

Case No

**IN THE HIGH COURT OF JUSTICE  
OF THE ISLE OF MAN  
COMMON LAW DIVISION**

**BETWEEN**

- (1) **OBA ENTERPRISES LIMITED**
- (2) **CERASUS INVESTMENTS LIMITED**
- (3) **PASCANI HOLDING LIMITED**
- (4) **GABRIEL CAPITAL LP**
- (5) **IRR**
- (6) **APRICUS INVESTMENTS LIMITED**
- (7) **ANDERSEN GROUP INC.**
- (8) **GREENCASTLE ENTERPRISES LIMITED**

Plaintiffs

-and-

- (1) **TMC (HOLDINGS) LIMITED**
- (2) **TMC TRADING LIMITED**

Defendants

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**AFFIDAVIT**

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I, **ANTHONY STEPHEN WOLLENBERG**, of Rakisons, Clements House, 14/18 Gresham Street, London EC2V 7JE hereby **MAKE OATH** and say as follows:

- 1 I am the senior partner of Rakisons, the English solicitors instructed on behalf of the Plaintiffs. I am duly authorised by the Plaintiffs to make this affidavit on their behalf. Save where otherwise appears, the matters to which I depose are based on information provided to me by my clients, being matters within their own knowledge as a result of their participation in the transactions the subject of this application. Where this is not the case, I depose to the source of my knowledge.
- 2 There is now produced and shown to me marked ASW1 and ASW2 two bundles of

paginated documents which I refer to in this affidavit.

### **The Proposed Isle of Man Proceedings.**

3 In the proposed Isle of Man proceedings, the Plaintiffs seek a declaration that TMC Holdings Limited ("TMC Holdings") and TMC Trading Limited ("TMC Trading") (collectively, where appropriate, "TMC" ) hold all monies and assets which they received from their dealings for or with a Russian company called JSC AVISMA Titano-Magnesium Combine ("AVISMA") after 6 December 1997 ("the relevant assets") on trust for the shareholders who acquired AVISMA on 6 December 1997 pro rata to their then shareholding in AVISMA.

4 As I explain below, on 6 December 1997, the Plaintiffs acquired a 61.6% shareholding in AVISMA. Accordingly, the Plaintiffs have a direct interest in the relief sought, and the relevant assets which TMC holds, pro rata, on trust for them.

5 In the event the Court concludes that the Plaintiffs are not entitled to the primary declaration sought, the Plaintiffs seek in the alternative a declaration that TMC hold the relevant assets on trust for AVISMA. The Plaintiffs remain substantial shareholders in a Russian company called Verkhne-Saldinskoye Metallurgicheskoye Proizvodstvennoye Ob'edinenie ("VSMPO"), and AVISMA is now a subsidiary of VSMPO.

6 Accordingly, even if the relevant assets are held by TMC on trust for AVISMA, the Plaintiffs still have a real and direct interest in the declaratory relief sought.

### **The Interlocutory Application**

7 Regardless of whether the beneficial interest in the relevant assets is vested in the Plaintiffs (as is asserted by the Plaintiffs in their primary case) or VSMPO (the Plaintiffs' secondary case), the Plaintiffs contend that it is clear that TMC have no beneficial entitlement to the relevant assets.

8 The Plaintiffs are concerned, in the light of information that has come to their attention (as set out at paragraphs 40-43 below), to ensure that the relevant assets are not dissipated by TMC before the Court has determined the beneficial entitlement to those assets . The Plaintiffs are also concerned to learn the present

whereabouts of the relevant assets and how TMC have dealt with them since 6 December 1997.

9 It is for that reason that the Plaintiffs seek :

- (1) restraining orders preventing TMC from dealing in any way howsoever with the relevant assets; and
- (2) disclosure orders requiring TMC to:
  - (a) disclose on affidavit the present whereabouts of the relevant assets;
  - (b) explain on affidavit TMC's dealings with the relevant assets since 6 December 1997.

## The Background

### (i) The Investment Proposal

10 In the fall of 1997, Creditanstalt Investment Bank, Moscow ("CAIB") approached the Plaintiffs with an investment proposal, the objective of which was the creation of the world's largest fully integrated producer of titanium products.

11 This was to be achieved by a two stage process. First, CAIB and the investors for which CAIB agreed to act as agent would acquire a majority stake in AVISMA. AVISMA was a Russian producer of titanium sponge. Second, this majority stake in AVISMA would be acquired by VSMPO, and the shareholders in AVISMA would be issued with new shares in VSMPO in return for their shares in AVISMA. VSMPO is a substantial producer of titanium products. Through the acquisition of AVISMA, VSMPO sought vertical integration to the source of the raw material.

12 A copy of the circular which CAIB issued to investors in relation to the VSMPO /AVISMA transaction ("the transaction") is exhibited at ASW2 page 71. I refer in particular to page 80 of the circular which refers to the position of Rosprom and Bank Menatep (the then majority shareholders in AVISMA) and TMC. As I explain, these were matters that were elaborated upon by CAIB in the course of negotiations leading up to the Plaintiffs' investment in the transaction.

(ii) Rosprom, Bank Menatep and TMC


13 Discussions regarding the proposed transactions took place between CAIB and the Plaintiffs over a period of several months. Yuri Lopatinsky, the managing director of CAIB, led the discussions on behalf of CAIB.

14 CAIB explained that AVISMA was under the control of its majority shareholders, Rosprom and its affiliated company Bank Menatep and/or their respective associates or affiliates. (For convenience I refer to these collectively as "Rosprom"). Rosprom controlled some 58% of AVISMA's voting stock and effectively managed AVISMA's production.

15 Even more significantly, however, CAIB explained that Rosprom owned or controlled a company called TMC – although the Plaintiffs were not clear as to precisely which TMC company it was - which was used to market and distribute all AVISMA's product worldwide.

16 It is not clear whether TMC ever had a legitimate function. On many occasions the Plaintiffs have been told that TMC existed in order to avoid "anti-dumping" legislation in the United States. In the time since my firm was instructed, I have been unable to establish whether or not this was the case.

17 It is also not clear from whom TMC has taken its instructions. It would appear that it was both CAIB and Bank Menatep (pages 57-58 of ASW2). I am informed that VSMPO are also believed to have instructed TMC.

18  Regardless of what may or may not have been TMC's original purpose, the Plaintiffs were told that a significant part of the profits which AVISMA was able to earn on the sale of its product were taken offshore through TMC. As TMC was owned or controlled by Rosprom, this proportion of the profits which AVISMA could have earned on the sale of its product would have been available directly to AVISMA's majority shareholders.

19 CAIB explained that the investors in the transaction would acquire not only Rosprom's majority shareholding in AVISMA, but also the right to the profits which Rosprom was accruing through TMC. At the time, there were no detailed discussions as to how this latter aspect of the proposal was to be achieved. The Plaintiffs were

not told whether Rosprom owned TMC and would procure the transfer of TMC to the new investors; or whether Rosprom simply had the ability to control the profits taken through TMC and would ensure that from the date of the acquisition those profits were directed to the new shareholders. However, regardless of the mechanism to be used, the entitlement to the profits taken through TMC was central to the entire transaction: for a large (if not the largest) part of the profits generated by AVISMA were taken through TMC. Without the right to those profits, investment in AVISMA was not an attractive proposition.

20 Acquisition of the rights to the profits being accrued through TMC was of importance to the Plaintiffs not merely because of their economic value. Of equal importance was the fact that this gave the Plaintiffs control over TMC's dealings with AVISMA and thus the ability to terminate TMC's dealings with AVISMA. The Plaintiffs were concerned by AVISMA's participation in an uncertain and unclear relationship with TMC, which had never been fully explained to them, and by the liabilities to which AVISMA (and possibly the Plaintiffs) might be exposed. At the time of their proposed investment, therefore, and in view of CAIB's representations that the relationship between TMC and AVISMA would be terminated on completion of the transaction, the Plaintiffs expected TMC to be collapsed into AVISMA as soon as possible following the share acquisition such that all AVISMA's profits would accrue directly to AVISMA.

(iii) Acquisition of Rosprom's majority shareholding in AVISMA

21 In September 1997, the Plaintiffs agreed to invest, and subsequently did invest, a total sum of US\$ 85,640,000 with CAIB in order to acquire Rosprom's shares in AVISMA and the associated rights to the profits being accrued through TMC. A copy of the subscription agreement signed, I believe, by some of the Plaintiffs is at ASW 2 page 103. Although the subscription agreement only refers to the acquisition of 58% of the shares in the supplier (being a reference to Rosprom's shares in AVISMA), I am informed that acquisition of rights to the profits being accrued through TMC was, for the reasons I have outlined and as indicated in CAIB's circular (ASW2 page 80), an integral part of the transaction.

22 The acquisition of Rosprom's shareholding in AVISMA completed in December 1997. CAIB acted as agents for the Plaintiffs (and possibly other investors) in the negotiation and conclusion of the acquisition of Rosprom's shares in AVISMA. The

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ANTHONY STEPHEN WOLLENBERG )

at 14-18 ~~Robert St~~ )  
13-2 )

on the 2<sup>nd</sup> day of November 1998 )

*ASW*

Before me,

*Helm Clarke*

*Solicitor*