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Cases No: HQ12DO3133 and HQ12DO1742

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/10/2013

**Before: Mr Justice Simon**

**Between:**

**Pavel Karpov**

**Claimant**

**and**

**(1) William Felix Browder**  
**(2) Hermitage Capital Management Limited**  
**(3) Hermitage Capital Management (UK) Limited**  
**(4) Jamison Reed Firestone**

**Defendants**

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**Mr Antony White QC** and **Ms Catrin Evans** (instructed by **HowardKennedyFSi LLP**) for  
the Defendants

**Mr Andrew Caldecott QC** and **Mr Ian Helme** (instructed by **Olswang LLP**) for the Claimant

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Hearing dates: 24-25 July 2013

**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 SIMON

**Mr Justice Simon:**

**Introduction**

1. On 16 November 2009 Sergei Magnitsky died in prison in Russia. Shortly before his arrest and imprisonment he had been investigating a substantial tax fraud committed against the Russian Federation by a criminal gang. I shall refer to this tax fraud as the Hermitage Fund fraud.
2. Beyond this short summary, many of the facts in issue between the parties are unknown or controversial, and are subject to stark divisions of opinion.
3. In North America and Europe, there have been denunciations of what occurred, with individuals and organs of the Russian Federation being accused of complicity in the Hermitage Fund fraud and involvement in the murder of Sergei Magnitsky, including accusations of a cover-up of these crimes. In Russia, although there seem to be differing views, the official position appears to be that what occurred involved a fraud against the state and the death of a Russian citizen in Russia; and that there is no justification for the extensive international response to these events.
4. Neither this claim, were it to proceed to trial, nor these applications, can be expected to throw significant light on many of the issues raised by the international debate.

**The Parties to the present action**

5. The First Defendant ('Mr Browder') is the Co-founder and Chief Executive of the Second Defendant, which is the manager of the Hermitage Fund. The Hermitage Fund was established in 1996 to invest in equity, and equity-related securities, and instruments of companies incorporated in Russia or countries of the former Soviet Union. The Third Defendant is a company providing investment research for the Hermitage Fund; and the Fourth Defendant ('Mr Firestone') is a US attorney who managed a Russian Law firm, Firestone Duncan (CIS) Ltd ('Firestone Duncan'). Sergei Magnitsky was an auditor employed by Firestone Duncan at its Moscow office, which specialised in Russian corporate and tax law.
6. The Defendants have conducted a forceful international campaign. They contend that a criminal organisation (the Klyuev gang) conspired to take control of certain subsidiaries of the Hermitage Fund and, having done so, procured a very large and unlawful tax refund from the Russian Federation (worth approximately \$230m) which was diverted to the conspirators.
7. The Defendants' campaign and, in particular, its denunciation of the death of Sergei Magnitsky while investigating the Hermitage Fund fraud, has led to reports from numerous international organisations which have condemned what occurred. The culmination of this campaign was the passing by the US Congress of the Sergei Magnitsky Rule of Law and Accountability Act 2012, and the publication by the U.S Treasury of a list of those who are said to have been implicated, ('the Magnitsky list').
8. At the centre of the campaign is an English language website: <http://russian-untouchables.com> ('the website'), and a Russian Language version which publishes

similar material. Among the material which has been published by the website are 4 videos: episode 1 on 22 June 2010, episode 2 on 12 July 2010, episode 3 on 14 April 2011 and episode 4 on 26 June 2012. These videos remain on the website; and the Claimant complains that each contains material which is defamatory of him. He also complains about the defamatory content of an interview Mr Browder gave to the BBC which was broadcast on 12 September 2011 and an article written in 'Foreign Policy' magazine which was first published online on 1 March 2012.

9. Until his retirement in July 2012, the Claimant was a policeman in Russia. He worked for the Moscow Police until December 2009, acting as a Senior Investigating Officer for major cases; and, from December 2009 until his retirement, as an Investigator with the Investigation Committee of the Ministry of the Interior. Artem Kuznetsov was the Deputy Head of the Tax Crimes Department of the Ministry of the Interior of the Russian Federation.
10. The Claimant was named in each of the four episodes published by the Defendants, as he was on the page of the Defendants' website containing the BBC interview and in the 'Foreign Policy' article. The nature of his complaint in the present proceedings can be summarised by reference to certain parts of the videos. This is only a summary because the material is extensive and ultimately the effect of the material has to be seen in context.

#### Episode 1.

Three years before Sergei [Magnitsky] died the same officers, Lt. Col. Kuznetsov and Major Karpov acting with the same convicted killer, Viktor Markelov, were accused of kidnapping [Fedor] Mikheev in 2006 with an attempt to extort \$20,000,000. To cover up their crime they sent [Fedor Mikheev] to prison for 11 years where he is to this day. They should have been stopped then, instead they went on to arrest, torture and kill Sergei Magnitsky to hide their crimes, crimes that they committed against their own Government and the people they were sworn to protect.

#### Episode 2.

[In 2008], after Sergei Magnitsky testified against the same criminal group for an even larger crime, the same officers arrested, tortured and eventually killed Sergei to hide their crime. Unless they are stopped the same criminal group will continue to murder and steal. It's time for the Russian government to prosecute the officers responsible for the arrest and death of Sergei Magnitsky. Major Pavel Karpov uses his position to steal, destroy lives; he's become a very rich man and believes his uniform makes him untouchable; it's time to prove him wrong.

#### Episode 3.

Instead of supporting Sergei Magnitsky and recognising him as a hero, the government allowed interior ministry officers, Kuznetsov, Karpov ... to arrest, torture and kill him.

11. In the Particulars of Claim the Claimant has pleaded (see for example §17) that:

In their ordinary and natural meaning and in context, the words and images complained of meant and were understood to mean that the Claimant;

1. Whether himself or through others caused, and is guilty of, the torture and murder of Sergei Magnitsky;
- 2 Did so in order to prevent exposure of the fact that he was party to a fraud on the Russian State in the sum of \$230 million;
3. Had previously fabricated a case against Fedor Mikheev (leading to his wrongful imprisonment for 11 years) in order to cover up the fact he was a party to kidnapping him in an attempt to extort a large sum of money from him; and
4. Unless stopped, would continue to commit or cause murder to cover up his crimes.

12. It will be necessary to consider the pleaded meanings later when considering the extent to which the Defendants rely on the defence of justification.

### **Legal proceedings**

#### **The Claimant's criminal complaints in Russia**

13. Following the publication of the Episode 1 video in Russia, the Claimant wrote to the Prosecutor-General of the Russian Federation complaining about its contents and the media reporting of it. The letter (dated 12 July 2010) was in the form of an application to the Prosecutor for him to review the facts and to start a criminal defamation action. Defamation was a criminal offence at the time, although it later ceased to be so. According to his witness statement his superiors were discouraging.
14. Following the publication of Episode 2, he wrote to the Head of the Department of Internal Security of the Russian Ministry of the Interior on 14 July 2010 asking for a criminal file to be opened. By a letter dated 6 August he was notified that his two letters would be attached to the criminal investigation file which had been opened in relation to the Defendants' allegation about the theft of the Hermitage Fund subsidiaries. It appears that the letters were attached to the criminal files of two men who were convicted of the Hermitage Fund fraud.
15. On 6 September 2010 the Claimant made a further application to the First Deputy Prosecutor General for a criminal case to be opened. This application was denied on 17 September, with an indication that there were no grounds for a separate review. The Claimant has explained that, since the criminal file was concerned with the tax

fraud and not with an allegation that he had murdered Sergei Magnitsky, he found the rejection of his application ‘deeply frustrating.’

16. On 27 September he wrote again to the Prosecutor General seeking a review of the 6 August notification.
17. On 12 October 2010 he appealed the decisions of 6 August and 17 September to the State Justice Counsellor and Acting Chair of the Investigations Committee of the Russian Federation. On 18 October his appeal was denied in the same terms as the original decisions; and at the same time he was notified that his application of 27 September was also denied.
18. On 2 July 2011 the Claimant initiated a further criminal complaint, which was suspended on 15 September 2011 and then rejected on 22 December 2011.
19. In these circumstances he decided not to pursue a criminal complaint any further.

### **The Claimant’s civil complaint in Russia**

20. On 6 July 2011 President Medvedev’s Human Rights Council published a preliminary report of their findings into the death of Sergei Magnitsky. The Claimant took the view that these findings were based ‘almost entirely on allegations and materials provided by the Defendants’.
21. On 14 July 2011, following the publication of the report (which, according to the Claimant, ‘ignited more media coverage’), he began a civil action for defamation against the authors of that report. Although the claim was not brought against the Defendants, the Claimant’s core allegation was that the report was based on allegations made by Mr Browder which the authors of the report had not verified. The relief claimed was a series of declarations that the account given in the report about the Claimant’s involvement in the events leading to the death of Sergei Magnitsky was inaccurate, and an order that the authors of the report retract such statements.
22. This claim was dismissed by the Presnensky Regional Court in Moscow. The fuller of the two versions of the decision shows that the Court dismissed the claim on the grounds that the statements made in the Human Rights Council report would be considered in the criminal investigation into the death of Sergei Magnitsky. The Claimant did not appeal against this ruling, although it would have been open to him to do so.

### **The Claimant’s claim in these proceedings**

23. The present proceedings were issued in 2012: on 4 May against Mr Firestone and on 31 July against Mr Browder and the Second and Third Hermitage Defendants.
24. It is common ground between the parties that one of the consequences of the delay following the publications is that the complaint is confined to publication in the period of 1 year immediately preceding the issue of proceedings: 5 May 2011 in the case of Mr Firestone and 1 August 2011 in the case of Mr Browder and the Second and Third Defendants, see s.4A of the Limitation Act 1980, as amended.

25. On 1 August 2012, Messrs Olswang sent a Letter of Claim on the Claimant's behalf in accordance with the Pre-Action Protocol for Defamation. The letter took issue with the allegations made against the Claimant and sought an undertaking not to repeat them, a statement to be made in open court and payment of his costs. So far as damages were concerned, the letter continued:

Our client is plainly entitled to substantial damages. However, our client's main concern is for the record to be set straight. Our client's approach to damages, in respect of which he reserves his position, will therefore be dictated by your approach to correcting the record and the promptness of your response.

26. The reply from the Defendants' then solicitors, dated 20 August 2012, was not emollient. Having noted that the Letter of Claim had been written after the proceedings had been issued, it continued.

Our clients nevertheless, welcome the opportunity to engage with your client in relation to his role in these matters and the source of the funds which he uses to support his extravagant lifestyle (and expensive legal representation). They are pleased that he is prepared to submit to the jurisdiction of the English courts which will, for the first time, be able to provide an impartial and independent investigation of these matters.

27. This exchange prefigured a number of issues which arise on these applications.
28. The Particulars of Claim were served on the Second and Third Defendants on 31 August 2012 and deemed served on Mr Browder and Mr Firestone on 4 September. The Particulars of Claim set out the words complained of and the defamatory meanings which it was alleged they bore.
29. On 18 December a Defence was served on behalf of all Defendants which extended to 239 paragraphs. The Defence denied that the words and images bore the meanings set out in the Particulars of Claim, and pleaded in accordance with CPR 53 PD 2.5 the defamatory meanings which they sought to justify in §59.

If and in so far as the words complained of in episodes 1 to 4 of the said videos ... bore or were understood to bear the following meanings they are true or substantially true:

1. the Claimant was involved with a group of corrupt law enforcement agents, government officials and organised criminals ('the group') who stole \$230 million in tax revenue from the Russian people;
2. he was one of those culpable of and/or complicit in the attempt to cover up the said tax fraud and which led to the arrest, imprisonment, ill-treatment and unlawful death in custody of Sergei Magnitsky;

3. (save for the episode 3 video) the Claimant had previously been involved with the group in the kidnap of Fedor Mikheev and the attempted extortion from his employer, and the cover up which led Mr Mikheev to be wrongly imprisoned for 11 years;
  4. there were real concerns that if the group, including the Claimant, was not investigated and brought to justice by the Russian authorities then members of that group and other corrupt government officials would commit further crimes.
30. Alternatively, the Defendants pleaded at §60 of the Defence that, if the words and images bore the meanings pleaded by the Claimant, they were true or substantially true.
  31. The Particulars of Justification were grouped under various headings: the Claimant's wealth, the Klyuev Crime Group, the Mikhailovsky GOK fraud, the kidnapping of Mr Mikheev and the tax fraud against Hermitage.
  32. The heading 'Tax fraud against Hermitage' contained a large number of sub-headings: 'Background to Hermitage', 'The planning of the tax fraud against Hermitage', 'The commencement of the investigation into Kameya (a Russian Hermitage Fund subsidiary)', 'The basis for the Kameya case and the irregular procedure used by the Claimant and his associates', 'The Claimant's wrongful retention of the documents and materials seized during the raids', 'The theft of the Hermitage Fund subsidiaries', 'The uncovering of the misappropriation of the Hermitage Fund subsidiaries and the tax fraud', 'The December 2007 complaints', 'The fraudulently obtained tax refunds of US\$230 million', 'The fate of the December 2007 complaints', 'Retaliation by the Russian State and the Klyuev group', 'The attempts to liquidate the Hermitage Fund subsidiaries and destroy evidence of the fraud', 'Intimidation by the Claimant of the Hermitage lawyer who filed the December [2007] complaints', 'The opening by the Claimant of a case against the Hermitage Fund subsidiaries and transfer of custody of documents used in the fraud', 'The re-opening of the Kalmyk case against [Mr Browder]', 'The decrees issued by the Claimant against [Mr Browder's] colleague', 'The abuse of position by the Claimant', 'Further attempts by Hermitage to report the theft of the Hermitage taxes', 'Harassment of Hermitage's executives and lawyers by state agents in response to complaints filed', 'The role of the Claimant in the unlawful detention of Sergei Magnitsky', 'Mr Magnitsky's discovery of an identical fraud a year earlier', 'Mr Magnitsky gives further testimony against the Klyuev group', 'The unlawful detention of Sergei Magnitsky', 'The ill treatment and/or torture of Magnitsky' and 'The official and high level cover-up of Magnitsky's death'.
  33. Of these sub-headings, whose number and ambit indicate the potential extent of an enquiry at trial, it was the penultimate heading, 'the ill treatment and/or torture of Magnitsky' on which the parties particularly focussed during the hearing.
  34. At §225 of the Defence the Defendants claimed that the libel proceedings had been brought as part of the Claimant's retaliation and were evidence of the continued cover up of his role and the role of others.

35. In addition to the Justification defence, the Defendants relied on a Reynolds defence and a defence of qualified privilege.
36. The Defendants also pleaded, at §§45-58, that the claim was an abuse of process and that proceedings should be struck out or stayed.

### **Applications**

37. On 19 February 2013 the Defendants followed up their plea of abuse of process by issuing the present application to strike out or stay the claim as an abuse of process under CPR 3.4(2)(b) and/or under the inherent jurisdiction.
38. On 28 March 2013 the Claimant issued his own application to strike out certain parts of the Defence under CPR 3.4(2)(a) and Practice Direction 53 §4.1(1), which provide that the Court may decide whether a statement complained of is capable of having the meaning attributed to it in a Statement of Case.
39. It is convenient to start with the Defendants' application although, as Mr Caldecott QC submitted, the issues raised on the Claimant's application have an impact on it.

### **The Defendants' application to strike out**

40. The Defendants apply to strike out the claims for what Mr White QC characterises as five inter-related reasons.
  - (1) The Claimant cannot show that he has any significant connection with England or a reputation to protect here, and therefore cannot establish 'a real and substantial tort' within this jurisdiction. The Claimant's contention, that the publication of the Defendants' allegations within jurisdiction during the limitation period has both created and destroyed a sufficient reputation in this country, is wrong in law.
  - (2) The Claimant can achieve no worthwhile vindication in these proceedings given the torrent of international condemnation of the Russian officials (including the Claimant) who were involved in the events leading to Sergei Magnitsky's death. The English court cannot restrain the continued publication of reports condemning the Claimant's conduct or direct the removal of the Claimant from the Magnitsky List; and any limited vindication that the Claimant might achieve is wholly disproportionate to the cost of the exercise and the burden on the court's time.
  - (3) Russia was the obvious place to bring the Claimant's claims; and the English court should not allow the Claimant to bring claims here when the court of the natural forum has rejected them.
  - (4) The Claimant has no real prospect of showing that any loss that he can establish was caused by actionable publication of the Defendants' allegations (within the jurisdiction and the limitation period) rather than publications which are not actionable (since they are outside the jurisdiction and the limitation period).
  - (5) One of the Claimant's expressed purposes for pursuing the claim is to attack his inclusion on the Magnitsky List; and this is not an appropriate use of the process of the court. The purpose reflects a political objective of the Russian Federation;



and is brought by an individual Russian public official who refuses to identify the source of his funding for the claim.

### **The timing of the applications**

41. The Claimant contrasted the Defendants' Solicitors enthusiastic welcome of the 'opportunity to engage with' the Claimant in relation to his role in the Magnitsky affair set out in their letter of 20 August 2012, with their present contention that the claim is an abuse of process and should be struck out, set out in §§45-58 of the Defence served only 4 months later.
42. The Defendants submitted that it was not until the Defence was served that the issues were identified and a view could be formed as to the likely length and expense of a trial; both of which are material considerations on a strike out application. They pointed out that it would have been open to them to run their abuse of process arguments at trial, see *Lonrho v Al Fayed (No.5)* [1993] 1 WLR 1489 at 1502D-E; and gave examples of cases where this was done: *Atlantis World Group of Companies NV v Gruppo Editoriale L'Espresso SPA* [2008] EWHC 1323 (QB) at [56]-[57] and *Abbey v Gilligan* [2013] EMLR 12 at [181]-[185].
43. Although there may have been a tactical calculation in pleading the full Defence and then issuing an application before the Claimant served his Reply, and although the application may also have been partly motivated by a concern about the likelihood of the plea of justification succeeding, I am satisfied that there is no bar to the Abuse of Process point being taken now. The Court is concerned to ensure that court resources are used proportionately and in accordance with the requirements of justice. If the claim is an abuse of the process, it should be struck out sooner rather than later, see *Jameel (Yousef) v. Dow Jones & Co Inc* [2005] QB 946 at [54], referred to further below.

### **The proper approach to an application to strike out a libel claim as an abuse of process**

44. The correct legal principles were largely agreed between the parties, although how the principles should be applied was hotly contested.
45. The broad underlying approach was set out in the speech of Lord Steyn in *Re S (at child) (Identification: restriction on publication)* [2005] 1 AC 593 at [17], setting out four propositions where the rights of a claimant under article 8 (protection of reputation) and a defendant under article 10 (protection of freedom of speech) are in issue.

First, neither article *as such* has precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.

46. This test was recently applied by Tugendhat J in *Trimingham v Associated Newspapers Ltd* [2012] 4 All ER 717 at [55], where he characterised the final proposition as the ‘ultimate balancing test.’
47. Mr White also submitted, and I did not understand Mr Caldecott to disagree, that where a party acts, in effect as a whistleblower, disclosing serious allegations of what it believes to be misconduct by a public authority, the Court should afford a special degree of protection under article 10, see *Guja v Moldova* (Application No. 14277/04) [2008] ECHR 14277/04 at [74]-[78] and *Heinisch v Germany* (Application No. 28274/08) (2011) 32 BHRC 252 at [62]-[70].

**(1) Whether the Claimant has to establish ‘a real and substantial tort’ within the jurisdiction, and if so, whether he has done so?**

48. The parties referred to a number of cases which were concerned with the Court’s approach to establishing jurisdiction in libel cases. These included, *Kroch v Rossell et Compagnie Societe des Personnes a Responsibilite Limitee*, *Kroch v Societe en Commandite par Actions le Petit Parisien* [1937] 1 All ER 725 (CA); *Berezovsky v Forbes Inc* [1999] EMLR 278 (CA) and on appeal to the House of Lords, *Berezovsky v. Michaels* [2000] 1 WLR 1004.
49. These cases establish that, where leave is required to serve the Court process out of the jurisdiction, the Claimant has to show a substantial connection with, or reputation to protect within, this country, see *Kroch v Rossell*, Slessor LJ at p.729, *Berezovsky v Forbes*, Hirst LJ at 299, *Berezovsky v. Michaels* Lord Steyn at p.1011B.
50. In some cases the assessment of the connection with, or reputation within, the country will be finely balanced. In *VTB Capital plc v Nutritek International Corp* [2013] 2 WLR 398 Lord Mance JSC, having conducted a detailed review of the authorities on service out of the jurisdiction and *forum conveniens* in tort cases, explained the different outcomes in *Kroch v Rossell* and *Berezovsky v Forbes Inc*.

[16] *Kroch v Rossell* [1937] 1 All ER 725 was a case in which a foreigner describing himself as ‘a gentlemen of no occupation’ claimed that he had been libelled in *Le Soir*, a publication with a daily circulation in Paris of about a million and a half, and in London of well under 50. He failed to establish any English reputation or connection, save temporary presence here to start the proceedings. Not surprisingly, the Court of Appeal thought that any breach here was technical and of no substance. It described the principles governing permission as requiring an examination of the circumstances to identify where the action should be better tried, in terms which foreshadowed Lord Goff’s approach in *The Spiliada*.

[17] *Berezovsky v Michaels* was concerned with an alleged libel of a Russian businessman in a magazine with sales of 785,000 in the USA, 1,900 in England and 13 in Russia. But, in contrast with the position in *Kroch*’s case, the claimant had significant connections with and reputation to protect in England. On the basis that the English tort was a separate one, for the pursuit of

which England was *prima facie* the appropriate forum on the approach taken in *The Albaforth*, the majority in the House upheld the Court of Appeal's conclusion that England was the appropriate forum for its pursuit

51. In *Jameel (Yousef)* (referred to above), the Court of Appeal held that the real and substantial tort test applied both to an application for permission to serve out of the jurisdiction and to an application to strike out a claim for abuse of process. In that case a foreign claimant issued libel proceedings against the publisher of a US newspaper in respect of an article posted on a US website but accessible to subscribers in England. The claimant asserted that he had a reputation to protect in England which was 'of the utmost importance to him', [14]. The defendant did not challenge jurisdiction but asserted that only five individuals had accessed the words complained of, [17]. Although the claimant did not admit this, the Court proceeded on the basis that any publication within the jurisdiction had been minimal, [18].
52. The Court was concerned with two issues. First, the defendant's appeal against the Judge's decision to strike out that part of the defence which contended that the presumption of damage was incompatible with article 10 of the ECHR. It is the second issue which is material to the present application: the defendant's appeal against the Judge's refusal to strike out the claim as an abuse of process. The defendant was unsuccessful on the first issue but successful on the second issue.
53. At [54] Lord Phillips of Worth Matravers MR (giving the judgment of the Court) rejected an argument that the defendant's failure to challenge the jurisdiction prevented it from relying on the abuse argument.

... An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.

54. At [55] the Court considered the balance between articles 8 and 10.

Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.

55. The Court, having noted what was accepted to have been very limited publication within the jurisdiction, then went on to consider the issues of vindication (at [61] to [71]) and the claim for an injunction (at [72] to [77]).
56. In the Court's view vindication was linked to reputation.

[66] ... This action falls to be considered as relating exclusively to an independent tort, or series of torts, in this country. It is thus not legitimate for the claimant to seek to justify the pursuit of these proceedings by praying in aid the effect that they may have in vindicating him in relation to the wider publication.

57. The Court of Appeal considered that the limited publication and minimal damage to the claimant's reputation would have led to very modest damages; and consequently both the damage was, and the vindication would be, minimal.

[69] ... The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick.

58. While this expression may have lost some of its resonance since it was used by Montaigne in his *Essai*, 'Of Presumption' (as Mr White's researches revealed), the emphasis on the importance of proportionality is clear.

59. At [70] there is a passage in the judgment, relied on by the Defendants, where the Court of Appeal described the test of a 'real and substantial tort' within the jurisdiction as being the test for both establishing jurisdiction and maintaining a claim.

If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but, subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake.

60. The Court then turned to the claim for an injunction, in a passage relied on by Mr Caldecott.

[74] Where a defamatory statement has received insignificant publication in this jurisdiction, but there is a real risk of wider publication, there may well be a justification for pursuing proceedings in order to obtain an injunction against republication of the libel.

61. In the result the proceedings in *Jameel (Yousef)* were stayed.

### **The Claimant's reputation in the jurisdiction**

62. One of the issues which arises in the present case is whether the reputation or connection with this country which is necessary to establish a real and substantial tort within the jurisdiction can be 'created and destroyed by the same publication'?
63. The Claimant has frankly and realistically acknowledged that, prior to the publications of which complaint is made, he had no real and substantial reputation in this jurisdiction. His argument is summarised in Response 1 to the Defendants' request for further information.

The Claimant accepts that prior to the campaign commenced by the Defendants ... he had no significant reputation within the jurisdiction. Since the commencement of that campaign and by reason of the Defendants' publications the Claimant has acquired an appalling reputation, such that if he entered the jurisdiction - which he ordinarily would wish to do - he would be open to the severest public obloquy.

64. Mr Caldecott submitted that there is no reason in logic or fairness why someone who is not generally known within the jurisdiction prior to publication cannot be seriously damaged where the offending publication both creates and destroys his reputation.
65. He drew attention to the observations by Eady J in *Multigroup v Bulgaria Holding AD v Oxford Analytica Ltd and others* [2001] EMLR 28 at [19],

I have always understood that ... one cannot, as it has been said, give a dog a bad name and hang him;

and at [22],

... I do not believe it to be seriously suggested that under English law an individual human being has to surmount a preliminary hurdle in order to bring defamation proceedings by showing an established reputation ...

66. In *Jameel (Yousef)* the Court of Appeal (when considering the presumption of damage, which was relevant to the first issue in the case) gave tacit approval to this approach at [28]:

... While we are unaware of any authority that supports this proposition, it seems to us that it makes sound sense. There seems no reason in principle why a newspaper should not simultaneously create and besmirch an individual's reputation. To take an extreme example, imagine that an unknown American who was about to visit an English town was erroneously described in the town's local paper as a paedophile. Manifestly the law ought to afford him a cause of action in libel.

67. A similar example had been given by Eady J in the *Multigroup* case at [24].

A point was raised in the course of argument based upon a hypothetical small trader in Shanghai. Suppose such a person

wished to provide transport services for an influx of English tourists expected for some sporting or cultural event. Suppose further that the company was libelled on English television just before the tourists left, in such a way as to discourage them from using the services contemplated by the Shanghai trader. I am by no means persuaded that such a trader (individual or corporate) would, or should, have no cause of action just because he, or it, had never been mentioned in England before.

68. Mr White was prepared to accept that, since the hypothetical claimant in these examples had an imminent connection with this country and a need to protect a reputation here, there might be a real and substantial tort within the jurisdiction. However he submitted that there was no authority for the proposition that a foreign claimant, who had no significant connection with, and no established reputation to protect in, the jurisdiction could rely on the publication about which he complained in order to establish such a connection and reputation. If the Claimant's proposition were correct, the claimants in a number of the earlier cases, for example, *Kroch v Rossell* and *Chadha v. Osicom Technologies Ltd v. Dow Jones & Co inc* [1999] EMLR 724, would have been entitled to rely on the publications about which they complained to establish the connection with and reputation in this jurisdiction which the Court in fact held they lacked. He also argued that, if the Claimant's proposition were correct, then the publications complained of would have been all that the claimant needed to rely on and the Court of Appeal and House of Lords in the *Berezovsky* cases could have decided the issue shortly on that basis.

### **Consideration of issue (1)**

69. In my judgment four relevant conclusions can be drawn in relation to the first issue:
- (1) Where a foreign claimant sues for libel in this country, the Court may strike out the claim if the publications which took place in the jurisdiction do not (individually or collectively) establish a real and substantial tort within the jurisdiction.
  - (2) A claimant may be able to show a reputation sufficient to demonstrate a real and substantial tort within the jurisdiction in cases where, although he had no reputation at the time, such reputation was created and destroyed by the publication. However such cases will usually arise where he or she has some form of prior or imminent connection with the jurisdiction.
  - (3) The requirement of a real and substantial tort is not an absolute requirement. The Court is required to have regard to the ultimate proportionality test described by Lord Steyn in *Re S (a child)* (see above), and may conclude that the balance falls in favour of allowing the case to continue.
  - (4) In such cases the lack of a real and substantial tort within the jurisdiction will nevertheless be an important consideration on any strike out application.
70. I turn then to the evidence. In §46 of his witness statement the Claimant says,

I entirely accept that I did not have a substantial reputation in England and Wales before the Defendants' campaigns started ... I have previously travelled to England on five or so occasions and I have some friends who live here, including former classmates from school and a former girlfriend with whom I am still in contact.

71. This is plainly not a sufficient basis for finding a real and substantial tort within the jurisdiction. The facts are comparable to the very limited publication in *Jameel (Yousef)*. However, his witness statement continues:

The reality is however that my substantial reputation in England and Wales has both been created and destroyed through the Defendants' campaign. As a result there has been significant national media interest in England and Wales about my position. It is my belief that I now suffer from what can only be described as an appalling reputation in England and Wales.

72. These remarks, echoing the words of the Court of Appeal in *Jameel (Yousef)* at [28], do not in my view provide the necessary link or 'imminent connection' with the jurisdiction to which I have referred above. Nor am I persuaded by Mr Caldecott's further submission that the continuing publication of the matters complained of, and the possibility of an injunction to restrain further publication, is sufficient to establish a real and substantial tort, at least by itself.
73. For these reasons, I am satisfied that the Claimant had no connection with, and had no reputation to protect within, the jurisdiction; and therefore cannot establish a real and substantial tort within the jurisdiction. His reputation exists in Russia and the damage to his reputation (which is presumed as a matter of English law) is in Russia. The contrast with the facts of *Berezovsky v. Michaels* (see above) is stark, see the speech of Lord Steyn at p1010E-1011B. For these purposes, even where there has been a significant circulation of the publications within the jurisdiction (as the Claimant can show), if on a consideration of the facts it can be seen that he has no connection with, or reputation to protect within the jurisdiction, this will be highly material to (although not dispositive of) whether the claim should be struck out.

**(2) Whether the Claimant can achieve a worthwhile vindication in these proceedings given the amount of international comment?**

74. It is common ground that vindication of a claimant's reputation and the opportunity to prevent repetition of the defamatory material lie at the heart of a claim for libel.
75. If the proceedings are not serving the legitimate purpose of protecting the claimant's reputation, the Court must bring the proceedings to a stop, see *Jameel (Yousef)* at [55] (cited above) and *Davison v. Habeeb and others* [2011] EWHC 3013 (QB), HHJ Parkes QC at [27].
76. The Defendants submit that the Claimant will be unable to obtain any worthwhile vindication, alternatively that the cost of a trial will be disproportionate to the vindication achievable. Mr White focussed on the impossibility of significant

vindication in view of events occurring both before the start of the limitation period and outside the jurisdiction.

77. The evidence shows what appears to be a sophisticated and successful campaign by the Defendants to expose the Hermitage Fund fraud, involving those who owe duties to the State, and a subsequent cover up by the same people and culminating in the death in jail by the person who tried to expose the crimes (Sergei Magnitsky). The bodies which have investigated the Defendants' allegations and have (to a greater or lesser extent) adopted them, include: the Council of Europe Parliamentary Assembly, the United States State Department, the Moscow Helsinki Group (a human rights monitoring organisation in Russia), the United States Commission on Security and Co-operation in Europe (an independent United States government agency), the United States Senate Foreign Relations Committee, REDRESS (a London-based human rights organisation), the Presidential Council for Civil Society and Human Rights (an advisory body established by the Russian President), the Organisation for Security and Co-operation in Europe, the United States legislature, the European Parliament and parliamentarians in the UK, Canada, the Netherlands and Italy, Human Rights Watch, Amnesty International and the International Bar Association. The material is set out in the first witness statement of Ms Thackeray at §§57-147, and shows over 60 examples of the reactions to the Defendants' allegations.
78. The cumulative effect is described by Mr White as 'an unstoppable torrent of international condemnation of the Russian state and of the public officials, including the Claimant, involved in the events which led to the death of Mr Magnitsky.'
79. He draws particular attention to the US Sergei Magnitsky Rule of Law and Accountability Act of 2012, passed on 14 December 2012, which included the following 'Findings of Congress'.
  - (8) On July 6, 2011, Russian President Dimitry Medvedev's Human Rights Council announced the results of its independent investigation into the death of Sergei Magnitsky. The Human Rights Council concluded that Sergei's arrest and detention was illegal; he was denied access to justice by the courts and prosecutors of the Russian Federation; he was investigated by the same law enforcement officers whom he had accused of stealing Hermitage Fund companies and illegally obtaining a fraudulent \$230,000,000 tax refund ...
  - (9) The systematic abuse of Sergei Magnitsky, including his repressive arrest and torture in custody by officers of the Ministry of the Interior of the Russian Federation that Mr Magnitsky had implicated in the embezzlement of funds from the Russian Treasury and the misappropriation of 3 companies from his client, Hermitage Capital Management, reflects how deeply the protection of human rights is affected by corruption.
80. There was provision for the President of the United States to submit, no later than 120 days after the enactment, a list containing each person whom he determined on the basis of credible evidence was responsible for,



the detention, abuse, or death of Sergei Magnitsky, participated in efforts to conceal the legal liability for the detention, abuse, or death of Sergei Magnitsky, financially benefitted from the detention, abuse, or death of Sergei Magnitsky, or was involved in the criminal conspiracy uncovered by Sergei Magnitsky.

81. On 12 April 2013 the US Department of the Treasury published the Magnitsky list of those specially designated under the Sergei Magnitsky Rule of Law Act 2012. The list includes the name of the Claimant and Artem Kuznetsov.

82. Mr White put the point starkly in §59 of his skeleton argument:

The torrent of international condemnation, including numerous reports which identify the Claimant (or enable him to be identified) and state that he was culpably involved in the events leading to the death of Mr Magnitsky, is such that any verdict of the English court stating that the Claimant's role in the events leading to Mr Magnitsky's death was something different to that alleged by the Defendants will be water flowing upstream.

83. None of the very large number of these reports, he submits, will be affected by a judgment in the Claimant's favour in these proceedings; and the Court could not prevent the Defendants or anyone else from repeating and publicising the public findings and statements made by authoritative and responsible bodies about the Magnitsky case. The existence of these public findings and statements means that the Claimant cannot realistically expect to obtain any worthwhile vindication in these proceedings, let alone such a level of vindication as would justify the enormous expense of a 6-8 week trial.

84. For the Claimant, Mr Caldecott submits that in so far as the words complained of meant, or were to be understood to mean, that the Claimant tortured and murdered Sergei Magnitsky, the reports do not support the justification of that meaning. He draws attention, by way of example, to the confined nature of the criticism of the Claimant in the incomplete report of the Presidential Council for Civil Society and Human Rights, which is largely directed to identifying the conflict of interest implicit from the Claimant investigating the allegations against himself.

85. In addition Mr Caldecott submits that there are principled reasons why the Claimant should be entitled to pursue the opportunity to establish that there is no justification for the most serious allegations against him, to vindicate his reputation and to obtain an injunction restraining a repetition of the libel. As he put it in §25c of his skeleton argument:

If the allegations made in the [material complained of] are found to be untrue (as the torture/murder and hospitalisation allegations clearly are), there is no reason why the Court should not restrain the Defendants from continuing to allege that those false allegations against the Claimant are true, whether in the course of discussing the reports of others or otherwise. Such a curtailment of the Defendants' Article 10 rights would not

restrict any of the other criticisms made by the Defendants of the Russian state or the other individuals accused of misconduct by them;

and §25e:

... in their evidence in reply the Defendants offer no explanation at all for (a) continuing to publish the allegations they do not justify and further factual material which they know to be false; and (b) failing to inform the responsible bodies that this aspect of their case requires amendment.

86. Mr Caldecott relied on cases which emphasise the importance of vindication and injunctive relief where there is continuing publication or risk of publication: *Jameel (Yousef)* at [74], *McLaughlin and others v. London Borough of Lambeth and another* [2010] EWHC 2726 (QB) [111-112] and *Cairns v. Modi* [2010] EWHC 2859 (QB) at [43].
87. He further submitted that most of the reports which are relied on by the Defendants are based largely, if not exclusively, on the Defendants' assertions, which have never been tested. He argued that, even if there had been earlier publication of exactly the same allegations of which complaint is made in the present proceedings, it would not avail the Defendants. The decision of the House of Lords in *Dingle v Associated Newspapers* [1964] AC 371 is clear authority that other publications to the same effect as the words complained of, or relating to the same incident as the words complained of, are inadmissible in mitigation or reduction of damages.

### **Consideration of issue (2)**

88. I accept that part of the purpose of these proceedings is the vindication of the Claimant's reputation, particularly in relation to the most serious charge: criminal complicity in the death of Sergei Magnitsky; and that the Court must proceed on the basis that the dissemination of a libel in other publications is legally irrelevant to the award of damages.
89. In the present case this approach will involve a close focus on the Defendants' pleadings in order to see what they can properly justify.
90. On the other hand, it may (at least in principle) be relevant to an abuse of process application and the consideration of whether the continuation of the proceedings would serve the legitimate purpose of protecting the Claimant's reputation, to consider the nature of that reputation in the light of matters of which no complaint can be made because they occurred either outside the jurisdiction or before the period covered by the claim. This approach does not involve an infraction of the rule on damages set out in *Dingle*. It is recognition of the realities of the case. It seems to me to be highly unlikely, for example, that the inclusion of the Claimant's name on the Magnitsky list would be affected by any finding of this court for reasons that I have already set out. This is a matter to be borne in mind in the context of the Claimant's wishes and the substantial costs of what is likely (subject to the Claimant's application) to be a long trial.

**(3) Whether the English court should allow the Claimant to bring his claim here when the court of the natural forum has rejected them?**

91. The Defendants submit that it is an inherent abuse of the Court's process to bring proceedings here when he has not been permitted to proceed in the Court of the natural forum: the Russian Federation.
92. Mr White accepts that the dismissal of the Claimant's criminal and civil defamation complaints does not create an estoppel under the domestic law doctrine of *res judicata* or issue estoppel. However he submits that the Courts of this country have been willing to strike out as abusive claims brought in England which seek to re-litigate matters decided adversely in a foreign court; and that such cases are not limited to cases where the prior foreign litigation involved the same parties. The important question is whether the claimant in the new proceedings had an opportunity to participate in the foreign proceedings which were determined against him, see for example *House of Spring Gardens Ltd v Waite* [1991] 1 QB p.241, 251H-252A and 254E-255D, where it was held that to re-litigate in England a claim on which the claimant had failed in proceedings before the Irish court, which was the forum chosen by the claimant and the natural forum, was an abuse of process, see Dicey, Morris & Collins on the Conflict of Laws (15<sup>th</sup> edition, 2012) §§ 14-033 and 14-142.
93. On this basis the Court should consider whether justice requires a further investigation of a claim which has been dismissed by the foreign court (see *Owens Bank Ltd v Etoile Commerciale SA* at 51A-C, per Lord Templeman).
94. Mr White further submits that in the present case there is no good reason why the Claimant, having tried and failed to bring criminal and civil defamation claims before the Russian Courts (which were both his chosen forum and the natural forum), should be allowed to pursue what are essentially the same claims here.

**Consideration of issue (3)**

95. The relevance of the Claimant's attempts to bring proceedings in Russia is that it demonstrates, what would have been clear in any event, that Russia is plainly the natural forum for bringing proceedings intended to vindicate the Claimant's reputation. He is a Russian citizen, who was employed to carry out public duties in Russia. All the relevant events took place in Russia, involved other Russian citizens; and much of the relevant underlying material on which a trial would be based is in Russia.
96. The relevance of these matters is not that they create estoppels or quasi estoppels (as Mr White contended), but that they throw light on issue (1), as Mr Caldecott conceded.

**(4) Whether the Claimant has any real prospect of showing that any loss that he can establish was caused by actionable publication of the Defendants' allegations (within the jurisdiction and the limitation period) rather than by publications which are not actionable (being outside the jurisdiction and the limitation period).**

97. Mr White points out that the evidence shows that, to the extent that inclusion of the Claimant's name on the Magnitsky list can be linked to the publication of the Defendants' allegations, the link is to the publication of the allegations in the United States outside the limitation period. The fact that the Claimant tried to bring criminal and civil defamation proceedings in Russia in 2010 and 2011, shows that he recognised that the publication of the Defendants' allegations in Russia (i.e. outside this jurisdiction) had already caused him damage before the date on which the limitation period applicable to the present claims began.
98. The essential sting of the words complained of (which are contained in Episode 1 and Episode 2 of the Russian Untouchable videos) had first been uploaded to the Russian Untouchable website on 22 June 2010 and (on any view) by 12 July 2010: in other words well before the dates of publication on which the Claimant can rely (5 May and 1 August 2011).
99. The number of publications of the material in the videos prior to the start of the limitation period was extensive. The evidence about the publications shows that the greatest number of 'hits' across all the jurisdictions selected by Ms Thackeray (see §§ 183-6 of her witness statement) occurred outside the limitation period (i.e. before 5 May and 1 August 2011) and outside the jurisdiction (mostly in states which constituted the former Soviet Union).
100. Mr White drew attention to the decision of the Court of Appeal in *Tesla Motors Ltd v BBC* [2013] EWCA (Civ) 152, where the claimants sued for libel and malicious falsehood in relation to an episode of the 'Top Gear' programme first broadcast in December 2008 to an audience of ten million. The claim was not issued until March 2011; and between the original broadcast and the start of the limitation period there were a further 27 repeats of the programme, [31]. As in the present case, the programme remained available for viewing online, [2]. The Court of Appeal upheld a decision of Tugendhat J refusing the claimant permission to amend its claim in malicious falsehood in relation to special or general damages.
101. At [36], Moore-Bick LJ, with whom Rimer and Maurice Kay LJJs agreed, identified what he characterised as the 'fundamental problem' faced by the claimant in relation to general damages:
- .... The difficulty for Tesla is that over a period of some 15 months between the first broadcast of the programme in December 2008 and the beginning of the one year limitation period at the end of March 2010 there had been numerous further broadcasts. Even if the programme had contained no unfavourable, but true, statements about the Roadster, the fact remains that there had been very wide publication of (what must be assumed to be) false statements that were no longer actionable. The need to distinguish their effect from that of the actionable falsehoods raise the issue of causation in an acute form ...
102. He continued at [46] in relation to the claim for special damages:

Again, the difficulty is of establishing that any particular loss was caused by one or more of the actionable falsehoods rather than by one or more of the statements that are not actionable.

103. Mr White submitted that the problem faced by the claimants in *Tesla* in the context of a malicious falsehood claim is the same difficulty that the Claimant has created for himself in the present libel action. Because of the delay in bringing these proceedings it is impossible to say what damage is actionable. All that is certain is that there was a ‘torrent of public allegations by national and international authorities’ before the start of the limitation period.
104. In response, Mr Caldecott pointed out that the Claimant was only named in 10 of the 60 reports and a very substantial number did not mention him at all. He also submitted that it is important not to lose sight of the fact that there was substantial actionable publication within the jurisdiction from the beginning of the one year limitation period, that the publication continues and that (in so far as it makes allegations of murder) it is an allegation of the utmost seriousness.

#### **Consideration of issue (4)**

105. At this stage two provisional conclusions can be drawn. First, if the case were to go ahead, the Claimant would face difficulty in distinguishing the effect of what are contended to be actionable libels from those which cannot be contended to be actionable libels. The causation issue will arise in, what Moore-Bick LJ described as, ‘an acute form’. Secondly and nevertheless, the Claimant is able to identify publications which are not time barred and which may give rise to an award of damages, notwithstanding the effect of prior publication.
106. Although the Court of Appeal in the *Tesla* case [49] considered that the small likelihood of the claimant recovering substantial damages did not justify continuing the proceedings to trial and this is plainly a relevant factor in the present case, I do not regard the Claimant’s potential difficulties on the issue of causation as sufficient reason, at least by themselves, for striking out the claim as abuse of process.

**(5) Whether the avowed purpose of the claim - to attack the inclusion of the Claimant’s name on the Magnitsky list - is an abuse of the Court’s process, reflecting, as it does, a political objective of the Russian Federation, and supported, as it is, by an unidentified funder?**

107. This argument contains a number of assertions and assumptions, at least some of which are contested. It raises two points, which it is convenient to identify as ‘the Collateral Purpose point’ and ‘the Nominal Claimant point’.

#### **The Collateral Purpose point**

108. In § 74 of his witness statement the Claimant explained why, after the failure of his criminal and civil defamation proceedings in Russia, he decided to bring the present proceedings.

In making my decision I was aware that the allegations against me were not simply going to disappear because the Defendants

were intent on pursuing an international and vigorous campaign against me. The campaign was clearly well resourced and, as far as I could see, was unlikely to rest until I had no reputation remaining and I was prevented from travelling anywhere outside of the Russian Federation and other sanctions unlawfully curbing my rights had been taken against me.

109. The references to being prevented from travelling and to other sanctions are plainly references to the actions of the U.S. Government culminating in his inclusion on the Magnitsky list, and to possibility that further sanctions might be taken against him in other jurisdictions. There is a reference in §8 of his witness statement to the adverse impact on his employment prospects from inclusion on the Magnitsky list. There is also evidence from a reported interview with a reporter from *Izvestiya* that the Claimant intends to use the judgment of this Court to protest against his inclusion on the list.

‘In the near future, I expect a decision from the London High Court which will dot all the i’s and cross all the t’s and show that all the information regarding me is a lie.’

To *Izvestiya*’s query as to whether he would contest his inclusion in the ‘Magnitsky list’, Karpov stressed again that this would be clear after the trial in England.

‘All this information is defamation,’ the former investigator said.

110. The Defendants submit that this is not a proper purpose for pursuing the claim in this jurisdiction, see *Jameel (Yousef)* at [66] (referred to above); but submit in addition that the evidence throws further light on how, when and where the real damage to the Claimant’s reputation has occurred.
111. For the Claimant, Mr Caldecott submitted that, if the decision of the High Court in London is such as to vindicate the Claimant’s reputation, he is fully entitled to rely on that decision in whatever way he can.

### **The Nominal Claimant point**

112. The present state of the evidence is that the Claimant’s costs of bringing and pursuing the claim are being supported by a friend who has guaranteed bank loans which the Claimant is using to pay his own costs and to provide security for the Defendants’ costs. Despite Defendants’ enquiries the Claimant has not identified the friend.
113. The Defendants’ argument under this heading changed in the course of the hearing.
114. Initially (in §112 of his skeleton argument) Mr White submitted:

This Court cannot be satisfied that the Russian state is not behind the claim in some way - perhaps by agreeing to indemnify the friend of the Claimant who is maintaining the claim. Where the Claimant puts forward opaque and unsatisfactory evidence of the way in which the litigation is

being funded, and the litigation appears to pursue an avowed political objective of the Russian state, the Claimant cannot complain if the Court takes a jaundiced view of his claim.

115. The difficulties with accepting this submission are that it involves drawing an inference on the basis of exiguous evidence that a friendly State is supporting an abusive claim for its own purposes. In addition, it assumes that there is a single view of the matter which represents the view of the Russian Federation, which, as Mr Caldecott pointed out, is not self-evident, since the Claimant's claims in Russia were not allowed to proceed.
116. In the course of argument Mr White refined his criticism to the lack of information about who is behind the funding of the claim. He submitted that the Court was not being told the whole truth.
117. The Claimant has adduced evidence (§§84-89 of the witness statement of Geraldine Proudler) that a representative of Messrs Olswang has spoken to the Guarantor of the loan, who had explained that he had known the Claimant for over 10 years and that he was concerned, as his friend, to help him clear his name. He had introduced the Claimant to the bank which made the loan, and stood as Guarantor of the loan. At §87 Ms Proudler states:

... The Guarantor has confirmed that he is not aware of any allegation that has been made against him by any of the Defendants or of any connection that could be made between him and the Russian government.

118. The Guarantor has described himself as having significant business interests, including in the United States. He is concerned that his name is not made public or provided to the Defendants, as he does not wish to be made a target by the Defendants on the basis of the assistance he is providing to the Claimant.

#### **Consideration of issue (5)**

119. I consider that the Claimant's avowed purpose in pursuing the Claim is relevant to the abuse application, not least because (again) it throws light on how, when and where the real damage to the Claimant's reputation has occurred.
120. I am not, however, persuaded by the Defendants' nominal claimant point. The fact that the Guarantor does not wish to be identified has raised the Defendants' suspicions, but (at least at this stage) I am not prepared to draw adverse inferences against the Claimant on the basis of the funding of the Claim.
121. Having considered these five issues, I propose to turn to the Claimant's application before reaching a final conclusion on the applications.

#### **The Claimant's application to strike out parts of the Defence**

122. The application relates to two aspects of the Defence. The first, which raises issues of meaning and the sufficiency of the supporting particulars, is an overarching complaint about the Defendants' pleas of justification in relation to the allegation that the Claimant was involved in the torture and murder of Sergei Magnitsky. The second,

which raises issues of proportionality and relevance, is a complaint about a plea in §§193-196 of the Defence, relating to Sergei Magnitsky's discovery of a fraud ('the Rengaz fraud') carried out a year before the Hermitage Fund fraud. It is not alleged that the Claimant was involved in the Rengaz fraud.

123. The applications are resisted.

**The legal approach to a plea of justification**

124. The principles to be applied are familiar and were not in dispute between the parties. Adapting the summary in the Claimant's skeleton argument they can be stated as follows.

(1) Defamatory allegations of fact are presumed to be false: the 'Presumption of Falsity.'

(2) Where a defendant pleads a defence of justification, the plea:

(a) must be directed at one or more defamatory meanings which are clearly identified, which the words are capable of bearing, and which are relevant by way of defence to the claim ...

(b) must be based on or supported by particulars which are not only clear but also both relevant to, and sufficient to support each meaning; and;

(c) must focus on conduct of the claimant and not be based on rumour or hearsay.

See *Ashcroft v Foley* [2012] EMLR 25 at [18].

(3) Point (a) relates to the meanings which the defendant seeks to justify; point (b) to the adequacy of the supporting particulars. As to principle (c), a defendant must identify the acts of the claimant which are relied on to justify the imputation in question, see *Ashcroft* at [58]. This latter point has 'particular resonance' where the charges are serious, see *Ashcroft* at [59].

(4) What matters is that the substance or sting of the libel is proved. Inaccuracies, which do not materially affect the seriousness of the charge need not be justified. This common law principle is expressly recognised by the words 'substantially true' in the new statutory defence of Truth set out in s.2(1) of the Defamation Act 2013.

(5) There are additional limiting rules arising from proportionality, which apply to the law of libel as they do to other forms of litigation. The issues must be confined to what is necessary for a fair determination of the dispute between the parties, see for example, *Gatley on Libel and Slander*, 11th Ed, §32.35, and CPR Parts 1.1(2)(c) and (e), 1.4(2)(b) and (c), and 3.2(k).

125. As already noted, the Defendants seek to justify two meanings: first, the meaning which they say the words bear (see §59 of the Defence, set out above); and secondly the meanings which the Claimant says the words bear (see §60 of the Defence).



126. It is convenient to start with §60 of the Defence which seeks to justify the Claimant's meanings set out in §17 (Episode 1) and §24 (Episode 2) of the Particulars of Claim. As already noted §§17 and 24 plead that, in their ordinary and natural meaning, the words and images complained of meant and were understood to mean that the Claimant,

1. Whether himself or through others caused, and is guilty of, the torture and murder of Sergei Magnitsky;

...

4. Unless stopped, would continue to commit or cause murder to cover up his crimes.

127. Paragraphs 211-219 set out the Defendant's case on the ill-treatment and/or torture of Sergei Magnitsky, and §220 sets out a summary and an important qualification of the justification defence.

For the avoidance of doubt, it is not alleged ... that the Claimant personally took part in the ill-treatment and/or torture or killing of Mr Magnitsky. The case against the Claimant is that he was however one of those culpable and/or complicit in it because of his part in the fraud and cover up. This gave him a motive (with others in the Klyuev Group ...) to try to prevent Mr Magnitsky from continuing to speak out about the tax fraud against Hermitage and to that end to have him arrested and incarcerated. It would have been reasonably foreseeable to any reasonable or blameless official in the Claimant's position (not least based on the high mortality rates in Russian prisons), that a person in Mr Magnitsky's position could well die in prison. Notwithstanding this, the Claimant participated in his arrest and detention in the manner alleged above.

128. This is an unsatisfactory plea of justification for at least two reasons. First, it focuses on the Claimant's motive; and motive alone is not sufficient to support a plea of torture and murder. Secondly, the only overt act relied on is the Claimant's involvement in the arrest and imprisonment of Sergei Magnitsky. The link which is made between the arrest and imprisonment on the one hand, and Sergei Magnitsky's death on the other hand, is that the latter was the 'reasonably foreseeable' consequence of the former, 'not least' because of high mortality rates in Russian prisons. The causal link which one would expect from such a serious charge is wholly lacking; and nothing is said about torture or murder.
129. In my view these are inadequate particulars to justify the charge that the Claimant was a primary or secondary party to Sergei Magnitsky's torture and murder, and that he would continue to commit or 'cause' murder, as pleaded in §60 of the Defence. The Defendants have not come close to pleading facts which, if proved, would justify the sting of the libel.

130. There are similar problems with the second part of §59.2 of the Defence which sets out the Defendants' *Lucas-Box* meanings, see *Lucas-Box v. News Group Newspapers Ltd* [1986] 1 WLR 147.

[The Claimant] was one of those culpable of and/or complicit in the attempt to cover up the said tax fraud and which led to the arrest, imprisonment, ill-treatment and unlawful death in custody of Sergei Magnitsky.

131. Again, as Mr Caldecott submitted, there is no satisfactory causal connection, and certainly none sufficient to justify a charge of culpability for torture and murder.
132. So far as the second part of the Claimant's strike out application is concerned, Mr Caldecott submits that the Defendants have expressly conceded in §196 of their Defence that the Claimant was not involved in the Rengaz fraud. He therefore submits that the Rengaz fraud is irrelevant; and it is consequently an abuse of process for the Court to be invited to try the issues involved in the Rengaz fraud.
133. For the Defendants, Mr White submits that, as alleged in §196, the discovery of the fraud was,

... material to the action that was taken against Mr Magnitsky and the Klyuev Group (including the Claimant).

134. He submitted that the pleading about the Rengaz fraud only consisted of five paragraphs, that it was 'part of the story' and that it would be unjust to 'salami slice' the particulars of justification.
135. I do not accept this argument. The purpose of a pleading is not to tell a story with parenthetical digressions of the story-teller's choosing, but to set out material facts with concision.
136. On this basis I am persuaded that the following paragraphs of the Defence cannot stand:
- (1) §60 of the Defence in so far as it purports to justify the meanings pleaded in §§17.1 and 17.4, 24.1 and 24.4, 31.1 and 31.4 and 38.1 of the Particulars of Claim.
  - (2) The last 16 words of §59.2 of the Defence.
  - (3) §§211 to 224 of the Defence.
  - (4) §§193-196 of the Defence.
137. The consequence which follows from this conclusion depends on my overall view of the merits of these applications.

## **Conclusions**

138. In the light of the evidence I have seen, the submissions I have heard and the views that I have already expressed on some of the issues, I have reached the following overall conclusions.
139. First, the Claimant cannot establish a reputation within this jurisdiction sufficient to establish a real and substantial tort. His connection with this country is exiguous and, although he can point to the continuing publication in this country, there is 'a degree of artificiality' about his seeking to protect his reputation in this country. This is an important, but not determinative, consideration on the Defendants' application to strike out the claim.
140. Secondly, if the case were to proceed and the Claimant achieved a judgment in his favour, it would provide a degree of vindication and, if an injunction were granted, it would prevent further dissemination of the libel by the Defendants. This again is a relevant factor. However, there are countervailing considerations. The impact of any such judgment and order would be unlikely to assist (let alone achieve) the most important of the Claimant's stated objectives: his removal from the Magnitsky list. This is because the libel action is necessarily directed to the confined pleaded issues and the trial will be based on material disclosed by the parties. The issues which would be determined at trial would not deal with other damaging allegations that have been made against the Claimant, let alone significantly affect views based on different material, which led to legislation enacted by the United States Congress.
141. Thirdly, the Claimant has achieved a measure of vindication as a result of the views I have expressed on his application. The Defendants are not in a position to justify the allegations that he caused, or was party to, the torture and death of Sergei Magnitsky, or would continue to commit, or be party to, covering up crimes. To use the expression in Olswang's letter of 1 August 2012, the record, at least in so far as it is presently set out in the pleadings, has been 'set straight'. I recognise that this will not prevent a repetition of the libel, which an order of the Court would do, at least in this jurisdiction; however, nothing in this judgment is intended to suggest that, if the Defendants were to continue to publish unjustified defamatory material about the Claimant, the Court would be powerless to act. I have used the expression 'presently set out in the pleadings' because I have not overlooked the possibility of an application to amend the particulars of the plea of justification to rely on participation in a broad conspiracy and/or joint enterprise.
142. Fourthly, I take into account the fact that the Claimant tried to bring proceedings to vindicate his reputation in the Russian Federation. This was the natural forum for such a claim. The connection with this country is limited to the presence of some of the parties and it being the place where some of the defamatory material was, and continues to be, published. These points are also relevant to my first conclusion.
143. Fifthly, it is material that, if the case were to proceed, the Court would be faced with a difficult causation issue arising from the delay in bringing proceedings, and the fact that much of the damage to the Claimant's reputation occurred before that date, outside the jurisdiction and not as a consequence of the defamatory publications.
144. Finally, there is also the matter of the costs of a trial. The fact that 14 bundles of documents were thought necessary for the disposal of these applications, before

disclosure has been given, is an indication of the likely costs which would be incurred and court time which would be required for a trial.

145. Taking all these matters into account and applying the ultimate ‘proportionality’ or ‘balancing’ test, to which I have referred above, I have concluded that these proceedings should be struck out as abuse of the process and/or under the inherent jurisdiction.
146. I will hear the parties on the form of the order.