Neutral Citation Number: [2008] EWHC 1918 (QB)

Case No: HQ07X01481

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2008

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

BORIS BEREZOVSKY	**Claimant**
- and -	
(1) THE RUSSIAN TELEVISION AND RADIO BROADCASTING COMPANY (2) VLADIMIR TERLUK	**Defendants**

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Desmond Browne QC and **Matthew Nicklin** (instructed by **Carter-Ruck**) for the **Claimant**
Murray Rosen QC (instructed by **Herbert Smith LLP**) for the **Defendants**

Hearing date: 23 July 2008

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. The Claimant in this litigation is Mr Boris Berezovsky, who has lived in this jurisdiction since October 2001. On 10 September 2003 he was granted refugee status and given indefinite leave to remain in the United Kingdom. He is very well known both here and in the Russian Federation. In particular, he is known as a critic of Mr Valdimir Putin. He has brought a number of libel actions in the past to protect his reputation in respect of defamatory allegations published or broadcast within England and Wales. In May 2006 he gave evidence in a libel action brought against a Russian television subscription service and fully explained his background and his political stance. As it happens, in that trial one of the witnesses called on his behalf was Mr Alexander Litvinienko, who stated in the witness box that there was a danger of assassination for those who spoke out about politics in Russia. Six months later he was, of course, murdered in London.

2. The complaint in this action is of the broadcast of a television programme known as *Vesti Nedeli* (apparently the equivalent of "Newsweek"). The broadcast took place on 1 April 2007 on the Russian television channel RTR Planeta, which is a freeview channel available throughout the United Kingdom without subscription. Not surprisingly, it has a significant audience among the expatriate Russian community in this country.

3. The programme included an interview with a man identified only as "Pyotr". It was asserted in the programme that he was under the protection of the British police. In the course of the interview, he made allegations against Mr Berezovsky to the effect that he had been part of a criminal conspiracy to avoid extradition from this country, and to obtain political asylum, by procuring a false confession from Pyotr. This was said to be, first, by offering huge bribes to him and, subsequently, by drugging him. Mr Berezovsky was also accused of being responsible for the murder of Mr Litvinienko. It is obvious, therefore, that these allegations are towards the top end of the scale of gravity. He should not be deprived of the opportunity of challenging such serious allegations in court, by way of seeking to vindicate his reputation, unless there are cogent and compelling reasons to justify such a course.

4. The fact that one or more defendants may choose to evade service, or not to participate in the proceedings, does not necessarily mean that vindication cannot be achieved. Mr Berezovsky may give evidence and it is quite possible that he will be believed. A judgment of the court would no doubt set out its reasoning fully and, if the outcome were in his favour, it would be for anyone interested to decide if they found that reasoning convincing or not. A finding in his favour *could* therefore go some way towards achieving vindication.

5. The claim form was issued on 3 May 2007, followed by the particulars of claim on 15 June. Master Rose granted permission to serve the claim form on the First Defendant, the Russian Television and Radio Broadcasting Company ("VGTRK"). Service was eventually achieved on 7 April of this year, when Herbert Smith were instructed to represent the First Defendant's interests.

6. It is the Claimant's case that Pyotr was in fact Mr Vladimir Terluk. Although he was obscured to viewers of the television programme, he was nonetheless recognised. Mr Terluk has, according to the evidence, lived in this country for nearly ten years. He

was interviewed in London for the purposes of the television programme. He proved somewhat elusive and I made an order on 20 May giving permission for service to be effected by alternative means (namely via a Law Centre).

7. The present application on behalf of the First Defendant seeks an order that the court should, as a matter of discretion, decline to accept jurisdiction over the claim. The only ground upon which this is based is that the case is said to be non-justiciable. It could hardly be disputed that the court would otherwise have jurisdiction in the circumstances I have described. The evidence shows that the Claimant and the Second Defendant are resident in England and that the seriously defamatory allegations were published to a significant number of people within this jurisdiction: see e.g. *Berezovsky v Forbes Inc (No 1)* [2000] 1 WLR 1004, HL.

8. Mr Rosen QC on behalf of the First Defendant emphasised that his client is not seeking merely a stay of the claim against it, based on the Article 6 grounds, but rather inviting the court actually to refuse jurisdiction. He accepts that this is an unusual application but so, of course, are the facts.

9. The basis of the application is that Pyotr is a Russian state-protected witness/victim and that disclosure by the First Defendant of any information, in the course of pleading or advancing its defence, which might lead to the identification of Pyotr, would place the First Defendant in breach of Article 21 of the Russian Federal Law No 119 FZ, of 20 August 2004, entitled "On state protection of victims, witnesses and other parties in criminal proceedings". It is in the nature of things that, being subject to these restrictions in its own jurisdiction, the First Defendant could not possibly have a fair trial.

10. Naturally, if the evidence establishes in any particular case that one or other party to the litigation cannot have a fair trial or cannot meaningfully advance its case at an earlier stage, there is likely to be a strong case for taking some steps, whether at the jurisdictional level or by way of a stay, to prevent the matter being litigated on a false footing. Nonetheless, it is necessary to recognise that the burden for establishing such an unusual case rests upon the First Defendant, in this instance, and that the evidence relied upon to establish these unusual circumstances requires to be scrutinised with considerable care.

11. The first matter to be decided is whether the evidence establishes, on a balance of probabilities, that Pyotr (and/or the Second Defendant) is indeed a state-protected witness and what the consequences would be as a matter of Russian law for the First Defendant in the conduct of this litigation.

12. It is fair to say that there are certain indicators which would suggest, as a matter of first impression, that it is most unlikely that Pyotr is in fact a state-protected person. One of the principal consequences associated with that status is that there is an obligation to maintain confidentiality as to the person's identity and whereabouts. On 19 March 2008 (within a matter of days of the proceedings being served, following considerable delay, upon the First Defendant), a resolution was issued by the Russian prosecutor and notified to Mr Berezovsky's representatives in Russia which accused him of "false denunciation about a serious crime linked to the artificial creation of prosecution evidence". The essence of the accusation against him is that he created false evidence to bolster his asylum application in 2003 by means of exercising

continuous psychological pressure, in the form of threats and bribery, on Mr Terluk. It is said that the purpose of this was to provide the British law enforcement authorities with false evidence to the effect that Mr Terluk, being an officer of the Russian special services, was charged with the responsibility of killing Mr Berezovsky by poison.

13. It will be noted that the commencement of these criminal proceedings took place after a very significant period of delay, following the incidents alleged to have taken place, and that in the resolution no attempt is made to conceal the identity of Mr Terluk. It is thus not immediately apparent how it could be regarded as a criminal offence in Russia to reveal that information.

14. There was a second resolution issued on 22 April 2008, with the purpose of extending the time available to the prosecutor's office for the investigation of the crimes to which the 19 March resolution related. This document not only reveals, once again, the identity of Mr Terluk as the person against whom pressure is said to have been brought, but it also identifies him as the person who gave the interview to the First Defendant's television channel. The natural inference is that Mr Terluk and Pyotr are one and the same. In the light of this document also, it seems highly unlikely that it would be a criminal offence in Russia to reveal his identity. Nevertheless, I accept that it must be a matter of Russian law whether or not, assuming the Second Defendant to be a protected person, there would be a prohibition upon his identification.

15. Reliance is placed upon two witness statements of Ms Zoya Matveevskaya and an expert report of Dr Irina Savelieva. The thrust of that evidence is as follows.

16. A witness or victim of a criminal offence can be made the subject of an order for state protection in accordance with Federal Law No 119 FZ, but there is no direct evidence that any such order has been made in respect of Pyotr. There is no confirmation, for example, from the relevant Russian authority which granted the order. Although Ms Matveevskaya has attempted to obtain information from the prosecutor's office, it has not been forthcoming. Her belief appears to be based on information given to her by a Mr Medvedev who is an employee of the First Defendant. Despite this, no evidence has been forthcoming from Mr Medvedev himself.

17. According to Ms Matveevskaya, Mr Medvedev was entrusted with access to Pyotr and given information which identified him on terms of confidentiality, in order presumably to facilitate the broadcast of the defamatory allegation against Mr Berezovsky. The absence of evidence from Mr Medvedev himself is unexplained. It is thus doubtful to what extent it would be appropriate for the court to accept such critical evidence, on a hearsay basis, and in the face of the powerful indicators to the contrary which I have already mentioned, when Mr Medvedev is apparently alive and well and working for the very Defendant which makes the present application.

18. My attention has also been drawn by Dr Savelieva to Federal Law No 2124, "On Mass Media", which is said to prohibit media organisations from divulging information which represents state or other protected secrets. This would apparently include data protected under Law No 119 FZ.

19. If the First Defendant, or any one of its employees, were to reveal the identity of someone under state protection there would be a risk of prosecution and punishment. At the moment, however, the fundamental building block of this application, namely Pyotr's status as a protected person, is not convincingly made out.

20. A further hurdle which the First Defendant needs to overcome, and which it has failed to do despite promptings in correspondence, is to identify the proposed defence which it would wish to advance in this litigation, and in respect of which it is inhibited by the inability to identify Pyotr.

21. It has not been suggested, for example, that the First Defendant wishes to advance a *bona fide* defence of privilege, in accordance with the principles expounded in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, or that it wishes to advance a defence of justification and to rely upon Pyotr as confirming that he was indeed threatened and/or drugged by Mr Berezovsky. I have no idea whether Mr Terluk would be prepared to say that, or whether the position is rather that he was threatened into making the accusation against Mr Berezovsky for the purposes of the television programme, since Mr Terluk's position remains unknown for so long as he appears to be successfully evading service of these proceedings upon him.

22. I see no reason to assume, without evidence to support it, that the First Defendant would wish, if the claim against it is allowed to proceed, to advance a defence of justification based upon evidence from Pyotr and/or Mr Terluk. Furthermore, if it were the case that it sought to advance a defence of *Reynolds* privilege, it would not necessarily follow that the source of the information needed to be identified. It may well be that reliance could be placed on the provisions of s.10 of the Contempt of Court Act 1981, which protects publishers, journalists and broadcasting organisations from being compelled to reveal the identity of a source unless the court holds it to be necessary for one or other of a number of established reasons. The First Defendant has suggested in correspondence that its behaviour in relation to the broadcast can only be judged by the law and standards operative in Russia. Such factors are clearly relevant but this would not preclude an English court from coming to a decision on the matter.

23. I should add that the evidence adduced by the Claimant's expert, Ms Elena Lipster, supports the proposition that the underlying assumption of the First Defendant's evidence, to the effect that Pyotr is subject to an order for state protection, must be wrong. This is for two reasons. First, it is said that it would be inconceivable that Mr Terluk would have been identified in either of the resolutions to which I have referred if he had indeed been a state-protected person. Secondly, it was claimed on the television programme in April 2007 that Pyotr was the subject of state protection at that time, and indeed that he had applied for such status in the summer of 2006, but the commencement of the relevant criminal proceedings was long afterwards, in March 2008. Mr Rosen challenges this evidence insofar as it strays from the proper domain of an expert in Russian law and ventures into the territory of fact or speculation.

24. I am not necessarily in a position to accept the evidence of Ms Lipster in these respects, but the circumstances to which she refers are such as to give rise to considerable doubt, or scepticism, as to whether Pyotr could indeed be a person with the protected status. Accordingly, for the First Defendant to be able to discharge its

burden of establishing that status, particularly compelling and cogent evidence is required. That is at the moment lacking. It ought certainly to be possible to produce better evidence, even if not conclusive evidence, through a witness statement from Mr Medvedev.

25. In the light of stronger evidence, it is conceivable that the court might at some stage be prepared to protect the First Defendant from having to litigate with one or both arms tied behind its back. All I can say at present is that the burden has not been convincingly discharged.

26. In any event, I see no reason to decline jurisdiction in the matter. The First Defendant has been duly served with proceedings relating to a tort alleged to have been committed within this jurisdiction. There is no question of bringing to bear the principles addressed by the Court of Appeal in *Jameel (Yousef) v Dow Jones Inc* [2005] QB 946. The evidence would appear to disclose a substantial publication within this jurisdiction of very serious allegations made against a man who has been living here for seven years. This is by no stretch of the imagination a case of "libel tourism"; nor one which could be described as "not worth the candle".

27. For the moment, therefore, the matter must be allowed to continue. As I have said, however, I would by no means rule out a further application when the First Defendant's advisers have managed to get its house in order and to produce convincing evidence of (a) the protected status of Pyotr, (b) the nature of the defence which the First Defendant wishes to advance, and (c) the legal consequences for the First Defendant of taking the necessary steps to advance that defence in these proceedings.