IN THE SUPREME COURT OF GIBRALTAR

Neutral Citation Number 2023/GSC/003

2020/ORD/072

BETWEEN:

(1) TOLKYNNEFTEGAZ LLP
(a limited liability partnership incorporated in Kazakhstan and in bankruptcy)

(2) ORYNBASAR KUBYGUL
(as bankruptcy manager of Tolkynneftegaz LLP)

Claimants

-and-

(1) TERRA RAF TRANS TRAIDING LTD
(2) ANATOLIE STATI
(3) GABRIEL STATI
(4) TRISTAN OIL LIMITED
(a company incorporated in the British Virgin Islands)

Defendants

James Ramsden KC with **Philippe Kuhn** and **Dhiraj Nagrani (**instructed by **Triay Lawyers)** for the **First Defendant/Applicant**

Keith Azopardi KC with **Kelly Power** and **Shane Danino (**instructed by **TSN)** for the **Second**, **Third and Fourth Defendants/Applicants**

Richard Morgan KC with **Moshe Levy** and **Paul Wee (**instructed by **Hassans)** for the **Claimants/Respondents**

Judgment date: 31 January 2023

JUDGMENT

YEATS, J:

1. This judgment deals with a number of applications made by the defendants. The first defendant seeks to challenge the court's jurisdiction. In the alternative, the first defendant applies for the claims to be struck out or for the proceedings to be stayed. The second, third and fourth defendants apply to set aside an order of this court dated the 27 November 2020 (made without notice to the defendants) granting the claimants permission to serve the proceedings upon them. They also seek an order setting aside the actual service on the 4 December 2020 of the claim form and particulars of claim; a declaration that the court does not have jurisdiction to try the claims; and, in the alternative, a stay.

2. The introduction of the parties and the summary of the claims that follows is in part reproduced from my judgment dated the 27 November 2020 on the claimants' application for permission to serve the second, third and fourth defendants (*Tolkynneftegaz LLP & anor v Terra Raf Traiding Ltd & ors* [2020] Gib LR 338). (I shall refer to that judgment as "the 2020 judgment".)

The parties

3. The first claimant, Tolkynneftegaz LLP ("TNG"), is a limited liability partnership incorporated in the Republic of Kazakhstan ("the ROK"). TNG operated what is known as the Tolkyn oil field in Kazakhstan between 1999 and 2010. It is now in bankruptcy (a term in the ROK corresponding to a liquidation in this jurisdiction).

4. The second claimant, Orynbasar Kubygul ("Mr Kubygul"), is TNG's bankruptcy manager. He was appointed as TNG's temporary bankruptcy manager by the Specialised Inter-District Economic Court of Mangystau Oblast in Kazakhstan on the 4 August 2019. His appointment was made permanent on the 26 February 2020.

5. The first defendant, Terra Raf Trans Traiding Ltd ("Terra Raf") is a company incorporated here in Gibraltar. It is the sole shareholder of TNG.

6. Anatolie Stati ("AS") and his son Gabriel Stati ("GS") (together "the Statis") are the sole directors and shareholders of Terra Raf. They are Moldovan and live in Moldova.

7. The fourth defendant, Tristan Oil Limited ("Tristan"), is a company incorporated in the British Virgin Islands. AS is the sole shareholder of Tristan and is its CEO and Chairman. (By a certificate dated the 19 December 2006, Tristan declared that AS and GS were both the beneficiaries of Tristan's funds held in a bank account in Latvia.) According to the claimants, Tristan played a key role in the dealings which are the subject of the claims.

The claims in outline

8. In July 2010, the authorities in the ROK revoked TNG's licence to operate the Tolkyn oil field. (A licence to operate a second oil field, the Borankol oil field, which was operated by TNG's sister company Kazpolmunay LLP ("KPM") was also revoked.) As a result Terra Raf, the Statis and a company called Ascom Group S.A. ("Ascom") (a company owned by AS and members of his family) commenced arbitration proceedings ("the ECT arbitration") against the ROK in Sweden under the Energy Charter Treaty. On the 19 December 2013, they obtained an award for an amount in excess of US$ 500M ("the ECT award"). (For convenience, in the course of this judgment, when referring to amounts of monies I shall set out rounded-off figures.) Subsequently, in proceedings in the United States in 2015, the ROK obtained evidence which it says shows that the ECT award was obtained by fraud. However, to date the ROK has been unsuccessful in having the ECT award overturned. There are on-going recognition and enforcement proceedings in a number of jurisdictions.

9. The claims in this action arise out of the same frauds said to have been uncovered by the ROK. The claimants seek to recover sums of approximately US$ 470M and €36M for the benefit of TNG's creditors. The principal creditors at the time of the filing of the claims were two regional tax authorities in the ROK. The claimants openly acknowledge that they

bring these claims with the financial and logistical backing of the Government of the ROK. They however assert that the litigation is not being directed or controlled by the ROK.

10. These proceedings were instituted on the 17 July 2020. The claim form and the particulars of claim were served on the first defendant on the 1 September 2020 and on the second, third and fourth defendants on the 4 December 2020. There are four claims. Adopting the nomenclature in the particulars of claim, these can be entitled as follows: The Terra Raf Loan claim; the Perkwood Payments claim; the Oil Revenues claim; and the New Notes claim. A brief summary of these claims, all of which relate to events said to have taken place between 2005 and 2010, is the following.

11. Claim 1: The Terra Raf Loan. In 2006 and 2007, Tristan issued two tranches of loan notes totalling US$ 420M ("the Tristan Loan notes"). The purpose behind the raising of funds was to repay existing indebtedness of TNG and KPM and provide them both with working capital. The companies guaranteed the Tristan Loan notes. The claimants say that AS fraudulently misrepresented, in a circular dated the 13 December 2006 inviting investment in the Tristan Loan notes ("the Tristan Circular"), that the sum of US$ 70M was to be applied by Terra Raf to repay sums which it owed to TNG and KPM. In the event, Terra Raf did not do so and instead transferred funds via other companies controlled by the Statis to interests they had in South Sudan. It is consequently said that TNG suffered a loss of US$ 35M (The US$ 70M to be paid by Terra Raf was to be split equally between TNG and KPM).

12. Claim 2: The Perkwood Payments. Between 2006 and 2009, TNG paid the sums of US$ 95.7M and €63.5M to a company called Perkwood Investment Limited ("Perkwood") from the proceeds of the Tristan Loan notes. The payments are said to have been made for the purchase of equipment to construct a liquefied petroleum gas plant ("the LPG plant"). Perkwood was a dormant company incorporated in England which the claimants say was used by the Statis to inflate the cost of the equipment. The true cost was only of approximately €27M and US$30,000. It is alleged that the Statis

misappropriated most of the balance of the monies paid by TNG to Perkwood.

13. Claim 3: The Oil Revenues. Between 2005 and 2010, TNG sold crude oil and gas condensate to Vitol S.A. ("Vitol"), a multi-national Dutch company. It did so via intermediary companies all owned by the Statis, including Terra Raf. Vitol made payments of approximately US$ 665M for the oil and gas but only approximately US$ 437M was paid to TNG. The balance was used by the Statis for other business interests or for their own personal use.

14. Claim 4: The New Notes. In 2009, Tristan issued new loan notes with a face value of US$ 111.11M to Laren Holdings Limited ("Laren"). Laren was also controlled by the Statis. The purchase by Laren was funded by a loan of US$ 30M which TNG guaranteed. The claimants say that the Statis intended to sell TNG and KPM and that would have triggered the repayment of the Tristan Loan notes. The sale did not in the end materialise. If it had, the Statis, through Laren, would have made a profit of approximately US$ 81M. It is said that a number of fraudulent misrepresentations were made by AS and Tristan to enable the issue of the loan notes. TNG also guaranteed the loan notes and remains liable to pay the sum of US$ 111M.

15. The causes of action upon which the claims are brought are the following: fraudulent misrepresentation (deceit); unlawful interference with the economic interests of TNG (also referred to as causing loss by unlawful means); and unlawful means conspiracy. There are also breach of contract claims arising from alleged breaches of an indenture dated the 20 December 2006 ("the Tristan Trust Indenture") which governed the issue and placement of the Tristan Loan notes.

16. The defendants dispute much of the facts that are alleged by the claimants. Nothing that is said in this judgment is intended to prejudge any of the disputed facts.

The defendants' applications

17. Terra Raf being a Gibraltar company, it was served as of right with the claim form and particulars of claim. Terra Raf indicated its intention to contest jurisdiction when filing its acknowledgment of service (which was signed by AS). Time having been extended by consent for the purpose, on the 19 January 2021 Terra Raf filed an application notice seeking the following orders:

    1. An order permitting [Terra Raf] to rely on expert evidence of foreign law (Kazakh law) pursuant to CPR 35 for the purposes of this application; and

    2. An order under CPR 11.1(1) and CPR 11.1(6):

        a. Declaring that the Court;
            i. has no jurisdiction to try the claim against [Terra Raf]; or, in the alternative,
            ii. should not exercise any jurisdiction which it may have; and

        b. That the Claim Form dated 17 July 2020 in so far as it relates to [Terra Raf] and service of the same on [Terra Raf] are hereby set aside; and/or

        c. That the proceedings as against [Terra Raf] be stayed.

    3. In the strict alternative to (2) above:

        a. An order that the claimants' Claim Form and/or Particulars of Claim be struck out pursuant to CPR 3.4(2) on the basis that:
            i. the aforementioned statements of case disclose no reasonable grounds for bringing the claim; or, in the alternative,
            ii. the aforementioned statements of case are an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings.

        b. Alternatively, an order that the Court strike out the claimants' Claim Form and/or Particulars of Claim pursuant to CPR 3.3.

        c. In the further alternative, that the proceedings be stayed pursuant to CPR 3.1(2)f).

    4. Costs

18. On the 25 August 2020, the claimants filed an application to serve the Statis and Tristan out of the jurisdiction and by alternative means. The application was heard without notice to the defendants. On the 27 November 2020, I granted the claimant permission to serve the Statis and Tristan and further ordered that this could be done by alternative means, namely service at the offices of Terra Raf's solicitors here in Gibraltar. These defendants then filed an application notice on the 29 March 2021 seeking the following orders:

> 1. under CPR Part 11:
>
> > (i) Setting aside service of the Claim Form and accompanying Particulars of Claim on the Second, Third and Fourth Defendants at the offices of Messrs Triay & Triay on the 4 December 2020 and generally;
> >
> > (ii) Setting aside the order dated 27 November 2020, inter alia granting permission to serve the claim form and particulars of claim on the Second, Third and Fourth Defendants outside of the jurisdiction and by an alternative method and at an alternative place by delivering them to the offices of Messrs Triay & Triay;
> >
> > (iii) Declaring that the Supreme Court of Gibraltar has no jurisdiction to try the claims brought against either the Second and/or Third and/or Fourth Defendants under CPR 11(1)(a), or alternatively that the Supreme Court of Gibraltar should not exercise any jurisdiction which it may have under CPR 11(1)(b); or, in the alternative,
> >
> > (iv) Further, staying the proceedings under CPR 11(6)(d) and/or CPR 3.1(2)(f) either generally and/or in favour of proceedings in Moldova and/or British Virgin Islands.
>
> 2. under CPR 35.4: permitting the Applicants to rely on expert evidence of foreign law by Sergei Vataev an expert in Kazakh Law and a witness statement of Grigore Pisica of Ascom Group S.A on Moldovan Law for the purposes of this application.

The Expert Evidence

19. By Orders dated the 7 May 2021 and the 20 January 2022, the parties were granted permission to rely on expert evidence for the hearing of the

defendants' applications. Reports/statements by the following experts were produced:

For the claimants
Mr Sagidolla Baimurat ("Mr Baimurat"), of the Bolashak Consulting Group ("Bolashak")

Professor Iskander Zhanaidarov ("Prof Zhanaidarov"), Chief Research Fellow at the Caspian University's Private Law Research Institute in Almaty, Kazakhstan, on Kazakh law

Mr Kevin O' Gorman ("Mr O'Gorman"), of Norton Rose Fulbright US LLP on New York law.

Mr Vladimir Iurkovski ("Mr Iurkovski"), of Schoenherr, Moldova on Moldovan law

For Terra Raf
Professor Peter Maggs ("Prof Maggs"), Research Professor of Law, University of Illinois, USA, on Kazakh law

For the Statis and Tristan
Mr Sergei Vataev ("Mr Vataev"), Kazakh Advocate on Kazakh law

Mr Grigore Pisica ("Mr Pisica"), Head of the Legal Department of Ascom on Moldovan law

20. The expert evidence is extensive. With annexes (and including translations), it runs to over 1,800 pages and is contained in three lever arch files.

The parties' factual evidence

21. In addition to Mr Kubygul and the Statis each filing witness statements for the purposes of this application, the parties have also filed evidence by the following:

Claimants
Mr Philip Maitland Carrington ("Mr Carrington"), an English solicitor whose firm, Herbert Smith Freehills LLP, has represented Kazakhstan in proceedings related to the enforcement of the award for a number of years.

Mr Arman Nurlanovich Akhmetkaliyev ("Mr Akhmetkaliyev"), the Head of the State Revenue Authority ("the SRA") of the City of Aktau in Kazakhstan.

Defendants

Mr Egishe Dzhazoyan ("Mr Dzhazoyan"), an English solicitor whose firm King & Spalding International LLP has acted for the Stati parties in the international litigation.

Mr Eduard Calancea ("Mr Calancea"), the former Chief Economist of Ascom.

The CPR provisions

22. The Civil Procedure Rule provisions being relied on by the defendants to make their applications are the following:

CPR 3.4

3.4(2) The court may strike out a statement of case if it appears to the court:

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; [or]

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;

CPR 11

11(1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

11(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including:

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying the proceedings.

Summary of the defendants' grounds

23. Terra Raf's challenge on jurisdiction pursuant to CPR 11 is brought under two alternative grounds. The first is the so-called *Revenue Rule*. This is the English common law rule against the enforcement in England of foreign tax or revenue claims. The second is that the proceedings amount to an abuse of EU law. Specifically, abusing the provisions of Council Regulation (EU) No. 1215/2012 ("the Brussels Recast Regulation") grounding jurisdiction against a defendant based on his place of domicile.

24. As to the strike-out application, Terra Raf relies both on CPR 3.4(2)(a) – that the statements of case do not disclose reasonable grounds for bringing the claim; and on CPR 3.4(2)(b) - that the statements of case are an abuse of the court's process. The following nine grounds are relied on by Terra Raf:

    i. That the proceedings are an abuse of process because they amount to a collateral attack on the ECT award.

    ii. That the proceedings are an abuse of process because they are being funded, directed and controlled by the ROK and this amounts to champerty or champertous maintenance.

    iii. That TNG's bankruptcy proceedings in the ROK are a sham and consequently it is said that the proceedings here amount to an abuse of the court's process and/or the claimants do not have standing or reasonable grounds to bring their claim.

    iv. That TNG's bankruptcy proceedings in the ROK are time barred under Kazakh law.

    v. That the fraud allegations advanced are barred by issue estoppel and res judicata (in so far as the Perkwood Payments claim and the New Notes claim are concerned).

vi. That the claims are time barred by reference both to Kazakh law and Gibraltar law.

vii. That the claimants do not satisfy *the double actionability rule* by which they have to show that the claims are actionable under both Gibraltar law and Kazakh law. It is said that there is no real prospect of success for the claims under Kazakh law and that in any event the claims are time barred under that law.

viii. That there are no reasonable grounds for bringing the claims on the merits.

ix. That the claimants breached their duty of full and frank disclosure in their without notice application for service on the Statis and Tristan. Specifically, that the claimants breached their duty of fair presentation of the case.

25. The Statis and Tristan rely on the following four grounds:

i. That for the reasons set out by Terra Raf, the court does not have jurisdiction to deal with the claims against Terra Raf as anchor defendant. It follows that there is no jurisdiction as against the Statis and Tristan either, as this is reliant on jurisdiction being grounded on Terra Raf in the first place.

ii. That there is no good arguable case that the Statis and/or Tristan are necessary and/or proper parties to the claims against Terra Raf and therefore the conditions set out in CPR Practice Direction 6B para 3.1 are not met.

iii. That the claims do not have any or any sufficient connection to Gibraltar and therefore Gibraltar cannot be the proper place to try these.

iv. That the claimants breached their duty of full and frank disclosure in their without notice application.

26. It is agreed that, given that it was served as of right, Terra Raf bears the burden of proof in its jurisdiction challenge under CPR 11. Similarly, as is the usual practice, it bears the burden in its alternative application for the claims to be struck out pursuant to CPR 3.4. On the other hand, in so far as the Statis' and Tristan's application challenging jurisdiction under CPR 11 is concerned, the claimants face the burden as those defendants were not served as of right.

27. There are a number of different, but closely worded, formulations for the standard of proof to be applied in jurisdiction challenges. The parties agreed that the court should apply the 'serious issue to be tried' test as this fairly represents the different iterations articulated in the leading judgments.

The Revenue Rule

28. The Revenue Rule is set out as Rule 3 in *Dicey, Morris & Collins on the Conflict of Laws,* 15th ed. at [R5-019]. The rule reads:

> "*English courts have no jurisdiction to entertain an action:*
>
> *(1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or*
>
> *(2) founded upon an act of state*."

29. The Revenue Rule is an English common law rule which extends to Gibraltar by virtue of section 2 of the English Law (Application) Act. Terra Raf says that the proceedings brought by the claimants are an indirect recovery of taxes said to be due by TNG to the ROK and therefore the Revenue Rule applies. If so, the court should decline jurisdiction.

30. The Aktau SRA filed a bankruptcy petition against TNG on the 26 July 2019. In his witness statement dated the 28 July 2021, Mr Kubygul explains that the Aktau SRA has claims of approximately US$ 24M in respect of

unpaid taxes. After the bankruptcy proceedings had been initiated, the SRA for the District of Beineu then also submitted a claim for approximately US$ 973,500. Subsequently, Mr Kubygul added two further creditors to the Register of Creditors. On the 29 April 2020, a claim in the sum of approximately US$73,000 by ZapKazProject LLP and on the 4 September 2020 a claim in the sum of approximately US$ 21,000 by KazTransOil JSC. (These last two creditors' claims are not tax claims.) As already noted, these proceedings were instituted on the 17 July 2020.

31. In his seventh witness statement dated the 13 December 2021, Mr Carrington evidences that two demand letters have now been received from holders of Tristan Loan notes demanding payment by TNG and seeking inclusion into TNG's Register of Creditors. The first, received on the 10 December 2021 was from Vaquero Global Investment LP from San Antonio, Texas (representing Vaquero US EM Credit Fund LP and Vaquero Master EM Credit Fund Ltd) for the sum of approximately US$ 6.6M (said to include principal debt and interest). The second was from VR Global Partners Ltd, with an address in the Cayman Islands, also received on the 10 December 2021 and demanding the sum of approximately US$ 69M in respect of principal debt. The letters are near identical in significant respects. There can be no doubt that they have been prepared either by the same person or from the same template. Two issues arise. Firstly, Mr James Ramsden KC suggested that the claimants were behind the procuring of these letters and the court should not trust the genuineness of the claims. (In his reply, Mr Richard Morgan KC pointed out that if this were seriously to be the defendants' position they could have easily established whether they are bona fide creditors. Tristan should have that information.) Secondly, as pointed out by Mr Ramsden in the course of the hearing, there is no evidence that they have actually been included in the Register of Creditors of TNG. For reasons that will become evident, it is unnecessary to try and resolve at this stage either the genuineness of the claims or whether they have been added to the register.

32. There are a number of authorities which assist in understanding the nature and scope of the Revenue Rule. The first is *Government of India v Taylor*

& anor [1955] AC 491 (HL). This concerned an appeal in the House of Lords from a refusal to allow the Government of India to prove income tax debts incurred in India in the liquidation of an English company. In dismissing the appeal, the House of Lords confirmed the existence of the Revenue Rule. In his lead judgment, Viscount Simonds stated:

> *"My Lords, I will admit that I was greatly surprised to hear it suggested that the courts of this country would and should entertain a suit by a foreign State to recover a tax. For at any time since I have had any acquaintance with the law I should have said as Rowlatt J. said in the King of the Hellenes v. Brostron: 'It is perfectly elementary that a foreign government cannot come here - nor will the courts of other countries allow our Government to go there - and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs.' That was in 1923."*

33. *Peter Buchanan Ltd v McVey* a case heard before the Irish Supreme Court in 1951, and reported at [1955] AC 516, was referred to and approved in the judgment of the House of Lords in *Government of India*. The case concerned a defendant who had sold his business' assets in Scotland to avoid paying certain taxes and had then moved to Ireland. The liquidator of his business attempted to bring proceedings in Ireland to recover the taxes but the claim was struck-out. At page 527 of his judgment, Kingsmill Moore J said:

> "*Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand. There seems to me to be a reasonably close parallel between the position of the Banco de Vizcaya and the present plaintiff. In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the courts of this country, relief cannot be given*."

At page 529, the learned judge continued:

> "*If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected. Mr. Wilson has pressed upon me the difficulty of deciding such a question of fact and has replied on 'ratio ruentis acervi.' For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction*."

The appeal from Kingsmill Moore J's decision is contained in the same report. There, Maguire CJ said at page 533:

> "*I agree that if the payment of a revenue claim was only incidental and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance to bring assets of the company under the control of the liquidator."*

(The relevance of this quote is of course that the claimants say that the tax claims are not the only claims in TNG's liquidation.)

34. *QRS 1 APS & ors v Frandsen* [1999] 1 WLR 2169 was an English Court of Appeal case which Mr Ramsden submitted was quite similar to the facts of our case. There, the plaintiffs were Danish companies which had been placed in liquidation. The Danish tax authorities claimed sums of approximately £4M in corporation taxes and funded proceedings in England against the owner of the companies. The claim in England was a restitutionary claim and, in the alternative, a claim for damages arising from the defendant's negligent or reckless actions (in effect the defendant was being accused of stripping his own companies of assets for his personal financial gain). The claim was struck out because it amounted to a revenue matter within the meaning of article 1 of the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("the Brussels Convention"). In dismissing the appeal, Simon Brown LJ said that the case was one:

> "…*where the liquidator, as nominee for a foreign state, in substance is seeking a remedy designed to give extraterritorial effect to foreign revenue law. In my judgment, such claims plainly fall within the compass of revenue matters as that expression would be understood by all member states for the purposes of article 1 of the Convention*."

35. In *Skatteforvaltningen (the Danish Customs and Tax Administration) v Solo Capital Partners LLP (in special administration)* [2022] EWCA Civ 234 ("the *Skatt* case"), the claims concerned the recovery of tax refunds made by the Danish authorities to the defendants where the refunds were said to have been induced by fraud. The Court of Appeal held that the claims did not fall within the Revenue Rule because they were not claims to recover unpaid tax but were claims to recover monies which had been abstracted from the country's general fund by fraud. In referring to the Revenue Rule Sir Julian Flaux C stated:

> "*126. The critical starting point for the purposes of Ground 1 of this appeal is to focus on the scope of Dicey Rule 3. What it renders inadmissible (whether under the narrower revenue rule or the wider sovereign powers rule) is an action, that is a claim, to enforce directly or indirectly a foreign revenue, penal or other public law. In its narrower form, the revenue rule, what it prohibits is enforcement of a direct or indirect claim for tax which is due but unpaid, as is clear from the speeches of the House of Lords in Government of India [1955] AC 491 and from the passages from the speech of Lord Mackay in Williams & Humbert [1986] AC 368 …*
>
> *127. It is also clear from a number of authorities that, in determining whether a claim is inadmissible by virtue of Dicey Rule 3, the court must examine the substance of the claim to see whether it is really a claim to recover foreign revenue*…"

36. I summarise the principles derived from these authorities:

    i. The court should decline jurisdiction to hear a case which is brought by a foreign government for the recovery of tax due in that foreign state.

ii. It is not the form of the action or the nature of the claimant that matters, it is the substance of the right sought to be enforced that must be examined.

iii. If the recovery of taxes by the foreign state is only a part of a wider claim, then the courts should not decline jurisdiction to hear the case.

37. The claimants' response to Terra Raf's reliance on the Revenue Rule is three-fold. In the first place it is said that what the claimants seek to do is recover from the defendants the substantial sums that were misappropriated from TNG. Mr Morgan submitted that TNG could have done that before the liquidation was commenced had it not been under the control of the Statis. The liabilities to TNG predate the bankruptcy and are unrelated to any tax obligation. Secondly, Article 4 of the Brussels Recast Regulation mandates that Gibraltar is the jurisdiction in which a claim against Terra Raf is to be pursued. The Revenue Rule does not therefore fall for consideration. Thirdly, that non-revenue creditors have also proved in TNG's liquidation and it is likely that further non-revenue creditors will seek to do so in the future. It is not therefore simply a revenue case. The object of the *Buchanan v McVey* and *QRS v Frandsen* cases was solely the recovery of unpaid tax and they are distinguishable on that basis.

38. For the first proposition, the claimants relied on *Williams & Humbert Ltd v. W & H Trade Marks (Jersey) Ltd* [1986] AC 368. The case concerned the compulsory acquisition by the Spanish Government of certain companies in Spain which then, through related companies, sought to bring two separate claims in England. The defendants contended that the claims should be struck out because the compulsory acquisition of the Spanish companies was effected by a penal or other public law of that country and the actions were therefore actions for the indirect enforcement of that law. The first instance judge struck out the defences and appeals from that decision were dismissed, the House of Lords holding that the actions were actions by English and Spanish companies to recover property to which they were said to be entitled before the enactment of the Spanish decrees. The actions did

not therefore constitute indirect attempts to enforce those decrees. English courts would recognise the compulsory acquisition laws of a foreign state with all its consequences, and Dicey Rule 3 could not be used to frustrate or contradict that principle. The claimants say that it would be an anomaly that the court would have allowed the claims in this case to proceed if TNG had been appropriated by the ROK but would decline jurisdiction if the revenue authorities of the ROK successfully wind up TNG and the bankruptcy manager then sues the defendants.

39. I agree that the position might result in an anomaly but ultimately, if the claimants are successful here in Gibraltar this will result in the application of the proceeds of the action being applied towards the satisfaction of the ROK's revenue claims. A focus in *Williams & Humbert* was on the fact that there was no "*unsatisfied claim*" arising from the compulsory acquisition of the companies. At page 440, Lord Mackay said:

> *"Having regard to the questions before this House in Government of India v. Taylor I consider that it cannot be said that any approval was given by the House to the decision in the Buchanan case except to the extent that it held that there is a rule of law which precludes a state from suing in another state for taxes due under the law of the first state. No countenance was given in Government of India v. Taylor, in Rossano's case [1963] 2 Q.B. 352 nor in Brokaw v. Seatrain U.K. Ltd. [1971] 2 Q.B. 476 to the suggestion that an action in this country could be properly described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. The existence of such unsatisfied claim to the satisfaction of which the proceeds of the action will be applied appears to me to be an essential feature of the principle enunciated in the Buchanan case for refusing to allow the action to succeed."*

40. Article 4 of the Brussels Recast Regulation mandates that Gibraltar is the jurisdiction in which a claim against Terra Raf is to be pursued. It is therefore said that the Revenue Rule does not fall for consideration. Mr Morgan relied on *QRS v Frandsen* and in particular the dicta of Simon Brown LJ and also on the decision of the Court of Justice of the European Union in *Revenue and Customs Commissioners* v *Sunico ApS & anor (Case C-49/12)* [2014] QB 391.

41. In *QRS v Frandsen*, the court also considered the hypothetical question of whether the claim could be struck out under the Revenue Rule even if the Brussels Convention, grounding jurisdiction, applied. Simon Brown LJ considered that the rule could not be invoked if the convention conferred jurisdiction on the English courts. At page 2178C the learned judge said:

> "*Assuming that the present claim is a civil matter within article 1 and, therefore, that under article 2 there is jurisdiction to bring it in England against the defendant as someone domiciled here, the plaintiffs submit that rule 3 of Dicey & Morris cannot properly be invoked so that the court immediately then declines to exercise its jurisdiction: such an application of rule 3 of Dicey & Morris would clearly "impair the effectiveness of the Convention".*
>
> *Mr. Ivory, for the defendant, submits the contrary. He argues that rule 3 of Dicey & Morris is not concerned with the appropriate place for the trial of this action. There is, he submits, really no difference between striking out the claim under rule 3 of Dicey & Morris and striking it out because on some other ground it is bound to fail, for example, for lack of merit or under the Limitation Act 1980.*
>
> *On this issue it seems to me that the plaintiffs' argument is plainly right. The necessary corollary of rule 3 of Dicey & Morris is that any such claim as this can only properly be brought in the tax authority's own courts. Were the Convention to apply, rule 3 would seem to me not merely to impair its effectiveness but indeed substantially to derogate from it*."

42. As already noted, Simon Brown LJ was considering a hypothetical question. What would happen if the claim was not a revenue matter for the purposes of the Convention but it nevertheless arguably fell within the Revenue Rule? I have not understood it to be said that the distinction applies in this case.

43. Mr Ramsden in fact replied to the *QRS v Frandsen* argument by referring to paragraph 150 of the judgment in the *Skatt* case:

> *"It must follow that either so far as those defendants are concerned the revenue rule applies, or the claim involves the exercise or assertion of a sovereign right. Whilst the test for the application of Dicey Rule 3 may not be identical to that for determining what is a "revenue etc matter" for Article 1(1) of the Brussels Recast Regulation , it can be seen that its application leads to the same answer. If Dicey Rule 3 applies (as SKAT has to accept it does in relation to the claim against ED&F Man) then*

> *by the same reasoning, the basis for the claim by SKAT against those defendants is either a right which arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers, from which it necessarily follows that the claim is a revenue matter outside the Brussels Recast Regulation."*

44. *Sunico* was a case under the Brussels I Regulation (Council Regulation (EC) 44/2001). The claim by the English Revenue authorities arose from VAT carousel-type frauds. The beneficiaries of the tax evasion were persons and entities domiciled in Denmark. Proceedings were issued in the High Court in England based on claims that the defendants had conspired to defraud the Treasury. Parallel proceedings were brought in Denmark by the English Revenue in order to secure, and in due course enforce, their claims against the defendants. In the Danish proceedings, the defendants submitted that since the claim were tax matters they were excluded from the ambit of the Brussels I Regulation. Article 1 of that regulation provides that it "*shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters*." The Danish court then referred the following question to the Court of Justice of the European Union:

> "*Must [Article 1] be interpreted as meaning that its scope extends to cover a case in which the authorities of a member state bring a claim for damages against undertakings and natural persons resident in another member state on the basis of an allegation—made pursuant to the national law of the first member state—of a tortious conspiracy to defraud consisting in involvement in the withholding of VAT due to the first member state?*"

In deciding that the Brussels I Regulation applied to the English Revenue's claims, the court said the following:

> "*37. So far as the legal basis of the commissioners' claim is concerned, their action against Sunico is based not on United Kingdom VAT law, but on Sunico's alleged involvement in a conspiracy to defraud, which comes under the law of tort of that member state….*
>
> *39. As the commission and the United Kingdom Government have observed, in the context of that legal relationship, the commissioners do not exercise any exceptional powers by comparison with the rules*

> *applicable to relationships between persons governed by private law…*
>
> *40. It follows that the legal relationship between the commissioners and Sunico is not a legal relationship based on public law, in this instance tax law, involving the exercise of powers of a public authority.*
>
> *44. In the light of the foregoing, the answer to the question referred for a preliminary ruling must be that the concept of "civil and commercial matters" within the meaning of article 1(1) of Regulation No 44/2001 must be interpreted as meaning that it covers an action whereby a public authority of one member state claims, as against natural and legal persons resident in another member state, damages for loss caused by a tortious conspiracy to commit VAT fraud in the first member state*."

45. Mr Morgan submitted that TNG's claims were private rights by a private entity seeking remedies against individuals. They are therefore civil and commercial matters and not revenue matters. Mr Morgan is of course right that the claims being brought by the claimants are private rights. However, the distinction with *Sunico* is that in that case the state had been defrauded in a *carousel* fraud. The defendants had benefited from that fraud. In our case, there is no suggestion that the Kazakh tax authorities have been defrauded.

46. The claimants' third proposition is that non-revenue creditors have also proved in TNG's liquidation and that it is likely that further non-revenue creditors will do so in the future. So, is the claim one which can properly be described as a claim for the recovery of tax revenue by the ROK? At the time of the filing of the claims, the ROK's tax authorities had claims in the bankruptcy of approximately US$ 25M with a single non-revenue creditor having a claim for US$ 73,000. By the time the application to serve out came before the court, a further non-revenue creditor had proved in the bankruptcy in the sum of US$ 21,000. Even taking both these non-revenue creditors into consideration, the revenue claims comprised over 99.5% of the total value of creditors' claims. On the assumption that the Vaquero funds claims and the VR Global claim are added, or have been added, to the Register of Creditors, the situation after the 10 December 2021 is very

different. With those taken into account, the revenue creditors' proportion decreases to around 25% of the total value. Mr Morgan also made the point that further creditors can sensibly be expected to prove in the bankruptcy as time goes on. All that said, the answer to the question therefore depends on what moment in time is the relevant one.

47. In *Goldman Sachs International v Novo Banco SA & ors* [2018] UKSC 34 the UK Supreme Court said:

> "*9. For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had 'the better of the argument' on the facts going to jurisdiction…. It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced*."

48. Further, in *Erste Group Bank AG v JSC 'VMZ Red October'* [2015] EWCA Civ 379 Gloster LJ said at paragraph 44 of her judgment:

> "*44. The parties did not dispute the proposition that an application to set aside permission to serve out of the jurisdiction falls to be determined by reference to the position at the time permission is granted, not by reference to circumstances at the time that the application to set aside is heard: see per Hoffmann J (as he then was) in ICS Technologies Ltd and another v Guerin and others [1992] 2 Lloyds Rep 430 at 434–435*."

49. Mr Morgan referred the court to what Hoffmann J had actually said in the *ICS v Guerin* case quoted by Gloster LJ in *Red October*. (*ICS v Guerin* was a case under the old Supreme Court rules but nothing turns on this):

> "*Mr. Crystal said I should look at the position today. An application under R.S.C., O. 12, r. 8 is a rehearing of the application to the Master and the exercise of a fresh discretion. It should therefore take into account whatever has since happened. I do not agree. The application is under R.S.C., O. 12, r. 8(1)(c) to discharge the Master's order giving leave to serve out. The question is therefore whether that order was rightly made at the time it was made. Of course the Court can receive evidence which was not before the Master and subsequent events may throw light upon what should have been relevant considerations at the time. But I do not think that leave which was rightly given should be discharged simply because circumstances have changed. That would mean that different answers could be given depending upon how long it took before the*

> *application came on to be heard. The position is quite different when the application is for a stay on the grounds of forum non conveniens. In such a case, the appropriate time to consider the matter is the date of the hearing*."

50. Mr Morgan submitted that at the time of the permission hearing the court would have been entitled to find that holders of the Tristan Loan notes would in due course prove in the bankruptcy, because such an eventuality was clearly foreseeable. That being so, the case is not one which had as its sole or primary purpose the recovery of a foreign country's tax revenue. I disagree.

51. Applying *Goldman Sachs*, as concerns the Statis and Tristan, it is the position at the date when the proceedings were commenced that is relevant. (As I read Hoffmann J's observations in *ICS v Guerin*, the court may admit further evidence to determine whether the material position at the time the order granting permission was made was in fact different. That is not to say that the claimants can file further evidence to change the original material position.) Mr Ramsden submitted that as Terra Raf was being pursued as anchor defendant the same cut-off date ought to apply. It seems to me that this is the only rational course because we are determining what the object behind the bringing of the proceedings was.

52. As at the date the proceedings were commenced, the tax creditors' claims amounted to 99.5% of the claims in TNG's liquidation. The creditors' claims can only therefore be sensibly characterized as being revenue claims. If at the time one were to have taken a step back and looked objectively at the purpose behind the bringing of proceedings against the defendants (and ignored any alleged ulterior motives) the only conclusion would have been that it was an action for the recovery of monies appropriated from TNG which would have been applied almost exclusively towards the payment of taxes due by TNG. If it had not been for the revenue claims it can safely be assumed that these particular proceedings in Gibraltar would not have been brought. Our case closely follows the situation in *QRS v Frandsen* where the English Court of Appeal was in no doubt that the Revenue Rule applied.

53. As an alternative final submission on the application of the Revenue Rule, the claimants say that the court retains a discretion to override the rule. That I should do so because Gibraltar public policy should not tolerate the use of a Gibraltar company to commit frauds. They rely on *Government of Iran v The Barakat Galleries Ltd* [2007] EWCA Civ 1374. There the Government of Iran brought an action in England for the recovery of artefacts said to be around 5000 years old and which were in the possession of the defendant. Although the case centred around whether the Government of Iran had obtained title to the artefacts under Iranian law, a secondary question before the court was whether the Iranian law purportedly conferring title to the items upon the state was a penal or public law and if so whether the court should therefore decline jurisdiction. At first instance Gray J considered that they were. On appeal, the court said:

> "*154. In our judgment, there are positive reasons of policy why a claim by a state to recover antiquities which form part of its national heritage and which otherwise complies with the requirements of private international law should not be shut out by the general principle invoked by Barakat. Conversely, in our judgment it is certainly contrary to public policy for such claims to be shut out. A degree of flexibility in dealing with claims to enforce public law has been recommended by the Institut de droit international (in particular where it is justified by reason of the subject matter of the claim and the needs of international co-operation or the interests of the states concerned…"*

I agree with Mr Ramsden that clearly the court's focus in *Government of Iran v Barakat* was on the particular sensitivity surrounding antiquities removed from their country of origin. It seems to me that no such sensitivity exits with regards to the policy behind the Revenue Rule.

54. I therefore find that the Revenue Rule applies to the claimants' claims. Accordingly, the court should decline jurisdiction to hear the claims and I shall do so. This of course disposes of the matter against all defendants. (As will be observed later in this judgment, if jurisdiction against Terra Raf fails, then there is no jurisdiction against the Statis or Tristan.) However, I shall move to consider all the grounds raised by the defendants. Clearly, the litigation panorama between the parties (when one includes the ROK) is

such that an appeal from this decision is highly likely. In the circumstances, it would be prudent to deal with all the grounds in this one judgment.

Abuse of EU law

55. The second limb of Terra Raf's jurisdiction challenge under CPR 11 is that the bringing of the claims pursuant to Article 4 of the Brussels Recast Regulation is an abuse of EU law.

56. This ground is closely related to the CPR 3.4(2)(b) collateral attack on the ECT award ground. The facts and basis for both grounds are the same ones. As I am rejecting Terra Raf's submissions on this abuse of EU law ground on questions of law, I shall deal with the relevant facts in the next section.

57. Mr Ramsden reflected that, on this ground, the court could be certain of the clear principle but that there is little guidance as to how the principle is to be applied on the facts. In Mr Ramsden's submission, the "*essential touchstone*" of the principle is that the provisions of the Brussels Recast Regulation should not be abused.

58. Article 4(1) of the Brussels Recast Regulation provides as follows:

> "*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*."

This of course is not an absolute mandatory rule. There are exceptions set out in the regulation, for example as to employment contracts, consumer contracts, insurance contracts and others. (Indeed it does not apply to revenue matters.) However, aside from the revenue matters already discussed, none of the express exceptions in the regulation are said to apply to the claims brought by the claimants against Terra Raf and so, ostensibly, Terra Raf is to be sued here. The claimants' position is indeed that Terra Raf has to be sued in Gibraltar. They had no other choice.

59. The two principal authorities referred to by counsel on this ground were *Vedanta Resources Plc v Lungowe* [2019] UKSC 20, a decision of the UK

Supreme Court and *PJSC Commercial Bank Privatbank v Kolomoisky* [2019] EWCA Civ 1708, a case before the English Court of Appeal.

60. In *Vedanta v Lungowe*, the claimants were Zambian nationals who sued Vedanta, a UK company, and its Zambian subsidiary in England. The High Court refused to declare that it did not have jurisdiction to try the claims, Vedanta amongst other things having argued that the claim should be stayed as an abuse because the claimants were using the claim against it purely as a means of settling jurisdiction in England against their real target, the Zambian subsidiary. The Supreme Court dismissed Vedanta's appeals. At paragraph 29 Lord Briggs JSC said:

> *"29. On that factual basis, I am satisfied, to the extent that the point is acte clair, that the EU principle of abuse of law does not avail the defendants. The starting point is the need to recognise that, following Owusu v Jackson [2005] QB 801, what is now article 4(1) lays down the primary rule regulating the jurisdiction of each member state to entertain claims against persons domiciled in that state. The Recast Brussels Regulation itself (like its predecessors) contains a number of express provisions which derogate from that primary rule. As exceptions to it, they are all to be narrowly construed. If, therefore, the Recast Brussels Regulation also contains (as it probably does) an implied exception from the otherwise automatic and mandatory effect of article 4, based upon abuse of EU law, then that is also an exception which is to be narrowly construed."*

After referring to a number of authorities dealing with abuse of EU law in the context of article 6(1) of the Brussels I Regulation (in connected cases a person may be sued in a member state where another defendant is domiciled), Lord Briggs said the following at paragraphs 35 and 36:

> "*35. Those decisions of the Court of Justice show that, even before the Freeport case [2008] QB 634, there was an established line of authority which limited the use of the abuse of EU law principle as a means of circumventing article 6 (now article 8) to cases where the ability to sue a defendant otherwise than in the member state of its domicile was the sole purpose of the joinder of the anchor defendant. Even though there appears to be no authority directly upon abuse of EU law in relation to article 4 itself (or its predecessors), the need to construe any express or implied derogation from article 4 restrictively would appear to make the position a fortiori in relation to article 4, as indeed the judge himself*

held.

36. But the matter does not stop there. ***Such jurisprudence as there is about abuse of EU law in relation to jurisdiction suggests that the abuse of law doctrine is limited to the collusive invocation of one EU principle so as improperly to subvert another****. In the present case the position is quite different. The complaint is that article 4 is being used as a means of circumventing or misusing the English national regime for the identification of its international jurisdiction over persons not domiciled in any member state: i e the forum conveniens jurisprudence and, specifically, the necessary or proper party gateway*." [My emphasis.]

61. Mr Morgan also referred the court to paragraph 40 of Lord Briggs' judgment, where having set out that following *Owusu v Jackson*, a case before the European Court of Justice, the English Courts could not stay proceedings against an anchor defendant on forum conveniens grounds, the learned judge said:

> "*40. Two consequences flow from that analysis. The first is that, leaving aside those cases where the claimant has no genuine intention to seek a remedy against the anchor defendant, the fact that article 4 fetters and paralyses the English forum conveniens jurisprudence in this way in a necessary or proper party case cannot itself be said to be an abuse of EU law, in a context where those difficulties were expressly recognised by the Court of Justice when providing that forum conveniens arguments could not be used by way of derogation from what is now article 4 . The second is that to allow those very real concerns to serve as the basis for an assertion of abuse of EU law would be to erect a forum conveniens argument as the basis for a derogation from article 4 , which is the very thing that the Court of Justice held in Owusu v Jackson to be impermissible*."

62. In *PJSC v Kolomoisky,* a Ukrainian bank brought proceedings in England against English companies with the sole purpose of suing two defendants who were domiciled in Switzerland. The Court of Appeal held that a claimant with a sustainable claim against an anchor defendant (which the claimant intended to pursue to judgment) was entitled to rely on article 6(1) of the Lugano Convention even where the sole object of the claimants was to be able to bring proceedings against foreign defendants. (Article 6(1) of the Lugano Convention provides that a defendant domiciled in a Lugano

Convention state may be sued in a court where a co-defendant is domiciled provided that the claims are closely connected and it is expedient to hear them together to avoid irreconcilable judgments from separate proceedings.) At paragraph 102 the Court of Appeal said:

> "….*if the question is asked, is a claimant with a sustainable claim against an anchor defendant, which it intends to pursue to judgment in proceedings to which a foreign defendant is joined as a co-defendant, entitled to rely on article 6(1) even though the claimant's sole object in issuing the proceedings against the anchor defendant is to sue the foreign defendant in the same proceedings, we consider that the question should be answered affirmatively*."

In reaching their conclusion their Lordships gave some examples of where an argument on abuse might succeed:

> "*108. Fifth, we regard the CJEU's decision in Cartel Damage as rejecting a general sole object test but subjecting reliance on article 6(1) to the principle of abuse of law in cases of artificial fulfilment of the close connection condition. In general, all rights under EU law are subject to this principle and there is no reason to exclude article 6(1). It is noteworthy that the example given by the Court is a collusive arrangement between the claimant and the anchor defendant to conceal a settlement of the claim until the proceedings have been issued and served on the foreign defendants. As earlier mentioned, other examples might be naming a fictitious person as the anchor defendant (Freeport) and commencing proceedings against an anchor defendant knowing that it was an inadmissible claim (Reisch Montage)*."

63. Mr Ramsden focused on two assertions being made by Terra Raf which it says amount to an abuse. The first was that TNG's bankruptcy in the ROK is a sham. The second that the claimants are being used as the ROK's proxies to frustrate the Statis' entitlement to the ECT award. Mr Ramsden submitted that I should have close regard to *PJSC v Kolomoisky* and to the examples of abuse of EU law which were referred to there. Further that the list was clearly not exhaustive. The abuse argument in *Vedanta v Lungowe* was very narrow.

64. I accept that the examples given in *PJSC v Kolomoisky* were non-exhaustive but I cannot ignore the dicta of Lord Briggs in *Vedanta v Lungowe*. Specifically, that abuse of EU law is restricted to collusive invocation of one

EU principle so as to improperly subvert another. That is not what is being said about the claimants in this case. As such, I have difficulty in finding that, if accepted, Terra Raf's contention on the claimants' supposed motives would amount to an abuse of EU law. I also have particular regard to Lord Briggs' observation that abuse, as an exception to the Article 4 mandate, is to be construed narrowly.

Collateral attack on the ECT award

65. Terra Raf asserts that these proceedings amount to a collateral attack on the ECT award and are a further attempt by the ROK to frustrate its enforcement through its proxies, the claimants. These proceedings are therefore an abuse of the process of the court and should be struck out pursuant to CPR 3.4(2)(b). (In *Vedanta v Lungowe* it was held that the grounding of jurisdiction pursuant to the Brussels Recast Regulation did not prevent the court from striking out a claim as being an abuse of process or for disclosing no reasonable cause of action – see paragraphs 16 and 17 of the judgment of Lord Briggs JSC.)

66. On collateral attacks on previous judgments, the starting point is the dicta of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, where at page 541 his Lordship said:

> "*The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made*."

(The first decision there had been taken by the criminal courts during the course of a trial for multiple murders in the Birmingham pub bombings by members of the IRA. One of the defendants had then attempted to sue the police for assault. The criminal courts had considered and dismissed the evidence of any assaults in a *voir dire* on the admissibility of the defendants' confessions.)

67. In principle, an abuse can lie where claims are brought which amount to a collateral attack on arbitration proceedings: *Michael Wilson & Partners Ltd v Sinclair & ors* [2017] EWCA Civ 3. The issue in that case was put in the following way by Simon LJ in the English Court of Appeal.

> "*13. At its most simple, the issue can be expressed as follows: whether it is an abuse of the Court's process for A to claim in legal proceedings against C, on a basis which has been decided against A in arbitration proceedings between A and B?"*

At paragraph 48, he set out the principles that he derived from a consideration of the authorities which had been referred to him:

> *"48. The following themes emerge from these cases that are relevant to the present appeal.*
>
> *(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated ... These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other...*
>
> *(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse ... and the court's power is only used where justice and public policy demand it...*
>
> *(3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process...*
>
> *(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the Arthur Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor*

> *their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case; or, as Lord Hobhouse put it in the Arthur Hall case, if there is an element of vexation in the use of litigation for an improper purpose.*
>
> *(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process…"*

He then concluded:

> "*67. In my view Teare J correctly stated the law in [50] of his judgment in the present case. There is no 'hard edged' rule that a prior arbitration award cannot found an argument that subsequent litigation is an abuse of process. The Court is concerned with an abuse of its own process; and there are abundant references in the authorities to the dangers of setting limits and fixing categories of circumstances in which the court has a duty to act so as to prevent an abuse of process.*
>
> *68. I agree with Reyes J's observation in the Parakou case that, although a Court will be cautious in circumstances where the strike out application is founded on a prior arbitration award, that caution should not inhibit the duty to act in appropriate circumstances. I would also add my agreement with Teare J's observation at [50] of his judgment that it will probably be a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process*."

68. The *Michael Wilson v Sinclair* case concerned the same claimant with two different respondents, one in the arbitration proceedings and the other in the civil courts. This is not quite the scenario in our case. However, the principle does seem to be that, in an appropriate case, a collateral attack on a determination in arbitral proceedings can amount to an abuse of the court's process. The court will however be cautious before striking out proceedings where the strike out is founded on a prior arbitration award.

69. More generally, the distinction between this type of abuse of process challenge and abuse on the grounds of issue estoppel was recognised in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132. Kerr LJ at page 137 expressed it in the following terms:

> "*... it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorise the situations in which such a conclusion would be appropriate*."

70. The ROK admits that it is assisting and funding the claimants. Mr Carrington in his first witness statement dated the 24 August 2020, confirms that the ROK is providing information, assistance (including the sharing of professional advisors) and funding. In his sixth witness statement (made in response to the defendants' applications) Mr Carrington confirmed that the financial support was "*considerable*". The ROK does not shy away from the fact that its legal teams at Bolashak in Kazakhstan, Herbert Smith Freehills LLP ("HSF") (as international counsel), and Hassans in Gibraltar all act for the claimants. (Hassans acted in Gibraltar for the ROK in proceedings seeking the registration of English costs judgments against the Statis – see *The Republic of Kazakhstan v Anatolie Stati & ors* (neutral citation 2021/GSC/05).) Further, that Prof Zhanaidarov and Mr Iurkovski have provided expert evidence for the ROK and do so now for the claimants.

71. Bolashak has a close connection to the Ministry of Justice ("MOJ") in the ROK. The defendants in fact assert that the MOJ is a very active participant in these and other related proceedings, something which they say is beyond their remit. Mr Vataev in his first report dated the 29 March 2021 describes how, in his experience, the MOJ's involvement in this bankruptcy is without precedent.

72. Mr Ramsden pointed to how the ECT award was final and binding and had not been set aside by the curial courts in Sweden. There have been four separate judgments of the Court of Appeal and the Supreme Court in Sweden, all of which have dismissed the ROK's attempts to annul the ECT award. That the ECT award is final and binding has in fact been recognised by the English Court of Appeal. In 2014, Terra Raf, the Statis and Ascom issued proceedings against the ROK in England for the enforcement of the ECT award there. After Knowles J gave the ROK permission to pursue their

fraud allegation as a ground for defending the enforcement, the Stati parties discontinued the proceedings. Knowles J then set aside the notice of discontinuance and the Stati parties appealed. The Court of Appeal upheld the appeal (*Anatolie Stati & ors v The Republic of Kazakhstan* [2018] EWCA Civ 1896). In the course of his judgment, David Richards LJ accepted that the court had the power to require the continuation of proceedings where it was necessary to determine whether the court's processes had been abused. He cited the example of a case where there had been material non-disclosure at a without notice hearing. At paragraph 65 he then said:

> "*The circumstances in the present case are very different. This appeal is not put forward on the basis that there was material non-disclosure on the application without notice for the enforcement order. The claimants had the benefit of an award which was valid under its curial law and which they were entitled to seek to enforce in other countries, including England. The State's allegations of fraud were insufficient to invalidate the award. The most that those allegations provided were a defence to enforcement as a matter of English public policy. They are therefore incapable of establishing that the original application was a "fraud on the English court". …In the present case, where the Swedish court has ruled that the State's allegations do not invalidate the award, enforcement in Sweden is clearly not a fraud on the court, and it is difficult to see how it could nonetheless be so in England."*

73. Terra Raf sought to rely on a report dated March 2021 by Stephen Kay KC and John Traversi entitled: "*Kazakhstan: Questions About Government, Justice & International Arbitrations*". It is referred to as the "9 Bedford Row report". Mr Morgan objected to the admission of the report but in any event referred to a report commissioned by the claimants in reply. This is a report by Ali Malek KC and Dominic Kennelly dated the 30 June 2021.

74. The 9 Bedford Row report is disparaging of Kazakhstan's rule of law. In its Executive Summary on page 3 the authors say:

> "*Overwhelming evidence shows that Kazakhstan struggles at every level to keep its word [to promote the rule of law]. Domestically, clear-cut laws for achieving justice, fighting corruption, and*

> *promoting freedoms and human rights are continuously challenged by the realities of life in the Republic, plagued by corruption, suppression of free speech and arbitrary law enforcement.*
>
> *The country's internal approach to rule of law is also being "exported". Our report found too many cases in which Kazakhstan's Ministry of Justice ignores court rulings overseas which have not fallen in the country's favour, even when proceedings are final and non-appealable. The Ministry not recognising or obstructing important international frameworks, including the New York Convention and Energy Charter Treaty, stands at odds with its founding decree, which includes the responsibility for "ensuring the implementation of terms and conditions of international treaties" and "support[ing] the rule of law in the work of state bodies, organizations, officials and citizens*."

75. At page 54 they then say:

> "*[The ROK] has been a respondent in more cases than any other Central Asian state. Further, the cases filed against Kazakhstan are significantly larger than those filed against other Central Asian states, mainly because these disputes arose from investments in its rich oil and gas sector.*
>
> *An analysis of some of these cases is instructive in the assessment of how Kazakhstan has treated and treats investors and their investment, how it responds to the arbitral jurisdiction and decisions it has consented to and how it has sought to avoid the consequences of contrary decisions. The "Tristan" case discussed below is of particular significance not only because of the size and importance of the award but also because of what it reveals about Kazakhstan's conduct. It shows that Kazakhstan uses attritional tactics to undermine an investment in an effort to acquire its assets for itself or for the enrichment of individuals within the political elite of the country. It deploys multi-jurisdictional efforts to overturn a final, binding arbitration award. It undertakes protracted and spurious efforts to avoid payment of the award and overturn conservatory orders made in respect of its assets abroad."*

76. The report highlights the litigation between the ROK and the Statis including the ECT award and appeals therefrom in Sweden and details some of the recognition and enforcement proceedings which have taken place in other jurisdictions. It is highly critical of the ROK's treatment of the Statis and of its conduct of the proceedings which are related to the ECT award.

77. In reply, Mr Malek KC and Mr Kennelly addressed the following two issues:

> *"4.1 Does the evidence cited in the report substantiate the allegation that Kazakhstan does not abide by – and actively seeks to frustrate – arbitration awards that are made against it in investment disputes?*
>
> *4.2 Is it correct that the Minister of Justice (Marat Beketayev) is responsible for issuing misleading press releases?"*

On the first issue, they conclude as follows:

> "*5.4 The Report fails to substantiate the serious allegation that it makes, i.e. that Kazakhstan does not abide by arbitration awards and seeks to frustrate them. Although the Report claims to have identified multiple cases where this has occurred, in truth only one case is cited that even arguably supports this allegation (i.e. the Stati Case), and even there important details are omitted in a way that renders the Report's conclusions unreliable*."

The "*important details"* said to have been left out of the 9 Bedford Row report was the finding by Knowles J in the English High Court that the ROK had made out a prima facie case of fraud and that the Statis had then discontinued their action to avoid the risk of an adverse finding. Further, that they had only been allowed to discontinue on the entering of an undertaking not to pursue any enforcement of the ECT award in England.

On the second issue, Mr Malek concludes:

> "*6. As to the second question, the press releases cited in the Report are not misleading, and the Report's criticisms of those press releases are misconceived. The Report's conclusion on this point is manifestly wrong. This is an extremely serious allegation which should never have been made*."

78. Mr Ramsden pointed to how Mr Malek has acted for the ROK in litigation concerning the Statis whereas the 9 Bedford Row report was prepared independently. That may indeed be the case but the point made in Mr Malek's report that important details have been omitted from the 9 Bedford

Row report cannot be ignored. More generally, the serious allegations being made are disputed. It is difficult to see how this court can simply have regard to the reports without the parties having had an opportunity to challenge the evidence at a hearing. It does not seem to me that I should be attaching any weight to the reports at this stage of the proceedings.

79. It was also argued on behalf of Terra Raf that the claimants do not actually have any legitimate interest in a Gibraltar judgment. Terra Raf is said to have no assets in Gibraltar. This was a matter raised at the without notice hearing and I said the following in the 2020 judgment (when discussing the Terra Raf Loan claim):

> "*47. On the question whether it is reasonable to try the claim against Terra Raf, the claimants say that a claim for US $35m is a substantial claim. Undoubtedly, that is so. The latest balance sheet for Terra Raf signed by the Statis and dated the 31 March 2020 (filed at Companies House in Gibraltar on the 10 June 2020) shows assets of £88m. It also shows that it has liabilities of £88m. There is, however, no information as to what those assets or liabilities may be. Mr Leech submitted that for the purposes of this application the court is entitled to proceed on the basis that there are substantial assets. I agree. Until we have further information as to the nature of the liabilities, Terra Raf appears to have substantial assets from which to meet any judgment. It is also said that if the award becomes enforceable then any judgment in this claim can be enforced against Terra Raf's right to the award. It seems to me that it is certainly reasonable for the claim against Terra Raf to be tried."*

80. Mr Ramsden, in effect, submitted that I was right to raise the concern with the claimants but that my conclusions were wrong. He pointed in particular to how the notion that any judgment in this claim could be attached to the ECT award was a flawed proposition seen in the light of the ROK's conduct in contesting to the last any enforcement action brought by the Statis. If the ROK (who is funding this litigation) does not pay up on the ECT award, how are the claimants going to attach any damages this court awards against Terra Raf's share of the ECT award? Mr Ramsden then asked rhetorically: if the proceedings are not brought for any legitimate intention of obtaining damages, what are they brought for? The answer, he submitted was that it was for an illegitimate collateral purpose. To parade a judgment (if

successful) in other jurisdictions. As noted by David Richards LJ in the English Court of Appeal when allowing the Statis to discontinue their enforcement action in England, that was impermissible as a litigation purpose. At paragraph 53, His Lordship said:

> "*53. The jurisdiction of the English courts in civil matters is invoked for the purpose, and only for the purpose, of obtaining relief in the form of orders of the court, including where appropriate declarations. It is not the function of our courts to hear cases which have no relevant result. The purpose of the claimants in the present proceedings was only to enforce the award. That purpose has ceased. The purpose of the fraud case raised by the State was limited to defeating the claimants' attempt to enforce the award in this jurisdiction.... As the judge recognised, the purpose of continuing the proceedings is not to give a ruling on English public policy, but to make findings of fact. But, those findings of fact lead to no relevant relief that can be given by the English court. Where there is no possibility of enforcement in this jurisdiction, no purpose is served by making declarations that enforcement would be contrary to English public policy – save as a peg for findings of fact about the alleged fraud."*

81. The defendants' evidence as to Terra Raf's assets in Gibraltar is given by Mr Dzhazoyan in his first witness statement dated the 19 January 2021. At paragraph 164 he asserts that Terra Raf's balance sheet does not contain any assets located in Gibraltar and that it has never held or operated any bank accounts here. In a footnote to the paragraph he says:

> "*As I understand from Mr Anatolie Stati, Terra Raf's long-term assets on the latest balance sheet represent the value of its nominal equity stake in TNG, as well as certain receivables owed to Terra Raf by an affiliated entity called Hayden Intervest Ltd and another entity, Montvale Invest Ltd, which was historically affiliated with the Stati Parties, prior to it being placed in liquidation. As for Terra Raf's liabilities, I am told by Mr Anatolie Stati that these represent various receivables owed by Terra Raf to its international legal advisors in connection with the ECT Award enforcement proceedings as well as a receivable owed by Terra Raf to Tristan Oil Ltd (the Fourth Defendant)."*

Although I accept that this is not a matter to be decided at this stage and that I have not been addressed as to accounting practices, I would simply observe that that the balance sheet for 2018 sets out Terra Raf's total assets as

£77,370,538 and its total liabilities at precisely the same figure. It would seem odd for this to be the case when the assets are said to represent a nominal stake in TNG and amounts owed by debtors and the liabilities are said to be legal fees owed by Terra Raf. The position is similar for the balance sheets for 2019 and 2020.

82. The court was also asked to note that the claimants had provided no evidence as to the enforceability of a Gibraltar judgment against the Statis in Moldova or against Tristan in the BVI. How then was the court to assess whether the claimants were serious about their intention to recover damages from the defendants?

83. On the other hand, the claimants say that they do have a legitimate purpose - the recovery of damages - and they deny the suggestion that these proceedings are brought to attack the ECT award. In any event, it was submitted on the claimants' behalf that *JSC BTA Bank v Ablyazov (No 6)* [2011] EWHC 1136 (Comm) is authority for the proposition that if there are multi-purposes for the litigation, the court will not stay the proceedings as an abuse if one of the purposes is a legitimate purpose. In that case, the defendants asserted that the claimant bank was bringing the proceedings at the behest of the President of Kazakhstan in order to eliminate the first defendant as a political opponent. Teare J held that although it was arguable that the claimant bank had such an ulterior motive, it also had a legitimate purpose in bringing the proceedings, namely the recovery of misappropriated assets. He considered that as one of the purposes was certainly legitimate, the claimants should be allowed to pursue their claim and the proceedings were not an abuse of the court's process.

84. Mr Ramsden countered by arguing that *Ablyazov (No 6)* was wrongly decided and that the court should have particular regard to Simon LJ's dicta in *Michael Wilson v Sinclair* where the learned judge said that the court should not be setting any limits to this type of abuse of process and that the court has a duty to act so as to prevent an abuse of process.

85. I start from the premise that the court should be cautious before striking out proceedings as an abuse of process because they amount to a collateral attack on a previous arbitral decision involving different parties. The ROK's admitted funding and assistance is of course an important factor. The ROK has been providing significant financial assistance to a bankruptcy manager. It seems to me that a clear inference can be drawn that it is doing so only because it is on the losing side of the ECT award. I therefore have little hesitation in finding that the motivation behind the ROK's assistance enabling Mr Kubygul to bring these proceedings is to frustrate the ECT award. However, what is relevant is Mr Kubygul's motivation. Is it, as the defendants suggest, that he is simply acting as a puppet dancing to the ROK's tune, or does he have a legitimate interest in pursuing a claim against the defendants? If it is both, can the possibility (or likelihood) of an ulterior improper motive be ignored if there is a second legitimate purpose behind the bringing of the proceedings – as was decided in *Ablyazov (No 6)*?

86. I accept that the court has a duty to prevent an abuse of its process as was made clear in *Michael Wilson v Sinclair*. However, in this case I consider that I should follow the course taken in *Ablyazov (No 6)*. There is a legitimate purpose behind the bringing of the proceedings by the claimants. They wish to recover monies said to have been taken by fraudulent means from TNG. On the face of it, Terra Raf has assets against which a judgment can be enforced. Further, despite the ROK's best efforts, it may indeed come to pass that Terra Raf benefits from the ECT award in due course. I shall not strike out the proceedings because they are said to amount to a collateral attack on the ECT award.

Champerty/Champertous maintenance

87. Terra Raf says that the proceedings are an abuse of process because they are being funded, directed and controlled by the ROK and this amounts to champerty and/or champertous maintenance.

88. The claimants objected to this ground being raised at the hearing on the basis that it had never formed part of Terra Raf's application and had only been

raised for the first time on the 13 January 2022 in correspondence. By that time all the evidence for the application had been filed. I allowed Terra Raf to make substantive submissions but reserved my decision as to whether or not the ground could properly be advanced. Logically, I shall deal first with whether Terra Raf should be allowed to raise champerty and/or champertous maintenance despite the claimants' objections.

89. As I have just referred to, Terra Raf's solicitors first raised the matter on the 13 January 2022. In a letter to the claimants' solicitors they wrote:

> "*We write to put you on notice that the First Defendant will be relying on the legal argument that the admitted control, direction and/or funding of the Claimants and the present proceedings in Gibraltar by the Republic of Kazakhstan … amounts to champerty or champertous maintenance, and accordingly an abuse of the court's process against which the First Defendant has sought and is entitled to seek relief pursuant to CPR 3.4(2)(b). This reflects the First Defendant's application notice dated 19 January 2021.*"

(At the hearing, Mr Ramsden accepted that there had been no actual express admission that the ROK was directing or controlling these proceedings.)

90. Mr Morgan's objections were in two parts. The first is a technical pleading point. As concerns strike out under CPR 3.4(2), Terra Raf's application notice does not say that the pursuit of the proceedings are an abuse of process. Rather it says that the statements of case are an abuse of process. Secondly, that champerty and/or champertous maintenance not having been raised until after the evidence was filed, the claimants have not been able to meet the case. There is evidence, for example, as to the way that Kazakh insolvencies are ordinarily managed, that the claimants may have wished to put forward. They have been unable to do so and it would therefore be unfair for the court to consider this ground. Mr Morgan, on instructions, confirmed that the claimants would not object to champerty/champertous maintenance being raised again at any future occasion by Terra Raf if the case progressed.

91. Taking the pleading point first, the relevant part of the application notice states:

> "*An order that the claimants' Claim Form and Particulars of Claim be struck out pursuant to CPR 3.4(2) on the basis that: … (ii) the aforementioned statements of case are an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings*."

Strictly, Mr Morgan is right in that it is the statements of case that are said to amount to an abuse of the court's process. Mr Ramsden countered by saying that the pleading point was simply wrong. That all strike out applications have as their target the statements of case and the striking out of the statements of case is what the application notice is asking the court to do. I agree with Mr Ramsden and note that the provisions of CPR 3.4(2)(b) only refer to striking out statements of case. You do not strike out the 'proceedings', although that of course is the effect of striking out a claim form.

92. As to the second more substantive objection, Mr Ramsden pointed to Mr Carrington's evidence and how that showed that there was funding and control of these proceedings by the ROK. In his first witness statement Mr Carrington says the following at paragraph 125:

> "*Without ROK's support it is unlikely that TNG and the Bankruptcy Manager would be able to bring these proceedings. ROK's support, via its Ministry of Justice, extends first, to the provision of information, assistance and sharing of professional advisors (including but not limited to Bolashak, my firm, Hassans, PwC and NRF), and secondly to providing the funding to enable them to bring these proceedings*."

93. In his first witness statement, Mr Dzhazoyan stated that he believed these proceedings are "*an abusive and vexatious attempt by the ROK … to thwart the enforcement of the ECT award*." Then from paragraphs 132 to 162, Mr Dzhazoyan sets out the connections between the claimants and the ROK with particular emphasis on Bolashak. Bolashak, it is said, derives most of its revenue as a legal consulting group from the ROK's state institutions. Further, there are close connections between members of Bolashak and the ROK's Ministry of Justice. At paragraph 162 he says:

> "*There can therefore be no doubt, on the basis of the above evidence alone, that Bolashak and the MoJ are closely interlinked. However, Bolashak's proper role and involvement in these proceedings and its links to the Claimants and the Kazakh government have not been disclosed, let alone explained, by the Claimants*."

94. Mr Carrington replied to Mr Dzhazoyan in his sixth witness statement dated the 30 July 2021 at paragraph 53:

> "*The Claimants' connection to Bolashak is evident and has been since the Claim Form was issued. The Claim Form gives the Claimants' address as care of Bolashak in Kazakhstan. As I explained in Carrington 1 (paragraphs 4 and paragraphs 123 to 126), the Claimants are bringing these proceedings with the considerable financial and practical assistance of ROK. I explained that this included the sharing of professional advisors. Finally, I also exhibited to Carrington 1 the minutes of TNG's creditors committee meeting on 9 July 2020, which approved the conclusion of the legal services agreement with Bolashak.*"

95. It was asserted by Mr Ramsden that these extracts show that the question of direction and control had been ventilated in the evidence and the claimants had had ample opportunity to address this. It does not seem to me that these extracts can be taken as an exchange on champerty or champertous maintenance. The claimants were not put on notice of this ground of abuse until after the date for the filing of evidence had passed. They were unable to properly answer that case. The fact that the claimants had previously filed evidence late is irrelevant. I will therefore not consider this ground any further.

Sham bankruptcy in the ROK

96. Terra Raf says that TNG's bankruptcy proceedings in the ROK are a sham and consequently that the proceedings here amount to an abuse of the court's process and/or the claimants do not have standing or reasonable grounds to bring their claim.

97. Mr Ramsden, by reference to cases on the UK Cross-Border Insolvency Regulations 2006, submitted that the court is entitled to consider the substance of the foreign liquidation when the proceedings are being brought

by the foreign liquidation office-holder. He referred in particular to *In re Dalnyaya Step llc (in liquidation) (No 2)* [2017] EWHC 3153 (Ch) where the Chancellor, Sir Geoffrey Vos, set aside a recognition order under those regulations on the basis that there had been a breach of the liquidator's duty of full and frank disclosure - the liquidator having failed to alert the court to the political background to the case. Mr Ramsden further submitted that the court should be alive to any foreign proceedings which are a sham or politically motivated. For that proposition he cited *Cherney v Deripaska* [2009] EWCA Civ 849. There, the English Court of Appeal dismissed an appeal from a decision of Christopher Clarke J who had found that despite Russia being the natural forum for the claims, England was the more suitable forum for these to be tried in the interests of the parties and the ends of justice. The basis for the finding was that the claimant would not pursue the claims in Russia because he would be subject to risks of assassination or arrest on trumped up charges. Waller LJ agreed saying that in his view there was "*cogent evidence*" of the risk that the claimant would not get a fair trial in Russia. At paragraph 44 of his judgment the learned judge said:

> *"44. In my view there was cogent evidence of a risk in the circumstances of this particular case, having regard to the position of Mr Cherney, the position of Mr Deripaska and taking account of the Mirepco documents, that Mr Cherney would not get a fair trial in Russia of a dispute between him and Mr Deripaska over shares in Rusal. I emphasise this particular case because it would be quite wrong for it to be suggested that the English court is saying that a fair trial cannot be obtained in Russia in all normal cases. This is not a normal case and it has particular features from which the judge was entitled to reach the conclusion he did*."

98. As an answer to these authorities, the claimants rely on *Dicey* Rule 179, which quite simply states:

> "*Subject to the Insolvency Regulation, the authority of a liquidator appointed under the law of the place of incorporation is recognized in England*."

99. In turn, Mr Ramsden's response was to say that Dicey Rule 179 is a mere starting point which is subject to the court's inherent power to control its own process. In *Singularis Holdings Limited v PricewaterhouseCoopers*

[2014] UKPC 36 Lord Sumption in the Privy Council said the following at paragraphs 19 and 25:

> *"19… In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers.*
>
> *25. In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up… Fourth, the power is subject to the limitation in In re African Farms Ltd [1906] TS 373 and in HIH [2008] 1 WLR 852 and Rubin [2013] 1 AC 236, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda."*

100. The case concerned the exercise of common law powers by the Chief Justice of Bermuda ordering auditors to produce documents in a liquidation. Lord Sumption explained the principle of modified universalism by referring to *In re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852* where Lord Hoffmann at paragraphs 6 and 7 of his judgment had said:

> "*6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.*
>
> *7 This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508 , 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also Fletcher , Insolvency in Private International Law , 2nd ed (2005), pp 15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.*"

And at paragraph 30 Lord Hoffmann continued:

> *"30. ... The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution…"*

101. So, I proceed on the clear basis that the courts in Gibraltar should co-operate with the courts in the country of the principal liquidation (in this case the ROK) in so far as such co-operation would be consistent with justice and Gibraltar public policy.

102. The fact that it is well known in Kazakhstan that the Statis were in a long-standing dispute with the authorities there over oil and gas assets worth billions of dollars is clear. Mr Kubygul confirms this himself in his evidence. Mr Ramsden also pointed to the "*clear conclusions*" of the ECT tribunal with regards to what he termed as the contrived prosecutions in the ROK of TNG's manager. (I note however that the passages referred to by Mr Ramsden at the hearing are in the section referred to as the "Timeline of Events" by the tribunal. They are not findings. Introducing the timeline at paragraph 216 of the ECT award the tribunal says: "*The following timeline records events mentioned by the Parties in their submissions, without prejudice to the relevance the Tribunal may attach to each item*".) In his written submissions, Mr Ramsden did refer to a conclusion of the ECT tribunal where at paragraph 1086 it stated:

> "*While Respondent's explanations and justifications regarding some specific actions it has taken affecting Claimants' investments may perhaps at least be arguable, even if not convincing to the Tribunal, (1) the picture of them seen cumulatively in context to each other and (2) the difference of treatment of Claimants' investments before and after the Order of the President of the Republic on 14/16 October 2008, permit only the conclusion that Respondent's conduct after the President's Order was a string of measures of coordinated harassment by various institutions of Respondent and has to be*

> *considered as a breach of the obligation to treat investors fairly and equitably, as required by Art. 10(1) ECT*."

103. It was submitted that all that the court needed to concern itself with is whether in this particular case there was corruption or a lack of judicial independence. It is unnecessary to determine that such conduct is widespread in that country.

104. The following submissions were made on behalf of Terra Raf. Firstly, if TNG's bankruptcy proceedings in the ROK were genuine they would have been commenced well before 2019. All claims relate to events which took place up to 2010. (In fact, KPM's bankruptcy commenced in January 2010.) Notwithstanding, TNG's bankruptcy was only sought after the ECT award was obtained and after the ROK's failed attempts to annul the award in the Swedish curial courts. Interestingly, in a matter unrelated to the present claims, the Aktau State Bailiff Department found TNG to be insolvent on the 29 April 2013. In an 'Order' returning an unexecuted writ, the Bailiff stated:

> "*A writ of execution was received for proceedings by the Aktau Territorial Department of the Court Bailiffs against [TNG] for the recovery of the amount of USD 45,896,577.69 for the benefit of the company Arkham S.A.*
>
> *At the present time, the debtor [TNG] is not undertaking any production activity and all of its property and other assets by the decision of the Government of the Republic of Kazakhstan had been transferred into trust management of JSC NOC "KazMunaiGas", i.e., the LLP is insolvent*."

105. Secondly, Terra Raf says that the claimants have not satisfied the court that the underlying debts are genuine. The claimants have to do this because, Mr Ramsden says, it is a factual matter which goes to founding jurisdiction and/or the standing of the claimants.

106. Terra Raf disputes the validity of the tax demands which underpin TNG's bankruptcy. As already noted, the bankruptcy petition was presented by the Aktau SRA. The petition was based on a total tax debt (with interest) of approximately US$ 24.2M. The debt was said to have accrued in 2009.

However, the evidence of Mr Dzhazoyan, as set out in his first witness statement, was that TNG had in fact overpaid a significant amount of tax and had addressed what the parties refer to as "the 2009 Notice". This was a notice dated 24 April 2009 by the State Revenue Department for Mangystau Oblast addressed to TNG. It was first produced as part of the late evidence in December 2021 by the claimants.

107. In reply, Mr Akhmetkaliyev confirmed that the tax debts upon which the bankruptcy petition was made remain unpaid. In his first witness statement dated the 29 July 2021 he says the following:

> *"19. I understand that the Defendants allege that the above tax liabilities have been paid by TNG. This is not correct. None of the above tax liabilities have been paid. The circumstances to which the Defendants are referring …all relate to payments of tax that were made by TNG prior July 2010. … The tax arrears which form the basis of Aktau SRA's bankruptcy petition are the taxes and payments declared by TNG itself through its own tax return declarations and calculations of advance payments. All of these tax arrears, with the exception of corporate income tax, had become due only in 2010 and 2011 …*
>
> *20. I also understand that the Defendants allege that the basis of Aktau SRA's bankruptcy petition is [the 2009 Notice]. This is not correct. Indeed, the 2009 Notice was mentioned by the tax authorities in TNG's bankruptcy petition. This was done to show the court the retrospective (historical) nature of the existing tax relationship between TNG and the tax authorities. As a competent tax authority, we had a certain history of tax claims vis-a-vis TNG, which we wanted to demonstrate to the court. The amount of tax arrears claimed in the bankruptcy petition by the Aktau SRA does not include the tax claims under the 2009 Notice. In any event, the tax arrears under the 2009 Notice have been paid either by TNG itself or through payment orders …*"

108. Terra Raf points out that Mr Akhmetkaliyev's response is contradictory and misleading when read with the bankruptcy petition and the 2009 Notice. In his second witness statement dated the 29 October 2021, Mr Dzhazoyan says the following at paragraphs 60 and 61:

> "*60.3 … my understanding is that, contrary to Mr Akhmetkaliyev's assertion that the 2009 Notice is mentioned in the Bankruptcy Petition as a "historical fact" to provide some background, in fact the 2009 Notice constituted key evidence submitted by Mr*

> *Akhmetkaliyev to demonstrate compliance with mandatory pre- trial debt recovery steps regarding TNG's alleged debt, appears to match the understanding of the Kazakh court. Indeed, the court Decision dated 27 September 2019 expressly links the 19 January 2009 tax debt (i.e., the same seven types of debt listed in the Bankruptcy Petition) with the 2009 Notice: "It was established during the court [hearing] that [TNG] has tax liabilities, part of which had accrued as a result of the calculation of advance payments for corporate income tax from 19 January 2009 and the issue of a demand for payment of liability No. 14000004629 of 24 April 2009 [being the 2009 Notice] …"*
>
> *61. Only two explanations of this contradiction are possible. If the 2009 Notice was not based on the seven types of tax debt described in the Bankruptcy Petition, Aktau SRA misled the Kazakh court and failed to comply with preconditions set by Kazakh Tax Code, which would mean that TNG bankruptcy proceedings are unlawful. Alternatively, if the 2009 Notice was based on the seven types of tax debt described in the Bankruptcy Petition, then it becomes clear that (and as I have explained in Dzhazoyan 1) the tax debts cited therein had already been paid and these provided no valid grounds for the Bankruptcy Petition. It follows that both Mr Akhmetkaliyev and the RoK, which stands behind TNG and Mr Kubygul, are misleading the Gibraltar court.*"

109. Terra Raf also has evidence from Mr Calancea that he did not sign any of the declarations on behalf of TNG which are said to have generated the tax which then formed part of the bankruptcy petition.

110. Mr Dzhazoyan also explains that in April 2016 the Mangystau Economic Court allowed the Aktau SRA to write-off TNG's tax credits in the sum of approximately US$ 6M. (According to Mr Akhmetkaliyev, the credits arose from VAT payable for the purchase of goods and services and was not an actual overpayment of tax by TNG.) The court held that TNG was no longer entitled to claim a set-off against the amounts standing to TNG's credit given that the five-year limitation from the fourth quarter of 2010 (when TNG had last operated) had expired. Mr Dzhazoyan questions the fairness of the steps taken by the Aktau SRA seeking the write-off on the basis of a five-year limitation but yet in 2019 they issued bankruptcy proceedings to recover the further sum of US$24.1M in relation to tax debts said to have accrued between 2009-2011.

111. Mr Ramsden submitted that no credible reason had been put forward by the claimants for the timing of TNG's bankruptcy proceedings. No action had been taken for several years by the ROK's tax authorities. Yet when it becomes clear that the ROK is losing the ECT award set-aside proceedings and the award's recognition proceedings in other European jurisdictions and in the United States, the bankruptcy proceedings are begun.

112. In his first witness statement, Mr Akhmetkaliyev says the following with regards to the delay by the Aktau SRA in presenting the bankruptcy petition:

> "*33. Furthermore, [the applicable tax codes provide] that an application to declare a debtor bankrupt by tax authorities is a measure of last resort, which is why it is not usually taken immediately after tax arrears have been identified. The tax authorities first try to undertake all other measures that are stipulated by the tax legislation, so as to provide the debtor an opportunity to meet its tax obligations without the need to liquidate the company. In the meantime, the taxes that are overdue accrue penalties.*
>
> *34. In the current case, the debtor's shareholders and beneficiaries had been involved in a long running arbitration and arbitration related court proceedings against the Government of Kazakhstan, the outcome of which was not predictable. One of the scenarios that the Aktau SRA had foreseen was that as a result of the arbitration and court proceedings the former subsoil users, TNG and an affiliated entity, Kazpolmunay LLP, would resume their business in Kazakhstan and would meet their tax obligations. This is the reason why the Aktau SRA did not initiate bankruptcy proceedings against TNG for a number of years*."

113. This explanation is criticized by Terra Raf. In its written submissions, Terra Raf say that Mr Akhmetkaliyev only became the head of the Aktau SRA in June 2019 yet he purports to give evidence without any reference to contemporaneous documents nor does he attribute what he says to anyone else. Further that he "*brazenly attempts to give favourable evidence on behalf of the ROK*" and that his evidence has the "*hallmarks of ex post facto rationalization*." The court is asked to give no weight to Mr Akhmetkaliyev's evidence.

114. In his witness statement, Mr Kubygul explains the steps he took prior to commencing the proceedings here in Gibraltar. This included liaising with the Ministry of Justice of the ROK and the ROK's legal teams at HSF and Bolashak.

115. As direction and control are denied by the claimants, Mr Ramsden postulated that Mr Kubygul has of his own initiative sought to bring claims in Gibraltar for circa US$ 500M, sums far in excess of what were being claimed by creditors at the time the claims here were issued. It was submitted that it was fanciful for Mr Kubygul to try and portray a situation where there was no control of these proceedings by the ROK. The following points were made: Mr Kubygul does not appear to have any familiarity with Gibraltar or any experience in this type of international litigation. The claims recycle the ROK's allegation of fraud. Mr Kubygul did not give a statement in support of the claimants' application for service out. This was left to Mr Carrington who is described as the ROK's international counsel. There was a limitation advantage of bringing these claims as turning on Mr Kubygul's 2019 appointment and consequent later knowledge (when compared to the ROK).

116. The claimants' position is that TNG's bankruptcy has been considered by three Kazakh courts and that this therefore clothes it in legitimacy. Terra Raf however point to Mr Vataev's first report in this regard. There, Mr Vataev questions the impartiality of the Kazakh courts when it comes to adjudicating in matters in which there are governmental interests. At paragraph 93 he then states:

> "*93. My view, based on all my knowledge of the relevant facts and matters and for the reasons stated above, is that TNG's bankruptcy is one of those examples where Kazakhstan's judicial branch simply rubber-stamped the claims of the tax bodies without critical scrutiny of the matter. In particular, I describe the specific details of what, in my view, constituted the most fundamental flaws of the relevant court decisions in Paragraphs 34 - 37 above*."

The issues identified by Mr Vataev at paragraphs 34-37 of his first report are the following: Firstly, he says that it is not clear that the Mangystau

Economic Court "*checked the correctness of the Tax Authority's actions".* Secondly, that there are apparent deficiencies in the court's decision (including that TNG does not appear to have been notified of the proceedings) but that these deficiencies would not render the decision unlawful. Thirdly, that the court did not examine whether TNG had assets from which to meet its debts.

117. The response to Mr Vataev's claims by Prof Zhanaidarov was to say that the Kazakh courts are constitutionally independent. However, Mr Ramsden submitted that, although technically correct, this ignores the actual reality of the situation.

118. At the hearing, the claimants relied heavily on *Koza Ltd v Koza Altin Isletmeleri AS* [2021] EWHC 2131 (Ch). There, the directors of a Turkish company sought to replace the director of an English Company which was wholly owned by the Turkish company. The English company sought declaratory relief preventing the replacement of its director arguing that the English Court should not recognise the appointment of the Turkish directors because the appointments had been made by a corrupt judgment in Turkey. Trower J held that the fact that the process by which the Turkish directors were appointed might have been flawed or politically motivated was irrelevant. The English court would recognise the authority of the Turkish directors.

119. On the 12 October 2022, solicitors for Terra Raf brought to the court's attention that the English Court of Appeal had handed down its judgment in an appeal from Trower J's judgment. The Court of Appeal dismissed the appeal on the facts but had disagreed with the approach of the first instance judge. I then gave directions for short written submissions to be provided by the parties and these were filed on the 8 November 2022 by Terra Raf and on the 15 November 2022 by the claimants.

120. It was highlighted on behalf of Terra Raf that the Court of Appeal has now held that Trower J was wrong to find that because the Turkish directors had been appointed by the Turkish courts that was the end of the

matter. The English court had to apply its own conflict of laws principles. At paragraph 139 the Chancellor Sir Julian Flaux said:

> "*I consider that Mr Scott is correct that the authority issue should not be resolved by a choice of law or applicable law analysis such as found favour with the judge, concluding that because the directors were appointed by the Turkish court and Turkish law regards them as validly appointed, that is the end of the matter. That approach has the effect of assuming the authority issue in favour of the defendants. The issue is not about the exercise of Koza Altin's rights, as the judge seems to have thought, but about whether, despite the position under Turkish law, the process by which the directors were appointed, by the Sűer judgment, was a corrupt one, so that their appointment should not be recognised by the English court, which should conclude for the purposes of proceedings in England that the defendants do not have authority to act for Koza Altin*."

121. And at paragraph 145 continued:

> "*If [the Turkish directors] were appointed pursuant to the Sűer judgment and if that judgment were arguably corrupt, then the judge should have determined that there was a serious issue to be tried as to whether the authority of the individual defendants to act as directors of Koza Altin should be recognised by the English court*."

122. The claimants pointed to how the Court of Appeal's judgment does not assist Terra Raf for three reasons. (A fourth submission concerned reliance on *Koza Altin* in relation to the Revenue Rule. It does not seem to me that this requires further discussion. The claimants only referred to *Koza Altin* in a footnote in the section of their written submissions on the Revenue Rule, but this was not developed in any way.)

123. Firstly, the question being decided by the Court of Appeal was whether the contention that the appointment of the Turkish directors should not be recognized was arguable and capable of creating a serious issue to be determined at trial. Here, Terra Raf is asking the court to decide summarily that the appointment of Mr Kubygul as bankruptcy manager should not be recognized.

124. Secondly, there is no basis in the evidence for saying that the decision of the Kazakh courts declaring TNG bankrupt should be impugned. In *Koza Altin* the Court of Appeal agreed with the judgment of Sir Michael Burton in *Maximov v. OJSC Novolipetsky* [2017] EWHC 1911 (Comm), [2017] CLC 121 where he said:

> "*[t]he fact that a foreign court decision is manifestly wrong or is perverse is not sufficient … The decision must be so wrong as to be evidence of bias, or be such that no court acting in good faith could have arrived at it.*"

125. In this regard, the claimants referred to two excerpts of Mr Vataev's evidence. The first at paragraph 45 of his first report where in relation to Mr Kubygul's appointment as bankruptcy manager Mr Vataev says:

> "*Generally, the procedures of Mr. Kubygul's appointment as the interim manager and the bankruptcy manager formally complied with the Law on Bankruptcy and existing practice, as I explain below*."

126. Then on TNG's bankruptcy he says the following at paragraph 119 of his second statement:

> "*To clarify, my opinion is that, although this decision is formally effective and there are no brazen defects in the decision, which would make it clearly wrong, the formal appearance of lawfulness does not at all imply or suggest that justice was adequately served*."

127. I agree with the claimants that this means that even on the defendants' own evidence they do not come close to the threshold confirmed by the Court of Appeal in *Koza Altin*.

128. Thirdly, the claimants say that even if there was a defect (which is denied) then any such defects were cured on appeal. Again the claimants refer to Mr Vataev's own evidence where at paragraph 43 of his first report he says:

> *"It is difficult to assess whether the resolution to dismiss the appellate complaint against the Bankruptcy Judgment is lawful and on which grounds it is based … I note that there are strong*

> *arguments in the appellate complaint (such as arguments about TNG's assets having been transferred under the management of KazMunaiTeniz ("KMT") and the absence of TNG's insolvency) and there must have therefore existed convincing reasons to justify the dismissal of the appeal."*

(Mr Vataev does say that he finds it unusual and suspicious that the full version of the Mangystau Oblast appellate court was not made public.)

129. The point regarding the timing of the commencement of the bankruptcy proceedings is obviously well made. I cannot simply disregard Mr Kubygul's explanations for the delay but I can observe that they do not appear to be entirely cogent. As for the underlying tax debts, there is evidence which, if accepted, would show that the tax liabilities have been contrived. However, this is strongly disputed and the evidence would therefore have to be tested. There are serious issues to be tried.

130. In my judgment, the most significant consideration under this ground is the fact that the Kazakh courts have sanctioned TNG's bankruptcy. Although criticism is made of the process by Mr Vataev, he does not consider the decisions to be unlawful and in fact confirms that Mr Kubygul's appointment complied with established practice. In the circumstances, this court must co-operate with the courts of the ROK.

Bankruptcy proceedings in the ROK are time-barred

131. Terra Raf asserts that TNG's bankruptcy proceedings in the ROK were commenced after the Kazakh law limitation period had expired. This, it is said, means that it is an abuse to bring these proceedings because the foundation of the claims lies in the time-barred bankruptcy petition. It is also said that this shows that there are no reasonable grounds for bringing these claims.

132. This ground is based on the opinion of Prof Maggs who says the following at paragraph 85 of his first report dated the 18 January 2021:

> *"With respect to the tax claims that were the basis of the bankruptcy proceedings, I note that, at all relevant times, the general limitation*

> *period under Article 48 of the Tax Code of the Republic of Kazakhstan has been five years. I understand and am instructed by Triay and King & Spalding that, as set out in the First Witness Statement of Egishe Dzhazoyan, the alleged tax liability which served as the legal basis for the initiation of TNG's bankruptcy and the appointment of the Bankruptcy Manager was based (at least in part) on a tax payment demand dating back to 24 April 2009, i.e. a much longer period than five years counting backwards from the date of the requisite bankruptcy petition (viz. 25 July 2019). This fact in and of itself raises serious doubts about the validity of TNG's bankruptcy proceedings and the legal authority of the Second Claimant to represent TNG*."

133. This is replied to by Mr Akhmetkaliyev in his first witness statement. His evidence is that the five-year limitation period applies only to the *calculation* of the tax obligation. At paragraph 32 of his statement he says:

> "*…the Aktau SRA is not precluded from claiming the payment of tax as long as it has been calculated within the period stipulated by the legislation (i.e. 5 years in the case of TNG*)."

134. In his first report, Mr Vataev, appears to agree with Mr Akhmetkaliyev. At paragraphs 7 and 8 Mr Vataev states the following:

> "*Thus, there is a nuance in the definition of the limitation period in Article 48(1) of the Tax Code - the limitation period is defined as the period of time during which (1) the tax authority has a right to calculate, assess, or revise the calculated/assessed sum of taxes (2) the taxpayer (tax agent) has an obligation to submit the tax reports and has a right to amend and supplement the report or withdraw the tax reports; and (3) the taxpayer (tax agent) has a right to demand the refund or offset of the taxes or fines.*
>
> *This definition does not say that the obligation to pay the already calculated/assessed tax ceases to exist once the limitation period expires. This definition may be interpreted as a bar for the tax authority to calculate or assess new tax obligations or revise the existing tax obligation after the limitation period has expired, but it does not preclude the tax authority from demanding the taxes that already have accrued and have been assessed by the tax authorities within the limitation period*."

135. At the hearing, Mr Ramsden conceded that this ground was not one which could properly be dealt with at this interlocutory stage. Certainly, in

light of the evidence of Mr Akhmetkaliyev and Mr Vataev, I cannot summarily conclude that the claims should be struck-out on the basis that the bankruptcy proceedings were time-barred under Kazakh law.

Issue estoppel and res judicata

136. It is said that the fraud allegations advanced by the claimants (in so far as the Perkwood Payments claim and the New Notes claim are concerned) are barred by issue estoppel. Terra Raf relies on issue estoppel as a grounding that these claims are *res judicata*.

137. In *The Sennar (No. 2*) [1985] 1 WLR 490, the House of Lords set out three requirements necessary to create an issue estoppel.

> "*…in order to create an estoppel of that kind, three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent Jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."*

138. There was no apparent disagreement between the parties that proceedings before an arbitration tribunal are equivalent to a decision of a court of competent jurisdiction for the purposes of the first requirement. Here the decision of the ECT tribunal has been declared to be final and conclusive and was taken on the merits. The divergence of positions was with regards to the second and third requirements.

139. The parties in the two separate actions are clearly not the same. The claimants in these proceedings were not parties to the ECT proceedings and the ROK does not appear here as a party.

140. In *PJSC National Bank Trust v Mints* [2022] EWHC 81 (Comm) Foxton J dealt with an application by the claimant banks to amend their

particulars of claim to allege that findings made by the London Court of Arbitration could not be challenged by the defendants. The arbitration had concerned the claimant banks and companies said to be under the defendants' control. It had been submitted for the defendants that arbitration awards could not bind anyone other than the parties or their successors in title (or successors to the relevant rights). Foxton J disagreed and found that the scope of issue estoppel arising from an arbitration award was not confined to contractual privies. At paragraph 26, he then qualified that finding by saying:

> "*That does not mean, however, that the contractual source of an arbitral tribunal's substantive jurisdiction is irrelevant to the application of the doctrine of issue estoppel by the receiving court. Far from it. I accept that it is one of a number of reasons why any attempt to establish the preclusive effect of an award against anyone except the parties or their contractual privies will be an extremely challenging task."*

141. Beyond the strict parties to the previous proceedings, issue estoppel can bind what are commonly referred to as *Gleeson* privies. This follows the decision in *Gleeson v Wippell & Co Ltd* [1977] 1 WLR 510 where Megarry J at page 515 said that issue estoppel applies to a wider class of persons:

> "*... it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party."*

142. In *PJSC Bank v Mints*, Foxton J was referred to a number of authorities which addressed the question of *Gleeson* privies and said the following at paragraph 33 of his judgment:

> "*Without in any way purporting to identify all relevant factors (which I suspect would be an impossible task, as well as a pointless one when it is the particular combination of factors which matters), the authorities to which I was referred provided a number of "signposts" which I have found of particular assistance in this case:*
>
> > *i) The starting point – or "basic rule" – is that "before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it" (Sales J in Seven Arts Entertainments Ltd v Content Media Corp plc [2013] EWHC 588 (Ch), [73]).*
> >
> > *ii) The test of identification is sometimes approached by asking if the party sought to be bound can be said "in reality" to be the party to the original proceedings.*
> >
> > *iii) That argument must be approached with particular caution when it is alleged that a director, shareholder or another group company is privy to a decision against a company, because it risks undermining the distinct legal personality of a company as against that of its shareholders and directors. The danger is particularly acute as the company must necessarily act through and be subject to the ultimate control of natural persons, and directors and shareholders who "control" the company in this sense will frequently have a commercial interest in the company's success…"*

143. It is said that the claimants' core fraud allegations are those which were made by the ROK in the ECT arbitration, in particular in relation to the purpose of the New Notes issued to Laren, and in the Swedish annulment proceedings on the question of the payments to Perkwood.

144. As has been previously noted, Terra Raf's position is that the current proceedings are being funded, directed and controlled by the ROK. This is of course denied by the claimants who say that they are only being funded and assisted by the ROK. Be that as it may, Mr Ramsden submitted that funding and assistance is sufficient for present purposes. Terra Raf relies on the following facts. First, the ROK was a party to the ECT arbitration and

instituted the subsequent annulment proceedings in Sweden. The annulment proceedings are said to be particularly relevant to the issue estoppel argument. Second, the same legal teams act for the ROK and for the claimants. It is said that this means that the claimants have access to disclosure from the ECT arbitration and related proceedings that has been deployed in this action and/or is accessible to the claimants. Third, the claimants' core allegations overlap substantially and recycle the allegations made by the ROK in the ECT arbitration as Mr Carrington himself concedes. Fourth, TNG's books, records, property and other assets have been in the ROK's control since 2010 when the ROK took over TNG's operations in Kazakhstan.

145. Whilst Terra Raf's submissions are noted, it does not seem to me that the claimants can properly be said to be the ROK's *Gleeson* privies. The ROK and the claimants are distinct entities. The fact that the claimants are being funded and assisted by the ROK is not, in my judgment, sufficient.

146. As to the third requirement, that the issues in both actions should be the same, Mr Morgan criticized Terra Raf's approach. Counsel for Terra Raf did not take the court to the findings of the ECT tribunal which are said to give rise to the issue estoppels. Terra Raf instead relied on the contents of an appendix to their written submissions containing a table of what they say are the relevant submissions and findings. Mr Morgan submitted that there had to be a precise examination of what matters are engaged; were the issues part of the ratio of the decision or obiter observations; and are identical issues raised in these present proceedings.

147. Again returning to *PJSC Bank v Mints*, on this third requirement, Foxton J said at paragraphs 44 to 47:

> "*44. In this context, there are three relevant requirements.*
>
> *45. The first is that the determination of that issue must be necessary for the decision… This is sometimes explained in positive terms (the issue must be "fundamental", "essential" or an "ultimate" issue) and sometimes in negative terms (it must not be "collateral" or merely "an evidentiary fact")...*

> *46. The second is that the determination of that "ultimate" issue must be clear. That requirement is even more important when the original determination is said to have been made by an arbitration award...*
>
> *47. The third is that for an issue estoppel to arise, the issue must be the same in both sets of proceedings*…"

148. The appendix is in tabular form and runs over ten pages. It has quotes from the ECT award, from the SVEA judgment, and from witness statements. These are then referenced to the relevant bundles. There is however no discussion in the written submissions and nothing was said about the details in the appendix in oral submissions. Clearly, there was insufficient time to do so at the hearing. We sat for seven full days but there were thirteen different grounds to deal with - of which issue estoppel was but one. It does not seem to me that the court should proceed to determine whether or not the matters raised in the appendix would satisfy the third requirement. It would be an onerous task to undertake at this interlocutory stage and the court would have to do so without the input of counsel.

149. In any event, Mr Morgan submitted that even if Terra Raf had properly identified the arguable estoppels, the test would have been fact sensitive. In the circumstances, the claimants would say that there was a serious issue to be tried on the nature and extent of the estoppels. Mr Morgan referred to what Knowles J said in his judgment determining that there was a prima facie case of fraud which needed to be determined in order to decide whether enforcement in England of the ECT award should be refused on the grounds of public policy. At paragraphs 80 and 90 of his judgment he said:

> "*80. No Court has decided the question whether there has been the fraud alleged. Neither the Swedish Court nor the US Court nor English Court has, although material has been put before those Courts that would allow them to decide that question…*
> *90. I hold that the decision of the Swedish court and the decision of the US court do not create an estoppel, that the state is entitled to rely upon the evidence obtained since the award, and that there is a sufficient prima facie case that the award was obtained by fraud*."

Mr Morgan submitted that Terra Raf needed to get past this finding and they had not even attempted to do so. I am not sure that this would be right and,

in any event, Knowles J does not appear to say that the ECT Tribunal's findings do not create an estoppel. He is only referencing the courts of Sweden and the US court.

150. Mr Morgan also relied on the rule in the 19th century authority *Abouloff v Oppenheimer*, which was referred to in *Altimo Holdings and Investment Ltd and ors v Kyrgyz Mobil Tel Ltd and ors* [2012] 1 WLR 1804 (PC) by Lord Collins:

> "*109. The principle in Abouloff v Oppenheimer & Co (1882) 10 QBD 295 (CA) is that, in the context of recognition and enforcement of foreign judgments at common law, a foreign judgment may be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been produced, or even was produced and rejected, in the foreign court. This is in contrast to the rule for impeachment of English judgments, which requires that the person seeking to impeach the judgment produces newly discovered evidence which could not have been produced at the trial with reasonable diligence…"*

151. It is fair to say that Lord Collins in *Altimo Holdings* did consider whether the rule in *Abouloff v Oppenheimer* was no longer good law but it does not appear that he came to a conclusion on this. However, the more important point is that the rule was concerned with enforcement of foreign judgments by way of common law action. This is not what our case is about and therefore I have some doubt as to its relevance.

152. Related to his argument on the rule in *Abouloff v Oppenheimer*, Mr Morgan referred to the public policy exception which cuts across any issue estoppel. This was also referred to in *PJSC Bank v Mints*. Again, it is convenient to defer to Foxton J's characterization of this at paragraph 58 of his judgment:

> *"58. It was common ground that even if the ingredients of an issue estoppel are otherwise established, the court may nonetheless refuse to give effect to the estoppel in "special circumstances". In Arnold v National Westminster Bank plc (No 1) [1991] 2 AC 93, 109, Lord Keith explained the position as follows:*
>
> > *"In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special*

> *circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result*…".

The learned judge then went on to accept that the exception should be kept to narrow limits, quoting *Spencer Bower & Handley: Res Judicata* 5th edition at paragraph 8.32 that:

> "*the exception should be kept within narrow limits to avoid undermining the general rule and provoking increased litigation and uncertainty*".

153. It seems to me that this exception, despite its narrow scope, may well have applied. There is an arguable case that material only came to light after the ECT tribunal made its findings. (That may or may not be the conclusion reached after the full examination of the witnesses and documents, but at this stage it is an arguable proposition.) In such a case, would it not be unfair to bar the claimants from presenting their case?

154. In my judgment, this ground has not been made out.

Limitation

155. Terra Raf says that the claims brought by the claimants are time barred and should therefore be struck out pursuant to CPR 3.4(2)(a).

156. The first point in issue is whether Kazakh law or Gibraltar law on limitation applies. Although Terra Raf contends that in either case the court will find that the claims ought to be struck out, there are important differences between the two regimes.

157. It is agreed that ordinarily, in matters of procedure, the law of Gibraltar as the *lex fori* applies over any procedural rule of Kazakh law as the *lex causae* (see *Dicey* rule 19). (The parties also agree that the expert

evidence confirms that the rules on limitation under Kazakh law can be classified as procedural because they operate to bar a remedy but they do not extinguish the right to a claim.) On matters concerning limitation however, the default position in England changed on the enactment of the Foreign Limitation Periods Act 1984, a statute which does not have an equivalent in Gibraltar and which does not apply in this jurisdiction. That English Act sought to prevent the undesirability of permitting actions to be brought in England which could not be brought in the courts of the country whose law applied to the substance of the claims. It provides that subject to public policy, where the law of another country falls to be taken into account in the determination of any matter, the law of that other country relating to limitation shall apply. Terra Raf says that this court should follow the position now adopted in England, and that the pre-1984 common law should be subject to such a necessary modification. Mr Ramsden relied on a number of authorities from Australia and Canada which, he submitted, the court should regard as highly persuasive.

158. The importance of this submission is that Kazakh law on limitation will be more restrictive in this case and therefore more favourable to Terra Raf.

159. Mr Ramsden argued that section 2 of the English Law (Application) Act allows this court to review the pre-1984 English common law and adopt the modern approach seen in Australia and Canada which is similar to the existing English statutory regime. The section provides as follows:

> "*2(1) The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require, save to the extent to which the common law or any rule of equity may from time to time be modified or excluded by–*
>
> > *(a) any Order of Her Majesty in Council which applies to Gibraltar; or*
> >
> > *(b) any Act of the Parliament at Westminster which applies to Gibraltar, whether by express provision or by necessary implication; or*

(c) any Act."

160. It was submitted that the words "*as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require"* allow the court to rewrite the English common law where the English common law is clearly unsatisfactory and/or outdated. I am not certain that the provision allows me to do this. The "*circumstances of Gibraltar*" arguably denotes something which is particular to Gibraltar's characteristics, for example in a social, economic, or physical sense. It does not give this court *carte blanche* to rewrite the common law in England, a law which it is mandated to apply. Arguably, the legislature's intervention would be required to correct a deficient and/or outdated English common law proposition.

161. In any case, Mr Morgan invited me to follow Lord Collins' course in *Altimo Holdings*, where the learned judge said that it would be inappropriate to decide an issue which requires '*detailed argument and mature consideration'* in an application to set aside service. I agree that the issue being raised by Terra Raf is deserving of fuller argument and should not be determined in this application. For present purposes therefore, I shall apply the Gibraltar law on limitation.

162. The starting position is that a six-year limitation period applies. That would, without more, bar the claims as proceedings were instituted in 2020 but all matters complained of are said to have taken place before 2010. However, the claimants rely on the fraud/fraudulent concealment exception provided for by section 32 of the Limitation Act. To that end, the question of when knowledge can be attributed to TNG is key, as the exception provides that in cases of fraud or fraudulent concealment, the limitation period does not begin to run until the claimant discovers the fraud or could, with reasonable diligence, have done so.

163. The claimants' basic position is that the Statis continued to control TNG (as a legal entity) through Terra Raf up until the appointment of Mr Kubygul as TNG's bankruptcy manager. The defendants cannot therefore

say that TNG or its creditors could have discovered their frauds at any point prior to the 2 August 2019, the date of his temporary appointment. In any event, it is said that the ROK first discovered the defendants' fraudulent activities on receiving disclosure from Clyde & Co in March 2015.

164. Terra Raf on the other hand says that the ROK and the claimants should be treated as one and the same for the purposes of attribution of knowledge. It is, according to Mr Ramsden, an inescapable reality and the court should not pretend that they are distinct. He referred to the ECT award and the finding that TNG was expropriated in 2010 and fell under the ROK's control through two corporate vehicles. The control extended to TNG's assets and records.

165. Section 32(1) of the Limitation Act, in so far as is material, provides as follows:

> "*32.(1) Where, in the case of any action for which a period of limitation is prescribed by this Act, either–*
>
> > *(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*
> > *(b) the right of action is concealed by the fraud of any such person; or*
> > *(c) the action is for relief from the consequences of a mistake,*
>
> *the period of limitation shall not begin to run until the claimant has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it*."

166. The English equivalent to section 32 is in near identical terms except that in sub-paragraph (b) the English provision refers to '*deliberately concealed*' instead of '*concealed by the fraud'*. Mr Ramsden referred to *McGee on Limitation Periods* where the learned authors consider there to be no difference in the distinction. I accept for present purposes that the English authorities can properly be relied on.

167. *Bilta (UK) Limited & ors v SVS Securities plc & ors* [2022] EWHC 723(Ch) was promoted by Mr Ramsden as an example where the English

High Court dismissed a section 32 defence where the claimants had not proactively investigated a suspected fraud. I have considered this case but a material distinction with the position that this court is in is that there the judge heard evidence and witnesses were cross-examined.

168. *Libyan Investment Authority v Credit Suisse International & ors* [2021] EWHC 2684 (Comm) was a case before the English High Court where two of the defendants sought summary judgment and/or strike out and three other defendants sought to set aside orders permitting service of the claim form out of the jurisdiction. HHJ Pelling KC, sitting as a Judge of the High Court, determined that the claimant's claims were statute barred and that the claimant had no realistic prospect of successfully relying on the fraud exception to limitation. It was a high value claim of some US$200 million. Judge Pelling considered that, depending on the facts of the particular case, issues concerning actual or constructive knowledge for the purposes of section 32 of the Limitation Act could be dealt with at an interlocutory stage. He then went on to consider the principles that apply to section 32 exception to limitation. As to reasonable diligence he said the following at paragraph 24:

> "*Reasonable diligence is to be tested by ".... how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by a reasonable but not excessive sense of urgency" - see Paragon Finance Ple v DB Thakerar & Co [1999] 1 All ER 400 per Millett LJ (as he then was) at 418…*"

At paragraphs 25 and 27 he then said:

> "*25. It is common ground that deciding whether a claimant could not with reasonable diligence have discovered the fraud it alleges involves two questions – (a) whether and if so when with reasonable diligence that claimant was put on notice of a need to investigate, which is referred to in the authorities as the " trigger " issue; and assuming that question is to be answered in favour of the defendant, (b) what a reasonably diligent investigation would have revealed and when – see OT Computers Limited (In Liquidation) v. Infineon Technologies AG and another [2021] EWCA Civ 501* per *Males LJ at paragraph 47...*

> *27. The effect of the authorities is that for the purpose of deciding whether the trigger stage has been passed, the court must decide whether and when the claimant if acting with reasonable diligence would have learned of something that merited investigation as to whether there has been a fraud, concealment or mistake*."

169. The next stage concerned when time started to run. In this respect Judge Pelling determined that he had to apply the 'Statement of Claim' test. He referred to this at paragraph 28 of his judgment in the following terms:

> "*I accept for present purposes that time should not start to run before such time as the fraud alleged could properly be pleaded. This approach is conventional … and is usually referred to in the authorities as the Statement of Claim test."*

170. Mr Ramsden submitted that the authorities demonstrate that there is a strong expectation that claimants will proactively investigate any suspicion of fraud or concealment. This can particularly be seen in *Libyan Investment Authority*.

171. Before looking at how these legal principles apply to the facts of this case, the parties are in agreement that I have to consider what Mr Ramsden described as an important threshold issue. That is, that the claimants must satisfy the court that fraud is an essential element of each of the pleaded causes of action. Otherwise, the exception provided by section 32 does not apply. In *McGee on Limitation Periods* (8th Edition) the learned authors, quoting authority, say at 20.009:

> "*An action is 'based on fraud' for this purpose when (and only when) fraud is an essential element of the claimant's claim.*"

172. It is agreed that the deceit claim falls within scope. There is however disagreement as to whether fraud is an essential element for unlawful interference and unlawful means conspiracy. The claimants in their written submissions rely on *Cunningham v Ellis & ors* [2018] EWHC 3188 (Comm) where Teare J held that section 32 applied to a claim for unlawful means conspiracy where fraudulent misrepresentation was alleged to be the unlawful means. At paragraph 95 he said:

> "*95. The action which the Claimant seeks to bring against the Defendants is for a conspiracy to injure by unlawful means. Fraudulent misrepresentation is relied upon in that regard. The question for the purposes of section 32(1)(a) is whether that cause of action is based upon fraud in the sense that fraud is an essential element of the cause of action. Given that the alleged fraudulent under-invoicing and retention of CID monies is an essential part of the claim (being the alleged unlawful means) it appears to me that fraud is an essential element of the cause of action relied upon by the Claimant*."

173. Mr Ramsden submitted that the decision in *Cunningham* was wrong. Although this was not developed in the course of argument by either side, in his written submissions Mr Ramsden submitted that the decision was obiter; was not the subject of detailed analysis by the learned judge; and was contrary to English Court of Appeal authority. *McGee* was also relied on for the proposition that section 32(1) is not intended to extend to "*a tort which can be committed without any fraud (though of course it may involve fraud)*". As I understand it, the submission is that section 32(1) never applies to a tort that could theoretically be pleaded without any allegation of fraud regardless of whether in the particular case fraud is pleaded. It seems to me that this is a point which is also deserving of full argument and analysis. It was only fleetingly referred to by Mr Ramsden in oral submissions and therefore I would hesitate before deciding at this stage that it has no application. I will proceed on the basis that section 32(1) can in principle apply to all the claimants' pleaded causes of action.

174. Turning to the facts, six points are made by Terra Raf. First that the claimants were selected as proxies to avoid the limitation bar and/or to avoid any defence on issue estoppel. This is in keeping with the overarching theme being asserted by the defendants regarding funding, direction and control.

175. Second, that the claimants' assertion that the Statis continued to control TNG through Terra Raf up until the appointment of the second claimant as TNG's bankruptcy manager is wrong because the ROK has been in control since 2010 via the corporate entities that took control of TNG's assets and records in 2010. Mr Ramsden relied on the ECT award findings

and on the evidence of AS and Mr Calancea. Mr Dzhazoyan in his second witness statement also sets out a summary of the documents produced by the ROK in the ECT arbitration. These include documents relating to the operation of pipelines, contracts for supply of oil to third parties and transportation agreements. I have read the references in the ECT Award provided by Mr Ramsden at the hearing. In particular, at paragraph 1534 the seizure of the assets of TNG is recorded by the Tribunal. There is however no reference to the seizure of *records*.

176. In his witness statement of the 29 March 2021, AS describes the takeover of TNG's assets. Most of what he describes concerns the seizure of equipment and plants. At paragraph 76, AS does refer to the ROK's authorities having taken control of TNG's "*books and bank accounts*" and at paragraph 83 AS says that the ROK took possession of all "*documents that were on site*."

177. Third, the ROK admitted in a disclosure statement dated the 8 June 2018 in the English enforcement proceedings that it had access to a large volume of documents. The principle feature of the English proceedings was that the ROK was asserting that the award should not be recognized on grounds of public policy, specifically, that the ECT award had been obtained by fraud. The documents disclosed in those proceedings therefore related at least in part to the alleged fraud. Mr Ramsden then further suggested that the documents must have been in the ROK's control since their take over in 2010.

178. Fourth, that the claimants' reliance on a letter from KPMG Audit LLC ("KPMG") dated the 21 August 2019 is wrong. KPMG were TNG and Tristan's auditors. On the 21 August 2019, KPMG notified the Stati parties that no further reliance should be placed on the audit reports issued by KPMG for the years ending 2007, 2008 and 2009. The reason for this is that KPMG say that they were misled by AS.

179. As part of their audit reports, KPMG included a note of related party transactions effected during the relevant period. The report covering the

year to the 31 December 2007, for example, does not show any transactions with Perkwood. The auditors relied on written representations made by AS, which representations included that a complete list of TNG's "*direct and indirect subsidiaries and associates, and other related parties*" was being set out. In 2015, the ROK informed KPMG that in court proceedings involving the ROK and Ascom, Ascom had represented that Perkwood was a related party to TNG. As a result, on the 15 February 2016, KPMG wrote to AS seeking explanations regarding Perkwood and the management fee that Perkwood had purportedly charged during the supply and construction of the LPG plant. There were then a number of exchanges between KPMG and AS/Ascom. Eventually, on the 21 August 2019, KPMG wrote to AS saying that as they had not received responses (in effect to a letter dated the 7 August 2019) that no further reliance should be placed on the audit reports. Ascom complained that they had not been given sufficient time to properly reply, but according to the claimants, they have not provided any substantive response since then anyway.

180. The claimants say that if the ROK's knowledge is relevant to an issue on limitation, then account has to be taken of the fact that it is alleged that the Statis misled TNG's auditors and that this only came to light when the auditors withdrew their audit opinions on the 19 August 2019.

181. Mr Ramsden confirmed that the Statis intend to sue KPMG over the issuing of the 19 August 2019 letter. Terra Raf alleges that KPMG issued the letter under pressure from the ROK and in any event in breach of Kazakh law. More fundamentally, Terra Raf says that reliance on the audit withdrawal letter is an irrelevance because attribution of knowledge predates its issue.

182. Fifth, it is wrong for the claimants to suggest that, as KazMunaiTeniz JSC was managing TNG and KPM's operations since 2010, any knowledge should not be attributed to the ROK. The practical reality is that the operations were taken over by the ROK. KazMunaiTeniz JSC is a subsidiary of KazMunaiGas, a Kazakh state company.

183. Sixth, it is wrong for the claimants to rely on the Clyde & Co documents, disclosed in the 2015 proceedings in the United States, as being instrumental. (In his sixth witness statement, Mr Carrington gives only two examples of the documents obtained from Clyde & Co in March 2015. The first a series of emails between employees of Standard Bank dating back to 2008 relating to a US$ 60M facility request by Tristan. The second, documents said to evidence GS's involvement in the New Notes transaction.) Whatever the significance of these documents may have been, Mr Ramsden pointed to how it had taken four years for the KPMG letter to issue.

184. It does not seem to me that I can shut the door on Terra Raf's submissions that the section 32 exception should not bite in light of the facts of the case. However, it is not possible to make a determination at this interlocutory stage without hearing evidence on the matter. As Mr Morgan submitted, the question whether the ROK (assuming for this purpose that the ROK and the claimants are inseparable) could have known prior to the 2015 disclosure that a claim could be brought is a matter of fact upon which there are serious triable issues.

The double actionability rule

185. Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("the Rome II Regulation") determines the law that applies to torts where the events gave rise to damage after the 11 January 2009. Prior to that date the applicable law is determined by reference to the common law in England before the enactment there of the Private International Law (Miscellaneous Provisions) Act 1995. With effect from the 1 May 1996, that Act abolished the common law (except in defamation cases) and the applicable law in England is the law of the country in which the events constituting the tort occurred. This English statute does not apply to Gibraltar and therefore the common law rules in existence before the 1 May 1996 in England apply to Gibraltar.

186. In *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC) the Privy Council confirmed that Rule 203 of *Dicey & Morris Conflict of Laws* 12th Edition (1993) represented the common law of England. This Rule provides:

> "*Rule 203 - (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and (b) actionable according to the law of the foreign country where it was done. (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties*."

In that case, the Privy Council was considering whether a defendant could rely on Saudi Arabian law (as the law where the conduct occurred) to establish liability in tort in Hong Kong (where the claim was being tried) when Hong Kong law did not recognize such liability.

187. As pleaded, the claimants' case is that the claims are actionable under both Gibraltar law and Kazakh law. At the without notice hearing of 2020, that is how they presented their case. However, the claimants now take a slightly nuanced position. They say that they must plead their claims as Gibraltar law torts and it is for the defendants to say and prove that the claims would not be actionable under the laws of Kazakhstan (or wherever else the defendants say the torts took place). Mr Morgan relied on *Boys v Chaplin* [1971] AC 356 where Lord Wilberforce said at page 386:

> "*While recognising the relevance for some purposes of the foreign law (an important point to which I shall return) the judgment [in Phillips v Eyre] states explicitly that it is basically the lex fori which is applied and enforced*."

(I would observe that applying and enforcing Gibraltar law is what would ultimately happen. However, the point is whether before getting to that stage a claimant has to prove that the claims would have been actionable under the law of the place where the wrong was said to have been committed.)

188. In any event, the iteration of *Dicey* Rule 203 which the Privy Council was actually considering in *Boys v Chaplin* was as follows:

> "*An act done in a foreign country is a tort and actionable as such in England, only if it is both*
>
> *(1) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and*
>
> *(2) not justifiable, according to the law of the foreign country where it was done*."

The second limb is in different terms to the rule which now applies and it may be that this resulted in a slightly different emphasis being given to actionability under the foreign law. Dicey Rule 203 is now clear. There has to be actionability under the foreign law.

189. At paragraphs 97 and 98 of the particulars of claim the claimants say:

> "*97. The law applicable to the Defendants' conduct is the common law and, accordingly, the 'double actionability' rule applies, whereby an act done in a foreign country is actionable as a tort in the Courts of Gibraltar if it is both (a) actionable according to the law of Gibraltar and (b) actionable according to the law of the foreign country in which it was done.*
>
> *98. Alternatively, the law applicable to the Defendants' conduct is the law of Kazakhstan as a common law exception to the double actionability rule. Further, or alternatively, the law of Kazakhstan is applicable to those events on or after the 11 January 2009 which gave rise to the damage which TNG suffered: see Article 4(2) of EC Regulation 864/2007 on the law applicable to non-contractual obligations."*

190. Indeed, in the 2020 judgment, I referred to the claimants' position in this way at paragraph 22:

> "*Evidence of the law of Kazakhstan is necessary because the claimants need to satisfy the court that the torts complained of are actionable both in Gibraltar and in Kazakhstan*."

191. At the without notice hearing, Mr Tom Leech QC, then representing the claimants, said the following:

> "*Our case is that whatever the position, Gibraltar law applies to each one of the four claims, so we have got to satisfy you that as a matter of Gibraltar law there is a serious issue to be tried. If you are satisfied on that, then in our case you go on and consider whether also we have made out a serious issue to be tried on the law of Kazakhstan, but if the defendants want to say some other law might apply, like the law of Moldova or Romania or New York, we do not have a duty to anticipate that, because we will at least have satisfied you on Gibraltar law… we cannot be required to second guess what defences they may take, unless it is clear on the facts that there is such an alternative*."

192. The position was made clear in *Metall and Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc & anor* [1990] 1 Q.B. 391. There the English Court of Appeal at page 446 said:

> "*In our judgment, in double locality cases our courts should first consider whether, by reference exclusively to English law, it can properly be said that a tort has been committed within the jurisdiction of our courts… [If] they find that the tort was in substance committed in this country, they can thenceforth wholly disregard the rule in Boys v. Chaplin [1971] A.C. 356; the fact that some of the relevant events occurred abroad will thenceforth have no bearing on the defendant's liability in tort.* ***On the other hand, if they find that the tort was in substance committed in some foreign country, they should apply the rule and impose liability in tort under English law, only if both (a) the relevant events would have given rise to liability in tort in English law if they had all taken place in England, and (b) the alleged tort would be actionable in the country where it was committed.***" [My emphasis.]

193. Mr Morgan however referred to a book by Richard Fentiman: *Foreign Law in English Courts – Pleading, Proof and Choice of Law* (1998). (Whilst not doubting the author's credentials, it was accepted that this was not a practitioner's textbook.) Mr Morgan relied on it to show that the matter far is from settled and clear. At page 102 Mr Fentiman states:

> "*The proposition that to plead actionability under the lex loci delicti is not required is supported by the editors of Dicey and Morris. It is also taken for granted in a substantial number of decisions."*

And at 103:

> "*But, notwithstanding the intuitive appeal of the contrary view, the idea that actionability under the lex loci delicti must be pleaded finds favour in the leading precedent book. Perhaps for this reason it appears to be common practice amongst some practitioners. In reality, however, it is hard to justify this view in terms either of authority or principle. Such authority as there is in support of the practice of pleading the lex loci delicti is insubstantial, although it has enjoyed inconclusive support in cases in which it has simply been taken for granted. It has been endorsed directly in one English decision, but the comments were made obiter and undue reliance should not be placed on them*…"

194. Mr Ramsden submitted that Richard Fentiman's pleading book is of no weight and that in any event the claimants' pleaded case is that both Kazakh law and Gibraltar law need to be satisfied. That the applicability of Kazakh law is critical and therefore the change of position by the claimants is to be seen with some scepticism. Terra Raf's submission is that the claims are not actionable under the laws of Kazakhstan and therefore they should be struck-out on this basis alone.

195. Taking what they say in their particulars of claim, the claimants' position must be that the court has to consider Gibraltar law and Kazakh law. They pin their colours firmly on the Kazakh law mast when referring to the flexible exception. Why then does the court need to wait for the defendants to identify that another foreign law is to be considered and does not apply? I conclude that I must consider both Gibraltar law and Kazakh law. The claims have to be actionable under both laws. Unfortunately, the upshot of the claimants' revised position on double actionability is that Mr Morgan made limited submissions on the applicability of Kazakh law.

196. I should pause to record that although the defendants contend that for the purposes of this application the court must consider actionability under Kazakh law as the second law under the double actionability rule, they reserve their right to argue that Moldovan, BVI or New York law may also be relevant if the matter progresses to a hearing.

197. As already noted, there is an exception to the double actionability rule which is commonly referred to as the 'flexible exception'. In

exceptional cases a court can apply either the law of the forum or the law of the place where the tort was committed if there is an overwhelming connection to either place - see *Dicey* paragraph [35-007] and *Red Sea Insurance*. Terra Raf says that the claims have connections to Moldova, the BVI and New York as well as to the ROK. (Its connection to Gibraltar is only Terra Raf's domicile.) There is therefore no overwhelming connection to the ROK. That said, Terra Raf's case is that if the claimants are right in that the flexible exception rule would steer the claims towards Kazakh law (their pleaded claim), then it says the claims have no realistic prospect of success under that law. Be that as it may, it seems to me that for the purposes of this application it must be right that the court consider whether the claims are actionable under both Gibraltar law and Kazakh law.

The applicable laws of Gibraltar

198. I will discuss certain aspects of actionability under Gibraltar law in the section on the merits of the claim. At this stage, a short reference to the legal ingredients of the causes of action will suffice.

199. *Clerk and Lindsell on Torts* 23rd Edition (2020) defines the tort of deceit as follows (paragraph 17-01):

> *"The tort involves a perfectly general principle: where a defendant makes a false representation, knowing it to be untrue, or being reckless as to whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable."*

200. As to causing loss by unlawful means, the authors of *Clerk & Lindsell* say the following at 23-78:

> "*In OBG Ltd v Allan [[2008] 1 AC 1] the House of Lords both confirmed the existence of a tort of hitherto uncertain ambit which consists of one person using unlawful means with the intention and effect of causing damage to another and clarified some aspects of the liability…The key conditions of liability for causing loss by unlawful means, at least in situations where three parties are involved, are: (i) an intention to cause loss to the claimant, (ii) use*

> *of 'unlawful means' against a third party; and (iii) interference with that third party's freedom to deal with the claimant*."

201. Unlawful means conspiracy, was defined by the English Court of Appeal in *Kuwait Oil Tanker CO SAK v Al-Bader* (No 3) [2000] 2 All ER (Comm) 271 at paragraph 108:

> "*A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so*."

The applicable laws of Kazakhstan

202. There are four Articles of the Kazakh Civil Code ("the KCC") which have been identified by the claimants as being relevant and providing actionability for their claims in Kazakhstan. These are Articles 94, 917, 932 and 953. The experts agree that liability under 932 and 953 depends wholly on liability being first established under 917. Articles 932 and 953 were therefore described as being 'parasitic' on Article 917. Mr Baimurat's opinion (which was relied on at the 2020 without notice hearing) was that the claims were actionable under these Articles of the KCC. Prof Zhanaidarov agrees, subject to some qualifications. Terra Raf however says that its expert evidence shows that the claimants would not in fact have a realistic prospect of success under Articles 94 or 917 and therefore there is no actionability under the laws of Kazakhstan.

Article 94 of the KCC

203. I set out below a translation of Article 94 of the KCC which has been taken from the expert report of Prof Maggs. The translation offered by Mr Baimurat and which I quote in the 2020 judgment differs, although it does not appear that the differences are in any way material.

> "*Article 94. Subsidiary Organization*
>
> *1. A subsidiary organization is a legal entity the preponderant part*

> *of the charter capital of which is formed by another legal entity (hereinafter – the parent organization), or if, in accordance with contracts concluded between them (or in another manner), the parent organization has the possibility to determine decisions taken by the given organization.*
>
> *2. A subsidiary organization shall not be responsible for the debts of its parent organization.*
>
> *A parent organization that by contract with a subsidiary organization (or in another manner) has the right to give the later instructions obligatory for it shall be responsible subsidiarily with the subsidiary organization with respect to transactions concluded by the later in performance of such instructions. In case of bankruptcy of a subsidiary organization due to the fault of the parent organization, the later shall bear subsidiary responsibility for its debts.*
>
> *3. Participants in the subsidiary organization shall have the right to demand compensation by the parent organization for losses to the subsidiary organization caused by the fault of the parent organization, unless otherwise provided by legislative acts.*
>
> *4. The particularities of the position of subsidiary organizations that are not determined by the present article shall be defined by legislative acts*."

204. The claimants' case is that Article 94 imposes a liability on Terra Raf (as a principal organization) for the debts and liabilities of TNG (its subsidiary organization). It also imposes a liability on Terra Raf towards TNG and its participants for wrongs that Terra Raf committed.

205. Prof Maggs, with whom Mr Vataev agrees, asserts that in order to establish liability under Article 94(2), a court would have to find three things: First that Terra Raf was TNG's parent organization. Second, that for Terra Raf to be liable for TNG's transactions, Terra Raf must have provided written instructions to TNG. (There is a dispute as to this requirement which I discuss in the section on the merits of the claim below at paragraph 261.) Third, that TNG's bankruptcy must have been caused by Terra Raf's fault. In relation to these requirements, a number of points are made on behalf of Terra Raf.

206. In so far as the question of providing instructions is concerned, this is not pleaded by the claimants and so the claim is bound to fail on that basis alone. Leaving aside the pleading point which could easily be cured by amendment if necessary, the parties' expert evidence is the following. For Terra Raf, Prof Maggs asserts that the right of a principal organization to give instructions applies only to rights under a contract for a transaction. For the claimants, Prof Zhanaidarov explains, at paragraphs 122 and 123 of his report dated the 28 July 2021, that to determine whether Terra Raf provided instructions to TNG it is necessary for the court to hear evidence as to the capacity in which AS signed the Tristan Trust Indenture and the guarantee of the loan notes on behalf of TNG. AS was named as "authorized agent" for TNG. He could have been appointed by TNG's director or by Terra Raf. Prof Zhanaidarov goes on to opine that these were binding instructions on behalf of Terra Raf because AS was clearly the controlling mind behind the transaction and his instructions flowed down a vertical structure through Terra Raf to TNG.

207. It seems to me that neither of the experts' respective positions should be summarily dismissed and the question of whether TNG could be said to have been acting on Terra Raf's instructions is a serious issue to be tried.

208. The second point under Article 94 is that it only applies to contractual claims and not to any claims for taxes. On this, the experts appear to be agreed. Strictly though, the claimants' claims are not claims for taxes.

209. Third, that under Article 94(2), only a creditor of TNG can sue Terra Raf directly. The claimants are themselves unable to do so and the claim therefore fails. In this regard, Prof Zhanaidarov says at paragraph 120 of his report:

> "*A principal organisation is not liable to a subsidiary under the provisions set out in the second sentence of Article 94(2) of the CC as noted above. Under the rules set out in the second sentence of Article 94(2) of the CC, principal organisation can be liable to a subsidiary's creditors as directly follows from the disposition of this Article*."

Prof Zhanaidarov is therefore agreeing, but only to the extent that the second sentence of Article 94(2) would not apply.

210. Fourth, that Article 94(2) requires that the assets of the bankrupt subsidiary are insufficient before the principal can be liable. It is submitted on behalf of Terra Raf that there is no evidence of this. This is not quite correct. There is evidence, relied on by Terra Raf itself in the context of TNG's alleged sham bankruptcy, that the State Bailiff found TNG to be insolvent as far back as 2013. Further, and more significantly, TNG is in bankruptcy. Whatever the defendants' position may be with regards to the legitimacy of those proceedings there is certainly evidence which, if accepted, would show that TNG is unable to pay its debts.

211. Fifth, Terra Raf cannot be sued under Article 94(3) because it is not one of a number of participants in TNG but is a sole shareholder. On this, the experts are disagreed. Prof Maggs says that as Terra Raf is the sole shareholder in TNG, Article 94(3) is of no application. At paragraph 29 of his first report he says:

> "*Paragraph 3 of Article 94 provides protection only to "participants" in the subsidiary organization … [It] protects persons such as minority shareholders of a subsidiary organization by giving them the right to bring suit against the parent of the organization … Terra Raf has at all relevant times been the sole participating member of TNG … It will be appreciated accordingly that the application of this rule to the present case, as suggested by Bolashak, would lead to a legal absurdity whereby Terra Raf would be suing itself qua sole shareholder in TNG. It follows that Paragraph 3 of Article 94 has no application in the present matter*."

212. Prof Zhanaidarov nevertheless asserts that under Article 94(3) TNG, through its bankruptcy manager, can sue Terra Raf.

213. Mr Ramsden submitted that the court could properly determine the point at this interlocutory juncture because the claimants' expert evidence on this does not make sense and does not properly address the point that the only participant in TNG is Terra Raf. I agree with Mr Ramsden. Article

94(3) cannot logically apply to this case and there is nothing in Prof Zhanaidarov's report which could meaningfully represent a contrary position.

214. The sixth point made under this Article is that a payment instruction or the receipt of monies is not a transaction under Article 94. As to this again there is disagreement between the experts but the court is asked to disregard the claimants' experts. It does not seem to me that I am able to do so. Prof Zhanaidarov at paragraph 108 of his report clearly states that a request to transfer funds in a bank account, or the receipt of money into an account, take place under a bank account contract. As such, they are transactions under Article 94(2). The disagreement between the experts cannot be summarily resolved.

215. Having carefully considered all of the above, the question whether the claims would be actionable under Article 94 of the KCC is a serious issue to be tried.

Article 917 of the KCC

216. The claimants rely on Article 917 as an alternative to Article 94. They say that this Article imposes liability for civil wrongs.

217. Article 917 according to the translation of Prof Maggs, states as follows:

> "*Article 917. General Bases of Liability for Causing Harm*
>
> *1. Harm (property and/or non-property) caused by unlawful acts (or inactions) to the property or non-property values and rights of citizens and legal person shall be subject to compensation in full by the person that caused the harm.*
>
> *Legislative acts may impose an obligation of compensation for harm on a person that is not the one who caused the harm and may also provide a higher measure of compensation.*
>
> *2. The one that caused the harm shall be freed from compensation for it if he shows that the harm was caused not by his fault, with the exception of cases provided by the present Code.*

> *3. Harm caused by lawful activities shall be subject to compensation in cases provided by the present Code and other lawful acts*."

218. It is said for Terra Raf that Article 917 is not engaged in this case because of a rule of Kazakh law prohibiting the "competition of claims". That is a rule that would prohibit the bringing of a tortious claim against a defendant where the harm said to have been caused by the defendant arises out of a contractual relationship with the claimant. The rule requires the claimant to sue under the contract. Terra Raf relied on its expert evidence to make good the point, but also relied on the English High Court case of *JSC BTA Bank v Ablyazov* [2013] EWHC 510 (Comm) where Teare J accepted that there was such a principle of Kazakh law even though he found it did not apply to the claims in that case. On competition of claims, the learned judge had this to say:

> *"221. The principle of the competition of claims is not to be found expressly stated in any code. However, the principle has been explained in these terms by a leading commentator on Kazakh law, Academician M.K.Suleimenov, himself quoting a Russian legal commentator, E.A.Sukhanov:*
>
> > *"…under our legislation there is not allowed the "competition of claims" that is widely applied in Anglo-American law. By "competition of claims" is generally meant the possibility of presenting several different claims for protection of one and the same interest, with the satisfaction of one of these claims preventing (extinguishing) the possibility of presenting others."*
>
> *222. Academician Suleimenov continued:*
>
> > *"In Kazakhstan's legislation, competition is allowed only by way of an exception in cases directly provided by legislative acts (for example in protection of the rights of consumers in cases of harm being caused to them by defects in goods sold to them).*
> > *In remaining cases competition of claims is not allowed. This means that if a dispute arises from contractual relations, a suit may be presented only with respect to contractual liability. One cannot bring a claim for non-contractual harm. One cannot use the rules governing obligations for compensation for harm."…*

> *224. I accept that the principle of competition of claims is part of the law of Kazakhstan. It appears to be implicitly recognised (as Professor Maggs said in evidence) by Article 947 of the Civil Code which expressly states that a claim may be brought under the legislation which provides consumers with a cause of action in respect of defective goods, irrespective of whether the consumer is in contractual relations with the supplier or not."*

219. As to the expert evidence being relied on by the parties, at paragraphs 24 and 25 of his second report dated the 27 October 2021, Prof Maggs explains the following:

> "*24 …where there is a contract between the parties, the court should apply the applicable general rule of the Civil Code and the rules of the Civil Code on contracts and not those on torts or unjust enrichment*."

> "*25 …where a claimant has a contractual claim against party A and a tort claim related to the same loss against party B, the claimant must bring a contract claim against party A and not a tort claim against party B*."

220. Mr Vataev, at paragraph 44 of his second report dated the 27 October 2021, defines the point as being:

> "*whether a party that brings a claim against a contractual counterparty may choose between a tortious and contractual claim."*

At paragraph 57, he then answers the question, saying:

> "*[As] a matter of Kazakhstan procedural law, alternative claims are allowed, at least in theory. However, as a matter of Kazakhstan substantive law, where a contractual claim is available, it will always prevail, while a claim in tort or unjust enrichment will fail."*

221. Terra Raf's case is therefore that the claimants could not bring tortious claims in the ROK arising from any contracts to which TNG was a party because of the rule against competition of claims. According to Mr Ramsden, Prof Zhanaidarov concedes the point when he says the following at paragraph 40 of his report:

> *"…Competing claims are permitted in Kazakh law. However, where there is an agreement between the parties regarding the extent of*

> *liability and the mechanisms for its application, preference is given to such agreements unless otherwise established by law."*

I am not certain that this amounts to a concession. Prof Zhanaidarov appears to be saying that there has to be more than just a contractual relationship. The contract must limit the parties' liability to each other. Indeed, Mr Morgan pointed to the preceding paragraph in Prof Zhanaidarov's report where he says:

> "*39. I disagree with the categorical nature of the statement in paragraph 36 of Peter Maggs' Expert Opinion that 'under the law of the Republic of Kazakhstan, a party to a contract cannot bring a tort claim for damages against another party to the contract'. Firstly, it does not follow directly from the rules of the laws of Kazakhstan that a party to a contract cannot bring a tort claim for damages against the other party to the contract. It is rather the inability in certain cases to bring a tort claim that arises from the principle of freedom of contract, in accordance with which the parties independently determine the terms of the contract within the frames of legislation in force. In other words, the parties agree on the extent of liability and the mechanisms for its implementation within the limits permitted by the mandatory rules of law. Therefore, if recovery in tort does not violate the rules of contract law (for example, as regards the extent of liability), then it is possible. Secondly, it should be borne in mind, as I have already noted above, that a tort claim may be brought outside the scope of a specific agreement*."

222. In relation to the question whether the satisfaction of a claim in contract excludes or exhausts the filing of a claim in tort, Prof Zhanaidarov says the following:

> *"49. The satisfaction of a claim under an agreement excludes (exhausts) the commencement of an action arising from an obligation to reimburse harm (action in tort), if the action is limited to a claim seeking reimbursement of property damage that arose from contractual relations and under the terms of the agreement. … We should draw attention that it is about the same interest, whilst in his Expert Opinion, Maggs emphasises something different - that the existence of a contractual relationship between two entities rules out a claim for damages on the basis of Article 917 of the CC. By way of illustration, lets use again the hypothetical situation set out above. Where a delivery of goods under a supply of goods contract is late,*

a penalty for late delivery of goods should be recovered under the contract. At the same time, during unloading the goods at the buyer's warehouse, the supplier caused physical damage to the warehouse building. In this case, we are dealing with two violated rights on the part of the buyer: the late delivery and the physical damage to the warehouse building. The two violated rights represent two different interests. Therefore, different claims should be filed – in the first case, a claim seeking recovery of a penalty, arising from the contract, and in the second case, a claim for damages ensuing from the obligation, arising from the infliction of harm."

223. Mr Morgan referred to *Kazakhstan Kagazy Plc & ors v Zhunus & ors* [2017] EWHC 3374 (Comm) where Picken J dealt with the same arguments on competition of claims under Kazakh law. At paragraphs 143 and 144 of his judgment, the learned judge said:

"*143. …with the exception of the law concerning limitation which I shall I address separately later, as far as I could detect the only area of disagreement between the Kazakh law experts is whether it is possible to bring concurrent claims in contract (including a claim under what is known as the JSC Law) and in tort.*

144. Professor Suleimenov's position on this issue is that it is not possible to bring concurrent claims since there is a rule which "is usually called a prohibition on the conflict of claims" and Kazakh law 'does not provide for the filing of alternative claims'. Mr Vataev disagreed with this, explaining that 'there is no prohibition against the competition of claims under Kazakhstan law in general and in relation to company officers' breaches of duty in particular', so that Kazakh law 'does not prohibit alternative claims within the same lawsuit, even if the satisfaction of one of the claims excuse satisfaction of the other claim'. Mr Vataev agreed in cross-examination that a Kazakh court would not hold a defendant liable in both contract (including a company director under the JSC law) and in tort or, for that matter, both in tort and in unjust enrichment. However, Mr Vataev was not in the relevant exchanges asked whether a Kazakh court would permit the bringing of alternative claims, something which in his reports Mr Vataev had made clear he considered is permissible. It seems to me that this distinction is important. In short, I consider that Mr Vataev's view is to be preferred since I struggle to see why it should not be open to a claimant under Kazakh law to pursue claims in the alternative, although I recognise that I approach the matter from an English law perspective which has no difficulty with the bringing of alternative claims. ***Ultimately, however, since the question is really a matter***

> ***of procedure rather than substantive law and since the Claimants have chosen to bring their claims before the Commercial Court rather than before a Kazakh court, it is a matter for this Court (as the lex fori) applying its own procedural law whether alternative claims should be permitted to be brought. Plainly, viewed as an English procedural matter, the answer must be in the affirmative***." [My emphasis.]

Mr Morgan then pointed to how pursuant to the English Civil Evidence Act 1972, which applies to Gibraltar by virtue of the English Law (Application) Act, Picken J's determination should be followed. Section 4(2) of the English Civil Evidence Act, provides that where any question of law of a country outside the United Kingdom has been determined in any proceedings before the High Court, then, subject to certain provisos, the law of that county shall be taken to be as determined, unless the contrary is proved.

224. Mr Ramsden submitted that Picken J had fallen into error in that case, probably it was said, as a result of the expert evidence available to him. Whereas Prof Maggs confirms that as a matter of procedure it is possible to plead alternative claims, the rule against competition of claims is a matter of substantive law. This, Mr Ramsden suggested, also appears to be conceded by Professor Zhanaidarov when at paragraph 41 of his report he says:

> "*In summary, it can be said that Kazakh legislation does not in principle restrict the right of claimants to file claims on any grounds. It is the prerogative of the court, based on a study of the case files, to decide to refuse to consider a claim on any given grounds*."

It does not appear to me that this amounts to such a concession.

225. Theoretically, the rule against competition of claims would not apply if the contracts were to be invalidated. However, Terra Raf says that this cannot be done by the bankruptcy manager in this case. I am unclear as to whether or not this is agreed by the claimants, but in any event, according to Prof Maggs time for the invalidation of a contract has passed. For that proposition he relies on Article 7 of the Kazakh Law on Rehabilitation and

Bankruptcy. According to Prof Maggs, this provides that there is no power to invalidate a transaction which took place more than three years before the filing of the bankruptcy proceedings.

226. As a final point on Article 917, Terra Raf says that the provision has no application if it was not at fault. As it is said that the claims have no merit, Article 917 does not apply. I do not propose to say any more on this. Clearly, if the claims have no merit then no questions of Kazakh law fall for determination regardless of whether under that law liability without fault can arise in certain circumstances.

227. At this stage, I simply cannot ignore Picken J's conclusion that it is a matter for the English/Gibraltar courts to allow the bringing of alternative claims as a question of these courts' procedure. Even if Mr Morgan is wrong and I do not have to religiously follow the conclusion in *Kazakhstan Kagazy,* there is a clear dispute between the experts in any event. I do not agree with Mr Ramsden that Prof Zhanaidarov is conceding the argument. It seems to me that there is a serious issue to be tried as to whether there would be actionability under Article 917 of the KCC.

Article 932 of the KCC

228. Article 932 of the KCC (as translated by Professor Maggs) states as follows:

> "*Article 932. Liability for Jointly Caused Harm*
> *Persons that have jointly caused harm shall be liable to the victim jointly and severally.*
> *On petition of the victim and in his interest, a court shall have the right to impose liability in parts upon those that have jointly caused harm*."

229. Article 932 therefore deals with joint and several liability. The parties' experts are agreed that it creates liability for persons that have jointly caused harm under Article 917 and does not stand alone. The experts' opinions can be succinctly set out by referring to Prof Zhanaidarov's report where at paragraph 72 he says:

> "*I agree with Professor Maggs' statement that "[a]rticle 932 creates joint liability under Article 932 for persons that have jointly caused harm actionable under Article 917. A claim under Article 932 thus must fail for any of the reasons that a claim under Article 917 would fail. In particular, joint and several liability only arises for persons that have actually contributed to the causing of harm*."

Article 953 of the KCC

230. Article 953 of the KCC (as translated by Professor Maggs) states as follows:

> "*Article 953. The Obligation to Return Unjust Enrichment*
> *1. A person (the recipient) that without bases provided by legislation or a transaction has received or economized property (was unjustly enriched) at the expense of another person (the victim) shall return to the latter the unjustly obtained*
> *2. The obligation provided by paragraph 1 of the present Article shall also arise if the basis under which the property was obtained or economized later ceased.*
> *3. The rules of the present chapter shall be applied regardless of whether the unjustified enrichment was the result of conduct of the party that obtained the property, the victim itself, or their persons or as the results of an event*."

231. This again applies only if liability is established under Articles 917 and/or 932.

The Rome II Regulation

232. The Rome II Regulation applies to torts committed after the 11 January 2009. The claimants accept that it does not therefore apply to the first three claims because the events that gave rise to the damage occurred before that date. In relation to the fourth claim, the claimants say that the Rome II Regulation may apply depending on what facts are found at any eventual trial as certain of the events which gave rise to the damages being claimed may have occurred after the coming into force of the Regulation. Articles 4(1) and (3) of the Regulation provide as follows:

> "*(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the*

> *damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*
>
> *…*
>
> *(3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question*."

233. Mr Ramsden limited himself to observing that the claimants have not articulated what part of Claim 4 would survive as a result of the application of the Rome II Regulation. In light of my conclusions on actionability under Kazakh law, there is no need to concern ourselves further with this regulation.

No reasonable grounds on the merits

234. Terra Raf asserts that, on the merits, there are no reasonable grounds for bringing any of the four claims and therefore they should be struck out pursuant to CPR 3.4(2)(a). In support of this submission it relies on the following:

i. That there was no active participation by Terra Raf in any of the matters being alleged by the claimants.

ii. That the claimants' specific claims in the tort of deceit are not recognized in law.

iii. That the claims in unlawful interference do not satisfy the '*dealing'* requirement.

iv. That the four claims lack any proper evidential or factual foundation and are "*speculative and, in many instances absurd*". In its written submissions, Terra Raf outlined a number of matters which it says supports the assertion. However, these were not addressed at the hearing, Mr Ramsden accepting that it was not the court's function

at this stage to conduct a mini trial of the facts. I have considered the matters raised but, in my judgment, these are matters of fact which are unsuited for resolution in a strike-out application. What the court has to consider is whether assuming the facts alleged by the claimants are true, their case is made out on the pleadings. As Lord Hope said in *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at paragraph 47:

> "*The question to which I now turn relates to the adequacy of the pleadings. This is the first of the two broad grounds on which the Bank say the claim should be struck out. The issue here is directed to the sufficiency of the particulars. It is whether, assuming the facts alleged to be true, a case has been made out in the pleadings for alleging misfeasance in public office by the Bank. If it has, then the question whether the pleading is supported by the evidence is normally left until trial."*

v. That under Kazakh law none of the claims have any real prospect of success. (In relation to this, Terra Raf relied on the submissions it made on the double actionability rule as set out above and my conclusions therefore apply in relation to this ground.)

235. In his reply, Mr Morgan took the court through an outline of the facts of the claims and submitted that in respect of all four there are serious issues to be tried on the facts. He urged the court not to fall into the trap of undertaking a comprehensive review of the relevant authorities and the facts. That this was a matter for trial once disclosure has taken place, evidence filed and so on. As a result Mr Morgan did not meaningfully address a number of the issues raised by Terra Raf such as whether the deceit claims were properly made out or whether the dealing requirement in the unlawful interference claims were met.

236. Nonetheless, I must consider the matters raised by Terra Raf and determine whether there is a serious issue to be tried. Before doing so, I will set out a slightly more detailed summary of the claims. (At the hearing, Mr Morgan referred to a number of the documents supporting the claims, but

quoting extensively from these would only add unnecessarily to an already lengthy judgment.)

Claim 1 – the Terra Raf Loan claim

237. In December 2006 and June 2007, Tristan raised US$ 420M by a private placement of loan notes. The purpose behind the raising of the funds was to fund TNG and KPM's operations in the Tolkyn and Borankol fields in Kazakhstan. Central to this part of the claim are the representations said to have been made in the Tristan Circular. At page 52, the following representations are made:

> "*Tristan Oil intends to use $76.0 million from the net proceeds of this Note Offering to make a loan to Terra Raf, at an interest rate of 0%. Terra Raf intends to use $70.0 million of the proceeds from this loan to repay $35.0 million of accounts payable to each of TNG and KPM with respect to sales of oil and condensate*."

238. The claimants say that on the 8 January 2007, Tristan transferred US$ 70M into Terra Raf's account but instead of paying US$ 35M to each of TNG and KPM, Terra Raf transferred the funds to other companies controlled by the Statis. Transactions supporting the claimants' contentions are contained in bank statements which have been produced.

239. In his first witness statement, Mr Dzhazoyan says that the monies were in fact applied by Terra Raf as per the representations made in the Tristan Circular. That a sum in excess of the US$ 35M was paid, in tranches, to KPM via a company named Stadoil Ltd and that a sum of just over US$ 32M was paid, also over the course of a number of transactions, to TNG via General Affinity Ltd ("General Affinity") - a company incorporated in England and said by the claimants to be controlled by the Statis. The claimants on the other hand say that the transactions referred to by Mr Dzhazoyan are not repayments of accounts payable but relate to sale of oil and other assets as can be seen from the transaction narratives and other

contemporaneous documents. It is therefore submitted that the evidence on the matter has to be tested at trial.

240. The claimants also say that these transactions were a breach of the Tristan Trust Indenture. Section 4.12 imposed a restriction not to make a payment in excess of US$ 10M to any affiliate unless certain requirements were met. One of the requirements was that a fairness opinion needed to be obtained from "*an accounting, appraisal or investment banking firm of national standing*." It is said that this was necessary in relation to the payment of US$ 70M to Terra Raf because the funds were not applied as per the representation in the Tristan Circular but were instead channelled to other affiliated companies.

Claim 2 – the Perkwood Payments claim

241. The payments made to Perkwood, which were ostensibly made for the purchase of equipment for the LPG plant, are said to have been made in breach of the Tristan Trust Indenture. The contract with the supplier of the equipment was entered into by Azalia LLC ("Azalia"), a company incorporated in Russia and controlled by AS. In turn, Azalia contracted with Perkwood, an English company which was controlled by the Statis. (The Statis held a power of attorney and a mandate over its bank account.)

242. The claimants say that between March 2006 and April 2009, TNG made payments totalling US$ 96M and €64M to Perkwood. Funds were then channelled into companies controlled by the Statis including Azalia and Terra Raf. Azalia paid the supplier of the equipment the sums of €27M and £17,160. It is alleged that the Statis misappropriated the remaining funds, part of which was employed in the construction of a castle in Moldova.

243. The payments made by TNG to Perkwood after the 20 December 2006 were said to have been made in breach of the Tristan Trust Indenture because they involved payments to an affiliate company and were less favourable than could have been obtained in a comparable transaction with

an unrelated entity. Further, that Tristan and AS made false representations in a series of letters to Tristan's auditors KPMG. The Tristan Trust Indenture required Tristan, TNG and KPM to provide representation letters to KPMG. An appendix to each letter sets out a list of related companies. In the copies of the letters that the claimants have, Perkwood is not included in the list, despite this company being controlled by AS.

244. Terra Raf did not make the false representations itself. However, as directors and shareholders of Terra Raf, the Statis could give instructions to TNG to enter into contracts and/or make payments to Perkwood and the other related companies.

245. Mr Morgan referred to two explanations that have been given by the defendants for the disparity in the payments by and to Perkwood, but it was submitted that neither of these were credible. The first explanation is that the difference was a management fee, but the claimants say that no provision for a management fee is contained in the contract between TNG and Perkwood. The other explanation is that there was a mark-up of the price paid for the LPG plant and this was a fee payable to Perkwood. The claimants point to how Perkwood filed 'dormant company' accounts throughout the relevant period at Companies House in England.

246. The claimants also have evidence, obtained by the ROK via a letter of request to the Russian authorities, that Azalia was a company that previously traded in food, beverages and tobacco but had been inactive since 2005. It had not entered into any contracts with Perkwood, TNG or Ascom. (Evidence was taken in Russia from Azalia's sole director on 23 August 2018.) Mr Morgan therefore submitted that the contracts were sham contracts which did not have to be set aside. They can simply be disregarded. For that proposition, he relied on *Autoclenz Ltd v Belcher* [2011] UKSC 41 where Lord Clarke at paragraph 23 said:

> "*I would accept the submission … that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement*."

Claim 3 – the Oil Revenues claim

247. The third claim concerns the sale of oil and gas to Vitol between 2006 and 2010. As has been explained above, the sale of the products was done via intermediary companies all owned by the Statis, including Terra Raf. Vitol made payments of approximately US$ 665M but only approximately US$ 437M was paid to TNG. It is said that Terra Raf retained the sum of US$ 112M from the amounts received from Vitol. (A related company by the name of Montvale Invest Ltd is said to have retained US$ 104M.) The agreement with Vitol provided that Vitol was to be responsible for the transportation and marketing costs of the oil. The claimants say that the retained sums cannot therefore be said to relate to any such costs.

248. The claimants assert that the contracts with the intermediaries were all sham contracts and that there was no justification for TNG to sell the oil and gas via intermediaries at such a low price. The claimants point to the fact that the Statis would have known exactly what Vitol were paying for the products.

249. In TNG's audited financial statements for the year ended 31 December 2007, TNG reported that the prices being paid on these transactions were market rates. If the facts alleged by the claimants are true, this would be a false statement. Selling TNG's assets at less than market value would be a breach of clause 4.1 of the Tristan Trust Indenture which inter alia reads:

> "*(a)… [TNG] will not consummate an Asset Sale unless (1) [TNG] receives consideration at the time of the Asset Sale at least equal to the Fair Market Value of the assets or Equity Interests issued or sold or otherwise disposed of….*"

250. The Tristan Trust Indenture was also allegedly breached in that the sales, which exceeded US$ 10M, were to affiliates and no officers' certificates or fairness opinions were obtained. It is also said that AS certified that Tristan had observed the covenants in the Tristan Trust Indenture for the relevant years. AS must have known that to be false as he

was controlling the transactions between TNG and the affiliates. These false certifications were made to Wells Fargo Bank N.A., the trustee under the Tristan Trust Indenture ("the Trustee").

251. It is alleged that Terra Raf formed part of this conspiracy to cause loss to TNG. This part of the claim includes the fact that Terra Raf received and allegedly misappropriated significant sums from the amounts paid by Vitol.

Claim 4 – the New Notes claim

252. In June 2009, having borrowed funds through Laren, the Statis purchased at a cost of US$ 30M a further issue of Tristan Loan Notes with a face value of US$ 111.11M. The notes were issued to Laren. The claimants allege that the Statis' intention was to sell TNG and KPM. Had the sale gone through, it would have triggered the repayment of the Tristan Loan Notes and this would have netted them a profit of approximately US$ 80M. In the event, the sale did not materialise but TNG was left with a liability to repay the amount of US$ 111M as it guaranteed the loan notes.

253. In the public announcement regarding the issue of the loan notes, Tristan fraudulently stated that Laren was owned by a charitable trust. Further, in a representation letter dated the 25 August 2009 to KPMG, AS falsely stated that Laren was not a related party to Tristan. AS in fact controlled both companies. These alleged fraudulent misrepresentations caused loss to TNG because it assumed the liability to repay the new loan notes. As an affiliate transaction, this also breached the Tristan Trust Indenture.

254. Mr Morgan accepted that Terra Raf's involvement in this claim was far less than in the first three claims. However, he submitted that Terra Raf was an essential party to this conspiracy because the instructions to TNG to enter into the guarantee arrangements could only have been made by AS or the Statis through Terra Raf. Furthermore, Terra Raf was directly involved

in the proposed sale of TNG which would have triggered the repayment of the loan notes by Tristan.

Lack of active participation by Terra Raf

255. In *Tsareva & ors v Ananyev & ors* [2019] EWHC 2414 (Comm) two Russian brothers owned two English companies which sat at the top of a structure of companies which held a majority stake in PSB (a bank in Russia). The claimants alleged that the bank had mis-sold them investment notes and proceedings were brought against the brothers in England using the English companies as anchor defendants. Andrew Baker J struck out the proceedings against the English companies having found that there was no proper basis for any claim that they had been a part of the wrongdoing. The following passages set out the considerations of the learned judge:

> *36… iii)… the English companies (and Menrela) were present at the material time in the ownership structure 'above' PSB only because an ownership structure involving such companies happened at that time to be, on tax advice, the Ananyevs' preferred ownership structure. The Ananyevs did not require them in order to be the ultimate beneficial owners of 'their' majority stake in PSB, that ownership having long pre-existed; and if at any time it had suited them, on advice, to structure their ownership differently they could no doubt have done so. Thus, the Ananyevs only needed to own the English companies (and Menrela) in order to be ultimate indirect majority owners of PSB so long as they chose to hold their majority interest in PSB, as an investment asset, in a holding structure that included those companies.*
>
> *37… if used by its owner in order to implement a conspiracy, a parent company will be liable; but on any view it must have been used, i.e. it must have done something, before any question of possible liability might arise. For the avoidance of doubt, agreeing is doing something….*
>
> *38. Thus, for there to be even a question of possible liability on the part of the English companies, they must have done something more than merely exist as corporate shareholders in Promsvyaz and thereby indirect majority owners of PSB. The claimants presented no evidence that the English companies did anything, however. The pleaded case is that the Ananyevs conceived and implemented a plan to raise funds to 'prop up' their businesses by getting PSB clients such as the claimants to give up funds deposited with PSB in return for the Notes, allegedly known to the Ananyevs to be worthless or at*

> *least highly likely to default. It is said that this necessarily involved the Ananyevs acting in combination with inter alia the English companies and Menrela. If this allegation of necessity were arguable, for present purposes that might overcome the claimants' inability to point by way of evidence to anything done by the English companies or Menrela. …. But the necessity alleged is not arguable. There is in truth no reason at all why the English companies or Menrela had to have any involvement of any kind in order for the Notes to be put together, marketed and sold as they were."*

256. It is said that this is precisely the case with the Statis' ownership of Terra Raf. It was a mere holding company which AS confirms at paragraph 37 of his first witness statement was in place as part of "*an efficient tax planning strategy."*

257. TNG's holding structure has changed over time. This is highlighted in the ECT Award. On the 17 May 2000, a 75% interest in TNG was acquired by Ascom, On the 13 March 2002, Ascom transferred its 75% shareholding in TNG to its subsidiary Gheso SA. Gheso acquired the remaining 25% in TNG on 3 May 2002. Finally, on the 12 May 2003, Gheso transferred its 100% interest to Terra Raf.

258. In *PJSC v Kolomoisky* (which has been referred to above in the context of abuse of EU law) the court also considered the question of whether the English companies had been mere conduits through which payments were being made. The Court of Appeal dismissed the particular ground of appeal but, Mr Ramsden submitted, the inference clearly is that if the English companies had been mere conduits, then no liability would have attached to them. That may be, but the court there was referring to mere conduits "*through whose accounts money passed fleetingly*" (paragraph 265). Further, the court referred to a passage of the judgment by Fancourt J who had discharged the orders made at the without notice hearing. At paragraph 95 of his judgment the learned judge had said:

> "*95. These facts themselves give rise to a strong inference that the English Defendants are only being sued in order to be able to bring a claim in London against the First and Second Defendants. What other reason could there be for bringing a claim against limited companies that, on any fair analysis of the evidence that the Bank*

> *had about the scheme, were mere conduits that have no independent business or purpose or any realisable assets?"*

There, the learned judge suggests that there is a difference between a company whose only involvement in an alleged fraud is that funds were fleetingly channelled through its accounts, and a company who channels funds and acts with an independent purpose and/or has realisable assets.

259. The defendants' evidence is that Terra Raf has no assets or accounts in Gibraltar. Indeed, that all payments referred to in the factual matrix of the claims were made in the ROK and/or in Latvia. That Terra Raf was a mere conduit for any payments made. Mr Ramsden submitted that, other than for tax reasons, it appears that Terra Raf did not matter to AS.

260. It seems to me that there is evidence that Terra Raf was more than a mere holding company or a conduit through which funds were transferred and this is also a serious issue which needs to be tried. Indeed, the question of Terra Raf having realisable assets is one which is far from settled. I would also observe the following. In relation to the Terra Raf Loan claim, it was represented that Terra Raf would receive funds and pay these over to TNG and KPM for a particular purpose. It is alleged that it did not do so. That denotes more than just Terra Raf being a holding company in the background which plays no part in the supposed fraudulent transaction. In the Perkwood Payments claim, Terra Raf was interposed to receive payments from Perkwood. Significant amounts of misappropriated funds were managed by Terra Raf. The same applies to the Oil Revenues claim. As conceded by the claimants, there does not appear to be any direct involvement by Terra Raf in the New Notes claim.

261. Mr Ramsden also submitted that it is wrong to assert that every alleged instruction or step taken by AS could only have been done in his capacity as director of Terra Raf. He referred to the expert evidence on Kazakh law relating to how a principal organization is able to give instructions to a subsidiary. Firstly, the evidence of Prof Maggs at paragraph 22 of his first report is the following:

> "*Under the second subparagraph of Paragraph 2 of Article 94, a parent organization is subsidiarily liable for the obligations of a subsidiary organization if the parent has the right under a contract or otherwise to give obligatory orders to the subsidiary and the obligations arose under a transaction concluded in the performance of such orders. Terra Raf, as the sole owner of a limited liability partnership had the right, following appropriate formalities, to give such an order...*"

262. For his part, Prof Zhanaidarov in his report says at paragraphs 99 and 102:

> "*99. A principal organization's binding instructions to its subsidiary may be issued in any form (both written and verbal). The issuance of such instructions is established by a court on the basis of evidence presented by the party to the proceedings justifying its claims. Kazakh law does not establish any restrictions as regards the form of such instructions and does not specify any mandatory formalities that would allow actions to be classified as falling within the scope of Article 94(2)(2) of the CC."*
>
> *"102. In terms of their consequences for the validity of a transaction concluded according to the will of the principal organization (as the sole participant) by a subsidiary, through a written order (for decisions falling within the competence of the general meeting) or a telephone call to the subsidiary's director (for decisions falling within the competence of the executive body), the form in which the instruction is conveyed is of no consequence. It does not matter in which form the instruction is issued by the principal organization and the decision is taken by the subsidiary (Article 94(2)(2) of the CC does not mention that it permits any form), the main thing is that a court, having evaluated the evidence produced, concludes that the subsidiary's actions were prompted by the principal organization's instruction. The binding nature of instructions is assessed by the court subjectively*."

263. Prof Zhanaidarov also observes that paragraph 29 of the particulars of claim (setting out the facts relating to the Tristran Trust Indenture) refers to AS executing the indenture on behalf of Tristan, KPM and TNG. The expert then says the following in his opinion:

> "*122. To answer this question, we would need to ascertain Anatolie Stati's powers in signing the Tristan Trust Indenture on behalf of*

> *TNG, KPM and Tristan, and in signing the guarantee for the Tristan notes on behalf of TNG and KPM. As follows from paragraph 29 of the Claim, he was named in these documents as the "Authorised Agent", who was a representative of TNG. TNG's representative could have been appointed by the director of TNG or the sole participant of TNG (Terra Raf), depending on how their competence is set out in TNG's constitutional documents. Terra Raf's owner is Anatolie Stati, who was named as the "Authorised Agent". It is for a court to determine whether Anatolie Stati's signature in the Tristan Trust Indenture and in the Guarantee for the notes constitutes an instruction or order for TNG, based on the case materials and the evidence produced.*
> *123. On the basis of the information provided to me, I would provisionally regard the signatures on behalf of TNG in the Tristan Trust Indenture and the Guarantees for the notes as a "binding instruction" to TNG according to the rule set out in the second sentence of Article 94(2) of the CC. I base this opinion on the premise of whose interests TNG was acting in when it authorised Anatolie Stati to sign these documents. For me, it is evident that this was the will of Anatolie Stati, as the owner of Terra Raf, passed on to Terra Raf, which in turn expressed its will in the instruction to sign the documents. It is this rigid and evident affiliation in the A.S.-Terra Raf-TNG vertical structure that, in my view, is what the second sentence of Article 94(2) of the CC calls "by other means", i.e., this is a situation where the principal organization has the right by other means (not under an agreement) to issue binding instructions to its subsidiary*."

264. On the basis of the extracts which have just been quoted, I consider that there is a serious issue to be tried as to whether or not TNG can be said to have acted on the basis of instructions received from Terra Raf.

Claimants' claim in deceit not recognized in law

265. The claimants advance their cases on unlawful means and unlawful means conspiracy on the basis that the 'unlawful means' in those two causes of action is the deceit (the first cause of action). At paragraph 61 of their written submissions the claimants explain this in the following way:

> *"C advances three Gibraltarian causes of action against Terra Raf (and the additional parties): (1) deceit or fraudulent misrepresentation; (2) causing loss by unlawful means; and (3) unlawful means conspiracy. C relies upon cause of action (1) as the unlawful means for the purpose of both causes of action (2) and (3),*

> *as well as a breach of the Tristan Trust Indenture by Tristan (which is governed by New York law).”*

Therefore, if the deceit claims fail, the other two causes of action also fail, leaving only the breach of contract claims.

266. Terra Raf attacks the deceit claims asserting that these are pleaded in unsustainable terms. There are four elements to the tort as follows. The defendant must have made a false representation. The defendant knows this to be false or is reckless as to whether it is true or false. The defendant intends that the claimant should act in reliance of the false representation. The claimant does so and suffers loss.

267. There are five types of core representations which are referred to in the particulars of claim. (1) The Tristan Circular representation where it was represented that US$ 70M was to be paid by Terra Raf to TNG and KPM in equal shares. (2) Representations made by Tristan in its reports for the period 1 January 2007 to 31 March 2009 relating to amounts invested (and to be invested) by TNG in the LPG plant project. (3) Representations by AS to KPMG regarding Tristan’s subsidiaries, associates and related parties. (4) A number of officer’s certificates for periods between the 1 January 2007 and the 30 June 2010 where AS made representations to the Trustee regarding Tristan’s performance of the Tristan Trust Indenture. (5) Representations made in TNG’s audited financial statements for the years ended 31 December 2007 and 31 December 2008 regarding the price of the oil and gas condensate that was sold to General Affinity. None of these representations were made to the claimants (to TNG). The representations were made to others. As Mr Carrington states in his first witness statement at paragraph 30:

> “*Although the Claimants rely on the fraudulent misrepresentations made by the Defendants, they made those representations to investors who purchased the Tristan Loan Notes (in the case of Claim 1) and to KPMG and to the Trustee (in the case of Claims 2 to 4). Nevertheless, TNG was the victim of the Defendants' fraud. Tristan was only ever a vehicle for the issue of the Tristan Loan Notes and did not own the underlying assets. TNG and KPM were the operating companies which owned the assets and guaranteed the*

> *loans. The Claimants contend that AS and Tristan are liable for the tort of deceit to TNG in respect of Claims 2 to 4 on the basis that KPMG, as auditors, were acting as the agents of TNG itself.*"

268. Mr Ramsden submitted that the claimants' reliance on the representations made to the investors and to KPMG is wrong. Firstly, that any claim in deceit arising from reports or other public documents made by KPMG would be limited to claims brought by the noteholders in respect of the Tristan Loan Notes and by the lenders in respect of the New Notes. Secondly, that the false representations said to have been made by the defendants were not intended for TNG nor were they received by TNG.

269. Mr Ramsden referred to *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm) and *Ras Al Khaimah Investment Authority v Azima* [2020] EWHC 1327 (Ch). In the first of these cases, the defendant had contracted with a commission agent for the supply of crude oil to the claimant. False representations were made as to the composition of the crude oil to the agent. As the defendant was aware that the representations would be passed on to the claimant and would be relied on, the defendants were found to be liable. At paragraph 39 of his judgment, Flaux J went on to add the following:

> "*139. Furthermore, it is clear that where the agent acting on behalf of the principal has relied on the fraudulent misrepresentation and the principal thereby suffers loss, the principal can recover in deceit even if the relevant representation is not actually passed to him. In this context, Mr Matthews QC relied upon the summary of the law in [6–031] of Chitty on Contracts (31st edition):*
>
> > *'There may be said to be three types of representees: first, persons to whom the representation is directly made and their principals; secondly, persons to whom the representor intended or expected the representation to be passed on [which as footnote 149 says includes third persons to whom the representee passes on the representation to the knowledge of the representor] and thirdly, members of a class at which the representation was directed.*'"

270. In *Ras Al Khaimah Investment Authority* the claimant had entered into a settlement agreement with a company owned by the defendant. It later transpired that it did so based on a fraudulent misrepresentation made to a

Mr Buchanan, the Chief Executive of an entity closely related to the claimant. The judge found that it was a reasonable inference that the claimant entered into the settlement agreement based on the representation made to Mr Buchanan and the claim was allowed.

271. These authorities are said by Mr Ramsden to support the proposition that for a claimant to rely on agency or attribution of a representation to a defendant, there has to be a "relational dynamic" with an intermediary that stands between the two parties. It is said that here there is none.

272. In my judgment, the question of whether the representations to the noteholders and to KPMG were representations which TNG can rely on in its deceit claims (and therefore in relation to its claims for unlawful interference and unlawful means conspiracy) is one on which there is a serious issue to be tried. On the claimants' case, the alleged false representations were being made knowing that TNG (and others) would rely on them to their detriment. For example, if representations were made to KPMG who were TNG's auditors, then those making the representations would have anticipated that TNG would rely on what was being said. In this context, it is important to separate the legal personalities. TNG is a distinct entity even if it was owned by the Statis at the material times.

Dealing requirement (in unlawful interference claims) is not satisfied

273. Terra Raf complains that the "dealing" requirement in the causing loss by unlawful means cause of action is not satisfied. As already noted in the section on Gibraltar law, there are three elements to the tort. An intention to cause loss to the claimant; the use of 'unlawful means' against a third party; and interference with that third party's freedom to deal with the claimant. (In this case, the *unlawful means* are the fraudulent representations said to have been made by the defendants.)

274. In *OBG Ltd v Allan* [2008] 1 AC 1 Lord Hoffmann provided a relevant example of the tort:

> "*49. In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which would have been actionable if the third party had suffered loss. Likewise, in National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd [1908] 1 Ch 335 the defendant intentionally caused loss to the plaintiff by fraudulently inducing a third party to act to the plaintiff's detriment. The fraud was unlawful means because it would have been actionable if the third party had suffered any loss, even though in the event it was the plaintiff who suffered. In this respect, procuring the actions of a third party by fraud (dolus) is obviously very similar to procuring them by intimidation (metus).*"

275. The third element, the interference with the third party's freedom to deal with the claimant, was recently considered by the UK Supreme Court in *Secretary of State for Health v Servier Laboratories Ltd & ors* [2021] UKSC 24. There, the defendants owned the European patent of a particular prescription drug and had obtained injunctions stopping a cheaper version from being sold in the United Kingdom. Subsequently, the defendants' patent was revoked and the claimant (in effect the National Health Service) brought proceedings including for the tort of causing loss by unlawful means. It was alleged that the defendants had deceived the European Patent Office (and the English courts) with the intention of profiting at the claimants' expense. At first instance, the judge struck out the unlawful means tort claim, holding that a necessary element of the tort was that the unlawful means had to have affected the third party's freedom to deal with the claimant and that this element was missing in the case. The defendants' deceit had not interfered with the freedom of the European Patent Office or the English courts to "deal" with the claimants. The Supreme Court dismissed the appeal confirming that a necessary element of the tort of causing loss by unlawful means was that the unlawful means used by the defendant against a third party should have affected the third party's freedom to deal with the claimant.

276. Mr Ramsden highlighted the following passages in the lead judgment of Lord Hamblen which he submitted required a strict approach to be taken on the dealing requirement:

> "*94. The dealing requirement performs the valuable function of delineating the degree of connection which is required between the unlawful means used and the damage suffered. This is particularly important in relation to a tort which permits recovery for pure economic loss and, moreover, by persons other than the immediate victim of the wrongful act.*
>
> *95. The dealing requirement also minimises the danger of there being indeterminate liability to a wide range of claimants. As Roth J pointed out in para 43 of his judgment, if the appellants' case is accepted the potential claimants in the present case would include the various UK health authorities, generic competitors, private medical insurers, foreign health authorities and indeed individuals who had to pay more for [the drug]*."

It was submitted that this dealing requirement was not met in any of the claimants' four claims.

277. In relation to the Terra Raf Loan claim, the claimants plead at paragraph 112 of the particulars of claim that Terra Raf and/or AS interfered with TNG's economic interests by making fraudulent misrepresentations in the Tristan Circular to potential noteholders and that Tristan also did so by breaching the covenants in the Tristan Trust Indenture. They then say that these interferences affected the freedom of action of both TNG and the noteholders. TNG was deprived of US$ 35M and became liable to repay this sum to the noteholders and the noteholders were deprived of the opportunity to police and/or enforce the Tristan Trust Indenture.

278. Mr Ramsden pointed to the claimants' assertion that TNG guaranteed the payment of monies due on the Tristan Loan notes by entering into a guarantee for the Tristan Trust Indenture ("the Tristan Note Guarantee"). It was submitted that TNG's liability to repay the noteholders arises from that contract. That the alleged fraudulent representation and the breach of the Tristan Trust Indenture are two different matters and it is the

Tristan Note Guarantee that affected TNG's freedom to deal with the noteholders. What the claimants are doing is repackaging the contractual liability that TNG has towards the noteholders under the Tristan Trust Indenture into this tortious claim. The reason it is said the claimants are doing so is because the contracts have exclusive jurisdiction clauses which would have steered the litigation towards other countries.

279. Mr Morgan did not address the submissions on the dealing requirement. Nonetheless, it seems to me that there is a serious issue to be tried as to whether the unlawful interference tort applies to the claimants' claims. Whilst the obligation on TNG to pay out may be contained in a contractual instrument, the tortious interference by the defendants affected the relationship between the holders of the Tristan Loan notes and TNG. No authority was referred to in support of the proposition that the claimants are prohibited from bringing a tortious claim in these circumstances.

280. The issue with the other three claims is much the same in principle.

Service out on the Statis and Tristan

281. The Statis and Tristan are not persons or entities resident in Gibraltar and the claimants needed the court's permission to serve the claim form on them out of the jurisdiction. I granted the claimants permission to do so by my order of the 27 November 2020. Having now decided that the court should decline jurisdiction against Terra Raf, it follows that the order granting the claimants permission to serve the Statis and Tristan must be set aside. If the court does not have jurisdiction to deal with the claims against Terra Raf as anchor defendant, it does not have jurisdiction against the Statis and Tristan – the foreign defendants.

282. Nevertheless, I shall proceed to consider the case against the Statis and Tristan as if the claims against Terra Raf were proceeding. Although I previously granted permission, the matter would have to be looked at afresh having had the benefit of adversarial argument.

283. On behalf of the Statis and Tristan, Mr Keith Azopardi KC made the following submissions. That there is no real prospect of success against GS; that the Statis and Tristan are not necessary or proper parties to the claims against Terra Raf; that Gibraltar is not the most appropriate forum for the trial of these claims; and that the orders I made on service on the 27 November 2020 should be set aside because there was material non-disclosure by the claimants at the *without notice* hearing.

284. As a general point, it was submitted that the claimants had concentrated on the factual elements of the claims at the hearing to distract the court from their weak case on jurisdiction. In a jurisdiction challenge, a claimant's case has to be strong on both the facts and on the basis for grounding jurisdiction. *Dicey, Morris & Collins on the Conflict of Laws* 15th Edition at 11-148, referring to the judgment of Lord Goff in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, states:

> "*A case particularly strong on the merits could not compensate for a weak case on forum conveniens; and a very strong connection with the English forum could not justify a weak case on the merits, if a stronger case would otherwise be required. The two elements are separate and distinct*."

285. CPR 6.36 provides that a claimant may obtain permission from the court to serve a claim form out of the jurisdiction if any of the grounds in paragraph 3.1 of Practice Direction 6B apply. In this case, the claimants rely on paragraph 3.1(3) of the Practice Direction. This states:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
> ….
> (3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance of this paragraph) and –
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

286. CPR 6.37 then sets out a number of requirements which the claimants must meet. In particular, 6.37(3) provides that the court will not give permission unless it is satisfied that [Gibraltar] is the proper place in which to bring the claim.

287. In *Altimo Holdings,* Lord Collins said the following at paragraph 71:

> "*On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438, 453–457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: eg Carvill America Inc v Camperdown UK Ltd [2005] 2 Lloyd's Rep 457, para 24. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547, 555–557, per Waller LJ affirmed [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries) [2007] 1 WLR 12, paras 26–28. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction*."

In effect therefore, once the court considers that there is a serious issue to be tried as between the claimants and Terra Raf there are three further stages to consider. First, whether there is a serious issue to be tried as against each of the Statis and Tristan. Second, whether there is a good arguable case that the Statis and Tristan are necessary and/or proper parties to the claims. Third, that in all the circumstances Gibraltar is clearly or distinctly the appropriate forum for the trial of the dispute.

288. The court is required to look at the claims against Terra Raf, as anchor defendant, separately to the foreign defendants. Is there a real prospect of success against Terra Raf if looking at that defendant in isolation? Of course, in this case a conspiracy between defendants is alleged. In *Tugushev v Orlov* [2019] EWHC 645 (Comm) Carr J considered the approach in cases involving alleged co-conspirators. At paragraph 253 she said:

> "*253. The final question is whether Mr Orlov is a necessary or proper party to Mr Tugushev's claim against Mr Petrik, which again I answer in the affirmative. The AA conspiracy claims against Mr Petrik and Mr Orlov are inextricably bound up, arise from the same facts and require a common inquiry. Mr Orlov and Mr Petrik are sued as joint and several tortfeasors for the same loss and it is appropriate to have one trial of the issues against them both. Ultimately, the question is answered by asking "supposing both parties had been within the jurisdiction would they both have been proper parties to the action?"...D2 will be a proper party if the claims against D1 and D2 involve one investigation." (see AK Investment at [87]). It is clear to me that, had both Mr Orlov and Mr Petrik been within the jurisdiction (as of course I have in fact found them to have been), they would both have been proper parties to a single investigation."*

Mr Morgan submitted that the claims against all four defendants here involve a single investigation. I agree that in principle they do.

289. The Statis and Tristan adopt Terra Raf's submissions on the merits of the claims against Terra Raf. I have already arrived at conclusions on these. As to real prospect of success on the claims against each of the Statis and Tristan, Mr Azopardi asked the court to give particular consideration to GS's position who only features in the conspiracy claims. It is said that GS was simply a passive shareholder whose role was limited to signing documents relating to Terra Raf; that the claims being made by the claimants are artificial; and that there is no real evidence against him.

290. Before the ECT Tribunal, the ROK is recorded as having made the following argument in relation to GS (at paragraph 728 of the ECT Award):

> "*Gabriel Stati - the pampered son of Anatolie Stati - is more a playboy than a businessman. No stranger to controversy, he was arrested following the April 2009 elections in Moldova amid allegations that he was involved in the organization and financing of civil unrest and attempting to overthrow the Moldovan government. The Moldovan authorities attempted to extradite Gabriel Stati from the Ukraine. There is little to suggest that he has had any active involvement in Claimants' alleged investments in Kazakhstan*."

That is not quite how the claimants put their case now. However, I have to look at what is being said here.

291. In his first witness statement dated the 29 March 2021, GS says the following:

> "*12. As explained by my father Anatolie Stati in his Witness Statement, in January 2000, he and I acquired 50% in the Terra Raf's authorised capital from previous owners of Terra Raf. The company itself was incorporated in March 1999. We became (and still remain) directors of Terra Raf in January 2000.*
>
> *13. Although I became a shareholder and director of Terra Raf, I never took an active part in investments and day-to-day management of the Stati Parties' business in Kazakhstan. My father was the only person who made all core decisions regarding the activities of Terra Raf, while I at all times was a passive shareholder and director of the company. My role was limited to signing certain corporate resolutions and documents for Terra Raf to the extent it was necessary from time to time.*
>
> *14. Except for Terra Raf, I do not run or own active business together with my father. I have certain interests in a number of Moldovan and foreign companies, which I own and manage separately from my father*."

292. Mr Azopardi submitted that it was simply not enough to bring a case on the basis that GS must have been involved because he was a director and shareholder of Terra Raf.

293. In reply, Mr Morgan pointed to how the Tristan Circular recited that AS owned TNG and KPM together with other members of his family and that the court can properly draw inferences from the documents as to GS's

involvement in the matters which have given rise to the claimants' claims. GS has powers of attorney in respect of companies that receive funds and has powers of attorney over Perkwood and General Affinity, both of which are said to have entered into sham contracts. Furthermore, in the Laren transaction he pledges his shares in Terra Raf in support of a guarantee which he entered into. I agree with the claimants that these matters show that there is a real issue to be tried on the question of whether GS had an active role in the alleged dealings which led to the claims being brought.

294. The next stage is that the claimants need to show that there is a good arguable case that the Statis and Tristan are necessary and/or proper parties to the claims against Terra Raf. The Statis and Tristan say that there is no good arguable case that they are, and therefore the conditions set out in CPR Practice Direction 6B para 3.1 are not met. That being so, the claimants should not have been granted permission to serve the proceedings upon them out of the jurisdiction.

295. In *Altimo Holdings*, Lord Collins said the following on proper party at paragraph 87:

> "… *the question whether D2 is a proper party is answered by asking: "supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": Massey v Heynes & Co 21 QBD 330 , 338, per Lord Esher MR. D2 will be a proper party if the claims against D1 and D2 involve one investigation: Massey v Heynes & Co , p 338, per Lindley LJ; applied in Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame) [2001] 1 Lloyd's Rep 203 , para 33 and in Carvill America Inc v Camperdown UK Ltd [2005] 2 Lloyd's Rep 457 , para 48, where Clarke LJ also used, or approved, in this connection the expressions "closely bound up" and "a common thread": at paras 46, 49.*"

296. In his written submissions, Mr Azopardi argued that the test is not met because Terra Raf would not have been joined into the proceedings as it was simply a holding company. I do not agree that this would necessarily have been the case. I have already observed that the allegations against Terra Raf involve more than just it being a passive company in the background. If

the claims are properly brought, then all four defendants would have been tried together. They would have been part of the same investigation and the facts relating to the different defendants are certainly closely bound up.

Is Gibraltar the proper place in which to bring the claims?

297. Mr Azopardi concentrated his oral submissions on the forum conveniens point. Is Gibraltar clearly or distinctly the proper place for the trial of the dispute?

298. In *Erste Group Bank AG v Red October* (which I have referred to above in the section on the Revenue Rule), the English Court of Appeal overturned the first instance decision of Flaux J to grant permission to the claimants for proceedings to be served out of the jurisdiction. Two of the defendants were Russian companies in an action alleging unlawful means conspiracy. The judge had taken a number of factors into account (described by the Court of Appeal as technical factors) including: that there was a possibility that two trials would have to take place, one in Russia and the other in England; that relevant contracts contained English law and jurisdiction clauses; and that the applicable law of the torts alleged was English law. In upholding the appeal, the court said the following at paragraphs 149 and 150:

> "*149. For all the above reasons we consider that the judge was clearly wrong in his evaluation that England was the appropriate forum for the determination of the Bank's claims against D3 and D5. In our view he approached the issue relating to forum by examining the technical factors urged on him by the Bank, rather than by standing back and asking the practical question where the fundamental focus of the litigation was to be found. As Lord Mance said in VTB Capital v Nutritek at paragraphs 14-16 and 51, the appropriate starting point for deciding on appropriate forum is the place of commission of the tort. In the present case that was manifestly Russia. There was no reason to depart from that starting point. We have no doubt that the clearly appropriate forum for the determination of this dispute was Russia and that, on any basis, the Bank failed to discharge the burden on it to establish that England was the appropriate forum.*
>
> *150. Further, in the exercise of his general discretion the judge did not give any consideration to the fact that in reality the only*

> *commercial driver behind the Bank's issue of proceedings in England against D1 and D2 was to enable a claim to be brought against D3 and D5 and to attempt to execute against their assets, whether in Russia or elsewhere. Whilst taken on its own this particular factor did not predicate that permission to serve out should be refused, it was, in the circumstances of this case, clearly an important factor that should have been taken into account."*

299. In *Traxys Europe SA v Sodemines Nigeria Limited & Basem El Ali* [2020] EWHC 2195 (Comm), the phrase "*center of gravity*" was used by Teare J. At paragraph 38 he said:

> *"38. In my judgment the Claimant has not established that England is the forum where the case may be more suitably tried in the interests of the parties and the ends of justice. Indeed, had I held that the burden lay on Mr. Ali to establish that Nigeria was the forum where the case may be more suitably tried in the interests of the parties and the ends of justice I would have held that he had done so. The claim against him lies in tort. The events which have given rise to those claims took place (in the main) in Nigeria. The witnesses upon whom the Claimant will rely to establish their claim against Mr. Ali are in Nigeria. In truth this is a Nigerian case, not an English case. The centre of gravity of the case is in Nigeria, not in England. To use the phrase used in one of the cases to which I was referred "the fundamental focus of the litigation" is on Nigeria, not England."*

300. Mr Azopardi identified eleven factors which he considered are relevant and submitted that these do not sufficiently meet the test that Gibraltar is clearly or distinctly the appropriate forum. (It is of course for the claimants to establish that Gibraltar is the most appropriate forum.) The identification of factors was referred to by Lord Briggs in *Vedanta* at paragraph 66:

> *"CPR 6.37(3) provides that: 'The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim.' [The phrase the proper place in which to bring the claim] is the latest of a series of attempts by English lawyers to label a long-standing concept. It has previously been labelled forum conveniens and appropriate forum, but the changes in language have more to do with the Civil Procedure Rules' requirement to abjure Latin, and to express procedural rules and concepts in plain English, than with any intention to change the underlying meaning in any way. The best known fleshed-out description of the concept is to be found in Lord*

> *Goff of Chieveley's famous speech in the Spiliada case, summarised much more recently by Lord Collins in the Altimo case at para 88 as follows:*
>
> > *"The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; …"*
>
> *That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."*

301. The first factor is the claimants' starting point that Terra Raf has to be sued in Gibraltar. The claimants say that they must sue Terra Raf in Gibraltar because of Article 4(1) of the Brussels Recast Regulation and that this is a weighty factor for the court to consider what the appropriate forum is in relation to all defendants. Mr Azopardi however submitted that the judgment in *Vedanta v Lungowe* confirms that the anchor defendant's domicile in Gibraltar is only a relevant factor and is not determinative. (There the Supreme Court held that the grounding of jurisdiction against the anchor defendant, and the consequent risk of irreconcilable judgments if the foreign defendant were to be tried elsewhere, was not a trump card preventing the court from declining jurisdiction against the foreign defendant. It is fair to say that in that case the anchor defendant was agreeing to submit to the foreign jurisdiction.)

302. The second factor is Terra Raf's place of incorporation and role in managing TNG. The claimants rely on the fact that the Statis chose to control and manage TNG via a company registered in Gibraltar and became directors of it. It is the Statis' case that they did so only for tax purposes and that this provides an answer to this factor. Further, it is said that in any event Terra Raf's place of incorporation is a weak connecting factor.

303. *Livingston Properties Equities Inc v JSC MMC Eurochem* [2020] UKPC 31 concerned proceedings brought in the British Virgin Islands against a number of defendants, including two Russian nationals, for the recovery of bribes that had been paid for the benefit of the Russians. The Privy Council agreed with the first instance judge who had dismissed an application by the defendants for a stay of the proceedings which had been made on the ground that Russia was a more convenient forum. Although the appeal was decided on the basis that there was no alternative forum and on the issue of proper law, in her analysis, Lady Arden referred to the judge having given weight to the fact that a number of defendants were entities incorporated in the BVI. The learned judge said at paragraph 39:

> "*the judge attached weight to their incorporation in the BVI which was unrealistic: the mere fact that an overseas person incorporates a company in the BVI does not of itself mean that he submits to the jurisdiction of the BVI courts*."

I agree with Mr Azopardi that the fact that the Statis chose to incorporate Terra Raf in Gibraltar is not important. As Lady Arden made clear, this does not mean that they intended to submit to the jurisdiction of the courts of Gibraltar.

304. Mr Azopardi in any event pointed to how the particulars of claim refer to fourteen different companies. All bar Terra Raf and a company named Jepson Corporation Ltd are incorporated in jurisdictions other than Gibraltar. In particular, Ascom which is the main company in the group, is a Moldovan company. It was a principal party in the ECT award but has been ignored in these proceedings. KPM, which is owned by Ascom, has also been ignored. The arrangements and dealings by AS concerned KPM as much as they concerned TNG. It was suggested by Mr Azopardi that the reason why KPM was being ignored was that it would have presented Mr Kubygul with a jurisdictional problem in that there could be little doubt that such proceedings would have had to be instituted in Moldova. It seems to me that there has to be some truth in that suggestion.

305. The third factor is the location of witnesses, the need for interpreters, and the translation of documents being relied on by the parties. The particulars of claim refer to eighteen individuals. None of these are based in Gibraltar or can reasonably be expected to give evidence about any facts said to have taken place in Gibraltar. There is no apparent Gibraltar link to these individuals save for the Statis' links to Terra Raf. I agree that this is relevant.

306. On the other hand, the claimants point to how if the claims were to be tried in Moldova, all documents would need to be translated into Romanian. This would be an enormous task which would be avoided if the claims proceeded in Gibraltar as most documents are in English or have already been translated into English from the Russian language. I acknowledge that proceeding in Moldova may cause the claimants this particular difficulty, but it does not seem to me that this can be anything other than a minor consideration for this court.

307. The fourth factor is the extent and complexity of issues of foreign law which the court will be expected to deal with. This judgment has already delved into matters of Kazakh law. There may also be arguments on Moldovan law, BVI law and/or New York law. It is therefore correct that necessarily the court will need to consider questions of foreign law. It is already apparent that there is conflicting expert evidence on Kazakh law.

308. In *VTB Capital plc v Nutriek International Corp* [2013] 2 AC 337 Lord Mance pointed to how it was preferable to try claims in the courts whose law applied. At paragraph 46 he said:

> *"The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum."*

309. In this case, the relevance of foreign law is principally on the question of double actionability. This factor may therefore be less important than it otherwise might have been.

310. The Statis place of residence is the next factor. Mr Azopardi submitted that this was a strong factor against Gibraltar. The main natural persons concerned in the proceedings are resident in Moldova. Mr Azopardi referred to *Lekoil Ltd v Akinyanmi* [2022] EWHC 282 (Ch) where HHJ Hodge KC referred to the presumption that a defendant is to be sued in the place where he resides and where "*any judgment will fall to be enforced*".

311. The sixth factor is the fact that there are no Gibraltar company law, public law or regulatory issues being relied on by the claimants in these claims. There will however be a number of legal and regulatory issues in other jurisdictions such as Kazakhstan, Moldova and the BVI.

312. For the claimants it was however said that there was a public interest in determining here whether a Gibraltar company had allegedly been a party to a fraud and where monies had been laundered through its accounts.

313. The next factor is the location of the tort and the location of the place where the damage is said to have been suffered. It is submitted that this is an important factor.

314. It is accepted that Gibraltar was neither the place where any torts were committed nor the place where TNG suffered any damage. In *VTB v Nutriek* Lord Mance made the following observation with regards to the significance of the place where the tort was committed in considering the appropriate forum:

> "*51. The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself,*

> *when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors*."

315. Mr Azopardi's assessment, as set out in paragraph 52 of the Statis and Tristan's written submissions, is that (on the claimants' own case) the torts alleged took place in New York, Moldova, the BVI and Kazakhstan. It appears to me that this is indeed what the claimants allege. Mr Azopardi also pointed to the five types of core representations that are set out in the particulars of claim and which I refer to at paragraph 267 above. None of these were either made or received in Gibraltar.

316. The eighth factor is the complexity of the proceedings and burden on the Gibraltar courts in circumstances where the connection to this jurisdiction is otherwise weak. Mr Azopardi referred to *Mujur Bakat Sdn Bhd v Uni Asia General Insurance Berhad* [2011] EWHC 643 (Comm) where Eder J said the following:

> *"…in considering whether or not England is the most appropriate forum, it is necessary to have in mind the overall shape of any trial and, in particular what are, or what are at least likely to be, the issues between the parties and which will ultimately be required to be determined at any trial."*

317. I accept that "*the overall shape*" of the trial, in terms of witnesses, language, issues of foreign law and so on, is certainly relevant. In so far as it may be suggested that the proceedings would be a burden on the Gibraltar courts, and that this is another factor to add to the mix, I would disagree. If Gibraltar is the most appropriate forum then, subject to all the other considerations being advanced on jurisdiction, abuse etc., the Gibraltar courts will have to deal with the claims.

318. The ninth factor is that none of the underlying contracts in the claims provide that they are to be determined in accordance with Gibraltar law or by the courts of Gibraltar. The particulars of claim refer to sixteen different contracts. None of them have Gibraltar addresses or provide that notices arising from the performance of the contracts are to be given in Gibraltar.

There are seven bank accounts referred to, all of which are said to be in Latvia.

319. Mr Azopardi pointed to how at the *ex parte* hearing the claimants had asserted that the Tristan Trust Indenture was an essential part of their case. (If not explicitly stated at the *inter partes* hearing, it is clearly a correct proposition.) That indenture is governed by New York law and is subject to New York-seated arbitration. Mr Azopardi submitted that this was a strong connecting factor to New York.

320. The tenth factor is the risk of conflicting judgments. It is the defendants' case that the arbitration enforcement proceedings being heard in Belgium, Luxembourg, the Netherlands and Sweden, touch upon substantially the same fraud allegations being made by the claimants in this case. Mr Azopardi relied on paragraph 84 of Lord Briggs judgment in *Vedanta v Lungowe* where the learned judge confirmed that the risk of irreconcilable judgments is a relevant factor but is not a "*trump card*".

321. It seems to me that it would be a mockery in this case to consider the risk of irreconcilable judgments to be a weighty factor. When one includes the ROK as an actual party there is extensive litigation in many different countries and so this eventuality may come to pass irrespective of whether or not this court retains jurisdiction in relation to these claimants' claims.

322. As a final consideration, Mr Azopardi referred to the fact that the court had not been properly addressed on whether a Gibraltar judgment could be easily enforced in Moldova (where the Statis reside) or in the BVI (the place of incorporation of Tristan). It was submitted that the ease of enforcement of a Gibraltar judgment in the other jurisdictions in which enforcement is likely to take place is a relevant factor. Mr Morgan however said that it was clear that the judgment could be enforced against Terra Raf here in Gibraltar. A judgment could also be enforced elsewhere in "the common law world".

323. So, how should the court determine whether Gibraltar is the proper place for the trial of these claims? In *Cherney v Deripaska*, the English Court of Appeal distinguished between natural forum and appropriate forum. Whilst there may be a natural forum for an action, there may also be a different more appropriate forum. There, Waller LJ said the following at paragraph 20:

> *"I accept that there are instances in the authorities when the word "appropriate" and the word "natural" in relation to forum are used interchangeably… But in the The Spiliada Lord Goff had made clear that it would be better to distinguish between "natural", i.e. the forum with which the case had the most natural connection, and "appropriate", which may be different, to meet the ends of justice [see 478A quoted above]. In my view the summary in the notes on page 22 of the White Book under CPR 6.37(4) Forum Conveniens summarises the position correctly:-*
>
> *"Subject to the differences set out below, the criteria that govern the application of the principle of forum conveniens where permission is sought to serve out of the jurisdiction are the same as those that govern the application of the principle of forum non conveniens where a stay is sought in respect of proceedings started within the jurisdiction. Those criteria are set out in The Spiliada , above:*
>
> *(i) The burden is upon the claimant to persuade the court that England is clearly the appropriate forum for the trial of the action.*
>
> *(ii) The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice.*
>
> *(iii) One must consider first what is the "natural forum"; namely that with which the action has the most real and substantial connection. Connecting factors will include not only factors concerning convenience and expense (such as the availability of witnesses), but also factors such as the law governing the relevant transaction and the places where the parties reside and respectively carry on business.*
>
> *(iv) In considering where the case can be tried most "suitably for the interests of all the parties and for the ends of justice" ordinary English procedural advantages such as a power to award interest, are normally irrelevant as are more generous English limitation periods where the claimant has failed to act prudently in respect of a shorter limitation period elsewhere.*
>
> *(v) If the court concludes at that stage that there is another forum which is apparently as suitable or more suitable than England, it*

> *will normally refuse permission unless there are circumstances by reason of which justice requires that permission should nevertheless be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the claimant will not obtain justice in the foreign jurisdiction. Other factors include the absence of legal aid or the ability to obtain contribution in the foreign jurisdiction.*
>
> *(vi) Where a party seeks to establish the existence of a matter that will assist him in persuading the court to exercise its discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it."*

324. Evidently, Gibraltar is not the place where any of the torts are said to have been committed. There is no agreement by which the parties contracted to submit to this court's jurisdiction. Gibraltar is not the Statis place of residence nor is Tristan incorporated here. The presumption is that defendants should be sued in their respective countries of residence. None of the witnesses are in Gibraltar nor do they have any meaningful link to Gibraltar. Although Terra Raf has to be sued in Gibraltar, this is a factor which has to be looked at together with all others. Considering all of this, it is clear that Gibraltar is not the natural forum for the trial of the claims. The centre of gravity is elsewhere.

325. The Statis and Tristan say that the claims' links to Moldova, the BVI and Kazakhstan are stronger than Gibraltar. In particular, it was submitted that Moldova would be the proper place for the trial of this action. That argument was advanced notwithstanding that there is no burden on the defendants to show that Moldova or any other place would be more appropriate as a forum than Gibraltar. The burden is on the claimants.

326. The claimants say that but for the Article 4(1) mandate, the natural forum for the claims would have been Kazakhstan. Indeed, they would happily have the claims heard in Kazakhstan if the defendants agree to submit to that jurisdiction. The defendants will not agree to that. They say that they will not be afforded a fair hearing in that country. That being the defendants' position, it must be right that we discard Kazakhstan as an

alternative forum. It would be a nonsense to find that the claims could or should be tried in Kazakhstan and not Gibraltar when the defendants themselves are saying that they will not go there. As was said in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460), the appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice.

327. In the same way that the defendants are wary of whether they would be fairly tried in Kazakhstan, the claimants are similarly concerned about unfavourable treatment in Moldova. One of the claimants' allegations is that the Statis used monies appropriated from TNG to bribe politicians in Moldova and elsewhere. It is therefore said that it is not a 'neutral' forum. There is certainly evidence that payments have been made to a person said to be a Moldovan politician and his family. However, it does not seem to me that evidence of payment of alleged bribes to one politician and his family would indicate that the Statis would receive favourable treatment from the courts in Moldova. As Lord Collins said in *Altimo Holdings*:

> *"97. Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required."*

I would in any event observe that the claimants also allege that bribes were paid to politicians in Kazakhstan, yet they are not concerned with having the claims tried in that country. Furthermore, it is a part of the claimants' case that the authorities in Moldova have assisted the authorities in the ROK by providing evidence in response to letters of request.

328. The Statis and Tristan point to seven factors which they say show that Moldova is the appropriate forum. Firstly, it is the Statis place of residence and therefore this is where any conspiracy (which they deny) would logically have been concocted. Secondly, the Statis were the directors of Terra Raf and Tristan. The executive/administrative bodies of these two companies are therefore also located in Moldova. Thirdly, Ascom (which is the Statis' main holding company) is a Moldovan company. Fourthly, it will

be easier for the Moldovan courts to interpret and apply Kazakh law. Fifthly, a number of key witnesses will be located in Moldova. Sixthly, the claimants are wrong to suggest that they will not obtain substantial justice in Moldova. The contrary is in fact true as evidenced by the assistance already rendered to the ROK's authorities by the authorities in Moldova. Seventh, the Statis have offered undertakings that they and Tristan will submit to the jurisdiction of the courts of Moldova. (As concerns the Statis personally this is not strictly necessary because they are domiciled in Moldova and it is agreed that they can be sued there as of right if they have assets in the country.)

329. The claimants say that there are doubts as to whether the courts in Moldova would try these claims or accept jurisdiction against Terra Raf and/or Tristan. It is not therefore an appropriate forum. They rely on the evidence of Mr Iurkovski. The Statis and Tristan challenge Mr Iurkovski's evidence and rely on the evidence of Mr Pisica. Mr Pisica does not however give independent expert evidence (as he himself acknowledges). He is Ascom's legal counsel and as such has close links to the defendants.

330. Would the Moldovan courts be better placed to interpret and apply Kazakh law? In his report dated the 28 July 2021, Mr Iurkovski explains that in the early 1990's Moldova's legislation did develop under common standards with the former Soviet states. However, since 2002, a new Moldovan Civil Code was enacted drawing from legislation in Canada, Germany and other Western countries. Mr Iurkovski says that the effect of this is that the Moldovan and Kazakh legal systems are now markedly different. There is therefore no advantage in having the claims tried in Moldova as the courts there will not necessarily be better placed to interpret and apply Kazakh law. Mr Pisica does not agree and says that there are many similarities between the countries' procedural codes, and that the Moldovan Civil Code also drew from the doctrine and law of the legal systems of the Commonwealth of Independent States and of Russia. (Mr Iurkovski agrees that the Moldovan Civil Code drew from aspects of the Russian Code.) It seems to me that I must attach more weight to the opinion of Mr Iurkovski.

He is an independent expert. I therefore accept that the legal systems are different. That said, it is obvious that the Moldovan legal system will be more similar to the Kazakh legal system than it would be to that of Gibraltar. Therefore, the Moldovan courts must necessarily have an advantage over the courts in Gibraltar.

331. As to the offer of undertakings by the Statis and Tristan, Mr Iurkovski says that there is no concept of unilateral submission to the jurisdiction of the Moldovan courts. He therefore doubts that the courts would accept such an undertaking from a defendant. Mr Pisica is of the contrary view.

332. More importantly, Mr Iurkovski makes the following points. First, that the Moldovan courts will often decline to try complex cases with a foreign element. That complex claims like this one are unknown to the Moldovan Courts and they would be likely to reject the proceedings on procedural grounds. Mr Pisica complains that Mr Iurkovski does not cite examples whereas he can refer to instances where the courts in Moldova have actually tried complex cases. Mr Iurkovski says the following at paragraphs 33 and 71 of his report:

> "*33. Often, when facing complex claims with a foreign element, the Courts of Moldova will return (restituie) the claim for formal reasons (e.g. alleged failure of the claimant to prove the identity of the signatory of the claim, failure to prove the powers of the person empowering the attorneys and/or signing the claim, etc.). In practice, this leads to a lengthy process, while the claimant risks the claim becoming time barred under the statute of limitation…*
>
> *71 Complex claims (involving e.g. complex multi-jurisdictional cases, participants and substantive applicable laws and legal concepts unfamiliar to Moldovan legislation) that would be similar to the claims from the Particulars of Claims are unknown to Moldovan court practice. When receiving a complex matter, I would expect Moldovan judges to use all possible means to return (restituie) a request for formal reasons (capacity of the director to sign the statement of claims was not duly attested, signature on the attorney mandate is applied by an unknown individual, original payment order of the state (stamp) tax was not enclosed, there is no stamp of the claimant on document x, etc.) and as many times as possible. A mere exemplification on how it may happen in practice*

> *is presented as a link in the footnote 19 above. Most importantly, such returns will neither stop nor suspend the statute of limitation which will continue to run in relation to the Claimants' claim*."

Mr Iurkovski is saying that the courts in Moldova will try to find any excuse to avoid dealing with complex cases and that a case such as this one has not been tried in those courts. It does not seem to me that this is sufficient to discard Moldova as a forum for the trial of these claims.

333. Secondly, Mr Iurkovski states that the Moldovan courts will only accept jurisdiction for any unjust enrichment claim if the unjust enrichment occurred in Moldova. At paragraph 45 of his first report he says:

> "*45. In relation to all Defendants, it should be noted, a Court of Moldova may accept jurisdiction over the matter only if the claim arises out of an unjust enrichment that occurred in Moldova (Article 460(1)(g) of the Code of Civil Procedure of Moldova), or in case the claim is formalized (constructed) as e.g. tort or wrong claim against defendants seated or with goods in Moldova (see Point 7.3.2.3 below). In the absence of unjust enrichment occurring in Moldova (or if the claims is not presented as a tort or wrong as explained in Point 7.3.2.3 below), a Court of Moldova should normally decline jurisdiction over the Defendants*."

334. This is in effect related to the third point, which is that the Moldovan courts will not try any claims in tort against Terra Raf or Tristan as they are not domiciled in Moldova nor do they have any assets there. At paragraph 46 Mr Iurkovski says:

> "*46. After reviewing the Particulars of Claim and other materials presented to me for the purpose of this Expert Opinion, I understand that neither Terra Raf, nor Tristan have had or currently have their: (i) seat, agencies (subdivisions) (agenție), branches (sucursală), representative offices (reprezentanță) in Moldova; or (ii) assets (goods) in Moldova. It is therefore my conclusion that a claim in relation to a tort or wrong addressed to these Defendants will fall outside the jurisdiction of the Moldovan courts (in accordance with Article 460 of the Code of Civil Procedure of Moldova).*"

335. Mr Pisica says that this is not correct and that the Moldovan courts would accept jurisdiction because the Statis control these companies and

they are domiciled in Moldova. Indeed, Mr Iurkovski appears to agree when in the following paragraph he says:

> "*47. If the administration bodies (organele de administrare) of Terra Raf and Tristan are located in Moldova, a Court of Moldova may accept jurisdiction (pursuant to Article 460(1)(a) of the Code of Civil Procedure), but subject to the claimant's burden of proof on the location of such administrative bodies in Moldova. Given the formal approach adopted by the Moldovan courts and the lack of relevant court practice in complex matters involving foreign companies/ foreign elements (including on determination of location of the administration bodies of foreign entities), I anticipate that such burden of proof would be impossible or close to impossible for the Claimants to satisfy.*"

In a footnote to paragraph 47, Mr Iurkovski makes the following comment:

> "*Code of Civil Procedure of Moldova does not provide for a definition to this end. While taking regard to Moldovan legislation on limited-liability companies and joint-stock companies, it can be concluded that the legislator refers to administrator(s) (managing director(s) (administrator(i)) / executive board (organul ex-ecutiv).*"

This appears to confirm what Mr Pisica is saying. Clearly, the managing directors of both Terra Raf and Tristan are AS and GS and therefore those companies can be sued in Moldova for torts or wrongs – and indeed for unjust enrichment.

336. In their written submissions, the claimants also highlighted how it would be next to impossible to file proceedings in Moldova before the expiry of the limitation period which was being assumed to be the 22 August 2022. This was principally due to the time required for the translation of documents into Moldovan/Romanian. The hearing of these applications took place between the 23 and 31 May 2022. Had a decision been taken immediately thereafter to decline jurisdiction (an unrealistic proposition in light of the matters which fell to be considered) the claimants would have had some 2 ½ months within which to issue proceedings. As it is, the 22 August deadline has passed. In any event, it does not seem to me that this should affect the court's decision on appropriate forum. The claimants knew that jurisdiction was being challenged when the defendants filed their

acknowledgments of service. Terra Raf did so on the 15 September 2020 and the Statis and Tristan did so on the 18 December 2020. The claimants could have instituted proceedings in Moldova before the limitation period expired had they been so advised.

337. The claimants also say that the fact that a Gibraltar judgment would be easily enforceable is an important factor. For that proposition they rely on *Sharab v Al-Saud* [2009] EWCA Civ 353 where Christopher Clarke LJ said the following:

> *"63. The enforceability of a judgment is an advantage on which a claimant is entitled to rely and which can, in an appropriate case, be decisive… In the present case the deputy judge was entitled to treat the enforceability of an English judgment as a factor clearly favouring England as the appropriate forum. It is true that he went on to say that the enforceability of such a judgment had obvious relevance "if the Prince has assets in this country", whereas the existing evidence does not go so far as to establish that the Prince does have personal assets (as opposed to business or investment interests) here. But I do not accept that this deprives the point of all practical significance, since there must be a real possibility that relevant assets can be identified for the purposes of enforcement. Account should also be taken of the status and enforceability of an English judgment elsewhere in the world. Looking at the position overall, I consider that the judge was right to regard an English judgment as offering Mrs Sharab a clear advantage as compared with a judgment of the Libyan court*."

The difficulty is that I have not been addressed as to enforceability of a Moldovan judgment. How then can I decide that a Gibraltar judgment carries the advantage?

338. Had I dismissed Terra Raf's challenge to this court's jurisdiction, I would in any event have found that Gibraltar was not the proper place for the trial of the claims against the Statis and Tristan. In my judgment, Moldova has stronger links to the claims and cannot be discarded as an available forum. In the circumstances, it would have been a more appropriate forum.

339. The parties also made submissions on the substantial justice exception referred to in *Spiliada.* This was set out by Lord Goff at page 478 where he said:

> *"(f) [if the court concludes] that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] A.C. 398 , 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff…"*

It does not seem to me that there is any compelling reason requiring the claims to be tried in Gibraltar.

Breach of duty of full and frank disclosure

340. At the conclusion of the hearing, I indicated that I would not be setting aside my order granting permission to serve the claim form and particulars of claim on the Statis and Tristan out of the jurisdiction on the basis of material non-disclosure. I was satisfied, on hearing the parties' submissions, of the conclusion that I should reach on this point and communication of my decision was necessary because the claimants were proposing to renew their application if I were to set my original order aside. (Mr Morgan explained that had renewed applications been necessary, these would have had to be made by August 2022 to avoid potential arguments on the claims becoming time-barred.) It seemed to me that there had not been any material non-disclosure by the claimants or those acting for the claimants at the time that they made their without notice application for service out of the jurisdiction.

341. In relation to the principles on full and frank disclosure, Mr Azopardi referred to the judgment of Bryan J in *Libyan Investment Authority*

v JP Morgan Markets Limited [2019] EWHC 1452 (Comm). At paragraphs 93 and 94 the learned judge said:

> "*93. In Knauf UK GmbH v British Gypsum Ltd [2001] EWCA Civ 1570 the Court at [65] explained the "golden rule" which must be followed with respect to full and frank disclosure:*
>
> > *"65. The leading cases remain Brink's Mat Ltd v. Elcombe [1988] 1 WLR 1350 and Behbehani v Salem [1989] 1 WLR 723 . Those authorities in this court bring their reminder of the essential principles: that there is a "golden rule" that an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion; that failure to observe this rule entitles the court to discharge the order obtained even if the circumstances would otherwise justify the grant of such relief; that a due sense of proportion must be maintained between the desiderata of marking the court's displeasure at the non-disclosure and doing justice between the litigants; that for these purposes the degree of any culpability on the part of the applicant or of any prejudice on the part of the respondent are relevant to the reviewing court's discretion; and that a balance must be maintained between undermining "the heavy duty of candour and care" which falls on applicants and promoting a "tabula in naufragio" to save respondents who lack substantial merits."*
>
> *94. The duty of full and frank disclosure only extends to those issues which can be said to be material to the decision which the judge had to make on the application…"*

342. Also relevant are the following parts of paragraphs 94 and 95:

> "*[94] …These principles have long been applied to applications for permission to serve out of the jurisdiction: see e g The Hagen [1908] P 189, 201. In that context it has been held that it would not be reasonable to expect an applicant for permission to serve out to anticipate all the arguments or points which might be raised against his case: see Electric Furnace Co v Selas Corpn of America [1987] RPC 23 , 29. A failure to refer to arguments on the merits which the defendant might raise at trial should not generally be characterised as a "failure to make full and fair disclosure", unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant permission: BP Exploration Co (Libya) Ltd v Hunt [1976] 1 WLR 788 , 788–789, approved in the Electric Furnace case [1987] RPC 23 , 29."*

> *95. Males J in National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at [19], made clear the importance of "not to allow a dispute about full and frank disclosure to turn into what is euphemistically described as a "mini" trial of the merits*".

343. Initially, Mr Azopardi sought to rely on his written submissions alone. This however changed when Mr Morgan complained that where criticisms of this nature are being made, these should be fully developed in oral argument. Mr Morgan referred to a judgment of our Court of Appeal, which coincidentally was handed down at the time of our own hearing: *Inspirato Fund No2 PCC Limited* [Neutral Citation 2022/GCA/08]. There, Rimer JA refused to deal with a ground of appeal which counsel had entreated the court to consider by reference to his skeleton argument but which had been undeveloped in oral submissions. As a consequence, Mr Azopardi addressed the court on full and frank disclosure. Principally, he dealt with how the claimants had failed to address the court on the contention that Moldova was the most appropriate forum to try these claims. This was not one of the matters that the defendants had complained about in their written submissions. As I observed in the course of the hearing, if the defendants really thought this was an important point, it would have been set out in their written submissions. That said, I accept that the fact that it was not is ultimately irrelevant if it is a meritorious complaint.

344. In their written submissions, the Statis and Tristan complained of the misportrayal by the claimants of the following matters: control of TNG post July 2010; the relevance of the trust management structure; limitation; the nature of TNG's bankruptcy proceedings; the true purpose of the Gibraltar proceedings; and the role of Bolashak.

345. The defendants' evidence is that TNG's assets, offices, books, documents and bank accounts were seized in July 2010 by the ROK and therefore there was no control of TNG by the Statis after that point. Therefore, the claimants' assertion that TNG continued to be controlled by the Statis through their shareholding in Terra Raf is misleading. It seems to me that the important point is that the claimants clearly set out that TNG's assets had been appropriated in 2010. The complaint can therefore only

relate to what the effect of that take over was. On this, the parties continue to hold different positions. I do not see the defendants' complaint as an issue of non-disclosure. The same applies to the complaint on the trust management structure and whether TNG (and KPM) had been subsumed into the structure or it had simply been their assets that were being managed.

346. The defendants' complain of an incomplete and misleading presentation on the issue of limitation. Counsel for the claimants at the without notice hearing did raise limitation as a possible bar to the claim and I dealt with this in the 2020 judgment. At paragraph 86, I said the following:

> "*As to limitation, the defendants could argue that Kazakhstan would or should have been aware of any allegations it is making after it took over the oil fields in 2010. They had access to records and documentation since that time. The claimants' case is that limitation has not expired - whether under the laws of Gibraltar or under the laws of Kazakhstan. The point was made that until the bankruptcy manager's appointment, a claim by TNG could not be brought. Mr Carrington's evidence is that the appointment was made on the 26 February 2020. Further, KPMG gave notice that it was withdrawing its audit opinions on the 21 August 2019. That may be a relevant date in so far as critical aspects of the claim are concerned. In any event, limitation is a matter that will need to be determined if it is raised by the defendants*."

347. It is said that the presentation was lacking in rigour and that the Bolashak opinion was not based or backed up with references to case authorities in the ROK. Again, the parties' positions on this are polarized. The claimants say that the claims are not time barred whereas the defendants say that they are, in particular by reference to Kazakh law. I do not see that the claimants needed to do more than what they did at the without notice hearing. They pointed out that limitation could be an issue. They identified date of knowledge as a factor and referred to what they maintain is the legal position. It cannot be a breach of their duty of full and frank disclosure to fail to address the court on legal submissions now being made by the other side and which do not accord with their own expert evidence. Furthermore, limitation is a procedural bar which has to be raised by a defendant.

348. On the question of the nature of TNG's bankruptcy, the defendants say that the court was not given a candid account of the background to the bankruptcy. I disagree, Mr Carrington clearly set this out in his first witness statement. The fact that there was a disparity between the initial creditors' claims and the amounts being sought in this claim was apparent. What the defendants now say about the bankruptcy has been dealt with in the course of this judgment.

349. The defendants' next complaint is that the claimants did not disclose the true purpose of the Gibraltar proceedings. In the Statis and Tristan's written submissions, they say that the true purpose of the proceedings is to frustrate the enforcement of the ECT award and that the proceedings are "*the latest chapter in a clear and continuous pattern of bad faith litigation*". Even if these assertions are found to be true, it is unrealistic to expect the claimants to say that they are conducting this litigation in bad faith. There may be arguments on abuse of process etc. (as has been the case) but it most certainly does not fall within full and frank disclosure matters.

350. The last of the complaints in the written submissions relates to the role of Bolashak. It is said that the claimants did not disclose the close and long-standing relationship between Bolashak and the ROK and that this affected the ability of Bolashak to give expert evidence – a matter which was central to the case bearing in mind the double actionability rule. The fact that Bolashak had a close relationship with the ROK was made clear and was recognized in the first judgment when I said the following at paragraph 23:

> "*As is highlighted by Mr Carrington in his first witness statement, none of the three experts are independent from the claimants. All the firms for which the experts work act for Kazakhstan in litigation related to the arbitration award. In the case of Bolashak Consulting Group, it also acts for the bankruptcy manager…*"

It may be legitimate for the defendants to say that the court should not have taken account of the Bolashak evidence but it is another to say that there was not full disclosure of the relationship.

351. I turn then to the point only made on behalf of the defendants in the course of oral submissions, namely that the claimants had underplayed the significance of Moldova as a forum to try these claims. It was accepted by Mr Azopardi that Mr Leech had referred to the defendants potentially saying that the claims should be tried in Moldova, but the complaint is that he did not go far enough. Again, I do not see this as a question of non-disclosure. The facts were set out. It may be said that greater emphasis should have been put on certain things but ultimately these are all matters in contention between the parties. As it was, the without notice hearing took two days.

352. For these reasons, it did not seem to me that here had been a breach of the claimants' duty of full and frank disclosure at the without notice hearing in November 2020.

Conclusion

353. The claimants' claims were brought with the principal aim of obtaining damages and applying these to the satisfaction of tax debts due by TNG in the Republic of Kazakhstan. This is a breach of the common law *Revenue Rule* which provides that the Gibraltar courts do not have jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a revenue law of a foreign state. As such, the court should decline jurisdiction to hear the claims against Terra Raf.

354. It follows that the court does not have jurisdiction to hear the claims against the Statis or Tristan. These defendants can only be sued in Gibraltar if jurisdiction is grounded against Terra Raf as anchor defendant. Therefore, this court's Order of the 27 November 2020 granting the claimants permission to serve the Statis and Tristan out of the jurisdiction is set aside. Had I dismissed Terra Raf's challenge, I would in any event have found that Gibraltar was not the proper place for the trial of the claims against the Statis and Tristan.

Liam Yeats
Puisne Judge
Date: 31 January 2023