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Case No: IHC 354/11
2007 Folio 942

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 7th July 2011

Before:
The Hon Mr. Justice Mann
and
The Hon Mrs Justice Gloster, DBE

- -

Between :

BEREZOVSKY	**Claimant**
and	
HINE & OTHERS	**Defendants**
AND	
BORIS ABRAMOVICH BEREZOVSKY	**Claimant**
- and -	
ROMAN ARKADIEVICH ABRAMOVICH	**Defendant**

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(in the Commercial Court Proceedings and in the Chancery Proceedings)
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(in the Commercial Court Proceedings)
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(in the Chancery Proceedings)
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(in the Chancery Proceedings)
David Mumford Esq (instructed by **Macfarlanes LLP**) for the **Salford Defendants**
(in the Chancery Proceedings)
Hearing dates: 8th & 9th June 2011

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Approved Judgment

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

.....
MRS JUSTICE GLOSTER, DBE

Mrs Justice Gloster:

Introduction

1. This is the court's judgment in relation to the application made by the defendant, Roman Abramovich ("Mr. Abramovich"), to strike out various parts of the Statement of Case lodged on behalf of the claimant, Boris Berezovsky ("Mr. Berezovsky") in the Commercial Court proceedings (2007 Folio 942) ("the Abramovich Action"), as set out in his Response dated 26 April 2011 ("the Response") to Mr. Abramovich's Request for Further Information dated 24 March 2011 ("the RFI"), pursuant to CPR3.4(2)(b). This judgment assumes a familiarity with the background to these actions, as set out in the judgment of Mann J dated 14 May 2010 in the three Chancery actions ("the Chancery Actions") ([2009] EWHC 1176) and our joint judgment dated 30 July 2010 ([2010] EWHC 2044). Although the application is made only in the Abramovich Action, its success or failure has a potential impact on the joint case management that has been put in place in both the above actions. Accordingly we have once more sat together, in our respective jurisdictions, to enable the application to be considered, and given effect to, in both cases.

2. The relevant parts of the Response are set out below. The passages which Mr. Abramovich seeks to strike out are underlined for emphasis:

> "Under Paragraph C62 of the Re-Amended Particulars of Claim
>
> Of: '*To pool the aluminium assets controlled or beneficially owned by ... Mr Berezovsky ....*'
>
> Requests:
>
> …
>
> 26. In relation to any such assets that it is alleged were 'controlled' by Mr Berezovsky please explain the means by which such control was held and exercised.
>
> 27. In relation to any such assets that it is alleged were 'beneficially owned' by Mr Berezovsky please identify under which law and by virtue of what rights such beneficial ownership interests are alleged to have arisen.
>
> Answers:
>
> …
>
> 26. The 1995 Agreement (as set out in paragraphs C34A and C34B of the Particulars of Claim) applied to the aluminium assets, and/or they fell within the scope of the joint venture relationship between Mr Berezovsky and Mr Patarkatsishvili. As a result the aluminium

assets were controlled by Messrs Berezovsky and Patarkatsishvili and Abramovich.

27. The system of law most closely connected to acquisition of the aluminium assets was English law (as the law expressly chosen in all the purchase contracts entered into by the Offshore Companies). Mr Berezovsky's rights or interests in the Offshore Companies arose (under Russian and/or English law):

(a) Pursuant to the 1995 Agreement;

(b) Pursuant to Mr Berezovsky's joint venture relationship with Mr Patarkatsishvili; and/or

(c) By reason of the fact that payment for these assets came from Mr Berezovsky's, Mr Patarkatsishvili's and Mr Abramovich's share of profits derived from their interest in Sibneft.

Those rights or interests in the Offshore Companies are evidenced in writing by (i) the fact that pursuant to the Share Purchase and Sale Agreement dated 15th March 2000, and the Amended and Restated Share Purchase and Sale Agreement dated 15th May 2000, in each case between Runicom Limited and GSA (Cyprus) Limited and in each case governed by English law, Runicom Limited represented that others apart from Runicom Limited (described variously as the '*Other Selling Shareholders*' and the '*P1 Shareholders*') were legally and/or beneficially interested in the Offshore Companies; and/or (ii) the fact that the 10 February 2000 agreement by which the aluminium assets were acquired identifies Mr Patarkatsishvili (along with Mr Abramovich and Mr Shvidler) as one of the purchasers of the assets (it being well known to Mr Abramovich that Mr Patarkatsishvili was Mr Berezovsky's joint venture partner, and that joint venture relationship extended to all commercial investments).

Under Paragraph C63 of the Re-Amended Particulars of Claim

Of: '*Mr Berezovsky and Mr Patarkatsishvili would beneficially own half, or 25% of the new company ("the Berezovsky/Patarkatsishvili RUSAL shares")*' and '*The Berezovsky/Patarkatsishvili RUSAL shares would be controlled and legally owned by Mr Abramovich , or by companies Mr Abramovich owned or controlled, and held on trust by Mr Abramovich for Mr Berezovsky and Mr Patarkatsishvili*';

Under Paragraph R64.1 of the Re-Amended Reply;

Of: '*... Mr Berezovsky (and Mr Patarkatsishvili) as the settlers of the trust.*';

…

Requests:

…

32. Whether it is alleged that the trust arose by:

(a) Declaration of the settlor(s); or

(b) Transfer of the trust property from the settlor(s) to the trustee; or

(c) In some other way and, if so, how.

Answers:

…

32. Mr Berezovsky's primary case is that the trust was an express trust, which arose as a result of the settlors'/ settlor's binding agreement and/or continuing intention that Mr Abramovich would hold the trust property on trust for the beneficiaries, which became fully constituted on the date specified in paragraph 31 above [25 December 2000].

Mr Berezovsky's secondary case is that the trust was a resulting trust and/or constructive trust, which arose as a result of the transfer of Mr Berezovsky's rights or interests in the Offshore Companies and (through them) the underlying aluminium interests to Rusal on the date specified in paragraph 31 above and/or by virtue of Mr Berezovsky's reliance on the agreement specified in paragraph 29 above, as a result of which he allowed Mr Abramovich to acquire ownership and/or control over the Rusal shares and never demanded that 50% of the Rusal shares ultimately owned and/or controlled by Mr Abramovich should be transferred to him and/or Mr Patarkatsishvili and/or companies under their control, and/or by virtue of the fact that it would be unconscionable in all the circumstances for Mr Abramovich to deny Mr Berezovsky's interest."

3. The thrust of Mr. Abramovich's application, as originally formulated, was to strike out the Response insofar as Mr. Berezovsky now seeks to plead, as a matter for determination in the Abramovich Action, that:

   i) there was a bilateral joint venture agreement between Mr. Berezovsky and Mr. Patarkatsishvili extending to all commercial ventures ("the Bilateral JVA"); and

   ii) Mr. Abramovich knew about such Bilateral JVA and its alleged scope.

   During the course of argument, Mr. Rabinowitz QC, leading counsel representing Mr. Berezovsky, indicated that the Response should be read as referring to a Bilateral JVA between Mr. Berezovsky and Mr. Patarkatsishvili limited to aluminium assets and RusAl. Mr. Abramovich's strike-out application accordingly encompassed that alternative case sought to be made by Mr. Berezovsky, notwithstanding that it had not been pleaded.

Procedural Chronology

4. Following the first conjoined CMC in July 2010 ("the conjoined CMC"), the court ordered, by its order dated 16 August 2010 ("the August 2010 Order") that the "Overlap Issues" as defined in paragraph 1 of the order should be decided by the judge assigned to hear the Abramovich Action at a joint trial as: (i) part of the Abramovich Action; and (ii) preliminary issues in the Chancery Actions. The defendants to the Chancery Actions ("the Chancery Defendants") were to be entitled to participate in the joint trial, and would be bound by the findings made upon the Overlap Issues, as well as upon certain other issues arising primarily in the Abramovich Action and identified at paragraph 5 of the August 2010 Order ("the Further Issues"). The Overlap Issues and the Further Issues were together referred to in our joint judgment at the conjoined CMC at paragraph 4 as the "RusAl Issues".

5. Paragraph 1 of the August 2010 Order defined the Overlap Issues as follows:

> "(1) Did the Claimant acquire any interest in any Russian aluminium industry assets by way of the KrAZ Asset sale prior to the alleged meeting at the Dorchester Hotel in March 2000 (<u>other than as a result of the joint venture agreement alleged by the Claimant in the Main Chancery Action</u>) and if so, what was the nature and extent of such interest and how did it arise?
>
> (2) Was there a meeting at the Dorchester Hotel in 2000 at which the Claimant, Mr Patarkatsishvili, Mr Abramovich and Mr Deripaska agreed to pool their assets in the Russian aluminium industry as the Claimant alleges (the "Dorchester Hotel Agreement")?
>
> (3) If so:

(a) Did Mr Abramovich agree to hold half his 50% interest on trust for the Claimant and Mr Patarkatsishvili?

(b) Was any such agreement governed by English law or Russian law (or another system of law)?

(c) Did any such agreement give rise to any trust-like interest in Rusal in favour of the Claimant (other than as a result of the joint venture agreement alleged by the Claimant in the Main Chancery Action)?

(4) Was the US$585 million received by Cliren following the sale of the Second Tranche of Rusal shares (as defined at paragraph 29 of the Abramovich List of Issues):

(a) US$450 million of sale proceeds and (ii) US$135 million of outstanding dividend payments from Rusal?; or

(b) A payment made by Mr Abramovich to Mr Patarkatsishvili at the request of Mr Patarkatsishvili in return for him providing assistance and protection to Mr Abramovich in relation to Mr Abramovich's acquisition of assets in the Russian aluminium industry?"

6. Paragraph 5 of the August 2010 Order defined the Further Issues as follows:

"(1) Regarding the sale in about September 2003 by Mr Abramovich of half of his 50% interest in Rusal, which he controlled ("First Tranche"), to Mr Deripaska:-

(a) Was the consideration received by Mr Abramovich for the sale of the First Tranche US$1.75 billion (as Mr Berezovsky contends in the Abramovich Action) or $1.578 billion (as Mr Abramovich contends in the Abramovich Action)?

(b) Did the sale amount to a breach of trust and/or breach of contract by Mr Abramovich arising from the alleged Dorchester Hotel Agreement, as Mr Berezovsky contends in the Abramovich Action?

(c) Is Mr Berezovsky entitled (as he contends in the Abramovich Action) to treat this as the sale of Mr Berezovsky's and Mr

Patarkatsishvili's alleged interest in Rusal acquired pursuant to the alleged Dorchester Hotel Agreement? Alternatively, is this to be treated as the sale of Mr Abramovich's interest in Rusal?

(2) If Mr Abramovich committed any of the alleged breaches of the Dorchester Hotel Agreement in relation to Rusal (as contended by Mr Berezovsky in the Abramovich Action), then:-

(a) Does he, as a result, hold the proceeds of the sale of the First Tranche on trust for Mr Berezovsky and Mr Patarkatsishvili?

(b) Is Mr Abramovich liable, as a result, to account in equity for the profit he made from the sale of the First Tranche and/or does he hold such profits as constructive trustee for Mr Berezovsky and Mr Patarkatsishvili?

(c) Is Mr Abramovich liable as a result to compensate Mr Berezovsky for the loss suffered by Mr Berezovsky? If so:-

(i) Is this loss to be calculated as the difference between the value of Mr Berezovsky's interest in Rusal shares before the sale by Mr Abramovich to Mr Deripaska and the value after such sale, or in some other manner?

(ii) Is the calculation the difference between the sale price of the First Tranche and the sale price of the Second Tranche, or is it to be calculated in some other manner?"

7. It is clear that neither the Overlap Issues nor the Further Issues included the issue as to whether there was a Bilateral JVA, and that the Overlap Issues were clearly defined to exclude any such issue; see the emphasised passages in the definition of the Overlap Issues as set out above.

8. Moreover, it is clear from our judgment that we rejected Mr. Berezovsky's submissions at the conjoined CMC to the effect that, if the RusAl Issues were to be determined at the joint trial, the existence of the alleged Bilateral JVA would have to be decided at the same time. Our reasons for so doing were the following:

i) Although the existence and scope of the Bilateral JVA between Mr. Berezovsky and Mr. Patarkatsishvili (then pleaded as one relating to all commercial investments) was part of the background facts advanced by

Mr. Berezovsky as part of his evidential case in the Abramovich Action, it was not a pleaded issue and was technically not something which needed to be decided in the Abramovich Action: see the judgment at paragraph 19, where we said:

> "Next is the bilateral joint venture agreement between Mr. Berezovsky and Badri. This is not a pleaded issue in the Abramovich proceedings, but it was said, and we accept, that it will be part of the background facts advanced by Mr. Berezovsky as part of his evidential case. It will be said to explain the events which are central to Mr. Berezovsky's claims in that action. The judge in the Abramovich Action may need to make some findings about it on the way to other more central findings, but it is not technically something which needs to be decided …."

ii) The RusAl Issues were discrete issues, whose separate trial was feasible and whose inclusion for determination in a joint trial would remove the major source of risk of inconsistent findings. There did not appear to be other obvious candidates to join the RusAl Issues in the fold of issues to be determined in the Abramovich Action so as to bind all parties. The other issues were not sufficiently common, nor sufficiently severable, nor practicably triable within the Abramovich Action.

iii) In saying that the other matters common to both proceedings were not practicably triable within the Abramovich Action, we clearly had in mind our own observation at paragraph 26 about the Bilateral JVA issues in the Chancery Actions. We pointed out that, if the Bilateral JVA issues were introduced into the Abramovich Action, all parties to the Chancery Actions would, as a matter of principle, have to be allowed to deploy their case upon it in full:

> "It was not always clear whether it would have involved the parties bringing in the whole of their documentary case on (for example) the bilateral joint venture into the Abramovich Action. If it did, then it would expand the Abramovich Action to an extent which (at the moment at any rate) is apparently undesirable (if indeed the litigation would remain triable as a result). The Joint Venture in the Main Action is to be tested by considering a large number of complex financial transactions (or at least that is the present intention), and they would have to be brought into the Abramovich Action if that issue were to be fully determined there. It would hugely increase the scope of the Abramovich Action."

iv) There remained some risk of inconsistent findings in this area, but it was not plain that the Bilateral JVA would be central, and the risk would have to be accepted: judgment at paragraph 28(vii).

9. As a result of the order which we made, there has (not surprisingly) been no disclosure given to Mr. Abramovich in relation to the Bilateral JVA by either Mr. Berezovsky or the Chancery Defendants.

Mr. Berezovsky's new pleaded case against Mr. Abramovich as set out in the Response

10. It is evident from Mr. Berezovsky's Response that further, or in the alternative, to his already pleaded claim (based on the alleged 1995/1996 agreements, and/or the alleged use of the Sibneft profits to purchase the aluminium assets, and/or the alleged Dorchester Hotel Agreement in March 2000), he is now seeking to contend (for the first time) that he has a claim, or cause of action, against Mr. Abramovich on the grounds that:

    i) he had an ownership interest in the five aluminium plants which were subsequently pooled with Mr. Deripaska's assets on the basis of the alleged Bilateral JVA; see Answer 26 of the Response;

    ii) the alleged Bilateral JVA gave Mr. Berezovsky an interest in the offshore companies which bought the aluminium assets and which contributed to the formation of RusAl; see Answer 27 of the Response; and

    iii) Mr. Abramovich knew of the existence of the alleged Bilateral JVA between Mr. Berezovsky and Mr. Patarkatsishvili, and that it extended to all their commercial interests.

11. On the back of these allegations relating to the Bilateral JVA and Mr. Abramovich's knowledge of it, Mr. Berezovsky pleads, for the first time, in Answer 28, that he has a cause of action against Mr. Abramovich because Mr. Abramovich was a trustee of Mr. Berezovsky's interest in the RusAl assets on the basis of an alleged express, resulting or constructive trust; see Answers 28 and 32 in the Response.

12. The nature of this new case as against Mr. Abramovich, is, to say the least, opaque. However, there is no doubt that it is a completely new cause of action as against Mr. Abramovich which has not previously been raised by Mr. Berezovsky, despite the various shifts in the formulation of his case that have occurred over the lifetime of the Abramovich Action.

13. Originally, the sole bases upon which Mr. Berezovsky claimed an interest in the RusAl assets were his alleged agreement with Mr. Abramovich in 1995/1996, the alleged Dorchester Hotel Agreement and/or the alleged use of the Sibneft profits to purchase the RusAl assets. These claims were all based on alleged direct dealings between Mr. Berezovsky and Mr. Abramovich. Mr. Rabinowitz realistically accepted this. However, he submitted that it had always been part of Mr. Berezovsky's case that he had an interest in the RusAl assets under the terms of the Bilateral JVA, and that paragraph 19 of our judgment clearly recognised that the scope of the Bilateral JVA was an evidential issue which might arise in the Abramovich Action.

14. On 31 May 2011, Mr. Berezovsky served his witness statement for trial. In paragraph 260 of his witness statement he now appears to rely on an express agreement between Mr. Abramovich, Mr. Patarkatsishvili and Mr. Berezovsky at some point prior to February 2000 that they would purchase the aluminium assets from Sibneft profits.

He also contends that his and Mr. Patarkatsishvili's share was the subject of the Bilateral JVA. Mr. Berezovsky also states in paragraph 87 of his witness statement that he "made clear" to Mr. Abramovich that he and Mr. Patarkatsishvili were "partners".

15. It is against the above background that Mr. Abramovich's application to strike out was made.

The Court's Approach

16. Although the application with which we have formally to deal is Mr. Abramovich's strike-out application, the reality is that Mr. Berezovsky is trying to amend his case to base his claim as against Mr. Abramovich in relation to RusAl and the aluminium assets on new grounds. The issue is whether the court should permit him to do so. Whether that decision is taken in the context of a strike-out application by Mr. Abramovich under CPR 3.4(2), or of an application, as yet unmade, by Mr. Berezovsky for permission to amend under CPR Part 17, seems to us to be immaterial. In either case the court has to consider whether the newly formulated statement of case, as it appears in the Response, if permitted to be run, or maintained, as a case at the joint trial, is an abuse of the court's process, is likely to obstruct the just disposal of the trial, or is likely to prejudice any other party to the proceedings.

Mr. Abramovich's submissions

17. In summary, Mr. Jonathan Sumption QC, leading counsel on behalf of Mr. Abramovich, made the following submissions in support of the application to strike out:

    i) If the existence and scope of the Bilateral JVA (and Mr. Abramovich's alleged knowledge of the same) ("the New Issues") were to be accepted as issues for determination in the Abramovich Action at the joint trial in October 2011, the practical implications for a fair trial would be very serious indeed. Any inclusion of the New Issues would be seriously prejudicial to Mr. Abramovich.

    ii) As the Overlap Issues are currently defined, they do not include the New Issues. The Chancery Defendants would therefore not be bound by any findings by the Commercial Court at the joint trial, and, theoretically, the New Issues would have to be retried in the Chancery Actions (where they are amongst the central issues in those actions). That would give rise to the possibility of inconsistent findings, which is exactly what the court was seeking to avoid in its previous joint judgment. Mr. Berezovsky was not seeking to redefine the Overlap Issues.

    iii) But in reality, the determination of the New Issues in the Abramovich Action would put the Chancery Defendants in a very difficult position. They would clearly be adversely affected by a decision in the Abramovich Action that there was a Bilateral JVA, even if such finding was not, technically, binding on them. The reality is that any Chancery Judge would be very slow to come to a different finding on the New Issues from that of the judge hearing the Abramovich Action. The Chancery Defendants would be entitled to be heard on the Bilateral JVA issues at the joint trial, and yet, in order to be heard

effectively, they would have to deploy all the material available in the Chancery Actions where the issue was central.

iv) Mr. Abramovich would need to obtain all the disclosure relating to the Bilateral JVA from Mr. Berezovsky and the Chancery Defendants, none of which he had obtained to date. This, effectively, was most of the disclosure in the Chancery Actions, which amounted to a huge volume of material.

v) The process of obtaining and digesting that material, putting it to existing witnesses and, if necessary identifying further witnesses to call in relation to the New Issues, would be a substantial task for Mr. Abramovich's legal team. There was simply no time available before trial to perform that task in any sensible fashion.

vi) If Mr. Abramovich were forced to deal with the Bilateral JVA issues in the Abramovich Action, the only feasible alternatives would be:

a) to adjourn the October 2011 trial date, which would be highly unsatisfactory; or

b) to exclude the RusAl Issues from the trial in October. The alleged Bilateral JVA issues could then be tried in Part I of the Chancery Actions in October 2012; thereafter the RusAl claim would have to be tried in the Commercial Court. Again this would be highly unsatisfactory, as not only would it delay matters, but it would be necessary for Mr. Abramovich to participate in the Chancery Actions to the extent necessary to protect his interests; or

c) to try the RusAl Issues arising in the Abramovich Action at the same time as the Chancery Actions: again, this would be wholly unsatisfactory, not only because of the delay, but also because the RusAl Issues, as between Mr. Berezovsky and Mr. Abramovich go far wider than merely the Bilateral JVA issues.

vii) There was no injustice to Mr. Berezovsky in not being permitted to amend his claim against Mr. Abramovich to raise the New Issues. Mr. Berezovsky had amended his case on numerous previous occasions; he had had every opportunity at earlier stages to plead the point against Mr. Abramovich, had he wished to do so. It should be inferred that he had taken a deliberate tactical decision not to do so. In those circumstances, it was not acceptable for a point of this significance to be taken at such a late stage before trial, given the disruption and prejudice that any such amendment would cause.

Submissions on behalf of the Chancery Defendants

18. Mr. Ali Malek QC, on behalf of the Anisimov Defendants, Mr. Adkin on behalf of the Family Defendants, and Mr. Mumford on behalf of the Salford Defendants, adopted the same position and supported the submissions made on behalf of Mr. Abramovich. They emphasised not only the prejudice to them if they had effectively to deploy their full arguments in relation to the New Issues in the Abramovich Action in October 2011, but also underlined the scale of the court's task in resolving the Bilateral JVA

issues, if they were to be introduced into the joint trial in October 2011. Not only would the scale of the documentation be vastly increased, but so would the extent of the evidence - both in chief and in cross-examination - and the length of the arguments.

Mr. Berezovsky's submissions

19. Mr. Rabinowitz's principal submissions can be summarised as follows:

i) There was no suggestion that the allegations in relation to the New Issues were unarguable.

ii) The allegation that Mr. Berezovsky was party to a Bilateral JVA with Mr. Patarkatsishvili in relation, at least, to the RusAl assets, or, more widely in relation to all his and Mr. Patarkatsishvili's commercial investments, was always an evidential issue in the Abramovich Action, and known by Mr. Abramovich to be such an issue. That was so, notwithstanding that (as Mr. Rabinowitz accepted) it had never been pleaded as an issue against Mr. Abramovich, or used to found a claim against him, based on his knowledge of the Bilateral JVA, that he was a trustee. In this context, Mr. Rabinowitz referred to certain comments made by Mr. Michael Brindle QC (leading counsel for Mr. Abramovich) during the course of the conjoined CMC, which, Mr. Rabinowitz submitted, showed that Mr. Brindle accepted that the scope and terms of the Bilateral JVA were always amongst the issues to be decided at the joint trial.

iii) There was no prejudice to Mr. Abramovich or any of the Chancery Defendants. There was no need to amend the scope of the Overlap Issues to encompass any issues relating to the Bilateral JVA. Mr. Berezovsky accepted that, given its centrality to the Chancery Actions, the Chancery Defendants should not be bound by the Commercial Court's decision on the Bilateral JVA.

iv) The only issues that the court would need to resolve, to deal with the newly pleaded case against Mr. Abramovich, so far as the existence of any Bilateral JVA was concerned, was whether the Bilateral JVA extended to the interests which Mr. Patarkatsishvili acquired in the underlying aluminium assets, and, following the merger with Mr. Deripaska's aluminium interests, RusAl. There would be no need to decide any wider issues as to whether the Bilateral JVA was "an all-encompassing joint venture" and/or whether it applied to all commercial assets regardless of the source of the funds. Nor was it necessary to decide whether there was an economic divorce as between Mr. Berezovsky and Mr. Patarkatsishvili in 2006 (these were wider issues that arose in the Chancery Actions).

v) It was wrong for Mr. Abramovich to contend that he would be prejudiced because he had not had disclosure in relation to the Bilateral JVA issues. On the contrary, he had had disclosure of all the documents in the Chancery Actions that related to RusAl and, pursuant to the provisions of paragraph 7 of the August 2010 Order, could have applied for inspection of any documents that fell within "train of inquiry" disclosure relating to the Overlap Issues or the Further Issues.

vi) Mr. Abramovich, at all material times, knew that Mr. Berezovsky was going to say that he had an interest under the Bilateral JVA. Pursuant to paragraph 7(2) of the August 2010 Order, he had been provided with a list of all disclosure given in the Chancery Actions. Accordingly, had he chosen to do so, he could easily have applied for inspection of any document relevant to the Bilateral JVA at a much earlier stage.

vii) Moreover, Mr. Abramovich, in his witness statement had already dealt with what he said was his limited knowledge of the commercial relationship between Mr. Berezovsky and Mr. Patarkatsishvili. Likewise, Mr. Anisimov had, in his witness statement, addressed the question as to whether there was a Bilateral JVA between Mr. Berezovsky and Mr. Patarkatsishvili in relation to the aluminium assets and RusAl. Furthermore, the Badri proofs recently disclosed pursuant to the order made in the Abramovich Action also addressed the Bilateral JVA. Therefore, there could be no prejudice caused to Mr. Abramovich by the elevation of what was always recognised as an evidential issue into a pleaded issue, which founded a claim against Mr. Abramovich.

viii) In those circumstances, it was unreal for Mr. Abramovich and the Chancery Defendants to contend that in the Chancery Actions, Mr. Berezovsky would be free to allege that Mr. Patarkatsishvili was referring, in the alleged proofs of his witness statement, to a Bilateral JVA with Mr. Berezovsky and/or a three-way joint venture agreement with Mr. Abramovich, but in the Abramovich Action Mr. Berezovsky would only be free to contend that Mr. Patarkatsishvili was speaking about a three-way joint venture.

ix) Notwithstanding that, as Mr. Rabinowitz accepted, Mr. Berezovsky's pleadings, as they currently stood, asserted a Bilateral JVA with Mr. Patarkatsishvili extending to <u>all</u> commercial investments (see, in particular, paragraph 27 of the Response), that was too wide and would, for the purposes of the Abramovich Action, have to be amended. All that was sought to be alleged in the Abramovich Action was a Bilateral JVA between Mr. Berezovsky and Mr. Patarkatsishvili limited in scope to the aluminium assets and/or RusAl.

x) In all the circumstances it would be unjust if Mr. Berezovsky were not permitted to pursue this new claim against Mr. Abramovich.

Discussion and Determination

20. In our judgment, to allow Mr. Berezovsky, at this late stage of the Abramovich Action, to amend his case to plead, for the first time, a substantive proprietary claim against Mr. Abramovich based upon an as yet unpleaded, or inadequately pleaded, allegation that:

i) Mr. Berezovsky had a beneficial interest in RusAl or the aluminium assets underlying RusAl as a result of a specific Bilateral JVA with Mr. Patarkatsishvili limited merely to the aluminium assets and/or RusAl; and

ii) because of his knowledge of such Bilateral JVA, Mr. Abramovich was an express, resulting or constructive trustee of such assets, and accordingly obliged to account to or compensate Mr. Berezovsky as a beneficiary of such alleged trust;

would not only seriously disrupt the fair and efficient conduct of the trial in the Abramovich Action, but would also be unjust, in that it would be unduly prejudicial to Mr. Abramovich and the Chancery Defendants. Nor do we consider that justice to Mr. Berezovsky requires the court to permit this amendment.

21. Our reasons may be summarised as follows:

i) The proposed amendment to Mr. Berezovsky's case, which, in effect the Response seeks to introduce, as it were, by a side door, comes at a staggeringly late stage in proceedings that have already been going on for several years. As a reading of the judgments of Sir Anthony Colman and the Court of Appeal on the strike-out application demonstrates, Mr. Berezovsky has significantly altered the formulation of his claim against Mr. Abramovich, or shifted its focus, on several previous occasions.

ii) In *Worldwide Corporation v GPT Ltd* [1998] EWCA Civ 1894 (reviewed with other similar authorities by Gloster J in her recent judgment on Mr. Abramovich's application to amend in *Berezovsky v Abramovich* [2011] EWHC 1143 (Comm) at paragraph 34-36), the Court of Appeal (Bingham CJ, Peter Gibson and Waller LJJ) said (at page 10):

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.
>
> We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it."

iii) We do not consider that a serious injustice would be caused to Mr. Berezovsky if he were not allowed to raise the New Issues in the trial of the Abramovich Action in October 2011 as against Mr. Abramovich. Mr. Berezovsky already has a number of ways in which he formulates his claim against

Mr. Abramovich in relation to the aluminium assets and/or RusAl. These include the alleged 1995/1996 agreement (as set out in paragraphs C34A and C34B of the Amended Particulars of Claim); the fact that the payment for the aluminium assets allegedly came from Mr. Berezovsky's, Mr. Patarkatsishvili's and Mr. Abramovich's share of the profits derived from their interests in Sibneft (see Answer 27(c) of the Response); and the Dorchester Hotel Agreement concluded on or about 14 March 2000, whereby it is alleged that there was a trilateral agreement as a result of which Mr. Berezovsky and Mr. Patarkatsishvili shared a 25% interest of the aluminium assets (see paragraphs C62 and 63 of the Re-Amended Particulars of Claim). Notwithstanding our refusal to permit Mr. Berezovsky to rely (as against Mr. Abramovich) on any claims or remedies based on the Bilateral JVA, he will be entitled to allege that English law was the system of law that governed all the relevant aluminium acquisition and merger transactions; and he will also be entitled to allege (notwithstanding Mr. Abramovich's application to strike out the entirety of Response 32) that the legal result, or the appropriate remedy arising as a result, of his existing claims to an interest in the aluminium assets and/or RusAl (i.e. those not based on the Bilateral JVA but based on the trilateral agreement) was that Mr. Abramovich was a trustee or otherwise subject to a proprietary claim. Indeed, Mr. Sumption rightly accepted this (see page 43 (16-21) of the transcript of the hearing on 9 June 2011).

iv) We have not been taken to any material to show or to support the strength of Mr. Berezovsky's new claims based on the Bilateral JVA specifically in regard to the aluminium assets and/or RusAl <u>as against Mr. Abramovich</u>. The Badri proofs do not, in our view, do so. It is fair to say, however, that none of the defendants submitted that the new case was not an arguable one.

v) The proprietary claims based on the Bilateral JVA are all claims that Mr. Berezovsky will be running in the Chancery Actions as against the Chancery Defendants. He will remain entitled to do so.

vi) On the other hand, if the permitted amendment to Mr. Berezovsky's claim against Mr. Abramovich based on the alleged Bilateral JVA in relation to the aluminium assets and/or RusAl, were allowed to proceed in the Abramovich Action, both Mr. Abramovich and the Chancery Defendants would suffer substantial prejudice.

vii) First, so far as Mr. Abramovich is concerned, we accept Mr. Sumption's submission that, if the amendment to Mr. Berezovsky's case were allowed, the disclosure burden would be intolerable. We reject Mr. Rabinowitz's submission that Mr. Abramovich could (and should) have applied for inspection of the documents disclosed in the Chancery Actions relating to the alleged Bilateral JVA at an earlier stage. Until the Response was served in April 2011, there was absolutely no reason why Mr. Abramovich should have concerned himself with reviewing documents that related exclusively to the alleged Bilateral JVA. We also reject the submission made by Mr. Rabinowitz that it must always have been clear to Mr. Abramovich that the New Issues were issues that were going to fall to be decided in the Abramovich Action. Of course Mr. Abramovich would have appreciated that Mr. Berezovsky's

relationship with Mr. Patarkatsishvili would form part of the background to Mr. Berezovsky's claims in the Abramovich Action. But Mr. Abramovich would have had no reason to understand that allegations of a Bilateral JVA with Mr. Patarkatsishvili were going to constitute the foundation of a proprietary claim in trust as against him (whether express, resulting or constructive). Nor do we consider that Mr. Brindle ever conceded the point.

viii) Mr. Adkin informed us that, in the Chancery Actions, approximately 95,000 documents have been disclosed (as compared with 5,600 documents in the Abramovich Action). Over 70,000 of those were documents which Mr. Abramovich had not seen, because they had not been identified as relevant to the Overlap Issues. The likelihood is that the vast majority of these 70,000 documents are relevant to the issue as to whether there was an over-arching Bilateral JVA between Mr. Berezovsky and Mr. Patarkatsishvili in relation to all their commercial investments.

ix) We reject, too, Mr. Rabinowitz's suggestion that Mr. Abramovich (or, indeed, the Chancery Defendants) could adequately defend the new case sought to be raised in the Abramovich Action, that there was a Bilateral JVA specifically in relation to the aluminium assets and/or RusAl, simply by reference to the documents that have already been disclosed in relation to the RusAl Issues. The reality is that, up until the recent hearing, Mr. Berezovsky's case has always been that there was an over-arching Bilateral JVA with Mr. Patarkatsishvili relating to <u>all</u> their commercial investments. Indeed, his recently served witness statement refers to such an over-arching agreement, not to any Bilateral JVA limited specifically to the aluminium assets and/or RusAl. Given that the agreement is said to have been oral, the principal way in which such an agreement could be challenged by Mr. Abramovich and the Chancery Defendants is by a review of all the relevant transactions in which Mr. Berezovsky and Mr. Patarkatsishvili were involved, and the associated documentation. Indeed, that is precisely what will be involved in the Chancery Actions. It is wholly unreal to expect that Mr. Abramovich, or, indeed, the Chancery Defendants, could be in a position to do that by October 2011. Moreover, the length of time that would have to be added to the joint trial timetable would be very substantial indeed. It would effectively involve hearing the Abramovich Action and the Chancery Actions together.

x) If that were to occur, further consideration would have to be given to the definition of the Overlap Issues. Either they would have to be expanded (effectively to include many of the principal issues in the Chancery Actions), or the Chancery Defendants would run the risk of an adverse finding which, although not technically binding, might have serious repercussions for their respective positions in the Chancery Actions. Realistically, they would have to engage in the litigation of such issues at the joint trial, so as to seek to avoid inappropriate evidential findings, or to ensure that the appropriate evidence was on the transcripts.

xi) The only realistic alternative, if Mr. Berezovsky were to be allowed to raise this late claim against Mr. Abramovich, would be to adjourn resolution of the RusAl Issues as against Mr. Abramovich and the Chancery Defendants until after the trial of the Chancery Actions, or possibly <u>to</u> the trial of the Chancery

Actions. Even Mr. Berezovsky does not suggest that this course would be an attractive one. We see no reason why it should be adopted. All the parties are geared up for the determination of both the Sibneft claim and the RusAl Issues in October 2011 at the joint trial. Substantial investment on all sides will no doubt have been made in the expectation that the matters would be resolved at that trial. There is no reason why Mr. Abramovich or the Chancery Defendants should have to suffer the uncertainty and anxiety caused by yet further delay in the determination of the RusAl Issues, simply because Mr. Berezovsky seeks to add to or alter his case once again.

xii) Finally, Mr. Berezovsky's proposed amendment seeking, in effect, to import into the Abramovich Action many of the principal issues which are centre stage in the Chancery Actions, completely undermines the careful case management structures put in place pursuant to the August 2010 Order. We are in effect being invited to tear up that order and start again. In our judgment, to do so would make a mockery of the court process, and, in particular, of the effective management of these types of high-value, heavy cases which the Commercial Court and the Chancery Division try to achieve. Wider considerations relating to the administration of justice and the consequences so far as other court users are concerned are also engaged.

xiii) In the absence of any real or substantial prejudice to Mr. Berezovsky, and taking into account all the above factors, we do not consider that it would be fair or in the interests of justice to allow him to pursue these new claims against Mr. Abramovich at this late stage. Even if there were any prejudice to Mr. Berezovsky in not being able to pursue this additional claim against Mr. Abramovich, that is something that, in our judgment, he should have to bear, rather than any prejudice should be caused to the other parties. The timing of the attempted introduction of the new case is his responsibility.

22. Accordingly, in general terms Gloster J, with the full agreement of Mann J, accedes to Mr. Abramovich's strike-out application, but the precise terms of the order will require further discussion with counsel. This is because, necessarily, her order will not preclude evidence relating to Mr. Berezovsky's commercial relationship with Mr. Patarkatsishvili being adduced at trial, as was always envisaged. What we are excluding, as is clear from this judgment, is any reliance on an alleged Bilateral JVA with Mr. Patarkatsishvili (whether over-arching or limited to the aluminium assets and/or RusAl) as grounding a cause of action against Mr. Abramovich.

23. The extent to which, or the detail in which, such evidence will be permitted to be adduced at the joint trial will be a matter for determination at that stage by Gloster J, as trial judge.

24. Likewise, as we mentioned above, Mr. Berezovsky will be able to assert trust or proprietary claims or remedies as against Mr. Abramovich, flowing from the existing pleaded claims in relation to the aluminium assets and/or RusAl. It may well be that these should be more clearly pleaded, but that is a matter for further argument consequential on this judgment.