Neutral Citation Number: [2010] EWHC 647 (Comm)

Case No: 2007 Folio 942

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2010

Before :

THE HONOURABLE SIR ANTHONY COLMAN

- -

Between :

BORIS ABRAMOVICH BEREZOVSKY

Claimant

- and -

ROMAN ARKADIEVICH ABRAMOVICH

Respondent

- -
- -

Laurence Rabinowitz QC, **Richard Gillis QC, Andrew George and Simon Colton** (instructed by Addleshaw Goddard) for the **Claimant**

Andrew Popplewell QC, Helen Davies QC and Andrew Henshaw (instructed by **Skadden**) for the **Respondent.**

Hearing dates: 20-24 July and 2-12 November 2009

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Final Judgment

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

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THE HONOURABLE SIR ANTHONY COLMAN

JUDGMENT OF THE HON
SIR ANTHONY COLMAN
SITTING AS A DEPUTY
JUDGE OF THE HIGH COURT

Introduction

1. There are before the court two applications. The Defendant, Mr. Roman Abramovich, to whom I shall refer throughout as "RA", applies (1) to strike out the claim against him by Mr. Boris Berezovsky, to whom I shall refer as "BB", under CPR 3.4(2)(a) — "the statement of case discloses no reasonable grounds for bringing - - - - the claim" — and under CPR 3.4(2)(b) — "the statement of case is an abuse of the court's process" — or (2) for summary judgment against BB on the whole of his claim under CPR 24.2 on the grounds that (a) BB has no real prospect of succeeding on the claim and (b) there is no other compelling reason why the case should be disposed of at a trial.

2. The Claimant, BB, applies for permission to amend his Particulars of Claim and Reply in various distinct respects. He does so — as so frequently occurs in the face of a defendant's strike out or summary judgment application — in order to attempt to improve upon his case, as originally advanced, by addition or clarification in the light of the defendant's criticisms. In the present case the amendment application is partly opposed on the grounds that it seeks to introduce new causes of action which are time-barred and/or that some of the proposed amendments are intrinsically lacking in any real prospect of success and/or that the attempt to introduce them at such a late stage is an abuse of process.

3. Where, as in this case, a claimant applies to amend his case in the face of a strike-out or summary judgment application the usual approach is for the court to decide whether to give permission for those amendments and then decide the defendant's applications with reference to the statement of case amended to the extent, if any, permitted by the court, but subject always to such special orders as to costs as may be appropriate in view of the late introduction of those amendments which have been permitted.

4. Accordingly, since the issues as to strike out and Summary judgment have to be determined on the basis of the Statement of Case and Reply amended to such extent, if any, as the amendment application may succeed, it is necessary first to decide that amendment application and then to determine the strike-out and summary judgment applications. Since a major ground upon which RA challenges BB's amendment application is the lack of any realistic prospect of success of the allegations in their amended form — a ground also mainly relied upon in respect of the original pleadings before introduction of the amendments, it will first be necessary to explain in some detail the factual basis which has given rise to the disputes between the parties.

The Factual Background as relied upon by BB.

5. According to BB, until 30th October 2000, he was a businessman in Russia with extensive commercial interests. These included a company — ZAO LogoVaZ — carrying on the business of servicing and selling motor vehicles, a 50 per cent interest in ZAO ORT-KB which in turn owned 38 per cent of OAO-ORT —a Russian Public Television company, another channel — TV6 — three Russian newspapers and a 21.5

per cent interest in OAO Siberskaya Neftyanaya Kompaniya, a Russian oil company, to which I refer as "Sibneft."

6. In addition to his business activities, BB had been heavily involved in Russian politics. He had been a strong supporter of and on good terms with President Yeltsin and had been Deputy Secretary of the Russian Security Council (October 1996 to November 1997), Executive Secretary of the Commonwealth of Independent States, the CIS, which was the successor umbrella organisation to the Soviet Union (April 1998 to April 1999) and an elected member of the Duma from 1999 until July 2000.

7. The television Company, ORT, had been part-privatised by Presidential Decree in December 1994, as a result of which 49 per cent of that company was sold to the private sector, including a substantial proportion to BB with the result that Mr Arkadi Patarkatsishvili (to whom I shall refer as "AP"), who was a close business associate of BB, became First Deputy General Manager. ORT's television channel was the leading Russian television channel. By 1998 BB and AP had acquired control of the entire privatised 49 per cent of ORT through ZAO ORT-KB and LogoVaZ. BB to some extent used Channel One operated by ORT as his political mouthpiece.

8. Following the resignation of President Yeltsin (31st December 1999), Vladimir Putin, then Prime Minister, took over control of the country and, having won the presidential election, was inaugurated as President on 17th July 2000. Although BB had supported Mr Putin for the Presidency, he subsequently openly criticised the government's policies in the media and in August 2000 publicly declared his intention to form a movement of "constructive opposition" to President Putin's administration.

9. On 12th August 2000 the Russian submarine KURSK was tragically lost in the Barents Sea and all the crew perished. Channel One was highly critical of the government's handling of the disaster. At a meeting in Moscow with one Alexander Voloshin, Chief of the Presidential Administration, which took place later in August 2000, BB was informed that President Putin wished to take control of the management of ORT and that BB should therefore surrender or procure the surrender of ORT-KB's and LogoVaz's shareholdings to the state or to an acceptable body and if he failed to do so, he "would end up like Vladimir Gusinsky." The latter, who controlled a private television network (NTV), had on 13th June 2000 been arrested and imprisoned having been charged with fraud. Three days later he was released and the charges were dropped upon his signing an agreement to sell his shareholding in the company controlling NTV against a promise by the Minister for Press, Television, Radio Broadcasting and Media Communication that the charges would be dropped. In the European Court of Human Rights in *Gusinsky v Russia*, Application 70276/01, this conduct of the Russian Government was subsequently not surprisingly condemned as a serious violation of Articles 5 and 18 of the European Convention on Human Rights.

10. In the course of that meeting with Mr. Voloshin, BB asked to meet President Putin. This meeting took place on the following day. President Putin repeated the demand for the transfer of the shares, confirmed that he wished to manage ORT personally and confirmed that BB would be imprisoned if he did not agree.

11. Shortly after this meeting AP was required to meet President Putin by whom he was told that the President wished BB and AP to "clear out" of ORT and that he must negotiate to sell the shares. A price was subsequently offered to AP but BB refused to

sell and in September 2000 he made a public announcement that in order to preserve the independence of ORT from the government, he would put the shares into a trust. His relations with the President got worse and on 30th October 2000 he left Russia for France. In the event the trust was not created.

12. On 7th December 2000 one Nicolai Glushkov, a close personal friend and business associate of BB and AP, was arrested. From 1996 to 1998 he had been First Deputy Director General of Aeroflot. He subsequently helped BB and AP to set up LogoVaZ, as part owner of ORT, and became its first financial manager. He was not in good health but was imprisoned in the harsh environment of Lefortovo Prison operated by the Federal Security Service. He has, it is alleged, consistently denied the charges regarding his administration of Aeroflot.

13. In December 2000, according to BB, there took place a meeting at BB's home in Cap d'Antibes, France, between BB, AP and RA. These three had an existing business relationship relating to the oil and gas company called Sibneft, referred to above. In the course of that meeting RA stated that he had come on the orders of the President and Mr Voloshin, that BB and AP had to sell their interests in ORT immediately, and if they did so, Mr Glushkov would be released from prison and they would be paid US$175 million but, if they refused to do so, Glushkov would remain in prison for a very long time and the President would seize their interests in ORT. BB says that he and AP had no alternative but to sell their interests for that price which represented a substantial undervalue. That is what they did, but Mr Glushkov was not released.

14. I interpose that RA denies that any such conversation took place. He says that some time before 25th December 2000 at a venue which he cannot remember he met with

BB and AP and was told by BB that he wanted to sell his interests in ORT and that BB invited RA to purchase them for a price of US$150 million which RA assumed also to cover AP's interests. RA says that he eventually agreed to pay them $175 million — an amount in excess of the true value of those interests and that the interests of BB and AP were sold to companies controlled by RA. It is denied by RA that the Russian state was operating through him in persuading BB and AP to dispose of their interests in ORT.

Sibneft

15. Meanwhile, in the period from about August 2000 to early 2001, in the course of a number of meetings between AP and RA, the latter stated that it was known by the Kremlin that BB and AP had interests in Sibneft and that there was mounting pressure from the Government such that those interests could be expropriated. AP understood that the implication of such remarks was that if they did not agree to dispose of their interests in Sibneft both he (who did not leave Russia until March 2001) and BB, who had already fled the country, would face serious consequences and he so informed BB.

16. At this point it is necessary to explain the relationship between BB, AP and RA with regard to Sibneft.

17. The company was created by Presidential Decree in August 1995 and combined previously state-owned companies with interests in the Omsk Oil refinery, oil and gas production and oil exploration and marketing. BB, PA and RA agreed in anticipation of such privatisation that they would acquire a controlling interest in Sibneft when it was created. BB was involved in discussing the privatisation plans with President Yeltsin

and the then government and with raising the necessary finance, whereas RA was concerned with the selection of the corporate components which would be combined in the new entity.

18. As will appear later in this judgment the precise nature of the interests which BB, AP and RA held in the privatised company is of fundamental importance to these proceedings.

19. BB alleges that before privatisation it was agreed between the three of them that such interest as they acquired in Sibneft would be held as to 50 percent by RA, 25 per cent by BB and 25 per cent by AP, that the profits would be shared in the same proportions and that any future business interests which they might acquire would be shared in the same proportions. I refer to this agreement as "the 1995 Agreement."

20. When BB's case was first pleaded, it was alleged that under the 1995 Sibneft Agreement BB, AP and RA would hold "beneficial" interests in Sibneft in the proportions 25%, 25%, 50%. However, in RA's Defence it was pleaded that this was a transaction governed by Russian Law and in that law there was no concept of a trust or of beneficial ownership of the nature of that arising under the English Law of trusts. This has caused BB to apply to introduce by a very late amendment and on the basis of expert evidence which has been placed before this Court a redefinition of the nature of the interests acquired under the 1995 Agreement by application of Russian Law. The amendment defines that agreement as a joint activity agreement, alternatively as a binding sui generis agreement. It further identifies the rights which BB and AP acquired by participation in that agreement. It pleads that they (1) had the right to demand from RA a distribution of the acquired ownership interests in the agreed

proportions; (2) would acquire rights of co-owners in respect of any property directly acquired by RA as a result of the agreement and (3) had the right to distribution of profits resulting from the joint activity in the agreed proportions.

21. By a further Presidential Decree dated 29 September 1995 the Government approved a privatisation Scheme under which 51 per cent of the issued share capital of Sibneft (4,516,396,250 shares) would be issued and transferred to state ownership for three years, the balance of the share capital to be sold by tender or auction. By a further decree of 30th October 1995 it was provided that the Government could auction the right to enter into a "loans for shares" agreement under which the successful bidder would loan money to the State and also manage the State's shareholding in Sibneft for three years, at the end of which, if the State failed to repay the loan, the 51 per cent shareholding would be transferred to the creditor. A company called Neftyanaya Finansovaya Kompaniya ("NFK") which was owned and controlled by BB, AP and RA, together with Stolichny Savings Bank, bid in the auction and on 28th December 1995 its bid was declared successful. There then followed auctions of the remaining (49 per cent) share capital most of which was acquired by companies under the control of RA and a smaller part of which was acquired by entities jointly owned or controlled by BB and RA. All such acquisitions are said to have been subject to the terms of the 1995 Sibneft Agreement. In May 1997 NFK transferred its management rights to Finansovaya Neftyanaya Korporatsiya ("FNK"). In October 1998 the State failed to repay the loan and its 51 per cent shareholding was transferred to FNK. On 16th December 1998 the issued share capital of Sibneft was increased to 4,741,299,639 of which about 86 per cent had been acquired by entities on behalf of BB, AP and RA

subject to the terms of the 1995 Agreement or a subsequent successor agreement made in 1996 ("the 1996 Agreement") to which I shall refer below.

22. It was originally pleaded that until 1996 BB and AP legally owned or controlled companies which owned or controlled their respective proportions of the shares in Sibneft but, because BB was becoming more heavily involved in politics and AP was the manager of ORT, it was decided between BB, AP and RA by way of oral agreement that it would be expedient if all the shares owned by BB and AP in companies which owned or controlled their respective interests in Sibneft should be legally transferred to RA or to entities under his control. However, by a late amendment it is pleaded that under the 1996 Agreement it was agreed that RA, BB and AP "would arrange matters so that RA or his companies were the legal owners of all the shares in Sibneft which had been acquired pursuant to the 1995 Agreement", that BB and AP "would continue to have the rights and interests which they had acquired pursuant to the 1995 Agreement in the shares that would be held by RA" and that RA "would, upon request, transfer to BB and/or AP shares equivalent to their interest in Sibneft" in the same proportions as stated above. It was originally pleaded by BB that by 1996 it was orally agreed that he and AP would continue to own the shares in Sibneft "beneficially" and that they would be "held on trust" for them by RA. However, the words "beneficially" held "on trust for them" are sought to be deleted by the application by BB to amend.

23. BB further alleges that it was agreed that he and AP would continue to be entitled to dividends and to any other payments made by Sibneft to its beneficial owners in the proportions of 25 per cent each and that subsequent acquisitions of Sibneft would be held subject to the same properties.

24. BB also seeks by way of amendment to introduce an additional term of this oral agreement — which, since an implied term is not alleged, must be an allegation of an express term — that RA would, upon request, transfer to BB and/or AP shares equivalent to their percentage interest in Sibneft. The introduction of this amendment alongside the deletion of the reference to beneficial entitlement and to in favour of BB and AP the creation of a trust was clearly a response to RA's having pleaded that Russian Law knows nothing of a trust.

25. I refer to this as "the 1996 Agreement." BB pleads that the 1996 Agreement was governed by Russian Law and took effect as a binding "sui generis" agreement.

26. It was originally pleaded that the 1996 Agreement had been implemented by about August 1997 by BB and AP divesting their respective shareholdings and the transfer to RA of the legal title to all shares which directly or indirectly gave them any measure of control over Sibneft. However, BB asserted that he and AP retained "beneficial interests" in that shareholding of which RA had thereby acquired legal ownership. Again, it was originally asserted that RA held the transferred shareholdings "on trust".

27. By the latest proposed amendment it is now asserted simply that the 1996 Agreement had been implemented by about August 1997 and that RA or his companies were legal owners of all, or substantially all, of the Sibneft shares that had been acquired pursuant to the terms of the 1995 Agreement and the 1996 Agreement in their respective proportions. It is to be observed that the amendments do not specify how RA acquired BB's interests in Sibneft and do not expressly maintain the case that BB and AP transferred shares to RA pursuant to the 1996 Agreement. Further, it is to be

noted that the amended pleading is careful to delete “beneficial” interest leaving in place their unspecified interests.

28. Thereafter RA alone managed Sibneft. However, during the period to December 2000 Sibneft made significant payments to BB and AP, at RA’s direction, in connection with their respective interests. No payments have been made during subsequent years.

29. Following the meetings between AP and RA from August 2000 to early 2001 referred to in paragraph 15 above, BB and AP decided that they were in principle willing to sell their “interests” in Sibneft to RA and that they should meet with him in order to negotiate the terms of the sale. That decision was, according to BB’s evidence, strongly influenced by BB’s fear, induced by what RA had told AP, that, if they refused to sell, RA would procure President Putin’s intervention and the consequent expropriation of their interests.

30. A meeting with RA was set up at Munich Airport in early May 2001 between AP and RA. In the course of that meeting AP returned to the issue of the release from prison of Mr Glushkov. RA said that if AP and BB were to sell their interests in Sibneft to him, Mr Glushkov would now be released.

31. AP named a price of US$2.5 billion for those interests, which he said was significantly less than they were worth, but RA refused to pay more than US$1.3 billion. AP also requested payment of their due proportions of all amounts which Sibneft had paid out since December 2000 and which would be paid out up to completion of full payment of the purchase price, but RA turned this down.

32. BB and AP discussed RA's offer. BB concluded that, as he put it in his witness statement, even although the price grossly undervalued Sibneft, they "had no real choice in the matter" because there was a prospect if they agreed, that Mr Glushkov would be released and that, if they refused, RA's relationship with President Putin was such that RA was in a position to bring about seizure by the Government of their interests in Sibneft which would be unchallengeable in the Russian courts.

33. The case advanced by RA is completely inconsistent with BB's account. He says that at a meeting at St. Moritz Airport, not Munich Airport, in January or February 2001, prior to the Munich Airport meeting, AP requested him to pay US$1.3 billion to BB in recognition of the political assistance and protection BB had provided in respect of the creation of Sibneft and taking account of the fact that BB and AP would no longer be receiving any financial benefit from the funding of ORT by RA, having no further interest in ORT. RA says that he agreed to make this payment on the basis that it would be the final request for payment by BB and that AP and BB would cease to associate themselves with him and his business interests publicly, including Sibneft. Above all, however, RA denies that BB and RA ever owned legally or beneficially directly or indirectly, or controlled any interests in any part of the issued share capital of Sibneft. Therefore they had no interest to sell to RA. The meeting at Munich Airport was thus merely to agree the mechanics for the payment of the US$1.3 million.

34. RA admits that he did make a payment of that amount but denies that he made it in the manner alleged by BB. In the ordinary way it would be unnecessary on an application such as this to have regard to a matter of factual detail such as the mechanism of payment but, given that RA has denied that BB and AP had any interest

of any kind in Sibneft and therefore could not have been intimidated into disposing of anything of that nature at any price, BB's account of the mechanism of payment of the US$1.3 million has become of crucial importance. Were it to be established at a trial of this claim, it would not only go a long way to destroy RA's case on the relatively narrow issue of whether BB and AP had identifiable interests in Sibneft and whether they and RA entered into an agreement for their sale but would also raise such substantial doubts about the credibility of RA's denial of intimidatory conduct as to go to the heart of BB's claim and RA's defence to it. It is therefore necessary to set out in some detail BB's case on this issue.

35. BB alleges that the sale to RA of his and AP's interests in Sibneft was made through an entity called Devonia Investments Ltd, to which I refer as "Devonia", as buyer, with Sheikh Sultan bin Khalifa bin Zayed al Nahyan, Crown Prince of Abu Dhabi, as guarantor of Devonia's payment obligation. It is pleaded that the purpose of this structure was to facilitate early payment of the price into bank accounts controlled by BB and AP in the United Kingdom without RA being publicly seen to acquire the beneficial interests of BB and AP in Sibneft.

36. For the purposes of this application BB's solicitor, Mr P.M. Marino of Addleshaw Goddard, has provided a witness statement in which he describes by reference to contemporary documents the negotiations during the period April 2001 to 12 June 2001 which gave rise to the Devonia Agreement. That evidence may be summarized as follows.

37. BB and AP instructed Mr Curtis of Curtis & Co to act as their solicitor on the sale of their interest in Sibneft. Mr Curtis had previously acted for the Sheikh when BB and AP

had sold their interests in ORT (described in paragraph 13 above). On that occasion the shares had been sold to a company controlled by the Sheikh and had then been resold by way of an option to purchase to companies controlled by RA. The transaction relating to the interests of BB and AP in Sibneft is apparently evidenced by contemporary documents recording what passed at meetings, at which were present the Sheikh, representatives of Clydesdale Bank and of Curtis & Co, which demonstrate that shares were to be sold upon the exercise of a succession of purchase options by BB and AP or their companies to the Sheikh, who was to pay the purchase price in instalments, using his own personal funds and was then to sell on the shares in tranches to RA's companies, the consideration for which was to be paid in instalments. In correspondence between the Sheikh and Clydesdale Bank in June 2001, the Sheikh refers explicitly to the subsequent transfer by way of onward sale to RA of the shareholding purchased from BB and AP. Mr Curtis referred in a letter dated 1st June 2001 sent to Mr Fomichev acting on behalf of AP, and copied to Clydesdale Bank and the Sheikh's representative to "the verbal trust arrangement that exists between BB, AP and Mr Abramovich's reluctance to reflect this trustee arrangement in writing given representations that he had made in Russia."

38. The Devonia Agreement, executed on 12 June 2001, to which BB, AP, Devonia Investments as purchaser and the Sheikh were parties, contained in the recitals the following information:

(i) BB and AP were the beneficial owners of 2,062,335,000 out of a total issued share capital of Sibneft of 4,741,000,000;

(ii) At the request of BB and AP, RA procured that the registered holders of the beneficially-owned shares were legal entities which were directly or indirectly wholly owned and/or controlled by RA;

(iii) BB and AP had agreed to sell and Devonia had agreed to purchase all or part of their beneficial interests on the terms set out in the agreement;

(iv) RA held or controlled the shares "as nominee in trust for and on behalf of BB and AP absolutely on verbal arrangements";

(v) BB and AP confirmed that Devonia intended to transfer the beneficial interests in the shares being purchased to RA or companies or entities controlled or associated with him;

(vi) In consideration of BB and AP entering into the Agreement the Sheikh had agreed to guarantee the obligations of Devonia under the agreement.

39. The agreement was expressly governed by English Law and subject to the exclusive jurisdiction of the English courts. It was agreed that Devonia would pay the purchase price of US$1.3 billion in instalments and that the money could be transferred to trust accounts at Clydesdale Bank of the X Trust and the Y Trust set up for that purpose in Gibraltar. In August 2001, after some 38 per cent of the purchase price had been paid in this manner, it was agreed that the outstanding 62 per cent could be paid in smaller instalments than previously to other trusts — BB's in the Isle of Man and AP's in

Gibraltar. The final instalment was paid by Devonia in March 2003. On 31st October 2006 the Sheikh wrote to a Mr Samuelson, Chairman of Mutual Trust SA in Switzerland in response to a request for confirmation of certain payments made (by the Sheikh) to First Curacao International Bank and to Clydesdale Bank in respect of Samuelson's clients, BB and AP. He confirmed that he had repaid $155 million to First Curacao Bank which had originally "been received by (him) from RA as part of Sibneft dividend payments to your clients", BB and AP. He also confirmed that "all the payments made by me to the X Trust account at Clydesdale Bank in London were from my funds as part of my purchase of Sibneft interests that I later sold to (RA)."

40. In his Defence RA has alleged that he was not aware of the Devonia Agreement prior to the commencement of these proceedings in 2007 and did not see a copy of it until one was provided on 17th March 2008 by BB's solicitors. He denies that the Agreement "accurately records the nature of any transaction between (BB, AP and RA)" and re-iterates that neither BB nor AP had any beneficial interest in Sibneft to sell and denies that he held any Sibneft shares as nominee in trust for and on behalf of BB or AP and that he agreed to purchase any such beneficial interest, whether through Devonia or otherwise. The payment of US$1.3 billion was made for the reasons stated in paragraph 33 above and did not represent the price for any sale of a beneficial interest in Sibneft, there having been no such sale.

41. RA's case is supported by the third witness statement of Mr G.S.P. Mitchard QC, a partner in Solicitors, Skadden Arps, in which he states that the Devonia Agreement and certain of the correspondence relied upon by BB appears "to have been part of an exercise between (BB) and Sheikh Sultan to satisfy the anti-money laundering

requirements of Clydesdale Bank" to enable the payment of the US$1.3 million to BB to be transferred to this country and was not something of which RA or his representatives were aware at the time. Mr Mitchard draws attention to the payment to the Sheikh of the very substantial 20 per cent commission on the transaction which, had RA really purchased anything from BB and AP, could have been avoided by contracting directly with RA. Amongst other matters to which Mr Mitchard draws attention is the payment by RA of the first instalment of the US$1.3 billion (US$33,850,000) to the designated account at the Latvian Trade Bank on 31st May 2001 in accordance with instructions given on 22nd May 2001 whereas, according to BB's evidence in Mr Marino's witness Statement, the Sheikh had not committed himself to involvement in the transaction until 29th May 2001 and the Devonia Agreement had not been executed until 12th June 2001. This chronology is strongly challenged in a further witness statement from Mr Marino to which he exhibits a fax dated 31st May 2001 from one Natalia Khudyk, an employee and director of Sibneft, Noyabrskneftegaz. The contents of this fax and various manuscript notes on it are relied on as evidence that Mr Khudyk knew all about Devonia and that it was owned by the Sheikh and that the Sheikh's advisor, Mr Jumean, was in direct contact with Ms Khudyk with regard to the on-sale of the interests transferred under the Devonia Agreement. It is said that she must have been in contact with others in RA's team and that it is to be inferred that RA also had knowledge of Devonia and the Sheikh's on-sale.

42. Mr Mitchard further recounts information given to him by one Mr Shvidler, an associate of RA, of a conversation with Mr Fomichev, AP's associate, which took place

on 30th April 2009. The latter is reported to have told Mr Shvidler that the purpose of the Devonia Agreement was to transfer money from the Latvian Trade Bank to England without infringing the Clydesdale Bank's money laundering requirements, that there never was an on-sale to RA, that Mr Curtis had the job of "making the transaction look real" and that since AP, and not BB, dealt with the Sheikh, BB himself may have known little or nothing about what was going on.

43. On this basis Mr Mitchard states that the Devonia Agreement was clearly not a genuine document and did not give rise to any further on-sale agreement whereby BB's and AP's interests in Sibneft, having been sold to the Sheikh, were sold on by him to RA or entities owned or controlled by him. Accordingly, whatever RA may have said to BB or AP did not give rise to any deprivation of their property : they neither had any beneficial interest in Sibneft nor did they dispose of any beneficial interest.

44. By re-amendments to the Particulars of Claim and amendments to the Reply, the subject of an application made in July 2009, BB sought to make some minor changes to previously pleaded factual allegations but also some rather more far-reaching changes to the legal analysis of the 1995 Agreement and of the 1996 Agreement. The main changes applied to be made are as to the legal analysis of these two agreements on the basis — heavily relied upon by RA, — that Russian Law knows nothing of the concepts of a trust, as known to the Common Law jurisdictions, or of the concept of a beneficial, as distinct from a legal, interest in property arising under a trust. Thus BB applies to delete all those references in his Reply which plead that the 1995 or 1996 Agreements gave rise to a trust of the interests of BB and AP in Sibneft and to their

respective beneficial interests. These concepts are sought to be replaced in the following manner.

(i) BB now pleads that the 1995 Sibneft Agreement was governed by Russian Law and took effect under Russian Law as either

(a) "a joint activity agreement" in accordance with the provisions of Chapter 18 of the Fundamentals of the Civil Litigation of the USSR and its Republics, alternatively

(b) A binding sui generis agreement under Russian Law.

and further that, if it is alleged by RA that the 1995 Agreement would not be recognized under Russian Law, BB and AP were entitled under Russian Law to restitution of property (i.e. the interests in Sibneft) transferred to RA under the 1995 Agreement or the value of the services performed by BB and AP pursuant to the 1995 Agreement as pleaded (namely, as regards BB, discussing privatisation with President Yeltsin and his government and raising the finance required to enable BB, AP and RA to acquire Sibneft) by an action in Russian Law for a declaration that the attempted 1995 Agreement was invalid and/or by reason of the Russian Law of vindication under Article 301 of the Russian Civil Code or by reason of the law of restitution under Article 167 of the Civil Code and/or in accordance with the law of unjust enrichment under Article 1102 of the Civil Code.

(ii) BB denies that the 1996 Agreement was of no legal effect, for it was a binding sui generis agreement under Russian Law. Alternatively, if it were of no legal

effect, BB and AP were entitled to restitution of the Sibneft shares which they agreed to transfer to RA or to his entities and/or to the value of the services performed by BB and AP under the 1996 Agreement by an action for a declaration that the transaction was invalid and/or by reason of the Russian Law of vindication under Article 301 and/or by the law of restitution under Article 167 and/or by the principle of unjust enrichment under Article 1102.

(iii) BB pleads that, if the 1996 Agreement is held to be of no legal effect, then the 1995 Sibneft Agreement remains legally binding and regulated the relationship between the parties.

45. The substitution of these elements of Russian Law and the re-characterisation of the rights acquired by BB and AP in place of the previous allegations of beneficial interests acquired under a trust are based on the expert evidence of Russian Law contained in an expert report prepared in about April 2009 by Dr. I.V. Rachkov, a qualified Russian advocate of impressive qualifications and experience and a partner in the Moscow office of the Munich law firm, Norr Stiefenhofer Lutz.

RUSAL

46. In the course of the period 1998/9 to early 2000, BB, AP and RA had acquired substantial assets in the Russian aluminium industry. Oleg Deripaska and his partners (to whom I refer as "Deripaska") also owned substantial aluminium industry assets and in about late 1999 or early 2000 these two groups entered into negotiations for the pooling of their aluminium assets.

47. On or about 14th March 2000 Deripaska, BB, AP and RA met at the Dorchester Hotel in London and, according to BB, arrived at a final oral agreement under which the two groups would pool their aluminium assets in a new company 50 per cent of which would be owned by Deripaska and his partners and 50 per cent by BB, AP and RA. It was further agreed that none of the participants would sell his shares without the agreement of the others. The new company — OAO Russkiy Alyuminiy (RUSAL) — was incorporated and registered in Moscow on 25th December 2000.

48. In the course of the Dorchester meeting, according to BB, it was orally agreed between BB, AP and RA that the beneficial ownership of the 50 per cent interest in the new company owned by their group would be sub-divided as to 25 per cent to RA and 12.5 per cent each to BB and AP. It was further orally agreed that RA or companies owned or controlled by him would legally own or control the interests of BB and AP which RA would hold on trust for BB and AP to whom RA owed the duties of a trustee and fiduciary. This was a structure similar to that used for Sibneft under the 1996 Agreement.

49. In due course RA managed the entire business interest of his group's 50 per cent interest in RUSAL. At the time of its registration the entire share capital of RUSAL was owned by six companies registered in the British Virgin Islands. BB and AP took no part in the management of RUSAL. BB invites the inference that RA, being entitled legally to own and control a 50 per cent interest in RUSAL must have owned or controlled three out of the six BVI companies.

50. In about September 2003 RA sold 25 per cent of RUSAL to Deripaska without BB's knowledge or consent. BB pleads that, having regard to the fact that, as at July 2004, a

BVI-registered company called RUSAL Holdings Ltd (registered on 7th May 2003) owned the entire share capital of RUSAL and another BVI company called Madison Equities Corporation which was owned or controlled by RA owned 25 per cent of the capital of RUSAL Holdings, it is to be inferred that, without BB's knowledge or consent, RA and Deripaska agreed at some time between May 2003 and July 2004 that the entire share capital of RUSAL would be transferred to RUSAL Holdings whose share capital would be divided in the same proportions as their respective interests in RUSAL, that is 50 per cent each, prior to RA's sale to Deripaska and, if the sale had already taken place, 75 per cent/25 per cent.

51. BB alleges that RA's sale of 25 per cent, as a result of which Deripaska obtained 75 per cent and therefore a controlling interest in RUSAL, reduced the value of the residual shares comprising the 25 per cent from their value as part of a 50 per cent holding. RA informed AP that the 25 per cent sold to Deripaska were RA's 25 per cent holding and that the price had been US$1.75 billion. AP protested to RA about this disposal without his and BB's consent at a meeting in Tbilisi, Georgia, towards the end of 2003 but RA rejected this protest.

52. In July 2004 BB and AP sold their 25 per cent interest to Deripaska with RA's co-operation and consent. AP is said to have conducted negotiations with Deripaska through intermediaries and they agreed a price of US$450 million. According to evidence referred to in Mr Marino's First Witness Statement, BB and AP decided to get rid of their interest for the best price that could be got, given their minority interest. The mechanics of the sale involved a two-stage transfer of shares in RUSAL Holdings from RA's BVI company. Madison, to AP's BVI company, Cliren, and subsequently from

Cliren to Deripaska's BVI company, Eagle . RA and AP executed personally a Deed of Release. BB's name was not mentioned in any of the documents relating to the sale, RA and Deripaska having insisted that there should be no recognition of BB because of his political activities. AP executed a Deed of Guarantee as beneficial owner of the shares in RUSAL Holdings by which he guaranteed the sale to Eagle by Cliren, the period of the beneficial interest in RUSAL Holdings being stated as commencing on 15th March 2000 — about the date of the meeting at the Dorchester Hotel.

53. RA denies that at the Dorchester Hotel meeting any such agreement as alleged by BB was entered into. He pleads that (i) had there been an agreement for a trust, any such trust would have been governed by Russian Law because that was the law with which it was most clearly connected; (ii) under Russian Law the concept of trust and beneficial interest does not exist; and (iii) only the registered owner of shares can have a proprietary interest in them. Accordingly neither BB nor AP had any beneficial interest in RUSAL and the alleged trust and beneficial interest could accordingly be of no legal effect .

54. In BB's Reply in its amended form it is pleaded as follows.

(i) The trust in respect of RUSAL was expressly or implicitly governed by English Law.

(ii) That conclusion was to be derived from the following facts —

(a) Previous purchases of aluminium assets by BB, AP or RA had been under contracts expressly subject to English Law, it being the expressed intention

of AP and RA to purchase through offshore structures subject to Western law.

(b) Prior to the oral agreement between BB, AP and RA in the course of the Dorchester Hotel meeting, a written Preliminary Agreement had been entered into by RA (on behalf of himself, BB and AP) with Deripaska, relating to the proposed merger of aluminium assets, which contained an express choice of English Law, which reflected an agreement between BB, AP and RA before the meeting that they should make arrangements regarding the proposed merger subject to English Law.

(c) After the conclusion of the Dorchester Hotel oral agreements, RA acting on behalf of himself, BB and AP, entered into another agreement in writing relating to the proposed merger of assets which contained an express choice of English Law and which came after AP had agreed with Deripaska and RA that all merger arrangements were to be governed by English Law.

BB's Claims in these Proceedings

(1) **Sibneft**

It is alleged by BB that RA undertook a course of conduct in which he made and was a party to explicit and implicit coercive threats and intimidation, including the threats and intimidation relating to ORT, described in paragraph 13 above.

BB pleads that the course of conduct and statements made by RA were "unlawful" and "illegitimate" in that they

(1) threatened improper and unlawful state conduct interfering in legitimate business dealings and interests and the expropriation of property for political ends;

(2) used Mr Glushkov's liberty, physical well-being and survival as a commercial bargaining chip;

(3) interfered with rights under Article 1 of Protocol No. 1 of the European Convention on Human Rights.

(4) were threats to act in breach of fiduciary duty and/or in breach of the duties owed by RA to BB and AP under the 1995 Sibneft Agreement and the 1996 Agreement and/or as common owners of Sibneft shares.

55. Point (4) has been introduced by way of amendment to replace an allegation that the conduct of RA constituted threats to act in gross breach of trust and would have been flagrantly in breach of RA's duty as a trustee.

56. The defence pleads that the statements said to have been made about possible expropriation were not threats but rather warnings and did not amount to a threat of use of unlawful means by RA or by anyone for whom RA acted as agent. Further, the alleged statement about Mr Glushkov was not a threat of the use of unlawful means or of the use of such means by RA or by anyone for whom he was an agent.

57. It is further pleaded that in so far as BB alleges that there could be unlawful conduct had the Russian President or officers of the Russian Federation taken ownership or control of BB's interest in Sibneft and/or in failing to release Mr Glushkov from prison

and/or that the Russian President or officers of the Russian Federation made or were party to any such alleged coercive threats or intimidation, adjudication by this court on such matters would be contrary to the doctrines of act of state, comity, and/or sovereign immunity.

58. Further, the threat to act in breach of trust and/or fiduciary duty did not constitute a threat of the use of unlawful acts or means for the purpose of the tort of intimidation.

59. BB then alleges that in about September 2005 RA's interests in Sibneft (70 per cent of the whole) were sold to Gazprom, a Russian public joint stock company for about US$13 billion. But for the fact that he had disposed of his interest in Sibneft to RA, BB would also have been entitled to sell the whole or 70 per cent to Gazprom for US$3.9 billion or (if 70 per cent) US$2.8 billion. Alternatively, if the tort of intimidation had not been committed but there had been a sale in June 2001 of BB's 21.5 per cent beneficial interest at an appropriate and fair price, he would have been entitled to be paid the difference between that price and what he actually received, an amount which he estimates at US$700 million. His claim for damages for the tort of intimidation is thus quantified.

(2) **Rusal**

60. BB contends that in disposing of a 25 percent interest in RUSAL to Deripaska in about September 2003 RA acted in breach of trust and/or his fiduciary duty because he either sold BB's and AP's 25 percent without their consent as beneficiaries and without accounting to them or sold his own 25 percent thereby wrongfully favouring his own interests over those of BB and AP, or, if he sold a mixture of his own and BB's

and AP's shares, he did so without their consent and without accounting to them and, to the extent of the disposal of part of his own 25 percent, by wrongfully favouring his own interests over their interests.

61. BB also runs an alternative case on breach of contract in the sale of the whole or part of the 25 percent of RUSAL owned or controlled by RA.

62. BB then pleads that by reason of those breaches of trust and for contract RA holds the proceeds of sale of the whole or part of RA's 25 percent of RUSAL on trust for BB and/or AP or is liable in equity to account for the profit RA made from the sale to Deripaska, which profit he holds on behalf of BB and AP as constructive trustee or RA is liable for loss and damage suffered by BB, that is the difference between the value of BB's portion of RUSAL before the sale to Deripaska (at that sale price) and the value after that sale, being the price ultimately received by BB in October 2004.

63. BB claims on that basis in respect of RUSAL a declaration that RA holds the due proportion of the proceeds of sale of the 25 percent of RUSAL and any further property representing the shares on trust for BB, further or alternatively orders that RA accounts to BB for all profits arising from RA's sale of the 25 percent interest in RUSAL and orders that RA should pay such sums as are due on taking of accounts and/or equitable compensation and/or damages for breach of trust and/or contract and/or an enquiry as to equitable compensation or damages and interest.

64. RA pleads that in or about September 2003 Madison Equities Corporation, registered in the British Virgin Islands, owned 50 percent of the shares in RUSAL Holding Ltd which owned the 6 BVI companies which in turn owned RUSAL and then sold for US

$1.578 billion 50 percent of its 50 percent interest to one or more entities owned and/or controlled by Deripaska. BB had no interest in any of the companies involved, including RUSAL, and no beneficial interest in the shares sold by Madison.

65. Further, BB's claim for breach of trust and/or fiduciary duty fell to be determined under Russian Law – that law which would govern the trust relied upon. Under Russian Law that claim would be time-barred three years from when BB learned or should have learned about the alleged breach and that was more than three years before these proceedings were concerned.

66. RA makes a similar point with regard to BB's claim for breach of contract. He pleads that the claim would fall to be determined under Russian Law which was the proper law of any such contract, Russia being the country with which the alleged contract would have been most closely connected. Accordingly that claim also was time-barred.

The Defendant's Submissions in relation to BB's case on Sibneft

67. It is submitted on behalf of RA that BB's case on Sibneft is hopeless in its unamended form, that is to say in the form in which it existed in July 2009 immediately before this court heard the present application. RA's case in support of the application to strike out or dismiss the claim was opened and presented by Mr. Andrew Popplewell QC who was unable to appear during the last nine days of the hearing. Mr Michael Brindle QC then presented RA's case in opposition to BB's amendment application and replied on the strikeout and dismissed applications.

68. The defendant relies on the following four key points

1. BB cannot establish that he had any beneficial interest under a trust or that he transferred any shares in Sibneft to RA. I refer to this as "the Proprietary Interest Point".

2. BB cannot establish a relevant interest in Sibneft by reliance on the Russian Law principles of restitution or vindication. I refer to this as "the Restitution/Vindication Point".

3. BB cannot establish any actionable threat of unlawful conduct. I refer to this as "the Intimidation Point".

4. BB's claim is based on matters which amount to an Act of State by Russia and therefore cannot be maintained in this court. I refer to this as "the Act of State Point".

69. As to the Proprietary Interest Point, it is submitted that in spite of the fact that BB had, through his Particulars of Claim in its various previous editions and through his counsel at a previous hearing before H.H. Judge Mackie Q.C. steadfastly maintained that he held a beneficial interest in Sibneft and that RA held Sibneft shares as trustee for BB and AP, BB had, by his latest application to re-amend the Particulars of Claim and to amend his Reply, abandoned his claim that a trust had been created and that RA held any shares in Sibneft as trustee for BB and AP.

70. In this connection reliance is specifically placed on the fact that BB signed as a statement of truth the Particulars of Claim and in particular paragraph 33, 34 and 37

under which it is pleaded that RA had orally expressly agreed with BB and AP that the 25 percent of the shares in Sibneft would be held by RA on trust for them beneficially. Further, in the course of the previous hearing before Judge Mackie, BB's counsel, Barbara Dohmann QC very emphatically asserted that BB's case was that RA held shares in trust for BB.

71. The Defendant relies on BB's previous but unsuccessful attempt to launch a claim against him for fraudulent breach of trust – a claim refused by Judge Mackie because it was time-barred – but which was founded on BB's explicit assertion of a trust in respect of the Sibneft shares.

72. Further, in the Devonia Agreement, see paragraph 37 above, the very subject-matter of the sale to Devonia Investments Ltd was BB's and AP's "beneficial interests" in the shares which, according to the Recitals, RA held "as nominee in trust" for and on behalf of BB and AP. Mr. Brindle QC, on behalf of RA, also draws attention to pre-contract correspondence in which Mr. Stephen Curtis, an English solicitor then acting for Sheikh Sultan and BB described the subject of the proposed purchase as "the entire beneficial interest (but not the registered shareholding of) BB and AP". In a letter dated 5th June 2001 to Clydesdale Bank Sheikh Sultan himself referred to monies to be forwarded to the accounts of BB and AP "relating to the purchase (by him) of their beneficial interest" in shares in Sibneft.

73. Mr. Brindle QC further submits that, having relied so emphatically on the concepts of trust and the related beneficial interest in shares in Sibneft, the abandonment of these concepts by BB, by way of the application to amend, in the face of the pleaded defence that Russian Law knows nothing of trusts or of beneficial interests in shares,

involves also an implicit abandonment of the allegation that BB transferred any shares to RA's control and therefore of the whole factual foundation of his case under both the 1995 Agreement and the 1996 Agreement.

74. In this connection, Mr. Brindle draws attention to the fact that BB has not put in by way of evidence any explanation as to how it now comes about that he put forward his previous case based on trust but yet now seeks to abandon it and advance completely a different case based on a different analysis of his rights in respect of Sibneft. Nor, it is argued, has there been any attempt to explain by evidence the repeated reliance on the trust concept as attributable to a misunderstanding or mischaracterisation by BB's legal advisers as distinct from BB himself. The only suggestion of such misunderstanding was now made by way of submission at this hearing. Yet, if that were so, BB's team of eminent lawyers, including Jeffrey Gruder QC and Barbara Dohmann QC, must all have got it wrong. However, Mr. Brindle QC invokes the inference that the real truth is that BB's original account of events was concocted: not only is there no trust concept in Russian Law but no such trust was ever created and indeed BB never had any rights in relation to any part of the share capital of Sibneft in which he transferred any interest, legal or beneficial, to RA. In reality, when faced with RA's defence that there was no such thing as a Russian Law trust or beneficial interest, BB has attempted to evade that obstacle to his claim by applying to re-characterise his rights in Sibneft and the rights which he claims to have transferred to RA and which form a vital part of the basis of his claim for the tort of intimidation.

75. The second aspect of the Proprietary Interest Point is that, contrary to BB's case, when under the transfer shares scheme the designated management company for Sibneft was NFK, see paragraph 21 above, and the loan was unpaid after three years, it was not NFK that acquired from the Russian Government 51 percent of Sibneft, but FNK; and that company was not owned or controlled by BB or AP but by RA. Accordingly, BB never received from the Government anything in which pursuant to the 1995 agreement he had an interest or anything which could be the subject of a transfer to RA under the 1996 Agreement so as to give rise to any beneficial or other similar interest vis-à-vis RA. That this was now accepted by BB was apparent from certain re-amendments which had been put forward in the course of this hearing. In particular it was now said by BB that under the 1995 Agreement all the shares in Sibneft acquired from the Government would be held as to 50 percent for RA and 50 percent for BB and AP and it was no longer pleaded that BB and AP had transferred to them any of the 51 percent of Sibneft shares. It was further pleaded that under the 1996 Agreement RA, BB and AP "would arrange matters so that RA or his companies was the legal owner of all the Sibneft shares acquired pursuant to the 1995 Agreement" and further that BB and AP "would continue to have the rights and interests which they had acquired pursuant to the 1995 Agreement" in the shares that would be held by RA. Importantly, what had now been deleted was the allegation that had previously been pleaded that it was agreed that BB and AP would transfer all the shares which they held or controlled in Sibneft to RA or to entities under his ownership and control. The reference in paragraph C37 of the Particulars of Claim to "rights and interests in the shares" that would be held by RA is a reference to the new paragraphs C34A and C34B in which it is now sought to be pleaded that the 1995 Agreement took effect

under Russian Law as "a joint activity agreement, alternatively as a binding sui generis agreement and that pursuant to such Russian Law rights under the 1995 Agreement BB and AP were entitled to demand from RA as a distribution of the acquired ownership interest in Sibneft in the agreed proportions, would acquire the rights of co-owners in respect of any property directly acquired by RA as a result of the 1995 Amount and had the right to the distribution of profits resulting from the joint activity in the agreed proportion.

76. Accordingly, it is submitted on behalf of RA that all the case on *transfer* of shares or beneficial interests to RA has been abandoned by the latest pleading and therefore the factual substructure of BB's case has been changed and the original substructure conceded to be untrue.

77. As to the Restitution/Vindication Point, it is submitted on behalf of RA that even assuming, contrary to BB's primary submission, that the 1996 Agreement was of no legal effect as constituting a binding sui generis agreement under Russian Law, BB could only be entitled to restitution, as it is proposed to be pleaded in Reply para. 39.3 "of the Sibneft shares which they agreed (and subsequently did) transfer to (RA) or to entities under his control" or to vindication and/or to restitution by reason of unjust enrichmentt if there had been a transfer of shares to RA in the first place; but as demonstrated no such transfer to RA had ever taken place.

78. As to the Intimidation Point, the case advanced by BB in his pleading failed to include an essential factual element of the tort, namely anything amounting to a threat.

79. In this connection Mr. Brindle emphasises that, as stated in Clerk & Lindsell on Torts (19th Edn) at paragraph 25 – 65, a distinction has to be drawn between a threat and a warning;

> "The need for some coercive element is the basis for the distinction between a threat and a warning, a distinction between a threat and a warning, a distinction which is difficult to apply but which is well founded in authority. Thus in *Rookes v. Barnard* it was noted that what had been said was a threat and not "merely informing BOAC that the men would strike if their terms were not accepted". If all that a union official does is to inform an employer that men will or may strike, that is not intimidation."

80. On behalf of RA it is submitted that for the purposes of the tort it is not necessary for the tortfeasor to be threatening personally to commit the act but where what is threatened is an act by a third party, as in this case where the Russian Government is the third party in question, the tortfeasor's possession of coercive power can be established either by reason of the third party having made the exercise of power available to the tortfeasor or because the tortfeasor is acting on behalf of the third party in order to convey the third party's threat. It is further accepted that in either case it is enough if the tortfeasor claims to have the power in question and is reasonably believed to have, even if he does not in fact have that power. In support of these submissions reliance is correctly placed on the speech of Lord Devlin in *Rookes v Barnard* [1964] AC 1129 at 1211. It is further submitted that a mere belief that the tortfeasor has the power to do something which he is not claiming the power to do, cannot turn a warning or a prediction of some future conduct into a threat. The

essential coercive element involves that the alleged tortfeasor asserts that he will procure the threatened outcome if there is a failure to comply.

81. In this connection Mr. Brindle QC refers to the statements of AP to other solicitors recounted in the First Witness Statement of Mr. Marino at paragraph 399 specifically:

> "(3) On several occasions, (RA) raised with (AP) the prospect of BB's and AP's interests in Sibneft being expropriated if they did not sell them to him (RA).
>
> (4) (AP) believed that (RA) was sending him a clear message – namely that if he and (BB) did not sell their interest in Sibneft to him, they could be seized."

82. Reference is then made to the May 2001 meeting between AP and RA at Munich Airport at which RA offered US $1.3 billion for their interests in Sibneft (see paragraph 31 above) and stated that although Glushkov had not been released from prison after the sale of ORT, if BB and AP sold their interests in Sibneft to him, then Glushkov would be released. In paragraph 10 of Mr. Marino's First Witness Statement it is stated by way of quotation from the information derived from the other solicitors of their interviews of AP that:

> "(AP) was well aware of (RA's) close relationship with President Putin and had absolutely no doubt that the state persecution (sic) and seizure of their interests (RA) referred to would happen if (RA) wanted it to."

83. This evidence, it is submitted, amounts to no more than that of a warning or prediction but falls short of a threat.

84. Reference is then made to the Particulars of Claim in which it is pleaded at paragraph 41, in the most recently amended form;

> "From about August 2000 (AP) and (RA) met on a number of occasions, (RA) on more than one occasion informed AP that there was increasing pressure from the Kremlin and that (BB)'s and (AP)'s interests in Sibneft *could be* expropriated as it was known that (BB) and (AP) had interests in Sibneft. If was clear to (AP) (as intended by (RA)) that RA's message to him and (BB) was that they should sell their interests in Sibneft to him, or face the consequences." (emphasis added)."

85. That, it is submitted, goes no further than a prediction and Mr. Brindle emphasis the difference in the facts pleaded in relation to the pressure placed upon BB in relation to ORT which he considers to have been a threat and that conduct pleaded in relation to Sibneft. The latter conduct, not being expressed as a threat, could not be converted from a prediction into a threat by the earlier events in relation to ORT, for those events merely lent credibility to the prediction.

86. In relation to what is alleged to have been the discussion at the Munich Airport meeting about the release from prison of Mr Glushkov, it is argued on behalf of RA that what he is alleged to have said was the opposite of a threat : rather it was an inducement which lacked the essential element of coercion.

87. The second aspect of the Intimidation Point advanced by Mr Brindle QC QC on behalf of RA is that the conduct threatened must be unlawful and it is insufficient to establish merely that the conduct is illegitimate. In as much as it is submitted on behalf of BB

that for the purposes of the tort of two-party, as distinct from three-party, intimidation it is enough to establish that the threatened conduct is illegitimate as distinct from unlawful, that submission is wrong in law and, consequently, conduct which can only be characterised as illegitimate cannot be relied upon. Breach of contract is on the authorities treated as unlawful conduct, breach of fiduciary duty arguably so but threatened conduct such as economic duress or undue influence, which is merely a ground for setting aside a contract, is not sufficient.

88. In support of this Submission, Mr Brindle QC has begun at *Allen v Flood* [1898] 1 AC 1, as marking the origin of the tort of intimidation, has visited *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435, in particular Lord Wright at pages 466-467 and, above all, *Rookes v Barnard* [1964] AC 1129. That last authority it is said, leaves it in no doubt that, whether in two-party or three-party intimidation, that which gives to the threat the character of a tort is the unlawfulness of the conduct threatened. Mr Brindle QC further supports this proposition by reference to the judgment of Lord Diplock in *Universe Tankships Inc. Of Monrovia v International Transport Workers Federation* [1983] AC 366 at p 385. In support of the proposition that mere economic duress is incapable of amounting to conduct which can be characterized as unlawful for the purposes of the tort of intimidation, it is submitted that a passage in Lord Scarman's dissenting judgment at page 400, where he refers to economic duress as being actionable as a tort, is unsupported by authority and incorrect. Accordingly, it is argued, a threat of economic duress by RA would not be a threat of unlawful conduct. Such conduct might attract a remedy of rescission of a contract induced by it together with a claim for restitution, but could not amount to a tort. However, a threat of

breach of fiduciary duty could, at least arguably, be characterizable as a threat of illegal conduct.

89. It is then submitted that, in as much as BB relied on the threatened conduct of expropriation and, based on that, a threatened breach of Article 1, Protocol 1 of the European Convention on Human Rights, could not be made good in a case, such as the present, where, as here, such expropriation was the legitimate action of a sovereign state within its own area of jurisdiction and where compensation was offered to the claimant owner of the property.

90. Further, the nature of BB's interest in Sibneft, being in its most recent manifestation a series of personal claims against RA, such as a claim for restitution, was not in the nature of an interest which could be expropriated within the concept under the European Convention on Human Rights.

91. As for the allegation of intimidation based on the "offer" of release of Mr Glushkov, it was a case distinct from that of the detention of Mr Gusinsky because BB does not allege that the charges against Mr Glushkov were manufactured and without foundation and therefore that he was unlawfully imprisoned.

92. Mr Brindle QC further submits that in order to make good the allegation of a threat of breach of fiduciary duty as a threat of unlawful conduct for the purposes of a claim in intimidation, it would be essential to establish that the relevant conduct would be unlawful by the law of the place where it would be perpetuated, namely, Russia. As the concept of fiduciary duty was not found in Russian Law, unlawfulness could not be established on that basis. However, it was accepted in argument that there was a

complete lack of authority on the conflicts of laws issue and in particular as to whether unlawfulness under the proper law of the tort of intimidation was sufficient, or whether it was enough for there to be unlawfulness under either that law or the law of the place where the threat would be carried out or whether the double actionability rule applied. Accordingly, this was an open question.

93. As to the Act of State Point it is submitted that the nature of the threat of expropriation necessarily involves participation of the Russian State through the instrumentality of the exercise of presidential powers by Mr Putin. In terms of the tort of intimidation the claimant has to establish either that RA was acting as the agent of the President or that they both had to participate in a joint enterprise directed to carrying out the threat. That was the way in which the claim was originally pleaded before the most recent proposed amendments. By these amendments the allegations that RA was liable as a joint tortfeasor or a participant in a joint enterprise with "a third party", that is with the President, were to be deleted. That, it is submitted, takes BB's claim outside the scope of the tort of intimidation. Without that deletion, it is argued that the claim must fail because it implicates a foreign sovereign state and is therefore impermissible under the Act of State doctrine.

94. It is submitted on this point that, given that this represents a clear defence to the claim, it was inappropriate to apply the dictum of Lord Templeman in *Williams and Humbert Ltd v. W H Trade Marker (Jersey) Ltd* [1986] AC 368 at p. 435 to the effect that "the general rule (that if an application to strike out involves a prolonged and serious argument, the judge should, as a general rule, decline to proceed with the argument unless be harbours doubts about the soundness of the pleading) . . . . would

seem to require a refusal by the judge to embark on the problems of international law."

95. Mr Brindle QC argues that, contrary to BB's case, Act of State does apply to BB's claim because the allegations against President Putin were not hypothetical as BB alleged but actual. Thus for example, there were the background allegations about the actual dealings in relation to ORT and to Sibneft and, even if the reference to joint tortfeasors and a joint enterprise were deleted, there was a strong inference of concerted activity between RA and the President.

96. Alternatively, the allegations against the Russian State and its President in particular, were not collateral: they went to the very heart of the claim. The approach to identification of the Act of State defence which would confine those issues which could not be determined to issues which had a direct remedial impact such as a declaration that a foreign State's legislation was invalid or state activity within its jurisdiction was illegal was too narrow.

97. It was submitted that the decision of Charles J in *R (on the application of Yukos Oil Co. And another) v Financial Services Authority* [2006] EWCA 2044 (Admin) demonstrated that it was not necessary for the relevant issue to have a direct remedial impact. It was enough if the conduct of the foreign state was at the very heart of the claim. In that case it was contended that the FSA should be judicially reviewed substantially on the grounds that in the course of its decision-taking as to listing on the LSE it had failed to take into account evidence that the company to be listed had acquired its assets from property and funds wrongfully expropriated by the Russian state. It was held that

the FSA was entitled to have regard to advice it had received that the Act of State doctrine precluded investigation of or reliance on that allegation.

98. It is to be observed that these authorities are concerned with the issue whether past conduct of the government of a foreign state has been unlawful and not whether future conduct would be unlawful if ever it took place. Thus in the *Yukos Case* it was an essential part of the claimant's case that corporate assets had in truth been wrongfully expropriated.

99. Finally, in relation to Act of State, it is submitted that, while considerations of public policy may in principle be taken into account to override the effect of the Act of State doctrine, that — analogously with the approach of Charles J — that should not apply in this case any more than it did in *Yukos Oil*, supra, in which Charles J had to consider whether the doctrine of Act of State was displaced by considerations arising in relation to the principle regarding expropriation under the European Convention in Human Rights.

100. On behalf of RA it is submitted that even if the amendments now applied for were to be permitted, they would not rescue the case relating to Sibneft advanced by BB from hopelessness. That is because of the intrinsic defects with regard to the absence of unlawful conduct, the absence of any kind of threat and the impact of the Act of State doctrine.

101. However, there are three other distinct lines of attack advanced on behalf of RA which relate exclusively to the proposed amendments. These are

(i) the proposed amendments raise a new cause or causes of action;

(ii) the proposed amendments are incredible and/or incoherent;

(iii) the proposed amendments are not advanced in good faith and so represent an abuse of process.

102. As to new causes of action, it is argued as follows.

103. Paragraphs C34 to C38 of the proposed amending pleading abandon the plea of a trust and the transfer of beneficial interests order it and replace it with a joint activity agreement or a binding sui generis agreement. The allegation of the transfer of shares to RA has also been abandoned. The centre of gravity of the case on the acquisition of proprietary interests in Sibneft has changed from the 1996 Agreement to the 1995 Agreement and it is now the case that RA was all along owner of the Sibneft shares or most of them.

104. Mr Brindle QC, on behalf of RA, argues that this goes well beyond a mere re-labelling exercise and involves an entirely new case on the facts as to how it is said that RA came to hold shares in Sibneft subject to those rights of BB said to arise originally under the 1995 Agreement (at paragraph C34B) and to have been made applicable by the 1996 Agreement to *all* the shares in Sibneft acquired under the 1995 Agreement. That this is not simply changing the legal label of the transactions was demonstrated by the changed legal system applicable, namely from English law to Russian Law, and with it the abandonment of the concepts of both shares held on trust and shares subject to a beneficial interest. It also raised a different factual structure in as much as it no longer rested exclusively on an agreement on transfer shares but on an arrangement relating to any Sibneft shares which any of BB, AP or RA might have

acquired or might in future acquire. That change in the factual structure was accompanied by another change, which in itself involved a new cause of action arising out of substantially different facts, namely the change in the damage alleged to have been caused by the threat from loss of a beneficial interest under a trust to loss of a personal claim for restitution or an account against RA arising under a joint activity agreement or a sui generis agreement.

105. To make good his submission that the proposed amendments introduced a new cause of action Mr Brindle QC referred to the well known definition of a cause of action given by Diplock L.J. in *Letang v Cooper* [1965] 1 QB 232 _____ "a factual situation the existence of which entitled one person to obtain from the Court a remedy against another person." He further illustrated the application of this definition by reference to *Steamship Mutual Underwriting Association Ltd v. Trollope v Colls (City) Ltd* (1986) 33 BLR 77 — a case where the claim against contractors and others had initially been confined to defects in air-conditioning but had later been expanded to comprise claims in respect of wall cracking — and in particular the following passage from the judgment of May L.J. at p. 98-99:

> I feel bound to agree with the learned judge where he concluded, having referred to the cases on what is a cause of action, the statement of claim in both its original and amended form related only to air conditioning. I think that its effect was to narrow the causes of action so that they became confined to breaches of contract concerned with air conditioning and negligence resulting in damages to the air conditioning. In the light of the definitions of a cause of action already referred to, I do not think one can look only to the duty on a party, but one must look also to the nature and extent of the breach relied upon, as well as to the nature and extent of the damage complained of in deciding whether, as a matter of degree, a new cause of action is sought to be relied upon. The mere fact that one is considering what are, as it is said, after all only different defects to the same building, does not

necessarily mean in any way that they are constituents of one and the same cause of action.

106. Further reliance is placed on the dictum of Millett L.J. in *Paragon Finance v. D.B. Thakerar & Co* [1999] 1 All ER 400 at p 405:-

> However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of actions must be made at the highest level of abstraction.

107. I interpose that the analytical exercise demanded by the need to ascertain whether there is or is not a new cause of action and which Millett L.J. described in the above passage is very far from being rocket science. It simply involves at stage one identifying those pleaded facts absolutely essential to the originally-pleaded cause of action, having weeded out all the unessential facts, and then, at stage two, asking whether the claim sought to be introduced by amendment is formulated on the same or a different factual structure. The comparative exercise demanded is a necessary logical consequence of the application of Diplock L.J.'s definition of a cause of action. If the essential factual situation required to found the subsequent claim/comprises material facts not comprised in the essential factual situation upon which the original claim is founded, there must, inescapably be a new cause of action. If that is the conclusion, permission to introduce it out of time may only be given if that new cause of action arises out of "substantially the same facts" as the original cause of action. That involves an evaluation of the extent, if any, to which the new essential factual structure differs from the original.

108. In this connection I was helpfully referred to the judgment of Warren J. in *Harland & Wolff Pensions Trustees Ltd v. Aon Consulting Financial Services Ltd* [2009] EWHC 1557 (Ch) and in particular to his observations about a new cause of action in relation to an original claim in negligence where it is sought by amendment to introduce a new head of loss. At paragraph 58 of his judgment, having referred to the judgment of Dyson LJ in *Aldi Stores Ltd v Holmes Buildings plc* [2003] EWCA Civ 1882, upon which counsel had relied for the proposition that in a negligence claim the introduction of a new head of loss (even if involving new allegations of causation) did not involve the introduction of a new cause of action, Warren J observed:

> I do not think that *Aldi* goes quite as far as Mr Nugee submits. I would, however, agree with him to this extent: I consider that his proposition is correct provided that the substance of the new claim can be pleaded simply as a consequence of the facts originally pleaded. For example, in a case of negligent advice, it is permissible to expand the relief to claim further loss arising as a consequence of actions taken in reliance upon the advice where those actions and reliance were pleaded in the original claim. But the limits of the proposition must be kept carefully in mind; the court must be satisfied that the amendment to the pleaded case is simply to add a new head of loss and not to introduce, for example, a new act of negligence which is relied on other than as part of the chain of causation leading from the original breach.

109. It is submitted on behalf of RA that the proposed amendments do involve reliance on new causes of action. It is further emphasised that they introduce a quite different factual structure for the claim by BB. The 1995 Agreement is now treated as founding the respective relevant interests of BB, AP and RA and the 1996 Agreement is demoted to a mere continuation or adjustment of the underlying agreement. Secondly, there is no longer an allegation about the acquisition of particular amounts of shares by those three individuals. Thirdly, there is now no allegation of an agreement to transfer shares to R.A. for political reasons. Finally, no actual transfer of

shares is said to have taken place. These new factual allegations, it is submitted, make clear that such cause of action as is now proposed does not arise out of the same or substantially the same facts as the previously pleaded cause of action.

110. In this connection the relevant test is to be found in *P. & O. Nedlloyd BV. v. Arab Metals Co* [2005] 1 WLR 3733, para 42, approved in S*ociety of Lloyd's v. Henderson* [2008] 1 WLR 2255, para 54: facts "substantially the same" as those already relied on are limited to:

> "something going no further than minor differences likely to be the subject of inquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success."

It is submitted that those factual distinctions set out above go far beyond the permissible scope of "substantially the same facts" in CPR 17.42.

111. It is further submitted on behalf of RA that, even if the proposed amendments are not excluded as time-barred, they should not be allowed because the case now advanced is incoherent and incredible. The main points made under this criticism may be summarized as follows.

(i) As amended, the alternative claim in restitution is founded upon a transfer of rights from BB and AP to RA which by the amendment has been deleted from the main claim.

(ii) The deletion by amendment of the allegation of the transfer of shares or beneficial interests in shares from BB and AP to RA is incompatible with the

allegation of threats of expropriation for there would be no proprietary interest to which the threats could refer.

(iii) In connection with (ii), the re-description of the rights said to have been disposed of by BB and AP in response to the threats of expropriation appears to be completely in conflict with the Devonia Agreement which, on the face of it, was concerned with the transfer of beneficial interests in Sibneft but which was a device created by B and others without RA's knowledge.

(iv) If there were no shares or interest in shares owned by BB, the only rights available for expropriation would be personal rights of restitution against RA but those would not be interests which President Putin would have any interest in expropriating and, that being so, the alleged threat would be unreal.

(v) BB's explanation for his loss arising from transfer of his interests in Sibneft is untenable in as much as he advances the case that he was thereby prevented from bringing an action for an account against RA in the English Courts but files to explain why. Whereas the experts on Russian Law, Dr Rachkov, relied on by BB, and Mr Rozenberg, relied on by RA, were in disagreement as to whether there could be rights in rem owned by one participant arising under a joint activity or sui generis agreement in respect of a holding of shares by one of the other participants (as propounded by Mr Ratchkov and challenged by Mr Rozenberg), such rights could only be pursued in the Russian Courts, BB claims that he could not have brought any claim in the Russian Courts where a fair trial would not be available and so his only remedy was a claim for an account in the English Court.

112. The application to amend is further challenged on behalf of RA on the grounds that the amendments are abusive, particularly in the sense that they are not put forward in good faith and in the belief that what is pleaded is true but rather as responses to the Defendant's criticisms of the substance of a previously pleaded case. Emphasis is placed on the absence of any explanation by BB as to why these changes – some of them quite substantial – have been put forward, not only at a late stage but as a re-action to issues raised by RA on the pleadings.

113. In the context of implausibility Mr Brindle QC QC submits that, contrary to BB's case, it is entirely plausible that RA should have paid $1.3 billion to BB out of a moral obligation to pay for BB's services in relation to the creation of their respective interests in Sibneft during the Yeltsin era when BB had great influence in the Kremlin and notwithstanding that RA was under no contractual obligation to do so and that RA should have made the payment at the time when he did. Such payment is said to have been in response to a request by AP for payment for BB made in the course of a meeting at St. Moritz Airport in January or February 2001. It is RA's case that the reason for his making the payment at that time was that BB and AP had by then been obliged to dispose of his interest in ORT (see paragraph 13-14 above) and accordingly RA's funding of that company would be withdrawn. RA claims that he made the payment on the condition that BB made no further requests for payment and that he and AP would cease to associate themselves publicly with RA and his interests, including Sibneft. The meeting that took place at Munich Airport in early May 2001 was for the purpose of agreeing the mechanics of payment of the $1.3 billion by instalments. The Devonia Agreement was a customised device created to facilitate the

transfer of $1.3 million from a Latvian bank to BB and AP so that Clydesdale Bank would be satisfied as to its money laundering regulations; that is according to what Mr Shvidler (RA) told Mr Mitchard (Skadden) that Mr Fomichev (formerly BB) had told Mr Shvidler.

114. In the context of incoherence, attention is drawn to an alternative case advanced by BB in paragraph R37.3 in which it is pleaded that if the 1996 Agreement was of no legal effect BB and AP were entitled to "restitution of the Sibneft shares" which they agreed to and subsequently did transfer to RA or to entities under his ownership or control. Thus, albeit alternative, this plea is apparently entirely inconsistent with paragraphs C36 and C37 by which the plea of transfer Sibneft to RA of shares in Sibneft had been abandoned.

115. As to the proposed amendments relating to threats, it is submitted that in C.52 it is wrong in law to plead in the context of intimidation that the course of conduct and statements made by RA were "unlawful and/or illegitimate". Unlawful alone must be the only correct description. However, whatever the correct analysis of the tort of intimidation, this is a bad point. The characterization of conduct as "unlawful" in this context applies not to the process of uttering the threat but to that which is threatened. This paragraph contains no plea that what was threatened was "illegitimate".

116. On behalf of RA it is submitted that the plea in paragraph C54 A.3 is untenable. This is a plea of estoppel by convention. It is as follows:

> C54A.3 Alternatively, it was the mutually manifested common assumption of Mr Berezovsky and Mr Abramovich that the

> effect of the implementation of the agreement set out at paragraph C46 above was to transfer to Devonia or extinguish all of Mr Berezovsky's rights, interests and claims in respect of Sibneft. That common assumption was mutually manifested by (1) the terms of the agreement, as set out at paragraph C46 above; (2) the payment by Mr Abramovich to Mr Berezovsky through Devonia of US$1.3 billion; and (3) the fact that Mr Berezovsky did not, following the conclusion of the Devonia Agreement, request Mr Abramovich to pay (and Mr Abramovich did not in fact pay) dividends or any other sums to Mr Berezovsky in respect of his rights, interests and claims in respect of Sibneft. Accordingly, it would be unjust for Mr Abramovich to resile from such common assumption (in circumstances where, as a result of the common assumption, Mr Berezovsky did not seek to exercise his rights, interests or claims in respect of Sibneft, and in particular to the extent that any such rights, interests and claims are now time-barred under Russian law).

The defect in this allegation emphasised on behalf of RA is that the only conduct on the part of RA which is relied upon is the terms of the Devonia Agreement (which RA denies knowing anything about) and his payment of $1.3 million ostensibly consistently with those terms. It is argued that this conduct is not capable of founding the necessary case of a shared assumption, namely that the payment was made pursuant to the agreement to transfer to RA the interests of BB and AP in Sibneft. Nothing crossed the line which was capable of representing to BB that RA shared his assumption.

The Defendant's Submissions in relation to BB's case on Rusal

117. As appears from paragraphs 47-48 above, the whole of BB's case on Rusal rests on the foundation that the agreement at the Dorchester Hotel on 14th March 2000 gave rise to a trust under which RA owed to BB and AP certain duties now alleged to have been broken. Whereas RA denies that any such agreement was entered into, he alleges that

were there such an agreement as BB alleges, it could not have given rise to a trust because any such putative trust would have been governed by Russian Law as the body of law with which the agreement was most closely connected and under Russian Law trusts and beneficial interests and fiduciary duties arising from them do not exist.

118. It is therefore submitted on behalf of RA that BB's claim for breach of fiduciary duty is bound to fail, for, absent any applicable trust in respect of interests in Rusal, there is no other basis upon which it can be said that such a duty arises. In any event, given that the putative trust would be governed by Russian Law, claims in respect of breach of fiduciary duty would be time-barred under that law after 3 years.

119. BB's case based on breach of the Dorchester Agreement would, as RA submits, also be time-barred because any such contract would have been governed by Russian Law and therefore also subject to Russian Limitation legislation.

120. The submission that the alleged Dorchester meeting gave rise to the creation of a putative trust governed by Russian Law has been advanced by RA on the following basis.

(a) The alleged oral agreement included neither an express nor an implied choice of law. Accordingly, whether one was applying the common law or, if it can be said to apply to oral trusts, The Recognition of Trusts Act 1987, the governing law was that body of law with which the trust was most closely connected: see Dicey Morris, & Collins, 14th Edn, page 1302 and The Hague Convention, Art. 7 which provides:

Article 7

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to –

a) the place of administration of the trust designated by the settler;

b) the situs of the assets of the trust;

c) the place of residence or business of the trustee;

d) the objects of the trust and the places where they are to be fulfilled.

(b) The body of law with which the putative trust was most closely connected was Russian Law for the following reasons:

(i) The situs of the assets was Russia.

(ii) The place of residence or business of the trustee (RA) was Russia.

(iii) The objects of the trust and the place where they were to be fulfilled was Russia, for Rusal was a Russian company conducting business in Russia.

(iv) At the time when the trust was set up all of those involved in its creation — BB, AP, RA and Mr Deripaska — were resident in Russia.

(v) The involvement of BVI – incorporated companies in the transaction was a collateral factor of lesser weight and the fact that the transaction was set up at the Dorchester meeting was of even less weight.

(vi) The fact that an agreement of 10 February 2000 between Runicom and Dilcor under which RA, BB and AP acquired certain aluminium interests from Mr Cherney which ultimately became subject to the putative trust

was expressly subject to English Law was also a weak, if not an irrelevant, factor. This was equally the case with regard to the pooling agreements between RA and Mr Deripaska, such as the Preliminary Agreement and the agreement dated 15th March 2000 between Runicom, a Gibraltar company, and GSA (Cyprus) Ltd, a Cypriot company, under which RA (Runicom) sold shares in aluminium companies to Mr Deripaska. The evidence of BB was that he was not involved in the negotiations relating to these agreements or to any other document with regard to the merger and creation of Rusal. Nor was he a party to any of the decisions as to the related corporate structures.

121. It is submitted on behalf of RA that under the Recognition of Trusts Act 1987 with regard to the closest connection test in Article 7 of the Hague Convention, contrary to the submissions of BB that the fact that under a particular body of law the trust does not exist should be a dominant factor, or at least a factor of great weight, in deciding whether it is with that body of law that the putative trust has its closest connection, one must apply, whether at Common Law or under Article 7, a strictly objective test of closest connection, even if that application leads to a result which involves there being no enforceable trust. It is therefore submitted that the views expressed by Professor Alfred E. Von Overbeck in his official Explanatory Report on the Hague Convention at paragraph 61 were wrong when he stated :

> "One would think that, given the broad power to assess the situation that Art. 7 confers on a court, the judge will have a tendency to conclude that a trust is most closely connected with a State which has this institution."

In support of this submission Mr Brindle QC has referred to a useful work — The Hague Trusts Convention : Scope Application and Preliminary Issues — by Prof. Jonathan Harris and in particular to pages 226-227 in which the view is expressed that the fact of invalidity of the trust under the law of a given state is completely irrelevant to the application of the closest connection test under Art.7. That work is also relied upon to support Mr Brindle QC's submission that, within the first-stage test of express or implied choice of law, the fact that a particular state's law could not have been impliedly intended because it knows nothing of trust does not necessarily lead to the conclusion that one of a number of other candidate states' laws must have been intended (see page 209).

122. The alternative submission on behalf of BB that the agreement between BB, AP and RA as to Rusal, if it did not give rise to a trust, gave rise to a contract is challenged on behalf of RA, not only on the fundamental point that no such agreement was made, but that, if it was, it too was governed by Russian Law and any claim based on its breach is also therefore time-barred. That submission is based on the application of Article 3 and 4 of the Rome Convention on the Law applicable to Contractual Obligations 1980 as applied by the Contracts (Applicable Law) Act 1990. In the absence of an express or implied choice of law within Art. 3, no implication being demonstrated with reasonable certainty whether on the basis of a course of dealing or otherwise, it is necessary to apply the test in Art. 4, that is the closest connection test. However, this applies different criteria from those in Art.7 of the Hague Convention, for Art 4.2 provides:

> Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal of business, the country in which that other place of business is situated.

It is submitted that all those who were candidates for the person having the characteristic performance – RA, ABB, AP and Deripaska – had their habitual place of residence in Russia in March 2000. Accordingly, Russian Law governed any such contract and all claims were time-barred.

123. Finally, it is submitted on behalf of RA that BB should not be permitted to amend his pleading by introducing at paragraph R64.1(2) and (3) of the composite pleading the following:

> Mr Abramovich has disclosed in these proceedings a Preliminary Agreement entered into by Mr Abramovich (on behalf of himself, Mr Berezovsky and Mr Patarkatsishvili) and Mr Deripaska prior to the meeting at the Dorchester Hotel pleaded at paragraphs C62 and C63 in respect of the proposed merger of the aluminium assets owned by the parties which contains an express English governing law clause (it having been agreed by Mr Berezovsky, Mr Abramovich and Mr Patarkatsishvili prior to the said meeting that they should make their arrangements regarding the proposed merger subject to English law.
>
> On about 15 March 2000, following the final agreements reached at the meeting at the Dorchester Hotel, Mr Abramovich (on behalf of himself, Mr Berezovsky and Mr Patarkatsisvili) and Mr Deripaska entered into a further written agreement concerning the proposed merger of the aluminium assets owned by the parties which contained an express English governing law clause (Mr Patarkatsishvili having informed and agreed with Mr Deripaska and Mr Abramovich, in the presence of Mr Berezovsky, during the course of the meeting at the Dorchester Hotel, that all the merger arrangements (including those relating solely to Mr

Berezovksy, Mr Patarkatsishvili and Mr Abramovich) were to be governed by English law.

124. Mr Brindle QC has strongly challenged the truth of the plea of an express agreement that English Law was to apply. He draws attention to the fact that notwithstanding repeated detailed reviews of the Particulars of Claim by those advising BB as to the pleadings and several earlier amendments to the Particulars of Claim, there had been no suggestion of an express agreement that English Law should apply until after RA's application to strike out had been issued on 14th November 2008 accompanied as it was by the Second Witness Statement of Mr Mitchard which stated that the then proposed amendment to rely on a Rusal Contract governed by BVI law, as distinct from a trust, was an entirely new departure and that under Russian law any such contract claim would be time-barred.

125. It was only in BB's Second Witness Statement in response to the present application, served on 16th April 2009, that BB stated for the first time that at the insistence of AP the Rusal transaction between BB, AP and RA should be subject to "British" Law as in paragraphs 68 to 77 of the witness statement, which was understood to mean English Law. BB had provided no explanation for this last-minute change in his case. Accordingly, this court should infer that the whole account of that express agreement had been concocted by BB to counter the Russian Law limitation obstacle. That was BB making things up as he went along and amounted to an abuse of process. No such amendment should be permitted.

Discussion

126. The logical starting point for consideration of the applications made on behalf of RA is BB's application to amend. Until that has been decided, the factual and legal "specification" for RA's summary judgment and strike out applications cannot be precisely defined. Furthermore, before evaluating the issues going to the substance of the amendments with regard to Sibneft, such as whether the proposed amendments are so incredible or incoherent that they should be disallowed and whether the proposed amendments are not advanced in good faith and are therefore an abuse of process, it is necessary to investigate whether and, if so, to what extent the amendments or any of them are time-barred.

Time Bar

127. This is a two stage evaluation:

(i) Do the amendments introduce a new cause of action (Limitation Act 1980, s.35(2))?

(ii) If so, do the amendments or any of them arise out of the same or substantially the same facts as the unamended claim? If they do not, they must be disallowed (CPR 17.4(2)).

Is a new Cause of Action introduced by the proposed Amendments?

128. It is important not to lose sight of the elements of the tort of intimidation — a matter to which I return later in this judgment. The essential structure established by *Allen v Flood*, (1898), *Rookes v. Barnard* [1964] AC 1129 and *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation* [1983] AC 366 is that the

defendant has made a coercive threat to the claimant that, unless the claimant acts in a certain way, impermissible conduct (to use a neutral expression before I deal with this tort in more detail) will be carried out against the claimant which causes him loss and/or damage, or that the defendant has made a coercive threat to a third person that, unless that third party acts in a certain way towards the claimant, the defendant will act impermissibly towards the third person and the claimant is thereby caused loss and/or damage. It is of the essence of the tort that there should be a threat of impermissible conduct either against the claimant or a third party and that such threat should cause loss and/or damage to the claimant.

129. The foundation of RA's case on the amendments being time-barred is that by those amendments BB has changed the whole basis of his intimidation claim. He has abandoned the allegation that RA received the transfer of BB's and AP's shares in Sibneft under an agreement (the 1996 Agreement) whereby RA would hold them on trust for BB and AP who would each have a beneficial interest to the extent of 25 per cent and that in 2001 in consequence of RA's threats BB and AP transferred to him by means of the Devonia Agreement their entire beneficial interest in the transferred shares or an immense undervalue and thereby suffered losses. For that BB seeks to substitute a new case the effect of which is that he, AP and RA agreed in 1995 that the shares in Sibneft thereafter acquired by any of them could be held for the benefit of the three of them in their agreed proportions, that under the 1996 agreement all their interests in Sibneft were to be held by RA for the benefit in such proportions of all three of them and that those interests thereafter amounted to personal rights of restitution and/or vindication under Russian Law to the effect that they were not

beneficial interests under a trust but that BB and AP disposed of such Russian Law rights under the Devonia Agreement by reason of RA's coercive threats and that BB thereby suffered loss. It is implicit that RA's threats were directed to BB and AP no longer divesting themselves of beneficial interests under a trust but of personal Russian Law rights against RA.

130. Does the essential factual structure of the amended claim differ from the essential factual structure pleaded to support the unamended claim?

131. The essential factual structure of the originally pleaded claim comprised an allegedly coercive threat — that unless BB disposed of his interests in Sibneft to RA those interests would be expropriated by orders of the President — and that loss and damage thereby caused — namely that BB was induced by the threat to dispose of his interests in Sibneft to RA at an undervalue.

132. It can thus readily be seen on analysis that what has changed is the explanation of BB's initial acquisition of an interest in Sibneft and the nature, under the applicable law, of the interest which he initially acquired, of the interest which he held at the time of the threat and of the interest which he disposed of in consequence of the threat.

133. The application of the dictum of Millett L.J. in *Paragon Finance v. D.B. Thakerar & Co*, supra, has been the subject of much judicial commentary but of those authorities to which I have been referred I have found the judgments of Dyson L.J. in *Aldi Stores Ltd v. Holmes Buildings plc* [2003] EWCA Civ 188L and of Warren J in *Harland Wolff Pension Trustees Ltd v. Aon Consulting Financial Services Ltd* [2009] EWHC 1557 (Ch) to be particularly illuminating. The following dictum of Buxton L.J. in *Deutsch Morgan*

Grenfell Group plc v. Inland Revenue Commissioners [2006] Ch. 243 at paragraph 296 is also of assistance. Having concluded that, in a claim for restitution in respect of several over-payments of tax, each separate over-payment gave rise to a separate cause of action for the purposes of judging whether an amendment was time-barred, Buxton L.J. observed:-

> Mr Rabinowitz QC argued against that conclusion, and I understand Jonathan Parker and Rix LJJ to accept, that this case was no different from a claim in tort, where new factual allegations may be added without constituting a new cause of action. That of course depends on the nature of the new factual allegations: see the judgment in the *Paragon Finance* case, at p 406c. But, more fundamentally, the essence of a claim in tort is of tortuous conduct causing loss. It may therefore be sufficient to plead the tortious conduct as the foundation of the action, causing unspecified loss, with subsequent particularisation of the loss merely filling out an already sufficiently pleaded claim. That indeed is the approach adopted in paragraphs 9 and 11 of the particulars of claim in this case. But in a claim for restitution the essence of the claim is the fact of the payment, with the reasons for that payment serving to assert why that payment should be returned: see paragraph 288 above. Both element in the cause of action must thus be pleaded, under the general principle of *Cooke v Gill* LR 8 CP 107.

134. I would add that the necessary analysis involved distinguishing between that component of a factual allegation which is essential to the cause of action in the sense that its absence would lead to the claim being struck out and that component which is no more than particularisation of the essential component which, as a matter of pleading, could be necessary to enable the opposing party to be well-enough informed to plead a meaningful defence.

135. Against this background it is possible to evaluate two submissions advanced on behalf of RA.

136. Firstly, it was argued by Andrew Popplewell QC in his main submissions that, whereas an amendment out of time which sought to add a head of damage to others said to have been caused by the same breach of duty was permissible, the substitution of a new head of loss for one that was deleted was impermissible. This was said to be particularly so because under the Limitation Act were this permissible it might create multiple limitation time periods.

137. This proposition, if correct, would characterize the identification of any particular head of damage said to have been caused by the breach of duty in question as an essential element of the tort. As such, it confuses the essential component of the tort, which is damage in general, with the normal and desirable content of a pleading, which is the identification of what damage. Once it is accepted that damage, as distinct from its particularisation, is the essential component, the substitution of one kind of damage for another, leaves the original cause of action unchanged and intact. Although Mr Brindle QC relied on the judgment of Warren J in *Harland & Wolff v Aon*, supra, particularly the passage which I have quoted at paragraph 108 above, I find nothing in that passage or in any other part of this very careful judgment which lends support to this submission.

138. In my judgment, the factual material in the original pleading relating to the alleged initial creation of BB's rights in Sibneft by means of the 1995 Agreement and the subsequent transfer of legal rights to shares by RA in the 1996 Agreement has the function of explaining the origin and existence, and defining the legal nature of, such rights as it is alleged BB was subsequently induced by the alleged threat to transfer to RA. Whether those rights are described as rights as against RA to beneficial interests

under a trust or rights or interests or personal rights in Russian Law to restitution or vindication against RA, they are both alleged to have been disposed of to RA in consequence of his threats. Put as a very simple analogy, it is as if it were first pleaded that X threatened to shoot Y unless Y handed over "your money", in consequence of which Y suffered loss by handing over a £20 note which he had just obtained from an ATM and then, by amendment, it was sought to delete the reference to a £20 note and an ATM and substitute four £5 notes which he had got from an exchange bureau. It could not seriously be suggested that the amendment raised a new cause of action.

139. I conclude that the proposed amendments, in so far as they relate to the disposal of BB's interest in Sibneft, whether derived from the 1995 or 1996 Agreements and whether personal claims against RA, raise no new cause of action in relation to Sibneft.

140. It follows that it is unnecessary, and indeed unreal, to decide whether, by those amendments, were there a new cause of action, it would have arisen out of the same or substantially the same facts as the original pleading. The relevant test in *P. & O. Nedlloyd BV v. Arab Metals Co*. supra, set out at paragraph 110 above, permits a relatively circumscribed factual area to be newly introduced. In my view, the additional factual area which is relied on and will have to be investigated and then subject of evidence goes well beyond that permissible additional area and consists in particular of precisely what rights or interests BB acquired under Russian Law, if not rights under a trust, and what he transferred to RA as a result of the Munich Airport Agreement and the Devonia Agreement. These matters are not, as I have held,

essential to be proved to maintain the claim for intimidation, but they are certainly not merely collateral to the main substance of the claim as now advanced.

141. I therefore hold that if those proposed amendments had raised a new cause of action in respect of Sibneft, leave to amend would have been refused. CPR 17.4(2) would not have saved the pleading.

142. There is, however, another proposed amendment, advanced in the alternative, which is to be found at R37.3 and R37.4(2), comprising the words "(BB) and (AP) were entitled to . . . . . the value of the services performed by (BB) and (AP) pursuant to the 1996 Agreement" (R 37.3) and "the 1995 Agreement" (R.37.4(2)). It is submitted that this is a new and independent cause of action and is consequently time-barred.

143. This alternative claim differs from all the other formulations of BB's claim because it does not stem from any interest of a proprietary or quasi-proprietary nature in Sibneft. In English Law terms it is broadly analogous to a personal quantum merit claim. Whereas, the other Sibneft claims are all based on BB's disposal of his interest in Sibneft to RA, this claim does not obviously fit into that mould. However, given that this late introduction to the claim is put forward as an alternative in case the 1996 Agreement was of no effect and the rights of the parties were consequently governed by the 1995 Agreement, it is assumed that the purpose of R.37.3 and R.37.4(2) is to rely on a sufficiently identifiable nexus between BB's alleged entitlement to compensation under Russian Law in respect of services provided and Sibneft for the expropriation of his right to be the subject of RA's threats. If that is what is intended, then this would not involve the introduction of a new cause of action.

144. If that is wrong, I am not persuaded that this particular amendment does arise out of the same or substantially the same facts as the original pleading. It would involve an investigation into the extent and value of BB's contribution of services and of the application of Russian Law to the provision of such services in order to ascertain whether BB would have had any rights vis-a-vis Sibneft or RA or both and, if so, whether the threat of expropriation of such rights could have been a meaningful exercise in coercion.

145. Assuming that the proposed amendments to BB's case are not time-barred by reason of the effect of Section 35(2) of the Limitation Act 1980, it is next necessary to consider the submissions advanced on behalf of RA to the effect that the amendments should not be permitted because (i) they were incredible or incoherent or (ii) because they were not advanced in good faith and therefore amounted to an abuse of process. Before doing so, it is necessary to refer to those principles which ought to be applied by a court which is invited by a defendant to strike out a claim under CPR 3.4(2)(a) and/or to dismiss the claim under CPR 24.2 and also invited to permit a claimant to amend his claim in the face of such an application.

Principles applicable to striking out or summarily dismissing a claim

146. It is well established that the overall burden of proof rests on the defendant who applies to strike out a claim or for judgment dismissing a claim to establish that the claim is no stronger than fanciful : see in relation to summary judgment on the claim under CPR 24.2(a)(2) — "the defendant has no real prospect of successfully defending the claim . . ." — *Swain v. Hillman* [2001] 2 All ER 91. For the court to be satisfied that the claim has no real prospect of success it must entertain such a high degree of

confidence that the claim will fail at trial as to amount to substantial certainty : see *Barrett v. Enfield London Borough Council* [2001] 2 AC 550 per Lord Browne-Wilkinson at page 557. That high degree of confidence is required in order to deal with each case justly and consistently with Article 6.1 of the European Convention on Human Rights : see *Three Rivers District Council v. Bank of England* [2001] UKHL 16 per Lord Hope at paragraph 92. Later in his judgment Lord Hope said this at paragraph 95 :

> For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is — what is to be the scope of that inquiry?
>
> I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in providing all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of facts would be a waste of time and money, and it is proper that the action should be taken out of the court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents, without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman,* at p. 95 that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

In my own judgment in *De Molestina v. Ponton* [2002] 1 Lloyd's Rep. 271 I attempted to explain how, upon this kind of application, the court might,

unusually, have to consider relatively complex facts. At paragraph 3.4 and 3.5 I said this:

> 3.4 The fact is that there may exceptionally be cases of great factual complexity where, if the application to strike out the claim is under CPR 24.2, it may be essential for the Judge before whom the application is made to conduct a careful investigation of the evidence to ascertain whether, in spite of the intrinsic complexity, there is obviously no substance in the claim. If that conclusion cannot be reached on the basis of the facts pleaded by the claimant and on any further facts which are indisputable, either because they have been admitted or because they have gone unchallenged when there was a reasonable opportunity to challenge them, or because they are the only realistic inference from other pleaded or admitted or unchallenged primary facts, the claim should be left to go to trial. However, as *Three Rivers District Council* shows, where the application in such complex cases relies on inferences of fact, the overriding objective may well require the claim to go to trial in the interest of a fair trial. That is because the relevant inference could not be safely drawn without further discovery and oral evidence at the trial. It is thus necessary, where such inferences are relevant, to guard against the temptation of drawing them as a matter of probability, because the achievement of the over-riding object requires a much higher degree of certitude. Where in a complex case, as may often be the situation, the frontier between what is merely improbable and what is clearly fanciful is blurred, the case or issue should be left to a trial.
>
> 3.5 The same general approach must apply in a case where the issues involve mixed questions of fact and law and where the application of the law is complex because it depends crucially on detailed findings of fact. It is, however, necessary at the application stage to be completely satisfied that all the relevant facts can be identified, whatever may be the conclusion on the issues of law, and that those facts are in reality incontrovertible. That said, the fact that the law is to some extent uncertain may not in itself necessarily be a reason for postponing to a trial full argument upon it, for, if the law can be as fully argued on the application as it can be at a trial, the achievement of the overriding objective can be as fully satisfied and may be more fully satisfied by the disposal of the issue of law on the hearing of the application. The latter is true because considerations relevant to the achievement of the overriding objective, such as the expeditious and most economical disposal of the case in terms of costs and of the Court's time, may often call for the disposal of the case or issue at an earlier stage than after what in a complex case could be a considerable delay before a trial could take place. In this there is no unfairness, if there is no issue as to

> any conceivably relevant facts, particularly when it is remembered that if there is pronounced uncertainty on an issue of law, it is almost inevitable that it can be tested on appeal.

147. In the context of the present case I would only add this. Where factual issues arise, particularly where they are central to the claim, which turn on a combination of disputed accounts of oral discussions which took place between eight and fourteen years ago which were neither formally nor informally recorded in writing, it would be surprising in the extreme if any court could arrive with the necessary high degree of confidence, at the conclusion that, if the matter were left for trial the trial judge was bound to prefer the account of one side rather than the other, even following cross-examination and the disclosure of documents. Further, in a case where it might be essential for the court to evaluate the understanding of one party of words spoken by the other, not only would cross-examination normally be essential but also evidence of the surrounding circumstances to enable the trial judge to evaluate the sense in which the words used would have been understood.

148. In relation to the countervailing application by BB to amend his statement of case in response to the applications to strike out or dismiss his claim as originally pleaded, the right approach of this court should be to permit those amendments, provided that they were sufficiently coherently expressed and in that context were reasonably consistent with the unamended residue of the pleading, unless completely confident that they in turn have no real prospect of success.

149. With these considerations in mind, I therefore turn to the case now advanced by BB with regard to the rights which he claims to have acquired in relation to Sibneft.

The New Case on BB's Russian Law Rights

150. The Devonia Agreement plays a key part in RA's attack on the proposed amendments. That is because under it BB and AP apparently sold to Devonia their "beneficial interests" in 2,062,335,000 shares in Sibneft and by Recital (F) it was stated that RA held the shares and/or controlled the Registered Entities and through them the shares "as nominee in trust for and on behalf of BB and AP absolutely on verbal arrangements." By Recital (G) it was further stated that the vendors confirmed and were aware that Devonia intended to thereafter transfer the beneficial interests in those shares to RA or companies or entities controlled by him.

151. On behalf of RA it is argued (apart from the allegation that the Devonia Agreement was a sham designed to transfer money from a Latvian Bank in a manner which would avoid money-laundering complications (see para 84 above)) that BB will not be able to establish that he had Russian Law rights arising from a joint activity agreement or a sui generis agreement, namely the 1995 or 1996 Agreements because neither basis involved an interest of any kind in issued shares in Sibneft and therefore did not supply the basis for a transfer either of the nature apparently evidenced by the Devonia Agreement or at all.

152. This argument has two further dimensions. Firstly, the shift in BB's case from beneficial interests in shares to Russian Law rights with regard to Sibneft deprives the alleged threats by RA of any real substance for, if there were no right in Russian Law, analogous to a proprietary interest, to be transferred from BB and AP to RA, the very basis of the loss alleged to have been caused to BB by the impact of the threats would be removed.

153. Secondly, if there were nothing analogous to a proprietary interest in any shares which were the subject of the alleged threats, those threats would be deprived of all credibility for, and impact on, BB because, if there were no such interest, there would be nothing worth expropriating and no reason for President Putin to wish to do so, since the Russian Law rights now relied on could not provide BB with any measure of control over Sibneft.

154. The Devonia Agreement was expressly subject to English Law and Jurisdiction and written only in English. According to BB, he was unaware of its substance, although he must have signed it. It was drawn up by English lawyers on the basis of instructions from their respective clients. Not only did it involve the immediate parties to it but also Sheikh Sultan bin Khalifa of Abu Dhabi, as guarantor of Devonia's performance. Unless that agreement was and was known by all concerned to be a completely bogus transaction, there must have been at least some evidence before those who negotiated its terms that there were at the lowest some tangible interests pertaining to Sibneft shares which were available to be transferred by BB and AP. Whether the agreement was or was not bogus, what seems to have escaped the attention of all concerned was that there was no such thing as a trust under Russian Law and further that the only transferable interest in shares in Russian companies was registered title.

155. It is argued on behalf of BB that in all the circumstances, if BB and/or AP indicated that they intended to transfer to RA such rights as they had with regard to Sibneft, it is not impossible that the English lawyers concerned, with inadequate investigation of, or instructions as to, Russian Law, might have assumed that what was being described to them were indeed accurately described as beneficial interests under a trust and that

they therefore created the Devonia Agreement on that foundation in the belief that they were giving effect to such instructions as they had received. Such an eventuality cannot be dismissed as fanciful at this stage without a comprehensive examination of the information provided to the lawyers.

156. Further, given that it is not submitted on behalf of RA that it is impossible in Russian Law to expropriate rights such as the Russian Law rights now relied upon, it is argued on behalf of BB that the impact of the threat of expropriation would not be removed if the rights were not beneficial interests under a trust but Russian Law rights. They were still valuable rights and BB, believing that President Putin was determined to divest him of all control and contact within Sibneft and to curb BB's power to influence it and generally to damage BB, might well have been influenced, as he claims he was, by RA's "threats".

157. It is further argued that on the basis of the Russian Law evidence such Russian Law co-ownership rights as BB had, could have been assigned to a third party for value, if not expropriated, or alternatively BB could have applied to the English Court for a mandatory injunction to enforce his co-ownership rights against RA.

158. There can be no doubt that on the face of it the abandonment by BB of the case based on beneficial interest in shares under a trust and the substitution, in the face of the pleaded defence that no such rights exist in Russian Law, of a case based on Russian Law rights is a substantial change of position. However, I am not persuaded that it now demonstrates that BB's claim is so lacking in substance and veracity that it can be said to be palpably hopeless, in the sense of having no real prospect of success.

159. Firstly, the substance of the tort, in addition to the threat of expropriation, is the impact of what was said on BB. If it were to be established at the trial, with the assistance of searching cross-examination and also disclosure of contemporary documents, that BB was caused to believe in the risk of expropriation of such rights as he had in relation to Sibneft and was thereby caused to embark on the disposal of his "interests" or Russian Law rights, there would be the causal impact essential for the tort of intimidation. Although, on the material now before the court, that may appear to be a seriously difficult case, it does not present itself to me as an inevitably hopeless case.

160. Secondly, it is true that the Devonia Agreement makes express reference specifically to the sale of the beneficial interests in shares in Sibneft and to the transfer of such interests to Devonia pursuant to the structure of options which it created. However, not even the most incompetent English solicitor would have drawn up an agreement in these terms —even if it were bogus — unless he had been given to understand by his client that there were in existence interests in relation to shareholdings in Sibneft which were owned by BB and capable of being transferred to a purchaser. The circumstances in which those instructions came to be given and in what terms will be amongst the many factual matters which will have to be explored at a full trial. It would be quite contrary to the purpose of the CPR 3.4(2) or 24.2 procedure to speculate as to the true facts at this stage.

161. Further, the argument advanced on behalf of RA that, once the concept of beneficial interest in shares is abandoned, the case that BB was influenced by the "threat" of expropriation could not be maintained because the substance of that case was both

that there was something to expropriate and that President Putin would have wanted to deprive BB of that interest, in my view, ignores the context in which the transaction was entered into. The recent experience of BB in relation to the disposal of his interest in ORT and his interviews with President Putin and with Mr Voloshin (see paragraph (..) above) could reasonably be expected to have influenced BB's understanding of the words used by RA and his perception of the risk to which he might be exposed if he ignored RA's remarks. There was also the arrest of Vladimir Gusinsky (see paragraph (...) above) which could well have demonstrated to BB that the President would be prepared to use the State's powers of criminal prosecution on trumped up charges to wrest control of commercial organisations from those who were politically unacceptable. Additionally, RA apparently had all the appearances of one whose relationship with President Putin was such that any remarks that he made about what the President would or could do to BB ought to be given great weight in the sense of accurately reflecting either RA's ability to influence Putin to act to their mutual advantage or RA's belief that he could do so.

162. This Court is simply not in a position at this stage in the proceedings to conclude with the requisite level of confidence that what RA might have told BB or AP would not; in the context of those remarks, have had that persuasive impact so as to constitute a threat of a coercive nature or to be understood by RA as likely to have such impact on BB as distinct from a mere friendly warning. This issue can only be determined in the course of a full trail.

163. The argument was advanced on behalf of RA that, in as much as the proposed amendment included the deletion from paragraph 52.5 of the Reply of the allegation

that RA was liable as a joint tortfeasor with President Putin the allegation of a threat of expropriation was deprived of an essential component and that the allegation of intimidation involved an inconsistency.

164. In my judgment, this overlooks the substance of the alleged intimidation, in particular the central component of impact on the mind of BB. In order to make good his case BB does not have to allege and prove any actual relationship between RA and the President specifically relating to Sibneft and BB's interests in it. Provided that he can establish that in all the circumstances he believed and was known by RA to believe that what he was being told by RA amounted to a coercive threat by RA to work with the President against BB there is no need to make good any allegation that at the relevant time there was in being a joint enterprise between them to bring about expropriation. In this connection, I have been referred by Mr Rabinowitz QC QC on behalf of BB to a passage in the dissenting speech of Lord Halsbury in *Allen v. Flood* [1898] AC1 at page 87 :

> *"if concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that an individual who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual, or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats; so that, if they in truth authorized him, he and they might all have been responsible, while the false statement that he made, though acting upon the employer by the same pressure because it was believed and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false."*

The absence of an express representation by the defendant that he is acting in concert with another who will injure the representee is inessential, provided that the threat is understood in such a way as to indicate that the defendant has the power to cause the injury threatened: see Lord Devlin in *Rookes v Barnard* [1964] Ac 1129 at page 1211, where he stated that the tort could not be committed "unless the intimidator has or is believed by the party threatened to have the coercive power which is the essence of the tort."

165. The further submission that the proposed plea of estoppel by convention, which appears at paragraph C54.3 of the pleading, was fundamentally defective, chiefly because nothing "crossed the line" from RA which could be the basis of the manifestation of an assumption shared by RA that the Munich Airport agreement and the resulting Devonia Agreement were valid and binding, in my judgment, encounters a major difficulty.

166. The pleading does rely on conduct by RA which is capable of amounting to a manifestation of his agreement or sharing of the assumption, namely the arrangements for the payment of US$1.3 billion by means of the mechanism of the Devonia Agreement. There is, however, an issue as to the circumstances in which that mechanism came to be set up and the money came to be paid, in particular whether as alleged by RA, it was a gratuitous payment in recognition of BB's services in setting up Sibneft and whether the Devonia Agreement was simply a device for the transference of that money set up for the banking convenience of BB and AP. This is not a matter on which this court can form any concluded view at this stage. It too will have to be resolved at a full trial.

167. The submissions on behalf of RA with regard to the causation of loss allegation in paragraph C54A4 of the pleading that BB has lost his entitlement to enforce his Russian Law rights with regard to Sibneft, not by the intimidation but by the effluxion of time is, in my judgment, misconceived. BB 's case is that he did not attempt to enforce his rights because he was caused by the intimidation to enter into a transaction by which he was reasonably given to believe would of all his rights in relation to Sibneft. The submission that the argument that the intimidation caused his loss is bound to fail, is in my view, untenable. Like all other issues of causation, it depends on the evidence at the trial. At this stage, here again one cannot conclude that BB has no real prospect of success.

168. As to the submission on behalf of RA that the amendments should be disallowed because they represent merely that the latest in an extended series of amendments or attempted amendments since these proceedings were commenced which have involved various reformulations of the case advanced by BB — most recently designed to avoid the effect of matters pleaded by way of defence, the court is entitled to view the proposed amendments in their own right and test their intrinsic viability. However, a history of repeated amendments and re-amendments of a responsive nature in re-action to matters raised by the defence should certainly be taken into account when it comes to evaluating the strength of a newly proposed case, particularly if the claimant has provided no explanation to the court for changing the case to be advanced.

169. There can be little doubt that in the present case many of the changes in the way BB's case is now proposed to be advanced appear to have been occasioned by what has

been pleaded in the defence. The most obvious example is the abandonment of the case based on the transfer of beneficial interests in shares in Sibneft and the substitution for it of the case based on Russian Law rights. Similarly, but less fundamentally, there is the deletion of the reference to RA and Putin being joint tortfeasors which appears to be directed to avoiding the supposed impact of the Act of State doctrine. These and other changes have to be viewed against the background of the receipt by BB of expert legal advice from very experienced counsel and solicitors in the past who no doubt provided their advice on the pleadings in response to detailed instructions from BB as to the interests which he claimed in Sibneft. Nor must it be forgotten that it is not only in relation to the case regarding Sibneft that BB has sought to change his original case, apparently in response to the defence, but also in relation to the case with regard to Rusal. By Paragraph R64.1A BB proposes to plead an express or implied agreement that the trust which it is said was to be created as a vehicle for the interests of BB, AP and RA in Rusal was to be governed by English Law. Here again, it is submitted that the purpose and motive for this amendment must have been the point taken by RA that in Russian Law there are no trusts (see paragraph D64.3 of RA's defence). Here again no explanation has been advanced by BB for this change in his case.

170. There can be no doubt that these apparently opportunistic amendments do create considerable suspicion as to the reliability of BB's whole evidence and in particular of his case on his agreements with RA and AP — the 1995, 1996 and the Rusal Agreements. Were the relevant measure of these applications the probability of success of the claim as amended, the absence of any explanation for these late

amendments would weigh heavily against BB to the effect that it might well be concluded that even after a full trial his claim was more likely to fail than to succeed. But the relevant currency is not relative probability but absence of reality : see Lord Hobhouse in *Three Rivers District Council v The Bank of England N^{o} 3* [2001] UKHL 16. Thus, whereas the significant fluctuations in BB's case call for explanation and will no doubt be a potential area for searching cross-examination at a full trial in the light of full disclosure of documents and the evidence of factual witnesses called by both parties, they do not in themselves justify the refusal of a full trial at this stage. For this court now to determine on the evidence before it, voluminous though that may be, that BB's applications to amend are intrinsically improbable or abusive and should therefore be disallowed would be to apply a more stringent test than would be permissible under the general principles that have been developed upon the application of CPR 3.4(2) and CPR 24.2.

171. There will, accordingly, be leave to amend the Particulars of Claim and Reply in all respects applied for in relation to the case regarding Sibneft. I shall explain my reasons for permitting the proposed amendment of paragraph C.52 by the insertion of "*or* illegitimate" later in this judgment (see Para 165 below).

Application to amend the Case regarding Rusal

172. The essential issue on this part of BB's amendment application is whether this court is now in a position to conclude that the proposed pleading at R.64.1A should be rejected as having no real prospect of success, I have already referred to the late introduction of this part of the pleading and to its apparently responsive nature in the face of RA's application to strike out on the grounds that the whole basis of the Rusal

claim was fatally flawed because it was based on RA having fiduciary duties to BB and AP as beneficiaries under a trust and Russian Law did not comprehend trusts or beneficial interests under them. Accordingly, the trust structure of the claim could survive only if that trust was governed by English Law. BB supports this application in his witness statement dated 15 April 2009 as follows:

> When Mr Patarkatsishvili and Mr Abramovich were negotiating the acquisition of aluminium interests in factories and related businesses at Bratsk, Krasnoyarsk and Achinsky in 1999, they told me that they were making the arrangements through offshore structures and subject to Western law so as to make them more tax efficient and to provide us with greater protection against abusive interference by the Russian authorities.
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> There was a similar discussion between the three of us in the context of our proposed merger with Mr Deripaska. I distinctly recall Mr Patarkatsishvili saying to Mr Abramovich and me that it was important that we protect the arrangements in a proper "*British law' way.* By "British", I understood Mr Patarkatsishvili to mean *"English"* and I have no doubt that Mr Abramovich understood the same.
>
> Mr Patarkatsishvili said that Vasily Anisimov (who was a business associate of Mr Patarkatsishvili and had been one of the vendors who sold to us the interests in Bratsk, Krasnoyarsk and Achinsky) had told him that we should make all our arrangements, including those as between ourselves, *"in a very precise British law way."* Both Mr Abramovich and I agreed with him that we would do so. For my part (and I believe that Mr Patarkatsishvili's and Mr Abramovich's positions were the same), in 2000, I would not have contemplated entering into agreements for a significant investment on terms that made it subject to Russian law because the Russian court system was so unreliable and by 2000 we had already had negative experiences arising out of politically motivated investigations by the Russian authorities.
>
> As explained in Mr Marino's statement, by this time Mr Patarkatsishvili and I were ourselves exploring using offshore structures to protect our interests and I understood how offshore trusts could be used to our advantage. Mr Abramovich said that he understood what Mr Patarkatsishvili was proposing. As a result we all agreed that, if a merger could be agreed, Mr Abramovich would hold our interests "on trust for us and that all arrangements regarding the merger (including the trust) would be governed by English law.

173. The proposed introduction of R64.1A could be disallowed only if I were to conclude that the evidence in the above passage as to an express agreement that proposed merger arrangements should be subject to English Law should be rejected as untrue, having been put forward in a opportunistic effort to defeat the case advanced on behalf of RA that any claim in respect of a putative Russian Law trust would be bound to fail. Again BB has not explained the reason why this point was not relied on in the first edition of his Reply.

174. Apart from BB's pleaded assertion that there was an express choice of English Law, it is pleaded that there was an implied choice of English Law.

175. It is to be observed that under The Recognition of Trusts Act 1987 it is provided by Article 1 that the provisions of the Hague Convention on the Law Applicable to Trusts and on their Recognition have the force of law in the United Kingdom and by Article 2:

> (2) Those provisions shall, so far as applicable, have effect not only in relation to the trusts described in Articles 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere.

Article 3 of the Convention applies it only to trusts evidenced in writing.

176. In the face of Article 2 I hold that the effect of the 1987 Act is to apply the provisions of the Convention to oral trusts or putative trusts which are governed by English Law. That governing law is ascertained by application of Article 6 or, if there is neither an express or implied choice of a governing law, one applies Article 7 — "the law with which it is most closely connected."

177. It is to be observed that Article 6 makes express reference to "the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case." In the case of an oral trust the applicability of that provision must clearly be modified to accommodate the need to ascertain "the law chosen by the settler" in the first sentence and so must be read by reference to the words spoken in the course of creating the trust. Indeed, were one to ignore the 1987 Act and apply the Common Law approach, a similar method would apply.

178. Accordingly, whereas an express choice of law for an oral trust must be proved by establishing that words of choice were spoken at a meeting or meetings, as pleaded at R64.1A(2), if no such express choice were made by the words used, one would have to investigate what words were used and all the surrounding circumstances to ascertain whether those words and circumstances gave rise to an implied choice of law.

179. In the passage from BB's witness statement quoted above there are various references to "Western Law" and "British Law" as well, finally, to "English Law." Further, on behalf of BB Mr Rabinowitz QC has drawn attention to the circumstances giving rise to these discussions which, it is submitted, are relevant to the implication of a choice of English Law. These are that, when in February 2000 BB, AP and RA acquired from the Reuben brothers the aluminium assets which they merged into Rusal, they did so under contracts containing an express English law provision. In that connection, those three at the time using offshore corporate entities to protect their asserts, Mr Anisimov, who was involved in the deals under which BB and AP acquired their aluminium assets is said, told AP that English law should be used for all transactions involving aluminium. Further, before the Dorchester meeting RA, acting

for himself and BB and AP, entered into a Preliminary Agreement with Mr Deripaska in respect of pooling aluminium assets and that agreement was made expressly subject to English law. Finally, following the Dorchester meeting, at which the trust arrangements were discussed, RA caused his company Runicom Ltd to enter into further agreements with Mr Deripaska's various companies relating to Rusal and each was expressly governed by English law.

180. In view of this evidence, the truth of which must be assumed for the purposes of this application, even if one excludes any express oral agreement to apply English Law, there is, in my judgment, ample material for it to be strongly arguable that there was an implication of English law to be the governing law of the trust. However, it is clearly the case that whether such implication should be made or not depends crucially on exactly what was said at the Dorchester meetings. The evidence of those meetings would have to be explored with the witnesses at a trial and its materiality to any such implication would have to be evaluated in the context of such further contemporary documents as might be disclosed.

181. In these circumstances it should be open to BB to pursue at a trial both his primary case (an express agreement that the trust would be governed by English Law) and his alternative case (an implied agreement to that effect). To disallow the primary case but to give permission for the secondary case would be impracticable and a wrong exercise of this court's discretion, since both primary and secondary cases are based on substantially overlapping facts.

182. Accordingly, BB will have permission to amend the Particulars of Claim to plead that the trust was expressly or implicitly governed by English Law.

183. BB's alternative case on governing law (that England was the country with which the trust was most closely connected) is relied on in the event that it is found that there is no express or implied choice under Article 6 of the Hague Convention. This, is, however, a plea with what presents itself to me as a very small prospect of success. That is because, on a preliminary view of the effect of Article 7, I consider that the point made by Prof Overbeck (see paragraph 121 above) is unlikely to be held to be correct and that Prof Harris's view is likely to be preferred. The argument that Art. 7 somehow enables a court to avoid the selection of a country with no law by allowing that fact to displace what would otherwise be the result of applying the objective tests set out in that Article seems to me to be probably wrong. Nevertheless, given that a contrary view has been expressed in the official Explanatory Report, I consider that this should be decided on fuller argument at a trial.

184. There will therefore be permission to amend BB's Particulars of Claim by the insertion of the whole of paragraph R64.1.A.

185. There is a further amendment to paragraph R74 which is intended to deploy BB's case on express or implied choice of the law of the trust for the purpose of choice of the law of the contract, which is the basis of an alternative case for breach of contract. This amendment is for the purpose of particularising the denial that Russian Law would govern any such contract : see D74.2 of the Composite pleading and R74. If BB wishes to expand his case on the governing law of the contract he should be permitted to do so unless the entire alternative pleas of breach of contract is to be struck out.

The Application to strike out or for Judgment dismissing the Sibneft Claim

186. The issue that now arises is whether the claim with regard to Sibneft as amended should be struck out or dismissed. In this connection I must go back to the four main points relied on by RA which are set out at paragraph 68 above. Now that the proposed amendments have been allowed, it is unnecessary to consider what would have been the position if the Particulars of Claim and Reply had remained unamended. So the Proprietary Interest Point and the Restitution/Vindication Point can be ignored. They have already been considered in so far as necessary in the context of the application to amend. I must therefore now consider the Intimidation Point and the Act of State Point.

The Intimidation Point

158. This falls into two distinct parts.

Firstly, it is argued on behalf of RA that the tort of intimidation can only be established if the threat relied upon is of "illegal" conduct, in particular the commission of a criminal act, a tort or a breach of contract or of fiduciary duty. On behalf of BB it is argued that, in a case of two-party intimidation, a further category of conduct is sufficient — namely duress, that is to say a threat of conduct not amounting to a criminal act, tort, breach of contract or of fiduciary duty which causes and is intended to cause the claimant to act in such a way that he suffers loss or damages. Mr Rabinowitz QC QC argues that whereas a threat of *illegal* conduct is required for three-party intimidation, the threat of a wider range of conduct, properly described as "illegitimate", is sufficient for two-party intimidation. He draws attention in particular to the fact that all those authorities which have identified the element of coercion as established by the threat of illegal conduct have been examples of three-party intimidation. Indeed, it is accepted that there are only two reported cases on two-party intimidation — *Godwin v Uzoigwe* [1993] Fam. Law 65 and *The SOGAT Case*

[1987] ICR 181. Neither case raised the issue whether a threat of anything other than illegal conduct would support a claim for two-party intimidation.

159. It is submitted that the Common Law has moved on since the earlier decisions on three-party intimidation, such as *Rookes v Barnard* [1964] AC 1129. Mr Rabinowitz QC referred to Lord Scarman's comment in *Universe Tankships Inc. of Monrovia v ITF* [1983] AC 366 of page 400:

> It is, I think already established law that economic pressure can in law amount to duress; and that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss: *Barton v. Armstrong* [1976] A.C. 104 and *Pao On v. Lau Yiu Long* [1980] A.C. 614. The authorities upon which these two cases were based reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. There must be pressure, the practical effect of which is compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him. This is the thread of principle which links the early law of duress (threat to life or limb) with later developments when the law came also to recognise as duress first the threat to property and now the threat to a man's business or trade. The development is well traced in *Goff and Jones, The Law of Restitution,* 2nd ed. (1978), chapter 9.

At page 385 Lord Diplock observed:-

> The use of economic duress to induce another person to part with property or money is not a tort per se; the form that the duress takes may, or may not, be tortious. The remedy to which economic duress gives rise is not an action for damages but an action for restitution of property or money exacted under such duress and the avoidance of any contract that had been induced by it; but where the particular form taken by the economic duress used is itself a tort, the restitutional remedy for money had and received by the defendant to the plaintiff's use is one which the plaintiff is entitled to pursue as an alternative remedy to an action for damages in tort.

It is argued that these statements of the law point to the view that, if the duress in question causes loss and damage not compensatable by restitution, it gives rise to a claim for damages in tort. That tort would be intimidation. Whether Lord Diplock's reference to "the particular form" is to be understood in that sense must, in my view, be a matter of very considerable doubt. However, it is not obvious that he was disagreeing with Lord Scarman.

160. That the precise limits of duress as a tort are ill-defined, particularly where there is lawful act duress, is recognised by the judgment of Steyn L.J. in *CTN Cash and Carry Ltd v Gallaher Ltd* [1995] 4 All ER 714, but that authority throws no light on the circumstances when, if ever, threats of conduct which is not illegal can give rise to a claim for damages. It merely establishes that if the threats are made in good faith, there can be no tort. In an earlier judgment Steyn L.J. had recognised that "while the actionability of two-party intimidation is not in doubt, there is very little guidance in the decided cases on the requirements of this tort."

161. Whether a threat of conduct towards a claimant which is neither a crime, nor a tort, nor a breach of contract or of fiduciary duty is capable of founding a claim in tort, even if made for the purpose of damaging the claimant, with the effect that he is induced to act in such a way that he suffers loss, is, in my view, extremely doubtful. No decision of the English courts has gone that far and it is, in my view, very improbable that the law will develop in that way. For that would render substantial areas of trade competition vulnerable to potential tortious liability. However, if outside the field of legitimate competition, such threats were made exclusively in order to inflict loss on

the claimant, it may be that the courts will provide a remedy going beyond restitution and going as far as damages.

162. That said, this must be regarded as a difficult but developing area of law. Since the development and application of legal principle in this field depends heavily on the findings of fact, it is not appropriate to shut out the claimant from arguing the point in a case such as this where the court is going to have to make detailed findings of fact whatever the answer to the issue of law might be.

163. Accordingly, there should be permission to amend paragraph C52 so that it pleads "The course of conduct and the statements made by Mr Abramovich were unlawful and/*or* illegitimate . . . ."

164. The second part of the Intimidation Point is the submissions on behalf of RA that, assuming that the issue of the unlawfulness of the threatened conduct has to be tested by reference to Russian Law, it was not unlawful by that law for the purposes of the tort. It was accepted by Mr Brindle QC on behalf of RA that there is no authority on the point of which body of law should be applied. In particular, it was argued that the threat of expropriation of BB's interest in Sibneft was not unlawful if such expropriation were accompanied by adequate compensation, and was in the public interest. BB relies on this conduct as being in breach of Article 1 Protocol 1 of ECHR and supports his case by the evidence of Dr Rachkov, his Russian Law expert. On behalf of RA, however, there is no expert evidence which speaks to the lawfulness of such expropriation. This is clearly a matter which needs to be investigated at trial. I interpose that BB's particulars of unlawfulness of the course of conduct pleaded in C.52 are all clearly capable of being held to be unlawful or at least improper in English

Law and, subject to investigation of expert evidence, also in Russian Law. Whether, having regard to what I have already said about "illegitimate" conduct, as distinct from "unlawful" conduct, that could form the basis of a sufficiently coercive threat, would remain to be considered after full argument. In so far as it was suggested that, in the absence of BB's case on trusts as originally pleaded, there could be no threatened breach of fiduciary duty, under the 1995 and/or 1996 Agreement, that point is apparently refuted by the evidence of RA's own expert, Mr Rozenberg, who stated that under joint activity agreements the participants in such a relationship were under mutual duties of a "fiduciary nature."

165. Given that in order to strike out this part of the case it would have to be demonstrated that each of the alleged areas of unlawful conduct could not be sustained, I conclude that, subject to the last key point to be considered, Act of State, the whole of C.52 should remain for investigation at a full trial.

The Act of State Point

166. In my judgment, there is a short answer to the submissions advanced on behalf of RA to the effect that the contents of the threat involved allegations against a foreign sovereign state going to the manner in which it exercised its governmental powers within its own territory. It is that no allegation is pleaded against the sovereign state or its President as such. The substance of what is pleaded is the content of RA's threat. Whereas it is pleaded that it was said that President Putin would or could cause BB's interests to be expropriated, it is not alleged that RA was in truth the mouthpiece of President Putin, but merely that his known relationship within the Kremlin and with the President was such that BB believed that RA was in a position to work jointly with

President Putin to further a common enterprise to the mutual benefit of the President and RA (see Voluntary Further Information served on behalf of BB, paragraph 26).

167. There is no allegation against the State, either as a necessary part of the tort of intimidation or for the purpose of obtaining a remedy against the Russian State, that the President or the State has already acted unlawfully or is about to do so. The ambit of the allegation is BB's understanding of what RA was telling him and his interpretation of the risk involved if he ignored RA's suggestion for the transfer of interests in Sibneft. By the amendment of R52.4 BB deleted the allegation that RA was liable for intimidation as a joint tortfeasor.

168. The facts alleged in this case therefore differ crucially from the facts before the court in *R (on the application of Yukos Oil Co.) v. FSA* [2006] EWCA 2044 (Admin) in which the underlying issue involved the allegation that the assets of the company seeking listing *had been* wrongfully expropriated by Russia. This was an alleged as an accomplished fact necessary for the relief claimed. Whether it was true would have to be determined by the FSA and subsequently the Court.

169. In the present case the allegations relating to the President and the Russian officials are simply deployed as part of the background against which RA's threat is said to have been understood by BB to be coercive. Not only are these allegations not at the heart of the cause of action, they are collateral to the conduct giving rise to the tort.

170. The Act of State doctrine does not involve precluding the English courts from receiving evidence of this kind and evaluating its truth. In no sense can it be said that the English court is thereby trespassing on territory within the ambit of the exclusive sovereign

jurisdiction of a foreign state. It is therefore unnecessary to consider the public policy submission in relation to this issue.

Conclusion

171. In view of my conclusions on all the main criticisms of BB's claim advanced on behalf of RA, I am satisfied that it is impossible to say that his claim has no real prospect of success. Whereas in certain respects it may appear to present very formidable difficulties, it is in no respect so weak that BB should be prevented from bringing it to trial.

172. It is right to add that I have never previously encountered applications to strike out or summarily dismiss claims involving such numerous and complex facts and legal issues as this claim involves. Weak as some aspects of BB's case certainly appear, the complexity and multiplicity of issues makes this exactly the kind of claim which is fundamentally unsuitable for applications under CPR3.4(2) or CPR 24(2). The length of time required for this hearing was dramatically underestimated in the first place and the documentation and witness statement evidence was extremely voluminous. The number of authorities referred to in the course of argument was immense. The overall effect has been to delay considerably the progress of the proceedings, to involve the parties in massive costs bills and to take up many expensive hours of court time and judicial time.

173. The application by BB to amend his pleadings will be allowed in full.

174. The applications by RA to strike out under CPR3.4(2) and for judgment dismissing the claim under CPR24.2 are refused.