number of subsidiary companies:- Teleport, Technopark, Roscomm and SCS. Mr. Klabin’s position with regard to Roscomm, and indeed SCS, must have been, and certainly ought to have been, abundantly clear to PLD. If it had been the intention of the parties that Mr. Klabin was to resign as the sole director of Roscomm (or SCS), that fact would have been specifically referred to, as it was in the case of Technocom and Teleport.

Mr. Robilliard suggested, though I believe with no great force, that I should not view the letter of the 30<sup>th</sup> September, 1999, as a contractual document at all, thereby invoking Lord Hoffmann’s guidelines as to

construction. I can immediately reject that argument. On the face of it, there may be no statement as to a consideration for the resignations, but that is to take far too restricted a view. Unquestionably, this document formed part and parcel of the completion of the full contractual arrangements between PLD and Mr. Klabin in September, 1999. In that sense, I think it was perfectly proper for Mr. Brazell to state that Mr. Klabin had been handsomely compensated – he was indeed if one takes the wider picture, without making any judgment as to whether the resignation letter included Mr. Klabin’s directorship of Roscomm.

Mr. Klabin also made much in his affidavits of what he alleged to be his agreements with Mr. Hatt, as the managing director of PLD and of Technocom, including that prior to the completion of the 1999 arrangements Mr. Hatt had agreed to pay Mr. Klabin US \$300,000 a year for unspecified services. Neither party has been able or seen fit to adduce any evidence from Mr. Hatt for the purposes of these proceedings; though his evidence, Mr. Robilliard submits, would be of much importance at trial.

The position in September, 1999, could be simply put, said Mr Robilliard. It was the intention that Mr. Klabin should continue as sole director of Roscomm, in addition to retaining his one-third shareholding, so that Technocom would not, by the 1999 arrangements, gain full control over Teleport by virtue of Roscomm’s 10% shareholding in it. That was the *status quo* which the parties intended to maintain. What Mr. Klabin said in his third affidavit (at paragraph 3 (Q)) was this:-

*“Finally, I would like to stress to the court that retention of my position as Director of Roscomm was intended to preserve the status quo in Roscomm (and through Roscomm in Teleport). Otherwise, as a minority shareholder of Roscomm I would have no say in Teleport. That say is important to the shareholders in Teleport. Roscomm’s rationale has always been that it holds the status quo in Teleport. In selling my shareholding in Technocom to PLD it was never intended by me (nor – I believe from my discussions at the time with Mr. Hatt – by PLD) that control of Roscomm’s 10% shareholding in Teleport would pass to Technocom. I would also add that there was no such condition in the Put and Call Option under which PLD purchased my shareholding in Technocom nor was such a requirement put to me before exchange of the 1999 agreement (under which I sold my remaining shareholding in Technocom). That is why I remained a Director and one-third shareholder: that is why PLD did not purchase my shares in Roscomm; and PLD well knew this at the time of their “merger” with MITI. Technocom’s application to the court in Guernsey serves no purpose other than to violate this status quo and gain a control of the business of Teleport. Control which it was never intended by me, nor I believe by PLD, that Technocom should exercise...”*

Thus, *vis-à-vis* PLD, Mr. Klabin retained a “bargaining counter”, (as Mr. Robilliard accurately described it) in his one-third interest in Roscomm and, more importantly, his sole directorship of it, an exceedingly strong position in view of the company’s Articles of Association in relation to the removal of directors. That was the position well known to PLD, and there was nothing in the documentation to show that Mr. Klabin was to

be deprived of that “bargaining counter” in the agreement to complete the purchase of his shares in Technocom, and the termination of his services to Technocom and to Teleport. Moreover, the continuation of that position, so it is alleged, was important both because of what I might describe as the “Helian arrangements” – the Services Agreement and the Pledge Agreement – and because others, for example Rostelecom, thought those arrangements and the independent position of Roscomm to be important.

Much was made in argument by Mr. Robilliard of the reasons for the importance of Roscomm’s controlling position in Teleport (Mr. Klabin’s controlling position through Roscomm), that is the maintenance of an independent and controlling balancing weight to the interests of PLD (46%) and Rostelecom (44%). I do not intend to explore those alleged reasons for the purpose of reaching a conclusion as to the meaning and effect of the 1999 letter of resignation. No evidence, as background to or contemporaneous with that letter, has been produced to support the argument. Various opinions (of Mr. Mustafidi and Rostelecom), have been produced in the latter half of 2002; they are manifestly *ex post facto* and merely muddy the waters in this regard.

**(v) Conclusions in relation to the Applicant’s case with regard to the letter 30<sup>th</sup> September, 1999**

I do not intend, for this purpose, to review, and thereafter take into account, the conduct of the parties subsequent to the 30<sup>th</sup> September, 1999, an exercise normally to be avoided, particularly as I do not find any ambiguity in the terms of the resignation letter of September, 1999, though it may pose some difficulties in construction.

On the other hand, I deliberately reviewed at length all the documentary evidence placed before me with regard to the successive purchases of Mr. Klabin’s interest in Technocom, from 1994 onwards. That is essential background. In my view, certain features stand out.

Firstly, whilst in 1994 PLD acquired a 51% shareholding in Technocom, subsequently increased in 1997, with consequent changes to its board of directors, the position with regard to Roscomm remained the same. Mr. Klabin retained his one-third shareholding and continued as sole director, an entrenched position arising from the company’s Articles of Association and the provisions of the Companies Law. These were all facts known, or which should have been known, to interested parties. Nor is there any evidence that PLD addressed or sought to address the question of any change to that position in 1999. Silence reigned.

Secondly, throughout the period, November 1994 to September 1999, whilst PLD was paying large sums of money to Mr. Klabin to acquire his shareholding in Technocom, it was at the same time keen to make full use of what it clearly considered to be (no doubt accurately) Mr. Klabin’s extensive knowledge of, and contacts and involvement in, the telecommunication and telephony business as it was developing in the new Russian Federation.

Thirdly, crucial both to PLD's developing interest in Technocom and its use of Mr. Klabin's expertise, was Technocom's interest in Teleport, including, but by no means limited to, its subsequent commercial contracts with it, i.e. the Equipment Leases of 1994, 1996 and 1998. Hence PLD's insistence upon the provision of Teleport's accounts before it acquired the first *tranche* of Mr. Klabin's shares in Technocom, as also its insistence that the licences issued by the Russian Government should be extended for a further ten years, as a precondition of completing that purchase. Of equal significance are the two Consultancy Agreements, including Mr. Klabin undertaking additional and extensive new duties when PLD purchased the second *tranche* of the shares in 1997, and most importantly in relation to the wider development of Teleport's business. Additionally, though I have already referred to my puzzlement as to its reasons, Technocom saw fit, through Mr. Hatt, to grant Mr. Klabin a Power of Attorney as late as February, 1999, with specific reference to Technocom's business interests in the Russian Federation. This demonstrated, as Mr. Robilliard said, the importance to PLD, in Mr. Hatt's eyes, of Mr. Klabin. This was at a time when, no doubt, negotiations were nearing completion in respect of the merger between PLD and MCI, and the former's takeover by MIG, and also in respect of the completion of the purchase of the share capital of Technocom by PLD.

In my assessment, Mr. Klabin's assistance and expertise were viewed as being essential to PLD and its subsidiaries throughout the period 1994 to 1999.

Despite that clear importance of Mr. Klabin to PLD, Technocom and Teleport, at the end of September, 1999, his services were unequivocally dispensed with, including, most importantly, the specific revocation of the wide authority with which he had been vested by virtue of the Technocom Power of Attorney. It would, therefore, appear peculiar that, at the same time, it was the intention of Mr. Klabin and PLD to allow Mr. Klabin, through Roscomm, to retain an effective controlling interest in Teleport. Is that the result achieved by the letter of the 30<sup>th</sup> September, 1999?

As Lord Reid said in Wickman Tools, (19) the fact that a particular construction leads to a very unreasonable result must be a relevant consideration (in construing a commercial agreement). The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear (as Mr. Greenfield emphasised).

However, I do not think that the proper construction of the September, 1999, letter leads to such an unreasonable result. The wording of the first paragraph of the letter may be somewhat unclear, arising from the use of the phrase "*in such capacity*". Mr. Robilliard argued that those are words of limitation with regard to the exact duties and rights Mr. Klabin was relinquishing with regard to PLD, Technocom, Teleport or any other subsidiary of PLD. Accordingly, it was only as a director of Technocom or of Teleport (my emphasis) that Mr. Klabin was relinquishing any duties he had in respect of, for example, Roscomm.

To state the argument in that way reveals I believe its inherent contradiction. He had had no duties as, for example, a director of Technocom in respect of the affairs of Roscomm. Admittedly, it is clear from the second paragraph of the letter that his acknowledgment that he had no outstanding claims or demands against any member of the Group related solely and specifically to his directorships of Technocom and Teleport (“the Positions”), as also his acknowledgment in respect of any claims by any member of the Group against him. He had been fully compensated for, and had no outstanding claims in respect of, his services in that regard.

In my view there is a good case for arguing that a wider meaning can be given to the phrase “*in such capacity*”, so as to encompass the general rights and duties attaching to the office of director.

Further, any such difficulty that there may be in construing the first paragraph must be remedied by the unequivocal terms of the third paragraph, by which Mr. Klabin acknowledged, in effect, that he would no longer have any authority to act on behalf of any of the PLD Group of companies, which necessarily includes Roscomm. He also undertook to make that lack of authority clear to all third parties who had a need to know, for example Teleport. How can Mr. Klabin on the one hand say that he was to continue as sole director of Roscomm, and on the other hand accept that he had no authority to act on the company’s behalf?

Moreover, whilst ignoring the parties’ conduct after the 30<sup>th</sup> September, 1999, as a factor in determining the meaning and effect of the resignation letter of that date, it must be relevant to take into account the reason which Mr. Klabin first gave, in June 2001 (to be precise Rosh’s letter to MITI of 27<sup>th</sup> June, 2001, the details of which I cite later), for his continuation as sole director of Roscomm, namely to secure the outstanding financial commitments of PLD to him under his alleged, but unsubstantiated, consultancy agreement in early or mid 1999 with PLD, worth \$300,000 per annum. There is no suggestion in that first response of the position which he later came to adopt, namely that, to the knowledge of all, his sole directorship was never to be affected by the 1999 arrangements. Business was to continue as usual.

I must, however, acknowledge that PLD, at the very least, was imprudent (I might use the description “sloppy”) in the documentation (or lack of documentation) which it produced and required to be signed before money changed hands, so as to establish Mr. Klabin’s unequivocal, written, undertaking to resign specifically as the sole director of Roscomm – the kind of documentation one would normally expect in such circumstances, bearing in mind the limited number of Technocom’s subsidiaries (as Mr. Robilliard rightly pointed out); for example, draft letters of resignation as the sole director of Roscomm, and draft minutes of the company’s Board appointing new directors, etc. These were exactly the draft documents which MITI produced for Mr. Klabin’s consideration and signature in the winter of 2001-2, to which I will later refer. This would have been particularly prudent in the light of the Articles of Association of Roscomm, allied to the provisions of the Company’s Law, with regard to the removal of a sole director.

There is a stark contrast between, on the one hand, what might be considered to be Mr. Klabin's shrewd assessment of the strength of his position, and, on the other, PLD's ineptitude in failing to address it.

I appreciate that the assessment of personal credibility at trial is, in this jurisdiction, rightly and solely, the province of the Jurats. Whilst acknowledging Mr. Robilliard's submission as to the "*due process*" point made by Hoffmann J (the potential injustice of depriving a party of the benefit of a trial in appropriate cases), I nevertheless agree with the force of Mr. Greenfield's submission that, in the circumstances of this case, I cannot avoid the responsibility of forming a view of the evidence before me. With regard to the present issue – the intent, meaning and effect of Mr. Klabin's letter of the 30<sup>th</sup> September, 1999 – I believe that the relevant evidence is overwhelmingly documentary, so as to enable me, properly, to reach a conclusion, for the purposes of these proceedings, with regard to that all-important letter.

On this issue, the Applicant has satisfied me, on the balance of probabilities, that there is a serious question to be tried. Further, that there is a strong case, well above the "*Cyanamid threshold*" and sufficient to satisfy the higher threshold required for mandatory injunctions, that Mr. Klabin's contractual obligations created in 1999 involved his relinquishment of any influence over, or say in, the running of Teleport, which included, by virtue of his letter of the 30<sup>th</sup> September, 1999, his undertaking to resign as sole director of Roscomm.

Clearly, however, his one-third minor shareholding in Roscomm was not to be affected.

#### **4 Events since September, 1999**

I turn now to consider what has happened since September, 1999, to assess the strength or otherwise of the Applicant's allegations with regard to Mr. Klabin's unworthiness to be a director of Roscomm. I adopt a similar approach to that relating to the letter of resignation, by predominantly considering the abundant documentary evidence, the primary facts, of the events as they have unfolded, drawing such inferences as are justified and appropriate; and to a much lesser extent taking account of the interpretation the parties themselves place upon these facts or events in their affidavits.

As far as it is possible to do so I proceed on a chronological basis.

##### **(i) The proposed Consultancy Agreement for 2000**

On the 3<sup>rd</sup> February, 2000, the lawyer for PLD wrote to Mr. Klabin in the following terms:-

*"Mark –*

*Pursuant to your discussions with James Hatt on the matter, attached please find a draft of your Consultancy Agreement with Metromedia (by which was meant MITI). At the moment, we have*

*kept the definition of “Services” quite general, pending further discussions between you and James as to the precise tasks he wants you to undertake on our behalf.*

*Please let me know of any comments or questions.. ...”.*

I turn to the draft Consultancy Agreement itself, noting that it was emphatically headed “*Draft – for discussion purposes only subject to contract.*”. The draft sought to set forth the terms and conditions pursuant to which Mr. Klabin would provide strategic business consultancy services to MITI, at the specific direction and request of the president of the company. The details of each separate service to be performed were to be agreed between the parties, as were the fees payable. The agreement was to commence on the 1<sup>st</sup> February, 2000, for a term of twelve months terminable by either party upon three months prior notice and subject to renewal upon agreement. Reasonable business expenses properly incurred were also to be reimbursed. There was then a provision as to confidentiality. It was finally, specifically, provided that with regard to all the services to be provided by Mr. Klabin, he was not to be considered a partner, co-venturer, agent or representative of the company (MITI) or any subsidiary or affiliate of the company, but would remain in all respects as an independent contractor; and neither party would have the right or authority to make or undertake any promise, warranty or representation, to execute any contract, or otherwise to assume any obligation or responsibility in the name of or on behalf of the other party.

On the 4<sup>th</sup> February, 2000, this proposal appears to have been acknowledged and agreed by Mr. Klabin; but he also replied to MITI’s Counsel, saying that generally he accepted the terms in the draft Agreement but offered a few comments (the details of which I do not think it is necessary for present purposes to summarise).

There is no other evidence before me in respect of this proposed Consultancy Agreement; and I have not, as I have had occasion previously to observe, had the benefit of any affidavit evidence from Mr. Hatt.

In those circumstances I consider I am fully justified in concluding that no binding Consultancy Agreement was concluded between PLD/MITI and Mr. Klabin, whether written or oral, though it is worth noting that Mr. Hatt (PLD’s senior management had remained in charge after the merger with MCI) clearly was interested in exploring the possibility of retaining the services of Mr. Klabin for the benefit of MITI, albeit that they were to be clearly identified on a “case by case” basis. There was certainly no set annual fee of \$300,000.

**(ii) The Board of Teleport**

On the 18<sup>th</sup> February, 2000, MITI wrote to Teleport (the letter being signed by Mr. Hatt) to confirm the appointment to the Teleport Board of Directors of the following persons as representatives of these companies, i.e. Mr. Hatt for Technopark, Mr. Armley for Roscomm and Mr. Atamas for Technocom.

A minute of the Board of Directors of Teleport dated the 21<sup>st</sup> February, 2000, records that a Mr. Vyshlov, representing Rostelecom, Mr. Mustafidi, as General Director of Teleport, Mr. Atamas, representing Technocom, Mr. Hatt, representing Technopark, and Mr. Armley, representing Roscomm, attended the meeting. The election of those new members of the Board was unanimously approved. It was also noted that these new appointments were made in connection with (i) the structural reorganisation of PLD due to that company's merger with MITI, and (ii) the withdrawal from Teleport of shareholders Mr. Mark Klabin and Mr. Boris Antoniuk (I am unclear why Mr. Klabin and Mr. Antoniuk should be described as shareholders of Teleport because they were not). No mention is made in these minutes to there being any representative of Helian on the Board of Teleport (notwithstanding the terms of the Pledge Agreement of April, 1999). A minute of the Board of Directors of Teleport dated the 29<sup>th</sup> March, 2000, recorded the same five Directors being present, the business being conducted relating to the sale by Teleport to Technocom of shares which the former owned in another Russian Federation company. Finally, a minute dated the 14<sup>th</sup> September, 2000, of the Board of Teleport again records that the same directors were present, the business transacted at this meeting relating to the sale by Teleport to Technocom of shares which it owned in another Russian Federation company.

What other meetings were held during 2000 I have no idea, as no other evidence has been adduced. On the evidence which I do have, however, it is clear that MITI had generally appointed their representatives to represent their different subsidiary company interests on the Board of Teleport, and specifically that Mr. Armley was representing Roscomm.

That is the limited evidence I have with regard to the Teleport Board. Whether, as Mr. Robilliard argues, those appointments were invalid under the law of the Russian Federation, I cannot say, as I have had no evidence in that regard.

I would also note, as Mr. Robilliard asked me to do (chronologically it is convenient to do so now), that Technocom's auditor's report for year ending 31<sup>st</sup> December, 1998 is dated the 27<sup>th</sup> June, 2000, two directors (Mr. Hatt and Mr. Crouch) having approved it on the 25<sup>th</sup> May, 2000. Note 18 to the Report clearly stated that its subsidiary Teleport had purchased services from Helian in 1998 for \$576,000 (which equals \$48,000 per month) a company "controlled by Mark Klabin" (who had resigned, with Mr. Antoniuk, from the Technocom board, so it was also stated, on 30<sup>th</sup> September, 1999). This report (which was produced with Mr. Klabin's third affidavit in October, 2002) demonstrated Technocom's knowledge, and therefore that of PLD and MITI, of Teleport's Services Agreement with Helian, and Mr. Klabin's control of the latter.

### **(iii) MITI takes charge (in place of PLD); purported termination of the Services Agreement**

On the 8<sup>th</sup> November, 2000, MITI dismissed the top PLD management team, for example, of the characters we know, Mr. Hatt and Mr. Anderson.

Mr. Brazell records in his main and first affidavit (at paragraphs 56 onwards) that early in 2001 MITI was considering the financial position of the PLD subsidiaries. Particularly noteworthy in that regard was Teleport's Services Agreement with Helian and the monthly payments which were still being made. Apparently, though this is pure hearsay, Mr. Armley had previously raised the matter of these continuing payments with Mr. Hatt, though no action was taken - this presumably must have been before November, 1999. In any event, negotiations started with Mr. Klabin with regard to the termination, at a price, of the Services Agreement. That in turn led apparently to a meeting in Vienna in February, 2001. Again, according to Mr. Brazell, Mr. Klabin raised the asking price from US \$180,000 to US \$250,000.

Be that as it may, on the 18<sup>th</sup> April, 2001, Rosh (through Ms. Tarasenko) wrote to Mr. Atamas in connection with the inquiry from MITI's lawyers regarding the pre-term termination of the current agreements between Teleport and SCS, on the one hand, and between Teleport and Helian on the other. Mr. Atamas was informed that the question of such pre-term termination could be considered "*under the condition of the payment of the indemnity in the total amount of the US \$250,000 to the owners of Helian International Corporation and to the partners of Technocom Ltd. – joint owners Space Communications Services (SCS) Ltd. In the case of your consent we are ready to present to your agreement the drafts for the necessary documents*".

This proposal was rejected by MITI.

On the 8<sup>th</sup> June, 2001, Teleport wrote to Helian with regard to the termination of the Services Agreement, as follows –

*"We hereby notify you that as of the 1<sup>st</sup> July 2001 we terminate the Services Agreement dated August 12 1995 No. T-95/74, as amended and restated between Teleport and Helian Corporation. Thank you for your co-operation."*

That is signed by Mr. K.P. Mustafidi as General Director of Teleport.

It is endorsed in manuscript as follows –

*"The above Agreement is terminated at the request of Metromedia International Telecommunications, Inc."*

and signed John Armley. That manuscript endorsement was apparently made at the request or insistence of Mr. Mustafidi who, according to Mr. Brazell, had previously been reluctant or indeed refused to sign such a letter, saying that it was a matter for Mr. Klabin.

**(iv) Inquiries of Mr. Klabin and resulting correspondence – June to September, 2001**

There followed a spate of correspondence which I think I am entitled to infer was triggered by the termination letter of the 8<sup>th</sup> June.

On the 13<sup>th</sup> June, 2001, the legal director for Russia for MITI, as owners of Technocom, wrote to Mr. Klabin requesting him to provide all business, financial and other documents, including foundation documents, correspondence, payment orders, financial statements and other documents relating to the operation of Roscomm and SCS. On the 22<sup>nd</sup> June, 2001, Mr. Klabin, signing himself as General Director of Commbel, as a shareholder of Roscomm owning 33% of its issued and outstanding stock, requested Technocom, as the majority 66% shareholder, to provide Commbel with information regarding the dividends (both direct and indirect) paid to Roscomm as a shareholder of Teleport for 1999 and 2000, together with the financial statements for Teleport for those years.

On the 27<sup>th</sup> June, 2001, Helian (though the letter was signed by Ms. Tarasenko on behalf of Rosh), wrote to MITI, with a copy to Mr. Mustafidi as General Director of Teleport, regarding the termination of the Services Agreement. In effect, that letter stated that the letter of termination was a unilateral act which was in breach of the Services Agreement, the term of which had to be linked to repayment of the “attracted loans” made for the benefit of Teleport, and with which various other Agreements interacted, in particular the Equipment Leases between Teleport and Technocom. Reference is made to the term of the Services Agreement being automatically prolonged until the fulfilment of Teleport’s obligations with regard to the “attracted loans”, and that the Equipment Leases would remain in effect until 2004 and 2005 respectively.

Also on the 27<sup>th</sup> June, 2001, Rosh responded to MITI’s letter of the 13<sup>th</sup> June regarding the provision of documentation relating to Roscomm and SCS. I must quote most of this letter:-

*“Please be informed that the foundation documents of both indicated companies are kept in custody in the head office of Rosh Group in Vienna.*

*Those documents were intentionally left under operation of Mr. Klabin, President of the Rosh Group, as a guarantee of his rights in course of sale of his share in Technocom in 1999.*

*In accordance with a verbal agreement between Mr. Klabin and Mr. James Hatt and the management of PLD Inc. of that time, Mr. Klabin was entitled to receive US \$300,000 per annum under consulting agreement that had to be signed with him personally. In order to secure the payments under that consulting agreement Mr. Klabin reserved the position (my emphasis) of director both in Roscomm and SCS. For the same reason Mr. Klabin also reserved one share in SCS...and 1,667 shares in Roscomm (33% of the issued stock).*

*Under request of Technocom Ltd. as a majority shareholder of Roscomm and SCS the foundation documents of these companies might be transferred to authorised representatives of Technocom Ltd. Please provide us with the address where we could courier the documents.*

*However, we are somewhat embarrassed by your request to provide correspondence, payment orders and financial statements of Roscomm and SCS as there is no trust, operatorship or other similar agreement between Technocom (or MITI as its shareholder) and Mr. Klabin (or any company of Rosh Group headed by Mr. Klabin) binding Mr. Klabin to provide any information or documentation.” (my emphasis).*

With regard to this letter, I firstly note that this is the first reference to Mr. Klabin having a “reserved position” as director of Roscomm, which was specifically to secure payments under the alleged PLD (“Hatt”) consultancy agreement of 1999. I also comment that the statement on Mr. Klabin’s behalf that all the Roscomm documents were intentionally left with him as guarantee of his rights at the sale of his last remaining shares in Technocom, and that there was no trust or agreement between them to provide the information and documentation requested (other than the foundation documents), stands uneasily with the contents of the resignation letter of the 30<sup>th</sup> September, 1999. The last paragraph of that resignation letter stated specifically, and I again repeat it, that *“I shall direct the staff at Vienna office of my associated companies to co-operate with PLD and Technocom at their expense in transferring any documents, software or other materials relating to the Technocom and the Group as PLD or Technocom may direct”*. That, in my view, was and is an unequivocal statement, and that the “Group” necessarily includes Roscomm

There is also before me an undated letter signed by Mr. Klabin on behalf of Roscomm addressed to MITI, Technopark and Teleport. It relates to the holding of a shareholders’ meeting of Teleport. I suspect that this letter was written at about the same time as the two previous ones, maybe slightly later (i.e. late June, 2001). Mr. Klabin advises the addressees that by virtue of the agreements between the shareholders of Teleport in April, 1999, Mr. Klabin, as sole Director of Roscomm, was currently the only person authorised to act on behalf of that company and represent its interests at the general shareholders’ meetings of Teleport. Therefore all correspondence and materials relevant to a shareholders’ meeting, such as agendas, should be sent for the attention of Mr. Klabin at his Vienna office. Again, I have to make the comment, without making any judgment on Mr. Klabin’s statement that he was a director of Roscomm, that his reference to agreements between the shareholders of Teleport in April, 1999 (of which I have no evidence), whereby Mr. Klabin was the only person authorised to act on behalf of Roscomm and represent its interests at shareholders’ meetings of Teleport, fits uneasily with the minutes of the meetings, which I have already referred to, of the shareholders of Teleport in the early part of 2000, though I acknowledge Mr. Robilliard’s argument that the Roscomm representative was appointed without proper authority. Moreover, by virtue of the Pledge Agreement, was not Helian to exercise Roscomm’s rights in respect of the latter’s shareholding in Teleport?

On the 16<sup>th</sup> July, 2001, Helian wrote to MITI and Teleport, such letter being signed by Mr. Klabin. He observed that Helian had received no answer to its letter to MITI of the 27<sup>th</sup> June regarding the termination of the Services Agreement. Again, reference is made to the fact that, at about the same time as the Services Agreement was entered into in 1995, there were other agreements, or there were to be other agreements,

related to the Services Agreement, for example leases between Teleport and Technocom of December, 1994, and December, 1996. The point that Mr. Klabin is making is that, within the framework of the relationship between the shareholders, the lease payments in favour of Technocom and the payments under the Services Agreement to Helian were to be seen as indirect dividends to those entities, respectively. He also states that the payments due to Helian by Teleport were guaranteed by 28 Bills of Exchange issued by Roscomm, covering the period until January, 2006, and also by the Pledge over the 10% of Teleport's shares owned by Roscomm, with the voting rights being transferred to Helian. In this letter Mr. Klabin concluded, on behalf of Helian, that in view of the unilateral termination of the Services Agreement he would be forced to seek enforcement both of the Pledge over the shares of Teleport and the Bills of Exchange.

It appears that on the 17<sup>th</sup> July there was a meeting in New York between, inter alia, Mr. Klabin and Mr. Brazell. One of the matters discussed at that meeting, on the basis of an e-mail sent on the 20<sup>th</sup> July to Mr. Klabin by a lawyer for Mr. Brazell, was that MITI wanted to be provided with many of the essential documents to which Mr. Klabin had recently been referring, such as the Bills of Exchange and the Pledge Agreement, or relating to the US \$300,000 per year consultancy agreement, or the alleged Teleport shareholders' agreement in April, 1999.

In response to that e-mail of the 20<sup>th</sup> July, Helian wrote to MITI on the 25<sup>th</sup> July (by Ms. Tarasenko for Rosh), saying that documents relating both to Roscomm and SCS had been sent to the New York offices. With regard to the alleged consultancy agreement between Mr. Klabin and MITI, the letter from Mr. Hatt of the 3<sup>rd</sup> February, 2000, with the draft consultancy agreement, and Mr. Klabin's response of the 4<sup>th</sup> February, 2000, were both forwarded. Copies of some of the Bills of Exchange and of the Pledge Agreement were also enclosed, together with a statement from the Shareholders' Register of Teleport. On the basis of all that information provided, Helian proceeded to summarise the position. I quote:-

- “1. Mark Klabin is entitled to receive US \$300,000 per annum beginning with the 1<sup>st</sup> February, 2000, under the Consultancy Agreement with MITI. The total amount due to Mark Klabin for the years 2000 – 2001 is US \$600,000.*
- 2. The Services Agreement MT-95/74 dated 12<sup>th</sup> August, 1995, between Teleport and Helian shall stay in full force for the period of 90 days after the last payment under the lease agreement between Teleport and Technocom.*
- 3. Helian is a lawful pledgee of the 10% of the issued share with Teleport owned by Roscomm with the voting rights transferred to Helian.*
- 4. Mark Klabin should reserve the position of the sole Director of Roscomm Ltd. and member of Board of Teleport.*

*Please, consider the above four positions as our sole position, any settlement with respect of which should include all the indicated issues.”.*

On the 26<sup>th</sup> July, 2001, Helian (again by Ms. Tarasenko of Rosh) wrote to Roscomm, Commbel, Technocom and MITI to the effect that, in view of the purported termination of the Services Agreement, if Teleport suspended payments due to Helian under the Services Agreement then Helian would seek enforcement of the Pledge over the shares of Teleport owned by Roscomm, and the enforcement of the Bills of Exchange, as a guarantee of the proper fulfilment of Teleport's obligations under the Services Agreement.

On the 27<sup>th</sup> July, 2001, Mr. Klabin wrote, in person, to Ansbacher, Topaz, Anka and Technocom, in his capacity, so he stated, as a Director of Roscomm, Commbel and Teleport. Mr. Klabin informed the addressees of the documents which had been sent to MITI following the meeting in New York on the 17<sup>th</sup> July, and that Roscomm had acted as general guarantor of the Services Agreement by issuing the Bills of Exchange and entering into the Pledge Agreement, pledging the only valuable asset owned by Roscomm. As a result of being notified that the Services Agreement had been terminated "we" (Mr. Klabin's word) had that day been informed that Helian was going to seek enforcement of the Pledge over Roscomm's Teleport shares and of the Bills of Exchange. The addressees were therefore asked to refrain from doing anything that might affect (i) the legal status and current management of both Roscomm and Topaz, (ii) the current obligations of Roscomm to Helian, and (iii) the disposal of assets of Roscomm. His only concern was expressed to be the stability of Roscomm and its ability to meet its obligations to Helian.

On the 14<sup>th</sup> August, 2001, Teleport wrote to Mr. Brazell at MITI, the letter being signed by Mr. Mustafdi as General Director. This letter relates to Helian's threatened action over the termination of the Services Agreement, which had not been accepted. Mr. Mustafdi asked MITI to indemnify both Teleport and the writer; stated that an AGM was necessary; that he was obliged to recognise and observe the rights of Helian as a lawful pledgee of Roscomm's 10% shareholding; and that Helian should be included in the list of shareholders who were to be informed of the next general meeting. He concluded by asking Mr. Brazell to recall the representative of MITI on behalf of Roscomm (presumably Mr. Armley), and to consider that, currently, the only person lawfully authorised to vote 10% of the shares of Teleport owned by Roscomm was Mr. Klabin - "*as the representative of Helian*". I emphasise that last comment. Mr. Mustafidi is not indicating that Mr. Klabin represented Roscomm.

Also on the 14<sup>th</sup> August, 2001, Teleport (again through Mr. Mustafidi as General Director) wrote to Rostelecom, Technocom, Roscomm (for the attention of Mr. Klabin), Helian (for the attention of a Dr. Proksch) and Technopark. He informed the addressees that, apparently resulting from the request of the Ministry on Anti-monopolistic Policy and other authority, new financial arrangements had been entered into between Teleport and Rostelecom on the 17<sup>th</sup> July, 2001 (with effect from the 1<sup>st</sup> July, 2001), in respect of their existing services inter-connect contract. That agreement was signed by Mr. Mustafidi, on behalf of Teleport, without prior reference to Technocom. That is, at any rate, the purport of a letter from Mr. David Lee, a Director of Technocom, to Mr. Mustafidi of the 8<sup>th</sup> August, 2001, referring to that agreement and, whilst not doubting its necessity, in effect reprimanding Mr. Mustafidi for having concluded it on behalf of

Teleport without reference to Technocom. Mr. Mustafidi further indicated increasing financial difficulties for Teleport, and suggested that an extraordinary meeting of shareholders should be held.

Mr. Brazell of MITI responded on the 15<sup>th</sup> August to Mr. Mustafidi's letter to him of the 14<sup>th</sup> August, in which he made clear the position of MITI, including the fact that in 1999 and 2000 Teleport and all its shareholders had acknowledged the right of MITI to designate its representative to act on behalf of Roscomm's shares in Teleport.

On 16<sup>th</sup> August, 2001, an "executive summary" was prepared by Mr. David Lee, as the Executive Officer of Technocom, for the benefit of the MITI Board of Directors. This document was attached to the Klabin's third affidavit (i.e. the unsigned draft of which being produced in September, 2002). No explanation has been given as to how it came to light, but I do not doubt its authenticity. I am assuming that it was presented to the MITI Board at about the time it is dated, though I have no evidence to that effect. This report related to the financial and general position of Teleport, and thus Technocom's investment in it. He identified various threats facing Teleport at that time, being six in number: licence restrictions on Teleport; Teleport being behind in its repayments to Technocom in respect of the leased equipment (such arrears stated to be over US \$45,000,000); Teleport had never paid a dividend to either partner i.e. Technocom and Rostelecom; the new interconnect agreement with Rostelecom potentially would incur a considerable financial burden for Teleport; proper control had not been exerted over the management team of Teleport by MITI; control of Roscomm, and hence Teleport, was under threat (though that was not the subject of Mr. Lee's paper); and that Rostelecom, as it was rationalising its subsidiary holdings, might "exit" Teleport, thus leaving MITI with the alternative of either buying out Rostelecom or accepting a new partner. The purpose of the paper was to analyse the current difficulties and give recommendations as to future action. Mr. Lee outlined the shareholder structure, and indicated that, at this time, whilst MITI had legal nominations as shareholders' representatives and as Directors to the Board of Teleport, through Technocom and Technopark, the Roscomm nominations were apparently subject to ongoing negotiations in New York. He further identified, as a particular threat, that any loss of control of Roscomm would mean that Teleport would not be "consolidated by MITI", with a considerable financial loss running into many millions of pounds. Part of the new strategy would include addressing the requirement to reduce costs through reorganisation and cost control before liquidity was threatened in Technocom that year "subject to successful negotiations over Roscomm".

With regard to the "executive summary", Mr. Klabin stated (at paras. 18/19 of his third affidavit) that no mention was made of he, Mr. Klabin, having any harmful influence as far as Teleport was concerned, the only individual complaint being with regard to Mr. Mustafidi acting as nominee for Rostelecom and not in MITI's interest. Naturally enough, he notes that negotiations with regard to Roscomm were ongoing and then states:-

*“I had become an obstacle in their plan, to sell or liquidate Teleport TP, after taking all available funds from the company against the interests of the other shareholders of Teleport.”*

(It is right to put these comments in context. Mr. Brazell (MITI, etc) during the spring and summer of 2002 had not only complained of Mr. Klabin’s conduct as the purported director of Roscomm, but also made allegations with regard to the latter’s undue and pernicious influence over Teleport, Mr. Mustafidi particularly, as also, to an extent, over Rostelecom).

On the 21<sup>st</sup> August, 2001, Ansbacher, in response to the request of Carey Langlois on behalf of MITI on the 17<sup>th</sup> August, produced copies which it held of the minutes of director’s and shareholders’ meetings of Roscomm. The resolutions then produced of the Board of Directors for 1999 and 2000 (the relevant years) make no reference either to the Pledge Agreement or the Bills of Exchange. Similarly those minutes of the annual general meetings for 1999, 2000 and 2001 make no reference to either of those two documents (though the 1999 meeting was only held on the 1<sup>st</sup> April and therefore prior to the Pledge Agreement).

On the 22<sup>nd</sup> August, 2001, Technocom responded to Mr. Mustafidi’s letter of the 14<sup>th</sup> August, 2001. The letter was signed by Mr. Lee, writing as the representative of Technopark and on behalf of all the affiliated companies owned by MITI which had an interest in Teleport, making up the 56% voting stock. More information was requested with regard to the new Rostelecom “Interconnection Agreement”. (Copies of this letter were sent to Rostelecom, Technocom (for the attention of Mr. Armley, somewhat oddly), and Roscomm).

On the 29<sup>th</sup> August, 2001, Helian (by Mr. Klabin) wrote to MITI and Teleport. Though all the documents had been provided, no answer, he said, had yet been received to his letters of the 27<sup>th</sup> June and the 16<sup>th</sup> July. The Services Agreement invoice for July had not yet been paid by Teleport. Unless comments and proposals were received within the next 10 days, then Helian would take all necessary steps to enforce the Pledge Agreement and the Bills of Exchange.

The 31<sup>st</sup> August, 2001, was a particularly busy day for correspondence in the MITI and its affiliates’ offices, letters being variously addressed to Mr. Klabin in person, to Rosh and Helian. The effect of all this correspondence was to reiterate MITI’s position with regard to denying all of Mr. Klabin’s allegations, and the documentary basis for them, arising during the summer of 2001, including their ignorance of various agreements, such as the Pledge Agreement and the Bills of Exchange, until July of that year, and totally repudiating the alleged consultancy agreement with PLD (through Mr. Hatt) by which Mr. Klabin would be paid US \$300,000 a year. It was also pointed out to Rosh, in MITI’s counsel’s letter to it, that no Director’s resolution of Roscomm had been produced with regard to the alleged Pledge Agreement (though of course a copy of that Agreement itself had been produced in the previous July).

Also on the 31<sup>st</sup> August, 2001, Carey Langlois wrote to Ansbacher asking them to confirm that they had no minute recording Roscomm’s decision to enter into the Pledge Agreement.

On the 27<sup>th</sup> September, 2001, Ansbacher provided Carey Langlois with a facsimile copy, which it had by then received from Mr. Klabin, of Roscomm's Director's resolution in respect of the Pledge Agreement. The original has not yet been produced. That resolution of Mr. Klabin, as the sole Director of Roscomm, is dated the 15<sup>th</sup> April, 1999. It records that it had been noted that the Company held 10% of the issued stock of Teleport, that Teleport was a party to a Services Agreement with Helian of the 12<sup>th</sup> August, 1995, and that collateral had been requested by Helian as security for payments under the Services Agreement. Accordingly, Mr. Klabin resolved:–

- “1. *that the Pledge Agreement with Helian providing the Pledge of 10% of the issued stock of Teleport owned by the company is hereby approved.*
  
3. *That the pledge order in accordance with the requirements of the Russian legislation instructing Teleport to insert a record evidencing the pledge of 10% of its issued stock in favour of Helian into the register of shareholders of Teleport is hereby approved.”.*

It should also be noted that some attempt at reconciliation was being proposed by MITI. I have already referred to the meetings in Vienna in February, and in New York in July, 2001. In Mr. Brazell's letter to Mr. Klabin of the 31<sup>st</sup> August, 2001, he specifically states – “*we have arranged for a representative to contact you early next week with a view to discussing this matter in person and, it is hoped, identifying a reasonable and mutually acceptable solution.*”.

#### **(v) Negotiations and other matters – October 2001 to March 2002**

Clearly by August, 2001, further negotiations between Mr. Klabin and Mr. Brazell were taking place. I turn to what documentary evidence has been provided with regard to these negotiations, and I bear in mind Mr. Klabin's allegations that those negotiations indicate what it was that Technocom was trying to obtain, and that it was the failure to do so which led to the Applicant instituting these proceedings.

On the 11<sup>th</sup> October, 2001, Salans, the Applicant's legal advisors, wrote to Charles Russell, Mr. Klabin's legal advisors, regarding the discussions that had been taking place between Mr. Klabin and Technocom in respect of the sale of Commbel Ltd's shares in Roscomm, enclosing a set of the chief terms and conditions on which MITI and Technocom saw this transaction proceeding. Amongst the “main transactions” referred to in that draft, were a deed of Release and Waiver relating to (without limitation) the 1995 Services Agreement, the 1999 Pledge Agreement and the Bills of Exchange, the alleged MITI (Hatt) Consultancy Agreement(s), the position of Mr. Klabin as sole Director in Roscomm, as also his similar position in SCS, the appointments by Helian of “designees” to Teleport shareholders, and/or board meetings, and claims for indirect dividends payable to Helian.

There was also to be the associated implementation of the alleged 1999 resignation of Mr. Klabin as the sole Director of Roscomm, the resignation of the General Director of Teleport (Mr. Mustafidi), and the further

resignation of Mr. Klabin as sole Director of SCS. The price was to be US \$1,250,000, a third payable on completion, a third in the middle of January 2002, and the remaining third to be held in escrow for a period of two years. What are described as the “completion items” included:- the necessary board resolution of Roscomm removing Mr. Klabin as sole director and appointing new directors, a shareholder resolution of Teleport removing the general director and appointing a new one, the delivery up of all Powers of Attorney in the possession of Mr. Klabin, issued by or in the name of Roscomm, SCS or Technocom whether before or after the 30<sup>th</sup> September, 1999, the production of the original Pledge Agreement, the production of the original Shareholder Register of Teleport, and the surrender and destruction of all the Bills of Exchange.

As Mr. Robilliard argued, all of these are matters, save for the removal of the General Director of Teleport, which form part of the application for injunctive relief, and which the Applicant failed to achieve by negotiation. On the other hand, it might be argued that all these items are explainable as being matters which Mr. Klabin himself had raised during the course of 2001, and for which MITI recognised, if they wanted to be to be “shot of him”, a price had to be paid. As Mr. Robilliard further argued, all these identified matters, in the eyes of the Applicant, had a real value.

By letter dated the 29<sup>th</sup> October, 2001, Charles Russell forwarded to Salans their draft of the proposed agreement. That draft incorporated most of the items which had been included in Salans’ draft, but particular payments were associated with particular items. So that:- US \$417,000 was to be paid to Mr. Klabin for Commbel’s one-third shareholding in Roscomm; US \$233,000 was to be paid to Mr. Klabin for his resignation as Director of both Roscomm and SCS; Mr. Mustafidi was to resign as President and Director of Teleport, for which he was to be paid US \$250,000 (this payment to Mr. Mustafidi was an entirely new item); Roscomm would cancel the Bills of Exchange, and Helian would terminate the Pledge Agreement; if Teleport were to pay Helian US \$500,000 as compensation for terminating the Services Agreement, then other payments due to Commbel and Mr. Klabin would be proportionately reduced. One other new item was that PLD was to pay Mr. Klabin US \$600,000 for monies due for the (“Hatt”) consultancy services, which would thus be terminated. Detailed provisions were then made as to different times for and amounts of payments in respect of the separately identified items.

Further, rather desultory, correspondence ensued at the end of October and the beginning of November, 2001, including curious arguments as to which firm of lawyers should be preparing the draft agreements; it also seems that, at one stage, completion in early November was regarded as urgent and desirable; but that did not transpire.

On the 31<sup>st</sup> January, 2002, Mr. Brazell, on behalf of MITI and the companies through which it owns its aggregate shareholding interest of 56 % in Teleport, wrote to Mr. Mustafidi, General Director of that company. That letter was prompted, said Mr. Brazell, by information he had received that Rostelecom, that same day, had submitted nominations for 2002 for the Board of Directors of Teleport, and that Rostelecom might have requested to nominate two designees to the Board, even though since 1992 Rostelcom had only

nominated one designee. Mr. Brazell informed Mr. Mustafidi that the MITI designated representatives, to the Board of Teleport for 2002, were Mr. Hauf, Mr. Lee and Mr. Atamas, though none of the particular companies which they were to represent was specified. Mr. Brazell concluded by making requests as to what items were to be included in the agenda for the annual general shareholders meeting, including the election of the general director.

On the 1<sup>st</sup> February, 2002, Mr. Klabin wrote on behalf of Helian to Rostelecom, MITI, Technocom, Technopark and Teleport. Mr. Klabin informed those addressees that, in accordance with the Pledge Agreement of the 15<sup>th</sup> April, 1999, which was duly registered in the Register of Shareholders of Teleport on the 23<sup>rd</sup> April, 1999, Helian nominated Mr. Klabin for election to the Board of Directors of Teleport. That claim by Mr. Klabin on behalf of Helian was rejected by MITI, in Mr. Brazell's letter to it of the 5<sup>th</sup> February, as also were all Mr. Klabin's arguments in respect of Helian's rights under the Pledge Agreement, the authenticity of which was again disputed. Mr. Brazell concluded that, while MITI was happy to continue discussions with him concerning his sale to MITI of 33% of the shares in Roscomm, that process would be prejudiced if he (Mr. Klabin) continued to make illegitimate and wrongful claims.

On the 5<sup>th</sup> February, Mr. Brazell, on behalf of Technocom, also wrote to Mr. Klabin, in person, with regard to a fees' invoice which had been tendered by Ansbacher. The purpose of this letter was to express strong objections to Mr. Klabin writing in the capacity of director of Roscomm. Again, that continuing capacity, after the 30<sup>th</sup> September, 1999, was firmly denied. Mr. Brazell further enclosed various draft documents for completion by Mr. Klabin as director of Roscomm, which were to acknowledge his earlier resignation from the Board, and appointing Mr. Brazell and Mr. Hauf as the new directors.

The next letter regarding the negotiations was that from Salans to Charles Russell dated the 12<sup>th</sup> February, 2002. It would appear, from that letter, that no provisions relating to the termination of Mr. Mustafidi's duties as Managing Director of Teleport were now to be included in the Agreement, and there is an indication that there may have been some dispute as to the amount which was now to be payable to Mr. Klabin. Also enclosed was a draft of the representations and warranties required of Mr. Klabin by Technocom, (a further draft being prepared on the 18<sup>th</sup> March 2002). One warranty to which Mr. Robilliard specifically referred me (2.3) was that, as far as Roscomm was concerned – *“the register of members and other statutory books of the company have been properly kept and contain an accurate and complete record of the matters with which they should deal, and no notice or allegation that any of them is incorrect or should be rectified has been received.”*. This indicated, Mr. Robilliard said, an acknowledgment and acceptance that Mr. Klabin had continued in his role as sole Director.

These negotiations, such as they were, came to an end on the 22<sup>nd</sup> March, 2002, when Charles Russell wrote to Salans informing them that Mr. Klabin no longer wished to proceed with the proposed sale of his shares in Roscomm to MITI.

**(vi) Further matters arising during 2002**

In early April, 2002, concern was being expressed, certainly by Technocom and Mr. Brazell, and by inference perhaps by Rostelecom also, that unjustified expenditure was being incurred by Teleport on renovations to its offices, and that those renovations were to be carried out by a company (“Gera”) in which Mr. Mustafidi held a 50% interest.

It further came to light that, at about that time (towards the end of March), Teleport had made a payment of US \$288,000 to Helian under the Services Agreement. That sum would amount to some six months payments under the original terms of that Agreement (US \$48,000 per month). That payment was made, according to Mr. Mustafidi, because Helian had continued, from July, 2001, to March, 2002, to provide the services required of it (see Mr. Mustafidi’s letter to Rostelecom and Helian of the 25<sup>th</sup> March, 2002 – MK2). This conflicts directly with the evidence of Mr. Klabin, namely that one of the concerns that he, and he says Rostelecom, had at the time was that Teleport was suffering because it had not benefited in the latter part of 2001 and the beginning of 2002 from the important services which Helian had previously provided to it.

(I would also note that in Mr. Mustafidi’s letter of the 25<sup>th</sup> March, 2002, Teleport purported to annul its termination of the Service Agreement on the 8<sup>th</sup> June, 2001, and indicated that it would pay its 9 months arrears forthwith – in fact only 6 months were paid. However, on the 29<sup>th</sup> March, 2002, three of Roscomm’s Bills of Exchange (\$144,000 each) are marked as being “cleared” – this amounts to 9 months payments under the Services Agreement).

At this time, a further and fundamental concern was being expressed by Technocom (for which see the translation of an e-mail communication from Mr. Atamas to MITI’s legal counsel dated the 5<sup>th</sup> April, 2002), arising from that which Mr. Atamas said Mr. Mustafidi had told him of agreements being reached between Rostelecom and Mr. Klabin on the question of consolidating their voting powers at shareholders meetings’ of Teleport; thus reducing MITI’s influence in Teleport to 46%.

Be that as it may, a draft Power of Attorney was prepared on behalf of Roscomm, appointing Rostelecom *“to be its attorney, with authority to exercise all the rights and privileges, including, without limitation, the right to attend shareholders meetings and exercise all voting rights, in respect of the Shares (as hereinafter defined) as a shareholder or being otherwise interested in the Company’s shareholding (i.e. Roscomm’s) in Teleport”*. This document came to light because, in compliance with my order of the 14<sup>th</sup> May, 2002 (amending that of the 19<sup>th</sup> April), Mr. Klabin in his second affidavit dated the 23<sup>rd</sup> May, 2002, stated (in the fourth paragraph) that he had not issued or executed any documents on behalf of Roscomm since the 30<sup>th</sup> September, 1999, save that a draft Power of Attorney, which was incomplete, was signed on behalf of Roscomm, which was never delivered. Even though the draft was incomplete, Mr. Klabin had directed that the signed draft be destroyed; subsequently the document was re-assembled and a photocopy attached to the affidavit, the original pieces having been sent to his Guernsey legal advisors.

I return very briefly to the further contents of that Power of Attorney. The Attorney (Rostelecom) was authorised, without prejudice to the generality of Clause 1 (which I have previously quoted) to speak and vote the Roscomm shares on all issues at a general shareholders' meeting (of Teleport). Interestingly, though the copy I have seen is undated, it was signed by Mr. Klabin and witnessed in St. Petersburg by Ms. Tarasenko.

No explanation has been given by Mr. Klabin for this Power of Attorney by Roscomm in favour of Rostelecom.

Not surprisingly, Mr. Greenfield described it as an "interesting document". Apart from the obvious questions as to why, if it was only a draft, it had been signed, witnessed and executed by Mr. Klabin, and that whilst it had been torn up by an unknown person the pieces had been kept, the essential point was that it is totally irreconcilable with the Pledge Agreement and particularly Clause 2.3 thereof, which had empowered Helian to exercise voting rights in respect of Roscomm's shares in Teleport in the latter's general meetings. Mr. Klabin had signed both these contradictory documents.

On the 29<sup>th</sup> March, 2002, two further Powers of Attorney were generated in Moscow.

The first was by Rostelcom in favour of Helian, being signed by Rostelecom's general director a Mr. Kuznetsov. The substance of this Power of Attorney was to empower Helian on behalf of Rostelecom to act in its name and to represent its interests in relation to Technocom and MITI to conduct negotiations to amend the terms of, or terminate, or restructure the payments due under, the Equipment Leases. Helian was not authorised without the prior written consent of Rostelecom to execute any documents by which the rights and obligations of Rostelecom be modified or terminated.

Secondly, Teleport, acting through Mr. Mustafidi, granted a Power of Attorney to Helian to represent the former's interests in relation to Technocom and MITI, to conduct negotiations relating to amending the terms of, or terminating, or restructuring payments due under, the Equipment Leases. In other words this Power of Attorney granted the same powers to Helian as Rotelecom had granted to it. However, in Teleport's Power of Attorney, there was no proviso by which Helian was not authorised to conclude any agreements affecting the rights of Teleport without Teleport's prior written authorisation.

**(vii) The Pledge Agreement revisited**

Apart from the documents which came to light as a result of Mr. Brazell's first affidavit sworn on the 11<sup>th</sup> April, 2002, on the basis which I made my order of the 19<sup>th</sup> April, a further mass of documents was produced with the further affidavits and statements sworn and made for the purposes of these proceedings between the middle of May and early September of this year. I believe that most of such important documents I have already identified. There is, however, one set of documents to which I have not yet referred and must now do so. They relate to the Pledge Agreement.

By way of preface I refer to the legal opinion of Mr. Andrew Onslow with regard to the Pledge Agreement, a contract which was stated to be governed by English law. The very basic conclusion which Mr. Onslow arrived at was that, in his belief, the Pledge Agreement did not give Helian any valid or enforceable rights over Roscomm's Teleport shares, one of the reasons being that, on the face of the terms of the Pledge Agreement, no consideration was stated; though he acknowledged that that in itself was not conclusive, as it was possible that evidence of consideration could otherwise be provided. That opinion is dated the 8<sup>th</sup> April, 2002, and would have become known to Mr. Klabin and his Counsel certainly towards the end of April or early May.

In his skeleton argument of the 27<sup>th</sup> May, 2002, Mr. Robilliard argued that the suggestion that there was no consideration for the Pledge Agreement was untenable. The effect of the Pledge Agreement, he argued, if correctly construed, was to confer on Roscomm the right to enforce, against Helian, Helian's obligations under the Services Agreement. This was a valid consideration; likewise the continued provision of services. In any event, the issue of the enforceability of the Pledge Agreement remains untested. That may be true, but I do not have before me any other expert opinion with regard to the Pledge Agreement. In so far as it may have any relevance for the purpose of these proceedings, I am satisfied that Mr. Onslow's reasons and conclusions are a correct statement of English law. That, however, is not the point immediately at issue.

On the 12<sup>th</sup> June, 2002 (Mr. Klabin at paragraph 44 of his third affidavit says July, which on the face of the document seems to be correct) Mr. Mustafidi provided a statement (which was not received until the 9<sup>th</sup> August) in which he enclosed correspondence which had immediately preceded the conclusion of the Pledge Agreement.

In a letter dated the 2<sup>nd</sup> April, 1999, Mr. Mustafidi as General Director of Teleport wrote to Helian in the following terms:-

*"Dear Sirs,*

*Please provide Teleport...assistance in recruitment of personnel and formulation of human resources policies, and consider a possibility of arranging job training for employees of Teleport related to issues in personnel management. Personnel management and human resources policies are currently extremely important for us due to great fluctuation of personnel. Though we realise that our request is beyond the limits of agreement T-95/74 of 12.08.1995 (i.e. the Services Agreement) currently in effect, we would like to ask you to provide such services free of charge because of the temporary lack of stability in our financial situation and taking into account our long-term partnership.*

*Hoping for further expansion of our co-operation on mutually beneficial conditions."*

On the 7<sup>th</sup> April, 1999, Helian replied (the letter being signed by Irena Vorobkiewicz) as follows:-

*“We will be happy to assist in recruiting services, and formation of personnel policy as well as instruct you on personnel management. Since effective management of human resources and HR fluidity are important problems, we will be ready to provide you with a specialist who will help you resolve these problems. We are confident that we can help you solve this problem in the shortest possible time.*

*We will be happy to expand our co-operation without additional payment on the part of Teleport. Upon receipt of your orders representatives of Helian.. will contact you and inform you about available action options.*

*Considering the current “temporary financial instability” please provide us with additional payment guarantees in regard to contract No. T-95/94dt.12/08/95.”.*

Mr. Mustafidi replied on behalf of Teleport on the 8<sup>th</sup> April as follows:-

*“I appreciate your willingness to expand our co-operation and, in particular, provide assistance in solving recruitment problems of Teleport without any surcharge. As to provision of additional collateral, unfortunately, I have to tell you that at present, Teleport itself cannot provide an additional security of payment under Agreement T-95/94 of 12.08.95, since, as you are well aware, it has no property of its own of sufficient value to be encumbered with the Pledge, nor can it provide a bank guarantee because of its unstable financial situation. The only option possible is to obtain such a security from our shareholders.*

*Since neither Rostelecom, nor Technocom, or Technopark can provide such a security to us, we are going to seek for such a security at Roscomm.*

*In future, we are hoping to provide sufficient guarantees by ourselves, without recourse to help of our shareholders.*

*...”.*

Consequently, on the 9<sup>th</sup> April, 1999, Mr. Mustafidi wrote on behalf of Teleport to Mr. Klabin, as Director of Roscomm. Mr. Mustafidi asked Mr. Klabin to consider the possibility of providing additional guarantees of the due fulfilment by Teleport of its obligations to Helian under the Services Agreement, those services being of great importance, especially with increasingly tough competition. In addition, Helian were committed to expanding the services they provided, for example the current services in relation to solving recruiting problems. Mr. Mustafidi continued:-

*“Helian.. is currently providing assistance to Teleport in fulfilment of Rent and Lease Agreement with Technocom. As you are aware, these agreements are of great importance to us, and in view of a lack*

*of stability of our financial situation, services of Helian.. are really important for us, especially in respect of due fulfilment of Agreement of Rent and Lease of equipment with Technocom.*

*We are asking you to do us such a favour, since we are unable to provide another collateral of our own under the said agreement.*

*As soon as we can, we will be only glad to provide an adequate security of our own under the agreement with Helian.*

*Hopefully I will find your understanding and assistance in solving this problem, which is so important for Teleport.”.*

On the 12<sup>th</sup> April, Mr. Klabin (on behalf of Roscomm) replied at some length. After stating that he had considered Teleport’s financial situation and understood why Helian was looking to expand and develop the assortment of services, including the timely and orderly execution of equipment lease and rent contracts with Technocom, Mr. Klabin continued:-

*“Roscomm Ltd. is directly interested in financial stability of Teleport and timely execution of all financial obligations of the company before third parties, especially when it comes to equipment lease and rent contracts with Technocom, our major shareholder.*

*As the assortment of services provided to Teleport increased along with the role Helian plays in the business of Teleport, and the company as well as our other shareholders do not find it possible to provide financial guarantees, Roscomm Ltd. finds it possible to pledge 20 (twenty) shares of Teleport to Helian.*

*Roscomm is ready to provide this support only if Teleport will undertake to pay Roscomm a fee of 5 (five)% of the amount received by Helian under contract T-95/94 of August 12<sup>th</sup> 1995 over the last twelve months of the term of such Pledge Agreement, (which I will refer to as the “5% dividend”) which we will be ready to sign with Helian in the nearest future. Additionally Teleport will guarantee us that if recourse is taken against the Pledge shares, Teleport will pay all the incurred damages along with the penalty fee of 20% of the value of the shares recourse is taken against.”.*

Mr. Mustafidi replied on the 13<sup>th</sup> April, saying that both the provision of additional collateral to Helian and the conditions offered by Roscomm were completely and unconditionally acceptable to Teleport, which had no objections whatsoever.

On the 19<sup>th</sup> April, Helian wrote to Mr. Mustafidi to inform him that Helian had settled a Pledge Agreement of 20 shares of Teleport with Roscomm on the 15<sup>th</sup> April, 1999. It was stressed, however, that Helian had agreed to this measure only due to the fact of Teleport’s inability for the moment to provide sufficient

guarantees of payment under the Services Agreement, in which Helian was more interested than guarantees provided by Teleport shareholders. On the 30<sup>th</sup> April, Mr. Mustafidi expressed Teleport's gratitude to Helian for its assistance.

It was remarkable, said Mr. Greenfield, that all of this correspondence was only produced, unsolicited, by Mr. Mustafidi and when it was. There was no reference to it in Mr. Robilliard's skeleton argument in May, 2002 (which in my view is unsurprising as he would not have been advised of it), nor, more importantly, had it been mentioned in any of the affidavits of Mr. Klabin or Ms. Tarasenko. Inevitably, Mr. Greenfield's observations with regard to this "cosy" correspondence (his description) were sceptically terse.

I would note, in passing, that even in his third affidavit (of October, 2002) Mr. Klabin makes no specific reference to the potential 5% dividend for the benefit of Roscomm. Rather, he emphasises his argument that what is good for Teleport must be good for Roscomm, and Technocom. For example at paragraph 58 in that third affidavit Mr. Klabin states:-

*"58. In connection with the sale of my interests in Technocom, it was necessary to take steps to ensure Helian's continued services and the continuation of the Helian/Teleport Services Agreement. I spoke to both Mr. Mustafidi and Mr. Hatt in connection with the giving of guarantees to Helian. Although he was not willing to grant a guarantee from Technocom, Mr. Hatt recognised the need for such security and the continued benefit to both Technocom and Roscomm. Mr. Hatt agreed that I could take whatever steps necessary to secure the position."*

And at paragraph 62 Mr. Klabin states:-

*"62. In facilitating the Helian/Teleport Agreement and in granting security from Roscomm to secure Teleport's compliance, I did not act for my personal benefit or against the interests of Roscomm. I do not consider that any activities undertaken by myself were against the interests of Roscomm. All steps taken by me, whether as director of Roscomm, under the Power of Attorney granted by Technocom or as representative of Helian were in the interests of furthering the business of Teleport and as such undeniably in the interests of Roscomm."*

I must make some further comments on the Pledge Agreement. It will be remembered that the recitals stated that Helian and Teleport were parties to the Services Agreement dated the 12<sup>th</sup> August, 1995, as amended and restated, effective until January, 2006. That date puzzled me. In April, 1999, when the Pledge Agreement was allegedly executed, there was in existence only the original Services Agreement of the 12<sup>th</sup> August, 1995, and the Supplemental Agreement No. 1 of the 21<sup>st</sup> August, 1995. On any examination of those two documents, it cannot be said that the Services Agreement was to be effective until January, 2006 (a most specific date). The date of termination was either August, 2000, or a later date to be established by the alternative formula for termination relating to the repayment of the "attracted loans". Moreover, the Supplemental Agreement No. 2 of the 5<sup>th</sup> January, 2000, specifically provides (at Clause 6) that all the

issues of the original Agreement, save those provided for in this second amendment which made no reference to termination, shall be the same. Not only Helian, but Teleport was supposedly aware of the Pledge Agreement as it had registered on the latter's official records.

Accordingly, because of my puzzlement, I asked Counsel – effectively Mr. Robilliard – if he could assist me with this specific date of January, 2006. In summary, Mr. Robilliard's submissions on this matter were as follows. The starting point was to appreciate that the phrase “the obligations to pay to the banks the attracted loans” incorporated the rent commitments under the Equipment Leases by Teleport to Technocom (an interpretation strongly disputed by Mr. Greenfield). It will be seen, said Mr. Robilliard, on examination of the 1994 Equipment Lease that it was to run for 10 years from December, 1995, which meant that the last payments would be due in the January, 2006 (payments being monthly in arrears). Similarly, the 1996 Equipment Lease provided that it would run for nine years from December, 1996, thus terminating in December, 2005, with the last monthly payment in arrears being due in January, 2006. Thus there was nothing sinister in the reference to that date in the Pledge Agreement, it was well known to Helian as a party to both relevant agreements. If that explanation was correct, said Mr. Greenfield, then, in accordance with the terms of the Services Agreement, the termination date would be 90 days after January, 2006, the last payment date (April 2006).

I must also add that a considerable amount of forensic evidence was produced with regard to the authenticity of the Pledge Agreement. I agree with Mr. Greenfield submissions that that evidence does not assist me one way or the other. Indeed I deliberately did not hear any submissions from Counsel on this matter. I am wholly ignoring that forensic evidence for the purposes of this judgment.

**(viii) Summary of submissions**

With regard to the information and evidence which has eventually emerged from all the affidavits, and attachments, during the course of 2002, rather as water may collect from a slowly dripping tap, I feel I have to exercise a great deal of caution.

What has emerged is the emphasis being placed by the deponents on a number of related matters, as also explained by Mr. Robilliard. Not only had Mr. Klabin deliberately retained his sole directorship of Roscomm after September, 1999, it forming no part of the deal he had struck with PLD in that year, but the fact that Roscomm, through Mr. Klabin, had maintained, and should continue to maintain, the balance between the conflicting interests of Rostelecom and Technocom in Teleport was important to all those parties. In turn, Helian provided services essential to Teleport and its well-being, and thus to Roscomm, because without those services Roscomm's shareholding in Teleport would be greatly if not fully reduced in value. Hence the benefit of the Pledge Agreement in the overall equation. Mr. Klabin's “reserved position” was not only just important to himself personally (his “bargaining counter”), it was important, when allied to the Pledge Agreement and the Services Agreement, to others. This was a view shared

particularly by Teleport (Mr. Mustafidi) and Rostelecom, as evidenced by written statements to that effect which were produced in 2002.

Mr. Greenfield, on the other hand, emphasised that all the additional information and evidence which had emerged during 2002 merely underlined, or threw additional light on the strength of, the Applicant's concerns with regard to Mr. Klabin's blatant disregard for his fiduciary duties as the director of Roscomm and his allegedly malign influence on other important players.

**(ix) Conclusions in relation to the Applicant's case regarding Mr. Klabin's conduct**

As with regard to the letter of resignation of September, 1999, so too with the Applicant's case with regard to Mr. Klabin's alleged unworthiness to remain as the sole director of Roscomm, I cannot avoid the responsibility of forming a view of the evidence before me, notwithstanding the Jurat's role in assessing personal credibility and the "*due process*" submission of Mr. Robilliard. As, also, in relation to the resignation letter, the evidence before me on the present issue is to a very large extent documentary and factual.

By way of preface to stating my conclusions on this matter, I make two brief observations.

Firstly, from the end of September, 1999, to the beginning of November, 2000, the senior managers of PLD were left in charge of the merged company (i.e. with MCI). It appears to me that the sloppiness, or at any rate the imprudence, demonstrated by PLD prior to the 30<sup>th</sup> September, 1999 – in ensuring, or failing to ensure, that all the necessary documents were completed and all of the "loose ends" were tidied up – continued for many months thereafter. Nothing was done formally to change the governance of Roscomm. Secondly, I have no evidence regarding any aspect of, particularly the reasons for, the dismissals of the senior PLD managers, though I believe that it is accepted that some of them at least were by no means amicable. I must avoid conjecture, but the dismissals cannot be completely ignored. The former senior managers of PLD may by now have left the scene, but MITI are bound by what they may or may not have done. Similarly, any knowledge on their part must be imputed to MITI. As previously observed, we have heard nothing from the former PLD managers for the purpose of these proceedings.

Painted with a very broad brush, the events after September, 1999, seem to reveal the following picture. For its greater part, 2000 passed in an unexceptional way, the only matters of note being the question of a further consultancy agreement being entered into by PLD with Mr. Klabin in February, and the appointment, or purported but legally ineffective appointment (says Mr. Robilliard) by MITI of new representatives of its various holding companies on the board of Teleport. In the autumn I sense the pace increased with the dismissal of the senior PLD management.

It is clear from what Mr. Brazell states that in early 2001 the senior management of MITI was starting to grapple more effectively with the position of the various subsidiaries, not least Teleport and the payments

being made under the Services Agreement to Helian. Negotiations took place with Mr. Klabin with regard to the termination of that Agreement. His asking price was apparently too high. Perhaps MITI sought legal advice with regard to its termination under the law of the Russian Federation. In any event in early June, 2001, Teleport purported to terminate the Agreement in writing, with Mr. Mustafidi a reluctant signatory to the letter.

That letter of termination of June, 2001, was undoubtedly in my view the catalyst for ever increasing activity by all the interested parties. I have already reviewed such activity, and in particular the documents it produced, at some length. I do not intend to repeat the exercise. A host and variety of documents have emerged, and stances been taken, not only in the summer months of 2001 but also after the institution of these proceedings in April, 2002, down to October of that year.

Whilst taking account of all the information and evidence which has emerged, and Counsel's submissions thereon, there are certain matters which I consider to be of particular, though varying significance. I turn to them, but in no order of importance.

(a) The Pledge Agreement

This document has featured prominently, almost incessantly.

Suspicious can be entertained with regard to its authenticity and validity, that is in respect of its creation on the 15<sup>th</sup> April, 1999, for a number of reasons (I repeat that I am ignoring any forensic evidence).

Firstly, I must return to the fact that in the recitals it is recorded that the duration of the Services Agreement, to which it directly relates, was specifically stated to be until January, 2006. This may not be of great significance, but I am puzzled by it, as already indicated. I have heard Mr. Robilliard's explanation, namely that this specific date is established by the fact that the Equipment Leases are encompassed in the term "attracted loans" between Teleport and Technocom of 1994 and 1996, under which the last payments were due to be made in January, 2006. That is a fact which must have been known both to Teleport and Helian (although the former was obviously not a party to the Pledge Agreement) in April, 1999. I would therefore have expected Supplemental Agreement No. 2 of the 5<sup>th</sup> January, 2000, and the Supplemental Agreement No. 3 of the 17<sup>th</sup> April, 2002, to have so stated. The former was silent; the latter stated a termination date of the Services Agreement of April 30<sup>th</sup>, 2006. Nor was there any reference to January, 2006, in Helian's letter of the 27<sup>th</sup> June, 2001, to MITI and Teleport with regard to the termination of the Services Agreement, which was stated to be linked to the re-payment of "the attracted loans" by Teleport (about which I have received no hard evidence whatsoever) and rent under the Equipment Leases, payments of which, I accept, were due, it was stated, until 2004 and 2005 respectively. Similarly, in Helian's further letter of the 25<sup>th</sup> July, 2001, no reference is made to the specific termination date of the Services Agreement as being January, 2006, though it is stated that it will stay in force for 90 days after the last payment under the "Lease Agreement" (sic). In the letter of the 27<sup>th</sup> July, 2001 (as director of Roscomm, Commbel and Teleport) to

Technocom (and Ansbacher, Topaz and Anka), Mr. Klabin stated, in relation to Roscomm acting as guarantor of Teleport's obligations to Helian under the Services Agreement through the Bills of Exchange and the Pledge Agreement, that payments were due by Teleport to Helian until January, 2005. Additionally, if the term "attracted loans" incorporated the rent payments due under the Equipment Leases, which I think somewhat implausible, then the date for the expiry of the Services Agreement would have been April 2006. It is all confusingly inconsistent, in sharp contrast to the understanding of the position by the relevant parties which I would have expected if, in and from April, 1999, it had been as clear as Mr. Robilliard had explained it to be.

Secondly, the existence of this document was not made known until the summer of 2001, after the Services Agreement had purportedly been formally terminated.

Thirdly, the relevant minute of Roscomm's board regarding the Pledge Agreement was only produced, by Mr. Klabin in Vienna, after many requests, in September, 2001 (about which Mr. Greenfield was particularly scathing).

Fourthly, there was no mention in that board minute to the potential 5% dividend which might have been of benefit to Roscomm, the correspondence relating to which was not produced by a third party until the middle of 2002. That Mr. Klabin remembered nothing of the potential 5% dividend is surprising. For example, in his first affidavit (20<sup>th</sup> May, 2002) he makes no reference to it when justifying the Pledge Agreement as being in Roscomm's interests (para.11).

Notwithstanding what might be considered to be relatively strong, circumstantial evidence to justify suspicion, I deliberately express no decided view as to the authenticity and validity of this document. That is a matter which may fall for proper judicial determination in another context, namely any litigation instituted by either Helian or Roscomm with regard to the enforcement or validity of the Pledge Agreement.

More importantly for present purposes, I must try and assess any commercial or other advantage which the Pledge Agreement might bring to Roscomm. Despite all the submissions to the contrary, I find it difficult to identify any such advantage.

I previously cited two passages from Mr. Klabin's third affidavit where he explains why it was important to Roscomm that Helian should continue to provide its services to Teleport. In similar vein, in his first affidavit (at para. 11), Mr. Klabin stated:-

*"11. I truly believe, and believed at the time of execution, that the Pledge Agreement was in the best interest of Roscomm in that it secured important activities by Helian... on behalf of Teleport as set out in the Helian/Teleport Agreement. Roscomm's only asset is its shareholding in Teleport. Simplistically, I would say that anything that is good for Teleport is good for Roscomm...."*

Superficially there may be some force in that argument. If that is so, it is difficult to understand why Technocom, the majority shareholder in Roscomm, was not informed of the proposed pledge of Roscomm's shares in April, 1999 (albeit that shareholders' meetings are not required, by the company's Articles, to approve the actions of the Director). That was at a time, according to the "cosy correspondence", that Technocom had been informed of Helian's request for additional security for the fulfilment of Teleport's obligations under the (to be extended) Services Agreement, but had itself declined to produce any. Moreover, in Mr. Klabin's letter, on behalf of Roscomm, to Teleport of the 12<sup>th</sup> April, 1999 (one of the batch of correspondence produced by Mr. Mustafidi but not recalled by the writer), Mr. Klabin referred to Technocom as being its major shareholder and that Roscomm had a direct interest in the financial stability of Teleport, particularly under the Equipment Leases. Yet Technocom was not informed of the 5% dividend arrangements. Well, Mr. Klabin might say, at that time Mr. Hatt had given him *carte blanche* to do whatever Mr. Klabin thought was necessary in the interests of Teleport. That, of course, was at a time when the final negotiations must have been taking place not only for the merger between PLD and MCI but for the final takeover by PLD of Technocom. If nothing else, it displayed a fine disregard for the interests of Roscomm's major shareholder.

(b) The Bills of Exchange

The position with regard to the Bills of Exchange (dated February, 1999) is even more peculiar. The minutes which have been produced both for shareholders' meetings and directors' meetings of Roscomm make no reference to the Bills of Exchange. Nor did Technocom know anything about them until the summer of 2001, after the Services Agreement had purportedly been terminated. Only inferentially, and that perhaps is being kind to Mr. Klabin, does he give any explanation in his three affidavits of the advantage which those Bills of Exchange might have for Roscomm, namely they helped to secure the fulfilment of Helian's services which were essential to Teleport, and thus to Roscomm. As I have already said, that argument superficially might have some attraction, with regard to the pledge. No such argument, however, can be advanced in respect of the Bills of Exchange, which pre-date the correspondence, of April 1999, which apparently explains how and why the Pledge Agreement came to be executed, but makes no reference to, and provides no comparable justification for, the Bills of Exchange. They seem to have come into being out of thin air, without rhyme or reason. Subsequently, of course, Mr. Klabin in his letter of the 27<sup>th</sup> July, 2001 (to which I have recently referred) refers to Roscomm issuing the 28 Bills of Exchange in favour of Helian in support of its guarantee of the proper fulfilment of the obligations of Teleport to Helian under the Services Agreement, the payments being due thereunder until January 2005.

That in itself is an interesting date. The amounts payable under the Bills of Exchange are US \$144,000 a quarter. There are twenty-eight of them, which amounts to a commitment by Roscomm of seven years, namely to January, 2006 (from January, 1999), the same date as the term of the Services Agreement, according to the recitals in the Pledge Agreement. That in itself poses a further question. Mr. Robilliard, in his explanation of the date of January 2006 in the Pledge Agreement placed no reliance on the simultaneous

expiry of the Bills of Exchange. Surely that would have supported his argument as to that specific date? Yet he was strangely silent on the matter.

As far as I understand it – and Mr. Klabin specifically says so – the only asset of Roscomm was its shares in Teleport. The company’s accounts for the relevant period show no realisable assets. How were the liabilities under the Bills of Exchange, potentially amounting to over \$4,000,000, to be funded?

In her affidavit (at para. 12) Ms. Tarasenko stated with regard to the Bills of Exchange:-

*“12. I am also the creator/draft person of the Bills of Exchange. True copies of all the Bills of Exchange, certified by Dinah Spence, are now produced and shown to me marked “KT2”. Again, the Bills of Exchange are standard form documents and are intended to further secure the rights of Helian under the Helian/Teleport Agreement.” (my emphasis).*

That statement seems accurately to encapsulate the situation in my opinion. The Bills of Exchange could not have benefited Roscomm. They certainly could benefit Helian, and those who represent Helian, because in the event that Roscomm did not have the finances to satisfy its obligations under the Bills of Exchange, the only assets against which Helian could proceed in the event of any breach of such obligations were Roscomm’s shares in Teleport. Interestingly useful security for Helian.

Taking the Pledge Agreement and the Bills of Exchange together, which I think it is right to do, there are two different scenarios. On the one hand, these documents were false, being created *ex post facto*. In that situation, the evidence for Mr. Klabin’s unworthiness to continue as a director of Roscomm is self-evident. If, on the other hand, the documents are genuine, then there must be, at the least, a strong case that they were not and could not have been in the interests of Roscomm. Accepting for present purposes the genuineness of these two documents, I would pose this question. Could they have been created in early 1999 because Mr. Klabin knew full well that part of his agreement with PLD was that he would be giving up all his influence, through Roscomm, in Teleport, and that the only effective way to retain his personal “bargaining counter” was by giving Roscomm’s powers in respect of Teleport to Helian, a company which Mr. Klabin might not own but over which, as I have already indicated and as shown by the evidence, he appears to have had a strong, if not complete, influence?

Any assessment of Mr. Klabin’s conduct as the sole director of Roscomm cannot be limited to the period after the 30<sup>th</sup> September, 1999; the background of the events earlier in 1999 may also be relevant.

(c) Mr. Klabin’s explanation for his retention of control of Roscomm

Mr. Klabin insisted initially (see the letter from Rosh to MITI of the 27<sup>th</sup> June, 2001) that his retention of full control over Roscomm (“the reserved position”) was to secure payments due to him under the alleged consultancy agreement with Mr. Hatt and the management of PLD worth US \$300,000 per annum. This

must be the consultancy agreement which Mr. Klabin says he had negotiated with Mr. Hatt during the course of 1999, and certainly prior to the 30<sup>th</sup> September, 1999. There is no other evidence for such a consultancy agreement. Subsequently, Mr. Klabin referred to the consultancy agreement of early 2000. Unquestionably the provision of such consultancy services by Mr. Klabin for PLD was contemplated by Mr. Hatt, but as I have already stated, there is no evidence at all that any agreement was ever concluded. Indeed such evidence as there is, is wholly to the contrary, and certainly did not include a payment of US \$300,000 per annum. I reject the existence of either such arrangement.

Accordingly, I conclude that this explanation by Mr. Klabin for his “reserved position” was spurious. Furthermore, this explanation illustrates that Mr. Klabin viewed his directorship of Roscomm purely from his personal point of view.

Later, of course, Mr. Klabin materially shifted his ground to that of his “reserved position” in Roscomm, which had always been contemplated and accepted in 1999 – its relinquishment was never part of the contractual arrangements entered into. Furthermore, Roscomm’s independent holding of the 10% balancing interest in Teleport was important to the latter, so that neither Technocom nor Rostelecom automatically had control. Equally, and I hope without excess cynicism, it could be said that it gave great power to Mr. Klabin which had real commercial value.

(d) Mr. Klabin’s disregard for his contractual obligations

Rosh’s letter to MITI of the 27<sup>th</sup> June, 2001, also indicates a clear reluctance, if not outright refusal, on the part of Mr. Klabin to provide the correspondence and financial statements, etc., of Roscomm as requested by MITI. That in my view was in breach of the unequivocal undertaking to do so given in the letter of the 30<sup>th</sup> September, 1999.

(e) Mr. Klabin’s different roles with regard to Teleport

The abundant correspondence, from different quarters but including Mr. Klabin, during the summer of 2001 indicates two contradictory positions which Mr. Klabin held with regard to the affairs of Teleport; on the one hand, he was said to be acting on behalf of Helian (by virtue of the Pledge Agreement), on the other directly on behalf of Roscomm (as its sole director). As if in his eyes the interests of both were identical.

(f) Reluctant reaction, or inaction

There is in my view a consistent thread of reluctant, if not opportunistic, reaction running through many of Mr. Klabin’s responses to the requests and inquiries properly made of him from June, 2001, onwards, as also in what was or was not produced. I cite, merely by way of brief example:- the provision of copies of the shareholders’ and board minutes of Roscomm, not least the board resolution with regard to the Pledge Agreement, a facsimile copy of which was eventually forwarded by Mr. Klabin from Vienna; the

allegations with regard to the Teleport shareholders' Agreement in 1999 of which no evidence was ever forthcoming; and the correspondence which eventually emerged, from Mr. Mustafidi in the middle of 2002, with regard to the Pledge Agreement, about which I can only express incredulity. Whether that correspondence sufficiently establishes consideration for Roscomm entering into the Pledge Agreement, which was central to Mr. Onslow's opinion as to its validity (produced in April, 2002), as a matter of English law, I know not, though it does of course seek to establish a beneficially commercial purpose for Roscomm entering into the Pledge. That Mr. Klabin appears to have known nothing about this correspondence – his affidavits are silent – is equally incredible, as he was a party to much of that correspondence. Well founded suspicions as to the authenticity of that correspondence must inevitably arise.

(g) Helian's threats to enforce the Pledge Agreement and Bills of Exchange

It is noteworthy that in the correspondence of the summer of 2001 Mr. Klabin starts, and continues to threaten, on behalf of Helian, that its security for payment under the Services Agreement (purportedly terminated in early June, 2001) will be enforced. That importantly demonstrates Mr. Klabin's conflict of interest between Helian and Roscomm, and his disregard for his duties as sole director of the latter.

(h) Matters arising in 2002

Apart from the matters which arose or came to light during 2002 which I have already mentioned, I must emphasise four more -

- (i) the resumption of payments, under the Services Agreement, by Teleport to Helian at the end of March, 2002;
- (ii) the letter from Teleport to Helian rescinding its letter of June, 2001 terminating the Services Agreement, and the Supplemental Agreement No. 3 to the Services Agreement in April, 2002;
- (iii) the draft Power of Attorney by Roscomm in favour of Rostelecom (April, 2002), of which Roscomm's major shareholder was not informed. That Power of Attorney related specifically to the affairs of Teleport, and directly conflicted with the powers given by Roscomm in favour of Helian under the Pledge Agreement. How could that be in the interest of Roscomm? The existence of this draft Power of Attorney was revealed in Mr. Klabin's second affidavit of the 23<sup>rd</sup> May, 2002. No reason for it is given. (Mr. Hatt had long since left the scene and could not be prayed in aid). In section G of his third affidavit, Mr. Klabin specifically refers to the position of Rostelecom. Again, no explanation is given by him as to why this Power of Attorney was drafted by Roscomm in favour of Rostelecom, and why it might benefit the former. He says much of the importance of Rostelecom to Teleport, and of the conflicting interests of Rostelecom and Technocom in Teleport, all of which may well be true. Thus, inferentially perhaps, reverting to his main contention, the

financial position of Teleport was crucial to Roscomm's shareholding in it, so the grant by Roscomm to Rostelecom of the former's powers in respect of Teleport might have some advantage. Why was that not specifically stated?

- (iv) The two Powers of Attorney dated the 29<sup>th</sup> March, 2002, granted respectively by Rostelecom and Teleport in favour of Helian regarding the re-negotiation, or otherwise amending, the terms of the Equipment Leases between Teleport and Technocom. I would note that in Teleport's Power of Attorney there was no restriction on Helian concluding agreements on Teleport's behalf without its prior written authorisation.

Additionally, as far as Teleport is concerned, it also worth noting in passing, though I deliberately place no emphasis on it, that, according to Mr. Brazell in his fourth affidavit (at para 39), the Applicant's after-the-fact electronic access to Teleport's accounting system, which it has enjoyed in the past, was terminated on or about the 3<sup>rd</sup> September, 2002, without explanation. I accept that I have only heard one side of that argument.

With regard to this second ground for the Applicant's request for injunctive relief, namely Mr. Klabin's blatant disregard for his fiduciary duties as the Director of Roscomm and his many conflicts of interest, I cannot avoid taking a view. Taken in the round, there are many disturbing aspects in this regard, both taken separately and cumulatively, in many of which, too many, Helian is centrally involved. The shadow of Helian looms large, and sinisterly so. Its interests appear to be paramount, and they certainly conflict with those of Roscomm, a conflict which Mr. Klabin seems happily to disregard. I cannot avoid the conclusion that his protestations to the contrary are over-zealous, and that the only interest with which he is concerned is his own.

The Applicant has again satisfied me, to the civil standard of proof, that there is a serious issue to be tried with regard to Mr. Klabin's conduct as a director of Roscomm. The Applicant's case in my view certainly passes both the "*Cyanamid threshold*" and the stricter tests required in the case of a mandatory injunction.

## **5. Should interim injunctive relief be granted?**

I repeat that the orders sought which are of a general mandatory nature, the paramount orders, relate to: changing the Board of Directors – the governance – of Roscomm so that Mr. Klabin be deprived of his office and the two MITI representatives be appointed in his place; the MITI representatives being authorised as the sole representatives of Roscomm in the affairs of Teleport; and Mr. Klabin being required personally to inform all interested parties, most particularly Teleport, of the position with regard to Roscomm.

By way of further repetition, the grounds on which the Applicant claims relief are twofold (the "essential battleground" as Mr. Robilliard neatly described it). Firstly, that by virtue of the letter of the 30<sup>th</sup> September, 1999, Mr. Klabin was contractually obliged to resign as a director of Roscomm; thus an order

depriving him of that office would merely put into effect what he was contractually obliged to do in the first place, with the result that the Applicant would have full power to appoint its own representatives to the board of Roscomm and take full control of the Company (by virtue of its two-thirds majority shareholding). The second ground is the unworthiness of Mr. Klabin remaining as a director, with similar consequences.

(i) **Brief Summary of Counsels' submissions**

I have already noted, albeit intermittently, many of Counsels' submissions, particularly regarding the evidence relating to their clients' respective claims and the strength and basis of them. Intending and, I hope, imparting no disrespect to Counsel, I now propose merely to summarise their main general submissions as to if, and to what extent, interim injunctive relief should be granted, their analyses rightly being guided by the legal principles which, with their help, I have cited, the crux being where the balance lies with regard to the risk of injustice.

At the moment, because of the cumulative affect of all of my orders the Board of Roscomm is paralysed. It should be freed, so Mr. Greenfield argued, of these constraints.

Mr. Greenfield submitted that if the injunction was granted to the Applicant but Mr. Klabin was to win the substantive proceedings, there was no evidence that damages would be an inadequate remedy for him. As there was no indication that directors of Roscomm had ever been paid a salary, he would suffer no loss in that regard. Moreover, his one-third shareholding would be unaffected. Commbel was free to pursue its own proceedings. Overall any losses, such as they were, that he might incur if he was deprived of this office would undoubtedly be quantifiable.

On the other hand, if the injunction were not to be granted, then there was a real fear, arising from the threats which had been made and on the evidence which had been produced as to Mr. Klabin's conduct, that Roscomm might lose its shares in Teleport, either by the enforcement of the Bills of Exchange or the Pledge Agreement. Whilst it was true that the Applicant held a 46% - 44% majority in Teleport, as Mr. Robilliard had regularly stressed, it was feared that Helian might take the balancing 10% control. It was also likely, on the evidence, and by inference, as to Mr. Klabin's influence over or closeness with Mr. Mustafidi and Rostelecom, that Roscomm (or Helian) would be likely to side with Rostelecom. Moreover, there are serious issues of dispute regarding the termination of the Services Agreement, issues not to be determined in these proceedings and to be resolved in accordance with Russian Federal law. The risk of collusion in that regard (Helian, Mr. Mustafidi, Rostelecom) could not be ignored. It was real.

In the event that the Applicant succeeded in the substantive proceedings, then the losses and the damages which it had incurred in the meantime would be unquantifiable and potentially very serious as far as the Applicant was concerned.

It could not be stressed too strongly, Mr. Greenfield argued, that Mr. Klabin's sole directorship emanated from Technocom's interest in Roscomm, not that of Commbel. If I reached the position of having to consider the *status quo* – though he did not believe that I did – then it was to protect the Applicant's wholly legitimate interests in Roscomm, and thus its interests in Teleport.

The balance of the risk of injustice came down heavily in favour of the Applicant.

I acknowledge the force of Mr. Robilliard's argument that if I grant the orders sought, so that two MITI representatives are on the Roscomm board, but that that board is otherwise freed of constraints, then the Applicant will effectively have achieved what it wants by virtue of these proceedings, without the Second Respondent having had the benefit of a full trial. Furthermore, so Mr. Robilliard argued, the Applicant would have achieved what it had singularly failed to achieve in its negotiations with Mr. Klabin during the winter of 2001 – 2002. Moreover, I would be interfering wrongly in the governance and structure of a limited liability company, by, for example, overriding the provisions of its Articles. Those matters are properly to be determined in accordance with the provisions of the Companies Law.

Mr. Robilliard was at pains to stress the importance which the evidence of Mr. Hatt might have at trial, because of the arrangements which were made between him and Mr. Klabin during the course of 1999.

With regard to the adequacy of damages, those damages were related to the loss by Mr. Klabin of his "reserved position" in Roscomm, and thus his "bargaining counter". If he was deprived of that "bargaining counter" prior to trial, and he was then to succeed, the damages which he had suffered would be unquantifiable.

With regard to the *status quo*, Mr. Robilliard argued that it was that Mr. Klabin was the sole director of Roscomm. He acknowledged that initially the sole directorship had been created in favour of Technocom, but that position had later changed once Mr. Klabin had sold out completely to Technocom. As Mr. Klabin stated in his third affidavit (at para. 12):-

*"There is no reason why MITI, PLD or Technocom would have been unaware of my position as sole director of Roscomm (and SCS) in 1999. In paragraph 24 of his first affidavit Mr. Brazell complains that the Articles of Roscomm are strange and contain provision for sole directorship. I have to stress that this was initially done in favour of Technocom (Roscomm was established on the 24<sup>th</sup> December, 1994) but the rationale for the retention of that position had changed once I had sold my remaining interest to PLD. As I have stated in paragraph 6 of my first affidavit PLD would have been aware of the position from their various due diligence processes and presumably (I have to presume as I have not seen MITI's papers) MITI's due diligence into PLD."*

However, said Mr. Robilliard, his client was prepared to accept the present paralysis of the Roscomm board. That did not paralyse the Applicant's interest in Teleport, as it did not need to exercise Roscomm's 10%

interest in Teleport, because its owners had a 46% to 44% majority shareholding as opposed to Rostelecom. Moreover, he argued, the *status quo* created by the 1999 arrangements was that Technocom was not to have control of Teleport through any interest in Roscomm; that was Mr. Klabin's province as had been acknowledged by those arrangements in 1999. It was not for this Court to interfere with the bargain between MITI and Mr. Klabin which had been lawfully struck in 1999.

Inevitably, Mr. Robilliard concluded, the risk of injustice weighed firmly in his client's favour, subject to the concession with regard to the present paralysis of the Roscomm board.

Mr. Robilliard also questioned if the Applicant was entitled to any injunctive relief because of three matters – its knowledge, its delay, and its conduct. With regard to the Applicant's knowledge, since 1994, and certainly 1999, it had known of Mr. Klabin's position in Roscomm, or, if it did not specifically do so, that arose from its own negligence. It was important for me to reach a conclusion as to when the Applicant acquired knowledge of Mr. Klabin's assertions as to his "reserved position" in Roscomm, and when it first had reason to complain about Mr. Klabin's conflicts of interest (the position with regard to Helian for example had been known throughout). That assessment of the acquisition of knowledge was relevant, Mr. Robilliard submitted, to the question of delay. Even if the latest date of the acquisition of full knowledge of the position was June 2001 (which Mr. Robilliard did not accept), the Applicant had still delayed taking any proceedings until April 2002. That conduct in itself should deprive the Applicant of the relief sought. Additionally, the question of delay and conduct, after 1999, could raise issues of acquiescence/ waiver and estoppel at trial, another reason why the effective determination of all the issues should be delayed to that time.

(ii) **Conclusions**

Whilst the orders sought are primarily mandatory in nature or effect, I very much bear in mind the observations of Hoffmann J in Films Rover (8) (at p. 780 j):-

*"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision... A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have just described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."*

In addressing that dilemma and applying that fundamental principle, I am particularly guided by the concise summary provided by Chadwick J in Nottingham Building Society (13), as commended by Philips LJ in Zockoll (10). The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffmann J. Secondly, the risk of injustice may well be greater when the order requested requires a party to take some positive step at an interlocutory stage, or for whom in this case the consequences will be far reaching, depriving him of his rights, in strict legal terms,

and without the protection of a full hearing at trial, rather than merely prohibiting certain action thereby preserving the existing position. In this regard, I have thought long and hard, guided by the observations of Harman J in re a Company (17) and Mr. Robilliard's pertinent submissions, about changing the structure and/or governance of a company in interlocutory proceedings. I also bear in mind the likelihood, if the requested orders are granted, that the substantive proceedings will become otiose, in that my decision would amount to the grant of the major part of the relief claimed in the substantive proceedings. Thirdly, do I feel a high degree of assurance that the Plaintiff will be able to establish his right to trial? If I am unable to feel any high degree of assurance that the Plaintiff will establish its right, I must consider whether there are circumstances in which it would still be appropriate for me to grant an interlocutory injunction because the risk of injustice if the injunction is refused sufficiently outweighs the risk of injustice if it is granted.

I also consider that it is appropriate to take into account, in assessing the risk of injustice, the kind of factors illustrated by the American Cyanamid (2) jurisprudence – the adequacy of damages, (the balance of convenience equating to the balance of the risk of injustice), the *status quo*, etc.

I proceed to consider all the factors which I consider to be relevant in this case to determining where the greater risk of injustice may lie if I make the “wrong” decision.

As I have already stated, and for the reasons given, I feel a high degree of assurance that the Applicant will be able to establish its rights at trial; indeed a higher degree of assurance, particularly with regard to Mr. Klabin's conduct, having now had the benefit of full *inter partes* argument and all the documentation which has been produced, than I did at the *ex parte* proceedings.

It would be unrealistic not to accept that any prospective date for trial must lie many months ahead, probably well into 2004. That is by no means a determinative factor, but I cannot ignore it in view of the assessment I have made of various disturbing features of Mr. Klabin's conduct, not least since the summer of 2001.

If I grant the orders as requested, at least in effect, they can readily be complied with, and Mr. Klabin will know exactly where he stands. The problems which may arise in many cases where compliance with and/or supervision of, complicated orders is burdensome, or where an injunctioned party has difficulty in knowing exactly what he can or cannot do, will not arise in this case.

My assessment of the risk of injustice must be placed against the background of three differing scenarios.

Firstly, if I do not grant, in effect, all the injunctive orders, Mr. Klabin will have control of Roscomm. That could have an impact in two ways. The issues perceived by the Applicant to be in dispute between Helian and Roscomm (the authenticity, validity and reasons behind the Pledge Agreement and the Bills of Exchange) might not be satisfactorily and properly resolved, as their resolution does not fall within the parameters of these proceedings but would fall for determination in separate litigation (which would also

include consideration of the relevant principles of English law regarding the Pledge Agreement). Events, pending trial, could overtake and pre-empt such resolution, leaving the issues unresolved. Similarly perceived issues in dispute between Helian and Teleport (the termination of the Services Agreement which falls to be determined in accordance with the law of the Russian Federation) could suffer the same fate. I can make no order, within the parameter of these proceedings, controlling the actions of Helian or Teleport, or those of Mr. Klabin outside his position in Roscomm.

The second scenario is that I make no alteration to the present orders, so that their cumulative effect remains for the time being. Roscomm would thus continue to be paralysed. The consequences as far as the Applicant is concerned could be similar to those under the first scenario. A “neutered” Roscomm could do nothing about the Pledge Agreement and the Bills of Exchange, nor could Roscomm have any influence with regard to the Services Agreement dispute or over the affairs of Teleport.

The third scenario is if I grant the orders sought by the Applicant to their full extent. Its influence over Roscomm would thus be unrestrained. Roscomm would have an engine under the Applicant’s control, so that it could take a view, at the least, in respect of any potential disputes with Helian; additionally, it could have some influence over the affairs of Teleport, including, again, any disputes with Helian. That might consequentially have a detrimental impact on Rostelecom, a factor of which, at Mr. Robilliard’s prompting, I am fully aware; but it is not one which falls within the province of these proceedings.

Such analysis of the differing scenarios points, initially, to giving Roscomm the ability to be master of its own affairs.

If I do not grant the injunctive relief sought, but the Applicant succeeds at trial, I have to assess the potential harm to the Applicant in the meantime. The Applicant unquestionably has a legitimate majority interest in Roscomm. Mr. Klabin’s “bargaining counter” derives from his “entrenched” position as sole director of Roscomm, by virtue of its Articles of Association and the provisions of the Companies Law. That “entrenched” position historically (which Mr. Klabin acknowledges) derived from the majority shareholding (Technocom’s). Currently, according to Mr. Klabin, it derives from the minority shareholding (Commbel’s). I have already stated my conclusions with regard to the strength of the Applicant’s case, on both grounds, to have Mr. Klabin removed as sole director.

If I discharge the orders as they currently stand, then Mr. Klabin will have full control over Roscomm. This could cause detriment to the Applicant, as I have already stated, in two ways; firstly, with regard to Helian and the authenticity and validity of the Pledge Agreement and the Bills of Exchange, and secondly, with regard to the affairs of Teleport over which Mr. Klabin will be able to exercise the balancing controlling interest between Technocom and Rostelecom. On all the evidence I have before me, I am satisfied that Roscomm would exercise that controlling interest in support of the “highest bidder”. If there is substance to the fears as to what Mr. Klabin might do should he be a free agent, and the harm that might cause to the

Applicant's legitimate interests, and the Applicant was then to proceed to win at trial, its damages in my view could be large and unquantifiable. I believe such fears are justified.

If, on the other hand, I allow all the present orders to stand as they are, Roscomm will continue to be paralysed. Mr. Klabin is content for that paralysis to continue. Superficially, that is an admirable concession. It also, however, demonstrates that that situation effectively equates with no orders being made at all. Roscomm will continue to be unable to deal with its own affairs directly, such as the Pledge Agreement and the Bills of Exchange. Additionally, it would be unable to exercise any influence over the affairs of Teleport. Roscomm, of course, is a mere corporate vehicle, whereas Teleport, from all the information before me and not least the various parties' demonstrable interests in it, is a trading company of value. It is true that the Applicant would continue to hold its 46% to 44% majority interest in Teleport *vis à vis* Rostelecom, but how effective would that control be, for example with regard to the Services Agreement and its purported termination in June, 2001, a matter to be determined in accordance with the law of the Russian Federation? In this paralysed situation, Mr. Klabin, whose interest in Helian must not be forgotten, would be able to continue what, to my mind, appears to be his strong influence over Mr. Mustafidi and the affairs of Teleport, including his connection with Rostelecom.

If the relief sought by the Applicant is granted in full, but Mr. Klabin were to succeed at trial, Mr. Klabin would in the meantime have lost his office as director, which as such I do not consider to be of any real significance – it is not in itself of much value, and any loss occurring could relatively easily be quantified. Far more importantly, Mr. Klabin would have lost what would at trial have been found to be his legitimate “bargaining counter”, probably forever. His influence, a valuable commercial asset, in the power struggles between Technocom and Rostelecom with regard to Teleport might not be redeemable. If Mr. Klabin were to lose that valuable bargaining counter, quantifying any loss thereby sustained could certainly pose real difficulties. But that must inevitably lead me back to the assessment I have made of the legitimacy of Mr. Klabin's bargaining counter, which assessment I need not repeat.

Whatever decision I make in these proceedings will not disturb Mr. Klabin's one-third interest (or more strictly Commbel's one-third interest), in Roscomm, which in any event is the subject of separate proceedings.

Further factors are I think relevant to my assessment of the risk of injustice in this case, derived from Hoffmann J's analysis in Films Rover (8).

The first is what he described as the “dynamic *status quo*” (oxymoron or not). Hoffmann J. used that description, I believe, to identify circumstances where there was sometimes a sense in which a mandatory injunction was needed to preserve the *status quo*, for example charter party withdrawal cases where owners may be required to continue to provide a ship, because the risk of injustice which would be caused by “wrongly” withholding the injunction, albeit mandatory in character, was far greater than the risk of

injustice if it turned out to have been wrongly granted. On the facts themselves in Films Rover (8), Hoffmann J. concluded that the dynamic *status quo* in that case was to allow the process of distributing the films in Italy to continue. That process of distribution should not be interrupted; the dynamic *status quo* was commercially more important than the factual *status quo* that the films were in England and that they should remain there.

Secondly, Hoffmann J. adapted the well known aphorism of von Clausewitz to describe the approach he considered had been taken by the defendants in Films Rover (8), namely to regard breach of contract and litigation as the continuation of commercial negotiations by other means.

In my view, there is a strong flavour of these two matters, taken together, in this case. The outcome of these proceedings must be of high commercial significance to both parties.

From Mr. Klabin's perspective, a bargain was lawfully struck in 1999 between MITI and Mr. Klabin, by which he was to retain his position as sole director of Roscomm unrestrained. In the winter of 2001-2002, the parties sought to negotiate a financially acceptable change to that situation. The Applicant is now seeking by litigation to achieve what it failed to achieve in those negotiations. It is not for this Court to support the Applicant and to remedy its failure and to grant it the relief which it seeks. To do so would wrongly interfere with the bargain struck in 1999. It goes without saying that to deprive Mr. Klabin of his lawful interest in that way would result in financial detriment.

From the Applicant's perspective, if no relief is granted, Mr. Klabin will continue to hold a position and thereby a commercial advantage to which he has no lawful right. The position which it thought, in my view with strong justification, that it had achieved in 1999, that is the removal of Mr. Klabin from any influence over the affairs of Teleport, would be overturned. To overcome that hurdle, the Applicant, I suspect, will have no alternative but to recommence negotiations with Mr. Klabin to buy him out wholly from Roscomm, and will thus, in my assessment, be placed in an unenviable, if not impossible, negotiating position. Its legitimate majority shareholding in Roscomm would be made worthless.

As is invariably the case, there are two contrasting views of the *status quo* (as Hoffmann J. observed). From the narrow viewpoint, it is that Mr. Klabin is the sole director of Roscomm. The reality, however, in my view, is that the *status quo* is properly to be described as dynamic; it is the Applicant's legitimate interest in and control over Roscomm, which it currently cannot exercise.

Since 1999, and particularly since late 2000, when it appears that MITI started to take a more serious interest in all its subsidiaries relevant to this case, the Applicant has been trying to put its house in order. Since June, 2001 (the date of the purported termination of the Services Agreement when matters came to a head), on my assessment of his failure to honour his obligation to resign as a director of Roscomm and his conduct throughout, Mr. Klabin has sought to thwart the proper commercial interests of the Applicant and its owners.

Injustice may arise not only by depriving a defendant of protection at a full trial, but equally by denying an injunction to a plaintiff who may have a good case, with the result that he is unable to bring it to trial because of commercial realities. This was the view taken by Hoffmann J. in Films Rover (8) arising from his assessment of the conduct of the defendant, and the commercial realities in that case. It was a “*qualitative consideration*” which he took into account in weighing the risks of injustice which granting or refusing the injunction would entail (at p. 785 f). Equally, in this case, I consider that that which I have described as the dynamic *status quo* is a qualitative consideration I must take into account. Or as Lord Diplock said in N.W.L. Ltd. (5) (at p. 625), “*the court is required to give full weight to the practical realities of the situation and weigh the respective risks that injustice may result from a decision one way or the other.*”

Even if I did not have the high assurance, which I do, as to the likelihood of the Applicant’s success at trial, I would still conclude that the risk of injustice if I make a wrong decision comes down in favour of the Applicant.

Nor am I persuaded by Mr. Robilliard’s arguments in respect of the Applicant’s knowledge, conduct and delay. I consider that the Applicant took a reasonable and realistic commercial view, in the light of the correspondence and Mr. Klabin’s conduct in 2001, to try and negotiate a satisfactory financial conclusion to Mr. Klabin’s demands; an assessment only reinforced, in my opinion, by the events and the facts which have emerged during the course of 2002 since the institution of proceedings. Whilst the cases to which Mr. Robilliard referred me regarding delay are helpful in respect of the general principle established, I find no assistance from the factual findings of the Courts in those cases. Each case must depend on its own particular facts. In this case, I do not find that there was any sufficient delay on the part of the Applicant in instituting proceedings to merit opprobrium, and thus to disqualify it from obtaining relief to which it might otherwise be entitled.

Nor do I consider that Mr. Klabin has any significant case regarding the Applicant’s acceptance of his position from September, 1999, onwards, thus founding an argument involving acquiescence, waiver or estoppel. The Applicant had increasingly to accept the reality of Mr. Klabin’s position as sole director of Roscomm, though of course it should have known of that position from the start. It did, however, consistently make clear its views as to Mr. Klabin’s obligations arising from the 1999 arrangements. Additionally, it was only in the summer of 2001 that the evidence started to emerge regarding Mr. Klabin’s conduct; thus my assessment that the Applicant’s attempts at negotiation made commercial sense.

For all these reasons, I am once more satisfied, to the appropriate standard, that in effect the Applicant should be granted the orders which it seeks. Having stated that conclusion in general terms, I must now turn to the specific orders themselves.

The Applicant should be given control of the Roscomm Board by the appointment of two MITI representatives to it, and the Board should be freed of any shackles. Whether or not Mr. Klabin is removed as a director of Roscomm is in a sense irrelevant, but for complete tidiness he should be. Additionally, the MITI representatives should be given full and exclusive rights to represent the interests of Roscomm, *per se*, as shareholders of Teleport, and thus be able to exercise in that capacity such influence as they can and to which they are entitled over that company. This is not to prejudge whether Roscomm or Helian are empowered to represent the Roscomm 10% shareholding in Teleport. Save in relation to his position in Roscomm, Mr. Klabin is not to be required to do, or desist from doing anything, and his activities are not to be controlled by the Court, by virtue of any orders which are to ensue from my decision.

On the basis of the foregoing, I invite Counsel to draft appropriate orders for my consideration, which I hope can be agreed, and after consultation with Mr. Harris representing the Third Respondent to the extent that his client is involved.

The parties are free to make any ancillary or consequential applications.