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Case No: 2006 Folio 1218

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2012

Before :

MR JUSTICE ANDREW SMITH

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Between :

Michael Cherney	**Claimant**
- and -	
Oleg Vladimirovich Deripaska	**Defendant**

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- -

Mark Howard QC and Fionn Pilbrow (instructed by **Dechert LLP**) for the claimant
Thomas Beazley QC, Alain Choo Choy QC and Leona Powell (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the defendant

Hearing dates: 2 May and 2 July 2012

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Judgment

Mr Justice Andrew Smith :

Introduction

1. The defendant in these proceedings, Mr Oleg Deripaska, applied on 25 April 2012 for what have been described as "witness protection orders", an expression that I adopt in this judgment. The applications concern twelve persons whom he intends to call to give evidence at the trial of this action starting start in July 2012, in which I am to hear evidence from 27 September 2012. They include orders that the trial be held partly in private when their evidence is heard and orders restricting the disclosure of the witnesses' identities ("anonymity orders"). At the hearing of these applications on 2 May 2012, I heard submissions about the relevant legal principles in public but, on the defendant's application (which the claimant, Mr Michael Cherney, did not resist), I heard in private submissions about the facts and the application to them of the legal principles because otherwise the purpose of the applications and the object of the hearing would have been defeated or at least compromised: CPR 39.2(3)(a) of the Civil Procedure Rules ("CPR"). When public reference was made to any of the witnesses, a letter (A to L) was used rather than the witness's name, and in this judgment I use those letters pending further submissions about this.

2. It was suggested during the hearing that I should make available to the parties a draft of this judgment so that they should have the opportunity to make representations that

it be redacted before being made publicly available. I have adopted this course, and the parties and some of their advisers have seen a version of this judgment that explains in some more detail the reasons for my decisions about three of the witnesses, witnesses D, F and K: see CPR notes at 39.2.9. I consider it necessary in the interests of justice to remove these more detailed reasons from this public version of my judgment because it would or might compromise the purpose of my order to do otherwise. After I refused Mr. Deripaska's application for permission to appeal against my judgment and Mr. Deripaska indicated his intention to apply to the Court of Appeal for permission to do so, I invited counsel to suggest further redactions that might be necessary to preserve the position pending the application for permission to the Court of Appeal and any subsequent appeal, but no further redactions were proposed.

3. I have considered whether I should defer determining these applications. Questions about how witnesses should give evidence are often best decided during the trial, and the relevant witnesses will not be giving evidence until November and December 2012. I concluded that it is fair to the witnesses not to delay making a decision about most of them (as I shall explain, I do defer the decision about one witness), but I should make it clear that, as with any trial management decision of this kind, changed circumstances might justify reconsideration of my order, and to that extent my decision is necessarily provisional.

The proceedings

4. I do not attempt to summarise all the issues in the proceedings, but I should explain why Mr Deripaska's allegations about Mr Cherney's involvement with Russian organised crime groups (or "OCGs") are at the heart of the litigation. Some of the background to the claim is uncontroversial. Throughout the 1990s there was a long and well-publicised history of violence against businessmen in Russia, who, as Mr Cherney accepts, were at particular risk from assassination attempts and other criminal activities. OCGs much increased their membership during the period between 1990 and 1996: they committed many contract killings, and their victims included businessmen with interest in the aluminium industry.

5. Mr Cherney claims that he made an agreement with Mr Deripaska in 2001 about Russky Alyuminiy (or Russian Aluminium or "Rusal"), an entity that was to be formed on the merger of OJSC United Company Siberian Aluminium ("Sibal"), in which he and Mr Deripaska had interests, with an aluminium group controlled by Mr Roman Abramovich and others; and that under the agreement, which was partly recorded or reflected in documents referred to as "Agreement No 1" and "Supplement No 1", Mr Deripaska was to hold 20% of the share capital in Rusal on his behalf and for his benefit pending its disposal and payment to Mr Cherney of its value. The claim is disputed, and of the matters pleaded in defence to it Mr Deripaska particularly referred on these applications to his pleading (at para 8.2 of the Amended Defence) that, having become General Director of the Sayansk Aluminium Plant ("SaAZ") in the Sayanogorsk area of Siberia in late 1994, he had in 1995 become subject to "krysha" arrangements (something akin to a protection racket) with OCGs represented by Mr Cherney, Mr Anton Malevsky and Mr Sergei Popov, and under them he had been forced to make substantial payments of "dolya" (or protection money). Mr Deripaska's case is that, while he does not know for certain which OCGs were represented by Mr Cherney, Mr Malevsky and Mr Popov, he understood (and was encouraged by Mr Cherney to believe) that Mr Malevsky was leader or a senior member of the Ismailovskaya OCG and Mr Popov was leader or a senior member of the Podolskaya OCG. In schedule 3 to the Amended Defence, Mr Deripaska pleads other details of his case: (i) he names others as leaders, members or associates of the

Ismailovskaya OCG (Sergei Aksenov, Dimitri Pavlov, Alexandr Bushaev and Vladimir Poliakov) and Sergei Lalakin as a leader, member or associate of the Podolskaya OCG; (ii) it is pleaded that Mr Cherney started his "life long" criminal activities in Uzbekistan and told Mr Deripaska of his connections and relationships with persons involved with organised crime, including (as well as those to whom I have already referred) Mr Anatoly Bykov, who is said to have operated in and around the Krasnoyarsk Aluminium Plant ("KrAZ"); and (iii) it is pleaded that in 1995 another criminal gang leader, Mr Vladimir Tatarenkov, whose gang operated in the Sayanogorsk area and collaborated with Mr Bykov's gang and who was on friendly terms with Mr Malevsky, made death threats to Mr Deripaska and others, and in particular was responsible for attempting to murder and for injuring Mr Valery Tokarev, the commercial director of SaAZ, and his driver, Mr Leonid Kazakov. According to Mr Deripaska, he had met Mr Cherney in May 1994 and Mr Cherney introduced himself as a partner in the Trans World Group ("TWG"), which was involved in the Russian aluminium business, and he started to make dolya payments after meetings with Mr Cherney in Israel in 1995. Mr Cherney indicated at the meetings that he knew of the risks to which Mr Deripaska was exposed in and around Sayanogorsk and that he would need "to touch base with the local gangsters (including Mr Tatarenkov and Mr Bykov)", explained to Mr Deripaska that TWG had arranged protection from Mr Malevsky and recommended that he do the same. Mr Deripaska claims that he was told by Mr Cherney that, unless he "started to pay Messrs Cherney and Malevsky and their criminal friends *dolya* by accepting a *krysha* arrangement, anything could happen and '*one can't wear a bullet-proof vest all the time*"'.

6. These allegations are denied by Mr Cherney, who says that he and Mr Deripaska were business partners and that Mr Deripaska does not genuinely believe that he represented any OCG or was involved in criminal activities. He contends that these applications for witness protection orders are part of a campaign to discredit him in the eyes of the court and of public opinion, and to this end to present him as a threat to those who are to give evidence at the trial. But, as Mr Mark Howard QC, who appeared for Mr Cherney, acknowledged, these are not contentions which can be determined or on which I should comment on these applications. I must consider them in light of the defence pleaded by Mr Deripaska to Mr Cherney's claim, which will be properly investigated only at the trial.

The CPR provisions

7. The applications are made under paragraphs 39.2(3) and 39.2(4) of the CPR, which are to be interpreted and applied in accordance with the overriding objective of enabling the court to deal with cases justly (as explained in CPR 1.1). CPR 39.2(1) provides that "the general rule is that a hearing is to be in public", and one implication of this is that under it parties and witnesses are publicly identified. But the general rule is subject to exceptions: CPR 39.2(3) specifies circumstances in which a hearing may be held in private, and CPR 39.2(4) allows the court to order the non-disclosure of the identity of a party or witness.

8. The importance of the principle that court proceedings be conducted in public is well established, was firmly affirmed by the House of Lords in Scott v Scott, [1913] AC 417 and is enshrined in article 6 of the European Convention for the Protection of Human Rights etc (the "Convention"), which states that, "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing …". It is for a party who applies for an order departing from it to establish the case for doing so, and authorities have emphasised that he needs to make out a sufficiently cogent case: it is not a matter "resting in [the judge's] mere discretion as to what is

expedient" and turns "not on convenience, but on necessity": per Visc Haldane LC in Scott v Scott (loc cit) at p.438. Because of the public interest in justice being administered openly, the parties' agreement that the general rule shall not apply or the fact that an application is not opposed is far from sufficient to justify departure from it. Indeed, it has been said that the court should be most vigilant when both sides agree that information should be kept from the public: ex p. P, The Times, 31 March 1998 per Sir Christopher Staughton. In this case, although Mr Howard rightly observed that Mr Cherney is entitled to have his claim tried publicly unless there are proper reasons for restrictions and although he opposes the applications in relation to some of the twelve witnesses (see para 25 below), he is, as it was put, "agnostic", as to whether or not there should be orders about most of them. Nor did Mr Howard identify any prejudice that Mr Cherney will suffer in the presentation of his case at trial if the court grants the applications. He will still, as the evidence in support of the applications observes, be able to investigate the allegations in the witness statements and challenge the evidence in cross-examination. However, Mr Howard properly drew to my attention considerations that might weigh against the applications, and in his oral submissions he said that witness protection orders would be "entirely inappropriate", notwithstanding they would mostly make no difference to the conduct of Mr Cherney's case.

9. CPR 39.2(4) is directed to protecting both parties and witnesses: "The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness". The conditions that allow the court to hold a hearing or part of a hearing in private and are stated in CPR 39.2(3) do not explicitly refer to the interests of witnesses, but CPR39.2(3)(g), which was the only basis upon which Mr Deripaska applied for some of the trial to be held in private, provides that the court sit in private if it "considers this to be necessary, in the interests of justice". This provision does not afford the court a general discretion, but requires the court to decide whether the condition is satisfied, and to conduct the hearing in public or (wholly or partly) in private accordingly. A decision whether to sit in private because this is necessary in the interests of justice does not depend only upon whether justice can be done between the parties to the litigation without witness protection orders and Mr Deripaska's applications do not depend upon him showing that his interests in the litigation would be prejudiced unless the orders are made. It was not disputed before me, and I accept, that the expression the "interests of justice" is wide enough to include the proper interests of witnesses that the court should protect. These conclusions seem to me to support this wide interpretation:

   i) CPR 39.2 is to be interpreted with a view to giving effect to the overriding objective that cases be dealt with justly, and the overriding objective is not (as is clear from CPR 1.1(2)(d)) confined to doing justice between the parties to the instant case.

   ii) It is implicit in the decision of the Court of Appeal in R v Legal Aid Board ex p. Kaim Todner, [1999] QB 966 (esp. at p.978B) that circumstances of a witness can, in an appropriate case, justify not only prohibition of the disclosure of his or her identity ("an anonymity order") but "protection from disclosure of the proceedings".

   iii) Given that CPR 39.2(4) expressly provides that the court may protect the interests of witnesses by making an anonymity order, it would, to my mind, be anomalous that the court should not also be entitled to protect the proper interests of witnesses under CPR 39.2(3).

iv) The court's power to make an anonymity order is part of a structure of measures available to the court in accordance with articles 2 and 3 of the Convention to protect people from attacks on their lives or from assaults from officers of the state and others (see In re Guardian News and Media Ltd, [2010] UKSC 1 at paras 26,27) and, as it seems to me, the power to hold hearings in private is another part of the structure. If so, the measures should be available to protect witnesses as well as parties if their rights under article 2 or article 3 justify it. (This is not to say that the powers under the CPR can be exercised only when Convention rights are engaged.)

I add that this interpretation of CPR39.2 is consistent with the concern expressed in a resolution of the Council of Europe of 23 November 1995 "on the protection of witnesses in the fight against international organized crime" (95/C 327/04), upon which Mr Deripaska relied. However, as was acknowledged, this resolution has no legislative standing, and it does not affect my decision upon these applications.

10. Mr Thomas Beazley QC, who represented Mr. Deripaska, relied upon In re Officer L, [2007] UKHL 36, a case that concerned a public inquiry set up by the Secretary of State for Northern Ireland into the circumstances surrounding the death of Robert Hamill, who had died from injuries received in an affray, and whose family alleged that police officers had done nothing to stop a sectarian attack upon him and that one officer obstructed its investigation. Police officers whom the inquiry proposed to call as witnesses applied for anonymity, expressing what was described as "reasonable and genuine fear" that they would be targeted if their names and appearances became known to a terrorist group and they were identified as being connected with the matters being investigated in the inquiry.

11. Their application was made on two bases. First it was contended that, if the officers were compelled to give evidence without anonymity, the procedure would contravene their rights under article 2 of the Convention, which provides that "Everyone's right to life shall be protected by law". Lord Carswell explained (loc cit at para 20) that this argument required them to demonstrate that, if they had to give evidence without anonymity, this would give rise to a "real and immediate risk" to their lives, that is to say, that they faced (in the words of Weatherup J in In re W's application, [2004] NIQB 67 at para 17) "a real risk that [was] objectively verified and an immediate risk that [was] present and continuing", and that the risk would be materially increased. Lord Carswell described the criterion as one "that is not and should not be readily satisfied: in other words, the threshold is high". The officers' subjective fears, although not necessarily evidentially irrelevant, could not in themselves constitute a proper basis for invoking article 2.

12. The officers also relied upon a common law duty of fairness, which tribunals of inquiry owe to witnesses. Lord Carswell recognised the duty and observed (loc cit at para 22) that the relevant principles here "are distinct and in some ways different from those which govern a decision made in respect of an article 2 risk". He said that here "Subjective fears, even if not well-founded, can be taken into account" because "It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health". Subjective fears could properly be one consideration when deciding whether the common law duty of fairness would be violated unless the officers were granted anonymity. Counsel cited no case, and I know of no case, in which it has been said that the courts are under such a *duty* to witnesses, but Mr Beazley submitted that the position under the CPR is similar in its effect and I accept that submission.

13. The proper approach to deciding whether circumstances justify the court departing from the general principle of open justice were considered in the ex p. Kaim Todner case (loc cit). Having emphasised the importance that court proceedings are public and that any application to depart from the principle should be allowed only if and to the extent that justice strictly requires, the Court of Appeal observed that when considering an application "it is appropriate to take into account the extent of the interference with the general rule that is involved" and that "If the restriction relates only to the identity of a witness or a party this is less objectionable that a restriction which involves proceedings being conducted in whole or in part behind closed doors" (at p.978B). They also said this (at p.978E-G):

> "A distinction can … be made depending on whether what is being sought is anonymity for a [claimant], a defendant or a third party. It is not unreasonable to regard the person who initiates proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the [claimant] in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts depend on their co-operation. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation."

There is no suggestion that any of the twelve witnesses has an "interest in the proceedings".

14. I observe that in the ex p Kaim Todner case the Court of Appeal did not suggest that it matters whether or not a witness is compelled to give evidence (and I do not understand the reference to the need for "their co-operation" indicates that the observation is confined to voluntary witnesses). In fact, all the witnesses about whom these applications are made live in Russia and are not ordered by subpoenas or otherwise compelled to give evidence, but in any case I accept the submission of Mr Beazley that this is not a significant consideration.

The Applications

15. The procedural background to these applications is that on 20 January 2012 I made an order which was designed to ensure that the witness statements exchanged in the action should be kept confidential and not improperly distributed to third parties. That order was not concerned with how the trial itself should be conducted, but was intended to afford some protection for witnesses pending applications of the kind that I am now considering.

16. It is convenient to group the twelve witnesses to whom the applications relate into six categories:

    i) Two witnesses, witnesses B and C, who worked with or for Mr Deripaska at the time when, on his case, he was paying dolya under a krysha arrangement and who had some knowledge of the controversial payments which Mr Deripaska contends were made by way of dolya.

ii) Witness L, who worked in Mr Deripaska's group of companies and whose statement includes evidence about the contact that Mr Deripaska had with Mr Cherney and Mr Popov.

iii) Witnesses who worked at SaAZ and whose statements include evidence about criminal activities there and the involvement in them of Mr Tatarenkov and Mr Bykov, and evidence about Mr Deripaska's response to them when he became General Director: witnesses A, E, G and H.

iv) Witnesses who worked in public offices in Sayanogorsk and whose statements include evidence about the matter described in iii) above: witnesses F, I and J.

v) A witness whom Mr Deripaska intends to call to give evidence about the activities of an OCG: witness K.

vi) An investigative journalist whom Mr Deripaska intends to call to give evidence about OCGs and their activities: witness D.

I do not intend here to summarise the evidence of the witnesses, but only to introduce it. In particular, as I shall explain, the statement of witness A covers more matters that this description would suggest.

17. I also mention by way of background that I have permitted Mr Deripaska to adduce the evidence of seven of the twelve witnesses (witnesses E, F, G, H, I, J and K) by video-link from Russia. They will not be coming to London to testify.

18. Mr Beazley identified three reasons that witnesses for Mr Deripaska are at risk from OCGs, or might reasonably fear that they are at risk:

i) Because OCGs might use violence against witnesses or their relatives for what I shall call "evidence prevention purposes": it is said that Mr Cherney's claim is brought in order to continue the very process of extortion that led Mr Deripaska to make the 2001 agreement, and that OCGs will therefore be concerned that the claim should succeed and to prevent Mr Deripaska from presenting evidence that might defeat it.

ii) Because OCGs might use violence for "investigation prevention purposes": Mr Beazley submitted that members of Russian OCGs will be concerned that evidence given at the trial will provide the Russian authorities with information that they will use to investigate the activities of OCGs and possibly to bring prosecutions.

iii) Because OCGs might use violence for "revenge purposes": that OCGs might seek retribution against witnesses who disclose their activities, particularly if it leads to investigations or prosecutions.

19. It is said that therefore:

i) Witness protection orders should be made because otherwise the witnesses and their families will face a materially increased risk of harm (by which I understand Mr Beazley to mean risk to their lives or at least to include that risk), and article 2 of the Convention requires that the court should protect their right to life by making witness protection orders. I have also considered whether their rights under article 3 would be contravened if orders are not made.

ii) The concerns (reasonably) expressed by the witnesses themselves justify witness protection orders under CPR39.2(3) and CPR39.2(4), reflecting the protection and consideration that would be afforded to witnesses before an inquiry in accordance with the common law duty of fairness.

iii) If witness protection orders are refused, this will have what Mr Beazley called a "chilling effect" and witnesses will be less willing to give evidence or to give it fully and candidly, and this will prejudice Mr Deripaska's presentation of his case at trial.

20. I should next state more specifically what witness protection orders are sought by Mr Deripaska. They are (in essence and together with other consequential orders):

i) That evidence of the 12 witnesses shall be heard in private in so far as it relates to specified matters, namely the membership and activities of OCGs, *dolya* paid pursuant to the *krysha* arrangement alleged by Mr Deripaska and the activities of Mr Cherney and Mr Popov.

ii) That, except "to the extent required for the purpose of these proceedings", the evidence and identities of the witnesses shall not be published or disseminated in a way that might reveal their identities or "the fact that they have given such evidence", or "which might otherwise put them at personal risk"; and specifically that Mr Cherney be prohibited from making such disclosure "save for the purpose of these proceedings".

21. Thus, Mr Deripaska does not seek to have all of the evidence of the 12 witnesses heard in private, but in most cases only evidence that they are to give about specified matters. The exception is the evidence of witness L, who is concerned that she might be a target of reprisals simply because she is to give evidence against Mr Cherney and, as it is said, Mr Popov, and for this reason wishes to give all her evidence in private and anonymously. But Mr Beazley submits that an order that evidence about the specified matters be heard in private and anonymously would in fact cover all the evidence of some of the other witnesses. In the evidence presented in support of the applications, it was indicated that this would be so in the case of six witnesses (witnesses D, E, F, I, J and K); but by the end of the hearing Mr Deripaska's position was that it would also be so in the case of witnesses G and H, and that the witness protection orders would cover all the evidence of the twelve witnesses other than witnesses A, B and C. (A schedule was produced setting out which paragraphs, subparagraphs and individual sentences of their statements would, as Mr Deripaska contends, be covered by the order.) However, the other nine witnesses might be cross-examined about other matters, and the implication of the applications, as presented by Mr Beazley and as I understand them, is that the witness protection orders would cover such cross-examination only of witness L.

22. The implementation of the witness protection orders would not be straightforward, and it is recognised in the evidence given in support of the applications that it would call for a high level of co-operation between the parties. Mr Beazley suggested in the course of submissions that, if it has been decided that in principle protection for witnesses should be ordered, the details could be worked out. However, I foresee practical difficulties in giving effect to an order that part of the evidence of any witness be heard in private: their evidence does not fall into discrete parts that might readily allow this. A further potential difficulty is the impact of witness protection orders on the cross-examination of Mr Cherney and his witnesses, in particular Mr Popov: in order for the orders to be effective, it might well be that parts of their cross-

examination would have to be heard in private in order that Mr Deripaska's case can be put to them fully and properly.

23. I am also not persuaded that an anonymity order in the terms sought is sufficiently specific: the draft order would give rise to too much uncertainty about what might put a witness at "personal risk" (and perhaps about what constitutes "personal risk" since these applications are put partly on the basis of risk to the families of opponents of OCGs).

24. I mention these difficulties because they are relevant if it is necessary to balance the interests of witnesses against the impact of protection orders upon the openness of the trial. But they would not, I think, be relevant if Convention rights under articles 2 and 3 require protection. In any case I would not consider it right to refuse orders because of these considerations without inviting further submissions.

25. Mr Cherney did not adduce any evidence, and in his skeleton argument Mr Howard stated that Mr Cherney opposed the orders only in the cases of witnesses B and C. It is said that their evidence about Mr Deripaska's dealings should be given in public because it goes to the central issue as to whether he, as he contends, made payments to criminals under krysha arrangements or, as Mr Cherney contends, to business partners. However, in his oral submissions, Mr Howard stated that Mr Cherney also "object[ed] specifically" to witness protection orders in relation to witness A whom he described as "one of [Mr Deripaska's] right hand men" and whose evidence he described as being sui generis because of his relationship with Mr Deripaska and its importance. In the end, however, Mr Cherney's opposition to orders about witness A was qualified: Mr Howard submitted that witness A does not have genuine fears for his safety, but he did not develop this submission, and said that, if I conclude otherwise, Mr Cherney does not oppose orders for his protection. As I shall explain, I accept that fears expressed by witness A are genuine.

The evidence in support of the applications

26. In support of the applications, Mr Deripaska relies upon witness statements of Ms Susan Prevezer QC, a partner in his solicitors, Quinn Emanuel Urquhart & Sullivan UK LLP, and a Dr August Hanning, a former President of the Bundesnachrichttiendienst, the German foreign intelligence service.

27. The twelve witnesses in respect of whom orders are sought all live in Russia, some in the remote Siberian region of the SaAZ and KrAZ plants. All are to give evidence about matters referred to in the proposed order. Ms Prevezer states that all of the twelve witnesses have expressed to her or another lawyer acting for Mr Deripaska concerns about reprisals against them or their relatives by OCGs who are described in their evidence or whose activities are referred to, and in particular to have expressed concerns about giving evidence in public so that it might be disseminated in Russia. The expressed concerns are that the OCGs to which I have referred will or might regard the witnesses' evidence as damaging to their interests (or potentially so). Ms Prevezer observes that, like the Berezovsky v Abramovich proceedings in this court, this litigation will attract considerable media attention in Russia, and I shall so assume. Further, although Mr Malevsky died in an accident in 2001 and Mr Tatarenkov, having been extradited in 2010 from Greece where he was arrested in 1999 and spent some years in prison, is remanded in Russian custody awaiting trial at the Krasnoyarsk Regional Court, I also accept for present purposes the evidence that the OCGs, including Ismailovskaya, are all still active in Russia: it does not seem to me an answer to the applications that the witnesses' evidence is directed to events in the 1990s. Ms Prevezer's evidence is that in the cases of all twelve witnesses the

lawyers to whom they spoke thought that their expressed concerns and fears were genuine. There is nothing to suggest that the witnesses have manufactured or exaggerated their fears and concerns for themselves and their families, and I accept the evidence about them in determining these applications (and without prejudice, of course, to the conclusions that I might reach at trial).

28. There is specific evidence about witness L. She has expressed concerns that, although she is not to give evidence about the membership or activities of OCGs, her evidence about Mr Cherney and Mr Popov and their activities makes her a potential target of OCGs associated with them.

29. I add, for completeness, that, according to information provided to Ms Prevezer by Mr Deripaska's lawyers in Russia, other potential witnesses have refused to give evidence for him on the grounds of concern about their own safety and that of their relatives. (There is evidence that Mr Cherney has faced comparable difficulties.)

30. Dr Hanning has given what Mr Beazley described as expert evidence about the operations of OCGs. He states that Germany has suffered more than many countries from organised crime, particularly from OCGs originating from Russia, and hence has experience of dealing with it, of seeking to control it and of bringing prosecutions for crimes associated with it. He explains the difficulty facing those concerned with investigating and prosecuting criminal offences in obtaining information and evidence and the threats that OCGs make against witnesses; and that, in response, the German authorities adopt the "default position" that "witnesses for the prosecution are especially at risk" whenever accused persons and accusations involve organised crime. Dr Hanning has illustrated the scale of the problem by providing statistics about the extent to which protection for witnesses was granted in Germany in 2006, which is apparently the only publically available information about this, and they show that by far the majority of cases in which protection was provided concerned OCGs. Dr Hanning states that Russian OCGs, including Ismailovskaya and Podolskaya, are "particularly ready to use violence against actual or potential witnesses".

31. Dr Hanning referred to the prosecution of Alexander Afanasiev and others, which was tried before the Stuttgart Regional Court, 5th Criminal Case division, in 2010, and the judgment of the Stuttgart court of 31 May 2010 was in evidence. The case concerned charges of money laundering on behalf of Ismailovskaya. Dr Hanning states that heightened security measures were put in place for the trial after the Public Prosecutor's Office had learned that "in Russia a number of potential or actual witnesses for the prosecution were threatened and in some cases were also physically eliminated by the Russian organized crime group Ismailovskaya". According to the judgment, in the course of the proceedings one defendant and her son were placed under a witness protection programme for some eight months; a witness, Mr Leonard Venjik, who provided the investigators with extensive information about Ismailovskaya, broke off all contact with them and refused to give evidence, explaining that he was threatened by Ismailovskaya; and another witness, Mr Jalol Khaidarov, who claimed to be or have been an associate of Mr Cherney, gave evidence that because of threats from Mr Malevsky he fled to Israel in 2000 and lived there under an alias and police protection, and claimed, the court said "convincingly", that he feared for his life.

32. I do not doubt the evidence of Dr Hanning, which was not disputed by Mr Howard, but it was directed to the protection afforded to witnesses in cases in which the public authorities were investigating or prosecuting criminal offences alleged to have been committed by OCGs or their members, and not to the position of witnesses in civil

proceedings brought by a claimant who is alleged to have represented and otherwise been associated with OCGs. These two circumstances are not, in my judgment, directly comparable.

33. Ms Prevezer identifies other matters that, it is submitted, show the risk that the witnesses will face if they give evidence openly. In summary:

    i) Ms Prevezer produced reports that demonstrate that the need to protect victims and witnesses is widely recognised in Russia and is reflected in legislation; that many witnesses are placed under state protection; and that this need is particularly associated with OCGs. She provided specific examples of cases involving OCGs in which it has been reported that witnesses have faced threats or retracted evidence or refused to give evidence in circumstances that suggest that they had been threatened.

    ii) She gave evidence that, while violence associated with the aluminium industry has decreased since the 1990s and law enforcement in Russia has improved, businessmen in Russia still face threats from OCGs and incidents of murder and other violence directed by OCGs against businessmen are still reported.

    Ms Prevezer also gave evidence about two instances in which individuals involved in litigation to which Mr Cherney was party are said to have been subjected to threats. I consider that evidence later.

34. In addition to this evidence originally presented in support of the application, in his oral submissions Mr Beazley referred to two witness statements served on behalf of Mr Deripaska for the purposes of the trial, the statement of witness D and that of a Mr Vladimir Afanasiev, who describes himself as having been between 1993 and 1998 "a special police operative for particularly important cases at the Central Economic Crime Agency" of the Russian Ministry of Internal Affairs. They add little to the picture presented by Ms Prevezer and Dr Hanning, but they reinforce it. Mr Afanasiev states the difficulties of obtaining evidence from witnesses who have been intimidated and pressurised by criminal groups, something that I would in any case have inferred. Witness D's statement includes evidence about how OCGs operated in the 1990s, referring to Ismailovskaya and Podolskaya and specifically to Mr Malevsky, Mr Popov and others and explaining their involvement with krysha arrangements; about his understanding of the involvement of Mr Cherney and his brother with OCGs; and his understanding of "the crime situation" in Krasnoyarsk and elsewhere in Siberia, referring specifically to Mr Tatarenkov and Mr Bykov.

35. The evidence presented in support of the applications is essentially about Russian OCGs and the threats that the witnesses face. It is not directed specifically to the position of the twelve witnesses or to matters that are specific to these proceedings. In particular:

    i) There is no specific evidence, or reason to think, that any of the twelve witnesses has in fact been the subject of any threats or pressure not to give evidence.

    ii) None of the twelve witnesses has said that he or she will not give evidence, or might not give evidence, unless his or her identity is protected or the evidence (or some of it) is given in private. They have all given a witness statement (or in the case of witnesses A, B and C two witness statements) without requiring an assurance of special protection. (This is not to say that they then believed that they could give evidence without risk: witness F, for example, said in his statement that he knew that he was exposing himself to

significant danger in making it, but considered it his duty to speak the truth about criminals.)

iii) Although it is said in general terms that the orders will assist to secure the witnesses' "full and frank evidence", there is no specific reason to think that without protection their evidence will be the less full or the less frank than otherwise.

The risk of violence for evidence prevention purposes

36. Ms Prevezer gave two instances of what were called "specific evidence of threats – or, at the very least, allegations of threats – by individuals apparently acting on behalf of or associated with Mr Cherney against litigants and witnesses in other proceedings". Mr Deripaska's argument that OCGs might use evidence against witnesses for evidence prevention purposes depends, in my judgment, largely upon this evidence: there is no other evidence that appears directed to violence being employed for this purpose, and I am not prepared to infer that there is a risk that violence will be so used in the absence of relevant evidence.

37. I cannot determine on these applications whether the threats about which Ms Prevezer gives evidence were in fact made, or if so whether Mr Cherney was responsible for them: Mr Beazley did not suggest that I should do so, but that I should "have reference to them" in assessing whether witness protection orders should be made. Mr Howard resisted this, arguing that the allegations are rejected by Mr Cherney and therefore Mr Deripaska cannot rely upon them without proving them. I am not persuaded that I should disregard this part of the evidence presented in support of the applications. The applications are interlocutory and involve an assessment of risks, and it is permissible for the court to take a view of the cogency of allegations of this kind without determining whether they are proved to the civil standard. It is said that Mr Cherney did not serve evidence in response to these allegations because Ms Prevezer stated that "The Court is not being asked to adjudicate upon this evidence", but I must still consider what support Ms Prevezer's evidence provides for the applications.

38. Ms Prevezer first referred to allegations made by a Mr Alexander Gliklad, who brought proceedings against Mr Cherney in the Supreme Court of the State of New York and whose affidavit evidence in those proceedings referred to "threats from Chernoi's (sic) agents that Israeli police would be used against [him]". However, on the face of it the account in his affidavit is not convincing in that it is apparently based largely upon general reports about Mr Cherney rather than any evidence about any specific threats that he made or for which he was responsible. (He referred to a policeman called Sergey Migdal giving him warnings about Mr Cherney, but even taken at face value there is no reason to think that the policeman had more specific information to support his general advice that Mr Cherney was a "scary guy" and that Mr Gliklad should "be careful". In his skeleton argument Mr Howard said that Mr Migdal rejected Mr Gliklak's assertions and provided a contrary account. That account was not in evidence, although Mr Beazley did not dispute that a police officer had contradicted Mr Gliklad's evidence.)

39. The other allegations to which Ms Prevezer referred concerned a case in the Chancery Division of this court called Cherney & ors v Neumann & ors, case no HC08 CO 2338. An allegation of contempt was made against Mr Cherney on the basis that his staff had sent to tax authorities material that had been obtained upon disclosure, but this was denied by Mr Cherney, who said that he knew nothing about the matters alleged. Mr Cherney brought cross-allegations of contempt against Mr Neumann.

There was a hearing before Proudman J in 2010 but the dispute was compromised before she gave judgment. At the hearing a Mr Rainer Wachholz, who has been described as an associate of Mr Cherney, gave evidence on his behalf, and it was alleged that Mr Wachholz had sought to intimidate a Mr Jan Miguel Fernandez Merida in order to prevent him from giving evidence. He was cross-examined about a conversation that he had with Mr Merida in a shopping centre in Alicante, which apparently was recorded, and the evidence before me included what was presented as a "transcript" of the conversation. Read at face value, the transcript would bear the interpretation that Mr Wacholz was, at least by insinuation, seeking to threaten Mr Merida to deter him from testifying, but the evidence is not satisfactory. It became apparent that the conversation was conducted in Spanish and the so-called transcript was a translation which was contentious and that in any case the recording of the conversation (and therefore the translation that was available) was incomplete. Mr Wachholz disputed the interpretation of the conversation alleged against him, and I was not told whether Mr Merida gave evidence about (or otherwise explained) how he interpreted the conversation and whether he considered himself threatened or intimidated.

40. I make due allowance for the difficulties inherent in adducing evidence in support of allegations of this kind, but I consider that this evidence is not of a quality that provides convincing support for allegations of the seriousness of those made against Mr Cherney on these applications or is required to justify orders of the special nature of those for which applications are made. I conclude that the contention of a risk of violence used against witnesses for evidence prevention purposes is not made out: it has not been shown that this risk is such that rights of witnesses or their relatives under the Convention should be protected, or that otherwise witness protection orders are justified – either because of the witnesses' concerns that they will face violence for evidence prevention purposes or because such concerns will have a "chilling effect", which will work to the prejudice of Mr Deripaska.

Witnesses B, C and L

41. The application therefore depends, in my judgment, upon whether a sufficient case is made out on the basis of a risk of violence for investigation prevention purposes or revenge purposes. This conclusion leads me to reject the applications in respect of witnesses B and C. They are presented on the basis that their evidence concerns (or parts of their evidence concern) dolya payments pursuant to the alleged krysha, but nothing in the nature or contents of their witness statements persuades me that realistically any risk of violence for investigation purposes or for revenge purposes will be aggravated if witness protection orders are not made, or that witnesses B and C would have any cogent reason to suppose this.

42. The evidence of witnesses B and C which is said to justify orders for their protection relates to payments to Mr Cherney, Mr Malevsky and Mr Popov that are said to be by way of dolya. They explain in their witness statements their part in arranging the payments by Mr Deripaska or his companies, and give evidence about individual payments. They also give evidence to support Mr Deripaska's case about the nature of his contacts with Mr Cherney, Mr Malevsky and Mr Popov. Witness B states that he suspected (but did not know) that the payments were made under a krysha arrangement, and describes work that he has done since Mr Cherney's claim was made in order to identify specific dolya payments. I think it unlikely that it would greatly concern OCGs if the Russian authorities learn of their evidence, and unrealistic to think that this information would add anything significant to what the authorities already know. Nor am I persuaded that this information is of a kind such that OCGs would take revenge against these witnesses.

43. For similar reasons, I reject the applications about witness L, which are made on the basis simply that her evidence relates to Mr Cherney and Mr Popov. She explains how she came to work for Mr Deripaska or his companies. She mentions persons that she met in the course of her work, and states the extent of her dealings with Mr. Cherney and Mr. Popov: that she met Mr Popov once and spoke to Mr Cherney only once. She says nothing about either occasion that could be of interest in any investigations by the Russian authorities, and nothing in her statement is at all likely to provoke violence or threats for revenge purposes.

44. As I have said, I do not doubt that witnesses B,C and L are worried and frightened about giving evidence, but I do not consider that for this or any other reason it is in the interests of justice that their evidence should be heard (wholly or partly) in private or that their identities should not be disclosed. I observe that my conclusion about witnesses B and C goes a long way to meet the difficulties about witnesses giving part of their evidence in public and part in private, but this is not the (or a) reason for my decision.

Witnesses E,F,G,H,I and J

45. I come to consider whether the risk of violence from OCGs for investigation prevention purposes or for revenge purposes justifies orders in respect of witnesses E, G or H, who worked at the SaAZ plant, or F, I or J, who worked for public authorities in Sayanogorsk. The applications in their cases are made on the basis of their evidence about "OCG existence, membership and activities" in Sayanogorsk and also, in the case of witness F, in Krasnoyarsk, but it is said that all their evidence should be given in private.

46. Only two of these six witnesses give any direct evidence of contact with any OCG member. Witness E gives evidence at paragraph 6 of his statement that between late 1994 and early 1996 Mr Tatarenkov told him by telephone that the goal of "the criminals" was to seize control over the SaAZ plant and to this end they would seize the plant, halt its production, blow up the power system and stop the power supply. Witness F, who was with the Sayanogorsk Police Department, gives evidence in paragraph 28 of his statement that an unnamed associate of Mr Tatarenkov who had been involved in a murder ordered by him cooperated with the police and provided them with information about the murder. The other witnesses' statements contain more general and less direct evidence about crime, including about the activities of OCGs.

47. It is not clear to me that any of the evidence of witnesses G, H, I and J will be controversial, and more importantly I do not consider that their evidence gives rise to any real risk that they will be the targets of violence or threats for investigation protection purposes or for revenge purposes or at all. Much of the evidence of witness E might also not be disputed, and in any case I do not consider his position different from that of witnesses G, H I and J either because of paragraph 6 of his statement or for any other reason. I decline to make witness protection orders in the case of these five witnesses.

48. For the most part the position with regard to witness F is not distinguishable from that of the other witnesses who are to give evidence about criminal operations in and around Sayanogorsk. One paragraph of his statement, however, might give rise to greater risks to him, but at the hearing before me specific submissions were not directed to it, and I shall consider with counsel before witness F gives evidence whether I should make specific directions about it. (Any directions will need to

recognise, if witness F gives evidence by video-link, the court has no effective power to compel him to answer questions.)

Witness A

49. Witness A is in a rather different position from other witnesses who were employed at SaAZ. His statement gives more detailed evidence than others about the activities of Mr Tatarenkov, Mr Bykov and OCGs in and around Sayanogorsk and Krasnoyarsk, and covers other matters which are said to justify his evidence being heard in private: the application refers to his evidence about "OCG existence, membership and activities (Sayanogorsk, Krasnoyarsk, Achinsk and Moscow)". Some of his evidence recounts, albeit in more detail than that of other witnesses, his second-hand understanding from others about these matters, and this is less likely to concern OCGs than his more direct evidence about them. By way of illustration, this more direct evidence includes the following:

    i) When steps were taken to dismantle illegal smelters in and around Sayanogorsk which were being used by Mr Tatarenkov's OCG, witness A (and others) received "regular threats" from Mr Tatarenkov (paras 59 and 68 of witness A's first witness statement).

    ii) A Mr Pesegov, whom witness A describes as "a local criminal boss within the Tatarenkov gang", demanded that he have "something for the 'guys'" (para 64 of his first statement).

    iii) Mr Tatarenkov telephoned the office of the General Director of SaAZ on 22 March 1995 and made the threat, "Take care, otherwise somebody will be painting the fence around your grave", and this telephone call was recorded (para 69 of his first statement).

    iv) In 1994 there was a plan to shoot those in a car carrying, among others, Mr Deripaska and witness A, and in 2000 Mr Malevsky handed witness A a recording in which a Mr Vilor Struganov, described as a "local criminal boss", told Mr Malevsky about the incident, indicating that he was behind the planned attack (para 86 of his first statement).

    v) In 1995 witness A met Mr Cherney in Israel with Mr Deripaska, and Mr Cherney's conversation indicated that he knew Mr Tatarenkov (para 93 of his first witness statement and para 21 of his second statement).

    vi) Witness A also met Mr Malevsky and was given to understand that Mr Cherney "strongly relied on him as his representative in Russia" (para 99 of his first statement).

50. I have not recited exhaustively the parts of the evidence of witness A that could illustrate why his evidence is more significant than that of others who worked at SaAZ, and why I have found it more difficult in his case to decide whether witness protection orders should be made. I have, however, concluded that the nature of his evidence is not such as to justify the inference that there is a real or immediate threat to his life or the lives of his relatives or that his or his relatives' Convention rights require that the courts make orders such as those sought. Particularly in light of the considerations to which I referred at paragraph 35 above, I do not think that there is sufficient evidence to support that inference or to justify orders under CPR 39 on the grounds that I consider them in the interests of justice or necessary to protect the interests of witness A (notwithstanding that I accept that he, like other witnesses, is frightened about giving evidence).

51. There is another consideration that applies to all the witnesses but is particularly significant in the case of witness A. As in the In re Officer L case, what is important on these applications is not simply whether a witness faces a risk or danger because he or she is to give evidence in these proceedings, but whether (and if so how far and in what ways) any risk or danger would be reduced by witness protection orders. The witness statements of the twelve witnesses have been served, and therefore their identities are already known to Mr Cherney and also, as Ms Prevezer realistically acknowledges, very probably to Mr Popov, who is to give evidence for Mr Cherney. But the order of 20 January 2012 is designed to minimise the risk that the statements will be used for anything other than the proper purposes of the litigation. More significantly, the names of most of those who are to give evidence in these proceedings (for either Mr Cherney or Mr Deripaska) have already been published. On 9 April 2012 there appeared on the Russian legal news website "pravo.ru" an article, referring to this litigation as a new 'Case of the Year'", identified witnesses, including all twelve to whom these applications relate. According to Mr Beazley the article was removed from the website after "something like" two or three days, but it can still be found through internet search engines. Mr Deripaska believes that Mr Cherney or his associates were responsible for this information appearing on the website, but this is denied by Mr Cherney and there is no evidence that he was so responsible: the advisers of Mr Cherney and Mr Deripaska co-operated to have it removed. However that may be, any criminal or other person interested in what evidence is to be given at trial can probably find out either because of this publication or in some other way.

52. This reinforces my decision that I should not make witness protection orders in the case of witness A: even if he or his relatives face some risks because he is to give evidence, I do not think that orders would sufficiently reduce them to justify the restrictions on the openness of the trial that they would necessarily entail.

Witness K

53. I am persuaded that I should make orders to protect witness K. As with some other witnesses, his evidence might not be significantly challenged by Mr Cherney, and I shall consider the details about quite what protection he should be given in light of further submissions. According to his statement, witness K met the leader of an OCG in the early 1990s and became involved in their extortion and protection activities.

54. Mr Howard observed that the statement of witness K does not include evidence which would obviously concern the OCG leader or witness K's associates or former associates. I accept that there is some force in that observation, but he does give direct evidence about their criminal activities. But, more significantly to my mind, I can well understand that a risk to him does not result so much from the contents of his witness statement as from the very fact that witness K, who I must suppose truthfully claims, in effect, to have belonged to an OCG, should be willing to speak before a court about their activities. His circumstances too might in some ways make him particularly vulnerable to attacks. In view of this, and because of the predictable reaction of criminals when those of their own ranks speak about their activities, I am persuaded that protection orders are justified in his case.

55. In reaching this conclusion I recognise that witness K's statement describes matters that took place, it is said, many years ago, but that does not persuade me that others will not be anxious to prevent an insider describing them in public. As with other witnesses, the question is whether witness protection orders will reduce any risk that witness K faces: I readily accept that any orders can only go some way to reduce any

such risk and cannot eliminate it, and that orders might be the less effective because his name has been published on the internet. Nevertheless, and despite my observations in paragraph 51 above, I conclude that they can afford him some protection.

56. I need not decide whether the Convention rights of witness K or his relatives (if he has relatives: there is not evidence about that) require that the court give him protection. It suffices that, despite the importance of the general principle that justice be conducted openly and recognising other countervailing considerations, I consider it in the interests of justice that his evidence should be heard in private and am satisfied that his identity should not be disclosed in order to protect his interests. His evidence is limited in scope and does not directly relate to what is said by Mr Cherney or his witnesses in their statements. I do not foresee that orders about how his evidence is given will disrupt their cross-examination or the other parts of the trial.

Witness D

57. There remain the applications about witness D. I shall not determine them in this judgment. I have already briefly described his evidence. However, Mr Cherney has contended that the evidence of witness D is not admissible (or should not be admitted) at the trial, and applied that it be excluded. I have not acceded to that application, but in light of observations made when that application was heard, those advising Mr Deripaska intend to reconsider what evidence of witness D should be adduced and to serve a revised witness statement. I shall determine the applications for witness protection orders for witness D when that revised statement is available. It is, to my mind, wrong that I should determine the applications about him before the witness statement is served, not least because that might give rise to submissions that it has been tailored in the knowledge of how they have been determined.

Conclusion

58. Therefore:

i) I grant witness protection orders in respect of witness K, and invite submissions about their terms.

ii) I shall invite submissions about how I should receive the evidence of witness F before he gives evidence.

iii) I defer determination of the applications about witness D.

iv) Otherwise I refuse the applications.

59. I add that, although for the most part I refuse these applications, this does not imply any criticism of Mr Deripaska or his advisers. On the basis of the evidence and information before me, I consider that they were right to bring to the court's attention before the start of the trial the concerns expressed by the witnesses and that the applications were properly made.