

Wednesday, 5 October 2011

(10.30 am)

Discussion re housekeeping

MRS JUSTICE GLOSTER: Yes, Mr Gillis.

MR GILLIS: Good morning. My Lady, can I just deal with two matters briefly before I make my application.

The first relates to the redaction regime, which we should probably talk about briefly before the witnesses start to give their evidence. As my Lady will recall, there is an order preventing public reference to certain named entities because those entities are regarded as being commercially sensitive. It's an issue which the Salford defendants have been particularly concerned about and what they have produced is a card which we are proposing should be put in front of the witnesses.

Might I just pass that up. (Handed)

MRS JUSTICE GLOSTER: Yes, certainly. Touching confidence that everybody will remember to apply the protocol.

MR GILLIS: My Lady, yes. We weren't going to insult your Ladyship by providing you with one unless you wish one but basically a traffic light system: the red entities down the left-hand side bad, the green entities good.

MRS JUSTICE GLOSTER: Yes, I better have one.

MR GILLIS: So, my Lady, that will be put in front of all the witnesses.

MRS JUSTICE GLOSTER: Yes. And they'll be told in advance?

MR GILLIS: They will.

MRS JUSTICE GLOSTER: And the redaction regime will continue through to the documents?

MR GILLIS: Yes. The redaction, some of it, as I recall, has been done automatically by using Adobe to search and replace and it may well be that that process has not been 100 per cent accurate, particularly where there have been poor photocopied documents. So it may be that some redacted terms still appear in the documentation before the court. That will just have to be dealt with as and when if it occurs.

MRS JUSTICE GLOSTER: Okay.

MR GILLIS: That's the first issue.

The second issue is the definition of the overlap issues arising from the agreed amendments in the Abramovich action. My Lady, that's why the Chancery defendants are here today. At present we haven't finally resolved upon appropriate amended wording to the definition of the overlap issues but none of the counsel involved think it's sensible to try and debate that before your Ladyship because we've not actually had time to --

MRS JUSTICE GLOSTER: Think about it.

MR GILLIS: -- discuss it between ourselves yet. What we

would propose, if it is acceptable, is that we will try and resolve that between ourselves and if that's not possible then we'll bring it back to your Ladyship.

MRS JUSTICE GLOSTER: If that's agreed, fine.

MR GILLIS: On that basis, I think the Chancery defendants are wishing to leave.

MRS JUSTICE GLOSTER: Yes. Well, thank you for coming along, see you tomorrow. We'll start tomorrow at 10.15, if that suits everybody.

MS DAVIES: Yes, my Lady. I just asked my learned friend Mr Mumford to produce a Russian version of this too, because obviously some of the witnesses giving evidence don't read English, and he's agreed to do that.

MRS JUSTICE GLOSTER: Fine. Okay, 10.15 tomorrow then.

Application by MR GILLIS

MR GILLIS: My Lady, if I can then move to my application.

MRS JUSTICE GLOSTER: Yes. This is the application to cross-examine the border guards.

MR GILLIS: Yes. My Lady, it's an application under CPR 33.4 in relation to Mr Fomichev and Mr Mochalov.

MRS JUSTICE GLOSTER: Hang on. Let me just get out the right -- I'm just trying to find the correct skeleton argument.

MR GILLIS: The application bundle is bundle T(C).

MRS JUSTICE GLOSTER: Just let me get it. I've got just two

skeleton arguments.

MR GILLIS: That's correct. My Lady, we have a hard copy of the application bundle if you want that.

MRS JUSTICE GLOSTER: Which one is it?

MR GILLIS: It's T(C).

MRS JUSTICE GLOSTER: Well, hopefully I can just do it on the... If it's not been handed up this morning, I'll just do it on this. Is it a new bundle, is it on Magnum?

MR GILLIS: It is on Magnum, yes.

My Lady, it relates to the evidence that those two individuals have provided regarding Mr Abramovich's border crossings in December 2000 which Mr Abramovich seeks to rely upon by way of hearsay evidence. The application is at T(C) at tab 2 T(C)/02/1 and the letter and the attachments which contain the hearsay evidence, we've set those out at paragraph 12 of our skeleton. They're also at T(C), tab 5, at page 14 T(C)/05/14.

MRS JUSTICE GLOSTER: Yes. Just a second, I just want to -- this is being a bit slow. Yes, I have it now. Okay.

Now, what is the position under the rule? Can I just look at the rule first of all.

MR GILLIS: My Lady, the rule is at page 984. So:

"Where a party proposes to rely on hearsay

evidence..."

And that's the case here because Mr Abramovich is relying on this documentary evidence in his statements.

"... and the person does not propose to call the person who made the original statement to give oral evidence, the court may, on the application of any other party, permit that party to call the maker of the statement to be cross-examined."

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: So that is our application: an application that we be permitted to call the maker of the statement to be cross-examined.

MRS JUSTICE GLOSTER: I see that it says at page 985:

"Part 33 is silent as to what should happen if the court gives permission for cross-examination and the person does not then attend as required."

MR GILLIS: Yes. My Lady, the --

MRS JUSTICE GLOSTER: What is the consequence?

MR GILLIS: The consequence that is referred to there -- and they refer to Lord Justice Thomas in the Polanski case -- is that the court can exclude the evidence in the event that the party who is seeking to rely upon the hearsay statement does not produce the maker to be cross-examined. So that's the consequence that is identified in Polanski.

MRS JUSTICE GLOSTER: I don't have to do that.

MR GILLIS: You don't.

MRS JUSTICE GLOSTER: I can just decide what weight I attach to the evidence in the event that the deponents don't turn up.

MR GILLIS: Absolutely, and that's the consequence of the decision -- or it was Mr Justice Mann's view in *Dyson v Qualtex*, which isn't actually referred to in the notes here, but he respectfully, because he was commenting upon Lord Justice Thomas's Court of Appeal decision, doubted that that was the necessary consequence, that the court exclude it. The court is entitled to take into account the fact that the person seeking to rely upon the hearsay statement didn't call the maker to be cross-examined; that is a further factor that the court can take into account in assessing the weight of the evidence.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: So the consequence, if your Ladyship acceded to our application and Mr Fomichev and Mr Mochalov did not make themselves available for cross-examination, we would not say that the necessary consequences of that is that the documentary hearsay evidence would have to be excluded. Your Ladyship may decide that's the appropriate course but on the other hand your Ladyship

could equally say: it's again simply a factor I take into account in assessing the weight that is to be attached to this evidence.

MRS JUSTICE GLOSTER: And what I'm doing is permitting you to call the maker of the statement to be cross-examined, aren't I?

MR GILLIS: The rule is quite bizarrely expressed.

MRS JUSTICE GLOSTER: I'm not requiring the other party -- sorry, I'm not requiring a party, which is the first party, to call him; I'm permitting you to call him for the purpose of cross-examination.

MR GILLIS: How the last part of the note indicates it operates is that if the party who is seeking to rely upon the hearsay statement does not make the maker of the statement available, then the court can draw the appropriate consequence.

MRS JUSTICE GLOSTER: I'm not sure that's what it says. Maybe there's authority. It's weirdly worded, isn't it?

MR GILLIS: Well, it is.

MRS JUSTICE GLOSTER: Because if I make the order you want me to make, I'm not requiring Ms Davies to make the person available; I'm saying you can call him.

MR GILLIS: My Lady, I agree that --

MRS JUSTICE GLOSTER: So you have to make the arrangements to get the border guards here.

MR GILLIS: My Lady, no, because that's what Polanski v Conde Nast is indicating, that that's how the rule operates. So it ends by indicating:

"If the court considers in all the circumstances that the person outside the jurisdiction should attend and be cross-examined at court in person but the party intending to call them refuses to arrange for them to come to the English court, then the ordinary consequences of a refusal to obey an order of the English court should follow."

MRS JUSTICE GLOSTER: Where is that?

MR GILLIS: That's the penultimate sentence on page 985. So following on from Polanski:

"If the court considers in all the circumstances that the person outside the jurisdiction should attend and be cross-examined at court in person but the party intending to call them refuses to arrange for them to come to the English court, then the ordinary consequences of a refusal to obey an order of the English court should follow."

MRS JUSTICE GLOSTER: Is that what the Court of Appeal said in Polanski or what the writer of the White Book has said?

MR GILLIS: I think that accurately reflects what Polanski says.

MRS JUSTICE GLOSTER: Have I got Polanski here?

MR GILLIS: My Lady, no, we have not brought it to court.

MRS JUSTICE GLOSTER: Perhaps you could let me have a copy.

MR GILLIS: Yes.

But, my Lady, it must work in that way because if you grant Mr Berezovsky permission to cross-examine with the suggestion that we are then under the obligation to require Pronichev to attend, and we don't, that couldn't then be a basis for shutting out Pronichev's evidence.

MRS JUSTICE GLOSTER: No, but this is why the wording of the order seems to me to be key. What I'm doing is permitting you to call him. I'm not imposing an obligation on anyone else to call him; I'm permitting you to call him. That's why it seems to me that it doesn't necessarily follow. Obviously I'll see what the Court of Appeal say. But it doesn't necessarily follow that I'm permitting you to call him. That is tantamount to an order of the court requiring the other party to produce him.

MR GILLIS: My Lady, I think that's how both Polanski and Mr Justice Mann in *Dyson v Qualtex* have interpreted the order as working, as I would respectfully suggest one sees in the notes. In other words, it's simply saying the court is indicating that it's appropriate that the person who is seeking to rely upon the hearsay statement

should make the maker of that hearsay statement available for cross-examination and by making this order the court is signalling that the hearsay evidence is of sufficient importance to warrant that. If in consequence the person who is seeking to rely upon that evidence doesn't make the maker of the hearsay evidence available for cross-examination, then the court can make the appropriate order in terms of either excluding or it's another factor which goes to weight.

MRS JUSTICE GLOSTER: Yes. Well, perhaps you would let me have the two cases. I would quite like them -- if somebody can go out and ring a clerk and get them, I would be quite grateful.

MR GILLIS: My Lady, yes.

My Lady, subject to that, it may be appropriate if I make the application and then we can come back to that.

MRS JUSTICE GLOSTER: Yes, sure.

MR GILLIS: My Lady, I was proposing to take the matter quite shortly because your Ladyship has read the skeleton arguments and has heard the opening. Your Ladyship knows that the -- I don't know whether your Ladyship has refamiliarised yourself with paragraph 12 of our skeleton, which sets out what the hearsay evidence is.

MRS JUSTICE GLOSTER: Yes, just take me -- we're talking --
can we just remind ourselves that we've got -- it's
General Pronichev, is it?

MR GILLIS: Yes. Mr Pronichev --

MRS JUSTICE GLOSTER: He's the head of the FSB Border Guard
Service.

MR GILLIS: Yes, I think he is the deputy head of the FSB.
So Mr Pronichev's title is the first deputy director of
the Border Guard Service.

MRS JUSTICE GLOSTER: First deputy director of the Border
Guard Service, yes.

MR GILLIS: And Mr Mochalov is the head of the border
control division.

MS DAVIES: My Lady, I hesitate to interrupt. Mr Pronichev
is actually the first deputy director head of the Border
Guard Service.

MR GILLIS: I'm obliged.

MRS JUSTICE GLOSTER: First deputy director head of the
Border Guard Service, yes.

MR GILLIS: Then Mr Mochalov is the head of the border
control division of the Border Guard Service.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: So, my Lady, it may be appropriate just to look
at the relevant letters, which we have at bundle T(C),
tab 5, at page 12 T(C)/05/12.

MRS JUSTICE GLOSTER: I think you had better give me the hard copy. (Handed) My mouse isn't working. I'll have the hard copy in the meantime.

Yes.

MR GILLIS: Tab 5 at page 12.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: This is the letter from Mr Pronichev.

MRS JUSTICE GLOSTER: Just a second. (Pause) Yes.

MR GILLIS: It's a letter dated 23 April 2011 at page 12.

Mr Pronichev starts by explaining the regulations that are in place and the power of general inspection and to stamp documents and then the critical part is at the bottom of that letter:

"Based on the available records and documents, the information sheet requested by you was prepared..."

And then is enclosed.

Then over the page we have the information sheet which was prepared by Mr Mochalov and that purports to show Mr Abramovich's entries and exits into and out of Russia. The entries which may be regarded as being of particular interest are the 6 December exit from Russia, 6 December return into Russia, and then on the face of it this is put forward as evidence of indicating that between 6 December and 2 January Mr Abramovich did not leave Russia.

My Lady, that's the hearsay evidence that Mr Abramovich seeks to rely upon and one can see the reliance in his third witness statement and his fifth witness statement.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: I don't propose to ask you to turn that up but for the record it's at paragraph 262 of the third and paragraph 7.1 of the fifth.

My Lady, in terms of relevance of this evidence, your Ladyship has read the skeleton and heard the openings and so I don't think there's much that I need to say about the relevance of Mr Abramovich's movements in this period because your Ladyship knows that Mr Abramovich denies having attended a meeting at Cap d'Antibes in December 2000 with Mr Berezovsky and Mr Patarkatsishvili, which Mr Berezovsky now dates as most likely to have taken place in the few days immediately after Mr Glushkov's arrest on 7 December.

MRS JUSTICE GLOSTER: Mr Glushkov was arrested on 7 December?

MR GILLIS: Yes, and the information about that arrest seems to have come out at about 11 o'clock Russian time. Your Ladyship knows the --

MRS JUSTICE GLOSTER: Mr Berezovsky's case is that he may have attended on the Cap d'Antibes meeting or a meeting

at Cap d'Antibes on the 6th or any time thereafter?

MR GILLIS: On the 7th or any time thereafter, because
Le Bourget was on the 6th.

MRS JUSTICE GLOSTER: Yes, exactly.

MR GILLIS: The meeting certainly took place after
Mr Glushkov was arrested; that was on the 7th. So in
a sense Mr Glushkov's arrest starts the clock ticking.

MRS JUSTICE GLOSTER: I thought there was some suggestion
that he may have gone down from Le Bourget to
Cap d'Antibes on the 6th.

MR GILLIS: There was. There was the suggestion that he may
not have returned to Russia after Le Bourget on the 6th.

MRS JUSTICE GLOSTER: And that he was the unidentified
person with Mr Patarkatsishvili --

MR GILLIS: Absolutely. It certainly seems as if
Mr Patarkatsishvili's plane flew down from Le Bourget to
Marseilles on the 7th and there were three passengers on
board, so query whether Mr Abramovich was one of those
passengers; because, as your Ladyship will remember,
Mr Patarkatsishvili's plane then flies back from
Marseilles to Moscow on the 7th.

MRS JUSTICE GLOSTER: On the 7th?

MR GILLIS: On the 7th. So that is a possibility, or the
days immediately thereafter.

MRS JUSTICE GLOSTER: Mr Berezovsky's case is that it's

after the actual arrest on the 7th, so that even if Mr Abramovich did fly down on the 6th and therefore the Russian return stamp is incorrect, the meeting wouldn't have taken place at Cap d'Antibes until the 7th?

MR GILLIS: That's right. It certainly couldn't have taken place before 11 o'clock Russian time on the 7th.

MRS JUSTICE GLOSTER: So is part of the suggestion in the evidence that Mr Abramovich stayed with Mr Berezovsky at his villa or at an adjacent villa on the night of the 6th? Is that one of the possibilities?

MR GILLIS: No, I don't think there's a suggestion that Mr Abramovich flew down on the 6th because I think Badri's plane flies down from Le Bourget to Marseilles on the 7th.

MRS JUSTICE GLOSTER: Oh, right. Yes, I see.

MR GILLIS: So it would either be that Mr Abramovich stayed in Paris on the evening of the 6th and did not fly back to Russia and then flew down with Mr Patarkatsishvili on the 7th; or alternatively, having returned to Moscow on the 6th, then flew back on the 7th. But my Lady, it's that window of the 7th and immediately thereafter that Mr Berezovsky suggests is the period where it is most likely the meeting took place.

MRS JUSTICE GLOSTER: So the entries that you may wish to challenge are the 6 December entry into the Russian

Federation because that doesn't tally with the possibility of a flight down from Paris to Marseilles on the 7th?

MR GILLIS: My Lady, what we are seeking to do is to explore what is the documentary basis for this information sheet in the records.

MRS JUSTICE GLOSTER: You say if there wasn't a flight down on the 7th from Paris to Marseilles, you say there should be a record of a further exit from the Russian Federation in the period 6 December to 2 January?

MR GILLIS: Indeed so.

My Lady, it may be useful just to annotate this. Where this record says there is an exit from the Russian Federation on 6 December -- so that's when Mr Abramovich flies out to Le Bourget -- interestingly there is no exit stamp in Mr Abramovich's passport, and that's common ground.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: The entry back into Russia on 6 December, as your Ladyship may recall, there was a dispute as to whether the stamp in Mr Abramovich's passport was in fact saying 5 December or whether it was indeed dated 6 December; but it does now look, from the forensic evidence, as if it was 6 December.

My Lady, what this evidence is being relied upon for

is not just to establish entry and exit on 6 December but also implicitly to establish that there were no further movements across the border after 6 December.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: Our fundamental position is that we think it's appropriate that an order for cross-examination should be made so that we can explore what is the documentary basis for this record. Therefore, how reliable is the evidence for the purposes of Mr Abramovich inviting the court to conclude that this establishes that he cannot have left and returned to Russia after 6 December? Because as your Ladyship will see -- and I'll expand upon this in a moment -- going back to the previous page, all it says is:

"Based on the available records and documents..."

We're not told anything about that. Without that sort of information, the court is simply not going to be in a position to assess what sort of weight can be put on this evidence.

So, my Lady, your Ladyship has clearly in mind the critical relevance to the Cap d'Antibes meeting of this evidence. So I can move on from that.

Your Ladyship also knows that Mr Abramovich has put before the court extensive evidence in relation to his movements during this relevant period. So that we have

Mr Abramovich's own evidence in his third and fourth statements; we have extensive hearsay evidence from individuals who say they can attest to Mr Abramovich's presence in Chukotka for much of the month. Then, my Lady, in the week before the start of the trial there have been a whole series of supplemental witness statements regarding this issue, most of which are now included in volume E8.

So, my Lady, there is much other evidence which Mr Abramovich seeks to put before the court but this hearsay evidence is potentially an important part of that case. What we say is that the evidence, as one can see from Mr Pronichev, is simply based on wholly unidentified documents which are described as being "available records and documents" and it's for that purpose and it's on that basis that we have the information sheet drawn up, from which the court is asked to infer that Mr Abramovich could not have left and returned to Russia after 6 December.

In our submission, as I've said, absent an order for cross-examination, it's going to be very difficult for the court to know what weight, if any, it can attach to this evidence because there are quite clearly, we would say, a whole series of questions that need to be asked and answered. That's the only way in which this

evidence can be tested.

MRS JUSTICE GLOSTER: It would be done by video-link, would it?

MR GILLIS: I'm not sure whether it would be done by video-link or whether the people would attend in person -- from Moscow I think it's just a three-and-a-half-hour flight -- but obviously that is something that could be decided at a later stage.

My Lady, if I could just give you a few examples. As we can see at page 12, Mr Pronichev at the bottom of that page, tab 5 at page 12, Mr Pronichev says that the answers given in the attached information sheet are "based on the available records and documents"; but, my Lady, he does not say what those documents and records are.

In our submission it's clearly relevant to know what the records are. How were they prepared and maintained? For example, how was the information collated from the no doubt many airports from which foreign flights could have been made? For example, were the passports scanned and was information then collated automatically in some central registry? Or, for instance, was the system dependent upon the filing of paper reports? All of those sorts of questions are inevitably going to be relevant for the purposes of the court forming a view as

to how reliable and complete the records are.

Then, my Lady, one sees that Mr Pronichev is referring at page 12 to "the available records" without giving any indication of what the available records are. My Lady, that qualifier of "available records" is obviously potentially very important.

MRS JUSTICE GLOSTER: Just a second. Just looking at the letter:

"... the border authorities have the power to affix appropriate stamps..."

MR GILLIS: Yes.

MRS JUSTICE GLOSTER: It doesn't suggest they've got to.

MR GILLIS: No.

MRS JUSTICE GLOSTER: You, on your side, could no doubt check what the relevant laws are and no doubt you would tell me if there was a requirement. It may be good practice to stamp the documents but it doesn't look, just from this letter, that -- well, I don't know. I haven't seen the guidelines, which are different from the law. One can quite see that although the guidelines may say it's good practice to stamp, that on occasions they don't get stamped, or that may be the case.

MR GILLIS: No, absolutely. I don't think we need to look at it but it's the evidence of Mr Tenenbaum that exit stamps are mandatory, but in actual fact we can see from

Mr Abramovich's passport on 6 December that, mandatory or not, you can certainly leave Russia without getting an exit stamp in your passport because that's exactly what happened with Mr Abramovich and his wife whom he said accompanied him.

My Lady, this is all a bit confusing because what Mr Pronichev is talking about here is the power to stamp documents. It may be that what he's referring to is the power to stamp a passport. But he then goes on to say:

"Based on the available records and documents, the information sheet... [has been] prepared..."

But that information sheet clearly can't have been prepared on the basis of simply passport stamped because we know that the information sheet is saying that Mr Abramovich left on 6 December but equally we know that Mr Abramovich's passport doesn't have a stamp for that date. So that would all seem to indicate that there is some separate record that is being maintained but we're not told --

MRS JUSTICE GLOSTER: Well, one would imagine there was, if entry in and out of Russia is similar to anywhere else.

MR GILLIS: Exactly so. But then one needs to know how those records are maintained and it takes me back to the point that I just made: are passports being scanned and bar codes read and then information being uploaded

automatically or was it a paper system? And if it was a paper system, how did it operate?

So, my Lady, that's the point that we make in respect of that.

MRS JUSTICE GLOSTER: Why do you need them both? Why can't you just have one of them? Why can't you just have Mochalov? I don't know, are there any difficulties put forward? If the other gentleman is a general, if he was in charge of the army or something somewhere, or a division, it would be unfortunate, wouldn't it, to be dragging him away from his duties? Mr Mochalov seems to have done the actual preparation.

MR GILLIS: My Lady, we would suggest that it's appropriate that both should be called to give evidence just in order to make sure that we have somebody who is able to speak to how the system operates. On the face of it Mr Mochalov has just been looking at certain records but we think it's appropriate that Mr Pronichev, who is the person who is saying, "Based on the available records and documents", should also come to give evidence to explain what those "available records" are.

My Lady, as I said, that qualifier of "available records" is potentially significant. Let me give an extreme example just to illustrate the point. Let's assume that in fact there were no available records

after 6 December because the system fell over or ten years later the files have been lost. Now, if that were the case -- and, as I say, it's an extreme example -- the court could draw no inference from the fact that there is no record of Mr Abramovich's movements between 6 December and 2 January.

So, my Lady, in our submission there is obviously a need for further examination of this evidence in order to establish what weight can actually be attached to it.

My Lady, with that, could I just move quickly to deal with the objections that have been made --

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: -- by my learned friend.

I think there are really three objections that are made to the application to cross-examine. The first I think we see at paragraph 28 of the skeleton argument of my learned friend T(C)/11/88. It is said that:

"If no challenge to the authenticity of the [two Russian entry] stamps..."

So this is looking at 6 December. I think this is paragraph 28.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: "If no challenge to the authenticity of the two [Russian] stamps is forthcoming, there will be even more reason to refuse this application, as all that the

documents from Mr Pronichev and Mr Mochalov will do will be to confirm information that is in fact already apparent from other sources."

Well, my Lady, the suggestion that the documents are merely confirming information apparent from other sources is not correct because it's common ground that there's no Russian exit stamp in Mr Abramovich's passport for 6 December, yet that's what the information sheet purports to record.

As my Lady appreciates, what is critical about the border guard information is that it's relied upon to confirm that there was no exit and re-entry from Russia by Mr Abramovich between 6 December and 2 January. For the reasons that I've already indicated, in our submission that assertion and the weight that is to be attached to this evidence to that effect simply cannot be determined unless there is examination in relation to the information which is said to lie behind the information sheet.

MRS JUSTICE GLOSTER: Ms Davies's skeleton at paragraph 30 makes the point that all that the two prospective deponents are doing is communicating the content of the official State records. But you, as I understand it, want to cross-examine them about the mechanics of maintaining records and how they elicited the

information that is provided in the information sheet.

MR GILLIS: Absolutely so.

MRS JUSTICE GLOSTER: So you're not actually asking them, "Well, did Mr Abramovich leave Russia during that period?" because they won't know because all they will have done is to have looked at particular records. But you really want to understand the procedures; is that right?

MR GILLIS: Absolutely. Of course they're going to have no personal knowledge; they weren't on the desk on the day. But what they will do is these are the people who are, if I can put it this way, charged with administering the system so they can explain what the system is, they can explain how the records are created, they can explain how the records are maintained, they can explain whether these are records that are maintained in relation to everybody or just in relation to particular individuals.

MRS JUSTICE GLOSTER: I suppose they can answer the question whether it is possible that if a person leaves in a private plane there is no formal record.

MR GILLIS: Absolutely. They are the people who can explain how it is that there is no exit stamp in Mr Abramovich's passport for 6 December. They can explain how it is that, in respect of all of the airports from which foreign flights could have been made, they can be sure

that there was no undocumented flight or that they can be sure that if there was a flight and documents were created, those documents would necessarily still be on the records ten years later. That's the type of evidence that they can give.

Just to be provided with this evidence that says, "We've inspected our records but we're not going to tell you what they are, and this is what they say", is of no assistance to the court, particularly when the court can see it's inconsistent with what is already before the court in relation to Mr Abramovich's passport.

MRS JUSTICE GLOSTER: Is there any evidence about the difficulties -- I have some sympathy with the points that Ms Davies is making in paragraphs 30 and 31 in the sense that these are people maintaining records or in charge of the maintenance of records. It may be -- I know not -- that there is some reluctance on the part of the border agency or the Border Guard Service to make its officials available for cross-examination by a foreign court. One can see there might be all kinds of policy reasons why the Russian State might not wish to make its border guards subject to cross-examination by a foreign State. So I have to take that into account.

MR GILLIS: My Lady, let me deal with that.

MRS JUSTICE GLOSTER: Well, just take it the other way around: the UK might take the view that it is not appropriate to make its civil servants available for cross-examination by a foreign court in relation to civil litigation. It might take that view for all kinds of policy reasons. It might therefore be the case that, for reasons that had nothing to do with Mr Abramovich, the Border Guard Service or the Russian Federation says, "No, we're not going to have our people being subject to cross-examination. We're quite happy to provide a bit of paper but we're not going to wheel them in to have them cross-examined, courteously or aggressively, by leading counsel".

MR GILLIS: It would be courteous, I'm sure. That may be, but let me say --

MRS JUSTICE GLOSTER: But you say that would go to the weight that I would --

MR GILLIS: Absolutely. If that's the outcome of the order being made, let them say that.

But, my Lady, if I can take it in stages. The first point -- and it's an obvious point but it's a point that I should make -- is that this court, if it were to accede to my application, is not making an order against these foreign officials that they should attend for cross-examination. What the court is --

MRS JUSTICE GLOSTER: I'm permitting you to call them.

MR GILLIS: You're permitting me to call them; we can look at the ramifications of that.

What Mr Abramovich has done is he has put in this hearsay statement from high-ranking officials because he wants that information to be franked with their authority.

MRS JUSTICE GLOSTER: I can see all that.

MR GILLIS: Now, in that situation, if Mr Abramovich has been able to avail himself of access to these individuals to put this hearsay evidence before the court, the order that we ask the court to make is simply effectively saying to Mr Abramovich: this court thinks it's appropriate that if you want to rely upon this hearsay evidence, you should produce these people to be tendered for cross-examination. In our submission that doesn't engage any principle of comity or any similar principle because you're not making an order against the officials; you are basically giving an indication to Mr Abramovich that he should take steps to seek to ensure that these people can attend to be cross-examined.

Now, if he can't do that because the border authorities come back and say, "This is not something we're willing to permit", well, so be it, and then

that's a fact the court can take into account. But we do submit that this argument of comity, as it were, or showing proper respect to a friendly nation, is really not engaged by the type of order this court is being asked to make. So we do say that it's entirely proportionate and fair that the court should make this order.

My Lady, there is actually no evidence before the court that if this order was made it would be impossible for Mr Abramovich to secure their attendance.

MRS JUSTICE GLOSTER: I've got the point.

MR GILLIS: My Lady, there are two points that I would like to, in that context, just draw to your attention.

Mr Abramovich is obviously a person of some influence within Russia and we would say as a result there's every reason to suppose that Mr Abramovich, if he asks, will be able to secure Mr Pronichev's and Mr Mochalov's attendance. My Lady, can I give you an example of that because just a few days ago we were served with a third witness statement from Mr Voloshin. Can I just ask my Lady to look at that.

MRS JUSTICE GLOSTER: I don't think I have it.

MR GILLIS: No, and I'm afraid it has not actually been uploaded into Magnum yet. (Handed)

My Lady, as your Ladyship may recall, in

December 2000 Mr Voloshin was the head of Russia's presidential executive office. I don't know whether he --

MRS JUSTICE GLOSTER: That's passed me by, I'm afraid.

MR GILLIS: My Lady, he --

MRS JUSTICE GLOSTER: Oh, Mr Voloshin. Sorry, I thought we were talking about Mr Mochalov.

MR GILLIS: No, Mr Voloshin. So he was the head of Russia's presidential executive office.

MRS JUSTICE GLOSTER: Sorry, I thought you were talking about Mochalov.

MR GILLIS: So he was running President Putin's office and one has seen in other evidence that he gives evidence as to what meetings took place with Mr Patarkatsishvili and Mr Putin.

My Lady, could I just ask you to read paragraphs 1 to 5 and then look at the attached telephone log, which is the document which is at the back of that clip and is very heavily redacted.

MRS JUSTICE GLOSTER: So there's a telephone call, yes.

MR GILLIS: It would appear to be the case that

Mr Abramovich, in support of his case, is even able to access Kremlin logs of telephone calls.

MS DAVIES: My Lady, paragraph 3 of this statement,

Mr Voloshin explains that he recently asked his former

secretary --

MR GILLIS: No, I entirely -- I'm sorry, maybe that didn't put it quite fairly. But through asking Mr Voloshin -- I'm sorry, I was taking it too shortly. I certainly wasn't intending to imply that Mr Abramovich had access to Kremlin logs or telephone calls; but through the influence of Mr Voloshin he is able to access or get access to logs of telephone calls within the Kremlin.

In those circumstances we would suggest there's no reason to suppose that if Mr Abramovich asked, Mr Pronichev and Mr Mochalov would not make themselves available for cross-examination.

MRS JUSTICE GLOSTER: I don't know whether I agree with that. There may be all kinds of policy reasons why the State or any State doesn't want their border guards being cross-examined. I don't see that I can assume that just because Mr Voloshin is prepared to come and give evidence, that means that Mr Abramovich can secure the attendance of people. I just don't think I can draw that inference.

MR GILLIS: And I don't ask you to and I don't suggest that it is necessary that you should conclude that the witnesses will be made available before you make the order.

MRS JUSTICE GLOSTER: Or that Mr Abramovich can necessarily

secure their attendance. I haven't got any evidence on --

MR GILLIS: If he can't, he can explain that.

But the other point that we were going to make, and I can sort of make it quite shortly, is that in relation to other State officials where we have applied to cross-examine them in relation to Mr Abramovich's border movements in respect of Chukotka, not just in relation to border movements but in relation to his whereabouts in Chukotka, Mr Abramovich has acceded to our application to cross-examine various State officials.

Just to take it quickly -- and your Ladyship has the order at L(2011), tab 12, at page 239 L(2011)/12/239 -- the order includes a Mr Markin, and he was the chief federal inspector of the office of the penitentiary representative of the president of Russia in the far eastern federal district; Mr Kurilov, who was the head of border protection directorate of Chukotka; Ms Umanskaya, who was the chairman of the electoral commission in Chukotka; and Mr Kolpakov, who was the lieutenant colonel of the militia in Chukotka.

My Lady, I don't suggest any of those individuals are of the same high level as Mr Pronichev and Mr Mochalov, but we already have a situation where it's been accepted that it is appropriate to have

cross-examination in relation to civil servants, if
I can put it that way.

MRS JUSTICE GLOSTER: Can I be clear: is this
cross-examination going to be limited to what I call the
exit and entry issues --

MR GILLIS: Yes.

MRS JUSTICE GLOSTER: -- and the record issues?

MR GILLIS: Yes.

MRS JUSTICE GLOSTER: There's no suggestion that there's
going to be any wider cross-examination of, for example,
what you say about Mr Abramovich's connection with the
Kremlin or anything of a wider... I think I need to
appreciate what is actually the extent of all this.

MR GILLIS: CPR 33.4 is very clear about that: the
cross-examination can only be in relation to the hearsay
evidence.

MRS JUSTICE GLOSTER: Yes. So it wouldn't go wider?

MR GILLIS: No, it wouldn't.

So, my Lady, in our submission, in considering
whether it's appropriate to make the order, it's not
necessary for your Ladyship to conclude that if the
order is made, the makers of the hearsay statements will
appear. In our submission that's not a necessary part
of the court's reasoning.

The court should ask itself: is the hearsay evidence

of relevance to an issue in the action? Then secondly: is that evidence of sufficient importance that cross-examination is required for the purposes of the court determining what weight can be attached to it? If the court answers yes to both of those questions, unless there are issues of comity or some suchlike principle, then the court should make the order.

In our submission there are no such issues of comity because the order is not directed against a foreign State official; it's in effect a direction to Mr Abramovich in relation to evidence which he has sought fit to put before the court in the context of this private litigation.

Now, if the relevant State officials are not willing to go further and not willing to make themselves available for cross-examination, well, so be it. As I've indicated, we do not suggest that the consequence of that is that the evidence is necessarily shut out; but it is, in our submission, a matter which would further go to the weight the court would attach to the evidence.

MRS JUSTICE GLOSTER: Well, it may be.

MR GILLIS: Or may be.

My Lady, if I can just look at Polanski, if I can pick it up at --

MRS JUSTICE GLOSTER: I haven't got it yet.

MR GILLIS: I'm sorry, I thought Ms Shah was passing it up.

(Handed)

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: Picking up from Lord Justice Thomas at
paragraph 62:

"The second reason advanced is that the claimant's evidence by use of VCF would be a better way of the claimant's evidence being before the court than through his witness statement served by way of hearsay notice. However, that presupposes that the statement would be before the court. The effect of the changes introduced under CPR 32 and 33 has not so far been widely appreciated, particularly as regards the way in which the changes relates to the position of witnesses who are outside the jurisdiction. Under CPR 33.4, when one party has served notice that hearsay evidence is to be given through a statement and the party does not intend" --

MRS JUSTICE GLOSTER: Let me read it to myself.

MR GILLIS: I'm obliged. (Pause)

My Lady, it's really down to letter C.

MRS JUSTICE GLOSTER: Yes. (Pause)

Quite a hard order, wasn't it?

MR GILLIS: My Lady, yes.

MRS JUSTICE GLOSTER: So the libel case didn't go ahead; is that right? Did Polanski ever come to this --

MS DAVIES: It was overturned in the Lords, my Lady. The result of the Court of Appeal decision was overturned.

MRS JUSTICE GLOSTER: Yes, I thought it was, because there's a human rights issue.

MS DAVIES: Absolutely, my Lady, yes.

MR GILLIS: I should have checked, but I don't think in terms of how the rule operates that was doubted.

MRS JUSTICE GLOSTER: I think I need to see what the Lords said, don't I? Well, if you give me the reference, I'll look at it.

MR GILLIS: We will. The sentence we rely upon is:

"If the court considers in all the circumstances that the person outside the jurisdiction should attend and be cross-examined in court in person but the party intending to call him refuses to arrange for him to come to London..."

And that in this case must be Mr Abramovich.

"... then the ordinary consequences of a refusal to obey an order of the court should follow."

MRS JUSTICE GLOSTER: It just must depend on the circumstances, mustn't it?

MR GILLIS: I'm not suggesting that the consequence follows but what it is contemplating is that the consequence of

the court's order is that the person who is seeking to rely upon a hearsay statement should make steps to make the maker of the hearsay statement available for cross-examination. He may not be able to do so, in which case the person won't attend for cross-examination; the court will look at the reasons and take that as a factor into account.

But, my Lady, it's not imposing, on the facts of this case, an obligation on Mr Berezovsky to require Mr Pronichev to attend, such that if Mr Pronichev doesn't attend or we fail to take steps to get him to attend, the evidence is shut out.

MRS JUSTICE GLOSTER: Yes, but if you go with Lord Justice Thomas that's exactly what would happen because Mr Polanski was not going to be allowed to produce his witness statement, was he?

MR GILLIS: My Lady, that's right. We do not, as I've said, indicate that that is --

MRS JUSTICE GLOSTER: You're cherry-picking Lord Justice Thomas a bit.

MR GILLIS: We --

MRS JUSTICE GLOSTER: Because --

MR GILLIS: Yes.

MRS JUSTICE GLOSTER: -- this case, Polanski's case, the effects of it were very, very serious indeed so far as

his claim was concerned.

MR GILLIS: Absolutely, and obviously Mr Polanski wasn't going to come here. So that's why, in our submission, it was obviously wrong for Lord Justice Thomas to be suggesting that the automatic consequence is that the evidence should be excluded because, as your Ladyship indicates, that has fair trial implications.

But, my Lady, in circumstances where we're not suggesting that that would be the consequence of noncompliance with the order, that difficulty doesn't arise.

MRS JUSTICE GLOSTER: Right.

MR GILLIS: My Lady, we will get the House of Lords decision.

MRS JUSTICE GLOSTER: I can look at it. If you just give me the reference, I can look at it myself. Yes. Thank you, Mr Gillis.

Submissions by MS DAVIES

MS DAVIES: My Lady, can I start with the issue of the effect of CPR 33.4.

MRS JUSTICE GLOSTER: Can I just say where I'm coming from.

I'm not going to exclude it if these people aren't produced for cross-examination, I wouldn't exclude the evidence, but obviously it's going to go to weight. I can quite see that there might be difficulties put

forward by the Federation for not wanting to have their servants cross-examined. Obviously I will listen to your submissions but it seems to me that it is an important issue in the case.

You yourself have said, or Mr Sumption has said, accepted that the ORT issue is an important issue. Whether this meeting took place or not is going to be an issue. You've produced this evidence. In a normal case where there's an issue about a date or when somebody has travelled, one would expect the people who are saying, "Yes, he did leave the country", "No, he didn't", would be produced for cross-examination.

At the moment, you're going to have to work quite hard to persuade me that I shouldn't make an order. I am not persuaded that the consequences should be that I should exclude it; it just depends as to the reasons why these people can't be cross-examined as to the records.

MS DAVIES: My Lady --

MRS JUSTICE GLOSTER: I quite see your point that they can't be cross-examined about anything else and they can't be cross-examined about their personal knowledge because they don't have any personal knowledge. But at the moment I am persuaded by Mr Gillis' submissions that in order to test this evidence, they do need to know

something about whether the records are complete; how the records are maintained; given that the exit stamp of 6 December isn't in the passport, whether there is a possibility, given the maintenance or the glitches in the maintenance of records, whether despite the record that's been produced, Mr Abramovich might have left Russia in the period between 6 December and whenever in January.

That's where I'm coming from. So I give you that indication.

MS DAVIES: My Lady, may I take it in stages.

MRS JUSTICE GLOSTER: Yes, sure.

MS DAVIES: Because there are a number of things, I'm afraid, in what my learned friend Mr Gillis said with which we disagree.

It's important that first of all we know what the order is that's being made and whose obligation it is to call the witness, which Mr Justice Mann in fact, in the other judgment my learned friend just handed round, makes clear. I'll come on to that.

Secondly, it's important -- of course we accept that the issue of the meeting in Cap d'Antibes in December is an important issue; there's no dispute from us about that. It's also important to remember in that context that the dispute has now actually become quite a narrow

one because, contrary to Mr Berezovsky's former position that the meeting was in the last days just before Christmas, late December, in the most recent witness statement from him he's moved that to most likely to be around 7 December; and in fact in correspondence since then it's now been conceded that the only relevant period is 7 to 16 December. So we're looking at nine days.

MRS JUSTICE GLOSTER: The 7th?

MS DAVIES: 7 to 16 December.

I'll come on to explain how this bit of evidence fits into our evidence in relation to that but one of the points we wish to make to my Lady is this is only one part of the material that we seek to rely on and there's actually a whole body of other material that we say, including witness --

MRS JUSTICE GLOSTER: You are relying on this, Ms Davies.

MS DAVIES: We are, but only as part of the story, and it's important.

CPR 33.4 is a discretionary remedy, there's no entitlement to an order requiring cross-examination where a party is seeking to rely on hearsay evidence, and we submit that there are a number of factors relevant to the exercise of the court's discretion: one is the significance of the evidence, and my learned

friend seems to accept that because he said this morning that the question was whether the evidence was of significant importance to warrant the order; the second is the nature of the evidence; the third is the value of cross-examination; and the fourth is the likelihood of the order having any utility, and that was a matter that troubled Mr Justice Mann in the Dyson v Qualtex case.

Before I come to that, can I just address this question of who calls the witness if an order is made under this provision because it affects some of the points that my learned friend made in relation to what are the difficulties here and who has adduced evidence on that.

MRS JUSTICE GLOSTER: I thought, looking at who calls it, he calls for the purposes of cross-examination.

MS DAVIES: Yes, indeed. My learned friend Mr Gillis is the one, if he obtains this order, who has to call Mr Pronichev and Mr Mochalov.

MRS JUSTICE GLOSTER: But he can cross-examine them. He's not limited to --

MS DAVIES: Exactly. That is what Mr Justice Mann said in terms in the Dyson v Qualtex case, my Lady, which my learned friend I think handed up.

MRS JUSTICE GLOSTER: Hang on. Do I have Dyson v -- did that get handed up?

MS DAVIES: It got handed up with Polanski. Is there another copy?

MRS JUSTICE GLOSTER: Not to me it didn't.

MS DAVIES: I do apologise, my Lady. It was handed to me.
(Handed)

If I can just explain who the parties are, we see Mr Carr was appearing on behalf of the claimant and Mr Arnold was appearing on behalf of the defendant. At paragraph 7, Mr Arnold was seeking an order that a witness called Mr Anderson attend to be cross-examined by video-link under CPR 33.4.

Mr Justice Mann at paragraph 9, towards the bottom of the page, in the sentence starting, "It is not an application for an order", makes the point that:

"It is not an application for an order that the other party do attend for cross-examination: it is an order giving Mr Arnold liberty to call the maker of the statement... himself so that the witness can be cross-examined on the contents of the statement. In other words, it gives Mr Arnold the liberty or permission or opportunity. It leaves open the question of how that is to be brought about."

MRS JUSTICE GLOSTER: Let me just read 9 and 10 to myself.

MS DAVIES: Through to 11, my Lady.

MRS JUSTICE GLOSTER: Yes, sure. (Pause)

He's got the same concerns about what Lord Justice Thomas said, with respect, in Polanski that I have expressed.

MS DAVIES: Yes, my Lady.

In paragraph 11 he is dealing with the point that because the witness in question is beyond the jurisdiction and therefore there's no summons that can make him attend, there's a futility in the order, and that there's no possibility of making an order against the claimant, Mr Anderson being the claimant's witness in this case.

MRS JUSTICE GLOSTER: Yes, but let's put it this way: I give them liberty to cross-examine because I think it's right or appropriate that there should be cross-examination of this evidence if you're seeking to rely on it; arrangements are made for the attendance; and then it's a matter for me, in the light of the fact that I have made the order, what weight I then attach to it, isn't it?

MS DAVIES: Of course, my Lady, I accept that. But my learned friend was suggested that Mr Abramovich has particular influence in Russia, can secure the attendance of these witnesses --

MRS JUSTICE GLOSTER: There's no evidence to support that.

MS DAVIES: We don't accept that for a moment. In fact we

don't have direct access to these people; that's a point I want to make. But the first point is it's not us, if this order was made, who would have to secure the attendance of these individuals; it's Mr Berezovsky.

MRS JUSTICE GLOSTER: That depends if you go with Mr Justice Mann or Lord Justice Thomas.

MS DAVIES: My Lady, Lord Justice Thomas is saying, with respect, the same thing. If one looks at paragraph 62 at (a):

"Under CPR Rule 33.4, when one party has served a notice then the court may permit another party to call the maker of the statement for the purpose of cross-examining him."

So Lord Justice Thomas is reading the rule in exactly the same way that Mr Justice Mann subsequently does.

It might also be of relevance to note, if one turns back to page 392 of the report --

MRS JUSTICE GLOSTER: No, but look further down. Look further down.

MS DAVIES: That's the consequences if an order is made.

I'm on a different point, which is: who is the party who has to make the arrangements?

My Lady, the rule that Lord Justice Thomas is looking at was also actually in slightly different

terms. If one turns back, at page 392 we have CPR Rule 33.4, which the relevant part, three lines down, is:

"... on the application of any other party" --

MRS JUSTICE GLOSTER: Sorry, I'm not with you. Where are you?

MS DAVIES: Paragraph 20, CPR 33.4, three lines down:

"... on the application of any other party permit the party to call the maker..."

The rule has now been tightened up in fact because the rule, if we go back to page 984 of the White Book --

MRS JUSTICE GLOSTER: Hang on, just let me read this.

(Pause)

Yes.

MS DAVIES: If we go back to page 984 of the White Book, whereas the rule previously, at the time of the Court of Appeal in Polanski, said "permit the party", that has now been changed to "permit that party to call the maker of the statement", "that party" clearly being the party making the application, which is how at paragraph 62(a) on page 403 Lord Justice Thomas read it and how Mr Justice Mann is clearly reading it in the Dyson judgment.

MRS JUSTICE GLOSTER: Yes.

MS DAVIES: Now, that's just by way of context. What

I really wanted to address was the factors that go to the discretion of the court, starting with the significance of the evidence in question.

MRS JUSTICE GLOSTER: Yes, okay.

MS DAVIES: I've already accepted, as is obviously the case, that the question of whether there was a meeting in Cap d'Antibes in December 2000 is clearly an important issue in the litigation.

Now, in terms of the evidential arena, in support of Mr Abramovich's case that he was in Russia there are a number of items of evidence we rely upon. The first is that we're proposing to adduce corroborative evidence in terms of witnesses who saw Mr Abramovich in Russia, both in Moscow in the period 7 to 10 December and then in Chukotka, where he flew overnight on 10 December.

My learned friend made a point about the order that's been made in relation to Chukotka witnesses but those are people who are in a different category to these high-ranking civil servants in relation to whom the application is now, because those are people who are giving evidence that they actually saw Mr Abramovich in Chukotka at the relevant time. In circumstances where witness testimony of his presence in Russia is obviously potentially of great weight, we didn't oppose the application, but you can't read from that a view that we

accept that any evidence relating to this must also be tested.

In terms of the key period which really -- although my learned friend is, for understandable reasons, trying to keep his window open as broadly as possible, ie 7 to 16 December, Mr Berezovsky's most recent account is either on or immediately after 7 December most likely and we are calling Mr Voloshin, who says in his most recent statement he saw Mr Abramovich in Moscow on 7 December; Mr Kapkov, who says he saw Mr Abramovich in Moscow on 9 December and also believes he was in Moscow on 8 December; and Mr Mamut, who saw him in Moscow on 9 December --

MRS JUSTICE GLOSTER: At the party?

MS DAVIES: At the party. All those witnesses will be giving evidence.

We also rely on the absence of flight records. There are no flight records indicating any flight from Moscow or indeed from Chukotka insofar as the period after 11 December remains important. And we've made the point -- my Lady has seen it in our opening and in annex 2 to our opening -- that for all other meetings that are said to have taken place between the parties in the period October to May, there are flight records.

MRS JUSTICE GLOSTER: So you don't really need this

sentence; is that what you're saying?

MS DAVIES: Well, the next point I come to is the passports because we also, of course, rely on the passports, the stamps.

Here, this is where my learned friend is trying to sow some seed of doubt or, as we would put it, clutch at straws because he is saying: well, look at the list in Mr Mochalov's information sheet and there's a passport stamp missing on 6 December. I'll deal with that in a moment, if I may. It appears now to be common ground that there is actually a passport stamp for every other entry in Mr Mochalov's -- although my learned friend's opening suggested there wasn't an entry stamp on the 6th, we've had that forensically tested.

Mr Handy, whose report I'm not sure my Lady has seen but it's in the L bundles, produces a very much enlarged picture. It may be worth just --

MRS JUSTICE GLOSTER: I've certainly seen reference to it.

Do you want me to have a look?

MS DAVIES: Yes, shall we have a quick look at it? It's in L(2011)/19/92.

I do have a hard copy if the technology --

MRS JUSTICE GLOSTER: I have 19/2011. Is it file 19?

MS DAVIES: Yes, it's file 19. The correspondence bundles are done by year and then file number.

MRS JUSTICE GLOSTER: Just a second. It's my own stupidity, I've just taken something out.

MS DAVIES: I do have a hard copy.

MRS JUSTICE GLOSTER: Is a hard copy handed up?

MS DAVIES: It's a bundle of all the correspondence. I'll hand it to my learned friends so they can see. But I've opened it on the relevant page. (Handed)

MRS JUSTICE GLOSTER: Thank you very much.

MS DAVIES: So this is an appendix to Mr Handy's report in which he produces the best copy we have of the 6 December entry stamp. His conclusion we can see at paragraph 10 of his report, going back a couple of pages to page 88 L(2011)/19/88:

"The date was interpreted as reading [6 December], from the ink present no other numerals were considered feasible. There was no evidence to suggest that the un-inked sections of characters were due to deliberate 'erasure'."

Now, my learned friend's own forensic expert had access to the passport on Monday. We have not received any formal indication of what the results of that investigation were. Mr Handy managed to produce his report within one day of seeing the passport. But from what my learned friend said this morning it looks as if their own forensic expert has not reached any different

conclusion because he said this morning it does now look as if this was an entry stamp for 6 December.

We set out in paragraph 22 of our skeleton --

MRS JUSTICE GLOSTER: I can give this back. (Handed)

MS DAVIES: -- the information relating to the other stamps in Mr Abramovich's passport corresponding to the other dates on Mr Mochalov's list. Now, I accept we haven't been able to find an exit stamp on 6 December, although we do have both a French entry stamp on 6 December and flight records showing a flight on 6 December, which is the other material to which I was referring to in my skeleton. But in any event that's wholly irrelevant because there's no suggestion that the meeting took place prior to 7 December; it had to take place after Mr Glushkov's arrest.

I should say this about the 6 December exit stamp. There are lots of stamps in Mr Abramovich's passport, as one might expect. We haven't been able to identify one which is 6 December but not all of them are legible. So when my learned friend says it's common ground that there's no stamp, it's common ground we haven't been able to identify a stamp. That's the point.

MRS JUSTICE GLOSTER: But it's certainly possible, just talking from one's experience, that even where normally one gets one's passport stamped, sometimes if more than

one passport is being presented, they just don't stamp it. That's life.

MS DAVIES: My Lady, of course judicial experience is something that can be taken account of.

We have in our skeleton -- annex 2 to our skeleton, which lists the other meetings which either Mr Abramovich says took place or are said to be common ground -- not only identified all the flight records that show that those meetings did take place but also the stamps. For almost every other meeting, as you would expect, there's either an entry or a --

MRS JUSTICE GLOSTER: Yes, normally --

MS DAVIES: An entry, exactly.

So that's sort of the backdrop. Then where are we? The actual evidence to which this application relates. My learned friend took you to the two letters to which his application relates but he didn't in fact also take you to the letter which prompted those responses, which, in order to understand the genesis of the documents, we respectfully submit is important. That's at T(C)/05/14.

MRS JUSTICE GLOSTER: Yes.

MS DAVIES: That's a letter, my Lady can see, dated 18 April. It will be in the T(C) bundle, tab 5, page 14.

MRS JUSTICE GLOSTER: Yes.

MS DAVIES: This is a letter from Mr Malkin to Army
General Pronichev.

MRS JUSTICE GLOSTER: He's the MP or something?

MS DAVIES: He's the MP. He's a member of the Federation
Council of the Federal Assembly of the Russian
Federation and he's making a request pursuant to
Articles 14 and 17 of the federal law.

The reason I draw my Lady's attention to that is we
don't have direct access to Mr Pronichev, he's a member
of the FSB, and the request was made through Mr Malkin
invoking effectively something equivalent to an Official
Information Act request for information.

My Lady has also seen -- that was an innocuous
request; we've seen what the response is. There is
reference to guidelines, nothing surprising.

It seems the thing that has really prompted this
application is the last sentence:

"Based on the available records and documents..."

Now, my Lady, those records and documents are, of
course, not documents that are within our control;
they're official records of the Border Guard Service.
We have, however, written -- again through Mr Malkin
because that's our only way of doing it -- to
Mr Pronichev asking for details of the records and

I should perhaps show my Lady that letter.

MRS JUSTICE GLOSTER: Is that in this bundle?

MS DAVIES: No, my Lady, it's in the L bundles again.

MRS JUSTICE GLOSTER: Give me the reference.

MS DAVIES: L(2011)/21/273. I do have a hard copy if --

MRS JUSTICE GLOSTER: It's all right. I would really rather get quicker on this. Okay, I've got it.

MS DAVIES: Page 279 is the letter we sent to Mr Malkin asking him to pass a letter to Mr Pronichev as a matter of urgency. The letter that we asked to pass to Mr Pronichev --

MRS JUSTICE GLOSTER: Hang on, let me just read it.

Yes, and the reply is at?

MS DAVIES: No, the letter to Mr Pronichev -- we haven't yet had a reply -- is at page 273.

MRS JUSTICE GLOSTER: Yes.

MS DAVIES: We refer to the guidelines -- it's the third paragraph -- and also to the reference to "available records and documents". Then the request is to:

"... provide us, if you are able to do so, copies of the above documents, together with any other documents which you based your letter or Mr Mochalov based the information sheet enclosed with your letter... as a matter of urgency."

We've had confirmation from Mr Malkin that he's

received this -- Mr Malkin's office, I should say, actually -- but we haven't had a response from Mr Pronichev yet.

So my learned friend put the application on the basis that what he's seeking to explore is what is the documentary basis for the information in the records; that's what we've asked Mr Pronichev to provide.

MRS JUSTICE GLOSTER: I think it goes a bit further than that, doesn't it? It also goes to what are the systems. Even assuming that the records in your office don't record any further exits from the Russian Federation, is it possible that there could have been an exit which isn't recorded on some of these documents and records? I think that's the question, or questions along those lines.

MS DAVIES: Your Ladyship will be assisted in relation to that by the other material that's been put before the court in terms of passport stamps which show that, on Mr Mochalov's list, all bar the 6 December exit have a stamp, but there are other passport records in relation to that, the entry into Le Bourget, and my Lady will be able to assess that.

The real question is: is it appropriate --

MRS JUSTICE GLOSTER: I would quite like to see whether we are going to get any of the available records and

documents because it seems to me the story might be much clearer from that.

MS DAVIES: It may well be, my Lady. If my Lady were to say we should adjourn this application until we know what the answer is to the letter --

MRS JUSTICE GLOSTER: I think I would like to see the available records and documents, if they're forthcoming, to actually identify what further questions either of these two gentlemen will be asked in cross-examination once those records and documents were forthcoming.

MS DAVIES: Obviously we don't know.

I really must deal with this suggestion that we have some sort of influence in relation to Russian State records which allows us to ensure that these sorts of requests are answered. That was put on the basis of Mr Voloshin's evidence. Mr Voloshin, as he explains in his first witness statement, is no longer a State employee. He left his position in 2003. He is now a chairman of private companies. He also explains he's a friend of Mr Abramovich, they have been friends for many years, and what he is explaining he did, in his witness statement, is phone up his former secretary and ask her to do him a favour.

That's really no basis for suggesting that we have this ability to secure access to anything else. We've

done what we can, my Lady. If Mr Pronichev responds and is willing to provide the records, then we can test, but we can't do any more in that sense. He's the head of the border guard, a member of the FSB.

But if my Lady is saying to me that she'd like to defer the --

MRS JUSTICE GLOSTER: I think I would like to see -- what I've really got to get a grip on is what is the utility of testing the question with the witnesses: well, given this is how you maintain the records and this is what you do when people leave the country, is there any possibility that, your records notwithstanding, somebody could have left the country without there being any record of it; and if so, in what circumstances would that take place?

MS DAVIES: I accept that they must have some other records because they didn't have Mr Abramovich's passport when they produced, so I accept that.

MRS JUSTICE GLOSTER: Yes, precisely. Well, you've asked for them.

MS DAVIES: And we've asked for them. If we defer -- this evidence -- as my learned friend Mr Rabinowitz described it, alibi evidence -- is not going to be relevant until sometime in November, so we have a bit of time to try and sort this out.

MRS JUSTICE GLOSTER: Yes. I think what I would like -- have you got any indication as to when you're getting these available records and documents?

MS DAVIES: I have no indication of when Mr Pronichev might respond to the letter, which is the relevant -- because we don't know whether he's going to be willing to provide anything further in response to this request.

MRS JUSTICE GLOSTER: When did this letter go?

MS DAVIES: It went last week.

MRS JUSTICE GLOSTER: Pronichev is not the MP?

MS DAVIES: No, Pronichev is the general and he's the head of the Border Guard Service, so he's a very senior civil servant. All we can do, my Lady -- again, because we don't have direct access to him -- is chase Mr Malkin to see if he has heard anything, which of course we can do.

MRS JUSTICE GLOSTER: What is the date of this letter?

MS DAVIES: 30 September.

MRS JUSTICE GLOSTER: We'd be looking at November. I'm going to -- if I were to adjourn this, I would then have to make up my mind in the event that there were no documents forthcoming by a certain date because if I were to make an order for cross-examination then arrangements would have to be made.

MS DAVIES: On the current timetable, the earliest that Mr Abramovich would be giving evidence is 1 or

2 November. The other -- to use my learned friend's phrase -- alibi witnesses will be coming, I think, two weeks later. We're not due to finish my client's evidence until the end of November essentially.

Now, of course my position is that it's actually for Mr Berezovsky's team to make the arrangements to get these people here if the order is made --

MRS JUSTICE GLOSTER: Well, he's going to have difficulty, isn't he? They're not going to come at his request.

MS DAVIES: There's no reason to think they're going to come at our request either.

MRS JUSTICE GLOSTER: I appreciate that.

MS DAVIES: My Lady, all I was going to say is that we wouldn't take some sort of formal point that these people should have been called before Mr Abramovich, nothing like that, obviously. I just wanted to make that clear. So if my Lady at some later stage wanted to make an order then we have plenty of time in the timetable to accommodate -- although we do say it is, with respect, unrealistic to suspect that high-ranking civil servants either would be willing or be permitted to derogate from their official duties --

MRS JUSTICE GLOSTER: Yes, I can see that; it's just I have no evidence about that. I have common sense and what you say in your skeleton argument.

MS DAVIES: That's why, my Lady, the question of who has to make the arrangements is perhaps of some relevance because our understanding of the rules is it's Mr Berezovsky who has to call these people if he obtains this order and he's put no evidence before the court to suggest it's possible.

MRS JUSTICE GLOSTER: Okay. Well, conclude your submissions, Ms Davies, please.

MS DAVIES: My Lady, I think that essentially I've covered the ground that I wish to cover, unless I can assist on...

MRS JUSTICE GLOSTER: Thank you. Yes, Mr Gillis.

Reply submissions by MR GILLIS

MR GILLIS: My Lady, just briefly. If I can start with the question of timing.

My Lady, the first point is that as one can see from T(C), tab 5 -- and one can pick this up from page 14 T(C)/05/14 -- the request was made on 18 April for the information and within five days, 23 April, they got their response. So very prompt indeed. So that would suggest that these things can be dealt with quickly.

The second point is that we have been pressing this issue with my learned friends for quite a while now. If I could just very quickly run through the position in relation to it.

The border guard evidence, if I can call it that, was first produced to us on 8 September. Your Ladyship knows that it was purportedly exhibited to Mr Abramovich's third witness statement in April; in actual fact it wasn't. That mistake was corrected so that we were first given this information on 8 September. So we wrote on 12 September requesting that they should produce the available documentation. That, my Lady, is the letter that you have at L(2011), tab 16, at page 142 L(2011)/16/142. So at paragraph 12(b) we asked them to produce the available records and documents:

"If they have not been made available, please request the provision of the documents referred to (and disclose them when provided)."

So that's what we asked on 12 September. We got no response to that, so that on 22 September we issued our application. We then got a reply to that letter of 12 September on 27 September.

MRS JUSTICE GLOSTER: What's the reference?

MR GILLIS: That's L(2011), tab 19, at page 179

L(2011)/19/179. At the top of that page, referring to 12(b), they simply say:

"The 'available records and documents' referred to in the letter of Mr Pronichev are internal documents of

the Russian Border Authorities. They are for official use only and have not been provided to Mr Abramovich."

So, in other words, they didn't reply to our request that they should ask for them.

It was then only on 30 September, three or four days before the trial was due to begin --

MRS JUSTICE GLOSTER: Page?

MR GILLIS: That is L(2011) tab 21, page 271

L(2011)/21/271.

MRS JUSTICE GLOSTER: Yes.

MR GILLIS: 30 September. I think this is what you have been shown, the letter attached, asking it to be sent to Mr Malkin and Mr Pronichev.

So, my Lady, in our submission this issue should have been being dealt with from April 2011 onwards but it wasn't because the letter wasn't produced to us. It was produced to us on 8 September, we've pushed for it from 12 September and it's only on 30 September that my learned friends have actually made any effort to actually progress this issue.

So, my Lady, in our submission this is something which needs to be dealt with as a matter of urgency. It's not correct that this issue only arises once Mr Abramovich's witnesses come to give evidence because it's no doubt going to be put to Mr Berezovsky that the

evidence establishes that Mr Abramovich cannot have left Russia between 6 December and 2 January, relying in part on this.

MRS JUSTICE GLOSTER: Well, Mr Berezovsky can't be cross-examined about these records; he can only say what he can say. He's not going to have any comments.

MR GILLIS: Well, I imagine -- it is not for me to second-guess how Mr Sumption is going to put his cross-examination but I would suggest it would be surprising if it's not put to Mr Berezovsky that this evidence shows that what he is saying cannot have taken place. So, my Lady, in our submission it is a matter that needs to be dealt with with some urgency.

The second point my learned friend made was to suggest or to say that this evidence from the border guards is merely part of the evidence they seek to rely upon. Well, of course that's right and they rely upon it.

MRS JUSTICE GLOSTER: Well, I put the point: well then you don't need to rely on it.

MR GILLIS: Exactly. Either you don't rely upon it or, equally so, bear in mind we wish to test the other evidence that they rely upon; and equally so, if they are going to continue their reliance upon this evidence, we want to be able to test it.

The third point we would make is in relation to the question of who, in a sense, the obligation falls upon to make steps to have the maker of the hearsay statement available to give evidence. My Lady, CPR 33.4 is drafted in fairly oblique language, I'm afraid to say, but my Lady if one steps back, in our submission it's quite clear how it's intended to work and it's shown by Lord Justice Thomas how it is intended to work: where the court has indicated that the hearsay evidence should be available for cross-examination, there is an obligation on the person who seeks to rely upon that hearsay evidence to make the maker available for cross-examination.

MRS JUSTICE GLOSTER: So you're submitting there is an obligation?

MR GILLIS: Yes, indeed so. We would say that is clear from what Lord Justice Thomas says.

MRS JUSTICE GLOSTER: And can be enforced like any other order of the court; is that your submission as well?

MR GILLIS: Not enforced in the sense that because you are in breach of an order the evidence can be excluded. As I've said, we're not relying on that. We're simply saying in circumstances where the court has indicated the maker of the hearsay statement should be available for cross-examination, if that person is not made

available, that's a factor the court can take into account.

MRS JUSTICE GLOSTER: Okay, it may be a fact, but if it can be enforced, like any other order of the court, then theoretically that leads to the consequence that the order can be served on Mr Abramovich and he can be in contempt if he doesn't make arrangements.

Are you saying that's the position? Because I don't understand what is meant by "can be enforced like any other order of the court", what Lord Justice Thomas says. That seems to imply to me that there is actually an obligation to make the witness available and I have problems with that.

MR GILLIS: My Lady, it may be said that that is implicit in the consequence that the court has indicated that cross-examination is appropriate. But, my Lady --

MRS JUSTICE GLOSTER: If that's right, it's not just that I'm saying, "Yes, you should have liberty to cross-examine these people", but, "Yes, I think it's appropriate that the defendant should be subject to an obligation that can be enforced to produce them", which is a different question altogether because it brings in other considerations.

MR GILLIS: My Lady, I see that, but that is certainly the way in which Lord Justice Thomas is interpreting it and

I would suggest also Mr Justice Mann.

So again coming back to the passage that we have in Polanski at page 403 at letter C, I do submit that --

MRS JUSTICE GLOSTER: Sorry, why is Mr Justice Mann doing that? Look at paragraph 11:

"I cannot make, so far as I can see, any order directed at the claimant, therefore there is no order in respect of which they can be in breach."

MR GILLIS: My Lady, I was going to take you to paragraph 10 but can I just start with what Lord Justice Thomas has said at 403 at letter C:

"If the court considers, in all the circumstances, that the person outside the jurisdiction..."

So that's clearly Mr Polanski.

"... who is wishing to rely upon the hearsay evidence should attend and be cross-examined at court in person but the party intending to call him refuses to arrange for him to come to London, then the ordinary consequences of a refusal to obey an order of the court should follow."

That can only be interpreted in one way. If the person who refuses to arrange for him to come to London: that must be Mr Polanski, it can't be Conde Nast. If Conde Nast fails to take steps to get Mr Polanski to come to England to give evidence, that in consequence of

Conde Nast's failure, Mr Polanski's evidence is inadmissible; that would be nonsense.

Equally so when one sees how it's interpreted in paragraph 10 in Dyson. At the end of that paragraph, picking it up halfway through, and this is referring to the note in the White Book:

"I think that the note is probably explicable by the fact that in the Polanski case, as it was outlined to me by Mr Arnold, who has some familiarity with it, Mr Polanski was himself the claimant..."

Well, here Mr Abramovich is the defendant.

"... and may well in some way have been said to be in breach of an order, although it is not at all clear what order he can be said to have been in breach of."

So Mr Justice Mann was again interpreting the Polanski decision as being a situation which was imposing upon Mr Polanski -- substitute Mr Abramovich -- an obligation to make the hearsay witness available to give evidence.

MS DAVIES: My Lady, I hesitate to interrupt but if my Lady reads the first half of paragraph 10 --

MRS JUSTICE GLOSTER: I've read it, yes.

MR GILLIS: My Lady, the other point we would make is: how else can the rule work? Because otherwise one ends up in a situation where, the court having given permission

to cross-examine a witness who is outside of the jurisdiction because the court is persuaded that that would be of assistance to the court, there is going to be no sanction that could attach because if the obligation is upon Mr Berezovsky to arrange for the attendance of Mr Mochalov, which he can't do, there is then going to be nothing that lies behind the order that the court has made.

In our submission, in the context of civil litigation, where the defendant has sought to put before the court hearsay evidence which the court considers should be subject to cross-examination, it's obviously intended that the court should have some means of seeking to ensure compliance with that indication.

MRS JUSTICE GLOSTER: I think it makes your task more difficult if you're pursuing this submission because if you're right, I then have to take account in making my order for the cross-examination, or deciding whether I should make an order for the cross-examination of these witnesses, whether or not it is appropriate in the circumstances that I should subject Mr Abramovich to such an order.

MR GILLIS: My Lady, in our submission not. We can cross that bridge, if I can respectfully say so, when we come to it because Mr Abramovich can explain to the court

what steps he took in order to seek to have these people attend for cross-examination and explain why they refuse to do so. If the court concludes that appropriate steps were taken and it was beyond Mr Abramovich's control to secure their attendance, then the court will not attach any significance to the fact that Mr Abramovich did not do what, in those circumstances, he was not capable of doing.

My Lady, in our submission it's not necessary to determine whether it is actually going to be in Mr Abramovich's power to secure their attendance in circumstances where, at the present time, no evidence of that issue has been put before the court. It's appropriate to deal with that question on the basis of the evidence, not on speculation.

My Lady, my learned friend made references to the relevance of the absence of the 6 December exit stamp and sought to suggest that that really didn't matter terribly much because there were Le Bourget entry stamps. Your Ladyship will appreciate that's not the point. The question is: how reliable is the system that was being used to collate entry and exit information?

It's the point your Ladyship has already made that in a sense they are seeking to rely upon the negative, namely the absence of any record of entry and exit, in

order to establish that Mr Abramovich was there during the relevant period. That takes you directly into the question as to the reliability or otherwise of the systems and record maintenance that lies behind the production of the information sheet.

My Lady, unless I can assist any further, it's on that basis that we would ask that the order sought be made.

MRS JUSTICE GLOSTER: Yes.

What I'm going to do is I'm going to adjourn this application, Mr Gillis, because I think it's important that I should decide what to do once I have seen, if they are going to be forthcoming, the records and documents that have been requested through the member of the Federation Council of the Federal Assembly of the Russian Federation to -- has the request been made to one of the proposed witnesses, to Mr Mochalov or to Mr Pronichev?

MS DAVIES: The request has been sent to Mr Malkin with the request that he send it to Mr Pronichev urgently. That's what we've done.

MRS JUSTICE GLOSTER: Yes. The request for the records and documents?

MS DAVIES: Yes.

MRS JUSTICE GLOSTER: It seems to me that I ought to decide

this issue, particularly in circumstances where the claimant is suggesting that it imposes an obligation akin to an order requiring Mr Abramovich to produce these witnesses for cross-examination, it seems to me that in order to decide what I should do in the exercise of my discretion as to whether to make such an order, and irrespective of what is the correct construction of the relevant rule as to whether it does actually impose any such obligation on the party wishing to rely on the hearsay statement, it's necessary for me to know whether documents are going to be forthcoming as a result of the request that has been made to Mr Malkin to obtain access to the relevant records and documents, the available records and documents.

The question is, it seems to me, what timeframe I should put on that. I'm minded to say two weeks from today, Mr Gillis. The date for that will be -- what are we today? It's the 5th today. So the 19th, two weeks today. I'll adjourn it until then, or a convenient time thereafter, and we can deal with it I think quite speedily.

If there's been no response, then I'll have to deal with it in the light of there being no response. If there is a response, I can then hear further submissions if necessary as to whether there is still a requirement

for cross-examination. I'm sure you will be pressing your request for cross-examination even in the light of the further documents but I want to make my decision on the basis of such further documents, if any, as are produced.

MR GILLIS: I'm obliged.

MRS JUSTICE GLOSTER: It may not be convenient on that particular date.

MR GILLIS: My Lady, I believe the 20th and 21st are nonsitting days so it might be sensible to try and find some time on the 19th. But we can discuss that nearer the time depending on what the results of the request show and how long we think any further argument might take.

MRS JUSTICE GLOSTER: Yes. That puts, as it were, some sort of end date by which the documents have got to be produced because it's obviously important that as much time as possible is given to the witnesses to make arrangements if indeed I'm going to make an order.

Right. Very well. Could somebody let me have the reference to the House of Lords in Polanski? I can find it for myself.

MS DAVIES: It's always been a puzzle to me that it's not referred to in this note in the White Book but it hasn't been for many years.

MR GILLIS: It's not helpful.

MS DAVIES: But we will, of course, let my Lady have
a reference.

MRS JUSTICE GLOSTER: Just email my clerk, otherwise either
I or my clerk have to do the work. You might as well do
it.

MS DAVIES: We'll definitely do that, my Lady.

MRS JUSTICE GLOSTER: Very well. So I'll adjourn the
application formally for 14 days or such convenient date
thereafter.

Discussion re translation of witness statements

MR GILLIS: My Lady, I'm afraid one other issue has arisen
and that is in relation to Russian translations of our
witness statements.

As your Ladyship will have seen, Mr Berezovsky's
witness statements were all in English. What has
happened, understandably, is that Skaddens, for the
purposes of putting Mr Berezovsky's witness statements
to their witnesses, have created translations of those
documents and we have requested Skaddens to produce
those translations to us for two purposes: firstly,
because in our submission it is going to be necessary
for Mr Berezovsky to see what Mr Abramovich's witnesses
are being told in Russian that Mr Berezovsky has said
because Mr Abramovich's witnesses, as one can see, they

have all given their evidence in Russian and do not seem to either speak or understand written English.

So a translation has been produced and in our submission it's important that Mr Berezovsky should be allowed to see what has been communicated to Mr Abramovich's witnesses in terms of what it is suggested that Mr Abramovich has said. So that's the first reason why we say it's important that the translations should be produced.

The second reason is that from a case management point of view, in order to put Mr Berezovsky's evidence to Mr Abramovich's witnesses who only speak Russian, we and the court are going to require a Russian-language version of those statements.

So, my Lady, we have asked Skaddens to produce those translations to us and that request has been refused.

Now, my Lady --

MRS JUSTICE GLOSTER: Well, the second reason, irrespective of the first reason, there has got to be, hasn't there, a Russian translation of any statement in English so that you or whoever is cross-examining the witness, you or Mr Rabinowitz or whoever, can say to the witness, through the translator, "Look at paragraph 77 of this statement; what do you say about such-and-such?" So there's got to be, from a case management point of view,

a translation --

MR GILLIS: Absolutely.

MRS JUSTICE GLOSTER: -- if you're wanting to cross-examine on any particular English statement.

The court can direct translations if they're not already there on the table. There may be a privilege reason why extracts that the defendant has made available to his witnesses should not be made available to you; but if they've got a whole lot of translations, it might be quicker if they just provided them.

MR GILLIS: My Lady, two points.

Firstly, I think it's Sumitomo v Credit Lyonnais which indicates that translations of documents are not privileged.

Secondly, what we have --

MRS JUSTICE GLOSTER: No, but there's a difference, isn't there, because the selection of the particular paragraphs to put to their witnesses might be a privileged issue. I don't see we need to get there because there have got to be translations of any relevant statement.

So what's the position, Ms Davies?

MS DAVIES: My Lady, I have to say this has rather been sprung on us. There was no application and my learned friend mentioned it just before --

MRS JUSTICE GLOSTER: Yes, but we're here and we have another half an hour.

MS DAVIES: Yes, but I don't agree with the Sumitomo point and I don't have Sumitomo here so I can't deal with that point.

MRS JUSTICE GLOSTER: Right, okay. But there have got to be translations.

MS DAVIES: Of course. My learned friend can make translations: he has got translators, he can get official translations produced.

As I explained to my learned friend just now, we don't have certified translations; what we do have are exactly what my Lady postulated, which are privileged extractions that were put to Mr Abramovich during the course of the proofing process. I explained that to my learned friend just before we came in. We will review them to see if we can make them available but I don't know the answer to that now.

The simplest thing is presumably just to get official translations done of the witness statements, which my learned friend is more than capable of doing if that's what he wants.

MRS JUSTICE GLOSTER: Well, the court can direct both parties to do it --

MS DAVIES: Of course, my Lady.

MRS JUSTICE GLOSTER: -- and costs shared subsequently at the discretion of the court.

MS DAVIES: My Lady, the only reason I'm suggesting my learned friend do it is it's his witness statements that he wants translated. But that's fine. I'm sure those arrangements can be made. What I am not -- those are the facts.

MRS JUSTICE GLOSTER: But have you had witness statements translated on en bloc?

MS DAVIES: My instructions, just obtained this morning -- because this was raised just literally as we came in -- is that we've had parts of the statements translated for the purposes of putting to Mr Abramovich in the proofing sessions.

MRS JUSTICE GLOSTER: Or putting to other witnesses?

MS DAVIES: Or putting to other witnesses.

My Lady will recall that the witness evidence was exchanged on 31 May and then there was a six-week period in which to produce reply statements. Experience tells certainly us on this side of the court that getting lengthy documents translated into Russian is a very lengthy process and we didn't therefore get them all translated -- those are my instructions -- we had bits and that's why there's a privilege problem.

But we're happy to review what we've got to see if

we can speed the process up by making those available,
but at the moment --

MRS JUSTICE GLOSTER: Otherwise, when it comes to court,
when Mr Rabinowitz or Mr Gillis puts paragraph 65 of
a particular statement to a witness, there's going to be
a gap whilst the translator translates it.

MS DAVIES: Of course, my Lady. I understand that.

I completely understand that when the Russian-speaking
witnesses are being cross-examined, they're going to
have to have translations of any document that's put to
them to speed things up. I can see that. Although
actually that's not happened in the rest of the bundles
but there we are; that's a different problem we're going
to have to deal with on a document-by-document basis.

But that's a separate question as to whether what my
learned friend is seeking now is an order that we make
available such translations as we have. If that's what
he's seeking, I can't deal with that order because
there's a whole privilege issue that we would need to
address.

MRS JUSTICE GLOSTER: Okay.

Mr Gillis, I can see from a case management point of
view that we've got to have translations and we've got
to have them quickly. I'm going to leave it for the
moment with the parties because if there is any

possibility of Ms Davies's clients or instructing solicitors producing any translations that had been made of witness statements, that would be good. That would be a good thing. But I can see that there is a real privilege issue and I would have to look at Sumitomo and the other case you mentioned as to whether the selection of the paragraphs that were chosen to put to their witnesses was covered by privilege.

MR GILLIS: My Lady, yes. Clearly from the case management point of view that is critical. What I would say is that it certainly looks, from the witness statements that have been served by Mr Abramovich, that translations have been prepared and they are effectively referred to because, for instance, in Mr Gorodilov's second statement at paragraph 2, which is at bundle E4 at tab 5 E4/05/54 -- it appears that Mr Gorodilov is just a Russian speaker -- he says:

"I have reviewed the witness statements recently served in support of Mr... Berezovsky's case."

So that on the face of it would look to take you into 31.14.

MRS JUSTICE GLOSTER: I can quite see we've got to have them but it does seem to me that it's -- at least in the first instance -- incumbent upon you, if you wish to cross-examine a Russian speaker off an English

statement, you'll have to come up with a translation. It's something that both parties should have addressed earlier in the process because the translation issue has been on the table for some time now.

MR GILLIS: My Lady, I see that. But in our submission it is unsatisfactory that we're not going to be produced -- it seemed -- with the translations that had been prepared and seem to have been referred to in the witness statements so we can be quite clear as to how Mr Abramovich's witnesses are understanding the evidence that Mr Berezovsky is giving.

MRS JUSTICE GLOSTER: Yes, I can see that. But I think that it does require a bit of consideration because it's only in a situation where there is a lost in translation issue that this point is going to arise at all, isn't it?

MR GILLIS: I can see that.

MRS JUSTICE GLOSTER: Basically, if the worst comes to the worst, I will direct both parties to produce translations of everything and that seems to me to be an unnecessary expense. I think both of you should have addressed this earlier and I would expect Ms Davies to cooperate, as far as she can within the constraints of privilege, to produce the translations if you can, please.

MS DAVIES: I hope I was making it clear that we would do that. All I can say is there has been an awful lot to deal with in the last two weeks. My Lady has managed to escape the joys of the correspondence bundles because they would almost fill this room, mostly in the last two weeks. So we're all working frantically behind the scenes to try and get everything ready. So we will, of course, take this further.

MRS JUSTICE GLOSTER: It's going to be a lot of time-wasting if paragraphs of witness statements have got to be translated while the witness is in the witness box.

MS DAVIES: As I said, we'll review them, if we can, give them what we've got and then get them certified because that may well be quicker. We'll do that. But we just need to look and see what we have and take it further.

MRS JUSTICE GLOSTER: I really don't want to waste time having a privilege issue as to whether translations or particular translations of particular witness statements are covered by privilege because there's something in your selection process. Okay.

Very well. Tomorrow we said 10.15. Thank you very much.

(12.40 pm)

(The hearing adjourned until
Thursday, 6 October 2011 at 10.15 am)

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