Case No: 2007 Folio 942

Neutral Citation Number: [2011] EWHC 1143 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6th May 2011

Before :

The Hon Mrs Justice Gloster, DBE

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Between :

BORIS ABRAMOVICH BEREZOVSKY	**Claimant**
- and -	
ROMAN ARKADIEVICH ABRAMOVICH	**Defendant**

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Richard Gillis Esq, QC, Roger Masefield Esq & Miss Nehali Shah
(instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Ms Helen Davies QC, Daniel Jowell Esq, QC & Edward Harrison Esq
(instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Defendant**

Hearing dates: 28th, 29th & 30 March 2011

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Approved Judgment

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

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MRS JUSTICE GLOSTER, DBE

The Hon Mrs Justice Gloster:

Introduction

1. On 7 April 2011, after an interlocutory hearing which took place on 28, 29 and 30 March 2011, I made orders (*inter alia*) in respect of two of Mr. Roman Abramovich's applications in the following terms:

> "***Specific disclosure to be provided by the Claimant***
>
> *The Patarkatsishvili materials*
>
> 2. Subject to paragraph 4 below, the Claimant shall give specific disclosure of all documents in his possession or control recording or reflecting the content of interviews or conversations between Mr Patarkatsishvili and the Claimant's former solicitors (including, in particular but without limitation, Mr Andrew Stephenson of Carter Ruck, Mr James Lankshear of Streathers and Mr Ian McKim of Cadwalader Wickersham and Taft) in relation to the subject matter of these proceedings.
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> 3. At the same time as providing disclosure, the Claimant shall provide inspection of such documents by way of uploading the same to the Central Commercial Database.
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> 4. The time for the Claimant to provide the specific disclosure and inspection referred to in paragraphs 2 and 3 above shall be extended to 48 hours after the date on which the Court hands down its reasoned judgment in relation to paragraphs 2 and 3 above. For the avoidance of any doubt, should the Claimant decide to apply for permission to appeal in respect of paragraphs 2 and 3 above, the Claimant shall be at liberty to seek to have the period specified in this paragraph 4 extended, or seek a stay of paragraphs 2 to 4 inclusive of this Order, pending the determination of that application for permission, or if granted, pending the appeal.
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> 5. The time for the Claimant to apply for permission to appeal and lodge any documents or notice or appeal or application for permission to the Court of Appeal shall be extended until 7 days after the Court's judgment on this matter is handed down.
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> …
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> ***Application by the Defendant for permission to re-amend***

10. The Defendant is granted permission to Re-Amend his Defence in the form exhibited to the Third Witness Statement of Mr Larizadeh. The Defendant is to pay the Claimant's costs occasioned by the amendments.

11. The Claimant is granted permission to serve consequential amendments to his Re-Amended Particulars of Claim and Amended Reply. Such consequential amendments are to be served by 4.00pm on Friday 6 May 2011."

2. The time estimate of two days given by counsel for the hearing of the five applications before the Court, which was listed to be heard on 28 and 29 March (and the necessary time for pre-reading), was woefully inadequate. In the event the hearing took three days and gave no time for delivery of a judgment. Accordingly, I told the parties that I would give my ruling on 7 April 2011 but would give my reasons subsequently.

3. These are the reasons for the orders which I made.

4. There is no need for me set out the background facts to this matter which are fully rehearsed in the judgment of Sir Anthony Colman[1] and that of the Court of Appeal[2] in relation to the Defendant's reverse summary judgment and strike-out applications ("the summary judgment application").

The Patarkatsishvili materials

The Defendant's submissions

5. Miss Helen Davies QC, leading counsel on behalf of the Defendant, Mr. Roman Abramovich (whom I shall refer to as "the Defendant"), applied for an order for disclosure of all documents in the possession or control of the Claimant, Mr. Boris Berezovsky (whom I shall refer to as "the Claimant"), recording or reflecting the content of interviews or conversations ("the Patarkatsishvili interviews") relating to the subject matter of these proceedings between the Claimant's former business associate Mr. Patarkatsishvili (who died on 12 February 2008) and the Claimant's former solicitors, including, in particular but without limitation, the solicitors Mr. Andrew Stephenson of Carter Ruck, Mr. James Lankshear of Streathers and Mr. Ian McKim of Cadwalader, Wickersham and Taft ("the Patarkatsishvili materials"). Her submission was that the Defendant was entitled to such disclosure because the Claimant had waived privilege in respect of such communications. It would appear from the fifth witness statement of Mr. Mark Hastings, a partner in Addleshaw Goddard LLP ("AG"), the Claimant's current solicitors, that these materials may include at least a transcript and notes of Mr. Stephenson's interview with Mr. Patarkatsishvili on 30 June 2005, and a draft and possibly a signed, or unsigned, proof of evidence or witness statement from Mr. Patarkatsishvili. There may also be notes of interviews or other communications between Mr. Patarkatsishvili and other solicitors.

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1 [2010] EWHC 1511 (Comm).

2 [2011] EWCA Civ 153.

6. Her application was made on two independent grounds, each of which, she submitted, was, on its own, enough to give rise to waiver of privilege on the part of the Claimant:

i) The first ground, upon which the Defendant based his application, was the alleged extensive deployment that had already been made in Court of parts of the contents of the Patarkatsishvili interviews in order to defend the Defendant's summary judgment application in hearings before Sir Anthony Colman and the Court of the Appeal. Miss Davies submitted that the contents of those communications were deployed, in particular, in the witness statements of Mr. Marino, and relied upon by the Claimant in his skeleton arguments. She also submitted that they had been referred to in the oral submissions of both parties.

ii) Accordingly, she submitted that, having so deployed part of the privileged communications in relation to the merits of the Claimant's claim, the Claimant had waived any privilege which he might have had in the Patarkatsishvili materials, and was therefore now obliged, by the application of the principle of collateral waiver, to give disclosure of all documents relating to the same subject matter. She relied upon the decisions of the Court of Appeal in *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd*[3] and in the analogous case of *Somatra Ltd v Sinclair Roche & Temperley*[4] as well as the earlier decision of Vinelott J in *Derby v Weldon*[5] to support her submissions that:

a) deployment of privileged material in interlocutory proceedings does generally suffice to engage the principle of collateral waiver – subject to a possible exception where the deployment was solely for a limited issue arising solely in the interlocutory application and does not go to the merits of the case as a whole; and

b) where such deployment addressed to the merits has taken place in an interlocutory hearing, it was not possible to "turn back the clock" by deciding not to deploy the privileged evidence at trial. She additionally relied upon textbook statements in Thanki, *The Law of Privilege*, at paragraph 5.57 and Hollander, *Documentary Evidence*, 10th Edn at paragraph 19-19, both of which express the view that reliance upon privileged material in court in the context of interlocutory proceedings involves a waiver (unless it can be argued that the waiver is in some way limited to an issue only arising on the interlocutory hearing). She referred to the statement in Hollander:

> "Once this has occurred, the perceived advantage has been obtained (whether or not there actually was any benefit) and the other party is entitled to insist on all the associated material being before the court."

iii) The second ground upon which the Defendant brought the application was upon the basis of the Claimant's statement, contained in the Case Management

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3 [2003] EWCA Civ 901.

4 [2000] 1 WLR 2453. This related to materials which were privileged on the grounds that they were without prejudice as between the parties.

5 [1991] 1 WLR 660.

Information Sheet filed at Court on 16 July 2010, that he intends to call each of Messrs Stephenson, Lankshear and McKim to give evidence at trial. In support of this ground Miss Davies submitted:

a) That the only purpose of calling such solicitors would be to give evidence as to what they were told by Mr. Patarkatsishvili in their interviews of him.

b) Should the Claimant intend to adduce evidence from any of these individuals, it would, in light of authorities such as *R (Factortame) v Secretary of State*[6] and *Vista Maritime Inc. v (1) Sesa Goa (2) A/S Bulk Trading Group Ltd*[7] be appropriate and good case management for the Court to order disclosure now, even if the Claimant had not previously waived privilege by deploying the privileged material at the summary judgment hearing.

c) The fact that, in his second witness statement, served in opposition to this application, Mr. Hastings asserts that the Claimant is, in fact, still undecided as to whether he will call these former solicitors as witnesses was irrelevant. Not only was that assertion somewhat surprising given the central importance of Mr. Patarkatsishvili's evidence to the Claimant's case (Mr. Patarkatsishvili for example having been the only person to whom it is alleged the Defendant made any threats in respect of Sibneft), but also the unequivocal indication in the Case Management Information Sheet (which has never been amended) is that the Claimant intends to call his former solicitors to give evidence as their interviews with Mr. Patarkatsishvili. Moreover the fact that witness statements are due to be exchanged on 29 April 2011 as a result of which the Claimant must by now in fact be in a good position to determine from which witnesses he wishes to serve statements belies the assertion that he is undecided as to whether to call these former solicitors as witnesses.

d) Furthermore, it was also not clear from Mr. Hastings' statement whether the Claimant accepts that, in the event he does decide to serve a statement from any of his former solicitors relating to the content of their interviews with Mr. Patarkatsishvili, he will, at the time of service of that statement, also be required to provide disclosure of the materials that are the subject of the Defendant's application. If the Claimant does not confirm that he accepts that to be the case, and the matter nonetheless potentially remains live in light of the Court's ruling on the first ground, the Defendant will in any event ask the Court to resolve in this application such issues of principle that arise. Any other course would allow the Claimant unnecessarily to defer the resolution of an important dispute between the parties by reason of his current stated prevarication as to his intentions in respect of the evidence from his former solicitors.

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6 (1997) 9 Admin LR 591 QBD.

7 [1997] CLC 1600.

7. Miss Davies accepted that, in normal circumstances, communications between a lawyer and a third party witness, or potential witness, for the dominant purpose of litigation are subject to litigation privilege, and that, unless such privilege is waived or otherwise lost, the usual position is that documents evidencing those communications are not disclosable. Accordingly, she accepted that the communications between the Claimant's former solicitors and Mr. Patarkatsishvili for the purposes of this litigation would be *prima facie* privileged, had it not been for the fact that (as she submitted) there had been a collateral waiver of the privilege attaching to such documents, as a result of the Claimant's extensive reference to the contents of the Patarkatsishvili interviews in the course of the Defendant's application for strike out/reverse summary judgment of the Claimant's claim.

The Claimant's submissions

8. Mr. Richard Gillis QC, leading counsel on behalf of the Claimant, opposed the Defendant's application for disclosure of the Patarkatsishvili materials. He pointed out that, for the purposes of defeating the Defendant's summary judgment application, the Claimant had relied solely upon limited parts of the content of the Patarkatsishvili interviews, and no reference had been made to any documents relating to those interviews. There had been, therefore, no express waiver of privilege. Accordingly, as was common ground, the Defendant's application for documents was dependent upon there having been a collateral waiver. He submitted that, in such circumstances,:

    i) In accordance with the relevant authorities[8], in order to establish that there had been a collateral waiver of privilege in relation to a document or class of documents, the party so asserting must demonstrate that it would be unfair for privilege to be maintained in respect of such document or class of documents.

    ii) As a starting point, it was important to recognise that legal privilege was an absolute and fundamental human right[9] which did not admit of balancing exercises with competing public interests, such as, for example, any perceived need in litigation that both sides should place their cards face up on the table.

    iii) Thus the concept of fairness inherent in the collateral waiver, or "cherry-picking", principle, was not some broad, flexible concept which permitted the court to engage in a discretionary balancing exercise in order to decide whether to abrogate the absolute right of privilege. On the contrary, it was a limited concept of fairness, which had to be applied carefully, for the sole purpose of ensuring that a party was not guilty of selective quotation or cherry-picking. In this context, and to emphasize that the principle was a safeguard against partiality, he referred to the various articulations of the principle by, amongst others, Mustill J (as he then was) in *Nea Karteria Maritime Co v Atlantic and Great Lakes Steamship Corp*[10]; Elias J (as he then was) in

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8 *R v Derby Magistrates (ex parte B)* [1996] A.C. 487; *Brennan v Sunderland City Council* [2009] ICR 479 at [63]; *Dunlop Slazenger International Limited v Joe Bloggs Sports Limited* [2003] EWCA Civ 901; *Derby v Weldon* [1991] 1 WLR 660.

9 See *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax and another* [2003] 1 AC 563.

10 [1981] Com. L.R. 132 at 139.

Brennan v Sunderland City Council [11]; and Waller and Thorpe LJJ in *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* (*supra*).

i) Mr. Gillis sought to distinguish the actual decisions in *Dunlop Slazenger International Ltd* and *Derby v Weldon* (*supra*) on the grounds that, on a proper analysis, in both those cases, the privileged materials were clearly going to form part of the evidence, and thus be deployed, at trial, which in each case had either started or was imminent.

ii) He submitted that the Defendant was unable to demonstrate any procedural unfairness in the circumstances of this case for a number of reasons:

   a) First, it would not be fair for the Claimant to be taken to have collaterally waived his litigation privilege in respect of documents recording or reflecting the contents of the Patarkatsishvili Interviews in circumstances where, by his summary judgment application, the Defendant placed the Claimant in the position of having to counter the allegation that his "version of events is factually incoherent and implausible". In effect, the Claimant was forced to waive privilege in order to defeat the summary judgment application. The Claimant made references to parts of the Patarkatsishvili Interviews (although never to any document) solely because of the nature of the Defendant's application and for the limited purpose of meeting the assertions made by the Defendant that the claim had no reasonable prospect of success.

   b) But the summary judgment proceedings were over. The Defendant's application had been unsuccessful both at first instance and on appeal.

   c) The next stage of the case was the trial. The Claimant had not decided whether or not to deploy the Patarkatsishvili Interviews at trial or the hearsay evidence given by the Claimant's solicitors or previous solicitors as to what Mr. Patarkatsishvili had said. It was perfectly possible that such evidence would not be adduced at trial at all – the Claimant might choose simply to rely on the tape recordings of the meeting at Le Bourget airport between the Claimant, the Defendant and Mr. Patarkatsishvili. At least until such time as the Claimant made the decision to rely upon the Patarkatsishvili Interviews at trial, the Defendant's application was premature.

   d) If the Patarkatsishvili Interviews were not in fact relied upon by the Claimant at trial, there was nothing "unfair" so far as the application of the collateral waiver principle was concerned, in the non-disclosure of the Patarkatsishvili materials.

iii) This was a case which fell fairly and squarely within the exception to the rule of collateral waiver, as envisaged by Waller LJ in *Dunlop Slazenger International Ltd* (*supra*) at paragraph 17 of his judgment.

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[11] [2009] ICR 479 at [63].

iv) Accordingly, the "clock could be turned back", because there had been no broad waiver of the privileged material for the purposes of the trial. The deployment of the Patarkatsishvili materials at the interlocutory stage had merely been a limited waiver for the limited purposes of the summary judgment application, and that application was spent.

Discussion and determination

9. There is no doubt (and indeed it was common ground) that the evidence of Mr. Patarkatsishvili, and his role in the transactions (or alleged transactions) which are the subject matter of the Claimant's claim, are critical.

10. Thus, for example, in relation to the Claimant's claim to have an interest in Sibneft:

i) He is the only person other than the Claimant and the Defendant, who is said to have been present when the alleged oral agreements were made in 1995 and 1996. He is also alleged to have been a party to those agreements.[12]

ii) Secondly, Mr. Patarkatsishvili is also alleged to have been the only other person present at the meeting alleged to have taken place in Cap d'Antibes in December 2000 when the Defendant is said to have made threats in relation to the Claimant's and Mr. Patarkatsishvili's interests in ORT – conduct said to have been of a similar nature and to presage a similar *modus operandi* as the Defendant's threats in relation to Sibneft.[13]

iii) Thirdly, Mr. Patarkatsishvili is the person (and the only person) to whom the Claimant alleges threats were made by the Defendant in respect of the alleged expropriation of the Sibneft interests. It is said that these threats were relayed by Mr. Patarkatsishvili to the Claimant.[14]

iv) Fourth, Mr. Patarkatsishvili is alleged to have been a party to the alleged Devonia agreement dated 12 June 2001 (the genuineness of which is denied by the Defendant), which is the primary means by which the Claimant alleges he suffered loss.[15]

11. Similarly, in relation to the Claimant's claim to have an interest in Rusal, there is little doubt that the evidence relating to Mr. Patarkatsishvili's alleged role is of central importance. For example:

i) Mr. Patarkatsishvili is alleged to have been a party (together with the Defendant and the Claimant) to the agreement for the establishment of the Rusal trust, said to have been concluded at a meeting at the Dorchester Hotel on 14 March 2000[16].

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12 See paragraphs C33, C34, C36 and C37 of the Particulars of Claim and paragraph 8 of the Consolidated Further Information provided by the Claimant.

13 See paragraph C31 of the Particulars of Claim.

14 See paragraphs C41, C42 and C46 of the Particulars of Claim.

15 See paragraph C48 of the Particulars of Claim.

16 See paragraph C62 of the Particulars of Claim.

ii) He is said to have been a party to the agreement (together with Mr. Deripaska, the Defendant and the Claimant) that none of them would sell their Rusal shares[17].

iii) He is said to have been the only party to have had discussions with the Defendant prior, and in relation, to the sale of the first tranche of the Rusal shares.[18]

iv) He is said to have been told by the Defendant that the first tranche of shares that had been sold for $1.75 billion was the Claimant's tranche and to have complained to the Defendant, on behalf of himself and the Claimant, at a meeting in Tbilisi, Georgia, about the sale and its conduct.[19]

v) He was involved in the negotiations for the sale of the second tranche of the Rusal shares to Mr. Deripaska in 2004. According to the Defendant he signed a deed of release dated 20 July 2004 confirming that, in relation to the RUSAL shares, he was always acting solely in his own name and for his own account.[20]

12. It was also clear, that during the course of the summary judgment application, the Claimant had, in Mr. Marino's witness statements adduced on his behalf, referred extensively to information said to have been provided by Mr. Patarkatsishvili to the Claimant's former solicitors in relation to the above matters. Mr. Gillis properly did not seek to suggest that there had only been a selective reference to privileged materials relating only to limited aspects of the subject transactions. As summarised above, he based his objections to production on wider grounds.

13. Despite Mr. Gillis' well-presented argument, I consider that I am bound by the approach taken in *Dunlop Slazenger International Ltd* (*supra*) by Waller and Thorpe LJJ in relation to this issue. In my view, the judgments in that case make it clear that, where, as here, there has been extensive deployment in interlocutory proceedings, such as a summary judgment application, of privileged material (albeit without reference to specific documents) in order to support a party's case on the substantive merits of his claim or defence, such deployment engages the collateral waiver principle, and it is then too late for the deploying party to attempt to turn the clock back. That is the case even if, as here, the deploying party is seeking to preserve its position by asserting that it has not yet made up its mind whether to adduce the evidence, which it deployed at the summary judgment stage, at trial.

14. That seems to me to be to be clear from paragraphs 16 and 17 of the judgment of Waller LJ , where he states:

> "16. There are only two points here which might provide for a different answer. The first is that this information was deployed at an interlocutory stage, and the second is that, insofar as it was being put in witness statements, they have not yet been deployed at a trial.

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17 See paragraph C62.3 of the Particulars of Claim.
18 See paragraphs C68 and 70 of the Particulars of Claim.
19 See paragraphs C68 and 70 of the Particulars of Claim.
20 See paragraph 74 of Paul Mitchard's 3rd witness statement.

> In relation to both aspects, what in essence the submission would come to is that at this stage a party is entitled to preserve its position and wait to see what actually happens at the trial in order to see whether that deployment takes place and whether a waiver takes place at the trial. As it seems to me, there is clear authority for the proposition that, if deployment has taken place at an interlocutory stage and waiver of the privileged material has resulted, then the cherry picking principle applied.
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> 17. It is unnecessary to go through all the authorities. The most formidable authority was the decision of Vinelott J in *Derby v Weldon* [1991] 1 WLR 660. The most material passage runs from 767H to 668E. It comes to no more than this. If in interlocutory proceedings a party has waived privilege -- in that case that was on a Mareva injunction application -- then, that is a waiver for all purposes and the cherry picking principle applies. Whether that will always be right is a matter that I would reserve for future decisions. It is not necessary to say that that will always be right to dispose of this case. If there is to be an exception to that principle it would need to be framed in the following way. It would need to be argued that since it was only for the purpose of the interlocutory proceedings and in relation to an issue in those proceedings that the waiver had taken place the waiver was in some way limited. That was almost certainly not the position in *Derby v Weldon* since the conversations did relate to the merits of the case as a whole. In this case, again the waiver that was taking place was not taking place simply in relation to obtaining the order from Gibbs J. The waiver that was taking place was taking place by reference to statements that were to be put in as part of the evidence to go to the trial and relating to the merits at the trial. In my view, it was not legitimate to turn back the clock, even to the limited extent that it was turned back before the judge. In other words, it was too late even then to make it unfair nor to order disclosure. But the point would not have got Mr. Croxford home in any event because there was and is an intention to rely on Mr. Shami Ahmed's statement as well." (My emphasis added)."

15. It appears to me that Waller LJ was addressing precisely the same type of arguments as those presented by Mr. Gillis in the present case, namely that privilege is not necessarily waived in circumstances where the deployment has only been for the purposes of an interlocutory application and there is no present or settled intention to

use the deployed privileged material at trial. In my judgment, as Miss Davies submitted, one cannot, on proper analysis, confine the ratio of *Dunlop Slazenger International Ltd* (or indeed of *Derby v Weldon)* to a situation where there was a settled intention to use the deployed privileged material at an imminent (or ongoing) trial. It is clear that Waller LJ regarded the reference by Miss Usmat Ahmed's statement in relation to the deployed privileged material at the interlocutory hearing before Gibbs J as having engaged the collateral waiver principle for all purposes, irrespective of the fact that counsel had told the court that her evidence was not going to be adduced at trial, and (as a ground for his decision) separately from the fact that Mr. Shami Ahmed's statement was going to be so used. Moreover, the judgment of Thorpe LJ (which refers exclusively to Miss Usmet Ahmed's statement) is clearly based on the premise that, once there had been partial waiver of the privileged material by Miss Ahmed at the interlocutory hearing, then the collateral waiver principle was engaged and the clock could not be turned back.

16. Nor, in my view, can Mr. Gillis derive any comfort from Waller LJ's articulation[21] of a possible exception to the collateral waiver principle. Again, Waller LJ's contemplated exception of a "limited waiver" would appear to exclude any case where there had been deployment of the privileged material at an interlocutory stage and such deployment had related to "the merits of the case as a whole".[22] In other words, my analysis of what the Court of Appeal decided is that once there has been a deployment for "merits purposes", that cannot be a limited waiver and the clock cannot be turned back.

17. My analysis of the ratio in *Dunlop Slazenger International Ltd* and of the ratio in *Derby v Weldon* (*supra*) is supported by the earlier decision of the Court of Appeal in *Somatra Ltd v Sinclair Roche & Temperley* (*supra*). That case related to the privilege arising as a result of the deployment at an interlocutory stage of evidence of without prejudice communications between the parties to an action. The judge at first instance[23] (Timothy Walker J) had refused to allow the disclosure of privileged materials, notwithstanding the deployment of certain limited without prejudice communications at an interlocutory stage for the purposes of a *Mareva* injunction. He held that the deployment of the without prejudice communications for the limited purpose of the *Mareva* application did not mean that it was too late to turn back the clock, in circumstances where the material had not been deployed at trial. He analysed Vinelott's decision in *Derby v Weldon* as being based on the fact that the relevant material had been referred to at trial by counsel opening the case. He weighed up the advantage gained by the deploying party at the interlocutory stage, as against the damage that would be done to that party by the deployment at trial of the covertly recorded without prejudice material and held that it would be grossly disproportionate to admit the without prejudice material.

18. The following paragraphs of the judgment of Clarke LJ (as he then was) show the approach adopted by the Court of Appeal:

> "26. The judge described Somatra's submission as being that Sinclairs voluntarily chose to deploy without

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21 At paragraph 17.

22 See paragraph 17.

23 [2000] 1 Lloyd's Law Reports 311.

prejudice material before the court and were therefore taken to have waived for all purposes the 'without prejudice privilege which would otherwise attach to the contents of the meetings and the telephone conversations'. Mr. Symons put the submission in much the same way before us, although it is accepted by both sides that the question is not the same as in the case of waiver of legal professional privilege. As I see it, the question can most accurately be posed as being whether Sinclairs lost their right to object to the admissibility of the contents of the without prejudice conversations at the trial by their reliance upon paragraphs 29.4 and/or 36(4) of the affidavit.

27. In so far as it is appropriate to have regard to the considerations of public policy underlying the rule, the answer seems to me to depend upon what justice requires. Would it be fair to permit Sinclairs to rely upon the contents of the conversations for the purposes of advancing their case on the merits in order to obtain a Mareva injunction without also permitting Somatra to rely upon the contents of the same conversations in order to resist Sinclairs' case on the merits at the trial? The authorities in my opinion help both to formulate and to answer that question, even though none of them resolves the precise point which we have to decide.

28. There is no doubt that if Sinclairs had deployed the material in paragraph 29.4 at a trial their right to rely upon the without prejudice nature of the conversations would have been lost. That is essentially for the same reason that Mr. Cran correctly concedes that Somatra could have relied upon the contents of the conversations on an application to discharge the Mareva injunction. In *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 it was held that where part of a privileged document was read in the course of the opening of counsel for the plaintiff at a trial, privilege was waived for the whole of the document. Templeman LJ (with whom Dunn LJ agreed) said (at 537G):

'In interlocutory proceedings and before trial it is possible to allow a party to disclose a document or part of a document by mistake to correct an error in certain circumstances. ... But in my judgment the plaintiffs deliberately chose to read part of a document which dealt with one subject matter to the trial judge, and must disclose the whole. The deliberate introduction by the plaintiffs of part of the memorandum into the

trial record as a result of a mistake made by the plaintiffs waives privilege with regard to the whole document. I can see no principle whereby the court could claim to exercise or could fairly and effectively exercise any discretion to put the clock back and undo what has been done.'

29. In an earlier part of his judgment (at p 538) Templeman LJ approved this statement of principle by Mustill J in *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corporation*, a decision made on the 11th December 1978 and only reported at [1981] Com LR 138 at 139:

'I believe that the principle underlying the rule of practice exemplified in *Burnell v British Transport Commission* [1956] 1 QB 187 is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.'

30. I recognise that in those cases the court was considering waiver of privilege and not the use of without prejudice communications, but I do not think that the principle can be any different in such a case. Fairness requires that where a party deploys privileged or without prejudice material as part of its case at a trial the other party should be entitled, in the one case, to see the whole of the privileged document and, in the other case, to rely upon the other without prejudice material which came into existence as part of the same without prejudice process. The question here is whether the same is true where the without prejudice material is deployed, not at the trial, but at an interlocutory application.

31. The authorities show that the mere fact that without prejudice material is deployed on an interlocutory application does not entitle the other party to deploy it at the trial before a different trial judge. An example of such a case is *Family Housing Association (Manchester) Ltd* ***v*** *Michael Hyde & Partners* [1993] 1 WLR 354. In that case the plaintiffs filed evidence of the contents of without prejudice negotiations in order to resist an application by the defendants to strike the action out for want of prosecution. The question was

whether they were entitled to rely on such evidence or whether they were precluded from doing by reason of the fact that the negotiations were without prejudice. It was held by this court that they were entitled to rely on it. Hirst LJ, with whom Mann and Balcombe LJJ agreed, recognised the public policy in favour of excluding such evidence but held that there was what he called (at page 363) a preponderant public policy in favour of admitting the evidence on applications of that kind. He expressed the view that to admit it would not infringe the public policy in favour of exclusion. He concluded in this way (at p 363):

'Consequently I am unable to see how exposure to the course of negotiations in this narrow context is in any way harmful to either side. If the application succeeds, the action will be at an end. If it fails, and the case proceeds to trial, the material will not be available to the trial judge and he will not be in any way embarrassed.

For the above reasons I accept Mr. Bloom's submissions, which seem to me to have particular force in relation to reliance upon an alleged estoppel ... It seems to me to be manifest that a plaintiff must be entitled to rely for this purpose on any relevant statements in the without prejudice correspondence to demonstrate either conduct or an implied intimation by the defendant that he is willing for the case to proceed.'

32. Mr. Cran submits that the same is true here. While justice requires that Somatra should be entitled to rely upon the contents of the without prejudice conversations at an application to set aside the Mareva injunction, the same is not true at a trial. Somatra did not in fact apply to vary or discharge the injunction, and, even if it had, the injunction would have been maintained, varied or discharged and, in each such event the material would not be available at the trial, which could and should take place before a different judge. I see the force of that submission, but I do not think that it is supported by the decision in the *Family Housing Association* case. Nor do I think that it represents the just result.

33. In the above passage Hirst LJ said that he accepted Mr. Bloom's submissions. He had earlier summarised Mr. Bloom's propositions as follows (at pp 361-2):

'Mr. Bloom on behalf of the plaintiffs relied on the following basic propositions. (i) The admission in an application of this kind of the contents of without prejudice correspondence for the limited purpose of explaining the passage of time, and the conduct of the parties during negotiations, does not infringe the policy which lies behind the exclusion of such correspondence for other purposes and on other issues. *The policy is only infringed if admissions etc are opened up on issues which will be before the trial judge.* (ii) Wider considerations of public policy require the disclosure of without prejudice correspondence in so far as it explains what has been going on between the parties, so far as such activity is relevant to the issues arising on an application to strike out, especially alleged inordinate and inexcusable delay. (iii) *In so far as the exclusion is founded on agreement between the parties, such agreements should by implication be confined to the opening up of admissions and concessions on the merits of the issues likely to be raised at the trial,* and should not extend to exclusion of material explaining delay and the conduct of the parties. (iv) Whilst public policy dictates that, in the majority of cases and in relation to the majority of issues, the details of without prejudice discussions cannot be disclosed, there is, in a residuum of cases, including the present, a stronger public policy which dictates disclosure.'

The emphasis in the above passage is mine. As I read Hirst LJ's judgment he accepted those submissions including the italicised portions.

34. He thus accepted the distinction between a case like that, where there was no infringement of the rule against the admissibility of the contents of without prejudice discussions and a case like this, where there is. <u>The infringement in the present case is that Sinclairs opened up issues on the merits which will be the very questions to be determined by the trial judge. It seems to me that no party which has taken part in without prejudice discussions should be entitled use them to his advantage on the merits of the case in one context, but then assert a right to prevent its opponent from doing so on the merits at the trial</u>.

35. The remaining case to which I should refer is *Derby & Co Ltd v Weldon (No 10)* [1991] 1 WLR 660, where Vinelott J considered the effect of deploying privileged

material on an interlocutory application. He said (at pp 667-8):

'Mr. Purle QC submitted that there is no general rule that when, adopting the word used by Mustill J in *Nea Karteria* …, material has been "deployed" in court in an interlocutory application privilege that could otherwise be claimed in relation to that and associated material has been waived. In the instant case, he submitted, if the plaintiffs waived any privilege in the course of the application for the Mareva injunction they did so in discharge of their duty to make full disclosure and should not be taken to have waived privilege altogether; they can assert privilege at the trial. I reject that submission. There are, of course clearly contexts where a party who refers in interlocutory proceedings to the fact that he has obtained legal advice and who states the effect of that advice does not thereby waive privilege. ... In the instant, case the plaintiffs deployed Mr. Baker's and Mr. Di Donna's evidence in answer to the claims by Mr. Comer and Mr. Price as to the knowledge of the plaintiffs and the ambit of Network's retainer. Moreover those matters have been brought into issue by Mr. Lyndford-Stanford.'

Vinelott J held that privilege had been waived. It is true that Mr. Lynford-Stanford was opening the case at the trial, but it seems to me that one of the bases of the decision was that the material had been deployed in a significant way on the application for the Mareva injunction. As I see it, the decision affords Mr. Symons' argument at least some, if not decisive, support.

36. My conclusion as a matter of principle and policy is that where, in support of its case on the merits of an action, a party deploys material which would not be admissible because it forms part of without prejudice communications the other party is entitled to refer to the contents of those same communications in order to advance its own case on the merits. It does not seem to me to be just to allow the first party to obtain an advantage by relying on the without prejudice material in one part of the litigation, as here on an application for Mareva relief, where the merits are relevant, and to rely upon the without prejudice nature of the communications when the other party wished to rely upon, say, an admission made in the same without

prejudice discussions at the trial, where the merits are of course also relevant.

37. The same conclusion is reached if the matter is viewed as one of implied contract between the parties ….

39. As I see it, however, the matter cannot be analysed in wholly contractual terms because of the element of public policy recognised in the cases. The essential point in a case like the present case is, in my judgment, that it would be unjust to allow one party to deploy the material for its benefit on the merits in one part of the litigation without allowing the other to do so too in another. For example, if there is an application to discharge a Mareva injunction the court may have to reach preliminary conclusions on the merits. Thus it is accepted here that an application to discharge the injunction would be likely to have involved at least some consideration of the admissions offered during the conversations in order to examine whether the assertions in paragraph 29.4 of the affidavit were sustainable. In these circumstances I do not see how it could be just thereafter to exclude the same evidence when the merits came to be considered in detail at a trial. Moreover, that seems to me to be so, even if no application is made to discharge the injunction. Any advantage gained by the applicants is gained when the affidavit is relied upon in the first place. They should not be allowed to seek that advantage on the merits by infringing the without prejudice status of the conversations without Somatra being allowed to rely upon the same without prejudice material to its advantage on the merits at the trial, without requiring it first to apply to discharge the injunction.

40. In all the circumstances, I have reached a different conclusion from the judge. I would hold that the contents of the conversations are admissible at the trial because Sinclairs relied upon them in paragraph 29.4 of Mr. Weir's affidavit. I should add in this regard that (subject to any discrete point that may arise at the trial) I do not think that it is possible to limit the admissibility to some of the contents of the conversations."

(My emphasis.)

19. Waller LJ added the following comments which are relevant for present purposes:

"48. I agree. On the main point argued on the appeal, the question whether the contents of "without prejudice"

meetings and conversations may now be referred to, I would just add one point by way of emphasis.

> 49. Where a *Mareva* or freezing injunction is being sought, the merits of the underlying dispute will be relevant. If that injunction is obtained, a cross-undertaking in damages will invariably be required. That is a factor which to my mind makes it clear beyond peradventure that it would be unjust to allow a party to deploy without prejudice material to support the merits of his case in order to obtain such an injunction, but be entitled to prevent the other party deploying part of the same material to attempt to defeat the case on the merits at a trial. A party who is attempting to defeat a case at trial is also seeking to demonstrate thereby that the injunction granted on an interlocutory basis should not have been granted in the first place and will be seeking an order for an enquiry as to damage which flows from the undertaking given to the court.
>
> 50. I agree with Clarke LJ that the material in paragraph 29.4 of the affidavit of Mr. Weir was being deployed on the merits in order to assist in the obtaining of the *Mareva* or freezing injunction. Once that conclusion is reached I agree with my Lord that it will be unjust if Somatra are not entitled to deploy part of that same material at the trial".

(My emphasis.)

20. In my judgment one can extract the following propositions from *Somatra Ltd v Sinclair Roche & Temperley* from the above cited passages:

i) The Court of Appeal has decided that in this area the principles relating to the circumstances in which the privilege relating to without prejudice materials has been waived are the same as, or at least very similar to, those in which the privilege relating to legal professional privilege materials is waived.[24]

ii) Once a party (on an interlocutory application) has opened up issues on the merits of the case, which will form part of the very questions to be determined by the trial judge, no party which has chosen to refer to privileged material or discussions for the purposes of that application, should be entitled use them to his advantage on the merits of the case in the interlocutory context, but then assert a right to prevent its opponent from doing so on the merits at the trial.[25]

iii) The Court of Appeal in *Somatra Ltd v Sinclair Roche & Temperley* clearly took the view that one of the ratios of Vinelott J's decision in *Derby v Weldon*

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[24] See paragraph 30 in Clarke LJ's judgment.

[25] See paragraph 34 in Clarke LJ's judgment.

was that the privileged material had been deployed in a significant way at the interlocutory *Mareva* application stage on the merits of the case. In other words the Court of Appeal rejected the argument that the ratio was solely that leading counsel had deployed, or was about to deploy, the privileged material at trial.[26]

iv) As a matter of principle and policy, it is not just, on the one hand, to permit one party to deploy legally professionally privileged, or without prejudice, material for the purposes of an interlocutory application, in order to advance that party's case on the merits, and thereby to gain a litigation advantage, and, on the other hand, to deny the other party the opportunity to refer to, or deploy, such materials at trial, where, likewise, the merits of the case are in issue.[27]

21. Accordingly, in my judgment, the principle of collateral waiver is clearly engaged in the present case. In circumstances where the Claimant has deliberately chosen, in the context of the summary judgment application, to waive legal professional privilege by referring extensively to the contents of the Patarkatsishvili interviews with his former solicitors, in order to support his case on the merits of his claim, it would not be just, fair, or consistent with the principles expounded in the authorities, to permit the Claimant, on the simple pretext of saying that he had not made up his mind whether to refer to such evidence at trial, to withhold disclosure of the underlying privileged materials relating to such interviews. To allow the Claimant to do so would, in my judgment, amount to cherry-picking of the worst kind. It would give him the unjust advantage of deploying privileged and possibly selective (or partial) materials for the purposes of surmounting the summary judgment hurdle, but not requiring him to give full disclosure of the underlying materials for the purposes of trial, in circumstances where there is no dispute that, if the evidence were indeed deployed at trial, such disclosure would have to be made.

22. That outcome would in my judgment be unjust. The Defendant – particularly when facing a long and complex trial of this nature, based to a large extent on alleged oral agreements – must be entitled to know the case which he has to meet, not merely for the purposes of preparing his own witness statements, but also for the purposes of considering, or making, any dispute resolution proposals. The Claimant's "Now you see it, now you don't" approach to the deployment of the privileged material, seems to me to be not only unfair, but also wholly at odds with what should be the correct approach to case management of a complex case of this type, where deployment has been made of privileged materials for a substantial "merits purpose" in the context of an interlocutory application.

23. For the above reasons, I granted the Defendant's application for disclosure on the basis of the first ground put forward by Miss Davies. I would not have granted disclosure merely on the second ground, if there had not been deployment of the privileged materials in support of the Claimant's case on the merits on the summary judgment application.

24. Finally, as I directed on 7 April, I see no reason why such disclosure of the Patarkatsishvili materials should be postponed until after service of the Defendant's

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[26] See paragraph 35 in Clarke LJ's judgment.

[27] See paragraphs 36 and 39 in Clarke LJ's judgment and paragraph 49 in Waller LJ's judgment.

witness statement. The fact that, arguably, the Defendant could have applied for such disclosure on the grounds of collateral waiver at the time of the summary judgment application, does not persuade me that, as a matter of my discretion, it would be appropriate to delay disclosure until service of the Defendant's witness statements.[28] The Claimant has the advantage of the third party Patarkatsishvili materials – and has chosen to deploy at least some part of them at an earlier interlocutory stage. I see no reason why he should have the advantage (if there is one) of preparing his witness statement in the full knowledge of what those materials contain, but the Defendant should not.

The Defendant's application for permission to re-amend the Defence

25. As set out above, I granted the Defendant permission to re-amend his Amended Defence in the form attached to Mr. Larizadeh's third witness statement. The Claimant opposed the amendments contained in paragraphs D56A to D56C of the proposed Re-Amended Defence. These proposed amendments seek to plead that, under the principles of English Private International Law, the applicable law of the tort of intimidation (which forms the basis for the claim in respect of Sibneft) is Russian law.

26. The draft amendments were provided to the Claimant in February 2011, which was more than seven months before the trial is due to start in October 2011.

27. The Claimant's case as currently pleaded is that the tort of intimidation, which constitutes the claim in the action in relation to Sibneft, is governed by English, alternatively French, law. In particular, the Re-Amended Particulars of Claim aver at paragraphs C56A and C56B:

> "C56A Mr. Berezovsky's primary case is that the proper law of the said tort is English law. Paragraph 50A above is repeated. Mr. Berezovsky suffered loss and damage as a result of Mr. Abramovich's unlawful intimidation by means of a sale agreement (1) negotiated and executed in England, (2) which contained English law and jurisdiction clauses; and (3) which provided payment of the purchase price was to be made in England.
>
> C56B In the event that (contrary to Mr. Berezovsky's primary case) it is averred that the proper law of the said tort is not English law, Mr. Berezovsky shall (to the extent necessary) aver that the proper law of the tort is French law. Paragraphs 27, 42, 45 and 46(2) above are repeated. Mr. Berezovsky (1) was made aware of Mr. Abramovich's unlawful threats when he was in France; and (2) took the decision to comply with those unlawful threats when he was in France."

28. The existing Amended Defence currently pleads:

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[28] There are many reasons why tactically he might have chosen not to do so at such time.

> "D56A On the basis of the matters pleaded by the Claimant, the Defendant does not advance any case that the putative proper law of the alleged tort is any law other than English law.
>
> D56B In the light of paragraph 56A above, the Defendant does not respond to paragraph C56B."

29. In the draft Re-Amended Defence, the Defendant seeks permission to amend D56A so as to delete the concession that the Defendant was not advancing any positive case that the proper law of the tort was other than English law and to plead instead that the tort of intimidation alleged in respect of Sibneft is governed, under principles of English Private International Law, by Russian law. The relevant paragraphs of the draft Re-Amended Defence (D56A to D56C) set out in detail why the Defendant contends Russian law applies to the intimidation claim. The amendments also plead that such claims are bound to fail under Russian law and, in particular, are time-barred under Russian law as a result of a statutory three-year limitation period. In the alternative (as previously), there is a denial that, even if English law were the proper law of the tort, the facts pleaded did not, as a matter of English law, constitute the tort of intimidation, because (shortly stated) the facts pleaded only amounted to a warning and not the type of intimidatory threat necessary to constitute the tort. Further, for the first time, there was a further plea in alternative that, even if French law were the proper law of the tort, the facts pleaded did not, as a matter of French law, give rise to liability under Article 1382 of the Civil Code of France (D56C).

30. It is common ground that the Defendant's proposed amendments sought to introduce a defence based on Russian law which was properly arguable. Accordingly, Mr. Gillis did not seek to oppose the amendments on the ground that they had no realistic prospect of success. He faintly tried, by the back door, as it were, to introduce an analysis of the merits of the Defendant's Russian law defence in his argument that the Defendant would not suffer any real prejudice if the proposed amendments were refused because they stood only "a poor chance of success[29]".

31. However, given the concession that the proposed amendments were properly arguable, Mr. Gillis did not strongly pursue any arguments as to the merits of the Russian law claims in his oral argument. In the circumstances, I have not considered it appropriate to address any arguments in relation to the strength (or otherwise) of the Defendant's Russian law defence.

32. I am, however, satisfied, *prima facie* at least, and without engaging in any detailed analysis, that the Defendant would be prejudiced if he were not allowed to re-amend his defence to contend: (a) that the applicable law which governs the alleged torts, as determined by subsections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995, was Russian law; and (b) that any claim by the Claimant was time-barred under the relevant Russian statute, three years from the date when the Claimant knew of the violation of his rights. The Defendant contends that, since the events said to give rise to the Sibneft tort arose in 2001, that these events were known to the Claimant at the time, and he therefore knew of the violation of his rights, the claim would be time-barred under Russian law.

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[29] See paragraph 147-162 of his skeleton argument.

33. It was also common ground that, in exercising my discretion whether to grant permission to re-amend, I should take into account not only the relevant factors identified in CPR Part 17 (amendments), but also those set out in CPR r14.1 (admissions) and in paragraph 7.2 of the Practice Direction which supplements that rule. Paragraph 7.2 of PD14 provides:

> "In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and
>
> (g) the interests of the administration of justice."

34. It is clear that the discretion which I have under both rules to allow an amendment to be made, and to permit an admission to be withdrawn, is a broad one. I refer to the principles as stated by Peter Gibson LJ in *Cobbold v Greenwich LBC* (9 August 1999, unreported CA):

> "The overriding objective [of the CPR] is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not harmed."

35. To similar effect is the observation of Brooke LJ in *Hannigan v Hannigan* [2000] FCR 650 (at paragraph 36):

> "... the judge was quite correct when he said that the Civil Procedure Rules were drawn to ensure that civil litigation was brought up to a higher degree of efficiency. But one must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve."

36. However, it is also clear, not least from the recent decision of the Court of Appeal in *Mason v Mills & Reeve*[30], that the court should not simply assume that an amendment should normally be allowed where refusal would cause prejudice to the party seeking the amendment. In adopting this approach, the Court of Appeal in *Mason* endorsed the statements of the Court of Appeal[31] in *World Wide Corporation Ltd v GPT Ltd*[32], and of Rix LJ in *Savings & Investment Bank v Fincken*[33], in the following terms:

> "68 Mr Simpson showed us a decision of the Court of Appeal, powerfully constituted by Lord Bingham LCJ, Peter Gibson LJ and Waller LJ, in *Worldwide Corporation Ltd v GPT Ltd*, [1998] EWCA Civ 1894, decided on 2 December 1998. It seems to me unfortunate and surprising that this case features neither in any report nor in the notes to the White Book. Searches on electronic databases reveal that it was referred to and followed in at least six cases in the Court of Appeal between 1999 and 2004, as well as in a number of first instance decisions. Particularly worthy of note is the endorsement in paragraph 79 of the judgment of Rix LJ in *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630:
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> 'As a postscript I would add that, although decided prior to the introduction of the CPR and concerned with an egregious application to change direction in the course of trial itself, the judgment of this court in *Worldwide Corporation Ltd v. GPT Limited* contains a full compendium of citation of authorities as at that date which emphasises that, even before the CPR, the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective.'
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> 69 The appeal in *Worldwide Corporation v GPT Ltd* was by the Claimants against the refusal of Moore-Bick J in the Commercial Court to permit amendments to the

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30 [2011] EWCA Civ 14. See also the commentary in the White Book at paragraph 17.3.5.
31 Lord Bingham LCJ, Peter Gibson and Waller LJJ.
32 [1998] EWCA Civ 1894.
33 [2003] EWCA Civ 1630.

claim in the first week or so of the trial, amendments prompted not by discovery of some unsuspected evidence or fact but by a re-appraisal by newly instructed Counsel of the merits of the case. It was said that he felt that the case previously pleaded would fail and that only by way of the amendment could the case be put on an arguable basis. Waller LJ gave the judgment of the court, setting out the reasons why the appeal had been dismissed. Mr Stanley Brodie Q.C. for the Claimants relied on observations as to the generous approach of the court to amendments required to enable the true issues between the parties to be resolved, so long as any injustice can be avoided, mainly by terms as to costs: Bowen LJ in *Cropper v Smith (1884)* 26 Ch D 700 at 710-711 is one of the classic statements of this attitude. Another is that of Brett MR in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263. More recent statements include that of Millett LJ in *Gale v Superdrug Stores plc* [1996] 1 WLR 1089 at 1098 and following. The court in *Worldwide Corporation v GPT* said this about this attitude:

'We are doubtful whether even applying the principle stated by Bowen LJ, the matter is so straightforward as Mr Brodie would seek to persuade us. But, in addition, in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) "mucked about" at the last moment. Furthermore the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales.'

70 Later in the judgment the court said this under the heading 'Approach to last minute amendments':

'Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he

> be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.
>
> We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it.'
>
> 71 The court also recognised, as I do, the reluctance with which an appellate court will interfere with discretionary case management decisions, perhaps especially those of a trial judge.
>
> 72 As the court said, it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

The Claimant's submissions

37. Mr. Gillis submitted that the Defendant's application for permission to amend should be refused. He argued that the Defendant's conduct in seeking now to withdraw his admission that English law applied to the Sibneft tort claim, having maintained that position up until the dismissal of his appeal in respect of his summary judgment application, was abusive. He submitted that on numerous occasions, in pleadings and elsewhere, the Defendant had unequivocally stated that he was accepting English law as the applicable law for the Sibneft claim. He pointed to statements made by the Defendant's then leading counsel which, he said, were a reiteration of "… what was

in effect an election to have the matter determined by reference to English law and not any other law"[34]. He claimed that this was a deliberate tactical decision, thereby enabling the Defendant to issue and pursue his summary judgment application and make arguments by reference to English law (rather than, as would have been the case, absent this admission, by reference to factual questions relating to what Russian law might be). The advantage which the Defendant sought to obtain by that tactic was to try and strike out the Claimant's claim or, at the very least, to obtain a long delay of the trial of the substantial claims brought against him[35]. Having failed to realise the full benefit which he hoped the summary judgment application would achieve, the Defendant was now trying to resile from his election. Mr. Gillis took me through a detailed analysis of the procedural chronology from 26 June 2008 to 23 February 2011, when the Court of Appeal handed down its judgment dismissing the Defendant's appeal against the dismissal of his summary judgment application. Mr. Gillis pointed out that it was the very next day (24 February 2011) that the Defendant's lawyers provided a copy of the proposed draft Re-Amended Defence, clearly demonstrating that the draft had been in preparation for some time, as part of a deliberate tactical device.

38. He pointed out that it had always been the Defendant's position, from service of his Defence in June 2008, that the underlying rights allegedly acquired by the Claimant under the Sibneft agreement were governed by Russian law, and were not English trust rights. Moreover, by April 2009, it was clear from Russian law evidence served by the Claimant, that he, too, was accepting that Russian law governed the underlying rights allegedly acquired under the Sibneft agreement. Therefore, although the Defendant's evidence sworn in support of the application for leave to re-amend suggested that one of the reasons for the change in the Defendant's approach was the fact that the Claimant had amended his claim after Sir Anthony Colman's judgment in April 2010, to plead Russian law in relation to both the rights acquired in the 1995 and 1996 Sibneft agreement, that could not justifiably provide any reason for the Defendant's desired change of track, since the Claimant had always maintained his position that English law was the proper law governing the Sibneft tort, and, for the purposes of the Court of Appeal hearing, that had been accepted by the Defendant.

39. Accordingly, Mr. Gillis submitted, it would not be in the interests of the administration of justice for tactical manoeuvring of this sort to be condoned by the court. That was a fundamental objection to the amendment. To permit the Defendant to resile from his election would be abusive: see, for example, the type of conduct referred to in *Competition Commission v BAA Ltd*[36]; and, as to the need for an amending party to provide an explanation for the change in position, see *American Reliable Insurance Company v Willis Ltd*[37]. No such explanation had been provided in the present case.

40. Moreover, submitted Mr. Gillis, the proposed amendments prejudiced the Claimant because he had had to defend an extensive summary judgment application "… by virtue of what was plainly a deliberate decision made by [the Defendant] not to raise this allegation at an earlier time". Apart from exposing the Claimant to a potential

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34 See paragraph 92(5) of Mr. Gillis' skeleton argument.
35 See, generally, paragraph 92 of Mr. Gillis' skeleton argument.
36 [2010] EWCA Civ 1097 at paragraph 51.
37 [2008] EWHC 2677 at paragraph 18.

strike-out of his whole claim, the summary judgment application delayed the trial and took up considerable time and expense. The proposed amendments also had the potential to cause the Claimant very significant prejudice going forward, so far as his preparation for trial was concerned. There was already a very tight trial timetable for the resolution of disclosure issues, and the completion of factual and expert evidence in what was a very complex trial. A critical period of preparation was approaching, when the Claimant's legal team should be reviewing disclosure and the witness statements which had been served, not only in this action but also in the related Chancery proceedings, whose parties were participating in this action to the extent that common issues were raised. But the Claimant's legal team would be deflected by having to consider the substantial expert and factual issues which would be raised by the proposed amendments to plead Russian and French law, and to consider what further evidence, both expert and factual, would be required, not merely in relation to limitation issues, but also in regard to other matters.

41. The Defendant, on the other hand, had clearly been considering the matters for some time, and would not be under the same pressures.

42. Finally, Mr. Gillis submitted that there would be very little prejudice to the Defendant if he was not permitted to re-amend his Defence; the proposed amendment had poor chances of success.

43. Moreover, it did not lie in the mouth of the Defendant to complain if he suffered any prejudice, because the position was of his own making, in deliberately choosing not to make the point at an earlier stage. In this context, Mr. Gillis referred to *Christofi v Barclays Bank plc*[38], and *Benedictus v Jalaram Ltd*[39], which, he submitted, were comparable cases to the present. The Defendant had deliberately sprung the application on the Claimant in February 2011, leaving the Claimant effectively only four weeks in which to prepare his witness statements.

Discussion and reasons for the decision

44. There is no doubt that the Defendant did not seek to plead Russian law as governing the Sibneft claim, either in June 2008, when he first served his Defence, or in May 2010, when the Amended Defence was served, following the hearing before Sir Anthony Colman. It is also clear from Mr. Larizadeh's evidence that the decision not to plead Russian law as governing the Sibneft claim was a considered one, as was the decision subsequently to seek permission to amend. Miss Davies accepted that the Defendant could, either as his primary case, or in the alternative, have pleaded Russian law at an earlier stage, and that privilege had not been waived as to the reason why the amendment had not been made before February 2011. She also accepted that no new evidence (within the meaning of sub-paragraph 7.2(a) of PD14 of the CPR) had come to light which was not available at the time the admission was originally made.

45. However, I am not prepared to conclude either that the decision taken by the Defendant to seek to amend at this stage is part of some deliberate and abusive litigation strategy on his part, or that such a decision amounts to offensive conduct of

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38 [2000] 1 WLR 937 at page 949, per Chadwick LJ.

39 (1998) 58 P&CR 330.

such a type that the court should mark its disapproval by refusing permission to amend. Even if such a deliberate, tactical decision had been taken at an earlier stage (i.e. to rely on English law alone for the purposes of the summary judgment application, with a view, if the summary judgment application failed, to widening the defence in order to allege that Russian law was the governing law of the Sibneft tort, and that a time bar applied), I do not consider that that conduct of itself would make it unjust or unfair, so far as the Claimant is concerned, to permit the proposed amendment at this stage.

46. As Miss Davies submitted (and as Mr. Paul Mitchard of Skadden set out in his second witness statement) there were ten grounds raised as the basis for the Defendant's summary judgment application. Only one of these, relating to the necessary constituent elements of the English law tort of intimidation, was based on the (then) common pleaded case that English law was the proper law of the tort. Other grounds, such as, for example: the general factual implausibility of the Claimant's claim; the assertion that Russian law governing the underlying rights under the alleged agreement, did not recognise the concept of a trust, and therefore the Sibneft agreement had no legal effect; and the Act of State defences, were not dependent on the premise that English law was the proper law of any alleged tort relating to the Sibneft claim, as the Claimant himself had pleaded.

47. Thus, the summary judgment application would have gone forward on these independent grounds in any event, irrespective of the separate point based on the necessary elements of the English law of the tort. Had that last point succeeded, it would have been dispositive of the whole Sibneft claim. However, as Mr. Gillis accepted, even if the Defendant had, at an earlier stage, pleaded, in response to the Claimant's assertion that English law was the applicable law, his current plea that Russian, alternatively, French, alternatively English law, was the proper law of the alleged tort, the summary judgment application would have still gone ahead in any event. Moreover, I accept Miss Davies' further submission that, even if Russian law had been pleaded in the alternative to English or French law as the Defendant's first asserted governing law, there would still have been a summary judgment application relating to the English law way of formulating the claim.

48. In the circumstances, any pragmatic approach on the part of the Defendant (i.e. assuming, for the purposes of the summary judgment application that, as pleaded by the Claimant, English law governed the tort, but challenging the factual and legal foundation of the claim on that hypothesis) cannot, in my judgment, be characterised as egregious or otherwise abusive. I reach that conclusion even if there had been a settled intention on the part of the Defendant at that stage (which one cannot necessarily infer from the evidence) to widen or change the basis of the defence, if the summary judgment application failed, in order to focus primarily on Russian law.

49. It was also perfectly clear from what was said by Defendant's leading counsel at the start of the hearing before Sir Anthony Colman that, if the application failed, there would be other issues of disputed fact "… or perhaps Russian law" that would have to be resolved at trial. Although, in relation to Sibneft, there was no pleaded allegation, by the Claimant or the Defendant, at that stage, that Russian law was the proper law of the tort, from the evidence to which I have been taken, the Defendant's conduct of the proceedings cannot be characterised as amounting to any sort of final election or representation that English law was accepted as governing the tort, such that no

further application to amend would be made, so as to raise, for example, the Russian time-bar point.

50. Nor do I accept, had the alternative position now sought to be pleaded been made clear at the earlier stage of the summary judgment hearing, that that hearing would have lasted any significantly shorter time.

51. Accordingly, I do not regard the conduct of the Defendant, in seeking the proposed amendment, as comparable to those of the parties in the cases upon which Mr. Gillis sought to rely in order to defeat the application to amend.

52. I turn from a consideration of factors (a) and (b) to the remaining factors set out in paragraph 7.2 of PD14.

53. Whilst, no doubt, the Claimant's extensive team of solicitors and leading and junior counsel[40] will have additional work to do because of the re-amendments to the Defence, I am not persuaded that, in reality, this will result in any real prejudice so far as the Claimant is concerned. In particular, I do not accept Mr. Gillis' assertions that the amendments will give rise to any additional, or any substantial additional, disclosure issues. Many of the factual assertions in the new pleading to support the Russian law claim are already matters in issue on the existing pleadings. Insofar as there may be new aspects, Mr. Gillis did not persuade me that these would be extensive.

54. Nor am I persuaded that there will be any significant broadening of the factual inquiry to incorporate matters that might be exclusively relevant to the Russian or French law causes of action, or the Russian limitation issues. These are factual matters that are likely to have been addressed in any event, in the context of, or in relation to, the English claim as it currently stands. The factual matters necessary to constitute the claim under French law must already have been considered by the Claimant for the purposes of the existing French law claim. Moreover, Mr. Gillis was not able satisfactorily to identify any significant or substantial additional factual matters that he would have to address in the light of the new Russian law claims that he would not have to address on the existing claim. For example, time bar matters (both factual and legal) already arise in relation to the Devonia agreement.

55. Although Russian law limitation issues may give rise to further factual matters which will need to be addressed by the Claimant, I was not persuaded that this would impose any significant additional burden upon him or his legal team, since these were matters which were highly likely to be covered by his witness statement in any event. Nor was I impressed by the submission that extensive disclosure or factual issues would arise in relation to the location of the Defendant's commercial interests in light of the new Russian law claim.

56. So far as any additional Russian law expert evidence is concerned, here, too, I do not consider that the Claimant will be seriously prejudiced if permission to re-amend is given. Whilst the Claimant's legal team has not previously had to address issues relating to the Russian law of intimidation, they have had to look at some Russian issues of limitation, in the context of both the Sibneft and the Rusal claims. The

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[40] The evidence showed a team of six to seven counsel and at least ten fee-earners at Addleshaws.

Claimant and the Defendant have already retained suitable Russian law experts, who have given evidence in the interlocutory proceedings. The trial timetable allows more than sufficient time for the Russian law experts to opine on the additional Russian law issues. Miss Davies offered a sequential service of expert witness statements, in place of the normal simultaneous exchange, which goes some way to alleviate any burden on the Claimant, since his expert will know what issues he will need specifically to address before concluding his report.

57. Accordingly, although I consider that, in the nature of things, some additional work will fall on the Claimant's legal team as a result of the re-amendment, at a time when trial preparations are building up, I do not consider that the additional work (and its consequential cost implications) are such as to amount to real or substantial prejudice of the type which might persuade me not to allow the amendments.

58. This is a large and complex piece of litigation involving substantial sums of money, where the Claimant himself has raised numerous issues and amended his own statements of case on a number of occasions. I consider that any prejudice that might be caused to the Claimant would be clearly outweighed by the prejudice which would be caused to the Defendant if I were not to allow the amendment to raise the Russian time-bar point which, as I have said, *prima facie*, at least, has a reasonable prospect of success. Thus, although I have regard, under sub-paragraph (c) to the possible prejudice that may be caused to the Claimant by the additional workload his legal team may have to assume, I do not consider that this is likely to be sufficiently more onerous than might otherwise be expected in the run-up to any long trial, such as to outweigh the undoubted prejudice to the Defendant, if he were not entitled to run the time-bar point.

59. As to sub-paragraph (e), this is not an application to amend brought at a very late stage. At the date of the application before me, the trial date was still some six months away. The trial itself is estimated to last at least three months. It was not surprising, in the light of the failure of the Defendant's appeal against the dismissal of his summary judgment application, that there should be some re-assessment on the part of his legal team of the focus or direction of the defence. These were not the only re-amendments sought to be made to the defence. None of them threaten the start date of the trial.

60. In all the circumstances, I consider, in the exercise of my discretion, that the interests of justice would indeed best be served by granting permission to the Defendant to withdraw the admission that English law is the law of the alleged Sibneft tort and to amend his defence. None of the cases relied on by Mr. Gillis in support of the Claimant's submissions provide any support for disallowing the proposed re-amendments in the particular circumstances of this case.