Neutral Citation Number: [2015] EWHC 545 (QB)

Case No: HQ12D04716

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 5th March 2015

Before:

MR JUSTICE WARBY

- -

Between:

VLADIMIR SLOUTSKER **Claimant**

- and -

OLGA ROMANOVA **Defendant**

- -

Adrienne Page QC (instructed by **Hamlins LLP**) for the **Claimant**
The Defendant, a litigant in person, did not attend

- -

Hearing date: 27 February 2015

- -

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.

.....

MR JUSTICE WARBY

Mr Justice Warby:

The applications

1. In this action the claimant sues for libel in respect of the publication in this jurisdiction of allegations of fabricating evidence, conspiracy to murder, and the bribery and corruption of the prosecutor and judges in criminal proceedings. The allegations complained of concern the case of Alexei Kozlov, a former business associate of the claimant. The defendant is a journalist, and the wife of Alexei Kozlov. Like the claimant, the defendant is a Russian citizen. She is resident in Moscow. So the claimant had to obtain the court's permission to serve proceedings on her. In December 2012, he did. Since then, steps have been taken to serve the proceedings on the defendant in Moscow, but the validity of those steps is disputed.

2. The defendant now applies for:-

    i) a declaration that this court has no jurisdiction to try the claim brought against her, alternatively, that it will not exercise any jurisdiction which it may have;

    ii) an order setting aside the grant of permission to serve the proceedings on the defendant out of the jurisdiction;

    iii) a declaration that (in any event) the claim form and particulars of claim have not been validly served; and/or

    iv) in consequence of (i) and/or (ii) above, an order that the claim form and particulars of claim be set aside.

3. The claimant cross-applies for:-

    i) a declaration that valid service of the claim form has been effected in accordance with Russian law; or, if service has not been so effected;

    ii) an order under CPR 6.15(2) retrospectively validating as good service the steps already taken to bring the claim to the attention of the defendant; or

    iii) permission under r 6.15(1) to serve the proceedings on the defendant at the address of her former solicitors, given as her address for service in a notice of change dated 12 January 2015, and an extension of time for service of the claim form to allow this.

4. The defendant's case has been set out in a witness statement she made on 5 September 2014 in support of her application, and a letter dated 13 January 2015 from iLaw Legal Services Limited ("iLaw"), solicitors who acted for her until that date. She is now unrepresented. She has not attended to present her application or to resist the claimant's applications. She remains in Moscow. The claimant is represented by Hamlins LLP and Adrienne Page QC, and has filed a substantial body of evidence.

5. The first question that arose was whether the hearing should proceed in the defendant's absence. I decided that it should, for reasons I shall explain after setting out the key stages in the litigation history. For reasons that will become clear, this

summary will omit some facts that are dealt with only in the evidence served by the claimant in February 2015.

A short history of the proceedings

6. The claimant is a businessman. He is a Russian citizen, and was a Senator in the Senate of the Russian Federation from 2002 to 2010. In April 2011 he emigrated from Russia to Israel where he founded, with others, the Israeli Jewish Congress ("IJC"), of which he is the President. He is a former Chairman of the Russian Jewish Congress, and former Vice-Chairman of the European Jewish Congress. The defendant writes for the Russian newspaper Novaya Gazeta, but also contributes to other publications.

7. The claimant complains that the defendant libelled him in four publications: a blog post written by her on the website of the Moscow-based radio station Echo Moscow ("the Blogpost"), two articles quoting her that appeared on the website of the Russian online newspaper gazeta.ru ("the Second and Third Articles"), and a programme broadcast on Radio Liberty ("the Programme"). The Blogpost and the Articles all first appeared on 15 November 2011. The Programme was first broadcast on 15 March 2012. The Blogpost, the Articles, and a transcript of the Programme are all said to have remained and to remain today available online. The claimant complains of republication on other websites and in print of the defamatory sting of the Blogpost and the Articles. All these publications were in the Russian language, though the Second and Third Articles were also published on the English language version of gazeta.ru.

8. The Particulars of Claim allege that these publications bore the following defamatory meanings:

   i) The Blogpost: "that the Claimant had put a contract out for the murder of Alexei Kozlov, which was to be carried out whilst Mr Kozlov was being transferred to prison". This defamatory sting is said to have been republished on three Russian websites, newsru.com, og.ru, and NR2.ru on 15 and 16 November 2011, and on a fourth Russian website, kommersant.ru, and its print version on 1 December 2011.

   ii) The Second Article: "that the Claimant had ordered the fabrication of evidence in the criminal prosecution of Alexei Kozlov and had put a contract out for the murder of Mr Kozlov, which was to be carried out whilst Mr Kozlov was being transferred to prison". This defamatory sting is said to have been foreseeably republished on newsru.com, og.ru and NR2.ru on 15 and 16 November 2011.

   iii) The Third Article: "that the Claimant had threatened to kill Alexei Kozlov and had put a contract out for his murder, which was to be carried out whilst Mr Kozlov was being transferred to prison".

   iv) The Programme: "that the Claimant had by means of bribes corrupted the head of the Presnensky Court, Evgeny Mikhailovich Naidenov, the public prosecutor and Judge hearing the appeal in Alexei Kozlov's case, Judge Vasyuchenko, and had issued instructions to them that Mr Kozlov's sentence of imprisonment was to be increased at his appeal hearing (whereas otherwise

> he would have been released) and was thereby guilty of an horrific perversion of the course of justice."

9. A pre-action protocol letter was written some three weeks after the fourth publication, on 13 April 2012. The defendant instructed iLaw who replied on 4 May 2012, making clear that they had no instructions to accept service. The claim form was issued on 9 November 2012. On 11 November an application was issued for permission to serve the proceedings outside the jurisdiction. It was supported by a witness statement of Mr Dawkins of the claimant's then solicitors, PSB Law LLP. The address for service given in the application was one in Zattonaya Street, Moscow.

10. On 12 December 2012 Master Yoxall granted the application, giving permission to serve the defendant at the Zattonaya Street address "or elsewhere in the Russian Federation." His order gave the defendant 21 days after service in which to admit the claim, or to file and serve a defence, or to file and serve an acknowledgment of service, in which case she would have a further 14 days to file and serve a defence.

11. On 11 January 2013 the claimant's solicitors wrote to iLaw, enclosing the Master's order and the application documents, and asking if they had instructions to accept service on behalf of the defendant. They were informed by letter dated a month later that iLaw had no such instructions, and that they expected to be instructed to challenge the jurisdiction "once you have served the English proceedings in Russia".

12. On 14 February 2013 the claim form, particulars of claim, and response pack were filed, with translations, at the Foreign Process Section of the Royal Courts of Justice. On 6 March 2013 the Senior Master made a formal written request to the Ministry of Justice of the Russian Federation pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965, Cmnd 3986 (1969) ("the Hague Service Convention"), for "prompt service" of those documents on the defendant. Whatever else may be said about service, it certainly was not prompt.

13. On 8 May 2013 the claimant's solicitor made a witness statement in support of an application to extend time for service until 14 February 2015. She explained that the Foreign Process Section had confirmed that the documents had been sent to the Russian Federation but had explained "that it could take up to 2 years for service to be effected there." The date chosen for the extension was therefore 2 years from the date on which the documents were first filed with the Foreign Process Section. The order extending time until 14 February 2015 was granted by Master Fontaine on 8 May 2013.

14. The defendant's witness statement records that the claim form and particulars of claim, in English and Russian, were received by her husband Alexei Kozlov, by recorded delivery at their address in Novospassky, Moscow, on 10 July 2014, having been sent by a Miss Krivosheeva, a private individual unknown to her. She asserts that this does not amount to valid service under Russian law and therefore does not amount to valid service under the Hague Service Convention. She states that the method of service in Russia under the Hague Service Convention is by summons to court, and that she was not summoned.

15. On 24 July 2014 an acknowledgment of service was filed by iLaw on behalf of the defendant indicating an intention to contest the court's jurisdiction. iLaw made clear in letters to the court and the claimant's solicitors that the acknowledgment had been filed without prejudice to the defendant's position that service on her had not been validly effected, and to her right to challenge the English court's jurisdiction. An extension of time for doing so having been agreed, iLaw filed the defendant's application disputing jurisdiction, and her witness statement in support, on 5 September 2014. A hearing date of 21 January 2015 was fixed.

16. On 8 January 2015, the claimant changed solicitors, instructing Hamlins, as a result of a breakdown in his relationship with his previous solicitors. On 13 January 2015 the defendant parted company with iLaw. On that date, at the same time as filing notice of change, iLaw wrote to the court at the defendant's request, stating that she could no longer afford the cost of representation, and setting out her position in respect of her application. The defendant's address for service given in the notice of change was iLaw's office address. On 14 January Hamlins, recently instructed as they were, sought an adjournment and, subsequently, asked for permission to adduce expert evidence. At a hearing on 21 January 2015 I granted an adjournment of the defendant's application, at the claimant's expense, in circumstances set out in my judgment of that date, [2015] EWHC 81 (QB). As that judgment records, the defendant did not appear and was unrepresented at the hearing. I gave directions adjourning the hearing to 27 February and setting a timetable for the service of evidence.

17. The order of 21 January 2015 as drawn up included the following paragraphs:

> "2. Any evidence upon which the claimant wishes to rely in opposition to the Application is to be served upon the Defendant as soon as possible and in any event by no later than 4pm on 13 February 2015.
>
> 3. The Defendant's evidence in reply, if any, is to be served upon the Claimant by no later than 4pm on 20 February.
>
> …
>
> 5. Upon the Application, no evidence may be relied upon by either party unless served in compliance with this order unless the court gives permission otherwise."

18. I also directed that any application for permission to adduce expert evidence was to be filed and served by 26 January 2015, with the defendant to have until 4pm on 2 February to file representations in opposition, and the application to be dealt with on paper, without a hearing. After the 21 January hearing, my written judgment was provided to the claimant's solicitors, who sent a copy to the defendant. The order was drawn up by the claimant's solicitors and provided to me for approval. It was sealed by the court on 23 January 2015.

19. On 26 January 2015 the claimant applied for (i) permission to adduce expert evidence at this hearing and (ii) an extension of time for service of the claim form until after the determination of the defendant's application. The defendant made no representations.

On 4 February 2015 I granted each party permission to adduce expert evidence as to the procedural rules for valid service in the Russian Federation and whether those rules have been complied with in this case, whilst limiting the cost that could be recovered in respect of any expert evidence. The expert evidence, if any, was to be served in compliance with the timetable set out in my 21 January order. I extended time for service of the claim form as sought, in order to preserve the position pending the hearing.

20. On Friday 13 February 2015 the claimant filed with the court evidence consisting of five factual witness statements, and an expert's report. This evidence was not served on the defendant until about midday on Monday 16 February 2015, when it was delivered to the offices of iLaw. On 17 February the claimant's cross-application was issued. On Thursday 19 February 2015 the claimant served a copy of my order of 21 January on the defendant. On Friday 20 February the claimant issued an application to vary my orders of 21 January and 4 February so as to permit reliance on the evidence which had been served late, on 16 February, and for relief from sanctions. The application notice also sought, so far as necessary, relief from sanctions for failing to effect timely service on the defendant of my order of 21 January.

21. The defendant has filed no further evidence and, apart from a brief message of 19 January objecting to an adjournment and asserting that the claim should not be heard in England, she has made no submissions since iLaw's letter to the court of 13 January 2015. She has not responded to any of the claimant's solicitors' communications with her. In short, there has been silence from her since 19 January.

Proceeding in the defendant's absence

22. Where a party fails to appear at the hearing of an application the court may proceed in their absence: CPR 23.11. This is a power that must be exercised in accordance with the overriding objective. Ms Page properly referred me to authority making it clear that the court should be very careful before concluding that it is appropriate to proceed in the absence of a litigant in person who is seeking for the first time to adjourn a hearing: *Fox v Graham Group Ltd* (26 July 2001) (Neuberger J); *SmithKline Beecham Ltd v GSKline Ltd* [2011] EWHC 169 (Ch) (Arnold J), [6]. That is not the situation here, however. The defendant has not sought an adjournment. She opposed the claimant's application for an adjournment by email of 19 January 2015. Since then, she has said nothing.

23. Where a litigant fails to appear without giving a reason it is necessary to consider first whether they have had proper notice of the hearing date and the matters, including the evidence, to be considered at the hearing. If satisfied that such notice has been given, the court must examine the available evidence as to the reasons why the litigant has not appeared, to see if this provides a ground for adjourning the hearing. The evidence as to notice was contained in the third and fourth witness statements of the claimant's solicitor, Mr Hutchings. This satisfied me that the defendant had ample notice that her application was adjourned to be heard on 27 February 2015. Such notice was first given by the claimant's solicitors by means of their provision of a copy of my judgment of 21 January. That was not only emailed on that date, but also sent by post on 22 January to iLaw's address and to the defendant herself in Moscow. Notice of the new hearing date was also given by the service of the formal order of 21 January

2015, which also set out the evidence timetable I laid down. Although the claimant's solicitors did not serve this order until 19 February, I find that it was served by the court by posting it first class on 23 January 2015 (see the next section of this judgment).

24. Mr Hutchings' statements also establish that the claimant's evidence in response to the defendant's application was served on the defendant at iLaw's address on 16 February, and that the subsequent applications and evidence and the hearing bundle were served in a timely manner at the same address, as were the claimant's skeleton argument and chronology. An email from iLaw of Thursday 26 February 2015 confirmed that the claimants' solicitors' emails of that week had been forwarded to the defendant.

25. As to the reason for the defendant's non-attendance, I did not consider that this had anything to do with any failure in the process of serving documents. The defendant has not made any complaint about service on her. I concluded that the probability is that she had never intended to appear in person, but intended all along to rely solely on written materials in the form of her witness statement and iLaw's letter to the court of 13 January 2015. She is resident in Moscow. She does not wish to be served with English proceedings. When iLaw ceased to represent her, she instructed them to write to the court setting out her position. In doing so they asked for a copy of the letter to be placed on the court file "for the Judge to read at the start of the hearing on 21 January." Their letter concluded with an indication that the Defendant did not intend to provide further evidence in support of her case of justification, as sought by the claimant; and a request that the court consider the evidence she had already served and grant her application. The defendant did not appear at the hearing on 21 January or protest at having wasted money or effort in arranging to attend. She has not given any indication since that she would attend the adjourned hearing. I was satisfied, therefore, that it was appropriate to proceed in the defendant's absence.

Issues

26. The applications give rise to the following issues:

    i) Should the claimant be granted permission to rely on the evidence served late, and relief from sanctions?

    ii) Should the grant of permission to serve proceedings outside the jurisdiction be set aside (a) for material non-disclosure and/or (b) on the ground that England and Wales is not the proper forum for the claim?

    iii) Should the extension of time for service of the claim form granted by the Master in May 2013 be set aside for material non-disclosure?

    iv) Have the proceedings been validly served on the defendant?

    v) If not, should the court authorise an alternative method and/or place of service by (a) ordering that steps already taken are good service, or (b) permitting service at an alternative place (and extending time for service to allow this)?

Permission to rely on late evidence/relief from sanctions

27. I can dispose shortly of the issue as to service of my order of 21 January 2015. There was undoubtedly an oversight by the claimant's solicitors. On the morning of 23 January they were notified by email from my clerk that the order had been taken to the associate for sealing and would be ready for collection that morning. They failed to collect it until much later, and Mr Hutchings' third statement explains and apologises for the fact that he did not serve the order on the defendant until 19 February 2015 (unsealed version) and 23 February 2015 (sealed version). However, the practical effect of CPR 40.4 is that the court serves orders unless agreed otherwise. This is done by first class post. A fourth statement of Mr Hutchings explains that, in response to enquiries made after he made his third statement, a Queen's Bench associate informed him that the court had served the order by posting it first class on 23 January 2015. The order was not received from the court by Mr Hutchings' firm, but the defendant has not disputed the assertion that it was sent to (and by implication received at) iLaw's address. That assertion was made in an email to iLaw of Monday 23 February 2015.

28. The position is different, however, when it comes to service of the claimant's evidence. By paragraph 2 of my 21 January order all that evidence should have been served by 4pm on Friday 13 February. It was somewhat faintly suggested by Ms Page that the expert evidence stood in a different category from the evidence of fact, because my order of 4 February granting permission to adduce expert evidence came later, and did not itself contain any debarring order such as that contained in paragraph 5 of my 21 January order. I reject that submission. Paragraph 2 of the 21 January order governed "any evidence" the claimant wished to rely on, and paragraph 5 applied to all such evidence. The mere fact that the claimant had not then obtained permission to adduce expert evidence is nothing to the point. The terms of paragraph 5 of the 21 January order therefore mean that the claimant needs permission to rely on any of the evidence served on 16 February 2015.

29. What the claimant's application notice seeks is an order varying the orders of 21 January and 4 February, and relief from sanctions. The former is inappropriate, but the latter is appropriate. Paragraph 5 of my 21 January order was in structure identical to the terms of CPR 32.10. That rule provides that if a party fails to serve a witness statement within the time specified by the court, the witness may not be called to give oral evidence without the court's permission. It is now clearly established that CPR 32.10 imposes a sanction, so that an application for permission is an application for relief from sanctions, which must be approached in accordance with CPR 3.9: *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 at [5] and [52].

30. CPR 3.9 provides that:

> "On an application for relief from any sanction imposed for a failure to comply with any … court order the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders."

31. In *Denton* at [24] Lord Dyson MR and Vos LJ, referring to these specified matters as "factors (a) and (b)", explained the three-stage approach which the court should take:

> "The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]".

32. The majority judgment cautioned at [27] against bringing context or circumstances that fall for consideration at the third stage into the first stage assessment of whether a breach is serious or significant. At [35] it emphasised that factor (a) "makes clear that the court must consider the effect of the breach in every case", and that if it has prevented the court or the parties from conducting the litigation efficiently and at proportionate cost that will be a factor in favour of refusing relief. Factor (b) emphasises that the old lax culture of non-compliance is no longer tolerated.

33. Ms Page submitted that the failure here was not serious or significant. The deadline was towards the end of Friday 13th, so the evidence was served only a matter of 3 or 4 working hours late. It was served in hard copy and it is likely, given the defendant's location, that nothing would or could have been done to convey the evidence to her before Monday in any event. The defendant had in all probability decided before that time on her evident policy of non-engagement. The failure has neither imperilled the hearing date or interfered with other cases competing for the court's attention. In my judgment, however, a failure to serve evidence for a substantial interim application by the deadline prescribed by an order with a debarring provision, albeit a qualified one, is properly characterised as a serious breach. The degree of seriousness, and the factors urged on the court by Ms Page, are circumstances which fall more appropriately for consideration at the third stage.

34. The evidence as to why the breach occurred is straightforward, but unimpressive. Mr Hutchings explains that "The failure to serve the evidence at or by 4pm on Friday 13 February was down to the fact that finalising the evidence to lodge with the court took up most of the day and our attention was then required on urgent cases including a privacy action going to trial on 2 March 2015 and preparation and service on 13 February of Particulars of Claim in another action." In short, a combination of late finalisation, mistakenly prioritising the filing of papers with the court over service on the defendant, and oversight due to other work. On this evidence Ms Page is entitled to say, as she does, that there is no question of the failure involving any deliberate flouting of the order or the rules. But she is right to accept that it is no excuse that the solicitors had too much work on. No good reason is provided for the breach.

35. One important point that was clarified by the judgment in *Denton* at [31]-[38] is that a serious default for which there is no good reason will not always lead to the refusal of relief from sanctions. Consideration of "all the circumstances of the case, so as to enable it to deal justly with the application", may lead the court to grant relief. Compliance is not an end in itself. A more nuanced approach is required. I decided to

grant the claimant relief from sanctions, and permission to rely on the evidence served on 16 February, for these reasons. First, as the court observed in *Denton* at [26], there are degrees of seriousness. This breach was far from being at the extreme end of the scale. Secondly, it was not deliberate. Indeed, the evidence was available for service and if it came down to a choice between serving and filing it, the claimant's solicitors made the wrong choice. Thirdly, consideration of factor (a) tells in favour of granting relief. Apart from necessitating the application for relief – the costs of which will inevitably be borne by the claimant - the breach has not had any or any serious effects on the efficient progress or the cost of this litigation, or any other litigation. Ms Page's observation that the delay in service is very slight in terms of working hours is a fair one, as is her submission that the likelihood is that the papers would not have been sent off on the Friday in any event.

36. I bear in mind also that the timetable I set was a relatively generous one, so that service on Monday 16 February still left the defendant more than 4 working days in which to prepare evidence in response if she chose, and 8 clear working days before the hearing in which to consider the evidence. Further, the defendant has decided not to file any evidence in response. In practice, given the nature of the claimant's factual evidence, to which I shall come, there is little that she could have said by way of evidence in reply. As to the expert evidence, she was aware from my order of 4 February 2015 that she had an opportunity to obtain some of her own. I infer from her silence that she must have decided not to. I bear in mind that consideration of factor (b) would suggest that relief should be refused: the timetable for evidence was set in conjunction with an adjournment sought by the claimant, who was not ready to proceed on the original hearing date. Overall, however, the facts that the breach was not of a high degree of seriousness, was innocent not deliberate, and did not have any significant adverse effects on the efficiency or cost of litigation are enough to outweigh the factor (b) considerations, and to lead to the conclusion that it is just to grant relief.

Jurisdiction

37. By CPR 6.36 permission to serve proceedings outside the jurisdiction may be granted if, and only if, the case falls within one of the "gateways" specified in PD6B 3.1. The claimant must show a good arguable case that all aspects of his claim fall within at least one such gateway. The claimant must also show that the claim has a reasonable prospect of success: r 6.37(1)(b). CPR 6.37(3) provides that the court will not grant permission unless it is satisfied that England and Wales is "the proper place in which to bring the claim."

38. Here, the gateways relied on were and are PD6B 3.1(2), that a claim is made for an injunction ordering the defendant to refrain from doing an act within the jurisdiction, and 3.1(9), that a claim is made in tort where damage was sustained within the jurisdiction. The defendant does not take issue with the propositions that those gateways apply, nor does she suggest that the claim has no reasonable prospect of success (though she does assert the truth of what she alleged in the publications complained of). The defendant's position is that the proper place to bring the claim is the Russian Federation and not England and Wales. She also asserts that there was a failure to disclose material facts on the application to the Master. For those two reasons she applies pursuant to CPR 11 for the declaratory and other relief identified

above, including an order setting aside the claim form and (if it has been served) its service upon her.

39. Section 9 of the Defamation Act 2013 provides that a court does not have jurisdiction to hear and determine an action for defamation against a person who is not domiciled in the UK, another Member State, or a Lugano Convention country unless it is satisfied that "of all the places in which the statement has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement". But by s 16(7) of the 2013 Act, s 9 does not apply to any action begun before its commencement on 1 January 2014. The general principles governing the defendant's application to set aside service on the grounds that Russian Federation is a more appropriate forum are those set out in *The Spiliada* [1987] AC 460. They may be summarised in this way:

    i) It is for the claimant to persuade the court that England is clearly the appropriate forum for the trial of the action.

    ii) The appropriate forum is the one in which the case may most suitably be tried for the interests of all the parties and the ends of justice.

    iii) The court will first consider what is the "natural forum", the one with which the action has the most real and substantial connection.

    iv) The court will normally treat as irrelevant any procedural advantages of England such as limitation.

    v) If the court concludes that there is another forum as suitable, or more suitable than England, it may consider factors going beyond those which connect the case with England or a foreign jurisdiction, such as whether the claimant will obtain justice in the foreign jurisdiction.

40. It has long been held that the "natural forum" for an action in tort is, on the face of it, the jurisdiction in which the tort took place: *The Albaforth* [1984] 2 Lloyds Rep 91. In some jurisdictions, notably the USA, there is a "single publication rule" by which a clamant defamed in a mass publication has only one cause of action, regardless of the number of jurisdictions in which the material was published. Under that rule, the single tort will normally be considered to have taken place in the home jurisdiction of the publisher, as it is there that the majority of the publication will usually have taken place. But this rule has been rejected in England. In *Berezovsky v Michaels* [2000] 1 WLR 1004 two Russian claimants sued US publishers in England in respect of publication in this jurisdiction of 1,900 copies of Forbes magazine. The House of Lords affirmed the decision of the Court of Appeal, that the action should be allowed to proceed. It rejected a submission that English law should adopt a "global publication" rule, on the lines of the "single publication rule". The House held that according to long-established common law principles each publication is a separate tort. Thus, where a libel is internationally disseminated, its publication in England involves tortious conduct separate from any tort involved in its publication abroad. In applying *The Spiliada* principles to such a case the court should have regard to the principle in *The Albaforth*, that the courts of the place where a tort was committed are, on the face of it, the natural forum for a claim in respect of that tort.

41. An important limiting principle at common law is that a claimant must demonstrate that the publication in this jurisdiction amounts to a "real and substantial tort": see *Berezovsky* at 1012E (Lord Steyn) and *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 95, [2005] QB 946, [50]-[51] where Lord Phillips MR cited with approval this summary of the position by Roch LJ in *Chadha v Dow Jones & Co Inc* [1999] EMLR 724, 732:

> "In my judgment once it is established that there has been an 'English tort' that is to say that there has been a significant publication of prima facie defamatory matter concerning the plaintiff within the jurisdiction, the English courts have jurisdiction with regard to that English tort. Where the perpetrator of the tort is not within the jurisdiction but is abroad, then leave to serve process abroad under Order 11 is required and the fundamental principle identified by the House of Lords in [*The Spiliada*] applies. If there is a substantial complaint with respect to the English tort, having regard to the scale of the publication within the jurisdiction and the extent to which the plaintiff has connections with and a reputation to protect in this county as against the inconvenience to the defendant of being brought her to answer for his alleged wrongdoing then service of the writ abroad is to be ordered."

42. When the court is considering whether the case discloses a real and substantial tort in this jurisdiction it is in principle irrelevant that there may have been more substantial publication in one or more other jurisdictions; English law permits a claimant to claim whatever is appropriate compensation and vindication in respect of publication here, provided that publication itself is sufficiently meaningful to satisfy the "real and substantial tort" requirement: see *Mardas v New York Times Co* [2008] EWHC 3135 (QB), [2009] EMLR 8, [39]. Publication abroad is not entirely irrelevant, however. The more tenuous a claimant's connection with this jurisdiction and the more substantial any publication abroad, the weaker the presumption in favour of England and Wales being the natural forum for the claim: *King v Lewis* [2004] EWCA Civ 1329, [2005] EMLR 4, [27] (Lord Woolf MR). Action taken in a foreign jurisdiction may also be of relevance. In *Karpov v Browder* [2013] EWHC 3071 (QB), [2014] EMLR 8 Simon J considered the fact that the claimant had attempted unsuccessfully to bring both criminal and civil proceedings in Russia suggested that this was the natural forum for any claim in respect of the allegations of which he complained.

43. As the law stands, the same principles apply to internet publication as apply to hard copy publication, except that the court's discretion in an internet context "will tend to be more open-textured than otherwise": *King v Lewis*, [31]. It is clear from the context in which Lord Woolf made that remark that he intended it to be taken as an indication that the Court should not be shy of allowing foreigners who publish via the internet to be sued in this jurisdiction, given that such publishers will have chosen to disseminate their information via a global medium. This emerges not least, but not only, from Lord Woolf's citation at [29] of the conclusion of the High Court of Australia in *Gutnick v Dow Jones* [2002] HCA 56, [192] that:

> "If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of

> liability in those jurisdictions in which the publication is not lawful and inflicts damage."

44. I note in passing that in *King* the Court of Appeal rejected "out of hand" a submission that the court should take into account whether or not the defendant had "targeted" this jurisdiction, concluding that this was too subjective and nebulous a criterion, liable to manipulation and "much more likely to diminish than enhance the interests of justice": see [34]. No point is taken on targeting in the present case however.

45. The principles identified above are applicable as much to individual publishers as they are to corporations or other business entities. That said, it does seem to me that in either case the court should consider any evidence of the parties' means as potentially bearing on the choice of appropriate jurisdiction. Evidence as to the parties' means, and any disparity of resources, will also be relevant of course to the exercise of the court's case management and costs management powers, if it concludes that the claim should be allowed to proceed in this jurisdiction. By evidence I mean of course more than mere assertion.

46. The witness statement of Mr Dawkins, submitted by the claimant to the Master in support of the application for permission, identifies the nature of the claim, explaining that the claimant's position is that the allegations complained of are entirely false. It identifies the gateways relied on, and proceeds to deal with the nature and extent of the damage alleged. It asserts that the claimant is well-known in this jurisdiction and that there has been substantial publication here. Both those assertions are expanded upon, giving detail. The extent of publication and republication here is covered in extensive detail, over 28 paragraphs. There then follows a section headed "The Defendant's reported position as to the legitimacy of the judicial system in Russia."

47. This section of Mr Dawkins' statement summarises the criminal proceedings against Alexei Kozlov as follows. In 2009 he was convicted and sentenced to 8 years' imprisonment, later reduced to 7 and then 5 years, for fraud. In 2011 the Supreme Court of the Russian Federation quashed the conviction and ordered a retrial. On 14 March 2012 the Presnensky District Court found Mr Kozlov guilty and sentenced him to 5 years imprisonment. The Programme was broadcast that same day. Mr Dawkins cites passages of the interview in which the defendant made clear her view that the judicial system was corrupt and illegitimate.

48. One of the defendant's statements was: "And hundreds or perhaps thousands of people have come away convinced that there is no court system in Russia, that we have a Constitution that is totally inoperative, and that we have a completely corrupt office of the public prosecutor, and, among other things, that there are completely corrupt people out there, including presiding judges and courts". The defendant also stated, according to the translation, that "It is with deep regret that I cannot recognise the legitimacy of the judicial system at all in Russia." It is the claimant's case that the interview accused him personally of involvement in this corruption, having bribed the head of the Presnensky court, the public prosecutor and Judge hearing his appeal. Mr Dawkins' statement says that the claimant is "concerned that were he to sue successfully in Russia, then the Defendant would allege that he was only successful because of corruption in the Russian courts."

Material non-disclosure

49. The criticism made by the defendant in her witness statement is that Mr Dawkins' statement failed to disclose to the court that in November 2011 (that is, shortly after the first three of the four publications complained of) the claimant had submitted a criminal complaint to the office of the Prosecutor General of Russia and the Russian Ministry of Internal Affairs, making allegations against the defendant of libel and false denunciation under the criminal code. She exhibits a media report of the complaint. The defendant's statement says that "to date, no action has been taken by the Russian authorities" but she makes the point that the claimant evidently considered it appropriate and worthwhile to seek vindication through criminal proceedings in Russia. She suggests that this would have been relevant to the court's decision on jurisdiction and ought therefore to have been disclosed. iLaw had written to the claimant's solicitors on 4 May 2012 referring to the duty of full and frank disclosure and identifying as one matter that should be disclosed "details of any actual or threatened proceedings in Russia or elsewhere concerning the postings/articles complained of".

50. The claimant's evidence confirms that he made a criminal complaint against the defendant, though it is said that this was in December 2011. His evidence is however that the Ministry of Internal Affairs decided, and on 26 January 2012 notified him, that it had decided not to initiate criminal proceedings. He exhibits copies of the relevant correspondence in Russian, with a summary of the sequence of events, prepared by his Russian and English lawyers. The claimant says he took the view at the time that the allegations were so serious, and unfounded, that they should be reported to the Public Prosecutor. But by the time the application for permission to serve proceedings outside the jurisdiction was made it had long been clear that the prosecutor would take no action, and he did not consider the fact that a complaint had been made and not taken up would have any bearing on the court's decision.

51. The relevant general principles are these:

    i) An applicant for permission to serve proceedings outside the jurisdiction is under the duty of full and frank disclosure which applies on all applications without notice.

    ii) The duty requires the applicant to make a full and fair disclosure of those facts which it is material for the court to know: *Brinks Mat v Elcombe* [1988] 1 WLR 1350, 1356 (1) and (2) (Ralph Gibson LJ). Put another way, disclosure should be made of "any matter, which, if the other party were represented, that party would wish the court to be aware of": *ABCI v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485, 489 (Waller J).

    iii) Non-disclosure of material facts on an application made without notice may lead to the setting aside of the order obtained, without examination of the merits. It is important to uphold the requirement of full and frank disclosure.

    iv) But the court has a discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the

question whether the non-disclosure was innocent is an important, though not decisive, consideration. See *Brinks Mat* at pp1357 (6) and (7) and 1358 (Balcombe LJ).

v) In the context of permission for service outside the jurisdiction the court has a discretion to set aside the order for service and require a fresh application, or to treat the claim form as validly served and deal with the non-disclosure by a costs order: *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 2 AC 495, [136] (Lord Collins).

52. Ms Page submits that in approaching the issue of full and frank disclosure on an application of this kind the court should bear in mind that it is unlike an application for a freezing order, or other interim injunction, the grant of which has an immediate and potentially severe impact on the defendant. But the court on such an application is being asked to bring a foreign defendant before the English court, exercising what is often called an exorbitant, meaning extraordinary or unusual, jurisdiction. I am not persuaded that the approach should be less strict in principle than it is in respect of other kinds of application.

53. It is submitted that the facts relating to the criminal complaint were not material facts. I would accept that the facts were immaterial to the approach which the claimant invited the court to take on his application. His case was not that he could not take action in Russia, or that the Russian judicial system would not reach a just result. His case was that he could not obtain vindication there because the defendant would simply denounce a judgment in his favour as a further illustration of the corrupt nature of the judicial system. That case depended on what the defendant had said in March 2012, which came some two months after the decision to take no action on the claimant's criminal complaint.

54. It is also true, as Ms Page submits, that the criminal complaint did not qualify, at the time of the claimant's application, as "actual or threatened proceedings in Russia", which iLaw had said should be disclosed. True, also, as Ms Page observes, the Master might have taken the view that the facts, as now explained by the claimant, tended to support his position. They demonstrate how seriously he took the matter, and rule out one means of obtaining vindication in Russia. But these considerations themselves suggest that the information was material in the sense explained in the *Banque Franco-Tunisienne* case. As a rule, it seems to me that the existence and status of a claim or complaint made in another jurisdiction is likely to be material on an application for permission to serve outside the jurisdiction. Here, I consider it very likely that the defendant would, if present, have wanted to rely on the complaint as an indication that the claimant himself saw Russia as an appropriate venue for a complaint over what she had said. The claimant would have had a ready answer, in the form of the defendant's own denunciations of the Russian judicial system, but that does not make the facts immaterial.

55. I accept, however, that the non-disclosure was innocent and, whilst I readily acknowledge the importance of upholding the requirement of full and frank disclosure, I cannot regard this omission as one that demands the immediate discharge of the order granting permission to serve outside the jurisdiction, without reference to the substantive merits of the jurisdiction issue. As Slade LJ observed in *Brinks Mat* at 1359C-D, "While in no way discounting the heavy duty of candour and care which

falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths". It is possible in my judgment to see clearly, before entering into the merits of the jurisdiction arguments as they now appear, that although the information about the criminal complaint was material in the sense that I have indicated above, it should not and would not have caused the Master to reach a different conclusion on the claimant's application.

56. The initial question for the Master was whether there appeared to be, at least arguably, a real and substantial tort in this jurisdiction. If so, his starting point would be that these courts are the natural forum for the claim in respect of that tort. The main factors of relevance to that initial question were the nature and extent of (i) the claimant's reputation here and (ii) publication here. The fact and extent of publication in Russia was of some relevance, as noted above; but it was not only self-evident, the details were before the Master. The key factor tending against regarding Russia as a reasonable alternative jurisdiction was whether proceedings there could vindicate the claimant. The first point on that score is that, as Ms Page submitted, it is far from clear that a claim in Russia could in principle serve to vindicate the claimant's reputation in the eyes of readers in this jurisdiction. But even if that is put to one side, the key – indeed the only - point advanced against regarding Russia as a suitable forum for this claim was the defendant's attitude to the Russian judicial system, as expressed in her interview of March 2012. The fact that the claimant had at an earlier stage sought to invoke the state's power to prosecute the defendant in no way undermined his case on that issue. For these reasons I exercise my discretion to leave the order of Master Yoxall in place despite the non-disclosure. It is of some relevance to note that although provided with the application documents as long ago as January 2013, the first mention of the non-disclosure by the defendant was in her witness statement of September 2014.

Is this the appropriate forum for the claim?

57. Both the authorities and experience suggest that whilst the relevant facts will sometimes be clear at an early stage this will not always be so. The claimant should normally be able to give adequate evidence of his reputation in this jurisdiction. Sometimes publication data will be clear, or agreed. In *Berezovsky* the scale of publication was agreed at 1,915 hard copies and 6,000 internet readers in this jurisdiction: see 1008B-D (Lord Steyn). In *Jameel* the court was able to proceed on the basis that the relevant words, which had been swiftly removed from the US defendant's website upon complaint, had been read by only five people. But there may, in particular in internet cases, be limitations on the information available at an early stage about the extent of publication, and genuine disputes about the inferences to be drawn from the evidence that is available. This case exemplifies the difficulty.

58. The court should be cautious about reaching firm conclusions on the facts about publication, where the evidence is contested. Although the court must not permit unjustified interference with freedom of speech by letting trivial claims proceed, it is the case, as Eady J observed in *Mardas* at [13], that care must be taken on applications of this kind not to deprive a litigant too readily of his right of access to the courts. When considering whether England and Wales is the natural forum the starting point is that "What matters is whether there has been a real and substantial tort within the jurisdiction (or, at this stage, arguably so)": ibid. [15].

59. As *Karpov v Browder* confirmed, a defamatory publication can in law amount to a real and substantial tort if it creates for a person a bad reputation where the person had none before. But this is not a case, as that was, of a claimant (a Moscow police officer) who was in practice unknown in this jurisdiction before the libel of which he complained. The claimant's evidence is that he has an international reputation which includes a substantial reputation and substantial connections in this jurisdiction.

    i) Mr Dawkins' statement explains that as a result of his political role as a senator for 8 years the claimant is very well known amongst the Russian community in this jurisdiction. That community is very substantial. The figures given by Mr Dawkins, drawn from documents provided by the Office of National Statistics, are that in 2011 there were 41,000 individuals who were born in Russia living in the UK, 22,000 of these in London. The total number of individuals born in countries where Russian is spoken who were living in the UK at that time is 248,000. One must bear in mind of course that the UK is a larger area than England and Wales, but these figures give a reliable guide to the numbers of people within this jurisdiction who may know of the claimant via his role in Russian politics or as readers of the Russian language media.

    ii) Mr Dawkins further states that the claimant's senior roles in Jewish organisations mean that he is also "very well known" by the Jewish community in this jurisdiction, and in London in particular. The claimant confirms these points whilst adding that his long support for Israel and his opposition to anti-semitism have given him a high profile, bringing him into contact with UK parliamentarians and organisations such as the British Jewish Leadership Council ("JLC", formerly the Board of Deputies of British Jews). He points to his role as a leader of the European Friends of Israel which has a membership of more than 1,500 parliamentarians across Europe, including a substantial number of British MEPs. He explains that he was named by the Jerusalem Post in June 2014 as one of the 50 most influential Jews in the world for that year. Simon Johnson, the Chief Executive of the JLC since October 2013, confirms that the claimant is known in the Jewish community as the President of the IJC, and that the JLC works regularly with the IJC, and co-operates with it on a range of issues. Mr Johnson met the claimant in that connection in May 2014 in Hendon, North West London.

    iii) The claimant states that he is well known internationally as a successful business man, mainly dealing in real estate development in Russia. He also relies on witness statements from three individuals. The Hon. Robert Kissin is a businessman, a former solicitor who has had a career in merchant banking and business, including as a main board director of Guinness Peat Group plc. He describes the claimant as "a long-standing business acquaintance" whom he has known since the early 1990s when Mr Kissin was living in London, and they did business as partners. He describes the claimant as visiting London frequently and meeting a large number of business contacts at this time. He speaks of the claimant visiting London periodically throughout the 1990s. Martin Todorov, a Bulgarian Russian Speaker who has lived in London since 2009, has known the claimant for 10 years, and meets him in London when he is there on business.

iv) The claimant was the owner of a house in the Boltons, London SW10, from 2000. It was envisaged that this might be his wife's primary residence, where she would live with their children, with him visiting often. However, they went through a highly publicised divorce involving a ruling by the Family Division of the High Court in September 2012, which was covered in the national press (Daily Mail, The Independent and Daily Telegraph).

v) The claimant enumerates his visits to London over recent years: 9 visits between December 2011 and November 2012, visits in July and November 2013, and seven visits in 2014. Some of these visits related to his divorce but others to his business, to attend Jewish events, and to investigate the possibility of moving his family here. The claimant states that it remains his intention in the future to move his family to London "and it is therefore very important to me to have a good reputation in this country."

60. The defendant has responded to the evidence of Mr Dawkins but not to the statements of the claimant and the supporting witnesses I have mentioned above. She disputes the prominence of the role of Senator in the Russian Parliament, and suggests that the claimant's roles in Jewish affairs have been prominent, to the extent that they have, outside this country and mainly after the dates of the publications complained of. She points to the fact that the IJC was founded on 20 March 2012, after the initial publication of the words complained of. Some of these points have some force, but they do not in my judgment negate the overall impact of the claimant's evidence, which is to show a real and substantial reputation in this jurisdiction at the time of first publication, which is likely to have grown since. It is right also to bear in mind that publication has continued to date, and that the claimant is seeking an injunction.

61. The facts of the claimant's case are less striking than those of *Berezovsky*, but do bear some comparison. Mr Berezovsky was a Russian politician and businessman. He had an apartment here, and a wife and children here. But he was not resident here himself. He had visited London on 22 occasions in 1994/95 and 9 times in 1996/97. The claimant's links are not as strong but he has at this stage what I assess as a persuasive case that he had and has a substantial and widespread reputation in this jurisdiction. Where the present case seems to me to be stronger than that of Mr Berezovsky is in the scale, or at least the arguable scale, of publication here. The evidence on this topic comes from enquiries made by the claimant's former solicitors in May and June 2012 which are described by Mr Dawkins, and from the defendant's statement, which is based on enquiries made by her and her solicitors in mid 2014. It is convenient to deal with each publication and republication in turn.

62. The Blogpost. Echo Moscow told Mr Dawkins' firm that there were 16,973 visits from this jurisdiction to its website in April 2012 of which 2,051 took place on 25 April and 6,444 between 23 and 29 April. The defendant has obtained from Echo Moscow figures for visits to her blog between November 2011 and January 2012. The total is 231,945. The figures produced by the defendant show, as one would expect, that the great majority of visits were at or shortly after the time of first publication, with over 226,000 in November and December. Applying to the total figure the percentage given by Echo Moscow of visits to the site emanating from Britain (0.64%) the defendant arrives at a figure of 1,484.

63. Republication of the sting of the Blogpost. Mr Dawkins estimates that newsru.com has 29,494 visitors per day from the UK. He arrives at this by using figures from Statshow.com for the total readership and Alexa.com for the percentage visiting from the UK. Using the same technique he arrives at not less than 24 per day for og.ru, and 49,148 per day for nR2.ru, from the UK. The website kommersant.ru provided the claimant's solicitors with monthly data for page views and estimates for unique page views of the site from the UK in April and May 2012. The page views in May 2012 were 238,000. The unique page views per month from the UK are estimated to be between 21,441 and 59,500 (the estimate is that 20-25% of page views are unique page views). The defendant has no data to offer for og.ru or nR2.ru. For the other two sites, the defendant's solicitors' estimates, using data obtained in June 2014 from alexa.com and trafficestimate.com, are of 63,371 monthly visits from the UK to newsru.com and 38,075 to kommersant.ru. The former is much lower than Mr Dawkins' figure, but the latter is within the bracket he provides.

64. The Second and Third Articles. Mr Dawkins' evidence comes from gazeta.ru itself, which confirms 174,000 page views from this jurisdiction in March 2012 for the Russian language version and a further 1,500 for the English version. The defendant's estimate is of 58,241 UK visitors per month. As she says, the figures are not necessarily inconsistent; the difference may well be explained by the difference between page views and visitors, the latter being 1 in 4 or 1 in 5 of the former. For republication of the sting on newsru.com the figures provided by the claimant and defendant are as above. That is, the lower estimate is of 63,371 UK visitors per month.

65. The Programme. Radio Liberty broadcasts over the internet at svobodanews.ru. It is the Russian broadcasting arm of Radio Free Europe/Radio Liberty ("RFERL") which has an English website at rferl.org. Mr Dawkins' relies on figures obtained from a representative of the Russian website: approximately 20,000 unique page views per month from the UK. For the rferl.org site he has made an estimate using the technique described above, and arrived at approximately 12,798 visitors per month. The radio programme and a transcript were still available at the time of his witness statement. By February 2015 the programme had gone but the transcript remained. The defendant has also obtained figures from Radio Liberty. In response to a request made in August 2014 the station said that monthly traffic was approximately 2 million visitors with 0.7% from Great Britain, implying some 14,000 GB visitors per month. Figures for monthly unique visitors to the audio and text pages were given: 2,074 and 3,110. No data on visits from GB to the audio page were available, but 11% of visitors to the text page (346) were said to be from the GB. The defendant suggests that these are low figures, but on the face of the document from Radio Liberty which she produces these would be monthly figures for August 2014, over 18 months after first broadcast, and remarkably high in the circumstances.

66. The defendant's approach to the figures is twofold. First, she points out at numerous places in her statement that the proportion of overall traffic that originates from this jurisdiction is small, with Russia and, in the case of RFERL, the USA and other jurisdictions, accounting for a greater proportion. In paragraph 91 of her statement she says:

> "...the proportion of web traffic to the Websites originating from the United Kingdom is exceptionally small, in almost all

> cases no more than 0.7% except in the case of the English-language *www.rferl.org*, in which case it rises to just 3.6%. The proportion of readership from elsewhere, in particular the Russian Federation, is significantly higher. On the basis of this data there has not been "substantial publication" of the Articles within the jurisdiction of England and Wales and it cannot be said to be the proper jurisdiction for Mr Sloutsker's claim."

67. This implies the "global tort" approach rejected by the House of Lords in *Berezovsky,* and misses the point. Under the law applicable to this case the fact that the defendant may have defamed the claimant to more people in Russia or the USA than in England and Wales does not provide the answer to the question whether she has committed a real and substantial tort here. Secondly, the defendant suggests that the absolute numbers of visitors to the various sites in question are so low that this is not the appropriate jurisdiction in which to try the claim. She points out with some justification that the traffic will have been lower in 2011 and 2012 than later on, and in particular at the time of her figures and estimates. This is because of traffic generated by events in the Ukraine. This may be so, but the claimant's figures and estimates were obtained and made much closer in time to the offending publications. The defendant also refers to material from Google Analytics which suggests that unique page view figures may overstate the number of visitors (because a single user will count as two if he or she visits a page during two separate user sessions.) This is a fair point, and should lead the court to take a slightly cautious view of unique page view figures.

68. In my judgment however the available evidence makes it plainly arguable at the very least that the claimant's claims concern real and substantial publications in this jurisdiction which, if the claims are sound, involve real and substantial torts. The claimant clearly has some reputation here to protect. On present evidence I am satisfied that his reputation is significant and widespread enough to make it likely that the substantial publication in this jurisdiction of seriously defamatory allegations would lead to serious harm. The claimant does not have to prove a good reputation, though he does provide some evidence to that effect. The defendant does not seek to present him as someone with a bad reputation.

69. There has to my mind unquestionably been substantial publication here. The claimant's figures, and in particular those for kommersant.ru, appear to me to be generally a more reliable guide than the defendant's estimates. Even on the defendant's figures, however, and allowing for the qualifications she puts forward, the sting of the allegations made on each of the Blogpost, the Second Article and the Third Article could easily have reached as many as 60,000 readers in this jurisdiction, and the Programme appears likely to have been heard or read here by several thousand at least. It has to be borne in mind that the assessment of whether there is a real and substantial tort is not a mere numbers game, and also that the reach of a defamatory imputation is not limited to the immediate readership. The gravity of the imputations complained of, which at this stage I treat as arguably conveyed by the offending publications, is a relevant consideration when assessing whether the tort, if that is what it is, is real and substantial enough to justify the invocation of the English court's jurisdiction. The graver the imputation the more likely it is to spread, and to

cause serious harm. It is beyond dispute that the imputations complained of are all extremely serious.

70. The rival jurisdiction proposed by the defendant is the Russian Federation. It is surprising to say the least in the circumstances for the defendant to maintain that this claim should be brought in Russia, given what she has said about its judicial system. The claimant reiterates what was said by Mr Dawkins, explaining that he wishes to sue here because "if I were to win a civil case in Russia, the Defendant would simply dismiss a court verdict as a further example of my supposed power (which does not in fact exist) to control the Russian judicial process. From what the Defendant has written … it is clear to me that she would never accept a verdict of the Russian court." The defendant has not replied to this evidence. She did respond, in her September 2014 witness statement, to what Mr Dawkins had said in his statement. She did so in one brief paragraph. This did not deny that she had said she did "not recognise the legitimacy" of the Russian court. What it did say is this:

> "I do not believe the Russian court is credible in the eyes of the Russian public. However, I have a good reputation in Russia. I am a political activist and I participate in public elections and campaigns. I believe that if this matter were heard in Russia it would be subject to significant publicity and public scrutiny, which will increase the legitimacy of the process."

71. Quite what this amounts to is, as Ms Page observed, unclear. She submitted that the defendant is in substance maintaining her refusal to recognise the legitimacy of the Russian judicial system, which is an insuperable obstacle to the defendant's present application. I would not go quite so far. However, this statement does not appear to me to be in any way a satisfactory response to the claimant's concerns. It clearly leaves it open to the defendant to denounce any unfavourable outcome as not, or not sufficiently, legitimate. This is a factor which arose in *Berezovsky* (see p1024D, Lord Hoffmann), and it is clear that the majority took into account as an important factor evidence which satisfied them that a favourable result in Russia "will not be seen to redress the damage to the reputations of the plaintiffs in England. Russia cannot therefore realistically be treated as an appropriate forum where the ends of justice can be achieved" (1014H, Lord Steyn). The defendant's stance seems to me to be a very powerful factor in favour of treating England as the appropriate jurisdiction in which to litigate a claim by this claimant for alleged libel published here by this defendant.

72. I should nonetheless go on to consider whether, despite this, England and Wales is not shown to be the appropriate jurisdiction. That might be so if the claimant could sue (or could have, sued) in Russia, and the defendant could reasonably and effectively defend herself there, but not here. The court should be wary of requiring a foreign defendant to engage in proceedings here which would be oppressive, by comparison with proceedings in a rival jurisdiction. Here, the claimant's own evidence confirms that Russia is in principle an available jurisdiction, and that it was available to him in respect of all the publications complained of until the limitation period expired in respect of the 2011 publications (a point to which I shall return).

73. The defendant maintains that Russia is the appropriate jurisdiction because she is there, the publications were in Russian, and a trial in Russia would be more convenient for the ends of justice. The defendant would maintain that what she wrote

and said was true, and would rely on witnesses who speak Russian and are resident in Russia, and documents there, to support her defence. She suggests that proceedings here would be more complex and expensive due to the need for translation, and that in these and other ways her defence would be hampered by having to conduct it abroad.

74. I do not consider that the issue of language would pose a significant problem here. English courts are accustomed to dealing with foreign languages. In practice, translation issues are rarely tried, but usually agreed. The translations available now are enough to persuade me that there should be no real difficulty in this case. As to the case of truth, the defendant's evidence as it stands is not satisfactory. She says, in paragraph 13 of her statement that "I shall seek to establish, among other things, that Mr Sloutsker, or someone acting on his behalf, contacted an officer of the FSB, the Russian Federal Security Service, seeking to arrange for the killing of Mr Alexei Kozlov for payment of the sum of $300,000. The FSB officer refused Mr Sloutsker's offer and contacted Mr Dmitry Muratov, the chief editor of the Novaya Gazeta, to inform Mr Muratov of the offer that had been made and to publicise the threat against Alexei. Mr Muratov contacted me to inform me of the information he had received."

75. Despite being asked for details in correspondence the defendant has not said what "other things" she would seek to establish, so this statement leaves a number of the allegations complained of wholly unanswered. That is a striking omission when the interview she gave on the Programme asserted, according to the translation, that she and her husband had just "decoded" a conversation between the claimant, speaking from London, and the head of the Presnensky court, in which the claimant gave instructions to the judge. She also stated that there were witnesses to the conversation. Her statement says nothing about these matters.

76. The defendant suggests that her defence would require a substantial volume of documentary evidence, much of which would be documents obtained from the Federal Penitentiary Service, such as travel itineraries, investigation records and prison documents, all of which would require translation. It is not explained, however, how such documentation, which she concedes would be hard to obtain even if proceedings were in Russia, would support her case. Although she has provided a list of 10 intended witnesses, the defendant has not provided any proof of evidence or other document signed by or emanating from any of the named individuals. Nor has she explained with clarity what evidence those witnesses could give. On the face of her 2 page summary of the witnesses and the evidence they would give, it appears that she is not in a position to call anyone who could speak from personal knowledge of anything done by the claimant to arrange Alexei Kozlov's killing, still less of any steps taken to fabricate evidence, to bribe a prosecutor, or to bribe a judge.

77. The first named witness is Mr Muratov, who is said to have received information from unnamed third parties in the law enforcement agencies on "'the order' of K killing". The majority of the other named witnesses appear to have been involved in providing security for Mr Kozlov. When asked for further details in correspondence she has declined to give them citing, through iLaw, financial reasons. This is not the subject of any elaboration or evidence. Nor is it easy to understand, as she must have known the answers or some of them when she made her statement in September 2014. In this respect also the present case bears comparison with *Berezovsky* in which Hirst LJ observed, giving the judgment of the Court of Appeal [1999] EMLR 278, at 292:

> "Where as here they foreshadow a defence of justification, and assert that a trial in England will present them with evidential difficulties, it surely behoves them, particularly where the allegations are so grave, to produce some evidential support for their plea, rather than trying to make bricks without straw."

78. I can see that evidence from Mr Muratov and the defendant might provide the basis for a defence of responsible publication on the lines of the defence that succeeded in *GKR Karate UK Ltd v Yorkshire Post Ltd* [2000] EMLR 410, but the information provided appears on the face of it an unpromising basis for a plea of justification. Even if that is wrong, I am not persuaded that the difficulties of conducting proceedings here are nearly as great as the defendant suggests. She states that several of her witnesses would have difficulties travelling, or obtaining permission to travel to this country. However, this is not said to apply to herself, or to Mr Muratov, who would be the principal witness in support of either of the defences to which I have referred. Most if not all of the other witnesses appear on the face of it to be irrelevant, or of peripheral or at best secondary importance. In any event, the court is well used to receiving evidence from foreign jurisdictions via video link, and no reason is provided why this would not be possible in this case, if required.

79. The claimant's evidence states that he would now be too late to sue in Russia on the November 2011 publications, as the limitation period of three years from first knowledge of publication has expired. That, however, is an irrelevant consideration of which I take no account in reaching the conclusion that England and Wales is clearly the appropriate place in which to try the claimant's claim in respect of publication in this jurisdiction. The evidence as to reputation and extent of publication discloses an arguable case of a real and substantial tort, so the starting point is that England and Wales is the natural forum. Russia, though it was an available forum, would not in all the circumstances be an appropriate forum for this claim.

80. It might well have been so, even for a claim in respect of publication in this jurisdiction, were it not for the nature of the allegations complained of and the defendant's refusal to accept the legitimacy of the Russian judicial system. For those reasons, however, the claimant is in my judgment justified in his submission that he could not expect to obtain vindication from proceedings in Russia. Conducting proceedings here will naturally pose challenges for the defendant, and for the court. The evidence in the claimant's exhibits suggests that there may be large disparities in resources. It is said that the defendant cannot afford representation. But that is not supported by evidence. In any event, I do not consider the difficulties to be insuperable. I consider on the evidence presently before me that the defendant can and will be given a fair opportunity to defend herself in this court and will not be prevented from putting forward any case that it is reasonably open to her to advance.

The extension of time for service of the claim form

81. The defendant complains in her witness statement of a failure to disclose the claimant's criminal complaint against her when application was made for an extension of time for service of the claim form in May 2013. No relevant relief is sought in her application form, however. In any event, whilst it is certainly the case

that a duty of full and frank disclosure was owed, it does not seem to me that the complaint was a matter which was material to the extension of time applied for.

Has there been valid service?

82. The issue is whether service has been effected in accordance with the Hague Service Convention, to which the Russian Federation is a signatory. Service by any method permitted by the Hague Service Convention is authorised by CPR 6.40(3)(b). The factual and legal picture in relation to this issue has been expanded and clarified considerably by the claimant's evidence.

The facts

83. The story is told in the statement of Mr Aitkulov, the Russian expert, by reference to court documents. It can be picked up after Master Fontaine's order of 8 May 2013, extending time for service until 14 February 2015. According to Mr Aitkulov's statement and its accompanying documents, by July 2013 the request for service made by the Senior Master had made its way to the Simonovsky District Court in Moscow. That is the district court for the Zatonnaya Street address given to the Master. In July and again in September 2013 the Simonovsky court requested details of the defendant's current address from the relevant bureau (the Moscow Department of Address Enquiry Operations and Information Resources of the Russian Federal Migration Service). In September the court was told that the defendant lived at Novospassky, as she did. On 12 September 2013, therefore, the Simonovsky court requested the relevant District Court, the Tagansky District Court, to proceed with execution.

84. Judge E V Podmarkova of that court was appointed to execute the request and determined on 30 September 2013 that it should be done at a court hearing on 25 October 2013. The defendant was summoned to appear at that hearing by two methods: (i) A writ of summons was sent to the Novospassky address by registered mail. This was returned to the court due to "the expiry of the holding period". (ii) A telegram with acknowledgment of receipt was also sent to the Novospassky address, on 22 October 2013. It stated "I hereby summon you to appear at 15:00 on 25-10-13 before the Tagansky District Court" giving the address and court number. This was handed over to the defendant in person at 16:20 on 22 October 2013, according to a certificate provided by Operative Lisyanskaya to Judge Podmarkova and timed at 16:57 on that date.

85. The defendant did not appear at the hearing on 25 October 2013. Judge Podmarkova determined that she had been duly notified of the hearing at the Novospassky address, and decided to proceed with the hearing in her absence. The translation of the official record of the judge's determination goes on:

> "The court, after deliberation, decided as follows. The said request demanded the service of judicial documents upon O Romanova but the latter failed to attend the relevant hearing, despite the court having notified her at her place of residence (her place of civil registration was established on the basis of a response to queries by the court) of the need for her to appear

> in court. O Romanova failed to appear before the court, nor was any petition lodged by O Romanova for adjournment of the matter to a later court hearing. Consequently, the court deemed it possible to conclude consideration of the request of the Royal Commercial Court of England and Wales for the service of judicial documents upon O Romanova without execution.
>
> The court session was duly closed."

86. On 12 February 2014 Judge Podmarkova certified on the standard Hague Service Convention form that the claim form and accompanying documents had not been served "by reason of the non-appearance of O Romanova", and returned the original Request and enclosed documents to the Ministry of Justice of the Russian Federation. On 25 March 2014 the Ministry of Justice passed the documents back to the Senior Master "in connection with an inability to execute a request for the service of judicial documents upon O Romanova", stating that "the request was not executed owing to the failure of [the defendant] to attend the appointed court hearing".

87. It is after this that attempts were made by Ms Krivosheeva, who is a Moscow advocate acting for the claimant, to serve the proceedings on the defendant. Her evidence, corroborated by a further statement of Vladimir Lipatov who attended with her, is that the claim form, particulars of claim and order for service outside the jurisdiction were handed over by her in person to the defendant on 6 July 2014 at 22:40 Moscow time, in the defendant's office in Moscow, where the defendant was present with her husband. The defendant took receipt but declined to sign an acknowledgment. Ms Krivosheeva also arranged for the documents to be delivered by registered post to the Novospassky address, and she produces a confirmation of registered delivery showing that the documents had been received at the address in question by a Mr Kozlov on 10 July 2014. This is clearly the delivery referred to by the defendant in her witness statement.

88. This account goes beyond the version of events given in the defendant's September 2014 witness statement, however, and in one important respect is at odds with that version. The defendant, having identified the method of service in Russia pursuant to the Hague Service Convention as a summons to court, stated that "I was not at any point summoned to any court of the Russian Federation." The defendant has not responded to the evidence I have outlined above. She did not receive the writ of summons but I conclude that, contrary to her witness statement, she did receive the telegram. In doing so I bear in mind that the claimant said nothing in her witness statement about the visit from Ms Krivosheeva on 6 July 2014. It seems inherently probable, given the background and the admitted posting of the registered letter, that such a visit did take place. Ms Krivosheeva's evidence is corroborated, and unanswered. I conclude that the defendant has consciously failed to disclose the fact of that visit.

The law

89. As is well known, the general scheme of the Hague Service Convention is that each Contracting State designates a Central Authority which undertakes to receive requests for service emanating from other Contracting States, and to proceed according to the

terms of the Convention. By Article 5 of the Hague Service Convention it is provided, so far as relevant, that the Central Authority "shall itself serve the document or shall arrange to have it served by an appropriate agency, either (a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory …"

90. Two preliminary points are important. First, although Article 10 of the Hague Service Convention permits the sending of judicial documents by postal channels directly to persons abroad, provided that the state of destination does not object, the Russian Federation has objected to postal service. It is therefore accepted by the claimant that service by registered post was not valid service pursuant to CPR 6.40. Secondly, there is no suggestion that personal service by handing the documents to the defendant is valid service by Russian law. Accordingly, the fact that the defendant was handed the documents in person by Ms Krivosheeva is not relied on by the claimant as amounting to service.

91. Mr Aitkulov's evidence is that the Russian procedural rules (the Civil Procedure Code of the Russian Federation, "CPC RF") provide for the execution of a request for service from a foreign court pursuant to the Hague Service Convention as follows. A court is assigned to execute the request ("the Serving Court"). The Serving Court, having received the request from the Ministry of Justice, schedules a date, time and place for a hearing ("the Service Hearing") and then summons the person to whom the judicial documents are addressed ("the Service Recipient"). The summons is usually sent by registered mail, but Russian law also envisages other means of sending it, including by telegram.

92. Mr Aitkulov goes on to state that if the summons is delivered and received by the Service Recipient he or she is deemed notified of the date and time of the Service Hearing. If the Service Recipient refuses to accept the summons he or she is equally deemed notified. There is no separate procedure for actually serving the documents, says Mr Aitkulov. A person served has the right to review the case files and relevant documents. "If the Service Recipient does not appear at the Service Hearing having been duly notified, the Serving Court is not required to take any further steps to notify the Service Recipient and can proceed with the Service Hearing." In such cases, he says "the Serving Court terminates the case and returns the set of documents to the Central Authority, indicating the reason why the documents were not served on the Service Recipient."

93. Mr Aitkulov concludes that the procedural steps taken in the present case up to and including the service of the summons by registered post and by telegram "were sufficient and constitute effective service". It is his view that on balance the better view is that service of the Writ of Summons by registered post is effective even if the Service Recipient does not receive it, but in any event service on the defendant in person by delivery of the telegram was sufficient to provide notice of the Service Hearing. The court cannot compel her attendance, he says. It "could not have taken any other steps" before concluding the hearing and reporting on it. The effect of his evidence is that the available procedural means for notifying the defendant of the foreign proceedings having been exhausted, the fact that the defendant did not appear at that hearing is no obstacle to the conclusion that she is deemed served with the proceedings.

94. The obvious puzzle that arises from that opinion, and which troubled me during the hearing, is that Judge Podmarkova certified that the defendant had not been served. However, after being taken carefully by Ms Page through the relevant part of Mr Aitkulov's report and the key authority on which he relies, and reflecting on it after the hearing, I have been persuaded that in Russian law the steps taken would be considered sufficient to effect service on the defendant. The key passage is in paragraph 38 of Mr Aitkulov's report, where he refers to the Decree of the Federal Arbitrazh Court of the Urals District No F09-2357/14 dated 18 June 2014, which he summarises pithily as follows: "if a Service Recipient notified of the Service Hearing refuses to take receipt of the documents at the Service Hearing he/she is deemed served with regard to the court proceedings abroad." He goes on to state that from the standpoint of the CPC RF there is no difference between the situation in which a Service Recipient appears, but refuses to take receipt of the documents, and one in which the Service Recipient fails to appear at the hearing at all.

95. Examination of the decision relied on does in my opinion support Mr Aitkulov's first proposition. The case concerned proceedings to enforce a judgment of the Commercial Court of England and Wales given by Leggatt J on 8 March 2013 in *Vis Trading Co Ltd v Nazarov & Ors* [2013] EWHC 491 (QB). Sotsinvest Inc sought to challenge before The Federal Commercial Court a decision of the Commercial Court of Bashkortostan dated 17 March 2013, to issue a writ of execution for $5.9m against Sotsinvest, based upon the English judgment. One ground of appeal was that the court of first instance had been wrong to conclude that Sotsinvest had been "duly notified in a timely manner of the time and place of the foreign court's consideration of the case" pursuant to the Hague Service Convention. The Federal Court dismissed this ground of appeal.

96. The Court agreed that official notification of the foreign proceedings in accordance with the Convention was required by Russian law (save where some other treaty provided otherwise) before a foreign judgment could be enforced, but held that on the facts of the case the relevant requirements had been satisfied. The court observed that "the court of general jurisdiction took exhaustive measures for the proper enforcement of the court order on the serving of documents of a foreign court to the company Sotsinvest…" What had happened, according to the Federal Court judgment, was that the Serving Court notified the company by summons and by telegram of a court hearing on 29 July 2010. A representative attended the Service Hearing, but refused to accept the documents. The court record showed that this had occurred, and notification was sent to the Queen's Bench Division of "the inability to enforce the court order [sc. The request for service] due to the recipients' refusal to accept the documents." In other words, a negative certificate was sent out. As a result of this, the English Commercial Court made an order for service by an alternative method. However, the Federal Court held that valid service had taken place by virtue of the summons to court: "in this instance notification … about the trial … was conducted in a proper manner in compliance with the norms of the Hague Convention, and was effective."

97. On the basis of this decision and Mr Aitkulov's opinion my conclusion is that, despite appearances on the face of the Russian District Court's certificate, these proceedings have been served on the defendant pursuant to Russian law, and hence in accordance with the Hague Service Convention and CPR 6.40. All possible measures were taken

to effect service on the defendant pursuant to the procedures outlined by Mr Aitkulov, and under Russian law that is sufficient to amount to valid service, even though the defendant declined to attend the Service Hearing. I am fortified in reaching that conclusion by the point made by Ms Page, that it would be a very strange and improbable gap in Russian procedural law if it permitted a defendant to evade effective service of proceedings by the simple expedient of not turning up at a Service Hearing. It is however a matter for consideration whether in these circumstances certificates issued by the Russian Court should take the form of the certificate issued in this case.

98. The defendant takes an additional point on service: that the documents sent to her by post did not include the Response Pack, in breach of CPR 7.8. This however is a point that relates only to the attempts at "service" carried out by Ms Krivosheeva and as I have said those are not relied on. (As it happens, there clearly was no prejudice. The defendant was represented and her then solicitors were able to and did file an acknowledgment of service.)

Service by an alternative method or at an alternative place/extension of time

99. Given my finding above, these issues do not arise. Without arriving at a conclusion on the issue, however, there does seem to me to be considerable force in the view that if all the steps taken to serve proceedings on the defendant were in law ineffective yet the proceedings do (as I have found) relate to a real and substantial tort in this jurisdiction, it would be undesirable to enable the defendant to avoid them as she (on this hypothesis) has managed so far to do.

Conclusions

100. I decided that it was fair to proceed with the hearing in the defendant's absence, and that the claimant should be relieved from sanctions for serving his evidence some 4 working hours late. Having considered all the evidence I have found that the claimant failed to disclose material facts on the application for permission to serve proceedings outside the jurisdiction, but I have rejected the defendant's application to set aside the Master's order for that reason. I have rejected, also, an implied suggestion by her – not the subject of an application - that the extension of time for service of the claim form should be set aside for material non-disclosure. I have concluded that the claim involves a real and substantial tort in this jurisdiction, and that England is clearly the appropriate place in which to try the claim. I have found that the steps taken by the claimant brought about service of the proceedings on the defendant in October 2013, which was valid and effective under Russian law and the CPR.

Next steps

101. The proceedings can now continue. Directions will be needed, and it will be appropriate to consider not just case management but also costs management. The claimant must by no later than 4pm on Friday 6 March 2015 serve a copy of this judgment on the defendant at her address for service and confirm to the court in writing that this has been done. I will allow the claimant until 4pm on Friday 13 March 2015 to file and serve written representations on the costs of these applications, a draft order, and proposed directions. The claimant must file and serve a costs

budget by the same date and time. The defendant will have until 4pm on Friday 27 March to file and serve her response, to make her own proposals as to directions, and to apply if so advised for permission to appeal the decisions recorded in this judgment. The defendant will not be required, so long as she is a litigant in person, to file a cost budget. The parties should agree as much as possible and may agree that any remaining disputes should be resolved without a hearing. If they do the court should be informed, in writing. A hearing will be fixed for the first convenient date on or after April 2015 to deal with any matters that are not agreed or dealt with on paper. Either party may apply to vary these preliminary directions, which have been decided on without a hearing.