Neutral Citation Number: [2013] EWHC 2631 (Ch)

Case No: HC1302145/HC13F02147

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30th August 2013

Before :

Mr Justice Mann

- -

Between :

ECLAIRS GROUP LIMITED and GLENGARY OVERSEAS LIMITED	**Claimants**
- and -	
JKX OIL & GAS PLC and others	**Defendants**

- -

Mr David Mabb QC and Mr Nigel Dougherty (instructed by Freshfields Bruckhaus Deringer LLP) for Eclairs Group Ltd
Mr Andreas Gledhill and Mr Paul Sinclair (instructed by Locke Lord (UK) LLP) for Glengary Overseas Ltd
Mr Michael Swainston QC and Mr Tony Singla (instructed by Allen & Overy LLP**)** for JKX Oil and Gas plc

Hearing dates: 23rd-26th July, 29th July, 1st August 2013

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Approved judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Honourable Mr Justice Mann

Introduction

1. This is the expedited hearing of two claims, which, having been caused by the same course of events, largely rely on the same grounds and can properly be dealt with together. At issue is the validity of certain restrictions on voting and transfer, imposed by the board of directors of the defendant company (the "company" or "JKX") under its articles on shares beneficially (though not legally) held by two significant shareholders, Eclairs Group Limited ("Eclairs") and Glengary Overseas Limited ("Glengary", together "the claimants"). Mr Mabb QC led for Eclairs, Mr Andreas Gledhill led for Glengary and Mr Swainston QC led for the company.

2. The board of JKX perceived that it was being "raided" by Eclairs and Glengary who, it was feared, sought to destabilise the company by replacing senior management and obstructing necessary fund raising processes with the ultimate aim of acquiring the company at less than its proper value. The board, or the principal executive directors, served a notice under section 793 of the Companies Act 2006 ("the Act") and article 42 of the company's Articles of Association seeking disclosure of interests in shares. When the responses came in the board considered the responses to be materially inaccurate and served restriction notices imposing restrictions which prevented the voting and transfer of the Eclairs and Glengary shares. This occurred some 6 days before the AGM of JKX. The company's annual general meeting was scheduled to take place on 5th June. It was known that Eclairs and Glengary would be likely to oppose certain ordinary and special resolutions, and while it was not clear whether their votes would be crucial to the fate of the ordinary resolutions, it was clear that the special resolutions would not be passed if Eclairs and Glengary voted against them. The effect of the restrictions would have been to prevent them from voting and thus giving effect to their opposition. Immediately on receiving the notices Eclairs, and then Glengary, sought interim relief in advance of that meeting, challenging the validity of the restrictions. The result of that application was an order of David Richards J, incorporating undertakings by the company, which created a regime under which the AGM could go ahead and Eclairs and Glengary could vote their shares, but there would be no declaration as to the effect of the votes on the resolutions pending this trial, and the effectiveness of that vote would depend on the success or otherwise of the attack on the restrictions. When the meeting took place and the votes were ultimately cast, the ordinary resolutions were carried and the Eclairs/Glengary votes would have made no difference; but the special resolutions would have been affected – they would be carried if the Eclairs/Glengary votes are disallowed, but lost if they are allowed. David Richards J ordered a speedy trial of the matter, and thus it arrived before me.

3. The case was set down for 5 days, and expedited on the footing that that would be the time allowed to it. Getting it to trial within that timeframe has led to some shortcuts in certain areas, but not at the expense of doing justice. Conducting the

trial within 5 days required some significant trimming of cross-examination. In the end one of the company's witnesses (who would normally have been cross-examined) was not cross-examined at all, and another was not cross-examined by Mr Mabb, but the trial time limit was still not achieved, even with a degree of trimming and early and late sittings, but the evidential phase was achieved in five (longer than usual) days. The final submissions took place on one further day (plus some further written submissions). I am satisfied that such trimming as has occurred has not resulted in injustice and that the parties have had a fair chance to advance their respective cases. The subsequent need to produce this judgment within a reasonable timeframe has led to a certain amount of trimming of my own, in that I have omitted references to a significant number of authorities which appeared in the written submissions of the parties. I have, however, considered them all where relevant, whether referred to or not. This judgment has not appeared with the speed I would have wished, but that was due to other sitting commitments in the vacation and the fact that the condensed nature of final submissions led to a longer period of gestation for this judgment.

4. The principal objections to the restrictions fall under three heads:

   (a) The preceding notices are said to be invalid because, in various respects, they do not comply with the Articles and/or the statute.

   (b) The directors were not entitled to impose the restrictions because they did not have reasonable cause to believe that the responses to the notices were inadequate.

   (c) The directors acted for an improper purpose in imposing the restrictions.

5. The following additional points are also said to arise:

   (a) Whether, even if the article 42 notices were invalid, the recipients were estopped from so asserting by reason of their responses to the notices.

   (b) Whether the restriction notices were invalid for failing to contain a particular reference to the power of the directors to remove the restrictions.

   (c) Whether certain non-disclosure on the part of the Claimants has the effect that undertakings given by the company at the interim application should be treated as discharged with the effect that the result of the vote can be treated as being what the company contends it to be.

   (d) Whether Eclairs and Glengary, who are each beneficiaries behind nominees (the latter being the registered holders of the shares) are entitled to bring this claim (as opposed to the nominee shareholders).

Companies, individuals behind them, structures and shareholdings

6. Before moving on to the factual background of the claim and the parties involved it is worth elaborating a little as to the rather complex means by which the interested individuals have opted to hold the shares in the Company. This section is not intended to give a detailed breakdown of every company that is or has been involved in such a structure but will serve to give a sufficient picture of some of the names and individuals encountered in the substantive part of this judgment.

7. JKX is a publicly traded company and listed on the London Stock Exchange. Its business is the development of oil and gas reserves, and the sale of the resultant products. While it has assets in Russia, the more important one for the purposes of this judgment is its Ukrainian subsidiary called PPC, which is a valuable company with interests in oil and gas. The two claimants presently have a combined beneficial interest in the company of some 39%, of which Eclairs' interest amounts to 27.55% and Glengary's interest to 11.45%. Those interests are held behind a wall of nominees and the ultimate individuals behind those groupings are as follows:

    - At the centre of this case is a Ukrainian businessman called Mr Igor Kolomoisky. He is a very wealthy man with a number of business interests, including interests in the energy sector of which Eclairs is one.

    - Mr Gennadiy Bogolyubov is a long-standing and close friend and business associate of Mr Kolomoisky. It is said that in March 2013 he acquired an interest in some of the shares then held beneficially by Mr Kolomoisky (via a discretionay trust of which he and his family are beneficiaries).

    - Mr Alexander Zhukov is the ultimate beneficial owner of Glengary (or of 95% of it).

The structure of the holdings giving the claimants their interests

8. Eclairs only has an indirect interest in the shares through the numerous nominees and custodians it employs. The structure can be summarised as follows – the direct link to the Company is Hanover Nominees Limited ("Hanover") which holds the shares in the Company (and is therefore registered as shareholder) as nominee for Renaissance Securities (Cyprus) Limited which, in turn, holds the rights to the shares on behalf of Renaissance Advisory Services Limited and, finally, Renaissance Advisory Services Limited holds the shares as custodian for Eclairs. Thus Eclairs (a BVI company) is treated as the beneficial owner. The

shares in Eclairs are currently said to be held as to 59.1% by Trival Ltd, which is owned by Mr Kolomoisky, and as to 40.9% by Marigold Trust Company Ltd ("Marigold"), which is owned by what is said to be a trust whose beneficiaries are Mr Bogolyubov and his family. How the trust acquired its shares, and the relationship between Mr Bogolyubov and Mr Kolomoisky in relation to them, is one of the matters significant to this case.

9. Glengary is the vehicle of Mr Zhukov. It is said to be a beneficiary under nominee arrangements covering its shares, passing through Lynchwood Nominees Ltd (which is registered as shareholder) and further nominees. The "ultimate beneficial owner" (the expression used by Mr Ratskevych, who gave evidence for Glengary on the point) of 95% of the shares in Glengary is Mr Zhukov. Mr Ratskevych himself is the beneficial owner of the other 5%.

10. One other company, namely Ralkon Commercial Ltd ("Ralkon"), needs to be mentioned at this stage. Ralkon was another vehicle of Mr Kolomoisky and was the vehicle through which he held JKX shares until March 2013 when Eclairs was substituted as that vehicle.

11. The claimants in these two sets of proceedings ought to be the registered shareholders whose rights have been suspended. However, it is said that those shareholders, being nominees, could not be propelled into action quickly enough; nor was it possible to get the registered ownership into the ultimate beneficiaries (Eclairs and Glengary) in time. So these proceedings were started by the beneficial owners, joining some or all of the intervening nominees as defendants. This gives rise to the locus standi point to which I have referred above.

Witnesses

12. I heard or received evidence from the following witnesses of the claimants

Mr Michael Bakunenko

13. Mr Bakunenko is a director of Eclairs, but was only appointed recently – 16th May 2013. He therefore joined part way through the events of this case, and has only limited personal knowledge of some of the background. Nonetheless, he was the person chosen by Eclairs to give evidence of some history (some basic facts about acquisitions and disposals of shares) and he gave some hearsay evidence (based on briefings from Mr Novikov, thought to be Mr Kolomoisky's right hand man) about other areas of history. He explained that the timing of his appointment was so that he could canvas some of the shareholder base of JKX to glean support for Mr Kolomoisky in his

exploitation of the latter's shareholder rights. He did that, and conducted various other activities in the events leading up to the present action. As a witness his credibility was not significantly attacked, but since he could only give direct (non-hearsay) evidence on largely uncontentious matters that does not matter much. So far as his evidence dealt with historic matters he could only rely on what Mr Novikov had told him. In my view Mr Novikov would have been a more appropriate witness for dealing with those points, and Mr Bakunenko could not give a good reason why Mr Novikov was not called. I think it likely that a deliberate decision was made to put up Mr Bakunenko rather than Mr Novikov so that the latter could not be so closely questioned on historical matters, but in the end not a lot turns on that. I consider that Mr Bakunenko would be likely to seek to give evidence which toes the Kolomoisky party line on any given issue.

Mr Oleksandr Ratskevych

14. Mr Ratsksevych works for Interfinance Holdings Ltd BVI, which handles various business interests on behalf of Mr Zhukov. He has been acting for Mr Zhukov for a number of years and can be closely identified with his affairs. He has acquired a 5% stake in Glengary. He gave evidence about the circumstances in which he was proposed as a director of JKX, a conversation he had with Dr Davies and one or two other events in mid-2013. He came across as a careful witness who wanted to give clear evidence.

Mr Graham Spitz

15. Mr Spitz is a partner in Locke Lord (UK) LLP, the solicitors acting for Glengary. He provided 2 witness statements (one of them correcting the other) about the circumstances in which it was suggested that Glengary might like to purchase a further parcel of shares in JKX (owned by a company called Naftogaz) in April 2013. He was not cross-examined on his witness statements.

16. I heard or received evidence from the following individuals for JKX (all members of the board that considered the imposition of Art 42 restrictions). On the application of Mr Mabb (and against the opposition of Mr Swainston) I directed that witnesses should be excluded from court until they had given evidence so that their evidence could not be affected by what the other directors had said. I formed the clear impression that they were all giving their evidence in a manner which was not affected by any foreknowledge of what their colleagues would say.

Dr Paul Davies

17. Dr Davies is the CEO of JKX, and has occupied that position for over 10 years. He is plainly an experienced man. He gave his evidence clearly and in a very considered fashion. As one of the executive directors, he was very active in considering what the stance of JKX should be in relation to what he considered to be a "raid" by Eclairs, and his views and acts were crucial. I considered that his evidence was reliable and I could rely on it.

Mrs Cynthia Dubin

18. Mrs Dubin has been the Finance Director of JKX since 2011, having had 28 years experience in the energy industry. Again, as an executive director she was very active in the company's riposte to Mr Kolomoisky's activities. Her evidence was particularly careful, considered and direct. She told me that she had had witness coaching in relation to her evidence in this case, and some of the effects were apparent in her evidence, but I do not think that it affected the truthfulness or reliability of her evidence. At the end of the day she, like Dr Davies, was an impressive witness.

Mr Nigel Moore

19. He is and was at the material time the chairman and non-executive director of JKX. His involvement in the day to day management of the company's riposte was therefore more limited, but it was still significant. He was a reliable witness, who demonstrated no propensity to exaggerate.

Lord Oxford

20. Lord Oxford is a former diplomat and now a non-executive director of JKX with significant experience of business in Russia and some of the CIS states, including Ukraine. His background was important to his views on the information being given and (as he would say) not given by Eclairs and Glengary in this case. He was a careful, measured and reliable witness.

Mr Alastair Ferguson

21. Mr Ferguson is a non-executive director of JKX who joined the board in November 2011. He has spent most of his business life working abroad, and a very large part of it in Russia and the Ukraine. He also has considerable experience in oil and gas. He therefore understands the industry in which JKX works and business practices in those two countries (and others). He came over as a good clear witness, and someone who discharged his duties as a non-executive director conscientiously and with a good deal of thought.

Mr Dipesh Shah

22. He is another non-executive director with experience of sitting on a number of FTSE company boards. He has himself been a CEO. His evidential style was to very measured and thoughtful, but it was also clear and, in my view, reliable.

Mr Martin Miller

23. He is the technical director of JKX. He has never been based in the Ukraine but carried out an initial assessment of assets there. He was abroad at the time of the important board meeting in this case, and did not participate by telephone, but he left what was treated as a proxy with the chairman. Like the other directors, he gave his evidence clearly, without exaggeration and reliably.

Mr Richard Murray

24. He is another non-executive director, having joined as such in 2013. Time constraints meant that his cross-examination was short – only Mr Gledhill cross-examined him. It revealed no reasons to doubt his honesty and credibility as a witness.

Mr Peter Dixon

25. He is the commercial director of JKX, and provided a witness statement. However, by the time the period allocated for the cross-examination of witnesses expired there was no time to call him, so his witness statement was not, to that extent, challenged. However, I do not treat it as unchallenged in the sense in which it would have been unchallenged had there been a positive election not to cross-examine – that would not be fair on the claimants. It is fairer to treat it as untested.

The facts leading to the restriction notices

26. In the narrative that follows any recitation of fact should be taken as a finding by me, unless the contrary appears. I must also add one caveat. I shall from time to time refer to reputations and perceptions. Much of what matters in this case depends on reputations of people (principally Mr Kolomoisky), and it is not necessary to make positive findings about whether that reputation is deserved (substantiated by actual facts). Accordingly, when I make findings about reputations they are findings about just that - they are not findings as to

whether the reputation is deserved. Similarly in terms of perceptions. Much in this case turns on what board members perceived or believed, not whether those perceptions or beliefs were accurate and reflected reality (though their reasonableness is firmly in issue). So when I make findings about perceptions and beliefs they are merely findings as to whether those perceptions and beliefs existed, not whether they were actually justified on the facts.

27. In the main, in this section of the judgment I shall deal with the facts as they unfolded. While from time to time I refer to what various board members were thinking about them, I shall return in a later section to deal in more detail with their respective perceptions and views, with what the state of mind of the board members was from time to time (when relevant) and with their purpose in supporting various courses of action.

28. Mr Kolomoisky and Mr Bogolyubov together own or control a financial organisation called Privatbank, and that organisation holds a 42% stake in the Ukrainian state oil company Ukrnafta. Mr Kolomoisky, and probably Mr Bogolyubov with him, has a reputation as a corporate raider, that is to say a person who acquires shares (less than a majority) and then exploits that shareholding to lever his way to managerial or actual voting control by using methods such as inserting his own staff, pressurising or destabilising the current management and frustrating conventional methods of raising capital, all with the object of getting control without paying what the other shareholders would regard as a proper premium for their shares. In the case of Mr Kolomoisky it is said that he has sought to take control of one particular company "at gunpoint" in the Ukraine. While it is not part of this case to determine the extent to which that reputation is justified, Mr Bakunenko accepted that Mr Kolomoisky had that reputation. At the beginning of the process involved in this case that reputation was known to at least some of the directors of JKX, and by the end it was conveyed to all of them. Some of the directors (including Dr Davies, Mr Ferguson and Mr Miller) were aware that doing business in countries such as the Ukraine involved countering these (and other) less than conventional ways of doing business (including the enlisting of state agencies to assist the cause of the raiders), and in the past the company had had to seek diplomatic intervention to stop what it considered to be unwarranted interference in the business of PPC. Over the course of time Dr Davies had ascertained that Mr Kolomoisky had sought control in this way of an Australian company called Consolidated Minerals, and another company called Ferrexpo (the largest iron-ore producer in the Ukraine).

29. Mr Zhukov does not seem to have had the same reputation, but he was known, or believed by Lord Oxford, to have done business with Mr Kolomoisky in the past before their dealings in JKX.

30. Each of Mr Zhukov and Mr Kolomoisky had individuals who can probably be called their "right hand men" in dealings such as those that occurred in relation to JKX. Mr Zhukov's was Mr Ratskevych. Mr Kolomoisky's was Mr Novikov. Representatives of JKX had a reasonable relationship with both men in the period prior to March 2013.

31. Mr Zhukov started acquiring shares in JKX through Glengary in 2004, and by June 2006 he had acquired over 32,300,000. In around December 2006, in an off-market transaction, Mr Kolomoisky acquired about half of that stake through Ralkon, one of his vehicles. That gave him about 12.5% of the share capital in JKX.

32. The purchase by Ralkon took place shortly after the apparent raid on the Australian company referred to above. In the ensuing period Ralkon built up its shares in JKX until it owned approximately 28% of its share capital. By the time of the events at the heart of this case Glengary owned just under 11.5%.

33. Between 2010 and 2012 JKX sought to improve its position in relation to the raising of capital. It was, by and large, unable to raise capital from conventional sources (banks and the like) and the directors (particularly Mrs Dubin and Dr Davies) were given to understand that some institutions were unwilling to lend to JKX because of its links with Mr Kolomoisky. Some banks openly expressed that view; others said it off the record; others did not express it, but the directors (with good reason) perceived that the Kolomoisky association was a bar to raising significant finance through that route. It is true that a lack of appetite for the country risk associated with the Ukraine was also thought to be a reason for a lack of enthusiasm, but Mr Kolomoisky's association was an important factor for a considerable number of institutions.

34. The company had limited powers to raise capital by issuing and allotting share capital, but they were not adequate, in the view of the directors. Between 2010 and 2012 they proposed resolutions to allow the allotment of new shares, the disapplication of pre-emption rights and the possibility of share buybacks. The resolutions proposed would have given the directors what they regarded as standard tools for a plc. However, some of the proposals would have required a special resolution, and on each occasion Mr Kolomoisky opposed, or made it known that he would oppose, the proposals (by and large), so they were never passed. It was understood that Mr Kolomoisky said that he did not want the dilution of his stake. The directors understood those concerns, so far as genuine, but considered that since the well-being of the company as a whole required the resolutions (so that capital could be raised through share issues) a reasonable shareholder who was concerned with the prosperity of the company would have agreed to a small dilution. Nonetheless, Mr Kolomoisky opposed it.

35. Glengary also opposed the proposals in 2010, and Mr Ratskevych said it was probable that that was after a discussion between Glengary and Ralkon. However, its proxy form was faulty, so its vote was not counted. In 2011 and 2012 Glengary did not seem to vote on the proposals.

36. Dr Davies's evidence was that because of the company's need for funds, and because it was impossible to raise funds through conventional channels, in August 2012 he went to meet Mr Kolomoisky in Monaco to ask if he would provide finance through Privatbank. Mr Kolomoisky agreed he would do so, but only if a nominee of his were given a shadow management role sitting with the general director of PPC. The general director of a Ukrainian company is a powerful role, and someone shadowing him would be able to apply influence in that role (and doubtless feed back information to his appointor). Dr Davies expressed the view that he did not think that the board of JKX, or the other shareholders, would approve that proposal, to which Mr Kolomoisky's riposte was that they did not have to know. This clandestine approach to matters did not commend itself to the board of JKX.

37. Mr Bakunenko sought to dispute this account. In cross-examination he claimed to have had a "briefing" from Mr Novikov, who was at the meeting (Mr Bakuneko obviously was not – he came on the scene much later), and who said that financing was not raised at the meeting, and there was no reference to Privatbank lending money to JKX. He said that Mr Novikov briefed him to the effect that Dr Davies had said at the meeting that the financing aspects had been resolved. This is, of course, hearsay evidence, and I find it to be incredible. I find that the company had been in need of sources of finance for several years, and that was the reason for the meeting. While a Credit Agricole facility had been rolled over, that institution had said it would not renew if Mr Kolomoisky acquired seats on the board, so it cannot be said to have been an assured source of finance. It is inconceivable that Dr Davies would have said that financing issues had been resolved; the very opposite was the truth. I accept Dr Davies' version of events and find that Mr Bakunenko's version is a contrivance put together for the purposes of this hearing.

38. By March 2013 Ralkon was holding over 47m shares. Glengary held over 19m. On 4th March Ralkon (through one of its nominees) made an unforeshadowed query as to how it could requisition an extraordinary general meeting. Mrs Dubin queried this, and 3 days later the company was told to disregard the question. On the same day (7th March) the company received notification that Ralkon had transferred its entire holding to another person, but that person was not identified. Dr Davies's inquiries of Mr Novikov as to who that other party was were met with the statement that that information would be given in due course when it was required. He also described the process of transfer as a "formal" one. On this occasion Mr Novikov was unusually reticent. The company issued a section 793 notice requiring the

identity of the purchaser but before it was answered the company was informed that the purchaser was Eclairs, whose shares were held in trust for Mr Kolomoisky. The company was therefore told to ignore the notice.

39. As information was given to the other directors, and as events unfolded, some of the other directors (for example Mr Ferguson and Mr Dixon) came to see this transfer to Eclairs as the first step in a raid on the company. Mr Ferguson explained to me that a raider would often start by putting his shares in the target company into a clean vehicle. That is what he came to see as happening here.

40. Shortly thereafter, on 15th March 2013, the Company received what it considered to be the first step of the raid, namely a letter from Eclairs (dated 7th March 2013) seeking to require the Company to convene an extraordinary general meeting, pursuant to section 303 of the Companies Act 2006. The purpose of the extraordinary general meeting would be to consider resolutions to remove Dr Davies and Mr Dixon from the board, and place 3 additional directors there, namely Mr Ratskevych, a Mr Yudin and a Mr Epshtein. The proposal to remove Dr Davies and Mr Dixon was viewed as very significant, and potentially very damaging, by the company. The two gentlemen were, respectively, the CEO and the commercial director, and at the heart of the company's activities. Mr Dixon was responsible for all the commercial activities (including negotiations and contracts for development and sales) in the Ukraine. To remove them would, as the directors appreciated, remove the heart of the management.

41. It also came to be seen as significant that Mr Ratskevych was one of the proposed new directors. He was associated with Mr Zhukov, not Mr Kolomoisky. In due course the directors took this as a sign that arrangements had been made between Mr Kolomoisky and Mr Zhukov. They certainly saw the section 303 notice as the opening of what some of them saw as a battle. When Mr Moore saw the notice he emailed Dr Davies on the evening of 15th March and expressed his sympathy and his intention to do:

> "whatever is possible to defeat this proposition as I am certain JKX needs your leadership and knowledge more than ever at this critical time …"

to which Mr Dixon responded:

> "Let battle commence!".

42. Dr Davies tried to contact Mr Novikov on 18th March to talk about the situation, but failed. He got the impression that Mr Novikov was ignoring him. Mrs Dubin had a greater degree of success in that she managed to speak to him, but he was uncommunicative.

43. Having sought legal advice the Company rejected the section 303 notice on the footing that it was not set out properly and the date of the notice pre-dated the date when Eclairs became a shareholder. When a formal written response was given it rejected the notice on the basis that Eclairs was not a shareholder (its holding was held by a nominee) and because the notice was non-compliant by virtue of the fact that it did not state the general nature of the business to be conducted at the meeting.

44. The same letter also sought details of the relevant skills of the proposed new directors. This was a genuine question. No details were given as to their suitability, and on the date they were proposed only Mr Ratskevych was known to JKX. Since he dealt with finances it was not clear what skills he had which would qualify him to be a director of an energy company. Further inquiries in due course revealed that Mr Yudin was actually wanted by the criminal authorities in the Ukraine "for abuse of authority or office with grave circumstances", and that he was reported to have fled the Ukraine for London.

45. On the next day (19th March), Dr Davies spoke to Mr Ratskevych to try to find out the intentions behind the notice. He reported this conversation to Mrs Dubin, Mr Dixon and others in an email of the same date. Mr Ratskevych confirmed that Mr Kolomoisky had contacted Mr Zhukov asking for his support in changing the management of JKX and that Mr Zhukov agreed provided that his man (Mr Ratskevych) sat on the board. Glengary's objective was apparently to get the share price above £3. Mr Ratskevych was unable to confirm quite all of this detail, but I find that Dr Davies's account was accurate.

46. At about this time the Company also found out about Mr Kolomoisky's and Mr Bogolyubov's involvement in Ferrexpo, an Ukrainian iron ore producer, and their attempts to seize control of that company (see above).

47. Also on 19th March the company held a board meeting to discuss the s303 notice. It was decided to serve notices under s793, seeking details of share ownership and arrangements between shareholders. Mr Baines, the company's financial adviser, explained that it might be argued that Eclairs, together with other shareholders, were trying to form an alliance to take control over JKX. Various of the directors had already formed views to that effect. Dr Davies, for one, thought that it was very significant that Eclairs was proposing Mr Ratskevych as a director of JKX when he was a Zhukov man. It was assumed that, having been told that its s303 notice was invalid, Eclairs would respond with a valid one, but it never did.

48. On 20th March the company started to send out a series of notices under s.793 to Eclairs and others. The one directed to Eclairs requested information regarding the number of shares held by Eclairs, the beneficial ownership of the shares and whether that company, or any beneficial owner, was party to any agreement or arrangement about the shares. This notice, in the same format but addressed to other parties, was also sent to Mr Ratskevych, Mr Zhukov and Glengary, along with the other two individuals put forward for director positions in the section 303 notice. A notice was not sent to Mr Kolomoisky because the company did not have an address for him and a notice sent to Trival Ltd did not get there because the courier was refused access to the building to which it was sent.

49. The following day (21st March) Eclairs informed the Company that, as of 19th March, the shares that had previously been held on trust for the sole benefit of Mr Kolomoisky were now held by Trivial Ltd on trust for Mr Kolomoisky (59.1%) and by Marigold as trustee of a discretionary trust for the benefit of Mr Bogolyubov and his family (40.9%). As a result, the Company wrote further notices, substantially in the same form as the notice sent to Eclairs, to Mr Bogolyubov and Marigold on the 22nd of March 2013. Dr Davies viewed him as a new investor and it heightened his view that steps were being taken to take control of the company. This view was further reinforced the next day when Dr Davies was sent a copy of a Ukrainian newspaper article which suggested that Mr Kolomoisky was seeking control of PPC and its assets.

50. Also on the 22nd, Mr Cardew of the Cardew Group – the Company's communications advisers - sent an email to Dr Davies and Mrs Dubin in which he said that "we must not lose sight of what we are trying to achieve: to delay and complicate the calling of the egm. To that end, as I stated this morning, it is necessary to be very scrupulous in public about ensuring that we are not being used as a vehicle for money laundering and that the interests of all our shareholders are protected." He made various proposals demonstrating his enthusiasm for standing up for the company, but most of them were not considered by the directors, and they were not cross-examined on them.

51. One of the significant blocks of shares, other than the Eclairs/Glengary shareholdings was one owned by a concern known as Naftogaz. Those shares were in fact subject to a form of charge in favour of a judgment creditor, and on 22nd March, as reported on 23rd March, Dr Davies heard that that creditor's solicitors were apparently seeking to place the shares on their client's behalf. Dr Davies reflected on the desirability of placing those shares with a friendly investor, because such a significant block of shares could make all the difference when it came to voting at a general meeting.

52. The responses to the section 793 notices started to come in and they all denied arrangements. With one exception they did not demonstrate a pattern of ownership which departed from the understanding of the company (in general terms). The exception was the response of Mr Ratskevych (dated 27th March) which revealed for the first time that he had a 5% interest in Glengary. In his evidence Dr Davies expressed surprise that this had not been disclosed earlier,

in 2007. On that occasion, because JKX was purchasing an asset from Mr Zhukov (who had more than 25% of the shares at the time) the company had issued a request for information in relation to the filing of a Class 1 Circular, seeking information as to the nature and extent of the interests of Mr Zhukov and Glengary. In response they both responded that "Mr Zhukov is the ultimate beneficial owner of Glengary … The beneficial ownership of Mr Zhukov can be confirmed by [a fiduciary] …". Mr Ratskevych had in fact acquired his interest in the shares a few months before the date of that circular. Dr Davies considered that the existence of that interest made the circular inaccurate. That inaccuracy was contested at the trial, but I find that JKX is correct in treating the earlier response as being inaccurate. The clear impression given by the circular was that Mr Zhukov was the, and the only, person interested in all the Glengary shares, and that impression was false. The falsity was material. This was one of the factors borne in mind by the directors in taking their crucial decisions later on. The failure to disclose it earlier was also a breach of the Disclosure and Transparency Rules, though that does not add much to the significance of the failure for present purposes.

53. Nigel Moore, the chairman, sent an email to Dr Davies on the 28th March communicating the main points of a meeting he had had with Mr Michael Abrahams on the previous day. The last bullet point stated that

> "He thought unsurprisingly that we should use every weapon in our armoury to fight Kolomoisky. He doesn't understand the rules of the London market, and he was described as 'seriously short of cash.'"

54. The Company received the reply to the section 793 notice from Mr Bogolyubov on the 2nd of April and he confirmed his interest in the shareholding in the Company through Marigold.

55. The company was due to hold an AGM, and on 23rd April 2013, a few weeks after receiving the replies to the Notices, the Company gave notice of an AGM to be held on the 5th June 2013, during which it proposed the consideration of a number of resolutions. There were 12 resolutions, including the following:

    (i) To approve the directors' remuneration report.

    (ii) To re-elect Mr Murray as director, who was up for re-election as having been appointed since the last AGM

    (iii) To re-elect Lord Oxford, who retired by rotation.

    (iv) To re-elect Dr Davies, who retired by rotation.

    (v) (As special business) To authorise the directors to allot up to £5.7m odd of share capital (this required an ordinary resolution).

    (vi) Authorising the company to make market purchases of its shares (this

required a special resolution).

(vii) Disapplying statutory pre-emption rights on the allotment of shares (this required a special resolution).

In the explanatory notes to the notice of the AGM under the heading 'Authority to allot shares (resolution 9)' the Company clarified that it had no present intention to exercise this authority.

56. The issue of the Naftogaz shares again became a topic of correspondence between Dr Davies and an unknown recipient (cc'd to Lord Oxford) on the 25th April when Dr Davies told the recipient that he had received information from Hogan Lovells, the solicitors acting for Merchant International, the judgment creditor with a charge over the Naftogaz shares. According to Hogan Lovells, Merchant had been approached by:

> "a current shareholder who might be interested in purchasing the Naftogaz's shareholding. I [Dr Davies] asked who that shareholder was, and although their solicitors do not know for sure, they did speculate that the person is connected to Oleksander Ratskevych, who I gather is one of the proposed directors nominated by Eclairs."

Dr Davies thought it likely that the approach was made by or on behalf of Glengary, and therefore thought that Glengary was considering increasing its stake in JKX. He also assumed it had something to do with the arrangement which he considered to exist between Mr Zhukov and Mr Kolomoisky. The potential acquisition had not been mentioned by Mr Ratskevych when they had spoken on 19th March and Dr Davies considered that he had not been given the full picture. In fact it turned out at the trial that part of what Dr Davies thought was not quite the full picture. The first approach between the judgment creditor and Glengary came from the judgment creditor's solicitors, not from Mr Ratskevych, and it occurred on 5th April (i.e. after the conversation between Dr Davies and Mr Ratskevych). However, it seems likely that it occurred as a result of a prior incident in March, when a contact of Mr Ratskevych (a Mr Olshanki) said he could put Mr Ratskevych in touch with the right people if he were interested in acquiring the shares held by Naftogaz. It looks as though that contact conveyed Glengary's possible interest to Merchant or its solicitors, so the contact did originate from what can fairly be regarded as the Glengary side, albeit more indirectly than a direct approach from Mr Ratskevych.

57. The directors were concerned that the resolutions proposed (and particularly those proposing re-appointment of directors) would not be passed because of opposition from Eclairs and Glengary. They started to contemplate how to counter that possibility and what to do if it happened. Mr Baines prepared a

script to be read after the EGM if the directors were not re-elected. It indicated that the board considered at least some of them (particularly Dr Davies) to be so important that the board would immediately re-appoint him or them. This script was circulated by Mr Moore to the other directors on 9th May under cover of an email which read:

> "Please find attached a draft statement I am planning to read out in the hopefully unlikely event of Paul, Raymond and Richard not being re-elected at the AGM.
>
> Paul and the team are presently making huge efforts to try and ensure we carry the day, including the possibility of issuing new shares, contacting as many shareholders as possible to impress upon them the importance of voting at this AGM and looking at any possibility of the Éclair/Glengary votes not being valid."

58. The first of the three tactics involved considering issuing a limited number of shares held by the company in what was described as a "cash box". They could be placed in "friendly" hands. However, it was ultimately considered that that proposal was impractical, not least because it would not be easy to make an attractive case for the placing of the shares bearing in mind the potential disruption from Eclairs/Glengary. The second tactic (contacting shareholders) was carried out with some vigour and, it transpired, some success. The third tactic was taken by at least some directors (Lord Oxford, for example) as being a reference to possible restrictions on voting under article 42, which was beginning to swim into the consciousness of at least some directors at about this time.

59. On 13th May 2013 the Company sent a further set of section 793 notices to the Claimants and others. These included notices to Mr Kolomoisky, Mr Bogolyubov, Marigold, Trival and Eclairs respectively and three further disclosure notices to Glengary, Mr Zhukov and Mr Ratskevych. These notices asked essentially the same questions of all the recipients, though some were more specificially tailored to their recipients than others. I do not need to set out all their terms. Those sent to Eclairs, Glengary, Mr Kolomoisky, Mr Bogolyubov, Mr Ratskevych and Mr Zhukov appear in Appendix 1 to this judgment, along with the responses which came in due course.

60. The notices included a request that the Company receive any responses as soon as possible but in any event by 17.00 on 28 May 2013. In anticipation of a need to consider the responses in a board meeting in advance of the AGM, on the 20th of May Mrs Dubin sent an email to the other members of the board in order to set up a board meeting for the 29th, the day after the responses were due to be received in order to "consider whether we wish to take action in relation to any possible restriction in accordance with Article 42 of our

Articles of Association". The board meeting was ultimately arranged for the 30th May.

61. At about the same time, on 20th May, Dr Davies received information about another corporate dispute with which Mr Kolomoisky and Mr Bogolyubov were engaged, this time with a gentleman called Mr Pinchuk. This claim involved an allegation that Mr Kolomoisky and Mr Bogolyubov had taken control of a company by force. There was litigation about this, which had not been concluded, so these were only allegations, but they coincided with misgivings that Dr Davies had already formed.

62. On the 23rd of May Eclairs circulated an open letter to the shareholders of the Company. It did so by posting an advertisement in the Financial Times with a clickable link which landed at the letter. It was expressed to be an open letter to all shareholders in JKX and stated that Eclairs was "writing to seek your support in voting for changes to certain members of the management and Board of [JKX] at the forthcoming AGM ... And to invite you to join the JKX Action Group in order to restore the performance of the Company to acceptable levels." It recommended that shareholders vote against the re-election of Dr Davies, the resolution to approve the directors' remuneration report and the 3 resolutions seeking authority to allot shares, authority to purchase shares and the dis-application of pre-emption rights. It went on to say:

> "We are seeking to discuss with fellow shareholders our concerns and dissatisfaction over JKX's performance and our desire to seek change to the management of the Company in order to maximise value for all shareholders. Glengary Overseas Ltd, a holder of 11.45% of JKX, has also expressed its concerns about the management of the company and its intention to vote against the Resolutions outlined above …
>
> "Following the AGM and if the resolution to reappoint Dr Paul Davies is not approved, we call upon Nigel Moore, Chairman, and the Board to conduct a full and wide-ranging external search for a new CEO, and also to replace Mr Peter Dixon as Commercial Director.
>
> "Whilst we have identified potential candidates in Mr. Borys Epshtein, Mr. Stanislav Yudin and Mr. Oleksandr Ratskevych, we are completely open to the recruitment of the best qualified candidates internationally….
>
> "JKX's wholly-owned subsidiary in Ukraine, Poltova Petroleum Company (PPC), has been forced to defend itself in court against action initiated by the Ukrainian tax authorities in 2010 seeking to charge PPC circa $70m of

unpaid tax." …

[After expressing dissatisfaction with the company's results] "We believe that these issues are a direct result of poor management, and in particular are the responsibility of Dr Paul Davis, CEO, and Mr Peter Dixon, Commercial Director.

"We urge our fellow shareholders to vote AGAINST Resolution 5, to re-elect Dr Paul Davies as a director of the company, at the forthcoming AGM on 5 June 2013...

"Eclairs would be fully supportive of the Board of JKX in running a process to identify the best qualified external candidates both to join the Board and to take the role of CEO.

"At the same time, we would request that the Board consider our proposed candidates on merit: namely Mr Borys Epshtein, Mr Stanislav Yudin and Mr Oleksandr Ratskevych."

63. Various aspects of this letter were seen as significant by the directors. The reference to Glengary was seen as relevant to the question of whether there were voting arrangements between Eclairs and Glengary; the criticism of the board for the poor performance of the company was seen as unfair and as a contrivance, as the concerns of Eclairs (if genuine) had never before been raised with the board (or the chairman), as the directors would have expected if they were genuine; the re-appearance of Mr Ratskevych in the list of proposed directors was again thought to be indicative of arrangements between the Eclairs and Glengary camps; and the reference to tax was misplaced and inaccurate, since there was no such claim in Ukraine.

64. So far as this last point (the tax point) is concerned, there was cross-examination of Mr Bakunenko (who had signed the circular letter) in order to investigate how this statement came to be made. It turned out that the justification for the statement was a comparison of references to a tax claim in 2 sets of accounts. There was no clear statement in the accounts to the effect of the statement in the letter; it was a matter of inference. I find that the inference was wrongly drawn. It was not the sort of statement which should have been presented as accurate without some checking, which would have revealed the mistake. It did, however, prove to be prophetic in that on 9th July 2013 the Ukrainian tax authorities started an audit of the 2010 accounts of PPC, a step which PPC claims to be illegal.

65. On 29th May the board sent a letter to shareholders addressing the points in the open

letter and refuting criticisms, recommending that shareholders vote in favour of all the resolutions. It stated the board's belief that the "Collaborating Parties" (namely Eclairs and Glengary) were intending to destabilise JKX at a key point, and they were indulging in an opportunistic attempt to secure control of assets without paying a premium to the shareholders.

66. On the 22nd May the Naftogaz shares appeared still to be in play because Mr Naidoo, a senior associate at Hogan Lovells (acting for the judgment creditor), contacted Mr Geraghty of solicitors acting for JKX to inform him that his client, Merchant International, had the benefit of an Order for Sale of the shares and that he was keen to find a buyer for the shares; and that "I have other interest from other current shareholders of JKX so I would be grateful if you could come back to me sooner rather than later." This was seen as material reinforcing the impression that Glengary might be interested in acquiring them.

67. In an email entitled "Battle for Control of JKX Oil & Gas plc" sent on the 23rd May, Mr Miller appears to follow up on a telephone conversation that had taken place previously on that same day with an unknown person. In particular it contains another passage that refers to the Naftogaz share:

> "A critical voting element could be the 5.8% owned by JSC Naftogaz of Ukraine but being held by a London law firm as it was the only accessible asset held by JSC Naftogaz during a dispute. We believe that the shares are now available for sale to settle the debt. At the current share price the full holding is worth around £6m."

The email finishes with the line "All we need is a very brave investor!!"

68. The board circulated a draft response to the open letter on the 24th May and board members, such as Mrs Dubin and Dr Davies, added or amended relevant parts from their own areas of expertise.

69. On 27th May Glengary, Mr Zhukov, Mr Ratskevych and Mr Bogolyubov each replied to the disclosure notices with Eclairs and Mr Kolomoisky responding the day after. All parties replied that they were not party to any agreement or arrangement (see Appendix 1). However, while the Eclairs side confined themselves to a bare denial the Glengary side acknowledged that there had been discussions with Eclairs regarding the performance of JKX.

70. In his reply, Mr Zhukov said that he was:

> "not a party to any type of agreement or arrangement referred to in paragraphs 1(e)(i)-(iii) of the notice. I have however participated in discussions with Eclairs Group Limited regarding JKX's recent operational and financial performance and the need to change the management team as per the open letter to JKX shareholders dated 23 May 2013".

71. In his reply, Mr Ratskevych said that he was:

> "not a party to any type of agreement or arrangement referred to in paragraph 1(e)(i)-(iii) of the notice. I have however participated in discussions with Eclairs Group Limited regarding JKX's recent operational and financial performance and the need to change the management team. I have been proposed by Eclairs Group as a candidate for the JKX board as per the open letter to JKX shareholders dated 23 May 2013".

72. And the response from Glengary stated that:

> "Glengary has participated in discussions with Eclairs Group Limited regarding JKX's recent operational performance and the need to change the management team. Glengary however is not party to any agreement or arrangement as mentioned in paragraph 1(d)(i), (ii) and (iii) of your notice. Glengary is simply a holding vehicle for the Shares in favour of its ultimate beneficial owners – Alexander Zhukov and Oleksandr Ratskevych and acts upon their instructions".

73. Also on the 28th May, Mrs Dubin contacted Equiniti to find out if Ralkon and Glengary had a history of voting together. She received a response later that same day and forwarded the information to Mr Baines in the following form: "Unfortunately, I am not sure we can say at the end of paragraph 3 that Kolomoisky and Zhukov have a record of voting in collaboration…"

74. The board meeting to consider the responses, and the board's views on the matter, was due to take place on 30th May at 3pm. Before it took place, at 9.17am, Mr Baines of JKX's financial advisers wrote to the Takeover Panel in the following terms:

> "Following my email of 23 May 2013 I am enclosing material as further evidence of the existence of a concert party between Mr Kolomoisky and

Mr Zhukov."

He then goes on to refer to the original acquisition by Mr Kolomoisky from Mr Zhukov, the fact that Mr Kolomoisky had contacted Mr Zhukov asking for his support in changing the management of JKX with Mr Zhukov's condition that Mr Ratskevych be made a director, Eclairs' open letter with the company's response and:

"Fifthly, the board has reasonable cause to believe that certain information provided in various responses to section 793 notices from Eclairs, Glengary and their beneficial interest holders regarding agreements and arrangements between them is either false or materially incorrect and, as such, in accordance with JKX's articles, the Board is minded to issue restriction notices to Eclairs and Glengary (and their nominees) restricting such shareholders from being able to vote or count in the quorum at JKX's AGM next week.

In the light of the above we are proposing to advise Glengary and Eclairs that we consider that they are acting in concert and that, if the Panel so determine, any purchase of shares in JKX by either of them will trigger a mandatory bid requirement under Rule 9 of the Takeover Code."

75. The information about what the board was minded to do was, of course, given before the meeting. It shows the extent to which various of the directors (probably Dr Davies and Mrs Dubin) had article 42 very much in mind. Although the board had not yet met, it also shows that at least some directors had apparently already formed views about the adequacy of disclosure in the section 793 notices. Nonetheless there was, I find, a full discussion of the point at the board meeting which was to come and there was no complete pre-judging of the point.

76. The evening before the board meeting Allen & Overy, the company's solicitors, had circulated a briefing note. This note gave certain advice for the benefit of the directors when they came to consider the replies to the section 793 notices and the attitude of the board to those replies. It also contained a table summarising the notices and responses. This was all that some of the directors had on the point - some of them did not see the actual notices or responses and relied on this briefing note.

77. Some of the directors attended the meeting in person, others on the phone, and Mr Miller not at all. On the morning of the meeting he sent an email to Mr Moore in which he said:

"I have [privileged words redacted] concluded that, in the interest of all the shareholders and stakeholders, the Board has no option other than to take the strongest possible action to deter these predators.

> As I will be in flight from Krasnodar to London during this afternoon's meeting, may I ask you to take my proxy and, in the event of a vote, cast my vote for the issue of a Restriction Notice to the Eclairs Group and Glengarry [sic] with the objective of preventing them from voting at the Annual General Meeting."

78. In cross-examination this email, and the expression of the objective, was used as a sort of suggested comparator to express the attitudes of the other members of the board. Some agreed with the sense, though not the terminology.

79. The board meeting duly took place. It took an hour and a quarter. All directors other than Mr Miller attended in some way or another. Lord Oxford, Mr Shah, Mr Ferguson and Mr Murray attended by telephone. Mr Moore, Mrs Dubin, Dr Davies and Mr Dixon were there in person. Mr Baines also attended, as did Mr John Geraghty (a partner in Allen & Overy – he attended by phone), together with 2 assistant solicitors or trainees (it matters not which they were) from that firm. Although Dr Davies and Mr Dixon attended they decided to recuse themselves, and they did not vote or take any part in the proceedings. The vote that occurred was therefore the vote of the directors other than those two.

80. The formal minutes record, inter alia, as follows:

> "7. The Chairman reported that the business of the meeting was to consider and, if thought fit, issue restriction notices to the following persons: [the main recipients of the notices were then identified].
>
> 8. There were produced to the meeting the following documents:
>
> [the section 793 notices]
>
> [the responses]
>
> 9. After due and careful consideration, the board unanimously determined that it has reasonable cause to believe that information provided in the Section 793 Responses was materially incorrect and, as such, that, under article 42 of the Company's articles of association, it was entitled to issue restriction notices to each of:
>
> Eclairs, Mr Kolomoisky, Mr Bogolyubov and Hanover [the registered shareholder] in respect of the [47m] shares in JKX held by Hanover on behalf of Eclairs; and
>
> Glengary, Mr Zhukov, Mr Ratskevych and Lynchwood [the registered shareholder of the Glengary shares] in respect of the [19m] shares in JKX held by Lynchwood on behalf of Glengary (the **Restriction Notices**).

> 10. The directors considered that the issue of the Restriction Notices would promote the success of the Company for the benefit of the members as a whole, having regard to the relevant factors set out in section 172 of the Companies Act 2006.
>
> 11. Accordingly, it was unanimously resolved that the Restriction Notices be issued as soon as reasonably practicable and that any one director be authorised to sign the Restriction Notices."

81. A much fuller note of what actually happened at the meeting was kept by each of the two Allen & Overy representatives, and their notes were transcribed and available at the hearing of this action. The directors gave evidence of their thinking, and there was much cross-examination on some of the detail of it. I do not set out that detail at this stage. The cross-examination, together with witness statements of the directors and the preceding correspondence, enables me to make findings as to what each of the directors considered and believed at that meeting without having to recite what the note says. I make those findings in a separate section below. For present purposes I can summarise by saying that the directors considered that inadequate disclosure had been given because they believed that further agreements or arrangements existed between the Eclairs camp and the Glengary camp which were not particularised, and that there were arrangements or agreements between Mr Kolomoisky and Mr Bogolyubov in relation to the Eclairs shares. They found it incredible that the raid could have been, and would have been, mounted without such an agreement, and pointed to various factors in support of such a conclusion. Those factors appear below in the sections dealing with reasonable cause to believe and with the directors' beliefs, intentions and purposes at the board meeting. In those circumstances the directors considered it was right to impose the restrictions that they did.

82. The restriction notices were issued the next day. The Eclairs notice was directed to Eclairs, Hanover, Mr Kolomoisky and Mr Bogolyubov. Its terms are set out in Appendix 2 to this judgment. The notice issued to the Glengary side was in similar terms, and addressed to corresponding persons and companies. The only paragraph with differing terms is also set out in Appendix 2 below.

83. There then followed the interim injunction application referred to above, as a result of which the effect of the voting at the AGM will depend on whether or not the restriction notices are valid. If the restriction notices are invalid then the votes were such that the ordinary resolutions were passed (the campaign to convince the majority of shareholders to vote and support the board seems to have been successful) but the special resolutions would fail. If the restriction notices were valid, so that the Eclairs and Glengary shares could not be voted, then all the resolutions would pass.

The section 793 notices - validity - form - submissions

84. The first attack on the restriction notices comes from the form of the questions asked. The claimants say that the company asked questions which were not within section 793, which ought not to have been asked, which it was not necessary for the recipients to answer, and which render the notices ineffective. It would follow from this argument that there was no power to issue the restriction notices.

85. The starting point in this argument is article 42, which introduces the effect of the section 793 notices. Article 42 reads:

> "42. (1) For the purposes of this Article, unless the context otherwise requires
>
> (a) "disclosure notice" means a notice issued by or on behalf of the Company requiring disclosure of interests in shares pursuant to section [793] of the Act,
>
> (b) "specified shares" means all or, as the case may be, some of the shares specified in a disclosure notice,
>
> (c) "restrictions" means one or more, as the case may be, of the restrictions referred to in paragraph (3) of this Article,
>
> (d) "restriction notice" means a notice issued by or on behalf of the Company stating, or substantially to the effect, that (until such time as the Board determines otherwise pursuant to paragraph (4) of this Article) the specified shares referred to therein shall be subject to one or more of the restrictions stated therein...
>
> (h) "interested" shall be construed as it is for the purpose of [section 793] of the Act.
>
> (j) for the purposes of paragraphs (2)(b) and (4) of this Article the Company shall not be treated as having received the information required by the disclosure notice in accordance with the terms of such disclosure notice in circumstances where the Board knows or has reasonable cause to believe that the information provided is false or materially incorrect.
>
> (2) Notwithstanding anything in these articles to the contrary, if
>
> (a) a disclosure notice has been served on a member or any other person appearing to be interested in the specified shares, and
>
> (b) the Company has not received (in accordance with the terms of such disclosure notice) the information required therein in respect of any of the specified shares within fourteen days after service of such disclosure notice,
>
> then the Board may (subject to paragraph (7) below) determine that the member holding the specified shares shall, upon the issue of a restriction notice referring to those specified shares in respect of which information has not been received, be subject to the restrictions referred to in such restriction notice, and upon the issue of such restriction notice such

member shall be so subject. As soon as practicable after the issue of a restriction notice the Company shall serve a copy of the notice on the member holding the specified shares.

(3) The restrictions which the Board may determine shall apply to restricted shares pursuant to this Article shall be one or more, as determined by the Board, of the following:

(a) that the member holding the restricted shares shall not be entitled, in respect of the restricted shares, to attend or be counted in the quorum or vote either personally or by proxy at any general meeting or at any separate meeting of the holders of any class of shares ...

(b) that no transfer of the restricted shares shall be effective or shall be registered by the Company,

(c) that no dividend (or other moneys payable) shall be paid in respect of the restricted shares and that, in circumstances where an offer of the right to elect to receive shares instead of cash in respect of any dividend is or has been made, any election made thereunder in respect of such specified shares shall not be effective.

(4) The Board may determine that one or more of the restrictions imposed on restricted shares shall cease to apply at any time. If the company receives in accordance with the terms of the relevant disclosure notice the information required therein in respect of the restricted shares all restrictions imposed on the restricted shares shall cease to apply seven days after receipt of the information. In addition, in the event that the Company receives an executed instrument of transfer in respect of all or any restricted shares, which would otherwise be given effective, pursuant to a sale

(a) on a recognised investment exchange, or

(b) on any stock exchange outside the United Kingdom on which the Company's shares are normally dealt, or

(c) on the acceptance of a takeover offer ...

to a party not connected with the member holding such restricted shares ... then all the restrictions imposed on such restricted shares shall cease to apply with effect from the date on which any such transfer as aforesaid is received by the Company for registration..."

86. Section 793 provides (leaving out irrelevant wording):

"(1) A public company may give notice under this section to any person whom the company … has reasonable cause to believe –

(a) to be interested in the company's shares, ….

….

(2) The notice may require the person –

(a) to confirm that fact or (as the case may be) to state whether or not it is the case, and

(b) if he holds …. any such interest, to give such further information as may be required in accordance with the following provisions of the section.

(3) The notice may require the person to whom it is addressed to give particulars of his own present …. interest in the company's shares ….

(4) The notice may require the person to whom it is addressed, where –

(a) his interest is a present interest and another interest in the shares subsists, ….

(b) ….

to give, so far as lies within his knowledge, such particulars with respect to that other interest as may be required by the notice.

(5) The particulars referred to in subsections (3) and (4) include –

(a) ….

(b) whether persons interested in the same shares are or were parties to –

(i) an agreement to which section 824 applies (certain share acquisition agreements), or

(ii) an agreement or arrangement relating to the exercise of any rights conferred by the holding of the shares."

87. Section 794 permits the company to apply to the court for an order imposing restrictions if a recipient of a notice fails to give the information required, and section 795 makes a failure to comply a criminal offence. Section 797 provides for restrictions which are similar to those provided by article 42.

88. Sections 820 and following amplify the meaning of "interest in shares" for the purposes of section 793. The relevant provisions are:

" 820(1) This section applies to determine for the purposes of this Part whether a person has an interest in shares.

(2) In this Part –

(a) a reference to an interest in shares includes an interest of any kind whatsoever

in the shares, and

(b) any restraints or restrictions to which the exercise of any rights attached to the interest is or may be subject shall be disregarded.

(3) Where an interest in shares is comprised in property held on trust, every beneficiary of the trust is treated as having an interest in the shares.

(4) A person is treated as having an interest in shares if ...

(b) not being the registered holder, he is entitled -

(i) to exercise any right conferred by the holding of the shares, or

(i) to control the exercise of any such right.

(5) For the purposes of subsection (4)(b) a person is entitled to exercise or control the exercise of a right conferred by the holding of shares if he –

(a) has a right (whether subject to conditions or not) the exercise of which would make him so entitled, or

(b) is under an obligation (whether subject to conditions or not) the fulfilment of which would make him so entitled.

...

89. Section 824 provides for what is now traditionally known as a concert party in relation to the acquisition of shares:

"824 (1) For the purposes of this Part an interest in shares may arise from an agreement between two or more persons that includes provision for the acquisition by any one or more of them of interests in shares of a particular public company (the "target company" for that agreement).

(2) This section applies to such an agreement if –

(a) the agreement includes provision imposing obligations or restrictions on any one or more of the parties to it with respect to their use, retention or disposal of their interests in the shares of the target company acquired in pursuance of the agreement (whether or not together with any other interests of theirs in the company's shares to which the agreement relates), and

(b) an interest in the target company's shares is in fact acquired by any of the parties in pursuance of the agreement.

(3) The reference in subsection (2) to the use of interests in shares in the target company is to the exercise of any rights or of any control or influence arising from those interests (including the right to enter into an agreement for the exercise, or for control of the exercise, of any of those rights by another person)."

90. Mr Mabb's submissions can be illustrated by reference to the Eclairs notice, and by concentrating on the provisions of paragraph 1(d) of that notice (the preceding paragraphs do not give rise to any issues in the case because any shortcomings in responses were in relation to paragraph 1(d), or its equivalent in other notices, and not in relation to the prior questions). He submits that the questions in that paragraph go beyond what is permitted by section 793. The consideration of his arguments requires the application of many cold towels in order to understand them.

91. First, he takes the question raised in paragraph 1(d)(i), which is:

> "(d) whether you are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect):
>
> (i) which includes provision for the acquisition by you and/or any other person of shares in JKX and which imposes obligations or restrictions on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares;" (my emphasis - the words become important to the argument)

92. There are said to be the following flaws in this question:

(i) It seems to be inspired by section 824, but that section only applies where shares are acquired pursuant to the agreement. The question is not so confined.

(ii) Section 824(1) refers to "an agreement between two or more persons that includes provision for the acquisition by any one of more of them [ie parties to the agreement] of interests in shares". The question is not so limited - it is capable of applying to agreements between parties which provide for purchase by an additional party who is not a party to the agreement - eg an agreement between A and B for the purchase by C. That goes beyond what is permissible.

(iii) The question goes beyond the range of shares that the questioner is entitled to ask about. This argument has the following steps:

(a) The addressee (A) is someone who has, or someone whom the

company believes to have (I paraphrase slightly in the interests of clarity), an interest in shares - s 793(1). The "belief" qualification applies to the person of the addressee.

(a) Such a person may be given a notice.

(c) When the notice is served it may ask questions about "the shares" - see subsection (4).

(d) Those questions may include questions about the identity of "persons interested in the shares in question" (ie the shares in which A is interested), and whether persons "interested in the same shares" were parties to a s 824 agreement or an agreement about voting rights "conferred by the holding of the shares" (subsection (5)).

(e) The questions which can be asked about shares can only be asked "where another interest in the shares subsists". There is no extension to interests which are reasonably believed to exist - that extension only applies to the identity of A as an addressee.

(f) This affects the form of question that can be asked and that has to be answered. The company can ask for particulars of such other interests as exist; it can ask about arrangements between A and persons who actually have such other interests. That is because those questions relate only to actual interests. The question may not ask whether those interests exist. If the company asks whether or not Z is interested, the question does not have to be answered unless Z is actually interested (in some relevant way). Unless Z is actually interested, he does not fall within the persons about whom questions can be asked within subsection (4) and (5).

(g) Even if the company has reasonable cause to believe that Z is interested in the same shares as A, it cannot ask A if Z is interested because the "cause to believe" qualifies only the interest of A, and not of Z - see above.

(iv) Applying all that to question (d)(i) one reaches the following conclusions.

(v) The question is asked "in relation to any of the shares in [JKX] which you have …" - that is to say Eclairs' own shares. The questions that the company was then allowed to ask under section 793(5) is about "persons interested in the shares in question" (ie the Eclairs shares) or "persons interested in the same shares", (ie the Eclairs shares again). However, what question (d)(i) asked was about arrangements affecting other (ie non-Eclairs) shares. That question is not about the Eclairs shares, and therefore is not within the wording of subsection (5); and it is about the interests of others which have not been shown to exist in relation to the Eclairs shares, and therefore is not a question which requires an answer in the absence of such an interest.

93. Next there is paragraph (d)(ii). This asks:

"(d) whether you are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect):

(ii) relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. a shareholders' agreement which governs (directly or indirectly) how the voting rights in the shares in Eclairs Group Limited are to be exercised);"

94. This is said to be a non-compliant question because it is not asked about the "shares in question" or "the same shares" (ie the Eclairs shares). It is asked about other shares, or about other people who do not (or do not necessarily) have an interest in the Eclairs shares. If it has in mind a possible agreement between Mr Bogolyubov (Marigold) and Mr Kolomoisky (Eclairs), it could only be answerable if it is the case that Mr Bogolyubov (Marigold) had an interest in the Eclairs holding.

95. Last, there is paragraph (d)(iii). This asks:

"whether you are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect):

(iii) with Mr. Alexander Zhukov, Mr. Oleksandr Ratskevych and/or Glengary Overseas Limited (or their respective companies or nominees), which relates to the exercise of JKX share voting rights (either directly or via yours and/or their respective companies and nominees)?"

96. Mr Mabb submits that this question is not within the section because while the company is entitled to ask Eclairs about interests in Eclairs shares ("the same shares", or "the shares in question"), this question asks about rights in other shares (Zhukov/Glengary/ Ratskevych shares) which, a fortiori are not Eclairs shares. Those three people/entities are not (or have not been shown be) interested in Eclairs shares.

97. Accordingly, Mr Mabb submits that those three questions are not within section 793, so (in respect of those questions, which are the important ones) the notices are not valid section 793 notices and so cannot found valid disclosure notices within article 42. The arguments are said to be strengthened by the wording of article 42 which provides for questions about "specified shares". The specified shares are (in the above example) the shares in which Eclairs is interested. Questions can be asked of Eclairs about interests in those shares, but not about interests in other shares. Saving the questions by some sort of blue pencil test (if ever permissible) is not possible in the circumstances.

98. Mr Mabb also submitted that there was a distinction between subsections (1) and (2) on the one hand and (3) and (4) on the other in terms of who could be asked questions. Someone whom the directors have reasonable cause to believe to have an interest can be asked the questions in subsections (1) and (2), but not questions under subsections (3) and (4). Only someone with an actual interest (and not just a suspected interest) could be asked questions under those later subsections. It is not clear to me that anything turns on that distinction in the present case, but it may be necessary to consider it in order to understand the scheme of the section.

99. Mr Gledhill advanced similar submissions. The focus of his submissions was to the effect that section 793 allows a company to ask the addressee A about interests in A's shares, but cannot ask A about interests which are said to affect Z's shares. The "interest" provisions in sections 820ff did not fix that problem. Accordingly, question (iii) in the Glengary notice was not a legitimate question because it was not a request for particulars about Glengary's shares. It followed, too, that Glengary was not obliged to answer it, and it further followed that the board was not entitled to act on the answers that Glengary did give or act on the footing that those answers were inadequate.

100. Mr Swainston disputed practically the whole of this analysis. His submissions were:

(i) The "reasonable cause to believe" qualification applied across the section, so it applied to the interest in subsection (5).

(ii) The reference to an interest in shares "includes an interest of any kind whatsoever in the shares" (section 820(2)(a)).

(iii) The kinds of inquiry within section 793(5) are not exhaustive of the questions that can be asked, but rather are examples. See the words "The particulars referred to in subsections (3) and (4) include…". See also what he says is the broad formulation in *TR Technology Investment Trust plc* [1988] BCLC 256 at 274-5.

(iv) Thus since Mr Kolomoisky and Mr Bogolyubov were interested in the same shares by virtue of their ownership of interests in Eclairs, they could be asked questions about agreements (arrangements) concerning those shares, and full particulars of them, and those full particulars would include the identity of any other parties, including a specific question as to whether Mr Zhukov was a party. Full particulars of the arrangements would have to include terms which extended to the voting of Mr Zhukov's shares.

(v) The relevant reasonable belief for the purposes of the section can include a belief as to an interest of any kind (section 820(2)(a)). This can include agreements falling within section 824. If there is agreement involving the purchase of shares and the voting rights attaching, this creates a deemed interest of all parties in all parties' shares. Furthermore, if an agreement gave control over those shares, a deemed interest was thereby created. Accordingly, if the company held a reasonable belief that such arrangements existed it could ask questions about them, and subsections (4) and 5 of section 793 were not confined to cases where the addressee had an actual interest. This is his "reflexive" analysis.

(vi) The notices in the present case were within what is permissible, but even if they were not they were nonetheless answered and the company was entitled to rely on those answers, which were apparently given in response to the notice. Were it otherwise the addressee could provide a wholly and obviously mendacious response and then complain when restrictions were imposed because he had not been given a proper notice.

The section 793 notices - validity - form - conclusions

101. Mr Mabb submitted that the rights conferred by the shares were property rights and that if they were to be removed by a mechanism such as section 793 and article 42, it must be done by language of sufficient clarity to make it clear that that was the intention. I agree with that with the modification that a section 793 notice must be sufficiently clear to make it apparent what information is being sought, and that any subsequent restriction notices must be sufficiently clear to make it apparent what the consequences of alleged non-compliance are. However, in relation to the section 793 notices one thing must be borne in mind in making judgments about clarity. As I shall have cause to say again in due course, the purpose of the notices is to get information which the company does not have and in circumstances of which the company is not entirely cognisant. The section exists in order to enable the company to obtain information in circumstances where the people have placed interests behind complex structures:

> "The reason why the definition [of interest] is so extensive is to counter the limitless ingenuity of persons who prefer to conceal their interests behind trusts and corporate entities." (Per Hoffmann J in *TR Technology* at p249).

102. It therefore has to be acknowledged that questions designed to penetrate such structures have to be asked where the company does not know the answer and the addressee does (or is reasonably thought to know). The construction of the notices has to be approached with that imbalance in mind.

103. Mr Swainston's submissions on this point did not always seem to me to follow a logical course through an analysis of the statute, and so did not always meet directly Mr Mabb's more dissective approach. It seems to me that it is necessary to be a little more dissecting of the section in order to consider Mr Mabb's case on invalidity. Since Mr

Mabb's analysis calls for a consideration of the validity of the notices stripped of the context of the answers in this case, it is necessary to consider that first. The correct position seems to me to be as appears below, but I need to stress that that I am dealing here with Mr Mabb's submissions that the questions asked were, as a matter of construction, not within those questions which are provided for by section 793. Their application to the facts of the case is a different point. Some of Mr Mabb's submissions involved considering their validity in the context of the apparent facts of this case concerning the shareholdings, but that is not the first step in considering his arguments. First one needs to measure the questions to see if they are capable of being valid questions, and what they mean.

104. The first thing to note is the apparent breadth of the exercise which Parliament has enabled the company to conduct. The definitions of "interest" cast the net very wide. Interests can be of any kind, and in the course of broadening that concept trusts (including, apparently, discretionary trusts) are penetrated, family relationships are elided (section 822, which I have not set out), voting control is included, pre-acquisition agreements are included (if the shares are purchased) and the corporate veil is (to a degree) pierced (see s 823). The definitions of "interest" acknowledge the wide variety of ways in which a person can in a real, rather than purely technical, way be said to have an interest. It would be inconsistent with that approach to construe section 793 in narrow way. It is intended to enable the company to get information which it does not otherwise have, and which relates to interests which would otherwise be hard to identify or ascertain.

105. The second thing to note is that section 793 is intended to provide the company with information which it does not already have. There is little point in asking a question which it already knows the answer to. This might seem an obvious point, but I think that some of Mr Mabb's submissions lose sight of it.

106. With those points in mind the section seems to operate as follows.

107. I agree with Mr Swainston that there is no good reason for saying that the "reasonable cause to believe" provision operates only for the purposes of subsections (1) and (2). It operates for the purposes of all subsections. It operates so as to describe the addressee of the notice, and that addressee is the addressee under all the sections. On the other hand, it operates only in relation to that addressee. It has no relevance to any third party about whom questions are asked. The words are, on the wording of the section, simply not directed to the description of that latter person. So far as Mr Swainston submitted otherwise, the submission fails.

108. So far as third party interests are concerned, the important subsection is subsection

(4). Much of Mr Mabb's submission involved an assessment of whether questions fell within subsection (5), but the opening words of that subsection ("include") make it clear that the two paragraphs of subsection (5) contain merely examples of questions that can be asked. The important question is whether a question falls within the words "such particulars with respect to that other interest as may be required by the notice." That is made clear by *TR Technology* (supra) at pp 274-5:

> "Section 212 [the predecessor of section 793) … allows the company to require anyone whom the company knows or has reasonable cause to believe to be interested in its shares to give "particulars of his own past or present interest" and, where any other interest in the shares subsists, "such particulars with respect to that other interest as may be required by the notice" (section 212(2)(b)). These last words are, on the face of them, very general. Prima facie they allow the company to ask for whatever particulars it thinks fit, provided that they are "with respect to that other interest" … But Counsel accepted that the word "include" in section 212(3) could not be construed as introducing an exhaustive list of matters of which particulars could be asked. If it were, the company could not ask for the number of shares in which a person named in the reply was interested. I do not think that section 212(3) is intended to do more than illustrate the kind of matters of which particulars can be required. It does not in my view limit the ordinary meaning of "such particulars… as may be required by the notice" in section 212(2)(b)."

109. Questions directed to A (who has or is believed to have an interest) about the interests of another must be questions about interests in A's shares, not other shares. I accept Mr Mabb's submissions about this. This flows from the expressions "the shares in question" and "the same shares"; and see the citation from *TR Technology*. Those shares are the shares in which A is interested.

110. So far as it matters in this case (and it is not clear that it does), I do not accept Mr Mabb's restrictions on the questions that can be asked of A in relation to Z's interests. One would have thought that the direct question "Does Z have an interest, and if so what is it?" (not permitted by Mr Mabb) is a slightly more useful question all round than "If Z has an interest, what is it?" (permitted). Mr Mabb submits that the effect of the latter question is that if the answer to the first part of the question would be No, then A does not have to answer the question at all. He can simply put the piece of paper in the waste paper bin, as he put it (assuming there is no other question which requires answering). He seemed to suggest that this was a beneficial state of affairs. For my part I fail to see how this is a sensible approach to the section. If the company asked the "permitted" question and got no answer it would not know if that is because A never got it, whether A got it and refused to answer, or whether A got it, considered it, realised the opening condition was not fulfilled and, being a technically minded man, put it in the bin. This approach does not do what the section is plainly trying to do, which is to create a regime in which the company is informed of interests affecting shares in circumstances in which those interests are not clear, and may even be deliberately kept from view. I do not think that the wording of the section compels that odd result.

111. The reasons for that are as follows. Mr Mabb seizes on the words "where … another

interest in the shares subsists" in subsection (4)(a), and says that if there is no such other interest then the remainder of that subsection and subsection (5) cannot apply, so there is no need to answer questions about it. I do not think that that is the effect of those words. They do, of course, qualify the requirement to give particulars. If no interest exists then particulars cannot and need not be given. However, I do not think that they require the drafting of slightly indirect questions, the failure to answer which can lead to uncertainty. It is implicit in the scheme of the section that the direct question: "Does Z have an interest?" should be asked in order to set the logical scene for what is asked next, and if asked it should be answered. Otherwise the section does not work properly - for the reasons given above, a failure to respond at all does not produce certainty. The section is designed to produce information, and it is designed to do so in circumstances in which the company does not already know the answer to the question. That objective can only be achieved if the company is entitled to ask, and to require an answer to, the direct question.

112. For the sake of completeness, I do not think that that result is achieved via the route suggested by Mr Swainston. He submitted that the "reasonable cause to believe" requirement extended to the third party interests (Z) referred to in subsection (4). As I have already pointed out, the language of the section does not extend that requirement to those third parties. It applies only to expand the gateway for asking questions of the addressee. Furthermore, it would actually impose an unnecessary and inappropriate restriction on the questions. If questions about Z could only be asked if the company had reasonable cause to believe he (Z) had an interest in A's shares, it would limit the class of people who could be asked about. It would prevent questions about people whom the company suspected might be interested, or about people whom it did not know at all. I do not think that the subsection should be so limited.

113. The interests that can be asked about, and the interest which A has (or is reasonably thought to have) in order to justify questions can be any of the interests identified and elaborated in sections 820 to 824. This point was developed somewhat by Mr Swainston in what was described as a "reflexive" application of section 795(5)(b). However, so far as that argument introduced additional subtleties into the point at this stage in the argument, it is not necessary to deal with it.

114. Other aspects of the scope of the section can be more appropriately dealt with in the context of the actual issues which arise in relation to the questions asked.

115. I therefore turn to those questions, and like Mr Mabb I concentrate on the questions in the Eclairs notice. In doing so I bear one over-arching point in mind. All the questions are preceded by the words "In accordance with section 793 of the Companies Act 2006…". The recipient of the notices would therefore know that the questions are being asked against that background, and that words such as "interest" are to be construed in accordance with the Act. That is to some extent burdensome, because the recipient might have to work out quite a lot for himself/herself. However, that burden is inevitable in the

circumstances in which section 793 is intended to operate, that is to say one in which the company has imperfect (or sometimes no) information, and that it is the shareholder who has to provide it. It is therefore for the shareholder to marry his "interest" with the questions asked and then answer properly. I also stress that at this point in this judgment I am dealing only with whether the questions are capable of being valid questions within section 793. I am not seeking to determine how they should have been answered.

Question (d)(i)

116. Mr Mabb submits that this question is modelled on section 824 but fails to be a question which accords with it. Section 824 gives rise to an interest only if shares are acquired pursuant to the agreement in question, but this question is not so limited.

117. I agree that this question appears to be linked to section 824. There would seem at first sight to be no other way in which such a question could be a question which is about the interests of the shareholder or a third party for the purposes of section 793. It is also true that the question does not ask whether shares were acquired pursuant to a section 824 agreement. However, it must be remembered that the question is asked "In relation to any of the shares in [JKX] in which you have … an interest". It therefore presupposes an acquisition. When viewed in that light, it can and should be taken as being a question asked about those shares and related arrangements about the rights attached to those shares. Those elements fall within section 824. The subsequent acquisition is pre-supposed by the fact of the Eclairs interest. The question is therefore capable of being a valid question.

Question (d)(ii)

118. Mr Mabb assumes this question is inspired by section s793(5)(b)(ii), and then says it goes beyond the scope of that subsection. In my view this is not the correct angle of approach. It does not really matter what inspired it. Nor does it matter whether the question fell within what he thinks may have inspired it. Subsection (5) is not limiting of the questions that might be asked. The required particulars can "include" those particulars. So if the question falls within the subsection there would be little scope for arguments of invalidity; but a failure to fall within it is not determinative.

119. In my view, taken with the opening words of the question ("in relation to any of the shares in JKX [etc]"), it is a question about Eclairs' shares in JKX. It asks if there are any agreements or arrangements relating to the rights in those shares. Such a question is justified on two potential bases. First, it is capable of being a request for particulars of the interest held by Eclairs within s793(3). Rights (and particularly voting rights) are capable of affecting that interest and its extent and their existence seems to me to fall within the concept of the interest of the addressee for the purposes of the section, particularly bearing in mind the object of the section, which is to provide transparency. Second, if the arrangement in question is such as to give rise to an interest in a third party over the Eclairs shareholding, then question (d)(ii) is capable of relating to that as well.

Question (d)(iii)

120. This question asks, in relation to the shares in which Eclairs is interested, whether Eclairs has been a party to any agreement or arrangement with Mr Zhukov et al "which relates to the exercise of JKX voting rights". Mr Mabb says that this question is invalid because it seeks to ask about rights in shares other than the Eclairs JKX shares ("the exercise of JKX share voting rights"). He says that that goes too far. The company's attempts to save this question by relying on "reflexive" rights which would give Eclairs an interest in shares beyond its own do not work because it is a pre-condition to subsection (4) that an interest arising out of the reflexive argument should exist, and anyway the question is apparently not confined to section 824 concert party arrangements which would be the only way the reflexive argument might come in.

121. The answer to this point again lies in starting from the point that the question is asked "in relation to any of the shares in JKX in which [Eclairs has] … an interest". That circumscribes the rest of the question. It then asks whether Eclairs is a party to an agreement/arrangement with Mr Zhukov et al (in relation to those shares) which relates to the exercise of JKX share voting rights. That seems to me to be a valid question when properly analysed. It is capable of being taken to be a question about Mr Zhukov having voting rights in the shares in which Eclairs is beneficially interested. To that extent it is a valid question about Eclairs' interest. So far as it is a question about shares in which Eclairs has a "reflexive" interest via s824, it is similarly valid - it is a question about Eclairs' interest. So far as it is a question about other shares, then it is hard to see how it can be a question "in relation to" shares in which Eclairs has an interest, but in my view if there is an arrangement operating in relation to those other shares which also involved JKX's holding then particulars of that ought to be given because JKX is entitled to particulars of the whole arrangement. That arrangement covers what was agreed about those other shares, not necessarily because the addressee has an interest in those shares, but because the arrangement in relation to those other shares is part of the whole picture of the addressee's interest in the Eclairs shares.

122. I have already dealt with Mr Mabb's principled objection to direct questions about third parties and their interests, and held that such questions are permitted. That deals with the other limb of Mr Mabb's objections.

123. It follows, therefore, that this too is a valid question, when properly construed. It is unnecessary to go through the other Eclairs parties' notices. The invalidity point fails in relation to them too.

The Glengary notices - question (d)(iii)

124. Mr Gledhill addressed submissions as to the validity of this particular question (which expressly or implicitly figured highly in the company's attitude to the answers). That question appears from the form in the Appendix. It is in the same form, mutatis mutandis, as the question in the Eclairs party questions. As a question it is valid to the

same extent. The real question is again likely to be what the company took from the answer and was entitled to take from it, bearing in mind what it knew or believed the situation to be. Again, it is not necessary to consider the other Glengary parties' notices separately. No invalidity arises.

Validity - general

125. I therefore find that the questions were capable of being valid questions falling within section 793. What, if anything, they required to be revealed on the facts of this case is a question to which I return having made findings about what the board could reasonably have believed to be the relevant facts about shareholdings and rights.

Estoppel and waiver

126. My findings on the validity of the s793 notices mean that I do not have to consider this point, and I will not lengthen this judgment by doing so.

Reasonable cause to believe - general points

127. Article 42 entitles the board to act if it knows or has reasonable cause to believe that the information given in the responses to the s793 notice is false or materially incorrect. Before going on to consider the facts in relation to this point the following general points arise.

128. Mr Mabb took the point that in a "reasonable cause to believe" case there has to be not merely an objectively justifiable reasonable cause to believe; the board actually has to believe the relevant fact, and he supported his point with authorities drawn from other areas of the law. Mr Swainston submitted that even if that twofold test might be relevant in other cases, on the facts of this case the point is academic because it is apparent that the board had a belief which coincided with what it said it had reasonable cause to believe, so it is not necessary to consider this particular point. I agree with Mr Swainston. I do not think that on the facts this point arises. This spares me from having to consider what might be the difference between "knows" (the first part of the article 42 test) and "belief" (inherent in Mr Mabb's position on the second part). I find it hard to image a case where a board has reasonable cause for belief, and imposes restrictions on that basis, but does not actually believe what it is entitled to believe and what it has apparently acted on. But I do not need to go into that.

129. It is also necessary to consider what it meant by "arrangement", a term used in s793 and in the restriction notices. Mr Mabb's submission is that the expression allows for relationships which are not legally binding but says they still require a degree of mutuality. In support of this proposition he relies on authority and, by way of a parallel, section 825 of the Act.

130. So far as authority is concerned he first cites Upjohn J in *Re Austin Motor-Car Ltd's Agreements* [1958] 1 Ch 61 at 74:

> "The whole question here is whether there is or is not a mutual contract or arrangement, whether enforceable at law or not. I do not propose to attempt any definition of "arrangement" in section 6(3). But to escape the alleviation afforded to the subject by section 8(3), some arrangement binding 3 or more parties must be spelt out of the facts, it being conceded that the conditions of the subsection are otherwise satisfied. Whether enforceable at law or not, it seems to me that an arrangement must at least connote an arrangement whereby the parties to it accept mutual rights and obligations."

131. This is not compelling authority so far as s793 is concerned. The case was one brought under the Restrictive Trade Practices Act 1956, which is a different legal environment. Furthermore, it is apparent that interlocking relationships were of the essence of the inquiry - see the third sentence. The last, crucial, sentence has to be read in that light. It is understandable, in the context of that case, why mutuality was required if there was to be an "arrangement". Mr Mabb's original citation omitted the third sentence. Once it is in place reliance on the authority is much less justifiable.

132. Next Mr Mabb relied on *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* [1963] 1 WLR 227, at page 739, in which Willmer LJ said:

> "I think it is highly significant that Parliament did not see fit to include any definition of "arrangement". I infer from this that it was intended that the word should be construed in its ordinary or popular sense. Though it may not be easy to put into words everybody knows what is meant by an arrangement between two or more parties. If the arrangement is intended to be enforceable by legal proceedings, as in the case where it is made for good consideration, it may no doubt properly be described as an agreement. But the Act of 1956 clearly contemplates that there may be arrangements which are not enforceable by legal proceedings, but which create only moral obligations or obligations binding in honour. This seems to me to be entirely consistent with the dictum of Upjohn J. to which I have already referred. Nor do I consider that there is any inconsistency between that and the view expressed by the judge in the present case. For when each of two or more parties intentionally arouses in the others an expectation that he will act in a certain way, it seems to me that he incurs at least a moral obligation to do so. An arrangement as so defined is therefore something "whereby the parties to it accept mutual rights and obligations"".

133. Again, care must be taking in applying this dictum (once again made in a restrictive practices environment) as though it is laying down a definition for other

environments. A study of the full judgment reveals that Willmer LJ was dealing with a submission that something more than an intentional arousal of expectations was required for there to be an arrangement, and that there must be mutuality in acceptance of rights and obligations. What Willmer LJ was doing was saying that, on the facts of this case, they were the same thing, and that they fell within the citation from Upjohn J. This dictum does not necessarily justify the porting of the concept of mutuality from that legislation to the Companies Act.

134. It is also to be noted that in the same case Diplock LJ expressed himself differently in terms which did not necessarily import mutuality:

> "No necessary or useful purpose would be served by attempting an expanded and comprehensive definition of the word "arrangement" in section 6(3) of the Act ... I think that I am only expressing the same concept in slightly different terms if I say without attempting an exhaustive definition, for there are many ways in which arrangements may be made, that it is sufficient to constitute an arrangement between A and B, if (1) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to be to act in a particular way, (2) such representation is communicated to B, who has knowledge that A so expected and intended, and (3) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to act in that particular way."

135. For these purposes the word "arrangement" in section 793(5) should certainly be construed as including non-binding arrangements. Beyond that it is right to give it its ordinary or popular sense, but I do not think that that necessarily requires mutuality in the arrangement. That would be unnecessarily confining in the search for information which Parliament intended should be a broad one. It may be that some non-mutual "arrangements" are too loose and informal to be of any signficance in relation to shares, but short of that they should be within the provision.

136. However, I do accept Mr Mabb's submissions in one respect. He points out that section 824(6) has the effect that agreements (which include arrangements) for the purposes of that section, and of other sections to which section 824 is relevant, have to have the feature of mutuality. Nonetheless, I do not think that this justifies extending the requirement into section 793(5). If anything, the existence of the express provisions of section 824(6), when contrasted with the absence of a corresponding provision in section 793(5), supports the conclusion that something different is intended for the purposes of the latter section.

137. Next, Mr Mabb submitted that "reasonable cause to believe" required something stronger than "reasonable cause to suspect". I accept that submission. The two states of mind are probably matters of degree, but the seriousness of the consequences on proprietary rights of exercising the power requires that the firmer state of mind be the relevant one.

The attack on reasonable cause

138. The two claimants make various attacks on JKX's case that the board had reasonable cause to believe that it had not been given accurate information. These include faults of process and faults in the assessment of whether the answers were inaccurate. In order to tackle these points it will be useful first to consider what the board's belief was.

Reasonable cause to believe - the underlying facts

139. While some of the individual directors had a slightly different take on some of the facts, there was a very strong common theme. I find that the board considered that it had reasonable cause to believe the following, based on the factors leading up to the service of the notices (identified above), including their experience of the way raiders behaved and the experience of some of them of the way that business was sometimes done in the Ukraine, and on the responses to the notices.

(i) They thought that the company was the subject of a raid in which a minority shareholder was trying to keep the value of the shares down in order to be able to buy other shares more cheaply; or to try to get control of PPC (the Ukrainian subsidiary).

(ii) They thought that the individuals behind the raid were Mr Kolomoisky, Mr Bogolyubov and Mr Zhukov. The first two of those had a track record of doing it elsewhere.

(iii) The attempt to remove Dr Davies and Mr Dixon was part of that plan. If successful it would have removed two individuals who were key to the company's activities.

(iv) Since there had been no attempt to engage with the board or the chairman over allegations of poor management, the board did not believe that the circular letter was being accurate when it spoke of the desire to replace directors for that reason.

(v) One of the attempted mechanisms was the attempted introduction of a shadow general manager when Dr Davies approached Mr Kolomoisky for funding in Monaco. This was in the context of the reputation of Mr Kolomoisky causing difficulties in raising finance from normal sources.

(vi) The transfer of shares from Ralkon into Eclairs was seen as a transfer into a clean company for the purposes of the raid.

(vii) The EGM requisition was part of the tactic. This included the proposal of inexperienced or plainly unsuitable directors, and Eclairs failed to respond to requests for details of their experience and qualifications. One of the proposed directors (Mr Ratskevych) was known to be associated with Mr Zhukov, giving rise to the suggestion that Mr Zhukov was associated with this step. Replacing management was known by at least some of the board members to be a standard tactic of raiders who wished to get control of a company in Ukraine.

(viii) Mr Ratskevych said that Mr Zhukov had agreed to support Mr Kolomoisky's attempt to make management changes if Mr Ratskevych was given a place on the board.

(ix) It was discovered that Mr Kolomoisky had transferred part of his shareholding to a known ally (Mr Bogolyubov).

(x) Mr Ratskevych's interest was discovered only in response to the first wave of s793 notices, and not when it had occurred. Mr Zhukov had apparently made a clear mis-statement as to the extent of his interest on the earlier occasion.

(xi) At about this time board members heard of another attempt by Mr Kolomoisky and Mr Bogolyubov to seize control of another Ukranian company (Ferrexpo).

(xii) The board inferred that Glengary had approached Natfogaz's judgment creditor to try to get hold of the Naftogaz shares.

(xiii) The Glengary responses to the s793 notices revealed that there had been discussions between Glengary and Eclairs. Eclairs' responses did not. There was an inconsistency.

(xiv) The open letter proposed the same 3 directors as had previously been proposed, including Mr Ratskevych, who had been seen as Mr Zhukov's man. Now his name was appearing in an open letter emanating from Eclairs, and which acknowledged a degree of common cause with Glengary.

140. Based on this, and the other factors, the directors claimed to have reasonable cause to believe that there were agreements between Mr Kolomoisky and Mr Bogolyubov in relation to Mr Bogolyubov's acquisition of his shares and for voting in relation to them and, in particular in relation to the raid; and they claimed to have reasonable cause to believe that there were arrangements or agreements between Mr Kolomoisky (and Mr Bogolyubov) and Mr Zhukov (and Mr Ratskevych) (or, to put it another way, between the Eclairs interests and the Glengary interests) in relation to the shares that they each had and in relation to the raid (at least). They believed that denials that there were any such arrangements were incorrect. In particular:

(a) Several of the directors articulated the view that it was fundamentally unlikely that Mr Bogolyubov would have taken his shareholding via Marigold without there being some sort of arrangement between Mr Kolomoisky and Mr Bogolyubov as to how they would approach the exploitation of the shareholding, which would include such matters as voting. Several of them said it was in their experience virtually unthinkable that in those circumstances there would be no shareholder agreement. An outright denial in the responses to the s793 agreement (which is what the board got) was not credible.

(b) Mrs Dubin, at least, considered she had strong grounds for doubting the honesty of Mr Kolomoisky and Mr Bogolyubov, which emphasised the need for her to have credible answers to the questions asked.

(c) The arrangement (using that word neutrally for the moment) for Mr Zhukov's support for Eclairs' management proposals in exchange for Mr Ratskevych's board membership (which is how the directors saw it) demonstrated that there were arrangements between Mr Kolomoisky and Mr Zhukov.

Whether there was reasonable cause to believe - process

141. Both Mr Mabb and Mr Gledhill take what might be called "process" points before examining the quality of the evidence. They draw attention to what they say are the following points. Mr Gledhill articulates the point in this manner: In order to have reasonable grounds to believe that the responses were inaccurate, the directors must have material which it evaluates reasonably, in a way that is proportionate to the gravity of the decision under consideration. As a result of the time constraints, and as a result of their reliance on Dr Davies's fact gathering, they in fact proceeded in a way which was "disorganised, unreasonable, and unfair to Glengary", and as a result arrived at a conclusion that was without adequate justification. He also takes a point about non-compliance with natural justice. Between them, Mr Mabb and Mr Gledhill drew attention to the following principal points (my brief findings on some of them also appear):

(i) The company's solicitors were involved, and prepared the briefing paper which was all that some of the directors saw in terms of the notices and responses. The summary was complicated, and since legal advice in it was redacted one cannot see an important part of the directors' reasoning process. The responses were not (contrary to the minutes) produced to the meeting so far as non-present directors were concerned. As a fact, this is true.

(ii) The summary employs the term "Arrangements", which it defines as being "an agreement or arrangement for (i) the acquisition of shares in JKX which imposes obligations or restrictions on the exercise of rights, control or influence in respect of such shares or the retention or sale of such shares or (ii) relating to the exercise of any rights arising from the shareholding in JKX". It then uses that term in relation to Mr Kolomoisky and Mr Bogolyubov. However, not all the directors appreciated that. Its wording does not quite coincide with question (d)(i), using "arising from" in place of "conferred by". I am not sure where this goes, but I think it is said to indicate that the directors were misinformed about the question and therefore the answer.

(iii) The board's purpose was to prevent the votes attaching to the 47m shares from being cast. That provides an important context for considering whether the board had reasonable cause to believe in the falsity of the responses. I deal with this point below in considering "improper purpose".

(iv) The debate at the board meeting was described by Mr Moore as being at a "fairly high level" and there was no focus on whether the sort of arrangement they believed to have existed was one the existence of which was denied. I find that Mr Moore did indeed refer to the high level nature

of the discussion in his cross-examination, but he had previously characterised the meeting as being one in which the board were very focused on whether to issue the restriction notices and all the directors had an opportunity to ask all the questions they wanted. I find that there is no clear record of a discussion relating to the believed arrangement and whether it was actually denied, but I also bear in mind that there was a lot of privileged information before the meeting and a number of recorded privileged interventions in the solicitors' records (they are redacted). This factor, so far as accurate, is not a strong pointer against the reasonable forming of a reasonable belief because the directors had a lot of material before them and did not necessarily have to have it all spelt out.

142. Mr Gledhill put the point in a different way.

(a) He said what ought to have happened was that each member should have had copies of the notices and responses, and the underlying material, clearly identified in advance, in time to read and assimilate properly and to reflect on it. The failure to do so meant that differing board members had differing perceptions. I find that in terms of documentary distribution this would have been one way of going about the matter, but it was not the only way. An accurate summary by lawyers is capable of being equally as good, and has the benefit of being able to be accompanied by advice. I find as a fact that all directors had time to assimilate the material and did so to the best of their abilities. In my view they brought to bear a conscientious deliberation. Although I do not think that things were rushed unfairly, a prolonged and agonised consideration of the matter, over a number of days, was not possible if a decision was to be reached before the AGM. I find (for reasons that I elaborate below) that the objective of holding a board meeting before the AGM was a perfectly legitimate one, and any shortening of the time available was because the respondents chose (as was their right) to lodge their responses at the end of the response period (something which is not surprising - they did the same in relation to the previous s793 notices).

(b) The board ought to have reflected on the seriousness or gravity of its decision for Glengary. The directors were (largely) not aware that if they were right then Glengary would have committed a criminal offence, and there would also be a loss of economic and reputational loss. I do not think that this point goes anywhere. The directors were not entitled to reach their decision flippantly or casually, but they were not obliged to address the point as though they were a judge making serious findings of fraud. In my view the board members will all have been well aware of the seriousness of what they were implicitly or explicitly accusing shareholders of. Several of them made serious allegations about Mr Kolomoisky's business ethics. They will have been well aware of the seriousness of what they were alleging.

(c) Mr Gledhill submitted that the board failed to ask itself relevant questions. It failed to ask itself whether any failures on the part of Glengary to disclose some relevant arrangement were dishonest or inadvertent. Whether they were one or the other would

have been capable of going to the decision to impose restrictions because it is capable of going to whether a failure is "materially" incorrect. Furthermore, the board failed to consider the question of materiality separately at all. I find that the board may well not have considered "materiality" as a separate point, but the evidence that Mr Gledhill relied on as evidence of that sort of absence (the evidence of Lord Oxford and Mrs Dubin) also made it clear that the board was well aware of, and discussed, the whole phrase "false or materially incorrect". Mr Moore made the same thing clear (at Day 4 p43). I find that the directors were aware of both elements, and even if there was no discussion of them as separate alternatives, nonetheless proper consideration was given to each of them. The difference between honest and accidental shortcomings may be thought to be obvious, but on the facts of this case the board would have been entitled to consider that it was irrelevant bearing in mind the nature and seriousness of what it thought the shortcomings were.

(d) In a point that is in some ways allied to the previous points, Mr Gledhill submitted that the board failed to approach the issue in a balanced way. It failed to give proper weight to the previous good relationships with Mr Zhukov, to the fact that Mr Ratskevych had referred to (and not concealed) the arrangement between Mr Kolomoisky and Mr Zhukov in the conversation with Dr Davies, to the fact that Glengary had referred to discussions in its response (which was said to give rise to pause for thought as to whether there really was a failure to disclose other reasonable facts, and which pointed away from surreptitious collusion rather than towards it), to the absence of previous collaboration between Glengary and the Kolomoisky interest in voting at meetings, to a difference of approach as to why Mr Zhukov did not want to have a power to issue and allot further shares and to the possibility that Glengary might have perfectly sensible reasons for wanting a change of management. I accept that all these points might be taken to be relevant, and that there is no evidence that, one by one, they were considered separately by the board, or that the board was told about each of them individually, but I do not consider that that, in the circumstances, is fatal to the decision as suggested by Mr Gledhill. They were the sort of points that the directors were likely to have had in mind. As an example, Mr Murray was asked whether he directed his mind to the point that the inconsistency between the Eclairs and Glengary responses might be evidence of there being no collusion. He said that he did address his mind to that possibility (Day 5 p152).

(e) Mr Gledhill relied on a failure by the board to draw any proper distinction between the positions of Eclairs and Glengary - it failed to consider whether Eclairs might have failed to disclose relevant agreements but Glengary did not. In my view, bearing in mind the arrangements that the board believed existed, I do not think that a failure to take Eclairs and Glengary separately affects the reasonableness of the board's view of the accuracy of the statements. The directors (or those who had been directors long enough) are unlikely to have forgotten that Mr Zhukov had a different history with the company, but the main thing they were concerned about was an arrangement, or belief in an arrangement, spanning the two shareholder groupings.

(f) Last there is Mr Gledhill's complaint of breach of natural justice. He submits that before imposing restrictions on Glengary the company was obliged by fairness and natural justice to give the Glengary parties an opportunity to comment. This requires a little development.

143. In support of his proposition that that last duty (natural justice) arose Mr Gledhill submitted that the court has a supervisory jurisdiction to grant relief where a decision-maker has acted contrary to fairness or natural justice, and he pointed to *McInnes v Onslow-Fane* [1978] 1 WLR 1520. He went on to rely on other cases where he said the courts have implied a duty to conduct exercises fairly (*Wilander v Tobin* [1997] 2 Lloyds Rep 293) or not arbitrarily (*Paragon Finance v Nash* [2002] 1 WLR 685). He also pointed to obiter dicta in *Gaiman v National Association for Mental Health* [1971] 1 Ch 317 to the effect that a power or expulsion of members for misconduct might attract the principles of natural justice.

144. It should be noted that Mr Gledhill's invocation of the principles of natural justice seeks to apply them not to the assessment of whether restrictions should be imposed or not, but rather seeks to apply them to the prior stage of the assessment of the accuracy of the answers. His submissions on the point occur in the section of his skeleton argument which deals with "reasonable cause" and in paragraph 35.3 he submits that no rational decision maker who has to assess whether he has "reasonable cause" for concluding a party has acted with impropriety should act on inferences from fragmentary evidence without putting the material to the other side for an explanation. I mention this because in the next paragraph (paragraph 36) he refers to the proposition "that before deciding whether or not to impose restrictions on Glengary's shareholding, the company was obliged by fairness and natural justice to give the Glengary parties prior opportunity to comment". This might be thought to be the stage of the exercise at which the board is deciding on penalty, but the rest of his submissions make it clear that that is not the case. It is therefore necessary to consider it at the prior stage; it is a point wrapped up with the concept of "reasonable cause".

145. *McInnes v Onslow-Fane* was a case in which a man was refused a boxers' manager's licence. It was neither a contract case nor a public duty case. In the course of his decision Megarry J said:

> "I do not think that much help is to be obtained from discussing whether "natural justice" or "fairness" is the more appropriate term. If one accepts that "natural justice" is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as "judicial", "quasi-judicial" and "administrative." Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-

> judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word "justice" and to use instead terms such as "fairness," or "the duty to act fairly"…" (page 1530D-D)

146. The last of those sentences may be of assistance in this case. The high point of Mr Gledhill's case is probably the decision in *Gaiman v National Association for Mental Health* [1971] Ch 317. That case concerned a company limited by guarantee and what was in effect a power of expulsion. It was averred that the principles of natural justice had to be complied with in the course of the expulsion procedure. Megarry J held that they did not. In the course of his judgment he commented on the difficulties of identifying any particular test for determining whether the principles applied or not and then said:

> "It may be that there is no simple test, but that there is a tendency for the court to apply the principles to all powers of decision unless the circumstances suffice to exclude them. These circumstances may be found in the person or body making the decision, the nature of the decision to be made, the gravity of the matter in issue, the terms of any contract or other provision governing the power to decide, and so on… This, of course, does little by way of providing a clear test: but as the authorities stand, it may not be possible to do much more than say that the principles of natural justice will apply unless the circumstances are such as indicate to the contrary. Certainly I would say that the cases show a tendency to expand the scope of natural justice rather than constrict it. The ambit of natural justice is indeed a subject worthy of further academic research."

147. He then went on to deal with a line of authorities which was said to reflect on the extent to which the principles of natural justice did not apply to companies limited by shares. He declined to find that the authorities established such a bald proposition, not least because natural justice was not expressly in issue in any of them. However, he went on to observe:

> "Where there is corporate personality, the directors or others exercising the powers in question are bound not merely by their duties towards the other members, but also by their duties towards the corporation. These duties may be inconsistent with the observance of natural justice, and accordingly the implication of any term that natural justice should be observed may be excluded. Furthermore, Parliament has provided a generous set of statutory rules governing companies and the rights of members, as contrasted with the exiguous statutory provisions governing trade unions and the even more exiguous provisions governing clubs. Yet again, the authorities cited by Mr Neill, though not establishing his proposition [that natural justice does not apply to companies limited by shares] do indicate the extent to which the courts will go in enforcing the provisions of the articles, even where those provisions appear to operate

harshly or unjustly. These considerations seem to me to militate against the application of the principles of natural justice in this field." (335F-H)

148. Although those remarks were obiter, they nonetheless have some considerable force.

149. Megarry J went on to list four factors in his case which he said pointed against the application of the principles of natural justice. Mr Gledhill relied on them because he said the converse of at least some of those facts existed in the present case, so that converse situation pointed towards the application of the principles of natural justice here. They were:

"Where, as in the present case, their duty may impel the council to exercise the power with great speed, whereas natural justice would require delay, I think that this indicates that the council is intended to be able to exercise its powers unfettered by natural justice…

Secondly, the cases on companies limited by shares indicates that provisions in the articles of a company for expropriation or expulsion are valid, even though they deprive the member of valuable proprietary rights. Companies limited by guarantee are, in a sense, in a position a fortiori; for the element of expropriation is lacking, at any rate to any appreciable extent. A member who joins does so on the terms of the articles, including article 7(B), so that what he gets is not an absolute right of membership, nor a right of membership until expelled for misconduct, but a right of membership until that membership is terminated by the Council acting bona fide in what they believe to be the interests of the association. The terms of the contract which bind the members must at least be of some importance.

Thirdly, the wording of article 7(B) seems to me to militate against the implied term. True, it lacks any phrase like "in their absolute discretion",… But it is a wholly unrestricted power, not confined to cases of misconduct, and so on. In other words, if the power had been confined to cases of misconduct or the like, that would have been some indication that the principles of natural justice ought to apply: for since there could be expulsion only if misconduct were established, not only would the machinery of natural justice in making and adjudicating on the charge be readily applicable, but also reputation might well be at stake. It is otherwise where, as here, the power given is absolute in its terms.

Fourthly, the cases in which the principles of natural justice have been held to be applicable have in the main been cases in which what was at stake was liberty, property or a means of livelihood (as in the trade union cases). That does not exhaust the field.… But I think that one of the elements which points to the applicability of the principles of natural justice is the importance and gravity of what is at stake. The mere membership of the association, involving no real interest in property, and no question of livelihood or reputation, does not seem to me to be prima facie a matter in respect of which there is any strong claim to have the principles of natural justice applied, at any rate on motion." (pages 336-7)

150. And later he said:

> "The rule may provide for expulsion either without restriction, giving an absolute discretion, or it may provide for expulsion only for some stated cause, such as misconduct. The principles of natural justice, which apply where the rule is of the latter type, do not apply where it is of the former type, subject to the possible qualification that if the power is exercised on some stated ground which impeaches the character or conduct of the member and it is intended as a penalty for it, he must be given notice and a hearing."

151. Mr Gledhill points out that in the present case various factors are present which Megarry J seems to consider to be pointers in favour of the application of the principles of natural justice. In particular, the exercise of the article 42 power divested a shareholder of proprietary rights, and there was a potential damage to reputation. It was not a full power of expulsion or appropriation, but it had some expropriatory effects.

152. So far as the source of the rights is concerned, Mr Gledhill said it was not necessary to imply anything into the Articles in order to give effect to the principle; they all came in within the concept of "reasonable cause to believe".

153. The expropriatory effects of a board resolution under article 42 have to be conceded. The exercise of the power is capable of having significant effects, as is demonstrated by the facts of this case if the board's power was validly exercised. Special resolutions will have been passed which, absent the exercise of the power, would not have been passed. The shareholders will now (if the exercise was valid) be stuck with them. There is also a potential limited reputational effect, though I think that has been a little overstated. Mr Gledhill is certainly able to pray in aid those factors.

154. However, what I think determines the point against him is the wording of the article and the nature of the board's decision. The Articles do not in terms require the board to determine the accuracy of the responses in terms which pre-suppose the conducting of some sort of enquiry. The board may exercise the power if it "knows" or "has reasonable cause to believe" that a response is inaccurate. Take the first of those. Mr Gledhill cannot introduce the principles of natural justice via his line of reasoning because there is no express introduction of the concept of reasonableness. What matters is the knowledge of the board. He did not make submissions as to whether or not the principles of natural justice come into play if the board relies on what I might call full scale knowledge (to distinguish it for these purposes from "reasonable cause to believe"), but the logic of his argument would not allow him to extend it into that situation. He would somehow have to imply a term, and he did not seek to do so, at least on his main line of reasoning.

155. Accordingly, if Mr Gledhill is right, there must be something different about the situation in which the board has "reasonable cause to believe". In those circumstances, according to him, the board must conduct some further enquiry involving the addressee of the notice so as to give the addressee a chance to meet what the board thinks might be the case. I do not see the logic of the situation in which the board has to afford an opportunity to make representations in the one case but not the other. The articles have entrusted the board with a function, which it exercises in the interests of the company. It is, on the wording of the articles, entitled to exercise its power on the footing of

information available to it, with no express duty of enquiry, though doubtless it can know very little without making some enquiry. Whether or not the board can act involves measuring the responses received against the state of mind of the board. If the board "knows" the responses to be inaccurate, it can act. If it has a slightly lesser state of mind, that is to say "reasonable cause to believe", then that state of affairs (which I would accept includes an actual belief on the part of the board, which might be thought somehow to be a little short of knowledge) similarly entitles the board to act. I can see no logical reason for requiring a further enquiry. The board knows what it knows, and it has the facts that it has, together with its judgment on those facts. If the state of mind, or state of affairs, exists, then the board can act.

156. That, I think, is the logic of the article itself. Furthermore, some of the factors relied on by Mr Gledhill are not as compelling as he would say. Thus:

(i) Mr Gledhill relied on the absence of a need for speed – contrast of the first of Megarry J's first factors. However, it seems to me that in some circumstances the board might have to act with great speed, and indeed to a degree this case turns out to be one of them (because of the forthcoming AGM). The power is likely to have to be exercised under circumstances of some commercial pressure. That may well prevent the sort of elaborate enquiry that Mr Gledhill's submission would have to give rise to. It should not be thought that the enquiry would be straightforward, or is one which could be dealt with quickly. The board would not necessarily be obliged to accept a denial (which one assumes will be forthcoming). Mr Gledhill's submissions would logically presuppose the formulation of probing questions, leading, in some cases, to complex answers and, conceivably, further investigations. That does not seem to me to be inherent in the article.

(ii) While I have acknowledged the expropriatory effect, to a degree, of article 42, that effect is limited. It is not as though the shareholder is deprived of the entire benefit of his shareholding. Indeed, he can escape from even a bar on transfers if there is a transfer to an arms-length transferee – see paragraph (4) of the article. Accordingly, the second of Megarry J's factors has less force.

157. Mr Gledhill also put great emphasis on *Australian Securities Commission v Multiple Sclerosis Society of Tasmania* [1993] TASSC 36, in which it was held that a baldly stated power to exclude a member from membership of a company limited by guarantee was held to import an obligation to comply with the principles of natural justice. That was a decision on its own facts, and in relation to a power to remove membership completely. It does not lead me conclude that natural justice procedures should be imported into article 42.

158. Likewise *RSPCA v Attorney-General* [2002] 1 WLR 448 is distinguishable. In that

case Lightman J had to consider a power (in effect) to reject membership of the society but only (according to its rules) "after full consideration by council". He held that the reference of "full consideration" must imply at least that the member in question should have the opportunity to put forward his or her own case in writing - see paragraph 40. That wording is plainly distinguishable from the present case.

159. In the circumstances I find that the principles of natural justice did not apply in this case and that the failure to observe the principles is not a vitiating factor in relation to the decision-making of the board, and does not go to the question of whether the board had reasonable cause to believe in the inaccuracy of the responses. The board either had reasonable cause or did not. That decision does not have to involve some form of further information seeking from the addressee of the notice.

160. For the sake of completeness I should record that in his submissions in reply Mr Gledhill suggested that so far as necessary there should be an implication of an obligation to adhere to the principles of natural justice. He relied (again) on the potentially expropriatory, and serious, effect of the article and said that the parties cannot be taken to have agreed to run that risk without the affected party having an opportunity to make a case. I am unimpressed by that argument too. I do not think it likely that parties (who for these purposes must presumably be all the members and the company) can necessarily have intended that those sort of procedures should be introduced into a potentially fast-moving situation which might arise, and which would potentially lock the company into quite complex or elaborate inquiries in some cases. Article 42 is intended to be a temporary measure, and while it may have some permanent effect in some cases (such as the present, if the company is right in its defence to these claims) its effect is not the same as a permanent expropriation arising from a cesser of membership. I would not imply the term suggested latterly by Mr Gledhill.

161. It follows from the above that I find that the criticisms of the article 42 procedures based on process fail. In my view the processes involved were themselves reasonable enough to allow for there to have been reasonable cause to believe if the quality of the material itself justified it. There was not, as Mr Gledhill put it, "rushed, disorganised and one-sided decision-making". What is required for the invocation of section 793 and article 42 will vary from case to case. One can doubtless imagine cases in which the sources of information available to the company, or obvious failures to inquire, or obvious holes in the material, would mean that the board cannot be held to have reasonable cause to believe. However, any inquiry into that matter must bear in mind that the board does not have to carry out some sort of corporate equivalent of a public (or private) inquiry; nor does it have to conduct some sort of detailed trial of the addressee. While the seriousness of the consequences of restrictions has to be acknowledged, the board is operating as a board, and in a commercial environment where it does not have the full range of powers that might be available to a more elaborate enquiry, and where there remains room for uncertainty. In any given case where there is reasonable cause to believe the falsity of the information it might be reasonable to believe otherwise, so there will always be points to be made the other way. The fact that post-event litigation, with

all the skills of lawyers deployed in the effort, manages to point up different ways in which things might have been done or thought about does not mean that a board could not have had, or did not have, reasonable cause to believe at the time.

Reasonable cause to believe - substance

162. I have set out above how it is said that the board came to have reasonable cause to believe that it had not been given the full facts about agreements and arrangements in the responses to the s793 notices. What the board relied, and relies, on is reasonable cause to believe (and actual belief) that there were arrangements within the Eclairs camp and arrangements between the Eclairs and Glengary camps which related to the shares, how they would be voted, and to raid. Assuming for the purposes of this section that that belief would entail that the responses were inaccurate, I have to consider whether there was indeed reasonable cause for that belief.

163. In my view, assuming that the underlying facts relied on were accurate, I consider that the board did have that reasonable cause. Taken in the round, and especially against the known background of Mr Kolomoisky (and Mr Bogolyubov) as raiders, the board was justified in thinking that there was an attempted raid of the kind that it feared, and that the steps it was seeing were part of that raid. The board was justified in believing that the relationship between Mr Bogolyubov and Mr Kolomoisky was such that it was likely that there was an arrangement relating to the Eclairs shares and their respective interests in them even though they did not know what that arrangement was. Ostensibly, Mr Bogolyubov acquired his interest in a new vehicle (Eclairs) at the time it took its interest in the JKX shares and as it started its approaches to JKX (which apparently Ralkon had been minded to start when it inquired about how to requisition an AGM but then abandoned immediately before Eclairs acquired its interest). The board was entirely justified in considering that there was some relevant arrangement between the two principals because it was highly unlikely that there was none. I observe that the seeds of such an argument were revealed during the evidence at the trial, in which it was suggested that Mr Bogolyubov was happy to let Mr Kolomoisky deal with the voting of Eclairs shares. That suggests there was some sort of arrangement when Mr Bogolyubov acquired his shares, though as a piece of information it is irrelevant to the issues in this case because it was not apparent when the board was meeting and was not disclosed in the responses. The same applies to a piece of late disclosure in this case which seems to reveal that Mr Bogolyubov had an interest in Ralkon which ceased at about the same time as he acquired his interest in Eclairs (see below in the section about non-disclosure).

164. Furthermore, while the facts are less striking, the board was entitled to consider that there were arrangements crossing the Eclairs/Glengary boundary as to the voting of shares and consequences of winning the votes that Mr Zhukov was going to support. The presence of Mr Ratskevych on the Eclairs directors ticket in the EGM requisition and in the Eclairs circular letter, the conversation with Mr Ratskevych and the reference to Glengary in the circular letter were, in the circumstances known to the directors, indicia of such an arrangement. The expressed interest in the Naftogaz shares was consistent

with that (though less probative). From time to time Mr Mabb taxed the directors with a suggestion they did not know what the arrangement was, and they admitted they did not. But they do not have to know what the arrangement is before asking their questions. The main point of the notice exercise is to find out things that the company does not necessarily know already.

165. All that assumes that all the factors relied on were matters that the board was entitled to take into account, and that the board gave them proper weight. Mr Mabb and Mr Gledhill sought to undermine the conclusion by taking various of the elements that I have identified above and seeking to demonstrate their falsity, their over-emphasis or their irrelevance. In the interests of time I shall not deal with all their points, but some of them can be met by a general point. From time to time each of them submitted that one of the factors relied on by the board did not justify the inference of an agreement between the parties against whom the point was taken. If each individual factor were taken by itself, that might, in the case of some of them, be true. However, none of the factors existed in isolation. They formed part of a mosaic, each gaining significance in the light of the others. That is the correct approach.

166. So far as the specific points are concerned, I deal with such of them as I need to deal with in the following manner:

(i) Mr Gledhill submitted that, without making enquiries of Mr Zhukov, the most that the board could and should reasonably have concluded about the inconsistency between the responses of the Glengary respondents and the prior conversation with Mr Ratskevych was that Glengary had inadvertently failed to really refer to the existence of the quid pro quo which Mr Ratskevych had told Dr Davies about. I disagree. It is not easy to see how it can have been inadvertent bearing in mind the question and the form of the answer given, but in any event whether inadvertence was a reasonable explanation, it was not the only reasonable explanation. The board was entitled to conclude otherwise. In any event, assuming the answer to have been relevant, the omission made it wrong.

(ii) Mr Gledhill criticised the board for assuming (on the footing of what it was told by Mr Baines) that Mr Ratskevych had made enquiries about buying the Naftogaz shares. The thrust of the concern of the board was that Glengary had initiated a contact and was actively pursuing a purchase, at least for a time. That turns out not to be quite the case. On the facts as they appeared at the trial, it appeared that the first direct contact between Hogan Lovells (solicitors for the chargee/sellers) came from them, and not from Mr Ratskevych. Mr Mabb made a similar point. Furthermore, it appeared that the interest of Glengary was expressed, but not particularly vigorously pursued. The thrust of the submissions of both claimants was that, as a result, the board had given this factor too great an importance. However, on the information as it first arrived at Dr Davies, it was indeed

Glengary who approached the sellers, and not the other way around, though the identity of Glengary as the possible purchaser was a matter of speculation, since Hogan Lovells merely speculated that the purchaser was connected to Mr Ratskevych. Accordingly, the discrepancy between what Dr Davies originally knew and how the matter was later perceived was not that great. Furthermore, it is not wholly inaccurate to describe the situation as one in which an approach came from Glengary, because Hogan Lovells did not approach Mr Ratskevych cold. According to the evidence, they seem to have approached him because they were tipped off as to his possible interest by an associate of Mr Ratskevych. That is a form of approach by Glengary, though perhaps not as direct as the board considered to have been the case. The important point was that Glengary were apparently interested in getting hold of the shares. That was a legitimate conclusion for the board to draw and its place in the mosaic was a question of judgment for the board.

(iii) Mr Gledhill criticised reliance on the non-disclosure of Mr Ratskevych's interest in Glengary as going to credit only, and said it was of no relevance in assessing whether there were relevant agreements some 6 years after the apparent non-disclosure. This seems to me to mischaracterise the point. The board's concerns started with a mis-statement by those who, in effect, represented Mr Zhukov's interests to the effect that he was the ultimate beneficial owner of Glengary. That was false. It was a statement made a few months after Mr Ratskevych acquired his interest. In the context of the events of 2013, it had some significance. So far as it was also painted as a failure to disclose, Mr Gledhill pointed out that while there were some disclosure obligations in 2007, arising out of a purchase by JKX from Mr Zhukov, the positive obligation of disclosure (under the FSA's Disclosure and Transparency Rules) was a disclosure about voting rights, and Mr Ratskevych had no voting rights. However, that does not deprive the positive mis-statement of its effect. It just means that there was a mis-statement by Mr Zhukov, unaccompanied by a corresponding failure to disclose by Mr Ratskevych. There was still a real point here for the consideration of the directors.

(iv) Mr Gledhill criticised the directors for placing reliance on internet stories linking Mr Zhukov to a charge of arms smuggling in Italy, a charge which they believed he had been acquitted of on a jurisdictional basis. Mr Gledhill himself overstates the significance of this point for the directors. While 3 of them in their evidence do refer to these matters as causing them concern at the beginning of the story, none of them said that it played any particular or particularly active part in their deliberations at the board meeting. By then it seems to have been part of the background only.

(v) Mr Mabb criticised over-reliance on the events surrounding the circular letter. He points out that the text of the letter made it clear that, while it proposed its own directors, it also said that it was open to the recruitment of the best qualified

candidates. Furthermore, the advertisement in the Financial Times was published by Eclairs and does not even mention Glengary. In terms of fact, what Mr Mabb said is correct. Those facts are, however, of little significance in this case. The fact is that the letter proposed 3 directors, of whom one was associated with Mr Zhukov and another was wanted for criminal offences. Those points were of rather greater significance than the statement that Eclairs was open to the appointment of the best candidates. The view might well have been taken that had it been Eclairs' concern to have the best candidates, then they would have justified their identified candidates as falling within that category, or would have taken prior steps to identify some better ones. The fact that the preceding advertisement in the Financial Times, with a clickable link to the circular letter, did not mention Glengary is of no real significance when the circular letter itself did.

(vi) Mr Mabb criticised the decision-making process in that the board failed to give weight to the denial by Mr Kolomoisky and Mr Bogolyubov that there was an agreement or arrangement between them. He said that such denials were entitled to "some weight", which was increased by the fact that a mis-statement in the response would or could be a criminal offence. It seems to me that Mr Mabb's own point has little weight. The whole point of the section 793 exercise is to consider whether the statement made is true. Of course, the denial cannot be dismissed, or its falsity assumed, and to that extent the denial has some weight. Doubtless a statement from a source viewed as prima facie respectable and strongly credible would have to be viewed as such, and the directors might consider that they would require something more than might otherwise be required for an unknown or less than credible source if they were to disbelieve the answers to the section 793 questions. Mr Kolomoisky and Mr Bogolyubov did not fall into the category of prima facie respectable and credible sources, in the reasonable view of the directors.

(vii) Mr Mabb was particularly critical of the view of a number of the directors that it would be highly likely that there would be some form of shareholders' agreement between Mr Kolomoisky and Mr Bogolyubov. He points out that it is perfectly possible for shareholders in a company not to have any agreement or arrangement in relation to the assets of the company, and that in this case Mr Bakunenko had said that Mr Bogolyubov adopted a passive role and was not surprised that there was no shareholders' agreement. It seems to me there are 2 points here. Mr Bakunenko's evidence of fact as to the absence of an agreement is irrelevant to the issues in this case. The question is what the directors had reasonable cause to believe. Secondly, the views of the directors on the point seem to me to be entirely reasonable. On the information they had, Mr Bogolyubov had acquired a significant interest of very significant value. If he paid for it, one would have thought it was likely that there would be an agreement. Those directors with real experience of such transactions in the same geographical circumstances believe there would be some sort of agreement, and that seems to me to be entirely reasonable if not correct as an expression of likelihood.

(vii) Finally I deal shortly with a suggestion of Mr Mabb that the board's views reached only the level of suspicion, and not belief (or reasonable cause to believe). I reject that submission on the facts. It was clear to me that the board's state of mind had moved beyond the realms of suspicion to the realms of belief.

167. All in all, I find that the directors had reasonable cause to believe that which they said they believed. The analysis and submissions of Mr Mabb and Mr Gledhill do not persuade me otherwise.

Were the responses to the notices inaccurate, based on what the directors had reasonable cause to believe?

168. Under this head I return to consider the effect of the questions in the notices, and the answers, and measure the latter against the views of the directors to see whether they had reasonable cause to believe they were false. It is unnecessary to deal with them all. Some of them are key - principally those directed to Mr Kolomoisky and Mr Zhukov, Eclairs and Glengary. If there is believed falsity in those notices then the other notices do not matter. If there is not then there is unlikely to be falsity in the others.

169. It will be convenient to start with Mr Kolomoisky's question (e)(ii) (see the Appendix) and Mr Kolomoisky's answer. Mr Kolomoisky's answer was:

"I am not party to any agreement or arrangement … (ii) relating to the exercise of any rights arising from the shareholding in JKX".

170. His prior answers seem to accept that he had an interest in the Eclairs holding because it gave those shares as the shares in which he had a direct or indirect interest.

171. The answer can be viewed as being inaccurate in a basic factual sense in the light of what the directors reasonably believed to be the case in relation to a Kolomoisky/Bogolyubov shareholders' agreement. It also seems to me to be an inaccurate answer to a question confined within section 793 bounds. The question is a permissible one in relation to the holding in which he has an interest because voting rights seem to me for these purposes to be within the concept of particulars of his interest - see above in relation to question (d)(ii) of the Eclairs notice.

172. Next there is the answer to Mr Kolomoisky's question (e)(iii). As a factual statement it is one that the directors could reasonably have believed to be false because of what they reasonably believed about a Kolomoisky/Zhukov arrangement. To recap, the board had reasonable cause to believe that there was an arrangement between Mr Kolomoisky and Mr Zhukov which involved them voting their shares together to change the management of the company, and to block the special resolutions, in exchange for Mr Ratskevych being placed on the board, if not a wider agreement. It must have been part of any such arrangement that Mr Kolomoisky could have his nominees on the board as well. The extent to which either of them was bound was not known, but the arrangement or agreement as believed by the board must have involved at least serious degrees of expectation on each side. The arrangement or agreement therefore involved the voting rights of both blocks of shares (the Eclairs shares and the Glengary shares).

173. However, one still has to consider whether it is an inaccurate answer when viewed through the prism of section 793. The whole set of questions is prefaced by the words "In accordance with section 793", so they were section 793-geared questions to which the defendant was entitled to give section 793-geared replies which would be viewed as such. I have already found that this question is capable of being a valid section 793 question. Accordingly, if the question is to be viewed as being one which is geared to section 793, and not as a general question about voting rights, then one has to consider and view the answer in the same way. This involves treating the answers as though they were carefully geared to the sort of questions as to "interest" that arise in relation to section 793. On that approach the answer would be accurate if there were no voting agreements which related to, or gave rise to, "interests" within the meaning of the section.

174. The matter can in my view be broken down in this way:

(a) Mr Kolomoisky has an interest in the 47m JKX shares. Does any element of the assumed agreement relate to his interest in those shares for the purposes of the section so as to fall under the obligation to give particulars of his interest? (The question is not framed in those terms, but if it did so relate then it would not matter that this particular aspect of his interest were spelled out in a more particularised inquiry such as question (e)(iii)). If it were a binding agreement as to how the shares were to be voted then in my view particulars would have to be given on this basis because it would be a serious qualification of the extent of his interest. Such an agreement would also create an interest in favour of Mr Zhukov (section 820(4)(b)), and if Mr Zhukov has such an interest it must logically follow that Mr Kolomoisky's is qualified and that qualification ought to be provided as part of the particularising of his interest. And again, if Mr Zhukov had an interest, then the company was entitled to ask, and Mr Kolomoisky was obliged to answer, questions about that (section 793(4) and (5)).

(b) What if the "deal" were not binding as a matter of contract? In my view it would be

capable of being an "arrangement". It is therefore necessary to consider whether the section obliges disclosure of the arrangement so far as it related to Mr Kolomoisky's shares. Such a perceived arrangement would not confer an interest under any of the provisions of sections 820 and following. Nonetheless, it seems to me that disclosure would be required as part of the disclosure of particulars of his interest under section 793(3). Section 793(5) is a strong pointer in that direction. Under subsection (4) a shareholder is obliged to give particulars "with respect to that interest" of a third party who has an interest in his shares. Those particulars can include:

"(ii) an agreement or arrangement relating to the exercise of any rights conferred by the holding of the shares" (subsection (5)).

It is therefore anticipated that mere arrangements (as distinct from agreements) can fall within the concept of particulars of an interest that need to be disclosed. That would seem to me to be consistent with the purpose of the section, which is to require persons interested to disclose their hands. It follows from that that if there were an arrangement of the kind reasonably believed to exist by the board, Mr Kolomoisky ought to have given particulars of it, whether in response to a general inquiry about interest (question (b)) or a more directed inquiry (question (e)(iii)). Giving particulars of the arrangement ought to involve giving particulars of the whole arrangement.

175. It follows that the board was entitled to the reasonable belief that Mr Kolomoisky had not given an accurate answer to question (e)(iii) so far as the arrangements with Mr Zhukov are concerned. It also seems to me the failure to disclose that would make the answer to (e)(ii) inaccurate as well.

176. All those findings turn on the interest which Mr Kolomoisky clearly has in the 47m shares. Mr Swainston had an argument which sought to cast the net of "interest" wider. He said that the company had reasonable cause to believe in an agreement falling within section 824, covering both the Eclairs and the Glengary shares. If there were such an agreement it would create an interest in all participants in all shares (section 825), which opens up the route to asking all the questions in the section 793 notices. This is his "reflexive" argument.

177. This line of argument requires an agreement for the acquisition of shares in JKX (the target company) and an acquisition pursuant to that agreement. On Mr Swainston's analysis the agreement was one under which Eclairs would acquire shares (the Ralkon shares) and was one to which Mr Zhukov was a party. If that were right then it would give the Eclairs parties and the Glengary parties interests in each other shares. However, I do not think that the facts support a reasonable belief that that sort of agreement existed, in which case it cannot be used as a means of having reasonable cause to believe that all

the parties were interested in each others' shares via that route. The company (on my findings) had reasonable cause to believe there were arrangements governing the voting of the Eclairs and Glengary shares, but had no reasonable cause to believe that it was part of that agreement that Eclairs would acquire shares. I am not even sure that such a suggestion gets as far as "plausible surmise", on the facts known to the directors. Eclairs could certainly justifiably be seen as a raiding vehicle, but it was not a joint raiding vehicle. On the facts as known it could only reasonably be believed to be Mr Kolomoisky's raiding vehicle. Accordingly, I do not consider this line is open to Mr Swainston.

178. Mr Zhukov's questions are set out in the Appendix. His answers denied any type of agreement referred to in paragraph 1(e), while acknowledging "discussions" with the Eclairs group as to JKX's financial performance and the need to change the management team "as per the open letter to JKX shareholders". The analysis in relation the directors' reasonable cause to believe about interests and falsity apply to his answers mutatis mutandis. Agreements and arrangements relating to rights arising from the shares affect his interest and are disclosable for the same reasons as appear above in relation to Mr Kolomoisky. The same is true of Mr Ratskevych and of Mr Bogolyubov.

179. At the trial there was no detailed dissection of all the questions and answers to work out which questions in which recipients' notices were inaccurate (or reasonably believed to be inaccurate) and to what degree. I shall not do that either. It is sufficient for present purposes that the Kolomoisky, Bogolyubov, Zhukov and (probably) Ratskevych responses were inaccurate. Those of Eclairs and Glengary will also be rendered inaccurate. None of them revealed the arrangements or agreements that the board reasonably believed to exist, and enough of them were inaccurate to give rise to the possibility of suspending the shares under article 42. It follows that the directors had reasonable cause to believe that they had not been given proper information within article 42 and their power of restriction was capable of exercise.

Improper purpose - the allegations

180. Eclairs and Glengary submit that while the article 42 power of restriction could have been exercised for a legitimate purpose, it was in fact exercised for purposes that went beyond that legitimate purpose. The legitimate purpose was the acquisition of information. The further purpose or purposes of the board in deciding to impose restrictions was for the purpose of altering voting control within the company and ensuring that the resolutions at the forthcoming AGM were duly passed. The directors were obliged to exercise the power only for legitimate purposes, so the illegitimate purpose, which was a substantial purpose, means that the exercise of the power should be set aside.

181. The company disputes that the only legitimate purpose of the article 42 power is to extract information. Mr Swainston submitted that restrictions could be imposed to protect the company and its shareholders as whole, pending proper disclosure. In the present case it was done to "neutralise any unfair advantage obtained by parties who were not making proper disclosure". The board had a "dual purpose", of extracting information and protecting the company. Protecting the company against a raid was a broad purpose, and carrying the resolutions was an incident of it. If an unfair advantage had been obtained through non-disclosure (and Mr Swainston said it had) then it was right to apply restrictions to undo that advantage. He disputed that carrying through the resolutions was the purpose of all the directors, but did not shrink from saying that even if it were then that was legitimate in the context of a raid which was going to damage the company. The "pending proper disclosure" feature is probably the way in which the company seeks to link the exercise of the power back to article 42 and the notices. Its presence or absence is an important factor in the case.

182. Before ruling on the propriety or otherwise of the purposes of the board's exercise, I will first need to make some findings. I turn to that in the next section.

Improper purpose - findings of fact

183. Bearing in mind that the improper purposes claim against the company is clearly articulated as a breach of fiduciary duty on the part of the directors, and equally clearly denied, it is somewhat surprising to find that the witness statements of the directors do not really touch on the point at all. Hardly any of them refer in any significant way to the purposes for which the restrictions were imposed. Only Mr Moore formulates the reason for imposing the restrictions in the way referred to by Mr Swainston, and that is in his second witness statement which was provided for the purposes of dealing with a different point. His evidence is simply a single statement stating the bald purpose of imposing the restrictions (to protect the company pending disclosure). Even allowing for the speed with which this action was brought on to trial, I find this state of affairs surprising. Its absence suggests that the individual directors may not have had in mind Mr Swainston's refinement.

184. In the absence of evidence in chief from the directors as to what their respective purposes were, the question of their motivations was made to arise in the cross-examination of each of the directors by Mr Mabb. There may be a difficulty in identifying the extent to which the distinctions which I have referred to above were put to each of the witnesses, but I have to do the best I can on the evidence before me. In the end I have concluded I can come to a decision on the point notwithstanding that the point in its most distilled form may not have been quite put to all the directors.

185. The events leading up to the board meeting bear the hallmarks of some of the directors having in mind the desirability of stopping the Eclairs/Glengary vote as being in itself a desirable end, not closely linked to the provision of information. That is inherent in the following emails:

(i) The email of 28th March ("we should use every weapon in our armoury to fight Kolomoisky");

(ii) The email of 9th May ("Paul and the team are making huge efforts to try to ensure we carry the day, including … looking at any possibility of the Eclairs/Glengary votes not being valid" (which Lord Oxford at least thought was a reference to article 42);

(iii) Mrs Dubin's email of 20th May in which she was seeking to set up a board meeting to consider the responses on 29th May (before the AGM);

(iv) The email of 27th May ("tipping the scales in our direction");

(v) The email of 30th May in which Mr Baines (in advance of board meeting) said that the board had reasonable cause to believe the responses to be inaccurate and was minded to issue restriction notices demonstrates the extent to which at least some of the directors (with whom he must have had contact) had moved their thinking towards imposing restrictions, and that was probably influenced by the desirability (as they saw it) of the restrictions as a weapon in the fight against the "raiders" rather than just a mechanism to extract information.

186. The following points in the chronology leading up to the board meeting (as to which I make the following findings) are significant:

(a) The board members were clearly anxious about the AGM, and anxious to get the resolutions through. They recognised there was a threat to them from Eclairs/Glengary voting against them.

(b) They regarded getting the resolutions through as being in the best interests of all the shareholders. They discounted issuing more shares as being a way of altering the voting balance in an achievable way. However, the company did embark on an exercise of persuading the other shareholders to support the resolutions and of carrying out a sort of survey to see where the land lay from time to time. This demonstrates the extent of the anxiety of the board. It was considerable.

(c) Some of the directors were concerned about the Naftogaz shares falling into unfriendly hands and considered trying to get more friendly shareholders to take

them. They also considered other ways of keeping assets out of the hands of the "raiders" such as selling the Ukrainian subsidiary.

(d) I think that the timing of the sending out of the article 42 notices was so that responses would come in before the AGM. There is nothing wrong with that, and it was not suggested that there was. It was no part of Mr Mabb's case that the decision to send out those notices was somehow impeachable (though his pleaded case takes a point on the probabilities of timing). It is obvious that sending them out so that the responses could be to hand before the AGM would be a justifiable step.

(e) That having been done, a board meeting was set up in advance of receipt of the notices so that they could be considered prior to the AGM. That went with the initial idea to have responses before the AGM. There is, in my view, nothing wrong with that either. The AGM was an important step; the notices were important documents; if they had revealed something important, it would have been relevant to have appreciated its significance before the AGM. If they did not reveal enough it would be relevant to consider restrictions before the AGM. Mr Mabb sought to portray the desire to have a board meeting to consider the responses before the AGM as somehow sinister or as a significant badge of an improper purpose. That is not correct. It was an entirely proper objective in the circumstances. There was no good reason to wait until after the AGM, and potentially very good reasons for making sure the board meeting happened first.

(f) Various of the directors in their own various ways, and to varying extents, considered the possibility of the responses being inaccurate, in advance of the board meeting. However, there was no clear unified purpose to move towards restrictions before then. For some it was clearly an idea; for others it probably was not even that. For those for whom it was an idea I do not think that they automatically associated it with the need to have information. Restrictions had their own independent merit.

(g) Mr Miller's expressed view on the day of the board meeting was that preventing Eclairs and Glengary from voting was in the interests of the company and its shareholders generally. He said that he wanted to vote in favour of the restriction notice "with the objective of preventing them from voting at the annual general meeting". Mr Mabb took the point that while Mr Miller had sought to give a proxy vote to Mr Moore, the articles contained no provision for doing so. If Mr Miller's vote was counted it must have been on the basis that Mr Moore was his alternate. It does not seem to me to matter which of these is the case. Mr Miller's vote was counted, and it would be right in the circumstances to treat his view as being the motivation behind one of the votes of the voting directors.

(h) The letter from Mr Baines to the Takeover Panel on the day of the board meeting probably reflected discussions that he had had with directors and reflects the fact that those directors were expressing the view that the notices had not been properly responded to and that restrictions were a possibility. However, I think that the clear

terms contained in that email were the result of Mr Baines jumping the gun. I do not believe that it is an expression of the fact that the board had already pre-judged the question. Apart from anything else, he could not have spoken to several of the non-executive directors.

187. At the board meeting the directors were uncertain as to whether there would be enough votes to pass the ordinary resolutions. Mrs Dubin was more confident than the others, and Mr Shah was too. I reject Mr Mabb's attempt to denigrate their evidence to that effect.

188. The formal minutes of the board meeting (see above) do not advert to the desirability of getting the missing information, or to the protection of the company pending that information being forthcoming, or anything like that. They refer in general terms to the promoting the success of the company and to directors' duties. This does not help Mr Swainston's analysis.

189. Of most significance, therefore, is the evidence of the voting directors in cross-examination. Mr Mabb asked them (apart from Mr Murray, whom he did not cross-examine for want of time) various questions about their purpose or predominant purpose. Mr Ferguson clearly viewed the purpose of voting for the restrictions as one limited to the extraction of the information. Mr Shah had a "balanced" view, but it is apparent that he regarded that as an important factor, and while he regarded protecting the company in a more divorced sense as significant, he did not put it so far in the forefront of his thinking as to make it a dominant factor separate from the extraction of information. However, the other 4 voting directors did seem to adopt a line in which they put disenfranchisement as a useful objective, to enable all the resolutions to be passed, in a way which elevated it very materially above the purpose of extracting information and gave it a life of its own. While they may (and in all probability actually did) appreciate that the restrictions would have to be lifted if the information was provided, they did not regard the ability to impose restrictions as being one designed to protect the company pending the provision of information; they regarded it as one which they could use, and did actually use, to get an advantage (the opportunity to pass the resolutions) for its own sake, not linked to the extraction of information. Putting the matter another way, they did not regard the opportunity to get special resolutions passed which would otherwise not be passed (and the increased chance of getting the ordinary ones passed too) as an incidental benefit of imposing restrictions as an incentive to provide information; they elevated it in their minds, and in their purposes, to something with its own independent merit as a way of doing down the "raiders" for the benefit of the shareholders. Once the special resolutions were passed, and the re-elected directors were in post, the company would be better equipped to resist the raid, and would have put obstacles in the way of the "raiders".

190. The point can be illustrated by the evidence of Mr Miller, who said:

"Q. And this may be repetitive, but as far as you are concerned is the benefit to the members the benefit that we have been talking about during the last half hour? Perhaps let me put it the other way round. Let me ask you again: what is the benefit to the members of imposing the restriction notices?

A. The benefit to the members of imposing the restriction notices would be to prevent those two parties from voting at the annual general meeting and thereby almost certainly ensuring that the resolutions that were being put to the meeting would be passed.

Q. Yes. Rescuing the special resolutions from certain failure and rescuing the ordinary resolutions from the risk of failure?

A. That is correct, my Lord.

Q. And the benefit to the company of securing the passage of those resolutions, can you elaborate on that?

A. The early resolutions were mostly to do with the reappointment of directors and these were the ones that required the majority vote. We were pleased that we would be able to maintain consistency with the board and not have to go through any changes. That was our recommendation, my Lord, to have that. The other resolutions, the special resolutions are the resolutions that provide the board, the company with the flexibility to increase its share base, or to decrease it for that matter.

Q. On the buy-back, the authority to buy back shares?

A. That's correct, that was the second special resolution, yes.

Q. Yes, I understand. So was that the purpose of voting for the restriction notices, the achievement of those benefits which you have just described?

A. Those were the direct benefits, that is correct, my Lord.

MR.JUSTICE MANN: Those were the benefits, was that the purpose of voting for them? That was the question to you.

A. Indeed, that was the purpose of voting for those.

MR. MABB: Any other purposes?

A. Ultimately it would be a set back for those parties.

Q. That is the deterrent of - I'm not interested in the precise language, the deterrent of Eclairs and Glengary?

A. We would not know which way things would go, but it would be a set back.

Q. So is that again looking at protecting or safeguarding or strengthening the position of the company and its shareholders?

A. Our principal concern is for the shareholders of the company, my Lord, yes."

191. There is nothing there about the purpose of extracting the information, and there is a clear emphasis on the disenfranchisement as being a desired, and intended, objective for the purposes of weakening the hand of Eclairs/Glengary.

192. Lord Oxford's evidence was less clear on this, but overall I consider that he had the same purpose as that referred to by Mr Miller. I will not set out every relevant passage in his evidence. Two will suffice for present purposes. At Day 4 pages 83-4 he said:

Q. Would you go down to paragraph 10 [of the formal company minutes]:

"The directors considered ..."? (Pause.)

Have you read that?

A. Yes.

Q. How would the imposition of restriction notices promote the success of the company in the terms of that paragraph?

A. Eclairs and Glengary were seeking to resist certain special resolutions and they had resisted them for several years. It has imposed considerable strain, let us say, on the company's ability to raise finance. So, we wished the special resolutions to pass and that would have promoted the success of the company.

Q. Just spelling out the detail, that would be by preventing the Glengary and Eclairs shares from being voted, enabling the resolutions to succeed?

A Yes.

Q. So, was that your purpose in voting for the restriction notices?

A No. My purpose was to ensure or to promote the success of the

company and of all shareholders.

Q. Yes, and how did you promote the success of the company?

A. By allowing the special resolutions to pass.

Q. To do which, it was necessary to disenfranchise the Eclairs and Glengary shares?

A. They were certainly intending to vote against those resolutions, yes.

Q. So you had to get across that; you had to prevent them voting to get the special resolutions through?

A. Yes.

Q. So your purpose was as you described it. Did you have any other purpose in voting for the restriction notices?

A. In what sense?

Q. I don't know.

A. I don't believe -- I believe -- the best summary is I wished for all the shareholders to have the maximum benefit from the company's resolutions. I take some encouragement from the fact that, admittedly after the event, 99.9 per cent or whatever it was of the other shareholders apart from Glengary and Eclairs, voted with the company, which I think reflects the fact that we made a correct and honest judgment."

193. That seems to leave out of account any question of the restrictions being intended to get the information out of the shareholders. On the other hand, later, at pages 95-97, he said:

"Q. So, the Chairman's evidence was that if the information is provided and the restriction lifted, then the company is back to square one. That was the Chairman's view.

A. That's what he means. I mean, it depends what you interpret as square one.

Q. Isn't it back to the same position where you have two big blocks of shares minded to vote against the board?

A. Yes.

Q. Does it follow that it would have been unhelpful to the company if the information said not to have been provided had then been provided, such that the restrictions would be lifted?

A. Well, as it turned out it wasn't unhelpful to the board.

Q. Well, no. Had the information been provided and the restrictions been lifted, enabling the two blocks of shares to be voted, would that have been unhelpful to the board?

A. They would have -- I mean, it would have been unhelpful to the board in the sense that the -- as a result of it, as we know now, the special resolutions would have been defeated.

Q. Yes. So you would be back to square one, as the Chairman says?

A, Yes. I mean, square one in -- I can't put words into the Chairman's mind. In my mind, square one remains an attempt by Eclairs and Glengary to take control of the company without paying a proper premium.

Q. Well, isn't that -- you would be back to whatever you thought the earlier position was?

A. Exactly.

Q. So you were not particularly thinking, "Let's get the information that we say has not yet been provided". You were not focusing on that?

A. No, I think we were. We were focusing very much on that. We were asking for the provision of information and we hadn't received it.

Q. When I asked you a few minutes ago what your purpose was in voting for the restriction notices, you accepted that your purpose was to prevent Eclairs and Glengary from voting, and you spoke about protecting the company and all its shareholders. You didn't at that stage say, "Well, actually our purpose was to elicit this information"?

A. Well, I say it now, and we had always intended to elicit the information.

Q. Looking at these different purposes, how significant was the eliciting of the information?

A. I think it is extremely significant. If we had a statement that we were -- that there was an agreement between them, well, that's a statement of fact, and it has consequences, possible consequences later on”

194. That elevates the extraction of information. Looking at the remainder of his evidence, I am satisfied that the extraction of information point, although of significance to Lord Oxford, was not so important as the opportunity that the situation presented of being able to pass the resolutions as a way of tackling the raid, and the extraction of the information was subsidiary.

195. Mr Moore's evidence was to the same sort of effect. One passage suffices (although I have taken into account his evidence as a whole):

> "Q. …. Why did you consider that the issue of the restriction notices would promote the success of the company?
>
> A. Because I was looking at the needs of the 62 per cent of shareholders, who were in danger of suffering from the fact that the company was being destabilised by these two raiders.
>
> Q. And just articulating that, how then would the imposition of the restriction notices be for the benefit of those members?
>
> A. Because it would mean that they wouldn't have the voting rights. Q. And --
>
> A. Sorry -- it meant we could get through the special resolutions, which would give us the freedom to be able to raise new capital.
>
> Q. And the ordinary resolutions that were still in the balance for the coming AGM as well?
>
> A. Yes.
>
> Q. Was that your purpose in voting for the imposition of the restriction notices?
>
> A. It was one of the reasons, yes.
>
> Q. What were the other reasons?
>
> A. I think I have already alluded to that. I think the -- I felt that the company was under attack and had been destabilised. The share price was far too low. It didn't reflect the asset value of the company at all. I felt that the share price -- one of the reasons the share price was low was because the impact of Mr Kolomoisky and Mr Bogolyubov being significant shareholders and the fact that their reputation, as I have already said, was to destabilise companies and try to get the assets cheaply.
>
> Q. How would the imposition of the restriction notices impact on those considerations?
>
> A. Because it would mean they wouldn't be able to vote at the AGM and restrict our ability to increase the equity -- increase the finance.
>
> Q. Isn't that the same point? It is the ability to get through the resolutions?
>
> A. That's a very narrow view in my view. I think it is much wider than that. We have a company to run, and oil and gas is an inherently risky business. You know, to have the inability to have access to new funds, it

makes it very, very difficult. The fact that Mr Kolomoisky and Mr Bogolyubov were shareholders has meant, as I think has already been explained, that we have been able to -- unable to raise new finance as easily as other companies in a similar situation can." (Day 3 pages165-167).

196. In fairness to Mr Moore, this evidence was followed by this at Day 4 pages 11-14:

"Q. Yes, yes. Can we try to work out what the focus of your objective was, or your purpose? Was the focus the one you described yesterday, that's to say to prevent Glengary and Eclairs from voting, supported by the restriction on transfer, and as you say, more widely, to protect the company in the way you have elaborated this morning?

A. Uh-huh.

Q. Is that correct?

A. Yes.

Q. But when you say, "pending proper disclosure", that's a recognition that the fix is not permanent?

A. It probably wouldn't be, but --

Q. It is not necessarily permanent?

A. -- it is very difficult to predict how things would work out in the future.

Q. Do you agree that the protection you have been talking about would fall away -- well, if the restrictions lapsed, then all the protection that you have been talking about would fall away?

A. I think it probably would, but I would like to talk to my lawyers about that.

Q. Of course. I said if the restrictions lapsed. That was put in as a legal qualification.

A. Yes, yes.

Q. Can I suggest to you then that your substantial or main purpose was the purpose we have talked about and you were talking about yesterday? It was prevent the voting of the shares and to protect the company and its shareholders in the way that you have elaborated?

MR JUSTICE MANN: Mr Mabb, can I just ask for clarification of this

question? Is that his purpose at the board meeting in voting for the restrictions?

MR MABB: I am so sorry, my Lord, it is. We are still back at the board meeting, as it were.

A. We are at the board meeting, as it were, as I understand it, yes. There are various bits of the jigsaw, as it were, in my mind, as to how to vote and to, if you like --

MR JUSTICE MANN: Now we have established you are talking about his purpose at the board meeting in relation to restrictions, could you put your question again?

MR MABB: Yes. Sitting at the board meeting, is it correct that your -- it doesn't matter whether you call it principal purpose or your substantial -- purpose in voting for the restrictions be was to prevent Eclairs and Glengary from being able to vote the shares issued at the AGM and, as you say, more widely, to protect the company and it shareholders in the way that you have described?

A. Yes, because the main job of a board is to try to create shareholder value.

Q. Yes, yes.

A. And I believe that that was the best way forward to achieve that.

Q. Yes, and although you recognised that provision of the information that you say had not been provided could cause the restrictions to lapse, that was not the focus or the substantial purpose?

A. It was certainly part of the jigsaw that I had in my mind as to how it made up my decision to vote in favour of the restriction notices."

197. He therefore had in mind the extraction of information, but looking at the totality of his evidence I think his predominant purpose was a separate one of benefiting the company by getting the resolutions through, to the detriment of Eclairs/Glengary.

198. Mrs Dubin was cross-examined on the point more shortly. Her evidence was that the sending of the notices was motivated by a desire to have information, but when it came to the purposes of the restrictions she said:

"Q. All right. Paragraph 10 [of the formal board minutes]:

> "The directors consider that the issue of the restriction notices would promote the success of the company for the benefit of the members as a whole, having regard to the relevant factors set out in Section 172 of the Companies Acts."
>
> How did you consider that the issue of the restriction notices would promote the success of the company?

A. I believed that the position that Eclairs and Glengary were taking was not consistent with what the other shareholders desired, certainly not approving the remuneration report didn't have a significant impact. Certainly not revoting Dr Davies on the board, I thought it was very serious not to have a CEO and again, I believed that the restrictions in terms of the company's ability to manage its shares to raise capital were in the best interest of all the shareholders and so I didn't actually think that their position – the position they were taking was for the benefit of everybody.

Q. No. So you thought their position was not for the benefit of the members. How would the imposition of the restrictions under article 42 be for the benefit of the members? How did you consider the imposition of those restrictions would benefit the members?

A. Because I thought that they would pass and they would give us the correct authority that the majority of the shareholders were interested in and the flexibility that the company needed to go forward.

Q. So that's the capital resolutions and the buyback resolutions?

A. Uh-huh.

Q. And it would also ensure the re-appointment or re-election of Dr Davies?

A. Certainly having the CEO in place is very important.

Q. Yes, yes."

199. There is nothing there about the purpose being to get the information, or the protection of the company pending the receipt of the information. It is more consistent with the restrictions being used as a useful counter to the "raiders".

200. The differences between relevant states of mind can be quite subtle in this situation, but I find that the evidence demonstrates that the following purposes, beliefs and states of mind existed among the voting directors:

(a) They all knew that the purpose of the notices was to get information.

(b) They all appreciated that the effect of restrictions would be (unless the information was provided before the AGM) that Eclairs/Glengary would be prevented from voting, with the effect that all the resolutions would be likely to be passed, or that there was a very enhanced prospect of that happening.

(c) They all saw that as operating for the benefit of the company as a whole, and as hindering the cause of the "raiders".

(d) The majority of the voting directors (Mrs Dubin, Mr Moore, Mr Miller and Lord Oxford) saw that as a sort of standalone proper and useful objective, and achieving it was a substantial purpose of voting for the restrictions, separate from the need to have information. Those directors did not have in mind the protection of the company pending the provision of the information; they had in mind protecting the company full stop. The restrictions were thus a useful weapon to be used against the "raiders". The disenfranchisement of the "raiders" at the AGM was not just an incidental effect of the imposition of restrictions; it was the positively desired effect, seen as beneficial to the company in the long term.

(e) The bona fides of those directors, and the genuineness of their desire to benefit the company as a whole, was not challenged, and in my view cannot be challenged.

The purpose of restriction notices

201. Underlying the debate on the "improper purposes" point is a disagreement as to the legitimate purposes of restrictions imposed under provisions such as article 42. The claimants say that the purpose is to provide an incentive to provide information; JKX disputes that.

202. In *Re Ricardo Group plc* [1989] BCLC 566 Millett J had to deal with an application to the court for relief under the predecessor section to section 793. He refused relief on the facts of the case, and in the course of his judgment said:

"…. [I]t would be idle if I were to delude myself into thinking that these applications are made in the course of ordinary litigation. In the first place, an order imposing Part XV restrictions on shares has a much wider effect than an ordinary interlocutory injunction. …. Far from preserving the status quo, they interfere with it. They are granted as a sanction to compel the provision of information to which the company is entitled. It follows, in my judgment, that once the information is supplied, any further justification for the continuance of the sanction disappears." (page 572e-f).

203. He went on at p 577i:

> "[I]n my judgment, these restriction orders are not to be used as weapons to gain a temporary advantage over an opponent in a contested takeover bid. Their only legitimate purpose is to coerce a recalcitrant respondent into providing the requisite information. …"

204. That is the foundation for Mr Mabb's submission as to the purposes of section 793 and a restriction notice. Mr Swainston did not accept that (he said that Millett J's pronouncements were obiter) and said that the statutory concept enabled restrictions to be imposed to protect the company and its shareholders as a whole, pending proper disclosure. He pointed to section 800 of the Companies Act 2006 which provides for the removal by the court of restrictions that the court itself has placed there in an application under section 794. It provides that:

> "(3) The court must not make an order under this section unless –
>
> (a) it is satisfied that the relevant facts about the shares have been disclosed to the company and no unfair advantage had accrued to any person as a result of the earlier failure to make that disclosure…"

205. Mr Swainston points out that the provision of the missing information by itself is not necessarily sufficient to lead to a discharge. The court can maintain the restrictions if and insofar as it is necessary and appropriate to do so in order to undo any unfair advantage arising from the failure to disclose. That is said to demonstrate that the purpose of the restrictions can be something beyond the extraction of the missing information, and in the present case that something is the protection of the interests of the company. Mr Mabb counters that by pointing out that that case involved the statutory regime whereas in the present case the regime is operating through the articles; and he also points out that section 800 is dealing with the discharge of restrictions and not their imposition in the first place, and in any event the additional apparent criterion in section 800 does not equate to the sort of broad additional purpose which Mr Swainston relies on.

206. In my view Mr Mabb is, by and large right. I do not think that Millett J's dicta are obiter, but even if they were I would, subject to one qualification, agree with them and follow them. The vice that is aimed at is the non-disclosure of information. If proper information is disclosed in the first place then there is no basis for imposing restrictions no matter how desirable that might be thought to be from the point of view of the company and the other shareholders, and no matter how apparently aggressive the predator has been in the period leading up to the notices. The purpose of the notices is not to counter the predatory activities as such; it is to acquire information. It follows that the non-provision of information is not to be taken as a justification for opening up a new

front against the predator with the benefit of a new weapon. It is, subject to one point, to provide a sanction or an incentive to remedy the default, and the only default which is relevant for these purposes is the failure to provide information. I think that Millett J is clearly right about that. The only qualification to his statements comes from section 800(3). That subsection means that the last sentence of Millett J's statement at page 572e has to be qualified by reference to section 800(3) - even if full information is given the restrictions might be maintained if unfair advantage has been taken of the non-disclosure. However, it should be noted that the additional qualification is limited. It does not provide that the restrictions can stay in place if they are for the benefit of the company, or if they put useful obstacles in the way of an undesirable predator, or anything like that. They are to stay in place in order to prevent unfair advantage being taken of the non-disclosure - the maintenance is still closely related to the non-disclosure and not to anything else.

207. Mr Swainston prayed in aid the provisions of section 172 of the Act 2006, which is one of a group of sections providing for the scope of directors' duties, and which itself provides:

> "172(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to [a list of factors]."

208. He submits that this "infuses" the obligations of the directors under article 42, and, as I understand it, seemed to submit that this displaced any argument that there might be some limitations as to the purpose for which directors could exercise the article 42 power. In doing so he misconstrues the purpose of section 172 and ignores the provisions of section 171. Section 172 is in the nature of an overarching obligation which arises when the directors are considering the exercise of their powers. It can easily and properly coexist with other limitations on powers, and does not, by itself, necessarily fill a gap if the purposes of certain powers are not actually articulated in the articles.

209. Section 171 reads:

> "171 A director of a company must –
>
> (a) act in accordance with the company's constitution, and
>
> (b) only exercise powers for the purposes for which they are conferred."

210. Section 172 does not somehow trump the provisions of section 171. In relation to any given power, it is necessary to identify the purposes for which the power is to be exercised (so far as possible), and having identified that purpose one then has to see whether the directors have exercised it for that purpose, and also whether it was exercised so as to "promote the success of the company". The first step is a necessary step, and is not rendered unnecessary by the existence of the second obligation. Section 172, therefore, does not amount to a reason for distinguishing *Ricardo*.

211. Accordingly, looking at the statutory regime, it can still be said that the imposition of the restrictions is to compel the production of information. Even if Millett J did not precisely define the parameters of the permitted purpose, the purpose of the section does not, in my view, extend to allowing it to be used as an additional weapon to manipulate voting in a takeover battle. Furthermore, the position is even clearer under the article 42 regime. There is no equivalent in the article of the "unfair advantage" part of section 800(3), so there is no internal justification for saying that the purpose of the restrictions is any wider than to compel the production of the required information. True it is that paragraph 10 (which I have not set out in this judgment) preserves the right to apply to court for restrictions, and if an application is made to the court section 800(3) comes into play, but that still does not expand the purpose for which the restrictions can be imposed in the first place.

212. That conclusion forms an important part of the framework for determining whether the board imposed the restrictions for an improper purpose.

Improper purpose - determination

213. It is apparent from my findings that the majority of the board did not impose the restrictions merely in order to compel production of the missing information; it had a very firm eye on the forthcoming AGM, the likely effect of the restrictions on the voting and resolutions and the desirability of being able to pass them all. It was clearly appreciated that the special resolutions were desirable in order to free up routes to capital, that that would have the potential benefit of putting obstacles in the way of the perceived "raiders" and that it could only be achieved by imposing the restrictions. To that extent the decision was justifiable as being for the benefit of the company as a whole. However, Mr Mabb and Mr Gledhill say that that purpose was not a proper purpose for which to exercise the article 42 power to impose restrictions, and since that power was exercised for that improper purpose its exercise can and should be set aside by this court.

214. The first question is whether, for these purposes, the purpose of the majority should be taken to be the purpose of the board, or the company. This point was not addressed in submissions, but in my view the majority's purpose is the important one for these purposes. In Australia it has been decided that the majority's purpose is relevant for these purposes (assuming it can be ascertained):

> "4454 To establish that a decision was infected by an improper purpose it is not necessary to show that all of the directors had that purpose. It is enough to establish that the majority of directors were acting improperly: *Harlowe's Nominees*. In my view the same principle applies to the duty to act in the best interests of the company. The reference to a majority indicates that the actions of an errant fiduciary have to be causative of a breach before it can be said that 'the directors' breached their duties." *Bell Group v Westpac Banking Corporation (No 9)* [2008] WASC 239 at 4454.

215. The *Harlowe's Nominees* case referred to seems to be a reference to *Harlowe's Nominees v Woodside (Lake Entrance) Oil Co [1968] HCA 37*. Having looked at that case it does not seem to articulate the point which is said to flow from it, but the proposition still seems to me to be correct. It accords with both common sense and principle. The claimants are therefore entitled to point to and rely on the majority purpose.

216. The next question is whether the purpose which I have found to be the main purpose was one which means that the decision, and therefore the notices, cannot stand because it is outside the scope of the proper purposes of article 42. Mr Mabb submits that it does - article 42 is intended to be the means of extracting information and the directors used it for the purposes of making life more difficult for a minority perceived as raiders, and in particular to get through a special resolution that would otherwise not have been passed. Mr Swainston submits that the purpose was legitimate in the context because it was perceived properly to be in the interests of the company as a whole (and in particular the greater body of shareholders) that the raiders be not allowed to proceed by stealth and to forward their apparent plan of getting hold of a company at less than its proper premium value.

217. Mr Mabb took as his starting point the decision in *Howard Smith Ltd v Ampol Ltd* [1974] AC 821, a case in which directors allotted share capital which reduced a blocking majority of 55%. The trial judge had found that the primary purpose of the board members supporting the allotment of shares was indeed to reduce the proportionate shareholding of the majority shareholder, and not to raise capital for the company. The Privy Council upheld the decision holding the power to have been exercised for an improper purpose. In doing so Lord Wilberforce held that the power to allot was not constrained solely by reference to a need to raise capital and that it would be wrong to impose such a limitation on the directors' powers. He went on (page 835):

> "To define in advance exact limits beyond which directors must not pass is, in their Lordships' view, impossible.… No more, in their Lordships' view, can this be done by the use of a phrase – such as "bona fide in the interest of the company as a whole," or "for some corporate purpose." Such phrases, if they do anything more than restate

> the general principle applicable to fiduciary powers, at best serve, negatively, to exclude from the area of validity cases where the directors are acting sectionally, or partially: i.e. improperly favouring one section of the shareholders against another. ...
>
> In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

218. Those statements indicate that using the best interests of the company as a whole as a touchstone is not sufficient. They also support the notion that it is appropriate to have some enquiry as to the scope of the purpose for the exercise of the power (as is anticipated by section 171 of the 2006 Act).

219. He went on to cite with approval the decision in *Harlowe's Nominees* (supra) in which the joint judgment said:

> "The principle is that although primarily the power [to allot] is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons related to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends. An enquiry as to whether additional capital was presently required is often most relevant to the ultimate question upon which the validity or invalidity of the issue depends; but that ultimate question must always be whether in truth the issue was made honestly in the interests of the company. Directors in whom are vested the right and the duty of deciding whether company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.…"

220. While that paragraph might be thought to give some support for the case of Mr Swainston that the real and only question is the directors' perception of the interests of the company as a whole, it will be noted that there is still a reference to purposes ("and not for irrelevant purposes").

221. At p836D-H Lord Wilberforce went on:

> "So far as authority goes, an issue of shares purely for the purpose of creating voting power has repeatedly been condemned: ….The constitution of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management. Just as it is established that directors within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office …., so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist. To do so is to interfere with that element of the company's constitution which is separate from and set against their powers. If there is added, moreover, to this immediate purpose, an ulterior purpose to enable an offer for shares to proceed which the existing majority was in a position to block, the departure from the legitimate use of the fiduciary power becomes not less, but all the greater. …."

222. Mr Mabb emphasised the underlined passages. They refer to destroying an existing majority, but the same ought to be true if the object were to dilute an irritating minority. Such conduct could not be justified by the bona fide, and perhaps justifiable, view that the allotment was in the best interests of the company. The power to allot does not exist for that purpose.

223. *Hogg v Cramphorn Ltd* [1967] Ch 254 is another case of a challenged allotment. There the directors believed they were acting in the interests of the company when they allotted shares with a view to frustrating a bid by a shareholder. It was held that the allotment was bad because of its purpose, and it was no answer to say the directors honestly believed it to be in the best interests of the company. In other words, that expression did not provide a complete answer to the propriety of the exercise of the power.

224. Mr Swainston pointed to the Australian case of *Teck Corporation Ltd v Millar* (1972) 33 DLR (ed) 288, as referred to and quoted from in *Howard Smith* at page 837. He relies on it as demonstrating that it was proper to use powers to stop a raid. That is too simplistic a view of the case. It is inappropriate to characterise what happened there as a "raid", say that a raid was stopped, therefore it is justifiable to stop a "raid" in the present case. A "raid" is not a term of art such that a set of principles can be applied to all situations which might be termed a "raid". It is a loose, convenient and pejorative shorthand which can be applied to a variety of situations, that is all, and as such cannot be used for comparisons and analysis in that way. *Teck* was a case on its own facts in which it was held that

what had happened was not the use of a power for an improper purpose.

225. Next, and again in support of his proposition that the guiding principle, and really the only guiding principle, for determining the scope of a power and whether it was exercised for improper purposes, Mr Swainston turned to *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199. That case was referred to by Lord Wilberforce in *Howard Smith* as showing "the wide range of considerations open to directors" in relation to the power to refuse to register share transfers. Mr Swainston pointed in particular to the judgment of Isaacs J at page 217:

> "The general character of such a regulation is clear, but the ambit of the purpose of the power of course varies with the circumstances of each case. The nature of the company, its constitution and the scheme of its regulations as a whole must all be taken into account in determining whether a given factor comes within its range. Solvency of a transferee is, of course, important… But his solvency is not necessarily the only consideration. The reputation of the company may be an essential element of success, and where, as in the present case, the corporation is one appealing to the public for its confidence and transfers are presented which are of such magnitude as to control the whole administration of the company, the maintenance of a board of directors against whom not even a suggestion of an approach can be made is manifestly a high business consideration, which no person charged with the beneficial administration of the corporate affairs would be likely to overlook, in the interests of the shareholders as a whole."

226. I do not consider that this case gets Mr Swainston where he would wish to be. The power to refuse to register a transfer is not a power of which it can be said in advance there are clear and completely determinable limits to the purpose for which it can be exercised. In those circumstances a broader view has to be taken. When a dispute arises the court has to decide whether certain purposes are or are not capable of justifying the exercise of the power. Wrongly interfering with rights of majorities is not likely to be. On the other hand, using the power to prevent the oppression of minorities may be. That is all that can be said about that sort of power. One still has to look for the purposes for which the power was deployed and justify them or impeach them (depending on which side of the argument one is on). The directors are not entitled simply to have resort to the catch-all of "best interests of the company as a whole" and the unwillingness of the courts to reconsider bona fide business decisions.

227. It is therefore necessary to consider the purpose for which the power to issue restriction notices is given to the directors and to consider whether it was properly exercised within that power. It is possible, in the case of this power, to identify the scope of its purpose (subject to the qualifications to which I referred when dealing with

Ricardo). The purpose of the directors in this case fell outside that purpose, and I can see no extension of it which would justify what they did. They took the opportunity of using the power to alter the potential votes at the forthcoming AGM in order to maximise the chances of the resolutions being passed in a manner which they thought was in the best interests of the company. I do not doubt the genuineness or reasonableness of their belief as to what was in the best interests of the company. However, what they did was to use a power given for a limited purpose, related to a failure to give proper information in response to a section 793 notice, and then to apply it for another, namely to stop shareholders voting so that the rights of shareholders could be successfully changed (and directors defended, though as it happened the latter would have happened anyway). That contravenes the basic provision that powers are to be exercised for the purposes for which they are given. The purposes of the majority of the directors had this impermissible purpose as a substantial, if not a principal, purpose of their exercising the power, notwithstanding that they may have had at least half an eye to the obtaining of information. Most of the directors gave far more importance to the advantage per se of getting their resolutions through than they did to the obtaining of the information. Subject to the next point, the exercise would be voidable and fall to be set aside.

Can the notices be saved on the footing that the directors would have acted in the same way even if taking only proper considerations into account?

228. This point is one which is not pleaded and did not arise at the trial until final speeches when I raised it myself. It occurred to me, having heard the evidence, that it might be said that even if the directors had acted for an improper purpose in the sense contended for by the claimants, so as to taint the decision-making process at the board meeting, nonetheless behind that purpose there was a legitimate purpose (which was actually the prime purpose of at least one of the directors) and it might be suggested that even if they had not taken the improper purpose into account then nonetheless they would have arrived at the same decision. It occurred to me to wonder, if it were plain enough that the same decision would have been arrived at anyway, whether there was a case for saying that the decision should not be set aside.

229. Having raised the point with the parties, and it not having been disclaimed by Mr Swainston, I gave the parties the opportunity to make submissions on it. In the course of those submissions Mr Swainston adopted it, and the claimants said it was a bad point. The reasons why it was said to be a bad point were that it was bad on the facts, unfair procedurally to allow it to be taken, and proceeded on a wrong basis of law. I shall therefore have to deal with all those matters.

Can this point be properly taken at this stage in the proceedings?

230. Mr Mabb and Mr Gledhill both submit that this point should not be allowed to rise bearing in mind how the claim was pleaded, addressed in evidence and addressed at the

trial. There was no opportunity to address the point in cross-examination, precisely because the point was not pleaded or foreshadowed in any other way, whether through the witness statements or otherwise. The directors' witness statements (as I have already pointed out) do not deal with purpose, other than Mr Moore's second statement (briefly), so the only evidence of it came from cross-examination. The cross-examination was carried out to investigate the claims and defences as pleaded, and the defences did not include anything like the point which I raised during final submissions. It was therefore not investigated in cross-examination.

231. There is no doubt that the procedural factual points taken by the claimants are good ones. The point was not pleaded, not taken in the directors' evidence (which did not describe their respective purposes) and was not canvassed in cross-examination. Nor was it a matter of submission until I raised it and submissions were put in in writing. On the other hand it must be acknowledged that the trial came on very quickly, and allowances might have to be made for the development of points at the trial which might, with more time for reflection and organisation of the case, have emerged in a more conventional fashion. A greater degree of flexibility and understanding might have to be brought to bear in those circumstances.

232. I have considered these points anxiously. There is much to be said for the stance taken by the claimants. However, in the end the question is not a technical one of what was pleaded or what might or might not have appeared in witness statements, but fairness, and in particular whether it would be fair to draw an inference from what emerged in cross-examination about the purpose and intention of the directors when the point was not a live one at the trial. If I considered it was quite clear what the position would have been, notwithstanding the fact that it was not examined in detail in cross-examination, and if I were quite clear that cross-examination on the point would not have led to any different conclusion, then I think it would be right to make the relevant finding. However, and with the greatest reluctance, I have concluded that it would not be procedurally fair to allow the company to take and succeed on the point now. My reluctance comes from the fact that, on the evidence that I have heard, I find it very hard indeed to believe that the directors would have come to any different conclusion. I deal with this in a short section below in which I consider the facts. However, in circumstances in which the directors have not made such a case in their own evidence in chief (or in the pleadings of the company), it would, in the end, be a step too far to allow them to say my purpose was X, but if I had been told that that was an improper purpose and I had to consider a legitimate purpose Y, I would have arrived at the same decision. If that were to be their case then it should have been positively advanced at some stage during the hearing. Although on the evidence I heard I find it difficult to see that the directors would have come to a different decision, nonetheless I can see that the claimants might have wished to have advanced their case differently, perhaps devoting more attention to the earlier events leading up to the service of the notices and what happened, and what the thinking was, between then and the board meeting. Mr Mabb advanced some elaborate arguments to the effect that the directors would have taken a different course if they had been thinking along the right lines, and might have taken the view that it was not worth imposing restrictions in circumstances in which they would have found themselves. I am deeply sceptical about such conclusions. For the reasons appearing in the next section, on the evidence I heard I

think that the result would have been the same. However, there is a possibility that the case would have been shaped differently, and the claimants are entitled to the benefit of the doubt on that point. Regretfully, therefore, and contrary to my initial impression on the point, I hold that the point cannot be taken.

233. Mr Swainston submitted that if the case as currently shaped did not allow the point to be taken, nonetheless I should allow it to be taken with a fresh hearing, coupled with fresh witness statements, dedicated to the point now that it had arisen. I do not think that that would be the right course. It would in substance be allowing an amendment to a case, to introduce a very substantial point, at the latest of late points in time. The need to bring litigation to an end is inconsistent with such a course. I therefore do not allow it.

234. Notwithstanding all that, and in case this case goes further, in the next section I set out my brief conclusions on the point, based on the evidence I heard. My short conclusions on the legal points do not do justice to the elaborate submissions made by Mr Mabb and Mr Gledhill. They are expressed in order to demonstrate that, had the factual situation allowed it, the facts had, in my view, some real legal significance.

How would the directors have acted absent the improper purpose?

235. In my findings above I have dealt with the basis on which the directors approached the decision to impose the restrictions. It will be apparent that there were mixed motivations as between the directors and the directors themselves individually had more than one purpose in mind. Such a state of affairs is neither uncommon, nor surprising. Within those purposes there were, in my view, legitimate purposes. Mr Ferguson, as I have pointed out, had a proper purpose in mind throughout. Mr Shah himself also gave heavy emphasis to the desirability of imposing restrictions in order to obtain the information, which he very much wanted to see. Lord Oxford also made it clear that he wished to impose restrictions in order to obtain information – see above. Mr Moore also had that "proper" purpose in mind as part of the "jigsaw". It is not so clear that Mr Murray had that view, or how close to the front of Mrs Dubin's mind the "proper" purpose was, but it is impossible to believe it was not present.

236. On the evidence that I heard:

(i) The desire to have the information which the directors felt had been withheld from them was genuine and in no way contrived. It was, at least for the majority, an important objective of the service of the notices, and it remained so at the meeting. The directors felt strongly that they had not been given full information about the arrangements between the parties and they would have wished to have received it.

(ii) Since it would have been a proper purpose of the exercise of the power to impose restrictions to compel, or incentivise, the production of information, it would have been proper to have formed the view that the prospect of being disenfranchised at the forthcoming AGM would have increased the incentive. To that extent, at least, there could have been an entirely proper link in the minds of the directors between the restrictions and the forthcoming AGM.

(iii) The directors had no qualms about taking steps that might alter the balance in the company by restricting voting on the claimants' shares so as to improve the chances of the directors being re-elected and removing a blocking vote in relation to the special resolutions. They saw that as being in the interests of the company as a whole, and that view was a reasonable view which they were entitled to reach. For the reasons that I have given above, it was not, by itself, sufficient to justify the imposition of the restrictions, but it was a view that they were entitled to take in conjunction with a more legitimate approach to the decision to impose restrictions.

(iv) Their view about the activities of the "raiders" was strong and it was unlikely that it would change before the vote on the restrictions. Had they confined themselves to "proper" purposes those views would have informed their decision, and would be likely to have led to the same decision being made. In holding those views and applying them to their decision they would not, merely by virtue of those facts, have been acting improperly or for an improper purpose.

(v) A combination of the possibility of imposing restrictions in order to induce the provision of information, coupled with a perception that it would not be unfair to prevent the claimants from voting while they were withholding information which would be of use and interest to the directors and the other shareholders (which would have been a proper perception to have formed) would justifiably have led to the imposition of the restrictions. I think it likely that they would have been so advised, and that they would have acted on that advice.

237. Accordingly, I consider that on the basis of what I heard, and the shape of the case before me, had the directors confined themselves to the proper purpose of imposing restrictions as a sanction for non-provision of information, and with a view to providing an incentive to provide that information, I think it likely, and to be frank virtually inevitable, that the directors would have reached the same decision and imposed the same restrictions.

The legal consequences of a finding that the directors would have acted in the same way anyway

238. Having considered the submissions of the parties, and in particular the thorough submissions of Mr Gledhill and Mr Mabb, I had provisionally reached the following conclusions.

239. First, the facts of this case (on the hypothesis that I am right in my conclusions in the previous section of this judgment) are more striking, and different from, the facts in the two leading cases about using powers for improper purposes. Looking at the facts in *Hogg* and *Howard Smith* it seems to me to be unlikely that the directors could ever have successfully run the case that they had a fallback position based on a proper purpose. Those are cases in which the genesis of the impeached resolutions was the very improper purpose itself. If the directors had not formed that purpose at the outset, the resolutions would never have been proposed, let alone passed. The case before me seems to be very different. The imposition of restrictions based on not providing information is a standard sanction, and it is much more plausible that there would be a perfectly justifiable residual purpose even if a tainted purpose is stripped out and even if it was the more substantive purpose. I do not see why the logic of the two reported cases should necessarily be inexorably applied to the present case. Nor do I think that allowing the point in this case would somehow open the floodgates to permitting a lot of dubious decision-making by directors. The facts of this case are very striking.

240. Second, where directors proceed on the basis of an improper purpose the decision is voidable, not void. Whether to avoid the decision is ultimately in the discretion of the court, and although that discretion is exercised on principled grounds, and although one can expect it usually to be exercised in favour of avoiding the decision, it does not seem to me to follow that in every case it should be avoided if the justice of the case does not require it. It is to be noted that in *Hogg* Buckley J did not avoid the decision on the basis of his determination as to its improper underlying purpose. He gave the majority shareholders the opportunity of approving the decision of the directors at a general meeting. To my eyes that demonstrates that voidable does not equal "will automatically be avoided", even though, as has to be accepted, the facts of that case were very different.

241. Third, it is arguable that a “but for” test should be applicable in this situation, which would support an argument for sustaining the decision of the board - *Whitehouse v Carlton House Pty Ltd* [1987] 162 CLR 285.

242. Fourth, there may be an analogy with judicial review in which, in an exceptional case, a decision apparently vitiated by taking an irrelevant consideration into account may not be declared invalid if it is obvious that the decision-maker would reach the same answer - *R(FDA) v Secretary of State for Work and Pensions* [2013] 1 WLR 444.

243. All these seemed to me to be pointers towards the possibility of sustaining the decision even though apparently tainted by an improper purpose. It seems to me that there is a real point here, on the facts of this case. However, since the issue cannot now arise in the present case I do not consider it further.

A minor point on the restriction notices

244. This point does not arise in the light of the more fundamental attack on the restriction notices, but I record and decide it briefly.

245. The point can be shortly stated. Article 42(1)(d) defines "restriction notice" as:

> "a notice issued by or on behalf of the company stated, or substantially to the effect, that (until such time as the Board determines otherwise pursuant to paragraph (4) of this Article) the specified shares referred to therein shall be subject to one or more of the restrictions stated therein," ...

246. The restriction notices that were served did not contain any reference to the restrictions being limited "until such time as the Board determines otherwise pursuant to paragraph (4)…". It is correct, as a matter of fact, to say that notices the did not contain any such express wording. The company's short answer is that the notices were explicitly issued under article 42. That is made clear in the heading ("Restriction Notice Issued under article 42…), the reference to article 42 in paragraph 5, the heading immediately following that paragraph ("Restriction Notice under Article 42") and the next sentence ("This is a restriction notice issued under Article 42…"). As a matter of construction the notice contains the information in the bracketed words of the definition because one is entitled and obliged to go back to article 42 to make sense of the notice.

247. I think that the approach of Mr Swainston is correct. The notice contains all the other information that it needs to contain – principally the extent of the restrictions, and it makes it as clear as it can be made that the notices were issued under article 42. The wording of the definition indicates clearly that there is no need to adhere to any wording in a slavish fashion. The restriction notice has to be "substantially to the effect" of what follows. In my view, as a matter of construction, there are enough references to article 42 to make it plain under what power the board is purporting to act, and when one goes back to look at that power one can see that it contains the power to remove the restriction under paragraph (4). In my view the restriction notices were plainly compliant.

Standing and locus

248. The two claimants in this case are not the registered shareholders of the shares in question. They have sued in their own names, joining the actual shareholders and the acting nominees in between. In the evidence before me, in the case of Eclairs it is said that there would have been difficulties in mobilising the registered shareholder (Hanover) in time to start this action and get the urgent relief that was applied for. Therefore Eclairs was justified in suing in its own name (as ultimate beneficial owner) joining Hanover and the intermediate nominees and account holders. In the case of Glengary that particular justification is not put forward in quite the same way. It is asserted, without any particular evidential basis, that it would have been difficult for Glengary to compel the shareholder (Lynchwood) to sue, bearing in mind the indirect relationship between them (with intermediate nominees). Glengary also submits that insofar as it is claiming declaratory relief it has sufficient interest to be able to sue anyway.

249. The company does not challenge the evidential accounts of where the beneficial interest in the shares is (which consists of generalised assertions unsupported by documentary evidence), or of the intervening nomineeship arrangements, and except for one point it does not challenge the basis on which it is said to have been right that the claimants, rather than the shareholders, should sue in these actions. That means that I do not have to spend time in this judgment considering the locus of the beneficial owners to sue in a case like this, save for the point taken by the company.

250. The point taken by the company is this. Mr Swainston points to certain provisions of the relevant custodianship/nomineeship agreements provided by Eclairs (no disclosure of the Glengary custodianship agreements having been provided) which he says demonstrates that the relevant custodians/nominees reserve to themselves the discretion not to do anything that they perceive to be against local stock exchange rules and the like. Two paragraphs that he cites read as follows.

251. Clause 10(b) of the Investment Services Deed between Eclairs and Renaissance Advisory Services Limited:

> "Instructions shall be carried out subject to the rules, operating procedures and market practice of any relevant stock exchange, clearing house, settlement system or market ("Rules"). The Nominee is entitled to refuse to carry out Instructions if in the Nominee's opinion they are contrary to any Rules or any applicable law, or other regulatory or fiscal requirements and shall be entitled in its absolute discretion to amend instructions so that they comply with applicable Rules."

252. Clause 3D of the Global Custody and Clearance Agreement between JP Morgan

Chase Bank and Renaissance Securities (Cyprus) Limited says:

> "JP Morgan need not act upon Instructions which it reasonably believes to be contrary to law, regulation or market practice but is under no duty to investigate whether any Instructions comply with any applicable law, regulation or market practice. JP Morgan shall be entitled (but not bound), if it deems possible to do so, to amend an Instruction in such a manner to comply with what JP Morgan reasonably believes to be applicable law, regulation or market practice. In addition, JP Morgan may decline to effect any Instruction if, in its reasonable judgment, the result would jeopardize JP Morgan's secured position as to any of Customer's obligations to JP Morgan under this Agreement, provided JP Morgan will promptly notify Customer of JP Morgan's decision to decline to effect an Instruction."

253. Mr Swainston goes on to make the point that where people like Mr Kolomoisky and Mr Zhukov create these extensive nomineeship arrangements they have the safeguard of the professional conscience of their professional nominees, who are best placed to establish what is locally acceptable and what is not. He says that that is why they have a discretion not to accept instructions "if they accept something untoward is going on" (to use his words). Being subjected to that conscience is part of the price paid for choosing a nominee system, and those nominees. As Mr Swainston put it, "there is no equity cutting across their discretion".

254. I am afraid that I fail to see where that gets Mr Swainston on the facts of this case. If one assumes for these purposes that the nominees have the broadly framed discretion that Mr Swainston relies on (which might be thought to be broader than is referred to in the two clauses that he cites) there is no evidence that the nominees refused to act because they thought there was something untoward going on. If and insofar as they positively refused to act (which is not wholly clear) it is not apparent that that is because of their misgivings about some underlying behaviour. Furthermore, even if they had refused on such a basis, that might be thought to be a reason why the beneficiaries should actually be allowed to sue themselves in circumstances where urgency did not permit an application to court for directions to be given to the trustees/nominees, or the replacement of nominees. The rules which govern the circumstances in which beneficiaries may and may not sue in their own name, joining the trustees, do not proceed on the basis of some public policy which would leave the beneficiary saddled with the judgment of the trustee. Where that trustee is a mere nominee there is no reason why the beneficiary should be so saddled.

255. It follows that Mr Swainston's single objection to this action on locus standi grounds fails. There being no other objection, there is nothing more in the point.

A non-disclosure point

256. The company takes a point arising out non-disclosure at the interlocutory stage. At the initial interlocutory stage the claimants were denying the arrangements relied on, and denying that the company was entitled to impose the restrictions. The applications were dealt with on the footing of the company giving undertakings to the effect referred to above. On two subsequent occasions the claimants went back to court to reveal that they had not disclosed documents which their full and frank disclosure obligations had required them to reveal. There were three. One was an "Agreement on the transfer of an economic interest", said to originate from April 2009 and under which Mr Bogolyubov acquired a 50% interest in Ralkon, and thus a shareholding in JKX. The second was a Termination Agreement purportedly dated 29th January 2013. Metadata for the latter document revealed its creation date as being 2nd February, and it was said a technical malfunction meant that the author was not revealed. No metadata was available for the first document.

257. The third document was from a Mr Eugeniy Usakov, who apparently wrote to Schroders on behalf of Glengary stating they were "in concert" with the position of Eclairs and were going to vote against the resolutions.

258. These documents would have been relevant to an action in which the actual existence or otherwise of agreements and arrangements were in issue, but not to this action in which the directors' perception of these things was the important factor. They were disclosed because the view was taken by the claimants, and certainly shared by the company, that they ought to have been disclosed as part of the duty of full and frank disclosure.

259. Mr Swainston now submits that this should be treated as a non-disclosure which would have entitled the company to a discharge of its undertakings to take the disputed votes but not act on their rejection or acceptance until after the decision in this action. Had those undertakings been discharged, or not even given, the company would (he says) have been free to reject the votes of Eclairs and Glengary and the resolutions would by now all have been passed. Mr Swainston invites me to reflect the serious non-disclosure, and prevent the claimants from benefiting from it, by undoing the effects of the undertaking with the result that the resolutions can all be held to have carried.

260. There are a number of problems about this. First, the point was not really set up properly within these proceedings. It is one which turns on an interlocutory non-disclosure and which would normally have to be addressed by a separate application to discharge the undertakings, with proper evidence focussed on that application. That has not happened, with the result that it emerges only in skeleton arguments. The further result is that there has been very little clear material directed towards the seriousness of the non-disclosure (which is disputed), what its consequences were and what they should now be. The point was hardly dealt with by the claimants - not surprisingly, in the light

of the lowly position the point seemed to adopt in the case by the time the matter got to trial. No real effort was devoted by Mr Swainston to demonstrating the severity of the non-disclosure. Furthermore, even if he were right I do not think that his consequence would flow - even if I treated the undertakings as discharged and if the company were to treat all resolutions as having passed, there would still be a question as to the validity of that decision.

261. It seems to me that there is nothing in this point, in the present circumstances.

Conclusion

262. I therefore conclude that the directors were entitled to conclude that the claimants had not made proper disclosure of the arrangements that existed and which affected their shareholdings but that the power to impose restrictions under article 42 was exercised for a purpose which was not a proper one for the purposes of that power and that its exercise should therefore be set aside. So far as necessary I will hear further submissions as to the form of relief which should follow.

Appendix 1 – the section 393 notices and responses

The Eclairs Parties

Notice to Eclairs Group Limited dated 13 May 2013

In accordance with section 793 of the Companies Act 2006 (the Act), please notify us as soon as possible, but no later than by 5 pm (London time) on Tuesday 28 May 2013 with the following information:

1. In relation to any of the shares in JKX Oil & Gas plc (JKX) in which you have, or during the last three years had, an interest (the Shares), please provide the following information:

   a. The number of Shares in which you have or had an interest;
   b. The nature of your interest in the Shares (e.g. beneficial owner, trustee, option);
   c. The date(s) you acquired and ceased to hold such interest, in each case, if applicable;
   d. Whether you are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect):

      (i) Which includes provision for the acquisition by you and/or any other person of shares in JKX and which imposes obligations or restrictions on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares;
      (ii) Relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. a shareholders' agreement which governs (directly or indirectly) how the voting rights in the shares in Eclairs Group Limited are to be exercised); or
      (iii) With Mr Alexander Zhukov, Mr Oleksandr Ratskevych and/or Glengary Overseas Limited (or their respective companies or nominees), which relates to the exercise of JKX share voting rights (either directly or via yours and/or their respective companies and nominees)?

   If so, please provide full particulars of such agreements or arrangements (including the names of all parties thereto).

2. Please send the information requested above in writing to Cynthia Dubin, Finance Director at JKX Oil & Gas plc, 6 Cavendish Square, London W1G 0PD and at cynthia.dubin@jkx.co.uk.

3. Please note that it is an offence under the Act to fail to comply with this notice (unless you can establish that the requirement to give information under this notice is frivolous or vexatious) or to knowingly or recklessly provide information which is false in a material particular.

4. If you fail to comply by the deadline specified above, JKX reserves the right to issue a restriction notice in respect of the Shares under Article 42 of the JKX Articles of Association. You are advised to seek legal advice if you are in any doubt as to how to comply with this notice.

Response from Eclairs Group Limited dated 28 May 2013

1. We, Eclairs Group Limited, hereby acknowledge receipt of the notice issued pursuant to section 793 of the Companies Act 2006 (the Notice) and respond to the Notice as follows.

2. In relation to the shares in JKX Oil & Gas plc (JKX), we can confirm that we are the beneficial owners of 47,287,027 shares in JKX, as of 5 March 2013.

3. We are not a party to any agreement or arrangement: (i) under which the shares in JKX have been acquired and which imposes obligations or restrictions on the exercise of the rights, control or influence in respect of such shareholding or on the retention or sale of such shares; (ii) relating to the exercise of any rights arising from the shareholding in JKX; or (iii) with Mr Alexander Zhukov, Mr Oleksandr Ratskevych and/or Glengary Overseas Limited (or their respective companies or nominees), which relates to the exercise of JKX share voting rights.

Notice to Igor Kolomoisky dated 13 May

In accordance with section 793 of the Companies Act 2006 (the Act), please notify us as soon as possible, but no later than by 5 pm (London time) on Tuesday 28 May 2013 with the following information:

1. In relation to any of the shares in JKX Oil & Gas plc (JKX) in which you have, or during the last three years had, an interest (the Shares), please provide the following information:

   a. The number of Shares in which you have or had an interest;

b. The nature of your interest in the Shares (e.g. beneficial owner, trustee, option);
c. The date(s) you acquired and ceased to hold such interest, in each case, if applicable;
d. So far as you know, the full name(s) and address(es) of the registered holder(s) of the Shares and the number of Shares held by each registered holder;
e. Whether you are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect):

(i) Which includes provision for the acquisition by you and/or any other person of shares in JKX and which imposes obligations or restrictions on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares;
(ii) Relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. an agreement which governs (directly or indirectly) how the voting rights in the shares in JKX held indirectly by you and Mr Gennadiy Bogolyubov (and his family) are to be exercised); or
(iii) With Mr Alexander Zhukov, Mr Oleksandr Ratskevych and/or Glengary Overseas Limited (or their respective companies or nominees), which relates to the exercise of JKX share voting rights (either directly or via yours and/or their respective companies and nominees)?

If so, please provide full particulars of such agreements or arrangements (including the names of all parties thereto).

2. We note that you and Mr Bogolyubov (and his family) are the beneficial shareholders in Eclairs Group Limited. We understand, based on the details of a TR1 notice received by JKX on or about 21 March 2013, that a 40.9% interest in Eclairs Group Limited was transferred to a discretionary trust for the benefit of Mr Bogolyubov and his family (the Trust). Prior to this transfer we understand that 100% of the beneficial interest in the shares of Eclairs Group Limited was held by you. In relation to the arrangements which effect the transfer of the 40.9% beneficial interest in Eclairs Group Limited to the Trust, please provide full particulars of any agreement or arrangements (whether written or unwritten, formal or informal, direct or indirect) between you and Mr Bogolyubov and/or the Trust:

(a) Which includes provision for the acquisition by you, Mr Bogolyubov and/or the Trust of shares in JKX (whether directly or indirectly) and which imposes obligation or restriction on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares; and
(b) Relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. an agreement which governs (directly or indirectly) how the voting rights of the JKX shares held indirectly by you and Mr Gennadiy Bogolyubov (and his family) are to be exercised).

3. Please confirm whether you and Mr Bogolyubov and/or the Trust are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or

indirect) relating to the exercise of any rights arising from the holding of shares in Eclairs Group Limited and its respective holding of shares in JKX.

4. Please send the information requested above in writing to Cynthia Dubin, Finance Director at JKX Oil & Gas plc, 6 Cavendish Square, London W1G 0PD and at cynthia.dubin@jkx.co.uk.

5. Please note that it is an offence under the Act to fail to comply with this notice (unless you can establish that the requirement to give information under this notice is frivolous or vexatious) or to knowingly or recklessly provide information which is false in a material particular.

6. If you fail to comply by the deadline specified above, JKX reserves the right to issue a restriction notice in respect of the Shares under Article 42 of the JKX Articles of Association. You are advised to seek legal advice if you are in any doubt as to how to comply with this notice.

Response from Igor Kolomoisky dated 28 May 2013

1. I, Igor Kolomoisky, hereby acknowledge receipt of the notice issued pursuant to section 793 of the Companies Act 2006 (the Notice) and respond to the Notice as set out below.

2. In relation to the shares in JKX Oil & Gas plc (JKX), I hereby confirm that 47,287,027 shares in JKX (the "Shares") are beneficially owned by Eclairs Group Limited ("Eclairs") as of 5 March 2013. Trival Limited ("TL") is the registered holder of 59.1% of the total share capital of Eclairs and I am the beneficial owner of TL by virtue of the deed of trust between the registered shareholder of TL and myself.

3. As far as I am aware, the registered shareholder of the Shares in Hanover Nominees Limited ("Hanover"), a holding/custodian vehicle of J.P. Morgan Chase Bank, N.A, whose registered office is at 25 Bank Street, Canary Wharf, London E14 5JP. The number of JKX shares held by Hanover in favour of Eclairs (through another custodian) is 47,287,027 shares.

4. I am not a party to any agreement or arrangement: (i) which includes provision for the acquisition of shares in JKX and which imposes obligations or restrictions on the exercise of the rights, control or influence in respect of such shareholding or on the retention or sale of such shares; (ii) relating to the exercise of any rights arising from the shareholding in JKX; or (iii) with Mr Alexander Zhukov, Mr Oleksandr Ratskevych and/or Glengary Overseas Limited (or their respective companies or nominees), which relates to the exercise of JKX share voting rights.

5. I, Mr Bogolyubov and Marigold Trust Company Limited are not party to any agreement or arrangement which (a) includes provision for the acquisition by me, Mr Bogolyubov or Marigold Trust Company Limited of shares in JKX and which imposes obligations or restrictions on the use or on the retention or disposal of such shares; or (b) relating to the exercise of any rights conferred by the holding of shares in JKX.

6. I am not a party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect) relating to the exercise of any rights arising from the holding of shares in Eclairs Group Limited and its interest in JKX shares.

7. Other than as set out in paragraph 2 of this letter, I confirm that I do not hold any interest in JKX shares.

Notice to Gennadiy Bogolyubov dated 13 May

In accordance with section 793 of the Companies Act 2006 (the Act), please notify us as soon as possible, but no later than by 5 pm (London time) on Tuesday 28 May 2013 with the following information:

1. In relation to any of the shares in JKX Oil & Gas plc (JKX) in which you have, or during the last three years had, an interest (the Shares), please provide the following information:

   a. The number of Shares in which you have or had an interest;
   b. The nature of your interest in the Shares (e.g. beneficial owner, trustee, option);
   c. The date(s) you acquired and ceased to hold such interest, in each case, if applicable;
   d. So far as you know, the full name(s) and address(es) of the registered holder(s) of the Shares and the number of Shares held by each registered holder;
   e. Whether you are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect):

      (i) Which includes provision for the acquisition by you and/or any other person of shares in JKX and which imposes obligations or restrictions on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares;
      (ii) Relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. an agreement which governs (directly or indirectly) how the voting rights in the shares in JKX held indirectly by you (and your family) and Mr Igor Kolomoisky are to be exercised); or

(iii) With Mr Alexander Zhukov, Mr Oleksandr Ratskevych and/or Glengary Overseas Limited (or their respective companies or nominees), which relates to the exercise of JKX share voting rights (either directly or via yours and/or their respective companies, nominees and trusts)?

If so, please provide full particulars of such agreements or arrangements (including the names of all parties thereto).

2. We note that you (and your family) and Mr Kolomoisky are the beneficial shareholders in Eclairs Group Limited. We understand, based on the details of a TR1 notice received by JKX on or about 21 March 2013, that a 40.9% interest in Eclairs Group Limited was transferred to a discretionary trust for the benefit of you and your family (the Trust). Prior to this transfer we understand that 100% of the beneficial interest in the shares of Eclairs Group Limited was held by Mr Kolomoisky. In relation to the arrangements which effect the transfer of the 40.9% beneficial interest in Eclairs Group Limited to the Trust, please provide full particulars of any agreement or arrangements (whether written or unwritten, formal or informal, direct or indirect) between you, the Trust and/or Mr Kolomoisky:

   (a) Which includes provision for the acquisition by you, the Trust and/or Mr Kolomoisky of shares in JKX (whether directly or indirectly) and which imposes obligation or restriction on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares; and
   (b) Relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. an agreement which governs (directly or indirectly) how the voting rights of the JKX shares held indirectly by you (and your family), the Trust and Mr Kolomoisky are to be exercised).

3. Please confirm whether you, the Trust and/or Mr Kolomoisky are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect) relating to the exercise of any rights arising from the holding of shares in Eclairs Group Limited and its respective holding of interests in JKX shares.

4. Please send the information requested above in writing to Cynthia Dubin, Finance Director at JKX Oil & Gas plc, 6 Cavendish Square, London W1G 0PD and at cynthia.dubin@jkx.co.uk.

5. Please note that it is an offence under the Act to fail to comply with this notice (unless you can establish that the requirement to give information under this notice is frivolous or vexatious) or to knowingly or recklessly provide information which is false in a material particular.

6. If you fail to comply by the deadline specified above, JKX reserves the right to issue a restriction notice in respect of the Shares under Article 42 of the JKX Articles of

Association. You are advised to seek legal advice if you are in any doubt as to how to comply with this notice.

Response from Gennadiy Bogolyubov dated 27 May 2013

1. I, Gennadiy Bogolyubov, hereby acknowledge receipt of the notice issued pursuant to section 793 of the Companies Act 2006 (the Notice) and respond to the Notice as follows.

2. In relation to the shares in JKX Oil & Gas plc (JKX), I hereby confirm that 47,287,027 shares in JKX (the "Shares") are beneficially owned by Eclairs Group Limited (Eclairs) of which Marigold Trust Company Limited (MTCL) is the registered holder of 40.9% of the total share capital. MTCL is the trustee of a discretionary trust for the benefit of myself and the member of my family. MTCL was registered as a 40.9% shareholder of Eclairs on 19 March 2013.

3. As far as I am aware, the registered shareholder of the Shares in Hanover Nominees Limited (Hanover), is a holding/custodian vehicle of J.P. Morgan Chase Bank, N.A, whose registered office is at 25 Bank Street, Canary Wharf, London E14 5JP. The number of JKX shares held by Hanover in favour of Eclairs (through another custodian) is 47,287,027 shares.

4. I am not a party to any agreement or arrangement: (i) which includes provision for the acquisition of shares in JKX and which imposes obligations or restrictions on the exercise of the rights, control or influence in respect of such shareholding or on the retention or sale of such shares; (ii) relating to the exercise of any rights arising from the shareholding in JKX; or (iii) with Mr Alexander Zhukov, Mr Oleksandr Ratskevych and/or Glengary Overseas Limited (or their respective companies or nominees), which relates to the exercise of JKX share voting rights.

5. I, MTCL and Mr Kolomoisky are not party to any agreement or arrangement which (a) includes provision for the acquisition by me, MTCL and Mr Kolomoisky of shares in JKX and which imposes obligations or restrictions on the use or on the retention or disposal of such shares; or (b) relating to the exercise of any rights conferred by the holding of shares in JKX.

6. I am not a party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect) relating to the exercise of any rights arising from the holding of shares in Eclairs Group Limited and its interest in JKX shares.

7. Other than as set out in paragraph 2 of this letter, I confirm that I do not hold any interest in JKX shares.

[Notices and responses in respect of the other Eclairs parties are not set out here]

Glengary, Zhukov and Ratskevych

Glengary

The following is the text of the notice served on Mr Ratskevych. Mr Zhukov received one in the same terms, with appropriate name substitutions.]

Notice issued pursuant to section 793 of the Companies Act 2006

In accordance with section 793 of the Companies Act 2006 (the Act), please notify us as soon as possible, but no later than by 5 pm (London time) on Tuesday 28 May 2013, with the following information:

1. In relation to any of the shares in JKX Oil & Gas (JKX) in which you have, or during the last three years had, an interest (the Shares), please provide the following information:

    (a) the number of Shares in which you have or had a direct or indirect interest;

    (b) the nature of your interest in the Shares (e.g. beneficial owner, trustee, option);

    (c) the date(s) you acquired the Shares and ceased to hold such interest, in each case, if applicable;

    (d) so far as you know, the full name(s) and address(es) of the registered holder(s) of the Shares and the number of Shares held by each registered holder;

    (e) whether you are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect):

(i) which includes provision for the acquisition by you and/or any other person of shares in JKX and which imposes obligations or restrictions on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares;

(ii) relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. an agreement which governs (directly or indirectly) how the voting rights in the shares in JKX held indirectly by you and Mr Alexander Zhukov are to be exercised); or

(iii) with Mr Igor Kolomoisky, Mr Gennadiy Bogolyubov and/or Eclairs Group Limited (or their respective companies, nominees or family or other trusts), which relates to the exercise of JKX share voting rights (either directly or via yours and/or their respective companies, nominees and trusts)?

If so, please provide full particulars of such agreements or arrangements (including the names of all parties thereto).

2. We note that you have previously advised that you and Mr Zhukov are the beneficial shareholders in Glengary Overseas Limited. Please provide full particulars of any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect) between you and Mr Zhukov:

(a) which includes provision for the acquisition by you and/or Mr Zhukov of shares in JKX (whether directly or indirectly) and which imposes obligations or restrictions on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares; and

(b) relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. an agreement which governs (directly or indirectly) how the voting rights in the JKX shares held indirectly by you and Mr Zhukov are to be exercised).

3. Please confirm whether you and Mr Zhukov are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect) relating to the exercise of any rights arising from the holding of shares in Glengary Overseas Limited and its respective holding of shares in JKX.

4. Please send the information requested above in writing to Cynthia Dubin, Finance Director at JKX Oil & Gas plc, 6 Cavendish Square, London W1G 0PD and at [email address provided].

5. Please note that it is an offence under the Act to fail to comply with this notice (unless you can establish that the requirement to give information under this notice is frivolous or vexatious) or to knowingly or recklessly provide information which is false in a material particular.

6. If you fail to comply by the deadline specified above, JKX reserves the right to issue a restriction notice in respect of the Shares under Article 42 of the JKX Articles of Association. You are advised to seek legal advice if you are in any doubt as to how to comply with this notice.

Response from Oleksandr Ratskevych to JKX Oil and Gas dated 27th May 2013

In response to your notice of 13 May 2013 and in accordance with section 793 of the Companies Act 2006, please, be hereby advised as follows.

1. In relation to the shares in JKX Oil & Gas ("Shares") I have, and during the last three years had, the interest as stated below:

(a) I hold an interest in 19 656 344 Shares;

(b) I hold an indirect interest in the Shares by holding a beneficial ownership interest of 5% in Glengary Overseas Limited of 3rd Floor, Geneva Place, Waterfront Drive, Road Town, Tortola, BVI ("Glengary");

(c) On 8 March 2007 I acquired a 5% beneficial ownership interest in Glengary which I still hold. At the time I acquired my beneficial interest in Glengary, Glengary had an interest in 39 312 688 Shares. On 27 December 2007 Glengary disposed of 19 656 344 Shares leaving Glengary with an interest in 19 656 344 Shares.

(d) As far as I am aware, the registered holder of the Shares in question is Lynchwood Nominees Ltd of 55 Moorgate, London EC2R 6PA, United Kingdom;

(e) I am not a party to any type of agreement or arrangement referred to in paragraphs 1(e)(i)-(iii) of the notice. I have however participated in discussions with Eclairs Group Limited regarding JKX's recent operational and financial performance and the need to change the management team. I have been proposed by Eclairs Group as a candidate for the JKX board as per the open letter to JKX shareholders dated 23 May 2013.

2. There are no agreements or arrangements between us regarding the acquisition of Shares or their use, as referred to in paragraph 2(a) of the notice. There are also no agreements or arrangements between us relating to the exercise of rights conferred by holding the Shares, as referred to in paragraph 2(b) of the notice.

Please note however that I hold a 5% beneficial interest in Glengary and Mr Zhukov holds a 95% beneficial interest in Glengary. My Zhukov controls a group of companies which includes Glengary ("Group"). I was appointed by Mr Zhukov as CEO of the Group and I am responsible for the day-to-day management of the Group, including Glengary. In connection with my position as CEO of the Group I was granted a 5% beneficial interest in Glengary.

Although I am consulted regarding matters relating to Glengary's interest in the Shares, Mr Zhukov, as the holder of a 95% beneficial interest in Glengary, ultimately decides how Glengary exercises its rights in the Shares.

3 Neither myself nor Mr Zhukov are party to any agreement or arrangement relating to the exercise of rights arising from the holding of shares in Glengary and its holding of Shares. Mr Zhukov, by way of a 95% beneficial interest, ultimately controls Glengary and, as such, he decides how Glengary exercises its rights in the Shares.

Response from Alexander Zhukov dated 27th May 2013

Dear Sirs

In response to your notice of 13 May 2013 and in accordance with section 793 of the Companies Act 2006, please, be hereby advised as follows.

1. In relation to the shares in JKX Oil & Gas Plc ("Shares") I have, and during the last three years had, the interest as stated below;

(a) I hold an interest in 19 656 344 Shares

(b) I hold an indirect interest in the Shares by holding a beneficial ownership interest of 95% in Glengary Overseas Limited of 3rd Floor, Geneva Place, Waterfront Drive, Road Town, Tortola, BVI ("Glengary");

(c) Glengary was incorporated on 28 May 2004 and I was the sole beneficial owner of the entire issued share capital in Glengary. Glengary acquired 23,810,862 Shares on 27 October 2004. On 1 December 2004 Glengary acquired a further 750,000 Shares resulting in a total interest in 24,560,862 Shares. On 15 June 2006 Glengary acquired 14 751 826 Shares increasing its total holding to 39,312,688 Shares. On 27 December 2007 Glengary disposed of 19,656,344 Shares leaving Glengary with an interest in 19 656 344 Shares. On 08 March 2007 I transferred 5% of my beneficial ownership interest in Glengary to Oleksandr Ratskevych. I currently hold a 95% beneficial ownership interest in Glengary;

(d) as far as I am aware, the registered holder of the Shares in question is Lynchwood Nominees Ltd of 55 Moorgate, London EC2R6PA, United Kingdom;

(e) I am not a party to any type of agreement or arrangement referred to in paragraphs 1(e)(i)-(iii) of the notice. I have however participated in discussions with Eclairs Group Limited regarding JKX's recent operational and financial performance and the need to change the management team as per the open letter to JKX shareholders dated 23 May 2013.

2. There are no agreements or arrangements between us regarding the acquisition of Shares or their use, as referred to in paragraph 2(a) of the notice. There are also no agreements or arrangements between us relating to the exercise of rights conferred by holding the Shares, as referred to in paragraph 2(b) of the notice.

Please note however that I hold a 95% beneficial interest in Glengary and Mr Ratskevych holds a 5% beneficial interest in Glengary. I control a group of companies which includes Glengary ("Group"). I appointed Mr Ratskevych as CEO of the Group and Mr Ratskevych is responsible for the day-to-day management of the Group, including Glengary. In connection with Mr Ratskevych's position as CEO of the Group I granted a 5% beneficial interest in Glengary to him. As the holder of 95% beneficial interest in Glengary I ultimately decide how Glengary exercises its rights in the Shares.

3. Neither myself nor Mr Ratskevych are party to any agreement or arrangement relating to the exercise of rights arising from the holding of shares in Glengary and its holding of Shares. As I have a 95% beneficial interest in Glengary, I ultimately control Glengary and I decide how Glengary exercises its rights in the Shares.

Glengary Overseas Ltd

Notice issued pursuant to section 793 of the Companies Act 2006

In accordance with section 793 of the Companies Act 2006 (the Act), please notify us as soon as possible, but no later than by 5 pm (London time) on Tuesday 28 May 2013, with the following information:

1. In relation to any of the shares in JKX Oil & Gas (JKX) in which you have, or during the last three years had, an interest (the Shares), please provide the following information:

    (a) the number of Shares in which you have or had an interest;

    (b) the nature of your interest in the Shares (e.g. beneficial owner, trustee, option);

    (c) the date(s) you acquired the Shares and ceased to hold such interest, in each case, if applicable;

    (d) whether you are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect):

        (i) which includes provision for the acquisition by you and/or any other person of shares in JKX and which imposes obligations or restrictions on the use (including exercise of rights, control or influence arising from such shares) or on the retention or disposal of such shares;

        (ii) relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. an agreement which governs (directly or indirectly) how the voting rights in the shares in Glengary Overseas Limited are to be exercised); or

(iii) with Mr Igor Kolomoisky, Mr Gennadiy Bogolyubov and/or Eclairs Group Limited (or their respective companies, nominees or family or other trusts), which relates to the exercise of JKX share voting rights (either directly or via yours and/or their respective companies, nominees and trusts)?

If so, please provide full particulars of such agreements or arrangements (including the names of all parties thereto).

2. Please send the information requested above in writing to Cynthia Dubin, Finance Director at JKX Oil & Gas plc, 6 Cavendish Square, London W1G 0PD and at [email address provided].

3. Please note that it is an offence under the Act to fail to comply with this notice (unless you can establish that the requirement to give information under this notice is frivolous or vexatious) or to knowingly or recklessly provide information which is false in a material particular.

4. If you fail to comply by the deadline specified above, JKX reserves the right to issue a restriction notice in respect of the Shares under Article 42 of the JKX Articles of Association. You are advised to seek legal advice if you are in any doubt as to how to comply with this notice.

Response of Glengary:

Dear Sirs,

In response to your notice of 13 May 2013 and in accordance with section 793 of the Companies Act 2006, please be hereby advised as follows.

In relation to the shares in JKX Oil & Gas Plc ("Shares"), Glengary Overseas Limited ("Glengary") has, and during the last three years had, the interest stated below:

(a) Glengary currently has an interest in 19,656,344 Shares. During the last three years Glengary's shareholding in JKX has not changed.

(b) Glengary is the beneficial owner of the Shares.

(c) Glengary acquired 23,810,862 Shares on 27th of October 2004. On 1 December 2004 Glengarry acquired a further 750,000 Shares resulting in a total interest in 24,560,862 Shares. On 15 June 2006 Glengary acquired 14,751,826 Shares increasing its total holding to 39,312,688 Shares. On 27 December 2007 Glengary disposed of 19,656,344 Shares leading Glengarry with an interest in 19,656,344 Shares.

(d) Glengary has participated in discussions with Eclairs Group Limited regarding JKX's recent operational and financial performance and the need to change the management team. Glengary however is not a party to any agreement or arrangement as mentioned in paragraph 1. (d)(i), (ii), and (iii) of your notice. Glengary is simply a holding vehicle for the Shares in favor of its ultimate beneficial owners – Alexander Zhukov and Oleksandr Ratskevych and acts upon their instructions.

[The remaining Glengary parties' notices and responses are not set out here.]

Appendix 2 - Restriction notices

[The Eclairs/Mr Kolomoisky/Mr Bogolyubov notice]

"Dear Sirs,

JKX Oil & Gas plc – Restriction Notice Issued under Article 42 of the Articles of Association

We refer to the notices issued by JKX Oil & Gas plc (JKX) to each of Eclairs Group Limited (Eclairs), Mr. Igor Kolomoisky and Mr. Gennadiy Bogolyubov on 13 May 2013 in accordance with 793 of the Companies Act 2006 (the Section 793 Notices).

We also refer to the responses dated 27 and 28 May 2013 to the Section 793 Notices of each of Eclairs, Mr. Kolomoisky and Mr. Bogolyubov (the Section 793 Responses).

Having reviewed public statements made by, and correspondence and other communications from, you and Glengary Overseas Limited (Glengary), Mr. Alexander Zhukov and Mr. Oleksandr Ratskevych, the board of directors of JKX (the Board) has reasonable cause to believe that information provided in the Section 793 Responses is false or materially incorrect. Without prejudice to the generality of the foregoing, the Board has reasonable cause to believe that the following statements made in the Section 793 Responses are false or materially incorrect:

None of Mr. Kolomoisky, Mr. Bogolyubov (or his family) or Eclairs (or their respective companies or nominees) are party to any agreement or arrangement (whether written or unwritten, formal or informal, direct or indirect) (Arrangements) relating to the exercise of any rights conferred by the holding of shares in JKX (e.g. an Arrangement which governs (directly or indirectly) how the voting rights in shares in JKX held indirectly by Mr. Kolomoisky and Mr. Bogolyubov (and his family) are to be exercised); and

None of Mr. Kolomoisky, Mr. Bogolyubov (or his family) or Eclairs (or their respective companies or nominees) are party to any Arrangements with Mr. Zhukov, Mr. Ratskevych and/or Glengary (or their respective companies or nominees) which relate to the exercise of JKX shares voting rights (either directly or via such persons' respective companies and nominees).

Please provide full and proper details of all information requested in the Section 793 Notices, including (without limitation) the scope and nature of all Arrangements of the type referred to in paragraph 3 above, as soon as possible.

Accordingly, the JKX board of directors has resolved to issue the following restriction notice in accordance with Article 42.

RESTRICTION NOTICE UNDER ARTICLE 42

This is a restriction notice issued under Article 42 in respect of 47,287,027 ordinary shares in JKX held by Hanover Nominees Limited (Hanover) on behalf of Eclairs (the Shares).

In accordance with Article 42(3) the following restrictions are imposed with respect to the Shares:

Hanover is not entitled, in respect of the Shares, to attend or be counted in the quorum or vote either personally or by proxy or otherwise at any general meeting or at any separate meeting of the holders of any class of shares or upon a poll or to exercise any other right or privilege in relation to any general meeting or any meeting of the holders of any class of shares; and

no transfer of the Shares shall be effective or shall be registered by JKX except as provided for in Article 42(4).

6. In accordance with Article 42(9) the Board has the right, at its discretion, to suspend, in whole or in part, this restriction notice either

permanently or for any given period.

…

[The Glengary/Mr Zhukov/Mr Ratskevych notice]

[The opening and closing paragraphs are the same as those above, substituting the names of the Glengary/Mr Zhukov/Mr Ratskevych where appropriate.] Paragraph 3 reads:

"3. Having reviewed public statements made by, and correspondence and other communications from, you and Eclairs Group Ltd (Eclairs), Mr Igor Mr Kolomoisky and Mr Gennadiy Bogolyubov, the board of directors of JKX (the Board) has reasonable cause to believe that information provided in the Section 793 Responses that none of Mr Zhukov, Mr Ratskevych or Glengary (or their respective companies or nominees) are party to any Arrangements with Mr Kolomoisky, Mr Bogolyubov (or his family) and/or Eclairs (or their respective companies or nominees) which relates to the exercise of JKX share voting rights (either directly or via such persons' respective companies and nominees) is false or materially incorrect."

[The remainder of the notice is in similar form to that appearing above.]