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ROYAL COURT
(Samedi Division)

24th February 2020

Before: **Sir Michael Birt, Commissioner with Jurats Olsen and Pitman**

Between	**MB & Services Limited**	**First Plaintiff**
And	**Tatiana Golovina**	**Second Plaintiff**
And	**United Company Rusal Plc**	**Defendant**

Advocate W A F Redgrave for the Plaintiffs
Advocate E C P Mackereth for the Defendant

JUDGMENT

COMMISSIONER:

1. This is an application by the Defendant for an order that these proceedings be stayed on the ground of *forum non conveniens* on the basis that the proper forum is that of the courts of Russia.

2. The Defendant is incorporated in Jersey. This is therefore a claim which has been brought as of right in Jersey rather than where leave to serve out of the jurisdiction has been necessary.

The applicable principles

3. There is no dispute between the parties as to the applicable principles. These are to be found in the well-known speech of Lord Goff in Spiliada Maritime Corporation –v- Cansulex Limited [1987] 1 AC 460. This Court summarised the key question in the following terms in Federal Republic of Brazil –v- Durant International Corporation [2010] JLR 421 at paragraph 19:

> ***"19. The applicable test when considering an application of this nature is well-established in Jersey and is summarised in the speech of Lord Goff in [Spiliada]. The court is concerned to establish which is the appropriate forum for the trial of the action i.e. that in which the case may be tried most suitability in the interests of all the parties and the ends of justice. Lord Goff also approved use of the expression "the natural forum" as being that with which the action had the most real and substantial connection. Thus, one is looking for connecting factors which would include matters such as convenience or expense (such as availability of witnesses); the law governing the relevant transaction; and the places where the parties respectively reside or carry on business…."***

4. A recent elaboration of some of the relevant factors is to be found in the judgment of the Supreme Court in Lungowe –v- Vedanta Resources Plc [2019] 2 WLR 1051 where, in a judgment agreed by the other members of the court, Lord Briggs said at [66]:

> ***"… that concept*** [i.e. identification of the forum in which the case can be suitably tried in the interest of all the parties and for the ends of justice] ***generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts, parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which would be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."***

5. Where, as in this case, proceedings are brought as of right because the Defendant is resident in the jurisdiction, (adapting the words of Lord Goff at 477 in Spiliada), the burden resting on the Defendant is not just to show that Jersey is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than Jersey. In this way, proper regard is paid to the fact that jurisdiction has been founded in Jersey as of right.

6. The Plaintiffs submit in this case that there is no natural forum because of the international nature of the dispute. In this connection, Advocate Redgrave placed reliance on a further observation of Lord Goff in Spiliada at 477 where he said:

> ***"Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions … or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum."***

7. The limited nature of the exercise which the court undertakes when considering the appropriate forum was emphasised by Lord Templeman in Spiliada where at 465 he said:

> ***"In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge…. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere."***

8. This sentiment was echoed in VTB Capital Plc –v- Nutritek International Corporation [2013] 2 AC 337, where Lord Neuberger, whilst accepting that Lord Templeman's observation was perhaps rather optimistic, nevertheless emphasised the limited nature of the role undertaken by the court when he said at [83]:

> ***"There is little point in going into much detail; when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial."***

9. There is a second limb to the *forum non-conveniens* test as articulated by Lord Goff at 478(f) of Spiliada:

"If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay shall nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction….".

10. Although Lord Goff refers there to evidence that the plaintiff will not obtain justice in the foreign jurisdiction, it is clear from subsequent authorities that the issue engages a lower threshold, namely whether there is a real risk that justice will not be obtained in the foreign court. As Lord Collins put it in AK Investment CJSC –v- Kyrgyz Mobil Tel Limited [2011] UKPC 7 in the Privy Council on appeal from the Isle of Man at [95]:

"95. The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances."

11. It follows from what we have just said that two issues fall for decision in the present case:

(i) Has the Defendant discharged the burden of establishing that Russia is another available forum which is clearly or distinctly more appropriate than Jersey?

(ii) If so, have the Plaintiffs discharged the burden of showing by cogent evidence that there is a real risk that they will not obtain justice in Russia if the case proceeds there?

Factual background to the claim

12. As well as the Order of Justice issued on 12th April 2019, the Court has been provided with a number of affidavits and affirmations in connection with the present application. These include four affidavits by the Second Plaintiff, two affirmations by Mr Kirill Strunnikov, Head of International Practice of the Legal Department of Rusal Global Management BV ("RGM"), which is the management company of the Rusal Group of companies, and one affidavit by Mr Vladislav Soloviev

who from April 2010 to 2014 was First Deputy Chief Executive Officer (CEO) of RGM and the Defendant and from November 2014 was CEO of the Defendant although he was employed by RGM. He served on the Defendant's board of directors from April 2010 to June 2018 and was employed by the Defendant from 1st January 2015 to 31st May 2019. He has been President of the Defendant since 15th March 2018.

13. The material before us shows that there are substantial factual disputes between the Plaintiffs and the Defendant, even though no Answer has yet been filed given the existence of the present summons. It is not for this Court to resolve any factual disputes at this stage. Accordingly, what follows is essentially taken from the Plaintiffs' claim (although we have included some evidence put forward on behalf of the Defendants where appropriate) and is not to be taken as any finding of fact. That task remains for the trial court in due course. In particular, as set out below, the Defendant will argue that if, which is denied, the Plaintiffs have any claim, that claim lies against one or more subsidiaries in the Rusal Group, not against the Defendant which, it says, had nothing to do with the events in question. Because the Order of Justice alleges that various actions were taken by or on behalf of the Defendant we have proceeded on that basis for the purpose of describing the events in question. This does not indicate any finding as to whether in fact the Defendant is the correct defendant.

14. The Defendant is a public company incorporated in Jersey. Its shares are listed on the Hong Kong and Moscow Stock Exchanges. At the material time, a Russian company EN+ owned 50.1% of the shares in the Defendant. EN+ was in turn owned as to approximately 70% by Mr Oleg Deripaska who is a Russian citizen and was the founder of the Rusal Group.

15. The Defendant is the holding company for the Rusal Group ("Rusal") which consists of a number of subsidiaries in different jurisdictions. Rusal is one of the largest aluminium producers in the world. Its business includes producing aluminium in various countries, mainly in Russia, by smelting alumina derived from bauxite mined in various parts of the world. The interim consolidated report for the Defendant for the first six months of 2017 records revenue of US$4.7bn, net profit of US$470m and total equity of US$3.8bn.

16. According to the first affirmation of Mr Strunnikov, the Defendant's own business is simply to act as a holding company of the Rusal Group. It does not itself trade by buying or selling materials or engaging in manufacturing. All of these activities are carried out by subsidiaries. Although incorporated in Jersey, the Defendant's headquarters are in Cyprus where it currently has 16 employees, but in 2014 it only had 2 employees located in Cyprus. The management company of the Group is RGM, a Dutch company. This company employed most of the executive/management staff for the Rusal Group. Mr Strunnikov asserts that, at the relevant time, all of the individuals

named by the Second Plaintiff as having played a significant role in the events in question (namely Mr Deripaska, Mr Soloviev, Mr Itskov, Mr Zykov, Ms Veselova and Mr Nicolaev) were employed by RGM, not the Defendant.

17. The Second Plaintiff was born in Uzbekistan when it was part of the USSR. She is a Russian citizen but has also been a British citizen since 1997. She has lived in the United States since 2001. She is an inventor and entrepreneur and her career has been involved with creating bulk packaging solutions for the transportation industry. She is the beneficial owner and sole director of the First Plaintiff which was incorporated in England and Wales in 2011.

18. Between 2007 and October 2015, the Second Plaintiff carried on business in Russia through a Russian company which she owned, called Ekopaktekh. In October 2009 she was approached by Pervaya Gruzovaya Kompaniya ("PGK") which is Russia's largest operator of railway freight wagons. They requested her to develop a custom-made bulk packaging solution for the transportation of powdered chemical products, such as alumina, in open-top cars (gondola wagons) on the Russian railway network.

19. PGK was aware that the Defendant transported a significant amount of alumina from its refineries around the world to the port of Vanino by ship for onward transportation by rail across Russia to various smelting plants. This had to be done in closed hopper wagons which were about twice the price of gondola wagons. If the alumina could be transported in gondola wagons, this would not only save the Defendant significant sums on its alumina transportation but also allow PGK to profit from return journeys through the leasing of its wagons. The Second Plaintiff understood at the time that the Defendant had given its backing to PGK to find a solution that would benefit all of the parties involved.

20. The initial meeting was held at Ekopaktekh's office in Moscow on 10th October 2009. The Second Plaintiff agreed to look into the issue of whether there was a way in which alumina could be transported in gondola wagons. She thereafter invested considerable time and effort in research and development and ultimately designed a suitable packaging solution in the form of gondola wagon liners ("GWLs").

21. PGK subsequently introduced the Second Plaintiff to representatives of the Defendant at a meeting at the Defendant's offices in Moscow on 9th February 2010 to discuss the development of the GWLs. As well as attendees from PGK, Mr Litivinenko and Mr Sabirov of the Defendant attended the meeting. Mr Polenov, director of the Department of Transport and Logistics ("the DTL") at the Defendant, subsequently became involved in the project. At the meeting Mr Sabirov confirmed that the Defendant would provide the Second Plaintiff and her team with access to its factories for

observing the operation of the loading and unloading process in order to assist her in creating her designs. From July 2010 onwards she began working directly with the DTL in developing prototypes of GWLs. From that time onwards, the Second Plaintiff and Ekopaktekh began working directly with the Defendant rather than PGK. The Second Plaintiff and Ekopaktekh developed the GWLs at their own expense. The First Plaintiff was incorporated by the Second Plaintiff in May 2011 and was assigned the intellectual property rights in the design of the GWLs. It also acted as a global base for distribution services in relation to GWLs.

22. From May 2011 to December 2013 the First Plaintiff supplied approximately 6,000 GWLs designed by the Second Plaintiff to a Russian transport operator called VLL Pacific Limited ("VLL") which in turn had a contract with a Swiss incorporated subsidiary of the Defendant, RS International GmbH ("RSI"). The GWLs were supplied via Ekopaktekh as the First Plaintiff's agent in Russia. It is said that initially, the intention had been to supply the Defendant directly and a draft contract to that effect was supplied by Mr Zykov (senior manager of the DTL) which contained a confidentiality clause protecting the Second Plaintiff's rights to her design, but such agreement was never in fact entered into because supply was via VLL.

23. The GWLs were manufactured in China by a company which is referred to as TKP. The principal of TKP was Mr John Chang. In May 2011 the Second Plaintiff had provided TKP with a draft supply agreement concerning the manufacture and supply of the GWLs. The agreement contained terms stipulating that the property and the design of the GWLs was that of the First Plaintiff and granted a limited licence to TKP to manufacture the GWLs solely for the purpose of supply to the First Plaintiff. There was a requirement that TKP and Mr Chang should keep all technical information and know-how relating to the GWLs secret and confidential and only use it for the purpose of the supply agreement. The Plaintiffs allege that, whilst the agreement was never signed, it was the clear common understanding at all times of TKP, Mr Chang and the Plaintiffs that the relationship between them was on this basis. Mr Chang confirmed by email to the Second Plaintiff on 16th May 2011 that he would not provide confidential information to the Defendant.

24. In 2013, the DTL invited the First Plaintiff to mass produce GWLs for loading at the Defendant's Nikolaev alumina factory in Ukraine. On occasions in the latter part of 2013 and early 2014 Ekopaktekh and/or the Second Plaintiff supplied various technical details and drawings of the GWLs to Mr Zykov of the DTL to assist in obtaining a Ukraine Railway permit for transport of alumina in open top wagons and for the purpose of assisting with the development of additional loading equipment to implement the use of GWLs at the Defendant's Nicolaev alumina factory in Ukraine. The Plaintiffs assert that this was subject to a common understanding that the information would be used solely for these purposes and not with a view to the Defendant using it to procure the manufacture of GWLs for itself outside the arrangement with the Plaintiffs.

25. In about October 2013 Russian Railways terminated access to a railway spur at Vanino which was used for the installation of GWLs before the loading of alumina. Efforts to restore access to the spur through discussions with representatives of the Defendant and with Russian Railways were unsuccessful. The Second Plaintiff then approached Mr Deripaska, the CEO of the Defendant, by email dated 12th January 2014 seeking his assistance in resolving the issue of the railway spur. Mr Deripaska responded positively and the spur was re-opened within a month. The Second Plaintiff asserts that she asked him to intervene because she was aware that he carried immense influence in the Russian Federation at many governmental levels. She informed him that the closure of the spur was causing the Defendant to lose $1m a month.

26. On 31st January 2014 the Second Plaintiff emailed Mr Deripaska inviting the Defendant or EN+ to acquire ownership of the First Plaintiff from her. As a result of this approach, the Second Plaintiff was invited to meet representatives and officers of the Defendant at the Defendant's Moscow office on 5th February 2014. Further meetings took place on 7th and 12th February 2014. Mr Soloviev attended the meetings on 7th and 12th February and Mr Itskov the meeting on 7th February. Discussions took place concerning the possible acquisition of the First Plaintiff by the Defendant from the Second Plaintiff. A working group was set up including the Second Plaintiff and Mr Zykov, Ms Veselova and Mr Litvinenko of the Defendant. It was agreed that the working group would visit TKP in China. However in mid-February 2014, representatives of the Defendant including Ms Veselova, Mr Bondarenko (the Defendant's Director for Production Development) and Mr Liu (the Defendant's Beijing representative) travelled to visit TKP in China without the Second Plaintiff. They met Mr Chang and proposed that TKP manufacture the GWLs for the Defendant directly rather than for the First Plaintiff and said that if TKP agreed to do this, the Defendant would increase its orders to 3000 GWLs per month by mid-2014, but that the Defendant would use another supplier if TKP refused the proposal.

27. The Plaintiff learned of the Defendant's visit to China shortly afterwards. She flew to China and confronted Mr Chang who confirmed that the Defendant had promised to order large quantities of GWLs from TKP. The Second Plaintiff complained forcefully about this by email to Mr Deripaska on 2nd March 2014 but he did not reply.

28. A meeting took place on 14th March 2014 at the Defendant's office in Moscow. Mr Soloviev, Mr Itskov and Mr Shmalenko attended on behalf of the Defendant. According to the Second Plaintiff, they did not deny her allegation, which she put to them, that they had gone behind her back in respect of the manufacture and purchase of the GWLs. Mr Itskov asserted that the Plaintiffs' profit margin had been too high. The Second Plaintiff said she wished to make a deal to sell the First Plaintiff to the Defendant but Mr Soloviev was non-committal. Other meetings and events took place in Moscow between March 2014 and March 2015 which are set out in the Order of Justice and to which we shall refer below in connection with the issue of a fair trial.

29. The Order of Justice asserts that Rusal SUAL ("SUAL"), a subsidiary of the Defendant, subsequently purchased GWLs from TKP with the first shipment reaching Russia on 1st July 2014. No orders for GWLs were placed with the First Plaintiff after October 2013.

30. From June 2014 onwards the Defendant, through its subsidiary SUAL, obtained GWLs from a different Chinese manufacturer Shandong Anthente New Materials ("Shandong") in place of TKP. Later in August 2014 the Defendant, through SUAL, began obtaining supplies of GWLs from a Ukrainian company called Ariva Pak LLC ("Ariva Pak").

31. While these events were going on, the Second Plaintiff had filed applications for certain patents. The first was a patent for utility model 143408 which was filed on 11th December 2013, and published on 20th July 2014. The second was utility model patent 143828 which was filed on 3rd March 2014 and published on 27th July 2014. The applications were filed in the name of Ekopaktekh and the Second Plaintiff but Ekopaktekh assigned its rights to the First Plaintiff on 18th August 2014.

32. We were informed that a utility model is a form of patent and that such patents take effect upon publication. Patents in similar terms to the Russian patents were subsequently obtained and published in Ukraine and China.

The Plaintiffs' claims

33. Following the events just described, the Plaintiffs have asserted a claim against Rusal on a number of occasions including the following:

    (i) On 2nd March 2014, in a long email from the Second Plaintiff to Mr Deripaska complaining about what had occurred, she said that the employees of Rusal referred to earlier had taken her business and her intellectual property for free. She subsequently sent further communications in July and August 2014 to Mr Deripaska alleging infringement of her patents. She listed the relevant patents.

    (ii) On 20th April 2015 the American law firm of Kim Law wrote to the Defendant on behalf of the First Plaintiff. The letter listed the various patents held by the First Plaintiff in Russia and Ukraine and asserted that the Defendant and its affiliates were infringing those patents by use of GWLs manufactured in breach of the patent rights. It demanded that the Defendant cease and desist from infringement of the patents.

(iii) In an undated letter (which we were informed was sent in March 2017) the First Plaintiff wrote to SUAL stating that the importation by SUAL of GWLs manufactured by Ariva Pak was an infringement of the First Plaintiff's Russian patents.

(iv) On 30th March 2018 a company called Arcanum Global (UK) Limited, which described itself as a partner of the Second Plaintiff, wrote to the chairman of EN+ setting out what the Plaintiffs contended had occurred and asserting that there had been an unlawful exploitation of the patented invention by Rusal and EN+.

(v) On 5th November 2018, the Defendant announced that it proposed to re-domicile by de-registering from Jersey and continuing its existence as a company under Russian law.

(vi) On 21st December 2018 Carey Olsen wrote a letter before action to the Defendant on behalf of the First Plaintiff setting out for the first time the claims now advanced in the Order of Justice and that they might be brought in Jersey.

34. The Plaintiffs bring these proceedings under two heads of claim.

35. The first is for breach of confidence. The Plaintiffs contend that the know-how in relation to the GWLs was confidential information and that the Defendant has misused that confidential information in breach of confidence by obtaining GWLs from TKP, Shandong and Ariva Pak. In relation to Shandong and Ariva Pak, it is pleaded that the Defendant supplied the confidential information to each of those manufacturers. In relation to TKP, it is pleaded that the Defendant knew that the know-how held by TKP was confidential information and it acted in breach of confidence by commercially exploiting that confidential information for its own benefit by acquiring GWLs directly from TKP rather than through the First Plaintiff.

36. The second head of claim is conspiracy to injure. The conspirators are said to include the Defendant, Mr Deripaska, Mr Soloviev, Mr Itskov, TKP, Mr Chang, Mr Liu, Shandong, Ariva Pak, SUAL and Rusal Trans LLC ("Rusal Trans"). It is said that these persons conspired to injure the Plaintiffs by cutting them out of the supply chain by unlawful use of the confidential information and/or by infringing the patents held by the First Plaintiff. The patents referred to are the two Russian patents referred to earlier, together with the equivalent patents obtained in China and Ukraine based on the two Russian patents. Key elements of the conspiracy are pleaded as including the visit to TKP in China to persuade TKP to produce the GWLs for the Defendant directly, cutting out the Plaintiffs, and the subsequent importation of GWLs from TKP, Shandong and Ariva

Pak without the Defendant paying the Plaintiffs for the right to use their intellectual property or their patents.

37. The Plaintiffs claim damages for the unlawful use of the Plaintiffs' confidential information. They assert that the patents have a value of US$209-225m. They also claim an account of the profits made by the Defendant as a result of its unlawful acts. They assert that the Defendant has made a total saving of approximately US$1bn between 2014 and the date of the Order of Justice by using GWLs.

1. The appropriate forum

38. Against that background (acknowledging again that the facts cannot be definitively established until trial) we turn to consider the first of the two questions which we must answer, namely has the Defendant discharged the burden of establishing that Russia is another available forum which is clearly or distinctly more appropriate than Jersey? We propose to consider that question under a number of headings.

(a) Witnesses

39. In connection with the question of witnesses, Lord Mance said this at [62] of VTB Capital (supra):

> ***"62. This [***i.e. the question of witnesses***] is a factor at the core of the question of appropriate forum. … In summary, it is clear that the issues and evidence will be focused overwhelmingly on matters which happened in and concern Russia, and that the oral and documentary evidence, on both factual and expert matters, is likewise likely to be overwhelmingly Russian and to be found in Russia, where it could be heard in Russian without translators."*** [emphasis added]

40. Advocate Redgrave submitted that, whilst earlier and later meetings took place in Russia, the key event in relation to both the breach of confidence and conspiracy claims was the visit to TKP in mid-February 2014. That is because, he says, the breach of confidence took place during that visit. That occurred in China rather than Russia and two key witnesses would be Mr Chang of TKP and Mr Liu, the Chinese representative of Rusal. Both of these witnesses were resident in China rather than Russia and were likely to require interpreters whether giving evidence in Russia or in Jersey. The Second Plaintiff was resident in the United States and therefore this did not point towards Russia. As to those witnesses from Russia who would be necessary, they were, he submitted,

clearly used to travelling internationally on business and there was no real problem with their travelling to Jersey to give evidence.

41. Whilst we acknowledge that evidence of what happened at the meeting with TKP in China will be important, we agree with Advocate Mackereth that this cannot be considered in isolation. As the Order of Justice recognises (because it goes into considerable detail on this aspect) evidence of the meetings in Russia both before and after the visit to TKP will be important evidence as part of the overall picture. All the other meetings took place in Russia and were attended by Russians with the meetings being held in the Russian language. The Court is likely to hear therefore (amongst others) from the individuals mentioned at para 16 above, namely Mr Soloviev, Mr Itskov, Mr Zykov, Ms Veselova and Mr Nicolaev. All of them reside in Russia and, apart from Mr Soloviev, are not thought to be fluent in English so that interpreters will be required.

42. As to other likely witnesses, Mr Deripaska is Russian and resides part of the time in Russia, although it is clear that he has homes in many countries and leads a somewhat peripatetic existence. The Second Plaintiff lives in the US but is fluent in Russian as well as English. If the Plaintiffs wish to call other witnesses as to events at these meetings in Russia, they too will be Russian. There is no suggestion that any witness resident in Jersey will give evidence.

43. In our judgment, the question of witnesses points in favour of Russia as the natural forum.

(b) Documents

44. While some of the emails to which we were referred were written in English, the vast majority of relevant documents are likely to be in Russian. Accordingly, if the case is held in Jersey, the documents will need to be translated, which will be an additional expense. It is not suggested that any material documents are located in Jersey.

45. Advocate Redgrave submitted that most of the relevant documents had already been produced and translated so that there would be little additional cost. We cannot accept that that will necessarily be so. These proceedings are at an early stage. In particular, discovery (with its onerous obligation to produce all documents that might be relevant) has not yet taken place. If the case is heard in Jersey, it seems to us likely that a very substantial proportion of the documents listed on discovery will need to be translated so that the parties' Jersey lawyers and those assisting them can determine whether they are significant or not.

46. The need for translation also gives rise to the potential for error or dispute. By way of example, the translation of the response of Mr Deripaska to the Second Plaintiff's initial email of 12th January 2014 concerning the problem at the spur records him as saying "*I'll sort it out this week*" and it is said that reliance is placed by the Plaintiffs upon the implicit assertion that he had the power to sort it out. During the course of the hearing, Advocate Mackereth informed us that the independent translation agents employed by the Defendant have translated Mr Deripaska's email as "*I'm looking into it this week*", which, it is said, carries a rather different connotation from "*I'll sort it out this week*".

47. In our judgment, the question of documents and the need for translation also points in favour of Russia as the natural forum.

(c) Proper law

48. We consider first the proper law of the claim for breach of confidence.

49. Advocate Mackereth submitted that the proper law of this claim was Russian law. Advocate Redgrave, whilst accepting that there was likely to be need for evidence of Russian law on the Russian equivalent of breach of confidence and patent infringement, submitted that evidence in this respect would also be required on the law of China and Ukraine.

50. In our judgment the proper law of the claim for breach of confidence is likely to be Russian law for the following reasons.

51. In Douglas v Hello Limited (No.3) [2005] EWCA Civ 106, [2006] QB 125 at [97] Lord Phillips MR, speaking for the English Court of Appeal said:

> ***"Dicey and Morris on the Conflict of Laws, 13th Ed (2000), Vol 2, at paras 34 – 029FF suggest, somewhat tentatively, that a claim for breach of confidence falls to be categorised as a restitutionary claim for unjust enrichment and that the proper law is the law of the country where the enrichment occurred. While we find this reasoning persuasive, it does not solve the problem on the facts of this case …"***

52. Advocate Mackereth also relied on the case of Innovia Films Limited v Frito-Lay North America Inc. [2012] EWHC 790 (Pat), a decision of Arnold J in the English High Court. The claim in that case was for breach of confidence. In the context of an application to set aside permission to serve the claim out of the jurisdiction, Arnold J gave consideration to the proper law of the claim for breach

of confidence. Having considered the above observation of the Court of Appeal in Douglas v Hello and the 14th edition of Dicey at 34-033 to 34-041, he proceeded on the basis that the claim for breach of confidence should be regarded as a restitutionary claim for unjust enrichment for the purposes of identifying the proper law and therefore fell within Rule 230 of Dicey. That Rule provided that the proper law of a restitutionary claim is the law of the country where the enrichment occurred. On the facts of the case before him, Arnold J held that, unless one said that the enrichment occurred where the defendant company was based (which he was not willing to do) enrichment in that case occurred virtually world-wide. He concluded that the better approach was to identify the law with which the obligation of confidence and its breach were most closely associated. The key point relied upon by Advocate Mackereth is that the judge treated a claim for breach of confidence as being a restitutionary claim for unjust enrichment for the purpose of determining the governing law.

53. Rule 230 in the 14th Edition of Dicey was in the following terms:

> ***"Rule 230***
>
> ***(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.***
>
> ***(2) The proper law of the obligation is (semble) determined as follows:***
>
> ***(a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;***
>
> ***(b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);***
>
> ***(c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."***

54. We should add that Rule 230 has become Rule 257 of the 15th Edition of Dicey but that has been affected by EU Regulations to which the United Kingdom is subject but which have no application in Jersey.

55. Since publication of the 14th Edition, there have been two English cases which have clarified the approach to ascertaining the proper law of a restitutionary claim, namely OJSC Oil Company Yugraneft (in liquidation) v Abramovich [2008] EWHC 2613 (Comm) and Fiona Trust and Holding Corporation v Privalov [2010] EWHC 3911 (Comm). Both of these cases held that the proper law is the law of the country which has the closest and most real connection with the claim. In some cases the place of enrichment will be of the greatest importance in ascertaining this, whereas in others it will be of little importance.

56. In our judgment, the claim for breach of confidence as pleaded has its closest and most real connection with Russia. The Order of Justice alleges that the Plaintiffs developed the GWLs over a period in Russia and supplied details of the know-how in relation to the construction of the GWLs to the Defendant (through Mr Zykov) and to TKP and this was on the basis that the know-how was confidential information only to be used for the specific purpose for which it was supplied. It is then alleged that the Defendant supplied details of this confidential know-how to Shandong (in China) and Ariva Pak in Ukraine in order that they could manufacture GWLs for the use of the Defendant.

57. Whilst the recipients of confidential information supplied by the Defendants in breach were in China and Ukraine respectively, the obligation of confidence as between the Plaintiffs and the Defendant arose in Russia and it is reasonable to infer that the decision to breach that duty of confidentiality was reached in Russia. It is of course also pleaded that TKP breached its duty of confidence and this would have occurred in China but that is not the cause of action relied upon. The cause of action is against the Defendant for its misuse of confidential information. Furthermore, while some enrichment may have occurred in Ukraine, the material presently before the Court suggests that the enrichment of the Defendant (through its relevant subsidiary) has occurred predominantly in Russia through the savings which it has made by using GWLs for transporting alumina across the Russian Rail network.

58. For these reasons, on the basis of the material before us and whilst accepting that it will ultimately be a question for the trial court to determine the proper law of the claims, our view is that proper law of the breach of confidence claim is the law of Russia. This would therefore require expert evidence to be produced on the law of Russia if the trial were to take place in Jersey whereas no such evidence would be needed if the case were to be heard in Russia.

59. Turning to the claim in conspiracy, that is a claim in tort. The position in relation to tortious claims is well established. In SGI Trust Jersey Limited v Wijsmuller [2005] JLR 310 the Court said at paragraph 30(vi):

"… The general rule (see Chaplin v Boys…) is that there is double action-ability. In other words, the lex fori is applied but the acts complained of must also be actionable under the lex loci delicti, ie the place where the acts were done."

60. The position is set out more fully in the 12th Edition of Dicey (being the last edition before the common law was amended by statute) where Rule 203 was as follows:

"(1) As a general rule, an act done in a foreign county is a tort and actionable as such in England, only if it is both

(a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and

(b) actionable according to the law of the foreign country where it was done.

(2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."

61. Advocate Mackereth submitted that the connection with Russia was so strong that this case fell within the exception set out at paragraph (2) of Rule 203, but we do not think it necessary to go that far. We are satisfied that the majority of the relevant acts giving rise to the tort of conspiracy are likely to have occurred in Russia and that accordingly evidence of Russian law would be required under the double actionability rule if the case were to be tried in Jersey. The individual co-conspirators include Mr Deripaska, Mr Soloviev and Mr Itskov. They are said to be the key participants on behalf of the Defendant in the conspiracy. Mr Soloviev and Mr Itskov reside in Russia and whilst Mr Deripaska travels considerably and one cannot say where he would physically have been at the time he participated in any conspiracy, the centre of gravity of the conspiracy was clearly in Russia. The decision to cut out the Plaintiffs and the subsequent procuring of the manufacture of GWLs by Shandong and Ariva Pak would all have been orchestrated by officers of the Defendant in Russia in liaison with Mr Deripaska, who may or may not have been in Russia at the particular time. We are satisfied therefore that the majority of the acts giving rise to the claim for conspiracy were carried out in Russia and that accordingly, even if the claim were tried here, expert evidence as to the law of Russia would be required.

62. Accordingly, consideration of the proper law of both claims points in favour of Russia as the natural forum.

(d) The patents

63. As set out above, the Order of Justice alleges two elements to the conspiracy to injure the Plaintiffs, namely (i) cutting the Plaintiffs out of the supply chain by unlawful use of the confidential information in breach of confidence and (ii) infringing six patents held by the First Plaintiff, namely two in Russia (143408 and 143828), two in China and two in Ukraine. The design patented by the Chinese and Ukrainian patents is identical to the design protected by the two Russian patents.

64. The alleged acts of infringement in furtherance of the conspiracy are set out in Schedule 2 of the Order of Justice in the following terms:

> ***"(i) Particulars of infringement***
>
> ***The Defendant, by itself or through its servants or agents, in combination with its fellow conspirators, infringed the patents identified in Schedule 1 in the following respects:-***
>
> ***(1) The Russian Patents***
>
> ***(a) Manufacturing or causing to be manufactured gondola wagon liners identical or substantially identical to the items protected by the said patents.***
>
> ***(b) Applying or causing to be applied in that manufacture the utility model protected by the said patents.***
>
> ***The manufacture and application were done without the consent of the Plaintiffs as rightsholders and contrary to the Plaintiffs' exclusive rights as rightsholders."***

There then follows identical wording in respect of the Ukrainian patents and the Chinese patents.

65. It is said on behalf of the Defendant that the validity of the Russian patents will be an issue in this case. In this respect, Rusal Trans, a Russian company which according to the Plaintiffs is a subsidiary of the Defendant, filed an objection to the two Russian patents in December 2014 with the Russian Federal Service for Intellectual Property ("Rospatent"), which is the administrative body in Russia responsible for the registration of patents. The objection alleged that the designs were not new.

66. According to the Second Plaintiff, some of the documents relied upon by Rusal Trans in support of its objection were false and forged documents. When she pointed this out, Rusal Trans withdrew the objection the day before the hearing before Rospatent, which was fixed for 1st December 2015. Mr Strunnikov on the other hand, in his first affirmation made on behalf of the Defendant, states that Rusal Trans simply wanted to adduce further evidence but this was not permitted under the procedures before Rospatent. Rusal Trans therefore withdrew the challenge with a view to commencing it afresh. On the material before us, we are unable to resolve this factual dispute. At the date of the hearing, no further challenge to the Russian patents held by the Plaintiffs had been brought by Rusal Trans but Mr Strunnikov asserted in his affirmation that, if proceedings were commenced in Russia (or if the proceedings in Jersey were allowed to continue) there would be a challenge to the validity of the Russian patents. He said this had not been done so far as there had been no need to do so in the absence of proceedings. The Court was informed, following the hearing, that a further challenge to the Russian patents has since been lodged with Rospatent.

67. It appears that one of the First Plaintiff's Ukraine patents was annulled by the commercial court of Kiev on 19th June 2019 pursuant to an application brought by Ariva Pak, although the First Plaintiff asserts in her affidavit that she was not aware of this until reading of it in Mr Strunnikov's first affirmation.

68. It was common ground between the parties and is well established that a challenge to the validity of a patent may only be brought in the courts or tribunals of the country in which the patent is registered – see the discussion in Coin Controls Limited –v- Suzo International (UK) Limited [1999] Ch 33 at 42-44. It follows that this Court has no jurisdiction to rule on the validity of the Russian, Chinese or Ukrainian patents in this case.

69. A foreign court does have jurisdiction to hear a claim for infringement of a foreign patent but where, as part of the infringement proceedings, the defendant raises the issue of validity, it will normally be appropriate to stay the proceedings in the foreign court in favour of proceedings in the courts of the country where the patent is registered, so that the issues of validity and infringement may be considered by the same court (see the discussion in Coin Controls referred to above).

70. Advocate Mackereth submitted that the reality of this case was that it was about infringement of the Russian patents. In support of the assertion that the breach of confidence element was of only minor significance, he referred to the fact that the claim had at all times until shortly before the issue of the proceedings been based upon infringement of patent as set out at paragraph 33 above. Furthermore, he submitted, the claim for breach of confidence, even if successful, could only account for a very small proportion of the claimed damages because it could only arise in respect of loss caused prior to the date of publication of the first Russian patent in July 2014. This was because any confidentiality in information is lost once that information is published to the world. The effect of publication of a patent is to publish to the world the technical know-how etc. which gives rise to the patent. In effect, upon the granting of a patent, a person substitutes his rights under the patent for any rights he may have had for breach of confidentiality. As an example of this principle, he referred to Franchi –v- Franchi [1967] RPC 149.The evidence from the Second Plaintiff in her affidavit was that the first shipment of GWLs manufactured by TKP directly for the Defendant was on 1st July 2014. It followed that only a very small proportion of the claimed compensation arose before publication of the Russian patents. If the Plaintiffs were to succeed in recovering substantial damages, it could therefore only be on the basis of the conspiracy to infringe the patents rather than for breach of confidence.

71. For these reasons, Advocate Mackereth submitted that whether the Russian patents were valid and whether they had been infringed was a key part of the case and this pointed strongly in favour of Russia as the appropriate forum. This was so even though the question of validity would be decided by Rospatent (with an appeal to the IP division of the Russian Commercial Courts (known as the Arbitrazh courts)) whereas the claim for infringement (if the patents were valid) would be heard by the Arbitrazh courts.

72. In response to these points, Advocate Redgrave submitted that, regardless of what had been relied upon in earlier correspondence, the claim was now brought on the grounds set out in the Order of Justice, namely breach of confidence and conspiracy. The Court had to proceed on the basis of the claims as pleaded, not the claims as formulated at an earlier stage.

73. Secondly, he submitted that, whilst he did not dispute the general proposition that claims for breach of confidence cannot be brought after publication of a patent, that did not mean that there was no continuing loss from the breach of confidence which occurred before publication of the patents in July 2014. In support of this, he referred to the case of Terrapin Limited –v- The Builders Supply (Hayes) Limited Company [1967] RPC 375.

74. Thirdly, he submitted that the issue of validity of patents was not confined to Russia. On the contrary, the validity of the patents in China and Ukraine was more significant. The particulars of

claim in the Order of Justice allege that the Defendant had caused the manufacture of the GWLs in breach of patent. The manufacturing had taken place in China (through Shandong) and thereafter in Ukraine (through Ariva Pak). The validity of the Chinese and Ukrainian patents was therefore more significant than that of the Russian patents, as no manufacturing had taken place in Russia. The validity of those patents would have to be determined in China and Ukraine respectively. This did not therefore point in favour of Russia as the appropriate forum.

75. We agree that we must consider the claims as pleaded in the Order of Justice and this includes the breach of confidence claim. The significance of that claim will be for the trial court to consider in due course, but on the face of it the principle referred to by Advocate Mackereth would appear to limit very substantially the quantum of any compensation for breach of confidence notwithstanding the case of Terrapin referred to by Advocate Redgrave and therefore to increase, relatively speaking, the significance of any patent infringement. But we make no definitive finding at this stage.

76. However, on the material before us, we accept the point made by Advocate Redgrave at paragraph 74 above, although again whether this point ultimately turns out to be correct will only emerge at trial. On the face of it, even if this case were to be tried in Russia, the issue of the validity of the Chinese and Ukrainian patents would seem to be relevant and would need to be determined by the courts of China and Ukraine respectively. Thus, whether the case is tried in Jersey or Russia, final trial is likely to have to await the outcome of any validity challenges in China and Ukraine if these are indeed necessary. Furthermore, because the validity of any Russian patent must be heard by Rospatent, even if the case were heard in the Arbitrazh courts of Russia, the case would have to await the outcome of the validity challenges before Rospatent together with any appeals.

77. In summary, whilst we consider that the existence of the Russian patents points in favour of the Russian courts as the appropriate forum, the issue of the validity of the Ukrainian and Chinese patents detracts from the significance of the point. On balance, we conclude that, because of the existence of the Russian patents, the patent issue as a whole points slightly in favour of the Russian courts over the Jersey courts, but not to any great extent.

(e) Residence of the parties

78. As already mentioned, the Defendant is incorporated in Jersey, the First Plaintiff is incorporated in England and Wales and the Second Plaintiff is resident in the US but has dual Russian and British Nationality. So far as her residence is concerned, there is nothing to choose between Jersey and Moscow as regards ease of travel.

79. Advocate Mackereth submitted that the Defendant was not the proper defendant and that the Plaintiffs had only chosen the Defendant for forum shopping purposes so as to be able to issue proceedings in Jersey. He referred to the evidence from Mr Strunnikov that the Defendant did not carry on any trading itself; it was merely the holding company of the Rusal group. The trading was done by subsidiaries and the correct defendant(s) would therefore be the trading company(ies) which carry on the business of transporting alumina using the Russian and Ukrainian rail network. He pointed out that the key individuals named in the affidavit of the Second Plaintiff were employed by RGM, not the Defendant; at the material time the Defendant only had two employees who were resident in Cyprus; and that there was nothing to suggest that those involved in any breach of confidence or conspiracy to breach confidence and infringe the patents were employees or otherwise acting on behalf of the Defendant.

80. In response, Advocate Redgrave pointed out that Mr Deripaska and Mr Soloviev, the two most senior people involved, were respectively CEO and First Deputy CEO of the Defendant at the material time. In the absence of evidence to the contrary, they were to be taken as acting for the Defendant. The fact that some of the other participants in what occurred were employed by RGM or other subsidiaries of the Defendant was irrelevant. He further pointed to the evidence from the Second Plaintiff in her affidavit that throughout her dealings on this matter, she was never made aware of which particular group company she was dealing with. She was provided with business cards which simply said the company they worked for was 'Rusal' and the name on the front of the Rusal office in Moscow simply had the name 'Rusal' in Russian.

81. On the basis of the information available to us at this stage, we decline to draw any inference against the Plaintiffs that they are forum shopping. It would seem that Mr Deripaska and Mr Soloviev are key participants in relation to the claim and they were officers of the Defendant. It is further noteworthy that, apart from objecting that the Defendant is not the correct defendant, the Defendant puts forward no suggestion as to the identity of the correct defendant(s).

82. In summary therefore, the incorporation of the Defendant in Jersey allows the proceedings to be brought here as a right but the residence of the parties is otherwise neutral as between Jersey and Russia as the appropriate forum.

Conclusion

83. Putting these matters together and having regard to the written and oral submissions of the parties, we conclude that the Defendant has satisfied the burden of showing that Russia is distinctly or clearly the forum with which the action has the most real and substantial connection and in which the case may be tried most suitably in the interest of the parties and the ends of justice.

84. Advocate Redgrave submitted that this was one of those truly international disputes envisaged by Lord Goff in the passage referred to at para 6 above and that there was no natural forum, with the consequence that the case should remain here, where the Defendant has been sued as of right.

85. We do not agree. Whilst there will undoubtedly be some evidence in relation to events in China and Ukraine, with the possibility of witnesses from those jurisdictions, this is a case where the centre of gravity is clearly Russia. This dispute relates predominately to events which took place in Russia and involves Russian citizens speaking in Russian in relation to operations (the transport of alumina by rail) which took place mostly in Russia. The majority of witnesses will be Russian speaking, who live in Russia and who will wish to give their evidence in Russian (with the exception of Mr Soloviev and Mr Deripaska). The majority of documents are likely to be in Russian and the claims are likely to be governed by Russian law (in the case of breach of confidence) or will require evidence of Russian law (in the case of the conspiracy claim). Thus, if the trial takes place in Jersey, expert evidence on Russian law will be required, much of the evidence will require the use of interpreters and the documents will need to be translated. The fact that some witnesses (as well as the Second Plaintiff) will not be Russian or Russian based or that expert evidence may be required on Chinese and Ukrainian law does not, in our judgment, detract from the centrality of Russia in this case.

86. Conversely, there is no connection with Jersey other than the fact of the Defendant's incorporation here. There is no suggestion that any witness from Jersey will give evidence and, on the material before us, we do not consider that Jersey law will have any relevance other than possibly to satisfy the double actionability principle in the conspiracy claim.

87. However, the Court may only stay proceedings started as of right in favour of a forum which is clearly more appropriate if that forum is 'available' i.e. the proceedings can be taken there. Advocate Redgrave submits that there is insufficient evidence that the Arbitrazh courts in Russia are available as a forum for the Plaintiffs to bring their claims.

88. We have received reports from two experts on Russian law, Professor William Bowring on behalf of the Plaintiffs and Mr Maxim Kulkov on behalf of the Defendant. Professor Bowring's report is concerned solely with the issue of whether the Plaintiffs can obtain a fair trial in Russia, to which issue we turn below. Mr Kulkov's report, as well as dealing with the issue of a fair trial, deals with the question of whether the Arbitrazh courts would have jurisdiction to try these claims.

89. In the executive summary of his report at paragraph 20 he states "*in my opinion, the Russian commercial courts would most likely establish their jurisdiction in the present case*." He elaborates on this at paragraphs 57 and 58 of his report. He states that the Arbitrazh courts hear economic cases and other cases relating to business and other economic activity with the participation of

foreign entities, international organisations and foreign individuals. He states that some of the grounds upon which the Russian Arbitrazh court hears such cases are where:

(i) a claim arises from causing harm to property by an action or other circumstances that took place in Russia; and

(ii) a dispute arises out of unjust enrichment that took place in Russia.

He goes on at paragraph 58 to refer to various paragraphs of the Order of Justice and concludes that almost all of the alleged actions that caused harm to the Plaintiffs were committed in Russia and that accordingly the Russian Arbitrazh courts would have jurisdiction to hear the claim irrespective of the nationality of the Defendant.

90. Advocate Redgrave submits that Mr Kulkov has been somewhat selective in the paragraphs of the Order of Justice which he relies upon and repeats his submission (referred to above) that it is wrong to say that almost all of the actions alleged to have caused harm to the Plaintiffs took place in Russia; on the contrary, he says, they were committed in China and also Ukraine. He also referred to the fact that although in paragraph 58, Mr Kulkov's opinion is given in unqualified terms, his executive summary only refers to the Russian Arbitrazh courts as 'most likely' establishing jurisdiction. In short, he submits that this Court cannot be confident that the Russian Arbitrazh courts would accept jurisdiction.

91. Whilst the expression 'almost all' used by Mr Kulkov at paragraph 58 may be putting it a little high, for the reasons mentioned above, on the basis of the material before us, we agree that the vast majority of the actions giving rise to the claims in this case took place in Russia. Mr Kulkov gives reasons to explain his conclusion that the Arbitrazh courts would accept jurisdiction to hear these claims which on their face are perfectly reasonable. In the absence of any evidence to the contrary on behalf of the Plaintiffs, we accept Mr Kulkov's evidence that the Russian Arbitrazh courts would accept jurisdiction.

92. We note in passing that Mr Kulkov explains that, although the labels would be different, equivalent claims would be available to the Plaintiffs in the Arbitrazh courts based on general delict (tort), patent infringement and wrongful disclosure or use of confidential know-how.

93. Finally, at paragraph 88 of his first affirmation, Mr Sunnikov asserts that the Defendant undertakes to refrain from challenging the jurisdiction of the Russian courts in relation to claims equivalent to those advanced in Jersey brought against it in Russia by either Plaintiff.

94. Although normally an alternative forum is not 'available' unless it is open to a plaintiff to institute proceedings as of right in that forum, an undertaking by a defendant to submit to that jurisdiction is sufficient to show that the forum is available; see the observation of Lord Walker of Gestingthorpe speaking for the Privy Council in Gheewala –v- Compendium Trust Company Limited [2003] JLR 627 at paragraph 24.

95. Accordingly, we find that the Arbitrazh courts of Russia are an available forum in this case.

(ii) Is there a real risk that the Plaintiffs will not obtain justice in Russia?

96. Having decided that the Arbitrazh courts of Russia are clearly the more appropriate forum for hearing this case and that such forum is available, we turn to consider the second question posed at paragraph 11 above, namely whether the Plaintiffs have satisfied us by cogent evidence that there is a real risk that they will not obtain justice in Russia if the case proceeds there.

97. In briefest outline, the Plaintiffs submit there is a real risk they will not obtain justice in Russia. They say that there is a risk of outside interference with the Arbitrazh courts where a case is of political sensitivity or touches upon the interests of the state or those close to it. They submit that, because of the important position of the Rusal Group and the involvement of Mr Deripaska as someone who is very close to President Putin, this is such a case and there is therefore a risk of interference. Furthermore, they point to the allegations of intimidation set out in the Order of Justice and the Second Plaintiff's affidavit as confirming the likelihood of interference.

98. On the other hand, the Defendant, whilst accepting that there may be interference in cases involving serious political sensitivity, submit that this is not such a case. It is simply a claim for damages against the Defendant which, even if successful, will have no impact on the interests of the state. Furthermore, if, which is denied, the Defendant might otherwise have been inclined to seek to interfere, its position with regard to OFAC (described below) means that any interference could well have catastrophic consequences for its business such that there is no possibility that it would in fact seek to interfere. The Defendant also denies the allegations of intimidation.

(a) The Arbitrazh courts

99. We have had the benefit of expert reports on the Russian legal system from both sides. The Plaintiffs relied on the expert report of Professor William Bowring, who is a Professor of Law at Birkbeck College, University of London. He is a fluent Russian speaker with a particular interest in the independence of the Russian judiciary. He has given expert evidence on the Russian legal

system in a number of cases in England and Wales and we are satisfied that he has the necessary expertise.

100. The Defendant relied upon a report from Mr Maxim Kulkov. Mr Kulkov is the managing partner of a law firm in Moscow and before establishing this firm, he headed the Russian dispute resolution practice at Freshfields Bruckhaus Deringer LLP. He is a member of the Moscow region bar and has represented clients in commercial matters in Russian courts of all levels. We are satisfied that he too has the necessary expertise to support his report.

101. Helpfully Professor Bowring and Mr Kulkov also produced a joint memorandum setting out their points of agreement and points of disagreement. On a number of key points, there is a substantial measure of agreement between them, although they disagree on the key question of whether the Plaintiffs are likely to obtain a fair trial of their claims in Russia.

102. Both reports are very detailed and very helpful. However, given the issues in this case, we shall only record a few points from the reports.

103. Both experts are agreed that, if this matter were to be tried in Russia, it would be tried by the Arbitrazh courts. These are the commercial courts which resolve economic disputes, particularly where foreign entities are involved.

104. Professor Bowring refers to considerable evidence to support his opinion that there are substantial problems relating to corruption and lack of independence in the general courts of Russia (i.e. the criminal and general civil courts). It is clear that on occasion in the past, such problems have extended to the Arbitrazh courts and Professor Bowring refers to the American case of Films by Jove Inc. –v- Berov 250F. Supp 2d 156(EDNY 2003) where, unusually, there was specific documentary evidence that a decision of the Arbitrazh court had been, in the words of the American court "*strongly influenced, if not coerced, by the efforts of various Russian government officials seeking to promote 'state interests'.*"

105. However, in 2005, Mr Ivanov was appointed Chairman of the Supreme Commercial Court ("SCC") which sat at the head of the Arbitrazh court system and had the same status as the Supreme Court of the Russian Federation (which was the head of courts of general jurisdiction) and the Constitutional Court of the Russian Federation. Mr Ivanov introduced considerable reforms to the Arbitrazh courts including that judges for particular cases are selected at random by computer, judges have to give reasons for their judgments, judgments are published on the internet and there is a proper complaints system. However, following President Putin's return to office, the SCC was

abolished in 2014 and its role was merged into that of the Supreme Court of the Russian Federation. Mr Ivanov was not re-appointed.

106. Professor Bowring expresses the view that, although in theory random selection of judges by computer is still the rule, this is not necessarily applied in all cases. He considers that matters have regressed since the abolition of the SCC in 2014.

107. Professor Bowring summarised his views in the Executive Summary of his report at para 12 as follows:

> ***"I also show in detail that while many cases, for example my own application for judicial review in 2006, are heard by judges independently and without interference, the more powerful or wealthy (often the same thing) the opposing party, the more likely it is that either there will be direct interference, or, more usually, judges will know what is expected of them. Corruption and 'telephone justice' take place behind closed doors, and only rarely is there a 'smoking gun'."***

108. He set his view out more fully in para 36 of his report as follows:

> ***"In my opinion there is an even more significant risk of a biased decision whenever the interests of the state or powerful individuals are engaged (Mr Deripaska falls into this category as I shall show in great detail below). The more the issue concerned is close to the central and most sensitive interests of the state or such individuals, the more likely it is that the judges will do the 'right thing', that is, render the decision which is desired by the powerful or wealthy (and often both) persons concerned. In most cases there is no need for a telephone call; a compliant judge will be selected by the Court Chairman who has total power to decide who takes a case. A judge who fails to be compliant will suffer in many ways: no prospect of promotion; loss of benefits including housing; and in the worst case, dismissal, carrying with it the loss of pension, benefits, and judicial immunity. In the next paragraph I outline the case of Judge Kudeshkina. And in any event practically all judges are compliant – the case of judges who stood up for the rule of law are very few and disastrous for the individuals concerned."***

109. Mr Kulkov agreed with Professor Bowring about the beneficial effect of the reforms introduced by Mr Ivanavav during his time as President of the SCC including random allocation of judges, reasoned judgments, the publication of judgments on the internet and a complaints procedure. He

also agreed that initial reaction to the merger of the SCC with the Supreme Court in 2014 was critical but as time has passed, there have been some improvements to the Russian Judiciary as a result, because the best practices of the Arbitrazh courts (previously developed under the supervision of the SCC) have been encouraged in courts of general jurisdiction.

110. He accepts there have been some drawbacks because a number of highly qualified judges and specialists of the former SCC did not join the Supreme Court. However, he disagreed with Professor Bowring about the continued implementation of the reforms. In his experience the random allocation of judges continues in the Arbitrazh courts.

111. However, he accepted that in certain cases, external or political influence could be brought to bear. Thus at para 84 of his report, he said:

> ***"While I agree with Professor Bowring that it could not be said that Russian courts are immune from external or political influence, in Russian commercial courts*** **[i.e. the Arbitrazh courts]** ***such influence is very rare, and in my view and experience, is limited to cases involving serious political sensitivity. That position is a result of the rules, procedures and practices I have outlined above, which have made procedures much more transparent and fair. I note that the one example Professor Bowring cites of misconduct in a commercial court case*** **[The Films by Jove case]** ***dates back to 2001, before the Ivananov reforms which started in 2005."***

112. He expresses a similar view but slightly differently expressed in para 120 where he says:

> ***"In my opinion, there is very little risk of denial of a fair trial in any kind of cases that are heard in commercial courts (not just in low-profile cases) where there is no 'significant political, economic or social element'."***

113. Ultimately, there appeared to be common ground between Professor Bowring and Mr Kulkov in relation to the general position. In the memorandum of matters upon which they agreed and disagreed, question 2 which was posed to them was "*Are the relevant courts*" (which in context clearly meant the Arbitrazh courts) "*subject to external influence such that a commercial claim of this type would be compromised?*"

114. The answer was agreed as follows:

"The Experts agree that it could not be said that Russian courts are immune from external or political influence, but that this is rare and limited to cases involving serious political sensitivity."

115. They then disagreed as to whether the present claim was such a case. Mr Kulkov considers that this is a simple commercial case which does not have the characteristics which would lead to a risk of external influence. Professor Bowring, on the other hand, is of the view that it is highly likely that Mr Deripaska's character, wealth, importance to Russia, and influence will enable him to influence the outcome of any litigation in Russia.

(b) English decisions

116. The question of whether a particular litigant can expect to receive a fair trial in Russia has been considered in three English cases to which we were referred.

117. In Cherney v Deripaska [2008] EWHC 1530 (Comm) Mr Cherney claimed that, in the events which had happened, Mr Deripaska held 13.2% of the Defendant on trust for Mr Cherney. The question before the English High Court was whether Mr Cherney should be given leave to serve the proceedings on Mr Deripaska outside the jurisdiction. Amongst other matters therefore, the Court had to consider the question of the appropriate forum. Christopher Clarke J held at [245] that the natural forum was Russia. However he went on to consider whether Mr Cherney could expect to obtain a fair trial in Russia. The background was that Mr Cherney had fallen out with Mr Putin, there had been a previous assassination attempt on him in Israel and that the 13.2% interest in the Defendant was a '*mighty investment*' in the world's largest aluminium producer and that the affairs of Rusal and Mr Deripaska's group would be of considerable importance, including strategic importance, to the Russian State. The evidence before him was that the Arbitrazh courts would not necessarily be expected to perform their task fairly and impartially in cases whose outcome would affect the direct material strategic interest of the Russian State. He summarised the position as follows at [246]:

"Given the closeness of the link between the Russian State and Mr Deripaska, the alignment of his interest with those of the State, and the size and importance of Rusal, it seems to me that the Russian State may well regard the question as to who was beneficially entitled to 20% of Rusal and is beneficially entitled to a 13.2% interest in [the Defendant] (even if the interest is held on trust for sale) as sufficiently important to justify encouraging the courts to see their way to rejecting Mr Cherney's claims if he were to present them in a Russian court."

118. The judge went on to say at [247]:

> ***"I should make it clear what I am <u>not</u> deciding. I am not deciding that a fair trial can never be obtained in the Russian arbitrazh system. On the contrary I do not doubt that there are many honest and good judges in the system at every level, who conscientiously seek to do justice according to the relevant legal principles and procedures, who are developing the arbitrazh system to relate to the commerce of the new Russia, and who do so without improper interference. Nor is it the case that in the arbitrazh courts the State is practically bound to succeed, as appears from the two examples cited by Mr Demitry Dyakin of the Magisters Law firm in his witness statement."***

119. As well as the significant risk that he would not obtain a fair trial, additional reasons relied upon by Christopher Clarke J for concluding that the matter should be tried in England even though Russia was the natural forum was that Mr Cherney had a well-founded fear that, if he proceeded in Russia, he would be at greater risk of assassination and would face criminal prosecution for trumped up charges.

120. The decision of Christopher Clarke J was upheld on appeal at [2009] EWCA Civ 849 but the Court of Appeal emphasised that regard had to be paid to the facts of a particular case. Waller LJ made this clear at [44] when he said:

> ***"In my view there was cogent evidence of a risk in the circumstances of <u>this particular case</u>, having regard to the position of Mr Cherney, the position of Mr Deripaska and taking account of the Mirepco documents, that Mr Cherney would not get a fair trial in Russia of a dispute between him and Mr Deripaska over shares in Rusal. I emphasise this particular case because it would be quite wrong for it to be suggested that the English court is saying that a fair trial cannot be obtained in Russia in all normal cases. This is not a normal case and it has particular features from which the judge was entitled to reach the conclusion he did."*** [Original emphasis]

121. The second English case is <u>Erste Group Bank AG, London Branch v JSC "VMZ Red October" and others</u> [2013] EWHC 2926 (Comm). The claimant was the London branch of an Austrian bank which had lent money to the first defendant, which owned and operated one of the largest steelworks in Russia. The first defendant had defaulted on its loan. The claimant alleged a conspiracy between the various defendants to injure the claimant by stripping the first defendant of its assets thereby rendering it insolvent. The third defendant, which was said to be the owner of a company which had guaranteed the liability of the first defendant, was a state owned corporation

incorporated for the purposes of managing Russia's military and manufacturing assets and developing its military industry. The Chief Executive of the third defendant was one of President Putin's oldest and most trusted friends and colleagues.

122. The issue before Flaux J was an application by the third defendant (together with the fifth defendant) to set aside service of proceedings upon them outside the jurisdiction. Much of the judgment relates to the question of the appropriate forum for trying the case and Flaux J held that it was England. It followed that the question of whether a fair trial could be obtained in Russia did not arise. However, as it had been the subject of detailed evidence and submissions before him, the judge considered the issue.

123. He held that the claimant had not produced cogent evidence of a real risk that it would not receive justice in the Russian courts. In reaching this conclusion, he took into account amongst other matters, that (i) there was no evidence that the claimant was an enemy of the state or that any political campaign was being waged against it; (ii) this was a simple commercial dispute and the amount involved, while not minimal, was not so great or of such apparent financial significance to the Russian State as to warrant improper interference with the courts; (iii) the Russian courts had dealt with a number of matters in relation to the loan and the claims against the first defendant; while some decisions had gone against the external creditors, a number of others had been in their favour; (iv) the fact that judges in the Arbitrazh courts were selected at random by computer and had to give reasons pointed against the third defendant being able to influence any court proceedings even if it was minded to do so.

124. The third case is Bazhanov v Fosman and others [2017] EWHC 3404 (Comm), a decision of Mr Daniel Toledano QC sitting as a Deputy High Court judge. The defendants in that case applied to set aside service out of the jurisdiction which had been effected upon them. The judge held that, on the facts, there was no jurisdiction to order service out and therefore set it aside. He went on to consider the question of the appropriate forum had he decided that there was jurisdiction to serve out. He held that the case was overwhelmingly connected with Russia which was therefore the natural forum. However, he went on to consider whether he would nevertheless have exercised his discretion in favour of a trial in England on the ground that there was a real risk that substantial justice would not be done in Russia.

125. The claimant, Mr Bazhanov had been a businessman and politician in Russia and in March 2009 had been appointed to the post of Deputy Minister of the Ministry of Agriculture of the Russian Federation. However, in April 2013 he had been accused by the Russian authorities of fraud and he was arrested and detained in December 2013. After the charges were downgraded leading to his release from custody, he fled from Russia to England where he had remained ever since. The

charges however remained outstanding. Mr Bazhanov contended that the charges were politically motivated.

126. The judge accepted the conclusions of Professor Simons, the expert witness for the defendants, that the available evidence did not clearly demonstrate that Mr Bazhanov's prosecution was politically motivated. In relation to the Arbitrazh courts generally, he accepted at [102] Professor Simon's evidence that in low-profile cases which do not have a significant political, economic or social element, there was a low risk of external influence and that from 2014 onwards, "*no credible evidence of the alignment of Arbitrazh courts with state interests or external interference – even in high profile cases - could be found in publicly accessible sources*". He also accepted Professor Simons' conclusion that the present case could not be characterised as a high profile one having a significant political, economic or social element. He further accepted that, even if there were a risk of an unfair prosecution if Mr Bazhanov were to return to Russia, Mr Bazhanov could bring his claim in the Arbitrazh courts whilst at all times remaining in England given that there was no legal requirement for Mr Bazhanov to appear in person.

(c) Mr Deripaska and OFAC

127. It was not disputed before us that Mr Deripaska is a very powerful and wealthy individual whose interests are closely allied to those of the Russian State. There is also evidence that he is a person who would not hesitate to seek to influence a Russian court if he thought it was in his interests to do so. We would refer to the following material before us in that connection:

(i) In Cherney at [244] Christopher Clarke J said as follows:

> ***"Mr Deripaska has held himself out as having a link with the Russian State that borders on the umbilical. In an article in the Financial Times of 13th July 2007 he is reported as follows:***
>
> ***'Moreover, unlike at Yukos, he would be ready to transfer Rusal back to the state at any moment, he declares.' 'If the state says we need to give it up, we'll give it up' he says. 'I don't separate myself from the State. I have no other interests.'"***

(ii) At [151] of Cherney the judge stated:

"Mr Deripaska, himself, is the subject of serious allegations. Dr Rachel Ehrenfeld, a distinguished academic, published an article on 17th December 2007 entitled "Russia's New State Oligarchy" in which she described Mr Deripaska as President Putin's 'favourite oligarch' and alleged that 'Deripaska's Rusal is suspected of resorting to bribery in 2004 to obtain a Nigerian Smelter company for the lowest bid and bribery in Guinea to obtain concessions for an aluminium refinery and bauxite mine.' She records that the Stuttgart Prosecutor's office accuses him of involvement with the Ismailovo mob in laundering €8 million and contracting the murder of several competitors; and that the Israeli police claim that he instigated illegal telephone-tapping of the Deputy Prime Minister and Minister of Strategic Affairs soon after the Prime Minister returned from Moscow, and that the tapes were apparently sent to Moscow."

(iii) Professor Bowring states at paras 121 – 126 of his report that, in the case of Philatona Trading Limited v Navigator Equities Limited [2019] EWCH 173 (Comm) Teare J saw and heard Mr Deripaska give evidence. Teare J concluded that Mr Deripaska was not a witness who wished to assist the court in ascertaining the truth, that it would be wholly unsafe to rely upon his evidence save where it was not disputed or was in accordance with the probabilities or was supported by contemporaneous documents, and that another witness in the case who gave false evidence had probably been prevailed upon to say what Mr Deripaska wanted him to say.

(iv) As set out at paragraph 119 of Professor Bowring's report, a US Treasury Press Release of 6th April 2018 had this to say about Mr Deripaska:

"Oleg Deripaska has been designated pursuant to E.O. 13661 for having acted or purported to act for or on behalf of, directly or indirectly, a senior official of the Government of the Russian Federation, as well as pursuant to E.O. 13662 for operating in the energy sector of the Russia Federation economy. Deripaska has said that he does not separate himself from the Russian State. He has also acknowledged possessing a Russian diplomatic passport, and claims to have represented the Russian Government in other countries. Deripaska has been investigated for money laundering, and has been accused of threatening the lives of business rivals, illegally wiretapping a government official, and taking part in extortion and racketeering. There are also allegations that Deripaska bribed a government official, ordered the murder of a business man, and had links to a Russian Organised Crime Group."

128. However, the Defendant places considerable weight upon what it says is the recent separation of Mr Deripaska's interests from those of the Defendant as a result of actions by the US Treasury.

These are set out in the second affirmation of Mr Strunnikov and do not appear to be the subject of any dispute.

129. Under US legislation, the US Treasury Office of Foreign Assets Control (OFAC) has power to designate persons and entities as Specially Designated Nationals (SDNs). Subject to certain exceptions, it is illegal for United States persons to have dealings with SDNs and non-US persons also face the threat of being themselves targeted by sanctions if they have dealings with SDNs.

130. On 6th April 2018, OFAC designated a number of Russian businessmen and companies and Government officials as SDNs. These included Mr Deripaska, EN+ and the Defendant and extended to all entities owned as to 50% or more by the Defendant (which comprised the whole Rusal Group).

131. Mr Strunnikov asserts that the imposition of sanctions on the Defendant had huge ramifications for it. Overnight its share price dropped 50%, the fear of secondary sanctions led many suppliers to cease supplying the Group and buyers to refuse to accept Rusal Group products. Foreign banks became reluctant to engage in transactions of any kind with any Rusal Group entity and many banks refused to process payments to or from those entities. Mr Strunnikov asserts that the cumulative effect was disastrous for the Rusal Group.

132. From April to December 2018, the Defendant, together with EN+ and others negotiated with OFAC in order to obtain relief from US sanctions. This resulted in the conclusion of binding terms of removal on 19th December 2018, which took effect on 27th January 2019. The details of the settlement agreement are set out in a letter from OFAC to the US Congress dated 19th December which is exhibited to Mr Strunnikov's affirmation.

133. The key terms would appear to be as follows:

(i) Mr Deripaska remains sanctioned and on OFAC's SDN list. Any entity in which he owns 50% or more will remain sanctioned.

(ii) His direct share in the Defendant is restricted to 0.01%.

(iii) Mr Deripaska's stake in EN+ must be reduced from approximately 70% to 44.95%. His shares are to be transferred largely to VTB Bank and a charitable foundation.

(iv) Mr Deripaska is not permitted to vote more than 35% of the EN+ shares. Any voting rights above that figure will be transferred to a voting trust obliged to vote in the same manner as the majority of shares held by shareholders other than Mr Deripaska. VTB Bank will also assign its voting rights to an independent third party.

(v) All voting rights in shares in EN+ held by persons with professional or family ties to Mr Deripaska must be assigned to an independent third party.

(vi) Eight of the twelve directors of EN+ must be independent directors with no business, professional or personal ties to Mr Deripaska and Mr Deripaska may nominate no more than four directors.

(vii) Although EN+ will continue to have a 56.88% shareholding in the Defendant, eight of the fourteen directors of the Defendant will be independent non-executive directors who have no business, professional or family ties to Mr Deripaska and the remaining six will have no business profession or personal ties to Mr Deripaska other than through their professional backgrounds as employees of the Defendant or EN+.

(viii) Mr Deripaska must relinquish his control over EN+, such that Mr Deripaska and EN+ agree not to enter into any arrangement through which Mr Deripaska could gain control of EN+ or any entity owned or controlled by EN+, including the Defendant.

(ix) The chairman of the Defendant must be one of the independent non-executive directors.

(x) The Defendant and EN+ are to set up an auditing, certification and reporting scheme to provide information to OFAC and certifications about their compliance with the agreement. In particular, they have to provide monthly certifications regarding independence from Mr Deripaska.

134. The arrangements contemplated in the settlement agreement have been put in place. Should EN+ or the Defendant breach any of the terms of the agreement, OFAC retains the right to re-designate EN+ or the Defendant.

135. The Defendant submits that, given the constitution of its board of directors and the potentially disastrous consequences of breaching the agreement and being re-designated by OFAC, there is

no likelihood of the Defendant seeking (even if it could) to influence any Russian court or contacting Mr Deripaska with a view to his doing so.

(d) Alleged intimidation

136. The Second Plaintiff alleges in the Order of Justice and in her affidavits that she has been subject to actions by or on behalf of the Defendant designed to intimidate her into dropping any claim against the Defendant. These can be summarised as follows:

(i) As already mentioned, the Second Plaintiff emailed Mr Deripaska on 2nd March 2014, complaining forcefully about what had happened in relation to TKP. Three days later she received an email from a Mr Nikolaev stating that, at the request of the Rusal Management team, he would like to meet with her to discuss the possibilities of cooperation in the future. The Second Plaintiff checked with Mr Polenov of the Defendant (with whom she had a good relationship) and discovered that Mr Nikolaev was head of security at the Defendant. She could think of no reason why any security personnel would need to contact her and believed that this was designed to intimidate her. She did not agree to meet Mr Nikolaev but emailed Mr Soloviev to complain on 7th March. Mr Soloviev replied on 10th March saying that he had taken care of it and Mr Nikolaev would not bother her any more.

(ii) Having learned about the manufacture for the Defendant by EKP and about the involvement of the new manufacturers, the Second Plaintiff emailed Mr Deripaska on a number of occasions in 2014 alleging infringement of patents. She copied these to Mr Soloviev but there was no reply. In July 2014 the Second Plaintiff noted that she was receiving interference and disturbance when making phone calls on her apartment's landline telephone in Moscow. The telephone line would begin to click and crackle and she quickly became suspicious that any calls were being tapped. She thereafter stopped using her landline.

(iii) In about September 2014, whilst the Second Plaintiff was in Moscow, she learned from her personal assistant that she (the personal assistant) had been receiving calls at Ekopaktekh's head office in Moscow from a Mr Alexander Vlasov requesting details of the Second Plaintiff's whereabouts and saying that he wanted to meet and speak with the Second Plaintiff on behalf of the Defendant to discuss matters relating to proposals about the Defendant purchasing intellectual property rights. The Second Plaintiff consulted Mr Polenov and he advised her that under no circumstances should she agree to meet Mr Vlasov. He told her that Mr Vlasov was a convicted felon, had a criminal record and violent history and that he was basically a henchman for Mr Deripaska whose role within the Defendant was to deal with people who created inconveniences to the company or to Mr Deripaska personally. The Second Plaintiff

felt scared by this and instructed her personal assistant to inform Mr Vlasov that she was out of the country. From September 2014 onwards, she stopped attending her office in Moscow because she felt concerned for her physical safety.

(iv) On 10th October 2014 the Second Plaintiff left Russia and came back to the USA. But before she left she met a business friend with a military background for coffee. He pointed out to her that someone was following them and eavesdropping on their conversation. The friend confronted the man who was following them half-jokingly and the man left at once after having been confronted.

(v) Mr Nesterenko worked for Ekopaktekh in October 2014 as head of the technical department in Moscow. He has sworn an affidavit to say that in late October 2014 he was telephoned by Mr Nikolaev who introduced himself as being in the technical team at Rusal and needing technical information about the GWLs. He asked to meet with Mr Nesterenko. They subsequently met at the Defendant's offices on 24th October. There were two other men present. Mr Nesterenko asserts that it immediately became clear that this was not a technical discussion but instead was a lengthy and quite threatening questioning about him and the Second Plaintiff. He says that Mr Nikolaev and his colleagues were particularly interested in a lot of personal information about the Second Plaintiff and whether she was a reasonable person. At the end of the meeting, Mr Nesterenko was asked if he was thinking of leaving Russia. They then advised him not to leave the country and not to change his telephone number as they might want to get in contact with him again for another face to face meeting. He thought this was a worrying comment and it made him feel extremely uneasy and anxious. They presented themselves as though they were somehow linked to the Russian State and could stop him from travelling abroad. He said that it was an intimidating meeting and not at all what he had expected. He says that he informed the Second Plaintiff immediately after the meeting what had happened. The Second Plaintiff confirms that Mr Nesterenko told her about this meeting at a time when she was in Austria. It seemed to her to be another attempt at intimidation. On 26th October she sent an email to Mr Soloviev complaining about this conduct of Mr Nikolaev despite Mr Soloviev's previous reassurance that Mr Nikolaev would not bother her any more. She says that she did not receive a reply.

(vi) The final matter relied upon by the Second Plaintiff relates to the Plaintiff's patent attorney in Moscow. She deals with this in her affidavit but the Court was also presented with an affidavit from Georgina Squire, a solicitor with the firm of English solicitors representing the Plaintiffs, who spoke to the patent attorney in order to obtain direct evidence from him. The conversation took place through an interpreter as the attorney speaks very little English. The attorney said that he would not provide an affidavit. He said that he had a wife and young family in Russia and he was therefore nervous about putting anything in writing about the

Defendant's conduct and of the possible ramifications for him and his family in Russia if he were to do so. He did however confirm that he agreed entirely with the Second Plaintiff's recollection of events as set out in her affidavit. He confirmed that he was approached by Mr Nikolaev who introduced himself as an employee of Rusal and said he was looking to discuss areas of cooperation in relation to matters of international patent law. The attorney agreed to meet and the meeting took place on 31st October 2014 at the Defendant's office in Moscow. It was attended by Mr Nikolaev, two men and two women. It subsequently became clear that the discussion related only to the Second Plaintiff's patents and the patent attorney considered that he had been invited to the meeting under false pretences. None of the individuals were lawyers or knew anything about legal issues. Mr Nikolaev asked if the Second Plaintiff was a 'patent troll' ie a person who seeks to extort money from another through claiming to own patent rights when those rights are limited or not legitimate. He asked the attorney to stop representing the Second Plaintiff for this reason. The attorney said that he told Mr Nikolaev that he was comfortable with the due diligence he had performed when taking on the Second Plaintiff as a client and that the Second Plaintiff was not a patent troll. Mr Nikolaev then pressed the matter of seeking to persuade the attorney to stop acting for the Second Plaintiff and indeed said that the attorney could sign a paper there and then to resign from acting for her. The attorney said that he was given the strong impression that Mr Nikolaev and his colleagues had been told by the management of the Defendant to resolve the situation with the Second Plaintiff and that was why they came to him to try to persuade him to stop acting for her. There then followed a subsequent meeting which the attorney insisted should be held at a local coffee shop and Mr Nikolaev also subsequently telephoned on a few occasions. On each occasion, he said he was seeking to "*resolve the issue*". At one stage Mr Nikolaev said something along the lines of "*everything has its price*", which was taken by the attorney and the Second Plaintiff to mean that the Defendant was willing to bribe the attorney in order to secure his support.

(vii) The Second Plaintiff asserts that all of these matters seem to be part of a deliberate course of conduct designed to intimidate her and the people she worked with. Mr Nikolaev started by attempting to meet her, then moved on to intimidate Mr Nesterenko with reference to his not leaving the country and finally attempting to persuade the Second Plaintiff's patent attorney to stop acting for her.

(viii) Apart from a short visit to Russia due to a family emergency, the Second Plaintiff has not been to Russia since November 2015. She says she does not wish to return to Russia as she would fear gravely for her safety and her liberty if she had to return, including for the purposes of participating in any court hearing.

137. In response to the Second Plaintiff's allegations, Mr Soloviev in his affidavit denied any intimidation. He says that Mr Itskov was concerned that the Second Plaintiff might be a patent troll. Mr Nikolaev was not head of security but merely an advisor in the Department of Security of International Projects for RGM. His attempt to contact the Second Plaintiff and his visits to Mr Nesterenko and the Second Plaintiff's patent attorney were simply part of undertaking due diligence on the Second Plaintiff and assessing the risk that she was a patent troll. So far as Mr Soloviev was aware, the suggestion that Mr Nesterenko felt he was intimidated with the authority of the Russian State or that the patent attorney was offered a bribe had no basis in what actually happened.

Discussion

138. Advocate Mackereth submitted forcefully that there was no real risk of an unfair trial in this case. We have reminded ourselves of his written and oral submissions and, without repeating all of them, we would summarise the most significant ones as follows:

(i) The experts were agreed that there was only risk of an Arbitrazh court being subject to external political influences in cases of serious political sensitivity.

(ii) This was not such a case. Unlike in Cherney, this was not a case in which ownership of the Defendant (which it was accepted played an important role in Russia) was at issue; it was simply an ordinary commercial dispute as to whether the Defendant was liable to pay damages to the Plaintiffs.

(iii) Unlike in Cherney and Bazjanov, the Second Plaintiff was not a public figure. She had no present or past involvement in Russian politics and there was no suggestion of any criminal charges against her or any political campaign against her.

(iv) The quantum of the Plaintiffs' claim had escalated dramatically, perhaps in the hope of making the case appear more significant to the Russian State than it was. In that connection he referred to the fact that in her initial email of 12th January 2014, the Second Plaintiff had indicated a price of US$15m; that this was subsequently increased to US$101m; and that in the Order of Justice, she was talking of the sum of US$1 billion as being the profits wrongly made by the Defendant over the period for which she was entitled to an account. Advocate Mackereth said that the Defendant strongly contested the quantum of any claim (if a claim existed) but, even if the claim was as large as the Plaintiffs contended, it did not turn it into a case of political sensitivity. It was still a commercial claim and the Defendant was in a position to pay any compensation awarded without dramatic effect on its business.

(v) The Second Plaintiff had in fact engaged with the Russian legal system, as she had registered her patents with Rospatent and successfully seen off a challenge from Rusal Trans to one of those patents.

(vi) There was no evidence that the Rusal Group sought to interfere with cases brought against it in Russia. Mr Strunnikov's second affirmation stated that he had made enquiries of all Russian companies in the Rusal Group and asked them to report on the outcomes of proceedings relating to intellectual property issues in which the Rusal Group entity was a respondent in the Russian courts between 2009 and 2019. The responses received showed that Rusal Group entities were completely unsuccessful in defending 43% of such cases, partially unsuccessful in defending 29% and completely successful in defending 25%, with 3% of cases ending with other outcomes.

(vii) Unlike at the time of the events in question, the Defendant now had an independent board with many directors of international repute and standing. None of them were appointed by Mr Deripaska. It was inconceivable that directors of such stature would approve of or authorise an attempt to improperly influence the Arbitrazh courts.

(viii) Furthermore, because of the OFAC settlement agreement, the consequences if either the board or Mr Deripaska sought to do so and was found out would be catastrophic for the Defendant and for Mr Deripaska because sanctions would almost certainly be re-imposed. In those circumstances it was highly unlikely that Mr Deripaska would seek to influence the court.

(ix) As to the allegations of intimidation, these were extremely vague in terms of interference with telephone lines, being followed etc and did not amount to the cogent evidence which was required. As to those meetings which were admitted, this was simply part of the due diligence which it was reasonable for the Defendant to carry out in order to ascertain whether the Second Plaintiff was a patent troll or whether she in reality had something of value to sell. The suggestion of intimidation had more to do with the Second Plaintiff's perception than constituting evidence of actual intimidation.

(x) Even if the Second Plaintiff felt unable to attend personally at any hearing before an Arbitrazh court, this would not prevent her from achieving justice, as the English Court held in Bazhanov. Under the Russian system, weight is placed upon statements by parties and submissions on their behalf. A party is not prejudiced by not attending in person.

139. We have carefully considered the above submissions and Advocate Mackereth's other oral and written submissions. However, we have concluded that there is cogent evidence that there is a real risk that the Plaintiffs would not obtain justice if this case were tried in Russia. We would summarise our reasons as follows:

(i) We bear firmly in mind the cautionary words of Lord Collins in AK Investments CJSC (supra at para 10) at [97] where he said:

> ***"Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required."***

(ii) We also bear in mind that, as the Court of Appeal made clear in Cherney in the passage quoted at para 120 above, the Court must focus on the facts of the particular case and whether in the particular case, there is a real risk of a party not obtaining a fair trial.

(iii) The experts Professor Bowring and Mr Kulkov are agreed that it cannot be said that the Arbitrazh courts are immune from external or political influence, but that this is rare and limited to cases involving serious political sensitivity. Mr Kulkov also referred in his report to there being very little risk of denial of a fair trial in cases where there is no significant political, economic or social element. But where these factors are present, the experts are agreed that there is a risk of outside interference. Once one acknowledges that such interference can take place, the difficulty then is, as Christopher Clarke J indicated at [241] in Cherney to ascertain the limit of cases in which such interference may occur.

(iv) Acknowledgment that interference may take place in some cases immediately leads to the conclusion that the reforms introduced under Mr Ivanov (such as random allocation of judges, reasoned judgments, publication of judgments etc) cannot be a complete answer because the experts are agreed that external influences can still occur in some cases despite these protections. Whether this is because, in a particular case, the judge will not in fact be randomly allocated or is subject to a telephone call or simply knows which way he must decide for his own self-interest, is beside the point. The agreed evidence before us is that in cases of political sensitivity, justice may not be done because the Arbitrazh court may be subject to improper external influence. The question therefore is whether this is one of those cases.

(v) We accept that the Second Plaintiff is not a high profile figure who has had any involvement in Russian politics. We also accept that the case does not involve a strategic interest of the

State such as a substantial shareholding in the Defendant as was the case in Cherney. We further accept that the current board of directors of the Defendant would not authorise or approve of any improper action in relation to the Russian courts.

(vi) But Mr Deripaska still has a substantial interest in the Defendant through his 44.95% shareholding in EN+. Furthermore he was involved to some extent in the events of 2014 and is likely to be a witness in any proceedings. We find that he is someone who, because of his closeness to the Russian State and his wealth and power, would have the ability to exert influence on a Russian court and he is someone who would be willing to do so if he thought it was in his interests. The Plaintiffs suggest - and we accept for the purposes of this hearing - that his ability to exert influence in Russia (albeit not on a court) is shown by the fact that, although the employees of the Defendant had tried to sort out the railway spur problem at Vanino for some time without success, the matter was resolved satisfactorily within a very short time of the Second Plaintiff contacting Mr Deripaska to alert him to the issue and to the fact that it was costing Rusal money.

(vii) Importantly, for the purposes of our present decision, we accept that members of the Defendant have taken actions in this particular case designed to intimidate the Second Plaintiff or to make it more difficult for her to pursue her action. Whilst the incidents described at (i) – (iv) of para 136 above would not, if they stood on their own, be sufficient to lead to that conclusion, they have to be read in conjunction with those summarised at (v) and (vi). As to (v), there is no effective challenge to the evidence of Mr Nesterenko as to the content of the meeting in October 2014 and in particular that he was told not to leave the country as he might be required for another meeting, which gave the impression to him of someone speaking from a position of authority in the State. The Second Plaintiff's email dated 27th October to Mr Soloviev recording that this had occurred is contemporaneous support for Mr Nesterenko's evidence.

(viii) Even more significantly, as set out at paragraph 136(v) above, we have the evidence of the patent attorney – which has not been satisfactorily addressed by any evidence on behalf of the Defendant – that Mr Nikolaev tried repeatedly to persuade the attorney to drop the Plaintiffs as clients and attempted to bribe him by reference to everything having its price. We regard an attempt to interfere with the relationship between an opposite party and his or her advisers as particularly serious.

(ix) The reputation of Mr Deripaska and the perception that he would be willing to use unlawful means is shown by the fact that the attorney was not willing to give an affidavit because of the possible ramifications for him and his wife and young family in Russia if he were to do so.

(x) In our judgment, the overwhelming likelihood is that these actions were taken on the authority or with the implicit approval of Mr Deripaska. This is therefore compelling evidence that, in this particular case, Mr Deripaska has been willing to use unlawful means to try and dissuade the Second Plaintiff from pursuing the claim. We accept that in many cases involving the Rusal Group, Rusal has been unsuccessful as described earlier in this judgment. However, these appear to be cases involving comparatively small sums and there is no suggestion that Mr Deripaska was personally involved in any of them. The present case is very different given the direct involvement of Mr Deripaska.

(xi) We accept that the situation has changed since 2014 in that Mr Deripaska has been designated by OFAC and the Defendant must comply with the agreement with OFAC if it is to avoid sanctions. However, the fact remains that Mr Deripaska has sought in this very case to exert improper influence on the Plaintiffs and we have little doubt that, if he was confident he could do so without being found out, he would attempt to do so again either by exerting further influence on the Second Plaintiff or her attorney or by exerting influence on the court. As Professor Bowring has stated, a telephone call would be very difficult ever to prove. Furthermore, there must always be the real possibility that, knowing that Mr Deripaska is interested in the outcome and is a witness, a judge will simply be aware of the best way to decide the case in his own self-interest.

(xii) We consider that in this particular case, the fact that the Second Plaintiff says that she will not return to Russia for any court case out of fear, is also a relevant factor. We accept that it is not necessary under the Russian system for a party to be present and that a case can be presented by way of statements and information from a party together with submissions. But an important aspect is whether the Plaintiffs can have confidence in their lawyer. Given our finding that the Defendant has made attempts to persuade the Second Plaintiff's patent attorney to stop representing her and implicitly to offer a bribe to that effect, if she does not attend, she will not be in a position to be confident that her lawyer has fought the case as hard as possible and has not been bribed or intimidated into simply going through the motions.

(xiii) In summary, whilst we accept that any interference with the Arbitrazh court which was discovered would have very serious adverse consequences for the Defendant and Mr Deripaska, we prefer the evidence of Professor Bowring about the risk in this particular case and we find that there is a real risk that, given what has already occurred in this case, coupled with the involvement and character of Mr Deripaska, there is a real risk that the Plaintiffs will not receive justice if this case is heard in Russia.

Conclusion

140. For these reasons we hold as follows:

(i) The Defendant has discharged the burden of establishing that Russia is an available forum in this case and that it is clearly or distinctly a more appropriate forum than Jersey.

(ii) Nevertheless, we do not stay the current proceedings because the Plaintiffs have satisfied us by cogent evidence that there is a real risk that they will not obtain justice in Russia if the case proceeds there.

141. We therefore dismiss the application to stay the proceedings.