BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0311

BETWEEN:

(1) ROBELCO LIMITED
(2) OLEG ZHEREBTSOV
(3) VLADIMIR SENKIN
(4) MIKHAIL LESCHENKO

Claimants

-and-

(1) SVOBODA CORPORATION
(2) AUGUST MEYER
(3) DMITRY KOSTYGIN
(4) SERGEI YUSCHENKO
(5) LOREN DAVID BOUGH
(6) ROBERT VOSS
(7) GREG LYKINS
(9) ALEXANDER EASTON
(10) EDWARD WYNDAM GRAHAM NICHOLSON
(12) MEM (PE) LIMITED
(13) STEEP ROCK RUSSIA FUND LIMITED
(14) STEEP ROCK RUSSIA FUND II LIMITED
(15) BOWDON HOLDINGS LIMITED
(16) HOMEBUSH OVERSEAS LIMITED
(17) PERIWINKLE LIMITED
(18) FOUR RUNNERS FUND III LLC
(19) TRICOR SERVICES (BVI) LIMITED

Defendants

-and-

(1) SEVKI ACUNER
(2) EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Interveners

Appearances:

Ms Karen Troy and Mr Ian Mann of Forbes Hare for the Claimants
Mr Paul Webster QC and Mr Malcolm Arthurs of O'Neal Webster for the First and Second Defendants
Ms Jo Cunningham of Maples & Calder for the Second Intervener
All other Defendants and the First Intervener unrepresented and absent

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	2008: February 28
	2008: March 31
Resumed hearing	2008: March 31, April 01
	2008: April 03

JUDGMENT

Introductory

[1] **HARIPRASHAD-CHARLES J:** On 31 March 2008, this Court handed down a draft written judgment in this matter and indicated that there were a few unresolved issues which it had not determined. The parties opined that the Court should resolve all outstanding issues as they are pertinent to the final orders which it will make. As a consequence, the Court requested the parties to make further submissions on 1 April 2008 although the Claimants opined that the First and Second Defendants (conveniently referred to as "the Defendants") should not be heard because of a pending application for contempt of court which is scheduled to take place on Friday, 4 April 2008[1]. Be that as it may, all parties were permitted to make further submissions. The following represents the judgment of the Court.

[2] Since 20 December 2007, the first two Claimants and the Defendants have been entangled in hostile litigation before this Court. The scope of these proceedings has been extended. Two new Claimants and 15 new Defendants have been added. None of the new Defendants has appeared and/or instructed Counsel at the trial. The European Bank for Reconstruction and Development ("the EBRD") and its director, Sevki Acuner ("Mr Acuner") are joined as interveners in this action. The Court has already heard one or more of these parties on no less than 10 occasions. In addition, litigation is also on foot in Russia arising out of the present dispute.

[1] It seems to me that the Claimants, having requested the Court not to hear further arguments from the Defendants because of a pending contempt application, have already determined the issue. This is the task of the Court only when a Court is properly seized of the matter. To date, this Court has not even seen the application.

The claim

[3] The Claimants seek the following relief namely:

(i) declaratory relief in respect of the Articles of Association and the constitution of the Board of Directors of Lenta Ltd ("Lenta"), a company incorporated under the laws of the British Virgin Islands ("the BVI");

(ii) a permanent injunction restraining the Defendants and each of them from exercising and from instructing and/or permitting any proxy, corporate officer, servant or agent whosoever to exercise in favour of any resolution removing any of Oleg Zherebtsov ("Mr Zherebtsov") and/or Vladimir Senkin and/or Mikhail Leschenko and /or Robert Voss as Directors of Lenta and/or otherwise displacing Mr Zherebtsov as Chairman of the Board of Directors of Lenta the voting rights attaching to the shares in Lenta that are registered in the name of the First Defendant and of which the Second Defendant is the ultimate owner;

(iii) a permanent injunction restraining the First to Fourth Defendants and each of them from publishing, disseminating or taking any step in reliance in Written Resolutions dated 15 January 2008 and

(iv) rectification of the Register of Directors and Officers of Lenta.

[4] The Defendants have counterclaimed for the following:

(i) a declaration that the shareholders of Lenta are entitled to remove any director of Lenta except the EBRD Director;

(ii) an order that Mr Zherebtsov be restrained whether by himself or through any proxy or agent, from exercising or acting in any way in reliance upon the signing authority purportedly conferred on him by the Board of Directors of Lenta on 4 October 2007 or subsequently; and

(iii) an order that Mr Zherebtsov be restrained whether by himself or through any proxy from issuing in his sole capacity any other Powers of Attorney on behalf of Lenta.

The parties and dramatis personae

[5] The First Claimant, ("Robelco") is a Cypriot company and is the owner of 35% of the issued shares in Lenta. The registered agent for Lenta is Tricor Services (BVI) Limited ("Tricor") at Palm Grove House, PO Box 3340, Road Town, Tortola, BVI. Lenta owns 100% of the issued shares in Lenta LLC, a company incorporated in the Russian Federation, and one of Russia's largest hypermarket chains.

[6] The Second Claimant, ("Mr Zherebtsov") is the sole shareholder of Robelco. He founded Lenta and was its General Director before becoming a member of the Board of Directors. He is currently the Chairman of the Board of Directors of Lenta and one of its seven directors.

[7] The Third Claimant, ("Mr Senkin") and the Fourth Claimant, ("Mr Leschenko") are directors of Lenta. Mr Senkin is currently the General Manager of Lenta LLC.

[8] The First Defendant, ("Svoboda") is a BVI Business Company incorporated in the BVI. Its registered office is also at Palm Grove House, PO Box 3340, Road Town, Tortola, BVI. Svoboda is the holder of 36% of the issued shares in Lenta. The Second Defendant, ("Mr Meyer") is the sole Director of Svoboda. He was formerly a Director of Lenta.

[9] The Third Defendant, ("Mr Kostygin") and the Fourth Defendant, ("Mr Yuschenko") are members of Lenta. The latter was also the General Manager of Lenta LLC until 31 December 2007 when his contractual appointment came to an end.

[10] The Fifth to Seventh Defendants are directors of Lenta. The Fifth Defendant is also a member of Lenta. The Ninth, Tenth and Twelfth to Eighteenth Defendants are all the

remaining members of Lenta. The Nineteenth Defendant is Tricor Services (BVI) Limited, the registered agent of Lenta in the BVI.

[11] The other major shareholder in Lenta is the European Bank for Reconstruction and Development ("EBRD") which holds 11% of the issued shares. The EBRD provided a loan of up to US$30 million to Lenta in 2004 to help fund its expansion efforts. Further funding from the EBRD in 2007 resulted in its receipt of 11% of the shares in Lenta. Mr Acuner is the EBRD's director of Lenta.

The factual matrix

[12] The factual matrix to this dispute is already contained in a written judgment of this Court delivered on 28 January 2008 with which the parties are all too familiar. Briefly, on 3 December 2007, a Notice of a Special Meeting of Members to be held on 21 December 2007 was circulated. The Agenda for that meeting included the passing of a resolution that required a simple majority to remove six of the seven Directors of Lenta including the nominee Directors of Mr Zherebtsov.

[13] On 12 December 2007, another Notice of a Special Meeting of Shareholders to be held on 28 December 2007 was circulated. The Agenda for the meeting included a resolution to request that the Board of Directors of the Company appoint Mr Yuschenko as Chief Executive Officer of Lenta and as General Manager of Lenta LLC as well as a resolution to request that the Board of Directors issue a Power of Attorney for Lenta to Mr Yuschenko for the calendar year 2008.

[14] On 23 November 2007, a motion was proposed at an Extraordinary Meeting of the shareholders to have all decisions regarding the funding and budgets rest only with the shareholders and to dissolve the current Board of Directors. The motion was passed by the majority of shareholders present with only Robelco voting against and the EBRD representative abstaining. It was later pointed out to the shareholders that the removal of all the directors at that meeting was ineffective as Regulation 44 of the Articles prohibited such a complete dismissal of the Board of Directors.

[15] In light of the above events, Mr Zherebtsov alleged that Svoboda and Mr Meyer are seeking to remove the Board of Lenta bar the EBRD's Director and to vest in the CEO, Mr Yuschenko, complete management control of Lenta with the result that Mr Yuschenko would be answerable directly to the shareholders (amongst whom he is a minority) rather than to the Board, whose voting majority he is constitutionally entitled to control. It is this concern that prompted Mr Zherebtsov to apply ex parte for the injunction. The injunction injuncted, on an interim basis, Svoboda and Mr Meyer from taking any steps to remove Messrs Zherebtsov, Senkin or Leschenko as directors of Lenta or from displacing Mr Zherebtsov as Chairman of the Board of Directors of Lenta Ltd until 15 January 2008. That injunction remains in place and has been extended to prohibit the removal of Mr Voss. In addition, further injunctive relief has been sought and obtained against Mr Yuschenko and Mr Zherebtsov.

[16] There have been a large number of factual allegations and issues which have unfolded during the dispute. Of principal concern in this trial is the proper interpretation of the Regulations, specifically, Regulation 47 which deals with the procedure for the removal of directors from Lenta's Board including those directors nominated by Mr Zherebtsov.

The Directors

[17] The management of the business and affairs of a BVI Company is under the direction or supervision of the directors of the Company.[2] Section 113 of the BVI Business Companies Act, 2004 ("the BCA") makes provision for the appointment of directors. Section 114 speaks to the removal of directors. Subsection (1) provides that "subject to the memorandum or articles of a company, a director of a company may be removed from office by resolution of the members of the company".

[18] In the present case, it is common ground that Regulation 44 provides for a minimum of one and a maximum of nine directors. It is also common ground that Regulation 45 regulates the procedure for appointing some of those directors. What is, however, at the heart of this

[2] See section 109 of the BVI Business Companies Act, 2004.

dispute is the proper procedure for the removal of those directors that are appointed pursuant to Regulation 45.

The issues

[19] The Claimants have identified 19 issues for determination in this trial.[3] Stripped to their bare essentials, they are condensed to the following issues, namely:

1. Whether the members of Lenta are entitled to remove any director other than the EBRD Director by a simple majority vote. Or put another way, does Mr Zherebtsov have the sole right to remove any director nominated by him?

2. Is Mr Zherebtsov a "member" of Lenta for the purposes of nominating directors under Regulation 45?

3. Are the Defendants estopped from denying that Mr Zherebtsov is a "member" of Lenta for the purposes of nominating directors pursuant to Regulation 45?

4. Whether a "ninth" director is to be appointed "at large" in accordance with section 113(2) of the BCA, by the members?

5. Whether the signing authority purportedly granted to Mr Zherebtsov on 4 October 2007 was granted in accordance with the Articles?

6. Whether Mr Zherebtsov has the authority to issue powers of attorney on behalf of Lenta without the unanimous approval of the Board of Directors?

7. Whether Rob Voss is a director as contemplated by the Articles of Lenta?

8. Are the Written Resolutions of 15 January 2008 invalid and/or ineffective?

[3] See Trial Bundles, Volume 3, chronology, issues and written submissions.

9. On a true construction of Regulation 45 and 59-65 of the Articles, were the Resolutions adopted by a majority of the directors present at the Board Meeting of 14 and 16 January 2008 valid? and

10. Was Mr Senkin duly appointed by Mr Zherebtsov as General Manager of Lenta LLC?

Submissions by Counsel: appointment and removal of directors

[20] The Claimants argue that, under the Articles, there is a continuing obligation on each member of Lenta to support the nominees of Mr Zherebtsov. Therefore, other members of Lenta cannot remove a director nominated by Mr Zherebtsov.

[21] The Defendants are of a contrary view. They say that the right to remove directors of Lenta, however nominated and appointed, apart from the EBRD Director, is vested in the members as a body by Regulation 47 and in no other person.

[22] The procedure for appointing directors is set out in Regulation 45 which provides the following:

> "Mr Oleg Zherebtsov shall, **whilst he remains a member**, have the right, in his sole discretion, to nominate three (3) of the directors (the **"Principal Member Directors**").The other members shall have the right, in their sole discretion, to nominate two (2) of the Directors ("the **Other Members Directors**"). Mr Oleg Zherebtsov shall also have the right to nominate two (2) independent directors, whose nomination shall be subject to the other members. Mr Oleg Zherebtsov shall have the right to nominate the chairman of the Board who shall have a casting vote where (i) the number of directors appointed to the board is an even number, and (ii) there would otherwise be a deadlock of the board. The members agree to exercise their votes in favour of the respective nominees for the Director positions. **Each director shall be appointed by a simple majority vote of the members**"[emphasis added].

[23] Regulation 45 gives Mr Zherebtsov the right, *whilst he remains a member*, to nominate three Principal Member Directors and also to nominate two independent directors whose nomination shall be subject to the other members. It also gives him the right to nominate the Chairman of the Board who shall have a casting vote where there is deadlock of the Board and the number of directors appointed to the Board is even. The Regulation also

provides that each director shall be appointed by a simple majority vote of the members. In short, it is not disputed that Regulation 45 regulates the procedure for appointing some of the directors.

[24] Regulation 46 gives the EBRD as long as it continues to hold shares in Lenta the right to nominate at least one person as a non-executive Director termed the "EBRD Director".

[25] Regulation 47 is the controversial Regulation. It deals with the removal of directors. It is the Defendants' case that, properly construed, Regulation 47 is clear and unambiguous. It "specifically allows the members of Lenta to remove by way of simple majority any director except the EBRD Director" and "this right or removal is not fettered in any way."[4]

[26] It is said by the Claimants that Regulation 47 on its face permits removal of directors by a simple majority of the members.[5] They then carried out a *volte-face* by submitting that Regulation 47 does not accord to the members of Lenta a "right" to remove its directors but, rather, imposes upon members an obligation to remove directors if required to do so by the person who nominated them, to ensure that there is a mechanism in place for such removal to be carried into effect. The Claimants next argued that Regulation 47 thus permits the removal of Principal Member Directors and/or independent directors nominated by Mr Zherebtsov only if those directors cease to be nominees of Mr Zherebtsov, i.e. on the initiative of Mr Zherebtsov, who also has the right to nominate replacements for any director who is removed by a simple majority vote of the members.

[27] Learned Counsel for the Claimants, Ms Troy, then concluded that as a matter of construction, but if necessary by constructional implication, there is a clear and continuing obligation on the other members of the Company to support all of the nominees of Mr Zherebtsov the necessary corollary of which is a restriction on the apparent right of the Other Members of Lenta to remove any of its directors at any time by a simple majority vote.

[4] See Amended Defence, para. 9.
[5] See Amended Statement of Claim, para. 3B.

[28] Learned Counsel insisted that the Articles were intended to guarantee that Mr Zherebtsov retained control of the Board of Directors and thus the overall management of Lenta when his shareholding was diluted to secure the arrangements concluded with the EBRD on 27 April 2007 in order to fund further expansion of Lenta LLC's operations in Russia. She contended that proposing, or voting for, a resolution that would necessitate the removal of any of the current directors of Lenta who were nominated by Mr Zherebtsov would place the Defendants in breach of Regulation 45 and would subvert the balance of control between the members and the Board, and within the Board, that the Articles were intended to secure.

[29] Mr Webster QC for the Defendants argued that Regulation 47 is clear and unequivocal and does not need to be given any complicated or strained meaning. He observed that Regulation 47 is in the standard form giving the members the right to remove directors by a resolution passed by a simple majority which is wholly in keeping with traditional company law where the shareholders have the right to appoint and remove directors.

[30] He next submitted that Regulation 47 carves out one exception in relation to the EBRD Director and, apart from that exception, it is wholly lucid and is not subject to any other Regulation. The reasonable conclusion, he says, is that the power of removal which follows does not apply to the EBRD Director as Regulation 46 delimits its own procedure for the appointment and removal of the EBRD Director which is vested solely in the EBRD.

[31] Learned Queen's Counsel further submitted that, if that is not sufficient to establish that the special removal procedure applies only to the EBRD Director, the bracketed words "(other than the EBRD Director)" remove any doubt. He explained that these words confirm that the only exception to the power of removal given to the members is in relation to the removal of the EBRD Director. All other directors fall squarely under Regulation 47 and are removable by a resolution of a simple majority of members.

[32] Learned Queen's Counsel argued that if it were intended that members could vote for the removal of only their own directors, it would have been the simplest thing for the draftsman

to state in Regulation 47. Instead, the draftsman carved out only one exception to the Regulation.

[33] It is also the Defendants' case that Regulation 47 fits and sits harmoniously with all the other Regulations including Regulations 45 and 61 and there is no inconsistency or ambiguity – the members have the right to remove any director, except the EBRD Director, and the respective groups of members are entitled to replace such directors.

[34] The Defendants opined that Regulation 48 which provides that "a director shall continue in office until the removal of such director *in accordance with these Regulations,"* supports the aforesaid interpretation. Mr Webster QC succinctly submitted that where the Regulations are plain and unambiguous, as in this case, there is no room for implying a term to create a different interpretation.

[35] Ms Cunningham who appeared for the EBRD was very forceful in her submissions. Like Mr Webster, she contended that the language in Regulation 47 is neither difficult nor strained. According to her, the parties have used words which are plain and capable of being understood. A "simple majority," she says, is a term of art which is well-understood and the language plainly envisages that any member may propose the removal of a director and that the proposal may be carried by a simple majority.

[36] Learned Counsel also argued that aside from the exception carved out in relation to the EBRD Director, there is nothing further in Regulation 47 which requires the words used in the opening sentence to be given a meaning different to that which they would be commonly understood to have. Equally, she says, there is no conflict between the language in Regulation 47 and the other Regulations which would necessitate the term to be read differently.

The applicable legal principles

[37] All parties are agreed that when construing any contract, including articles of association, the duty of the Court is to ascertain and give effect to the common intention of the parties,

objectively assessed. In the case of **Halstead (Donald) v Attorney-General of Antigua and Barbuda**[6] the Court was confronted with the interpretation and legal effect of a consent order. Sir Vincent Floissac, CJ in delivering the judgment of the Court went into minutiae in interpreting the consent order. At page 102, his Lordship succinctly stated:

> "I start off with the basic principle that the interpretation of a contract or the appropriate meaning of an ambiguous word or phrase of a contract is derived from the objective common intention of the parties to the contract. That objective common intention is an inference drawn from the word or phrase interpreted objectively in the light of its contractual context. That contractual context comprises the whole or every part of the contract and all relevant contractual surrounding circumstances which were known to and should be presumed to have been within the contemplation of the parties at the time of the execution of the contract."

[38] In ascertaining the common intention of the parties, the following principles provide invaluable guidance, namely:

a. The "golden rule" is that the words used by the parties should be given their plain and natural meaning: see **Pinner v Everett**[7] where Lord Reid stated this principle in the following terms: "In determining the meaning of any word or phrase in a statute the first question is what is the natural or ordinary meaning of that word or phrase in its context in the statute."

b. To arrive at the true interpretation of the document, a clause must not be considered in isolation but must be considered in the context of the whole of the document. In **Chamber Colliery Ltd v Twyerould**,[8] Lord Watson said:

> "I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible."

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[6] (1995) 50 WIR 98.
[7] [1969] 3 All E.R. 257 at 258.
[8] [1915] 1 Ch. 268 at 272.

c. The task of ascertaining the intention of the parties must be approached objectively:[9] the question is not what one or other of the parties meant or understood by the words used, but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[10]

d. A contract should ordinarily be construed with regard to the circumstances which gave rise to it and the situation in which it is expected to take effect including the object or purpose of the contract[11] but such extrinsic evidence is of limited relevance in construing articles of association.[12]

Implied terms

[39] The presumption against adding terms is stronger where the contract is written and represents an apparently complete bargain between the parties. Where, however, the bargain is obviously not complete, the court is less reluctant to supply the missing terms.[13] In **Codelfa Construction Pty Ltd v State Rail Authority of New South Wales**[14], Mason J said:

> "For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue."

[40] Notwithstanding, there are situations in which the court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that the parties must have intended the stipulation in

[9] Manual Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749 at 767, 775 and 782.
[10] Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896 at 912-913.
[11] ICS v West Bromwich BC [1968] 1 WLR 896 at 912-3.
[12] Rose v Lynx Express Ltd & Or [2004] 1 BCLC 455.
[13] Liverpool City Council v Irwin [1977] A.C. 239 at 253.
[14] (1982)149 C.L.R. 337 at 346.

question.[15] An implication of this nature may be made in two situations. First, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. The two criteria often overlap, and, in many cases, have been applied cumulatively, although they are alternative grounds.

[41] There is yet another situation where a term may be implied. This is where the court is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense, the court is searching for what must be implied. A term ought not to be implied unless it is in all of the circumstances reasonable. But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or would make carrying out the contract more convenient. The touchstone is always **necessity** and not merely **reasonableness**.

[42] The learned authors of **Chitty on Contracts** 27th ed. Vol. 1 para. 13-005/006 comprehensively explained the concepts of business efficacy of a contract and obvious inference from agreement. The test for business efficacy is whether it will make the contract work.

[43] The court will also imply a term which must necessarily have been intended by both of the parties to the agreement.[16] The court will not imply a term where the parties have entered into a carefully drafted written agreement containing detailed terms.

[44] In the case of a statutory contract, such as articles of association, the court has even less power to imply a term and can only do so where it is required as a matter of construction. In **Scott v Frank F. Scott (London) Ltd** [17], the Court held that it has no jurisdiction to rectify the articles of association of a company, even if those articles do not accord with what is proved to have been the concurrent intention of the signatories of the memorandum at the moment of signature.

[15] Hamlyn & Co. v Wood & Co. [1891] 2 Q.B. 488 at 494.
[16] See Chitty on Contracts 27 ed Vol. 1 para. 13-006.
[17] [1940] 3 All ER 508, [1940] Ch 794.

[45] In **Bratton Seymour Service Co Ltd v Oxborough**[18], the issue before the court was whether it was possible to imply into the articles of association of a company set up to manage a development of flats a term that the shareholders, who were the owners of the flats, should make contributions for the upkeep of the amenity areas of development. It was held that the articles of association constituted a statutory contract with its own distinct features in that, unlike an ordinary contract, it was indefeasible on the grounds of misrepresentation and it could not be rectified on the grounds of mistake. Where the court might be able to infer a term purely by way of constructional implication, it was not possible to go further and to imply a term from extrinsic circumstances.

[46] In **Equitable Life Assurance Society v Hyman**[19]**,** Lord Steyn impressed that the purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear. He further stated that:

> "The critical question is whether a relevant restriction may be implied into article 65(1). It is certainly not a case in which a term can be implied by law in the sense of incidents impliedly annexed to particular forms of contracts. Such standardized implied terms operate as general default rules…If a term is to be implied, it could only be a term implied from the language of art. 65 read in its particular commercial setting. Such implied terms operate as ad hoc gap fillers."

[47] As I elaborated in an earlier judgment in this matter[20], it is plain that terms can be implied from the language of the articles of association to give them reasonable business efficacy. There are however limits to the use of evidence of surrounding circumstances as an aid to the construction of articles of association. Lord Walker of Gestingthorpe in **HSBC Bank Middle East (Representative of Class B Investor Shareholders) and Others v Paul Clarke (Joint Provisional Liquidator of Oracle Fund Limited) and Others**,[21] approved the following passage of Steyn LJ in **Bratton Seymour v Oxborough**:

> "I will readily accept that the law should not adopt a black-letter approach. It is possible to imply a term purely from the language of the document itself: a purely

[18] [1992] BCLC 693 at p. 698.
[19] [2000] UKHL 39, [2000] 3 All ER 961 at 970 c-e.
[20] See Claim No. BVIHCV2007/311 –Robelco Limited et al v Svoboda Corporation et al –Judgment delivered on 28 January 2008 – paras 24 -33.
[21] [2006] UKPC 31, Judgment delivered on 21 June 2006.

> constructional implication is not precluded. But it is quite another matter to seek to imply a term into articles of association from extrinsic circumstances".

[48] The restrictions on implying terms into articles of association are important because the articles cannot be rectified by the Court. The BCA provides that the articles can only be amended by resolution of the members.[22] If there is any inconsistency between different parts of the articles, the Courts will follow the canons of construction and look to the whole, seeking to achieve concord between the different provisions and compliance with the law.[23]

Are the members of Lenta entitled to remove any director other than the EBRD Director by a simple majority vote?

[49] The first and foremost issue which arises in this claim raises a very short question of construction, primarily of Regulation 47. A good starting point is an attempt to interpret the controversial Regulation in isolation. In **Murray Riggall v Frederick Robert Harrington et al**[24] Sir Vincent Floissac, CJ was guided by a dictum of Lord Wilberforce in **Reardon Smith Line v Hansen-Tangen**[25] where he said:

> "When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."

[50] Accordingly, what Mr Zherebtsov or Mr Meyer assert on the interpretation of Regulation 47 is immaterial. The question to be answered is the meaning which the Regulation would convey to a reasonable person, having all the background knowledge which would reasonably have been available to the parties if placed in the situation of the parties.

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[22] Section 12 BCA
[23] Oakbank Oil Co. v Crum (1882) 8 App Cas. 65 HL
[24] Civil Appeal No. 1 of 1991-Court of Appeal –British Virgin Islands-Judgment delivered on 10 January 2004 [unreported].
[25] [1976] 1 All E.R. 570 at 574.

[51] Nonetheless, there are two diametrically opposed interpretations of the right to remove directors. Ms Troy argued that under the articles read as a whole, there is a continuing obligation on each member of Lenta to support the nominees of Mr Zherebtsov. Therefore, other members of Lenta cannot remove a director nominated by Mr Zherebtsov.

[52] The Defendants contend that Regulation 47 "specifically allows the members of Lenta to remove by way of simple majority any director however nominated and appointed, apart from the EBRD director." That right of removal, they say is not fettered in any way. Ms Cunningham embellishes and supports the Defendants' contention.

[53] For my part, I think it is necessary that I should set out copiously Regulation 47. It reads:

> "Without prejudice to Regulation 46, **the directors** (other than the EBRD Director) **may be removed by a simple majority vote of the members** [emphasis added]. Mr Oleg Zherebtsov and the other members' respective rights in Regulations 45 and 46 to nominate a director(s) shall also include the right to nominate a replacement for the removed director upon written notice to the other members."

[54] In my opinion, the language in the first sentence, namely "**the directors may be removed by a simple majority vote of the members**," is not complicated or strained. The words which the parties have used, being ordinary words of the English language, must be construed in their ordinary and natural meaning. The ordinary meaning of the sentence is as plain as a pikestaff. The phrase "a simple majority" is a term of art and means exactly what it says. It clearly envisages that *"any member may propose the removal of a director save the EBRD Director and that the removal can be done by a simple majority."*

[55] I therefore find great force in the submission of both Mr Webster and Ms Cunningham that aside from the exception carved out in relation to the EBRD Director, there is nothing further in Regulation 47 which requires the words therein used to be given a different meaning to that which they would be commonly understood to have. Similarly, there is no conflict between the language in Regulation 47 and the other Regulations which would require the sentence to be read differently.

[56] In addition, there is nothing in the Regulations read as a whole which would, on the face of it, be inconsistent with the right of any member to propose the removal of a director other than the EBRD Director. Regulation 47 is in the standard form giving the members the right to remove directors by a resolution passed by a simple majority which is wholly in keeping with conventional company law where the shareholders have the right to appoint and remove directors. It appears that a conflict only arises if the term of "continuing support" as contended for by the Claimants is implied into the Regulations.

[57] The Regulations should be construed with reference to their overall objective and their purpose and accordingly, the whole context must be considered in endeavouring to garner the intention of the parties, even though the immediate object of inquiry is the meaning of this isolated sentence. And so Lord Davey in **N.E. Railway v Hastings**[26], quoting Lord Watson in **Chamber Colliery Co v Twyerould** said "*the deed must be read as a whole in order to ascertain the true meaning of its several clauses...*" Reading the articles of association in their entirety, there is certainly nothing which confers or purports to confer upon Mr Zherebtsov absolute or sole control of the Board. What the Claimants have done is to look outside of Regulation 47 and, indeed, the articles as a whole. They have approached the Court with an unreservedly preconceived and misconceived notion that Mr Zherebtsov should have full control of the Board. It seems to me that if it were intended that members could vote for the removal of only their own directors, it would have been the simplest thing for the draftsman to put in Regulation 47. Instead, the draftsman carved out only one exception to that Regulation.

[58] In my judgment, any different meaning to the grammatical and ordinary meaning of Regulation 47 would lead to absurdity and inconsistency; precisely what Judges have been admonished to avoid.

[59] Furthermore, if the right to remove directors were restricted in the manner proposed by the Claimants, the effect would be absurd. If accepted, it follows that the removal of the independent directors could not be proposed and acted upon by the other members even

[26] [1900] A.C. 260 at 267.

though a nomination of those directors had been subject to their approval in the first place. There is no legal or commercial justification for such a limitation to be imposed upon the rights of the members to remove a director who is in office as a result of the exercise of their discretion.

[60] Additionally, if Regulation 47 is given the meaning asserted by the Claimants, it would be wholly unreasonable and inequitable. There is nothing inconsistent or commercially unrealistic with the right of a simple majority vote to remove a director. Indeed, this is one of the tenets of company law. In the absence of any contrary provisions in the articles, BVI law expressly recognizes the members' prerogative to remove a director either by a resolution passed by simple majority at a meeting or by a written resolution passed by 75%.[27] I cannot accept that there is any basis for the implication of such terms as contended for by the Claimants, whether on the grounds of business efficacy or otherwise. Regulation 47 provides a readily comprehensible method of removing directors which is both effective and common to most companies.

[61] Regulation 47 is capable of clear expression. It does not contradict any express Regulations in the articles but adds to them. It is something so obvious that if an officious bystander had been asked whether that was the common intention of the parties the answer would have been "of course."

[62] In addition, the term that the Claimants seek to imply is, in any event, far too wide. By imposing an obligation of continuing support in respect of independent directors, it appears that the court would be removing from the members any right to remove directors appointed by reason of their exercise of discretion. The Claimants' arguments indubitably introduce a method of interpretation which is novel and unsound.

Implication of a right of "continuing support" beyond the right to "appoint"

[63] Regulation 45 confers on Mr Zherebtsov a right to nominate and have appointed three directors and to nominate a further two independent directors who would be appointed only

[27] See BCA, sections 114 and 81.

upon approval of the other members. The right in Regulation 45 is in respect of nomination only. Nothing contained therein speaks to a right to maintain in office any or all of those directors.

[64] It is plain that where the parties intended such a right, they have expressly carved out such right: see Regulation 46. The overwhelming inference, therefore, is that if the parties intended to confer upon Mr Zherebtsov a right of continuing support for his directors, it was the simplest thing for the draftsman to do and they would have inserted such right in this meticulously drafted document. They did not do so and, as Ms Cunningham correctly submitted, the only sensible conclusion to be drawn is that they did not intend to confer such right.

[65] For all of the reasons given above, it seems to me that on a proper construction of Regulation 47, the directors (other than the EBRD Director) may be removed by a "simple majority vote of the members." This is a clear, unambiguous power that the members of Lenta have been granted by the articles. I can find nothing in the BCA or in the articles which constrains me to come to any other conclusion.

EBRD's Rights regarding Director Representation

[66] Regulation 46 reads:

> "Provided that EBRD continues to hold Shares, EBRD shall have the right to:
>
> a) **appoint and maintain** in office such individual as EBRD may from time to time nominate as a non-executive director of the Company (the "EBRD Director") and remove any EBRD Director so appointed and upon such EBRD Director's removal appoint such other individual in such EBRD Director's place;
>
> b) in the event of the EBRD Director being unable to attend a meeting of the Board or any committee of the Board, nominate an observer who shall be permitted to attend at such meeting;
>
> c) **require that at all times there will be at least one independent individual with international stature within the retail industry serving as a non-executive director of the Company**; and

d) **require** the appointment of an EBRD nominee as a member of the audit committee of the Company.

The EBRD Director shall not be entitled to the payment of any director's fees. The Company shall reimburse the EBRD Director and any person appointed pursuant to Regulation 46(b), (c) or (d) above with all reasonable costs and out-of-pocket expenses (including travel costs) incurred by such Director in respect of attending meetings of the Company or carrying out authorised business on behalf of the Company."

[67] It appears to be common ground that EBRD has, by virtue of Regulation 46, a right to *"appoint and maintain"* in office such individual as it nominates and to require that at all times there will be "*at least one independent individual with international stature within the retail industry*" on the Board. Neither the Claimants nor the Defendants advanced any pleaded case on a different interpretation of Regulation 46.

[68] However, as Ms Cunningham so correctly pointed out, in stark contrast with paragraph 3A of the Amended Statement of Claim, paragraph 3(4) of the prayer for declaratory relief appears to intimate to more restricted rights of EBRD. Remarkably,

1. the Claimants adopt the restrictive language contained in Regulation 45 and seek a declaration that EBRD has the right to *"nominate and appoint"* a director, rather than EBRD's actual right which is to "*appoint and maintain"* in office such individual as it may from time to time nominate.

2. the Claimants seek a declaration that EBRD has a right to "*nominate a further independent director*". This again appears to be in stark contrast with Regulation 46.

3. the Claimants assert that the other members have a *"right to nominate two, but not more than two, Other Member Directors.*"

[69] Ms Cunningham correctly submitted that in so far as the declaration sought is intended to restate the right of the other members (including EBRD under Regulation 45), then it is not clear why it is necessary. She added that insofar as it is intended to limit the other

members and the EBRD's rights under the Regulations as a whole, then it should be clearly stated.

[70] In my judgment, Regulation 46 is pellucidly clear. Regulation 46(a) states that the EBRD shall have the right to "appoint and maintain" in office such individual as it nominates. It therefore provides the mechanism by which the EBRD Director is to be appointed.

[71] Regulation 46(c) states **that EBRD shall have the right to require** that at all times there will be "*at least one independent individual with international stature within the retail industry*" on the Board. The Regulation is clear and easily understood. Again, there is no need to import any strained meaning. Regulation 46(c) does not speak to "appoint and maintain" but to the right of the EBRD to "require" that there be at least one independent individual with international stature within the retail industry on the board. As Ms Cunningham elegantly puts it, "it operates as a super-added layer over the appointment process". It does not mean that the EBRD has a right to "appoint" a second director of its choice as contended by the Claimants.

[72] In my judgment, under Regulation 46 taken as a whole, the EBRD has the right to appoint only one director pursuant to Regulation 46(a). There is no right under Regulation 46(c) for the EBRD to appoint a second director. It is simply a right of the EBRD to "require" that there be and not to "appoint and maintain" at least one independent individual with international stature within the retail industry on the Board. It is a qualification that the independent individual should possess as opposed to an appointment that the EBRD should make.

Appointment of a "ninth" director

[73] Another issue arose, albeit late in oral submissions, as to the appointment of a "ninth" director. Before I deal with the issue, I should remark in passing that the Claimants are of the opinion that the Defendants admitted that "the Other Members of Lenta have a right between them to nominate two, but not more than two directors of Lenta (Other Member

Directors).[28] Therefore, to turn around and say now that the "ninth" director is at large, to be appointed by the members under the BCA, is inconsistent with their initial stance.

[74] It is common ground that Regulation 44 provides for the number of directors of Lenta to be "not less than one and not more than nine directors" and that there is no requirement for Lenta either always or at any given time to have the full complement of nine directors that it is permitted to have.

[75] The Claimants however assert that Regulations 45 and 46 of the Articles provide a complete code for the appointment of the not less than one and not more than nine directors referred to in Regulation 44. Specifically, the Claimants sought to demonstrate that one does not have to look beyond the Articles of Lenta for the appointment of a ninth director as Regulation 46(c) makes provision for such appointment, contrary to the EBRD as well as the Defendants' submissions. Ms Troy fought hard in her attempt to persuade this Court that Regulation 46(c) when read in conjunction with the final paragraph of Regulation 46 provides for the appointment of an independent person with international stature within the retail industry as a "ninth" director of Lenta, at the behest of the EBRD.

[76] At paragraphs 66 to 72 of this judgment [supra], this issue was fully canvassed and determined. I simply do not intend to repeat what was already resolved except to indicate that I accept the submissions of the EBRD that it is entitled to appoint and maintain a single "EBRD Director" under Regulation 46(a) and Regulation 46 (c) has nothing to do with the appointment of another director at the behest of the EBRD but simply alludes to a super-added layer over the appointment process. I also agree with Learned Counsel for the EBRD that if a ninth director is to be appointed, that person is to be appointed in accordance with section 113(2) of the BCA, by the members, as there is no provision in the Articles for the appointment of a ninth director. Learned Queen's Counsel, Mr Webster fortified these arguments in his short and succinct written submissions.

[28] Amended Defence and Counterclaim, para 3, Responses to request for further information, Request 1-2 and Responses (a) to (b) and Requests 9 to 12 and Responses (i) to (l), Amended Defence and Counterclaim, para 10-11.

[77] Ultimately, I hold that on their true and proper construction, Regulations 45-46 of the Articles of Association of Lenta provide for the appointment of up to nine directors, of whom seven are to be appointed in accordance with the provisions of Regulation 45, one is to be appointed in accordance with the provisions of Regulation 46 and one is to be appointed in accordance with the provisions of section 113(2) of the BCA without restriction.

Is Mr Zherebtsov a "member" of Lenta?

[78] The Defendants submitted, somewhat diffidently, that Mr Zherebtsov is not entitled to nominate any director of Lenta because he is not a "member" of Lenta for purposes of Regulation 45 of the Articles.

[79] It is not in dispute that Mr Zherebtsov has never been issued any shares in Lenta and his name has never been entered on the Register of Members of Lenta. The shares over which he exercises control are owned by Robelco.

[80] Section 2 of the BCA defines a member in relation to a company to include a person who is a shareholder. Section 78 defines a shareholder as a person whose name is entered on the register of members as the holder of one or more shares or fractional shares in a company. Consequently, as is defined by the BCA, Mr Zherebtsov is not a member

[81] The Defendants submitted that Regulation 45 confers upon Mr Zherebtsov the right to nominate directors of Lenta "while he remains a member (of Lenta). According to Mr Webster QC, "Mr Zherebtsov is not and has never been "a member (of Lenta)". Consequently, he does not have the right to nominate members.

[82] Learned Counsel for the Claimants, Ms Troy, raised the issue of estoppel. She argued that the Defendants are estopped from arguing that Mr Zherebtsov is not a member as (i) he holds shares in Lenta through Robelco, (ii) he has been treated as a shareholder and (iii) in the M & A's and the Subscription Agreement, Mr Zherebtsov is included in the definition of a key shareholder.

[83] First, Robelco owns 35% of the shares in Lenta and Mr Zherebtsov is the sole shareholder of Robelco.

[84] Next, the Memorandum and Articles of Association ("M & A's")[29] and the Subscription Agreement [30] of Lenta, however, define key shareholders as Svoboda, Robelco …together with the Robelco ultimate owner and the Svoboda ultimate owner. Regulation 45 describes the nominees of Mr Zherebtsov as the Principal Member Directors.

[85] There is evidence before the Court that the Investment Manager, Ms Katherine Lean (who swore to an affidavit in these proceedings) considers Mr Zherebtsov to be a member. Mr Meyer himself does. In his first affidavit he stated: "I have been informed by, and do verily believe, Katherine Lean, that when she sent the Notice out to **Members, including Oleg Zherebtsov..**."[31] At paragraph 7 of the said affidavit, Mr Meyer continued: "Oleg Zherebtsov under Article 47 retains the right to nominate a replacement for any of [sic] Principal Member Directors (as defined in Article 45 of the Articles)."[32] Yet another example can be gleaned from the Minutes of the Annual General Meeting ("AGM") **of Members** (emphasis added) of Lenta which took place on 7 September 2007. The preamble of the Minutes of that meeting indicated **the members** who were present: the name Oleg Zherebtsov (representing Robelco) appears.

[86] On 22 January 2008, eight days after filing his first affidavit, Mr Meyer swore a second affidavit. Therein, he specifically addressed the issue of whether Mr Zherebtsov is a "member". At paragraph 14, he said "In fact, Zherebtsov is not a member of Lenta". At paragraph 15, Mr Meyer makes a similar assertion. However, Mr Meyer has not explained this "turn around" on what he now deposed. He did not proffer any evidence to explain his inconsistency nor did he explain when during those eight days Mr Zherebtsov had ceased to be a "member" as, unquestionably, is the only inference to be drawn.

[29] See Exhibits to the first affidavit of Oleg Zherebtsov at page 133.
[30] See Exhibits to the first affidavit of Oleg Zherebtsov at page 50.
[31] See Paragraph 5 of first affidavit of August Meyer filed on 14 January 2008.
[32] See first affidavit of August Meyer filed on 14 January 2008.

[87] It is plain from the evidence which has been adduced at this trial that the intention of the parties was that both Mr Zherebtsov and Mr Meyer would be considered shareholders and thus members as long as they continue to be the ultimate owner of Robelco and Svoboda respectively and those two companies continue to hold shares in Lenta. It is not as simple as Mr Webster QC puts it, that Mr Zherebtsov is not a member by virtue of the definition contained in the BCA. By that definition, Mr Zherebtsov was never a member. However, Regulation 45 provides for the voting rights of Mr Zherebtsov whilst he **remains a member**. It appears from the Regulation that at the time of the drafting of the M & A's, the scrupulous draftsman considered Mr Zherebtsov a member. Nothing has changed in regard to the shareholding in Lenta since the drafting of the M & A's. As I reiterated, there is not an iota of evidence to demonstrate when that situation changed; in effect, when did Mr Zherebtsov cease to be a member since he was initially a member and/or was treated as a member. I am therefore of the view that since the judgment of the Court on 28 January 2008, nothing has changed materially to demonstrate that Mr Zherebtsov is not a member of Lenta.

[88] Ms Troy forcefully argued that in any event, the Defendants are estopped from denying that Mr Zherebtsov is a member of Lenta.

[89] Estoppel by representation is essentially a rule of evidence. Its effect was described by Lord Birkenhead in **Maclaine v Gattey**[33] as follows:

> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his detriment, A is not permitted to affirm against B that a different state existed at the time."[34]

[90] It is plain from the above that the Defendants are now estopped from denying that Mr Zherebtsov is a "member" of Lenta for purposes of exercising the nomination rights accorded to him in Regulation 45 of the articles. I therefore hold that Mr Zherebtsov is a member of Lenta for the purposes of nominating directors pursuant to Regulation 45.

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[33] [1912] AC 376 at 386.
[34] See Audubon Holdings Limited et al v The Treasure Island Company Limited et al [Claim No. BVIHCV2002/0227]– Judgment delivered on 31 March 2006 (BVI) [unreported].

Sole signatory rights to Mr Zherebtsov

[91] The Defendants counterclaimed for:

(i) an order that Mr Zherebtsov be restrained whether by himself or through any proxy or agent, from exercising or acting in any way in reliance upon the signing authority purportedly conferred on him by the Board of Directors of Lenta on 4 October 2007 or subsequently; and

(ii) an order that Mr Zherebtsov be restrained whether by himself or through any proxy from issuing in his sole capacity any other Powers of Attorney on behalf of Lenta. Alternatively, a declaration that any Power of Attorney issued by the Second Claimant in his sole capacity whether by himself or through an agent or proxy, is null and void.

[92] The facts which give rise to the Defendants' claim can be briefly stated as follows: on 4 October 2007, the Board of Directors of Lenta held an Extra-Ordinary meeting in St. Petersburg, Russia. In attendance were six directors namely Messrs Oleg Zherebtsov, Loren Bough, Vladimir Senkin, Greg Lykins, Rob Voss and Sevki Acuner. One of the items which was discussed at that meeting was a resolution to appoint a single authorised signatory on behalf of Lenta. Mr Zherebtsov expressed his wish to be considered to have the right to sign all documents of Lenta. It was resolved that **the proposed resolution be drafted and put before the Board for execution via email** (emphasis added) granting Mr Zherebtsov sole signatory rights on behalf of Lenta. It is a fact that unanimous consent was not received either on 4 October 2007 or at a subsequent meeting held on 14 January and continued on 16 January 2008.

[93] The Defendants contend that having such signatory rights would enable Mr Zherebtsov to act as the Company entering into and terminating contracts and would amount to having a power of attorney in relation to Lenta. They also contend that in accordance with the provisions of Regulations 57 and 58, the granting of sole signatory rights on behalf of Lenta would require a unanimous vote of the directors to be validly passed. According to

the Defendants, this did not happen as at least two of the directors, namely Mr Lykins and Mr Bough informed them that they did not vote in favour of the resolution granting sole signatory rights to Mr Zherebtsov at that meeting. The Defendants assert that the resolution was not validly passed. They are also troubled about the two sets of minutes of the meeting on that day, both purportedly signed by Mr Zherebtsov[35].

[94] The Claimants say that the Defendants have misguidedly characterised the assumed grant of such sole signatory rights as tantamount to a delegation of the powers of the Board of Directors of Lenta made in a manner inconsistent with Regulation 57 of the Articles, or to the grant of a power of attorney to Mr Zherebtsov, in a manner inconsistent with Regulation 58 of the Articles, in each case because those Regulations require the "*affirmative unanimous resolution of all the directors*", which, it is accepted, had never occurred.

[95] The Claimants emphatically state that Mr Zherebtsov has never contended that he has sole signatory rights on behalf of Lenta. However, they submit that, looking at the record of the Board Meeting held on 4 October 2007 that the sole signatory rights contemplated were no more than the "formal" signatory rights referred to in Regulation 69 of the Articles, which can be granted by simple "approval" of the directors of Lenta.

[96] It is true to say that the Claimants have not put in an answer to the counterclaim and, as Mr Webster submitted, the injunction sought should be granted. I may add that despite the failure to answer the counterclaim, they have not remained silent. Indeed, they have raised this issue at the trial and also at the resumed hearing.

[97] In looking at this issue, no doubt, a good starting point is the Regulations themselves. Regulations 57 and 58 state as follows:

[35] Compare Minutes of Extra-Ordinary Meeting of the Board of Directors held on 4 October 2007, pages 1 to 5 of Exhibit "AM1" with pages 6 to 7 of Exhibit "AM1." Both sets of Minutes are purportedly signed by Mr Zherebtsov. See specifically 4.1.4. In any event, the Court has, in passing, mentioned the allegedly two sets of Minutes. Nothing turns on this.

> "57. The Board may, **by affirmative unanimous resolution of all the directors**, [emphasis added] entrust to and confer upon any director any of the powers exercisable by it upon such terms and conditions and with such restrictions as it thinks fit, and either collaterally with, or to the exclusion of, its own powers, and may from time to time revoke, withdraw, alter or vary all or any of such powers…."
>
> 58. The Board may from time to time, **by affirmative unanimous resolution of all the directors** [emphasis added], by power of attorney appoint any company, firm or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the Company for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these Regulations) and for such period and subject to such conditions as they may think fit…"

[98] Regulation 57 of the Articles states that "the Board may, by affirmative unanimous resolution of all directors, entrust and confer upon any director any of the powers exercisable by it upon such terms and conditions and with such restrictions as it thinks fit…" This Regulation is clear and unambiguous and is easily understood given its plain and natural meaning and there is no need for the Court to imply any terms.

[99] In essence, Regulation 58 provides that the Board may from time to time, by affirmative unanimous resolution of all directors, by power of attorney, appoint any person, whether nominated directly or indirectly by the directors, to be the attorney of the Company…." Like Regulation 57, this Regulation is also clear and unequivocal and is to be given its plain and natural meaning. There is no need to import any strained or complicated meaning.

[100] Therefore, in my judgment, Regulation 58 requires the grant of any power of attorney on behalf of Lenta to be approved by "affirmative unanimous resolution of all the directors." It is also my view that Regulation 57 requires the same "affirmative unanimous resolution" for the conferment upon a director of the right normally vested in the Board, to approve the entering into transactions on behalf of Lenta.

[101] Although the Claimants have accepted that Regulation 58 requires the grant of any power of attorney on behalf of Lenta to be approved by "affirmative unanimous resolution of all the directors," they allege that:

1. The Defendants, as applicants for equitable relief by way of injunction and/or declaration, must come to the Court with clean hands but they have not done so;

2. There is an estoppel by convention pursuant to which the Defendants are prohibited from alleging that Mr Zherebtsov was not entitled to issue powers of attorney on behalf of Lenta acting alone in his capacity as one of its directors;

3. In any event, no perpetual injunction should be granted against Mr Zherebtsov because, on the evidence, there is no real risk that the acts complained of, which were of limited duration and of no discernible harm to Lenta (and, on the contrary, were of manifest benefit to both Lenta and Lenta LLC) will ever be repeated. In this regard, Learned Counsel cited the case of **Wilcox v Steel**[36].

[102] The maxim "he who comes into equity must come with clean hands" is of old vintage. It is used in cases where a claimant must show that his past record in the transaction is clean; for "he who has committed Iniquity …shall not have Equity."[37] In the present case, the Claimants relied upon the issue of a power of attorney that had been signed by a sole director of Lenta and to certain of the Defendants not as evidence that the Defendants did not come with "clean hands" but as circumstances giving rise to an estoppel that prohibited the Defendants from alleging that Mr Zherebtsov was not entitled to issue powers of attorney on behalf of Lenta acting alone but in his capacity as one of the directors.

[103] They allege that on 8 September 2007 Mr Bough issued a power of attorney to Mr Yuschenko. Judging from the date when it was granted, the power of attorney was retrospective. As Mr Webster correctly asserted, there is insufficient evidence before the Court as to the circumstances which led to the grant of that power of attorney. As a consequence, I am constrained to conclude that the issue of estoppel does not arise here.

[36] [1904] Ch. 212, C.A. and see generally, Snell's equity, 31st Ed. Pgs 396-397, para 16-13.
[37] Jones v Lenthal (1669) 1 Ch. Cas. 154.

[104] It is a fact that on 11 and 29 January 2008[38] Mr Zherebtsov had issued two powers of attorney. By letter dated 15 February 2008, the Claimants' solicitors, Forbes Hare confirmed to the Defendant's solicitors, O'Neal Webster that Mr Zherebtsov issued only two powers of attorney acting alone but in his capacity as one of the Directors of Lenta to Messrs Telyakov and Kolbin. They alleged that both of those powers of attorney were issued on an urgent basis, in response to the threatened alteration of the Russian Register of State Entities to substitute the name of Mr Yuschenko for that of Mr Senkin as General Manager of Lenta LLC, pursuant to an application that Mr Yuschenko had made on 24 January 2008.

[105] However "justified" and/or expedient that reason may appear to the Claimants, Mr Zherebtsov cannot usurp the powers of the Board particularly at a time when these parties are embroiled in discordant litigation. Even if there was no risk of any discernible harm to Lenta, Mr Zherebtsov must not for a moment lose sight of the fact that there is a Board. He is under the fallacious belief that the Articles of Lenta were intended to guarantee that he retained control of the Board of Directors and the overall management of Lenta.

[106] For all of the reasons stated above including the written submissions of the parties at the trial as well as at the resumed hearing and having regard to the case of **Wilcox v Steel**, I am of the considered opinion that even with evidence of provocation and urgency, the fact that Mr Zherebtsov had revoked the powers of attorney and he has profusely apologized to the Court, I will nevertheless grant a perpetual injunction against Mr Zherebtsov in relation to powers of attorney[39]. I take into account that these parties live outside the jurisdiction of this Court and consequently, this Court does not have personal jurisdiction over them.

[107] For completeness, I will provide specific answers to the specific issues set forth in the list of issues proffered by the Claimants[40] namely:

[38] There is divergent evidence on the date when the Power of Attorney to Mr Kolbin was granted . In any event, that needs no determination.
[39] See Order for the final injunction.
[40] See Issues 15, 16, 17 and 19.

1. The granting of sole signatory rights for Lenta to Mr Zherebtsov requires the affirmative unanimous resolution of the Board.

2. The granting of any power of attorney by Mr Zherebtsov requires the affirmative unanimous resolution of the Board.

3. There is no estoppel that prohibits the Defendants from alleging that Mr Zherebtsov was not entitled to issue powers of attorney on behalf of Lenta acting alone or in his capacity as one of the directors.

4. There is a real danger, however contrite Mr Zherebtsov appears to be, that, unless he is restrained from exercising sole signatory right and/or granting powers of attorney, he will do so again. As I indicated, this Court does not have *in personam* jurisdiction over him.

Status of Mr Voss

[108] This is yet another issue which has occupied some judicial time. The Claimants have pleaded that the Minutes of the AGM held on 7 September 2007, when construed in combination with Regulations 45 and 46 of the articles of Lenta, suggest that Mr Voss must have been appointed as an independent director; the logic being that since Mr Voss was not appointed as a Principal Member Director, an Other Member Director or the EBRD Director, then he must have been appointed as an independent director.

[109] The Claimants further assert that Mr Voss was appointed as an independent director pursuant to a nomination made on behalf of Mr Zherebtsov, under Regulation 45. They alleged that, on a true construction of Regulations 45, 47, 48 and 61, he cannot now be removed other than on the initiative of Mr Zherebtsov. Thus, the purported removal of Mr Voss is invalid.

[110] The Defendants reject vigourously the Claimants' argument and contend that the status of Mr Voss as an independent director was never discussed or confirmed. They submit that Mr Voss was never properly appointed as an independent director of Lenta.

[111] The Defendants say that even if the Court accepts that view that the appointment was valid, Mr Voss was properly removed by the members of Lenta on a resolution passed in accordance with the Articles of Lenta on 15 January 2008.

[112] I now consider whether Mr Voss was appointed as an independent member as asserted by the Claimants. Subsection 10 of the Minutes deals with "Election of the Board of Directors of the Company". Subsection 10.1 states that "in accordance with the given rights reserved for Oleg Zherebtsov in the Articles of Incorporation, his representative at the meeting, Vladimir Senkin put forward two of the allotted three candidates for seats on the Board of Directors". They include:

- Oleg Zherebtsov - Principal Member Director
- Vladimir Senkin - Principal Member Director
- One space left for future nominee – Principal Member Director

- Greg Lykins - Other Member Director
- Loren Bough - Other Member Director

- Sevki Acuner - EBRD Director

- Rob Voss - questionable

[113] Subsection 10.2 states that "Discussion amongst the Members followed" and 10.4 resolved that "the Members of Lenta Ltd have confirmed and approved the appointment of those named in 10.1 of the Minutes as members of the new Board of Directors effective 7 September 2007. One member namely Stephen Ogden abstained from voting".

[114] The issue which has arisen is whether or not Mr Voss was appointed as an independent director. Clearly, he was not appointed as a Principal Member Director as the Minutes noted that "one space left for future nominee". Again, he was not appointed as an Other Member Director because two such members were already appointed, namely Mr Lykins and Mr Bough. It seems therefore that Mr Voss was appointed in no other capacity but as an independent director pursuant to a nomination on behalf of Mr Zherebtsov under Regulation 45 of the Articles. All members present and voting save Mr Ogden (who abstained from voting) sanctioned and confirmed the appointment.

[115] It therefore lies ill in the mouth of the Defendants including Mr Meyer who was in attendance at that Meeting to say that Mr Voss was not appointed as an independent director of Lenta. When one also looks at the Minutes of an Extra-Ordinary Meeting of the Board of Directors held on 4 October 2007, the name Rob Voss appears as being present. It would be a mystery in what capacity he appeared if he was not a director. In fact, at that meeting, Mr Voss was elected as a member of the Committee styled "Nomination Committee".

[116] The next issue which arises for determination is this: having been validly appointed as an independent director, was he properly removed by the members of Lenta by a resolution passed on 15 January 2008? This will be dealt with under the following sub-heading.

Were the Written Resolutions of 15 January 2008 invalid and/or ineffective?

[117] The next contentious issue which arises for determination is whether the Written Resolutions of 15 January 2008 which purported to remove Mr Voss as the independent director and to appoint Messrs Meyer, Yuschenko and Kostygin as directors of Lenta were invalid and/or ineffective.

[118] At paragraph 16 of the Claimants' written submissions for resumed trial, the Claimants say that the Resolutions were invalid and/or ineffective for the following reasons namely:

1. the proposed Resolutions were not "notified" to Robelco (nor to the EBRD) as required by Regulations 36 and 91 of the Articles;

2. in any event, the proposed Resolutions were not approved by the "requisite majority" of votes referred to in Regulation 36 of the Articles which, by virtue of section 114 (2) (b) of the BCA (which is not subordinate to section 88 as the Defendants appears to intimate), is 75%.

Notification

[119] As to notice, it is common ground that Mr Zherebtsov was given notice of the Written Resolutions by way of an attachment to an email. Regulation 91 of the Articles of Lenta deals with Notices. It ascertains the method by which a resolution is to be sent. It states:

> "Any notice, information or written statement required to be given hereunder shall be in the English language and may be:
>
> a) personally delivered….or
>
> b) sent by air courier, ….
>
> c) sent by pre-paid airmail, or…
>
> d) sent by facsimile….."

[120] Regulation 36 of the Articles of Lenta provides as follows:

> "A resolution which has been notified to all members for the time being entitled to vote and which has been approved by members holding the requisite majority of the votes exercisable in the form of one or more documents in writing or by telex, telegram, cable, telefax or other written electronic communication shall forthwith, **without the need for any notice**, become effective as a resolution of the members".

[121] The Claimants argue that it is plain that the reference in Regulation 36 to "one or more documents in writing or by telex, telegram, cable or other electronic communication" is a reference to the forms in which a written resolution may be approved by members. They

allege that the prior notification of a written resolution required by the opening words of Regulation 36 ("A resolution which has been notified to all members for the time being entitled to vote") must be, but in this case clearly was not, delivered by one of the means specified in Regulation 91 of the Articles.

[122] Regulation 91 does not refer to service by email. The Claimants insisted that the proposed resolution was not notified to Robelco (nor to the EBRD) as required by Regulations 36 and 91. I am not astounded that the indefatigable Ms Troy who is prepared to leave no stone unturned would raise such a fine distinction particularly in this modern age of hi-tech advancement. In my opinion, she has put a narrow construction on Regulation 91 read in conjunction with Regulation 36.

[123] I would therefore hold that Mr Zherebtsov was properly notified and, for this insignificant reason alone, the Written Resolution cannot be said to be invalid. It cannot be said that Mr Zherebtsov did not have notice of the Resolution, albeit via electronic means.

Requisite majority

[124] I do not think it is disputed that the Written Resolutions passed on 15 January 2008 were approved by a 50.75% majority of the members. However, the Claimants say that by virtue of section 114(2) (b) of the BCA, the requisite majority of votes required for a written resolution to remove a director of a BVI Business company is 75%. The Defendants say that the appointment and removal of directors is regulated by Regulation 47 of the Articles of Lenta and there is no need to look to the BCA. Pursuant to Regulation 47, a simple majority is required to appoint or remove a director.

[125] The Written Resolutions document is boldly styled "WRITTEN RESOLUTIONS OF THE MEMBERS ADOPTED IN ACCORDANCE WITH REGULATION 36 OF THE ARTICLES OF ASSOCIATION." The first sentence reads "The undersigned (the "**Members**") being the shareholders of the Company, DO HEREBY CONSENT to the adoption of the following resolutions taken without a meeting, this resolution (the "**Consent**") to have the same force and effect as "if the actions herein referred to had been taken at a timely called

and duly held meeting of the Shareholders of the Company…" There could never be clearer language as to whether these were resolutions adopted at a meeting.

[126] Next, the divergent views taken by the parties lead to the following question: are the Written Resolutions governed by the Articles of Lenta or by section 114 (2) (b) of the BCA? The Defendants contend that both sections 88 and 114 of the BCA are subject to the memorandum and articles of Lenta, and as such, the articles must prevail in order to determine this issue. This is true. However, it cannot be disputed that if the articles are silent, then one reverts to the BCA for assistance.

[127] Section 114 of the BCA provides as follows:

> "(1) Subject to the memorandum and articles of a company, a director of a company may be removed from office by resolution of the members of the company.
>
> (2) A resolution under subsection (1) may only be passed
>
> (a) at a meeting of the members called for the purpose of removing the director or for purposes that include, the removal of a director; or
>
> (b) by a written resolution passed by at least seventy-five per cent of the members of the company entitled to vote."

[128] As I stated in paragraph 60 of this judgment which I now restate "in the absence of any contrary provisions in the articles, BVI law expressly recognizes the members' prerogative to remove a director either by a resolution passed by simple majority at a meeting or by a written resolution passed by 75%.

[129] There is nothing in the Articles that modifies this statutory requirement. The Defendants sought assistance from section 88 of the BCA. This section is not helpful. The section simply provides that "any action that may be taken by members at a meeting may also be taken by a written resolution of the members". The Claimants contend that the more specific and apposite provision is section 114 (2) (b) which deals specifically with written resolutions and which must prevail in relation to a determination of "the requisite majority of votes" that is required for a valid written resolution to remove a director. It is

unquestionable that Regulation 47 of the Articles speaks to the removal of directors but in my judgment, it contemplates a meeting where all members are present and voting in person. In addition, it speaks nothing of written resolutions. I agree with Ms Troy that in such matters where written resolutions are circulated for approval, the threshold is higher than in a meeting where members are able to be involved in open and candid discussions.

[130] Accordingly, I hold that the Written Resolutions were and are invalid and ineffective to remove Mr Voss as a director of Lenta because they were not passed by the requisite majority of 75%. It naturally follows that, if the Written Resolutions were not effective to remove Mr Voss as a director, they also cannot have been effective and valid to appoint all of Messrs Meyer, Kostygin and Yuschenko as directors because that would have resulted in a board of ten directors contrary to Regulation 44 of the Articles.

Were the Resolutions adopted by a majority of the directors present at the Board Meeting of 14 and 16 January 2008 valid?

[131] Flowing from the above paragraph, this Court, having declared that the Written Resolutions of 15 January 2008 were formally valid because the requisite notice by the contemporary technique of electronic transmission was given to Mr Zherebtsov, this Court further declares: (i) Mr Voss was not properly removed as a director and (ii) the appointment of Messrs Meyer, Kostygin and Yuschenko as additional directors is ineffective because the Written Resolutions that purported to remove and appoint these persons were not passed by the requisite majority of 75% of the votes available to be cast.

[132] It follows therefore that as at 16 January 2008, the Board of Directors of Lenta was comprised of the following seven directors namely Messrs Zherebtsov, Senkin, Bough, Voss, Lykins, Acuner and Leschenko.[41] It would further follow that the Resolutions adopted by the Board on 16 January 2008 by a simple majority of the directors present and voting comprising Messrs Zherebtsov, Senkin, Leschenko and Voss, which were that the employment of Mr Yuschenko as General Manager of Lenta LLC be cancelled and not renewed for 2008 and that Mr Zherebtsov should be given authority to appoint his

[41] Appointed as director at the Extra-ordinary Meeting of Shareholders on 31 October 2007.

replacement (which eventually resulted in the appointment of Mr Senkin as General Manager of Lenta LLC) were validly adopted.

[133] The above conclusions correspond with paragraph 3 of the Order that the Court made on 28 January 2008, which Order must now be confirmed.

Ancillary issues

[134] The Claimants have raised a plethora of other issues which I do not think warrant my determination. However. I do hope that I have answered those which will assist in the resolution of the existing dispute between the parties.

Conclusion

[135] For these reasons, which owe much to the formidable arguments of all Counsel, I make the following declarations and orders:

[136] **IT IS DECLARED that:**

1. On its true and proper construction, Regulation 47 of the Articles of Association of Lenta Limited permits any member to propose the removal of a director (save for the EBRD Director) and provides that the proposal may be passed by a simple majority vote of the members.

2. On their true and proper construction, Regulations 44-46 of the Articles of Association of Lenta Limited provide for the appointment of up to nine directors, of whom seven are to be appointed in accordance with the provisions of Article 45, one is to be appointed in accordance with the provisions of Article 46(a), and one is to be appointed pursuant to section 113(2) of the BVI Business Companies Act, 2004, without restriction.

3. On the true and proper construction of the Articles of Association of Lenta Ltd and the BVI Business Companies Act, 2004, Oleg Zherebtsov is a member of Lenta Limited for purposes of nominating directors to its Board.

4. The members' Written Resolutions of January 15, 2008 were invalid and/or ineffective to (i) remove Robert Voss as an independent director of Lenta Ltd and (ii) appoint any of Messrs Kostygin, Yuschenko and Meyer as additional directors.

5. The current directors of Lenta Limited are Oleg Zherebtsov (Chairman of the Board and Principal Member Director), Vladimir Senkin (Principal Member Director), Mikhail Leschenko (Principal Member Director), Loren Bough (Other Member Director), Robert Voss (Independent Director), Greg Lykins (Other Member Director) and Sevki Acuner (EBRD Director).

6. The Resolution adopted by the Board on 16 January, 2008 that resulted in the appointment of Mr Senkin as General Manager (or Director General) of Lenta LLC (OOO) was valid, as was the Board Resolution of the same date which cancelled the employment of Mr Yuschenko as General Manager (or Director General) of Lenta LLC (OOO). Accordingly, Mr Sergei Yuschenko has ceased to be the General Manager (or Director General) of Lenta LLC (OOO) and Mr Vladimir Senkin is the duly appointed General Manager (or Director General) of Lenta LLC (OOO).

7. No Power of Attorney to act on behalf of Lenta Limited is valid unless it is or was granted pursuant to an affirmative unanimous resolution of all of the directors of Lenta Limited under Regulation 58 of its Articles of Association.

[137] **AND IT IS HEREBY ORDERED as follows:**

1. The Second Claimant is restrained, whether by himself or through any proxy, servant or agent whosoever, from:

    a) acting on the sole signatory rights purportedly granted to him on October 4, 2007; and

    b) issuing in his sole capacity, without an affirmative unanimous Board resolution, any Power of Attorney for any reason to any person on behalf of Lenta Limited.

2. The injunctions herein granted in paragraph 1 of the Order of 20 December 2007, in paragraph 2(5)-(6) of the Order of 22 January 2008 and in paragraph 1(5)-(6) of the Order of 31 January 2008, as continued, are hereby discharged.

3. The injunctions herein granted pursuant to CPR 17.1(1)(b), in paragraph 2(1)-(4) of the Order of 22 January 2008 and in paragraph 1(1)-(4) of the Order of 31 January 2008, as continued, are hereby made perpetual and the First, Second and Fourth Defendants and each of them accordingly are restrained, whether themselves or through any corporate officer (as regards Svoboda Corporation), proxy, servant or agent whosoever from:

    a) further disseminating either any copy or the substance of the Register of Directors of Lenta Limited as amended pursuant to the Written Resolutions of January 15, 2008 to record the removal of Robert Voss as a Director of Lenta Limited and the appointment of Dmitry Kostygin, Sergei Yuschenko and August Meyer to its Board of Directors;

    b) further publishing or disseminating either any copy or the substance of the Written Resolutions dated 15 January 2008 that purport to have effected the said changes in the composition of the Board of Directors of Lenta Limited;

    c) taking any further step pursuant to or in reliance on the Written Resolutions dated 15 January 2008 that purport to have effected the said changes in the composition of the Board of Directors of Lenta Limited; and

    d) taking any further step pursuant to or in reliance on the Confirmations incorporated into the Written Resolutions dated 15 January 2008 that purport to confirm that Sergei Yuschenko is the lawful and true Chief Executive Officer of Lenta Limited and Director General of Lenta OOO (or LLC) and that Vladimir Senkin is not the Chief Executive Officer of Lenta Limited or Director General of Lenta OOO (or LLC).

4. The Register of Lenta Limited be rectified, if necessary, to reflect the present composition of the Board of Directors set out in declaration 5 above.

5. The parties are to file and exchange Schedules of Costs and written submissions on both liability for and the basis of assessment of costs, by Friday, 11 April 2008.

Postscript

[136] I venture to say that the parties to this litigation must put their differences aside if they are to work towards the common good of this profitable enterprise. As Mr Acuner said: "the only way forward for us and our Company is for everyone to talk as business partners at the appropriate forum which is usually the Board, and when appropriate, the General Shareholders' Meeting".

Indra Hariprashad-Charles
High Court Judge