Krasner v Machitski and others

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

[2005] EWHC 1787 (Comm), (Transcript)

HEARING-DATES: 3 AUGUST 2005

3 AUGUST 2005

CATCHWORDS:
Contract - Enforceability - Certainty of terms - Memorandum of agreement - Joint venture to acquire voting shares in company - Whether parties intending to enter into contractual relations

INTRODUCTION:
This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

COUNSEL:
The Claimant appeared in person; Lord Grabiner QC, D Toledano and A Boase for the First, Second, Third, Fourth and Sixth Defendants; SJ Berwin LLP

INDEX: Paragraph no

PANEL: COOKE J

JUDGMENTBY-1: COOKE J:

JUDGMENT-1:
COOKE J:Introduction[1] The Claimant (Mr Krasner) was born in the Soviet Union but emigrated to the United States about 30 years ago. He studied metallurgy in the Soviet Union and economics and finance at the University of Wisconsin where he then took an MBA. He is now a British National. He worked in the metals industry for various multi-national trading companies from 1979 onwards. He was a trader with, amongst others, Philipp Brothers in New York and later worked for Salomon Brothers International Ltd in London. He was engaged for eight years as Vice Chairman of AIOC Corporation in New York, Vienna and London and then became a senior executive of Marc Rich Investment Ltd from June 1996 to June 1998. There he supervised a number of divisions, including the non-ferrous and precious metals division. He was primarily responsible for trading relationships and projects for the Marc Rich Group in a number of

countries including the Commonwealth of Independent States.[2] In circumstances which are related later in this judgment, the Marc Rich Group began legal proceedings against him and others and obtained a worldwide freezing injunction in the Chancery Division of this court in November 1998 covering assets of up to £ 8M. That figure was subsequently reduced to £ 2m but the matter was settled in early June 1999, followed by a Court Order and confidential scheduled Settlement Agreement on 1 July 1999. Under that Order, sums apparently in the order of £ 2.3m were paid by Mr Krasner to the Marc Rich Companies.[3] Mr Krasner represented himself at the trial of this settled by leading counsel before the solicitors instructed by him ceased to act for financial reasons. I had throughout the hearing to make allowances for Mr Krasner acting as a litigant in person in his cross-examination of witnesses.[4] The First Defendant (Mr Machitski) was born in Russia and has both Russian and Israeli citizenship. He lived permanently in Russia until 1993 when his family moved to Israel before settling in the United Kingdom. His main place of residence is Moscow but he travels widely. In the Soviet Union, he studied law and then economics and worked as a civil servant throughout the 1980s before going into business on his own account in November 1989. In the 1990s, his business included timber processing, oil, gas and natural resources in Russia (the Rinco Group). He is recognised as a talented businessman with considerable entrepreneurial skills, who acquired great wealth after the privatisation of Soviet State-owned interests. In circumstances which are related later in this judgment he sold extensive gas/oil interests to Yukos in 2000 and thus came into possession of substantial liquid funds for investment.[5] Until 1999, he had never made any investments in business outside Russia. At the time with which this dispute is concerned, his English was poor. He employed two or three translators to translate conversation and documents for him and on occasions relied on Mr Krasner to translate for him at meetings.[6] Mr Machitski and Mr Krasner met socially in 1997 initially through their respective wives in London and got on well. They met from time to time thereafter. At that time Mr Krasner was working for Marc Rich, whilst Mr Machitski was in business in Russia.[7] The other Defendants are companies which form part of what is loosely referred to as the Marco Group of companies, which came into existence in the context of Mr Machitski's and Mr Krasner's endeavours to acquire a controlling shareholding in SC Alro SA., a Romanian smelting company producing aluminium in which the Romanian Government held 54% of the shares. In broad terms, Mr Krasner claims a 20% stake in Alro or the companies which hold shares in Alro, in circumstances where the shares in the ultimate holding company are held for Mr Machitski's Family Trust.

All the Defendants were represented by leading counsel, two junior counsel and SJ Berwin LLP. (Save for the Fifth Defendant, proceedings against which were stayed by consent.)Tsvetnye Metally[8] It was in the autumn of 1998 that Mr Krasner approached Mr Machitski for assistance in relation to a company called Tsvetnye Metally. In Mr Krasner's amended reply it is accepted that Novarco AG, a company within the Marc Rich Group, purchased aluminium from Ironsight Ltd, a company controlled by Mr Krasner and paid the purchase price in advance. Ironsight had itself paid $2m to Tsvetnye Metally under a separate contract with that company as a prepayment for the aluminium brought from it. Tsvetnye Metally failed to deliver the aluminium which gave rise to the claim by Marc Rich against Mr Krasner who had, according to Mr Krasner, left before the second of the relevant prepayments (totalling $2,038,497) was made by Marc Rich. On 18 November 1998 Mr Krasner went to Mr Machitski's office and, following an introduction to Mr Chigirinski, a plan was devised to enter into a deal with the liquidator/administrator of Tsvetnye Metally which had become insolvent. The deal was achieved in early 1999 by setting off the debt owed by Tsvetnye Metally to Ironsight against the purchase of one of its subsidiaries Mtsensk Aluminy. The idea was to make money out of the subsidiary company's operations. Mr Machitski and Mr Chigirinski paid the transaction expenses and invested in the operations of the company which was then owned by vehicles controlled by the three of them after acquisition from Ironsight. Mr Machitski and Mr Chigirinski had 60% of the business and Mr Krasner 40% but this was changed in April 1999 to one-third each.[9] By a contract dated 10 December 1999 Mr Chigirinski bought Mr Machitski and Mr Krasner out and Mr Krasner received exactly $2m in tranches between March and December 2000, although he had by this time already settled the Marc Rich claim against himself in respect of this transaction (In June/July 1999).[10] An issue arises between the parties as to whether or not Mr Machitski was made aware of the background to the Ironsight/Tsvetnye Metally transaction or was informed that it was Marc Rich's money which had been lost in it, as opposed to that of Ironsight. My attention has not been drawn to any documents which record the details of the Mtcensk deal save for the Debt Extinguishment Agreement of 9 September 1998, the Pledge Agreement of 2 November 1998 and the final settlement Agreement under which Mr Chigirinski bought out the interests of Messrs Machitski and Krasner.[11] It is clear however that the Marc Rich freezing injunction was issued on 18 November 1998 (the same day as the meeting in Moscow between Messrs Machitski, Krasner and Chigirinski) and that Mr Machitski was aware that Mr Krasner was in litigation with

Marc Rich long before the autumn of 1999. Mr Machitski's evidence was that, from the earliest days of their acquaintance, he had known that Mr Krasner had left Marc Rich in acrimonious circumstances and that legal proceedings had been brought against him by his former employers. Mr Machitski's evidence was also that in July/August 1999, Mr Krasner had told him that he had temporary financial problems in connection with the Marc Rich litigation which would prevent him from co-investing in Alro.[12] In his statement Mr Krasner said that, following the meeting on 18 November he told Mr Machitski that Marc Rich's money was involved. In his oral evidence, he stated that, immediately following the grant of the freezing injunction, he sent Mr Pismensky (now deceased) to Moscow to provide all the documentation in connection with the pre-payment to Mr Machitski and his advisers. He said that, based on Mr Machitski's disclosure of documents, it was clear that a copy of the freezing order had been provided with a legal file which contained documents relating to a novation of the debt/agreement to Marc Rich. He did not suggest in his statement that he had told Mr Machitski directly about the exact circumstances in which Marc Rich came to sue him, nor of the nature of its allegations of interposition of a company belonging to him which made profits at Marc Rich's expense.[13] Mr Kobzev, the lawyer acting for Mr Machitski accepted that he had, at a meeting with Mr Pismensky and Ironsight's lawyers in November 1998, received a copy of a letter of 4 November 1998 from Ironsight's lawyers to Ironsight, but said he did not receive a copy of the freezing order until autumn 1999. He said that no explanation was given of the documents he received, including the letter, and that he also received other documents with the copy injunction in the autumn of 1999 in relation to a trial involving Mtcensk when Ironsight was brought in as a third party and he needed to see its constitutional documents. He said he took no notice of the freezing order which had no bearing on the action with which he was concerned. I did not find Mr Kobzev's evidence on this satisfactory.[14] The documents disclosed by Mr Machitski include a copy of the Debt Extinguishment agreement and Pledge Agreement executed in the autumn of 1998. I do not see how the arrangements which were concluded between Mr Krasner, Mr Machitski and Mr Chigirinski could have been agreed without some detailed understanding on the part of those advising Mr Machitski, if not Mr Machitski himself, of the inter-relationship of Novarco, Ironsight and Tsvetnye in connection with purchase of the aluminium over which the disputes had arisen. The debt of Tsvetnye to Ironsight recorded in the Debt Extinguishment agreement became secured by a pledge of the Mtcensk shares under the Pledge agreement which entitled Ironsight to realise the

shares in the event of non-payment of the debt by 18 November 1998. It was this which gave rise to the possibility of investment by Mr Machitski, Mr Chigirinski and Mr Krasner.[15] In considering the various possible mechanisms for salvaging the situation, the letter of 4 November 1998 must have been considered by lawyers or advisers to Mr Machitski. This referred to Novarco, a Marc Rich company, and to issues relating to the revocation of Iron sight's offer to Novarco and the question of any acceptance by Novarco AG of an offer. The letter also refers to an analysis of"the company's relations with Novarco . . . with a view to nullifying the agreement on assignment of the original purchase contract between Ironsight and Tsvetnye."Mr Krasner made reference to this in his evidence and it seems to me that, in purchasing any shares in Mtcensk, any buyers would have had to explore Ironsight's title to sell the shares in the context of potential issues about a prior assignment/novation of the contract to Novarco.[16] In the light of what has been disclosed, I am satisfied that on 19 November 1998 Mr Pismensky flew to Moscow, after Mr Krasner was notified of the injunction, with copies of the correspondence between Marc Rich, Ironsight and Tsvetnye as Mr Krasner said in evidence, and that these documents then came to the attention of Mr Machitski's advisers. In the circumstances, there must have been some knowledge in Mr Machitski's camp of the Ironsight purchase from Tsvetnye and the Marc Rich purchase from Ironsight, even if the exact nature of the Marc Rich allegations was not directly explained. The general nature of Mr Krasner's problems with Marc Rich in the context of the purchases would have become obvious and it would make no sense if Mr Machitski was unaware of this in general terms, even though I find that Mr Krasner never told him directly about them.[17] I find that Mr Krasner did not inform Mr Machitski on 18 November of the true state of affairs between himself, Marc Rich and Ironsight but in subsequent discussions and by virtue of the documents to which I have referred, the position became known to Mr Machitski and his advisers.ElephantX.com[18] Another joint project was concluded in 1999 between Mr Machitski and Mr Krasner, involving the purchase of shares in an American IT company. In this connection Mr Machitski made a loan of $1.5m to Mr Krasner at 6% pa interest to enable him to invest a similar sum himself. The investment was a failure but the loan was repaid in full with interest to Mr Machitski in February/March 2000. The loan, supported by a charge over Mr Krasner's shares in ElephantX.com as security, was documented in a letter agreement of 27 September 1999 (with considerable amendments in manuscript) together with a charge over the shares dated 5 November 1999.Citala[19] n the summer of 2000 Mr Machitski and Mr Krasner also jointly invested in a

high-tech Israeli company called Citala but this investment was also a failure. Mr Krasner and Mr Machitski each invested $500,000 initially but Mr Machitski later invested a further $2m or so, which was effectively lost by the spring of 2004.[20] Mr Machitski places reliance on these enterprises in which he and Mr Krasner were involved, because they were formally recorded in detailed documents drafted by lawyers and because they show Mr Krasner's ability and willingness to invest money in these projects whereas, according to Mr Machitski, he was not prepared to do so, in Alro.[21] Mr Krasner drew a distinction between such projects which were one-off investments in which he was prepared to put money, and Alro, to which I now turn, which involved continuing work on his part for a minority share, where he was not prepared to invest and where there was, he said, a formal Memorandum of Agreement, drafted by a lawyer, which set out the basis of the parties' co-operation and which provided for Mr Machitski alone to invest funds and for him (Mr Krasner) to invest time and effort in achieving their joint purpose.[22] Because of the importance of the Memorandum of Agreement and the arguments concerning it, I now set out the prior history of the Alro Project.The Alro Project[23] Whilst working at Marc Rich, Mr Krasner knew a trader there, Mr Stefan Arnswald who left Marc Rich in 1998. In early 1999 he informed Mr Krasner of a business opportunity of which he had become aware. In order to qualify for funding from the World Bank under its Private Sector Adjustment Loan Agreement, the Romanian Government was required to privatise a number of state-owned companies including SC Alro SA (Alro) an aluminium smelter and the only aluminium producer in Romania. Another such company was SC Alprom SA (Alprom) which owned a rolling mill and extruder, making basic components from aluminium. Mr Arnswald considered the privatisation of Alro and Alprom as an investment opportunity.[24] At that time Alro was owned, as to 54% by the Romanian Government, 10.5% by a Romanian company called Conef, 10% by the Romanian Investment Company (managed by Foreign & Colonial in London) and about 6.6% by Broadhurst Investments Limited, with other small shareholders holding the balance. Alprom was at that time owned as to 70% by the Romanian Government and 10.7% by Conef. Conef had a seat on the board of directors of both Alro and Alprom and also owned shares in other Romanian non ferrous metals businesses.[25] Mr Arnswald introduced Mr Elian to Mr Krasner. Mr Elian owned a small percentage of shares in Conef but had various pre-emption rights which enabled him to acquire the balance of 99.93% of Conef. According to a fax of 7 February 1999 from Mr Elian to Mr Arnswald, a plan of action had been devised to purchase 51% of Conef for $3-4m, thus

acquiring 10.5% of Alro, to purchase 4-5% of shares in Alro from the market at about $3-4m and to purchase about 12-13% of Alro from the Romanian State for a maximum price of $13m ("probably a lot less"). Thus 28-29% of Alro would be obtained for less than $21m which, together with the shareholding of Broadhurst and the Romanian Investment Fund (estimated to increase by then to 25-30%) would allow for an effective takeover of Alro.[26] Mr Krasner thought that he received a copy of this fax in April/May 1999 and on investigating the matter, understood that the Romanian Authorities wanted to proceed rapidly with privatisation. In May 1999, the State Ownership Fund (APAPS) sought the help of Investment Banks for this purpose by placing an advertisement in the Financial Times.[27] It was in early June 1999 that Mr Krasner and Mr Machitski met at the latter's house in London and discussed a proposed investment in Alro in general terms. One or two days later a further meeting took place at which Mr Krasner introduced Mr Arnswald and Mr Elian to Mr Machitski. Again, all conversation was very general but Mr Krasner and Mr Machitski flew to Bucharest to investigate. Whilst there, Mr Elian organised a dinner attended by Mr Moisescu who was the President of Conef, a manager of Broadhurst Investments Limited who was a director of Alro, and a Romanian Senator. Mr Machitski was accompanied by two of his employees, including Mr Krasnov who was Mr Machitski's most senior advisor, with strong diplomatic connections.[28] Whilst in Romania, Mr Machitski and Mr Krasner visited the Alro factory at Slatina, accompanied by Mr Elian. A separate meeting took place with Mr Elian in his office at Bucharest in which, according to Mr Krasner, there was discussion of the possibility of acquiring shares in Conef. Mr Machitski accepted that the possibility of buying shares in Conef was raised on this trip, but not that it was seriously discussed. At that time Mr Elian expressed the view that the Romanian Government's 54% share in Alro was worth about $70-80M. The trip lasted for three days but there was no discussion according to Mr Krasner as to how any joint venture between them would work, whether with regard to shareholdings, investment finances or investment by Mr Krasner himself. The working assumption was that he and Mr Machitski would work together on the project but matters went no further than that although, by the time of the trip, it was clear that Mr Krasner's dispute with Marc Rich had been resolved.[29] Another issue arises between the parties as to whether or not Alprom was regarded as part of the Alro Investment. The touring party had the possibility of seeing the Alprom factory but Mr Machitski said that he had seen enough after visiting the Alro plant, according to Mr Krasner. The Alprom plant was only ten minutes drive away from that of Alro.[30] The

expenses of the trip were invoiced by Mr Elian and paid for by one of Mr Machitski's companies, ABC Trading AG (ABC).[31] On 9 July 1999, Mr Elian sent Mr Krasner a list of the main shareholders in Alro, including those previously referred to in this judgment and a further seven investors whose shareholdings totalled 9.48%. On 18 July Mr Elian listed the Investment Banks on the Romanian Government short list for assistance in the privatisation process.[32] On 12 July Mr Krasner sent Mr Machitski a note with his "thoughts on Romania", suggesting the immediate establishment and implementation of a plan which would lead towards taking control of Alro. He suggested discussions with Tendler Beretz LLC, a consultancy business in New York run by Mr Tendler and Mr Beretz who had formerly worked for Phibro-Salomon and who, he thought, could help in dealing with the World Bank in Washington and lobbying as necessary for its approval. He also suggested that he should maintain a regular contact with the investment funds holding shares in Alro and would try to develop, by the end of the month, a put/call model for presentation to the funds with a view to the possibility of concluding REPO Agreements with them. He suggested that they should discuss these preliminary thoughts, together with others set out in the note. Mr Machitski has no recollection of the details of the discussion which followed.[33] In August 1999 Mr Machitski and Mr Krasner met Messrs Tendler and Beretz on Mr Machitski's yacht in Monaco and discussed and agreed the principal terms on which Tendler Beretz would be retained, which were finally included in an agreement dated 26 August 1999 though actually signed later. The Agreement was signed by Mr Machitski and Mr Krasner jointly on behalf of ABC although Mr Krasner had no connection with that company. Tendler Beretz were to receive remuneration of $300,000 for the first year and a 5% participation in net profits of the marketing vehicle for aluminium for six years thereafter, in the circumstances set out in the Agreement.[34] Mr Tendler and Mr Beretz recommended the involvement of Dr Meir Rosenne, an Israeli lawyer and former diplomat as a project consultant. He was a partner in Balter, Guth, Aloni & Co, a large Israeli law firm. He had been ambassador for Israel to France and the United States. He was born in Romania and spoke Romanian fluently and was therefore thought to be a good choice for lobbying Romanian officials.[35] It was suggested that there was merit in being identified with the USA in the context of privatisation and Tendler Beretz proposed that Marco International Corp (MIC) should be utilised in the share acquisitions. Mr Kestenbaum was its chairman and chief executive officer and he was the son-in-law of Mr Beretz. MIC was a modest US-based metals trading company with a particular interest in aluminium.[36] On 24

August 1999, a meeting was held at Mr Machitski's house in London attended by Mr Elian, Mr Moisescu (the president of Conef) and Mr Dobra, (the general manager of Alro) as well as by Mr Machitski and Mr Krasner. Discussions centred on the possibility of acquiring Alro and Conef and the extent to which Mr Moisescu and Mr Dobra could assist.[37] This was followed by a meeting on 25 and 26 August at Mr Machitski's house where Messrs Tendler and Beretz introduced Dr Rosenne.[38] Mr Machitski's lawyer, Mr Sherman, a partner in Boodle Hatfield was also present. He was qualified in the USA and was registered to practice in England as a foreign lawyer. His specialist area of practice was International Corporate transactions. According to Mr Sherman, Mr Kestenbaum was also present and much discussion centred on the respective roles of the consultants and members of the team who were to be involved in what was then described as the "Vostok Project". No one suggests that the discussions were more than exploratory at this stage although the objectives were clear. Mr Sherman's evidence was that it was considered that it would be better to negotiate with the Romanian Government through a US or Israeli connection, rather than a Russian company, because of the perceived antipathy of Romanians to Russians. The agenda for that meeting was effectively set by a document dated 25 August and drafted in Russian by Mr Machitski but translated into English and entitled "preliminary plan of actions in respect to Vostok project" (Vostok is the Russian for East). The "strategic objective" was defined as the creation, on the basis of the enterprise being purchased, of a vertically integrated holding which would provide a consecutive industrial chain consisting of a plant producing raw materials (eg SC Alum SA which has in fact been acquired by Mr Machitski's enterprises in the last week, prior to this judgment being delivered), a power plant, a plant producing primary products (Alro) and a plant for manufacturing products out of the primary products (Alprom). The participants in the project were to include "a group of private investors (USA and Israel)". The actions to be taken involved a great deal of discussion with people in positions of political influence, the head of APAPS, consulting banks and the like. Specifically, arrangements were to be made for co-ordinating the structure of the sale of the Romanian state shareholding, for the financing structure of the purchase of the controlling stake, for discussions with the holders of the 46% of privately-owned shares, with the purpose of obtaining control over 33% plus one share and then taking part in the tender with the object of obtaining a package of shares from the state of either 18%, if the state shareholding was split into three lots for sale, of 27% if it was split into two lots or of 54% if it was sold in one lot. It appears therefore that the minimum objective was to

obtain 34% of the privately-owned shares and 18% of the state-owned shares.[39] Mr Machitski maintains that, from the outset, he always considered that Mr Krasner's involvement would be as a co-investor with him in the project, partly because of his own absence of business experience outside Russia and also because he did not then have sufficient funds available to make a substantial investment on his own. Monetary contribution from Mr Krasner was important so that he had financial risk in the same way as Mr Machitski. In his statement he maintained that the reference in his note to "a group of private investors in the USA and Israel" meant himself and Mr Krasner.[40] Following discussions at the meeting at the end of August, a retainer agreement was concluded with Mr Sherman of Boodle Hatfield who was instrumental in effecting Retainer Agreements with Tendler Beretz and Dr Rosenne. Dr Rosenne's terms of engagement, as set out in a Retainer Agreement (sent under cover of a letter from Mr Sherman dated 27 September 1999, which referred to Mr Machitski and Mr Krasner as "our clients" and was countersigned by both of them) and a Letter Agreement of 26 October 1999, included a success fee of $1m should ABC Trading directly or indirectly purchase or gain control of Alro and/or Alprom. Mr Sherman's engagement as legal adviser to the project was recorded in a letter from him dated 2 September 1999 which was countersigned by Mr Machitski and Mr Krasner with the word "agreed" in Russian. The letter was addressed to Mr Krasner and confirmed Mr Sherman's willingness to work with him and Mr Machitski on 'the Project'. Mr Sherman was also involved in setting up a retainer arrangement with MIC whereby MIC was to assist in the efforts to acquire a controlling interest in Alro by allowing the use of an affiliated company to be controlled by Mr Machitski's company ABC for payment of $150,000 in three instalments and an agreement to indemnify and to hold MIC and its affiliates harmless against any damages expenses costs or losses as a result of the agreement.[41] All these arrangements with the individual and entities involved in the project were recorded in documents which, with the exception of the retainer of Mr Sherman, were in the name of ABC but all of which were signed both by Mr Krasner and Mr Machitski. Mr Machitski's explanation for this was that, because a future agreement was envisaged between him and Mr Krasner, he wanted Mr Krasner to sign such agreements so that there could be no argument about the expenses of the joint ventures which were later incurred. Mr Krasner maintained that it showed that both were accepting liability to the consultants as part of the joint venture.The September discussions[42] Mr Krasner's evidence is that he had a meeting with Mr Machitski in the first half of September 1999 at

Mr Machitski's house in London and that this probably took place at a weekend on either the 4 or 11 September 1999 in the afternoon. No one else was present. His evidence was that on that occasion they first discussed shareholdings in the project and Mr Machitski told him that he wanted him to invest funds jointly with him in a joint venture to acquire Alro. Mr Krasner declined because he was not in a position to invest and said so, referring to his recent settlement with Marc Rich and confirming his shortage of available funds. According to Mr Krasner, he said that he was prepared to work on behalf of the joint venture in order to secure control of Alro and Alprom in return for 20% of the shares acquired. He would work effectively full-time in order to achieve the acquisitions and would obtain "sweat equity", meaning equity in return for his efforts. This, he said, was accepted by Mr Machitski who agreed to pay the ongoing expenses of the Alro project and no mention was made of any limit to any investment to be made by him. Loan finance was not discussed at all. Although Mr Machitski's initial assumption had been that they would be equal partners with equal contributions, after this meeting he said that there was consensus on a 80/20 split and a mutual understanding that Mr Krasner was never to put money in. He was never in a position to do so, nor did he want to do so in order to obtain a minority interest.[43] Mr Krasner's evidence is that at this meeting he asked Mr Machitski for a written agreement setting out the terms of the arrangement because the Alro project would take up most, if not all of his time, for a significant period in the future and Mr Machitski's response was that he would also wish to have an agreement in writing in order to avoid disputes. There was no discussion of a salary or a retainer as there was for the consultants engaged at around this time.[44] Mr Machitski's evidence was that there was no real discussion of the parameters of the proposed joint venture until about October 1999 but regardless of the date of discussions, he was clear that there was agreement "in principle" to an 80/20 split for investment by the two of them in the project and for participation in its profits. He wanted a party who had something at stake financially and the importance of securing third party debt financing was also discussed, since this would reduce the amount of the capital investment which each of them would have to make. His evidence was that Mr Krasner assured him that he had good contacts with financial institutions and that he would be able to arrange the necessary bank finance. The assumption was, in their discussions, that lending banks would require them to put up at least 30% of the total acquisition price and that the Government share holding was worth approximately $70-80m which meant that Mr Machitski would have to invest about $16-20m of his own money and Mr Krasner would have

to invest approximately $4-5m of his own funds. The balance of the purchase price, some $50m, would be debt financed by international banks with the Alro shares as security, with this bank debt being cleared from the profits of the privatised enterprise in due course. Because Mr Machitski had no business experience outside Russia, Mr Krasner was to undertake the day-to-day management of the proposed project, subject to Mr Machitski's overall control and supervision. Mr Machitski said that he would never have agreed to Mr Krasner obtaining 20% of the shares without paying for them and paying for shares alone was discussed without any alternative ever being raised.[45] Whilst Mr Machitski said that all these matters were discussed between them, he said there was no binding agreement reached between them at all. The discussions all took place without commitment and because Mr Krasner told him that he had temporary financial difficulties, he asked if he could borrow funds from Mr Machitski to pay for his proposed 20% share, in the same way as he had borrowed for the ElephantX.com project. Mr Machitski was sympathetic and told him that he would be willing to consider granting him a short-term interest-bearing loan to fund 20% of the Romanian Government share holding to the tune of about $4-5m. Mr Machitski said that because of Mr Krasner's temporary financial difficulties, he agreed that he would pay the anticipated costs associated with realising the project, namely the costs of the consultants, travel and out of pocket expenditure but that these would ultimately be shared on an 80/20 basis.[46] Mr Machitski also said in evidence on more than one occasion that he did not regard any oral agreement to be binding since the only agreements which gave rise to liabilities were those which were contained in formal documents executed by the parties. He said that all discussions prior to that were preliminary expressions of intent and that reflected his invariable practice in business life.Activities in September-November 1999[47] Mr Krasner flew to New York on 12 September to meet with Tendler Beretz and Mr Kestenbaum and then went on to an aluminium trade conference in Montreal where he met Mr Dobra, of Alro. Dr Rosenne travelled to Bucharest on 14-16 September 1999 on a fact finding visit and reported back by a letter of 27 September to ABC Trading. The letter refers to the purpose of the visit as:"the gathering of as much information as possible on the ways and means to participate in the privatisation process of the aluminium industry in Romania and in particular to gain control of Alro and Alprom."In the letter he describes a series of meetings which he conducted to that end. The meeting with the chairman of APAPS and the Israeli ambassador revealed a preference for US Jews to obtain control of the aluminium plants because they understood the mentality of East Europeans. Dr Rosenne recommended

that a letter of intent be sent.[48] It was at the end of the month that the formal written retainer between MIC and ABC Trading was concluded so that MIC could act as the "US flag" for the project. It was signed by Mr Machitski and Mr Krasner for ABC. On 29 September MIC sent a letter of intent to the chairman of APAPS expressing interest in submitting a proposal to acquire, through one of its affiliates, Alro and Alprom and to conduct a "due diligence" investigation of them. By letter of 5 October 1999, APAPS replied to MIC and to Dr Rosenne saying that work on the privatisation process would not start earlier than December 1999, explaining the prospective involvement of an Investment Bank and saying that the letter of intent would be submitted to the Bank chosen in due course.[49] Mr Krasner visited Romania again with Dr Rosenne in early October and had further meetings and reported to Mr Machitski in a memo of 8 October.[50] Mr Krasner travelled to Israel to meet with Dr Rosenne and Mr Tendler and reported back in an email, copied to Mr Machitski in which he summarised his thoughts on conclusion of the preliminary study of the projects. The areas upon which he considered it right to concentrate included approaches to the Investment Banks, the Israeli/Romanian angle, the World Bank, Washington and the investment funds which held shares in Alro. He specifically identified the private shareholdings of Conef (10.5%) Foreign & Colonial (10%) and Broadhurst (6.5%) and took upon himself the responsibility for dealing with the first two whilst allocating responsibility for Broadhurst to Tendler Beretz.[51] At around that time he met with Mr Zimmerman of Foreign & Colonial to explore the possibility of acquiring the Alro shares under his control and between 18 and 20 October he visited Romania again with Dr Rosenne and discussed with the president of Conef the possibility of buying Conef and thus obtaining Alro's shares. Once again a report on this visit was sent to Mr Machitski advising that, in addition to lobbying the Investment Banks advising the Romanian Government, there should be simultaneous pursuit of the investment funds which held shares in Alro as this could prove decisive to the outcome of the project.[52] The question of the vehicle which would acquire the shares was canvassed by Mr Sherman in an email of 27 October sent to Mr Kestenbaum of MIC. He suggested that a UK company be established as an affiliate of MIC, to be called Marco Acquisitions Ltd ("MAL"). A copy of this email was sent to Mr Machitski and there is a Russian translation of it countersigned by Mr Machitski himself with the word "agreed" written in Russian.[53] Letters of agreement dated 4 November were drafted by Mr Sherman following negotiation by Mr Krasner with Mr Elian and Mr Arnswald. The agreement with Mr Elian, signed by him, Mr Krasner and Mr Machitski (without any

reference to ABC) refers to the "acquisition of 51% or more of the voting shares of SC Alro SA" and committed Mr Elian to working exclusively with them to help them acquire the shares of Conef or alternatively the shares of Alro owned by Conef. If that objective was achieved, Mr Elian was to receive $250,000 and was to be the senior executive of a trading company which would trade Alro's production and supply raw materials supplies and equipment to Alro. He would be remunerated commensurately and would be entitled to a bonus equivalent to 5% of the Trading Company's profits on an annual basis. Mr Arnswald was engaged for a small annual figure and a bonus of $250,000 if "majority control of the voting shares of the company which is the subject of the Project" was achieved. Furthermore he was to be a senior executive of the trading company to trade the production of the Project Company with a fixed salary and a bonus related to the after tax profits.[54] ITC Management AG was a Swiss company incorporated in Zug. It traded with Alro in order to obtain as much information about its business operations. There was a UK service company Dover Resources Ltd ("Dover") which acted as its marketing arm and UK service agent and was intended to be a marketing agent for Alro products, Dover was funded by commissions received from ITC Management AG and in due course, Conef and/or Alro. Both ITC and Dover were specifically referred to in Mr Arnswald's engagement letter since his remuneration was to come from the former whilst he was to be an employee of the latter.[55] It seems that both ITC and Dover were owned by persons connected with Mr Machitski or indirectly owned by Mr Machitski himself. Dover's offices in London were used by Mr Krasner and Mr Machitski on occasions when they were in London and Mr Krasner's personal assistant, Carla Levin worked full-time from those offices.[56] Between November 1999 and the end of 2002, Mr Krasner was paid a salary of £ 6,700 per month by Dover amounting in total to £ 80,400 per annum. This was agreed at some stage in November or December with Mr Machitski after the incorporation of Dover on 4 November 1999.[57] It is against the background of work already done by Mr Krasner, exploratory work done by consultants, the conclusion of agreements with consultants signed by both Mr Machitski and Mr Krasner and the letter of intent sent to APAPS and the discussions between Mr Krasner and Mr Machitski that the Memorandum of Agreement of 6 December 1999 came to be signed.The draft memorandum of agreement[58] Mr Krasner's evidence is that, following the discussions in September 1999 in Mr Machitski's house, where it had been agreed that there should be a written agreement, he had to chase Mr Machitski a number of times for a draft written agreement to be provided. It is common ground that a meeting

did occur in late October 1999 between Mr Krasner, Mr Machitski and Mr Sherman at the offices of Boodle Hatfield. Mr Machitski maintains that the proposal for a record of discussions came from Mr Krasner and that he, Mr Machitski, was not concerned to record anything because so many matters were unknown and outside the parties' control and there was therefore no basis for any concrete terms to be set out in a final binding agreement. Mr Krasner said that Mr Machitski, whilst being chased by Mr Krasner for a draft written agreement, continued to say that he wanted one also.[59] Instructions were given to Mr Sherman to draft a document which Mr Machitski says was to be a memorandum or protocol of intent - a memorandum of understanding which was not to be a binding document. It was to record basic principles without commitment from either side with a view to those being transmuted at a later date into a binding agreement if the Project went ahead. Mr Machitski's evidence was that he always wanted Mr Krasner to be his "partner" but that because Mr Krasner never put money into the project, that never occurred. In consequence, he said that there was never a joint project, only his own project for which Mr Krasner acted as his manager, representative and co-ordinator. Mr Krasner's evidence is that the document was to be a binding agreement and that, by this agreement the basis of the joint venture was established between them, the objectives of which were successfully achieved on purchase of the controlling interest in Alro and Alprom.[60] At the meeting when instructions were given to Mr Sherman Mr Krasner acted as interpreter for Mr Machitski because of his limited English but because Mr Sherman had already been involved as an adviser to the Project and was familiar with the basic objectives, the discussion was relatively straightforward. Mr Sherman's evidence was that, as a result of his involvement in prior discussions, he was aware of the objective of the Project which was to acquire voting control of Alro which of necessity involved acquisition of some of the Government's shares. The shares acquired were to be split 80/20 between Mr Machitski and Mr Krasner. There was, according to him, no detailed discussion of financing at the meeting save that they wished to find an institutional investor for the Project. He asked Mr Machitski, via Mr Krasner whether there was a limit on the amount that he was prepared to spend on accomplishing the object of acquiring voting control of Alro and the answer was a maximum of $20M. It was clear to him that there would be a need for participation by institutional lenders or investors to make up the costs of acquiring the voting control (which, on Mr Elian's prior estimate, was likely to be $70-80m). Mr Sherman's instructions were, according to him, to set out the broad principles of what had previously been discussed. The 80/20 split was

already known and Mr Sherman's evidence was that, in early November 1999 he sent a draft document which he thought reflected the preliminary discussions between Mr Krasner and Mr Machitski to Mr Krasner.[61] The documents show that on 1 November Mr Sherman sent a draft Memorandum of Agreement to Mr Krasner together with a copy of his email to Mr Kestenbaum of 27 October which put forward MAL as the acquisition vehicle for the Alro shares. It is also clear, in my judgment, that a copy was provided to Mr Machitski by either Mr Sherman or Mr Krasner, as would be expected, although there is no record of this. However a copy of the draft, translated into Russian appears in Mr Machitski's disclosed documents and a fax dated 17 November 1999 from Mr Baroyants to Mr Krasner in Russian reads as follows:"Dear Alex,I am writing to you on the request of VL Machitski to say that having looked at the draft Memorandum of Understanding of 7November 1999, he has suggested supplementing it with the following text . . ."[62] There then followed a pre-emption clause if either party should decide to "exit the business" and a further clause providing that each of the two parties should agree with the other in exercising their votes "to counter other shareholders". If either party "should vote or act against (to the detriment of) the other" that party should pay the other party compensation equivalent to the amount of loss suffered as a result of such actions, and also a one-off fine in the amount of $10M.[63] Mr Machitski accepts that he had the draft translated, considered it and that these were his suggested additions so that it is plain that he directed his mind specifically to the terms of the agreement and to amendment of it. It does not seem that there was a further draft of 7 November, so the reference to that date may be the date when it was sent to Mr Machitski or a typographical error for 1 November.[64] On 26 November 1999, Mr Krasner met with Mr Sherman, as related in a fax in Russian from Mr Krasner to Mr Machitski of that date. According to that fax, he and Mr Sherman discussed the establishment of MAL, an agreement between Mr Krasner and Mr Machitski and an operating agreement in respect of ElephantX.com. A fax of the same date, timed at 19:00 hours, from Mr Sherman to Mr Krasner included a fresh draft of the clauses suggested by Mr Machitski, asking whether this wording was acceptable. This wording provided for a one-way penalty only, payable by Mr Krasner if he failed to vote his shares in line with Mr Machitski.The meeting of 6 December 1999 and the Memorandum of Agreement[65] On 6 December 1999, Mr Machitski and Mr Krasner met at Boodle Hatfield's offices for about 45 minutes to discuss various aspects of the joint venture, including the formation of MAL. At that meeting the Memorandum of Agreement (the MOA) was signed in the presence of Mr Sherman although

he said in evidence that he had no recollection of this at all.The MOA which was signed by both Mr Machitski and Mr Krasner reads:"December 6, 1999Between: Vitaly Machitski ('M') and Alexander Krasner ('K')PROJECT: the acquisition of voting control (51% or more) of the voting shares of SC Alro SA ('Alro'), a Romanian aluminium smelting company.BACKGROUND: M and K have been working together on the Project, have engaged consultants to assist them, have spent considerable amounts of time and money, and now wish to set down in outline form, the key elements of their co-operation.MANAGEMENT OF THE PROJECT: M shall have overall control of the Project and K shall be responsible for, and will continuously report to M in respect to, its day to day operation, including managing the activities of all retained consultants.FINANCING THE PROJECT: M shall provide a maximum amount of USD 20m to fund the acquisition. Considerable additional amounts of financing will be required from third party lenders or equity investors, and M and K will work together to obtain such financing on the best available terms.OWNERSHIP & OPERATION OF ALRO: Of the total amount of voting shares in Alro acquired as a result of their co-operation, M will own 80% and K 20%. At the time of such acquisition, M and K will enter into a shareholders' agreement with each other, which will include several key points, as follows: (1) both M and K will sit on the Management Board of Alro and K will be responsible for its commercial activities; (2) K will vote his shares of Alro in line with M, and any failure to do so will trigger a penalty payment of USD 10m from K to M; (3) If at any time M finds a buyer for his shares and if K then wishes to sell his shares, M will insure that such buyer will purchase K's shares on identical terms to those which such buyer purchases M's shares.Furthermore it is contemplated that a separate trading company will be established to source all raw materials for, and to sell finished product of, Alro. In respect to such trading company, ownership and profits will be split 80% M and 20% K, and K will be its Managing Director.INTERIM ARRANGEMENTS: M has established and owns a Swiss trading company which will operate off-take contracts already entered into with Alro. K has established a UK service company, which will be 80% owned by M and 20% by K, which will trade the product of the Swiss trading company under the terms of its off-take contracts with Alro. The UK service company will be responsible for all personnel and other expenses it incurs, and will derive revenue through a service contract with the Swiss trading company as negotiated and agreed between M and K. Profits of the Swiss trading company after payment of service fees to the UK service company, will be applied to reimbursement to M and to K of expenses which they have

incurred and will continue to incur in pursuing the Project, and then to reimbursement to M of Project consultant fees and expenses which he had incurred and will continue to incur.DURATION: The co-operation between M and K will be of indefinite duration and will only terminate if M, in consultation with K, believes that the Project will not succeed."[66] A number of matters are clear from the terms of the document. First there was to be, at the time of the acquisition of the voting shares in Alro, a further agreement, namely a "shareholders' agreement" which would include three key points. Further, other matters were in contemplation which were not specifically agreed upon, namely the establishment of a separate trading company to source raw materials for Alro and to sell its finished product. That again was to be the subject of the same 80/20 split as the Alro shares. The same 80/20 split was to apply to a UK service company to be formed to trade the product of a Swiss trading company.[67] The 80/20 split in relation to the venture is clear. The nature of the venture, with one qualification, is also clear, namely the acquisition of voting control (51% or more) of the voting shares of Alro which is described as a Romanian aluminium smelting company. The only element which is unclear in that objective is whether or not Alprom is included. The wording is however specific in referring to Alro as the smelting company, as opposed to Alprom, which was a separate company, not involved in smelting but involved in operating a rolling mill and extruding process.[68] I am unable to see how it can possibly be said that there is any room for doubt in relation to the financing provisions in the document. Mr Machitski was to provide a maximum amount of $20m to fund the acquisition, whilst it was envisaged that it would be necessary to obtain financing from third party lenders or equity investors in addition. Both Mr Machitski and Mr Krasner were to work together to obtain such financing on the best available terms. There was no provision whatsoever for Mr Krasner to provide any financing himself. Nonetheless he was to own 20% of the total amount of the voting shares in Alro which were acquired as a result of the parties' co-operation, Mr Machitski was to have overall control of the Project but Mr Krasner was to be responsible for the day-to-day operation and management of all retained consultants in order to achieve the objective. The effect was that Mr Krasner was to do the essential work to achieve the acquisition whilst Mr Machitski provided the money and was in overall control in the sense that Mr Krasner was to be answerable to him for all he did.[69] The terms of the arrangements are clear as far as they go but it is argued by Mr Machitski that the document is too incomplete and uncertain to constitute a contract binding in law and that there was no intention to enter into contractual relations.[70] I was referred to the judgment of Mance

LJ in Baird Textiles v Marks & Spencer [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737 (CA) and to his dicta at paras 59-64. For a contract to come into existence there must be agreement on essentials with sufficient certainty to be enforceable and an intention to create legal relations, both of which requirements must be judged objectively. An intention to create legal relations is normally presumed in the case of an express or apparent agreement which satisfies the certainty of terms requirement but there may be occasions when a sufficiently certain agreement is reached where, either by express agreement or implication (for example in some family situations) there is no intention to create legal relations.[71] I am unimpressed with any of the arguments raised about contractual uncertainty or lack of intention to create legal relations.i) It is neither here nor there that the Alro Project was in its infancy at the stage when the MOA was executed. It was not clear whether, when or on what terms privatisation would take place, but the objective of the Project was clearly expressed.ii) The clause which sets out the background and the actual background which I have set out in this judgment shows that there had been both time and money spent in the past, consultancy Agreements concluded which were signed by Mr Machitski and Mr Krasner acknowledging liability to their consultants, and a Letter of Intent sent by MIC, whose affiliate was to be utilised to purchase Alro shares. The parties wished to set down in writing the basis upon which they were co-operating with one another. The reason for that could only be the need for certainty as to the parties' respective obligations.iii) The terms for "Management of the Project" and "Financing the Project" are clear as is the first sentence of the "Ownership and Operation of Alro" clause. The roles that each of the two parties would have to play are sufficiently spelt out with regard to work to be done, provision of financing and ownership of shares acquired. Whilst any involvement of further equity investors would undoubtedly require further agreement between the two parties in order to change the equity split of 80/20, that in itself presents no bar to the conclusion of a binding agreement. Financing from third party lenders was to be achieved by the two parties working together to obtain it on the best available terms and this would not affect the 80/20 split.iv) There would obviously be a need, and the MOA so provided, for a more detailed shareholders' agreement at a later stage when the shares were acquired. That was a matter for further negotiation although three keys points were to be included in it. The MOA however covered the position up to the point of acquisition, that being the project covered by the MOA itself.v) The interim arrangements were again clear enough (plainly referring to ITC and Dover) whilst the contemplated separate trading company arrangements after

acquisition were similar to those which were to operate in the interim.vi) The Memorandum recognised that the duration of the Project itself was uncertain but that it would continue until the parties considered that the acquisition of 51% or more of the voting shares of Alro could not be achieved, or by necessary implication, until that objective was accomplished.[72] The language of the document does not suggest that the Memorandum was not to be binding. The reference to the parties' desire "to set down in outline form the key elements of their co-operation" does not connote any intention not to enter into legal relations. The heading of the document is "Memorandum of Agreement", the document was drafted by a lawyer for signature by the parties and was signed by both of them in presence of the lawyer after negotiation of its terms and specific amendment at the instigation of Mr Machitski and his own lawyer who negotiated that alteration with Mr Krasner. The document was plainly intended to govern the positions of the parties up until the acquisition of voting control of Alro, whereupon a further agreement would be made concerning the operation of the company itself and the parties' respective rights and obligations in relation to the shares then acquired.[73] Moreover, on Mr Machitski's own case he wrote on the top of the original signed copy of the MOA, "Romania Agreement - Machitski/Krasner" in Russian, on returning home from the meeting - an unlikely action if he considered the MOA not to be enforceable.[74] In my judgment this was plainly intended to be a binding agreement between the parties recording the essence of their co-operation to obtain 51% or more of the equity of Alro and there is no difficulty in construing its terms.[75] In para 10 of the re-amended particulars of claim, it is alleged by Mr Krasner that at around the time of the Memorandum of Agreement, the parties orally agreed that the voting shares of Alro, once acquired, would not be held personally by himself and Mr Machitski but through a corporate vehicle to be designated by them so that their respective 80/20 shareholdings would not be in Alro directly but in the relevant company or companies owning the Alro voting shares. There is little real issue about this because all the surrounding documents show that the parties envisaged the use of an acquisition vehicle affiliated to MIC, because of the perceived advantages of a "US flag" company. The 27 October email from Mr Sherman which suggested MAL as the corporate vehicle for acquiring shares was signed by Mr Machitski in agreement on 1 November when sent to him by Mr Sherman with the draft MOA. MIC, it will be recalled had, in its letter of 27 September 1999, signed in agreement by both Mr Krasner and Mr Machitski, agreed to assist them in acquiring a controlling interest in Alro and establishing an affiliated company as the vehicle for the acquisition

in the most appropriate jurisdiction. MIC's letter to APAPS expressing interest in the acquisition of the Romanian state shareholding, referred to the use of an affiliate for that purpose.[76] The MOA itself envisaged the obtaining of financing and possible equity investors which was likely to involve a holding company and Mr Machitski specifically refers in his statement to discussions in the autumn of 1999 about bringing third parties in to invest and the importance of securing third party debt financing which would reduce the amount of his and Mr Krasner's own capital investment.[77] It appears from the later discussions between the parties that what was always envisaged was a tax efficient structure with offshore companies holding the shares for family trusts set up by Mr Machitski and Mr Krasner. As appears later in this judgment, there were lengthy debates about the exact form this should take but both Mr Machitski and Mr Krasner set up trusts and companies which, it is common ground, were created for the purpose of holding shares through a chain of companies if necessary in a vehicle which itself would hold the Alro shares.[78] The 27 October email from Mr Sherman to Mr Krasner, a copy of which was signed in agreement by Mr Machitski, shows that, from the outset, it was envisaged that there would be such a company holding the Alro shares in which, directly or indirectly, Mr Machitski and Mr Krasner would have an interest. The company formed for this purpose was MAL, which was incorporated in England on 9 December 1999, three days after the MOA was signed. Mr Sherman was then appointed company secretary and Mr Krasner sole director. The shares were held by MIC, which was always intended to hold as a nominee, until November 2000.Credibility of the witness evidence[79] The two main witnesses whose credibility I have to assess are the two central characters in the dispute, namely Mr Krasner and Mr Machitski. The major issues which I have to resolve turn, to a considerable extent upon the view which I take as to the conflict of evidence between them on a number of major points, including the meeting of 6 December 1999 and the discussions between them thereafter. Mr Sherman, it might be thought, would also have relevant evidence to give about this meeting but, surprisingly, stated that he had no actual recollection of it at all.[80] The evidence of other witnesses was largely introduced as corroborative evidence, certainly on the part of those witnesses called by Mr Machitski. Mr Krasner however called Mr Teacher of his former solicitors whose evidence was clear and unimpeachable although it was limited in value. He also called Mr Braun who was straightforward in giving evidence, admitting the misrepresentations which he had made in a letter intended to help Mr Krasner obtain a mortgage and in which he put an express disclaimer of

responsibility. I consider that, for the most part, the other witnesses called by Mr Machitski had limited direct evidence of any value to give but I accepted it where it was consistent with the documents and what I regard as the inherent probabilities. Nonetheless nearly all the witnesses called by Mr Machitski were in his pay in one way or another and were defensive in answering questions put by Mr Krasner who was representing himself, which did not help in assessing their reliability. Moreover, as became apparent on cross examination, none of them, save for Mr Nastase had any real knowledge of Alro's business, nor the business of Aluminium smelting, production and trading, yet some were prepared to offer criticism of Mr Krasner's management of Alro.[81] I found Mr Nastase's criticisms of Mr Krasner unattractive. He was found by the reporting accountants to have signed the front page of the Tolling contracts, which were the subject of criticism, after receiving them duly signed by Glencore and, of all the witnesses, was in a position to know the financial position of Alro at the time when the Tolling Agreements were entered into. He purported however to be ignorant of some of the basic facts of which, as its Chief Financial Officer, he must have known. By expressing ignorance, he was able to avoid answering questions which pointed to the economic sense of the Tolling Agreements themselves. Both Mr Nastase and Mr Sventsky (and Mr Machitski himself) effected ignorance of the ownership of companies which were plainly connected with Mr Machitski, such as Dover, Pioche Consultants, Alum and ABC or were less than candid in relation to such information, of which, by the nature of their positions, they must have been aware. Mr Krasnov offered criticisms of Mr Krasner's management without any commercial experience upon which to base it and Mr Machitski's own criticisms were largely contrived. I have already commented upon Mr Kobzev's evidence in relation to the Marc Rich matter. By and large therefore I felt unable to accept the evidence of any of the witnesses called by Mr Machitski at face value and looked for other material to support it before accepting it as accurate.[82] So far as the main protagonists are concerned, I did not find that I could accept the evidence of either in its entirety. Each of them gave evidence about some matters which seemed to me to be wholly at variance with the documents and inconsistent with the events which were either recorded in those documents or established facts.[83] There were a number of areas where Mr Krasner can be seen to have acted dishonestly and to have misled this court in matters prior to this trial as well as giving inaccurate evidence at the trial.i) The main inference to be drawn from the history which underlay the Marc Rich litigation is that Mr Krasner was in truth the beneficial owner of Ironsight Limited although

he was only prepared to admit that he controlled it. The settlement with Marc Rich was an implicit recognition of liability to it in respect of the interposing of his company, Ironsight, between Marc Rich and the Russian supplier. Whilst it appears to me that Mr Machitski and his advisers must have come to appreciate the position and were not ultimately misled by Mr Krasner in this respect, the fact that Mr Krasner settled with Marc Rich in respect of allegations of secret profits is significant. His denial, in affidavits in the Marc Rich litigation, of a beneficial interest in Ironsight whilst not admitting that he had control of it, stands in contrast to his admission in these proceedings of control, said to be on the basis that he held sway over Mr Pismensky (who was said to be the beneficial owner) because Mr Pismensky had been a trainee and close associate of Mr Krasner. The obvious conclusion to be drawn as to why Mr Pismensky obeyed Mr Krasner's instructions is that Mr Krasner was the beneficial owner of Ironsight, yet he continued to deny that in evidence to this court. To talk of Ironsight as an arm's length supplier in his affidavit in the Marc Rich proceedings was therefore also inaccurate and misleading, as Mr Krasner must have appreciated.ii) It is clear that Mr Krasner caused Mr Braun to write a letter dated 26 March 2004 in support of a mortgage application being made by Mr Krasner to the Ahli Bank. The letter referred to an authorised dividend distribution at a time when the general meeting of Alro had not yet taken place at which the necessary resolution to pay a dividend had to be passed. It also referred to Mr Krasner's share of the dividend as "about £ 3m" (the equivalent of about $5.4m) and referred to him as a registered shareholder. He was by that stage a registered shareholder in respect of 100 shares but did not have a registered shareholding entitling him to £ 3m worth of the $24m worth of dividends to which the letter also referred. Mr Braun's evidence was that he and Mr Krasner discussed the content of the letter in advance and, although he worded it himself, it was drafted on Mr Krasner's instructions, (specifically including the reference to £ 3m) and that he pointed out the inaccuracy and misleading nature of the letter to Mr Krasner before sending it. He included a disclaimer of responsibility in order to avoid liability.iii) As is plain from the evidence which was given by Mr Krasner himself, the sums which were made available to him by Mr Machitski in May 2004, totalling $6.5m were framed as "loans". Mr Krasner accepts that the $3m loan was a "straight" loan, whilst contending that the $3.5m figure was an advance in respect of dividends that were his due in any event, despite the disparity with the £ 3m figure to which Mr Braun's letter referred. In an email reply to the administrator of his family trust, Mr Krasner referred to the $3m payment as

a "provisional" dividend which would be declared during the first quarter of 2005 in respect of the calendar year 2004 but which was booked in the meantime as a loan. He thus led others to believe that the $3.5m figure was a declared dividend and the $3m figure was a provisional dividend when he knew that, even on his own case, this was not so.iv) When Mr Krasner sought and obtained a Freezing Order from this court on initiation of proceedings, he did so on the basis of an affidavit which referred to the $2m and $3.5m payments from Mr Machitski in 2003 and 2004, which were framed as "loans", simply as dividends without disclosing the fact that there were specific loan agreements in respect of them. Whether or not he believed that he was entitled to payments of dividends, he failed to disclose the loan agreements which, on their face, governed the sums advanced. That betrays disingenuity in putting material before the court.v) When obtaining the Freezing Order, security was required for his cross undertaking in damages and Mr Krasner put forward the equity in the residence at Chesham Place, which had been acquired with the aid of the Ahli Bank mortgage and the "loan" payments from Mr Machitski. What he failed to disclose was that, shortly after the purchase of the house in his own name, he executed a declaration of trust of it in favour of his wife. Whilst this lack of security was remedied in May 2005, with an undertaking from his wife to support the injunction, on the inaccuracy being discovered by his solicitors, it is inconceivable that he could not have had the declaration of trust in mind at the time when the original affidavit was sworn in support of the relief sought. Moreover, although he denied in evidence before me that the purpose of the Declaration of Trust was to put the house beyond the reach of any creditors, it is clear that this was the purpose and that, this being the case, he was aware that the declaration of trust was such as to divest himself of a beneficial interest in the property which meant that the cross undertaking he was offering was valueless.[84] In considering Mr Krasner's evidence therefore, wherever it was in conflict with that of anybody else (and to a lesser extent even where it was not), I examined it closely to see whether there was anything to support it in the shape of documents, evidence from others or inherent probabilities, before accepting it. There was one major area where I was prepared to accept it, namely in relation to the 6 December meeting, the MOA and surrounding discussions, whilst elsewhere, where there was a conflict I usually felt bound to reject it, notwithstanding my caution in accepting the evidence of Mr Machitski because of the areas where I found his evidence to be incapable of belief. In each individual conflict of evidence I examined all the evidence, including that of persons other than the main characters, and weighed it against the

documents, the prior history of events and the inherent commercial probabilities.[85] As appears later in this judgment in a number of areas, I was unable to accept Mr Machitski's evidence. These are not areas where there is room for honest mistake or a failure in recollection. The evidence given was not honest, in my judgment.i) I could not accept his evidence in relation to the meeting of 6 December and the effect of the MOA which he said was agreed to be a non-binding memorandum of intent and related only to acquisition of the Government shareholding in Alro, as opposed to acquisition of a combination of privately and Government-owned shares to obtain control.ii) I could not accept what he said about the arrangement which the MOA enshrined, which he maintained was based upon discussions in which it was the mutual intention that both parties should invest funds. Nor could I accept his evidence that representations were made that the MOA contained such terms.iii) When he said that the nature of the project had fundamentally changed after signature of the MOA, inasmuch as he decided that acquisition of the privately-owned shares should be pursued, I was unable to accept that evidence because the prior history, as set out earlier in this judgment, shows clearly that the aim was at all times to acquire a controlling interest by acquiring a combination of shares from varying sources.iv) He advanced improbable explanations for the joint signature by himself and Mr Krasner of the consultants' agreements, when the obvious explanation was that they were jointly signed because, at that stage, what was envisaged was a joint venture between him and Mr Krasner which accorded with what was later set out in the MOA. In consequence they both acknowledged liability to the consultants by signing letters of commitment or retainer.[86] He was not candid, it seemed to me, about his ownership (direct or indirect), or his or Alro's connection to various companies (eg ABC, Dover, Pioche Consultants), nor as to the extent of his knowledge of the affairs of Alro, its profits and dividends, the state of the loans made by offshore companies, or the extent of refinancing available for the costs of acquisition or investment in Alro, although I accept that some reluctance may be explicable by reference to taxation issues, local law issues or other factors which have nothing to do with this action.[87] It appeared from the evidence of Mr Braun at paras 32-34 of his statement, which went unchallenged, that Mr Machitski had, after Mr Krasner's departure from Bucharest in October 2004 offered Mr Braun a contract which included remuneration for work done in the acquisition of the shares in Alro of $500,000, a 3.5% profit share in respect of the gas supply project to Romania and a salary of $180,000 per annum in respect of services to Alro and Alprom, together with an option to acquire shares in Marco Industries

BV ("MIBV") or Alro. The "preliminary agreement" which was signed but which did not constitute a binding agreement, according to Mr Machitski, included these terms but when the time came to produce a full formal agreement, the remuneration for the part played by Mr Braun in the acquisition of Alro was expressed to be for actions taken by him which constituted a "rewriting of history". It is clear to me that Mr Machitski was seeking to minimise the part played by Mr Krasner and, despite refusing to acknowledge it in cross-examination, was not above "rewriting history" if it served his purpose.[88] I was largely able to accept Mr Machitski's evidence and unable to accept Mr Krasner's evidence as to the basis upon which the project actually proceeded in the years 2000-2002 until a controlling stake in Alro was acquired and as to the content of discussions between the main protagonists after the MOA. The documents and the evidence of others is wholly inconsistent with Mr Krasner's case that he treated the MOA as applicable to the pursuit of the Alro shares once it became plain that external financing was unavailable above and beyond the $20m maximum which Mr Machitski had agreed to provide under the terms of the MOA. His failure to refer to the MOA when instructing lawyers in the summer of 2000 and April 2002 to draft an agreement between Mr Machitski and himself is telling. The evidence shows that at no time was any reference made to the MOA until Mr Krasner's letter of 3 September 2004, unless his evidence is accepted in relation to the events of October 2002, which I relate later in this judgment.[89] It might be expected that the evidence of Mr Sherman in relation to the events of 6 December 1999 and the signature of the MOA would have been decisive in respect of the conflict between Mr Machitski and Mr Krasner on this topic. Mr Sherman was Mr Machitski's lawyer: he drafted the MOA: he attended the meeting of 6 December. In his statement he said he had no actual recollection of the meeting at all although he was prepared to accept he was present as both Mr Machitski and Mr Krasner agreed that he was. This is hard to credit since the signature of such a document was self-evidently a matter of some importance in the context of a great deal of work done by Mr Sherman for the project.[90] In his statement, Mr Sherman expressed his view that the MOA was unenforceable (notwithstanding the inadmissibility of such evidence) and set out a number of reasons for this which were really matters of argument. When he came to give evidence he spoke with great authority about the sequence of events over a two year period and his involvement in them, with a considerable recollection of the significant events. I found most of his evidence reliable but there were two specific areas where he noticeably blanched in cross-examination. The first of these was when he was asked whether he

considered the MOA to be a binding agreement and stated that it was only an agreement to agree and was not therefore binding. He had no answer as to why the MOA did not state expressly that this was the case. Though this evidence of his subjective view of the enforceability of the MOA was inadmissible (in the context of the court's determination of its enforceability, as opposed to the question of express confirmation of unenforceability), I was not able to accept that this was his genuine belief, whether at the time of the MOA or at the time of giving evidence, whatever arguments in law there might be. The second area of his evidence where he was plainly uncomfortable was when he was asked by Mr Krasner about meetings between them over lunch in August and October 2004. Mr Sherman recalled the meetings but denied the suggestion that he had confirmed to Mr Krasner that the MOA was binding in law and that Mr Machitski was doing to Mr Krasner what he did to other people, namely not living up to his obligations. Whilst there was no evidence from Mr Krasner to this effect in his witness statement or in his oral evidence, I was again left with the clear impression that Mr Sherman was troubled by the answers he was giving. I could not accept Mr Sherman's evidence on either of these two points, where his discomfort was evident and I could not accept that he had absolutely no recollection of the 6 December meeting either.[91] In his evidence, Mr Sherman stated that he had not been prepared to give a statement to Mr Machitski's solicitors or to give evidence at trial unless and until he was paid the fees which he said were his due in respect of work done on the project for Mr Machitski. He said that he had valued that work at about $200,000 in October 2001 but had continued to work for another year until Mr Machitski had become dissatisfied with the services of Boodle Hatfield. Whilst Boodle Hatfield's relationship had terminated with Mr Machitski in an acrimonious manner with substantial bills unpaid, their claims for fees had been compromised in 2002 whilst Mr Sherman's own fees, which he said were charged separately as a consultant, had remained unpaid. There was no evidence of any invoice being submitted at any time until 2005, shortly before the trial. Through an intermediary, Mr Kullmann, who approached him in November 2004, he met with Mr Machitski in March 2005 and agreed on the sum of $500,000 in payment for his services. He sent an invoice to ABC which was promptly paid and then paid $200,000 of the sum received to Mr Kullmann as commission for making that recovery.The alleged representations[92] It was in these circumstances that Mr Sherman gave evidence that he did not have any recollection of the meeting of 6 December 1999 nor of the representations which were alleged by Mr Machitski to have been made thereat by Mr Krasner. I have no doubt

whatsoever that if the representations had been made then Mr Sherman would have remembered them and would have given evidence of them.[93] Mr Machitski's evidence was that, at the meeting there was no Russian translation of the MOA available and that he relied upon Mr Krasner to go through the document translating its main contents. He said that Mr Krasner"did not translate word for word but did confirm that it was essentially the same document that I had been sent in November 1999 with the amendments contained in the Baroyanets letter."[94] Mr Machitski's re-amended defence included pleas of misrepresentation by Mr Krasner at the meeting of 6 December. First it was alleged that Mr Krasner represented to Mr Machitski that the MOA reflected an agreement whereby both individuals would acquire shares upon privatisation of the Government's controlling stake in Alro following a joint contribution of funds up to $25M, provided as to 80% by Mr Machitski and as to 20% by Mr Krasner. Mr Machitski's own evidence did not support this alleged misrepresentation at all. Secondly, it was alleged that Mr Krasner confirmed that the document was essentially the same as the document Mr Machitski had reviewed in November 1999 with the amendments forwarded to Mr Krasner by Mr Baroyanets, which, if said, was true. Thirdly, it was alleged and confirmed in Mr Machitski's evidence that Mr Krasner confirmed to Mr Machitski that the document was a memorandum of intent only, which did not have legal effect and that all documents imposing obligations would be discussed in the future, when the privatisation of Alro had been announced. Mr Machitski then, according to his re-amended defence and evidence, asked Mr Krasner to check the point with Mr Sherman and Mr Machitski understood Mr Sherman to confirm through Mr Krasner, what Mr Krasner had said.[95] In addition, Mr Machitski's statement of case sought rectification of the MOA to accord with what is alleged by Mr Machitski to have been the prior common intention and understanding of the parties that both individuals were to contribute funds of up to $25m in the 80/20 proportions previously discussed.[96] I have no hesitation in finding that Mr Krasner did not state that the MOA was not intended to have legal effect, since the whole point of having an agreement in writing, from his perspective, was to enable him to know where he stood. He wanted and sought an Agreement in writing in order that there should be a binding commitment to reward him for the work he was about to do. Mr Sherman, who said he had no recollection of the meeting, would equally not have confirmed that this document had no binding effect unless he had made provision in it that this was to be the case. I cannot imagine any competent lawyer offering such a confirmation unless the document expressly contained wording which expressed that intention

and I have already found that this was not his belief at the time. Equally, I cannot accept that Mr Krasner would have said to Mr Machitski that the MOA contained terms as to joint funding of the acquisition of shares when the MOA itself said nothing of the kind. Moreover, Mr Machitski knew that it said nothing of the kind because of the prior draft which had been translated into Russian where the paragraph relating to "financing the project" was in identical terms, as was the first phrase in the "Ownership & Operation of Alro" clause.[97] Furthermore, I am clear that there was no common intention or understanding at the time of the signature of the MOA in December 1999 that Mr Krasner would make a contribution to the funding, jointly with Mr Machitski in the same proportions as the 20/80 spilt for the shares they acquired in Alro. Mr Krasner had no available funds to invest at that time and did not want to borrow to finance a minority shareholding. As Mr Machitski's knew, Mr Krasner was, I am satisfied, looking to obtain "sweat equity" of 20% and in signing the MOA after due consideration of a translation of the terms into Russian, Mr Machitski was agreeable to this. In so doing with a maximum funding on his part of $20m and an 80/20 split in the shareholdings, he was effectively valuing Mr Krasner's work as worth $5m.The alleged prior oral agreement of September 1999[98] In these circumstances it is unnecessary for me to decide whether there was a binding agreement concluded orally in September 1999 as Mr Krasner alleged as an alternative by way of amendments to his particulars of claim. However, in my judgment no concluded binding agreement can be spelt out of the discussions which took place at that time. There was no contemporary or indeed other record of any agreement made then and, if the position was clear, a reference to this might well be expected in the original particulars of claim rather than in an amendment introduced in April 2005. Whilst it would be natural to rely upon the MOA as the primary Agreement, Mr Krasner was well aware of the arguments raised in relation to it so that any alternative case as to an agreement made at some other stage could be expected in his original statement of case.[99] If the parties had made such an agreement, then it is something which might have been recorded in the MOA itself and something about which Mr Sherman might well have been instructed.[100] In essence however the position is that, as at September 1999, the Project was still in its infancy and arrangements had not yet been concluded with all of the members of the Project team who were to investigate and advise on the feasibility of it. The issues of funding had scarcely been discussed and certainly there had, on Mr Krasner's evidence, been no limit agreed to Mr Machitski's obligation in this respect. I do not consider that Mr Machitski would have bound himself to an open ended

commitment to fund the purchases of Alro shares, whatever the cost, even though third party funding was probably in mind at the time. An 80/20 split only makes sense if the parties' obligations which would entitle them to those shareholdings, were clear. At this stage of negotiations they were not.[101] On more than one occasion in the course of his evidence, Mr Machitski stated that he did not regard any agreement as legally binding unless it was contained in a formal legal document. He regarded all discussions and oral assents as no more than expressions of intent without binding commitment. I find that this was indeed his attitude, although there is no evidence that Mr Krasner was aware of it at that stage. Mr Machitski regarded the documentation relating to the terms upon which the consultants were engaged as binding, being signed by both Mr Krasner and himself, and the distinction between a signed agreement on the one hand and oral, in principle, discussions on the other, must have been apparent to Mr Krasner, whether or not he appreciated that Mr Machitski's approach to oral agreements was a basic tenet of his business practice.[102] The discussions prior to the MOA were not such as to give rise to an enforceable legal obligation and it was in order that there should be enforceable legal obligations that the MOA was executed. The MOA does not suggest that it is recording any prior agreement and in the section headed "background" the parties have expressed their desire to set down the key elements of their co-operation in this Memorandum. The evidence does not show that there was any clear agreement before that time although the general principles of co-operation were the subject of discussion and binding commitments to consultants had been made. Mr Krasner's evidence was that at the September meeting at Mr Machitski's house in London he asked for a written agreement and Mr Machitski's response was that he also would wish to have such an agreement in writing in order to avoid dispute. That appears to me to be a clear recognition of the need for an agreement in writing for the parties to be bound. Prior to that there was no intention to create legal relations.Developments in 2000[103] Mr Machitski's statement refers to discussions in the autumn of 1999 about the possibility of acquiring a "blocking packet" of Alro's shares from private shareholders based on the assumption that, by doing so, influence would be acquired and an ability to block any special resolution which other shareholders in Alro might wish to pass (with a 75% required majority). In my judgment it is clear that the purchase of privately-owned shares was always under consideration from the outset of the project, as the earlier history recited in this judgment shows. Whilst, in order to obtain an absolute majority, it was always going to be necessary to purchase part of the Romanian Government's own

shareholding, since this amounted to 54%, the build up of a substantial shareholding from private shareholders not only meant that a smaller number of shares would be required from the Government in order to assume control but that any other prospective purchasers on privatisation would be discouraged from such purchase by the presence of a substantial minority shareholder. Thus the prospects of obtaining the majority shareholding were significantly improved by substantial purchases of privately-owned shares.[104] From the outset, the shares in Conef were therefore a recognisable target. Conef not only had shares in Alro, but also owned shares in other non-ferrous metal companies in Romania so that Conef's shares were of value in themselves, quite apart from the Alro element and the accompanying seat on the Alro Board that the shareholding entailed. Mr Machitski considered that even if no further progress were made on the Project thereafter, he was likely to be able to make some profit on a sale of the Conef shares. (In this he appears to have been correct because shortly after their acquisition, Pechiney offered a premium of $6m for them). Following the MOA, Mr Machitski and Mr Krasner set about the acquisition of the Conef shares through the medium of Mr Elian.[105] In accordance with the MOA, and Mr Elian's engagement by the letter agreement of 4 November 1999, Mr Machitski gave approval for the acquisition of Conef and Mr Krasner and Mr Elian set about that process. Mr Elian's pre-emption rights to acquire the balance of the shares in Conef were utilised with funding from one of Mr Machitski's companies in March 2000. The plan was that, on acquisition, Mr Elian would sell on the Conef shares to MAL at a price of $12.305M. The conclusion of the deal was delayed because of a legal challenge by a Portuguese company which tried to block the sale but the latter's claims were dismissed by the Romanian Court in the summer of 2000. On 23 June 2000 therefore, Mr Elian bought the Conef shares and they were transferred to MAL on 27 June for the agreed price, resulting in registration of MAL as a shareholder in Conef on 4 July 2000. In consequence of the purchase, MAL was indebted, under the terms of a loan agreement, to New Time Establishment (NTE) a Liechtenstein company controlled by Mr Machitski. Following the acquisition, Mr Elian and Mr Krasner became vice presidents of Conef whilst Mr Moisescu remained president.[106] The other great benefit of the Conef shareholding was that it brought with it a seat on the boards of Alro and Alprom so that Mr Machitski and Mr Krasner, by those means, gained insight into the operation and management of those companies.[107] Mr Sherman's evidence, which I accept, is that in early 2000 he arranged meetings for Mr Krasner with two of his financial institution contacts to investigate the possibility of

participating in the acquisition of shares in Alro. Mr Krasner's evidence was that this took place in about June 2000 with a view to re-financing the Conef purchases. Mr Machitski's evidence was that there were a number of meetings with prospective lenders, in which he participated also, where there was discussion of loan financing. Mr Krasner, Mr Sherman and Mr Machitski were at one in their evidence, in saying that it was then found to be impossible to finance or re-finance existing loans with funding from institutions because of the latter's perception of the risk in buying a minority stake in a Romanian company controlled by the state, though scheduled for privatisation. Mr Machitski's complaint was that whilst the original intention was to borrow to the tune of 70% with a 30% investment by himself and Mr Krasner, this never resulted in anything because, despite Mr Krasner's prior assurance that money could be borrowed, this proved to be impossible.[108] It is clear from the terms of the MOA that in December 1999 it was recognised that considerable amounts of financing would be required, either from third party lenders or equity investors and that both Mr Machitski and Mr Krasner were to work together to obtain it. It is common ground that this proved to be impossible whilst the minority stake in Alro was being built up. There is no question of any such breach by either party in not funding or in failing to obtain external funding. The position as of today is different, since, having acquired the majority shareholding, the company which now holds it, namely MIBV has been able to negotiate a syndicated loan of $52 or 55m albeit that no draw-down has taken place. The money is nonetheless available. Alro has also obtained a facility of a similar amount.[109] The MOA provided for Mr Machitski to provide a maximum of $20m by way of funding. Whenever the discussions with the banks and institutions took place, I find that it is clear that, by the time the Conef deal was concluded, the problem in obtaining financing or later re-financing from external institutions was recognised. There is no doubt that a project which involved buying a minority stake in a Romanian company which was supposed to be privatised, with a possibility of acquiring control only at that stage, was one of considerable risk. In Romania, past privatisations had been aborted. There were in fact delays in this proposed privatisation due to political uncertainty in Romania. Parliamentary and presidential elections were fixed for November 2000 but, in the period up to that point, the Government was unpopular and privatisation was politically difficult. When the new Government was elected, it was one which was not initially receptive to the idea of privatisation or the requirements of the World Bank who were requiring such steps to be taken as a condition of providing money to the country. Both Mr Krasner and Mr Machitski, must have realised that more

than $20m of the latter's money was going to be needed to acquire the controlling interest in Alro, whether or not subsequent refinancing, after acquisition of that controlling interest might prove possible.[110] Mr Machitski's evidence was that in the spring of 2000, before the shares in Conef were acquired, he gave Mr Krasner the opportunity to purchase 20% of Conef but no agreement was reached between them. When Mr Krasner was asked about this initially he said that this did not take place because Mr Machitski knew that he had no money to invest. He then went on to say that he could not recall if the suggestion was made but did not think that it was, saying: "I would say that he did not make the suggestion to me."The draft purchase agreement for shares in Conef[111] Mr Sherman's evidence was that, following the acquisition of the Conef shares, he was being pressed by Mr Krasner to produce a draft agreement in relation to the proposed purchase by Mr Krasner of 20% of the acquired shares in Conef. Mr Sherman was clear in his evidence that Mr Krasner was asking him to do this and the contemporary documents support him in this. That evidence tallies with the evidence of Mr Machitski of discussions prior to the purchase of Conef about the possibility of such a purchase by Mr Krasner of 20% of the shares in Conef and the appreciation, at about that time, that bank financing of the acquisition of minority shares in Alro was not feasible.[112] It was in this context that I find, in accordance with the evidence of Mr Sherman, that Mr Krasner, from July onwards pressed for an agreement to evidence the "deal" which he was suggesting to Mr Sherman had been offered by Mr Machitski in relation to the purchase by him of shares in Conef (which in turn owned 10.5% of the shares in Alro). A memorandum of 28 September 2000 from Mr Sherman to Mr Machitski refers to Mr Krasner frequently asking him to prepare such an agreement over the previous 10 weeks.[113] Mr Sherman's evidence was that on September 28 he met with Mr Krasner, who had arranged for a meeting with him to discuss the matter, and was insistent that a document be drafted. In consequence, on 28 September he sent Mr Machitski the memorandum to which I have just referred and on 29 September he sent a one-page draft letter agreement under cover of a fax, addressed to the latter's translator, asking her to deliver it with her translation of the draft. This fax of 29 September was also copied to Mr Krasner at a number (020 7589 6301), which represented his home telephone line and which also served as his fax number. Mr Krasner maintained in evidence that he never received this document because his fax had broken and, by this time, he had plugged in his computer to the line on a permanent basis. Any faxes, by this stage, he sent and received from the offices of Dover Resources.[114] Whether or not

he received this draft agreement, the fact remains that he had, on Mr Sherman's evidence which I accept, instructed him to draft a document in the terms of the draft sent to Mr Machitski. Mr Krasner said he could not remember giving such instructions, but I find that they were given and that Mr Krasner must remember having giving them. Mr Machitski's evidence was that, although "the Project was going in a very different direction from that originally envisaged in the summer and autumn of 1999", he saw Mr Krasner as a potential partner and co-investor and considered it appropriate to offer him the opportunity to purchase part of the Conef investment. He was thus prepared to offer Mr Krasner the opportunity to purchase 20% of the Conef shares at 20% of their acquisition cost (about $2.461M) by borrowing from Mr Machitski in a similar manner to the ElephantX.com Project. In Mr Machitski's disclosed documents appears a draft agreement of 4 October 2000 which gave MAL a put option to require Mr Krasner to purchase 20% of the Conef shares for the same price as set out in the draft letter agreement. There is no evidence that this draft was the subject of any direct discussion between the two of them, but the existence of the two documents shows that both of them were thinking in terms of a purchase of 20% of the Conef shares for a price to be paid by Mr Krasner.[115] The draft letter agreement provided as follows:"This letter confirms the agreement which you and I have made in respect to the financing and ownership of 2,674,626 shares of the share capital of Conef SA, ("Conef") a company organised under the laws of Romania, registered with the Trade Registry Office of Bucharest under Number J 40/377/1991, and representing 99.93% of the share capital of Conef (the 'Shares'). The shares are presently registered as owned by Marco Acquisitions Ltd, a UK Company.I provide finance for the acquisition of the Shares, USD 2,460,655.92 of which we have agreed is to be treated as a loan Amount, along with any unpaid interest which at the time of the repayment may be owing, you will be entitled to ownership of 20% of the Shares, ie 534,925 shares, and I will cause such number of shares to be registered in your name or in the name of your designee in the share registry of Conef.You may repay the Loan Amount to me at any time, but in any event you will repay the Loan Amount to me upon my first written demand.You will pay interest to me on the Loan Amount at the rate of _____ % per annum, accruing daily, and payable annually in arrears, with the first interest payment due to be paid on _____ June, 2001. Note to VM/AK: perhaps Conef could pay annual dividend to cover annual interest payment on Loan Amount, and to provide a return on balance of VM's investment."[116] The draft letter also included a note by Mr Sherman to both Mr Machitski and Mr Krasner suggesting that Conef

could perhaps pay an annual dividend which would cover the interest payments on the loan amount and provide a return on the balance of Mr Machitski's investment. The draft letter provided for signature by Mr Machitski and a further signature in agreement from Mr Krasner.[117] Mr Sherman's evidence was that, having sent this draft agreement to Mr Machitski, and, as he thought, to Mr Krasner, nothing ever came of it. As he put it, it "disappeared into the ether". As he knew they were in daily contact, he never chased them, considering that they would revert to him if they wanted something done about it.[118] It was common ground between Mr Krasner and Mr Machitski that no agreement was ever reached on these terms. Mr Machitski said that discussions along the lines of the agreement had taken place prior to the purchase of Conef shares and revived after the purchase but discussions did not crystallise into any final agreement. His evidence was that the draft letter agreement reflected the terms that had been discussed and he drew attention to a Russian translation of the draft in which he had written in the figure of 8% as the relevant interest rate. He said that the matter had been discussed in September/October 2000 but ultimately Mr Krasner changed his mind and said he did not want to enter into the letter agreement prepared by Mr Sherman. This is to be contrasted with his willingness to invest with Mr Machitski in Citala in August 2000, albeit in a smaller amount.[119] The significance of this draft letter agreement, in Mr Machitski's submission, lies in the fact that Mr Krasner was prepared to press for and discuss this draft Agreement with a view to agreeing its terms and paying for a 20% stake in Conef, whereas his case now is that he was at all times entitled to 20% of the shares acquired in Alro, whether directly or indirectly, pursuant to the MOA and that he frequently asked for his allotment of shares to be made. Mr Machitski contends that this is a glaring inconsistency.[120] Mr Krasner's evidence was that there was no discussion at that time of the consequences which would follow in relation to the MOA, if Mr Machitski put in more funding than the $20m envisaged by the MOA. He said that Mr Machitski was happy to do it when funds became available to him and that, in each case where shares were purchased after this, he would present blocks of private shares for purchase to Mr Machitski with a prospective deal which he had negotiated in order that Mr Machitski could decide whether or not to go ahead. He said that the only conversation about investment of funds in excess of $20m in the context of the MOA occurred in September 2004. However he said that, when it became clear that it was difficult to obtain external financing for the purchase of minority shareholdings, he and Mr Machitski considered how to finance them and Mr Machitski referred to the money available to him, once the sale to Yukos of

his oil interests had occurred. On another occasion in his evidence however he said that, on a number of occasions there was discussion about Mr Machitski's funding and it was always agreed that his company loans would have to be repaid and would be treated as "preferential loans", meaning that they would have to be repaid first. In particular he said that such discussions took place in the summer of 2004 when the refinancing of Alro and MIBV was being considered.[121] Neither party maintains that any express new agreement was made between the date of the MOA and this draft letter agreement. If therefore the terms of the MOA were not abrogated, the only issue which arises is whether or not those terms are applicable to a situation where it had become apparent that external financing had not been utilised to purchase the Conef shares and was not going to be available for the building up of the minority shareholding which was then envisaged and which had commenced with the purchase of the Conef shares. It is plain that the parties cannot have considered that they were applicable, since otherwise this draft agreement could not have been suggested, let alone discussed and agreed in principle which is what Mr Krasner told Mr Sherman. The alternative way of looking at it is to say that the parties, by their conduct treated the MOA as at an end, because performance of its terms was no longer possible.[122] In late September 2000, Mr Machitski's financial situation had changed substantially. He had sold controlling stakes in a number of Russian companies to Yukos and had considerable liquid funds available to him for future investment. Whereas in December 1999 he could not realistically have considered purchasing a controlling stake in Alro without loan finance, he was now in a position where he could do so. His evidence was that, as the Romanian Government was delaying its announcement of its privatisation plans he thought about changing strategy and embarking on a more aggressive plan aimed at buying as many Alro shares as possible on the open market in order to acquire a substantial minority shareholding.[123] I reject the evidence that this was a major change of stance since the private shareholdings were always a target. The main objective always was to achieve control of Alro by a combination of purchases of private shares and Romanian Government shares if that route proved feasible. Mr Machitski's own agenda for the meeting in August 1999 had envisaged the build up of privately-owned shares, following which a package of Government-owned shares could be obtained, whether 18%, 27% or 54%, in circumstances where it was unclear whether the Government shareholding would be sold in one, two or three packages. At the end of the day, it was only necessary to purchase 10% of the Government holding in order to acquire control.[124] Nonetheless, I accept that there was a change of emphasis. The liquid funds

now available to Mr Machitski meant that a sustained campaign could be mounted to acquire shares in Alro with an investment by Mr Machitski which considerably exceeded the $20m maximum set out in the Memorandum of Agreement.[125] If Mr Machitski had not decided to do this, the Project would not have gone ahead and the MOA co-operation would have terminated in accordance with the "Duration" clause in it. By putting in his own funds, over and above $20M, a new element was introduced, for which the MOA made no provision as the parties knew. They recognised the MOA to be, in such circumstances a dead letter. Mr Machitski's evidence was that in November 2000 he again discussed the position with Mr Krasner, in the light of his new liquidity and said that he was prepared to allow him to co-invest on an 80/20 basis if he wished to do so. Mr Krasner's response was to say that he could not do so at that stage, but would need 12 months to decide whether he could participate using his own capital. Mr Krasner could not recall any such conversation but accepted that it might have taken place. Generally however, he maintained that there was no discussion whatsoever about paying for 20% of the shareholding which was to be built up and that both were aware of the funding situation. They knew that no bank was willing to fund the purchases and Mr Machitski was enthusiastic about using his own money in order to make the acquisitions. In his statement, Mr Krasner said that the first time that Mr Machitski claimed that he, Mr Krasner, had to buy his shares was in 2004, well after control had been obtained of Alro. This cannot be right in the context of Mr Sherman's evidence about the draft agreement for the purchase of Conef shares and I find that such discussions took place in relation to the projected further purchases of privately-owned Alro shares, along the same lines as those discussed in relation to the Conef shares and the draft letter agreement relating thereto, as Mr Machitski maintained in his evidence.[126] It was part of Mr Machitski's case that the Project which was actually pursued was very different from the project contemplated by the MOA, so that it did not apply. Whilst I reject the suggestion that it was different by virtue of the pursuit of privately-owned shares as opposed to Government-owned shares, I accept that there was a fundamental difference in the position once it was recognised that third party funding was not available and Mr Machitski decided to go ahead with his own funds to purchase the Conef shares initially and then, following the acquisition of Conef shares, to acquire minority shares and then the controlling interest in Alro that had been the subject of the MOA. The MOA was no longer applicable, and by the parties' conduct, was treated as such. It was implicitly abrogated by the parties. Thereafter, Mr Machitski's evidence, which I

accept, was that Mr Krasner was not consistent in his approach but always sought to reserve to himself the possibility of buying into Alro. There were occasions when he pressed for a draft agreement to allow him to do so and would ask whether or not Mr Machitski was prepared to agree. Mr Machitski would respond by saying that this was a possibility but nothing ever came of it because Mr Krasner would appear to change his mind and say that he had no funds available to make the necessary investment. Mr Machitski's view of this was that Mr Krasner was ultimately not prepared to take the risk involved in purchasing a minority shareholding in Alro and then seeking to obtain the Government shares, which was the course adopted, as appears below.The 2001 purchases of further privately-owned shares in Alro[127] Between February and May 2001, Mr Krasner with the aid of Mr Peter Braun, who had been recruited by Mr Krasner, with Mr Machitski's approval in June 2000, arranged for the discreet purchase of blocks of privately-owned shares in Alro. Each of these purchases was funded by monies emanating from one of Mr Machitski's companies and **lent to a BVI company specifically formed for the purpose of acquiring the shares**. Formal loan agreements were concluded which provided for payment of interest at commercial rates:i) The shareholding belonging to Broadhurst Investments (4.9%) was purchased via the Bucharest Stock Exchange by negotiation in London and Bucharest.ii) A further 2.99% block was also purchased from Broadhurst via the Bucharest Stock Exchange.iii) A 4.69% holding was purchased from Regent and Invesco which were investment funds and minor shareholders in Alro. An intermediary was used by Mr Krasner for negotiation in accordance with his instructions and the purchase was effected through the Bucharest Stock Exchange.iv) A 2.7% shareholding was purchased from Alpha Bank of Greece through the same intermediary. Once again the purchase was effected through the Bucharest Stock Exchange.v) The Romanian Investment Fund of Cyprus' shareholding which was managed by Foreign & Colonial constituting approximately 10% of Alro's share capital (together with a holding in Alprom of about 7%) was also purchased.vi) In addition Conef, it appears, had acquired another 3.37% shareholding on the open market.[128] Mr Krasner would consult with Mr Machitski on the purchase of these various shareholdings, the ultimate decision being made by Mr Machitski whose companies were producing the money. **The BVI companies were used in order to disguise the identity of the ultimate purchaser of the shares in advance of the privatisation bid**. By discreet purchases, a substantial minority shareholding was thus built up. In June/July 2001, the BVI companies transferred their shares to MAL as part of a public offer made by MAL at that time under which MAL acquired,

through the Bucharest stock market, both these shares as well as some further small private shareholdings. The end result of all these transactions was that between January and July 2001 MAL and Conef had between them a minority shareholding of 41.73% of Alro. This shareholding was acquired at a cost of $62.5m with funds borrowed from various companies owned by Mr Machitski. Details of those loan agreements, payment of interest and repayments are set out in a letter from SJ Berwin LLP to TSS dated 9 June 2005, to which Mr Sventsky testified.[129] It is right to say that the purchases were conducted with great skill by Mr Krasner and Mr Braun **but a premium had to be paid over the market price together with large commissions**. **The effect, as intended, of building up such a large minority shareholding was not only to bring about a position where a lesser shareholding had to be acquired from the Romanian Government in order to give control but also to make the acquisition of the Government's controlling shareholding in Alro unattractive to any other purchasers because of the large minority interest already held by MAL and Conef.[130]** In addition to the share acquisitions referred to, Mr Krasner acquired a nominal personal shareholding in Alro of around 100 shares which enabled him to attend shareholders' meetings. As Conef had a seat on the board and MAL was able, through its substantial minority shareholding to procure seats on the board for Mr Braun and Mr Manaktala, Mr Machitski and Mr Krasner were thus able to gain insight into the management and operations of Alro.[131] Through intensive lobbying by Mr Krasner and others involved in the Project, the Romanian Government was persuaded in July 2001 to change the Byelaws of Alro so that a 75% majority was required for significant shareholder resolutions. This had the effect of giving **negative control** to MAL/Conef as the owners of the minority shareholding of 41.73%.[132] There then ensued a period of delay before the privatisation which was not announced until 17 December 2001. There were a number of reasons for this:i) Pechiney who had supplied much of the initial technology required to set up Alro in the first place, were themselves interested in acquiring a controlling interest in Alro and various meetings were held by Mr Sherman, Mr Krasner and Mr Kestenbaum with their representatives in the summer of 2001 to find some way of co-operating rather than competing.ii) A meeting was held on 11

September 2001 for that purpose but in fact the terrorist attacks on that day in New York led to an alteration in world markets and Pechiney's loss of interest, particularly in the light of MAL's existing stake in Alro.iii) There were other interested parties such as Glencore and Balli Metal who appeared to have had some pre-emption rights in respect of the Government-owned shares and Mr Sherman, Mr Krasner, Dr Rosenne and Mr Braun were involved in efforts to overcome the problems presented by these challenges.iv) The Romanian Government, despite being warmer towards privatisation as a concept, delayed its privatisation plans. It was clear that the World Bank was hostile to the MAL/MIC bid and extensive lobbying was required of the World Bank.[133] It is clear that the acquisition of the Alro shareholding was a risky enterprise. It was possible that a purchaser could be left with a minority stake in a Government-owned business, and there was some disputed evidence that Mr Elian and Mr Arnswald left the Project considering that acquisition of a controlling stake was unlikely.Discussions in 2001 about the project and the tax structures[134] There were extensive discussions throughout most of 2001 in relation to the corporate structure under which the Alro shares were to be held. The object was to achieve a tax efficient structure for the benefit of the ultimate owners. The assumption was that Mr Krasner would in due course purchase 20% of the shares acquired.[135] On 1 December 2000, the shares in MAL held by MIC were the subject of a transfer to Mr Krasner, although this transfer was never stamped. The transfer was equally never recorded in MAL's shareholders' registry nor was a certificate ever issued to him. The reason, it appears, for the transfer was to save a potential tax liability in Romania on the shareholding, which was leviable by reference to the turnover of the shareholder. It will be recalled that MIC had been nominee shareholders only, although the only document recording the position appears to be the letter of 27 September 1999 in which MIC agreed to help Mr Machitski and Mr Krasner in establishing the vehicle to acquire a controlling interest in Alro, which was to be one of their affiliated companies under Machitski and Krasner's control. The latter had agreed, in that letter, to indemnify MIC in respect of any losses resulting from the agreement. MIC had turnover which could result in a tax liability on the shares however. During the period from 1 December 2000 to 30 November 2001, MAL's shares were therefore held by Mr Krasner, for this reason and this reason alone, without any suggestion that there was a change in the beneficial ownership of the shares, wherever that lay.[136] Between March and November 2001, extensive discussions took place between Mr Sherman's colleagues in the tax department at Boodle Hatfield (Mr Way and Mr Stone) on the one hand and Mr Teacher

and Ms Rock of Mr Krasner's solicitors (TSS) and accountants instructed by him, Levy Gee on the other. In all the detailed discussions, the premise was a 80/20 split between Mr Machitski and Mr Krasner with the ultimate holding of those percentages of shares in Mr Machitski's and Mr Krasner's offshore family trusts, through a chain of companies, but the concern was with a tax efficient structure, not with the commercial arrangements between Mr Krasner and Mr Machitski.[137] At the same time Mr Teacher regularly asked Mr Sherman to provide a Shareholders' Agreement, as shown in a series of chasing letters, but the latter never produced such a draft. The first of these letters is dated 28 March 2001, with chasers in June, July, August and November 2001. Mr Teacher's evidence was that his impression throughout was that Mr Krasner had a stake in the purchase of Alro shares but he never saw or knew of the MOA until the summer of 2004. Mr Sherman said that the operating assumption was 80/20 on some financial basis to be agreed between Mr Machitski and Mr Krasner.[138] A meeting took place on 23 August 2001 where Mr Machitski, Mr Krasner and their respective advisers were present. The object was to seek to agree a way forward for the corporate structure for "the investment in Romania". Mr Machitski outlined the aims as ownership "by family trust with members of the family as beneficiaries", minimising the tax liability within commercial constraints, creating the optimum situation for capitalising the companies and achieving sufficient transparency to attract international financing.[139] It seems that Mr Machitski and Mr Krasner may not have attended all of that meeting, leaving the tax experts to discuss the matters between them, although no agreement was actually reached.[140] Mr Krasner's evidence is that shortly after this meeting, in Mr Machitski's London house, Mr Machitski assured him that 20% of the shares would be transferred by the proposed offshore company in Nevis to his family trust (the Nevis company being a suggested ultimate holding company). Mr Machitski denies that any such conversation took place whilst accepting that at all times discussions proceeded on the basis of an 80/20 split with Mr Krasner financing his 20% share by whatever means he could. The essence of the dispute between Mr Krasner and Mr Machitski is illustrated by the dispute about this meeting and is the same for the whole of the period following the MOA. On the one hand, Mr Krasner maintains that he was at all times entitled to 20% of the shareholdings acquired in Alro, by virtue of the work which he carried out to achieve the controlling interest whilst Mr Machitski maintains that discussions always proceeded on the basis that Mr Krasner would pay for his 20% share, with Mr Krasner being unwilling to commit himself to making a monetary investment.[141] Whilst I have already found that the

Memorandum of Agreement was an enforceable and binding agreement, and rejected Mr Machitski's evidence in relation to it and to discussions immediately preceding it, the significant difference between the position in December 1999 and the position in 2001 and thereafter was the knowledge of both parties that Mr Machitski was going to invest much more than $20m in the acquisition of the Alro shares necessary to bring about control. It is that difference which explains the draft letter agreement relating to Conef in September 2000 and which informs my view as to the discussions which occurred in 2001.[142] Mr Krasner in his statement draws attention to a meeting in March 2001 with the US lawyers, Skadden Arps, where they advised that banks would not lend until the borrowers had control over the dividend policy of the company in question thus reinforcing the view formed by Messrs Krasner and Machitski in 2000 as a result of contacts with Banks made through Mr Sherman. I find that it was clear to both Mr Krasner and Mr Machitski that financing or re-financing the acquisition of shares in Alro was not a practical proposition until control had been acquired. If a controlling stake was to be acquired, it would therefore have to be done with Mr Machitski's money, provided through his companies, rather than by any other means. He was willing for Mr Krasner to be a 20% shareholder of the Alro shares acquired (as he was for the Conef shares), provided that Mr Krasner paid his 20% contribution. In practice this meant that he would have to borrow money to do so and, since the acquisitions were going ahead with Mr Machitski's money, this would mean entering into a formal agreement with Mr Machitski for purchase with him or from him, if necessary borrowing from Mr Machitski in order to do so.[143] I find that discussions proceeded in 2001 upon this basis with Mr Machitski being willing to sell 20% of the shares acquired in Alro at 20% of the total cost of those shares, including the price paid and associated expenses. The transfer of any shares from an offshore company to Mr Krasner or his family trust was therefore always premised on the basis that Mr Krasner would pay for them, once the stage was reached at which it was clear that Mr Machitski was to finance the purchases himself.[144] By November 2001 Mr Machitski had become dissatisfied with Boodle Hatfield's advice on tax structures. He had engaged Mr Sedyshev as his legal adviser and effectively dispensed with the services of both Mr Sherman and Boodle Hatfield, though Mr Sherman continued to act as company secretary of MAL.[145] In practice what occurred was that Mr Krasner decided to use an offshore structure in Jersey, whilst Mr Machitski set up his own structure utilising Plaschem International Inc., a company in Nevis in the West Indies, which was the trustee of his family trust, as Mr Krasner knew.[146] On 30 November 2001, Mr Krasner then

transferred the shares in MAL to MIC whilst a Declaration of Trust and Agreement was executed on the same day. That declaration of trust was made by MIC, MAL, Mr Krasner as transferor for the shares and Plaschem as beneficial owner. Under the terms of the declaration, MIC declared that it would hold the MAL shares on trust for Plaschem and Mr Krasner and Plaschem agreed to indemnify MIC from the consequences of doing so. Both Mr Krasner, as transferor and Plaschem as beneficial owner also warranted that Plaschem was the beneficial owner of the shares and that Mr Krasner was, prior to the transfer, holding the MAL shares as nominee for Plaschem.[147] The significance of this document, in Mr Machitski's submission, is that it shows a clear recognition by Mr Krasner that he had no beneficial interest in the Alro shares, whether through MAL or by any other means. At the very time where he could have asserted an entitlement to 20% of the shares and the declaration could have made express mention of an 80/20 split between Plaschem on the one hand and himself, a company nominated by him or his family trust on the other, the declaration specifically referred to the shares being held prior to and after, the transfer as trustee for Plaschem as the beneficial owner. As Mr Krasner accepted, there was no reason why the declaration could not have specifically made mention of his beneficial interest in the shares if this was the true position at the time. He accepted that he did not raise the point with Mr Machitski at the time but said that he trusted Mr Machitski to effect the necessary transfer from Nevis.[148] By this time in November 2001, there had been rumours circulating about an impending announcement by the Romanian government of its privatisation plan. Mr Machitski's evidence was that at this stage and by reason of the fact that the 12 month period which Mr Krasner had requested (in order to consider whether or not to invest in Alro) had expired, he and Mr Krasner discussed and continued to discuss the possibility of the latter acquiring 20% of the Alro shares already acquired and the possibility of purchasing 20% of such part of the Government shareholding as might subsequently be acquired. These discussions continued throughout this period from the time shortly before the Declaration of Trust was executed until February 2002. I accept Mr Machitski's evidence on this, corroborated as it is by the Declaration of Trust in which Mr Machitski's rights to the shares were expressly recognised by Mr Krasner.[149] On 17 December the Government of Romania announced the privatisation of the Government shareholding which made it plain that, in addition to purchasing the shares, a substantial further investment was required, by way of share capital for industrial investment and $16.5m for environmental programmes.[150] APAPS were seeking to sell at least 10% of the Romanian Government

shareholding to an entity with experience in the aluminium business, knowledge of the Romanian market and capacity to bring in new technology, know-how and high-level management, with the capacity to increase share capital by at least $45M. In order to meet these requirements, a Consortium Agreement was concluded on about 21 December between MIC, MAL and Conef.[151] In order to satisfy MIC's lawyers, an Indemnification Agreement was also concluded in December 2001 between MIC, MAL, Conef and Messrs Krasner and Machitski. This referred to the APAPS announcement and the Consortium's agreement to formulate a bid for Government shares, to enter into a sale and purchase agreement of the shares and to take other incidental actions. One of the recitals to the Indemnification Agreement expressly refers to Mr Krasner and Mr Machitski as having "an interest in the transactions described herein", before going on to provide for an indemnity by MAL, Conef, Mr Krasner and Mr Machitski to MIC in respect of any losses arising out of the conclusion of the Consortium Agreement and its performance in submitting a bid for the shares, purchasing any shares and the ownership and operation of Alro, should a controlling interest be obtained. Mr Krasner relies upon this agreement as showing that he had an interest in the shares acquired and was a 20% co-venturer with Mr Machitski and asks why, if this was not the case, his indemnity was required.[152] Mr Machitski's answer was to say that Mr Kestenbaum of MIC wanted the widest possible indemnity, on his lawyers' advice, and had dealt with both Mr Krasner and Mr Machitski from the outset as can be seen from the letter agreement of 27 September 1999 which was signed by both of them. Mr Kestenbaum did not give evidence but the suggestion was that he did not know the details of the relationship between Mr Machitski and Mr Krasner and that Mr Machitski might commonly have referred to Mr Krasner as his "future partner" or even as his "partner", in order to invest him with sufficient apparent authority to act for him and Mr Kestenbaum would have assumed that Mr Krasner and Mr Machitski were co-venturers. Mr Krasner also had a power of attorney to act on behalf of MIC and MIC was the legal owner of MAL and a party to the Consortium Agreement. An indemnity from all concerned was a sensible precaution in circumstances where MIC was lending its name to a Consortium which was purchasing Government shares in Alro and might be incurring liabilities in respect of that transaction.[153] In my judgment it is plain that Mr Kestenbaum must have considered that Mr Krasner had some "interest in the transactions" and, given the situation in September - December 1999, it was not unnatural that he should think in these terms. He had dealt with Mr Krasner and, through him, with Mr Machitski and perceived them to be the

individuals behind MAL. Thus his requirement of an indemnity from Mr Krasner as well as Mr Machitski was natural and sensible from his perspective, whatever the exact nature of their interests in the transaction and their relationship to each other, the details of which he was never told and could not know. Whether the case of Mr Krasner or Mr Machitski is correct, the giving of an indemnity is equally consistent with Mr Krasner actually having a beneficial interest in the shares or being interested in the transaction because he had agreed or hoped to purchase shares or because he was involved extensively in the transaction and had authority to incur liabilities, which could directly or indirectly fall on MIC.The events of 2002-3[154] The discussions about the purchase of Alro shares, according to Mr Machitski, culminated in a meeting between Mr Krasner and himself in February 2002. Mr Machitski's evidence was that Mr Krasner told him that it was not possible for him to make any investment at that time because he was in a difficult financial position as he was obliged to pay the debts of former business partners in AIOC. Mr Krasner's evidence was that this was impossible since AIOC had entered into voluntary liquidation back in 1996 and he could not therefore have made mention of this six years later. Mr Machitski's evidence was that Mr Krasner told him that he was literally frightened for his life because those who were owed significant sums of money by AIOC were looking to him for payment and were not afraid to use violence. Mr Krasner rejected every element of this version of events.[155] In the context of this dispute over what was said at the meeting, Mr Machitski maintains that Mr Krasner specifically asked for a full-time position in the group of companies controlled by Mr Machitski so that he had a steady source of income, whilst still hoping to gain access to funds in the foreseeable future. He was not in a position to invest at that point but wished to be able to do so subsequently.[156] In consequence, according to Mr Machitski, Mr Krasner came into his team as a Senior Executive responsible for his business interests and projects outside of Russia including, but not limited to, the Alro Project. It is common ground between the parties that Mr Krasner did exercise responsibility in relation to other projects for Mr Machitski.[157] As will become apparent from the next section of this judgment, Mr Krasner undoubtedly needed funds following the termination of his employment by Marc Rich. Having left Marc Rich in July 1998, he was subject to litigation which was finally settled on 1 July 1999 by a significant payment on his part. Although he made investments in ElephantX.com and Citala, these incurred losses. He asked for and was given loans by Mr Machitski, on his own evidence, because he was short of money in January 2001 and thereafter.[158] From the time of the formation

of Dover on 4 November 1999, Mr Krasner received a salary of £ 6,700 per month until December 1992 when, by reason of a potential conflict of interest between Alro, of which he became President after acquisition and Dover (which became its exclusive marketing agent) that employment terminated. Apart from this income and the loans, Mr Krasner was not in receipt of any sums from Mr Machitski or his companies. On 14 March 2002 however, an agreement was concluded between a company controlled by Mr Machitski, IMEX Oil Ltd and a company controlled by Mr Krasner, Glacis International Ltd. This agreement provided for Glacis to give consultancy services to IMEX in relation to a project involving the supply of Natural Gas to Romania. That agreement provided for payment to Glacis of a sum equal to 20% of the net income derived from the projects by IMEX. This led to two payments to Glacis in September and December 2002 amounting to $833,302 in total. By an "Acceptance Act number 1" dated 30 September 2002 that figure was agreed as the appropriate figure for the services rendered. Mr Machitski's case is that this represented payment for all the services effected by Mr Krasner, including his work on the Alro project as well as other matters such as the Gas Project. Mr Krasner maintains that he had a separate agreement made orally at the end of 2002 with Mr Machitski for an 80/20 split of profits on the gas project in respect of his work on that project and this contract enshrined that.[159] There was an equivalent agreement dated 30 January 2003 between the same two companies, which provided for a monthly fee of $8,950.00 and an additional commission of 10% of the net income from the Natural Gas Project. There were then two letters of acceptance of figures for the second quarter's figures at 10% and the third quarter's figures at 7% and an Addendum in respect of that quarter referring to 5.9%. The total figures paid for that year appear to amount to $815,598.00, paid in three instalments in October 2003, January and February 2004, unless the latter two payments relate to a different period. The figures however manipulated cannot be made to fit with IMEX profit figures whether as set out in audited accounts or otherwise.[160] What became plain from the evidence of Mr Sventsky, was that the sums paid actually bore no relation whatsoever to the income from the Gas Project. Mr Sventsky had carried out a series of different calculations in order to justify on paper a pre-determined sum, which Mr Machitski had already decided upon as appropriate remuneration for Mr Krasner. He did the same for other individuals engaged by his companies.[161] Contrary to Mr Krasner's case that there was an 80/20 split on the Gas Project (as evidenced by the IMEX/Glacis Agreements) in exactly the same way as there was an 80/20 split on the Alro Project, it is clear that Mr Sventsky's calculations of

amounts payable to Mr Krasner were not intended to represent 20% of the Gas Project income at all but were intended to provide a paper trail which would justify a payment by IMEX to Glacis of a figure which Mr Machitski considered to be the right figure for Mr Krasner's remuneration. Mr Sventsky's evidence was that the remuneration was for all work done in relation to a number of agreements including the Alro Project, the Gas Project, a project for the supply of Natural Gas from Russia to Turkey and a project relating to a Romanian company called Petrom. Mr Krasner was working for Mr Machitski full-time not just on Alro and the figures paid reflected that work. It was paid to one of his companies by request rather than to him as an employee under an employment contract. It is clear from Mr Krasner's evidence that he worked on a number of Mr Machitski's projects including those already mentioned and the privatisation of other Romanian companies and an Aluminium project in Australia.[162] On 3 January 2003, there was a contract between Sarose Limited (another of Mr Machitski's companies) and Mr Krasner himself under which he was paid $12,250 per month ($147,000 pa) with effect from the beginning of the year. Mr Krasner's explanation for this was that it was a replacement for the Dover Contract which was ended because of the perceived conflict of interest to which I have already referred. Additionally, Mr Krasner received, as chairman of the Board of Alro, after his appointment in November 2002 the sum of $1,000 approximately per month.[163] The IMEX/Glacis Agreements support Mr Machitski's case that Mr Krasner sought and was given the opportunity to work for Mr Machitski full-time before the acquisition of Alro. Whilst the existence of temporary arrangements, prior to the acquisition of Alro, in order to provide for Mr Krasner until that occurred, are equally consistent with either party's case and the engagement of Mr Krasner on a full-time basis does not rule out an entitlement to shares under the MOA, I accept Mr Machitski's evidence that, as from March 2002, Mr Krasner became his senior manager and representative responsible for his projects outside Russia. I thus reject Mr Krasner's evidence that there was no change in the relationship in consequence of the discussions culminating in February 2002 although the exact terms of that discussion as recorded by Mr Machitski are probably not accurate, unless Mr Krasner chose to refer to a dated transaction to justify his inability or unwillingness to invest funds. This new form of remuneration, in the shape of funds paid by IMEX, bears upon the rewards paid to Mr Krasner for his work in relation to Alro although it is true that much of the work in relation to the acquisition of the controlling interest had occurred prior to the first IMEX/Glacis agreement.[164] Mr Krasner had procrastinated over proposals

for him to purchase 20% of the Alro shares but at a time when acquisition of control was on the horizon, what was needed was a substantial investment, since the purchaser was required to pay sums of the order of $72m under APAPS' proposals. Mr Krasner was in no position himself to fund 20% of that figure together with 20% of the $62.5m already paid. I find that he wished to be involved in the project and to preserve the possibility of acquiring shares by making arrangements with Mr Machitski. He needed income and working for Mr Machitski on the Alro and other projects supplied that need as well as preserving his hopes of ultimately acquiring a stake in Alro which Mr Machitski's money was funding.[165] Mr Krasner objected to the suggestion that he had asked to be and became an "employee" of Mr Machitski's. He pointed to the absence of any contract of employment, terms of engagement, salary, pension or anything akin to the terms upon which various witnesses who gave evidence for Mr Machitski were engaged. It is however not suggested that he was an "employee" in the ordinary sense of the word but that the agreement was that he would work full-time on Mr Machitski's businesses, continuing to receive the salary from Dover (and then Sarose) together with a lump sum to be agreed between him and Mr Machitski for which the IMEX/Glacis agreement provided the cover. Mr Krasner asked how it was, in such circumstances that he would be in receipt of information as to proposed dividends to be declared by Alro, as he clearly was in April 2003. Mr Machitski's answer was that Mr Krasner had, by then, become president of Alro and chairman of the board of directors and it was the board's responsibility to draw up the agenda for the annual general meeting of the company at which resolutions were to be passed to pay dividends. Moreover at that stage it was still envisaged that Mr Krasner would or might invest money in Alro and acquire shareholdings so that he would have a significant interest in dividends paid. That approach is borne out by the continuing saga of discussion between Mr Machitski and Mr Krasner as to a shareholders' agreement, which had not yet been the subject of negotiation between them.[166] In April 2002, Mr Teacher was instructed by Mr Krasner to draft a shareholders' agreement because privatisation appeared to be imminent. Mr Krasner's family trust had been set up in Jersey in November 2001 through Allied Irish Bank. The instructions received from Mr Krasner were for an 80/20 equity split, for a provision for unanimity in all decisions for the inclusion of provisions in the event of deadlock, a non-competition clause should Mr Krasner, as minority shareholder cease to be such a shareholder and for various provisions dealing with the death or incapacity of either shareholder.[167] In consequence, Mr Teacher produced a draft Shareholders' Agreement and Subsidiary Agreement which he sent to

Mr Krasner by email on 19 April 2002. This draft agreement was inconsistent in a number of respects with the MOA because Mr Teacher had never seen that MOA and received no instructions from Mr Krasner concerning it. His evidence was that he was never shown it and was completely unaware of it until shortly before the events of September 2004. A copy of the final version in unexecuted form was found in his firm's files during the course of the hearing but there was no explanation as to its provenance. Mr Krasner agreed that he had never provided Mr Teacher with a copy until the summer of 2004 and it is clear that, as the latter accepted, if he had been in receipt of such a copy, he could not have prepared the draft Shareholders' Agreement and Subsidiary Agreement in the terms in which he did. Whilst Mr Teacher said that his impression throughout all the tax discussion was that Mr Krasner had a stake in the purchases of the Alro share and that a 80/20 split was the underlying premise upon which all discussions proceeded, he had no knowledge of the MOA at all and therefore drafted the Shareholders' Agreement with a unanimity term which conflicted with the MOA and its provision that Mr Krasner should vote in accordance with Mr Machitski's wishes, on penalty of payment of $10m. The draft Shareholders' Agreement did not actually specify the percentage shareholdings to be held in a Dutch Antilles company by the family trusts of Messrs Machitski and Krasner, though the company was plainly intended to be the ultimate holding company for the Alro shares.[168] Mr Teacher's evidence was that financing discussions took place in August 2001 when Mr Sherman talked of raising money through a Dutch bank and that he, Mr Teacher, never understood that Mr Krasner would finance the acquisition of any shares himself, nor borrow to do so. He thought the position was, as was actually set out in the MOA, that Mr Machitski was providing the funding and Mr Krasner was providing expertise on the ground in Romania, although he had no knowledge of the MOA at all.[169] Once again however, it is clear to me that, if Mr Krasner had considered that the MOA was applicable, he could not have instructed Mr Teacher to draft a Shareholders' Agreement without reference to it, particularly since the MOA contained three key points which were specifically to be included in the Shareholders' Agreement which was to follow it. The inevitable conclusion is, again, that Mr Krasner did not believe the MOA to be applicable at this stage, the obvious reason for which was the necessity for extensive funding by Mr Machitski over and above the $20m limit.[170] Mr Teacher reminded Mr Krasner from time-to-time about the draft agreements and was told by the latter that he was in the course of agreeing them with Mr Machitski. The documents show that in July 2003, over a year later a trainee solicitor at Mr

Teacher's firm emailed a further copy of the draft agreements to Mr Krasner at his request and a copy was sent to Mr Sedyshev by Mr Krasner, but the enclosing email does not suggest it had ever been sent before.[171] Mr Krasner's evidence was that he had mislaid his copy of the MOA at this stage in 2002 but forwarded the copy Shareholders' Agreement and Subsidiary Agreement to Mr Machitski by an email which has not been located, either by Mr Krasner or Mr Machitski. I find that no such message was sent in April 2002 because Mr Krasner had not made up his mind whether to borrow to invest or not. There was no discussion about that draft and nothing positive happened with regard to a draft Shareholders' Agreement until the documents were produced in September 2004 which were the subject of discussion in Moscow at that time. (The July 2003 email to Mr Sedyshev did not result in any discussion of an agreement at that time.)[172] On 30 April 2002, MAL, MIC and Conef entered into a Share Sale and Purchase Agreement with APAPS under which 10% of the Government shares in Alro was to be acquired for $11.5m. Mr Krasner signed the agreement for both MAL and MIC, having received the power of attorney from the latter to do so.[173] Deloitte & Touche had been engaged by the consortium which had agreed in its Consortium Agreement of 21 December 2001 that the purchase would be in the name of MAL. Deloittes had been engaged to carry out a due diligence exercise which they had effected.[174] The World Bank objected to the sale and insisted on a second fairness opinion from another investment bank before any further tranches of loans would be made to Romania. The Share Sale and Purchase Agreement was subject to clearance under various Romanian competition law provisions also and there was consequently a need for lobbying of World Bank officials and Romanian politicians and authorities in order to validate the purchase. A number of Addenda and supplemental documents were drafted, agreed and executed in that connection.[175] On 30 May 2002, the share capital of Alro was increased by means of a $45m investment by MAL, but it was not until October/November 2002, after a second fairness opinion was obtained from the Bank of America in accordance with the World Bank requirement, that the Government 10% shareholding was finally and irrevocably acquired. By this means MAL's shareholding became 64.77%. (In due course the further investment of $16.5m on 31 December 2003 and 31 December 2004 was made resulting in increases in share capital which meant that MIBV's shareholding was increased to 76.09%).[176] The privatisation of Alprom was announced on 29 March 2002 but it was not until 19 December 2002 that Alro, then largely owned by MAL, entered into a share purchase agreement with APAPS and obtained a further 69.92% of

Alprom in addition to the 10.67% already owned by Conef.[177] Following acquisition of the controlling shareholding in Alro, in November 2002 the board of Alro was reconstituted and Mr Krasner was made president. The other members of the board were Mr Braun and Mr Manaktala, a technical expert in the production of aluminium, Mr Nastase, who had previously worked for Deloittes in their financial advisory department and who became chief financial officer, together with a Government representative who remained on the board to protect its interests. These individuals were engaged by Mr Krasner, with Mr Machitski's approval, **although his existence was kept quiet**. Another Romanian, Mr Dobra was added to the board as general manager in November 2003, by which time Mr Krasner had become president of Alprom as well as Alro.[178] Mr Nastase reorganised the finance department of Alro, separating the cash, accounting and commercial functions and Mr Krasner instituted changes in the operational organisation. He secured an extended contract with suppliers of electricity, negotiated a ten year alumina supply contract and established a profit motivated sales and marketing organisation for the company which employed Dover as its exclusive sales agent. According to a statement from Mr Manaktala, which was not challenged, the long-term alumina supply contract saved Alro 10s of millions of dollars because of the subsequent increase in the price of alumina, although it has been terminated by the supplier Trafigura in circumstances which have led to arbitration. Mr Krasner signed a novel five-year pact with the Trade Unions to avoid industrial disruption.[179] Nonetheless, Mr Krasner's management of Alro was the subject of criticism in the evidence adduced on behalf of Mr Machitski who maintained that by early autumn 2003 Alro was not performing to the levels which he had expected. From that point on, he and his Moscow based employees began to make more frequent visits to Romania and to concern themselves increasingly with the day-to-day issues of Alro's production and commercial activities. A Supervisory Board was instituted, chaired by Mr Machitski, where the board of Alro would meet jointly with the Executive Committee of Mr Machitski's Marco Group.[180] In October 2002, when it appeared that the acquisition of the Government shareholding would go through on the basis of the second fairness opinion, Mr Krasner testified that he raised the question of his shareholding with Mr Machitski when he was in London. Mr Krasner's evidence was that, at that point, he could not locate his copy of the MOA although he knew that he had a copy in his file somewhere. Whilst at Heathrow Airport, he spoke to Mr Machitski on the telephone and the latter told him not to concern himself

looking for the document because he would send him a copy, but Mr Krasner said he would collect it the next time they met.[181] In his statement, Mr Krasner said that on the next occasion when they met Mr Machitski gave him a copy on the top of which was written, in Russian, the words "Romania agreement. Machitski-Krasner." In his oral evidence he said that October 2002 was a good time because the objections from the World Bank had been overcome and control of Alro was in hand. At that point he could not find his copy of the MOA so he called Mr Machitski who told him to relax as he kept every piece of paper. Mr Machitski asked him if he wanted a copy faxed to him and Mr Krasner asked for it to be handed over. When he came to London Mr Machitski gave it to him and they embraced. Mr Krasner went on to say that Mr Machitski had taken out his pen and written the words "Romania agreement. Machitski-Krasner" in his presence.[182] The document which was disclosed by Mr Krasner was a copy of the MOA which contained the wording at the top in photocopy. The MOA with the original wording on it was in Mr Machitski's possession and when this was pointed out and produced to him on the following day in cross-examination, Mr Krasner then maintained that the endorsement had taken place in his presence but that Mr Machitski had given him a photocopy.[183] Mr Machitski's evidence was that no such event had ever occurred and that what had happened was that Mr Krasner had come to his home and said that he was missing various documents, whereupon Mr Machitski handed over a file of papers for him to find what he wanted and photocopy documents as necessary. In this way Mr Krasner must have obtained a photocopy of the document with his original endorsement which he had made on returning home after signing the MOA on 6 December 1999.[184] Mr Krasner relied on the event, as related by him as an acknowledgement by Mr Machitski of the parties' respective obligations under the MOA in October 2002 but his inconsistent evidence on the subject, by elaboration of his statement in cross-examination which was shown to be false by reference to the original copy of the MOA with the original endorsement, is telling.[185] The inconsistencies in Mr Krasner's evidence on this point and all the surrounding circumstances which show that no other reference was made to the MOA at any time after execution until September 2004 have driven me to the conclusion that Mr Krasner's evidence is not to be accepted. Given the draft Conef Share Purchase Agreement and the extensive funding by Mr Machitski, I do not consider that the latter would have acknowledged the validity of the MOA in the circumstances outlined by Mr Krasner nor endorsed it with the words which appear at the top at that stage. It would be contrary to the tenor of all their

recent discussions, the draft Conef Share Agreement and the Declaration of Trust signed by Mr Krasner. The words endorsed on the top fortify Mr Krasner's submissions in relation to the enforceability of the agreement, but I find that they were written on it on 6 December 1999 and not at the later stage when the situation had changed so dramatically in relation to the actions required by the parties to acquire a controlling interest in Alro. I accept Mr Machitski's evidence as to how Mr Krasner obtained a copy of the MOA with the endorsement on the top and reject Mr Krasner's evidence that any event of the kind which he described actually took place.[186] It thus appears that Mr Krasner, in an attempt to bolster his case on the applicability of the MOA has fabricated an event which did not take place and which reinforces the view I have formed on his evidence about his discussions with Mr Machitski in the years 2000-2004.[187] In 2003, there was a corporate restructuring in relation to the shareholdings in Alro. The necessary steps were taken in April 2003 at about the time the first major dividends were expected from the Alro shares. The desire was to avoid tax which would be paid by MAL in the UK, if it was the direct holder of the shares at that point. A chain of companies was set up to achieve the desired result.[188] It will be recalled that MIC held shares in MAL (which held the Alro shares) as nominee for Plaschem, pursuant to the Declaration of Trust of 30 November 2001. Behind Plaschem lay Mr Machitski's family trust. Under the new arrangements MIBV became the direct holder of the Alro shares in place of MAL and was in turn owned by a Dutch Antilles company Romal Holdings NV ("Romal"), the shares of which were held by MAL as nominee for Plaschem under a Declaration of Trust dated 8 April 2003 though executed by Mr Krasner, on his evidence, on 17 April 2003.[189] According to the witness statement of Ms Gusman, it had originally been proposed that legal ownership of Romal should rest in MIC which had previously held the MAL shares but Mr Kestenbaum of MIC was concerned that a new holding of Romal by MIC could have filing consequences in the USA and was reluctant to accept the proposed arrangements. In consequence the decision was made, shortly before any dividend was declared by Alro, that MAL would hold the Romal shares for Plaschem instead.[190] The significance of the Declaration of Trust of 8 April 2003, executed by Mr Krasner on behalf of MAL, is that, once again, he was presented with the opportunity of insisting that 20% of the indirect holding of shares in Alro should specifically be held on trust for his benefit. This he did not do. In respect of both this and the prior Declaration of Trust, his evidence was that he trusted Mr Machitski to transfer 20% of Plaschem, the ultimate holding company but took no steps to bring this about by insisting on a provision in the Declaration and refusing to

co-operate in the new arrangements without this being done. His evidence was that at all times from 23 August 2001 onwards Mr Machitski repeated assured him orally that shares in the Nevis offshore company which became Plaschem, would be transferred to him or his family trust in due course. I reject that evidence.[191] By this means MIC disappeared out of the chain of shareholdings and for Romanian law reasons MIBV became a member of the consortium, as well as holder of the Alro shares.[192] Mr Machitski's evidence is that in the spring of 2003, whilst Mr Krasner was working on a number of projects for him, he was looking to find a way to give Mr Krasner an incentive by linking his remuneration to the financial performance of Alro. As appears later in this judgment, Mr Krasner sought and obtained loans from Mr Machitski and Mr Machitski's evidence was that he suggested to Mr Krasner that he might sell him a 20% interest in MIBV (which now held the Alro shares) through a mechanism which would be linked to the achievement of particular results in Alro's business. The essence was, without descending into great detail, that Mr Krasner would be given the right to purchase 20% of the shares in MIBV at a favourable price and that this price could be paid from future dividend streams, though Mr Krasner would not have the right to receive dividends until the acquisition costs, including all the expenses incurred in acquiring the Alro shares, were paid in full from the dividends. The dividends would also serve as security for repayment of the loans made in 2001 and 2002 and which he was proceeding to make in 2003 and 2004. Furthermore the right to acquire shares would be conditional upon the achieving of particular financial targets by Alro. Mr Machitski instructed Mr Sedyshev to draft such provisions. It was in connection with this that Mr Sedyshev sought and was sent, in July 2003 a copy of the Shareholders' Agreement signed by Mr Teacher.[193] Mr Machitski maintains that there was a significant difference in negotiations from this point on, as compared with his earlier willingness to allow Mr Krasner to have 20% of the Alro shares since MIBV held nearly 80% of Alro shares at that point. If Mr Krasner was to obtain 20% of MIBV's holding in Alro, he would obtain 16% of the Alro shares and thus have some degree of negative control over Alro. If however he purchased 20% of MIBV's shares, the effect would be that MIBV could exercise its 75% voting rights and Mr Machitski would maintain control over both MIBV and Alro.[194] Mr Krasner denied that there were discussions along these lines in May 2003 and specifically that there was any question of "performance targets". He said he was not aware of Mr Sedyshev being asked to draw up terms and pointed to the fact that on 17 July 2003, he forwarded the Shareholders' and Subsidiary Agreement drafted by Mr Teacher in April

2002 to Mr Sedyshev.[195] It should be borne in mind that the evidence is that, from the earliest days, Mr Machitski and Mr Krasner would speak to each other daily on the telephone and sometimes several times in the day. Whilst there were no doubt pressing matters relating to the conduct of Alro's business, which were the subject of discussion, it is hard to see how their interrelationship and the basis of it could remain undiscussed. On Mr Krasner's case, because of the terms of the original MOA, what remained were matters of detail for a Shareholders' Agreement. On Mr Machitski's case there was room for debate and discussion on the principles of an Agreement as well as detail and I find that there must have been discussions of the kind suggested by Mr Machitski whether or not all elements were present in each of the discussions which did occur. I am clear, that in accordance with the draft letter of Agreement relating to the Conef shares, the parties were from early 2000 onwards always discussing the terms on which Mr Krasner might purchase shares, because the MOA was seen to be inapplicable and unworkable because of its funding provisions.Loans to Mr Krasner and his companies[196] By a loan agreement dated 20 January 2001, New Time Establishment ("NTE") a company owned by Mr Machitski made available a loan facility of $1m to Glacis International Ltd (a company owned by Mr Krasner). Drawdowns could be made at any stage but repayment was due between 4 January and 10 January 2002. Interest was payable at the rate of 7%.[197] This was the first of a number of unsecured loans made by NTE to Glacis, in addition to which there was a loan made by NTE to Mr Krasner personally. There were two loans in 2001 and three loans in 2002 followed by additional loans in 2003 and 2004 to which different considerations apply inasmuch as Mr Krasner maintains that these latter two loans (of $2m and $3.5m respectively) were in reality dividends on his shareholdings.[198] It is common ground that in late 2000 or early 2001 Mr Krasner asked Mr Machitski for a loan of $1M. At that time Mr Krasner had been working on the Alro Project for the best part of a year-and-a-half. The only income he was receiving in respect of the Project was a salary payable by Dover of £ 80,400 per annum which commenced in November 1999, following Dover's incorporation in that month. As compared with the consultants engaged on the Project and the responsibilities he was undertaking, this figure was not large. Mr Machitski was prepared to make an unsecured loan to Mr Krasner of $1m. Mr Krasner's evidence is that Mr Machitski said he was confident that control of Alro would be acquired and that he regarded Mr Krasner's shareholding in Alro (as envisaged in the MOA) as adequate security for the loans that he would make. Mr Krasner also testified that Mr Machitski suggested that a

$10m dividend should be taken out of Alro each year in respect of the shareholdings acquired. Mr Machitski said that he had no need of his $8m share but suggested that $2m was appropriate for Mr Krasner. The concern was that the acquisition of control was taking longer than anticipated and a loan was therefore needed because dividends had not yet become payable.[199] Since Mr Machitski, on his own evidence, was looking for Mr Krasner to co-invest, on an 80/20 basis, I find that a conversation of this nature is likely to have taken place notwithstanding his denial of it. Both parties regarded the loan as one which would be repaid in due course out of dividend income accruing to Mr Krasner from Alro and the shareholding Mr Machitski then expected him to acquire when he was in a position to do so. Between January and June 2001, Mr Krasner then drew down the full $1m under this facility.[200] On 8 August 2001 there was a similar agreement for a further $1m facility with an interest rate of 8%, repayable in August 2002. The interest on the first loan was deducted from the capital sums advanced under the second loan where drawdown took place in August and November 2001. Further interest and some capital has been repaid on the first loan by deduction from later loans with the result that the current balance now owing on that loan is of the order of $900,000. The balance on the second loan now owing, where there has been no repayment of capital is of the order of $1.29m.[201] On 19 March 2002, a third loan agreement was concluded between NTE and Glacis, providing for a facility of $250,000 with an interest rate of 5% and repayment in March 2003. This was drawn down shortly thereafter. Approximately $300,000 remains outstanding in respect of this loan.[202] On 8 May 2002 a further loan agreement between NTE and Glacis was concluded with a facility for $500,000. This was drawn down fully, inasmuch as part was taken to reduce interest and capital on the first loan whilst the balance was transferred to Glacis. It was repayable in May 2003. The current amount outstanding is of the order of $580,000.[203] A fifth loan agreement of the same date was made but on this occasion the parties were NTE and Mr Krasner in a personal capacity. The sum involved was £ 460,000, the interest rate was 5% and the date of repayment was May 2003. The amount outstanding under the loan is approximately £ 570,000. This particular loan, according to Mr Krasner, was required by him for the payment of a tax liability to the Inland Revenue.[204] No issue arises in relation to the validity of these loans nor, it appears, in relation to the sums due under them although during the course of the hearing a repayment of some $900,000 was made. I find that Mr Machitski was willing to make such loans partly in gratitude for Mr Krasner's work, partly because he hoped he would thus retain Mr Krasner's loyalty and devotion to his business

and partly because he hoped and expected that Mr Krasner would invest in Alro which would mean that his loan could then be secured and Mr Krasner tied into the Alro business with an incentive to make it profitable, by repaying loans out of dividends received.[205] Other issues arise in relation to further loans and loan agreements in 2003 and 2004. On 14 May 2003, a loan agreement was concluded between Plaschem and Glacis for $2m repayable five years later in 2008 with 5% interest. The payment was actually made by Romal. On 28 April 2004 an addendum was made to that loan agreement but the parties to it were Romal and Glacis. This increased the amount of the loan by $3.5m to a total of $5.5m.[206] Mr Krasner's case is that during his first year in office as president of Alro, he and Mr Machitski had specific discussions about dividends on the Alro shares, in the light of the previous discussions in 2001 in which the sum of $10m had been mentioned. Alro held its general meeting in March or April each year and the privatisation agreement required the payment out of a minimum sum by way of dividend to APAPS in respect of its continuing shareholding in Alro. Consequently a large dividend payment had to be made in April 2003 in respect of the fiscal year of Alro which corresponded with the calendar year 2002. On about 13 May 2003, MIBV was paid the sum of $10,085,853.00 by way of dividend in respect of the shares it held and around this time, Mr Krasner maintains that he asked Mr Machitski for his $2m share on the 80/20 split, as he had been working for a long time on modest remuneration. Mr Machitski is said to have informed him that the payment of such sum had to be in the form of a loan because he did not actually have any shares in Alro as yet. He suggested therefore that a formal loan agreement be concluded and that the status of the loan be considered in due course. In consequence the $2m loan agreement was executed. In a similar way, Mr Krasner maintains that the $3.5m figure in April 2004 was subject to the same arrangement or understanding. His calculation is that the figures fall short of 20% of the total dividends received by the consortium members in 2003 and 2004 by $252,820.00 and $510,641.00 respectively and that it was agreed that any difference between the loans and dividends paid would be resolved later. Mr Krasner says he had little choice but to sign the loan documentation as he needed the money and Mr Machitski was "stringing him along."[207] Mr Machitski maintains that the loans were straightforward loans and had no reference to dividends at all. What is however striking about these two loan agreements, in distinction from the earlier agreements, is the five year period for repayment which suggests an appreciation that funds for repayment would be some time in coming. Nonetheless, I do not see how these loans can be characterised as dividends

nor that their classification as "loans" can be seen as a temporary measure, as Mr Krasner contends.[208] I have little doubt that at the time that these two loans were made, it was still envisaged that Mr Krasner would or might enter into an agreement to purchase 20% of the shares acquired in Alro and that, as was ultimately set out in the draft agreement in September 2004, loans would be repaid out of dividends to which Mr Krasner became entitled. It seems to me that Mr Machitski adopted a strategy with Mr Krasner (as he did to a lesser extent with others engaged by him) whereby he lent money to secure loyalty and obligations which would act as an incentive to the individual concerned to work for Mr Machitski and his companies and achieve profits for them. To lend substantial sums of money to Mr Krasner with a view to tying him in to Mr Machitski's businesses, to offer him the opportunity to purchase shares and to make payments due out of dividends earned, exemplifies this approach. I find that Mr Machitski at all times intended Mr Krasner to have the opportunity to purchase 20% of the acquired shares in Alro (and on somewhat advantageous terms by reason of his prior work) and that he was prepared to lend money to Mr Krasner both because of services already rendered and because of his desire to ensure his future support and loyalty. If however, these loans in 2003 and 2004 had been advances in respect of dividends which were agreed to be paid, once the necessary shareholding structures had been organised, the agreements could and would have so provided and would have been superseded by an appropriate reorganisation of the shareholdings instead of that which took place in 2003.[209] In addition to these loans there was a further $3m which Mr Krasner accepts as being an out and out loan for the purpose of the purchase of a house. Mr Krasner maintains that he said he would repay it out of his share of the Alro dividend for 2004 which would become payable in 2005, to which Mr Machitski made no response. That conversation is consistent with Mr Machitski's position and his intention that Mr Krasner and he should conclude an agreement whereby the latter did acquire shares in Alro for which payment would fall to be made. That $3m loan was never documented but agreement was reached that it should be repaid by the end of August 2004, some three months later.[210] The $3.5m and $3m sums were paid at the end of April and beginning of May 2004 and were mostly used by Mr Krasner to pay for a house which he purchased for approximately £ 7.7m, with the aid of a substantial mortgage.[211] Mr Krasner accepted that he owes $3m on this loan and, notwithstanding the denial in his statement, also readily accepted in cross-examination that he had told Mr Machitski that he was willing to provide a personal guarantee in respect of the extended loan to Glacis of April 2004. That evidence further

reinforces the conclusion that I have arrived at as to the nature of the $5.5m loans in 2003 and 2004. In law they are no different from all the other loans made, notwithstanding any expectation that they might be repaid in the future out of dividends to which Mr Krasner might become entitled as a result of a purchase of Alro shares.The events of 2004[212] It is common ground that in April 2004 Mr Krasner asked Mr Machitski about an agreement which Mr Kobzev was supposed to be preparing in relation to the discussions which had taken place between them in relation to shares. Mr Kobzev's evidence is that he had been asked at the turn of the year to assist Mr Sedyshev in producing a draft agreement for discussion which should not only set out the parameters of the working relationship but include a set of preconditions enabling Mr Krasner to acquire shares. Details however were not spelt out to him and nothing was done until March when he commenced drafting agreements for other senior personnel in Mr Machitski's organisation. About that time he telephoned Mr Krasner, having spoken to Mr Machitski and discussed with him the ambit of the agreement as explained to him by Mr Machitski which followed the lines of Mr Machitski's earlier discussions with Mr Sedyshev. Mr Krasner suggested that a draft should be prepared with blank spaces where there was insufficient detailed information available from him or Mr Machitski so that, with a draft in hand, he and Mr Machitski could consider the matter further. It was clear that there was a lot of negotiation required and a lot of detail to be settled. It was agreed that they would contact each other again at the beginning of April. Mr Kobzev's evidence was that at no time in this or a subsequent telephone conversation, when he said he could not even begin to draft an agreement for discussion purposes because he did not have sufficient information, did Mr Krasner refer to the MOA and that Mr Kobzev was unaware of it until 3 September 2004. As I find that between the spring of 2003 and September 2004, in accordance with Mr Machitski's evidence, there had been continuing discussions between him and Mr Krasner of a 20% interest, it is clear that the MOA was not considered relevant and did not feature in the negotiation.[213] On 7 and 8 April a meeting took place of the Marco Group management in Zurich. After the meeting had finished, Mr Krasner asked Mr Machitski about the draft agreement and Mr Machitski called Mr Kobzev into his office and asked whether any progress had been made. He said that he was embarrassed because there was delay in this. Mr Krasner's evidence was that Mr Machitski reprimanded Mr Kobzev and said he was embarrassed in front of his "partner" and that his "partner" would think that he was trying to cheat him. In response Mr Kobzev agreed to produce a draft by Monday 12 April. Mr Machitski and Mr Kobzev's

evidence was that the latter said that he could only prepare a draft for discussion if he had more specific detail as to what was required and that if information was provided to him he would produce a draft within three days. However no further information was forthcoming and no draft was produced.[214] In June 2004, Mr Machitski held a birthday party and Mr Krasner told Mr Kobzev at the party, in passing, that a conversation had occurred between him and Mr Machitski about the draft agreement and that the latter would instruct Mr Kobzev about the contents of the conversation. Thereafter from the middle of June until the end of July 2004 Mr Kobzev had four or five meetings with Mr Machitski in which the draft agreement was discussed and the basic principles of the agreement proposed by Mr Machitski were outlined, though these yet had to be discussed with Mr Krasner. They formed the basis of a draft agreement which was eventually supplied to Mr Krasner in September but was, in this interim period, set out in working drafts which were discussed between Mr Kobzev and Mr Machitski.[215] On 16 July 2004, Mr Krasner testified that he had a telephone conversation with Mr Machitski in which the question of shares was discussed. Mr Krasner maintains that Mr Machitski said that he had no legal rights to any shares and that Mr Krasner was at his mercy. He nonetheless said that he would not let him down. Mr Machitski had no recollection of any such conversation but it is inherently likely that such a conversation did occur and I accept Mr Krasner's evidence in relation to it.[216] In August 2004, Mr Krasner visited Mr Machitski on his yacht in the South of France. According to Mr Machitski, difficult conversations took place about issues relating to Mr Krasner's management of Alro. Mr Machitski was critical on a number of fronts relating to profit, expenditure, guaranteed supply of electricity at appropriate cost, balanced long-term contracts for the supply of alumina and the lack of progress in the introduction of IT. Discussions moved onto the issue of outstanding loans and the guarantee which Mr Krasner agreed to give in May and a draft of which, I find was handed to Mr Krasner by Mr Machitski in July. On Mr Krasner's version of events there was no criticism of him at these meetings but there was discussion of refinancing with two banks and obtaining syndicated loans for MAL and MIBV totalling some $110m. He agreed there was discussion of the $3m loan which was due for repayment at the end of August. Mr Krasner asked if it could be applied against his share of the profits of the gas business in 2004 and Alro dividends to be declared in 2005. Mr Machitski did not commit himself however and said that the matter would be discussed later. In his statement Mr Krasner said that in August 2004 he approached Mr Machitski "with a view to confirming that he would

honour the 80/20 Memorandum of Agreement" but agreed in cross-examination that although the 80/20 split was discussed, no mention was made of the MOA. Mr Machitski indicated that he would consider granting Mr Krasner an option to acquire 20% of the investment in Alro provided his loan funding was refinanced. Mr Krasner said that on this occasion, Mr Machitski's funding was discussed in the context of "preferential loans" which had to be repaid first.[217] It is difficult to make any clear findings as to what did occur at these meetings in August but it is plain that the meetings were difficult. Although not referred to in his statement, Mr Krasner's oral evidence was initially that he had mentioned the MOA in the telephone conversation of 16 July but later said there was no mention of it until the meeting in September 2004, leaving aside the incident in October 2002 when he obtained a copy of it. He ultimately accepted that he made no mention of it in the meetings in August 2004 and I find that in fact he made no mention of it at all until the letter of 3 September 2004, to which a copy was attached.[218] There can be no doubt that, by this time Mr Krasner felt aggrieved, whether as a result of the kind of agreement which Mr Machitski was now offering or as a result of some criticisms made of his management. If such criticisms were made they appear to me to have been largely misplaced but they led to Mr Krasner obtaining a supporting statement from Mr Manaktala. It appeared that Mr Machitski was putting him under pressure in respect of the loans made, seeking his personal guarantee and repayment of the housing loan of $3m. At all events, after the August meetings Mr Krasner, with the aid of his solicitors, sent a letter on 3 September to Mr Machitski which set out his dissatisfaction with what was now on offer.[219] In that letter he referred to attempts to contact Mr Machitski by telephone several times that day and his decision to write to him concerning the "ongoing discussions over the past two weeks concerning the ownership of the Romanian Alro/Alprom Project". The letter referred to the dissatisfaction which Mr Krasner had expressed in those conversations that no progress whatsoever had been made and to Mr Machitski's desire, also expressed in the conversations that he wished to be repaid the money invested by him into the Alro business by refinancing, following which Mr Krasner would be granted an option to purchase a shareholding in Alro/Alprom. The letter continued in these words:"I think that I ought to remind you that the Memorandum of Agreement that we signed in front of David Sherman in London on 6 December 1999. I enclose a copy of that document which you yourself have marked 'Romania agreement Machitski/Krasner' when you gave this copy to me in October 2002.It clearly records that you will hold 80% and I will hold 20% of the

voting shares of Alro as a result of our co-operation. In reliance upon that assurance I have spent virtually all of my time since 1999 in delivering control of the Alro and Alprom businesses and have for several years now been working full-time along with the board acting under my direction in maximising profits from the Alro and Alprom businesses.I find it unacceptable that I am now expected to acquire an 'option' to obtain the shareholding which we had already agreed that I had. The refinancing of your investment is an entirely separate matter.I have no wish to provoke any sort of dispute about this. I simply wish to see the fulfilment of our 1999 agreement.I suggest that this can be resolved either by you buying out my 20% stake or by me buying out your share.I also note that I have not been paid any dividends in 2000 or 2001 in respect of Alro despite the fact that I had a 20% equity stake in these years. I would now like to receive those dividends."[220] The letter speaks for itself and on its face suggests one party to the MOA buying out the other as the solution. It maintains that the refinancing of Mr Machitski's funding is irrelevant to Mr Krasner's entitlement to 20% of the shares and to dividends in respect of that holding. It effectively ignores the provision in the MOA that Mr Machitski was to provide a maximum amount of $20m only by way of funding. Mr Krasner appears to have been looking for a financial settlement rather than a shareholding or an ongoing relationship with Mr Machitski, but I suspect that was said for effect. As Mr Krasnov's and Mr Kobzev's evidence of the conversation with Mr Krasner confirmed, it was designed to bring Mr Machitski to the negotiating table.[221] As might well be expected, in circumstances where I find that the MOA had not been referred to at any stage in their relationship since it was first signed, Mr Machitski's reaction was, according to Mr Krasner "emotive". They spoke on the telephone and Mr Machitski asked "it is divorce?" to which Mr Krasner replied in the negative. He expressed his concerns about the lack of agreement about shares and Mr Machitski said that his lawyers were preparing an agreement. Mr Krasner maintains that he told Mr Machitski that he was not honouring his promise to conclude a shareholders' agreement and reminded him of the 16 July conversation when the latter had said that the former had no legal rights. Mr Machitski's version of the conversation is that he asked Mr Krasner what his letter was about with its absurd claims, to which Mr Krasner said that he was in a state of depression following the conversations in August on the yacht and that he wanted to remedy the situation. He did not want attention to be paid to the letter, the object being, with its reference to the MOA, to focus attention on the need to formalise discussions in an agreement.[222] In my judgment, both parties were jockeying for position in

relation to a proposed agreement and seeking to exert the maximum leverage on each other at this stage. Mr Machitski valued Mr Krasner's work and wanted to tie him in to work for him for five more years, as appears from the draft Agreement produced in September. The criticisms advanced by Mr Machitski and the attempt to create financial pressure were intended to make Mr Krasner sign up to a deal with the carrot/prospect of an indirect shareholding in Alro in which he had always expressed an interest. Mr Krasner attempted to fortify his position by obtaining a statement for Mr Manaktala dated 18 August 2004 as to his achievements with Alro, and sought to rely on the MOA, (having spoken to Mr Sherman and to his own solicitors) to bolster his negotiating position to get a better deal from Mr Machitski in respect of his loans, remuneration and stake in the Marco Group.[223] It was agreed that they would meet in Moscow and Mr Krasner arrived there on 6 September. There is dispute about the time when a draft agreement was made available to him but Mr Machitski and Mr Kobzev spent most of the 7 September working on a draft and on 8 September a discussion took place between Mr Machitski and Mr Krasner with Mr Krasnov and Mr Kobzev attending at various stages.[224] The draft agreement which was supplied required Mr Krasner to render services to Mr Machitski over the next five years on various projects in Eastern and Western Europe with particular reference to Romania. It contained provision for Mr Krasner to purchase 20% of MIBV from Romal, for which Mr Krasner would pay a sum, which he was told at the meeting would be just over $17m and represented a significant discount on the market price. Legal title would pass to him straightaway but the shares would be assigned by way of security for the purchase price and the loans already granted to Mr Krasner. Mr Krasner's rights to dividends would also be assigned by way of security. The purchase price would be payable out of dividends but Mr Krasner would only be entitled to receive dividends after all the investment costs in the Alro project had been recouped by Mr Machitski's companies. In addition Mr Krasner, through Glacis would be entitled to a yearly loan of up to 20% of the amount received by Romal from MIBV in the form of dividends, subject to proper documentation of such loans, Mr Krasner's personal guarantee and the dividends standing as security. The evidence of Mr Machitski, Mr Krasnov and Mr Kobzev, to the extent that they were present, was to the effect that Mr Krasner said that he had been under pressure in writing the letter of 3 September and wished it to be ignored, including its reference to the MOA. He withdrew his demands and said he was willing formally to revoke the letter he had sent. In consequence Mr Kobzev drafted a document which Mr Krasner signed in their presence

which included the following terms:"I hereby inform you that I am completely satisfied with your oral answer to my letter of 03 September 2004 concerning participatory interest in the Romanian Alro/Alprom project.I assume that the fact of presenting to me the draft agreement on the principles and conditions for collaboration in the implementation of the projects on the territory of Romania and countries in Europe fully testifies to your intentions to formalise our agreements in relation to these projects.In connection with this, I hereby officially announce the unconditional revocation of my letter of 03 September 2004 concerning participatory interest in the Romanian Alro/Alprom project and consider it from my side to be invalid, not expressing my formal legal position and not engendering any obligations, either on my side, or on your side.I request you not view the indicated letter as an official notification requiring any reaction or counter measures."[225] Once again this letter is self-explanatory but supports the suggestion that the object of Mr Krasner's earlier letter was to obtain a formal agreement as to his position and the basis upon which he could obtain an indirect shareholding in Alro. Whilst Mr Krasner maintains that he signed this letter under duress, in order to get out of Moscow when pressure was being applied to him, he did not write any letter on his return to London making this point and on his own evidence, he was being pressed to initial the draft agreement but refused to do so on the basis that he required legal advice. I find that there was no undue pressure upon him which could explain his signature to this letter and that he did so voluntarily because he considered that it would assist him in obtaining the type of agreement that he was after.[226] There is no doubt that the terms of the draft agreement were such as to tie Mr Krasner in to Mr Machitski's business for five years and there was considerable uncertainty as to the point at which any monies would become available to him to purchase shares in MIBV, given the provisions relating to the prior utilisation of funds to repay Mr Machitski's companies' investments in Alro (about $94m at that point) and repayment of Mr Krasner's loan obligations, amounting to about $12.2m.[227] Mr Krasner returned to London and it appears that negotiations about a draft agreement continued on a without prejudice basis.[228] It is clear that Mr Krasner, after considering his position, was dissatisfied with the terms on offer, whilst perceiving that Mr Machitski was looking for failures in his management of Alro to use as leverage in continuing negotiations.[229] It was in this context that on 21 September he gave instructions to debar Mr Sventsky and Mr Sklyarov, part of Mr Machitski's regular reporting team, from the premises of Alro in Romania. He relented however after discussions with Mr Krasnov who was seeking to bring about peace between Mr Machitski and Mr

Krasner. Mr Machitski and Mr Krasner met in Claridges Hotel that day and had further discussions about the draft agreement and Mr Krasner's problems with it. Issues were raised about the Tolling Agreements (to which I refer later in this judgment) and a meeting took place in Bucharest, to which Mr Krasner and Mr Machitski flew that evening, at which those agreements were discussed with Mr Sventsky, Mr Nastase and Mr Sklyarov. It was following that meeting that Mr Machitski instructed his representatives to carry out an internal investigation into those agreements.The criticisms of Mr Krasner[230] I am unimpressed with the criticisms that were made of Mr Krasner's management although no doubt it was hoped that additional profits would be made by Alro and in particular that expenses would be cut down and Mr Machitski no doubt pressed for this in August 2004. The problem of cutting down expenses was well recognised but the overall profitability of Alro is seen in the audited accounts which show a profit in 2002, after tax, of the order of $30m, when the tax rate was 12.5%, a profit in 2003 of $50m, when the tax rate was 25%, and a profit in 2004 of $48m at the same higher tax rate, after Mr Krasner became President in November 2002.[231] The criticisms made of the long-term electricity contract and the alumina contract with Trafigura appear to be criticisms made in hindsight after Trafigura terminated the supply agreement in circumstances where the spot market prices had risen substantially and were from time to time about double the contract price. The electricity contract, though made with an intermediate trader, rather than a direct supplier, was fortified by a guarantee of supply by the supplier and shortages appeared to have occurred as a result of a drought (the power supply being hydroelectric) and increased requirements for electricity on the part of Alro. Whilst these matters were not explored in any great detail before me, I am unable to see that they provided any basis for the course of action adopted by either party in September or October 2004. Equally, I am unable to accept that any problems over IT and the appointment of IT consultants had any relevance to events which took place in that period, other than constituting, at most, negotiating counters.[232] The only documented issue which had arisen at that time relates to the Tolling Agreements. I heard some evidence on this from Mr Braun and from Mr Nastase who was the vice president of Alro and the country manager for the Marco Group in Romania. The matter had clearly been raised in August/September and October 2004 and was the cause of outrage on the part of Mr Braun and Mr Krasner. I am satisfied on the evidence that the Tolling Agreements were concluded in early 2004 at a time when there was a shortage of alumina which was essential to the running of the Alro plant since it needed an uninterrupted supply for 365

days a year. It is plain that the prices for alumina were about double the prices in 2002. In these circumstances, Alro, which purchased its supply partly on a long-term contract basis and partly on the spot market was faced with the difficulty of obtaining alumina. Pechiney had been bought by Alcan who would not extend the existing contract with Alro and a crisis in the market developed at the beginning of 2004 as Kaiser Aluminium were in Ch 11 and suspended deliveries to Trafigura, Pechiney and another company which was shipping to China. The demand in China exploded at the same time. These problems gave rise to the need for purchases of spot cargoes from Glencore, Trafigura and a spot contract with Pechiney as well as the Tolling Agreements.[233] Mr Krasner and Mr Braun decided that the only solution to the shortage of available alumina for the plant's uninterrupted supply was to buy material from Glencore which had a contract with Alum by which it supplied Bauxite to Alum which converted it into alumina. By entering into an arrangement with Glencore, Alro was able to secure a supply of alumina at a time when other options were very limited. Mr Braun described the Tolling Agreements as in reality a straight sale of alumina from Glencore to Alro dressed up as a Tolling Agreement in order to save VAT. The alumina purchased from Glencore was paid for by the provision by Alro to Glencore of aluminium plus a processing fee.[234] The calculations which were carried out by Alro personnel and then by Mr Machitski's investigative team proceeded simply on the basis of comparing the cost of production of the aluminium with the aluminium produced which gave rise to a loss. Mr Krasner and Mr Braun signed copies of calculations effected on this basis by the team showing losses less than the figure of $3.5m now put forward (about $1.58m at that stage).[235] Mr Krasner and Mr Braun's point in essence was that mathematical calculations of this kind were irrelevant to the market situation and the need to keep the plant running so that any calculation of profit and loss could not be restricted to an individual contract but had to take account of the overall cost of supply as against sales over a more extended period and the apparent loss of $3.5m had to be seen in the overall context of the profits achieved in the year. There is plainly much to be said for this argument and none of the criticisms advanced in evidence before me grappled with the issues raised by Mr Krasner and Mr Braun nor emanated from anyone with sufficient knowledge of market conditions, other than perhaps Mr Nastase, whom I found to be evasive when cross-examined on these issues, and on the reasons for the financial situation of Alro in 2005.[236] Nonetheless, although these criticisms were apparently unjustified, they played a part in the events of September and October 2004 starting with the barring of Mr Machitski's

team on 21 September and culminating in the events at the end of October. It was on about September 24 that two documents were prepared by Mr Sventsky relating to the Tolling contracts which had been concluded on 27 February and 21 May 2004, and which had been the subject of calculations by Alro's accounting staff and Mr Machitski's investigating team.[237] The Tolling Agreements were discussed at the supervisory board meeting on 23 and 24 September when discussions were heated and Mr Krasner made the same points as he made at the trial. Issues arose as to the established procedures for signing of contracts and a review of the Tolling Agreements was instigated by Mr Machitski. In a report dated 16 December 2004, Ernst & Young later concluded that the calculations already made were mathematically correct and would give rise to losses between $1.8 and $3.5M. They also concluded that both contracts were signed by the general manager and the commercial manager and were submitted to Glencore for signature without the second mandatory signature of Mr Nastase who only signed the front page of the contracts after receiving the signed contracts from Glencore.[238] I conclude that this grievance and any others raised against Mr Krasner have little substance and were advanced with a view to making him feel vulnerable in the context of the strained without prejudiced negotiations which were in train with regard to the draft agreement, in the hope of inducing him to conclude a deal on the basis put forward by Machitski. I reject the evidence of Mr Machitski to the contrary effect. It seems to me highly likely that both Mr Machitski and Mr Krasner were well aware of the issues raised about the Tolling Agreements as far back as August 2004 when they were first brought to the attention of Mr Braun, notwithstanding their evidence to the contrary.October 2004[239] At a meeting at Mr Machitski's house in London on 16 October 2004 to discuss the draft agreement, he accused Mr Krasner of some kind of impropriety in respect of the Tolling Agreements. This raised the temperature of the discussions and in consequence Mr Krasner, having arranged to meet Mr Machitski on 18 October in London, then called a board meeting of Alro for the same day in Bucharest with an agenda which related to various matters concerning electrical supply, alumina supply and the need to comply with legal provisions and the rules for the Bucharest Stock Exchange regarding corporate governance. Mr Krasner's evidence was that he wanted to arrange for an independent auditor to investigate the Tolling Agreements. It appears that the intention was to examine the Tolling Agreements and the functions of management as compared with that of shareholders, although this is not clearly spelt out in the agenda.[240] At all events Mr Nastase refused to attend the meeting and it was aborted after a telephone conversation between

Mr Machitski and Mr Krasner, following which Mr Machitski flew to Bucharest himself.[241] On 19 October, Mr Machitski called a meeting of the Supervisory Board at which Mr Krasner apologised for calling the non-scheduled meeting of the Alro board and Mr Machitski said there was no outstanding disagreement between Mr Krasner and himself. The minutes of the meeting recall Mr Machitski expressing an intention to introduce a formalised system of relations between shareholders and members of Alro's board.[242] Following the meeting on 19 October, Mr Machitski says that he had a conversation with Mr Krasner about obtaining an independent assessment of the Tolling Agreements, stating that, if they were found to be detrimental to Alro, Mr Krasner would probably be held personally liable for losses caused. Mr Machitski also says that he required the loans he had made to him to be repaid urgently and that any further discussion of an agreement between them would have to be postponed until these matters were resolved. He also asked Mr Krasner to write an undated letter of resignation from his position as Chairman of Alro.[243] At that point Mr Krasner told him that he was about to fly to Zurich on personal affairs and whilst there would arrange to repay the $3m loan granted in May 2004. He obtained bank details from Mr Sventsky in order to make the payment.[244] The following day Mr Krasner telephoned Mr Machitski from Zurich and asked when Mr Machitski was returning to London and at which airport he would be arriving. When Mr Machitski arrived at Luton Airport on 20 October he was served with the claim form in these proceedings.[245] Mr Krasner's complaint throughout this period was that efforts were being made to undermine his position as president of Alro and the sequence of events indicates that there was indeed a struggle as to who was in control of Alro. Mr Krasner's statement says that following the meeting he concluded that it was impossible for him to continue working as a director and that he therefore decided to resign, which he did on 27 October 2004. Mr Manaktala and Mr Braun also both resigned from the Board whilst retaining their other contractual engagements with Alro.[246] It was Mr Machitski's case that Mr Krasner had brought proceedings against him because he felt himself to be at risk in relation to his management of Alro and/or because of his loan obligations which Mr Machitski had threatened to call in and/or to improve his negotiating position in respect of the draft agreement or a deal of some kind. In my judgment it is the last of these elements which constituted that major motivation for Mr Krasner in circumstances where he hoped that a deal would be forthcoming in relation to the money loaned, together with compensation for all that he felt, with some justification, he had achieved for Mr Machitski. He rightly felt that the acquisition of Alro would not have

been achieved apart from his efforts which were more extensive and protracted than had initially been envisaged at the time of the MOA when his services were effectively being valued at $5m since this equated to his 20% input into a project where Mr Machitski's 80% input was valued at $20m.The contractual claim[247] In these circumstances, the contractual claim depends upon the construction of the MOA, its applicability to the circumstances in which the Alro shares were acquired and its continued existence in those circumstances.[248] I reject the evidence of Mr Machitski and that of Mr Sherman and Mr Krasnov, to the extent that they support him in suggesting that there was no intention to create legal relations on execution of the MOA. The whole purpose of that MOA was to avoid disputes and to set out the terms of the project in which Mr Krasner and Mr Machitski were to be involved.[248] The MOA itself, though succinct, had clear provisions setting out the nature of the project, provisions relating to management of it, financing it and ownership and operation of it. Whilst many more details would have to be agreed later, it was clear in its terms and those terms made it plain that the maximum financing to be provided by Mr Machitski was $20M. Any additional financing would be required from "third party lenders or equity investors". The MOA also provided that Mr Machitski and Mr Krasner would work together to obtain such financing on the best available terms. It is clear from this provision that, when reference is made to "third party lenders or equity investors", this meant someone other than Mr Machitski or Mr Krasner who were parties to this agreement.[250] It is therefore also clear, in my judgment, that funds advanced by companies in the control of Mr Machitski or Mr Krasner would not amount to funds advanced by "third party lenders" within the meaning of the MOA. The term "third party lenders" envisaged entities which were entirely independent of the parties to the MOA and not companies owned and controlled by them. The $20m which Mr Machitski was to fund could be, was expected to be and duly was ultimately, advanced by the companies owned by him and not by him personally. That was the manner in which it was expected that he would provide funding. Thus "third party lenders" represent institutions or individuals independent of the parties. This is reinforced by the reference to "equity investors" since any funding by means of "equity investors" would of necessity mean investors independent from Mr Krasner and Mr Machitski to whom a slice of the equity would have to be given by readjustment of the 80/20 split, by further agreement between the parties.[251] In my judgment, this short point is the complete answer to Mr Krasner's claim in contract because the terms of the MOA are incapable of application to a situation where Mr Machitski, by one means or another procured funding to the tune

of $150m gross (about $90m net, it would appear) and no further agreement was concluded between the parties in respect of that excess funding over the maximum for which the MOA provided. Mr Krasner sought to say that any excess funding over $20m by Mr Machitski's companies would qualify as third party lending in contradistinction to the first $20m also provided by such companies, which was to be treated as provided by Mr Machitski under the terms of the MOA. Such a distinction is impossible to draw despite the fact that the funding arrangements made by Mr Machitski's companies, initially with MAL, then with other off-the-shelf offshore companies incorporated and owned by him, and then with MAL and Conef, were all bona fide commercial loans set out in formal loan documents with interest provisions. The funding companies were all Mr Machitski's companies and it matters not that the loans are bona fide and on commercial terms - they remain funding procured by Mr Machitski and made by him through the medium of companies and controlled by him.[252] The conduct of the parties establishes their recognition of the inapplicability of the terms of the MOA to the situation which emerged once it became clear that external financing by banks and institutions of the acquisition of the controlling interest in Alro was impossible. The evidence establishes that by the time of the acquisition of the shares in Conef, the difficulty had been appreciated as a result of attempts made to obtain funding, largely by Mr Sherman but also by others. Thus it is that Mr Krasner pressed for a different kind of agreement under which he would purchase 20% of the Conef shares, after they had been acquired and a draft agreement to this effect was produced, at his insistence, in September 2000. The continuing theme of discussions about purchase of 20% of Alro shares and then in due course MIBV shares illustrates the point. I have found that throughout the period until the 3 September letter, no mention was made of the MOA which is inconceivable if either party had considered it to apply. The fact that the attention of none of the lawyers, who were involved in drafting a shareholders' agreement or other agreement to regulate the interrelationship of Mr Krasner and Mr Machitski, was directed to the MOA and none had any knowledge of the MOA is singularly potent. It is inconceivable that Mr Krasner would not have referred to the terms of the MOA, if it applied, when he instructed Mr Sherman and Mr Teacher to draft agreements or that he would not have drawn it to the attention of Mr Sedyshev when sending him a copy of Mr Teacher's draft agreement in July 2003. The MOA had express provisions as to three items which were to be included in such an agreement, yet these were never drawn to Mr Teacher's attention and the draft which he produced contained provisions which were directly inconsistent with the MOA.[253]

There is no evidence of any fresh express replacement contract ever being made between the parties other than the specific contracts to which this judgment has already made reference. The agreement with Dover, the agreement with Sarose Limited and the agreements between IMEX and Glacis provided for remuneration to Mr Krasner who also received a small salary for being president of Alro. In addition there was a series of loans all of which, save for the $3m loan made in May 2004, were documented by formal loan agreements setting out their terms. Whilst I have no doubt that these loans were given in the expectation that an agreement would be concluded between Mr Krasner and Mr Machitski under which he would purchase a direct or indirect shareholding in Alro and would receive dividends which could be used to pay off the loans, there was no agreement that the sums paid to Mr Krasner as loans were anything other than loans.[254] It is in my judgment also clear on the evidence that neither party treated the MOA as continuing to apply after early 2000. By their conduct, they recognised that it was no longer effective to govern their relationship and the purchase of any Alro shares which might be made. On the basis of the findings of fact I have set out, I conclude that Mr Machitski and Mr Krasner by their conduct agreed that it was no longer to apply. In para 109 of the Re-amended defence and counterclaim, Mr Machitski pleaded that the MOA had no application to the actual events which took place and/or that it was terminated by agreement. As the parties did plainly treat it as inapplicable, in so doing, by their conduct they impliedly, if not expressly, agreed that it was at an end and no longer effective to govern their relationship whilst the obligations under it were no longer to be performed.[255] In these circumstances as a matter of contract Mr Krasner is not entitled to specific performance of the MOA, nor of any alleged September contract, nor to damages for breach of contract. He is equally not entitled to any sums in respect of dividends alleged to be due since he is not entitled to any shares in Alro nor in any company holding shares directly or indirectly in Alro. Equally there is no entitlement at all in relation to shares in Alprom or dividends therefrom.[256] As a matter of contract, Mr Krasner is also not entitled to any of the declarations sought in relation to the sums advanced to him in May 2003 and April 2004, nor in relation to shares held in Alro or Alprom.Unjust enrichment[257] Mr Krasner claimed that if there was no enforceable contract on the terms of the MOA, supplemented by the oral agreement as to holding the shares indirectly through a tax efficient structure, or any enforceable agreement reached orally in September 1999, he was nonetheless entitled to relief on the basis that Mr Machitski had been unjustly enriched at his expense.[258] As explained in Banque Financiere

De La Cite v Parc (Battersea) Ltd [1999] 1 AC 221, [1998] 1 All ER 737 there are four general conditions which must be satisfied for a claim for unjust enrichment to succeed (per Lord Steyn at p 227 - see Lord Hoffmann at p 234 and Lord Clyde at p 237):"i) That the other party has benefited, ie has been enriched by the actions of the Claimantii) The enrichment was at the Claimant's expenseiii) The enrichment was unjustiv) There are no defences available to the Defendant."[259] It is clear that there is no need for any misconduct on the part of the Defendant as is made clear by Lord Steyn at page 227 and Lord Hoffmann at page 243.[260] The factual elements necessary for a claim to succeed for unjust enrichment overlap with those of the Pallant v Morgan principle for equitable relief so that it is possible to deal with these matters together in this judgment.Pallant v Morgan Equity[261] This form of relief originated with the decision of Harman J in Pallant v Morgan [1953] Ch 43, [1952] 2 All ER 951 and the reasoning set out at p 50. Reasoning of a similar kind appears in the authorities citied by the Court of Appeal in Banner Homes Group plc v Luff Developments Ltd [2000] Ch 372, [2000] 2 All ER 117. There, it was stressed that equity must retain its inherent flexibility and capacity to adjust to new situations and should never be deterred by the absence of a precise analogy provided that the principles invoked are sound. Nonetheless the following propositions were advanced:i) A Pallant v Morgan equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one party to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the Defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it.ii) It is unnecessary that the pre-acquisition arrangement or understanding should be contractually enforceable.iii) In the ordinary way, if there was an enforceable contract, there would be no need to invoke the Pallant v Morgan equity.iv) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party (the acquiring party) will take steps to acquire the relevant property and that, if he does so, the other party (the non-acquiring party) will obtain some interest in that property. Furthermore, it is necessary that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, perhaps more accurately, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding.v) It is necessary that, in reliance upon the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the

acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it.vi) Although in many cases the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, to enable the other to acquire the property in question, that is not a necessary feature and though there will usually be advantage to the one and correlative disadvantage to the other, the existence of both advantage and detriment is not essential. Either will do.[262] In summarising the position, Chadwick LJ at page 399 said this:"What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted. Those circumstances may arise where the non-acquiring party was never 'in the market' for the whole of the property to be acquired; but (on the faith of an arrangement or understanding that he shall have a part of that property) provides support in relation to the acquisition of the whole which is of advantage to the acquiring party. They may arise where the assistance provided to the acquiring party (in pursuance of the arrangements or understanding) involves no detriment to the non-acquiring party; or where the non-acquiring party acts to his detriment (in pursuance of the arrangement or understanding) without the acquiring party obtaining any advantage there from."[263] Other authorities which were cited to me illustrate the constraints upon these principles. There is no requirement that the arrangement or understanding be sufficiently certain to be enforceable (Banner Homes at p 398 B-C). There is no need for the arrangement or understanding to satisfy the rules of offer or acceptance (Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd [2004 EWHC 2547 (Ch) at para 238). The arrangement or understanding need not come into existence at a definable moment (ibid) and need not be intended by the parties to have any contractual effect (Banner Homes at p 398 C). It is clear that any such understanding or arrangement will not give rise to a Pallant v Morgan equity where the parties are negotiating the terms of a potential agreement and the potential agreement is expressly agreed to be "subject to contract" (London & Regional Investments Ltd v TBI plc [2002] EWCH Civ 355 at para 42 per Mummery LJ and Kilcarne at para 229). The exception applies where "it is part of the bargain that specific matters remain in a state

of negotiation until future agreement is made", so that this exception applies in such circumstances, whether expressly agreed to be subject to contract or not.[264] Turning then to the facts in relation to the claims for unjust enrichment and for a Pallant v Morgan equity, the key issue here is whether or not there was a pre-acquisition arrangement or understanding that Mr Krasner would own 20% of the Alro shares acquired and an unjust enrichment or an inequity in Mr Machitski and his companies retaining the shares without allowing Mr Krasner a 20% interest. There can be no doubt as to Mr Machitski's enrichment nor as to Mr Krasner's contribution to it in the work which he did. Mr Krasner did work in bringing about the acquisition of the shareholdings in Alro which conferred a distinct benefit upon Mr Machitski whose companies acquired the shares. Without his work, the shares would almost certainly not have been acquired.[265] The claim for unjust enrichment and a Pallant v Morgan equity must fail however for essentially the same factual reasons as the contractual claim. Once it is recognised that the MOA is inapplicable in its terms to the acquisition of the Alro shares in the circumstances of which both parties were aware, namely the inability to obtain external funding and the need for Mr Machitski to finance the acquisitions in a sum vastly in excess of $20M, it is hard to see how there can be any pre-acquisition arrangement or understanding that Mr Krasner would obtain a shareholding in Alro without providing funding, as the MOA had originally envisaged. The existence of the draft Conef Share Purchase Agreement, brought about at Mr Krasner's insistence, demonstrates clearly that he was not by then or thereafter labouring in reliance upon an arrangement or understanding that he would obtain a shareholding merely by virtue of his work. The continued discussions and negotiations as to the basis upon which he might obtain a shareholding reinforce this. What was being discussed prior to the acquisition differed from what was discussed after it, but once it was plain that the MOA could not apply, the position was always fluid and it cannot be said that there was any clear pre-acquisition arrangement or understanding in reliance upon which Mr Krasner helped Mr Machitski to acquire the shares in Alro. From that point onwards in spring 2000 it was always a question of whether Mr Krasner was in a position to, or wanted to, invest in the Project in order to acquire a 20% stake or to purchase from Mr Machitski 20% of what was to be or had been acquired.[266] Even as late as September 2004, long after the acquisition, Mr Krasner and Mr Machitski were discussing terms for such an acquisition with payment to be made by Mr Krasner. Essentially, Mr Krasner worked on the Project prior to the acquisition of the controlling stake in November 2002 with a salary from Dover and then additional remuneration under the

IMEX/Glacis agreements in the hope that he would be able to obtain finance to co-invest with Mr Machitski, either by borrowing from Mr Machitski himself, if necessary, or purchasing shares from him with deferred payment terms. The inability to reach agreement on such terms at any point however militates against a pre-acquisition understanding or arrangement as well as any injustice or inequity in Mr Machitski retaining ownership of the shares for which he had paid in full.[267] Although there is no requirement that the arrangement or understanding be sufficiently certain to be enforceable, the fact remains that the negotiations in which the parties were involved were inconsistent with the arrangement which is now suggested, namely that 20% of the shares in Alro would belong to Mr Krasner without payment. I cannot therefore find that there was any such arrangement or understanding nor that there is any injustice or inequity in Mr Machitski's companies holding onto the shares which they have acquired with their own funds or funds supplied by Mr Machitski or other companies belonging to him.[268] In these circumstances, the claim made for unjust enrichment and a Pallant v Morgan equity both fail and Mr Krasner is not entitled to any of the relief sought on this basis.[269] No claim was advanced for a Quantum Meruit in respect of work done by Mr Krasner, but it appears to me self-evident that, by the MOA, the parties at that stage valued Mr Krasner's work for the purpose of acquiring a controlling interest in Alro at $5m (see the 80/20 split and the $20m maximum funding from Mr Machitski). It is clear that the work actually done by him to that end extended over a longer period than had originally been anticipated and proved to be more arduous. In my judgment, although Mr Machitski was not prepared to accept it when asked, the project would never had got off the ground without Mr Krasner and it was his communications skills, knowledge of the aluminium business and co-ordination of the various consultants which was the key to acquiring the controlling stake. His contribution to the successful acquisition of a controlling shareholding in Alro can scarcely be overstated.[270] During the period from the middle of 1999 until the beginning of 2002, the only remuneration which Mr Krasner received for his work was the salary from Dover. By early 2000 it was clear to the parties that third party funding was not going to be possible for the acquisition of the controlling interest. Mr Krasner's evidence, which I accept, was that there was discussion about the dividends to be taken out of Alro if a majority shareholding was acquired and that Mr Machitski accepted that Mr Krasner should take $2m annually out of a $10m dividend. I accept also Mr Krasner's evidence that it was in this context that the first two loan agreements were concluded in 2001 providing for a $2m facility, three loan agreements were concluded in 2002

for sums of the order of $1.4m, a loan facility for $2m was granted in May 2003 and a further $3.5m facility was extended in April 2004. Whilst I have found that these were loans, it appears that the expectation was that they would all fall to be repaid out of monies earned by Mr Krasner by way of dividends on shares which he purchased and the figure of $2m per annum in respect of his services appears to represent the order of valuation in the minds of the parties.[271] It is interesting to note that the effective valuation of his services in the MOA is $5m and that at a rate of $2m per annum, Mr Krasner's services from the period between mid 1999 and March 2002, at the rate of $2m per annum, surpasses that figure. From March 2002 onwards, Mr Krasner was in receipt, as I have found, of remuneration in the shape of payments by IMEX under the contrived IMEX/Glacis agreements, which were, on Mr Machitski's evidence, discretionary figures fixed by him. Such remuneration, even taking Mr Krasner's Dover/Sarose and Alro remuneration into account, never amounted to $2m per annum.[272] Taking into account what Mr Krasner received in respect of work done up to June or November 2002 in the acquisition of the Alro shares and thereafter up to 27 October 2004, it may well be that some claim could be made for Quantum Meruit since, from the time when the parties came to appreciate that third party funding was impossible, Mr Krasner can only have been working on the basis that he would receive something by means of an agreement yet to be reached, the ambit of which was uncertain. That issue is outside the scope of this action as is any claim by Mr Machitski on the Loan Agreements and in the absence of any plea, claim or submission upon it, I can come to no concluded view in respect of it. It appears to me however that it is very much a live matter as between the parties, in the context of any outstanding loans owed by Mr Krasner's companies to Mr Machitski's companies.Misrepresentation, rectification and breach by Mr Krasner of the MOA[273] For the reasons already given, not only does Mr Machitski fail on his contentions relating to the legal enforceability of the MOA but he also fails in his claim for a declaration of rescission of it, rectification of it or damages in respect of misrepresentations inducing it. Equally, his claims for breach of the MOA by failing to invest and failing to obtain third party finance are also dismissed.

DISPOSITION:
Judgment accordingly.