



# In the Royal Court of the Island of Guernsey

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**The** 20th day of November, 2001 before Lieutenant Bailiff Catherine Mary Newman, Q. C.; sitting alone

BETWEEN

PAVLOS VARDINOYANNIS

Applicant

And

- (1) ANSOL LIMITED
- (2) AVAZ SAIDOVICH NAZAROV
- (3) ANSOL AG
- (4) ELSUN INVEST AG
- (5) FAIZY INVEST AG
- (6) YULDUZ TRADING AG
- (7) ASHTON INVESTMENTS LIMITED
- (8) THE HONG KONG AND SHANGHAI BANKING CORPORATION
- (9) CHANDLER BACKER & CO

Respondents

WHEREAS on the 4th day of April, 2001 the Bailiff made an order prohibiting the disposal of assets worldwide by the Respondents and ordering disclosure of information, hereinafter known as "the freezing order" and WHEREAS on the 4th May, 2001 the Bailiff part heard an application by the Respondents dated 23rd April, 2001 in the terms attached hereto for the discharge of the said order for material non disclosure and WHEREAS on 23rd, 24th and 25th July, 2001

the Lieutenant Bailiff considered the said application of the 23rd April, 2001 and heard thereon Advocates P.T.R. Ferbrache and J.P. Greenfield Counsel for the Applicant and the First and Second Respondents respectively;

The Lieutenant Bailiff THIS DAY handed down judgment in the terms attached hereto and;

- (1) DISMISSED the said application for the discharge of the freezing order of 4th April, 2001;
- (2) ORDERED that the said freezing order be continued until the trial of this action or until further order; and
- (3) the Lieutenant Bailiff having this day heard submissions from the said Counsel further ORDERED that the "collar" level as set out in paragraph 1.1 of the said freezing order be set at US \$40 million; and
- (4) the Lieutenant Bailiff ORDERED that the Applicants costs for the hearing of the application for the freezing order on the 4th day of April, 2001 be DISALLOWED; and
- (5) the Lieutenant Bailiff further ORDERED that costs should be awarded to the Respondents in respect of the adjourned hearing before the Bailiff on the 4th day of May, 2001 of the Respondents' application dated 23rd April, 2001; and
- (6) with regard to this matter generally and to the ancillary orders made the Lieutenant Bailiff ORDERED that the Applicant should have three quarters of his recoverable costs.



Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY**  
**ORDINARY COURT**

BETWEEN:

PAVLOS VARDINOYANNIS

Applicant

-v-

- (1) ANSOL LIMITED
- (2) AVAZ SAIDOVICH NAZAROV
- (3) ANSOL AG
- (4) ELSUN INVEST AG
- (5) FAIZY INVEST AG
- (6) YULDUZ TRADING AG
- (7) ASHTON INVESTMENTS LIMITED
- (8) HSBC BANK PUBLIC LIMITED COMPANY
- (9) CHANDLER BACKER & CO.

Respondents

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The First and Second, Fourth, Fifth, Sixth and Seventh Respondents, whose address for service in Guernsey is 1 Le Marchant Street in the parish of Saint Peter Port, hereby

**APPLY TO THE COURT**

for the following orders:

- 1 The time limits set out in paragraph 3 of the Order of the Bailiff herein dated 4<sup>th</sup> April 2001 be suspended pending the final disposal of this application;
- 2 The proceedings herein be stayed and/or the leave given to serve out of the jurisdiction at paragraph 4 of the said Order of the Bailiff dated 4<sup>th</sup> April be set aside and, in any event, the Order discharged on the grounds that either:
  - a) the Applicant has no or no good arguable claim against the First Respondent, whether within this jurisdiction or at all, and the other Respondents are accordingly neither necessary nor proper parties thereto; or

- b) the Court has no jurisdiction in any event with regard to the proposed claim; or
  - c) Guernsey is not the appropriate jurisdiction to be seized of this matter whether for want of jurisdiction or because it is a forum non conveniens; and
  - d) in any event because the criteria set out at RCCR 7(2) are not made out.
- 3 Further or alternatively, that the said Order be discharged on the grounds inter alia that:
- a) the Applicant has not made out a good arguable case against the First Respondent and/or any or all of the Respondents; and/or
  - b) the Applicant has not demonstrated a real risk of dissipation of assets by either the First or Second Respondents and/or any or all of the Respondents; and/or
  - c) the affidavits filed on behalf of the Applicant do not make full and frank disclosure of all material facts surrounding the Applicant's claim, alternatively it was not the Applicant's intention to make full and frank disclosure either to the Court or the Respondents in obtaining the said order and/or the affidavits filed on behalf of the Applicant misrepresented material events; and/or
  - d) the said Order is not justified on the balance of convenience between the Parties; and/or
  - e) it would not be just and convenient to continue the said Order having regard to the manner in which the Order was obtained, the evidence relied upon and all of the circumstances.
- 4 In the further alternative, that paragraphs 3, 4.2, 4.3 and 4.4 of the said Order be discharged or amended on such terms as the Court thinks fit.
- 5 The Applicant be required to deposit security for any loss and damage suffered by the First and Second Respondents pursuant to his undertaking at schedule 5 paragraph 2 of the said Order in the sum of US\$11 million or in such sum and manner as the Court shall deem fit.

- 6 If notwithstanding the said Order is continued the Respondents seek a reduction of the sum frozen to such figure as the Court deems fit.
- 7 Costs, to be taxed if not agreed, on an indemnity, alternatively standard basis.
- 8 Further or other relief.

ADVOCATE

Dated this 23<sup>rd</sup> day of April 2001

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

BETWEEN

PAVLOS VARDINOYANNIS

Applicant

And

- (1) ANSOL LIMITED
- (2) AVAZ SAIDOVICH NAZAROVAROV
- (3) ANSOL AG
- (4) ELSUN INVEST AG
- (5) FAIZY INVEST AG
- (6) YULDUZ TRADING AG
- (7) ASHTON INVESTMENTS LIMITED
- (8) THE HONGKONG AND SHANGHAI BANKING CORPORATION
- (9) CHANDLER BACKER & CO

Respondents

**The Parties**

1. The Applicant is Mr Pavlos Vardinoyannis, a Greek citizen. The First Respondent ("Ansol Guernsey") is a Guernsey company. The Second Respondent ("Mr Nazarov") is a Tadjik national. The Third Respondent ("Ansol AG") is a Swiss company, which I have been told is now defunct. The Fourth to Sixth Respondents, as I understand it, will play no further part in these proceedings. On 28<sup>th</sup> June 2001 I discharged the freezing and

ancillary orders made against them on the application of the Applicant himself. The Seventh Respondent, Ashton Investments Limited, is an English company controlled by Mr Nazarov. The Eighth Respondent is a bank. It did not appear at the hearing before me, and no further relief is sought against it. The Ninth Respondent is a firm of Guernsey accountants. Ansol Guernsey has its registered office at their premises. Partners in the firm hold the shares in Ansol Guernsey as nominees for Mr Nazarov.

2. The Applicant has intimated, by the production of a new form of cause, an intention to apply to join the Tadjik Aluminium Plant ("TadAz"), a Tadjik state-owned enterprise. TadAz is one of the largest aluminium plants in the former Soviet Union and is the largest single contributor to the GDP of Tadjikistan. The Applicant believes that TadAz has separate corporate personality. In a short letter sent by the Deputy Minister of Justice of the Republic of Tadjikistan to Clyde & Co, the Respondents' English solicitors, dated 11<sup>th</sup> July 2001, he describes TadAz as "a legal entity". The Applicant proposes, in due course, to apply to join TadAz to the proceedings and to remove other Respondents so that the only parties would be Ansol Guernsey, Mr Nazarov and TadAz.

### **The Applications**

3. By an Application notice dated 27<sup>th</sup> March 2001 the Applicant applied to this court for a worldwide injunction prohibiting the disposal of assets by Respondents 1,2,3,4,5, & 6 up to a value of US \$55 million. An Application

was made at the same time for the disclosure of information by Respondents 1,2,3,4,5 & 6 about their assets, and for the disclosure of information by the 7<sup>th</sup> Respondent about the assets of Respondents 1,2,3,4,5 & 6 and of TadAz, which was not, at that stage, proposed as a party to the proceedings. The 8<sup>th</sup> Respondent was to disclose information about bank accounts in Guernsey held by the Respondents 1,2,3,4,5,6. Against the 9<sup>th</sup> Respondent, the relief sought required them to produce information and paperwork about Respondents 1-7 and TadAz within the jurisdiction, and give information about what documents they held. They were also to disclose to the Applicant the identity of the beneficial owners of the 1<sup>st</sup> Respondent.

4. On 4<sup>th</sup> April 2001, the Bailiff granted an order to the Applicant. A minor amendment, with which I am not concerned, was made on 9<sup>th</sup> April 2001.
5. On 20<sup>th</sup> April 2001 Ansol Guernsey issued an Application notice requesting the immediate release of certain funds referred to in a letter dated 19<sup>th</sup> April 2001 from Clyde & Co, who act for Ansol Guernsey in England, to Taylor Joynson Garrett, who act for the Applicant in England. This concerned certain transactions, which, the letter of request said, were to be made in the ordinary course of business. On the same day the Bailiff made an order varying the earlier orders which he had made, so as to provide that Ansol Guernsey could deal with its assets in the ordinary and proper course of business provided one working day's notice was given of

the proposed disposal with information about what was proposed to be done.

6. On 23<sup>rd</sup> April 2001, Ansol Guernsey and Mr Nazarov issued a notice of Application to suspend the operation of the orders for disclosure until after a substantive hearing on its Application. The Application notice went on to ask for a stay of proceedings on the grounds that Guernsey is not the appropriate jurisdiction for the case to be heard; that there was no good arguable case, that there was no real risk of dissipation of assets, that there had not been full and frank disclosure of all the material facts surrounding the claim and that the balance of convenience did not justify the making of the order. Security for the cross undertaking in damages was also requested.
7. On 24<sup>th</sup> April 2001, the Deputy Bailiff heard that Application. However the court was not able, on that occasion, to set aside sufficient time for the effective hearing of the Application. The Deputy Bailiff thus suspended the time limits for compliance with the disclosure orders until 4<sup>th</sup> May 2001 and adjourned the Application generally.
8. On 4<sup>th</sup> May, the Bailiff continued the suspension of the time limits and ordered that the Applications should be fixed for hearing, giving directions as to the service of evidence in support and in response.
9. There is an amended notice of the 23<sup>rd</sup> April Application dated only June 2001 and unsigned. By that amendment the Respondents 4,5,6 and 7 join in the Application earlier made by Ansol Guernsey and Mr Nazarov on

23<sup>rd</sup> April and seek to have leave which was earlier given to serve the worldwide freezing order outside the jurisdiction set aside on the grounds that the Applicant having no good arguable claim against Ansol Guernsey in the jurisdiction or at all, the other Respondents were not necessary or proper parties thereto and this court had no jurisdiction over any part of the claim, nor was it a convenient forum for the resolution of the dispute between the parties. The amendment further requested the discharge of all the orders earlier made on similar grounds to those relied upon by Ansol Guernsey and Mr Nazarov alone and on the additional ground that it would not be just and convenient to continue the order having regard to the manner in which it was obtained, the evidence relied upon and all the circumstances.

10. The Respondents then refined their earlier Application for security for the cross undertaking in damages by asking for a deposit in the amount of US\$11 million, and for a reduction in the amount frozen.
11. I gave leave for the amendment to be made on 28<sup>th</sup> June 2001.
12. By an Application notice dated 22<sup>nd</sup> June 2001 the Respondents 2,4,5 and 6 applied to the court for discovery and inspection of six categories of documents listed in the Application notice, with liberty to take copies. The documents related to the trading records of or were part of the trading records of Allouette Anstalt ("AA") and Allouette Industry AG ("AIAG"). AA and AIAG were the trading entities used by the Vardinoyannis family and Mr Nazarov as the vehicles for their joint venture trade with TadAz.

These categories of documents were discussed between the party's legal representatives and on 28<sup>th</sup> June 2001 I heard, amongst other case management matters, an Application for an order in agreed terms. An order was made, effectively by consent, by me on that day, and I gave further directions in preparation for an effective hearing of the amended Application of Respondents 1,2,4,5,6, &7 on 23<sup>rd</sup> July 2001 with an agreed time estimate of 3 days. In fact, as matters turned out, the parties' time estimate was rather optimistic, and in order to complete the hearing in three consecutive days it was necessary to extend the court hearing hours and shorten the breaks to fit in what was effectively 5 days of court time.

13. By the date of the hearing on 28<sup>th</sup> June it had been agreed between the parties that the order of the Bailiff dated 4<sup>th</sup> April 2001 should be discharged as against the Respondents 3,4,5 & 6, with the Applicant paying the costs of Respondents 4,5, & 6.
14. On 27<sup>th</sup> June the Applicant produced his cause, and his summons to Ansol Guernsey for it to be tabled was returnable before the Bailiff for 6<sup>th</sup> July 2001. On 28<sup>th</sup> June 2001 I dispensed with the need to table the cause on 6<sup>th</sup> July, again by consent.
15. Some time was taken up on 28<sup>th</sup> June with a discussion of the way in which the earlier orders supervising the circumstances in which and conditions under which Ansol Guernsey was allowed to dispose of its assets in the ordinary and proper course had in fact operated. The parties found that certain practical difficulties had arisen, and the Applicant was content to

accept that some variations were appropriate, with proper safeguards. The scheme for making such payments was varied in the terms of the order which I made dated 28th June 2001, contained in a separate document from the other directions and case management orders.

16. As I understand it, permission has not yet been sought to serve Mr Nazarov with the proceedings, although permission was sought and granted to serve him with the freezing order. If this action is to proceed against him, service issues will have to be attended to. A number of such points have been left over until after the determination of this Application, and that makes sound practical sense.

#### **Proceedings in England**

17. On 6<sup>th</sup> April 2001, in the High Court in London, Blackburne J, the Vice-Chancellor of the County Palatine, made an order at the behest of Mr Vardinoyannis against Ansol Guernsey, Mr Nazarov, Ashton and two banks, Credit Agricole Indosuez and The Royal Bank of Scotland plc, under the provisions of Section 25 of the Civil Jurisdiction and Judgments Act 1982 as extended, together with orders for ancillary disclosure. The freezing order, in an amount of up to US \$55 million of assets in England and Wales, was made until a return date of 6<sup>th</sup> July 2001. The order contained the usual savings, including permitting disposals of assets in the ordinary course of business provided one working day's notice was given. The disclosure sought and granted against the prospective Defendants was in relation to the affairs not only of Ansol Guernsey, but also in relation to

the affairs of the Respondents 3-7 in the proceedings before this court and TadAz. There were orders made against the two banks to disclose information about the existence and recent movements in any bank accounts in the name of Ansol Guernsey and Mr Nazarov.

18. On 19<sup>th</sup> April 2001, a claim form was issued in the High Court in London.

On 20<sup>th</sup> April 2001 Lloyd J made an order allowing Ansol Guernsey to make certain specified payments. On 23<sup>rd</sup> April 2001 the same Judge varied the time limits for compliance with the disclosure orders by extending them until 4pm on 30<sup>th</sup> April, which gave Ansol Guernsey and Ashton time to issue an Application notice seeking a longer extension. This was done on 29<sup>th</sup> April, and sought an extension to bring the time for compliance with the English order into line with the limits set in this court. Mr Nazarov applied for a similar order by Application notice dated 25<sup>th</sup> April. There was a partially effective hearing of these Applications for extensions of time before Lawrence Collins J on 8<sup>th</sup> May 2001 and they were stood over.

19. Other variations to Blackburne J's order were sought by the Application Notice of 1<sup>st</sup> May, which sought relief designed to create a more flexible regime under which Ansol Guernsey and Mr Nazarov could make payments in the ordinary course of business. This order was made by Park J on 2<sup>nd</sup> May 2001

20. Applications to set aside the claim form on the grounds that the English court had no jurisdiction over Ansol Guernsey or Mr Nazarov were issued on 17<sup>th</sup> May 2001.
21. Finally, on 18<sup>th</sup> May 2001 an Application was made for production of documents referred to in affidavits sworn by Alexander Shusko ("Mr Shusko") and Stephen Tricks ("Mr Tricks") on behalf of Ansol Guernsey. Among the documents sought was a copy of the contract between Ansol Guernsey and TadAz. This Application was heard by Blackburne J on 23<sup>rd</sup> May. He permitted Ansol Guernsey to strike out the references to the documents and went on to reject the Claimant's Application for production. However Mr Shusko's affidavit has been deliberately put in the bundles for the hearing before me in its unamended form, containing the reference to the contract.
22. On 6<sup>th</sup> July the Application for a freezing order and ancillary disclosure, was heard in London by Ferris J. He made the order with effect until 3<sup>rd</sup> August 2001, against Ansol Guernsey and Mr Nazarov, with the usual saving provisions about payments in the ordinary course of trade, legal expenses and so forth, the detail of which is fully set out in the Order and I need not repeat it here. The banks were also ordered to preserve certain relevant documents identified in a schedule, until the return date. The Applications of 17<sup>th</sup> and 16<sup>th</sup> May 2001 were adjourned generally. I have not been told what, if anything, happened on the return date in August.

### **The claim by the Applicant against the Respondents**

23. The Applicant claims to be the victim of a conspiracy between Mr Nazarov, Ansol Guernsey, Ansol AG and others. There is an issue between the parties about whether the agreement really amounted to a partnership or whether it was more properly called a joint venture. That is a question which may very well have to be determined at trial. I need only be satisfied that there is an arguable case that the agreement between the Vardinoyannis family, represented now by the Applicant, and Mr Nazarov amounted to a partnership under Liechtenstein law.
24. The case is that there was a simple partnership in Liechtenstein law following the provisions of Articles 649, 661 and 680 of the Liechtenstein Law on Persons and Companies. Among the duties of partners in such partnership were the following familiar obligations:
- a. To share profits in the partnership shares
  - b. To devote themselves diligently to the pursuit of the interests of the partnership and make good any losses caused by improper conduct
  - c. Not to engage in any activity which might frustrate or harm the purposes of the partnership
  - d. Generally to act in good faith.
25. The Respondents dispute the existence of a partnership in Liechtenstein law. They do not necessarily accept that Liechtenstein law applies at all. They prefer to call the arrangement a joint venture. Both parties have, from time to time, used the expressions "joint venture" and "partnership".

Of course, a partnership is always a joint venture in the ordinary sense of the words. The converse is not necessarily true.

26. I have read the evidence of the Liechtenstein experts called by both parties.

It does not assist on the fundamental requirements for a simple partnership in Liechtenstein law. I must therefore assume that in Liechtenstein, as in Guernsey, a partnership involves two or more persons going into business together with a view to profit. The Applicant contends that the relationship of simple partnership survived the interposition of the vehicles AA and AIAG. The Respondents take a different view. However both parties acknowledge that the interposition of the vehicle is not fatal to the existence of a relationship involving duties of mutual good faith. Moreover, the Respondents, in argument, go so far as to say that at best, there was a quasi-partnership of the type discussed in **Ebrahimi v Westbourne Galleries [1973] AC 360**. Both Ansol Guernsey and Mr Nazarov, therefore, accept that there may be a relationship akin to a quasi partnership as understood by Guernsey lawyers. It is fundamental to the quasi partnership relationship, as it is to the partnership relationship, that the parties should act in good faith to and deal fairly with one another. Neither party should conspire with a third party to damage the joint trade, nor should either party divert business opportunities from the joint venture.

27. Applying basic principles, I am satisfied that there is an arguable case that there was a Liechtenstein partnership. Nor, in my judgment, would there

be any great difference in the duties owed by Mr Nazarov to the Applicant if there were a joint venture agreement and not a simple partnership under Liechtenstein law. Assuming, for the sake of argument, that there was a joint venture agreement akin to a quasi-partnership relationship and that agreement was governed by some other law, Greek or Tadjik, say, I would assume, in the absence of evidence about the duties imposed by that foreign system of law, that the same duties of good faith and fair dealing applied under that system of law. Thus, it seems to me, the principal allegations against Mr Nazarov do not stand or fall depending on whether there was a partnership or not. In this judgment I will use the expression partnership as a convenient label for which I believe there to be some basis in fact. I do not, in so employing that expression, intend in any way to pre-judge the issue before the trial. It will remain open to the Respondents to argue, if they wish to, that the relationship was not a simple partnership governed by Liechtenstein law.

28. It must also not be forgotten that many of the allegations made against Ansol Guernsey and Mr Nazarov flow from Mr Nazarov's alleged breaches of the agreement described as the Athens Agreement, reached between the parties on 11<sup>th</sup> June 1998 and designed to give both a mutually satisfactory exit from the partnership. This agreement does not specify any governing law. It is for the Defendants to allege that foreign law applies to this agreement, and which law.

29. The partnership was set up after meetings in Athens at which the opportunities to do business with TadAz were discussed between the parties. At the second such meeting, in early June 1996, Mr Ermatov, the director of TadAz, was present, as was Mr Anisimov, who was a director of Coalco, one of TadAz's creditors. Mr Nazarov was present and so were the Applicant and his uncle, Mr Theodore Vardinoyannis, now deceased.
30. At this second meeting, Mr Nazarov proposed that the partnership would enter into barter contracts for aluminium with TadAz. Mr Nazarov had strong relationships with TadAz and ran TadAz's representative office, Tadal, in Moscow. He could procure or persuade TadAz to enter into agreements to trade with the joint venture. The partnership would provide TadAz with raw materials. Mr Nazarov, as an aluminium trader, would be in charge of sourcing the raw materials and the Vardinoyannis family partner would be in charge of providing or arranging for finance for the purchase of the raw materials and generally to support TadAz's need for working capital. The partnership would sell the aluminium on the open market and the profits would be split as to 70% to Mr Nazarov and as to 30% to members of the Vardinoyannis family.
31. The first partner from the Vardinoyannis family side was Theodore. The partners chose to use two corporate vehicles for this trade: the first was AA, a Liechtenstein establishment. Following a re-negotiation of the profit split, the founders' rights in AA were held for Ansol BVI and Aletri International Anstalt ("Aletri") in the proportion 60/40. Aletri is a

Vardinoyannis family establishment which was used as a nominee to receive the profit share allocated to the Applicant. It has formally assigned all its claims to the Applicant. This was the vehicle from June 1996 until July 1997. A Liechtenstein corporation, AIAG, was then used from July 1997 until the end of the partnership. The reason for this was that a privatisation of the TadAz plant was being discussed, and the parties were advised that AIAG was a more suitable vehicle to participate in a proposed privatisation than AA. However, nothing came of the privatisation talks.

32. Theodore died in September 1996 and the Applicant became the partner in his place, with the apparent consent of Mr Nazarov. Both the Vardinoyannis family and Mr Nazarov used nominees to receive any profits to be distributed by the partnership. Mr Nazarov used Ansol BVI. The Vardinoyannis family, first Theodore and then the Applicant, used Aletri .

33. It seems that the Applicant was made aware that TadAz owed money to other suppliers of raw materials, but it was the Applicant's evidence that Mr Nazarov told him that they were willing to be postponed to the new joint venture. No enquiries appear to have been made into the accuracy of this. At all events, Mr Nazarov was keen to establish, through the Vardinoyannis family, a new and regular supply of raw materials and working capital for TadAz.

34. AA entered two barter contracts with TaAz, called during the hearing, for convenience, the 1996 and 1997 contracts. When the trading switched to

AIAG, there was a written assignment to AIAG of the rights and obligations under the 1997 contract. In the contemporaneous correspondence the name "Allouette" is used for both vehicles interchangeably.

35. Later, the Applicant claims that another aluminium trader called Mr Rosenberg was introduced as a shareholder in the partnership vehicle AIAG. I will explain his involvement shortly. He took 10%, reducing Mr Nazarov's interest to 50%. The Applicant's interest stayed unchanged at 40%. The Applicant claims that Mr Rosenberg also became a partner, by 11<sup>th</sup> July 1997 at the latest.

36. The 1996 barter agreement is basically a master agreement, as supplies of raw materials were governed by the addition of addenda as and when the need arose. Prices for the raw materials were stipulated in the addenda. The price of aluminium, however, was set in the contract itself, at clause 9, but was formulaic. Under the addendum No 1, TadAz agreed to supply AA with all its production of aluminium on a daily basis. If AA/AIAG did not supply raw materials or the finance for raw materials, TadAz reserved the right to enter into agreements with third parties and ship aluminium to them in exchange for raw materials, but only with the consent of AA/AIAG. Likewise, if AA/AIAG did not provide finance for gas, electricity and reconstruction, but third parties did provide such finance, TadAz reserved the right, again with the consent of AA/AIAG, to supply aluminium to the providers of such funds.

37. The 1996 contract was superseded, on 1<sup>st</sup> May 1997, by the 1997 contract. It was in broadly similar form. TadAz agreed to supply the partnership with aluminium in quantities equivalent to the values of raw materials delivered to it and amounts paid during the previous month: see Clause 11. Again, the price for the finished aluminium was to be determined by reference to a formula derived from prices on the LME. A new provision, Clause 14, stated that any disputes with regard to deliveries of aluminium were to be governed by English law, and any disputes with regard to the deliveries of raw materials were to be governed by Tadjik law.

38. Neither the 1996 nor the 1997 contracts are expressed to terminate on any particular date. However, it appears that the Applicant was told that Amendments to the contracts, specifying orders, were to run for only a year to satisfy the Tadjik Government's desire to calculate the predicted earnings of the plant on an annual basis. However, Mr Nazarov told the Applicant that the contracts could be extended. Indeed, at the end of March 1998 or thereabouts, the 1997 contract was extended by agreement until 30<sup>th</sup> April 1998.

39. Theodore and subsequently the Applicant arranged an Export Credit Facility with UEB with an original limit of US\$40 million which was subsequently increased to US\$60 million. Raw materials and funding were supplied to TadAz, including funding for the payment of other creditors such as, in 1997, Coalco, and aluminium was supplied to AA/AIAG, which assigned ownership of the aluminium to UEB as security for the

debt. Theodore had given UEB a guarantee of AA's liabilities up to US \$40 million. After Theodore's death another uncle, Vardis Vardinoyannis, who is regarded as the head of the family, agreed to take over the guarantee. After some delay, Vardis entered a guarantee on 21<sup>st</sup> January 1998 for US \$60 million, which was increased to US \$67 million on 10<sup>th</sup> February 1998. Vardis agreed that the Applicant should take over the complete control of the TadAz trade on behalf of the Vardinoyannis family.

40. There was a good deal of evidence before me about the precise operation of the offices of the joint venture in Moscow and London, which I do not think it necessary to repeat in this judgment. Suffice it to say that the Applicant was obliged to take on trust that the plant was actually receiving the quantities of raw materials which were being supplied through AA/AIAG and funded by the UEB facility. Mr Nazarov had complete control of this side of things, as well as of sales of finished aluminium. After the death of Theodore, and the introduction of the Applicant to the partnership or joint venture, it was agreed, at a meeting in Athens, to introduce an aluminium trader called Mr Rosenberg to the operation. The Applicant's evidence is that, at least in the early days, Mr Rosenberg was worth his hire and increased the profitability of the operation by improving the prices at which its aluminium was sold. A few months later, Mr Rosenberg was given a small share in the partnership. He took 10%, reducing Mr Nazarov's share to 50%. The Applicant's share stayed the same.

41. By mid-1997, the production at the TadAz plant did not appear to have improved despite what the Applicant describes as a steady supply of raw materials. When PriceWaterhousecoopers were instructed to and did prepare a report for the Applicant, in May 1997, one of the matters referred as the cause of a deteriorating financial position was a decline in production of aluminium and increased liabilities owing to an irregular supply of raw materials. As Mr Nazarov was in charge of the supply side, running it from the Moscow office, this was a matter of concern to the Applicant. In addition, the world prices for aluminium were in decline.
42. By mid 1997, Mr Nazarov was pressing for Mr Rosenberg 's role to be reduced; he wanted to introduce his colleague, Mr Shusko, as the aluminium salesman for the joint venture. The Applicant was not keen on this plan, principally because he was not happy to allow Mr Nazarov to increase the control which he had over the operation but also because he was content with Mr Rosenberg's performance for the joint venture. Mr Nazarov professed himself to be unhappy with the prices Mr Rosenberg obtained, but the Applicant viewed the criticisms which Mr Nazarov made as unfair and partly motivated by self-interest. This is another dispute between the parties upon which it is not necessary for me to express a view.
43. In June 1997 Mr Nazarov asked the Applicant to supply US \$7.5 million by way of additional capital to upgrade the plant, and the Applicant agreed, but asked in return for the office operations to be moved to Athens, thus

giving him greater access to information. Mr Nazarov did not agree to move the office operation to Athens.

44. By the turn of the year, the Applicant contends that TadAz already owed AA/AIAG about 100,000 metric tonnes of aluminium.

45. In early 1998, Mr Nazarov made another request for an injection of US \$7.5 million. There was a meeting in Athens on 23<sup>rd</sup> February 1998 to discuss this and other matters pertaining to the business. Mr Nazarov complained about lack of finance for improvement to the plant. The Applicant and his uncle Vardis said that they had not committed themselves to the capital investments and had therefore provided everything asked of them despite their concerns about whether the plant was really receiving the benefit of all the funding which they had provided. It was shortly after that meeting, the Applicant deposed, that a very considerable further sum was demanded, and the suggestion made by Mr Nazarov that he would seek the introduction of new partners.

46. By early 1998 there is some evidence that Mr Nazarov was not merely asking for further investment, but complaining that TadAz needed more capital investment than AA/ AIAIG was supplying. It is clear from his first affirmation that without substantial capital investment the TadAz plant could not reach its profitable operating level of 18,000 metric tonnes of aluminium per month. It appears to be common ground between the parties that at all times material to this dispute TadAz was not operating at a profit. It was always under considerable financial pressure and lacked

the ability to invest in improvements to the plant which would enable it to operate profitably. However there is little evidence of the reasons for this lack of profitability. What is obvious from the evidence before me is that a number of other people, notably Ansol Guernsey, are making considerable profits out of trade with TadAz.

47. One of the complaints which Mr Nazarov makes is that the Vardinoyannis family never actually bound themselves to investing in the improvement of the plant. Mr Nazarov believed, in 1998, that an investment of US \$80-100 million was required over a 2-3 year period. The Vardinoyannis family had talked about investing US \$40 million, but this had not got any further. There were a series of meetings in Athens, Istanbul and Paris. On 10<sup>th</sup> March 1998 Mr Nazarov sent the Applicant a fax referring to discussions which were in train about the provision of a large amount of capital investment by possible new partners, the Sayansk and Nikolaev plants, and imploring him to keep the day to day needs of TadAz supplied. Mr Nazarov assured the Applicant in that fax that whatever the results of the talks might be, the liabilities to the Applicant would be treated as TadAz's first priority.

48. At the Paris meeting, on 18<sup>th</sup> March 1998, Mr Nazarov says, it was made clear that the Applicant would not make a capital investment in the TadAz plant. It is argued on his behalf that it was agreed that the joint venture would terminate and aluminium would no longer be released to

AA/AIAG/UEB. In his first affirmation, however, all Mr Nazarov says is that the joint venture "in its current form" would terminate.

49. Mr Nazarov sent the Applicant a fax of 25<sup>th</sup> March 1998 to which the Applicant did not refer in his affidavit, although it was in the bundle of documents before the court. As I understand it, this fax was not drawn to the attention of the Bailiff. I shall have to say more about that in a later section of this judgment. It was clear from that fax, sent by Ansol BVI to the Applicant, that Mr Nazarov had unilaterally arranged that with effect from March 19<sup>th</sup> 1998 TadAz would not be releasing all its metal to UEB because he claimed not to have adequate information about the credit line and the way in which it operated. Mr Nazarov asserts, in that fax, that he no longer thinks it appropriate to use UEB's financing service. There are two rival translations of this letter. One, exhibited to the Applicant's first affidavit, says that "none of" the metal shipped since 19<sup>th</sup> March will be consigned to the bank. Mr Nazarov's translation has " All the metal dispatched from TadAz, starting 19<sup>th</sup> March, will not be released to the Bank". The fax also refers to continuing discussions with the proposed new funders and requests an early meeting in Athens.

50. So far as I know, the Bailiff was not told about this fax or exactly what the Applicant would have understood it to mean. The Applicant does not say where he thought the aluminium was going after he received this fax. I think that what the Applicant expected to happen to the aluminium after 19<sup>th</sup> March depends very much on what the arrangements were with UEB.

If all aluminium shipped to AIAG automatically fell into the clutches of UEB, because of the provisions of the credit line, then it would follow that the aluminium would have to be shipped to some other recipient if any attempt to avoid the involvement of UEB was to stand any chance of success. The Applicant did not appear to be unduly concerned by this fax. He did not make any protest to Mr Nazarov.

51. The Bailiff was simply told that by April 1998 the supplies of aluminium had dried up and the Applicant believed that aluminium had been diverted to a third party. He does not say that he knew that UEB would not be getting it, but nevertheless expected it to continue to be available to the joint venture partners in some other way.

52. On 31<sup>st</sup> March 1998 a further extension of the 1997 agreement, until 30<sup>th</sup> April 1998, was agreed. However, on 1<sup>st</sup> April 1998, TadAz entered into a similar barter contract with Ansol AG, under which it bound itself to supply over 235,000 metric tonnes of aluminium to AG by the end of the year. The contract itself is open-ended, and rights and the obligations of both parties to the contract cannot be assigned to any third party without the consent of the non-assigning party. On the basis that it had previously supplied AIAG with all its aluminium, TadAz could not possibly produce enough aluminium to satisfy the new obligation, let alone both. There is no evidence to suggest that the Applicant was told about the new obligations which TadAz had entered into, or the new rights to receive aluminium which Mr Nazarov's company, Ansol AG, had acquired.

There is no pretence by Mr Nazarov that Ansol AG was a vehicle used by agreement between the parties further to the 25<sup>th</sup> March fax.

53. On 2<sup>nd</sup> April 1998, the Applicant wrote to Mr Ermatov protesting that AA/AIAG was not receiving any shipments of aluminium, despite the fact that it was continuing to supply raw materials. He copied that fax to Mr Nazarov. In a further letter to Mr Nazarov, dated May 12<sup>th</sup>, written after Mr Nazarov had failed to attend a planned meeting, the Applicant complained that he was not being kept informed of the whereabouts of the metal, and that he had learned from the proposed third party investors that they had withdrawn, but had not been kept informed by Mr Nazarov himself. He stated that it was crucial that the partners should meet and discuss the way forward.

54. There was a meeting in Paris that month. The exact date of that meeting is not entirely clear, but it was before the 25<sup>th</sup> May. The meeting was attended by Mr Nazarov, Mr Ermatov and the Applicant. The Applicant says that Mr Nazarov admitted that he had used his own vehicle to receive the aluminium and the proceeds of sale which should have gone to AIAG. It is alleged by the Applicant that, at that meeting, it was acknowledged on behalf of TadAz that it was indebted to the partnership in the sum of at least US\$20 million (a figure which appears to bear some relation to a particular advance sought for the purpose of refurbishing the cells at the plant); this was subsequently confirmed in writing on 25<sup>th</sup> May 1998. Mr Nazarov agreed to repay the overdraft on the partnership account at UEB

and to formulate provisions for the future of the partnership, including safeguards for the Applicant to monitor his future conduct and a plan for further investment. All this is said to have been confirmed in a letter sent by the Applicant to Mr Nazarov on 3<sup>rd</sup> June 1998. That letter begins with a reference to the discussions in Paris the previous month and refers to steps which Mr Nazarov had agreed to take "to ensure that our project continues". It presses Mr Nazarov for repayment of the UEB overdraft out of the proceeds of sale of metal which, the Applicant appeared to believe, Mr Nazarov was receiving himself; secondly, Mr Nazarov was to have provided information about how the joint venture was to continue, given that Mr Nazarov had taken control of all metal sales and purchasing of raw materials and third, Mr Nazarov was to have presented a plan for the further investment which was to provide the basis of a discussion with the head of the family, Vardis Vardinoyannis . The letter ends with an inquiry as to whether Mr Nazarov really does intend to continue the venture and stating that the writer has reached to the point where he needs to come to final terms.

55. At a meeting in Athens on 11<sup>th</sup> June 1998, Mr Nazarov did not provide information which satisfied the Applicant, and he decided to end the partnership. It has been contended, on behalf of Mr Nazarov, that the joint venture came to an end in March 1998. The fax of 25<sup>th</sup> March is relied upon as one of the pieces of evidence supporting this case. I do not read that letter as terminating the partnership. Rather, by asking for a meeting

to discuss the introduction of new partners, it acknowledges its continuation. In my judgment, considering all the evidence, there is a strong arguable case that the partnership or joint venture did not end until June 1998. A written agreement was entered into, called The Athens Agreement, between the Applicant, Mr Nazarov and Mr Rosenberg, under which it was agreed that there would be a winding up, in the context of which there would be an independent audit; liabilities of TadAz to AIAG, including all liabilities to UEB, would be settled by Mr Nazarov from the proceeds of sale of aluminium received by AG from TadAz immediately following the presentation of the results of the audits, subject only to dealing with one matter, called the Nickojev debt, to which I need not refer in any detail. Mr Nazarov would also pay US \$1 million to UEB on or before 15<sup>th</sup> June and the parties would generally co-operate with one another, which expressly included the possibility of doing further business together, to achieve a settlement of the partnership's affairs. I should add that the Athens Agreement does not appear to operate as a release of the obligations of TadAz to AIAG. It still remains liable for the entire debt. Nor, so far as I understand it, has anything materially changed in the manner in which TadAz settles its debts: it would only do so directly via the supply of aluminium for sale. Ansol Guernsey now appears to have a broader role in settling TadAz debts, and I shall say more about that in due course.

56. It is the Applicant's case that Mr Nazarov has done little or nothing to perform his obligations under the Athens Agreement. The Applicant expressly told the Bailiff that Mr Nazarov failed to make the payment of US \$1 million provided for by the Athens Agreement. This statement was wrong because it is clear that Mr Nazarov did arrange for this US\$1 million to be paid, albeit late.
57. The Applicant's draft affidavit also said that the agreed payment of US\$200,000 to the Applicant for his expenses had not been made, although in fact it had. Advocate Greenfield told the court at the hearing before me that this inaccuracy had been corrected before the Bailiff.
58. There is also a dispute about the audit. An agreement was reached on 27<sup>th</sup> August 1998 about how the audit was to proceed. This agreement was reached between the parties' representatives, Brett Heenan for the Applicant and Kiril Mazur for Mr Nazarov; but Mr Nazarov contends that the reason why the audit has not progressed is that Mr Heenan has failed to get on with it. Certainly it has not made much progress and even on Mr Nazarov's figures, a substantial amount of money remains owing to UEB and to the joint venture in the course of being wound up. The Applicant contends that Mr Nazarov has obstructed the audit process. This is disputed. The lack of progress on the audit has been cited by Mr Nazarov as not only the reason, but also the excuse for his not having paid off the indebtedness to AIAG as promised in the Athens Agreement: his case is not merely that he does not know how much to pay, but that the time for

payment has not yet arrived. I do not have to resolve the issue of why the audit has not yet been completed, and it may be that work done in the context of this application to establish the balance can be used by the parties to provide the certainty the abortive audit has failed to supply. It is open to the parties, if they are genuine in their wish to see the matter of the audit settled, to adopt the work done by their respective accountants in this application as a new starting point.

59. The Bailiff's attention was drawn to the fact that payments had been made to reduce the UEB overdraft, but it is pointed out that a sum in excess of US\$6 million was outstanding as at November 2000. The Bailiff would have been aware, from the affidavit itself, that in the summer of 2000 Mr Nazarov had written to UEB querying the amount of the overdraft and asserting that no more than US \$2.4 million was due. In fact, when the Applicant became aware of this correspondence, Vardis wrote to Mr Nazarov on 21<sup>st</sup> July 2000 suggesting that he discharge at least the amount which he believed to be due. But this did not happen.

60. A number of matters are pleaded as instances of breach of the partnership agreement and/or frauds by Mr Nazarov. Some of those were not dwelt on in the evidence or submissions before me, but briefly referred to. At the heart of the case is the allegation that Mr Nazarov set up another company, Ansol AG, in March 1998, in which he was interested but the Applicant was not, and he, AG and TadAz agreed together to enter into a barter contract with AG. This was done on 1<sup>st</sup> April 1998. Under that contract

TadAz agreed to ship nearly US\$3 million worth of aluminium to AG, although there were insufficient deliveries of aluminium to AIAG to keep the account with TadAz in proper balance. The Applicant points out that TadAz bound itself to supply over 26,000 metric tonnes per month to AG, thus creating a situation where not only could it not satisfy its obligations to AG, it could not possibly honour its prior obligations to AIAG. Effectively, they are alleged to have diverted aluminium from the partners vehicle to Mr Nazarov and his vehicle Ansol AG. The existence of this contract between TadAz and AG is said to have been kept secret from the Applicant by Mr Nazarov, Ansol AG and TadAz.

61. Mr Nazarov denies having done this secretly. He relies on the terms of the fax of 25<sup>th</sup> March 1998 to show that the Applicant knew that AIAG would not be receiving the aluminium after 19<sup>th</sup> March. I have already referred to the deficiencies of the evidence before the Bailiff on this point. It is clear that Mr Nazarov does not produce evidence that the Applicant knew about Ansol AG, and he has not sought to suggest that the Applicant knew exactly where the aluminium was going after supplies to AIAG dried up. Exactly what the Applicant thought was happening will doubtless be explored at trial.
62. The Applicant contends that it takes about 3 months for aluminium to go through the manufacturing processes at the plant; accordingly, he says, the first shipments of aluminium made to AG could not have been manufactured from raw materials supplied by AG. Instead it would have

been manufactured from raw material supplied by AIAG. Mr Nazarov says this is not so, because in fact stocks of alumina were very low. In any event, the contract with AG provided for AG to receive more aluminium than could have been produced from the raw materials which AG agreed to supply. The Applicant was not told about the formation of and contract with Mr Nazarov's company AG.

63. Mr Nazarov contends that the entire UEB overdraft outstanding as at 19<sup>th</sup> March 1998 was already secured by aluminium released from the plant. Be that as it may, the overdraft was not extinguished. His forensic accountant, Humphrey Creed of Horwath Clark Whitehill, acknowledges an indebtedness of AA/AIAG to UEB of US\$3 million as at November 1998, with queries outstanding as to the balance (the total indebtedness as at that date was said to be close to US \$ 6 million). He accepts that at that date TadAz owed approximately US \$93 million to AA/AIAG. (The Applicant does not accept the adequacy of this figure). This debt, of course, had arisen because AA/AIAG had supplied TadAz with raw materials and working capital which had not been repaid to it out of the proceeds of sale of aluminium. Mr Nazarov contends that TadAz was at liberty to choose to supply aluminium to new third parties providing new supplies of raw materials, because it was important to keep the plant going. First of all, there is no evidence that TadAz was making these choices at all; to all intents and purposes it was Mr Nazarov who was changing the identity of TadAz's contracting party, and as it suited him, so

TadAz went along with it. After all, from TadAz point of view it was still dealing with Mr Nazarov and his Moscow office. This was important: Mr Ermatov has himself deposed to the fact that TadAz cannot switch suppliers easily, because it takes several months to put the necessary arrangements into place: see paragraph 6 of his affirmation dated 7<sup>th</sup> June 2001. The evidence discloses a strong case for saying that it was Mr Nazarov's unilateral decision to stop using the credit facility backed by the Applicant's family. Mr Nazarov's argument amounts to a suggestion that a hopelessly insolvent manufacturer is at liberty to decide to keep on trading and to move on from one supplier to another whenever a large balance has been run up. That is an untenable proposition as a matter of law, nor does it make commercial sense.

64. The Applicant alleges that once AG had been exposed Mr Nazarov secretly set up Ansol Guernsey in September 1998 to continue the diversion of aluminium to his own vehicles. In his first affirmation, which was, of course, not before the Bailiff, Mr Nazarov gives an explanation of why he stopped using Ansol AG. His case is that he would have wished to change the directors and knew no suitable Swiss; moreover it was not possible for Russians to work in the AG offices in Zug without work permits, which they could not obtain. He therefore chose to incorporate a Guernsey company, Ansol Guernsey, and make use of an English company, the 7<sup>th</sup> Respondent, which would provide consultancy and management services to Ansol Guernsey. It may be that the difficulties which Mr Nazarov

speaks of are absolutely true. However that, it seems to me, begs several questions. It does not address the issue of why the Applicant was not kept informed. It does not address the issue of why Mr Nazarov continued to correspond with the Applicant on AG's letterhead; even as recently as 8<sup>th</sup> August 2000 Mr Nazarov wrote a letter to Vardis Vardinoyannis on the letter headed paper of Ansol AG giving the impression, as I read it, that AG was still actively trading in aluminium with TadAz. It does not explain why Mr Nazarov changed his mind about the Swiss directors; he describes them as "Rosenberg" men, but the court has not had any explanation of why, when and how they became objectionable to Mr Nazarov and how he managed to persuade the Swiss directors to allow him to continue to correspond on the AG letterhead and assign a debt owed by TadAz to AG to Ansol Guernsey. I find the explanation given superficial. I have also noted the advice given by Mr Shusko to Mr Nazarov in August 1998 that there were advantages in moving the Ansol structure to the Channel Islands chiefly:

- a. Zero tax compared to 4.9-9.98% in Switzerland; with an estimated annual profit of US \$50 million this would confer considerable advantages;
- b. Political stability;
- c. No need to appoint local directors;
- d. Correspondence and audits would be in English, which would be an advantage when dealing with international banks;

- e. No problems with cash transactions because no tax liability; contrast the position in Switzerland where the tax authorities would be vigilant about seeking documentary proof for payments;
- f. Better positioning for a flotation on European stock exchanges .

65. I also note that Mr Shusko's note recommends that Mr Nazarov should take the TadAz long term contract in the name of the new proposed Channel Islands Ansol Company and not in AG, thus confirming the strong impression which I have had from the evidence that he makes the choice and TadAz is content to contract with any entity put forward by Mr him. Mr Shusko describes this a contract concerning the "management" of TadAz.

66. Ansol AG has been defunct for some time. It may even be in some process of liquidation, as Mr Nazarov suggests. Contradicting Mr Nazarov's assertion that he could not get the directors of Ansol AG to act in accordance with his instructions, on 30<sup>th</sup> December 1998 Ansol AG assigned to Ansol Guernsey the right to recover amounts outstanding from TadAz in the sum of US\$20 million, such sum to be repaid by the supply of aluminium to that value. On the same day, it is alleged, Ansol Guernsey entered into a contract, described in these proceedings as the First Ansol Guernsey contract, with TadAz, under which it acquired the sole and exclusive rights for one year to sell raw materials to TadAz and TadAz undertook not to supply aluminium to any third party without Ansol's agreement. A second contract is believed to have been entered into in

December 1999 and a third, in December 2000, for 5 years. These are also, on both sides, said to be exclusive agreements.

67. These contracts meant, the Applicant argues, that Ansol AG was no longer going to receive any aluminium from TadAz and would be unable to discharge its obligations under the Athens Agreement. Equally, the effect of the agreements with Ansol Guernsey was that TadAz could not hope to discharge its liabilities to the partnership because all its production was tied up in shipments to Ansol Guernsey.

68. The manner in which Ansol Guernsey conducts its trade was explained in the affirmations of Mr Shusko. Mr Shushko speaks excellent English and has acted as the translator for Mr Nazarov in these proceedings; his own evidence is given in English and does not require translation.

69. Ansol Guernsey carries on the business of supplying raw materials to TadAz. I am told that Ansol Guernsey has a substantial business. Ansol Guernsey supplies raw materials and other services to TadAz under a barter contract. Unlike the contracts which TadAz entered into with AA/AIAG or even Ansol AG, the Ansol Guernsey contract is an exclusive one. TadAz agreed not to supply aluminium to any third party without Ansol Guernsey's agreement. Thus AA/AIAG was not going to receive aluminium from TadAz in satisfaction of its debt without the consent of Ansol Guernsey. Nor would Ansol AG thereafter receive any aluminium which it could sell to satisfy the debt as provided for by the Athens Agreement.

70. Ansol Guernsey also arranges for the supply of these raw materials and services by others and takes an assignment of the third party's debt. When aluminium is then shipped to Ansol Guernsey, it sells the metal and repays the third party. It takes finished aluminium from TadAz in payment. From this account, it appears that Ansol Guernsey could, if it wished, make arrangements with the Applicant to pay the amounts outstanding to UEB and the partners in AA/AIAG and recoup the balances out of the sales of aluminium.

71. Following production the aluminium is shipped by rail from Tadjikistan to Tallinn, where it is stored. Some consignments go to the Black Sea or Iran. The shipping of aluminium to Ansol Guernsey or its order is financed by CAI in London which advances funds to it against a pledge of the finished aluminium as from the loading of the metal on to the wagons at TadAz. The pledged metal is then held to the order of CAI while on the wagons and while in store at Tallinn. Ansol Guernsey sells the metal to third parties, usually on long term contracts with delivery normally being at Tallinn. The price is usually set by reference to the prevailing prices on the LME at the time of delivery. Ansol Guernsey hedges its exposure on the LME. Immediately prior to delivery to the third party buyer, Ansol fixes the price, closes the forward open hedging contract and raises an invoice at the applicable price. The buyer pays CAI, which releases the goods to the buyer. The proceeds of sale go first to the repayment of the financing loan

on the consignment plus interest and bank charges and the balance is credited to Ansol Guernsey's account.

72. Ansol Guernsey also trades aluminium from other sources. For example, it buys aluminium from Russian Aluminium ("Rual") at prices fixed by reference to LME prices. It turnover is said to be in the order of US\$55million per month, about half of which is financed by CAI in the manner which I have outlined.
73. When an unusually high number of shipments are to be made, Ansol Guernsey may have to go to other sources of finance.
74. As might be expected, the major component of the cost of raw materials is the price of alumina. Ansol Guernsey buys alumina from suppliers in the market including Transworld (Aluminium) Limited. In order to support these purchases, it must provide standby letters of credit for the duration of the contract. At least one of these letters of credit was issued by UBS. UBS would issue an individual letter of credit for each consignment of alumina shipped against a deposit plus Ansol Guernsey's undertaking to replenish its safekeeping account at UBS up to required levels. UBS also has custody of the Bills of Lading in relation to the consignments. This undertaking avoids the necessity for Ansol Guernsey to replenish the account, thus tying up its cash. The availability of this type of arrangement at any given time will depend upon UBS' willingness to accept an undertaking from Ansol Guernsey in place of the cash or other security.

### Has the court got jurisdiction over this claim

75. The Respondents complain that the only connection which this matter has with Guernsey is the fact that Ansol is a Guernsey company. That may be so, but it is enough; provided that there is a cause of action against Ansol Guernsey this court has jurisdiction over that company as of right. The incorporation of Ansol Guernsey came after the fraud began and it is said to follow from that fact that there is no case against it. It is also pointed out that the law governing the obligations between the partners, including those arising out of the Athens Agreement, is not Guernsey law, and this would appear to be prima facie correct, notwithstanding the difficulties in identifying which law does apply. It is not appropriate for the court to embark on a general inquiry into that issue. It is for the Defendants to raise when an Application is made for leave to serve out of the jurisdiction or to set aside such leave. There is no litigation proceeding in any foreign court at all, and no obvious and convenient jurisdiction which readily presents itself as the obvious forum for the resolution of this dispute: see **The Abidin Daver [1984] 1 AC 398 per Lord Diplock at 411**. There are tort claims also, and indeed the primary claim lies in the torts of conspiracy and inducement to breach. Ansol Guernsey and Mr Nazarov are said to be co-conspirators and it is also alleged that Ansol Guernsey procured various breaches by Mr Nazarov of his partnership obligations and of the Athens Agreement. I accept the submissions made by the Respondents that if there is no good arguable case against Ansol Guernsey then this court has no jurisdiction to entertain the case. The only basis upon which

the court would have jurisdiction to entertain the claims against the other Respondents would be if they were necessary or proper parties to a claim against Ansol Guernsey. The claim has no other real connection with this jurisdiction. I also agree with the Respondents that on an Application for permission to serve out of the jurisdiction it would be open to them to invite the court to examine the claims against Mr Nazarov carefully to ensure that the proper limits of this principle were respected. However that Application is not presently before me, may never come before me and I say no more about it.

**Is Guernsey the proper forum for the Resolution of this dispute?**

76. This point is really taken for Mr Nazarov's benefit, since it would be difficult for a Guernsey company to say that Guernsey was not an appropriate jurisdiction in which to try a claim arising out of the common law torts of conspiracy and procuring breach of contract. Mr Nazarov has chosen to use Guernsey for one of his corporate vehicles. As the advice given to him by Mr Shusko to which I have already referred shows, he did not do so by accident but because of the real commercial and fiscal advantages which he believed this jurisdiction offered. The investigation of the claim presently made against him is inextricably intertwined with the investigation into the activities of Ansol Guernsey. The Respondents contend that the Applicant must establish that Guernsey is clearly the appropriate forum for the trial of the action. They say that it is not, and that Tadjikistan would be the appropriate forum. In my judgment the Applicant does not, at this early stage, have to satisfy any more stringent

test than that set by RCCR 7 which is generally treated as having a similar meaning to RSC Ord. 11. The Applicant does not have to show that Guernsey is clearly and distinctly the most appropriate forum. It only has to show that there is a claim against a Guernsey national and that Mr Nazarov is a necessary and proper party to that claim. All forum points remain open to Mr Nazarov on an Application for leave to serve the proceedings on him out of the jurisdiction, or, such leave having been given, to set it aside. There is no such Application before me.

77. Evidence has been called by both sides on the question of whether Tadjikistan has a fair system of civil law and whether it would be possible for there to be a fair trial of any issues involving TadAz given the importance of TadAz to the national GDP. Authorities have been cited on the question of whether or not it is permissible to compare the procedures of different countries in establishing the appropriate forum, e.g. **Amin Raheed Shipping Corporation v Kuwait Insurance Co Ltd [1984] AC 50**. It seems to me that such evidence and the arguments which accompany it is entirely premature. The issue is whether the Applicant has a good arguable case against Ansol Guernsey, and whether he has a good arguable case that Mr Nazarov is a necessary and proper party to that case. I say nothing about TadAz, for no argument has yet been advanced on the joinder of TadAz.

**Has the Applicant got a good arguable case against Ansol Guernsey?**

78. This is crucial. In my judgment the Applicant does have a good arguable case against Ansol Guernsey. I have already stated that the Applicant has a good arguable case that his relationship with Mr Nazarov imposed duties of good faith and fair dealing on Mr Nazarov, and that it would be a breach of Mr Nazarov's duties to divert business, business opportunities or aluminium to his private vehicles during the subsistence of the partnership. It would further be a breach of his duties to his partner to prefer his own interests to the interests of the partnership during the course of the winding up. The Applicant has a good arguable case that Ansol Guernsey knew, when it entered into the exclusive barter agreement with TadAz, that if aluminium was supplied to it, Ansol AG would not have aluminium to sell and Mr Nazarov would be able, if he wished, to avoid his liabilities under the Athens Agreement. It intended that consequence when it entered the barter agreement. It knew that payment to AIAG was entirely dependent on Mr Nazarov's choosing to make it since Ansol AG was not a party to the Athens Agreement. One of Mr Nazarov's more unattractive points is that the reason why Ansol AG has no responsibilities under the Athens Agreement is because he did not have authority to sign on its behalf. He correctly points out that it was he personally who bound himself to pay off the liabilities, albeit that he was to do so from the proceeds of sale of aluminium received by Ansol AG. On the true construction of this agreement, therefore, taking his point about authority into account, he bound himself to procure the payment of the

liabilities by Ansol AG. Ansol Guernsey helped him to avoid that liability. As to the specific causes of action relied upon, there are many different variations in the pleading and I do not think it necessary to cover each one. Suffice it to say that the Applicant has demonstrated a good arguable case in at least the following respects:

79. **Conspiracy.** The allegation is that Ansol Guernsey and Mr Nazarov, with others, wrongfully and with intent to injure the Applicant by unlawful means conspired to defraud the Applicant and to conceal the fraud from him. The allegations are of an unlawful means conspiracy. Ansol Guernsey entered into trading agreements with TadAz, knowing, because Mr Nazarov's knowledge was its knowledge, that in doing so it was putting aluminium out of the reach of Ansol AG and thus enabling Mr Nazarov to say that there were no proceeds of sale out of which he was obliged to discharge the debt under the Athens Agreement.

80. Can there be a conspiracy between Ansol and Mr Nazarov, its controller? Were the charge to be one of criminal conspiracy, it could not stand: **R v McDonnell [1966] 1 QB 233** approved by the Court of Appeal in **A-G's Reference (No 2 of 1982) 1 QB 624**. In Massachusetts, New South Wales and Canada, the Respondents contend that the position appears to be the same in cases of civil conspiracy: cf **Goulart v Transatlantic Marine Inc v Enos [1970] 2 Lloyd's Rep 389**; **United Breweries v Tooth & Co Ltd (1986) NSW Lexis 6882**; **347202 BC Ltd v Canadian Imperial Bank of Commerce [1995] ACWSJ 75928**. However in Ireland, the court did not extend the McDonnell principle to a case of civil conspiracy in **Taylor v**

Smyth [1991] IR 142, where McCarthy J held that a company could conspire with the individual who controlled it. It may be that perfect accuracy requires it to be said that in this case persons supplied by Chandler Backer control Ansol Guernsey and, in relation to Ansol Guernsey, Mr Nazarov controls them. In addition, it appears that a power of attorney has been given to a Mr Gabrielan in Moscow, who runs the office and therefore has some sphere of authority, however limited that may be.

81. In England, it has been held in **Belmont Finance Corporation v Williams Furniture Limited No 2** [1980] 1 All ER 393 CA that a company could conspire with its directors, because the company had a separate legal personality. This was so notwithstanding the fact that the court might have to look to the knowledge of the controller of the company for the company's knowledge.
82. No express agreement need be proved, tacit co-operation is sufficient, so long as all parties to the conspiracy are aware of the surrounding circumstances and share the same object: **Kuwait Oil Tanker Co SAK v Al Badder (unrep)** 16<sup>th</sup> November 1998. Thus it is sufficient that Mr Nazarov, as the guiding mind of Ansol Guernsey, knew what was going on and he intended that the company should participate in what he planned to do.
83. It is not necessary for all the conspirators to have joined the conspiracy at the same time. The conspiracy can have begun before the formation of Ansol Guernsey; upon its creation and activation, Ansol Guernsey joins the

conspiracy. This may, however, mean that it is only liable for losses suffered after it joined the conspiracy.

84. Nor is it necessary for every participant to have taken part in every act, so long as what they are alleged to have done or failed to do falls within the overall scope of the common design: **Kuwait Oil Tanker [2000] 2 All ER (Comm.) 271.**

85. It has long been the law that fraud, breach of contract and combinations to commit tortious acts can be the basis for allegations of unlawful means: see **Crofter Handwoven Harris Tweed Co v Veitch [1942] AC 435 at 432; Rookes v Barnard [1964] AC 1129.**

86. The intent to injure need not be the predominant purpose of the conspiracy.

87. The law of conspiracy in Guernsey is the same as the law in England: **International Hellenic Operations Limited v Silver Falcon; Guernsey CA 20<sup>th</sup> October 1994.**

88. I am entitled to assume, for present purposes, that Guernsey law is applicable to the alleged conspiracy or, if foreign law is applicable, in the absence of evidence about what system of law is applicable and what it provides, to assume that it is the same as Guernsey law.

89. What was the role of Ansol Guernsey in the conspiracy? Ansol Guernsey, it is said, was instrumental in Mr Nazarov's breaches of the Athens Agreement. It entered the long-term barter agreement with TadAz. Ansol Guernsey co-operated with with Mr Nazarov and TadAz to ensure that TadAz did not repay its debts to the partnership save by direction of Mr

Nazarov. It knew, when it entered the contracts with TadAz, that the aluminium would be supplied to it instead of being supplied to Ansol AG. When it entered into the agreements with TadAz it knew that Mr Nazarov intended that the contracts it was signing should be a means of diverting aluminium from Ansol AG, the entity which the Applicant knew about. It knew that Mr Nazarov was diverting aluminium from Ansol AG so that he could say that Ansol AG had only got such proceeds of sale as it suited him to disclose, and thus avoid the proper performance of his liabilities under the Athens Agreement. It helped him to do that. The Applicant has a good arguable case on all these points. I do not accept the argument that once the partnership was terminated Mr Nazarov was free to pursue his own interests as he saw fit. The Athens agreement was his personal obligation to his former partner and he owed a continuing duty of good faith to the Applicant in relation to all matters to do with the winding up of the partnership or joint venture. Moreover, it is common ground that there was never any prospect of TadAz paying the debt with money. TadAz pays its debts in aluminium; it enters into barter contracts. If TadAz was to pay the debt which it owed the former partners that repayment was only ever going to come from the sale of finished aluminium. Mr Nazarov knew, and Ansol Guernsey knew, that if they tied up all TadAz's aluminium production, it would be unable to pay AIAG. The Applicant would have no means of controlling repayment of his share of the debt and would suffer loss. Mr Nazarov would continue to

have control of the aluminium produced by TadAz and could make further profits out of the TadAz relationship.

90. I accept the Respondents' submissions that allegations about allegedly secret profits made by Mr Nazarov should not be taken into account. I have ignored them.

91. **Procuring breach of contract.** One who knows of the existence of the right of another but does an act which impairs or destroys that right, commits the tort of inducing a breach of contract. It is sufficient if there is some deliberate conduct by a defendant who appreciates or is reckless as to the probable consequences to the person injured. Procurement or inducing is not necessary, though often present. It is sufficient if the defendant deliberately engages in dealings inconsistent with the contract: see **Clerk & Lindsell on Torts, 18<sup>th</sup> edn, para 24-49**. Thus by deliberately entering into the barter contract with TadAz, Ansol Guernsey did an act which it knew to be inconsistent with the Applicant's right to have the Athens Agreement performed.

92. **Locus.** Has the Applicant any real right to bring the claim? There is a dispute over the question of whether the use of a corporate vehicle to carry out the partnership or joint venture business prevents the Applicant from claiming in his own name. He argues, supported by evidence from his Liechtenstein lawyers, that he is entitled to sue. This is disputed by the Respondents, whose own Liechtenstein lawyers have produced evidence to the opposite effect. However the Applicant also says that the

partnership survived the interposition of the company, and in any event the Athens Agreement was a contract to which he was a personal party. Although this is by no means the strongest part of the Applicant's case, I am satisfied that he has shown that he has a good arguable case on locus.

93. The Applicant says that the conspiracy has led to him suffering a loss of US\$51 million. Mr Mazur, his witness, originally calculated the total debt of TadAz to AA/AIAG as US \$127,704,481. A 40% share of that figure is US \$51 million odd. Mr Mazur admits that this does not take account of expense, which would reduce it, or of interest, which would increase it. Thus it would have been plain to the Bailiff that this was not an exact figure. I shall say more about quantum later. The point is taken that the claim for loss is merely a reflection of the loss suffered by AA/AIAG. In **Johnson v Gore Wood & Co [2001] 1 All ER 481 HL**, Lord Bingham of Cornhill, who delivered the leading speech, re-iterated the principle of corporate autonomy and reminded courts to be vigilant in their scrutiny of pleadings to ensure that claims by shareholders were only brought for losses separate and distinct from the losses suffered by the company. In the present case, TadAz owes a debt to AIAG, for the recovery of which the company alone is entitled to sue. The Applicant has, as I have already found, a good arguable case that Mr Nazarov owed him continuing duties of good faith and fair dealing despite the use of the corporate vehicle. He seeks to sue, not for recovery of the TadAz debt, which is unaffected by his claim, but for the loss which he claims to have suffered as a result of the

wrongful acts which led to the termination of the partnership and the failure to perform the Athens Agreement; further, since the Athens Agreement was a contract to which AIAG and TadAz were not parties, non-performance would not be actionable at the suit of AIAG; a fortiori from any tortious procuring of such breaches. Nor is it alleged that AIAG was the victim of the conspiracy pleaded.

94. The Applicant can allege that he has suffered loss because his partnership with Mr Nazarov came to an end as a result of the latter's wrongful acts. He can allege that he has suffered loss because the Athens Agreement was not performed. He can allege that he has suffered loss because the Respondents have diverted the barter contract away from Ansol AG to themselves. It seems likely that had Mr Nazarov not diverted aluminium to Ansol AG and kept the Applicant in the dark not only could aluminium have been available to satisfy AA/AIAG and the Athens Agreement, but the partnership might not have ended when it did. Would aluminium have been supplied to AA/AIAG after the 1997 agreement ended? The relevant history shows that TadAz enters into agreements to supply aluminium with whichever Ansol entity Mr Nazarov puts forward. Had he been willing to extend Ansol BVI's or Ansol AG's contracts, I think there is a very strong case for saying that TadAz would not have objected. Had Mr Nazarov and Ansol Guernsey not entered into the 5-year contract with TadAz, it could well have been available to Ansol AG.

95. **Double actionability.** The Respondents say that in order for the conspiracy to be actionable at all in Guernsey, the test of double actionability set out at *Dicey & Morris 12<sup>th</sup> Edn rule 203* must be satisfied. Although the law in England has changed since that Edition was published, it has not changed in Guernsey. Under this rule, it is argued, the conspiracy must be actionable as a tort both according to Guernsey law and also according to the law of the foreign country where the tort took place. The authority relied upon by the Respondents is *Kuwait Oil Tanker Co SAK v Al Bader* [200] 2 All ER (Comm.) 271. The first thing which I say about that case is that it is an appeal from a judgment after a full trial of the action, which had taken place in front of Moore-Bick J with witnesses. Thus the conclusions reached by the Judge were arrived at after hearing all the evidence. The claim was for conspiracy to injure by unlawful means. The essence of the tort is injury to the claimant as a result of the unlawful act or acts where two or more people have combined to cause that injury. The Defendants pleaded that the acts complained of as giving rise to their liability took place (or largely took place) in Kuwait and that Kuwaiti law was the law applicable to the tort. Since Kuwaiti law contains no tort of conspiracy, the action failed the test of double actionability. The rule is that generally a tort committed in a foreign country is generally only actionable in Guernsey if it is also actionable in that foreign country. However, a particular issue between the parties may nonetheless be governed by the law of the country which, with respect to

that issue, has the most significant relationship with the occurrence and the parties. It is to be noted that it is not necessary for the foreign country to treat the tort in the same way, or even to recognise the same cause of action, so long as there is a right of recovery by civil action for the consequences of the same acts. Nourse LJ, delivering the judgment of the Court of Appeal, expressly approved the manner in which the Claimants had proceeded: they pleaded their case in conspiracy, without reference to the law of Kuwait, it being their case that English law applied. The Defendants pleaded that the proper law of the tort was Kuwaiti law and that the tort of conspiracy was not actionable in Kuwait. The Claimants then responded with their case on the relevant provisions of the Kuwaiti Civil Code. As the Judge had himself remarked, the Claimant was entitled to rely on the presumption that foreign law is the same as English law until the contrary is proved. It was for the Defendant to raise questions of foreign law, and if he chose not to do so, the case would be disposed of without reference to foreign law. The Court of Appeal stated that the burden lies on the Defendant to plead and prove that foreign law applies to the tort and that his conduct is not actionable under that law. In my judgment, therefore, the Applicant does not have to prove that his claim is actionable under the law of any other jurisdiction. It is for the Respondents, in due course, to plead and prove that a foreign law applies and that this claim is not actionable under that foreign law.

**Should the freezing order be discharged for material non-disclosure ?**

96. Plainly, the Applicant had a duty to the court to disclose all material facts: see *Brinks Mat Ltd v Elcombe* [1998] 1 WLR 1350 at 1356; *Thompson v Thompson* (1996) 22 GLJ 82; *Hume v Matheson Securities (Channel Islands) Ltd* (1997) 24 GLJ 60 at 72-73. From these cases, I discern the following principles:

- a. The court must be kept informed about any matters which may influence the exercise of its discretion. Advisers who are unsure of whether to include or exclude material are duty bound to err on the side of inclusion. A high degree of candour is required;
- b. Applicants and their advisers must carry out proper inquiries with a view to ascertaining the correct facts;
- c. They must make sure that Applications are carefully prepared;
- d. Innocent non-disclosure is treated more leniently than deliberate non-disclosure: See *ABCI v BFT* [1996] 1 LL Rep 485 at 490;
- e. It is the duty of the Applicant to make full and fair disclosure of all the material facts;
- f. Materiality is not a matter to be assessed by the Applicant or his advisers but by the court;
- g. If material non-disclosure is established the court will be astute to ensure that an Applicant who obtains an injunction without proper disclosure is deprived of any advantage which he may have derived by the breach of duty;

- h. Whether the fact not disclosed is sufficiently material to justify discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the Judge on the Application;
- i. The injunction will not be discharged in every case. The Judge retains a discretion to continue or re-grant the order. This is particularly so where the court would, even if there had been full disclosure, have granted an injunction, or if the punishment would be out of all proportion to the offence.

97. The Respondents say that there was substantial non disclosure in this case and that it falls into 4 categories:

- a. Allegations which the Applicant must have known to be false:
  - i. In the affidavit used before the Bailiff, the Applicant gave the impression that the supply of aluminium to AIAG had simply dried up in April 1998. However, he did know that metal would no longer be released to UEB., because he had received the fax of 25<sup>th</sup> March 1998. I accept that the omission of any reference to this fax in the affidavit was a serious, if inadvertent, error. The Applicant says that he only saw the translation of the document "late in the day", a rather imprecise term given the seriousness of the matter, and the history of supplying contemporaneous translations with Russian documents to which Mr Nazarov refers. With

some caution, at paragraph 97 of his second affidavit, the Applicant says that he did not accept that metal should be diverted to "unknown third parties".

ii. the Bailiff was told that Mr Nazarov had done nothing at all to fulfil his side of the June 1998 bargain: see paragraph 95 of the draft affidavit which was before the Bailiff. However critical the Applicant feels entitled to be about the conduct of Mr Nazarov, this statement was simply wrong. Two points were relied upon:

1. the US \$1 million to which I have referred above had not been paid. As the Applicant deposes in his second affidavit at paragraph 105, this was a mistake. Yet a letter showing that US \$1million had been paid was in the bundle, dated September 14<sup>th</sup> 1998 and originally marked for his attention. What adds to the impression of lack of care is that it is obvious to any reader of the letter that it actually assists the Applicant, because it gives the impression that Ansol AG was still trading. It seems to me that the Applicant is personally responsible for having failed to go through his evidence with sufficient care.
2. The draft affidavit also said that a payment of \$200,000 which Mr Nazarov agreed to ensure would be repaid

to the Applicant personally in respect of his expenses had not been made. As I have mentioned, this was corrected in submissions. In the sworn version it was accepted that the payment had been made.

b. Failing to disclose material documents.

- i. A number of faxes and letters are relied upon as showing that the Applicant gave the Bailiff a false impression about whether or not the Vardinoyannis family had provided all the funding which they were obliged to provide: see, for example, a fax from Mr Nazarov to the Applicant dated 19<sup>th</sup> February 1998 in which he urges the Applicant to produce more funds as TadAz is in a desperate financial position; a fax from Mr Nazarov to Vardis dated 4<sup>th</sup> March 1998 to similar effect, imploring the Applicant to provide longer - term investment and insisting that that sales of aluminium should be taken over by the Nazarov side of the joint venture. In my judgment, the Bailiff would have clearly understood, from the affidavit, that the Vardinoyannis family had not provided long-term investment, although doing so had been discussed and the need for such finance was frequently stated by Mr Nazarov to be an urgent priority. Had there been a suggestion that the Vardinoyannis family had failed to provide adequate ordinary working capital I

would take a different view, but that is not what emerges from the evidence presently before me.

- ii. Correspondence between Mr Nazarov and UEB evidencing a bona fide dispute. In the light of the matters deposed to at paragraph 99 of the draft affidavit of the Applicant, from which it is quite clear that the Bailiff was told that Mr Nazarov had corresponded with UEB to dispute the amount said to be outstanding, I do not accept that any failure to draw particular attention to the correspondence at the hearing created a false impression.
- c. Failure to draw the Bailiff's attention to relevant parts of material documents which were in the evidence before the court. Four particular examples are relied upon:
  - i. The Applicant did not refer to the letter dated 25<sup>th</sup> March 1998. This is the letter, or fax, sent by Mr Nazarov to the Applicant informing him that no further aluminium would be consigned to UEB since inadequate information had been received about the operation of the credit facility, and requesting a meeting in Athens to discuss the way forward with prospective new funders. I do treat this omission from the affidavit as serious. The Bailiff should not simply have been told that the supply had dried up in April 1998 as if there had been no previous warning of a change in the way

in which the aluminium was to be received. I accept that at the end of the day the Applicant still has a strong arguable case that what Mr Nazarov actually did was wrongful. That is not the point.

- ii. He omitted to mention the significance of the letter dated 3<sup>rd</sup> June 1998 . That is the letter from the Applicant to Mr Nazarov referring to their discussions in Paris and pressing Mr Nazarov for repayment of the UEB overdraft out of the proceeds of sale of metal which, the Applicant appeared to believe, Mr Nazarov was receiving himself; secondly, Mr Nazarov was to have provided information about how the joint venture was to continue, given that Mr Nazarov had taken control of all metal sales and purchasing of raw materials and third, Mr Nazarov was to have presented a plan for the further investment which was to provide the basis of a discussion with the head of the family, Vardis Vardinoyannis . The letter ends with an inquiry as to whether Mr Nazarov really does intend to continue the venture and stating that the writer has reached the point where he needs to come to final terms. I do not accept this criticism. The Applicant does refer to these matters at paragraph 87 of the draft affidavit. In paragraphs 86 and 87

he deals with the discussion at the meeting which the letter merely repeats.

- iii. He did not refer to a letter of 2<sup>nd</sup> April 1998. This is a fax cover sheet from the Applicant to Mr Nazarov enclosing a copy of a letter which the Applicant had sent to Mr Ermatov, seeking to reassure Mr Ermatov that it was "business as usual" notwithstanding the fact that he and Mr Nazarov were in discussions with third parties about new funding. In my judgment this letter cannot be taken in isolation from the letter of 25<sup>th</sup> March 1998 which preceded it by a few days. The two are obviously linked in some way, as appears from the fax cover sheet to Mr Nazarov. Whether the Applicant chose to send the letter to Mr Ermatov in the hope of getting information from him, or whether it was sent to protect the Applicant's position vis a vis TadAz, I cannot say. I have noted that a question has been raised by Mr Ermatov as to whether or not he actually received this fax, and the Applicant says that faxes for TadAz were usually sent via Mr Nazarov's Moscow office. I propose to focus such criticism as I make on the omission of any reference to the 25<sup>th</sup> March fax, rather than this one and the consequences, as I see them, of that omission.

d. He failed to draw attention to the few pieces of UEB correspondence which were exhibited. This point adds little to the criticism made by the Respondents of the Applicant's failure, as they see it, to draw sufficient attention to the fact that UEB knew about Ansol Guernsey in 1999 and also to the fact that Mr Nazarov had corresponded with UEB about the state of the AA/AIAG indebtedness.

e. He misrepresented the true position in certain important respects. Six specific instances are cited:

i. At paragraph 75 of his first affidavit he asserted that all monies requested had been paid. At paragraph 48 of Mr Nazarov's first affidavit he says this is not the case. This complaint is linked with the complaint in the next subparagraph. I do not accept that the Applicant misrepresented the position about this matter in his draft affidavit. There is a distinction here which the submission glosses over. It is clear that there were talks about the Vardinoyannis family making a longer-term capital investment in the plant; indeed at one stage they were interested in participating in its privatisation. But even Mr Nazarov, in his own evidence, accepts that the talks about longer term investment never came to anything and there is no evidence of any commitment being made still less of any breach of a commitment. On the other hand, they did arrange the UEB credit facility in the amounts required

for ordinary working capital from time to time, despite increasing concerns over whether the goods claimed to have been purchased out of the Moscow office had in fact been purchased or reached the plant. As I read the affidavit which was before the Bailiff, this distinction would have been clear to him, as it is to me.

- ii. It is said that paragraph 75 of the Applicant's first affidavit would have given the Bailiff the impression that the Vardinoyannis family had put their hands in their own pockets for US \$300 million to fund TadAz. I do not think that it would, as it certainly did not give me that impression when I read the draft affidavit. The paragraph in question reports what the Applicant told Mr Nazarov at a meeting in Athens on February 23<sup>rd</sup> 1998 at which there were some mutual recriminations. The evidence before me suggests that Mr Nazarov did not challenge that statement at the meeting in the context in which it was made. It is clear to me, at any rate, that this was an ongoing credit facility and not a single drawdown. The total value of raw materials supplied, taxes and creditors paid and plant repairs and upgrades paid for is indeed alleged to be in the order of US \$300 million, as the Applicant confirms in his second affidavit. In any event, one must always bear in mind that the Vardinoyannis family had

guaranteed the facility and if there was any default they would be personally liable. Thus they were exposed in a very real sense for a very considerable amount of money. That over the life of the partnership something like this figure had been provided is supported elsewhere in the evidence before the Bailiff, where the Applicant deposes to the fact that AA had supplied raw materials to the value of US\$209 million and made other payments to or for TadAz's benefit totalling US\$60.75 million. These figures can be seen in a schedule produced by Mr Nazarov's company Ansol BVI, by Anna Osadtchaya, and dated 27<sup>th</sup> August 1997. Thus the Bailiff would have been able to set this point in its proper context.

- iii. Concerning the UEB repayments : It is argued that the impression was given to the Bailiff that the repayment of the overdraft facility at UEB was all the doing of the Vardinoyannis family; but documents not drawn to the Bailiff's attention showed that Mr Nazarov had himself been in communication with UEB. He had written to UEB as recently as 30<sup>th</sup> November 2000, on the headed paper of Ansol AG, which was no longer the trading entity, referring to earlier correspondence and asking for information about the state of the account with UEB. The gist of the complaint

made by Mr Nazarov is not very clear from the letter but it appears to be that he was by no means sure that the bank was keeping separate the indebtedness of AIAG and Metalcor AG, for which he was not liable. The Applicant had, in fact, deposed to an agreement in May 1999 between AIAG, Ansol AG, Metalcor and UEB regarding the liability to UEB, which at that time was a little over US\$4.2 million. In the summer of 2000, the affidavit makes clear that Mr Nazarov was contending that the indebtedness was only about US \$2.4 million, by virtue of releases of metal made to UEB "on behalf of AG" amounting to US \$1.8 million . It is said that the Bailiff's attention was not drawn to the letter itself but in my judgment the affidavit is clear: Mr Nazarov was disputing figures supplied in relation to the account under discussion in the correspondence, asserting that sufficient aluminium had been delivered to reduce the amount to US \$2.4 million odd, but that the overdraft was still subsisting. Mr Nazarov contends that he has procured the making of substantial payments to UEB, totalling some US \$18 million against an overdraft of US \$45 million. He complains that he has not had clear statements from the bank that more liabilities were run through the account by the Applicant.

- iv. About the involvement of Vardis Vardinoyannis in AA :  
reliance was placed on what were said to be inaccuracies in affidavits sworn in relation to litigation called the Woralco litigation. The Applicant denies any inaccuracy and I do not consider this complaint to be made out or material.
- v. About the audit: the Bailiff was told that the Applicant had experienced difficulties with regard to the audit and that the Applicant's case was that Mr Nazarov was not co-operating in the audit. Complaint is made that the Bailiff's attention was not specifically drawn to a letter dated 27<sup>th</sup> June 1997 sent by the Applicant to Mr Nazarov thanking him for the co-operation which had been given to Brett Heenan, who was at that time an advisor to the Vardinoyannis family engaged in a study about the workings of the TadAz operation. This complaint is completely irrelevant. The letter is referring to a quite different exercise from the audit, which was to take place starting in 1998. In fact, in an affidavit sworn by Brett Heenan which was before me but not before the Bailiff, he makes very clear that even during the earlier exercise he had difficulties in obtaining proper information from Mr Nazarov despite his personal advantages in being a Russian speaker and thus able to communicate with Mr Nazarov directly. I do not accept that the Applicant should be penalised for

having thanked Mr Nazarov for seeing Mr Heenan and giving him assistance at the outset of his inquiries in 1997 even if the inquiries ultimately did not prove fruitful.

vi. as regards dividend payments and his active agreement as to the manner in which they should be paid: there is evidence of the payment of dividends and active agreement to that course in the affidavit which was before the Bailiff. Indeed, the Applicant explains how invoices were used, ostensibly for raw materials but coded "D" for "dividend", to get round the restrictions imposed by UEB; however, he says, UEB did come to know of this practice and condoned it. Both Mr Nazarov and the Applicant engaged in this practice and I shall say no more about it.

vii. About the meeting of 18<sup>th</sup> March and the relevance of the date of 19<sup>th</sup> March . This criticism might be valid were the Respondents able to show that the Applicant was aware of their case prior to making the application to the Bailiff. I do not understand that to be so.

98. I have therefore, accepted that serious criticism may be made of the Applicant having told the Bailiff that Mr Nazarov had done nothing at all (although I bear in mind the last minute correction at the hearing) to perform his obligations under the Athens Agreement, and of the omission

to refer to the fax of 25<sup>th</sup> March 1998 whilst relying on the 2<sup>nd</sup> April fax to Mr Ermatov.

99. How seriously should I view this non-disclosure? The Applicant says that any non-disclosure was inadvertent. I accept that. But the Applicant failed to read his own affidavit with sufficient care. Had he done so, he would have spotted the errors in relation to the payments. Had he read the exhibit to his own affidavit, he would have seen the document showing that the US\$ 1 million had in fact been paid. He would probably have remembered that he had in fact received US \$200,000. Careful preparation is essential to applications made without notice. I do not think that it would be right to ignore the fact that the Applicant sought a draconian order of the type made in this case without having read his own affidavit with the greatest care. It is not as if the Application was prepared in a great rush: time was taken to conduct an investigation and put the Application together.

100. As to the treatment, or omission to deal with, the 25<sup>th</sup> March fax, I find it extraordinary that this was glossed over. I accept that there was no intention to mislead, but given that the fax was in the bundle it should have been noticed by the Applicant or his advisers, and explained, not ignored.

101. I find, therefore, that circumstances have arisen in which it is right for me to consider whether or not I should exercise my discretion to discharge the freezing order for material non-disclosure. It is within my discretion

to refuse to discharge the freezing order or to discharge it and re-grant it:  
**Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc [1988] 1 WLR 1337**  
**at 1343H-1344A.**

102. Would the Bailiff have made a different order had these matters been dealt with properly? I think not. After careful thought I have come to the conclusion that justice can be better served by refusing to discharge the order but making a special order for costs, and I will hear submissions on that after judgment. Subject to submissions, I would be minded to disallow the costs of the hearing on 4<sup>th</sup> April, and part of the costs of preparation, as a proportionate means of expressing the court's disapproval of what happened.

103. I should also consider the point made by the Respondents about the delay in making the application for the freezing order. The Applicant was aware that supplies of aluminium from TadAz had dried up for a long time before he applied to this court. He became suspicious of Mr Nazarov, he says, in 1999, but he did not order an investigation until July 2000. Nor, it is said, is there any explanation for the delay from October 2000 until the Application in April 2000. The Applicant does give an explanation of this delay. He states, in the affidavit which was before the Bailiff, that he believed that it would be better to carry on negotiating with Mr Nazarov rather than to sue him, for some time, and thought this would be a better way of securing payment. When he began the investigation in the summer of 2000, there were very large quantities of documents to be read and he became aware of Ansol Guernsey via some UEB documents which he saw

in October 2000. The Respondents produced a small bundle of UEB documents during the hearing. It is clear from this bundle that UEB was receiving correspondence from Ansol Guernsey at various times during 1999. The Applicant says that he was unaware of this until he obtained documents from UEB in October 2000. I should say that the Respondents also rely on this correspondence with UEB as evidence supporting their claim that they did not do anything secretly. The Applicant also had to investigate whether it would be better to commence proceedings in Liechtenstein. I accept this explanation. I understand that there was also some delay in serving the order, but this matter was not pressed before me in any detail.

104. Should the order be discharged if the Applicant has exaggerated his claim? There is copious evidence on quantum, and a considerable dispute, thus making it impossible to decide, without the trial of a number of factual issues, if at all, the final figure for the indebtedness of TadAz to the partnership. The limit sought and granted in the freezing order was \$55million. The Applicant puts his losses from the conduct of the Respondents at US\$51 million. It is pointed out by the Respondents that this fails to give credit for the liabilities and expenses which AIAG would have incurred. An attempt to reconcile the figures has been made by Mr Mazur, for the Applicant and Mr Creed and Mr Gemmell for the Respondents, in their reports. I will take account of the fact that in his

second affirmation Mr Mazur reduces the amount of the alleged debt to US \$119,225,417 for various accounting errors. 40 % of that is US\$47.6 million.

105. The Applicant claims to be entitled to add to that the amount owed to UEB and guaranteed by his uncle. The basis for that is not apparent to me and I will not take it into account. In his supplemental report dated 20<sup>th</sup> July 2001, Mr Creed appears to accept that UEB were owed US \$3 million by AIAG at the end of 1998.

106. After the hearing had ended, I indicated that I would accept a final submission from the parties by way of reply. The Respondents have sought to include further evidence from Mr Creed in their submissions. Both parties have sent me a steady flow of additional materials, both authorities and evidence. Some of it is not referred to in skeletons, and I am not given any information about why it has been supplied to me: the two lengthy transcripts, which I have not been asked to read, are a case in point. The liberty which I gave has been exceeded. Much of it is peripheral and much of it is more suitable for trial than for the present exercise. Much of it is disputed, and I am in no position to resolve the disputes, nor is it my function at this interim stage.

### **Dissipation**

107. The Respondents say that there is no evidence of risk of dissipation. The only case made by the Applicant on dissipation is, they say, the allegation of fraud. If there is a good arguable case that the Respondents have acted fraudulently, and acting together to divert aluminium to the

sole control of Mr Nazarov at a time when a substantial debt was owed to the partnership would be such a claim in my judgment, then it is unnecessary for there to be other evidence of dissipation. Indeed, the case can be said to be about dissipation, in one sense. Bearing in mind what happened after the Athens Agreement, I take the view that there is a risk that the right to receive aluminium from TadAz would once again be moved were the injunction not in place. Indeed, it may be necessary for the Respondents' advisers to explain the effect of the injunction with particular care to these Respondents: I note from the second affidavit of Mr Shusko in the English proceedings, dated 2<sup>nd</sup> May, the rather disturbing comment at paragraph 19 that there may "come a point at which Ansol has to assign its rights under its various contracts to other parties in order to keep TadAz operating while the injunctions are in force". Without really knowing what Mr Shusko meant by that sentence, suffice it to say that any assignment by Ansol Guernsey of its rights under the barter agreement would be vulnerable to attack as a breach of the court's order.

#### **Balance of convenience**

108. The Respondents invite me to decline to make or continue a freezing order on the grounds that the order is disruptive to Ansol Guernsey's trade. The evidence relied upon was for the most part put before the court prior to the agreement between the parties which led to the Order of 28<sup>th</sup> June to which I refer in paragraph 15 above and which was designed to create, on an agreed basis, a more flexible arrangement allowing Ansol

Guernsey to continue ordinary trading operations. Of course there is no order against TadAz, which remains free to raise finance in the market if it can. I do not doubt that TadAz finds this very difficult, but that is because of its parlous financial circumstances, not because of the order of this court. TadAz's expressed priorities are to pay current suppliers first, leaving existing creditors unpaid until a surplus is achieved. The evidence discloses that in all the years which are material to this dispute TadAz has never achieved a surplus. So there is little, if any, prospect of TadAz paying its debts to AIAG. However, large profits are being made, out of the aluminium trade with TadAz, but by Ansol Guernsey, not TadAz. Ansol Guernsey's accounts for the year ended 31<sup>st</sup> March 2000 show a gross profit of US \$38.2 million and a retained profit for the year of US \$27 million. Between 1<sup>st</sup> April 1999 and 31<sup>st</sup> March 2000 it made a loan of US \$19.6 million to another Nazarov company, Ansol Capital Limited, on an informal basis and paid out nearly US\$4.5 million in dividends. The Respondents invite me to discount the apparent profitability of the company on the grounds that the profits are all on paper. I do not see how that can be right, given the loan and the dividends. If the only profits left are paper ones, that is because the money has been stripped out by Mr Nazarov or at his direction.

109. So far as I know, the new scheme for approving payments in the ordinary course of business has worked well and the only Application which has been made to the court concerned a proposed advance to build a

sports centre, which could hardly be justified as expenditure in the ordinary course of business. Doubtless, as Mr Shusko has deposed since the making of that consent order, there are obstacles in the way of Ansol Guernsey raising new finance to provide for projects of expansion or reconstruction. In my judgment the balance of convenience lies in continuing the injunction to hold the ring and avoid the risk of further movements in the contractual rights., rendering any action against Ansol Guernsey nugatory.

#### **Fortification**

110. It is said that the Applicant has no assets in Guernsey to support the cross-undertaking in damages. No detailed submissions were made on this Application. Sensibly, it was decided to leave those submissions until after this judgment. I shall hear submissions on fortification.

#### **Disclosure**

111. Should there be disclosure as ordered by the Bailiff on 4<sup>th</sup> April or in some other, modified form?

112. Disclosure before the time has come for trial is always an intrusion into the affairs of the party who has to give it. But disclosure to enable an injunction to be made effective is sometimes a necessary evil and is a tool which is available to the court notwithstanding a challenge to jurisdiction: see **Grupo Torras SA v Sheikh Fahad (unrep) 16<sup>th</sup> February 1994 CA.**

113. In Guernsey, no general pre-action discovery order may be made: see **Silver Falcon Enterprises Limited v International Technology Operations Limited [1994] 17 GLJ 42.** However as I read that case, it does not stand

for the proposition that disclosure cannot be ordered in support of a freezing order. On the contrary, in endorsing the submission that the court can and does in proper cases make disclosure orders in support of arrest, it suggests that it can. To my mind, if the Guernsey court has power to grant freezing orders, and undoubtedly it does, it must be able to police those orders adequately.

114. The discretion to grant such disclosure should be sparingly exercised; it does not automatically follow from the grant of a freezing order: see **Bekhor v Bilton** [1981] 2 All ER 565. It is said that the current form of the order goes beyond the standard form order and amounts to a fishing expedition. That is not permitted. The Respondents have asked for a hearing on the form of that order and of course they shall have it.