England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2008] EWHC 1138 (Comm)
Case No.: 2007 Folio 942

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

22 May 2008

B e f o r e :

HIS HONOUR JUDGE MACKIE QC
(sitting as a Judge of the High Court)

BORIS ABRAMOVICH BEREZOVSKY **Claimant**

- and-

ROMAN ARKADIEVICH ABRAMOVICH **Defendant**

Miss Barbara Dohmann QC, Mr Andrew George and Mr Tom Richards (instructed by Cadwalader, Wickersham & Taft) appeared for the Claimant.
Mr Andrew Popplewell QC, Ms Helen Davies QC and Mr Paul Mitchard QC (instructed by Skadden Arps) appeared for the Defendant.
Hearing dates: 18 and 28 April 2008

HTML VERSION OF JUDGMENT

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1. There are two applications before the court. The Claimant applies under CPR 17 to amend the Claim Form and the Particulars of Claim. The Defendant applies under CPR 18 for Further Information about the Particulars of Claim and for an extension of time for service of the Defence. The applications were heard on 18 and 28 April. The application to amend raised a limitation point on which I reserved judgment. For reasons I give below I deal only briefly with the Defendant's request for Further Information.

Background

2. The Claimant and the Defendant are well known Russian businessmen. The Claimant Mr Berezovsky lives in England and the Defendant Mr Abramovich has interests here including Chelsea Football Club. Mr Berezovsky claims damages and other relief amounting to $4.3 billion arising out of allegedly wrongful actions committed by Mr Abramovich after it is alleged he had been entrusted with responsibility for holding and safeguarding the interests of the Claimant and of his late business partner Mr Patarkatsishvili. Before turning to the claims in more detail I first summarise what has happened in the action so far.

The Action so far

3. The Claim Form was issued on 1 June 2007 by the Claimant's then legal team. Subsequent efforts to serve Mr Abramovich attracted publicity. Mr Justice Tomlinson granted a four month extension of time within which to serve the claim form until 1 January 2008. On 1 November service was effected by the Claimant's new solicitors who then indicated that the initial Particulars of Claim would be replaced by new ones drafted by fresh Counsel. The new Particulars of Claim were served on 8 January with a draft amended claim form. Once it became clear that the Defendant would not agree to some of the amendments and the Claimant would not supply further information the Defendant's application was issued on 15 February and the Claimant's application was issued on 3 March.

The Claims

4. The two investments which are the subject of the action were made in Sibneft, an oil and gas company, and in RUSAL, an aluminium company. The nature of the claims, as summarised by the Claimant is as follows. I emphasise that these are the claims of the Claimant. They are strongly denied by the Defendant.

Sibneft

a. In about the summer of 1995, the Claimant, the Defendant and Mr Patarkatsishvili agreed that their ownership interest in Sibneft would be beneficially held as to 50% by the Defendant; 25% by the Claimant; and 25% by Mr Patarkatsishvili and that profits would be shared between them in the same proportions.

b. By 1996, with the Claimant becoming more involved in Russian politics and Mr Patarkatsishvili being responsible for the management of Russia's largest and most politically influential television channel, the Defendant proposed that the Sibneft interests held by the Claimant and Mr Patarkatsishvili should be transferred legally to him or to entities under his control. The Claimant and Mr Patarkatsishvili agreed to this on the basis that, amongst other things, the Claimant and Mr Patarkatsishvili would continue beneficially to own the shares so transferred, which would be held on trust for them by the Defendant, and that the Claimant and Mr Patarkatsishvili would continue to be entitled to dividends and to other payments made by Sibneft to its beneficial owners.

c. By the summer of 2001, the Claimant's active opposition to the policies of President Putin resulted in an orchestrated campaign by the Russian state against the Claimant's interests. By contrast, the Defendant was and remained at all times close to President Putin and part of his inner circle. In these circumstances, the Defendant conducted a campaign of intimidation against the Claimant (through Mr Patarkatsishvili) (1) threatening that the Claimant and Mr Patarkatsishvili's interests in Sibneft could be expropriated; and (2) making it clear that the Claimant and Mr Patarkatsishvili should sell their beneficial interests in Sibneft to the Defendant, or face the consequences. In particular, the Defendant informed the Claimant (through Mr Patarkatsishvili) that if they sold their beneficial interest in Sibneft to him, their close business associate, Mr Nikolai Glushkov, would be released from prison in Russia (where he was being held on charges which the Claimant believes to have been wholly unfounded and politically motivated).

d. Further, the Defendant did not inform the Claimant (nor Mr Patarkatsishvili) that Sibneft would be, or would be likely to be, in a position to make a dividend payment to shareholders that was announced in August 2001 and which ultimately amounted to some $993 million.

e. As a result of the matters set out above, the Claimant was induced to sell his beneficial interest in Sibneft shares to the Defendant (via a third party, Devonia Investments Limited) at a considerable undervalue.

RUSAL

a. At a meeting at the Dorchester Hotel in London on about 14 March 2000, the Claimant, the Defendant, Mr Patarkatsishvili and a Mr Oleg Deripaska agreed to pool their various interests in Russian aluminium companies to form a new entity, RUSAL. 50% of RUSAL was to be owned by Mr Deripaska and his partners and 50% was to be owned by the Claimant, the Defendant and Mr Patarkatsishvili. It was agreed that none of the Claimant, the Defendant, Mr Patarkatsishvili and Mr Deripaska would sell their shares without the agreement of the others.

b. At the same meeting, the Claimant, the Defendant and Mr Patarkatsishvili orally agreed, in respect of their 50% interest in RUSAL that (1) the Defendant would beneficially own one half of that interest (ie 25% of RUSAL); (2) the Claimant and Mr Patarkatsishvili would each beneficially own one quarter of that interest (ie 12.5% of RUSAL each); and (3) the shares beneficially owned by the Claimant and Mr Patarkatsishvili would be controlled and legally owned by the Defendant, or by companies the Defendant owned or controlled, and held on trust by the Defendant for the Claimant and Mr Patarkatsishvili.

c. In about September 2003, and without obtaining the consent of or even informing either the Claimant or Mr Patarkatsishvili, the Defendant sold 25% of RUSAL to Mr Deripaska. According to the Claimant, the Defendant asserted that all of the shares which he sold to Mr Deripaska were "his" shares in RUSAL, rather than those which were beneficially owned by the Claimant or Mr Patarkatsishvili. Inevitably, the price which Mr Deripaska was willing to pay for the shares which gave him majority control over RUSAL was far higher than that which he (or anyone else) was subsequently willing to pay for the remaining shares. The 25% of the RUSAL shares sold in September 2003 (which the Defendant allegedly asserted were "his" shares) were sold for US$1.75bn. The remaining 25% of the RUSAL shares held by the Defendant (which the Defendant allegedly asserted were shares he held on behalf of the Claimant and Mr Patarkatsishvili) were subsequently sold to Mr Deripaska in October 2004 for US$450m.

5. There is as yet no Defence so the Defendant has not set out his position but, as I have mentioned, most of these allegations, if not all of them will be denied. It emerged from questions I asked that the conversations in 1995, 1996 and 2001 relied on by the Claimant in his Sibneft claim occurred at meetings where only the parties and the late Mr Patarkatsishvili were present. There are no notes, tapes or contemporaneous documents evidencing these discussions. Mr Berezovsky will therefore have to prove these discussions on the basis of the recollections of himself and of Mr Abramovich in the context of the background and of the circumstantial evidence. Mr Berezovsky faces a similar task with RUSAL where much depends on what happened at a meeting at the Dorchester Hotel in March 2000. That too is undocumented and will turn on the recollections of the parties and perhaps that of Mr Deripaska.

The Claimant's application to amend

6. A number of the amendments proposed by the Claimant have been consented to by the Defendant. I deal only with those in dispute. The starting point for the Court is that a party should have permission to amend his pleadings so that all issues can be effectively adjudicated upon provided that any prejudice to any other party caused by the amendment can be compensated in costs and provided that the public interest in the efficient administration of justice is not significantly harmed. (Cobbold v Greenwich LBC [1999] EWCA Civ 2074 at [10]).

7. Paragraph 1 of the Claim Form currently seeks "*damages and/or compensation and/or equitable compensation for duress on the part of the Defendant and/or in lieu of rescission on the grounds of duress on the part of the Defendant and/or in respect of tortious liability (in particular for intimidation by the Defendant) arising from the sale by the Claimant in or about June/July 2001 of his beneficial interest in OAO Sibneft to Devonia Investments Ltd.*"

8. The Claimant will not proceed with his duress claims and of course the Defendant does not oppose their deletion. The Claimant seeks to amend paragraph 1 to add claims for breach of trust, breach of duty and an account of profits so that the new paragraph 1 will read:-

> *"Damages and/or compensation and/or equitable compensation and/or an account of the profits in respect of tortious liability (in particular for intimidation by the Defendant) and/or for breach of trust and/or breach of fiduciary duty arising from the sale by the Claimant in or about June/July 2001 of his beneficial interest in OAO Sibneft to Devonia Investments Ltd*".

The Defendant opposes these new claims on the grounds that they relate to events in 2001 and are therefore time barred.

9. There are other proposed amendments to the Claim Form and Particulars of Claim which arise out of the Defendant's concerns about adequacy of information. I propose to deal with those at the next hearing in the light of any Further Information issues which remain outstanding.

The limitation point

10. Miss Dohmann QC for the Claimant says that there are three distinct reasons why the Defendant's claims that the amendment is statute barred are misconceived.

Section 21 of the Limitation Act

11. First she contends that there is no relevant period of limitation for the new claim as it is for fraudulent breach of trust and is covered by Section 21 of the Limitation Act 1980 which provides, under the heading "*time limit for actions in respect of trust property*":-

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –

> *(a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or*
>
> *(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use …*".

She relies on Armitage v Nurse [1998] Ch 241 where at 251 Millett LJ held that a

fraudulent breach of trust:

'*simply means dishonesty. I accept that formulation put forward by Mr Hill on behalf of the respondents which (as I have slightly modified it) is that it*

> *"connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not*."
>
> *It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests then this is acting dishonestly. It does not matter whether he stands or thinks he stands to gain personally from his actions. A trustee who acts with the intention of benefiting persons who are not the objects of the trust is not the less dishonest because he does not intend to benefit himself.*'

She says that it is self-evident that the claim pleaded against the Defendant involves the Defendant *"knowing that 'the manner in which he was acting' is contrary to the interests of the beneficiaries [i.e. the Claimant and Mr Patarkatsishvili]*". If the alleged facts pleaded by the Claimant are established at trial, then the Defendant will have committed a fraudulent breach of trust, as that term is defined for the purposes of section 21(1)(a) of the 1980 Act and no limitation period will apply to the claim.

She submits, alternatively, that the Claimant is entitled to rely upon section 21(1)(b) of the 1980 Act. The Claimant seeks "*to recover from the trustee* [ie the Defendant]… *the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use*" [i.e. the profits which the Defendant made through his sale of what had been the Claimant's beneficial interest in Sibneft shares and/or dividends received by the Defendant from Sibneft in respect of that interest]. As to the claim for breach of fiduciary duty, Section 36 of the 1980 Act provides in effect that a claim for equitable relief arising out of a breach of fiduciary duty is not subject to any express time limit in the 1980 Act. Limitation periods for such claims are applied by analogy either to (1) the provisions of the 1980 Act which relate to common law contractual or tort claims; or (2) the provisions of the 1980 Act which relate to breach of trust claims, as set out above.

As explained in Gwembe Valley Development Co Ltd v Koshy (No 3) [2004] 1 BCLC 131 per Mummery LJ:

> "*For limitation purposes the two classes of trust and/or fiduciary duty are treated differently. The first class of case arising from the breach of a pre-existing duty is, or is treated by analogy, as an action by the beneficiary for breach of trust falling within section 21(1) of the 1980 Act. This means that there is no limitation period for the cases falling within section 21(1)(a) or (b); but that there is a six-year limitation period for cases falling with s21(3).*"

She submits that the Claimant's claim for breach of fiduciary duty arises from fiduciary duties which arose prior to the Defendant's wrongful acts (see paragraph 57A of the Amended Particulars of Claim) and the provisions of section 21 of the 1980 Act are applicable by analogy. The Claimant is therefore entitled to rely, by analogy, on both section 21(1)(a) and section 21(1)(b) of the 1980 Act in that (1) the Defendant committed a "*fraudulent breach of fiduciary duty*" and (2) the Claimant seeks to recover the proceeds of this property which the Defendant acquired through the misuse of his fiduciary powers and in breach of the fair dealing rule.

12. Mr Popplewell QC for the Defendant submits that these considerations are irrelevant as neither the current nor the proposed Claim Form alleges a fraudulent breach of trust or fraudulent breach of fiduciary duty. If what is to be relied upon is a claim for fraudulent breach of trust/fiduciary duty, the Claim Form must say so. In particular:

(1) It is trite law that allegations of fraud must be distinctly alleged but there is no such allegation in the proposed amended claim form.

(2) A claim for fraudulent or intentional breach of trust/fiduciary duty is a different cause of action from a claim for breach of trust/fiduciary duty generally and must be separately and distinctly pleaded: see *Paragon v Thakerer [1993] 1All ER 400* Headnote and 406c-f.

(3) Unless the Claim Form were confined to fraudulent breaches of trust/fiduciary duty, it would allow non-fraudulent breaches to be advanced in the Particulars of Claim and in the action, notwithstanding that those non fraudulent breaches were time-barred. The same would apply to any claim for non fraudulent breach of trust or fiduciary duty the Claimant might hereafter seek to advance in the proceedings.

(4) Accordingly, if Section 21(1) (a) were to be relevant, there would have to be a different proposed amendment to the Claim Form from that which is sought on the present application. If there were a different application to amend the Claim Form, being one to allege only a fraudulent breach of trust/fiduciary duty Section 21(1)(a) would be relevant only on the hypothesis that the relevant proper law is English Law. If the proper law governing limitation issues were even arguably a foreign one amendment would prejudice his client. This is because Section 35 relates the date of any amendment back to the date the action was commenced - a provision to which I refer below. As Mr Popplewell points out, with the support of the notes to CPR 17.4.2, (which is drawn from the decision at first instance in Goode -v- Martin [2001] 3 All ER 562) if a claim is arguably time barred, a party should be left to commence fresh proceedings where the time bar point can be determined. He submits that the evidence on such proper law has not been marshalled or put before the Court on this application

because the application is not at present one to add a claim for fraudulent breach of trust or fiduciary duty.

He submits that the same points apply to proprietary claims against trustees under Limitation Act s21(1)(b) :

(1) the current proposed amendment to the Claim Form does not advance a claim falling within section 21(1)(b); and

(2) even if section 21(1)(b) were to be relevant, the Claim Form amendments would have to be confined to section 21(1)(b) claims, so as not to allow time barred claims in and thereby circumvent section 35 and Part 17.4(2).

To come within section 21(1)(b) the claim would have to be to recover something in specie from Mr Abramovich personally (not something received, for example, by a company owned or controlled by him.) The relief claimed in the proposed Amended Claim Form is for: (i) "damages" (ii) "compensation"; and (iii) "account of profits". None is a proprietary claim. The account of profits claim is advanced on the basis that because the Defendant was in breach of trust he is liable as a trustee to account for any profits made. It is not a receipt based claim. Where, he asks, is there anywhere in the Claim Form or Particulars of Claim an allegation that the Defendant personally received anything?

13. The proposed new claim as put forward in submissions is, I accept, a claim for fraudulent breach of trust and fiduciary duty but it is not as yet so pleaded on the draft amended Claim Form. I agree with the Defendant that a claim of fraud must be explicit first because fairness requires it and secondly so that any permitted amendment does not enable the Claimant to bring in otherwise statute barred claims for non fraudulent breach of trust and breach of fiduciary duty. If those requirements are met then it seems to me that subject to the Defendant's claims of potential prejudice because of Section 35 and to any later right to seek to strike out and make other applications, an amendment should be permitted. But, on this ground, I refuse the amendment as it stands.

14. Mr Popplewell submits that if the Claimant wishes to amend to plead fraudulent breach of trust the Defendant should have an opportunity to bring evidence to show that the proper law governing limitation issues was arguably a foreign one. There is as yet no indication of what limitation defence under foreign law the Defendant would seek to invoke. The difficulty created for a Defendant by an amendment is that once made the amended action is deemed to have been commenced when the original action was. So the risk for the Defendant in this case would only arise first if there were a relevant foreign limitation period, secondly if it were affected by the relation back provision of Section 35 of the 1980 Act and thirdly if the period between July 2007 when this action was brought and the spring of 2008 were pertinent. While I appreciate that no new pleading alleging fraud is yet before the Court the Defendant's case on this point will lack conviction until specific examples of relevant foreign law provisions are produced.

CPR Part 17.4(2)

15. Miss Dohmann submits that even if the relevant primary limitation period has expired the claims for breach of trust and breach of fiduciary duty can still be added because they arise out of the "*same facts or substantially the same facts as a claim in respect of which [the Claimant] has already a claimed a remedy in the proceedings*". She draws attention to several cases containing helpful observations from the Court of Appeal but I say at once that these seem to me to be "trumped" by the recent guidance set out in Society of Lloyds -v- Henderson [2007] EWCA Civ 930 and Giles -v- Rhind [2008] EWCA Civ 118. These cases take the matter on from earlier authorities notably Goode -v- Martin [2002] 1 WLR 1828 and their effect was helpfully summarised in two paragraphs of Mr Popplewell's skeleton argument as follows:

> a. A new claim does not arise "*out of the same facts*" as those on which the old claim was based "*if, in order to prove it, new facts have to be added*." The basic test therefore is "*whether the plea introduces new facts*." It is not sufficient merely to demonstrate that some or a substantial part of the facts relied on to promote the new claim were relied on to promote the old claim. Moreover, it is not sufficient that certain facts are indirectly

relevant, for example by way of background, to the old claim. Rather they have to be facts "*in respect of which*" a remedy was originally claimed.

b. The additional possibility that the new facts are substantially the same as those already relied on is limited to:

"*……..something going no further than minor differences likely to be the subject of enquiry but not involving any major investigation and/or differences merely collateral to the main substance of the new claim, proof of which would not necessarily be essential to its success*." (taken from Colman J in P&O Nedlloyd v Arab Metals [2005] 1 WLR 3733 at 3745)

16. The Claimant submits that the new claims pass this test because the intimidation claim necessarily involves consideration of the relationship between the parties and how the Defendant came to be in a position to intimidate the Claimant into selling his beneficial interest in Sibneft. This will involve considering issues surrounding how and whether the Defendant obtained legal ownership of the Claimant's interest in Sibneft and also the specific acts of intimidation relied on which themselves constitute the main allegations of breach of trust and fiduciary duty. Miss Dohmann submits that these new claims merely place a different legal label on those which arise out of the wrongful actions through which the Defendant induced the Claimant to sell his beneficial interest in the Sibneft shares and which form the basis for the intimidation claim.

17. The Defendant submits that the causes of action now sought to be introduced give rise to "new lines of enquiry" over and above those that form the necessary basis for the current claim in tort. If conduct is said to be inconsistent with the duties of a trustee this requires consideration of the nature of those duties and the question of the proper law of the alleged trust which itself will be affected by issues such as the place of its creation, the situs of the trust assets, the place of residence or business of the alleged trustee and the trust objects. Other allegations involve investigation of matters irrelevant to the Defendant's position as alleged trustee. Essentially the Defendant says that it is self evident that different factual issues necessarily arise as between a claim of intimidation involving only the status of the Claimant as the alleged owner of some interest in Sibneft (whether or not proprietary) and the claim of breach of trust/fiduciary duty which focuses on the status of the Defendant as an alleged trustee.

18. There are some difficulties in carrying out a comparative exercise at this early stage of the claim when only the position of the Claimant is known in any detail. In most of the reported cases the litigation had matured sufficiently by the time of the application for the shape of the dispute to be clear. The exercise for the judge is a "*matter of impression*" (as Glidewell LJ put it in Welsh Development Agency v Redpath Dorman Long [1994] WLR 1409 at 1418) but one requiring a "*reasoned assessment of the relevant factors*" and a "*qualitative judgment*" ...Convergence Group v Vellacott [2005] EWCA Civ 290). If this case had been a domestic one I would have been attracted by Miss Dohmann's argument that the new claim puts a different label on essentially the same case. But the claims of breach of trust may well (and given the approach of the parties to this litigation almost certainly will) give rise to dispute as to the proper law involving factual investigation of the circumstances of the alleged trust as part of a dispute as to whether a trust existed and, if it did, what the trustee's duties were. The claim will involve exploration of potentially wide ranging matters which do not arise on the claim for intimidation (the legal ingredients for which are common ground). For this reason alone these new claims do not as I see it arise from the same or substantially the same facts as those for which the Claimant has already claimed a remedy.

19. If I had permitted an amendment under CPR 17.4(2) I would have done so on terms that prevented the Claimant from relying on matters not required for the intimidation claim. Other aspects of discretion would also have arisen although they were not much addressed directly in argument. There seems no good reason why this new claim could not have been brought within the limitation period and cases dependent on oral discussion should generally be brought sooner not later. But in a sense this aspect of the application is an irrelevance given the Claimant's position that this is a fraudulent breach of trust. If it is a fraudulent breach of trust and is properly pleaded as such the 6 year limitation period does not apply and a claim can be taken forward either by seeking an amendment in this action or by bringing a

separate claim unconstrained by the need to confine the facts as an amendment under CPR 17.4 (2) would have required.

Breach of trust/breach of fiduciary duty – no new claim

20. The Claimant contends, as its third option, that the proposed amendments do not seek to "*add*" a "*new claim*" to the proceedings. This argument contends that the current claim form contains a sufficiently concise statement of the nature of the new claims to fall within CPR 16.2.1(a). To fulfil the requirement in CPR Part 16.2.1(a) "*it is necessary at least to give some idea or indication of the duty which it is alleged the defendant has failed to perform*" – Nomura International v Granada Group & ors [2007] EWHC 642 at paragraph 40 per Cooke J.

As set out above, paragraph 1 of the original Claim Form sought "*Damages and/or compensation and/or equitable compensation for [various matters]… arising from the sale by the Claimant in or about June/July 2001 of his beneficial interest in OAO Sibneft to Devonia Investments Limited*."

By definition a claim for "*equitable compensation…. arising from the sale by the Claimant in or about June/July 2001 of his beneficial interest in OAO Sibneft to Devonia Investments Limited* must either involve a claim for breach of trust or breach of fiduciary duty in respect of that sale. Paragraph 1 of the Claim Form is not specifically framed in the language of breach of such duties.

In any event, as required by CPR Part 16.2.1(b), the remedy is set out in the Claim Form and the Claim Form contains a "*concise statement of the nature of the claim*". The reference to "*equitable compensation*" in the Claim Form gives the Defendant "*an indication*" of the duty which it is alleged he failed to perform.

Paragraph 1 of the Claim Form contains (1) an express claim for equitable relief (2) express reference to the Claimant's status as beneficiary and (3) express allegations of acts (duress and tortious intimidation) which would on any view amount to breaches of trust or fiduciary duty if committed by a trustee or fiduciary. Only the Defendant's duties as trustee or fiduciary are not specifically itemised; but these are necessarily implied by the claim for equitable compensation, and clear in all the circumstances.

The breach of trust claim contained in the unamended version of the Particulars of Claim therefore properly falls within the terms of the original Claim Form and the Claimant does not require any amendment to the Claim Form in order to plead it.

In these circumstances, the amendment sought by the Claimant to the Claim Form to introduce the claim for "*breach of trust and/or breach of fiduciary duty*" into the Claim Form does not "*add*" *a* "*new claim*" into the proceedings. It merely rectifies the original infelicitous drafting by clearly identifying a claim which has already properly been made in these proceedings in the Particulars of Claim.

It is accepted that amendments to the Particulars of Claim are required in order to introduce the claim for breach of fiduciary duty. However, the claim for breach of fiduciary duty arises out of the same facts as the claim for breach of trust which has already been made in the proceedings and CPR part 17.4(2) is satisfied.

21. The Defendant rejects these arguments on the grounds that:-

(1) The first paragraph of the current Claim Form contains no claim for breach of trust or fiduciary duty. It contains claims for: (i) intimidation; and (ii) duress. The relief claimed in the first half of the first line is claimed in respect of those two causes of action.

(2) That plain reading of the Claim Form is reinforced by the Particulars of Claim drafted pursuant to it. The only basis on which the relief of "compensation" is clamed is for the tort of intimidation: see paragraphs 24, 25, 27, 28 and Prayer paragraph (1).

(3) It is impossible to read the Claim Form as advancing a claim for breach of trust or breach of fiduciary duty *sub silentio*.

(4) The reference to "equitable compensation" as a head of relief for duress is understandable. Drawing an analogy between duress and undue influence, it would therefore support an argument that equitable compensation is recoverable as an adjunct to setting aside an agreement for duress. Such rescission was indeed part of the relief sought in the Claim Form as part of the duress claim (now abandoned).

(5) Undue influence may be a cause of action which includes as part of its rationale a breach of trust. That does not mean that a Claim Form alleging duress is advancing a claim for breach of trust.

(6) The dictum of Cooke J in Nomura does not advance the Claimant's argument on this point either. Paragraphs 39, 40 and 41 of the judgment read as a whole show that Cooke J was not suggesting that it is sufficient for a Claim Form only to give "*some idea or indication of the duty which it is alleged that the defendant has failed to perform*".

22. I prefer Mr Popplewell's arguments in this particular debate but I would reject the Claimant's submission from first principles. CPR16.2 (1)(a) requires a claim form to contain a concise statement of the nature of the claim. The claim form simply does not give a concise statement of the nature of a claim for fraudulent breach of trust and of fiduciary duty. That is unsurprising because when one looks at the genesis and evolution of the Claim Form it seems reasonably clear that no such claims were then envisaged. There is nothing in this point.

Proposed amendment - Conclusion

23. For reasons I have given the present proposed amendment is refused. It is open to the Claimant to bring claims for breach of trust or of fiduciary duty more than six years after the causes of action arose but only for those explicitly based on and limited to fraud. The current proposed amendment is not explicit about fraud. The Claimant and his advisers have, of course, to be satisfied that the fraud claims are proper ones to pursue. If the Claimant proceeds and if the Defendant later has arguments that a foreign applicable limitation period should apply he should support these with detail on any further application.

Request for further information

24. The Defendant served a Request for Further Information on 23 January dealing with the matters which it contended needed to be answered before the Defence could be prepared. After an initial indication from the Claimant that some information might be provided he at that stage agreed to answer only one of the 50 Requests. The Claimant submits that the Defendant's approach is inconsistent with the procedural rules of the Commercial Court, particularly those adopted following the Report and Recommendations of the Commercial Court Long Trials Working Party. The Claimant relies upon passages in the report in particular the observation at paragraph 50 that "*parties to Commercial Court litigation frequently forget the principle that further information can only be ordered if it is really necessary because the other party does not know the case it has to meet*". The Defendant responds also by referring to passages in the Report but submitting that Requests for Further Information even before the Defence remain appropriate where what is sought is really necessary to enable the Defendant to know what case it has to meet. An additional submission is that since the Report has in mind more frequent early and robust applications to strike out or for summary judgment it is important for the Claimant's case to be clear so that the viability of such early applications can be considered.

25. This Court now manages cases in line with the proposals and recommendations in the Report. Statements of Case should only contain those facts that are needed to ensure that the other parties know what they have to meet. That means material facts, but not background facts, a concept which, as the Report points out, used to be helpfully encapsulated in the description of Commercial Court pleadings as "Points of Claim" and "Points of Defence". There is of course often room for argument about what is material and what is background. In this case it is hard to see the section headed "*President Putin Comes to Power*" and other passages dealing with the television coverage of the tragic loss of a Russian Submarine in August 2000 being anything other than background. Those and similar passages suggest that the Statement of Case does not contain only "*those facts that are needed to ensure other parties know what case it is they have to meet*".

26. But, as the Report points out, a detailed Request for further information should be relatively uncommon. Furthermore, contested applications requiring a judge of this Court to evaluate each of 50

requests giving reasons why each should be allowed allowed in part or refused should be very rare. Of course contested applications about further information should be even rarer before a Defence is served. Quite apart from other considerations it is difficult for a judge to understand a case and make useful Orders without knowing the case which will be in the Defence. If a Defendant considers that it needs more information to enable it to prepare a Defence of the kind the Commercial Court requires, it should, in my view, ask the Claimant, preferably by requesting the minimum and not making the sort of wide ranging request we have in this case which inevitably causes controversy. The Claimant should provide whatever information is reasonably necessary. Further if other information is readily to hand it will save time and money for the parties to provide it even if they have a legal justification for refusing it. That exercise should be conducted by brief exchanges between solicitors in terms aimed at securing compromise not at scoring points. If problems remain they are best left to the first Case Management Conference.

27. The Request for Further Information in this case has been heard in a context of the application to amend. The Requests associated with and sought as a condition of amendments have some justification and most of the answers have, as I understand it, now been provided. Furthermore whatever my reservations about dealing with Requests for further information at this point, the judge has a case management duty at every hearing and it would be pointless to refuse on principle to take obviously sensible steps to speed things up and save money.

28. The requests vary as I see it, from those the Defendant does not need to prepare his Defence (such as those relating to background matters and issues such as the nature of the charges brought against Mr Glushkov) and those which the Defendant reasonably does need (such as information about the crucial conversations which are alleged to have occurred some years ago). Then there are other questions, the answers to which Miss Dohmann felt able to provide during the course of her submissions. If they can be provided by Counsel during the hearing they can also be made available, at a much lower cost, by solicitors beforehand. Other requests lie somewhere in the middle.

29. The provision of information remained fluid at the end of the hearing. So I asked that the solicitors exchange short letters. The Defendant should set out what, upon reflection he felt he still needed to draft a Defence. The Claimant should then indicate which of those items he felt able to provide. If, following that exchange, there are a limited number of requests unresolved I will deal with them when handing down this judgment.

Conclusion

30. The contentious amendments are refused in their present form but it remains open to the Claimant to claim fraud if advised to do so. I will deal with any further disputes about further information when handing down judgment. It may help to avoid wider misunderstanding about this hearing if I summarise it as a first and minor skirmish, with a relatively inconclusive outcome, in what is potentially a very large case.

31. I shall be grateful if the parties will let me have, not less than 48 hours before this judgment is handed down, notes of corrections of the usual kind and of any other matters that they seek to raise at the hearing.
