IN THE EASTERN CARIBBEAN SUPREME COURT

HIGH COURT OF JUSTICE

ST. CHRISTOPHER & NEVIS

NEVIS CIRCUIT

(CIVIL)

A.D. 2012

CLAIM NO. NEVHCV2011/0030

BETWEEN:

1.UNITED COMPANY RUSAL PLC

2.UNITED COMPANY RUSAL INVESTMENT MANAGEMENT LLC

Claimants

-and-

1.CORBIERE HOLDINGS LTD.

2.RALEIGH INVESTMENTS INC.

Defendants

Appearances: Mr Jonathan Crow QC, Mr Mark Brantley, Ms Elizabeth Harper and Ms Midge Morton for the Claimants;
Lord Goldsmith QC, Mr Anthony E. Gonsalves and Ms Sonya Parry for the Defendants

JUDGMENT

[2012: 20, 21, June; 13 July]

(Application for leave to appeal – whether Re-Re-Amended Statement of Claim discloses cause of action for tortious conspiracy – whether claim is an abuse of process)

INTRODUCTION

[1] Wallbank J [Ag]: This application by the Claimants for permission to appeal a ruling striking out their claim is the first of a number of applications which were heard in this matter on 20th and 21st June 2012.

The parties and other material entities and persons

[2] OJSC MMC Norilsk Nickel ("Norilsk") is said to be the world's largest producer of nickel and palladium and the parent of a group of companies with subsidiaries in Europe, Asia, North America and the Caribbean. It is said to be listed in Moscow, and is registered and operates in Krasnoyarsk Krai, a part of Siberian Russia. American Depository Receipts ("ADRs") representing its shares are said to be traded on the New York, London and Berlin stock exchanges. Norilsk is not a party to these proceedings but is of central importance in this matter.

[3] The first Claimant ("UC Rusal plc") is said to be the ultimate holding company of the Rusal group of companies. The second Claimant ("UC Rusal LLC"), is a company which is part of the Rusal group. For convenience only, I shall refer to them together as Rusal.

[4] Rusal is said to be the world's largest producer of aluminum and alumina. UC Rusal plc's shares are listed on the Hong Kong stock exchange. UC Rusal plc's Chief Executive Officer, and one of its principal shareholders, via intermediate vehicles, is a Mr Oleg Deripaska.

[5] Since April 2008, Rusal has, it is said, acquired 25% plus one share of Norilsk's issued share capital, through UC Rusal LLC.

[6] The Defendants (respectively "Corbiere' and "Raleigh") are incorporated in Nevis under the Nevis Business Corporation Ordinance 1984 as amended. They are, directly or indirectly, subsidiaries of Norilsk as well as shareholders in Norilsk entitled to vote as such.

[7] Another major shareholder of Norilsk is said to be Interros International Investments Limited ("Interros"). Interros is said to have a holding of slightly less than 30% of the issues share capital of Norilsk, through a number of Interros subsidiaries. Interros's principal is said to be a Mr Vladimir Potanin.

[8] Lord Goldsmith QC, and his firm of London Solicitors Messrs Debevoise & Plimpton LLP, act in these proceedings for Norilsk's subsidiaries Corbiere and Raleigh. Apparently seamlessly, they also represent Interros in an ongoing and related London arbitration, LCIA Arbitration No. 101666, *United Company Rusal Plc vs Interros International Investments Limited*. In this Nevis matter on behalf of Corbiere and Raleigh Lord Goldsmith QC and his London solicitors call in their aid affidavit evidence from Interros sources.

[9] It is clear to this Court that Corbiere and Raleigh are very closely aligned with Interros, although they maintain separate legal personality and they act as separate companies.

[10] Trafigura Beheer B.V. ("Trafigura") is an ostensibly independent company which allegedly bought certain Norilsk ADRs from Corbiere and Raleigh in a transaction which will feature in the narrative of alleged facts, set out further below.

Background to application

[11] On 25 to 27 February 2011 this Court, constituted by Bannister QC, J. heard an application by the Defendants to discharge an interim injunction previously

obtained by the Claimants against the Defendants.

[12] Bannister QC, J. discharged the injunction for a number of reasons, including Rusal's failure to give full and frank disclosure. He also took into account certain conduct of Rusal and/or its legal representatives. He stated that he saw no cause of action in the Statement of Claim pleaded before him, which contained an attempt at pleading a cause of action in tortious conspiracy.

[13] On 20 July 2011, Rusal served a Re re amended Statement of Claim (the "RRASOC"). The RRASOC developed the pleaded case on conspiracy, and dropped other allegations raised in the earlier Statement of Claim.

[14] On 27 to 29 September 2011 this Court, constituted by Redhead J., heard an application by the Defendants to strike out the RRASOC.

[15] On 11 November 2011 Redhead J. delivered a written decision striking out the RRASOC on grounds that it disclosed no reasonable grounds for bringing the claim for conspiracy, and that the claim was an abuse of process. The abuse of process identified by Redhead J. was that these proceedings are vexatious, in that they replicate claims by Rusal in Russia and in London LCIA Arbitration proceedings.

[16] Rusal have applied for permission to appeal. Rusal submit that Redhead J. was wrong on both his grounds. The Defendants contest Rusal's application and in their Notice of Opposition asked for an oral hearing for Rusal's application for permission to appeal.

[17] The application for permission was heard over slightly more than one day. It was strongly resisted. The issues arising in this matter are numerous and it is clear that considerably longer would be required at an eventual trial in order for them to be ventilated and reviewed fully.

STANDARD OF REVIEW

[18] Mr Crow QC submitted, and I accept, that in order for Rusal to succeed with their application for permission to appeal, Rusal has to satisfy this Court that there is a realistic prospect of success in satisfying a Court of Appeal that Rusal have pleaded the constituent elements of conspiracy, that there is a realistic prospect of success on the evidence in establishing those elements and in establishing that the proceedings are not an abuse of process.

[19] Mr Crow QC submitted that the threshold Rusal have to get over is relatively low.

[20] Lord Goldsmith QC submits that either of the grounds (failure to produce a viable cause of action and abuse of process) is a sufficient basis for rejecting the application.

[21] The applicable threshold principles commence with the following:
"*...permission to appeal may be given only where the appeal appears to have a realistic prospect of succeeding on appeal; or there is some other compelling reason why the appeal should be heard. A fanciful prospect is not sufficient.*" (***Employers International v Boston Life Annuity Co. Ltd. (BVI Civil Appeal No. 5 of 2007, Edwards J. at paragraph [23]***).

[22] The parties are in agreement that Redhead J.'s decision to strike out the claim on grounds of abuse of process involved, at least at some level, an exercise of discretion.

[23] Lord Goldsmith QC urges first that the exercise of discretion by a first instance judge involves first an appreciation of the facts, and such an appreciation is pre-eminently a matter for the first instance judge and not the

Court of Appeal, and secondly, that the Court of Appeal should not interfere with the manner in which the first instance judge exercises his discretion merely on grounds that the Court of Appeal might consider that the discretion should be exercised differently. Lord Goldsmith QC relies upon dicta in ***Golding v The Wharton Saltworks Co. (1876) 1 QBD 374***, ***Bellenden v Satterthwaite [1948] 1 All ER 343*** and ***Walbrook Trustee (Jersey) Ltd. v Fattal [2008] EWCA Civ. 427***.

[24] Lord Goldsmith QC essentially argues that Rusal have a high threshold to overcome in order to obtain permission to appeal Redhead J.'s exercise of discretion in striking out the claim as an abuse of process.

[25] Mr Crow QC argues that the decision what a first instance judge should do if proceedings are abusive involves the exercise of discretion, because it goes to the remedy, but the question whether proceedings are an abuse of process is not a discretionary question, but is a question of law as to whether or not the proceedings in one jurisdiction are an abuse of that court's process. Mr Crow QC says that as a matter of law the first instance judge Redhead J. was wrong in saying that there is an abuse of process in this case, and that whether or not this was the case is appealable as any other issue of law.

[26] Mr Crow QC relies upon a fall back argument that the Court of Appeal has jurisdiction to interfere with a first instance judge's consideration of the facts.

[27] The Court of Appeal's purview in relation to first instance decisions where discretion has been exercised was addressed in ***Employers International v Boston Life Annuity Co. Ltd. (BVI Civil Appeal No. 5 of 2007, Edwards J. at paragraphs [24] and [25]***):

> *[24] The second well established principle as to the conditions upon which an appellate Court may interfere with the exercise of such discretion was*

explained by Sir Vincent Floissac, CJ. in ***Michel Dufour and Others v Helenair Corporation Ltd****. thus:*

> *" We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong"*

[25] The learned Chief Justice pointed out that the first condition was explained by Viscount Simon LC in ***Charles Osenton & Co. v Johnston*** *who stated that an appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. The appellant tribunal should not reverse the order of the judge merely because that tribunal would have exercised the original discretion in a different way. However, if the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations, then the reversal of the order on appeal may be justified. The Chief Justice further noted that the second condition was explained by Asquith LJ, in* ***Bellenden*** *(formerly* ***Satterthwaite v Satterthwaite****) in language which was approved and adopted by the House of Lords in* ***G v G.*** *Asquith LJ stated that it is of the essence of judicial discretion that on the same evidence 2 different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the*

generous ambit within which reasonable disagreement is possible and is plainly wrong, that an appellate body is entitled to interfere."

[28] Also, in ***Hadmore Productions Ltd v Hamilton [1983] 1 AC 191 at p 220***:

> *"Upon an appeal from the judge's grant or refusal of an [interim] injunction the function of the appellate court, whether it be the Court of Appeal or your lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate courts is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."*

[29] It had been advanced by the Defendants before Redhead J. that the RRASOC should be struck out on the ground that "[t]*he raising of the same issues in different proceedings is clearly vexatious*" (as set out at Redhead J.'s judgment at paragraph [9] iii). The "different proceedings" which concerned Redhead J. were (1) proceedings before the Russian Court in a claim by UC Rusal LLC against the Defendants and Trafigura and (2) arbitration proceedings in the London Court of International Arbitration (LCIA) brought by UC Rusal plc against Interros.

[30] Redhead J. noted at paragraph [89] that Lord Goldsmith QC had said that at least three of the fundamental points which were raised in the Russian Court are raised before this Court. At paragraph [94] Redhead J. noted that Mr Crow QC had submitted that the defendants argue that Rusal has raised substantially the same issues in the Russian proceedings as are presently before the Arbitration proceedings in London (LCIA).

[31] Redhead J. held as follows at paragraph [120]: *"I agree that great caution must be exercised before shutting out Rusal from putting forward its case on the ground of abuse of process but having examined the issue thoroughly, I do not think that I have an option but to hold that Rusal's re-re-amended Statement of Claim is an abuse of process."*

[32] Redhead J. reviewed the arguments put forward by both sides but does not directly explain why he came to that conclusion.

[33] Mr Crow QC urges that Redhead J. adopted too narrow an approach and simply did not engage with the fact of the difference in the parties and the necessity for that difference in the different sets of proceedings.

[34] For the purposes of this application for permission to appeal, both parties focus their attention upon the question whether there is duplication between these proceedings and the LCIA Arbitration. Redhead J. noted that the three proceedings in the Russian courts had previously failed – at paragraph [101].

[35] Mr Crow QC points to the Second Affidavit of Maxim Sokov filed on 25 February 2011 for a summary of the Russian proceedings.

[36] At paragraphs 57 to 60 Mr Sokov identifies three cases in Russia. The first, case no. A33-266/2011, is or was a claim by UC Rusal LLC against the Defendants, Trafigura, The Bank of New York Mellon, The Bank of New York

International Nominees and Norilsk Nickel. Mr Sokov describes this claim as a claim for declaratory relief that conversion of shares belonging to the Defendants into ADRs is null and void, and that sale and purchase between the Defendants and Trafigura is null and void. The second claim, case no. AA33-267/2011, is or was a claim by UC Rusal LLC for declaratory relief that a tender offer by Corbiere to sell shares in Norilsk is null and void. In the third claim, case no. A33-268/2011 UC Rusal LLC seeks or sought a declaratory judgment that three decisions of Norilsk's Board of Directors are null and void.

[37] Although Mr Sokov in this Second Affidavit does not identify the precise issues before the Russian courts, none of these claims appears to be a claim for damages for conspiracy and for final injunctive relief by UC Rusal plc and UC Rusal LLC against Corbiere and Raleigh, as claimed in the RRASOC in these Nevis proceedings.

[38] Redhead J. reviewed Rusal's arguments that:

a. the parties are not the same in proceedings overseas (Russia and the LCIA Arbitration) as in these proceedings – paragraph [94]: "*Mr Crow submitted that it may be perfectly proper for a claimant to bring more than one set of proceedings against different defendants in different jurisdictions, particularly if it is a complex commercial dispute.*"

b. Before shutting out a party "'*the Court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may be properly called on those issues and in the new action*" - paragraph [95];

c "...the suggestion that "*substantially the same issues*" are now or

have previously been before other courts or tribunals is incorrect. Mr Crow QC argued that Rusal has not advanced the conspiracy claim which it is advancing in any of these proceedings." – paragraphs [96], [97], [98];

d Rusal "*...submitted that it is not an abuse of process for a claimant to bring consecutive sets of proceedings against different defendants, even where they arise out of the same subject matter and the latter set could have been brought within the former, unless there is no good reason whatever for failing to make one claim only.*" -- paragraph [99];

e it was impossible for Rusal to bring the present claims against Corbiere and Raleigh in the LCIA arbitration as the latter were not parties to the material arbitration agreement. Equally, Rusal could not have sued Interros in Nevis, because such claims are covered by an arbitration agreement between Rusal and Interros. – paragraph [100]. In his submissions on this application, Mr Crow QC highlights that it was UC Rusal plc, not UC Rusal LLC which was a party to the arbitration agreement, and that different disclosure processes apply in the LCIA arbitration than before this Court, and that the relief sought is different.

[39] Redhead J. also reviewed Corbiere and Raleigh's submissions, the principal points on the issue of abuse of process appearing to be the following, as noted by Redhead J.:

a the Defendants "*submitted that the principle <u>bringing two sets of proceedings in respect of the same subject matter is normally vexatious</u>.*" - paragraph [116]. The emphasis supplied is Redhead J.'s. In doing so, he cited the case of ***Australian Commercial***

Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd [1989] 3 All E.R. 65 at 69, as quoted in ***Merrill Lynch, Pierce Fenner & Smith Inc. vs Raffa [2001] CP Rep 44***. It is clear from this quote that this is a general statement of principle and does not cover all situations, and that case indeed countenances situations where a claimant should not reasonably be required to elect which of two proceedings he should pursue. Both parties had moreover laid before Redhead J. a fuller quote from these cases which shows that what the court there was pronouncing upon were duplicate proceedings against the same defendant in two jurisdictions: *"Where a plaintiff seeks to purse the same defendant in two jurisdictions in relation to the same subject matter, the proceedings verge on the vexatious."*

b Redhead also opined at paragraph [93] *"In my opinion, it is not simply bringing the same proceedings in more than one jurisdiction that would invoke the abuse of process principle, but whether all the issues could have been conveniently determined in that suit."* Redhead J. did not then go on to consider whether or not all the issues could have been conveniently determined in Russia, or in the LCIA Arbitration, or, as Mr Crow QC submitted was the case, the impossibility of doing so.

c At paragraph [166] Redhead J. stated: *"Lord Goldsmith QC in his Skeleton Arguments submitted that it cannot be in the interest of justice for two tribunals in two different jurisdictions in effect to be hearing the same dispute brought by the same claimants, even if against nominally different defendants."* Mr Crow QC, in his submissions on this application highlights that the claimants are not the same in these proceedings as in the overseas proceedings. In Russia the claimant was UC Rusal LLC. In the LCIA arbitration the

claimant is UC Rusal plc.

[40] At paragraph [91] Redhead J. quotes a well established passage from ***Hunter v Chief Constable of West Midlands Police [1982] A.C. 529*** in which Diplock LJ stated the following:

> *"It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process may arise are very varied, those which give rise to an instant appeal must surely be unique. It would in my view, be most unwise if this House were to use this occasion to say that might be taken as limited to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."*

[41] Mr Crow QC submits that having quoted this passage, Redhead J. committed an error of principle "*because he simply did not apply the approach in Hunter that he had quoted.*" Mr Crow QC submitted that '*you cannot simply say: you have got similar issues in two different jurisdictions, therefore there is an abuse; you have to look at the circumstances to see whether the litigation would bring the administration of justice into disrepute among right-thinking people.*"

[42] Mr Crow QC then highlighted that the parties in the LCIA arbitration are different from these Nevis proceedings, and submitted that '*Rusal has no choice but to proceed in this way because Corbiere and Raleigh are Nevis companies, they are the companies who ostensibly sell to Trafigura and ostensibly bought in under the buy-back, they are the actors in the conspiracy who we wish to target in this claim. We could not have joined them to the arbitration because they are not parties to the co-operation agreement, and we could not sue Interros here*

because we do have an arbitration clause with Interros. So the Judge has come to the conclusion that it is an abuse of process for Rusal to do something which it has no choice but to do, other than not sue two of the actors in the conspiracy".

[43] I have had to consider what, if anything, is the legal effect of this submission.

[44] First, it is trite that there is a general public interest in avoiding a multiplicity of claims. Sometimes it is simply an abuse of process to bring duplicate sets of proceedings, with the result that the later proceedings will be struck out (see ***Buckland vs Palmer [1984] 1 WLR 1109*** and ***Blackstone's Civil Practice 2006, paragraph 54.5***).

[45] Lord Goldsmith QC forcefully stressed in oral submissions upon this application that these proceedings "*overlapped* [with the LCIA arbitration] *a lot before as Justice Redhead rightly said and now it is just completely the same.*" In doing so Lord Goldsmith QC glided over the difference in claimants and defendants between these proceedings and the LCIA Arbitration. Even upon their face, they are not duplicate proceedings.

[46] The key word by which Redhead J. seeks to bridge the positions between the parties that, on the one hand (as Rusal argue) the parties are different and on the other hand (the Defendants argue) that the LCIA and Nevis proceedings are the same, is to describe the Defendants here as "*nominally different*" from Interros, the defendant in the LCIA arbitration.

[47] There would seem to me to be a reasonable prospect of succeeding with a submission to the Court of Appeal that this analysis is unsustainable, as failing to take into account or consider:

a the legal principle that where the parties in the two claims are not

the same, issue estoppel does not apply (***Sweetman v Nathan [2003] EWCA Civ 1115, The Times, 1 September 2003***), and possible exceptions arising from that case;

b the legal principle (albeit often distinguished or restricted) that factual findings in one claim are not admissible in the other (***Hollington v F Hewthorn & Co. Ltd [1943] KB 587***);

c on the facts, and perhaps more decisively, that the evidence before the Court points inexorably to the circumstance that Corbiere and Raleigh have carefully maintained separate legal personalities from (a) Interros, (b) Norilsk and (c) each other in the commercial and legal dealings which form the background to this dispute, and indeed that their very *raison d'être* is to have separate legal personalities.

[48] In my view Lord Goldsmith QC cannot approbate and reprobate the Defendants' separate legal personality when it suits his clients Interros and the Defendants.

[47] It appears to me that Redhead J. erred in principle by failing to take into account the legal consequences of the separate legal personalities between Corbiere, Raleigh and Interros, and that the acts and functions of Corbiere and Raleigh demonstrated them to be separate in function from both Interros and Norilsk. There appears to me to be a more than reasonably arguable case that in treating Corbiere and Raleigh as no more than "nominally different" from Interros Redhead J. was clearly or blatantly wrong. This is not a case where the same parties would be twice vexed in the same matter.

[48] This appears to me to be sufficient to dispose of this part of the application. However I would go further and say that I am not taken by Lord Goldsmith QC's submission that it would be unsatisfactory for the Court of Appeal to give the Nevis proceedings the "kiss of life", only for them to be "put into a coma" pending the outcome of the LCIA Arbitration.

[49] Pursuant to CPR Part 62.20(1) the Court of Appeal has the same case management powers as the High Court, including to stay these Nevis proceedings should it be so minded, in accordance with CPR Part 26.1(2)(q), in furtherance generally of the Overriding Objective in CPR Parts 1.1 and 1.2.

[50] Lord Goldsmith QC's submission on this point did not take into account that the parties to the LCIA Arbitration (his client Interros), and UC Rusal plc have, through a private consensual arbitration process, now submitted themselves to a direction of the LCIA Tribunal to favour such a stay to permit the appeal to proceed. Therefore, for his (separate) clients Corbiere and Rusal now to take a position that such a stay would be unsatisfactory, merely highlights the difference in legal personalities between Interros, Corbiere and Rusal.

WHETHER RRASOC DISCLOSED NO REASONABLE GROUNDS FOR BRINGING A CLAIM FOR CONSPIRACY

[51] Rusal allege that Corbiere and Raleigh combined with

(a) Norilsk's managers ("Managers"), defined at paragraph 22 of RRASOC as Mr Strzhalkovsky, (who is described at paragraph 10, ditto, as having been appointed Norilsk's General Director on Mr Potanin's (i.e. Interros's) nomination) and/or the managers, at this point unnamed, of Norilsk under his direction;

(b) the Defendants' directors, being or including a Mr Alfonso Ayllon and a

Mr Gregoris Koursaros (defined at RRASOC paragraph 3); and

(c) Interros

with the intention of injuring Rusal. These parties are styled herein as the "Alleged Conspirators".

[52] Rusal allege that Interros's motivation behind this combination is to injure Rusal

(a) out of animosity towards Rusal; and
(b) to clear the way for Interros and Norilsk to enter into transactions where by Norilsk's free cash can be distributed by way of a preference to Interros ahead of Rusal.

[53] Rusal allege that the Managers' intentions behind this combination are to:

(a) damage Rusal out of (i.e. motivated by) animosity; and/or
(b) to consolidate their control over Norilsk, and defeat Rusal's attempts to bring about greater independent shareholder scrutiny of the actions of Norilsk's management.

[54] These matters are pleaded at paragraphs 25 to 27 of RRASOC.

[55] I deliberately draw a distinction between intention and motivation. As will be developed later, as a matter of law I understand ***Crofter Hand Woven Harris Tweed Company, Limited v Veitch et al. [1942] A.C. 435*** to be authority for a proposition that it is the purpose that matters when a tortious conspiracy is claimed, not motivation.

[56] At this stage the closest Rusal seem to get to demonstrating animosity as a

motive is an alleged oral personal outburst by Mr Strzhalkovsky to an alleged Rusal nominee Mr Sokov, immediately after a Norilsk board meeting on 21 June 2011, as pleaded at RRASOC paragraph 49.5.3. Clearly, short of a proper and full examination of evidence surrounding this alleged communication, this Court keeps an open mind about what, if anything, this demonstrates.

[57] At paragraph 28 of the RRASOC Rusal avers that the directors of Corbiere and Raleigh are to be inferred from certain other facts pleaded at paragraph 22.5 of the RRASOC of facts to share the Managers' aims.

[58] In essence, Rusal allege that Interros and/or Norilsk management are the driving force behind the alleged conspiracy, with Corbiere and Raleigh playing a subsidiary but active and essential part in it.

[59] Finally, after pleading a matrix of facts, Rusal allege, at paragraph 62 of the RRASOC, that the Corbiere and Raleigh have, with the other Alleged Conspirators, conspired to injure Rusal by lawful, further or alternatively, by unlawful means.

[60] Rusal alleges at paragraph 63 of RRASOC that since the inception of the conspiracy, its influence over the affairs of Norilsk has been substantially diminished, reducing the value of its investment in Norilsk. Rusal say that it has thereby suffered loss and damage, which is to be quantified following service of expert evidence. Rusal claim a final injunctive order restraining perpetuation of the alleged conspiracy and damages.

[61] Against this backdrop, the events of the conspiracy alleged by Rusal are as follows as I materially apprehend them to be alleged. I make no findings of fact of any kind at this stage:

[62] In April 2008, Rusal acquired its 25% plus one share shareholding in Norilsk

from a company called Onexim. Onexim's principal was a former business partner of Mr Potanin, Interros's principal. Interros tried to buy that stake, but failed (RRASOC paragraph 6).

[63] Norilsk's Board of Directors became constituted with nominees from Interros, Rusal, Norilsk's management and of a large number (at one point some 51,000) of independent shareholders. Until June 2010, the independent shareholders held the balance of power on the Board through their nominee Directors (RRASOC paragraph 7).

[64] Since it acquired its shareholding Rusal has been publicly critical of Norilsk's management. Rusal complains about insufficient transparency towards shareholders (RRASOC paragraph 9).

[65] Interros and Norilsk's management were united in antipathy towards Rusal since April 2008. In August 2008 this alignment became closer through the appointment as Norilsk's General Director of Mr Vladimir Strzhalkovsky, who had been nominated by Interros's principal Mr Potanin (RRASOC paragraph 10).

[66] In August 2008 Norilsk's Board resolved to buy back 4.2% of Norilsk's authorized share capital. The price for this buy-back (the "First Buy Back") was at a premium over the closing market price on the date of the resolution of about 27%. By dint of the manner in which Rusal's shareholding had been structured, and by the fact that its shareholding was subject to security rights, Rusal's ability to participate in the buy-back was limited. Interros's shareholding had however been arranged in a more advantageous manner, enabling Interros – and in particular its various subsidiary companies that acted as shareholding vehicles - to sell a bigger corpus of shares than Rusal, thus enabling Interros to obtain more of Norilsk's free cash paid out as consideration for the buy-back. Rusal say that Interros and Norilsk management well knew this at the time they entered into this resolution (RRASOC paragraphs 15 to 17).

[67] In October 2008 a Norilsk subsidiary, "OGK-3", agreed to buy a 25% stake in OJSC Rusia Petroleum from an Interros holding vehicle, Jarford Enterprises, Inc. The price agreed was US$576 million. Rusal say this price was over-inflated, and that its true worth would have been about US$92million. Rusal allege that they were not given a say in this transaction. Rusal say that this transaction was not at all arms' length, as it had been instigated by a Mr Bugrov, who wore three hats as (1) Chairman of OGK-3's Board; (2) a senior Interros executive; and (3) an Interros nominated member of the Norilsk main board (RRASOC paragraphs 12 to 14).

[68] These transactions and Interros and Norilsk management's seeming ability to manipulate Norilsk's business to Interros's advantage, and conversely, to Rusal's disadvantage as a shareholder, brought disagreements to a head.

[69] Consequently in October – November 2008 Rusal and Interros convened and settled their differences, by UC Rusal plc (i.e. the First Claimant) entering into a Cooperation Agreement with Interros. The Cooperation Agreement regulated, as between the parties thereto, the representation on the Norilsk Board of each of the parties (clause 4 of the Cooperation Agreement) and the manner in which they would vote their respective shares (clause 5, ditto). Each party conferred upon the other a "veto right" to require the other, in case the first party should object to it, to vote against acquisitions or disposals of assets in excess of US$200million or any transactions with shares in Norilsk, its subsidiaries and dependent companies which, inter alia, provide the right to vote the shares. The parties agreed to refer disputes arising in connection with this agreement to London Arbitration under LCIA Rules, to be governed by English law (RRASOC paragraphs 18 to 19). Mr Crow QC describes the aim of the Cooperation Agreement was to give Rusal and Interros equality of representation in Norilsk's governance.

[70] Initially all appears to have proceeded in accordance with the Cooperation Agreement. However, below the surface, changes were afoot. By April 2010, the Interros nominee Mr Strzhalkovsky and/or Norilsk managers under his direction had acquired control over a significant block of votes at any shareholders meeting of Norilsk. The way this was done is alleged to have been as follows.

[71] Norilsk has subsidiaries. Two of these are Corbiere and Raleigh. Under Russian law there is no express prohibition on a subsidiary acquiring shares in its parent, and then exercising the voting right attaching to those shares. Russian law does not allow a Russian company to buy its own shares and vote them. A subsidiary is however ostensibly exempt from this rule.

[72] By April 2010 Corbiere and Raleigh had accumulated an aggregate stake in Norilsk of 8.13%. Mr Strzhalkovsky is reported in a Russian business journal on 7 April 2011 to have stated: "*Yes, this stake votes...currently I make such decisions, i.e. to vote with this shareholding for the management*" (RRASOC paragraphs 20 to 22). I pause here to note that it had been Corbiere and Raleigh that had been chosen, or had decided, to accumulate this stake, not Interros or one of its subsidiaries.

[73] Rusal then alleges that Interros breached the Cooperation Agreement, Clause 4(5), by voting a Board which resulted in a four to three imbalance in representation in Interros's favour and to Rusal's detriment on Norilsk's Board. This took place at the 2010 Norilsk AGM, held on 28 June 2010 (RRASOC paragraph 23 and 24).

[74] Rusal allege, at paragraph 25 of the RRASOC, that the outcome of this AGM was the result of voting by Interros, Corbiere and Raleigh "*pursuant to an agreement, understanding or combination (the "Scheme") between Interros, the Directors* [that is, Corbiere and Raleigh's directors], *the Defendants* [that is,

Corbiere and Raleigh] *and the Managers* [that is, Mr Strzhalkovsky and/or other managers of Norilsk under his direction] *(together, the "Conspirators") to further their common objective of:*

25.1 Marginalising Rusal and/or diminishing its influence over the affairs of Norilsk.

25.2 Forcing Rusal to sell its stake in Norilsk, preferably for less than its true worth, and to a party more amenable to the broader objectives of Interros and/or the Managers (as pleaded below)."

[75] Leaving aside questions whether directors of a company, as directors, can conspire with the company of which they are directors, this pleading identifies an apparently broad group of Alleged Conspirators. Counting all alleged conspirators, there are at least six.

[76] Rusal then pleads, at paragraph 26 of the RRASOC: "*Interros's objective is not itself to acquire Rusal's stake. Rather, it is participating in the Scheme with the intention of damaging Rusal, and specifically... to clear the way for [f]urther buy-backs.*"

[77] Rusal points out that the LCIA Arbitration Tribunal has held Interros to have been in breach of Clause 4(5) of the Cooperation Agreement by its conduct at the June 2010 AGM. Rusal prays this in aid for saying that the alleged conspiracy used unlawful means (RRASOC, paragraph 29 to 31).

[78] Rusal also pray in aid an allegation that the Managers, by directing or procuring Corbiere and Raleigh's votes, acted in breach of article 71 of the Russian JSC Law, which provides, in what seem to be rather general terms, that a company's managers "*must act in the company's interests and perform their duties to the company in good faith and reasonably*" (RRASOC, paragraph 29 to 31). There was some disagreement between Mr Crow QC and Lord Goldsmith QC whether this remains a live issue, or whether it has been disposed of in other

related proceedings in Russia. Lord Goldsmith QC says this has been disposed of. Mr Crow QC says it has not. In light of the apparent clear finding of a breach of Clause 4(5) of the Cooperation Agreement by the LCIA Tribunal, I do not need to decide what the status is of this possible Russian unlawful conduct issue.

[79] The events surrounding the June 2010 AGM, including Corbiere and Raleigh voting their shareholding at Mr Strzhalkovsky's direction (as Rusal would have it) essentially constitute "Phase One" of the alleged conspiracy. Once the balance of power had been tipped in Interros's favour, this paved the way for what can be called, for convenience, "Phase Two" of the conspiracy.

[80] "Phase Two" sees the Alleged Conspirators tip the balance of power even further in their favour, and to Rusal's detriment (as Rusal would have it). Phases "One" and "Two" are pleaded as being chapters in the same conspiratorial scheme, not separate conspiracies. This is what Rusal say happened:

[81] In October 2010 Interros wrote to Rusal proposing to buy out Rusal's stake in Norilsk for US$9 billion. Mr Potanin proposed that he would head a pool of investors which would include Interros and Norilsk for the purpose of this buy-out. Rusal refused. Rusal made a public pronouncement stating that Rusal "*confirmed its investment in Norilsk is strategic and we have no intention of selling our shareholding.*" (RRASOC, paragraph 49).

[82] On 16 December 2010 at a Norilsk Board meeting, Norilsk offered to buy out Rusal's stake for US$12 billion. This offer was expressed to be open for acceptance until 1500 hours on 28 December 2010. Rusal say the significance of this timing is that this is one hour before the start of a significant Board meeting which was subsequently convened.

[83] On 20 December 2010 Norilsk announced in a press release that it had entered into agreements with a third party, Trafigura Beheer BV ("Trafigura") to

sell it Norilsk ADRs held by Corbiere and Raleigh, representing approximately 8% of Norilsk's share capital ("the Trafigura Deal"). Rusal claim the Norilsk Board was not consulted about this proposed deal and that the first it knew about the transaction was this press release (RRASOC, paragraph 38). The consideration for this sale, on or shortly before 20 December 2010, was US$217 per share (RRASOC, paragraph 46.4.1).

[84] Hard on its heals, on 23 December 2010, a Norilsk Board meeting was convened in Moscow for 28 December 2010 to vote on a further buy-back (the "Second Buy-Back") (RRASOC, paragraph 39). When the proposal was put to a vote at the (Rusal allege) Board loaded in Interros's favour, it was passed by eight to four (RRASOC, paragraph 41).

[85] The price for this buy back, offered by Corbiere, was US$252 per share or ADR (RRASOC, paragraph 42).

[86] Corbiere went on to purchase 6.85% of Norilsk's shares in issue.

[87] Rusal explain the rather curious fact that Corbiere had ostensibly disposed of its stake in Norilsk for US$217 per share and then bought a smaller stake for US$252 only days later as follows.

[88] Rusal note that Trafigura did not appear to have had sufficient assets or purchasing power to buy Corbiere and Rayleigh's stake as it is alleged to have done (RRASOC, paragraph 47.2).

[89] Rusal allege, with some evidence to support this, that Trafigura did not in fact buy the Corbiere and Raleigh stake at all. Rather, Trafigura was publicly portrayed as having bought that stake, but in reality Trafigura was acting as a nominee for Corbiere and Raleigh, or, in other words, that Trafigura was "fronting" for Corbiere and Raleigh.

[90] Norilsk, Corbiere and Raleigh would want to do this, say Rusal, to by-pass Russian regulatory requirements for government approval to be obtained where a foreign investor seeks to gain control of 10% or more of the total voting shares of a Russian company (RRASOC, paragraph 35 to 37). The purpose of the Trafigura Deal was, say Rusal, to increase Corbiere and Raleigh's ability to acquire a greater shareholding in Norilsk, without needing to obtain government approval, and thus to increase the number of share votes that Corbiere and Raleigh could control (RRASOC, paragraph 44), without regulatory approval.

[91] Rusal relies upon an interview with Mr Potanin published in the Wall Street Journal on the same 23 December 2010 in which Mr Potanin commented on the Trafigura Deal: "*the deal headed off Rusal's challenge to management's right to vote the 8% stake ... the deal opens the way for management and Mr Potanin to form a block of shareholders with enough shares to wield effective control, Mr Potanin said. That would "lock up" Rusal's stake, making it less valuable because it would have less influence, he added.*" (RRASOC, paragraph 48.1). Rusal claim this is evidence (a) that Corbiere, Raleigh, Norilsk management and Interros were targeting Rusal and (b) of a purpose on the part of the Alleged Conspirators to injure Rusal by reducing the value of its stake in Norilsk, and therefore Rusal's net asset value.

[92] Rusal allege that Trafigura obtained representative positions on the Norilsk Board, including one nominated by Corbiere, who has consistently sided with Interros on matters in dispute between it and Rusal (RRASOC, paragraph 48.49, 54, 55.5 and 56).

[93] Pausing here, as I apprehend Rusal's case, the significance of Mr Potanin's alleged statements in the Wall Street Journal interview are as follows. First, he implies that even after the Trafigura Deal, Interros and Norilsk management would control the votes attendant to Trafigura's (putative) shareholding.

[94] Secondly, and – it appears to me more importantly for the purposes of considering whether a tortious conspiracy can be established – a question is begged why should Interros/Mr Potanin care whether Rusal's stake should become "less valuable"? What, commercially, does "less valuable" mean in the present context?

[95] An obvious starting point is Rusal's allegation at paragraph 25 of RRASOC that the Alleged Conspirators have an objective of forcing Rusal to sell its stake in Norilsk "*preferably for less than its true worth*". As Rusal alleges at 49.3 of RRASOC, the monetary value attributable to a shareholding stake is not just a listed or otherwise set share value, but should also take into account the extent to which a stake is strategic, in terms of the influence the stake can wield in the governance of the company.

[96] However, Rusal allege (at paragraph 26, RRASOC) that Interros's objective is not itself to acquire Rusal's stake. If that is right, and it appears from the evidence I have seen so far that this allegation is at least arguable, then why should Interros/Mr Potanin even comment upon that stake becoming "*less valuable*"? An answer, is that Mr Potanin is using "valuable" in more than a monetary sense. A shareholding stake can have value to its holder in terms of the amenity it provides to influence the affairs of a company, and thereby the management of its assets. In considering this analysis my initial reaction was to treat this as perhaps rather far fetched. However, the story does not end there.

[97] On 27 December 2010 Norilsk issued a press release, stating: "*the deadline for [Rusal]'s response ... is on December 28. We have to state that in case the negotiations on the proposed transaction fail [Norilsk] will have to implement other means to neutralize the negative effects of the shareholders' conflict...[Norilsk] will be intending to present a general buy back proposal for approval by the Board...*"

[98] In about February 2011 an article published in Interros's internal magazine stated – although it is not clear who the author was, nor his capacity to speak for Interros, if he purported to do so: "*... Rusal's owner is in a losing position and he [Mr. Deripaska] must understand it...If the conflict persists and Rusal leaves the negotiating table, the "friendly pool of equally minded people" will easily win over Rusal at upcoming shareholders meetings. Oleg Deripaska knows for sure what a controlling shareholder may do to a minority one. One of the most radical ways to say goodbye to a no longer wanted partner is to authorize its interest dilution.*" (RRASOC, paragraph 49.5.2).

[99] Assuming that this pronouncement is somehow representative of Interros's thinking (which is a matter for further evidence at any eventual trial), what does this demonstrate, at least on its face? First, that there purports to be a "*friendly pool of equally minded people*". It is at least arguable that this "pool" equates at least to an extent with the pool of Alleged Conspirators. Secondly, that this "friendly pool" will be able to out-vote and marginalize Rusal. Thirdly, a way of ridding Interros or Norilsk of Rusal is to "dilute" Rusal's "interest". What does this really mean however? It can be put more directly (and in doing so I am doing no more than to say that this appears to me to be a reasonably arguable interpretation at this stage of the matter): "Reduce the value of Rusal's stake and Rusal will become irrelevant." As I apprehend the thrust of Rusal's overall case to be, *the means of marginalizing Rusal's influence was by devaluing its stake*, and that inherently reduces Rusal's net asset value, and that inherently injures Rusal.

[100] If a first step towards an ultimate goal entails intentionally damaging someone else's assets this raises a question of law whether that is a sufficient intention or "purpose" to establish a cause of action in tortious conspiracy, should the other necessary elements also be present. Furthermore, it is a question of law whether intentionally damaging someone else's assets as a first step to an

ultimate goal amounts to a predominant purpose sufficient to establish a conspiracy to cause damage to a person by lawful means.

[101] Rusal hedge their bets on this. To cover the possibility that the Court might at trial find that there was in law no "predominant purpose" to damage Rusal here, Rusal seek to bring this set of events within the category of a conspiracy to harm by unlawful means, which does not require causing damage to have been a predominant purpose. At paragraphs 50, 51, and 52 of RRASOC Rusal allege that the Alleged Conspirators' conduct in relation to the Trafigura Deal and the Second Buy-Back amounted to a breach by Norilsk's Managers, in which the other Alleged Conspirators would necessarily also be implicated, of their duties towards Norilsk under Article 71(1) of the JSC Law (for not acting bona fide in the best interests of the company, as Mr Crow QC summarized it), and clauses 5 and 7 of the Cooperation Agreement.

[102] In answer to this Lord Goldsmith QC stated that the Cooperation Agreement has been found by the LCIA Arbitration Tribunal to have been fundamentally breached by Rusal. Lord Goldsmith QC stated that this Agreement had been terminated by acceptance by Interros of the repudiatory conduct of Rusal in breaching the cooperation agreement. He stated that the Agreement was still in effect at the time of the 2010 AGM [June 2010] – and concedes that breach of this Agreement was available for Rusal to rely upon to establish unlawful means conspiracy at that time - but that it terminated either on 14 October 2010 or 23 February 2011, this being a further question for the LCIA Arbitration Tribunal to resolve.

[103] Mr Crow QC submits that the termination of the Cooperation Agreement is irrelevant, because the breach thereof by Interros upon which Rusal rely in these proceedings occurred at a time prior to the termination.

[104] In answer to Rusal's allegation of breach of Article 71(1) of the JSC Law,

Lord Goldsmith QC stated that "*these very transactions which Mr Crow QC complains about and complains were a breach of Russian law, the directors not doing their duty and so forth, have all actually been taken to the right forum which is the Russian court .... The proceedings have failed.*"

[105] Mr Crow QC countered this by saying that these issues have not been ventilated in Russian proceedings and decided against Rusal, and he prayed in aid the Second Affidavit of Mr Sokov to this effect.

[106] What I take from this exchange is that it is contentious how far, in fact, the Russian proceedings have gone to address these issues.

[107] Rusal allege that consequent upon the Trafigura Deal and the Second Buy-Back, as between Interros (30%), Trafigura (8%) and Corbiere and Rayleigh (together 7%), this group obtained control over approximately 45% of shareholders votes. Since the majority of non-institutional independent shareholders seldom exercise their voting rights (say Rusal), Rusal alleges that this is very close to a controlling stake (RRASOC, paragraph 49.6). Rusal allege that the balance of power was further tipped in the Alleged Conspirators' favour through a third buy-back (RRASOC, paragraphs 57, 58 and 59). Rusal also allege that at the 2011 AGM, on 21 June 2011, Interros, Norilsk managers and Trafigura secured six seats on the Norilsk Board, with Rusal only having two RRASOC, paragraphs 60 and 61).

Redhead J.'s Judgment

[108] In relation to the aspect of the matter concerning strike out for failure to show a cause of action against the Defendants, Redhead J. summarized the grounds for the strike out application before him as follows:

> [9] i. The applicants/claimants re-re-amended statement of case sets out

no cause of action against the respondents/defendants and therefore does not disclose any reasonable ground for bringing the claim.

[9] ii. Further, and in the alternative, the claimants re-re Statement of Case (*sic*) is not viable, obviating the need for a trial, obviously frivolous or vexatious or obviously unsustainable and consequently without solid basis, such that it is an abuse of the process of the court.

[109] First, Rusal in their draft Notice of Appeal show how they have pleaded "lawful means" and "unlawful means" conspiracy in the RRASOC. They do so because Redhead J. did not in terms address whether these causes of action had been properly pleaded in terms of pleading the necessary elements of both torts. There does not seem to be a serious issue between the parties that the pleadings contained in the RRASOC are technically correct.

[110] Redhead J. set out the principles upon which he should assess the application for strike out before him. After a review of authorities he cited, at paragraph [29] a passage from ***Baldwin Spencer v The Attorney General, Lester Bryant, Asian Village Limited, (Civil Appeal No. 20 of 1997 at 8***) that the "*operative issue for determination must be whether there is 'even a scintilla of a cause of action'. If these pleading disclose any viable issue for trial then we should order the trial to proceed but if there is no cause of action we should equally resolute in making that declaration and dismissing the appeal.*"

[111] Redhead J. then reviewed the authorities which set out the elements of "lawful means" and "unlawful means" conspiracy respectively, with reference to ***Kuwait Oil Tanker Co SAK vs Al Bader [2000] 2 All ER 271 at 371***, ***Digicel (St Lucia) Ltd. v Cable & Wireless Plc [2010] EWHC*** and ***Crofter Hand Woven Harris Tweed Company, Limited v Veitch et al. [1942] A.C. 435***

These passages are as follows:

Kuwait Oil Tanker Co SAK vs Al Bader [2000] 2 All ER 271 at 371:

"It is common ground that there are two types of actionable conspiracy, conspiracy to injure by lawful means and conspiracy to injure by unlawful means. The first sometimes described simply as conspiracy to injure and the second as conspiracy to use unlawful means, in our view they are conspiracies to injure and their ingredients are the same with one critical difference. In both cases there must be a conspiracy to injure the claimant, but in the first case (in which the means employed would otherwise be lawful) the predominant purpose of the conspiracy must be to injure the claimant whereas in the second case, although the defendant must intend to injure the claimant, injury to the claimant need not be the predominant purpose."

Digicel (St Lucia) Ltd. v Cable & Wireless Plc [2010] EWHC:

"(1) There must be a combination, (2) the combination must be to use unlawful means, (3) there must be an intention to injure a claimant by those unlawful means and (4) the use of unlawful means must cause a claimant to suffer loss or damage as a result."

Crofter Hand Woven Harris Tweed Company, Limited v Veitch et al. [1942] A.C. 435 at 444:

" On this question of what amounts an actionable conspiracy "to injure"... I would first observe that some confusion may arise from the use of such words "motive" and "intention". Lord Dunedin in ***Sorrell v Smith*** *appears to use the two words interchangeably. There is the further difficulty that, in some branches of the law "intention" may be understood to cover the suits which may reasonably flow from what is deliberately done, on the principle that a man is to be treated as intending the reasonable consequence of his acts. Nothing of the sort appears to be*

involved here. It is much safer to use a word like "purpose" or "object". The question to be answered, in determining whether a combination to do an act which damages others is actionable, even though it would not be actionable if done by a single person, is not "did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action", but 'what is the real reason why the combiners did it?" Or, as Lord Cave puts it, "what is the real purpose of the combination?" The test is not what is the natural result to the plaintiffs of such combined action or what is the resulting damage which the defendants realize or should realize will flow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters but purpose; the relevant conjunction is not ὅστε *"so that" but* ἵνα *" in order that".*

[112] Redhead J. then treated the RRASOC before him. His conclusion was expressed in paragraph [121]:

" In my considered opinion, it is beyond a doubt that the facts alleged by Rusal in the context of the claim it purports to set forth leaves its prospects of success fanciful; in other words, the Rusal claim is bound to fail and has no prospect of succeeding."

[113] Rusal submit first that "if a court is going to give summary judgment or strike out on the basis that the claim cannot succeed on the evidence, it has got to be absolutely sure that it has taken into account the pleaded evidence that actually appears in the statement of claim and any other evidence which has emerged since the pleading was settled because it is otherwise an uninformed decision". Rusal submit that "the real vice in Justice Redhead's judgment on this aspect is that he has simply ignored very significant elements of [their] pleaded case and he has ignored evidence that emerged after the pleading was settled but before the hearing in September in front of him which was deployed in considerable detail."

[114] Mr Crow QC submits that when Rusal say that Redhead J. ignored this, Rusal mean that Redhead J. simply does not mention it.

[115] Mr Crow QC says Redhead J. disregards the whole context in which this dispute emerged, as pleaded in paragraphs 8, 9 and 10 of RRASOC.

[116] Also, Mr Crow QC argues that Redhead J. ignored the context of the Rusia acquisition transaction pleaded in paragraph 11 to 17 of RRASOC, on which Rusal rely as evidence for a conspiracy to injure Rusal.

[117] Mr Crow QC submits that Redhead J. ignored paragraph 46 of RRASOC, in relation to the Trafigura Deal, being the rather curious incident wherein the Defendants sold shares to Trafigura at US$217 per share, and then a few days later agree to buy-back shares at US$252 per share, building in, as Mr Crow QC submits, a loss that makes no commercial sense.

[118] Mr Crow QC then submits that Redhead J. failed to take into account the critical admission coming from Mr Potanin in the article in the Wall Street Journal, pleaded at paragraph 48.1 that "*the object of the exercise is to lock up Rusal's stake, making it less valuable because it would have less influence.*"

[119] Mr Crow QC submits further that Redhead J. ignored the pronouncement in the Interros internal magazine, pleaded at paragraph 49.5.2, RRASOC " *One of the most radical ways to say goodbye to a no longer wanted partner is to authorize its interest dilution*". Pausing here, this pronouncement does not appear to have been addressed by Bannister J in his earlier decision either.

[120] Mr Crow QC submits that Redhead J. further ignored the alleged continuing packing of Norilsk's Board with Interros nominees at paragraphs 53 to 55 of RRASOC, and a third buy-back alleged at paragraphs 57 to 59 of

RRASOC, which Rusal say is also part of the same strategy.

[121] Mr Crow QC submits that "no single point of evidence is going to be conclusive, but it is the accumulation of material which illustrates the story that [Rusal] are trying to put across. It is the accumulation of facts which are ignored by the judge which undermines the integrity of his decision that [Rusal] are unable to show that the claim has any realistic prospect of success at trial."

[122] Rusal's next point is that Redhead J. ignored evidence that was deployed in front of him.

[123] Mr Crow QC submitted that Redhead J.

a misunderstood Rusal's case that Trafigura could not have purchased the defendants' shareholdings;

b failed to take into account that the Defendants had put forward untrue and misleading statements in support of their strike out application concerning Trafigura's alleged purchase of the defendants' shares, as Mr Crow QC explained that there is independent evidence that the purchasers had been companies called Delmonico and Crelios, not Trafigura;

c failed to take into account that "the fact that the court was being misled was a highly material consideration in support of the allegation that there was a covert conspiracy to set up a state of affairs within Norilsk that was damaging to Rusal;"

d simply did not take into account this "critical package" of evidence;

e did not take into account that the proposed buy-back by Corbiere,

under which Corbiere was going to be acquiring shares which Trafigura would be controlling, was not discussed beforehand by the Board of Corbiere's parent Norilsk, despite the value of the transactions being some US$3.5billion dollars and that the voting influence in Norilsk's affairs would consequently also change;

f failed to take into account that this is a state of affairs that is (as Mr Crow QC submits) "truly astonishing", as "the conspiracy is agreed between Interros, the Interros friendly manager at Norilsk and Corbiere and Raleigh, but not the main Board."

g ignored evidence that Norilsk's directors "astonishingly" preferred to have a qualified auditors' report than "disclose enough information to satisfy the auditors as to the beneficial ownership of the shares that its own subsidiaries have ostensibly sold".

[124] Rusal's next point was that Redhead J. had, at paragraph [85] of his judgment, taken the passage cited in ***Total Network SL v HM Revenue and Customs [2008] 1 A.C. 1174*** as authority for a proposition that the fact that a conspirator is benefiting himself at the expense of a person injured thereby makes it "*most difficult for the injured party to establish that that person's predominant motive was to cause him injury*", whereas, say Rusal, this authority supports the opposite. Mr Crow QC put it thus: "So, with respect, rather bizarrely, his Lordship quotes the passage which on any fair reading supports our approach on the law, and appears to believe that it supports the opposite." I am persuaded that Mr Crow QC is correct on this point.

[125] Rusal's next point was that Redhead J. appears to have understood the conspiracy allegation to have been that Corbiere and Raleigh conspired with Interros to break the Cooperation Agreement. Rusal's submission is that the

object of the conspiracy was not to procure breach of the Cooperation Agreement, rather, to injure Rusal. Breaking the Cooperation Agreement was one of the unlawful means used by one of the conspirators in pursuit of the overall strategy, not the purpose of the conspiracy, say Rusal.

[126] Pausing here, it is to be noted that Bannister QC, J., considered a different pleading which appears to have included allegations of tortious procurement of breach of contract, which the RRASOC does not. Redhead J. appears to echo Bannister QC J.'s decision very closely, and follow Bannister QC J.'s findings. Redhead J. deals in his judgment from paragraphs [54] to [61] on a possible conspiracy to breach the Cooperation Agreement even though it appears clear from the RRASOC that this is not the conspiracy that is pleaded. At least in this regard, Redhead J. appears to have been under a misapprehension as to Rusal's pleaded case in the RRASOC.

[127] Mr Crow QC's next critique of Redhead J.'s decision was aimed at paragraphs [66] to [69] of his judgment. Mr Crow QC made three points:

a in discounting that individual corporate governance acts amounted to individual conspiracies, Redhead J. took a segmented view of the evidence – he was 'salami-slicing' the evidence as it currently stands, as Mr Crow QC put it, failing to have regard to the accumulated body of evidence as a whole;

b taking such a segmented view was, in Mr Crow QC's submission, all the more invidious because Redhead J. ignored a lot of evidence that already existed;

c Redhead J. ignored the inferences that should, in Rusal's submission, be properly drawn from the evidence which he should have taken into account.

[128] Finally, Rusal say that at paragraph [82] of his judgment Redhead J. failed to engage with the fact that because Corbiere and Raleigh are entitled to vote as shareholders of their parent Norilsk, a buy-back would not in this case have the effect of increasing the relative ownership stake of each investor in the company, which Redhead J. understood (from Lord Goldsmith QC's submissions) to be the supposed legitimate commercial justification for a buy-back.

[129] In response the Defendants made the following submissions, in summary:

1. *Rusal failed to show anything in its pleading which establishes concerted action taken pursuant to the alleged combination or understanding reached:*

   (a) *The tort of conspiracy requires active participation and not simply facilitation.*

   (b) *Rusal therefore has to show conduct that has been undertaken to implement or carry out the combination or understanding reach by the supposed conspirators.*

   (c) *Rusal asserts the existence of the supposed "Scheme" whose purpose is said to be to "marginalise" Rusal and refers to various acts supposedly committed in furtherance of that Scheme.*

   (d) *The problem Rusal faces is that there is no credible evidence that any of the defendant's actions were undertaken in order to carry out the supposed conspiracy.*

   (e) *Similarly, there is no evidence whatsoever that supports the assertion that the defendants were party to a "common objective" to "marginalise" Rusal or force it to sell its stake.*

I disagree. The Defendants' conduct in voting their shares in their parent Norilsk, selling their shares to Trafigura or nominees of Trafigura, and then actively participating in the Second Buy-Back appears undisputed. Also the content of the various pronouncements by Norilsk and Interros related persons commenting on the transactions appears undisputed. It appears from these at this stage that Corbiere and Raleigh had combined with, inter alia, Interros and Norilsk management, in a scheme to negate the influence of Rusal or force it to

sell its stake. I say "at this stage", because allowance should be made that there might have been other pronouncements which have not yet been disclosed and which counter the pronouncements highlighted before this Court, as well as other material facts. To my mind inferences can properly be drawn from this accumulated body of information and evidence that the Defendants' actions were undertaken in pursuance of a combination with alleged conspirators identified by Rusal and that Rusal has ultimately been damaged thereby.

2. *The various iterations of Rusal's pleading have never been able to overcome the fact that Norilsk management and the Respondents were voting and selling the shares with varying interests in mind depending on the particular transaction - none of which were directed at harming Rusal.*

I am not persuaded that this is correct. The pronouncements by Norilsk management and Interros connected persons indicate that negating the influence of Rusal was very much a purpose of this like-minded group of persons, which included the Defendants.

3. *In its draft Notice of Appeal at paragraphs 14.1.1 to 14.1.3, Rusal says that the Judge was wrong not to conclude that a conspiracy existed based on Interros voting its shares, the circumstances of the Trafigura deal and the circumstances of the buyback. However, it is clear from the relevant passages of the Judgment (¶¶ 66, 80 and 84) that the learned Judge took the view that not only were each of those facts insufficient to find a conspiracy, they were ordinary dealings in shares which might be expected in the corporate world.*

The difficulties with this submission are that whilst the transactions themselves do not directly demonstrate a conspiracy to injure Rusal, Redhead J. appears not to have given consideration to the specific statements made in the Norilsk management's and Interros's pronouncements which comment on the desired effect of the various transactions. The pronouncements appear to be indispensible pieces in the evidential jig-saw for demonstrating that there has been a conspiracy here. Redhead J. also appears not to have given consideration to the fact that the buy-backs in this case would not have the "ordinary" effect of concentrating the value of the shareholders' stakes pro rata, as the Defendants have the right to vote such shares in their parent by a special feature of Russian law.

4. *Further, Rusal suggests that the Judge failed to take account of the various press statements made by some of the supposed conspirators (see ¶¶ 14.2.1 to 14.2.5 in the draft Notice of Appeal). However, none of those press statements take the matter any further; they merely reflect the type of statements that are made in the*

press every day between warning shareholders. There can never be anything actionable about a shareholder or management exercising their legitimate rights.

First, if legitimate rights are being exercised in a manner which amounts to a tortious conspiracy then clearly that would give rise to a cause of action. Secondly, the pronouncements made by Norilsk management and Interros connected persons cannot so blithely be dismissed. Regard has to be had to what they say, and that, at least on the evidence as so far presented, strongly indicates that Norilsk management and Interros and the Defendants were acting together to dilute the influence and value of Rusal's stake in Norilsk.

Lawful Means Conspiracy

5. *The learned Judge did not accept that participating in the buyback, or the existence of the Trafigura transaction could evidence a predominant intention to injure Rusal. Each time the shareholders were acting in their own interests, not with the intention of harming Rusal. [See Redhead J Judgment ¶¶ 82 and 84].*

The statement that "each time the shareholders were acting in their own interests, and not with the intention of harming Rusal" appears unsupported by primary evidence. That is a sweeping submission which doubtlessly the Defendants would want to make in a Defence to the RRASOC and support with evidence in due course.

Unlawful Means Conspiracy

6. *Rusal also accepts that the Judge correctly identified the elements of this Claim (see draft Notice of Appeal at ¶ 5).*

7. *Even if Rusal were able to establish an "unlawful act" with adverse financial consequences to it, which were both foreseeable and foreseen, if they were not consequences that the Defendants desired or had any interest in bringing about, the necessary intention is not established. See Douglas v Hello (CA) (supra), at ¶ 217.*

8. *It is clear from the Judgment that the learned Judge was conscious of this fatal deficiency (see Redhead J Judgment ¶¶ 84, 87 and 88).*

The difficulty with this submission is that the Defendants, together with Norilsk management and Interros, indeed appeared to have desired or had an interest in bringing about adverse financial consequences to Rusal. The pronouncement by Mr Potanin in the Wall Street

Journal interview, taken together with the pronouncement in the Interros internal magazine suggest that to have been the case.

9. *The Defendants say that Redhead J., like Bannister J. before him, saw this claim for what it was – a dressed up attempt to pursue another route to harass Norilsk and Interros via the Defendants and to further a greenmail campaign by taking snippets of newspaper articles and attempting to stitch them to a series of completely legitimate corporate transactions and thereby seek to convert a disgruntled shareholder's disappointment into a legal cause of action.*

I am not persuaded that this is the case. Equally I do not consider that the Defendants can continue to mine the undoubtedly abusive acts of Rusal in relation to their attempt to obtain an interim injunction for prejudice against Rusal with respect to their re-re-amended claim.

[130] Lord Goldsmith QC supplemented the Defendants' written submissions with oral arguments, which can be summarized as follows:

a the questions of abuse of process and the existence of a cause of action have already been considered by two experienced judges, with the implication that between them they were more likely than not to have reached the right conclusions.

This was an instantly unattractive submission, as even experienced judges sometimes err.

b there had been six days of arguments before Bannister QC J. and Redhead J. combined, the implication again being that both these judges had understood the matter in that time. I asked Lord Goldsmith QC whether these two judges might have been confused by the sheer volume of information and material that had been presented to them. Lord Goldsmith QC submitted that he did not believe so for a moment.

Again, I am not persuaded. As Mr Crow QC submitted in reply, the decision he is

seeking to appeal is that of Redhead J., not Bannister QC, J. The fact that in paragraphs [54] to [61] of his decision Redhead J.'s devotes considerable attention to addressing a case of a conspiracy to breach the Cooperation Agreement which has not been advanced in the RRASOC, suggests that Redhead J. had not fully understood the pleaded case before him, despite, or perhaps because of, the mass of detail before him.

c it is not appropriate for Counsel (Mr Crow QC) to set examination papers for judges to say "Aha, I told you twelve things and you only mentioned these, therefore you must have got it wrong". Judges of seniority deserve the credit for having understood the arguments.

In my view this argument fails because Redhead J. saw no credible evidence supporting a conspiracy, but he does not then say why he dismisses the body of evidence which Mr Crow QC submits he ignored, if indeed he had taken it into account.

d three different jurisdictions have been dealing with the issues before this court and "enough is enough". This is a contrived dispute which has nothing to do with Corbiere and Raleigh.

I am not persuaded by this submission. First, it seems reasonably clear that Corbiere and Raleigh were active players, and not just facilitators, through their actions in buying and selling shares and voting them, in furtherance of a combination with Norilsk management and Interros to reduce the influence over Norilsk's governance. This dispute has much to do with Corbiere and Raleigh. Secondly, it seems reasonable that if Rusal wish to do so and are able to mount a viable cause of action against Corbiere and Raleigh, then regardless of how many other jurisdictions may have treated even the same issues against other parties, Rusal should not be lightly deprived of the opportunity of vindicating their rights, such as they can establish, against the Defendants in Nevis.

e it is an unrealistic proposition for Rusal to claim that they are being injured when they have been offered about US$14billion for their shareholding, which is over market value.

Mr Crow QC submitted in reply, and I accept, that Lord Goldsmith QC has no expert evidence that this amount was an overvalue.

f Rusal's conduct in trying to interfere with the Court's process upon the application to discharge the ex parte injunction before Bannister QC J. should weigh against Rusal now.

I am not persuaded that a party's prior conduct should influence the Court's mind on matters currently before it, particularly as Bannister QC J. had already dealt with this aspect.

g for "lawful means" conspiracy, Rusal would have to prove the Defendants' predominant purpose was to injure Rusal, and it is not enough to say in effect that the predominant purpose is to achieve a benefit for Interros/Norilsk.

I agree with Lord Gordsmith QC on this point.

h the present claim is contrived to enable Rusal to seek disclosure from the Defendants.

Lord Goldsmith QC claimed that Mr Crow QC had admitted as much in his oral submissions, or at least that Mr Crow QC had said that obtaining disclosure would be an advantage of proceedings in Nevis, but Mr Crow QC denied this and on examination of the transcript it is clear that Mr Crow QC is correct.

[131] For the reasons given by Mr Crow QC I am satisfied that Rusal has a reasonable prospect of persuading the Court of Appeal that Redhead J was wrong in dismissing the claim for failure to establish a viable cause of action on the grounds that he did.

[132] However, that does not of itself mean that Rusal should succeed on this part of their application for permission to appeal. As Mr Crow QC himself submitted, Rusal need to satisfy me that there is a realistic prospect of success in satisfying a Court of Appeal that Rusal have pleaded the constituent elements of conspiracy and that there is a realistic prospect of success on the evidence in establishing those elements.

[133] I am satisfied that Rusal have pleaded the constituent elements of both "unlawful means" conspiracy and "lawful means" conspiracy.

[134] In relation to "unlawful means' conspiracy, Rusal will have, it seems to me, a considerable number of facts to prove these elements at a trial. These will in all probability have to include that the chain of causation in the establishment of the conspiracy remained unbroken from the time 'unlawful means" were used until the alleged loss and damage was sustained. Lord Goldsmith QC accepted that Rusal could rely upon any unlawful acts in breach of the Cooperation Agreement at the 2010 Annual General Meeting, up until termination of that agreement in either October 2010 or February 2011.

[135] Mr Crow QC appears content that such breaches suffice for Rusal's purposes. I would raise a question mark whether that is the case, as the pronouncement in the Interros internal magazine, for what they are worth at this stage of the matter, suggest that there were negotiations between the parties. The full circumstances of the parties' interactions are not yet evident, thus it is not clear whether the chain of causation, such as it might need to be, remained unbroken. Be that as it may, Lord Goldsmith QC accepted in his oral

submissions that the fact that it may be difficult for someone to prove something does not mean that his case is fanciful.

[136] I am satisfied that on the case presented in the RRASOC and the evidence before the Court that Rusal have a reasonable prospect of successfully establishing that Rusal suffered loss or damage resulted from unlawful and lawful action taken by the Defendants pursuant to a combination of the Defendants and other Alleged Conspirators and that at least part of the objective or common purpose was "in order that" (in the conjunctive sense of "□να") Rusal should be injured.

[137] The aspect of Rusal's case that gave me most difficulty is the question whether Rusal can establish a case with a reasonable prospect of success that the predominant purpose of the alleged conspiracy was to damage Rusal, i.e. the requisite standard to establish "lawful means' conspiracy. From a commercial and common sense point of view the predominant purpose of the Defendants' combination with Norilsk management, Interros and possibly other Alleged Conspirators was not to injure Rusal, but so that they themselves could benefit having negated Rusal's influence over Norilsk's affairs.

[138] Interros's and Norilsk's purpose, which the Defendants apparently shared, also appears to have been to be able to vote through share "buy-backs", which would enable Interros to have paid to it directly or indirectly, Norilsk "free cash", by-passing a dividend procedure which would see all shareholders, including Rusal, rewarded pari passu. Such a buy-back was pleaded at paragraph 15 of RRASOC. Such action would represent a gain to Interros at the expense of shareholders including Rusal.

[139] Mr Crow QC, with commendable candor, accepted that Norilsk's gain as a result of the conspiracy is not necessarily Rusal's loss, as different factual scenarios could be played out. Even if one takes Interros as treating the value of

Rusal's shares to be a matter of their amenity to vote in Norilsk's affairs, and not just as an expression of monetary terms, and then even if one accepts that the very means of achieving the Alleged Conspirators' goals is by debilitating Rusal (such that injury to Rusal is inherent in the scheme, and not just "collateral damage"), Rusal would still need to satisfy the trial Court that the predominant purpose of the scheme as a whole was to injure Rusal.

[140] Mr Crow QC seeks to overcome this problem by arguing that the passage from ***Total Network SL vs HM Revenue and Customs*** quoted above and at paragraph [85] of Redhead J.'s judgment means that "if you are intending to derive a benefit for yourself which necessarily brings injury to the other person, that may well be sufficient to constitute the predominant intention to injure for the purposes of conspiracy".

[141] At first sight this argument seems to be stretching the concept beyond the proposition that the obverse of the predominant intention to benefit is a predominant intention to harm, in circumstances where the benefit to derives from harm to another. On Mr Crow QC's argument "collateral damage" necessarily inflicted in obtaining a benefit by lawful means would seem to be enough to establish a predominant intention to harm.

[142] However, upon a review of the authorities referred to in ***Crofter Hand Woven Harris Tweed Company, Limited et al v Veitch et al [1941] AC 435*** and the most recent English leading case on economic torts, ***OBG Limited et al vs Allan et al. [2007] UKHL 21, [2008] 1 A.C. 1***, it appears that Mr Crow QC has a reasonably arguable case that his argument here is right.

[143] Specifically, it first appears to be the case that the concept of an intention to harm as being the obverse of an intention to benefit has its origin, and applies, in relation to the tort of unlawful interference in the business of another. In ***Total Network*** Neuberger LJ, without pronouncing definitively thereon, considered that

this concept could extend to ascertaining predominant purpose in cases of "lawful means" conspiracy. In the context of "unlawful means" torts, this concept was clarified in the leading judgment of Hoffmann LJ in ***OBG*** at paragraph 167 as follows:

"Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort. This accords with the approach adopted by Lord Sumner in Sorrell v Smith [1925] AC 700, 742:

> *'When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendant's success is the plaintiff's extinction, and they cannot seek the one without ensuing the other."*

[144] In the present matter the case as presented by Rusal appears to me to fall, at least arguably with a reasonable prospect of success, into the situation identified by Hoffmann LJ as one where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant.

[145] For the reasons stated I give the Applicants/Claimants permission to appeal against Redhead J.'s decision dated 11 November 2011 and direct that the costs of this application shall be costs in the appeal, if any.

[146] Finally, I should like to express my gratitude to Counsel for both sides and those behind them for their assistance in relation to this matter. I express a special commendation to the parties for having provided a daily transcript by John Larking Verbatim Reporters. I thank John Larking Verbatim Reporters for their accurate and exceptionally prompt service which greatly assisted this Court by capturing the carefully nuanced and compelling submissions of Counsel.

Gerhard Wallbank
High Court Judge (Acting)

13 July 2012