



Neutral Citation Number: [2009] EWCA Civ 849

Case No: A3/2008/2277

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, COMMERCIAL COURT
Mr Justice Christopher Clarke
[2008] EWHC 1530 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2009

Before :

LORD JUSTICE WALLER
LORD JUSTICE MOORE-BICK
and
SIR JOHN CHADWICK

Between :

Deripaska
- and -
Cherney

Appellant

Respondent

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Ali Malek QC, Joe Smouha QC, Christopher Harris (instructed by **Bryan Cave**) for the
Appellant
Geoffrey Vos QC, David Foxton QC, David Lord QC and James Weale (instructed by
Dechert LLP) for the **Respondent**

Hearing dates : 20th, 21st July 2009

Judgment
As Approved by the Court

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Lord Justice Waller :

1. This appeal is concerned simply with where the trial of an action should take place. Christopher Clarke J by a judgment of some 264 paragraphs dated 3rd July 2008 has granted permission to serve the proceedings out of the jurisdiction and ruled that the proper place to bring the claim is England. In so deciding he found (1) that Mr Cherney had a reasonable prospect of success in respect of his claim [116] and indeed that he had the better side of the argument that the agreements as alleged by him (relating to 20% of the shares in a Russian company known in the proceedings as ‘Rusal’) were made [119]; (2) that, although Mr Cherney had a good arguable case that English law and English jurisdiction had been orally agreed, he did not have the better argument, indeed on whether jurisdiction had been agreed Mr Deripaska had much the better side of the argument [144]; and thus that CPR 6.20(5)(c) and (d) [now 6BDP.3 -3.1(6)(c) applicable by virtue of CPR 6.36] were not available to Mr Cherney as a basis for the English court taking jurisdiction; (3) that since it was common ground that if the contracts on which Mr Cherney sued were made, they were made in England, the English court had a basis for exercising its discretion to take jurisdiction under CPR 6.20(5)(a) [now 6BPD.3 -3.1(6)(a)]. In considering whether the English court was the proper place for the proceedings to be brought under CPR 6.21(2A) [now CPR 6.37(3)], having considered a great deal of material, he analysed the question in two stages; at the first stage he found that the “natural forum” was Russia but at the second stage he found that “the risks inherent in a trial in Russia (assassination, arrest on trumped up charges, and lack of a fair trial) are sufficient to make England the forum in which the case can most suitably be tried in the interest of both parties and the ends of justice”.
2. In reaching that conclusion he had to consider whether, if the English court declined jurisdiction on the basis that the natural forum was Russia, Mr Cherney would be able to proceed with his claim in Russia. What he found was that Mr Cherney would never go to trial in Russia [198]. He found that Mr Cherney had a well founded fear for his own safety and that he would be more at risk in Russia than England [199]. He found that there was a significant likelihood of Mr Cherney being prosecuted if he returned to Russia and a real possibility that Mr Deripaska might use his influence, or his ability to orchestrate feelings against Mr Cherney, to encourage the authorities to take that course, and a “distinct possibility that the charges would be trumped up” [201]. As regards the question whether Mr Cherney would receive a fair trial, he directed himself as to the need for circumspection in relation to any assertion that a fair trial could not be obtained in a foreign court and as to the need for “positive and cogent evidence” [237]; he recorded the fact that it was common ground between the experts that, in certain cases, the arbitrazh courts in Russia cannot necessarily be expected to perform their task fairly and impartially – for example where “the outcome will affect the direct and material strategic interest of the Russian state” [239]. He found that the affairs of Rusal and Mr Deripaska’s group of companies must be of considerable importance, including strategic importance, to the Russian state [243] and there was a close link between the Russian state and Mr Deripaska [246] and thus that there was “a significant risk of improper government interference if Mr Cherney were to bring the present claims in Russia” [248]; what he also made clear was that he was not finding that a fair trial could never be obtained in the Russia - on the contrary [247].

3. He also found that Mr Deripaska appreciated that Mr Cherney would not go to trial in Russia relying on certain correspondence between an English public relations firm Mirepco Limited and a lawyer, or possibly a consultant, who acted for one of Mr Deripaska's companies (the Mirepco documents). One of the strategies for dealing with the litigation outlined in the report was in the following terms:-

“5. Russian (or other jurisdiction) judgement offset. A case can be opened against Cherney in Russia, or any other jurisdiction with which the UK has reciprocal enforcement arrangements (under the Hague Convention). Cherney will probably not defend it, as he will not return to Russia to answer any questions. Thus a default judgement can be obtained against him. If the case in the UK is settled or won by Cherney, and an amount paid, the outstanding judgement debt from the Russian case can be used to offset any such liability by using it to impound any money due to Cherney either under a settlement or a judgement.”

4. Counsel before the judge told the judge on instructions that Mr Deripaska had not commissioned that report and knew nothing about it, but no evidence was filed which offered any explanation. The judge concluded the report was genuine and a reflection of the assessment of Mr Deripaska and his advisers. That finding has not been challenged and there is still no evidence to counter the inference drawn by the judge.
5. When considering at the second stage, whether England was the proper place for the trial, the judge also took account of the fact that neither party were strangers to England. Apart from the contract being made here Mr Deripaska had a house in London and a house in England outside London and considerable assets here [261].
6. As I emphasised at the outset, what the court is at present concerned with is simply where an action should be tried. I appreciate that litigants do often feel strongly about the place where cases should be tried but disputes as to forum should not become state trials. A passage from the speech of Lord Templeman at 465 F-G in *The Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (*The Spiliada*) is worth repeating:-

“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. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. 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. I agree

with my noble and learned friend Lord Goff of Chieveley that there were no grounds for interference in the present case and that the appeal should be allowed.”

7. But here we are with an appeal to this court with a mountain of material; an appellant’s skeleton argument of 69 pages; respondent’s skeleton of 53 pages; a reply skeleton from the appellant of 39 pages. It surely would have been better for both parties and better use of court time if they had expended their money and their energy on fighting the merits of the claim.
8. Permission to appeal was granted by the judge because he was persuaded that there was an arguable point relating to what is termed the second stage in *The Spiliada* test. It is said by those representing Mr Deripaska that, having found Russia to be the natural forum, that was the end of the matter and the court simply had no business going into the question whether a trial would ever take place in Russia or as to whether a fair trial could be obtained in Russia. That second question might be relevant in a stay case, where the English court has jurisdiction and is considering staying the action, but is not (so it is submitted) a question the court considers when leave is being sought to serve out and the court has concluded that the natural forum is not England. In the alternative it is said if that extreme submission is unacceptable, then reasons for giving permission to serve out, even though the natural forum is not England, must be of the most compelling kind.
9. It is this latter submission that has led Mr Malek QC for Mr Deripaska to ask us to look at the evidence that there was before the judge to support his submission that it was not “cogent” or sufficiently cogent to allow the judge to hold that England was the “proper forum”. He submits (rightly) that the judge’s ultimate holding was that cumulatively assassination, arrest on trumped up charges and lack of fair trial persuaded him to rule the way he did and thus, if the evidence in relation to any one of the aspects was not there or was not of the “cogency” required, this court would have to re-assess whether the proper forum was England.
10. When granting permission the judge did not suggest that any of the factual issues or any of the aspects on which he had made an evaluation were ones on which he was granting permission. Furthermore evaluation of evidence is very much the province of a judge exercising the discretion under the leave to serve out provisions. It is not the function of the Court of Appeal to go through the whole exercise again unless it can be shown that the judge has misdirected himself in some way. What an appellant is (I accept) entitled to do is to argue (if it is arguable) that there was no evidence to support a finding or indeed in a case such as this (assuming for the present that the extreme submission, that no stage 2 question arises, fails) argue that the evidence is simply not at the level of cogency to allow a conclusion that the natural forum should be displaced. But in conducting that exercise the Court of Appeal should be slow to interfere with the judge’s assessment of the affidavit evidence. In this case Mr Malek accepted that the judge’s summary of the evidence was impeccable. The question is whether that evidence supported the judge’s conclusions or whether it was of the ‘cogency required’.

11. The issues on the appeal are these. (1) If a court has concluded, in a leave to serve out case, that the natural forum is other than England, is it open to the court still to find England the “proper forum”, i.e. the place where, in the interests of the parties and the ends of justice, the case should be tried ? (2) If the answer to the first question is that the court can conclude England is the “proper forum”, in what circumstances can it so conclude and did the judge (a) direct himself appropriately and (b) if so, did he have evidence, or evidence of sufficient cogency, on which he could reach the conclusion he did? (3) Insofar as Mr Cherney claims a declaration in trust, has he established that it comes within what is now one of the subparagraphs in 6BPD3 -3.1.

(1) If a court has concluded in a leave to serve out case that the natural forum is other than England, is it open to the court still to find England the “proper forum” i.e. the place where in the interests of the parties and the ends of justice the case should be tried?

12. The argument of Mr Malek and his team is founded on the speech of Lord Goff in *The Spiliada*. In *The Spiliada*, which was actually a service out case, Lord Goff was concerned first to clarify the law relating to the situation in which the English court granted a stay in proceedings properly served on a defendant. He was doing so, as he explained, in the context of recent developments establishing that English law had now adopted the Scottish principle of *forum non conveniens* in stay cases. This as he says followed a break through in *The Atlantic Star* [1978] A.C. 436 [where incidentally he had been counsel for the appellants]. In that case Lord Denning MR’s famous dictum “You may call this “forum shopping” if you please, but if the forum is England, it is a good place to shop . . .” was disapproved as out of date and insular [see Lord Reid at 453]. It developed further through such authorities as *The Abidin Daver* [1984] A.C. 398, but not altogether with a clear voice, and it was a needed clarification on which Lord Goff embarked in relation to stay proceedings in *The Spiliada*.
13. In the course of his explanation he defined what “*forum non conveniens*” meant saying “that the basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice.” [476C]
14. In setting out how a court should approach a stay application he said the court will look first to see what factors there are which point in the direction of another forum. These are factors indicating another forum, where justice can be done at “substantially less inconvenience or expense”. He suggested that at this stage the court is looking for the “natural forum”, that being as Lord Keith had said in *The Abidin Daver* at [478A] of *The Spiliada* “that with which the action had the most real and substantial connection” and it is for those factors the court must first look. If there is no other forum in that sense, that will normally be the end of the stay application, but if there is another forum in that sense, Lord Goff said the court “will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted . . .”. “One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign

jurisdiction: see *The Abidin Daver* [1984] AC 398 at 411 per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff.”

15. Lord Goff then turned to how the principle of *forum non conveniens* is applied when the court is exercising its discretion to serve out. His view was that “It seems to me inevitable that the question in both groups of cases must be at bottom that expressed by Lord Kinnear in *Sim v Robinow*, 19 R. 665, 668, viz to identify the forum in which the case can be suitably tried for the interests of all parties and for the ends of justice” [480G]. But he pointed out three distinctions: (1) In service out cases the burden is on the plaintiff; in stay applications the burden is on the defendant; (2) in service out cases the plaintiff is seeking to get the court to exercise its discretionary power; (3) special regard must be had to the fact that the jurisdiction is “exorbitant” (although, he cautionsn that simply means it is extraordinary in the sense explained by Lord Diplock in the *Amin Rasheed* case [481E-F]). In summary he said “The effect is not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but he has to show that this is clearly so. In other words the burden is quite simply the obverse of that applicable where a stay is sought of proceedings started in this country as of right.” [481D-E].
16. Mr Malek’s argument involved suggesting that in that summary Lord Goff was using the word ‘appropriate’ in the sense of ‘natural’. His argument was that, once the court had found that a plaintiff had failed to establish that England was the “natural” forum, that concluded the position. He submitted that in a stay case once a defendant had failed to show that another jurisdiction was the “natural” forum that was the end and no second stage was necessary and thus he said the “obverse” of that was that a conclusion that England was not clearly the natural forum concludes the argument in a service out case. He said it so concluded it even if the Plaintiff / Claimant could demonstrate that justice could not be achieved in the “natural” forum. He suggested there might be room for the court still to allow service out if the natural forum was actually unavailable but that would be the limit of the court’s powers.
17. If he is right, then the object (as Lord Goff put it “at bottom”) of achieving the forum in which the case can be tried “for the interest of all the parties and for the ends of justice” will, in many service out cases, not be achieved. It is unlikely Lord Goff intended that and in my view it is clear he did not. Certainly if the natural forum was unavailable that would provide a strong basis for the court giving leave to serve out, but that is not the limit of the court’s powers.
18. The argument of Mr Malek involved failing to appreciate what the word “obverse” in the above summary related to. It was simply referring to the fact that the burden of proof is the “obverse” in service out cases from that in stay cases.
19. Furthermore Lord Goff was not using the word “appropriate” in the sense simply of “natural”. The use of the word “appropriate” as opposed to “natural” in that summary was, I think, deliberate. In the summary Lord Goff has not gone through a two-stage

process; he has gone straight to what is the ultimate question – what is the forum where in the interest of the parties and the ends of justice the trial should take place?

20. I accept that there are instances in the authorities when the word “appropriate” and the word “natural” in relation to forum are used interchangeably. Indeed Lord Goff himself could be said to be doing so, even in the judgment in *The Spiliada*, in the passage at 478C, to which I have already referred but will quote in full below, where he spells out what is involved at the “second stage”. Lord Goff himself in *Connelly v RTZ Corporation PLC* [1998] AC 854 at 874D, in a stay case where the “natural” forum was Namibia, was satisfied that “this is a case in which, having regard to the nature of the litigation, substantial justice cannot be done in the appropriate forum, but can be done in this jurisdiction”(my underlining). But in the *The Spiliada* Lord Goff had made clear that it would be better to distinguish between “natural”, i.e. the forum with which the case had the most natural connection, and “appropriate”, which may be different, to meet the ends of justice [see 478A quoted above]. In my view the summary in the notes on page 22 of the White Book under CPR6.37(4) *Forum Conveniens* summarises the position correctly:-

“Subject to the differences set out below, the criteria that govern the application of the principle of forum conveniens where permission is sought to serve out of the jurisdiction are the same as those that govern the application of the principle of forum non conveniens where a stay is sought in respect of proceedings started within the jurisdiction. Those criteria are set out in *The Spiliada*, above:

(i) The burden is upon the claimant to persuade the court that England is clearly the appropriate forum for the trial of the action.

(ii) The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice.

(iii) One must consider first what is the “natural forum”; namely that with which the action has the most real and substantial connection. Connecting factors will include not only factors concerning convenience and expense (such as the availability of witnesses), but also factors such as the law governing the relevant transaction and the places where the parties reside and respectively carry on business.

(iv) In considering where the case can be tried most “suitably for the interests of all the parties and for the ends of justice” ordinary English procedural advantages such as a power to award interest, are normally irrelevant as are more generous English limitation periods where the claimant has failed to act prudently in respect of a shorter limitation period elsewhere.

(v) If the court concludes at that stage that there is another forum which is apparently as suitable or more suitable than England, it will normally refuse permission unless there are circumstances by reason of which justice requires that permission should nevertheless 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 claimant will not obtain justice in the foreign jurisdiction. Other factors include the absence of legal aid or the ability to obtain contribution in the foreign jurisdiction.

(vi) Where a party seeks to establish the existence of a matter that will assist him in persuading the court to exercise its discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it.”

21. That summary correctly emphasises, in relation to service out, the distinction between what may at stage one seem the “natural forum”, as the place with which the case has the closest connection, and ultimately the “appropriate or proper forum” which a plaintiff can establish, even if England is not the “natural forum” if justice requires that permission to serve out be given.
22. On any view it is clear that the judge in his judgment in this case was not using “natural” and “the proper place for trial” as interchangeable otherwise his judgment makes no sense. He was following the use of words as suggested in *The Spiliada* – “natural” for closest connection and “proper” as the place of trial in the interest of all parties and the ends of justice.
23. I thus reject Mr Malek’s more extreme argument as to the application of the two stage process.
24. What then is the correct approach if a natural forum other than England has been identified? In *The Spiliada* case itself it does not seem that the judge, Staughton J (as he then was), went through a two-stage process. The test he had applied was whether the plaintiff had shown the English court “to be distinctly more suitable for the ends of justice.” That of course is ultimately the correct question. Comparisons were then done as to the position of witnesses, the connection with Canada and matters relating to what can be termed the “natural forum” without reaching any positive conclusion. That indeed can be the position in many cases. Ultimately what the judge found to be crucial was the “*Cambridgeshire factor*”, i.e. the fact that he was trying a similar case where teams of lawyers and experts had already prepared a precisely similar case and where thus “Overall it would be wasteful in the extreme of talent, effort and money if the parties to this case were to have to start again in Canada.” [471C the quote from Staughton J’s judgment].

25. It was the exercise of that discretion which the House of Lords restored and it is worth, having regard to the exercise I must conduct hereafter, quoting the words of Lord Goff, who after spelling out the differences in view as between the judge and the Court of Appeal, and in particular having said that the Court of Appeal had underrated the importance of the “*Cambridgeshire factor*” said this “ . . . I am of the opinion that this is a classic example of a case where the appellate court has simply formed a different view of the weight to be given to the various factors, and that this was not, therefore, an appropriate case for interfering with the exercise of the judge’s discretion.”[486C].
26. The point however at this stage is that *The Spiliada* was not a case where it can be said there was a clear natural forum other than England, but justice still required the case to be tried in England. For assistance as to the proper approach when the court has such a case one must go back to Lord Goff’s analysis in stay cases as to what the approach should be. I repeat more fully the passage at 478C where he said (and I accept it is in this passage that he does use “appropriate” as meaning the same as “natural”) as follows:-

“(f) 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 should 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; see the *The Abidin Daver* [1984] AC 398, 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage.”

27. In my view what appears from that passage is the following. First, so far as establishing that there are factors that make England an appropriate forum despite another forum being natural, one factor, that justice cannot be achieved in that natural forum, requires “cogent evidence” and the reason for that was spelt out by Lord Diplock in *The Abidin Daver* at [411B-D] in terms which it is worth quoting in full:-

“The possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies. But where there is already a *lis alibi pendens* in a foreign jurisdiction which

constitutes a natural and appropriate forum for the resolution of the dispute, a plaintiff in an English action, if he wishes to resist a stay upon the ground that even-handed justice may not be done to him in that particular foreign jurisdiction, must assert this candidly and support his allegations with positive and cogent evidence.”

28. It does not follow that there is a requirement for “cogent evidence” or any particular kind of evidence to establish all other factors which may lead the court to be persuaded that, despite somewhere else being the natural forum, England is the forum where it is in the interests of all parties and the ends of justice for the case to be tried. The requirement is that the plaintiff, or now the claimant, should “clearly establish” that England is the appropriate forum in that sense. This may be a distinction without much difference but it must not be forgotten that the judge is deciding whether a discretion should be exercised, and some points may seem more powerful on the evidence that he has and some less, but it is for the judge to evaluate the same and reach his conclusion.
29. I should make clear again, having regard to points made by Mr Malek, that the judge is not conducting a trial. It is not a situation in which he has to be satisfied on the balance of probabilities that facts have been established. He is in many instances seeking to assess risks of what might occur in the future. In so doing he must have evidence that the risk exists, but it is not and cannot be a requirement that he should find on the balance of probabilities that the risks will eventuate, e.g. as in this case that assassination will occur. He has only statements and experts’ reports on which he is not going to hear cross examination. He is able, of course, to take a view as to the cogency of the evidence at that stage. But then he has to make an evaluation taking account of all factors as to whether the claimant (despite Russia being the “natural forum”) has discharged the burden of showing that England is “clearly the proper forum”. That involves (1) assessing whether on the evidence a trial would be likely to take place in Russia; (2) if not, because Mr Cherney says he will not go there, whether Mr Cherney has shown that he has well-founded reasons why he will not go to Russia and (3) whether in any event Mr Cherney has shown on cogent evidence that there is a real risk that he will not get a fair trial there.
30. I should add the following, having regard to a further point made by Mr Malek. Mr Malek sought to add a requirement that the court could not hold England to be the appropriate or proper forum unless there was a sufficient English interest over and above (as I understood his argument) the requirement that one of the gateways such as contract made in England was established. In my view there is no such requirement; the gateways under 6BPD3 3.1 supply the English connection.
31. Can the judge’s evaluation be criticised? In considering whether England was the proper forum despite Russia being the natural forum, the judge, in my view, rightly divided the question of fair trial from the points on which Mr Cherney was relying for saying that he would not be able to go to Russia if the case had to be brought there. What the judge concluded was summarised by him as follows:-

“255. I turn then to the second stage. If the claim is not permitted to continue in England, it will almost certainly not be pursued in Russia or elsewhere. It has not been suggested that, if the case is not heard in either Russia or England, there is some other jurisdiction to which Mr Deripaska is subject where the case can appropriately be tried.

256. The fact that the claimant may face difficulties or obstacles in proceeding in what is, prima facie, the natural forum does not necessarily entitle him to trial in England. Nor can the English courts, whatever their merits, be the default home for every claimant who asserts that he will not venture abroad for his litigation or receive a fair trial there, provided only that he can bring himself within the letter of CPR 6.3. But the fact that the effective choice is between trial in England and no trial at all is a material factor in any determination of the appropriate forum. The extent to which it is material will depend on the reasons for that being the effective choice.

257. In the present case I am satisfied that two of the reasons are that Mr Cherney has a well founded fear that, if he proceeds in Russia, he will (a) be at greater risk of assassination, and (b) face criminal prosecution for what, on his evidence, and the reported remarks of Mr Deripaska's lawyer, would be a trumped up charge. Those fears cannot be discounted or disregarded on the footing that he runs no greater risk of assassination in Russia than in Israel or that there is no real possibility of any trumped up charge being brought.

...

260. In addition, whatever the position in other cases may be, I am, as I have said, satisfied that, in this particular case, there is a significant risk that Mr Cherney will not obtain in Russia a trial unaffected by improper interference by State actors and that substantial justice may not be done.

261. So far as general discretionary considerations are concerned, the parties are not strangers to England. Mr Deripaska has a house in London and another in the country. His group has substantial assets within the jurisdiction. The parties met and made whatever agreement they did make in London. The rules contemplate that there may be circumstances in which the only basis for jurisdiction lies in the fact that the agreement was made in this country. The fact that that is the only ground for jurisdiction may militate against exercising discretion in the claimant's favour. But in this case London was not a fortuitous meeting place. It was somewhere readily accessible to both parties and may properly be regarded as neutral ground. Both parties have confidence in English law and the English courts.

262. It does not seem to me that any need to call Russian or other non-English witnesses would give rise to unacceptable difficulties. The two most important witnesses are the parties themselves. A substantial proportion of the relevant material (e.g. as to company structures, instructions to lawyers and accountants and movement of funds) must be in writing. Several witnesses, such as the representatives of Syndikus and Mr Philipides, Mr Mishakov and others are likely to be seasoned travellers. Neither party has suggested that they will suffer significant prejudice if the trial takes place here.

263. Lastly, I take into account the fact that Mr Cherney delayed until December 2007 making the application that Tomlinson, J had contemplated would be heard (after it had been made) in June. There appears to me no satisfactory justification for this delay. I do not, however, regard that delay as a sufficient reason to deny Mr Cherney the order that I would otherwise make.

Conclusion

264. Taking all those considerations into account, I am persuaded that the risks inherent in a trial in Russia (assassination, arrest on trumped up charges and lack of a fair trial) are sufficient to make England the forum in which the case can most suitably be tried in the interests of both parties and the ends of justice and, accordingly, the proper place for the determination of this claim.”

32. It seems to me that if the judge had evidence or in the case of fair trial “cogent evidence” on which he could make the above findings, there can be no criticism of his approach. Despite Mr Malek’s attempts to persuade the court otherwise it seems to me to be an impossible contention that the judge did not have evidence or indeed “cogent evidence”. I will examine each of the features relied on by the judge in turn.
33. Was there sufficient evidence that Mr Cherney was at greater risk of assassination in Russia? The summary of the evidence at paragraphs 47 and 48 relating to an assassination attempt in Israel in 1995 is not criticised. From that summary it appears that such an attempt had a significant Russian connection. It was for the judge then to assess whether there was a greater risk if Mr Cherney returned to Russia. That the judge did in paragraph 199 in these terms:-

“199. As to the *first* of Mr Cherney's concerns, Mr Stewart submitted that Mr Cherney is no more likely to be the subject of an assassination attempt in Russia than he was in Israel or is anywhere else. I do not accept that. Whoever tried to have him killed in Israel was almost certainly Russian based. The risk of a successful assassination seems to me likely to be greater in the place where the person or persons who might wish to have

him killed reside and where the requisite personnel and materiel are likely to be more readily available. This is particularly so if Mr Cherney is engaged in a public trial. I cannot tell whether any threat to Mr Cherney is likely to come from a figure from his supposed criminal past or a former business rival (or someone who falls into both categories) or neither. I do, however, consider that Mr Cherney has a well founded fear for his safety and that he will be more at risk in Russia than England.”

34. That assessment is based on sound reasoning and it is not for the Court of Appeal to reassess the position.
35. Was there sufficient evidence for the judge to have found there was a real risk of prosecution and on trumped up charges if he returned to Russia? In his road map for his oral submissions under issue 6, Mr Vos QC identifies all the evidence that was available to the judge, and it is clear that to say there is “no evidence” is simply unarguable. The key points are that the main issue before the judge on this aspect appeared to be not whether he would be arrested if he returned to Russia, but whether the arrest and prosecution would be justified by Mr Cherney’s criminality. The judge dealt with that aspect at great length finding no evidence of criminality on Mr Cherney’s part.
36. There was also evidence as to the misuse of criminal prosecutions. The judge summarised the evidence in a way which was not criticised by Mr Malek at paragraphs 213 and 214 in these terms:-

“213. The use of criminal prosecutions (or the threat of them) as tools in a power struggle with rivals was a feature of Soviet Russia. The pattern has continued and has a new name: “*zakaznye dela* ” (“prosecutions to order”). In 2004 the ECHR in *Gusinsky v Russia* found that the Russian authorities had, in violation of Article 18 and 5, commenced a criminal investigation and deprived Mr Gusinsky of his liberty, not on suspicion that he had committed a criminal offence, but in order to intimidate him as part of a commercial bargaining strategy, namely to induce him to sell his media business to Gazprom on unfavourable terms. The Central Magistrates Court in Madrid refused the Russia Government's attempt to extradite Mr Gusinsky from Spain on a similar basis.

214. There is force in Professor Bowring's opinion that a State capable of such conduct on one occasion is perfectly capable of doing so again. His view is that Mr Cherney is an obvious candidate for false charges because Mr Cherney's action poses a real threat to Rusal and to Mr Deripaska's most fundamental interests. The likelihood of this is increased because of Mr Cherney's link with Mr Berezovsky, who has been tried and

sentenced in absentia, and is a well known enemy of Mr Putin, his former protégé.”

37. The Mirepco documents showed that Mr Deripaska was capable of making allegations to denigrate Mr Cherney, and the judge thus reached this conclusion at paragraph 201:-

“It seems to me that there is a significant likelihood of Mr Cherney being prosecuted if he returns and a real possibility that Mr Deripaska might use his influence, or his ability to orchestrate feeling against Mr Cherney, to encourage the authorities to take that course. I refer below to the evidence of Professor Bowring (see paragraphs 213-4 below) which appears to me to lend substantial support to that conclusion. There is reason to suppose that Mr Deripaska or his advisers have already conceived a plan to denigrate Mr Cherney in this country (see paragraph 249 below) and in Israel (see paragraph 153 above); and there appears to be far more scope for such a plan and for a prosecution in Russia. Further there is a distinct possibility that any charges would be trumped up.”

38. It is simply unarguable that the judge did not have the evidence on which he could arrive at that assessment of the risk to Mr Cherney.
39. Was there cogent evidence that Mr Cherney was at risk of not getting a fair trial in the Russian arbitrazh court? Again in his road map, Mr Vos, under issue 7, identified the evidence that was before the judge. The critical features of the judge’s findings on this issue are these. First, as he records in paragraph 239, “it appears to be common ground between the experts that, in certain cases, the arbitrazh courts cannot necessarily be expected to perform their task fairly and impartially. Professor Stephan [Mr Deripaska’s expert] characterises that as only applicable in a case whose outcome will affect the direct and material strategic interest of the state.” The judge however pointed out that, in what was termed the *Films by Jove* case, it appeared that the Russian State had intervened in a dispute which did not affect its vital interests [see paragraph 242 of the judgment, which Mr Malek did not criticise, as an accurate summary of the evidence relating to that case]. The judge then examined the position of Rusal [the company whose shares are the subject of the contracts sued on by Mr Cherney], and Mr Deripaska’s companies in Russia in paragraph 243. I do not understand the facts there summarised to be disputed, although the conclusion which the judge reached must have been in issue before him. His conclusion was that “The affairs of Rusal and Mr Derispaska’s group must be of considerable importance, including strategic importance, to the Russian State.”
40. That is the judge’s assessment, there was evidence to support that conclusion, and it is not a matter on which the Court of Appeal should conduct a reassessment.

41. The judge then pointed to the strong links between Mr Deripaska and the Russian State which he suggested bordered on the “umbilical” [244] and as to which he had the evidence of Professor Bowring to support him.

42. That led the judge to make this assessment in paragraph 246:-

“246. Given the closeness of the link between the Russian State and Mr Deripaska, the alignment of his interests 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 UCR (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. The same applies to the question whether any part of that interest has to be sold to honour obligations to Mr Cherney (no friend of the Russian State). Sual and Glencore have a 33 1/3% interest in UCR. A sale of Mr Cherney's alleged 13.2% beneficial interest would increase the minority interests to just over 46%, which might be a matter of concern (even if Mr Cherney were to sell to a loyal Russian). The apparent need to keep Mr Cherney's name off the face of the documents suggests a considerable sensitivity on the part of Mr Deripaska or the Russian State about Mr Cherney having any link with Rusal or UCR. The prospect of this is enhanced if, as also seems very possible, the State took, or was persuaded to take, the view, whether by a public campaign or by private representation, that Mr Cherney's interests had been obtained by the illicit acquisition of State property, as has been alleged in various publicity campaigns in Russia and elsewhere. This was a consideration that Judge Trager thought may well have influenced state officials in the *Films by Jove* case: see page 53 (RHC) of his 2003 decision. The fact that Mr Deripaska is reported to have owed his expansion to strong support from the Russian authorities also provides ground for believing that he may benefit from such support in the future.”

43. What the judge further said in paragraph 247 and 248 is important:-

“247. I should make it clear what I am *not* 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 Dmitry Dyakin of the Magisters Law firm in his witness statement.

248. I do however regard there as being a significant risk of improper government interference if Mr Cherney were to bring the present claims in Russia, where they would be very high profile proceedings indeed, such that substantial justice may not be done to him if he is required to proceed there. I am not satisfied that, if he is so required, justice will be done. I find support for this conclusion from the observations of Professor Hendley, upon whom Professor Stephan relies, in a chapter headed "*Putin and the Law*" in her book "*Putin's Russia*" where she concluded:

"But the continued willingness of those with political power to use law in an instrumental fashion to achieve their short term goals means justice can sometimes be out of reach. It also means that the commitment to the basic principle of the rule of law, namely that law applies equally to all, irrespective of their power or connections, is not yet complete. A gap between the law on the books and the law in practice exists in Russia, as in all countries. Surely it has receded from the chasm it was during the Soviet era. But whether it will increase or decrease as time goes by remains to be seen"."

44. In my view there was cogent evidence of a risk in the circumstances of this particular case, 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.
45. Accordingly, insofar as an attack was made on the judge's conclusion as to proper forum, I would dismiss the appeal.
46. That leaves the final issue relating to Mr Cherney's claim for a declaration that certain shares are held in trust. The way the claim was pleaded was first to assert matters of background; the fact that Mr Deripaska and Mr Cherney were beneficial owners of Radom Foundation which controlled Sibal; that what was contemplated was a merger of Sibal with other entities into a vehicle, Rusal, of which the owners of Radom and the other entities would have a 50% shareholding. The pleading then asserted the existence of an agreement dated 10th March 2001 under which it was recognised that Mr Cherney would be entitled to 20% of Rusal and by which it was agreed that Mr Deripaska would pay the value of that 20%, following in particular realisation of the 20%, and that Mr Deripaska would hold the 20% for Mr Cherney in the meanwhile.

Mr Deripaska was to pay \$250 million as a first instalment within a year, that amount to be deducted from the ultimate sum realised.

47. A number of paragraphs then set out the terms of the two written agreements alleged as confirming the agreement and providing the mechanics as to how the agreement would work. \$250 million, it is common ground, was paid and the action relates to an alleged failure to perform the further stages of the agreements.
48. Part of the case made by Mr Cherney in relation to non-performance relates to an allegation that in March 2007 Rusal merged with two other companies to form United Company Rusal, under which merger 66% of the new company was to be owned by the former shareholders of Rusal, and it is alleged “In the premises 20% of that 66% shareholding (which is held by Mr Deripaska directly or indirectly) is held on trust for Mr Cherney” and a declaration is claimed to that effect.
49. Two issues arise. First, it is said that the claim in trust does not fall within any of the subparagraphs relating to trust in 6BPD3 3.1 and that the claim is not “in respect of a contract” and thus does not fall within the gateway relating to contracts. In any event it is said that Russian law is the proper law, that the judge has held that Mr Deripaska has the better of the argument on proper law and, since Russian law knows no concept of trust, there is not a sufficiently arguable case to permit service out of the jurisdiction.
50. I can deal with both points shortly. First, what Mr Cherney was seeking was a remedy in respect of the contractual bargain he says he made. His case on the pleading was that, flowing from the contract under which shares in Rusal were agreed to be held for him, insofar as those shares had been exchanged for others, the bargain applied to those shares. Under English law his remedy would be a constructive trust remedy but it arises out of his contractual claim. His claim was not alleged to arise out of any dealings or any trust existing prior to the entry into the agreements the subject of the action as alleged by those representing Mr Deripaska. Previous dealings were matters of background only against which obligations under the alleged contracts were said to arise.
51. His case is also that English law was agreed as the proper law of the contract and the judge has held he has a good arguable case that it was. But in considering whether Mr Cherney can base jurisdiction on the proper law being English he found it was not as strong as Mr Deripaska’s argument that Russian law applied.
52. In my view the claim which was being brought by Mr Cherney was a claim in respect of a contract made within the jurisdiction and it did not cease to be that when he claimed that the contractual bargain in relation to one lot of shares attaches to other shares for which they have been exchanged. That remains so even if he asserts that the effect of that bargain now attaching to other shares would give rise to a constructive trust in English law.

53. As to the assertion that under Russian law a remedy in trust would not be recognised, and thus a sufficiently arguable case for such a remedy had not been established for service out purposes, the answer seems to me to be that at this stage English proper law was not being relied on so as to provide a gateway for jurisdiction. Russian law is a matter for Mr Deripaska to raise by way of defence. I accept that if he could raise by way of defence something amounting to a knockout blow that would obviously have to be taken into account and would mean that a sufficiently arguable case would not be established. But in this case he would not (for example) be entitled to summary judgment that Russian law applied, and thus it is on any view not a knockout blow.
54. Furthermore, I am not absolutely clear that, even if he could say that he would be bound to succeed on showing Russian law should apply to the contract, the court would prevent the action claiming a remedy by reference to the shares in the new entity remaining part of the claim. It would depend how clear the Russian law was as to there being no remedy if the shares, the subject of a contractual obligation, had been exchanged for others. It does not appear to have been wholly clear on the evidence before the judge.
55. It follows that in any event I would dismiss the appeal.

Lord Justice Moore-Bick :

56. I agree that the appeal should be dismissed, in substance for the reasons given by Waller L.J. By any normal standards this case has little to do with England beyond the fact that the contract happened to be made here in London. Apart from that all its connections are with Russia, so it is understandable that the judge should have held that Russia was the “natural” forum for the trial of the action. He concluded, however, that because of the unusual circumstances surrounding the case, in particular the increased risks to Mr. Cherney of assassination, prosecution on trumped-up charges and state interference in the judicial process, England was the jurisdiction in which the action could most suitably be tried in the interests of all the parties and for the ends of justice. Accordingly, Mr. Malek Q.C. could succeed on the appeal only if he could satisfy the court *either* that the judge was wrong in holding that factors of the kind just mentioned could properly be taken into account when considering whether England was a more appropriate forum for the trial of the action than Russia, *or* (since the judge relied on the cumulative effect of all three factors) that there was insufficient evidence to support his findings in relation to one or more of them. In my view, however, he failed to establish either of those matters.
57. I think it is clear, as Waller L.J. has explained, that in *The Spiliada Maritime Corpn v Cansulex Ltd* [1987] A.C. 460 Lord Goff was drawing a direct comparison between the principles applicable to the stay of proceedings begun as of right in this jurisdiction and those applicable to the grant of permission to serve proceedings out of the jurisdiction. In each case the fundamental principle is that of forum conveniens, although the approach of the court when dealing with an application to stay proceedings may be subtly influenced by the fact that in such cases jurisdiction has been founded here as of right. Mr. Malek submitted that once the judge, having

considered the usual connecting factors, has reached the conclusion that the courts of another country provide the “natural” forum for the trial of the action he cannot take into account other extraordinary factors when deciding where the action can most suitably be tried in the interests of all the parties and for the ends of justice. I agree, however, that the argument proceeds on a misunderstanding of Lord Goff’s speech and leads to a conclusion which is wholly at odds with the principles that he was enunciating. The case of *Connelly v R.T.Z. Corpn Plc* [1998] A.C. 854 provides one example of the kind of unusual circumstances that may lead the court to conclude that the interests of justice require the action to be tried in a forum with which it has little or no natural connection.

58. For similar reasons I am unable to accept the modified version of Mr. Malek’s argument which would recognise the possibility of giving weight to unusual factors of that kind, but only if they demonstrate a close link of some compelling kind with this jurisdiction. In my view, the fact that the contract was made in this country, which is sufficient under our law to give the court jurisdiction to allow service of the proceedings abroad, also provides a sufficient link to justify the exercise of that power in circumstance where it is in the interests of justice to do so. For these reasons I am satisfied that the judge was right to have regard to matters that might prevent Mr. Cherney obtaining justice in Russia when deciding whether, viewed overall, England was the appropriate forum for the trial of the action.
59. As Waller L.J. has pointed out, the evaluation of the evidence in cases of this kind is very much a matter for the judge. This court can interfere with his conclusions only if it is satisfied that the evidence before him was incapable of supporting them. To his credit Mr. Malek recognised that and therefore set out to persuade us that, although there was some evidence going to the risks of assassination, prosecution on trumped-up charges and government interference in the judicial process, on careful examination it was incapable of supporting the judge’s conclusions. He submitted that before taking any individual factor into account the judge had to be satisfied by cogent evidence that the event in question would in fact occur, but a little reflection is sufficient to make one realise that that cannot be the right test. All one can ever do when considering what will happen in the future is to assess the degree of likelihood that the event in question will occur; and the degree of likelihood required to justify taking the risk seriously will depend on the nature of that event. In most ordinary cases a person cannot reasonably be expected to accept more than a slight degree of increase in the risk of assassination, but a greater degree of risk of government interference in the judicial process might be thought acceptable. These are very much matters for the judge hearing the application.
60. I do agree with Mr. Malek, however, that allegations of a kind that impugn the integrity of the institutions of a friendly foreign state should neither be made nor entertained lightly, but must be distinctly alleged and supported by positive and cogent evidence. Lord Diplock made that plain in relation to ideological or political obstructions to justice in *The Abidin Daver* [1984] A.C. 398 at page 411 and in my view the same principles apply in cases where, as here, it is alleged that a foreign government will be unable or unwilling to protect the claimant’s personal safety or will manipulate its criminal justice system to bring false charges against him. These

too are serious charges that are not to be made lightly or accepted without the support of positive and cogent evidence. However, I do not think that the court is precluded on the grounds of comity from considering them in a proper case.

61. The judge held that there was a significant risk in this case that by travelling to Russia, as would be necessary if he were to pursue his claim there, Mr. Cherney would place himself at materially greater risk of assassination than if he were to remain in Israel, where he normally lives, or if he were to come to London for the purposes of the trial. In my view there was plenty of evidence to support that finding. In paragraphs 46 to 48 of his judgment Christopher Clarke J. gives a brief summary of Mr. Cherney's personal history which includes an attempt on his life in Israel in 1995 by people with Russian connections. Whatever view one takes of Mr. Cherney's former business activities, there is every reason to think that he had made enemies in Russia and that the risk of assassination would be significantly greater in that country than in most others that he was likely to visit. Mr. Malek laid some emphasis on the fact that the only positive attempt to kill Mr. Cherney had taken place well over ten years ago, but there was evidence that he had been warned quite recently that he would be at risk if he travelled to Russia and that he had cancelled plans to visit the country as a result. In my view there was evidence of sufficient quality to support the judge's finding in this regard.
62. It appears to have been accepted before the judge (though not before us) that Mr. Cherney might well face prosecution if he were to return to Russia. Mr Deripaska said that if Mr Cherney feared prosecution it was because he had been accused of a number of serious crimes; Mr Cherney says that false charges would be made against him to justify his arrest, and perhaps subsequent imprisonment, in order to prevent him from pursuing his claim. The judge held that there was no evidence that Mr. Cherney had been involved in criminal activities and Mr. Malek did not seek to challenge that finding. It follows, therefore, that there is a real possibility that any charges brought against him would not be well-founded. However, the matter does not end there because there was evidence before the judge, not least in the form of Professor Bowring's report, the decision of the European Court of Human Rights in *Gusinsky v Russia* and the well-known proceedings against Mr. Khordorkovsky of Yukos, that tended to support the conclusion that the criminal justice system has been used, and from time to time is still used, as an instrument of government policy, a conclusion that was further supported by the writings of an acknowledged expert on the Russian judicial system, Professor Kathryn Hendley. Even Mr. Deripaska's expert, Professor Paul Stephan, cast a degree of doubt on the integrity of the criminal justice system when he stated that the inadequacies in the judicial system were limited to the courts of general jurisdiction rather than the arbitrazh courts.
63. Mr. Malek submitted that the judge had failed to take account of the fact that Mr. Gusinsky and Mr. Khordorkovsky were political opponents of the government, whereas Mr. Cherney was not, but that in my view is only part of the question. The fact that Mr. Cherney is not a political opponent of the Kremlin may mean that he is not exposed to the risk of mistreatment on that ground, but it does not mean that the system might not be turned against him for other reasons if Mr. Deripaska or those supporting him thought it might be worthwhile to do so. I shall come in a moment to

the question whether the judge was entitled to find that the Russian government would be likely to take an interest in this dispute, but the Mirepco documents, to which Waller L.J. has referred, give one an insight into the methods which Mr. Deripaska or his supporters had in mind to use in order to discredit Mr. Cherney and undermine his position. As such they provide some additional grounds for thinking that, if the government were minded to exert pressure on Mr. Cherney, the initiation of criminal proceedings, whether on a speculative or knowingly false basis, could not be ruled out. The extradition cases to which the judge was referred provide additional support for this part of Mr. Cherney's case. If, as I think, there was cogent evidence before the judge that the system is capable of being manipulated in that way, albeit in relatively rare cases, it was for him to assess the degree of risk that Mr. Cherney would run if he were to travel to Russia in order to pursue the action.

64. It was an essential plank in Mr. Malek's argument, both in relation to the risk of prosecution on trumped-up charges and the risk of interference in the working of the arbitrazh courts, that there was no reliable evidence that the government was or would be interested in what was no more than a private dispute between two individuals over a relatively small shareholding in a joint stock company whose business, unlike that of oil and gas production, was not considered to engage the strategic interests of the state. He accepted that there was evidence that in cases which do engage Russia's national interests the government is liable to manipulate the judicial process (the proceedings against Yukos and Mr. Khordorkovsky provide one obvious example), but he submitted that that was confined to cases in which national strategic interests were at stake or in which the state was seeking to re-nationalise previously privatised assets. He submitted that the present case fell into neither of those categories and that none of the examples on which Mr. Cherney relied was truly comparable to the present case. Accordingly, they did not provide a sufficient basis for the opinions expressed by Prof. Bowring on which he placed considerable reliance.
65. Mr. Malek did not really dispute that the nature and size of United Company Rusal, in which Mr. Cherney claims a 13.2% interest, renders it an industrial giant of national importance in Russia, responsible for the employment of many people and of significant economic importance generally. That of itself is some evidence from which the judge could properly infer that its fortunes were of some interest to the government. The size of the stake being claimed by Mr. Cherney may not be large in overall terms, but in financial terms it is very substantial and although he is not seeking to gain control of the shares themselves, the claim if successful could prove financially embarrassing for Mr. Deripaska, who currently remains in control of the company. Moreover, there was some evidence before the judge that Mr. Deripaska enjoyed the support of the government.
66. The three instances of government interference in the judicial process on which the judge relied are the proceedings relating to Yukos, Films by Jove and Media Most. It can be said with some justification that the Yukos case involved both what might be described as the re-nationalisation of strategic assets and the damaging of a political opponent. It can also be said that the Films by Jove case (which concerned rights to animated cartoons produced in the Soviet era) involved the re-nationalisation of assets formerly owned by the state (though hardly assets of strategic nature) and that the

Media Most case again involved the damaging of a political opponent. However, it was open to the judge to view these cases more broadly as examples of the government's willingness to interfere in the judicial process in circumstances where it considers that national interests are sufficiently engaged. Having regard to the economic and industrial importance of United Company Rusal and the links between Mr. Deripaska and those in government, I think that there was ample evidence on which the judge could find that there was a risk of government interference in the judicial process if the present action were tried in Russia. Again, it was for him to assess the extent of that risk; this court could interfere with his assessment only if it were satisfied that the evidence was not capable of supporting his conclusion. In my view that is not the case.

67. For these reasons, as well as those given by Waller L.J., I am of the view that the judge was entitled to hold that, although Russia is the natural forum for the trial of the action, the risks to which Mr. Cherney would be exposed if the case were to be tried there are sufficient to render England the appropriate forum in the sense in which that expression was used by Lord Goff in *The 'Spiliada'*. As far as jurisdiction is concerned, I agree that the words "in respect of a contract" in CPR rule 6.20(5)(a) (now paragraph 3.1(6)(a) of Practice Direction 6B) are to be construed broadly and are wide enough to encompass a claim based on rights said to arise out of a contract, even though those rights may be of a proprietary nature. It may be that in due course Mr. Deripaska will succeed in establishing that the contract is governed by Russian law and that Russian law does not recognise rights of the kind asserted by Mr. Cherney. However, that is for the trial. The fact that, as the judge held, Mr. Deripaska has the better of the argument at this stage in relation to proper law does not mean that Mr. Cherney's case is so weak that it does not give rise to a serious issue to be tried.

Sir John Chadwick :

68. I agree that what Lord Justice Waller has described as the appellant's more extreme argument fails. The argument is founded on a misunderstanding of Lord Goff's observations in *The Spiliada* case. I agree, also, that it cannot be said that there was no evidence, or no evidence of sufficient cogency, to support the judge's conclusion that England was the appropriate forum on the special facts in this case. It is not for this court to re-assess the weight to be given to the matters which the judge was entitled to take into account in exercising his own discretion.