THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2023/0087

BETWEEN:

P.J.S.C. NATIONAL BANK "TRUST"

Claimant

and

[1] **MIKAIL OSMANOVICH SHISHKHANOV**

Companies Registered in the British Virgin Islands (the "BVI Companies", "the BVI Entities", "the BVI Defendants," or "the Anchor Defendants")

[2] ~~**CRAMBE ASSET HOLDINGS CORP ("Crambe")**~~
[3] **OLYSERVE INC**
[4] **RABALO LIMITED**
[5] **REACHWAY OVERSEAS LTD**
[6] **IFCHOR S.A. (PREVIOUSLY KNOWN AS HANSBERG FINANCE LTD)**
[7] **FROWELL HOLDINGS LTD**
[8] **GARLAND SOLUTIONS LTD**
[9] **DIAMOND FORCA LTD**
[10] **DARMAN FINANCE LIMITED**
[11] **BLANCHE UNION LTD**

Companies Registered Overseas ("the Overseas Traders", "the Traders" or "the Trader Defendants")

[12] **MIDWESTERN TRADING GROUP, INCORPORATED, MINNESOTA, USA ("Midwestern")**
[13] **CARGILL FINANCIAL SOLUTIONS LLC, ILLINOIS, USA ("Cargill Financial")**
[14] **CARGILL INCORPORATED, DELAWARE, USA ("Cargill, Inc.")**
[15] **BUNGE SA (SWITZERLAND) ("Bunge")**
[16] **CREDIT AND TRADING COMPANY LTD (UK), a member of the Bunge Group of Companies ("CTC Bunge")**
[17] **QUADRA COMMODITIES SA (SWITZERLAND) ("Quadra Switzerland")**

[18] **QUADRA COMMODITIES SINGAPORE PTE. LTD (SINGAPORE) ("Quadra Singapore")**
[19] **LOUIS DREYFUS COMPANY SUISSE SA (SWITZERLAND) ("LDC Switzerland")**
[20] **LDC TRADING AND SERVICE CO S.A (URUGUAY) ("LDC Uruguay")**
[21] **LOUIS DREYFUS COMPANY ASIA PTE. LTD (SINGAPORE) ("LDC Singapore")**
[22] **NEW RESOURCES INTERNATIONAL S.A. (PREVIOUSLY KNOWN AS NOBLE RESOURCES INTERNATIONAL SA) (SWITZERLAND)**
[23] **LIBERTY COMMODITIES LIMITED (UK) ("Liberty")**
[24] **ATLANTIC INDUSTRIAL & TRADING PTE. LTD (SINGAPORE)**
[25] **ALPHATRADE INTERNATIONAL LIMITED (HONG KONG)**
[26] **XANGBO GLOBAL MARKETS PTE. LTD. (SINGAPORE)**
[27] **SIMEC GROUP LIMITED (HONG KONG)**
[28] **WILSON INTERNATIONAL TRADING PRIVATE LIMITED (SINGAPORE)**
[29] **INTRA ASIA TRADING PTE LTD (SINGAPORE)**
[30] **TRIUMPH COMMODITIES PTE. LTD. (PREVIOUSLY KNOWN AS TRIUMPH METALS & MINERALS PTE LTD) (SINGAPORE)**
[31] **BERING TRADING LIMITED (HONG KONG)**
[32] **IFCHOR (SWITZERLAND) SA (PREVIOUSLY KNOWN AS IFCHOR SA) (SWITZERLAND, LAUSANNE)**
[33] **EMPORIUM TRADE PTE. LTD. (PREVIOUSLY KNOWN AS PAN ASIA COMMODITIES AND TRADING PTE LTD) (SINGAPORE)**
[34] **PARAS METALLICS PTE. LTD. (SINGAPORE)**
[35] **PEARL RIVER DELTA TRADING (HONG KONG) LIMITED (HONG KONG)**

Advising Bank

~~[36] **CREDIT SUISSE AG (SWITZERLAND) ("Credit Suisse")**~~

Defendants

Appearances:

Mr. Paul McGrath KC, and with him, Mr. Nathan Pillow KC (attending remotely), Mr. Ben Woolgar, Mr. Benedict Tompkins and Mr. Jamie Holmes (as from his admission on 9th October 2025), all instructed by Emery Cooke, and Mr. Andrew Emery of that firm, for the Claimant

Mr. Tom Roscoe, instructed by Forbes Hare, and with him, Mr. Alistair Abbott of that firm, for the First Defendant

Mr. Duncan Matthews KC and with him Mr. Damien Walker, both instructed by Appleby, and with him, Mr. Andrew Willins KC, Ms. Fay O'Halloran, and Ms. Kara Benjamin, all of Appleby, for the Appleby Defendants

Mr. Robert Weekes KC, instructed by Walkers, and with him, Mr. Oliver Clifton and Mr. Harry Oulton, both of that firm, for the Cargill Defendants

Mr. Matthew Hardwick KC, instructed by Conyers, and with him, Mr. Richard Evans, and Ms. Gráinne Hussey of that firm, for the Bunge Defendants

The 3rd to 11th (i.e., the BVI defendants), 22nd to 27th, and 29th to 31st and 33rd to 35th Defendants neither attended nor were represented at the hearing

[The Claimant no longer seeks any relief against the 2nd and 36th Defendants]

2025: October 2; 6; 7; 8; 9;
November 22.

JUDGMENT

Introduction

[1] **MITHANI J [Ag.]**: In this Claim ("the Claim", "this Claim" or "these Proceedings"), issued on 5th May 2023, the Claimant is P.J.S.C. National Bank Trust. I will refer to it in this judgment ("this Judgment" or "the Judgment") as the "Claimant" or "NBT".

[2] The defendants to the Claim are the 34 defendants referred to as such in the heading of this Judgment (excluding for these purposes the 2nd and 36th defendants).

[3] Unless otherwise stated, or the context otherwise requires:

(a) I will refer to the first defendant, Mr. Mikail Osmanovich Shishkhanov, as either the "First Defendant" or "Mr. Shishkhanov";

(b) I will refer to the corporate defendants by: (i) the number in which they appear in the heading of this Judgment; (ii) the abbreviations provided

for them in that heading; or (iii) the description given to them in the Bundles lodged for the purpose of the Hearing; and

(c) the expression: (i) "the Claimant" or "NBT" shall include its predecessors in title; and (ii) "the Defendants" shall mean one or more (or all) the defendants to the Claim, other than the BVI Defendants.

[4] The other abbreviations I shall use in the Judgment are set out below.

[5] This Judgment concerns the determination of the Defendants' challenge to the jurisdiction of this court ("this Court" or "the Court") to hear and adjudicate upon this Claim ("the Jurisdictional Challenge"). The issue for resolution is whether this Court ought to decline jurisdiction, as the Defendants contend, or whether it should continue to exercise and remain seised of jurisdiction over the Claim, as the Claimant wishes the Court to do.

[6] I heard the Jurisdictional Challenge over five days, from 2nd October 2025 to 9th October 2025 (the "Hearing"). The Jurisdictional Challenge was advanced by a number of the Defendants, who seek an order to set aside the Court's prior permission to serve the claim form out of the jurisdiction granted by an order of the Court dated 11th May 2023 ("the Order") and, in consequence, to bring these proceedings in this jurisdiction to an end insofar as they concern them.

[7] The central question for determination at the Hearing was whether the Order, which was made *ex parte* on the Claimant's application dated 5th May 2023 for permission to serve the claim form out of the jurisdiction, should be permitted to stand. Specifically, the Court was required to consider whether the Claimant had properly satisfied the relevant gateways for service out, whether the BVI was the appropriate forum for the resolution of the dispute, and whether, in all the circumstances, the continuation of the Order was just and appropriate.

[8] The Hearing was initially listed to address several additional applications concerning the service of the Claim Form out of the jurisdiction. However, following discussions between the Parties, it was agreed that I should, at this stage, determine only those parts of the applications brought by the Defendants

which sought to set aside the Order, based on issues of: (i) gateway; (ii) forum; (iii) discretion; and (iv) alleged breaches of the Claimant's duty of full and frank disclosure (or fair presentation) in relation to (i)-(iii). Those are matters (though, particularly in the case of the First Defendant and the Appleby Defendants, not the only matters) that were raised by the following applications:

(a) A notice of application dated 19th June 2024, subsequently amended on 17th July 2025 ("NA1"), issued by the First Defendant. The evidential material filed in support of NA1 comprises the affidavits and/or witness statements identified in the Bundles as Shishkhanov 1, Davies 1 and Davies 5, served on behalf of the First Defendant. The Claimant relies in response upon Popkov 5, Popkov 6 and Popkov 9.

(b) A notice of application dated 7th June 2024 ("NA2") issued by, or on behalf of, the Cargill Defendants. The supporting evidence for NA2 consists of the affidavits and/or witness statements labelled in the Bundles as Maples 1, Maples 2 and Sawatzke 1, served on behalf of the Cargill Defendants. The Claimant's responding evidence comprises Popkov 5 and Popkov 7.

(c) A notice of application dated 16th September 2024 ("NA3") issued by, or on behalf of, the Fifteenth Defendant. The evidential materials for NA3 include Fedotova 1 and Fedotova 3, served on behalf of the Fifteenth Defendant, and Popkov 5 and Popkov 8, served on behalf of the Claimant.

(d) A notice of application dated 19th April 2024 ("NA4") issued by, or on behalf of, the Sixteenth Defendant. The evidence filed in support of NA4 comprises Stewart 1 and Fedotova 3, served on behalf of the Sixteenth Defendant, while the Claimant relies upon Popkov 5 and Popkov 8 in response.

(e) Various notices of application ("NA5") issued by the Appleby Defendants. The written evidence for NA5 consists of the affidavits and/or witness statements identified in the Bundles as Hussey 1,

Hussey 2, Hussey 3, Grealy 1, Howard 1, Howard 2 and O'Halloran 1, filed on behalf of one or more of the Appleby Defendants. The Claimant's responding written evidence consists of Popkov 5 and Morris W2.

[9] For the avoidance of doubt, the written evidence relating to NA1 through NA5 is not confined to the affidavits and witness statements expressly enumerated above. It also encompasses any further affidavits, witness statements, exhibits or documents included in the Bundles which the Parties rely upon for the purposes of these applications.

Abbreviations Used in this Judgment

[10] In addition to the abbreviations specified above, in this Judgment, unless otherwise stated, or the context otherwise requires, the following words and expressions shall have the following meanings assigned to them:

"The Appleby Defendants" shall mean the 17th to 21st, 28th and 32nd Defendants or any one or more (or all) of them[1].

"The Application", "the Applications", "the Jurisdiction Application" or "the Jurisdiction Applications" shall mean the applications referred to as NA1, NA2, NA3, NA4 and NA5, above and any other application of the Defendants relating to the Jurisdictional Challenge or any one or more of those applications.

"The BCA 2004" shall mean the BVI Business Companies Act 2004.

"The Bunge Defendants" shall mean the 15th and 16th Defendants, i.e., Bunge and CTC Bunge, or either or both of them.

[1] Appleby also previously acted for two other Defendants, namely Liberty Commodities Limited (the 23rd Defendant) and Simec Group Limited (the 27th Defendant), and filed jurisdictional challenges on their behalf. Appleby ceased to act for those Defendants on 24th July 2025. Unless otherwise stated, or the context otherwise require, any reference in this Judgment to the Appleby Defendants does not include the 23rd and 24th Defendants.

"The BVI Defendants", "the BVI Ds", "the BVI Entities", or "the Anchor Defendants" shall mean the 3rd to 11th Defendants or any one or more (or all) of them. The Claimant makes no claim against Crambe, the Second Defendant.

"The Bundle" or "the Bundles" shall mean the various bundles of documents produced by the Parties for the Hearing.

"The Cargill Defendants" shall mean the 12th to 14th Defendants or any one or more (or all) of them.

"The Claim" shall mean the claim made by way of the claim form dated 4th May 2023, issued by the Claimant against the Defendants and the BVI Defendants on 5th May 2023.

"The Claim Form" shall mean the claim form dated 4th May 2023, issued on 5th May 2023, by which the Claim was commenced.

"The Court" or "this Court" shall mean this Division of the High Court of the Eastern Caribbean Supreme Court, based in the territory of the Virgin Islands, hearing the Applications.

"The Court of Appeal" or "CA" shall mean the Court of Appeal of England and Wales.

"The CPR" shall mean the ECSC Civil Procedure Rules 2000, which (it is undisputed between the Parties) govern and continue to govern the Claim.

"The Defendants" shall mean the 1st and 12th to 35th Defendants or any one or more (or all) of those defendants.

"The Directors" or "the Former Directors" shall mean one or more (or all) of the former directors of the BVI Defendants.

"Document" or "Documents" shall mean a claim form, order, application or any other document (or a combination of such documents) included in the Bundles, and "a Document" (or "the Document" or "the Documents") shall be construed accordingly.

"E&W" shall mean "England and Wales".

"The E&W CPR" shall mean the E&W Civil Procedure Rules 1998.

"The *ex parte* application" shall mean the *ex parte* application made by the Claimant to the Court for PTSO.

"The *ex parte* hearing" or the "PTSO hearing" shall mean the *ex parte* hearing for PTSO, which took place on 11th May 2023.

"The High Court" shall mean the High Court of Justice of England and Wales.

"The IA 1986" shall mean the Insolvency Act 1986, as it applies to E&W.

"The BVI IA 2003" shall mean the BVI Insolvency Act 2003.

"The Liquidator" or "the Liquidators" shall mean the liquidator or liquidators for the time being of the BVI Defendants, and where there is more than one person occupying that position, shall include any one or more of them. The current liquidators of the BVI Defendants are Mr. Paul Pretlove, Mr. Johnny Law and Mr. David Standish.

"The Note" or "the Updated Note" shall mean the note dated 29th April 2024, lodged by the Claimant with the Court, prepared by the Claimant to draw the attention of the Court to the Claimant's failure at the *ex parte* hearing to comply properly with its duty to give full and frank disclosure and to update the Court about all matters relating to that duty.

"PTSO" shall mean permission or leave to serve a Document out of the jurisdiction of this Court.

"The Order" shall mean the order dated 11th May 2023 made by this Court, granting permission to the Claimant to serve the Claim Form upon a defendant against whom PTSO was required.

"The Reply Submissions" or "the Reply Skeleton Argument" shall mean the written skeleton argument filed by the Cargill Defendants on 10th October 2025.

"The Parties" shall mean the Claimant, the Defendants and the BVI Defendants, or any one or more (or all) of them.

"Service out" or "serve out" shall mean the service of the Claim Form or any other Document upon a defendant who is out of the jurisdiction of this Court and against whom the Claimant applied for PTSO.

"The Statement of Claim" or "Particulars of Claim" shall mean the statement of claim dated 10th August 2025 filed in the Claim by the Claimant on 11th August 2025.

"The Supreme Court" or "SC" shall mean the Supreme Court of the United Kingdom.

"The Traders", "the Overseas Traders", or the "Trader Defendants" shall mean 12th to 35th Defendants or any one or more (or all) of them.

"written evidence" shall mean any witness statement made, affidavit sworn, or affirmation made by any person in the Claim, and shall include any signed or unsigned Document which is allowed by the Court to stand as that person's written evidence in the Claim.

[11] In addition, in this Judgment, unless otherwise stated or the context otherwise requires:

(a) references in this Judgment to any group of entities under a common or collective name shall be deemed to refer to one, more than one, or all of the entities comprised in that group, including any entity identified by an abbreviation or variation of that name. Accordingly, any reference to "Cargill," "the Cargill Companies," or "the Cargill Defendants" shall mean and include Midwestern, Cargill Financial and Cargill, Inc., or any one or more of them;

(b) any reference to "the Claim" shall be to the whole or any part of the Claim against all or any of the Defendants and the BVI Defendants;

(c) the reference to Mr. Shishkhanov shall be to him in his personal capacity and on behalf of any company, entity, or trust owned or controlled by, or associated with, him;

(d) the reference to any company or corporation shall be to that company or corporation and company or entity owned or controlled by, or associated with, that company or corporation;

(e) a reference to a person's name followed by a number refers to the affidavit or witness statement provided by that person, identified according to the order in which that affidavit or witness statement was made.

(f) the use of the singular includes the plural and *vice versa*;

(g) "person" or "individual" includes a company, corporation or other entity;

(h) where a passage in a court judgment or a publication is cited, the passage will not include any footnote references contained in it; and

(i) any underlined emphasis appearing in this Judgment is my own. All other emphasis — whether in bold, italics, or otherwise — reflects the original emphasis as it appears in the source materials reproduced from the Bundles and remains that of the respective authors or creators of those documents.

[12] Some of the other expressions that I will use in this judgment are set out below. Others will be obvious from the description I give to them in the course of this Judgment.

Background

[13] The best summary of the background circumstances giving rise to the Claim is set out in Popkov 1, filed on behalf of the Claimant.

[14] For the purposes of this Judgment, it suffices if I provide the following summary of the relevant background facts and circumstances.

[15] The Claimant is a public joint stock company incorporated under Russian Law. It is a specialist financial institution, which was empowered by the Central Bank of Russia ("the CBR") in July 2018 to consolidate, rehabilitate, and dispose of the non-core assets of distressed Russian financial institutions. It is the legal successor to JSC Rost Bank ("Rost Bank").

[16] Rost Bank was a Russian bank founded in 1993, primarily to finance Russian crude oil companies.

[17] PJSC B&N Bank ("Binbank") was a Russian bank incorporated as a public joint-stock company in 1990. Binbank was founded by Mr. Mikhail Gutseriev ("Mr. Gutseriev"), a Russian businessman. Before 1995, Mr. Gutseriev owned (at least) the majority of the shares in Binbank.

[18] Mr. Shishkhanov is or was a Russian businessman. He is Mr. Gutseriev's nephew. Mr. Shishkhanov is the key defendant in the Claim.

[19] Mr. Shishkhanov controlled Binbank and Rost Bank at all material times, before their collapse, rescue, and Rost Bank's merger into NBT in the summer of 2018.

[20] The other defendants to the Claim are:

(a) The BVI Defendants, which are said to be multiple BVI entities allegedly controlled by Mr. Shishkhanov.

(b) The Trader Defendants, which are major global commodity traders, such as Cargill, Bunge, various "Louis Dreyfus" companies (such as LDC Switzerland), Liberty, and others.

(c) Financial institutions such as Credit Suisse, though the Claim is no longer pursued against Credit Suisse.

[21] Under the supervision of the CBR, Binbank was, at all material times, subject to a detailed regulatory regime imposed in compliance with the Basel Accords.

[22] Under the regulatory regime, Russian banking regulations, *inter alia*, prohibited:

(a) Excessive exposure to one borrower/group (max 25%).
(b) Excessive related-party lending (max 20%).
(c) Failure to provision adequately for bad loans.

[23] The Claimant alleges that Mr. Shishkhanov orchestrated a highly sophisticated, complex, and substantial fraudulent scheme ("the Scheme"). The Scheme was designed to circumvent the above lending restrictions and extract several billion dollars (or their equivalent) from Binbank and Rost Bank, while creating the appearance of legitimate international trade finance.

[24] The Scheme comprised two distinct stages.

[25] The initial stage ("Stage 1") concerned Binbank's transfer of funds to the Traders pursuant to fictitious trade finance transactions. Subsequently, the Traders transferred those funds, or funds of approximately equivalent value, to the BVI

Defendants, which were entities controlled by Mr. Shishkhanov. The BVI Defendants then misappropriated those funds.

[26] Stage 1, presented here in simplified form for clarity, unfolded as follows.

[27] Binbank entered into letters of credit ("LC") transactions with the Traders, which were third-party entities of substantial stature and possessing strong credit ratings, but had no commercial relationship with Binbank. These LCs were ostensibly issued to finance commodity purchases, referred to in the Bundles as "the Trader Transactions."

[28] The Traders and Binbank executed LC Issuance Agreements and related documentation that purported to confirm *bona fide*, arm's-length arrangements. Concurrently, the Traders executed parallel, undisclosed "empty shell agreements" with affiliated BVI entities (i.e., referred to in the Documents as "the first tranche entities"), which were the actual beneficial owners of the trading funds.

[29] Despite the appearance of international trade, the underlying supply agreements were frequently incomplete, backdated, or fabricated.

[30] The BVI entities in question, i.e., the BVI Defendants, received funds directly from the Traders pursuant to these empty-shell agreements. Binbank's records falsely reflected these trade finance transactions as duly completed and settled. To secure their obligations, the Traders provided performance guarantees or standby letters of credit issued by reputable banks. However, Binbank habitually waived its rights to enforce these guarantees and standby letters of credit, thus extinguishing any real financial exposure to the Traders.

[31] The Traders earned a commission estimated to exceed US$80 million for their intermediary role in this Scheme.

[32] The second stage ("Stage 2") concerned interbank loans and repayments between Binbank and Rost Bank, designed to simulate debt settlements.

[33] Binbank extended interbank loans to Rost Bank, which were exempt from applicable lending restrictions. Rost Bank, through complex transfer chains involving what the Documents describe as "second tranche entities" (incorporated in various jurisdictions — many in Cyprus but some in Cayman, Belize, St Lucia, Russia, Switzerland and the BVI), routed funds to the BVI entities. The BVI entities then reimbursed the Traders, who, in turn, discharged their obligations to Binbank. The funds effectively circulated among Binbank, Rost Bank, the Traders, and the BVI entities, thereby concealing the true movement and losses arising from the aforementioned transactions.

[34] Rost Bank's indebtedness to Binbank increased due to rollover repayments and the absence of genuine asset recovery. The Claimant alleges that, as a consequence, approximately US$2 billion of Binbank and Rost Bank's funds were dissipated, with Rost Bank (later NBT) bearing the primary amount of the loss.

[35] The Scheme deceived the CBR and other regulatory bodies by circumventing Binbank's lending limits and capital requirements through these orchestrated transactions.

[36] The entirety of the Scheme was masterminded and controlled by Mr. Shishkhanov and involved multiple international entities, deliberately structured to evade detection and frustrate recovery. This staged Scheme enabled the Defendants and the BVI Defendants to abuse trade finance frameworks, thereby disguising fraudulent transfers to offshore companies and discharging their ostensible liabilities on paper, while the actual funds were misappropriated.

[37] Simplified even more substantially (purely for my benefit for the purpose of this Judgment), the Scheme, or at any rate, the most common form of the Scheme took the following course:

(a) Binbank issued irrevocable documentary LCs to various independent trading companies (i.e., the Traders) pursuant to formal LC Issuance Agreements, creating the appearance of legitimate trade finance transactions for commodity purchases.

(b) The Traders, as account parties, applied to Binbank for the issuance of irrevocable LCs, ostensibly for legitimate commodity transactions.

(c) Contemporaneously with these visible transactions, the Traders entered into separate, undisclosed agreements with BVI-incorporated entities (i.e., the "BVI Defendants") connected to Mr. Shishkhanov. These parallel agreements had no genuine commercial substance and created immediate payment obligations requiring the Traders to transfer funds directly to the BVI Defendants.

(d) The Traders obtained counter-guarantees, standby letters of credit, or other security instruments from reputable international financial institutions, including Credit Suisse, which were provided to Binbank as collateral security for the Traders' reimbursement obligations under the LCs.

(e) Binbank systematically waived or released these security instruments without recording such waivers in its books and records, without obtaining substitute collateral, and without disclosure to auditors, regulators, or other stakeholders. This eliminated the Traders' actual financial exposure while maintaining the documentary appearance of secured transactions.

(f) The Traders received commission payments for their intermediary role but bore no genuine credit risk or performance obligations.

(g) Binbank recorded these transactions in its financial records as settled trade finance operations, thereby concealing that funds had been diverted to the BVI Defendants rather than applied towards genuine commodity purchases.

(h) Separately, Binbank extended interbank loans or credit facilities to Rost Bank.

(i) Rost Bank subsequently transferred substantially equivalent amounts through multiple tiers of offshore special purpose vehicles or intermediary entities (referred to in the Bundles as the "second tranche entities") to the BVI Defendants, layering the funds through complex corporate structures to obscure their ultimate destination and beneficial ownership.

(j) The BVI Defendants applied the funds received pursuant to step (i) to discharge the Traders' obligations under the sham agreements described in step (c).

(k) The Traders then remitted funds to Binbank in satisfaction of their reimbursement obligations under the LCs, completing a circular flow of funds that simulated legitimate trade finance activity.

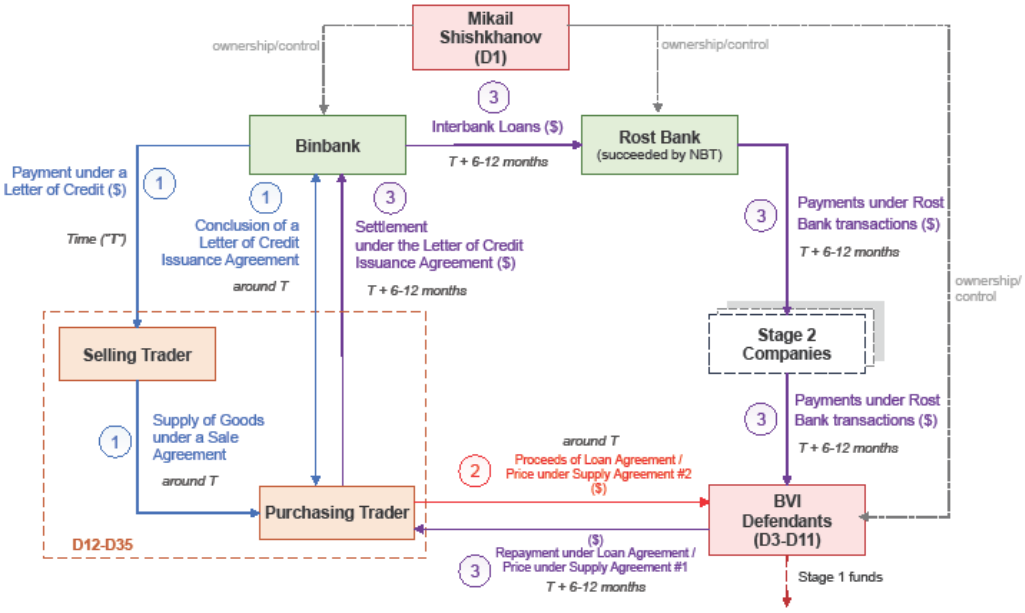
(l) Rost Bank's indebtedness to Binbank increased progressively as principal amounts were rolled over or refinanced rather than repaid, and as the absence of genuine underlying assets prevented actual debt service. These accumulating obligations were obscured through accounting manipulations.

(m) The cumulative effect of this scheme was the misappropriation and dissipation of approximately US$2 billion through a systematic pattern of fictitious trade transactions, fraudulent interbank lending, layered offshore fund transfers, and falsified accounting records, orchestrated by Mr. Shishkhanov and associated parties.

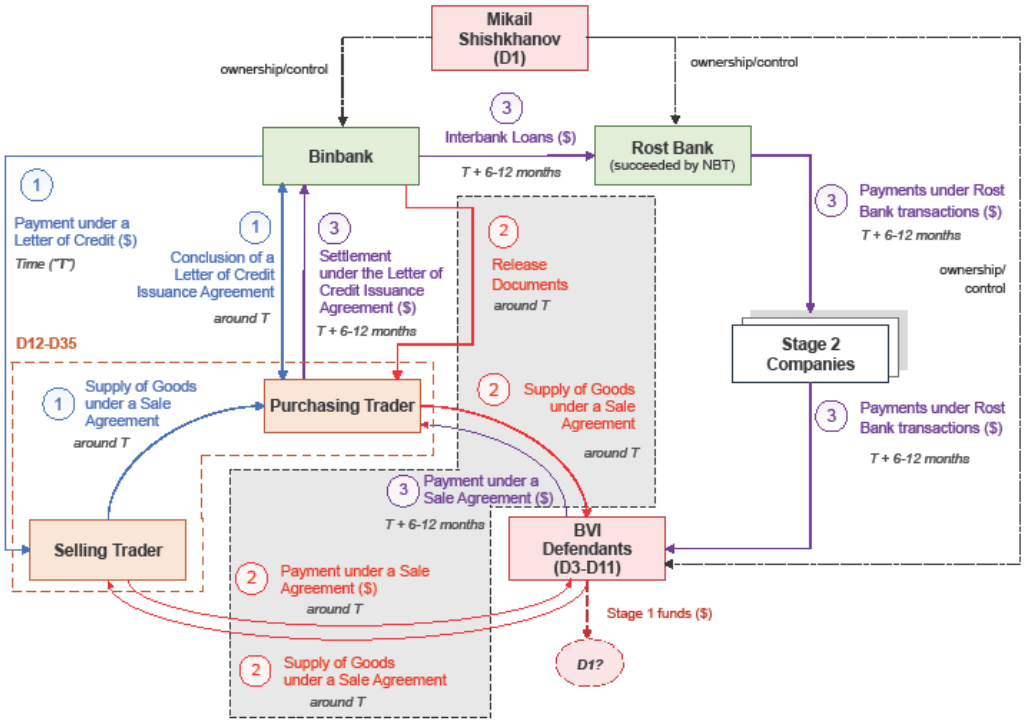
[38] I found the diagrams that Mr. Paul McGrath KC, who appeared on behalf of the Claimant, along with Mr. Nathan Pillow KC, Mr. Ben Woolgar, Mr. Benedict Tompkins, and Mr. Jamie Holmes (as from his admission on 9th October 2025, explaining how the alleged fraud took place, extremely helpful. I reproduce the diagrams below. They should be considered alongside the helpful explanation of how the Scheme worked that Mr. McGrath gave in the course of his submissions on the third day of the Hearing: [2]

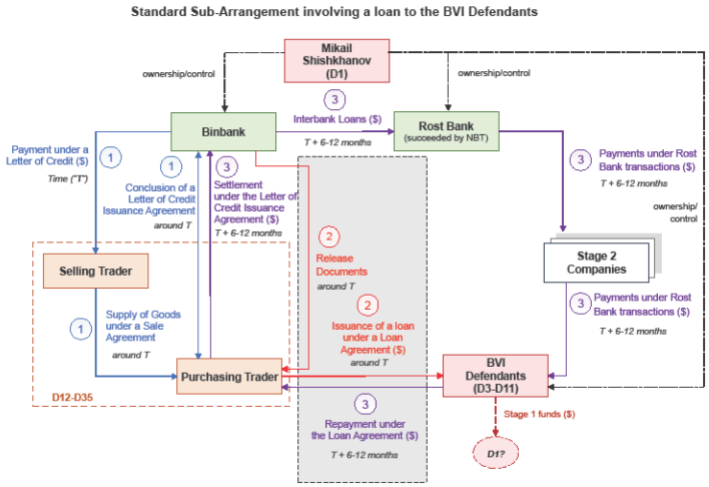
[2] Court Transcript, Day 3, p. 105, line 5 to p. 144, line 22, *passim*.

NBT v Shishkhanov & ors: Overview of Typical Sub-Arrangement



Standard Sub-Arrangement involving supply of goods to- and from the BVI Defendants





[39] I do not need to elaborate further on the background facts and circumstances. I appreciate that the simplified version of my understanding of the Scheme may not be entirely accurate, but it is sufficient for me to determine the Jurisdiction Application.

The Relief Sought in the Claim

[40] In short, the Claimant brings the following claims:

(a) against Mr. Shishkhanov, for breaches of his Russian Law corporate duties which he owed to Binbank and Rost Bank;

(b) against all Defendants, for unlawful means conspiracy under BVI Law;

(c) against the Trader Defendants and the BVI Defendants separately, for dishonest assistance under BVI Law;

(d) against the Trader Defendants and the BVI Defendants separately for "knowing receipt" under BVI Law; and

(e) against all Defendants under art. 1064 of the Russian Civil Code, which imposes liability for any harm caused to a person or to a person's property by the wrongful, intentional or negligent behaviour of another person.

[41] The Claimant's substantive claim against the Defendants and the BVI Defendants (as revised during the course of Mr. McGrath's oral submissions at the Hearing) is for:

(a) damages, as specified in paras. 104-105 of the Statement of Claim;

(b) an account of all sums received by each of the Traders and the BVI Defendants;

(c) an account of all profits made by each of the Traders and the BVI Defendants;

(d) any necessary inquiries as to the sums claimed in (b) and (c) above;

(e) equitable compensation; and

(f) interest on any sums found due to it.

[42] In terms of damages, the Claimant's primary claim against each Defendant and BVI Defendant is for the total loss alleged to have been caused to it (US$1.913 billion) as a result of the operation of the Scheme. In the alternative, the Claimant claims, against each BVI Defendant and Trader Defendant, the loss which is alleged to have been caused by the subset of the "sub-arrangements" in which the relevant BVI Defendant and Trader Defendant was itself involved, in amounts ranging from US$15 million to US$515 million. The total amount

claimed against the seven Appleby Defendants under the alternative case is US$1.377 billion.

The Procedural Steps Leading to the Making of the Jurisdiction Application

[43] For the purpose of determining the Jurisdictional Challenge, it is only necessary for me to refer to the following steps that have been taken in the Proceedings. Popkov 5 provides a much fuller chronology of the relevant events. However, the steps specified below, in my view, provide a sufficient context for the issues that have arisen in the Applications.

[44] The Claim was commenced by the Claim Form issued on 5th May 2023. On the same date, the Claimant applied for permission to serve the Claim Form on the Defendants outside the jurisdiction of this Court. The application for permission was made *ex parte*, supported by Popkov 1, i.e., the first affidavit of Dmitry Leonidovich Popkov.

[45] The hearing of the application took place *ex parte* before Wallbank J on 11th May 2023. Wallbank J made the Order which was in the terms (or substantially the terms) of the draft produced to him at that hearing.

[46] By the terms of the Order, Wallbank J granted the Claimant permission to serve the Claim Form and related documents out of the jurisdiction of the Court.

[47] The "full and frank" disclosure made by counsel, Mr. Andrew Emery ("Mr. Emery"), of Emery Cooke, who appeared before Wallbank J, is recorded in a transcript of that hearing, which is included in the Bundles. The Defendants state that the purported disclosure was wholly inadequate and that, by itself, this should result in the Order being set aside and the Court determining the Jurisdictional Challenge in their favour, including refusing to make a fresh order permitting the service of the Claim Form out of the jurisdiction. This is so even if the Claimant satisfies the Court that the Claimant's substantive case on the Jurisdictional Challenge is made out.

[48] The Claimant accepts that its disclosure was not adequate. However, it disputes that this warrants setting aside the Order. If, contrary to that assertion, the Order

is set aside, the Claimant asserts that it should be re-granted in the same or similar terms

[49] The Statement of Claim was filed on 11th August 2023.

[50] The BVI Defendants were incorporated between 2008 to 2015. They were struck off the Register of Companies and dissolved between 2016 and 2020. They were restored to the Register of Companies by the Court on 2nd February 2023, at the behest of the Claimant and were placed into voluntary liquidation following their restoration to the Register.

[51] On 19th October 2023, the BVI Defendants were placed in insolvent liquidation, and the Claim against them was stayed. However, on 17th January 2024, the Court granted the Claimant permission pursuant to s. 175(1) of the BVI IA 2003, to continue the Claim against them.

[52] As noted above, the present liquidators of the BVI Defendants are Mr. Paul Pretlove, Mr. Johnny Law and Mr. David Standish. Until 26th May 2025, Mr. Pretlove was the sole liquidator.

[53] The Table below, prepared by the Cargill Defendants, sets out the purported service of the Proceedings on the Defendants and the BVI Defendants specified therein.

Defendant(s)	Date of service	Reference
JSC BTA Bank v Sabyrbaev BVIHCM2021/0171 (7th December 2023) ("Sabyrbaev") handed down		
D3-11	29th January 2024	Acknowledgement of service [G2/11-15]
Sabyrbaev made public (13th February 2024)		
D1	27th February 2024 (Russia)	Acknowledgement of service [G/1/5-10]
D16	28th February 2024	Acknowledgement of service [G/7/31-36]

D23	29th February 2024	Acknowledgement of service [G/13/67-72]
D12-14	1st March 2024	Acknowledgements of service [G/3-5/16-24]
"Note to Update the Court by Way of Continuing Full and Frank Disclosure" filed by NBT (30th April 2024)		
D20	3rd May 2024 (claim form received)	Acknowledgement of service [G/11/55-60]
D18	6th May 2024	Acknowledgement of service [G/9/43-48]
D21	6th May 2024	Acknowledgement of service [G/12/61-66]
D28	6th May 2024	Acknowledgement of service [G/15/79-84]
D24	6th May 2024	Morris affidavit sworn 6th May 2024, footnote 7 of paragraph 7.g [F/16/193]. Purported service at previous registered address – Morris affidavit sworn 5th May 2025, paragraph 20.5.9 [F/44/853].
D26	6th May 2024	Morris affidavit sworn 6th May 2024, footnote 7 of paragraph 7.g [F/16/193]. Not re-served in 2025 pursuant to Hague Service Convention as dissolved as of 20th February 2025 (Morris affidavit sworn 5th May 2025, paragraph 20.5.8 [F/44/85]) (stated by NBT to be recently restored (paragraph 5.5 of Annex 2 of skeleton argument).
D27	7th May 2024	Acknowledgement of service [G/14/73-78]
D25	7th May 2024	Morris affidavit sworn 5th May 2025, paragraphs 10.3 and

		20.2.2 [F/44/847 and 850]
D19	3rd June 2024	Acknowledgement of service [G/10/49-54]
D32	3rd June 2024	Acknowledgement of service [G/16/85-89]
D17	4th June 2024	Acknowledgement of service [G/8/37-42]
D15	5th June 2024	Acknowledgement of service [G/6/25-30] Directions hearing (4th March 2025)
D31	2nd May 2025	Morris affidavit sworn 5th May 2025, paragraph 9.3 [F/44/845-846]. Dissolved at time of purported service.
D35	2nd May 2025	Morris affidavit sworn 5th May 2025, paragraph 9.3 [F/44/845-846]. Dissolved at time of purported service.
D29	19th May 2025	Letter from Legal Registry of Singapore Supreme Court [K41/1397]
D30	20th May 2025	Letter from Legal Registry of Singapore Supreme Court [K42/1399]
D21	20th May 2025	Letter from Legal Registry of Singapore Supreme Court [K44/1404]
D28	22nd May 2025	Letter from Legal Registry of Singapore Supreme Court [K46/1408]
D18	22nd May 2025	Letter from Legal Registry of Singapore Supreme Court [K48/1412]
D33	22nd May 2025	Letter from Legal Registry of Singapore Supreme Court [K47/1409]
D34	27th May 2025	Letter from Legal Registry of Singapore

		Supreme Court [K45/1405]

[54] On 25th October 2023, the former directors of six of the BVI Entities (the Third to Fifth, Eighth to Ninth and Eleventh Defendant) filed fixed date claim forms in this Court, seeking, *inter alia*, "the termination of the voluntary liquidation" of each company under s. 207(A) of the BCA 2004 or, alternatively, the removal of Mr. Pretlove as the "voluntary liquidator" under section 205C(2)(b) of that Act. Those claims were subsequently discontinued.

[55] The Claimant states that it is significant to refer the Court to certain other proceedings brought by the former directors of the BVI Defendants (referred to either as "the Former Directors' Proceedings" or "Former Directors' Applications"). They say that those proceedings shed important light on the value of pursuing the BVI Defendants.

[56] Certain of the Former Directors of six of the nine BVI Defendants commenced proceedings on 31st January 2024, each by way of a separate Originating Application within the relevant insolvency, seeking relief that included: (a) the reversal of Mr. Pretlove's decision to place the BVI Defendants into insolvent liquidation; and (b) the restoration of the BVI Defendants into voluntary liquidation.

[57] The Claimant says, in para 58 of its skeleton argument, that the purpose of the Former Directors' Proceedings, i.e., to reverse Mr. Pretlove's decision to return the BVI Defendants to voluntary liquidation, was "to wrestle control of the BVI Defendants' participation in any proceedings away from Mr. Pretlove as liquidator. That required restoration of the voluntary liquidation status of the BVI Defendants … the avowed purpose of the Former Directors' Proceedings is to enable those former directors to take over the BVI Defendants and conduct this litigation on their behalf because they claim to be 'the best placed persons to oversee and conduct the Companies' response to the NBT claim and/or have a legitimate interest in overseeing and conducting the Companies' response to the NBT claim'. This is consistent with both a clear intention to participate in and defend these proceedings and, in the eyes of the former directors, a real

substantive reason to do so. Otherwise, it is difficult to imagine why the former directors would see any merit in becoming engaged at all."

[58] It appears to me also that if the Former Directors wish to return the BVI Defendants to voluntary liquidation, or to discharge or rescind the liquidation and seek control of those entities, they must believe, contrary to what the Defendants suggest, that the BVI Defendants are not insolvent or, if they are, that they can soon be returned to solvency.

[59] On 29th May 2024, the Former Directors' Proceedings were heard by Wallbank J and dismissed.

[60] I do not need to set out the reasons for Wallbank J's decision as they are not directly relevant to the Jurisdictional Challenge. In any event, the former directors appealed that decision to the ECSC Court of Appeal by way of a notice of appeal, filed on 10th July 2024 and amended on 22nd August 2024. As part of Ground 3 of the appeal, the Former Directors assert that: (a) as noted above, they are the best placed persons to conduct the litigation for the BVI Defendants; and (b) they "have a legitimate interest in overseeing and conducting the Companies' response to the [Claim]."

[61] Counsel advised me during the Hearing that the appeal was scheduled to be heard in the week beginning 13th October 2025. I am not aware whether the appeal proceeded as planned that week, nor do I have information regarding its outcome.

[62] On 23rd April 2024, the Claim against the BVI Companies was stayed by consent pending the final determination of the Directors' Proceedings and the Jurisdictional Challenge.

[63] On 30th April 2024, NBT submitted a note to the Court (i.e., the Note) to update the Court on the deficiencies in the Claimant's full and frank disclosure to the Court when it applied *ex parte* for the Order.

[64] Following or arising from the purported service of the Proceedings on some of the Defendants, the Claimant made various applications to extend time for serving the Claim Form.

[65] The Court granted the first extension on 8th May 2024.

[66] The Claimant then made a second application to extend the time for the Claim Form on 5th November 2024. I granted that application on 10th March 2025.

[67] From April to December 2024, various applications involving the Jurisdictional Challenge were made by one or more of the Defendants. These applications included setting aside the Order (i.e., the Jurisdiction Applications) and the orders extending time for service of the Claim Form. In addition, one or more of the Defendants also applied to set aside the service of the Claim Form upon them.

[68] The Claimant made a third application for an extension, as service on some of the Appleby Defendants (referred to in the Appleby Defendants' skeleton argument as the "Singaporean Appleby Defendants", i.e., the Eighteenth, Twenty-First and Twenty-Eighth Defendants) and LDC Uruguay could not be completed before the expiry of the previous extension.

[69] Some of these applications were listed for hearing alongside the Jurisdictional Challenge at the Hearing. However, with the consent of the Parties, I agreed to hear only the Jurisdiction Applications. It was clear that the five days allocated for hearing all the applications were inadequate, and this proved to be the case. The Hearing was only completed late on 9th October 2025. I agreed with the Parties that if the Jurisdiction Applications were not successful, I would give directions for the remaining applications to be heard within a reasonable time frame. If they were successful, I would not, of course, have to deal with the extension of time applications or the applications to set service aside.

The Basis of the Jurisdictional Challenge

[70] The basis upon which the Jurisdictional Challenge is made is set out in the Jurisdiction Applications. They do not need a detailed mention.

[71] In summary, the Defendants contend that: (a) the Claimant cannot demonstrate that the gateway requirements of the CPR for PTSO have been satisfied; (b) even if they are satisfied, the appropriate forum to determine the Claim is not the BVI; and (c) in any event, the Claimant failed to comply with its duty of full and frank disclosure when applying for and obtaining the Order, such that even if the Claimant can satisfy (a) and (b), the Order should be set aside on that basis.

[72] In determining the Jurisdictional Challenge in this case, the Court must, therefore, decide the following issues.

[73] First, whether the requirements of CPR 7.2 and CPR 7.3, which set out the essential prerequisites for granting PTSO, have been satisfied. If they are not satisfied, the Order must be set aside. The Court does not then have to deal with any other issue. I will refer to this in the Judgment as "Issue 1", "the First Issue", or "the Gateway Requirements".

[74] If the requirements of CPR 7.2 and 7.3 are satisfied, the Court must, second, decide whether the appropriate forum to hear the Claim is the BVI. If it decides the forum issue against the Claimant, the Court must set aside the Order. I will refer to this issue in the Judgment as "Issue 2", "the Second Issue", or "the Forum Issue".

[75] Third, even if the Court decides both issues in favour of the Claimant, it must go on to determine:

(a) whether the allegation made by the Defendants that the Claimant failed to give full and frank disclosure to the Court of facts which it should have brought to the attention of the Court when it applied for the *ex parte* order is made out;

(b) if that allegation is made out, whether the non-disclosure related to facts and matters which were material or, in this case, material in the manner in which the Defendants suggest;

(c) if they were material, whether their non-disclosure warrants the Order being set aside on that basis alone;

(d) if it does, and the Court discharges the Order, whether the Court should re-grant the Order or make it in terms similar to the current terms of the Order; and

(e) if the Court decides to continue the Order or to remake the Order in the same or similar terms, whether it should make any consequential order, such as in relation to costs, for the Claimant's failure to comply with its duty of full and frank disclosure and frank presentation to the Court at the *ex parte* hearing.

I will refer to this in the Judgment as "Issue 3", "the Third Issue", or "the Disclosure Issue".

[76] While Mr. Matthews (who appeared with Mr. Damien Walker) represented only the Appleby Defendants, the other Defendants largely adopted his written submissions and endorsed his oral arguments at the Hearing. Since Mr. Matthews took the lead in presenting the Defendants' case, and to avoid repetition, I will address these issues primarily by reference to his written and oral submissions. The Cargill Defendants (represented by Mr. Robert Weekes KC who appeared with Mr. Oliver Clifton and Mr. Harry Oulton), the Bunge Defendants (represented by Mr. Matthew Hardwick KC, who appeared with Mr. Richard Evans and Ms. Gráinne Hussey) and the First Defendant (represented by Mr. Tom Roscoe, who appeared with Mr. Alistair Abbott), have all formally adopted the Appleby Defendants' written and oral submissions, while emphasising those aspects of the Claim that are specifically pertinent to their respective cases before this Court. A significant difference between the position adopted by the First Defendant and by the Trader Defendants on the Jurisdiction Application is that the First Defendant wishes to have the Claim tried in Russia. The Trader Defendants, while challenging this Court's jurisdiction to try the Claim, proffer no alternative forum for its trial.

[77] For the avoidance of doubt, subject to the above difference between the First Defendant and the Trader Defendants, unless otherwise expressly stated or the context requires to the contrary, any reference to a position advanced by the Appleby Defendants is to be taken as extending to all of the Defendants. Conversely, any position advanced by any other Defendant shall likewise be treated as applying to all of the Defendants.

The Grounds of Challenge

Introduction

[78] Before I address the above issues, I must make a few short points which I understand are common ground between the Parties.

[79] First, it is for the Claimant to prove that Issues 1 and 2 are made out. As regards Issue 2, the position would be different if this were a "service in" case, i.e., if PTSO was not required and the only issue for the Court was whether the appropriate forum for trying the Claim was the BVI: see, by way of example, **Spiliada Maritime Corpn v Cansulex Ltd, The Spiliada** ("The Spiliada").[3]

[80] Second, as regards the burden, it is appropriate to mention that where the Defendants accept an underlying fact or allegation relied upon by the Claimant, or where it is established to the satisfaction of the Court, the so-called "persuasive" or "evidential" burden may pass to the Defendants in the same way as the evidential burden of proving a fact or matter passes to a defendant in a civil trial where an underlying allegation made by a claimant is accepted by a defendant or demonstrated by the claimant to the satisfaction of the court: see, by way of a recent example, **Quadra Commodities SA v XL Insurance Co SE**,[4] applying **Dunlop Holdings Ltd's Application**.[5]

[81] So far as the Disclosure Issue is concerned, the burden is on the Defendants to prove that the grounds relied upon by them are made out and that the Court should make the order that they invite it to make.

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[3] [1987] A.C. 460 at 480, per Lord Goff.
[4] [2023] EWCA Civ 432.
[5] [1979] RPC 523.

[82] Third, the standard of proof for establishing the Gateway Requirements is low. The Claimant must show a "good arguable case" that one or more of the gateways upon which it relies to seek PTSO is satisfied: see **Brownlie v Four Seasons Holdings Inc** ("Brownlie"),[6] referred to below. This standard is higher than the "real issue to be tried" test, which the Court must apply when considering the merits of the claimant's case (see below), if a gateway is passed: see **Carvill America Inc v Camperdown UK Ltd**.[7]

[83] Fourth, while it is for a claimant to establish that there is sufficient material to demonstrate that the gateways relied upon by it are passed to the standard of proof referred to above, the Court does not consider that material in isolation. The Court will consider all the material placed before it (including from any defendant) to determine whether the claimant's case on the relevant gateway is made out. This principle does not just apply at the interlocutory hearing of a jurisdictional challenge, but also when the application for PTSO is made *ex parte*, at which stage, the claimant will need to place all relevant material before the Court, as part of his duty of full and frank disclosure, even if that material may undermine his case for seeking such permission. As Waller LJ explained in **Canada Trust v Stolzenberg**:[8]

> "'Good arguable case' reflects … that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

[84] Finally, as regards Issue 1, the relevant time at which the Court considers whether a gateway is satisfied is the date when the *ex parte* application for the Order was made: see, by way of examples, **Erste Group Bank AG v JSC VMZ Red October** ("Erste")[9] and **Gunn v Diaz** ("Gunn").[10]

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[6] [2017] UKSC 80, at [7]
[7] [2005] EWCA Civ 645, at [45], per Christopher Clarke LJ.
[8] [1998] 1 W.L.R. 547 at 555E.
[9] [2015] EWCA Civ 379, at [48].
[10] [2017] EWHC 157 (QB), at [86].

[85] The overall assessment of the material which has been placed before the Court (and conclusions based on that material) is within the sole province of the Judge dealing with the jurisdictional challenge. However, in the present case, my conclusions are not based on the niceties of where the burden of proof lies. That is because, wherever the burden lies, the material supporting the conclusions I have reached is clear, based on the standard of proof I need to apply.

Issue 1 — the Gateway requirements

[86] The statutory provisions that govern the grant of permission to serve a defendant outside of the jurisdiction of this Court are set out in CPR 7.2 and CPR 7.3.

[87] CPR 7.2 states that a claim form may be served out of the jurisdiction only if: "(a) [CPR] 7.3 allows; and (b) the court gives permission."

[88] The requirements of CPR 7.2 are cumulative. Both requirements must be satisfied before a claimant can serve a claim form out of the jurisdiction.

[89] CPR 7.3(2) sets out the types of claims for which this Court can grant permission to serve a claim form out of the jurisdiction and the circumstances in which the Court may grant permission for the service out of a claim form. The relevant provisions of CPR 7.3(2) state:

> "*Features which may arise in any type of claim*
>
> 1 The court may permit a form to be served out of the jurisdiction if the proceedings are listed in this Rule.
>
> 2 A claim form may be served out of the jurisdiction if a claim is made:
>
> (a) Against someone on whom the claim form has been or will be served, and:
>
> i there is between the claimant and that person a real issue which it is reasonable for the court to try; and
>
> ii the claimant now wishes to serve the claim form on another person who is outside the jurisdiction

and who is a necessary or proper party to the claim;

…

4 A claim form may be served out of the jurisdiction if a claim in tort is made and the act causing the damage was committed within the jurisdiction, or the damage was sustained within the jurisdiction.

9 A claim is made for restitution where the defendant's alleged ability arises out of acts committed within the jurisdiction or out of acts which, wherever committed, where to the detriment of a person domiciled within the jurisdiction …"

[90] A helpful summary of the principles governing the Gateway Requirements is contained in para. 6HJ.1 of the **White Book, 2025 Edition** ("the White Book"), by reference to the similarly-worded provisions of para. 3 of Practice Direction 6B ("PD 6B"), which supplements Section IV of Part 6 of the E&W CPR governing service out in England and Wales:

> "The general principles to be applied by the court, when hearing and determining an application (whether *ex parte* or *inter partes*) made by a claimant … for permission to serve proceedings on a defendant who is out of the jurisdiction of E&W on the basis that the claim comes under one or other of the heads of jurisdiction stated in para.3.1 of [PD] 6B, are as derived from the authorities … Put shortly, the principles are:
>
> 1. that there is a good arguable case that the claim against the foreign defendant falls within one or more of the heads of jurisdiction for which leave to serve out of the jurisdiction may be given as set out in para.3.1 of [PD] 6B;
>
> 2. that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim …; and
>
> 3. that, in all the circumstances: (a) England is clearly or distinctly the appropriate forum for the trial of the dispute (forum conveniens) and (b) the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction ...."

[91] Paragraph 6.37.14 of the **White Book** then goes on to summarise what needs to be demonstrated by the Claimant to pass one of the gateways:

"6.37.14 An application for permission … must set out which head of jurisdiction (or "ground") is relied on … It had been thought that, if a claim was put forward at the permission stage on one legal basis, the claimant could not subsequently justify permission on another legal basis; a fresh application for permission was needed. This was referred to as the rule in *Parker v Schuller*[11] and was said to apply not just to the cause of action asserted, but also to the jurisdictional gateway relied upon … That is no longer the case, however, following the Supreme Court's decision in *NML Capital Ltd v Republic of Argentina*[12] **...** it is now accepted that the court has a discretion to allow a claimant to rely on a new jurisdictional gateway that was not referred to at the permission stage…

The position must, however, be assessed as at the time of the original permission hearing. New evidence may be adduced at the hearing of the application to set aside, but only if it sheds light on the position as at the permission stage: see *Satfinance Investment Ltd v Athena Art Finance Corp* ("Satfinance").[13] In that case, the claimant sought to justify the grant of permission to serve out under the "necessary or proper party" gateway … by reference to the joinder of a new "anchor defendant" after the date of the original permission hearing. The court held that this was not permissible, distinguishing *NML Capital* and *Alliance Bank*[14] … on the basis that, in those cases, the new grounds the claimant sought to rely on to justify the grant of permission did not depend on facts which occurred only after the original permission hearing (see [123]–[124]). A fresh application was therefore required. (Contrast the position on an application to stay proceedings on grounds of forum non conveniens, which will be determined on the basis of the circumstances as at the time of the court's decision on the application: *Vauxhall Motors Ltd v Denso Automotive UK Ltd*).[15]

Obviously, it would be unsatisfactory if it were sufficient for a claimant merely to assert that his or her claim fell within one or other of the heads of jurisdiction set out in para.3.1 of PD 6B. Not infrequently, the question

[11] (1901) 17 T.L.R. 299, CA.
[12] [2011] UKSC 31.
[13] [2020] EWHC 3527 (Ch), at [41] and [52], per Morgan J.
[14] [2013] EWCA Civ 1588, at [75].
[15] [2025] EWHC 213 (Ch), Bacon J.

whether the claimant's claim comes within one or other of the heads of jurisdiction raises factual and legal issues of considerable difficulty. So far as factual issues are concerned, the standard of proof that the claimant must satisfy, in relation to establishing that the claim against the foreign defendant falls within one or more of the relevant heads of jurisdiction, is that of "a good arguable case": see *VTB Capital Plc v Nutritek International Corp* ("VTB")[16] and *AK Investment CJSC v Kyrgyz Mobil Tel Ltd and others, Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd and others* ("AK Investment" or "Altimo")[17] **...** That point did not arise directly *in Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*[18]*,* as attention was concentrated upon the separate question of the strength of the case on the merits which a claimant has to establish in order to justify the grant of leave to serve proceedings out of the jurisdiction … But the point was made clear by Lord Goff in his analysis of *Vitkovice Horni A Hutni Tezirstvo v Korner*[19], demonstrating that in that case the House of Lords rejected the submission that the standard of proof in relation to establishing that a case fell within one of the heads of jurisdiction was the civil standard of 'balance of probabilities' (a higher standard than 'good arguable case') …

In this context, 'good arguable case' connotes more than a serious issue to be tried or a real prospect of success, but not as much as balance of probabilities (*Carvill America Inc v Camperdown UK Ltd*).[20] That standard of proof applies to an issue going to jurisdiction both where the issue is one which will also be an issue at trial and where it will not be. In *Canada Trust v Stolzenberg*[21], Waller LJ explained that it is important to remember that in cases where points arise which relate to jurisdiction, but which might also be argued about at the trial, the court must be concerned not even to appear to express some concluded view as to the merits (e.g. as to whether the contract existed or not). And it is also right to remember that the 'good arguable case' test, although obviously applicable to the without notice stage, becomes of most significance at the inter partes stage where two arguments are being weighed in the interlocutory context (which is not

[16] [2012] EWCA Civ 808, at [99]. The decision of the Court of Appeal was upheld on appeal: see [2013] 2 A.C. 33.
[17] [2011] UKPC 7.
[18] [1994] 1 A.C. 438, HL.
[19] [1951] A.C. 869, HL.
[20] [2005] EWCA Civ 645, at [45], per Christopher Clarke LJ.
[21] [1998] 1 W.L.R. 547 at 555E.

a trial). In that context, Waller LJ stated, 'good arguable case' reflects 'that one side has a much better argument on the material available'. This so-called *Canada Trust* gloss was approved by Lord Steyn in the appeal to the House of Lords in the *Canada Trust* case[22], endorsed by the Privy Council in *Bols Distilleries BV v Superior Yacht Services*[23], and *Altimo Holdings*[24], and applied in various other cases though at times in terms that doubted whether the word 'much' added much to the test (see e.g. *AstraZeneca UK Ltd v Albemarle International Corp*[25] and *Aeroflot, Russian Airlines v Berezovsky*.[26]

In *Brownlie v Four Seasons Holdings Inc*[27], Lord Sumption expressed the opinion that the *Canada Trust* gloss 'is a serviceable test, provided that it is correctly understood'. He explained that the reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice Horni A Hutni Tezirstvo v Korner*, op cit. Instead, it means (1) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (2) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (3) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. His lordship doubted whether anything was gained by the use of the word "much" in the test, which suggests "a superior standard of conviction that is both uncertain and unwarranted in this context".

In *Goldman Sachs International v Novo Banco SA* ("Goldman Sachs")[28], the Supreme Court endorsed the three-limbed explanation of the 'better of the argument' test given by Lord Sumption in the *Brownlie* case, thereby removing doubts that it was obiter. Subsequently, in *Kaefer Aislamientos SA de CV*

[22] [2002] 1 A.C. 1
[23] [2006] UKPC 45, at [26]-[28].
[24] [2011] UKPC 7, at [71].
[25] [2010] EWHC 1028 (Comm), at [26], per Hamblen J.
[26] [2011] EWCA Civ 784, at [50].
[27] [2017] UKSC 80.
[28] [2018] UKSC 34.

> *v Atlas Drilling Mexico SA de CV (Kaefer")*[29], the Court of Appeal provided guidance[30] as to how the test is to be applied in practice. The court also stated … that the adjunct 'much' in the *Canada Trust* formulation must be laid to rest, noting that the word was deemed superfluous by Lord Sumption in *Brownlie.* See also *Coward v Ambrosiadou."* [31]

The "necessary or proper party" gateway ("the NPP Gateway")

[92] The primary basis upon which the Claimant relies to establish that it was appropriate for the Court to make the Order, i.e., the Order granting the Claimant PTSO, is the ground specified in CPR 7.3(2), i.e., the ground commonly known as "the necessary or proper party" gateway or "the NPP Gateway".

[93] CPR 7.3(2) is substantially identical to the equivalent provision of para. 3.1 of PD 6B. The material parts of para. 3(1) of PD 6B provide as follows:

> "(3) A claim is made against a person … on whom the claim form has been or will be served (otherwise than in reliance on 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."

[94] This gateway substantially mirrors the wording of the equivalent provision in England and Wales, now contained in paragraph 3.1(3) of Practice Direction 6B to the CPR. It follows that the Court may properly have regard to the English authorities interpreting that provision. While such authorities are not binding, they are ordinarily of considerable persuasive weight. In **Joint Stock Company "BTA Bank" v Sabyrbaev** ("BTA"),[32] Wallbank J made the position clear:

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29 [201] EWCA Civ 10.
30 *Ibid*., at [72]-[86].
31 [2019] EWHC 2105 (Comm), Mr. Andrew Henshaw QC, sitting as a deputy Judge of the High Court.
32 BVIHCM2021/0171, 7 December 2023, at [90]-[91].

"[90] The wording of the CPR 7.3(2) (the NPP Gateway) almost exactly replicates the language of the current rule in England under Part 6B para 3.1(3) of the English Civil Procedure Rules (indeed the wording was altered to track the change in the English rules: *Nilon* [i.e., *Nilon Limited and Anor v Royal Westminster Investments S.A*]).[33] As such English case law on the provision, which has been the subject of considerable analysis by the English Courts, is of very highly persuasive authority.

[91] Where a procedural rule in the BVI is worded in identical terms to its English analogue (and origin), the English common law interpretation of that rule must provide at the least a very highly persuasive indication of the meaning, effect and scope of the BVI rule; particularly where the rule has not previously been the subject of substantive judicial dicta in the BVI. The fact that there is but a single set of common law principles is additionally evident from the following matters: (1) *AK Investment,* which the Privy Council in *Nilon* (of course a BVI appeal) treated as authoritatively stating the law for the purpose of disposal of that appeal (see e.g. at (13) of Lord Mance's judgment), was itself an appeal to the Privy Council from the Isle of Man; (2) the judgment in *AK Investment* has been uniformly applied since by the English Courts and indeed in the BVI (see for instance in *WWRT Ltd v Carosan Trading Ltd*);[34] and (3) it would be remarkable if a gateway exactly modelled on the English version were to admit of a different interpretation."

[95] In **Gunn v Diaz** ("Gunn"),[35] Andrews J summarised the requirements for the NPP Gateway as follows:

"[86] A number of authorities relating to the jurisdiction under this gateway were cited to me, from which the following principles relevant to the issues in the present case can be extracted:

(i) The 'necessary or proper party' gateway is anomalous, in that, by contrast with the other heads of jurisdiction, it is not founded upon any territorial connection between the claim, the subject-matter of the relevant action, and the jurisdiction of the English courts …

(ii) The prospect of proceedings having to take place in more than one jurisdiction will never be enough, in and of itself, to justify the joinder of a foreign defendant: *Altimo,*[36] adopting the well-known dictum of Lloyd LJ in *Golden Ocean Assurance Ltd v*

[33] [2015] UKPC 2, at [11]-[12].
[34] BVIHCMAP2022/002, 20th July 2022, at [16] – [17], per Pereira CJ.
[35] [2017] EWHC 157 (QB), at [86].
[36] [2011] UKPC 7, at [73], per Lord Collins.

Martin, The Goldean Mariner[37]: '… caution must always be exercised in bringing foreign defendants within our jurisdiction under O. 11 r. 1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.'

(iii) The claimant must show that a claim is made against a defendant on whom the claim form has been or will be served (otherwise than in reliance on the 'necessary or proper party' gateway). Service on that anchor defendant may be within the jurisdiction; outside the jurisdiction without permission if permission is unnecessary; or outside the jurisdiction with permission, if permission is required …

(iv) The mere fact that defendant A is sued only for the purpose of bringing in B as a defendant is not fatal to the application for permission to serve B out of the jurisdiction, but it is a factor in the exercise of the court's discretion: *Altimo*[38] … reiterated and applied in *Nilon Ltd v Royal Westminster Investments SA.*[39]

(v) The court must first ask itself, viewed in isolation, (a) whether there is a real issue to be tried between the claimant and the anchor defendant on the merits, (i.e., one with a real, rather than fanciful, prospect of success) and (b), if so, whether it is reasonable for the English court to try that claim …

(vi) The question whether it is reasonable for the English court to try the claim between the claimant and the anchor defendant is an objective one: it is not the same question as whether it was reasonable for the claimant to start proceedings against that defendant within the jurisdiction …

(vii) If the anchor defendant has failed to acknowledge service or is not defending the claim, there is highly unlikely to be a real issue to be tried which it is reasonable for the court to try: *a fortiori* if the claimant has entered default judgment or summary judgment already …

(viii) It is only if both limbs of PD 3.3(1)(a) are satisfied that the court should go on to consider, under sub-para (b) whether there is a good arguable case that B is 'a necessary or proper party' to the claim between the claimant and A …

(ix) The question whether B is a 'proper party' to the claim against A is answered by asking: 'supposing both parties had been within the jurisdiction, would they both have been proper parties

[37] [1990] 2 Lloyd's Rep 215 at 222, CA.
[38] [2011] UKPC, at [76]-[79].
[39] [2015] UKPC 2.

> to the action?' B will be a proper party if the claims against A and B involve one investigation or there is a sufficient 'common thread' between them."

[96] To pass the NPP Gateway, the Court must be satisfied that:

(a) there is a "real issue" to be tried in relation to the claim made by the Claimant against the BVI Defendants — i.e., the Claim against the BVI Defendants is one with a real, as opposed to a fanciful, prospect of success — and the claim is one which it is "reasonable for the court to try"; and

(b) the foreign defendant is a "necessary or proper" party to that claim.

[97] As regards the NPP Gateway, the Court must ask itself, viewed in isolation, whether this requirement is satisfied, i.e., whether there is a real issue to be tried in relation to the Claim between the Claimant and the BVI Defendants and, if so, whether it is reasonable for the court to try the Claim. This point has been made clear in many cases. They include **Erste**[40] and **Gunn.**[41]

[98] The Defendants, of course, deny all the allegations of wrongdoing in the Claim made by the Claimant against them. I make it clear that whatever language I use in this Judgment, I do purely for the sake of convenience. I express no view, final, concluded or even provisional on the subject.

[99] As regards (a) above, it appears to be common ground between the Parties that, subject to the other requirements of the relevant gateway, the Claimant's case against the BVI Defendants is properly arguable. The principal issue for determination by me is whether the Claim against the BVI Defendants satisfies the requirement that it is reasonable for the Court to try (the "Reasonable to Try Requirement" or "RTT Requirement"). If that requirement is met, it must follow that there can be no real issue between the Parties as to the BVI Defendants being necessary parties to the Claim. Conversely, if I conclude that it would not be reasonable for the Claim to be tried against the BVI Defendants, the NPP

[40] [2015] EWCA Civ 379, at [38].
[41] *Ibid*., at [86]

Gateway cannot be satisfied. The gateway will, therefore, not be passed where the BVI Defendants are, as the Defendants submit, mere "empty shells", or where judgment in default has been, or is liable to be, entered against them. In such circumstances, it cannot properly be said that the Claim would be reasonable for the Court to try, or that it gives rise to a "real issue" requiring determination by the Court.

[100] Although the Parties have sought to disaggregate the requirements of the NPP Gateway into separate elements or constituent parts, I do not consider that such an exercise is either necessary or helpful. In my view, the proper approach is to address all aspects of the gateway under a single rubric — namely, whether the Claimant has established that the Reasonable to Try Requirement has been satisfied. However, I will refer specifically to the constituent elements where appropriate.

[101] The Defendants contend that the Claimant is unable to establish that the RTT Requirement is made out. The substance of what they say is set out, *passim*, in Howard 1, i.e., the first affidavit of Mr. Benjamin Howard dated 26th April 2024, furnished on behalf of the Appleby Defendants. They are encapsulated by the following paragraphs of the Appleby Defendants' skeleton argument, lodged for the purpose of the Hearing:

> "81. The disputed issue which the Court will have to adjudicate upon is whether there is, as between NBT and the BVI Companies, 'a real issue which it is reasonable for the court to try' … that expression imposes two separate conditions;
>
> …
>
> 87. The Court begins by examining the claim against the Anchor Defendant in isolation — that is to say, on the assumption that there will be no joinder of any foreign defendant which is alleged to be a necessary or proper party to that claim. The Court must be satisfied that two separate conditions are satisfied: first, that there is a 'real issue … to try' between the claimant and the Anchor Defendant ('the Real Issue Condition'); and secondly, that this is an issue which it is 'reasonable for the court to try' (the 'Reasonable To Try Condition'). It is only if both of those conditions are satisfied that the Court goes on to consider whether the foreign defendant is

a necessary or proper party to the claim against the Anchor Defendant…

88. It is for the claimant to provide a plausible evidential basis for its contention that each of the conditions is satisfied. The question as to whether the conditions are satisfied is to be answered by reference to the position on the date on which the claimant obtained permission to serve out ('the Relevant Date'), not the position at the time of the set aside hearing. Hence permission to serve out will not be set aside on the basis that circumstances have changed since the Relevant Date in such a way that a condition is no longer satisfied. However, events which occurred after the Relevant Date may throw light on what the position was on that date and be taken into account for that purpose. Evidence which is relevant to the question as to what the position was on the Relevant Date and which is available at the time of the set aside hearing should be taken into account regardless of whether it could have been obtained at the Relevant Date.

89. In the context of this gateway, the word 'try' refers not only to a trial in the traditional sense and a contested hearing concerning summary judgment or final relief, but also other forms of judicial determination (such as receiving evidence, hearing argument and determining whether it is useful and appropriate to make a declaration) … But it does not refer to the administrative process of entering default judgment or the process of assessing quantum after that has been done. Hence, if that is all that remains for the Court to do at the Relevant Date, the gateway will not be available…

90. There are two aspects to the Real Issue Condition:

    a. The first concerns the viability of the claimant's claim against the Anchor Defendant. The test as to whether there is a 'real issue … to try' is the same as the test as to whether there is a serious issue to be tried in relation to the merits, and both tests are the same as the test for summary judgment or strike out. Hence there will not be a 'real issue … to try' as between the claimant and the Anchor Defendant unless the claimant can establish that its claim has a real (as opposed to a fanciful) prospect of success. As has been explained above, that is a low bar for the claimant to overcome.

    b. Secondly, there will not be (or will no longer be) a 'real issue … to try' between the claimant and the Anchor Defendant if, as of the Relevant Date, the claimant has already obtained summary judgment against the Anchor Defendant; the Anchor Defendant has

admitted the claim, or the claim has been admitted by a liquidator in insolvency proceedings; or the Anchor Defendant has failed to acknowledge service or file a defence within the stipulated period, and the claimant has either obtained default judgment or is entitled to apply for it.

91. It is uncontentious that the Court should proceed on the basis that there is a real issue as between NBT and the BVI Companies.

92. In relation to the Reasonable To Try Condition, the question is not whether it was reasonable or proper from the claimant's perspective for it to commence the proceedings against the Anchor Defendant in the first place, but whether it is reasonable for the Court to 'try' the issue in the sense described above …

93. That is an objective question. The claimant's own considerations and motivations cannot supply the answer. It is also a 'finely nuanced, soft-edged question'. In answering it, the Court's task is evaluative and contextual'. It should take into account 'all the circumstances of the case' as of the Relevant Date …[42]

94. It will be relevant for the Court to consider the likelihood, as of the Relevant Date, that the Anchor Defendant would dispute its liability and defend the claim. In that regard, the Court will not give 'weight or emphasis' to a 'possibility (for example, that the Anchor Defendant 'might be wound up and a liquidator might decide to defend [the] proceedings') if there is 'nothing specific' to cause it to do so. However, whether or not it was likely as of the Relevant Date that the Anchor Defendant would defend the claim is 'not determinative one way or the other': [43]

    a. Even if the Anchor Defendant did not intend to defend the claim, it might nevertheless be reasonable for the Court to try the claim against it if there is 'some utility' in the Court granting summary or final judgment on an uncontested basis — i.e. if 'some useful purpose or legitimate interest might be served by the prospective grant of summary or final judgment on an uncontested basis against the anchor defendant'.[44] That might be the position if, for example, the claimant wished to obtain a declaration against the Anchor Defendant, as the Court will not grant a declaration simply because the defendant has not presented any defence, but instead requires to be persuaded by evidence and

[42] Referring to Erste, at [48]; Gunn, at [86(vi)]; and HC Trading Malta Ltd v KI (International) Ltd ("HC Trading") [2022] EWHC 1387, at [16], [18] and [21].
[43] Referring to HC Trading, at [32].
[44] Referring to HC Trading, at [11], [16] and [32].

argument that it would be useful and appropriate to grant the declaration.

b. Conversely, the fact that the Anchor Defendant did intend to defend the claim does not necessarily mean that it is reasonable for the Court to try the claim.

96. Hence the 'main inquiry' in relation to the Reasonable To Try Condition concerns the 'utility' of trying the claim against the Anchor Defendant. It will not be reasonable to do so if there would be no 'discernible utility' in doing so or if the claimant has 'nothing to gain from a trial of the issues', even to the stage of obtaining summary judgment. If there is 'no obvious utility' in conducting a trial (in the relevant sense) and preparing a judgment, it is 'inconceivable', having regard to the overriding objective, that the Court will make judicial time available for a trial. It will not engage with 'pointless and wasteful litigation'. Whether a claim lacks utility is 'a matter of common sense'.[45]

97. The point about the appropriate use of judicial time applies with even greater force in the BVI — where, as Wallbank J noted in BTA at para [192], the resources of the Court are 'limited'. NBT acknowledged at the directions hearing on 4 March 2025 that a trial of its claims is likely to take at least 12 weeks. It is likely that a substantial amount of judicial time would also be consumed by prior interlocutory applications."

[102] The Defendants' central contention, succinctly stated, is that the determinative enquiry in assessing whether the RTT Requirement is satisfied is whether the BVI Defendants possess any assets in this or any other jurisdiction against which the Claimant might enforce any judgment obtained in these Proceedings.

[103] The Appleby Defendants put this point in their skeleton argument in the following terms:

"98. It will be crucial to consider whether the claimant will be able to enforce any judgment which it obtains in the instant proceedings against the Anchor Defendant's assets. It will therefore be relevant to consider what (if any) assets the Anchor Defendant has, where any such assets are located, and what the rules are in any relevant country concerning the recognition and enforcement of foreign judgments and the proving of claims in insolvency proceedings.

99. If the Anchor Defendant did not, as of the Relevant Date, intend to defend the claim against it, the claimant cannot satisfy the gateway simply by choosing not to obtain a default judgment

[45] Referring to HC Trading, at [19].

> and instead opting for a trial on the merits. It will have to identify a legitimate interest which would be better served by taking that course[46] — for example, by establishing that, in a country in which the Anchor Defendant has assets against which a judgment could be enforced, a default judgment would not be entitled to recognition, but a judgment following a trial on the merits would be.[47]"

[104] The Defendants' answer to this enquiry is categorical: the BVI Defendants possess no such assets, nor is there any realistic prospect of their defending the Claim, notwithstanding both the appointment of a liquidator made in relation to the BVI Defendants for that purpose and the filing of acknowledgments of service in which the Liquidator has indicated the intention of the BVI Defendants to defend the Claim.

[105] The Defendants say that the short and simple answer to the question whether the BVI Defendants have any assets in this or any other jurisdiction against which the Claimant can enforce any judgment is an emphatic "No". Nor, they say, is there any likelihood that the BVI Defendants will defend the Claim, even though a liquidator has been appointed, *inter alia*, to do so. That is because the Liquidator has not been provided with funds to do so, nor is he likely to obtain any third-party funding (whether from an insurer or otherwise) to enable him to do so.

[106] The Claimant has provided some funding to the Liquidator to enable him to carry out the preliminary enquiries, which any liquidator must undertake upon accepting appointment to that office. The Claimant provided the funding for this because Wallbank J made an order on 16 September 2023, giving the Liquidator permission "to declare the [BVI Defendants] to be in insolvent liquidation should he see fit after carrying out investigations in the normal way." The effect of s. 218A(2)(c) of the BCA 2004 is that the restoration of those entities can only be made, or take effect, if "satisfactory provision has been made or will be made for the expenses and remuneration of the liquidator, if appointed". The Claimant said that it provided that funding for that purpose on a "non-recourse basis".

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[46] Referring to Satfinance, at [94].
[47] Referring to Lakatamia Shipping v Su [2023] EWHC 1874 (Comm).

[107] The Defendants contend that the Claimant's claim against the BVI Defendants is manifestly artificial and contrived.

[108] In paras 86 and 87 of the skeleton argument of the Cargill Defendants, the position is summarised as follows:

> "86 …
>
> a) NBT has brought very substantial fraud claims against companies with no assets.
>
> (b) Given that NBT's own case is that those companies never had any assets before their liquidation; those companies have been subject to complete voluntary liquidations; and those liquidations mostly took place between 7 or 8 years ago, there was never any plausible evidential basis for believing that those companies would have any valuable assets. NBT sued them anyway.
>
> c) NBT would not have been able to sue them without applying for their restoration to the Register and paying for their liquidator (and it would appear, their legal practitioners).
>
> d) Rather than apply for default judgment against those companies, NBT has agreed to stay its claims against them until after determination (at least) of these jurisdictional challenges, thereby ensuring that there are extant claims against anchor defendants, whilst those applications are being determined.
>
> 87. If (as is apparent from the above), the claim is a contrivance and a device for seeking to obtain jurisdiction, it must also follow that this is not a claim which it is objectively reasonable for the Court to try."

[109] The Cargill Defendants also make the point, in para. 133 of their skeleton argument, that "NBT was funding the liquidator to defend the very claims that NBT was bringing against the BVI Companies. This [goes] directly to the issue of whether the Claim against those defendants is artificial and a contrivance and therefore whether it is reasonable for this Court to try that claim at all."

[110] Upon my raising this issue with Mr. McGrath during the course of oral argument at the Hearing, he confirmed that the Claimant unreservedly accepted that it could not, and would not, fund the Liquidator to defend claims which it was prosecuting against the BVI Defendants. He therefore saw nothing contrived or artificial about the Claim being brought against the BVI Defendants, since, as at 11th May 2023, the date of the *ex parte* hearing, it was reasonable to expect they would defend the proceedings through the Liquidator, who had indicated that he intended to do so and who was independent of the Claimant. The funding provided by the Claimant to the Liquidator thus far, as pointed out above, was required under the BCA 2004, which the Claimant was obliged to comply with for the restoration order to take effect.

[111] I respectfully agree with Mr. McGrath. There is no evidence to suggest that the Claimant has provided or will provide funding to the Liquidator to defend the Claims that the Claimant has brought against the BVI Entities. To do so would carry grave consequences for the Claimant and pose serious professional issues for the Liquidator.

[112] Like Mr. McGrath, I find it difficult to understand why the Former Directors of the BVI Defendants seek to assume control of those entities. One might infer that they intend for the BVI Defendants to mount a defence against the Claim. If so, it is difficult to uphold the assertion that there is no dispute between them and the Claimant, which it is reasonable for the Court to try. Consequently, it is unsurprising that Mr. McGrath contends in his skeleton argument that "the non-BVI defendants, as active parties to the litigation, have a clear tactical incentive to contest the position of the BVI Defendants as anchor defendants. The involvement of the former directors, who are not parties to the proceedings, in seeking control of the BVI Defendants strongly suggests that NBT's pursuit, and the BVI Defendants' defence, of the claims possesses genuine value. It is immaterial whether this value emerges after resolution of these proceedings."

[113] In addition, whatever the Defendants may say about the solvency or otherwise of the BVI Defendants, if the BVI Defendants are insolvent, it is difficult to understand why the Former Directors wish to return the BVI Defendants to voluntary liquidation, or to discharge or rescind the liquidation and seek control

of the BVI Defendants. They must believe, contrary to what the Defendants suggest, that the BVI Defendants are not insolvent or, if they are, that they can soon be returned to solvency.

[114] I need not rehearse the positions advanced by the remaining Defendants, whose written evidence is substantially consonant with the submissions put forward by the Cargill Defendants.

[115] Is the RTT Requirement satisfied?

[116] The Claimant relies on several cases to support the contention that the requirement is satisfied in the present case.

[117] In **Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd** ("Multinational Gas"),[48] three oil companies from the USA, France, and Japan formed a joint venture to trade in liquefied petroleum gas and liquefied natural gas. They created a company, the plaintiff company, initially intended to be incorporated in England, but it was instead incorporated in Liberia for tax reasons. An English company, "Services", was set up to act as the plaintiff's adviser and agent. The plaintiff's shareholders were the oil companies, which appointed directors, all of whom were resident abroad. The plaintiff neither had any UK business premises nor held any meetings in the UK. The plaintiff operated profitably from its start until 1974. Between 1973 and January 1975, its directors made significant decisions to charter or acquire interests in 20 tankers and to incur future liabilities. A market downturn led to financial difficulties, and by September 1977, the plaintiff ceased trading and went into liquidation, along with Services. The plaintiff obtained permission to bring a claim against Services out of the jurisdiction for breach of duty under the agency agreement, relating to the information and advice provided. The plaintiff sought to hold the oil companies and one subsidiary accountable for breaching the duty of care in managing and directing the plaintiff. It also claimed against the plaintiff's directors for negligence, alleging that this caused its insolvency. The plaintiff applied for leave to issue concurrent writs and serve notice out of

[48] [1983] Ch. 258, CA.

jurisdiction on the foreign defendants; leave was initially granted by the Master but overturned on appeal by the judge.

[118] The Court of Appeal dismissed the appeal by the plaintiff, *inter alia*, on the basis that although the court had jurisdiction under RSC Ord. 11, r. 1(1)(**j)** (the forebear of the current E&W CPR and PD 2B) to grant leave for the proceedings to be served on a foreign defendant where an action had been properly brought against a defendant within the jurisdiction, an order would not be made where the foreign defendant had a good defence to the action. Since the three oil companies had acted with respect to the plaintiff company as shareholders only and not as agents and since, as the only shareholders, they had unanimously required the plaintiff company's directors to make decisions or later approved what had already been done, it followed that they owed no fiduciary duty to the plaintiff company, which in turn was bound by anything done *intra vires* in respect of it with the unanimous agreement of the shareholders, as, in law, the acts of the shareholders became the acts of the plaintiff company itself and binding on it. By adopting or approving the acts of the directors of the plaintiff company, the three oil companies, acting in agreement with each other as shareholders, made those acts the acts of the plaintiff company. It followed that the liquidator could not sue the oil companies because, as shareholders, they owed no duty to the plaintiff company as a separate entity. Additionally, he could not sue the nominee directors because the oil companies had effectively made the directors' acts the acts of the plaintiff company itself. The foreign defendants were therefore not proper parties to the action.

[119] **Multinational Gas** makes it clear that PTSO should not usually be granted to serve a claim against a foreign defendant if the "local" defendant has been made a party to a claim solely to bring a claim against the foreign defendant. As Dillon LJ observed in that case:[49]

> **"**It is well established that an action is not properly brought against a defendant within the jurisdiction if that defendant has been made a party to the action solely in order to found an application under what is now sub-para (j) of Ord 11, r 1(1), to serve the proceedings out of the

[49] *Ibid.,* at 268.

jurisdiction on foreigners who could not otherwise be sued in the courts of this country. The most common instances are where the plaintiff has as a matter of law or on the undisputed facts no valid claim at all against the defendant within the jurisdiction, as in *Tyne Improvement Comrs v Armement Anversois, SA, The Brabo* ("the Brabo")[50] and *Witted v Galbraith*.[51] But the decisions of the Court of Appeal in Ireland in the *Eason* cases (*Ross v Eason & Son Ltd*[52] and *Sharples v Eason & Son*[53]) show, as I understand those cases, that even if the plaintiff technically has a cause of action against a defendant within the jurisdiction in circumstances in which the probably successful defence of that defendant depends on facts which would have to be proved by that defendant at the trial, yet the action is not to be regarded as properly brought against the defendant within the jurisdiction for the purposes of Ord 11 if the true inference from all the facts is that the sole reason for suing the defendant within the jurisdiction is to found an application under what is now sub-para (j) of Ord 11, r 1(1) to join foreign defendants in the action: see the judgment of the Lord Chancellor of Ireland in *Ross v Eason & Son Ltd."*[54]

[120] Lawton LJ summarised the approach that a court should take to the grant of PTSO:[55]

> "In my judgment the principles … which have to be considered in this case are these: first, that the court should "be exceedingly careful before it allows a writ to be served out of the jurisdiction": see *The Hagen*.[56] Secondly, that leave ought not to be given if the sole, or predominant, reason for beginning the action against a party duly served within the jurisdiction is to enable an application to be made to serve parties outside the jurisdiction … Thirdly, that the *mere* fact that the party within the jurisdiction will be unable to satisfy a judgment does not of itself mean that the action was not properly brought against that person. Fourthly, that an action is not properly brought against a party within the jurisdiction if it is bound to fail … All the defendants, being the non-resident parties to whom [the] Master's order referred, submitted that the plaintiff's claim against them was bound to fail as a matter of law. Peter Gibson J. was not satisfied that this was so…
>
> On the evidence before him, Peter Gibson J found, and in my judgment was right to find, that the predominant reason for bringing the action against Services was to enable an application to be made to serve the defendants out of the jurisdiction. The fact that Services were in liquidation was a factor which he was entitled to take into consideration

[50] [1949] A.C. 326.
[51] [1893] 1 Q.B. 577.
[52] [1911] 2 I.R. 359.
[53] [1911] 2 I.R. 436
[54] [1911] 2 I.R. 459 at 463.
[55] [1983] Ch. 258 at 285.
[56] [1908] P. 189 at 201.

> in coming to this conclusion even if, by itself, it was not conclusive against the giving of leave. This view of the case is enough to dispose of this appeal in favour of the defendants. I consider it advisable, however, to make a finding on the defendants' arguments that the plaintiff's claim against them and against Services was bound to fail."

[121] While the law on directors' duties (and Jurisdictional Challenges) has moved on since **Multinational Gas** was decided, the observations of May LJ on whether an action is "properly brought" against an anchor defendant if it was brought only or predominantly for the purpose of bringing proceedings against other defendants who are out of the jurisdiction are worth noting. May LJ said[57]:

> "In my judgment, an action brought against an English defendant against whom a substantial, plausible, pleadable or arguable cause of action is shown, use whatever epithet one may wish, whom an injured plaintiff is fully entitled to sue, even though any money judgment which he obtains will or may not be satisfied, cannot be described, in the absence of mala fides, as one which has not been properly brought. How can one realistically criticise the plaintiff for suing Services? On the evidence the former's rights against the latter had been under consideration for some time before the writ was issued. In my opinion, the facts that Services is a pauper and that the motive for suing it in England is to enable the plaintiff to pursue legitimate litigation against those who cannot be so described are irrelevant to the question whether the action was properly brought against Services."

[122] The Claimant relies on this and other passages in **Multinational Gas** to support the proposition that the mere inability to effect financial recovery against an anchor defendant does not inexorably lead to the conclusion that the claim has not been properly brought against that defendant.

[123] That proposition is uncontroversial. That is because, unless there is clear evidence that the claim against the anchor defendant has been brought solely, or predominantly, for the purpose of securing the procedural advantage of a PTSO order, it is difficult to discern any reason why a claimant would commence proceedings against a defendant from whom no recovery could reasonably be anticipated in the event of success.

[57] Multinational Gas, at 279E-G.

[124] But it does not follow that a claim against an anchor defendant who possesses no tangible assets must be regarded as devoid of substance or of no utility. A claim may retain real and legitimate utility notwithstanding the absence of any immediate prospect of financial recovery. Thus, where the anchor defendant, as here, holds (or is reasonably alleged to hold) a potential cause of action against its former directors or officers for misfeasance, breach of trust, wrongful or insolvent trading, or comparable misconduct, it may be entirely proper for a claimant to pursue proceedings against that defendant and, if unsatisfied, to seek its liquidation.

[125] The appointment of a liquidator may then permit the pursuit of claims against those former directors or officers, which may in turn afford the claimant a measure of recovery in respect of the indebtedness due from the anchor defendant if there is a return of dividend in the liquidation for the benefit of the creditors of the company.

[126] While the precise nature of any claims that may be available to the Liquidator against the former directors of the BVI Defendants is not known, it is a settled principle that causes of action forming part of a company's property belong to the company. These causes of action are generally transferable or assignable in the same manner as any other assets of a company. Accordingly, should the Liquidator be without the means to pursue such claims directly, there is in principle no insuperable obstacle to their assignment to the Claimant, provided they existed at the date of liquidation. Certain claims, however, arise only upon liquidation and are enforceable exclusively by the Liquidator. Such claims are, at common law, incapable of assignment. It may be noted that section 246ZD of the IA 1986 confers on an office-holder the power to assign such claims to creditors or third parties. There is, however, no equivalent provision in the BVI legislation. Nonetheless, the Claimant may properly provide financial assistance to enable the Liquidator to prosecute those claims on behalf of the company.

[127] In these circumstances, where it is established that the genuine purpose of the proceedings against the BVI Defendants is to facilitate the Liquidator's pursuit of claims against their former directors or officers, and the Court is satisfied on the appropriate standard of proof that such is indeed the case, it is difficult to

accept the Defendants' argument that the Claim is not properly brought against the BVI Defendants.

[128] The essential enquiry, therefore, is whether the claim against the BVI Defendants has been advanced merely to secure a procedural advantage to enable the Claim to be brought against the Defendants, or whether it is supported by a genuine intention to obtain a substantive benefit for the Claimant through the liquidation process. The existence of the so-called Cypriot Settlement Agreement to which I was referred (but which I have not considered in detail) that compromises certain direct claims between the Claimant and the Former Directors, does not extinguish or diminish the independent rights of action that may be available to the Liquidator against the Former Directors or other officers of the BVI Defendants.

[129] It remains for the Claimant to satisfy the Court that the claim is properly brought. That question must be determined objectively, having regard to all the relevant facts and circumstances.

[130] The Defendants' submission that the Claimant might, alternatively, pursue direct claims against the former directors by reference to the decision in **Royal Brunei Airlines Sdn Bhd v Tan**[58] is not persuasive. Even if, in a case of conspiracy, the corporate veil may be pierced so as to render a director personally liable, that principle applies only to those directors who were active participants in the relevant wrongdoing. It is far from clear that all former directors fall within that category. If that is correct, only the Liquidator is entitled to pursue such claims Moreover, if both the Liquidator and the Claimant were to prosecute overlapping claims, there would be an evident risk of duplication and double recovery. A further consideration is whether the Claimant possesses sufficient documentation and evidential material to sustain such direct claims The Liquidator is likely to be better placed in that regard, either by virtue of documents already in his possession or through the exercise of the investigatory powers conferred upon him by the BVI IA 2003.

[58] [1995] 2 A.C. 378, [1995] 3 All ER 97, PC.

[131] In any event, absent a clearly established circumstance wherein a claimant deliberately elects to bring a claim against an anchor defendant by adopting a complex and circuitous procedural route — specifically to enable a claim against a trader defendant to be made, as happened in **BTA** (considered below) — it is not, in my view, within the Court's purview to dictate the manner in which a claimant elects to pursue a defendant against whom it contends a cause of action exists.

[132] The applicable test is straightforward and applied on a low standard of proof. The Court considers the Claimant's intention in bringing the claim against an anchor defendant, taking into account whether the Claimant's failure to pursue direct remedies affects the dominant purpose. However, it is not the Court's function to explore alternative routes for redress unless it is manifest that the course pursued is a sham designed solely to circumvent procedural gateways, as was the case in **BTA**.

[133] On the material before me, I find the Claimant's reason for including the BVI Defendants justified, and that at the time of the *ex parte* hearing, the Claimant fully intended to pursue the claim against them as the most appropriate and expedient course. While the Defendants may regard this approach as indirect or tortuous, it cannot be considered unmeritorious. Hence, at the date of the PTSO hearing, the NPP Gateway was firmly established.

[134] Notwithstanding the clarity of my finding on this issue, it is nevertheless appropriate, out of respect for the careful and skilful submissions advanced on behalf of the Defendants, that I address the remaining authorities to which I was referred, since each party contends that those authorities lend support to the position they respectively urge upon the Court.

[135] **Altimo** involved a dispute over the enforcement of a Kyrgyz court judgment by a Kyrgyz company against various Manx companies beneficially owned by associates of the previous Kyrgyz regime. The Manx companies counterclaimed, alleging that the original Kyrgyz judgment had been obtained by fraud. The Manx court allowed the Manx companies to join additional parties as defendants and serve them outside the Isle of Man, even though the

underlying matters had mainly occurred in Kyrgyzstan. The deemster initially set aside the order for PTSO, but the Staff of Government Division overturned it on appeal. The Privy Council dismissed the appeals of the additional parties, seeking to challenge jurisdiction and service out, holding that: (a) the standard of proof for alleging serious risk of injustice in a foreign court was a "real risk" of injustice; (b) the English and Manx courts could find that justice would not be done in a foreign jurisdiction if there was cogent evidence of corruption, lack of judicial independence, or procedural irregularities; (c) the case involved serious, connected, issues that concerned all the parties and required a trial; (d) although Kyrgyzstan was the natural forum for the claims to be tried, substantial evidence showed irregularities and breach of natural justice in the Kyrgyz court, which was likely to create more than a real risk of injustice; (e) without a trial, in the Isle of Man, the issues would not be tried at all; and, accordingly, (f) the court was justified in exercising its discretion to permit service of the claim outside the jurisdiction.

[136] The observations of Lord Collins of Mapesbury, giving the judgment of the Board, bear quoting in full:

> "74 Among the questions which arise on this appeal are these: When is an action 'properly brought' against the defendant served within the jurisdiction (and outside the jurisdiction under the English rules), referred to here as D1, or 'the anchor defendant'? When will the foreign additional defendant, or D2, be a "proper party"? In particular, what is the merits threshold for each of those claims? Is the claim not 'properly brought' against D1 if the motive of the claimant in suing D1 is to add D2? Does it matter that in practice the claimant will not recover against D1?
>
> 75 The leading decisions are the decisions of the House of Lords in *The Brabo* and *Derby & Co Ltd v Larsson*[59], and of the Court of Appeal in *Massey v Heynes & Co*[60] and *Multinational Gas.* The members of those tribunals do not all speak with one voice, but the following propositions may be derived from them.
>
> <u>The motive in suing the anchor defendant</u>

[59] [1976] 1 W.L.R. 202.
[60] (1888) 21 Q.B.D 330.

> 76 First, the mere fact that D1 is sued only for the purpose of bringing in D2 is not fatal to the application for permission to serve D2 out of the jurisdiction: *The Brabo*[61] and *Derby & Co Ltd v Larsson*[62].
>
> 77 The question was discussed extensively (and somewhat discursively) in *Multinational Gas,* but without reference to the relevant passages in *The Brabo* and without any citation to the court of *Derby & Co Ltd v Larsson.*
>
> 78 The point arose in the *Multinational Gas* case because D1 was in liquidation and therefore the plaintiff had no real prospect of recovery against D1. Lawton LJ did not treat as fatal to the application the fact that the sole, or predominant, reason for beginning the action against a party duly served within the jurisdiction was to enable an application to be made to serve the parties outside the jurisdiction. It was instead a relevant factor in the exercise of the discretion.[63] Dillon LJ said that an action was not to be regarded as properly brought against D1 if the true inference from all the facts was that the sole reason for suing D1 was to found an application to join foreign defendants in the action. But although he held that the predominant reason for the action against D1 was to enable foreign defendants to be joined, he regarded the action as bona fide and properly brought. [64] May LJ considered that if there was a good arguable case against D1 in an action in which any judgment obtained against that defendant might or would not be met owing to lack of funds, the fact that the main or predominant purpose of keeping D1 in the proceedings was to enable the plaintiff to bring in D2 was not a ground for saying that the proceedings were not properly brought against D1.[65] See also *Goldenglow Nut Food Co Ltd v Commodin (Produce) Ltd*. [66]
>
> 79 The better view, therefore, is that the fact that D1 is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is "properly brought" against D1, provided that there is a viable claim against D1."

[137] Lord Collins went on to explain the approach that a court should take where a defendant who is challenging the jurisdiction of the court contends that the claim against the anchor defendant is bound to fail:

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[61] [1949] A.C. 326, 338–339, per Lord Porter.
[62] [1976] 1 W.L.R, 202 at 203, per Viscount Dilhorne.
[63] 1983] Ch. 258 at 268.
[64] 1983] Ch. 258 at 286-7.
[65] 1983] Ch. 258 at 273-279.
[66] [1987] 2 Lloyd's Rep 569 at 578.

"80 …the action is not properly brought against D1 if it is bound to fail: *The Brabo.*[67] He also put the point (echoing *Witted v Galbraith*)[68] on the basis that leave will not be granted if the lack of a plausible cause of action against D1 shows that the presence of D1 in the jurisdiction is being used as a device to bring in D2. See also *Multinational Gas.*[69]

'Bound to fail'/'Serious issue to be tried and questions of law

81 A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *E F Hutton & Co (London) Ltd v Mofarrij*[70] *and Chellaram v Chellaram (No 2).*[71]

82 Because this appeal is concerned with the 'necessary or proper party' provision, the question of the merits of the claims is relevant to the question of whether the claim against D1 is 'bound to fail' and to the question whether there is a 'serious issue to be tried' in relation to the claim against D2. There is no practical difference between the two tests, and they in turn are the same as the test for summary judgment.

83 What is the position if the viability of the claims depends on a substantial issue of law? Is the court bound to decide it at the stage of the application to set aside service out of the jurisdiction?

84 The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts … In the context of interlocutory injunctions, in the famous case of *American Cyanamid Co v Ethicon Ltd*[72], it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It was no part of the court's function 'to decide difficult questions of law which call for detailed argument and mature consideration'.[73]

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[67] [1949] A.C. 326 at 338–339, per Lord Porter.
[68] [1893] 1 Q.B. 577.
[69] [1983] Ch 258 at 268, 273–274.
[70] [1989] 1 W.L.R. 488 at 495.
[71] [2002] 3 All ER 17, at [136].
[72] [1975] A.C. 396.
[73] [1975] A.C. 396 at 407.

> 85 In *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*,[74] Lord Goff said that if, at the end of the day, there remained a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desired to try, the court should, as a rule, allow the service of the writ. The standard of proof in respect of the cause of action could broadly be stated to be whether, on the affidavit evidence before the court, there was a serious question to be tried.
>
> 86 There is no reason why the same principle should not apply to the question whether, in a service out of the jurisdiction case on the 'necessary or proper party' head, a claim is 'bound to fail' as well as to the question whether there is a 'serious issue to be tried' in the claim against D2. Prior to the modern authorities on striking out, summary judgment, and interlocutory injunctions, the point was considered in the context of 'necessary or proper party' in *The Brabo.* In that case it was held that the claim against D1 was bound to fail because the claim against it was made as agent of the Crown and it was therefore entitled to Crown immunity (as it then was). That was not a case where the point of law was a difficult one. Lord Porter said that 'when the various Acts and provisions are collated the answer is clear'.[75] Consequently the observations of the members of the Appellate Committee are *obiter*, but although they do not all put it in the same way, the overall effect of the decision is that if the question is whether the claim against D1 is bound to fail on a question of law it should be decided on the application for permission to serve D2 (or on the application to discharge the order granting permission), but not where there is an exceptionally difficult and doubtful point of law: Lord Porter[76], and cf, per Lord Porter[77]; Lord du Parcq. [78] Contrast Lord Simonds[79]: 'the court should not easily be deterred by any apparent difficulty or complexity of subject matter from considering and, if it can do so at that stage, forming an opinion on the question whether the action is bound to fail against the defendants within the jurisdiction'."

[138] In the present case, the Defendants' position on this issue is almost entirely based on conjecture and bare assertions. To quote from the Appleby Defendants' skeleton argument:

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[74] [1994] 1 A.C. 438 at 452.
[75] [1949] A.C. 326 at 341.
[76] *Ibid.*
[77] *Ibid*., at p. 338.
[78] *Ibid*., at p. 338
[79] *Ibid*., at p 348.

"258. … the starting point is that NBT had a choice as to whether to bring these proceedings in the BVI or elsewhere, but chose to bring them in the BVI, despite the fact that none of the parties had (or has) any presence or assets here.

259. Unlike the claimant in the *Mints* case [i.e., *PJSC National Bank Trust v Mints*],[80] NBT has not provided an explanation for that choice which is rational and legitimate. Indeed, it has not provided any explanation whatsoever. It has simply denied — most unconvincingly — that it engaged in forum shopping in relation to limitation …

260. Moreover, as noted above, despite NBT's attempts to portray the BVI Companies as being central players in the alleged conspiracy, the obvious reality is that their alleged role was as vehicles and minor players, they are highly unlikely to defend the claims on the merits and, in any event, they have no assets against which NBT could possibly hope to execute a judgment, either in the BVI or elsewhere. The Court should not allow the tail to wag the dog. NBT's attempts to portray the BVI Companies as being central players in the alleged conspiracy is as self-serving on jurisdiction as it is obviously wrong.

261. Finally … the position at the time of the Service Out Hearing was that the BVI Companies had not decided to defend the claims on the merits, it was highly unlikely that they would decide to do so and, in any event, it was plain that there would be no utility in NBT pursuing its claims against the companies to trial. The obvious reality is that, if the Court were to uphold the foreign Defendants' set aside applications, NBT will not pursue its claims against the BVI Companies in this jurisdiction or, indeed, in any other jurisdiction, where they would not be needed as Anchor Defendants. It did not apply to restore any of the Second Tranche Entities which had been dissolved, and it has not sued any of those entities in these or (as far as the Appleby Defendants are aware) any other proceedings — for the simple reason that they were not needed as Anchor Defendants.

262. In all of those circumstances, the Court should attach no weight to the Multiplicity Factor and, given the position in relation to the usual connecting factors, it should find that NBT has not discharged its burden of demonstrating that the BVI is clearly or distinctly the appropriate forum."

[139] The Defendants' submissions appear to proceed on the premise that, by reason of their own assertion, their position must necessarily be correct. That much is

[80] [2021] EWHC 692.

evident from the passages emphasised in the above paragraphs of their skeleton argument. On the standard of proof applicable in this Court, however, it is not apparent how the Defendants can displace the Claimant's written evidence and its submissions. Even if the explanations advanced by the Claimant for the inclusion of the BVI Defendants may not appear compelling to the Defendants, it does not follow that the proper inference to be drawn is that the Claimant's position must be erroneous.

[140] I accept the Claimant's submission that the BVI Defendants are not being deployed merely as "anchor defendants". In any event, even if that were the case, such a circumstance would not, of itself, preclude the grant of the PTSO sought. It is but one of several matters to which the Court must have regard in the exercise of its discretion on the Jurisdictional Challenge. Nor can it properly be said, for the reasons set out in this Judgment, that the Claim against the BVI Defendants is bound to fail or lacks utility. Even if that conclusion were incorrect, it would remain no more than a factor to be weighed in the Court's overall evaluative assessment.

[141] PTSO was refused, on the facts, in **Erste**.

[142] In that case, the appellant Russian companies (R and L) appealed against a decision that England was the appropriate forum for proceedings alleging unlawful means conspiracy, issued against them by the claimant bank. The bank had loaned money to the first defendant, the borrower, and the second defendant, the guarantor, both based in Russia. The agreement was subject to the exclusive jurisdiction of the English courts. The borrowers defaulted. The bank's case was that R, L and the other defendants had operated an unlawful means conspiracy to make the first two defendants (D1 and D2) insolvent. It claimed damages for breach of contract against the first two defendants, and damages in tort against R and L. It also claimed relief under s. 423 of the IA 1986, as it applies to E&W.

[143] Flaux J gave PTSO. R and L disputed the jurisdiction of the E&W courts to try the case and applied to set aside service. Gloster LJ (giving the judgment of the

Court of Appeal (whose members included Briggs LJ, and Aiken LJ) allowed the appeal.

[144] The appeal was allowed primarily because the Court of Appeal found that the claimant had submitted to the determination of its claims in the Russian insolvencies of D1 and D2. The Court of Appeal ruled, *inter alia*, that: (a) the first instance judge wrongly failed to separate key questions under para. 3.1(3)(a) from para. 3.1(3)(b) of PD 6B and incorrectly assessed the consequences of the bank's participation in Russian insolvency proceedings; (b) the judge incorrectly concluded that the tort claim was not subject to Russian jurisdiction and misapplied case law on that point; (c) the judge erred in finding that England was the location of damage because the loan agreement designated New York for repayment, where the loss occurred. Additionally, the alleged conspiracy was more connected with Russia; (d) the bank has failed to establish a sufficient connection to England or a serious issue for trial under s. 423; and (e) the judge had erred in concluding that England was the appropriate forum for conspiracy claims, which were predominantly Russian in nature. He had given undue weight to technical points over the fundamental focus of the litigation, contrary to guidance in **Altimo.**

[145] The reasoning in **Erste** requires a more detailed explanation because it appears to conflict with the approach for granting PTSO in **Altimo**. The essential rationale for the Court of Appeal's refusal to grant permission can be explained in a series of a few short points.

[146] First, the Court held that, at the date of the application for permission to serve out of the jurisdiction, it would not have been reasonable for the English court to have tried the debt, contractual, guarantee, and conspiracy claims against D1 and D2. Alternatively, it would not have been reasonable for the English court to have tried the conspiracy claims against D1 and D2. Not least, it would not have been consistent with the overriding objective or with the principle that the court would not engage in pointless or wasteful litigation. Accordingly, on the facts, the gateway requirements of para 3.1(3)(a) of PD 6B were not satisfied, because the claimant could not demonstrate, as at the date of the application to serve out, that, viewed in isolation, it would have been reasonable for the

English court to have tried the debt, contractual and guarantee claims and the conspiracy claims against D1 and D2.

[147] Second, and in the alternative, it would not, in any event, have been reasonable for the English court to have tried the conspiracy claims against D1 and D2. Even if the conclusion that the threshold requirements of para 3.1(3)(a) of PD 6B were not satisfied was wrong, nonetheless, applying the principles established in cases such as **Altimo**, **Stichting Shell Pensioenfonds v Krys**,[81] **and Rubin v Eurofinance SA**,[82] England was not the appropriate forum for the trial of the dispute, and the court ought not to exercise its discretion to permit service of the proceedings out of the jurisdiction.

[148] Third, the claimant had not established a good arguable case that its tort claim qualified under para 3.1(9) of PD 6B. The application of art 4.1 of Rome II Regulation (applicable in much refined form in the UK since its exit from the European Union, and irrelevant in the BVI) pointed neither to English nor Russian Law as the applicable law, but rather to New York Law on the assumption, which was at least arguable, that the co-perpetrator of a tort was not to be regarded for those purposes as a victim of it. Further, it was clear from the circumstances of the case that the alleged conspiracy was manifestly more closely connected with Russia than with any other place. In addition, it was clear that all the participants in the alleged conspiracy had been based in Russia, that the conspiracy itself would have been hatched there, and that all the acts committed pursuant to it would have occurred there. No aspect of the question whether the conduct complained of had or had not been unlawful could turn upon any issue of interpretation of the loan agreement or guarantee, to which the main perpetrators of the conspiracy had not been parties in any event.

[149] The Court of Appeal stated that there would be cases where the question of whether a sufficient connection with the jurisdiction could be shown could only be resolved at trial, and where, at the stage of considering service out of the jurisdiction, the claimant might demonstrate a serious issue to be tried in relation to the question of sufficient connection. That could not mean that the court

[81] [2014] UKPC 41.
[82] [2012] UKSC 46.

would, in no circumstances, address that question (albeit only on a "serious issue to be tried" basis) at the stage of considering whether to grant, or set aside, service out of the jurisdiction.

[150] Fourth, the judge had not considered whether there was more than a fanciful prospect that the claimant would, if permitted to pursue a claim under s. 423 of the IA 1986, obtain such relief at trial. On the evidence, each of the transactions complained of by the claimant had been reviewed by the Russian courts. In those circumstances and bearing in mind the close connection between the claimant's claim as a whole and Russia, it was inconceivable that the claimant would be able to show at trial that a sufficient connection existed with the present jurisdiction. Since relief under s. 423 would have to be treated as an application made on behalf of every unsecured creditor; it was inconceivable that any court other than one in Russia, which had jurisdiction over the insolvencies of D1 and D2, could be regarded as the appropriate court for the grant of such relief. Consequently, on the question whether there existed a sufficient connection with the present jurisdiction, and whether any practicable relief could be obtained at trial, the claimant had failed to disclose a serious issue to be tried. The result was that PTSO should not have been granted under para 3.1(20) of PD 6B.

[151] Fifth, if the judge had erred in relation to the proper approach to the determination of the issue under para. 3.1(3) of PD 6B, the applicable law, and whether each of the "gateway requirements" had been satisfied, then those errors fatally undermined the evaluative conclusion which he had reached in relation to the appropriate forum and likewise had affected the exercise of his general discretion. However, even if the present court had been wrong in its conclusion that the requirements of the para 3.1(3) gateway (or indeed the other gateways) had not been satisfied, nonetheless, on any basis the judge had been "plainly wrong" in having concluded that England and Wales was the appropriate forum in which to determine the claims against R and L. On any basis, the matter had overwhelmingly been a Russian case. There had been no connection whatsoever with England other than the exclusive jurisdiction clauses in the loan agreement and guarantee. The claimant had not discharged the burden it had of showing that England was clearly or distinctly the appropriate jurisdiction.

[152] Finally, in the exercise of his general discretion, the judge had not given any consideration to the fact that, in reality, the only commercial driver behind the claimant's issue of proceedings in England against D1 and D2 had been to enable a claim to be brought against R and L and to attempt to execute against their assets, whether in Russia or elsewhere. Whilst, taken on its own, that particular factor did not lead to the conclusion that PTSO should be refused, it had, in the circumstances, clearly been an important factor that the first-instance judge should have taken into account.

[153] There appears to be some tension between the reasoning in **Erste** and **Altimo**. In **Erste,** the Court of Appeal approved the Privy Council's approach to the grant of PTSO in **Altimo**.[83] However, it did so with some reservations. In the words of Gloster LJ, giving the judgment of the Court of Appeal:

> "It was obvious from the evidence that the commercial (and indeed only) 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. However we do not consider that in the present case it is necessary or appropriate for this Court to revisit the question whether the fact that a claimant's motive in bringing proceedings against the anchor defendants was only for the purposes of enabling a claim to be brought against the foreign defendants is a factor which is relevant to the question whether the threshold criteria under paragraph 3.1(3) of PD6B have been satisfied. To do so would involve reconsideration of this Court's decision in *Multinational Gas* … and the various authorities there cited. That would be a task for the Supreme Court. Accordingly, even if we have reservations on this point, we must accept for the purposes of this case the Board's conclusion, as expressed in in *Altimo*[84], that the fact that the anchor defendant is sued only for the purpose of bringing in the foreign defendants is not an element in deciding the question whether the gateway requirements of paragraph 3.1(3)(a) or (b) have been satisfied. That factor is only for consideration under the wider discretionary head of Issue 4."

[154] The Defendants place significant, if not substantial, reliance on Wallbank J's decision in **BTA** to support their contention that a PTSO should not be granted.

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[83] [2015] EWCA Civ 379, at [25].
[84] [2011] UKPC 7, at [79], considered above.

BTA is the only known case in this jurisdiction in which the Court considered an analysis of the principles governing PTSO.

[155] The facts of **BTA** were similar to the facts of the present case. In **BTA**, the claimant brought various claims against several BVI Special Purpose Vehicles ("SPVs"), alleged to have been used as part of an international fraudulent scheme orchestrated by Mr. Ablyazov. The SPVs were effectively shell companies with no significant independent existence or assets. Apart from some funds passing through Latvian bank accounts, there was no evidence that the SPVs owned meaningful assets. The SPVs were incorporated in the BVI, were usually designed to hold and manage specific assets or transactions and were often used in financing or leasing arrangements. The claimant alleged that the SPVs were mere conduits, or "siphons," for Mr. Ablyazov's activities. Substantial default judgments against four of these SPVs were entered in Kazakhstan in 2009 but were never enforced. The claimant had a contractual right of repayment from the SPVs but had no practical means to enforce those rights, because the SPVs had no assets and had been in receivership for a substantial period, recognised by both the English and BVI courts. The receivership had lasted approximately from 2010 to 2018-2019 but was discharged on the basis that no useful purpose remained, suggesting that no assets belonging to it could be found or recovered. The claimant was content to allow the SPVs to be struck off the Register and dissolved. Despite holding large judgments (over US$ 4 billion) against the beneficial owner of the SPVs' shares, Mr. Ablyazov, the claimant made no attempt in the decade following the judgment to appoint receivers over those shares or to pursue enforcement through the SPVs. The SPVs had no active directors and could not meaningfully take part in the claimed proceedings.

[156] The claimant sought to use the SPVs as anchor defendants to facilitate claims against foreign defendants involved in the alleged fraud, to be brought in the BVI. Shortly after obtaining orders to restore the SPVs to the Register of Companies in the BVI, the claimant brought claims, including a conspiracy claim and a declaration that the transactions were sham or fictitious under the Kazakh Civil Code. The claimant's claims against SPVs were made just days before

issuing claims against the foreign defendants, reinforcing the view that the SPVs were strategically used for jurisdictional advantage rather than substantive claims

[157] The Court found that the claimant had artificially manipulated the jurisdictional gateways under CPR 7.3(2) to bring the foreign parties, against whom it had filed claims, to litigate those claims in the BVI courts. The claimant's failure to engage with and effectively proceed against the SPVs, along with no evidence of asset recovery efforts, raised serious doubts about the real utility and *bona fides* of the claimant's claims against the SPVs. The Court also found that BTA had breached the duty of full and frank disclosure in the original *ex parte* application for PTSO, thus further undermining its case for litigating the claims in the BVI.

[158] Several of Wallbank J's observations bear setting out in full:

> "169 … the question whether there is real issue which it is reasonable for this Court to try must be taken in isolation from claims intended to be brought against foreign target defendants. The Court has to proceed on the assumption that there will be no additional joinder of the foreign defendants. This restriction may seem artificial, and indeed unrealistic, but that misses the fundamental purpose of the gateway. This is to delimit to a small number of circumstances the exercise of the Court's extraterritorial jurisdiction to bringing foreign parties here in order to defend a claim. The circumstance we are concerned with here is when it can be said that a foreign defendant is a 'necessary or proper party' to a claim pursued here in the BVI, against (usually but not always) a BVI defendant. That defendant would be the defendant that anchors the proceedings in this jurisdiction, hence the often-used shorthand designation of 'anchor defendant'. **The point is that it is the BVI claim against the anchor defendant which would be assisted by the addition of the foreign defendant**. Excluded from that consideration is the reasonableness of trying claims against the foreign defendant. In other words, utility in suing foreign defendants cannot be used to overcome lack of utility in trying the claim against the BVI defendant.
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> [170] A second point to be perceived from these passages is that the assessment of reasonableness to try an issue is to be done **objectively**. The stipulation of reasonableness inherently entails having an objective regard. Thus, averments by the

claimant of its intentions concerning pursuit of claims against the BVI defendants should be treated with caution and are not determinative, even if they may be relevant. That is because a claimant's averments of intention could be fanciful or a contrivance to contort a matter through the gateway. The Court has to consider whether, on all the facts evidenced before it, there would, **viewed objectively**, be any utility in trying the purported claim brought against the anchor defendant, stripped of the proposed claims against the foreign defendants.

[171] In **HC Trading Malta Limited v (1) K.I. (International) Limited and others ("HC Trading")**[85]**,** the English Commercial Court considered that the formulation 'reasonable for the court to try', raises a 'finely nuanced, soft-edged, question', and, in essence, that what would satisfy this limb of the gateway test is if **some useful purpose or legitimate interest might be served** by the prospective grant of summary or final judgment on an uncontested basis against the anchor defendant. The need for an objective assessment introduces an element of realism into the exercise: a claimant, through clever Counsel, can often create the impression of utility where none exists, viewed objectively, and judged against reality.

[172] A third point to be derived from these passages (as BTA itself argues) is that the Court is concerned with 'likelihoods'. The Court can only perceive matters the best it can, on the material before it, using its knowledge and experience, including of human nature, and common sense. Complete certainty may not always be possible. That is not to say that the test whether it is reasonable for the Court to try an issue is to be resolved on a balance of probabilities. The fact that a defendant has not acknowledged service nor filed a defence, nor otherwise engaged with the claim brought against him/it, serves as a strong pointer that it is not reasonable for the Court to try the claim. In **HC Trading Malta Limited v (1) K.I. (International) Limited and others**[86]**,** the English Commercial Court considered … 'The test in this context is not exacting for a claimant. It is only where the court concludes that pursuit of an intrinsically viable anchor claim lacks discernible utility that is likely to lead to a conclusion that it is not "reasonable to try" such claim. Any utility therefore matters. It doesn't necessary establish reasonableness, but it all counts towards discharge of the interlocutory burden by the claimant.'"

[159] On the Reasonable to Try Requirement, Wallbank J observed:

[85] (2022) EWHC 1387I (Comm), Mr. Stephen Houseman QC, sitting as a deputy Judge of the High Court.
[86] *Ibid*., at [18].

"[173] It also appears to me that what constitutes utility sufficient to render it reasonable to try an issue can also vary, depending upon the circumstances of a particular case. In other words, I do not understand it to be sufficient for anything whatsoever that could somehow be described to be 'useful' to entail that the issue is reasonable to try. If that were so, every well-spun and packaged 'utility' devised by clever Counsel would satisfy the requirement. Rather, the Court has to look at the practical reality, including extent or degree, of a professed 'utility'.

[174] In my respectful judgment, precisely the same considerations apply to claims formulated to include declaratory relief. In the present case, in essence, BTA submits that because it has included a claim for a declaration, which cannot be granted on a default basis, then, without more, there is an issue which it is reasonable for the Court to try. But that is false logic. In **Satfinance**, there was an important issue which was reasonable for the English Court to try: which of **Satfinance** or Athena owned the Painting. There was a real utility there in the English Court trying that issue. Here, on the other hand, the declaration sought is that the L/Cs were a sham. Now, a finding that the L/Cs were a sham might be something the Court might possibly (but not necessarily inevitably) have to make in determining the various money claims brought against the BVI SPV Defendants. But why BTA would need a **declaration** to that effect is unclear and that was not explained by BTA's Counsel. Leaving out the foreign defendants, I have serious difficulty discerning any utility in trying a claim for a declaration against the BVI Defendants alone:

(1) Such a declaration could not operate as an issue estoppel or *res judicata* as between BTA and other Defendants;

(2) The BVI SPVs are defunct companies with no assets here or overseas and no **realistic** prospect of any assets being discovered after the almost decade long receivership which has already been discharged and no realistic prospect of the defunct BVI SPVs honouring any judgment.

In short, I can see no point, no utility, whatsoever in this Court trying a claim against the BVI Defendants alone for this declaration.

[175] I am indeed persuaded that … BTA added the claim for a declaration by way of amendment to its Statement of Claim, simply to get around the fact that the BVI SPVs' failure to acknowledge service or file a defence otherwise indicated that

it would be highly unlikely to be reasonable for this Court to try the claim.

[176] A fourth point that I derive from these passages from **Gunn v Diaz** and from the wording of **CPR 7.3(2)** itself is that the issue has to be reasonable for the **BVI Court** to try. The point is not whether there is an issue it would be reasonable to try somewhere, anywhere, in the abstract. The question is whether **this Court** should try the issue between the claimant and the anchor defendant.

[177] All the English High Court in **Gunn v Diaz** was doing, when it referred to a failure on the part of a local defendant to acknowledge service or to defend a claim, was to identify these as indicators of a very probable lack of utility. The reason is not difficult to understand. Whilst in such a case there would be a point — indeed a lot of point — in applying for default judgment, when such a remedy is available, it is more difficult to see the point in allowing the Court's processes to be allowed, more ponderously and expending more scarce resources to reach the same result, when the defendant has represented by his omission that he will not be contesting the claim.

[178] At the same time, since the lack of acknowledgment of service and/or defence are mere indicators (albeit powerful ones), the Court should have regard to other indicators as well. Such was the approach taken by the English High Court in **Gunn v Diaz**. There, one of the questions before the court was whether there was an issue as between the claimant and the fourth defendant, the car hire company Sixt, which it was reasonable for the Court to try. The Court found there was not, basing its finding in this regard upon a number of cumulative factors. Sixt was a foreign defendant, but on the facts of that case it would be an anchor defendant. Sixt had acknowledged service of the claim, indicating an intention to challenge jurisdiction, but it had then failed to serve a defence, and judgment in default of defence was then entered against it … The court, by Andrews J (as she then was, after a pre-eminent career as a Queen's Counsel specialising in shipping and international trade, and before her elevation to the English Court of Appeal) ruled that:

> [50] The effect of entering judgment is that neither of those defendants would be entitled to contest liability or quantum. In any event, it is unrealistic to suppose that Diaz or Sixt are going to seek to engage in the process, which means that there will be no trial of the claims against them. The assessment of damages is likely to be carried out on the basis of uncontested evidence, including expert evidence, adduced by the claimants."

And:

> [100] In the present case, as in **Erste** … there would be no particular advantage for the claimants to be gained from this court trying any legal issues arising as between the claimants and Sixt that may still require determination, especially as those issues would all have to be resolved by reference to Costa Rican law. There is no evidence, for example, that Sixt has any assets outside Costa Rica against which an English judgment could be executed. In any event Sixt is undoubtedly solvent and is likely to be able to pay any damages awarded against it."

> [179] The English Court's approach in Sixt was to take various indicative factors cumulatively, in an assessment of the probability that a trial by the English court would have utility. By 'utility', the English Court included any 'particular advantage'. The indicative factors considered ranged from the likelihood Sixt would engage in legal proceedings to and through trial, to Sixt's ability, on the state of the evidence before the Court, to pay any damages awarded against it and availability of assets for enforcement. Thus, it is apparent that the approach taken by the English Court in **Gunn v Diaz** was to consider all the circumstances in the round and to deduce from them such utility as there might be in trying a claim between the claimant and the proposed anchor defendant. This is hardly surprising, nor indeed revolutionary (since this is what a court generally should do anyway). What **Gunn v Diaz** is not a proposition for is that a failure to acknowledge service or serve a defence can be branded as a talisman and taken as conclusive that this means it is not reasonable for the court to try the case. If utility, viewed in the round, is the main touchstone of the test in respect of this limb to the gateway, another is realism."

[160] Wallbank J then went on to apply the analysis in **Erste** in finding that the Reasonable to Try Requirement was not satisfied, stating:

> "[180] In **Erste**,[87] the English Court of Appeal approached the limb as follows:
>
> > "30. The key issue which arises under this head is whether the Bank had established that there was between the Bank and D1/D2 'a real issue which it is reasonable for the [English] court to

[87] [2015] EWCA Civ 379.

try' (as required by paragraph 3.1(3)(a)). This issue in turn involves consideration of the following three sub-issues:

i had the Bank submitted to the jurisdiction of the Russian insolvencies of D1 and D2 and the Russian courts;

ii irrespective of whether there had, or had not, been such submission, was it reasonable to try claims in England against entities in liquidation in another jurisdiction (D1/D2) in circumstances where:

(a) the Bank had (admittedly) lodged claims in their insolvencies and participated in proceedings in Russia;

(b) as alleged by D3/5, no additional sum would be recovered against D1 and D2 as a result of any judgment in English proceedings, beyond the amounts that had already been proved in the Russian insolvency proceedings;

(c) as alleged by D3/5, as a matter of practical reality D1 and D2 were not going to take any part in any English Commercial Court proceedings as they were irrelevant to the process of insolvency in the jurisdiction of their centres of main interest ('COMI'); and

iii. was it reasonable to try claims in England as against D1 and D2 which necessarily involved consideration of the propriety (or otherwise) of decisions of the Russian courts and actions taken by the defendants, creditors or others in the context of Russian insolvency proceedings."

[181] In **Erste**, the English Court of Appeal contrasted the 'stark' or 'hard-edged' approach taken by the lower court judge with a

'more nuanced, soft-edged' approach'.[88] Thus, at paragraph 47, the English Court of Appeal recounted:

> '…the judge appears to have regarded the issue as being the hard-edged question as to whether, by putting in a proof in the insolvency of D1 in Russia, the Bank had submitted its claims against D1 to the exclusive jurisdiction of the Russian courts and therefore it was not open to the Bank to pursue its claims against D1 in England; and likewise, in relation to the Bank's claims against D2, whether by participating in the proceedings concerning the validity of the Guarantee, the Bank had submitted its claims against D2 to the exclusive jurisdiction of the Russian courts, so that the English court no longer had jurisdiction over the Bank's claims against D2."

[182] The English Court of Appeal then stated that in contrast, the limb of the gateway raises a 'much more finely nuanced, soft-edged, question'.

[183] In **Erste**, the English Court of Appeal considered [at [78]…] that there were, in that case, no 'real issues' as between the Bank and D1'. It went on to find (in the same paragraph) that in any event there were no issues that it was reasonable for the English Court to try. That was for a number of reasons:

> "(ii) As at the date of the application to serve out, D1 and D2 had both failed to file any acknowledgement of service or otherwise indicated that they intended to defend the proceedings within 14 days of service of the claim form as required by CPR Part 58.6(2). Consequently, as at that date the Bank was entitled to obtain or apply for judgment against both D1 and D2 in default of acknowledgement of service under CPR Part 12.
>
> (iii) The fact that D1 was not **substantially challenging** its indebtedness under the Loan Agreement was subsequently confirmed by the **attitude** taken by D1 on the summary judgment proceedings in front of HH Judge Mackie QC on 14 December 2012, in so far as it is legitimate to consider such subsequent events as 'casting light' upon what should have been relevant considerations as at the date of the application to serve out: see

[88] [2015] EWCA Civ 379, at [49].

Hoffmann J in ISC Technologies Ltd v Guerin (above). As stated above, the only consideration put forward in the letter from the liquidation manager of D2 was an indication that D1 might have a defence to the English claim on the grounds that it was subject to insolvency proceedings in Russia.

(iv) In such circumstances, as at the date of the application before Cooke J, there was no real issue as between the Bank and D1 in relation to the debt and contractual claims under the Loan Agreement and certainly none which it was 'reasonable' for the court to try."

[161] Wallbank J concluded from the above passages cited in **Erste** that:

"[184] What can be derived from this is that the Court must have regard to whether the intended anchor defendant '**substantially challenges**' the claim made by the claimant against it. The anchor defendant's **'attitude'** towards this question can be indicated by absence of acknowledgment of service or lack of service of a defence on his part. The answer to the question whether it is reasonable for the Court nonetheless to try the claim is not just to be gleaned from the intended anchor defendant's attitude, but also whether the claimant is entitled to request judgment in default. It is logical, and should not be hard to understand, that it would be a pointless waste of time and resources to indulge pursuit of an ordinary trial process when (a) the anchor defendant, viewed objectively and realistically, will not be substantially challenging the claim and (b) the claimant could obtain a judgment against him through a much quicker and less resource intensive default route.

[185] I further note that events subsequent to the hearing at which permission to serve out was given can be considered, to 'cast light' upon what should have been relevant considerations as at the date of the application to serve out. Again, that makes sense, because otherwise the Court would be confined to considering only the material placed before it by the Claimant, which may have been incomplete, or indeed selective or attractively arranged.

[186] In **Satfinance**, the intended anchor defendants were an individual, Mr. Philbrick, and his company IPL. The English Court received argument over whether the evidence indicated that Mr. Philbrick and IPL were or were not going to be active defendants in the litigation. That issue had arisen because Mr. Philbrick had not engaged with a hearing notice, his London art

gallery had closed, and he had 'disappeared' from England, taking himself off to Vanuatu *via* Australia, before being extradited to Guam and then being moved under compulsion by United States' authorities to New York to face claims there. The Court noted that there, insufficient time had passed in which Mr. Philbrick or IPL could be expected to indicate whether they intended to defend the intended English proceedings. The English Court thus did not decide the issue whether the gateway was satisfied on the basis of any finding as to the likelihood of these defendants actively participating in the litigation or 'substantially challenging' the claim. Instead, it considered that irrespective of what Mr. Philbrick and/or IPL might do in respect of the claim, there would be utility in allowing the claimant to seek a declaration as to title to the painting in dispute, which required a non-summary process.

[187] The Court in **Satfinance** considered how the Court should approach the matter where it might encounter difficulty in discerning the likelihood of intended anchor defendants actively participating in the claim. At paragraph 51 of the judgment, the English Court stated:

> 'In the past, the court asked whether the claimant had the better of the argument in relation to the relevant question. However, recent cases have elaborated the test and have offered guidance as to the approach where there are difficulties, on the evidence, in making a confident assessment on the relevant question. This guidance is contained in two decisions of the Supreme Court, namely, **Brownlie** and **Goldman Sachs**, and both these cases have been considered by the Court of Appeal in **Kaefer**. The relevant guidance can be taken from **Goldman Sachs** at [9] and is in these terms: '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. In **Brownlie** [at [7] …], this court reformulated the effect of that test as follows: "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it." 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.'

[188] What I take, in particular, from this guidance is that it is for the claimant to provide a '**plausible evidential basis for the application of a relevant jurisdictional gateway**' and if the Court is still left in doubt, the claimant is entitled to the benefit of such doubt, but only if the claimant's evidential basis for satisfying the gateway is plausible.

[189] It merits remarking that the English Court places stress on '**plausible**'. That is entirely understandable. The whole point about the restrictions upon the gateway is to limit use of the Court's extraterritorial jurisdiction to genuine cases where foreign defendants are necessary or proper parties to support proceedings in this jurisdiction. That is needed to prevent the Court from simply purporting to exercise an unchecked extraterritorial jurisdiction. At the same time, it is very common for claimants to have no true interest in pursuing anchor defendants but to target foreign defendants as their real litigation counterparts, and then to contrive a presentation that persuades the Court that the claimant satisfies the restrictions in the gateway. In this regard, **the Court is not obliged to accept an evidential narrative which the Court does not consider to be plausible**. Thus, the objective nature of the Court's discernment process is protected to avoid self-serving contrivances or delusions proffered by claimants prevailing.

[190] In the present case, Counsel for BTA had difficulty articulating what the utility of trying the claims brought against the BVI SPVs would be. He resorted to the unenlightening line that the utility, here, was 'obvious'. If it was so obvious, it bears asking why he could not describe the utility. He submitted that there would be utility in obtaining judgment after trial for the purposes of enforcement overseas.

[191] On the basis that the Court has to consider the claims against the BVI SPVs in isolation, such enforcement overseas would have to be against the BVI SPVs themselves, not other foreign defendants, and as we have seen, these BVI companies appear to be well and truly dead, without assets and already raked over for many years during a now discharged receivership. I confess I cannot see any utility nor advantage to BTA in having this Court try the claim against the BVI Defendants alone.

[192] When BTA omitted to include evidence that it would be reasonable for this Court to try the claim, this was not just a minor technical omission, it was primordial: on the facts of this case it is by no means obvious that there would be any point whatsoever in the Court allowing its limited resources, and

those of the BVI taxpayer that very largely funds it, to be used for the pursuit of claims against the BVI SPVs. That is because the BVI SPVs:

(1) appear to be defunct and thus unlikely to intend to participate in the claim;

(2) have not satisfied regulatory requirements to avoid further striking off;

(3) have no known assets;

(4) had been under a lengthy receivership (running from 2010 until 2018 or 2019), the utility of which appears to have been exhausted;

(5) have been inactive for over a decade; and

(6) did not participate in, nor resist previous legal proceedings, from which it can be inferred that those who own and control the BVI SPVs were unconcerned at the prospect of judgments being made and enforcement attempts effected against them. That position does not appear to have changed now.

[193] A further factor underlines that it is unrealistic to suppose that the BVI Defendants will ever be found to own assets. BTA's own case is that the offshore SPVs were used as 'siphons' or vehicles for funnelling money from BTA to Mr. Ablyazov and his close associates. It is in the nature of a 'siphon' or a 'funnel' that it acts purely as a ***channel*** not as a container. On BTA's own case, the BVI SPVs cannot be expected to own any assets, whether directly or indirectly, any longer."

[162] Wallbank J's overall conclusion on the application of the factors that he had identified was stark:

"[194] These factors suggest that if BTA were to be allowed to press claims against these BVI SPVs in isolation from claims against the other foreign Defendants, the resulting judgments would be nugatory and academic. There would be no genuine utility in a trial of claims against the BVI SPVs.

[195] That is all the more so, where, as here, BTA could obtain judgment in default of acknowledgment of service or of Defence against them, but it has not. BTA could also have obtained the appointment of an office holder, such as a receiver by way of equitable execution or indeed a liquidator over the BVI SPVs, which would enable them to participate actively in this claim

> and search for undisclosed assets at the same time, but BTA has not. It would appear that BTA itself perceives that there would be no point in doing so."

[163] Wallbank J viewed the entire process that BTA had implemented to navigate the NPP Gateway as a cynical attempt to bypass it without any basis. Although he did not use the expression "abuse of process", it was clear from the above passages that he was thinking along those lines, referring to BTA's "avow[ed] … intent[ion] to pursue claims" against the BVI SPVs in the circumstances in which BTA had said it was doing as being "delusion[al]", "far-fetched speculation" and "allowing the Court's processes and resources (and thus BVI taxpayers' money) to be used to litigate claims which have no genuine utility here."[89]

[164] It is important to note that in **BTA**, Wallbank J found, as facts (or evaluative conclusions reached on the material put before him and the oral submissions he had heard), *inter alia*, that:[90]

(a) as the BVI SPVs had not filed acknowledgements of service, it meant that they were "unlikely to intend to participate in the claim." He indicated, in the circumstances, that "it would be highly unlikely to be reasonable for this Court to try the claim";

(b) The BVI SPVs were "defunct companies with no assets in the BVI or overseas";

(c) there was "no realistic prospect of any assets being discovered" because, *inter alia*, they had already been subject to a receivership for almost a decade, which had now been discharged; and

(d) BTA's own case was that the BVI SPVs were used as 'siphons' or vehicles for funnelling money from BTA to Mr. Ablyazov and his close associates. "On BTA's own case, the BVI SPVs cannot be expected to own any assets, whether directly or indirectly, any longer". Accordingly,

[89] BVIHCM2021/0171, 7 December 2023, at [156].
[90] *Ibid*., at [174(2)], [190], [191], [193] and [194].

> there was "no realistic prospect of the defunct BVI SPVs honouring any judgment". Any judgment against the BVI SPV companies would be "nugatory and academic". In those circumstances, the prospect of obtaining a judgment which could be enforced overseas did not provide the necessary utility.

[165] That position simply does not apply in the present case for all the reasons I have mentioned above.

[166] It is also noticeable that Wallbank J's judgment makes scant reference to **Altimo**. The only direct reference I could see him make to **Altimo** was in para. 122 of his judgment,[91] dealing with who had the burden of proving that the gateway was passed:

> "The Applicants contended that in this regard the burden falls upon the claimant: that is clear from the statement of Lord Collins in **Altimo** (at [71]) '…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…'"

[167] The Parties cited several other cases to support their arguments before the Court. They essentially turn on their own facts and require no detailed analysis. Nonetheless, I will address the most relied-upon ones by the parties. The Privy Council's observations in **Altimo** and **Erste** must inform this Court's approach to the Jurisdictional Challenge.

[168] I have already referred to **Gunn**. In that case, the first claimant was injured in a road traffic accident in Costa Rica. Her relatives and insurers (all based in England) sought damages and recovery of outlays under Costa Rican law against various defendants in Costa Rica and the USA, including a Costa Rican state insurer ("INS"). The claimants obtained permission to serve proceedings out of the jurisdiction under the tort gateway, arguing that damage was sustained in England. Shortly afterwards, the Court of Appeal in **Brownlie** ruled that "damage" under this provision referred only to direct damage, not

[91] The only other mentions of that case are in paras. [91] and [92] of his judgment. However, the mentions made in those paragraphs are made by reference to other cases in which that case was cited.

consequential loss. This meant the claimants' permission to serve out had been granted on an incorrect legal basis. Despite knowing this, the claimants' solicitor did not inform the court of the decision or its implications when later applying for an extension of time for service. The court held that the solicitor had breached his duty of full and frank disclosure, even though the omission was not deliberate. The claimants later sought to preserve jurisdiction over INS by relying on an alternative basis — the NPP Gateway — and argued that another defendant (Sixt) had submitted to the English court's jurisdiction and could serve as an anchor defendant.

[169] The court rejected this, holding, *inter alia*, that: (a) permission to serve out had to be judged at the time when it was initially made and not at a later stage; (b) since permission had been wrongly granted under the tort gateway, there was no permissible anchor defendant; and (c) it would be unjust to allow the claimants to benefit from their non-disclosure.

[170] Andrews J observed:

> "[107] … on the assumption that contrary to all my previous findings there is a good arguable case that all the requirements of the 'necessary or proper party' gateway have been satisfied, the court must consider under CPR 6.37(3) whether England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute against all the defendants. 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: *The Spiliada*.[92] The burden lies on the claimant to satisfy the court that this is so. In determining this:
>
> (i) The Court must consider which is the 'natural forum', namely what is the forum which has the most real and substantial connection with the dispute.
>
> (ii) Where the claim against the anchor defendant is in tort, the starting point for deciding the appropriate forum is the place of commission of the tort.
>
> …

[92] [1987] A.C. 460 at 475–484; and AK Investment, at [88].

[107] … on the … all issues of law in this case are issues of Costa Rican law. Some of them appear to be novel; many are complex. Expert evidence will be required. The relevant documents (including the relevant legal provisions) are all in Spanish. The governing law is generally a positive factor in favour of a trial in that country because it is generally preferable, all other things being equal, that a case should be tried in the country whose law applies. 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 applicable to such issues in the two competing jurisdictions: see *VTB*[93] and *Erste*.[94] …

[111] On the face of it, there is no good reason why INS should be required to come to the English courts to defend such a claim. Although INS is a substantial state-owned entity, the policy limits are so modest that the costs of litigating the matter outside Costa Rica are likely to be regarded as disproportionate…"

[171] Andrews J held that even if she had concluded that there was a good arguable case that the claims against INS fell within the "NPP" gateway, and even if she had considered that E&W jurisdiction was clearly and distinctly the appropriate forum for resolution of those claims, there were two further and independent reasons why she would refuse permission to the claimants to rely on that alternative gateway, as a matter of discretion:

"[118] The first is that, as I have already indicated, it would be wrong in principle to allow any party to take advantage of its service on Sixt, and Sixt's subsequent inactivity, as a vehicle for bringing in another defendant to the English proceedings, when the claim against Sixt was one for which the party in question should not have obtained permission for service out of the jurisdiction in the first place. That is so irrespective of whether I am right or wrong in my view that these considerations arise at an earlier stage of the analysis.

[119] The second is that it would be unjust to INS for this court to allow these claimants to achieve any advantage from their culpable failure to disclose all material facts to the court at the stage when they sought the second extension of time for service of the claim form. As I have said, the court has the power to set aside an order obtained by non-disclosure even if

[93] [2013] 2 A.C. 33, at [46].
[94] [2015] EWCA Civ 379, at [149].

> it might still have been granted had full disclosure been made by the party who obtained it. This is not a case in which the extension of time for service is likely to have been granted. It is highly probable that if the decision in *Brownlie* had been drawn to the court's attention when the second extension of time for service out was sought, the extension would have been refused. The claim form would never have been served on Sixt, and the claimants would not be in a position to argue that it may still be served on Citi [Sixt's owner]. The consequence of that is that neither of those parties would even have been candidates for the anchor defendant."

[172] In contrast. PTSO was granted in several cases following **Gunn.** They include **Satfinance**, **HC Trading** ("Satfinance") and **Lakatamia Shipping v Su** ("Lakatamia").[95]

[173] In **Satfinance**, the appellant company claimed ownership (by way of seeking declaratory relief) of a painting by New York artist Jean-Michel Basquiat under an agreement with the first and second defendants (P and IPL). The respondent company claimed entitlement to the painting, based on arrangements made with the third defendant (B), a Jersey-registered company, following a title transfer from IPL to B and a security interest granted by B to the respondent. The appellant sued the defendants and the respondent, serving P and IPL within the jurisdiction and seeking permission to serve the respondent out of jurisdiction. This was because P and IPL were anchor defendants, a real issue existed between the appellant and the anchor defendants, and the respondent was a necessary party to the claim.

[174] The Master found that P and IPL would not defend the claims, meaning that no real issue existed with the anchor defendants, so the NPP Gateway was not established. The appellant submitted that the Master was wrong about the gateway and should have assessed the facts as at 1 November 2019, at which date neither of the anchor defendants had indicated whether they intended to defend the proceedings. It also contended that it should be allowed to take a new point on appeal, which was that as it had joined a company incorporated in England and Wales (D) as fifth defendant, D could be regarded as an anchor

[95] [2023] EWHC 1874 (Comm).

defendant, and its claim against D involved a real issue which it was reasonable for the English court to try, so that it could establish the gateway.

[175] The Master set aside the order granting PTSO, finding, *inter alia*, that: (a) P had actively avoided service and fled from the proceedings; (b) IPL also showed no intention of defending the proceedings; and (c) therefore, no real issue existed between the appellant and P and IPL that the court would be required to "try". The gateway was not, therefore, satisfied. Even if the gateway had been satisfied, England was not the appropriate forum because the issues of title were governed by New York Law, where the artist, the transactions, and potential witnesses were based, and proceedings in New York could resolve all related issues more effectively.

[176] Morgan J dismissed the appeal against the Master's decision but found that the gateway had been passed, given the nature of the relief that the appellant had sought to obtain in the claim.

[177] After setting out the requirements of the NPP Gateway, Morgan J said:

> "89. I have concluded that I can make a reliable finding on the material in this case. My finding is that, as at 1 November 2019, P had fled to Vanuatu in order to escape from claims such as the present claim and this evidence is sufficiently strong to show that he (and L) did not intend to defend such claims
>
> 90. However, that is not necessarily the end of SIL [i.e., the appellant's] case …I now need to consider the point made by SIL in reliance on its claim for a declaration as to its title to the painting. It is important to consider how the claim to a declaration would be dealt with on the correct hypothesis. If the court were considering the claim to a declaration, at a time when Athena was a party who was resisting that declaration and P and IPL were not defending the claim in any way, then because the declaration would potentially affect the position of Athena, it is likely that the court would not grant such a declaration without considering what Athena had to say on that subject, even as regards the relationship between SIL on the one hand and P and IPL on the other. However, that is not the hypothesis which I need to consider. Instead I should consider what would be likely to happen if P and IPL were the only defendants to the claim and they had not defended the claim.

91. In the event of P and IPL being the only defendants to the claim, but yet not defending the claim, the court would not make a declaration as to SIL's title to the painting merely on the ground that the defendants had not presented any defence. The court would apply its conventional approach which is that a declaration of the court is a judicial act and should only be granted if supported by evidence and argument and where the court is persuaded that a declaration would be useful and appropriate. In this case, the evidence relied upon would be the documents entered into by SIL, P and L. P and L's evidence of payment by SIL and P admission as to the price he, or L, had initially paid for the painting. Adducing that evidence would be a relatively simple matter. However, that evidence would give rise to an issue as to whether SIL's beneficial interest in the painting was 50% or 2/3 or 100%. SIL's interest must be at least 50% but SIL does not limit its claim to that percentage and is claiming to have a more extensive beneficial interest. It has not been said by Athena that there is no real issue to be determined, as between SIL and IPL, as to the extent of SIL's beneficial interest. I consider that there would need to be a hearing in relation to SIL's claim to a declaration at which the court heard submissions as to the extent of SIL's beneficial interest. Although SIL would also have to persuade the court that a declaration as to title would be useful and appropriate, I would not expect that matter would involve any real difficulty.

92. In these circumstances, in the context of [the] gateway, there would be a real issue between SIL and P and L, which it would be reasonable for the court to determine. Does that satisfy [the] gateway which refers to an issue which it is 'reasonable to try? The authorities on [the] gateway how that obtaining a default judgment, pursuant to an administrative process, does not involve the court 'trying' the claim but <u>obtaining a summary judgment does</u>. I do not think that what is, and is not, 'a trial' in other contexts will necessarily determine what is "a trial" for the purposes of [the] gateway. On balance, having regard to the purposes of [the], I hold that the type of process and determination potentially involved in SIL obtaining a declaration as to title in this case, on the assumption that the only defendants are P and L, would bring the claim within [the] gateway.

93. I therefore hold, on that limited ground, that SIL has established that the case is within gateway 3. However, the type of court process which would be needed to determine SIL's claim for declarations against Mr. Philbrick and IPL, if they were the only defendants, will be relevant to the question which I next have to consider as to the appropriate forum in this case.

94. If I had not accepted SIL's submission as to the relevance of the fact that its claims against P and IPL included a claim to a

> declaration of title, which it was reasonable for the English court to try, I doubt if I would have held that SIL would establish [the] gateway 3 by choosing not to obtain a default judgment but instead opting for a trial on the merits and/or an assessment of damages or equitable compensation. As to its possible choice of a trial on the merits over a default judgment, SIL did not identify any legitimate interest that would be better served by taking that course in this case. As to the claim for damages or equitable compensation, a claimant can specify the sum of money which it claims and obtain a default judgment. …"

[178] Although Morgan J held that the appellant could not attempt to justify the grant of permission on 1st November 2019 by reference to the joinder of D, which only occurred on 19th May 2020, he ruled that the appellant's application based on the joinder of D was a fresh application for permission to serve the respondent out of the jurisdiction. The relevant date was the hearing date for that application. If SIL wished to pursue it, the court would be prepared to give directions to enable it to do so.

[179] **Satfinance** makes it clear, by reference to the several authorities considered in this Judgment, that it is the court's role to decide issues arising in the application by reference to the position when the permission was initially granted, rather than at a later date. This is subject to the exception that if a fresh application for joinder is made, the court will consider matters as at the date of the hearing of that application.

[180] **Satfinance** also makes it clear that the court will not consider developments that occurred after the initial PTSO application was heard. The only evidence that it will permit the respondents to rely upon in an application to set aside the grant of PTSO is evidence that informed the court's decision when the application for permission was heard *ex parte*.

[181] Perhaps more crucially, Morgan J ruled that, having found that neither P nor L intended to defend the claim, if the anchor defendants had been the only defendants to the claim, but yet not defending the claim, the court would not make a declaration as to the appellant's title to the painting merely on the ground that no defence had been presented. That was because the authorities on that gateway showed that obtaining a default judgment, pursuant to an

administrative process, did not involve the court "trying" the claim, but obtaining a summary judgment did.[96] The process and determination potentially involved in the appellant obtaining a declaration as to title, assuming the only defendants were P and IPL, would bring the claim within the gateway.

[182] It is perhaps worth pointing out that, unlike in E&W, a person wishing to apply for summary judgment on the whole or part of his claim can do so even if the respondent has not filed an acknowledgement of service indicating his intention to defend the claim: see CPR 15.4, which is replicated in the revised 2023 version of the CPR I am clear that where an applicant does so in such circumstances, and the respondent chooses not to defend the application, i.e., where he simply allows the application to proceed without contesting it, this will not constitute a trial on the merits in the same way as there would be no trial on the merits where the claimant, rather than entering a default judgment, seeks to have his case tried to avoid having to satisfy the "real issue" point. I am a little less sure about the respondent's position if he files an acknowledgement of service indicating his intention to defend the claim but then does not contest the summary judgment application. However, this is not the situation here and is, therefore, largely irrelevant.

[183] The Defendants have made much of the question of whether the Liquidator will defend the Claim.

[184] The Appleby Defendants state in their skeleton argument:

> "138. … the Appleby Defendants submit .. it objectively [was not] likely (or '*reasonable to infer*', as NBT puts it) that the BVI Companies would … decide to [defend the Claim]. On the contrary, it was highly unlikely for the following reasons:
>
> a. The BVI Companies had no assets. In those circumstances, the companies themselves

[96] It is pertinent to observe that CPR 12.4 precludes a claimant from seeking a default judgment in respect of non-monetary claims. By contrast, whilst default judgment remains available for declaratory relief in England and Wales, the procedure to apply for it is not administrative: E&W CPR 12.4; rather, a formal application to the court is required. The court must determine on the application, *inter alia*, whether the grant of the declaration sought constitutes an appropriate exercise of its judicial discretion. The court will decline to grant declaratory relief where such relief is unnecessary or would otherwise be inappropriate in the circumstances of the case.

had no interest in defending the claims (as Wallbank J rightly observed at the hearing on 29 May 2024).

b. In any event, even if the BVI Companies wished to defend the claims, they could not do so without funding. In that regard: (i) The BVI Companies did not have any assets of their own which they could use to fund a defence; (ii) While NBT had (as required by the legislation) agreed to provide limited funding to Mr. Pretlove in relation to the restoration of the BVI Companies, it had not agreed to fund him to defend the claims on the merits and it was highly unlikely that it would do so, not least because it would arguably be inappropriate for it to do so; (iii). Given that the BVI Companies are defendants rather than claimants in the BVI proceedings, that any claims by the BVI Companies against their former directors would have no material pecuniary value … further below) and that, in any event, the object of any such claims would simply be to make the companies whole in respect of any liability which they were found to have to NBT, it was even more unlikely that any independent third party would provide funding to the BVI Companies — as subsequent events have confirmed.

139. NBT's reliance on the fact that, on 19 March 2024, the BVI Companies filed an acknowledgment of service in which they stated that they intended to defend the claims is wholly misplaced:

a. That occurred after the Relevant Date and logically does not cast any light of the position as of that date.

b. In any event, the filing of the acknowledgment of service does not even show that, as of 19 March 2024, it was objectively likely that the BVI Companies would defend the claims It was no doubt prudent for [the Liquidator] Mr. Pretlove to take that step in order to preserve the BVI Companies' right to defend the claims in case he were to decide that they should do so. However, Mr. Goodman subsequently informed the Court on 29 May 2024 that '*whether the claim should or shouldn't be defended … remain[s] under consideration*' by Mr. Pretlove, and it is clear from Campbells' subsequent letter of 11 June 2024 that this was still the position as of that date. Moreover, given

that Mr. Pretlove stated his intention to seek the imprimatur of the Court if he decided that the companies should defend the claims, and that (as far as the Appleby Defendants are aware) he has made no such application, it is to be inferred that, even today, he has still not decided that the companies should defend the claims

140. Mr. Popkov suggests that Mr. Pretlove '*has given substantial indications that he intends to defend the claims, including by way of reservations of right in correspondence, and his invitation to the former directors to prepare defences together*'. However:

a. Again, those events occurred after the Relevant Date and do not cast any light on the position at that date.

b. In any event: (i) The reservations are again consistent with a prudent desire by Mr. Pretlove to preserve the BVI Companies' rights in case he were to decide that they should challenge jurisdiction and/or the validity of service and/or defend the claims; (ii) Given the statements made by Mr. Goodman at the hearing on 29 May 2024 and by Campbells in their letter of 11 June 2024, Mr. Pretlove's offer to the former directors cannot be interpreted as an indication that he had decided to defend the claims

141. NBT's reliance on the Former Directors' Applications is equally misplaced:

a. Once more, the events occurred after the Relevant Date and do not cast any light on the position at that date. It is not suggested that the making of the applications could reasonably have been anticipated at the Relevant Date and, in any event, they appear to have been unfounded.

b. In any event, the submissions made in support of the applications demonstrate only that the former directors have a strong personal interest in causing the BVI Companies to defend the claims They do not show that the companies themselves have or had a strong interest (or, indeed, any interest) in defending the claims Moreover, given that, as of the Relevant Date, the companies had no assets and were insolvent, it was inevitable that Mr. Pretlove would put the companies into insolvent liquidation, whereupon the personal interests and views of the former directors would hold no sway.

142. Further, and in any event, even if (contrary to those submissions) it had been objectively likely, as of the Relevant Date, that the BVI Companies would defend the proceedings, the authorities make clear that this would not be determinative of whether the Reasonable To Try Condition was satisfied, and that this would ultimately depend on whether there would be sufficient utility in trying NBT's claims against the BVI Companies."

[185] I have already indicated that I am satisfied that the Liquidator evinced a clear and genuine intention to defend the Claim. That intention was expressed before the *ex parte* hearing. I have no reason to doubt that this is what the Liquidator intended to do. In those circumstances, I am also satisfied that there is a real issue between the Claimant and the BVI Defendants.

[186] I reject the Appleby Defendants' submissions at paras. 138-142 of their skeleton argument for the reasons previously articulated. The Claim possesses substantial utility and merit as a defensible claim. Moreover, there exists a compelling rationale for the Claimant to recover meaningful compensation for losses attributable to the conduct of the Former Directors of the BVI Defendants, contingent upon the Liquidator successfully prosecuting his claims against them, irrespective of whether the Claim brought by the Claimant against the BVI Defendants is ultimately defended.

[187] In **Lakatamia Shipping Co Ltd v Su and others**,[97] the claimant, a shipping company, brought a case of unlawful means conspiracy against the third defendant, a Monégasque lawyer. The claimant alleged that the third defendant committed the torts of unlawful means conspiracy, intentionally causing damage by unlawful means, and deliberately and knowingly inducing a violation of rights in judgment. In particular, the claimant alleged that the third defendant had helped the first and second defendants to dissipate assets in Monaco in breach of an English worldwide freezing order, thus reducing the value of the debt which the first defendant owed the claimant under various English judgments. The third defendant applied to set aside service of the claim form against him on the basis that the court did not have jurisdiction over him, contending, *inter alia*: (a) that

[97] [2023] EWHC 1874 (Comm). Phillips LJ dismissed the third defendant's application for permission to appeal: see Lakatamia Shipping Co. Ltd v Su [2025] EWCA Civ 1389, at [16].

there was no good arguable case that the "tort" jurisdictional gateway in CPR PD 6B, para 3.1(9)(a) was satisfied because "damage" had not been "sustained … within the jurisdiction"; and (b) that the claims did not give rise to a serious issue to be tried on the merits, in particular since they relied on the claimant showing that the third defendant had intended to harm the claimant.

[188] Bryan J dismissed the third defendant's application. He was satisfied that the claimant had established that there was a good arguable case that damage was sustained within the jurisdiction for the purpose of the 'tort' gateway.

[189] Bryan J also found that when determining the "intention" elements of the torts of unlawful means conspiracy, causing damage by unlawful means and inducing a violation of rights in judgment were satisfied, a person who had done an act deliberately and with knowledge of its consequences would be taken to have intended the consequences of that act and to have aimed the act at the person who, it was known, would suffer those consequences. Accordingly, the third defendant's assertion that he had not intended to injure or cause loss to the claimant or breach its judgment rights could not prevent there being a serious issue to be tried that he had committed those three torts by helping the first and second defendants to dissipate assets, knowing that the first defendant was subject to the English worldwide freezing order and owed the English judgment debts. It followed that, on the facts, all three of the claimant's claims gave rise to a serious issue to be tried on the merits.

[190] The following observations of Bryan J are particularly apposite for mention:

> "84 In the first place it is well established that, 'the fact that D1 is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is 'properly brought' against D1, provided that there is a viable claim against D1(emphasis added) — see *Altimo* (para 79) (followed in *Erste,* para 43). Such submission would therefore go (at most) not to the issue of gateways but to forum conveniens.
>
> 87 Lakatamia therefore has legitimate reasons for suing Mr. Su in this jurisdiction, and for proceeding to trial against him even if Mr. Su did not take part in the trial, and there is utility in Lakatamia doing so. Lakatamia has confirmed that it will

> proceed to trial (and not seek default judgment) and that it needs to obtain a judgment at trial (if the judgment is to be enforceable in Taiwan)—and there is evidence before the court in support of that proposition. Lakatamia has a legitimate interest that is better served by proceeding to a trial and judgment (see *Satfinance,* para 94, per Morgan J) and there is utility in Lakatamia doing so (see *Erste*, para 78(vi), per Gloster LJ). This is a case where there is 'particular advantage' for Lakatamia to be gained from the English court trying the claim against the anchor defendant (*Gunn,* paras 99–100)."

[191] The foregoing authorities establish that the determination of whether to set aside an order for PTSO on the basis that the requisite gateway has not been satisfied is inherently fact-sensitive. The mere presence of factual similarities between cases does not impose upon this Court an obligation to apply the same outcome mechanically.

[192] In any event, there are material distinctions between the instant matter and the decision in **BTA**.

[193] In **BTA**, the claimant sought PTSO pursuant to, among other gateways, the Necessary or Proper Party Gateway. The claimant advanced the proposition that the BVI constituted the most appropriate forum, citing the incorporation of the majority of the BVI SPVs within that jurisdiction, the situs of the alleged fraudulent transfers, the multinational character of the remaining defendants, and the inadequacy of alternative fora, particularly Kazakhstan, where concerns regarding judicial integrity and enforcement efficacy were raised.

[194] The Court determined, however, that BTA failed to discharge the burden of establishing that it was reasonable for the Court to assume jurisdiction over the claims against the BVI SPVs under the NPP Gateway. This deficiency arose from BTA's failure to adduce evidence of any realistic prospect of substantive participation by these corporate entities, which were predominantly dormant or dissolved. Such circumstances (not applicable in the present case because all the BVI Defendants have been restored to the Register, albeit that they are subject to insolvent liquidations) gave rise to substantial doubt as to whether a genuine triable issue existed as between the claimant and the BVI SPVs, and

whether the exercise of jurisdiction over such entities would comport with principles of justice and reasonableness.

[195] Wallbank J further observed that the BVI SPVs had been subject to receivership proceedings in England, which had been terminated several years before the application, and that BTA had not pursued default judgments or undertaken other enforcement measures to recover the sums allegedly due. These omissions substantially undermined BTA's assertion that serious issues warranting a trial existed against the SPVs. The dormant and asset-depleted status of these SPVs suggested that they were being employed principally as a procedural mechanism to facilitate service upon other foreign defendants, rather than as defendants against whom substantive meritorious claims could be maintained.

[196] BTA had contended that the threshold for establishing the reasonableness of service out of jurisdiction was modest and that considerations of justice mandated recognition of the BVI as the proper forum to afford victims of international fraud an avenue for redress. Wallbank J emphasised, however, that the established jurisprudence — including the authorities cited in this Judgment — required that where anchor defendants neither intended to defend the proceedings nor possessed realistic assets or ongoing operations, the justification for exercising jurisdiction within the forum dissipated.

[197] In such circumstances, it was incumbent upon the Court to ensure that the jurisdiction was exercised only where a genuine, reasonable, and justifiable foundation existed for doing so, and not to facilitate claims that are speculative in nature or purely procedural in purpose. The absence of contractual or other straightforward causes of action against the BVI SPVs (not applicable in the present case) further diminished the substantiality of the claims advanced.

[198] Accordingly, the Court concluded that BTA's application for PTSO on the foreign defendants through the restored BVI SPVs failed to satisfy the requirements of the gateway provisions under CPR 7.3(2), particularly the requirement that claims against the anchor defendants be reasonably fit for trial. This deficiency warranted setting aside the *ex parte* order granting PTSO, as permitting service

in such circumstances would undermine the integrity of the Court's process, i.e., constitute an abuse of the Court's process (though he did not use that expression). The Court thus determined that the BVI could not be regarded as clearly or distinctly the appropriate forum for the trial of the claims against the BVI SPVs, and that the application for service out must be refused on grounds of jurisdictional propriety and reasonableness.

[199] Wallbank J did not appear to have taken into account in his assessment of the material that was placed before him that, even on the basis that the SPVs had only been included in BTA's claim to facilitate the claim against the foreign defendants, that factor was not decisive. However, he was satisfied that, taken together with the other conclusions he drew from that material, the jurisdictional challenge should succeed.

[200] This Court has not drawn from the written evidence and materials before it the same inferences or conclusions that the learned judge in **BTA** derived from the material and submission in those proceedings. This distinction is material. The submission advanced by the Defendants that the BVI Defendants were restored for the predominant or sole purpose of satisfying the requirements of the Necessary or Proper Party Gateway appears to this Court to rest upon speculation rather than any evidentiary foundation. The Court is, therefore, unable to accept that submission, nor does it find persuasive the categorical assertion made by counsel for the Cargill Defendants in paragraph 10 of their skeleton argument that "**BTA** is on all fours with the present case and is dispositive of it."

[201] Wallbank J was entirely justified in reaching the conclusion he did in **BTA** on the material before him and the submissions made to him. I might well have reached the same conclusion had I presided over those proceedings. However, the factual matrix of the instant case differs materially from that in **BTA**. Rather than adopt the position advanced by the Claimant in its skeleton argument that BTA was wrongly decided (which it did not seriously pursue at the Hearing), I prefer to pose the question thus: had Wallbank J been seised of the present matter, would his Lordship have reached the same conclusion as I have reached in this

case on the NPP Gateway issue? If not — and recognising that reasonable judicial minds may differ in the evaluation of evidence, facts, and submissions without either conclusion being demonstrably erroneous — I would respectfully indicate my divergence from such a view. That does not render Wallbank J's decision in BTA irreconcilable with my decision in the present case, as the Defendants assert. It simply means that the evaluative conclusions reached by two judges on the same material differed, and neither conclusion can be said to be unreasonable, though, in my case, the ECSC Court of Appeal (or even the Privy Council) may have the final word on that.

[202] Accordingly, I am satisfied that the requirements of the Necessary or Proper Party Gateway have been established.

[203] In those circumstances, I do not have to decide whether the Tort Gateway is passed. However, for the sake of completeness, I should do so, in case there is an appeal against this Judgment or the respondent to the appeal wishes to serve a respondent's notice to the appeal.

The Tort Gateway

[204] CPR 7.3(4) sets out the requirements of the Tort Gateway in the following terms:

> "A claim form may be served out of the jurisdiction <u>if a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction</u>."

[205] This provision is identical, in substance, to para. 3.1(9) of PD 6B. It follows that English Law, on its application, will, at the very least, be persuasive, if not instructive for this Court.

[206] There are two requirements for this gateway to be passed.

[207] The first is that the Claimant must have made a tort claim.

[208] The second requirement has two limbs; only one needs to be satisfied. It suffices if either the act causing the damage has been committed within the jurisdiction or the damage is sustained within the jurisdiction.

[209] The first issue for the Court to determine is whether any of the Claimant's heads of claim are in tort. I can deal with this issue briefly, as, given what I say in this Judgment, that issue is largely otiose.

[210] It is common ground between the parties that the Claimant's claims for conspiracy and breach of Art. 1064 of the Russian Civil Code are claims in tort within the meaning of CPR 7.3(4). The Claimant accepts that the claim for "knowing receipt" is not a claim in tort or, at any rate, the Claimant does not rely on the Tort Gateway to support its contention that the Tort Gateway is passed in relation to that head of claim.

[211] However, there is a dispute about whether the Claimant's claim for dishonest assistance amounts to such a claim.

[212] The Defendants contend that a claim for dishonest assistance is not a claim in tort. On behalf of the Appleby Defendants, Mr. Matthews advances the following submission in his skeleton argument:

> "156 … NBT suggests that it has been held in the BVI that "*dishonest assistance is a tort for the purposes of characterisation in the conflict of laws*" … citing **Nissan v Ghosn** (BVIHCM2019/0121) (9 August 2024) … at para [40(2)]. That is misleading. In that case, Wallbank J was concerned with how a claim for dishonest assistance is to be characterised for the (different) purpose of choice of law. In both England and the BVI, such a claim is properly to be characterised as a claim in tort for the purpose of choice of law.151 But such a claim is not to be so characterised for the purpose of the Tort Gateway in relation to jurisdiction.
>
> 157. The Appleby Defendants are not aware of any BVI authority on that point. However, it was held by the English Court of Appeal in the leading case concerning the analogous English tort gateway that it was "*clear beyond argument*" that a claim for dishonest assistance does not fall within that gateway: see **Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc**

> ["Metall"] [98] … A gateway concerning claims based on constructive trust (which include claims for dishonest assistance) was added to the RSC later that year. Then, with effect from 1 October 2022, the constructive trust gateway (now in PD 6B) was expanded so as to make specific provision concerning claims for unlawfully causing or assisting in a breach of trust (para 3.1(15A)) or a breach of fiduciary duty (para 3.1(15C)). In the BVI, the equivalent gateway is found in CPR Rule 7.3(8)(a), which provides that a claim form may be served out of the jurisdiction if "*a claim is made for a remedy against a defendant as constructive trustee and the defendant's alleged liability arises out of acts committed within the jurisdiction*". NBT does not seek to rely on that gateway, presumably because it recognises that it cannot credibly contend that the Appleby Defendants' alleged liability for dishonest assistance arises out of acts which they committed within the BVI jurisdiction …
>
> 158 NBT's attempt to rely upon the Tort Gateway in relation to its claims for dishonest assistance fails for that reason alone and leave to serve those claims out of the jurisdiction must be set aside…."

[213] The leading case on the subject is the Court of Appeal decision in **Metall**, in which Slade LJ, giving the judgment of the Court of Appeal, said: [99]

> "In our judgment, it is clear beyond argument that a claim which is founded on any of the three categories of constructive trust which we have mentioned cannot be said to be "founded on a tort" within the meaning of R.S.C., Ord. 11, r. 1(1)(f). The law of tort has nothing whatever to do with any such claim. In all such cases the wrongful conduct of the defendant occurs against the background of a pre-existing trust and the claim is founded on that trust. As is stated in **Salmond & Heuston on Torts**, 19th ed., p. 14, under the heading 'Tort and Equity': 'No civil injury is to be classed as a tort if it is only a breach of trust or some other merely equitable obligation. The reason for this exclusion is historical only. The law of torts is in its origin a part of the common law, as distinguished from equity, and it was unknown to the Court of Chancery'."

[214] The Claimant accepts that, on the authority of **Metall**, a claim for dishonest assistance does not constitute a claim in tort. Other cases appear to support this view. They include **Royal Brunei Airlines v Tan**,[100] in which Lord Nicholls

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[98] [1990] 1 Q.B. 391 at 473-4.
[99] *Ibid*, at p. 474.
[100] [1995] 2 A.C. 378

clarified that dishonest assistance was an equitable cause of action based on accessory liability, not a claim in tort.

[215] In his oral submissions on behalf of the Claimant, Mr. McGrath said:[101]

> " … as regards whether or not the dishonest assistance claim as a matter of principle falls within the tort gateway, the Defendants say no. And they rely upon, and I accept that **Metall** holds that it does not. But as a result of the **Metall** decision … the English CPR changed its gateways to include the constructive trust gateway. So there was never then any need to then subsequently revisit the question of gateways as a matter of English law. It's a little bit like **the Siskina** started the trouble off in respect of freezing orders, and then the English enactment for the Brussels Convention meant that we didn't have the issue, but all the offshore world did. So that hasn't been tested.
>
> Now, My Lord, we say, and I don't want to take you through them all, My Lord, but we say for the reasons set out in our skeleton in 86 and 88, that dishonest assistance as a claim is now distinct from knowing receipt. And Your Lordship will see that I don't try and get knowing receipt which some academics will call an unjust enrichment claim, but we can spend ages having a chat about that. But dishonest assistance is seen as a wrongdoing claim. And in the context of enlightened characterization for the purposes of conflict of laws, we say that the more enlightened approach is to accept that dishonest assistance is the kind of wrongdoing that would naturally fall within the tort gateway, but I do accept that **Metall** still stands as an authority that it doesn't.
>
> But Your Lordship will see in our skeleton that in other areas, I am not saying in this area, but in other areas of conflicts, the dishonest assistance claim has been treated in the same way as a tortious claim. It's treated that way in respect of the Brussels regime, but I accept, and it was said against me, well that's its own regime. I accept that, My Lord. I am putting it forward as part of an enlightened characterization that is accepted when one's on the international stage as opposed to what would happen in a purely domestic case.
>
> The double actionability rule … which is a rule for tortious conduct, is a rule that has been also applied to the dishonest assistance claim. It will be said against me that's a [choice of law] law rule and not a jurisdictional rule. I accept that, My Lord, I don't put it any higher than that. But it's nevertheless an indication that a tortious approach in conflicts has been applied to — a tortious rule in conflicts has been applied to the question of a dishonest assistance claim.

[101] Court Transcript, Day 4, p. 123, line 6 to p. 125, line 16.

> And, My Lord, breach of fiduciary duty can fall within tortious claim, and dishonest assistance is interference with the breach of duty and is a wrongdoing claim.
>
> So … we say that … the characterisation of a dishonest assistance claim is capable of falling within the tort gateway."

[216] At paras. 86-88 of Mr. McGrath's skeleton argument, it is said:

> "86 NBT acknowledges that **Metall** … suggests that a claim in dishonest assistance does not fall within this gateway, because dishonest assistance is founded on one of the categories of constructive trust … The 7.3.(8)(a) gateway is broader than that for the tort gateway, the test being … '… *that a substantial part of the acts viewed as a whole, on the part of the original fiduciary* ***and*** *the defendant, which give rise to the alleged liability, took place within the jurisdiction'* …; but nothing turns on this.
>
> 87 To the extent that it remains good law in England, the **Metall** line of authority should not be followed, being inconsistent with the modern approach … in numerous subsequent English decisions of high authority: (i) dishonest assistance falls within the tort gateway for the purposes of jurisdiction under the Brussels regime;[102] (ii) the double actionability rule (as to the governing law of a tort) applies to dishonest assistance;[103] (iii) a dishonest assister is not akin to a trustee for the purposes of limitation;[104] and (iv) a claim for breach of fiduciary duty can fall within the tort gateway,[105] and it would be odd if a claim for dishonest assistance (of a breach of fiduciary duty) did not fall within the same gateway.
>
> 88 In the alternative, NBT will rely upon the constructive trust gate way at CPR 7.3(8)(a)..."

[217] There is some support for Mr. McGrath's submission. In addition to the cases he refers to in para. 87 of his skeleton argument, the following commentary in

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102 Referring to Casio Computer v Sayo [2001] EWCA Civ 661, at [10]-[17].
103 Referring to Grupo Torras v Al-Sabah [2001] CLC 221, CA, at [121]-[145]
104 Referring to Williams v Central Bank [2014] AC 1189, SC, at [35], [90], [102], [114]-[119]
105 Referring to Twin Benefits v Barker [2017] EWHC 1412 (Ch), at [112]-[116]; and Tulip Trading v Van der Laan [2022] 2 All ER (Comm) 624, at [165]

Dicey, Morris and Collins on the Conflict of Laws ("Dicey & Morris"),[106] is appropriate to refer to:[107]

> "Dishonest assistance in a breach of trust is very likely to fall within the choice of law rules for torts in the **Rome II Regulation**. It is a claim based on non-contractual wrongdoing for which the paradigm claim is for compensation for loss. At common law, after some uncertainty, it appeared to have been established that the choice of law rules for torts applied equally to dishonest assistance. In **Casio Computer Co Ltd v Sayo**,[108] the Court of Appeal considered that dishonest assistance fell within the European autonomous meaning of "matters relating to tort" under Art. 5(3) of the Brussels Convention."

[218] In another passage of the work, the authors say:[109]

> "The continuing uncertainty as to the treatment of such obligations in the conflict of laws in England is a hangover from earlier insularity in thinking on the topic. Though there are judicial statements, most notably of courts in Australia, that, as equity acts *in personam*, equitable claims are governed by the *lex fori*, this (at least from an English law perspective) probably means no more than that a court may order equitable remedies within the limits of its own procedural powers over a defendant subject to its personal jurisdiction and in respect of rights and obligations which have been found to arise under the law identified by the relevant choice of law rules. There is no more truth in the proposition that a court can only apply its own principles of equity than in the (obviously false) proposition that a court can only apply its own principles of common law or local legislation. Moreover, although this may have informed earlier thinking on the topic, equitable principles have no stronger claim to operate as public policy, in the international sense, than their common law counterparts. It would, to adopt the sentiment expressed by the Court of Appeal in **Google Inc v Vidal-Hall**,[110] seem an 'odd and **adventitious** result … if the historical accident of the division between equity and the common law' affected the characterisation of claims within the conflict of laws. The more recent trend in the English case law has been to seek to fit claims which, under domestic law, would rest upon principles of equity within one of the well-established categories of the English rules of the conflict of laws for choice of law purposes, including tort, unjust enrichment/restitution and the internal management of companies. Other relatively recent decisions, however, including those of the Court of Appeal, are admittedly more difficult to fit within this

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106 Dicey, Morris and Collins on the Conflict of Laws, 16th Edition, 2022, Eds: Lord Collins of Mapesbury, Professor Jonathan Harris *et al*.
107 Dicey & Morris, para. 36-060.
108 [2001] EWCA Civ 661.
109 Dicey & Morris, para. 36-090.
110 [2015] EWCA Civ 31.

framework, and may be taken to support, if not the exclusive application of the *lex fori*, then the application of independent choice of law techniques to claims based on equitable obligations. Those decisions either do not examine the impact of the Rome I and Rome II Regulations on the characterisation of equitable obligations, with most having been decided before their adoption, or seem to accept that the Regulations do require a fresh approach to characterisation."

[219] In addition, in **OJSC Oil Company Yugraneft v Abramovich**,[111] Christopher Clarke J (as then was) stated that, "Dishonest assistance, a form of equitable wrongdoing, is so closely analogous to a claim in tort (as characterised for purely domestic purposes) that it should, I would have thought, be so characterised for private international law purposes."

[220] I agree with these observations.

[221] Things have moved on since **Metall** was decided. While I accept that there is substantial authority for the proposition that a claim for dishonest assistance is not a claim in tort, there is no obvious reason why it, or the broader plea based on constructive trust, cannot be treated as a "tortious" claim, not for whether they constitute a cause of action in tort, but for the purpose of the provisions governing PTSO.

[222] Cases on PTSO are unlikely to have to decide any longer whether a claim for dishonest assistance or constructive trust is or is to be treated as a claim in tort, so it is unlikely that this Court or the E&W courts will have the opportunity to review the decision in **Metall** to see whether it fits in with current thinking on characterisation for the purpose of the now largely otiose PTSO provisions contained in the 2000 CPR. That is because a dedicated gateway exists in CPR 7.3(8) of the revised 2023 CPR, governing such claims While this may be thought to confirm that dishonest assistance and constructive trust claims are not "tort" claims for the purpose of the provisions governing PTSO (otherwise, why would there need to be a separate category for such claims), a fresh approach to characterisation is required. That approach warrants treating these

[111] [2008] EWHC 2613 (Comm), at [223].

claims as tort claims for the purpose of the PTSO provisions, in the same way they are treated for other purposes.

[223] There is no need for me to undertake a review of the decision in **Metall**, given that anything I say will be *obiter* only. However, the preponderance of academic opinion also favours treating dishonest assistance and related claims (such as "knowing receipt" claims) as tortious for the purpose of the requirements of the Tort Gateway.[112]

[224] For my part, the modern approach of treating non-contractual claims such as dishonest assistance, knowing receipt, and the like as tortious is compelling. I cannot see any reason for distinguishing the meaning of the expression "tort" depending upon the context in which that expression is used. Alternatively, in my judgment, there is good reason to extend the meaning of that expression for the purposes of a PTSO application to constructive trust claims, though, like England and Wales, this is unlikely to be of any practical significance unless the application is governed by the CPR 2000, which will be rare.

[225] Without having heard detailed submissions of the type necessary to decide whether **Metall** would be consistent with what is thought to be the modern approach to the characterisation of claims in tort, I would decline to follow **Metall** as regards the characterisation of claims such as dishonest assistance as non-tortious. If that is correct, and the claims for dishonest assistance and knowing receipt have both been pleaded and formed the subject of the application for PTSO at the *ex parte* hearing, I would find the claims made by the Claimant for dishonest assistance and knowing receipt to be claims in tort.

[226] So far as the second requirement of the Tort Gateway is concerned, the Claimant needs to satisfy the Court that the act causing the damage was committed within the jurisdiction or the damage was sustained within the jurisdiction.

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[112] See, for example, Chong, A, "Characterisation and Choice of Law for Knowing Receipt" (2023) 72 ICLQ 147; and Briggs, A, "Private International Law in English Courts", Second Edition, OUP, 2022, p. 238 *et seq*., referring also to similar views held by Collier [1989] All E R Annual Review 49.

[227] The law relating to the second requirement was summarised by Slade LJ in **Metall** in the following terms:

> "…Condition (c) prompts the inquiry: what if damage has resulted from acts committed partly within and partly without the jurisdiction? This will often be the case where a series of acts, regarded by English law as tortious, are committed in an international context. It would not, we think, make sense to require all the acts to have been committed within the jurisdiction, because again there might be no single jurisdiction where that would be so. But it would certainly contravene the spirit, and also we think the letter, of the rule if jurisdiction were assumed on the strength of some relatively minor or insignificant act having been committed here, perhaps fortuitously. In our view condition (c) requires the court to look at the tort alleged in a common sense way and ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere): if the answer is yes, leave may (but of course need not) be given. …"

[228] The Court of Appeal endorsed the substance of this approach in **Manek and others v IIFL Wealth (UK) Ltd and others**.[113] In that case, the claimants, who were the minority shareholders in a company, Hermes Ltd, brought an action in deceit against two Indian defendants (Ramu and Palani) and others. The claimants alleged they were defrauded when selling their minority shareholding in Hermes Ltd for $40 million to the majority shareholder, shortly before Hermes Ltd was sold to Wirecard for €250 million.

[229] The Court of Appeal held, *inter alia*, that the claimants were entitled to rely on the Tort Gateway. It ruled that the acts in question had to be those of the putative defendants. However, the claimant was only required to identify some plausible, substantial acts committed in England that contributed to the tort.

[230] Coulson LJ, with whom Phillips and Underhill LJJ agreed, observed:[114]

> "The judgment of the court in *Metall und Rohstoff* makes it clear that the court has to ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction, and not to concern itself with 'whether other substantial and efficacious acts have been committed elsewhere'. That is what the judgment says in express terms It is not possible to gloss it. In an evolving international fraud like this,

[113] [2021] EWCA Civ 264.
[114] [2021] EWCA Civ 264, at [53].

> with relevant events in London, Vienna, Singapore and India, it is not permissible to embark on a geographical comparison exercise, identifying where each event happened, and then announcing the single winner of the jurisdictional contest by reference to the competing quantities and/or qualities (in terms of causative significance) of the relevant events. The fact that, on the judge's analysis, the telephone call of 22 August was more substantial and efficacious is irrelevant in principle to the question of whether what was said and done at the meeting in London on 8/9 August 2015 was substantial and efficacious."

[231] Based on these and the other authorities referred to by the Claimant, it is very difficult to see how the Defendants' submission that the Tort Gateway is not passed can be correct.

[232] Let me take, as an example, the decision in **Chep Equipment Pooling BV v ITS Ltd**,[115] which the Defendants rely on in support of their contention that the court's focus must be on the formation of the conspiracy rather than on the steps taken to implement it. In that case, Mr. Richard Salter QC, sitting as a deputy Judge of the High Court, observed:[116]

> "32.1 This 'gateway' (relevantly) requires damage to have been sustained which results from an act committed within the jurisdiction.
>
> 32.1.1 In ***Metall,*** the Court of Appeal held that this requirement obliges the court to look at the tort alleged in a common sense way, and to ask whether damage has resulted from substantial and efficacious acts committed within the jurisdiction, regardless of whether or not such acts have been committed elsewhere. The question is where in substance the cause of action arises. If the court finds that the tort has in substance been committed in this country, the fact that some of the relevant events have happened abroad is irrelevant for these purposes.
>
> 32.1.2 *JSC BTA Bank v Ablyazov (No 14),*[117] like the present case, involved an allegation of a conspiracy to injure by unlawful means. The Supreme Court held that, for the purposes of Article 5(3)(b) of the Lugano Convention 2007 (which provides that 'A person domiciled in a state

[115] [2022] EWHC 471 (Comm).
[116] [2022] EWHC 471 (Comm), at [32].
[117] [2018] UKSC 19.

bound by this Convention may, in another state bound by this Convention, be sued: … (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'), the making of the conspiratorial agreement in England should be regarded as the harmful event which set the tort in motion, so that the courts of England and Wales have jurisdiction.

32.1.3 This reasoning was applied by Carr J in *Tugushev v Orlov*[118] … to the para 3.1(9)(b) gateway. Carr J held … that 'the making of a conspiratorial agreement is sufficient to amount to a substantial and efficacious act justifying the defendant being brought here to answer the claim, and may constitute an act committed within the jurisdiction from which damage has been or will be sustained for the purposes of the tort gateway'.

32.1.4 Taking these authorities into account, I respectfully share the view … that it is appropriate, when considering this 'gateway', to focus on the formation of the conspiracy rather than upon the steps taken subsequently to implement it."

[233] Like Mr. McGrath, I am unable to accept the reasoning in **Chep Equipment**.

[234] First, it fails to take into account all the elements of a claim for unlawful means conspiracy. In summary, the elements of the tort are: (a) two or more persons must have acted together pursuant to a common aim or design; (b) those persons must have deployed methods that are wrongful to achieve that aim or design; (c) the predominant purpose of that aim or design must have been to injure the claimant, and must not merely have been a foreseeable side effect of pursuing legitimate business interests; and (d) the claimant must have suffered actual loss as a result.

[235] The elements of a claim for unlawful means conspiracy were restated by the Court of Appeal in **Lakatamia Shipping Co Ltd v Su and others**[119] in the

[118] [2019] EWHC 645 (Comm), at [56]–[61].

[119] [2025] EWCA Civ 1389, at [60], per Males LJ (with whom Sir Julian Flaux C and Falk LJ agreed). The Court of Appeal's decision was reported on 5 November 2025. Although the final draft of this Judgment was prepared before that date, I have been able to incorporate it before the draft judgment was circulated.

following terms, adopting the observations of Bryan J in **Lakatamia Shipping Co Ltd v Su**:[120]

> " … the summary of the relevant principles [was set out] by Mr. Justice Bryan in an earlier judgment in the litigation between *Lakatamia and Mr. Su (Lakatamia Shipping Co Ltd v Su* which were based upon the elements of the tort of inducing a breach of contract. This summary was in turn adopted by Mr. Justice Foxton in *Lakatamia Shipping Co Ltd v Tseng*: [121]
>
> Mr. Justice Bryan said:
>
> '126. … the elements of the [unlawful means conspiracy tort] are:
>
> (1) The entry of a judgment in the claimant's favour,
>
> (2) Breach of the rights existing under that judgment,
>
> (3) The procurement or inducement of that breach by the defendant,
>
> (4) Knowledge of the judgment on the part of the defendant, and
>
> (5) Realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed under the judgment.
>
> 127. I am also satisfied, again by analogy with the tort of inducing a breach of contract, that the following further principles apply to [this] tort:-
>
> (1) It suffices that the defendant intended to violate the claimant's rights under the judgment. The defendant does not need also to intend thereby to damage the claimant. As Judge Russen QC stated in *Palmer Birch v Lloyd*:[122]
>
> 'In order for liability to be established under the inducement tort, the result intended by the defendant must be a breach of contract. But that is both

[120] [2023] EWHC 1874 (Comm).
[121] [2023] EWHC 3023 (Comm), at [20] and [21].
[122] [2018] EWHC 2316 (TCC), at [174].

necessary and sufficient and there is no need for the claimant to go further by establishing an intention to cause damage …'

(2) Just as it is unnecessary for a defendant in a claim for inducing a breach of contract to know the details of the contract provided that they had 'the means of knowledge' (*Emerald Construction Co Ltd v Lowthian,*[123] it is inessential that the defendant to a claim for the Marex tort has actual knowledge of the contents of the judgment.

(3) In this regard blind-eye knowledge is sufficient. Thus, as was said by Lord Denning in *Emerald Construction,*[124] 'it is unlawful for a third person to procure a breach of contract knowing, or recklessly, indifferent whether it is a breach or not'.

(4) '[A]ny active step taken by the defendant having knowledge of the covenant by which he facilitates a breach of that covenant' falls within the ambit of the tort: see *British Motor Trade Association v. Salvadori*. [125]

(5) There is no need to establish 'spite, desire to injure or ill will' on the part of the defendant, see **Clerk & Lindsell on Torts**, at para 23.57'."

[236] On behalf of the Claimant, Mr. McGrath explained the position, in my judgment correctly, in the following terms in his oral submissions:[126]

> "So when my friend says, well, there's no suggestion, for example, that the conspiracy agreement was reached in the BVI. We have never said that. We've never said it was. Nor do we say that we need to say that and it's odd, in any event, to say that that is the only relevant place for a conspiracy claim, given that that doesn't, in fact, create the tort. You need the loss. And then what's equally odd is that Your Lordship will appreciate that in a conspiracy, conduct of one is conduct of all, carried out pursuant to a conspiracy. So it isn't a clear cut, what did you do and we have to look at you independent of everybody else because it's the conduct of somebody over here who is an alleged co-conspirator,

[123] [966] 1 W.L.R. 691 at 700, per Lord Denning MR.
[124] *Ibid*.
[125] [1949] Ch. 556 at 565, per Roxburgh J.
[126] Court Transcript, Day 3, p. 23, line 24 to p. 25, line 5.

> obviously we have to prove our case. But the conduct of person over here is attributed to and you as the co-conspirator, if we succeed in establishes conspiracy, are liable for the losses that flow from that conduct over there. In this case, My Lord, the act of incorporation is obviously as, I will come on to it, but it is obviously, the importance that we say that the deliberate use, you can infer the deliberate use of BVI entities from the fact that they are the singular group of entities performing the same role. Whereas you don't get that, for example, at the second tranche entity stage and you don't get that at the trader group."

[237] Second, if one strictly adheres to the language of CPR 7.3(4) ("the act causing the damage was committed within the jurisdiction"), it must include not only the initial act, i.e., where the conspiracy was hatched, but also the place where any other conspirator joined the conspiracy. Likewise, in the case of the second limb of that provision ("the damage was sustained within the jurisdiction"), it cannot refer to the single act where the damage was initially caused.

[238] It follows that to focus solely or principally on the formation of the conspiracy is wrong in principle.

[239] One achieves this result either by relying on s. 45(1) of the BVI Interpretation Act (CAP.136) (which defines "acts" as including " a series of acts") and s. 36(2) of that Act (which expressly states that words in the singular include the plural and *vice versa*); alternatively, by giving a purposive interpretation[127] to the statutory words "act" and "damage".

[240] There will be many torts in which the cause of action will not be "perfected" in a single act. An unlawful means conspiracy is a classic example of this. It is unrealistic to assume that one can simply look at the initial act between the conspirators and ignore what happens subsequently, such as if the initial agreement between the co-conspirators is varied or new parties join the conspiracy. To suggest, therefore, that one solely or principally looks at the point when the conspiracy was initially formed seems to me to be wrong.

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[127] See Bennion, Bailey and Norbury on Statutory Interpretation, 8th Edn, 2020, Bailey and Norbury, [10.1] *et seq.*, especially [10.5] and [10.7], [11.1] *et seq.*, [12.1] *et seq.*, [13.1] *et seq.*, and [15.1] *et seq*.

[241] Third, the plain meaning of the words used in CPR 7.3(4) does not support the premise that the focus should be on where the conspiracy was formed. It simply states that the act causing the damage must have been committed within the jurisdiction or the damage must have been sustained within the jurisdiction. It also disregards the "continuous nature" of certain acts or certain types of damage which may apply in a particular case, especially in a case such as this, where the act relied upon is an act of unlawful means conspiracy and the damage relied upon may have been minimal or nominal when it was first sustained but became substantial as fresh acts were undertaken or the conspiracy continued. Nor does it seem to me to provide a satisfactory answer when the allegations involve multiple, separate conspiracies, some of which may pass the gateway and others may not.

[242] Fourth, it is difficult to see how the approach in **Chep Equipment** can be said to reflect the clear warning given by Coulson LJ in **Manek** (not cited to the Judge in **Chep Equipment**) that, in an evolving international fraud such as is alleged in the present case, it is impermissible to embark on a geographical exercise to identify where each event occurred with a view to determining where the act causing the damage was committed or whether the damage was solely or mainly sustained within the jurisdiction. If **Manek** had been cited in **Chep Equipment**, the Judge's decision would, *a fortiori*, have remained the same, because he found the Tort Gateway satisfied on the narrow interpretation he gave to the above words. However, it is almost certain that the observations he made above would have been substantially revised to take into account the impeccable logic of Coulson LJ's words in **Manek**. So far as they were not, I disagree with him.

[243] Fifth, I cannot see what assistance the Defendants can derive from the decision in **Abu Dhabi Commercial Bank PJSC v Shetty and others**.[128] That was a "forum" rather than a "gateway" case.

[244] In that case, the claimant bank was a UAE-incorporated and domiciled bank. It issued proceedings claiming that the defendants were involved in a massive

[128] [2022] EWHC 529 (Comm).

fraud within one of the claimant's subsidiaries. The claimant alleged that the defendants had conceived or carried into effect a scheme by which false financial statements were created that gave a false impression of the financial strength of the relevant subsidiary and concealed losses that it had accumulated as a result of dishonest misappropriation. There were several issues before the court, but the defendants, none of whom were or had ever been resident or domiciled in England, applied for orders setting aside the order granting PTSO and discharging a worldwide freezing order that had been made. The defendants submitted that Abu Dhabi was the most appropriate forum for the resolution of the dispute and that, accordingly, the claim should be stayed upon certain undertakings which they were willing to give.

[245] His Honour Judge Mark Pelling QC, sitting as a Judge of the High Court, held that the claims did not have their closest connection with England. On the contrary, they had their closest connection with Abu Dhabi, where the claim could suitably be tried in the interests of all the parties and the ends of justice. The claimant was a UAE-incorporated and domiciled bank owned in part by the government of Abu Dhabi and described as one of the largest banks in the UAE. It had no connections to England other than its engagement of London solicitors to prepare some of the documents. Those factors indicated that the parties had their closest connection with the UAE and no material connection with England. Accordingly, the governing law of the dispute was the law of the UAE. In those circumstances, and in light of the defendants' undertakings, the claim was stayed.

[246] The Defendants rely on the following observations made by Judge Pelling in support of their contention about the source of the act giving rise to the alleged claim and where the damage was sustained: [129]

> "19. If paragraph 3.1(9)(b) is to be relied on it is necessary that the claimant shows that damage has resulted from substantial and efficacious acts committed within the jurisdiction by the defendant against whom the gateway is relied on, whether or not substantial and efficacious acts have been committed elsewhere — see *Metall* … This is an issue which if it is to be established requires '… a plausible (albeit contested) evidential

[129] [2022] EWHC 529, at [19], [134] and [138].

basis for it …" — see *Brownlie v Four Seasons Holdings Inc*[130] … and *Goldman Sachs International v Novo Banco SA* [131]… Each of the defendants denies that either of the tort gateway requirements is satisfied in relation to any of them but in any event maintain that permission to serve out should either not be granted under paragraph 3.1(9)(a) or permission under paragraph 3.1(9)(b) should be set aside because the forum conveniens for the determination of the litigation is plainly not England much less clearly and distinctly England.

134. Since this gateway is relied on against each of the defendants it will be necessary to consider them individually and by reference to each factual allegation made and each cause of action relied on. In relation to each, the focus is on whether a "substantial or efficacious act" has been committed within the jurisdiction — see *Metall* …

138. As the authorities in this area make clear however, a court considering the paragraph 3.1(9)(b) gateway has to look at the tort alleged in a common sense way and decide whether damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere) … It has to look at the issue separately in relation to each defendant against whom the gateway is relied on."

[247] I am not sure what assistance the Defendants derive from Judge Pelling's observations. What he said was no different to what the Court of Appeal had said in **Metall**. Significantly, while Judge Pelling cited **Manek** in the context of the proper forum for determining the claim,[132] he did not refer to Coulson LJ's observations in that case about it not being permissible for a court to embark on a geographical exercise to identify where each event occurred with a view to determining where the act causing the damage was committed or whether the damage was solely or mainly sustained within the jurisdiction. This is perhaps not surprising, because Judge Pelling had two jurisdictions to choose from, and, on the facts, it was obvious that the only jurisdiction in which the claim could be tried was Abu Dhabi.

[248] Finally, it must be noted that the Claimant's information about the alleged conspiracy is not extensive. The Claimant has placed sufficient material before

[130] [2017] UKSC 80, at[7]. .
[131] [2018] UKSC 34, at [9].
[132] *Ibid*, at [161].

this Court to satisfy the Court, on the standard of proof it must apply, that there was a conspiracy to defraud in which the Claimant suffered substantial loss or damage, and which involved the BVI Defendants and may have involved the Defendants. It would be a counsel of perfection to expect the Claimant to know the intricacies of the alleged conspiracy at this stage, and to expect it to say definitively where it was hatched (who joined it and when), what it involved or where the damage was sustained.

[249] In my judgment, even if one applies the narrow, restricted view of the requirements of this gateway (i.e., the **Chep Equipment** view), I am satisfied that, on the material presented to this Court, the gateway is satisfied. The Defendants might have provided more information about their involvement, if any, about the allegations made by the Claimant. They chose not to. If they had, it may have warranted the Court taking the view not just that the gateway was not passed, but that (whether or not it was passed) there simply was no case for the Defendants to answer and for the Claim to be struck out or for summary judgment to be entered against the Claimant on that basis.

[250] This rather puts paid to several of the arguments advanced by Mr. Matthews at paras. 172 to 183 of his skeleton argument. Based on such material as the Claimant has thus far obtained about the alleged conspiracy, a clear case has been made out that the requirements of the Tort Gateway are satisfied.

[251] I disagree that the so-called "putative defendant condition" is not satisfied. The position of the Defendants is based on the premise that the date of incorporation of the BVI Defendants is the date the Court must consider in deciding whether the Tort Gateway is passed. As explained, *passim* in this judgment, I have never understood this to be the Claimant's case.

[252] The crucial point here is that I do not see that the place of incorporation of the BVI Defendants is relevant to the case for all the reasons already referred to.

[253] Nor, as I have said, do I see the case of the Claimant any longer as being based solely on the premise that the incorporation of the BVI Defendants must be the point in time when the conspiracy was conceived. If that were correct, it would

be easy to avoid any possible Jurisdictional Challenge, based on the Tort Gateway, by simply "purchasing" an "off-the-shelf company" instead of incorporating one.

[254] Mr. McGrath observed in his oral submissions:[133]

> "So there is a deliberate use and that, therefore, means that incorporating those defendants was a deliberate decision, we say, insofar as they were incorporated during the period of the conspiracy, was a deliberate step. Now it's said against me that three of them were incorporated some years earlier and obviously I need to address that, and as a matter of pleadings, the pleadings says the conspiracy took place between 2013 and 2017, so they say, well those three -- well, they were already on the self, they were already on the shelf, so that that act didn't happen in respect of them but they were still used. And, in fact, what's interesting is that the span of time over which there was use and incorporation, only reinforces the deliberate nature of the choice that BVI was the place that they wanted these defendants operating in both stage one and stage two to be incorporated. They wanted the BVI, because given the span of time, one would say, pick one from Seychelles, pick one from the Cayman. Why chose, over a period of time, only one jurisdiction when, as you've seen from what's been said, there's Cypriot entities here, there's Seychelles Belize, Singapore, et cetera. So we say -- and then, of course, My Lord, once -- now, it will be said against me well it's not part of your pleaded case and I can't deny that, My Lord, and I will not deny that, but the reality when you are looking at what the connection is here and what is part of the case that we present, is that the role played by these BVI entities in the scheme isn't just as a conduit to receive monies, pass monies at both stages. It's also to act as a counter-party to the transactions that cover them up, we say. Obviously that will, no doubt, be denied, and then, thereafter, as a means of extracting from the scheme as it showed on the diagram down to whatever murky world exists below that diagram as a means of benefiting by the extracted funds, those behind the scheme of D1 and his associates."

[255] It follows that the fact that some of the BVI Defendants were incorporated prior to the inception of the alleged conspiracy is irrelevant.

[256] The important point here is what Mr. McGrath says at para. 77 onwards of his skeleton argument:

> "77 NBT relies upon the incorporation and use of each of the nine BVI Ds (D3-D11) as in each instance substantial and

[133] Court Transcript, Day 4, p. 25 line 1 to p. 26, line 14.

efficacious acts in the BVI, in light of the centrality of the BVI Ds to, and the advantages thereby conferred on, the alleged conspiracy.

78 First, the scheme alleged by NBT (and which is not disputed on the merits for the purposes of this application) is, at a high level, as follows:

78.1 Monies flowed out from Binbank (Stage 1) … and then back to Binbank (from Rost Bank) (Stage 2) … The key detail for present purposes is that in every instance, as part of the Stage 1, significant sums were first received by the BVI Ds and then paid away by the BVI Ds (ultimately, NBT alleges, for the benefit of Mr. Shishkhanov). The BVI Ds thereby acted as the fulcrum for these transfers, which were critical to the success of the fraud; and they did so pursuant (or purportedly pursuant) to written 'contracts' that were physically executed (signed and/or stamped) by the BVI Ds NBT does not know the precise mechanism and relies upon the connections between Mr. Shishkhanov and/or his close associates and the BVI Ds themselves (i.e. to which the BVI Ds were party).

78.2 Broadly speaking, all other aspects of the transactions were designed to disguise the above. This includes (i) the entire second stage, by which Binbank appeared to have been repaid; (ii) the concealed ownership of the BVI Ds (as further revealed by the BVI Disclosure Application); and (iii) the variety and complexity of the detail of the transactions, including nine different BVI Ds, the 24 different Traders, the broadly two different forms of transaction (loans and supply agreements) and variations within these, and the large number of jurisdictions within and between which the various transactions and stages thereof took place.

78.3 In short, the scheme was an elaborate 'cup and ball trick', repeated many times. It was designed to ensure that anyone looking would not notice where the money was really going — in each case via the BVI Ds.

79 Secondly, a BVI company was a perfect candidate for such disguise on the facts of this case. What matters is the combination of the following two points:

79.1 First, there are a number of well-known features of companies incorporated in this jurisdiction. All served to assist the Ds in their object of disguising or obscuring their fraudulent scheme. These include that (i) information as to (a) shareholders/beneficial owners, and (b) their financial position,

is not publicly available; (ii) there is no exchange control legislation, which might have imposed restrictions on the transfer of large sums internationally; and (iii) company directors are not required to be resident in the BVI.

79.2 In addition, there is the very fact that (on the evidence as it stands, pending disclosure etc.) there is no other discernible connection to the BVI. This is common ground on the evidence, which shows the point in remarkable detail. A deliberate decision by those involved in setting up this elaborate conspiracy was accordingly made to incorporate the BVI Ds in this jurisdiction to facilitate the implementation of the Scheme. By contrast, it is common ground that the BVI Ds' directors were in Cyprus. Notably, the Cypriot share register is publicly available. The incentive to divide the jurisdiction of the nominee directors and that of incorporation is plain.

80 Thirdly, there is the fact that the only common feature of all of the transfers78 is the role of one of the BVI Ds as part of stage 1. It is the only common factor, across dozens of companies, transfers, jurisdictions, and the multiple years in which these took place. That is either an astonishing coincidence or a strong basis for the inference that the scheme was deliberately executed using companies in this jurisdiction to have the effect described at ¶79 above.

81 To be clear, no criticism of BVI company law is intended by this submission. It is merely to note that, on the particular facts of this case, the use of BVI companies was a perfect fit for the Ds' purpose and was clearly (it can be inferred) a deliberate choice. Whether the same might have been so in another jurisdiction to which there was similarly no wider connection is irrelevant. There is at least a good arguable case that the incorporation and use of BVI companies by the Ds, in light of the advantages that conferred, was not happenstance or 'fortuitous', and that it was not a "minor or insignificant act" as part of the alleged scheme. Rather, the BVI Ds' role was central, and their incorporation and use as part of the essential modus operandi of the scheme (and the concealment of it) was in each instance a "substantial and efficacious" act from which "damage has resulted" "in a common sense way".

[257] It follows that if I had found the NPP Gateway not to have been passed, I would have found the Tort Gateway to have been comfortably passed.

The Constructive Trust Gateway

[258] The Claimant claims that it is also entitled to the "Constructive Trust" gateway ("the Constructive Trust Gateway"), even though that gateway was not relied upon at the *ex parte* hearing.

[259] The Constructive Trust Gateway is set out in CPR 7.3(8)(a), which states that the gateway is passed "if a claim is made for a remedy against the defendant as constructive trustee and the defendant's alleged ability [sic] arises out of acts committed within the jurisdiction."

[260] A "knowing receipt" claim can give rise to a claim in constructive trust: see, by way of examples, **El Ajou v Dollar Land Holdings**;[134] and **Williams v Central Bank of Nigeria**.[135] The Constructive Trust Gateway is, therefore, also relied upon in support of the claim that the Claimant makes for dishonest assistance and for "knowing receipt. It is made as a further alternative to the two other gateways.

[261] In **NML Capital Ltd v Republic of Argentina**,[136] the Supreme Court elucidated upon the court's discretion to permit a claimant to invoke a novel jurisdictional gateway, notwithstanding its absence at the permission stage. The Supreme Court unequivocally abrogated the restrictive doctrine enunciated in **Parker v Schuller**,[137] which precluded a claimant from advancing alternative, valid grounds for seeking PTSO solely because of their omission at the *ex parte* permission hearing. In its ruling, the Supreme Court extensively referenced the overriding objective set out in E&W CPR 1.1, which requires the court to administer justice justly, economise on expenses, and facilitate the expeditious resolution of disputes. The Supreme Court held that where the established criterion for granting amendments to pleadings — namely, where such amendments do not inflict unjust prejudice upon the opposing party, or where an appropriate costs sanction can remedy any prejudice — is satisfied, the impetus to allow such amendments is notably intensified. This is especially the case where a refusal to permit an amendment would serve no purpose other

[134] [1994] 2 All E R 865.
[135] [2014] UKSC 10.
[136] [2011] UKSC 31.
[137] (1901) 17 T.L.R. 299, CA.

than to engender unnecessary delay and increased costs. Thus, the decision affirms the principle that procedural rigour must not impede substantive justice, and that flexibility in jurisdictional pleadings is consonant with the overriding objective of the CPR, facilitating the just, efficient, and cost-effective administration of justice.

[262] The Supreme Court ruled that similar considerations applied where an application was made for PTSO: the court should have a discretion as to the order which would best serve the overriding objective. In that case, the claimant was not relying on a different cause of action from that in respect of which PTSO had been obtained or on facts which had not been before the first-instance judge when he had given PTSO. Nor had there been any failure to comply with a rule of court. In those circumstances, the application to rely on alternative reasons to make good the claimant's case against the defendant was for the judge reviewing the *ex parte* order for PTSO to decide. That decision involved the exercise of a discretion which, on the facts of that case, the appellate courts had no good reason to impugn. It followed that to require the claimant to start fresh proceedings would be a waste of time and money and that, accordingly, the claimant was not precluded from proceeding with its action by relying on additional grounds to make good its claim against the defendant.

[263] The Claimant's case, insofar as it advances a constructive trust basis of claim, is, in my judgment, plainly arguable. Whether or not the point has been expressly pleaded to date, there is no principled reason why permission to amend the Statement of Claim — should such an application be brought and the requisite criteria for amendment satisfied — ought not to be granted to incorporate any additional cause of action founded on a recognised species of constructive trust. In that event, permission to rely upon the corresponding jurisdictional gateway would likewise be appropriate.

[264] As to the discretionary question whether the Claimant should be permitted to invoke the Constructive Trust Gateway, the Defendants have identified no prejudice, procedural or substantive, that would arise were the Claimant permitted to rely upon that additional jurisdictional basis. In the absence of any such demonstrated prejudice, and subject to the qualifications I have already

identified, I would exercise my discretion in favour of allowing the Claimant to rely upon that gateway.

[265] Otherwise, although I was not addressed in detail about the requirements of the Construct Trust Gateway, the requirements of that gateway largely mirror the requirements of the Tort Gateway ("a claim is made for a remedy against the defendant as constructive trustee and the defendant's alleged ability arises out of acts committed within the jurisdiction"). Accordingly, my provisional view would be that the dishonest assistance claim made in these Proceedings passes the Constructive Trust Gateway.

Issue 2 — the Forum Issue

[266] Even if the Court is satisfied that one or more gateways have been passed, it must go on to deal with the appropriate forum for hearing the Claim. If the proper forum is not the BVI, PTSO will be refused, and the Order will be set aside.

[267] I have already pointed out that the burden of establishing that the BVI is the appropriate forum in which the Claim should be tried is on the Claimant.

[268] The standard of proof to which this must be established is that there is a serious issue to be tried in that there is a substantial question of fact or law or both arising on the facts disclosed by the written evidence that the claimant *bona fide* desires to have tried.[138]

[269] In **Metall**,[139] Slade LJ observed that "[t]he ascertainment of the appropriate forum … involves a balancing exercise. Lord Templeman in *[The] Spiliada* … pointed out that the resolution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the Commercial Court judge who deals with it and that 'an appeal should be rare and the appellate court should be slow to interfere'."

[138] See, for example, Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] A.C. 438.
[139] [990] 1 Q.B. 391 at 483.

[270] In **Vauxhall Motors Ltd and others v Denso Automotive UK Ltd and others**,[140] Bacon J set out the principles that governed the choice of the appropriate forum as follows:

> "49. The forum conveniens principles set out in the well-known judgment of Lord Goff in *[the] Spiliada* apply both to the question of whether to permit service outside the jurisdiction in relation to service-out defendants, and whether to decline jurisdiction in relation to service-in defendants. Those principles have been the subject of considerable further commentary in more recent case-law. For present purposes the relevant principles can be summarised as follows:
>
> i) In service-in cases, the burden is on the defendant to show that England and Wales is not the natural or appropriate forum for the trial, and that there is another available forum which is clearly or distinctly more appropriate, or which in other words is the 'natural forum' for the trial of the action. If the court is satisfied that there is another available forum which is prima facie the appropriate forum, the burden shifts to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country: *Spiliada* pp. 476–478.
>
> ii) In service-out cases, the burden is on the claimant to show that England and Wales is clearly or distinctly the most appropriate forum. It is not sufficient to show that it is one of several equally suitable available fora: *Gulfvin Investment v Tahrir Petrochemicals*.[141]
>
> iii) Where there are multiple defendants, some of which have been served without the need for permission and some with permission, the court is in essence looking for a single jurisdiction in which the claims against all the defendants may, as a whole, most suitably be tried.[142]
>
> iv) In seeking to establish the appropriate forum for the litigation, the court should consider the forum with which the action has "the most real and substantial connection". [143]
>
> v) Relevant factors will include the location of witnesses and documents, and their language, consideration of the places

[140] [2025] EWHC 213 (Ch).
[141] [2022] EWHC 1040 (Comm), at [18]–[22].
[142] Referring to Vedanta [2019] UKSC 20, at [68] and Mercedes-Benz v Continental Teves [2023] EWHC 1143 (Comm), at [22].
[143] Referring to The Spillada, at p. 478; and Vedanta, at [66].

where the parties reside or carry on business, the place where the wrongful act or omission occurred, and the place where the harm occurred. [144]

vi) It is generally preferable, other things being equal, that a case should be tried in the country whose law applies. That factor carries particular force if issues of law are likely to be important and there is evidence of relevant differences in the legal principles between the different competing fora: *VTB Capital v Nutritek*.[145]

vii) …

viii) It may be relevant that the legal teams and experts in one jurisdiction have built up a substantial bank of knowledge and expertise relevant to the claims (the so-called "Cambridgeshire" factor).[146] But it is not sufficient simply to assert that the same firms of solicitors have been acting for the parties for some time. [147]

ix) In considering whether there are special circumstances requiring a stay not to be granted notwithstanding the conclusion that another forum is prima facie more appropriate, one factor may be cogent evidence establishing that the claimant will not obtain justice in the foreign jurisdiction. [148]

x) Procedural differences such as differences in disclosure rules in different jurisdictions are, however, generally not reasons making it unjust to stay proceedings in this jurisdiction. [149]

xi) If a claimant would be out of time in the foreign jurisdiction, and did not act unreasonably by failing to issue protective proceedings in that forum, that does not render the foreign jurisdiction 'unavailable', but may be a reason why it would be unjust to stay the domestic proceedings. It will be relevant to consider the claimant's awareness of the time-bar and the explanation for its failure to issue protective proceedings.[150] If the claimant has acted reasonably in commencing proceedings in England and Wales, and in allowing time to expire in the relevant foreign jurisdiction, a stay (or set-aside of service) should only be granted on terms the defendant waives the time-bar in the foreign jurisdiction, assuming it can do so.[151]

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[144] Referring to The Spillada, at p. 478; and Vedanta, at [66].
[145] [2013] UKSC 5, at [46].
[146] Referring to The Spiliada, at pp. 485-6. For the "Cambridgeshire factor", see below.
[147] Samsung Electronics v LG [2022] EWCA Civ 423, at [32].
[148] The Spiliada, at p. 478.
[149] The Spiliada, at pp. 482–3.
[150] The Spiliada, at pp. 483–484; and Citi-March v Neptune Orient Lines [1996] 1 W.L.R. 1367 at 374.
[151] Referring to Baghlaf Al Safer v Pakistan National Shipping [1998] CLC 716 at 727; and The Spiliada, at p. 484.

[271] The Editors of the **White Book 2025** provide a more detailed summary of the law governing the appropriate forum in which a claim should be tried:

> "6.37.16 … certain principles apply where the court is required to determine whether or not a claimant should be granted permission to serve a claim form out of the jurisdiction … They include the principle that a claimant, in applying without notice for permission to serve a claim form out of the jurisdiction under [E&W CPR] 6.36, must establish, amongst other things, that in all the circumstances England is clearly or distinctly the appropriate forum (forum conveniens).
>
> In giving the leading speech in *the Spiliada* Lord Goff noted the distinction between: (1) the circumstances … arising in that case where an application is made to the English court by a claimant under what is now [E&W CPR] 6.36 for permission for service on the defendant out of the jurisdiction (a 'service out case'), and (2) circumstances where the jurisdiction of the English court has been founded 'as of right', that is to say by service of proceedings on the defendant within the jurisdiction (e.g. because the defendant was in the jurisdiction or a ship was arrested here), and the defendant applies to the court for a stay of the proceedings on the ground of forum non conveniens (a 'service in' case). Put simply, *the Spiliada* raised the question whether the judge, in determining whether the case was 'a proper one' for service out of the jurisdiction, had applied the correct test, in particular in determining whether England (and not Canada) was the appropriate forum (forum conveniens).
>
> Lord Goff concluded that the stage had been reached where the 'fundamental principle' applicable in both 'service out cases' and 'service in cases' is that the court: '… has to identify in which forum the case could most suitably be tried <u>for the interests of all the parties and for the ends of justice</u>.' His lordship drew out considerations common to both groups and identified distinctions between them and, in giving guidance, dealt directly with the question of permission to serve out of the jurisdiction[152] and indirectly with the question of stay of English proceedings.[153]

[152] [1987] A.C. 460 at 478E to 482A.
[153] *Ibid*., at 475C to 478E.

> Lord Goff's speech has been regarded as the *locus classicus* in relation to issues of appropriate forum, both in 'service in cases' and in 'service out cases' at common law. However, it must be remembered that a submission by a defendant in a 'service out case' that England is not the forum conveniens is not the same as a plea by a defendant in a 'service in case' of forum non conveniens, not least because of the differing incidence of the burden of proof in the two cases, though the principles to be applied by the court overlap to an extent …
>
> On occasion, certain principles stated by Lord Goff to be considered by a court when determining, in 'service in cases', whether the English proceedings should be stayed on forum non conveniens grounds … The guidance given by Lord Goff as to the determination of the appropriate forum in 'service out cases' … is at 478E to 482A of his speech. Recourse should be had to those passages…'

[272] The Editors of the **White Book** then make the following points in that paragraph:

> "Some important points to bear in mind are as follows:
>
> 1 The burden is on the claimant, not merely to persuade the court that England is the appropriate forum, but 'to show that this is clearly so' (*The Spiliada*);[154] alternatively, to adopt the words of [E&W CPR] 6.37(3), 'the court has to be satisfied by the claimant that England is the proper place in which to bring the claim' (*VTB*, at [131]); see too, at [78(viii)].
>
> 2. The 'fundamental principle' (applicable to both 'service out' and 'service in' cases alike) is that the court 'has to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice' (*The Spiliada*).[155]
>
> 3. <u>The determination of the appropriate forum in a given case requires the proper application of relevant private international law rules on the doctrine of forum conveniens as derived from extensive case law. It is not a simple 'exercise of discretion' (though frequently couched in those terms)</u>. The court is required to reach an evaluative judgment upon whether, in the light of the relevant considerations, England is clearly the

[154] *Ibid*, at 481.
[155] *Ibid*, at 481 at 474A.

more appropriate forum (*VTB*, at [97], per Lord Neuberger, and at [156], per Lord Wilson).

4. Each case depends on its own particular facts. Reported decisions of first instance judges in deciding whether or not to permit a foreign defendant to be served outside of the jurisdiction are illustrations of circumstances in which a discretion has been exercised, and are not binding authority on how that discretion is to be exercised (*Jong v HSBC Private Bank (Monaco) SA* ("Jong")."[156]

[273] The task of the court (referred to in **The Spiliada** and other cases) "to identify the forum in which the case can suitably be tried in the interests of all the parties and for the end of justice" involves what Lord Briggs, giving the judgment of the Supreme Court in **Vedanta**, described as "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."[157]

[274] As noted above, the burden is on the Claimant to show (to quote from **VTB**) that the BVI "is the proper place in which to bring the claim." This must mean that the Claimant should also demonstrate why the other fora which the Claimant could have used, based on its ability to serve a party (in this case, one or more of the Defendants) without needing the permission of the Court, are not appropriate. However, this need only be done by reference to why the BVI is the most appropriate forum. I am not sure the Claimant must then go through each forum where a party could be served without permission and establish why that forum is not suitable for the Claim to be tried, particularly where the Defendants have not put forward a positive case for that forum.

[156] [2015] EWCA Civ 1057, at [18].
[157] [2019] UKSC 20, at [66].

[275] On the third day of the Hearing, Mr. Weekes, on behalf of the Cargill Defendants, said this:[158]

> "The forum conveniens test puts the burden on the Claimant, NBT, to show that the BVI is clearly and distinctly the most appropriate forum. It follows from that test that there is no burden on a defendant to nominate an alternative forum. That's the first point. It's a burden which lies on the Claimant.
>
> The second point … is inherent in the exercise of identifying the most appropriate forum, which is the burden for NBT, that NBT must show why the BVI is more appropriate than any available forum."

[276] Other than the emphasised words in this statement, what Mr. Weekes says is correct. However, he then went on to say:[159]

> "One cannot conclude that the BVI is the most appropriate forum without saying it is more appropriate than other fora. It follows that the burden on NBT, which it has not chosen to discharge, is to identify other available fora and say why they are not available in the circumstances of this case."

[277] It may be that Mr. Weekes' observation was intended merely to reaffirm the uncontroversial principle that the burden of establishing that the BVI constitutes the appropriate forum lies squarely with the Claimant. If that is the proper construction of his submission, it is, of course, unobjectionable. However, his remarks appear to suggest something more — namely, that the Claimant was required to undertake a comprehensive survey of all potentially available fora and to demonstrate, in respect of each, why it would not represent a suitable or convenient venue for the adjudication of the dispute. If that was indeed his intended meaning, I am, with respect, unable to agree.

[278] The obligation imposed upon a claimant is to satisfy the Court that the BVI is the natural or appropriate forum for the trial of the Claim. It does not extend to an exhaustive comparative analysis of every conceivable alternative jurisdiction, evaluating, for each, the advantages and disadvantages in terms of applicable law, procedural fairness, accessibility of witnesses, and any other factor relevant

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[158] Court Transcript, Day 3, p. 47, lines 9 to 18.
[159] *Ibid*, lines 19 to 24.

to the interests of justice. To impose such a requirement would be both artificial and disproportionate. Moreover, in circumstances where the Defendants have failed to identify any forum demonstrably more appropriate than the BVI, it would be neither reasonable nor consistent with principle to place upon the Claimant a burden of such magnitude.

[279] The substance of this point was made in **Manek v IIFL Wealth (UK) Ltd**, [160] in which Coulson LJ observed:

> "79 Standing back from the detail for a moment, it seems to me that there has to be a degree of realism when considering the proper place for a claim of this sort to be heard … It cannot be enough for the defendant(s) to such a claim to point to other jurisdictions round the world where the case might be heard and then say that, because the situation is complicated and involves so many different countries, the claimant has not discharged the necessary burden of proof. That could give rise to a never-ending carousel of unsuccessful applications across the world."

[280] This point seems particularly apposite to make in the present case. What is to say that Singapore, Switzerland, Uruguay, Cyprus or any other jurisdiction, where one defendant would have no right to object to it, because (for example) it is based there, would be acceptable to a defendant who does have the right to object to it, because it has no connection to that jurisdiction? As Coulson LJ pointedly observed, it could give rise to a never-ending carousel of applications made in different jurisdictions about which jurisdiction was the most suitable to try the case.

[281] The Defendants have unequivocally declined to furnish any indication as to which forum is most apt to adjudicate the claim. Their stance, predicated on an assertion that the onus lies exclusively on the Claimant to establish the appropriateness of its chosen jurisdiction, constitutes a tactical evasion designed to impede the adjudication of the claim in any forum, thereby frustrating accountability for the alleged unlawful means conspiracy. This Court

[160] [2021] EWCA Civ 625.

must be vigilant to preclude such procedural obstructionism and ensure that the claim does not founder due to divergent jurisdictional challenges.

[282] In any event, for the reasons set out in this Judgment, I am satisfied that the Claimant has provided more than sufficient reasons for setting out why the BVI is the most suitable forum.

[283] Continuing with para. 6.37.16, the Editors of the **White Book** say:

> "In *Limbu v Dyson Technology Ltd* ("Limbu"),[161] the Court of Appeal emphasised the importance of presence or domicile in England as a connecting factor to the jurisdiction, which is at the heart of the difference in the burden of proof between service in and service out cases. It held that the judge had failed to give that factor sufficient weight where the primary claims were against two English-domiciled defendants, rather than a third Malaysian defendant. The court also considered it significant that the litigation would be coordinated and conducted on behalf of all three defendants from England, where the group chief legal officer was based, regardless of where the litigation took place. Clearly a court cannot decide where a matter should be most appropriately and justly tried without being clear what it is that is to be tried. In *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd,*[162] it was accepted that this question should not be answered simply by reference to the relief claimed, since in an English action the relief claimed will almost inevitably be framed in English terms, particularly where it is statutory. The court explained[163] that the proper characterisation of the dispute involves looking at the overall dispute between the parties and at how the claim is to be answered insofar as that is known. The 'case' is not restricted to an analysis of the claim and relief sought by the claimant. The inquiry requires the court to identify which is the natural or appropriate forum or forum conveniens for the dispute between the parties, not merely the claims the claimant wishes to advance or the relief it wishes to seek (*Re Harrods (Buenos Aires) Ltd)*.[164]
>
> In *Limit (No.3) Ltd v PDV Insurance Co Ltd*,[165] the Court of Appeal noted that, in general, where a defendant wishes to set aside an order for permission to serve out of the jurisdiction on the basis that the action involves or may involve issues which should be tried in a court or courts outside the jurisdiction, it is incumbent upon the defendant, so far as possible, to identify the issues concerned and to state as clearly as

[161] [2024] EWCA Civ 1564.
[162] [2019] EWCA Civ 38.
[163] *Ibid*, at [32] to [35], and [95] *et seq*.
[164] [1992] Ch. 72 at 123, per Bingham LJ.
[165] [2005] EWCA Civ 383.

possible how they arise or may arise in the proceedings.[166] That is so even though, on such an application, the burden of proving that England is the more appropriate forum for the trial of the action is on the claimant. It is not appropriate for a defendant merely to speculate as to the issues which might arise.[167]

The factors a court is entitled to take into account in considering whether England is the appropriate forum are legion. In a given case, one judge and another judge might quite reasonably disagree on the weight to be given to the relevant factors and as to their cumulative effect. In *The Spiliada,* … Lord Templeman, perhaps aware of the fact that the flexibility introduced into the law by the decision of the House of Lords in that case would increase the scope for disputes between parties in particular cases about the application of the doctrine of forum conveniens (and of forum non conveniens), observed that the authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case. His lordship said that the judge should not be referred to other decisions on other facts but should study the evidence and refresh his memory of Lord Goff's speech in the quiet of his room and the hearing of submissions should 'be measured in hours and not days'.[168] It has frequently been noted that this dictum has proved to be wildly optimistic and that, in this procedural context, the controls on excessive citation of authority appear to be ineffective. Lord Templeman added that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the judge, and that '[a]n appeal should be rare and the appellate court should be slow to interfere'.[169] Appeal judgments repeating the latter dictum, or containing dicta expressing the same sentiment, are common. However, despite such exhortations it is not the case that such appeals are rare, and it has to be said that the incidence of appeal courts interfering with the decisions of judges does not appear to be sufficiently low to act as any real deterrent to appeals.

In giving guidance in the *Spiliada* case, Lord Goff referred to a number of 'matters, 'factors' or 'circumstances' which in his opinion should be, or may be, regarded as relevant, but without attempting to be exhaustive and without suggesting that any of them were to be treated as determinative in claims based on particular causes of action. Included among these 'matters' etc. are the ground of jurisdiction within which the claimant's claim falls (e.g. where England is the place where the contract was made or the tort was committed), the defendant's residence or place of business, the applicable substantive law (e.g. the law of the contract), and generally the legal and practical issues involved (including the availability of witnesses, costs and delay). The

[166] *Ibid*, at [72], per Christopher Clarke LJ.
[167] *Ibid*.
[168] [1987] AC 460 at 465F-G.
[169] *Ibid*.

court should give to such factors, 'the weight which, in all the circumstances of the case, it considers to be appropriate.'[170]

Care should be taken to consider the factors in the light of the increased use of digital technology. As noted in *Ditto Ltd v Drive-Thru Records LLC*[171], given the increase in witness examination by videolink as a consequence of the COVID-19 pandemic, the fact that witnesses were outside the jurisdiction carried, at best, little weight in determining the forum with which the dispute had the most real and substantial connection. See also *Al Mana Lifestyle Trading LLC v United Fidelity Insurance Co PSC*[172] in which Cockerill J that in the modern world the location of witnesses and documents did not weigh as heavily as they used to do. (The decision in that case was overturned on appeal, but the Court of Appeal's judgment does not affect the point made here[173]. However, the language of documents may still be an important factor: see *Joyvio Group Co Ltd v Moreno* …"[174]

[284] Then, at para. 63.37.17, the Editors of the **White Book** say:

"In the *Spiliada* case, Lord Goff gave attention to the question whether it was relevant for the court to inquire whether or not a refusal of permission to serve out of the jurisdiction would deprive the claimant of a 'legitimate personal or juridical advantage' accruing to the claimant in the English jurisdiction, for example, damages awarded on a higher scale, a more complete procedure of disclosure, a power to award interest, a more generous limitation period.[175] As a general rule the court should not be deterred from refusing permission for service out of the jurisdiction (or from granting a stay of proceedings in a 'service in case') simply because the claimant will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum.[176]

On the matter of limitation periods in particular, Lord Goff concluded that, where the claimant's claim is time-barred in the foreign jurisdiction and would undoubtedly be defeated if it were brought there, practical justice should be done, so that if the claimant acted reasonably in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in the foreign country, it may not be just to deprive the claimant of the benefit of the English proceedings.[177]

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[170] *Ibid*, at 482.
[171] [2021] EWHC 2035 (Ch), at [83].
[172] [2022] EWHC (Comm) 2049, at [98].
[173] [2023] EWCA Civ 61.
[174] [2024] EWHC (Comm) 2493.
[175] [1987] AC 460 at 482A-484.
[176] *Ibid*, at 482E.
[177] *Ibid*, at 483H.

In *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*,[178] it was explained that the correct approach in principle is that only if the court decides that another forum is, prima facie, more appropriate should it then consider whether, after all, there exists a juridical advantage for the claimant such that trial in England is required if substantial justice is to be done between the parties.[179] In that case the claimant's failure to issue a protective writ in the foreign forum in time to avoid a time-bar was characterised as not manifestly unreasonable because, though possibly negligent, it was not part of a calculated procedural scheme designed to make it easier for them to obtain permission to serve out of the jurisdiction. See, further, *Lewis v King*,[180] where difficulties inherent in the principle are noted.

Other significant authorities on the 'justice in the foreign jurisdiction' factor, and its possible relevance not only in 'service out cases' but in 'service in cases' as well, are: *Connelly v RTZ Corp Plc*[181] ('if a clearly more appropriate forum overseas has been identified generally speaking the plaintiff will have to take that forum as he finds it')[182]; *Deripaska v Cherney;*[183] *Altimo;*[184] *Ferrexpo AG v Gilson Investments Ltd; and Lungowe v Vedanta Resources Plc* [i.e., Vedanta].[185]

In *Klifa v Slater* [186] (in the context of a 'service in case'), where the relevant tort took place in France before completion of the UK's withdrawal from the EU on 31 December 2021 (IP completion day) but proceedings were commenced in England after that date, the court took into account that: (i) enforcement would have to take place in England and to enforce a French judgment would require a registration process (under the E&W Foreign Judgments (Reciprocal Enforcement) Act 1933 and Pt 74 [of the E&W CPR]) and therefore involve cost, delay and potential opportunity for challenge; and (ii) the claimant had carried out substantial work, and incurred substantial expense, in complying with the pre-action protocol process before IP completion day (when the claimant would have been entitled to bring proceedings in England as of right under the Judgments Regulation), which would be wasted if a stay was granted.

In *Morgan v Sydney Charles Financial Services Ltd,*[187] the High Court considered that Guernsey was a more appropriate forum than England. However, the claimant had not acted unreasonably in commencing proceedings in England, where she had the benefit of ATE insurance and Conditional Fee Agreements (CFAs) with her solicitors and counsel, and allowing her Guernsey claims to become time barred. She

[178] [1990] 1 Q.B. 391.
[179] *Ibid*, at 488, per Slade LJ.
[180] [2004] EWCA Civ 1329, at [37].
[181] [1998] A.C. 854, HL.
[182] *Ibid*, at 854, per Lord Goff.
[183] [2009] EWCA Civ 849.
[184] [2011] UKPC 7, at [89] to [102].
[185] [2019] UKSC 20, at [88] to [101].
[186] [2022] EWHC 427 (QB).
[187] [2023] EWHC 3236 (Comm).

> would not have been able to afford to litigate in Guernsey, where she could not obtain litigation funding and CFAs were not permitted. Practical justice therefore required that she should be permitted to proceed in England…"

[285] There is much authority to suggest that, where there is evidence that a fair trial of a claim may not be possible in a foreign jurisdiction contended for by a defendant, the court may be persuaded to continue with the jurisdiction in which the claim was issued: see, for example, **Brownlie v FS Cairo (Nile Plaza) LLC**.[188] On the facts of this case, there is no suggestion by the Parties that this applies to any of the jurisdictions in which the Claim could be tried if it is not tried in the BVI.

[286] The "Cambridgeshire factor" has not been relied upon by any party. However, for completeness, I should address it briefly.

[287] The "Cambridgeshire Factor" was considered at length in **The Spiliada**.

[288] At first instance in that case, the Judge held, *inter alia*, that the accumulated experience of counsel and solicitors, derived from their participation in the trial of a related shipping action at the time being tried by the judge ("the Cambridgeshire action"), would lead to savings of time and money. The House of Lords (disagreeing with the Court of Appeal) held that the judge had not erred in his assessment of this factor.[189] Labelled by Lord Goff as "the Cambridgeshire factor", his lordship stated that the judge was entitled to take the view (as he did) that that matter was not merely of advantage to the claimants, but also constituted an advantage which was not balanced by a countervailing equal disadvantage to the defendants; and (more pertinently) further to take the view that having experienced teams of lawyers and experts available on both sides of the litigation, who had prepared for and fought a substantial part of the Cambridgeshire action for the defendants (among others) on one side and the relevant owners on the other, would contribute to efficiency, expedition and

[188] [2022] UKSC 45, at [198], per Lord Lloyd-Jones, with whom Lord Reed P, Lord Briggs and Lord Burrows agreed. For a recent example of this, see Magomedov and others v TPG Group Holdings (SBS) LP and others [2025] EWHC 59 (Comm).
[189] [1987] A.C. 460 at 484-485.

economy, to assisting the court to reach a just resolution, and to promoting a possibility of settlement, in the **Spiliada** case itself.

[289] In **Samsung Electronics Co Ltd v LG Display Co Ltd**,[190] the Court of Appeal accepted that the Cambridgeshire Factor was capable of being a powerful factor in favour of English jurisdiction and, by analogy, BVI jurisdiction. However, in that case, its application lacked evidence and was only addressed in submissions at the appeal stage. While the evidence did not need to descend to minute detail, it had to be "… sufficient to lay a proper factual foundation for matters to which the judge is invited to give weight as supporting the exercise of jurisdiction by the English court."

[290] Where other litigation involving similar facts is taking place in other jurisdictions, the Cambridgeshire Factor might be considered essential to support a party's case on forum. Despite the existence of associated litigation in England and Russia, this factor is of little or no relevance in the present case, and no party has seriously suggested otherwise. The Parties have made a substantial investment in this jurisdiction in terms of the costs involved in instructing their legal teams in this jurisdiction. While undoubtedly that has involved a detailed consideration of the merits of each party's case, albeit in the limited context of determining the Jurisdictional Challenge, it cannot be said to have involved any associated case being fought in any other jurisdiction. In any event, and importantly, to re-emphasise this point, the Claimant has not relied on that factor. Nor has any other party. That has to be right because it would seem to me to be wrong in principle for the Claimant to succeed on the Jurisdictional Challenge just because substantial costs have been incurred by all the Parties in contesting jurisdiction in the BVI. If a claimant were able to do that, that factor would be likely, in every case, to support the claimant's choice of forum, particularly where, as here, substantial costs have been incurred by the Parties in support of their respective positions on the Jurisdictional Challenge.

[291] Based on the authorities referred to above, I do not need to deal with all the cases referred to by the Parties. As the authorities make clear, the Court must

[190] [2022] EWCA Civ 423.

reach an evaluative judgment on whether, on the facts of this case, the BVI is the more appropriate forum: see **VTB**.[191] Reported decisions of first instance judges in deciding whether or not to permit a foreign defendant to be served outside of the jurisdiction are illustrations of circumstances in which a discretion has been exercised, and are not binding on this Court on how that evaluative judgment is to be exercised: **Jong v HSBC Private Bank (Monaco) SA** ("Jong").[192]

[292] Whilst respectfully adopting the observations articulated in the authorities mentioned above, I do consider it appropriate to provide commentary on certain fact-specific decisions cited by the Parties. Such commentary shall address those material considerations which each Party contends support their respective position regarding forum selection, or, in the case of the Traders, those factors alleged to militate against the BVI constituting the proper forum for adjudication of the present dispute.

[293] As noted above, in **The Spiliada**, Lord Goff made it clear that it was "fundamental" that a court "identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice."

[294] The First Defendant contends that the appropriate forum should be Russia. As noted above, the First Defendant is the only Defendant who has positively asserted that the appropriate forum to try the Claim is Russia.

[295] The Claimant had contended that the First Defendant could not argue that Russia was the appropriate forum because he had already submitted to the jurisdiction of the BVI courts. However, the Claimant abandoned that point in the course of Mr. McGrath's oral submissions.

[296] I am unable to accept that Russia is the appropriate forum to try the Claim.

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[191] [2013] 2 A.C. 33, at [97], per Lord Neuberger, and at [156], per Lord Wilson.
[192] [2015] EWCA Civ 1057, at [18].

[297] The First Defendant's contention that Russia is the appropriate forum to try the Claim is set out in the skeleton argument lodged on his behalf by Mr. Roscoe, as follows:

> "75 NBT's claim is obviously more connected to Russia than anywhere else:
>
> 75.1 As Mr. Popkov hiMself puts it, these are proceedings "brought by a bank owned by the Russian Central Bank (NBT), against a high-profile Russian businessman (Mr. Shishkhanov), concerning in part the conduct and business of two other historic banks (Binbank and Rost Bank) as well as to some degree the Russian Central Bank itself."

[298] However, the First Defendant then goes on to say:

> "75.2 It is common ground that significant parts of NBT's case are governed by Russian law. The Court will see the volume of Russian law evidence. NBT's own position in September 2022 was that its claim was governed by Russian law.
>
> 75.3 The loss and damage to NBT seemingly must also have occurred in Russia.
>
> 75.4 Many, if not most, relevant documents are in Russia (e.g. 'the big archive', of 'thousands' of documents on which NBT's claim is based (referring Popkov 1 at §19); 'all of Binbank's files (§74.b.); the 'emails of Binbank's employees' and their 'desk documents' (§74.c.i.)).
>
> 75.5 Many of those documents will be in Russian.
>
> 75.6 It is to be assumed that NBT's witnesses (including Mr. Popkov, his 'team' who he says uncovered the Scheme (§74 Popkov 1) and the Binbank or Rost Bank employees who (knowingly or otherwise) facilitated the Scheme) are located in Russia, and speak Russian as their first (if not only) language.
>
> 75.7 The fact that various sets of proceedings have already been brought by NBT against Mr. Shishkhanov in Russia in connection with these and related matters further reinforces the point. Mr. Shishkhanov outlines those proceedings at §§14-17. There is an account on behalf of NBT in Mr. Popkov's evidence in support of

> the BVI Disclosure Application at §§115 *ff*. Those cases are summarised in more detail a schedule in Grebelsky 2 … NBT apparently did not think that Russia was an inappropriate forum when it brought those proceedings."

[299] The First Defendant then states at para. 75.8 of that skeleton argument:

> "The position is difficult therefore to distinguish from that described in **Magomedov v TPG Group Holdings**[193] … 'The natural forum for the trial of these claims is unquestionably Russia, in the sense that Russia is the country with which there are the most numerous and the strongest connecting factors. It is where most of the alleged tortious conduct occurred; it is where (at least) much of the direct damage was sustained; it is where Mr. Magomedov is as well as several other important parties; it is where most of the witnesses are located; it must also be where most of the relevant records are located; and its legal system is (at least) highly relevant'."

[300] There is, frankly, nothing in these points.

[301] First, the involvement of Russian banks and witnesses does not, by itself, make it a compelling case for the Claim to be tried in Russia. It has long been held that the country of incorporation or business of a claimant will rarely, by itself, make it appropriate for that country to be a proper forum for a claim to be tried.

[302] Second, the First Defendant is a Russian and also a St Kitts & Nevis national. He also states that he is based between Cyprus, Russia, and the UAE. The Claimant states that he may now be ordinarily resident in Cyprus. If that is correct, and Mr. Roscoe did not seek to suggest otherwise, then he not only has no presence in Russia, but it is difficult to see how many of the points he relies upon to suggest that Russia would be an appropriate forum can be correct.

[303] Third, there is no substance in the point that the vast majority of documentary evidence is likely to be located in Russia. Even if that point is correct, those documents will be available on disclosure and can be translated into English if the Claim is tried in the BVI. The likely position is that the documentary evidence will be in various jurisdictions around the world, depending on where the Traders

[193] [2025] EWHC 59 (Comm), at [516].

are based, and possibly in the BVI. A substantial volume of the documentation is likely to be in English or easily translatable into English.

[304] Fourth, so far as it is suggested that it may be difficult for witnesses to travel to this jurisdiction, that is not only incorrect but can be easily addressed by the witnesses having to give evidence remotely under CPR 29.3 — a common feature of the giving of evidence in this jurisdiction, especially since Covid.

[305] Fifth, I am not sure that I agree that Russian Law will govern the Claim. However, even if that is correct, it is not the "be-all and end-all" of the outcome of the Jurisdictional Challenge. The issue before this Court is the appropriate forum for this Claim. The governing law is but one of the factors that the Court consider in deciding that issue. A prime example of this is **Erste**, in which the countervailing factors relied upon by the Defendants were found by the Court of Appeal to be sufficient to warrant disregarding the "exclusive jurisdiction" clause in the agreement that formed the subject of the claim and refusing PTSO.

[306] Finally, the decision in **Magomedov** does not assist the First Defendant.

[307] In **Magomedov**, the first claimant was Mr. Magomedov, a Russian businessman with interests in both a Russian port operator (NCSP) and the parent company of a Russian transport and logistics group (FESCO). The other claimants were companies incorporated in Cyprus and the BVI. An alternative assets management corporation controlled the first to seventh defendants. The defendants were alleged to have been involved in conspiracies that led to the first claimant's arrest and conviction for organised crime. According to the claimants, the criminal proceedings were part of a campaign waged against the first claimant in order to acquire NCSP and FESCO for the benefit of the Russian state.

[308] The claimants alleged two separate conspiracies involving valuable Russian assets: the NCSP conspiracy, relating to the first claimant's interest in PJSC Novorossiysk Commercial Sea Port, and the FESCO conspiracy, relating to the first claimant's stake in the nineteenth defendant (FESCO). The NCSP conspiracy allegedly involved the Russian state, while the FESCO conspiracy

did not. In January 2011, Omirico Limited ("Omirico"), a company incorporated in Cyprus, acquired a 50.1% indirect ownership interest in NCSP. Omirico was a joint venture, the participants of which included Mr. Magomedov and his brother.

[309] The claimants alleged that the Russian State sought to seize control of NCSP due to its strategic importance to Russia. The claimants had previously obtained permission to serve the claim out of the jurisdiction and for alternative service on certain defendants. The claimants' case was that the criminal proceedings were part of a campaign waged against Mr. Magomedov for political reasons, with the aim of wresting assets from Mr. Magomedov for the benefit of the Russian State.

[310] The defendants challenged the English court's jurisdiction and made various other applications, including applications for strike-out and summary judgment.

[311] Bright J found that the claimants had failed to establish a serious issue to be tried, primarily due to resolutions and meetings authorising the relevant transaction that the claimants had not disclosed. Regarding the FESCO conspiracy, the court identified serious issues against certain defendants, including threats made during meetings in August 2020 and the alleged bribe received by one defendant. However, the court rejected various other limbs of the FESCO conspiracy case.

[312] Bright J concluded that English law did not apply to either conspiracy and that the claimants had not suffered any loss in England. Russian Law applied to the NCSP conspiracy claims, which were time-barred. While Russia was the most appropriate forum for the FESCO conspiracy, the Judge decided that trying the claim there risked the claimants not receiving a fair trial. It followed that the competing jurisdictions for the claims to be tried were England or Cyprus.

[313] Determining that Cyprus, instead of England, was the appropriate forum, Bright J said:

> "516. The natural forum for the trial of these claims is unquestionably Russia, in the sense that Russia is the country with which there

are the most numerous and the strongest connecting factors. It is where most of the alleged tortious conduct occurred; it is where (at least) much of the direct damage was sustained; it is where Mr. Magomedov is as well as several other important parties; it is where most of the witnesses are located; it must also be where most of the relevant records are located; and its legal system is (at least) highly relevant.

529. In the context of the alleged FESCO conspiracy there are more numerous and stronger connections with Cyprus. Some of the Claimants are companies incorporated in Cyprus (Maple Ridge, Wiredfly, Smartilicious and Enviartia); more importantly, some of the Defendants are companies registered in Cyprus (Halimeda and Ermenossa) or are resident in Cyprus (Mr. Kuzovkov); several witnesses are located in Cyprus (Mr. Privalov, Mr. Economou and Mr. Tsantekides); some of the relevant events occurred in Cyprus, notably Halimeda's actions in relation to the Cypriot Injunctions; for the same reason, there is an argument that at least some damage occurred in Cyprus.

530. As a result, a number of the Defendants allegedly involved in the FESCO conspiracy submitted that Cyprus was the most appropriate jurisdiction (or, at any rate, more appropriate than England and Wales). Furthermore, a large number of them undertook to submit to Cypriot jurisdiction: in addition to Halimeda, Ermenossa and Mr. Kuzovkov, also Domidias, Ms. Mammad Zade, Mr. Rabinovich, Mr. Kuzovkov, Felix, Mr. Severilov, FESCO, Mr. Garber and GHP. The relevant exceptions were ROSATOM and DP World, and TPG (which, unlike the others, did not challenge the jurisdiction of this court and on this basis did not positively indicate whether or not it would submit to Cypriot jurisdiction).

531. … I consider that Cyprus is such a forum, in respect of all the relevant Defendants — including those that did not give an undertaking to submit to Cypriot jurisdiction, and including TPG. Furthermore, the claims in relation to the alleged FESCO conspiracy undoubtedly have more numerous and stronger connections with Cyprus than with this jurisdiction. Cyprus is, in principle, a more appropriate jurisdiction."

[314] In determining Cyprus as the appropriate forum, Bright J found, as facts, *inter alia*, that: (a) some of the claimants were incorporated in Cyprus; (b) some of the defendants were companies registered in Cyprus or were resident in Cyprus; (c) several witnesses were located in Cyprus; (d) some of the relevant events occurred in Cyprus; (e) at least some damage occurred in Cyprus; (f) a number of the defendants allegedly involved in the FESCO conspiracy submitted that

Cyprus was a more appropriate forum than England and Wales); and (f) several of them undertook to submit to Cypriot jurisdiction.

[315] Those facts are markedly different from the present case. While the First Defendant has stated that he considers Russia to be the appropriate forum (and this means he will likely submit to the jurisdiction of the Russian Courts), he has little connection with Russia other than the fact that he holds dual nationality (i.e., is a national of Russia and St Kitts & Nevis) and (presumably) speaks fluent Russian. The Trader Defendants have kept their powder dry, not proffering any view on any of the above matters, except in the most general and vague terms

[316] The fact that there are related proceedings in England and Russia also does not appear relevant to me on the facts. Accepting, as I do (as the Defendants did not seriously challenge them), that the factual matters set out in paras. 130-139 of the Claimant's skeleton argument are correct, I cannot see how the existence of those proceedings assists the First Defendant, still less the Trader Defendants, who have failed to make any submissions about Russia being the appropriate forum or suggesting with any certainty whether another jurisdiction might be preferable to the BVI. There is plainly some overlap between those proceedings and this Claim. However, I do not see the overlap as being significant, let alone substantial. So far as any of the Defendants, contrary to paras. 130-139 of the Claimant's skeleton arguments, suggest otherwise, or that those proceedings have a material bearing on forum, I reject that suggestion.

[317] I do not know much about the English or Russian proceedings in which the First Defendant is included as a defendant. Nor do I know much about the bankruptcy proceedings against the First Defendant in Russia, or the principles governing bankruptcy law in Russia.

[318] I was informed by way of an email dated 10 October 2025, sent to me by Mr. Roscoe, via my judicial assistant, *inter alia*, that:

> "1 The bankruptcy proceedings are referred to in Popkov 1 at para. 212 … :

(a) Mr. Popkov explains that they were commenced by Mr. Shishkhanov on 16 February 2023 (and so 2 ½ months before these proceedings were commenced, and 1 year before he was purportedly served with them).

(b) Mr. Popkov's evidence is that, as a matter of Russian law, the bankruptcy proceedings do not prevent and do not extinguish NBT's claim.

2 Mr. Shishkhanov refers to the existence of the bankruptcy proceedings in his affidavit (dated 19 June 2024) at para. 17.2… He explains that NBT has registered itself as a creditor in those proceedings of all actual and contingent claims it has against him.

3 There is a table in Mr. Grebelsky's first report … detailing connected Russian proceedings. Row 8 of the table … sets out detail of the bankruptcy proceedings. It explains:

a (4th Column) that the proceedings were commenced by Mr. Shishkanov's motion, but are now pursued by his creditors.

b (7th Column) that they are ongoing.

c (8th Column) that NBT is currently a registered creditor to the extent of 28 bn RUB.

d The balance of NBT's claims from separate proceedings in Russia is not included pending the conclusion of those claims, which NBT continues separately to pursue (as set out elsewhere in the table).

4 It is common ground that at least five claims by NBT against Mr. Shishkhanov in Russia overlap with the present claim (to the extent of giving rise even to potential double-recovery): para 133 of NBT's skeleton argument (if not issues of res judicata (or similar): para. 132). Those 5 claims are recorded in Mr. Grebelsky's table at rows 1, 9, 10, 12 and 15. The first, in particular, is ongoing.

5 NBT therefore has seen utility in proceeding with claims in Russia against Mr. Shishkhanov, notwithstanding the bankruptcy proceedings and its present contention that Russia is an inappropriate forum."

[319] My purpose in requesting information about the bankruptcy proceedings in Russia against the First Defendant was to find out how the proceedings brought

against the First Defendant would be treated if the equivalent of a bankruptcy order in Russia were made against him. In both the BVI (under s. 312 of the BVI IA 2003) and England and Wales (under s. 285 of the IA 1986), the proceedings would be stayed (if necessary on an application by an interested party, such as the equivalent of a trustee in bankruptcy) and the summary procedure of a creditor "proving" for his debt would take over unless the court gave permission to allow those proceedings to continue which, for reasons I do not have to canvass in this judgment, it is likely to do on the facts of this case: see, by way of examples, **Re Exchange Securities and Commodities Ltd**;[194] **Michael Wilson and Partners Ltd v Sinclair**;[195] **Avonwick Holdings Ltd v Castle Investment Fund Ltd;**[196] and **Hellard v Chadwick**.[197]

[320] Of course, if some sort of stay on the making of the equivalent of a bankruptcy order applied in Russia, the utility of the Russian proceedings as against the First Defendant would be even less relevant, given that the First Defendant alleges that he does not have the assets to pay off all his creditors, unless the fraud exception applies in Russia in the same way as it applies in the BVI (under s. 380 of the BVI IA 2003) and England and Wales (under s. 285 of the IA 1986): see, by way of examples, **Hall v Old Talagoch Lead Mining Co**;[198] **Re Rio Grande du Sol Steamship Co**;[199] **Thames Plate Glass Co v Land and Sea Telegraph Co**;[200] **Joseph Peace & Co**;[201] and **Re Hutton**.[202]

[321] For the purposes of this Judgment, I am prepared to proceed on the basis that the Russian proceedings will continue against the First Defendant even if the equivalent of a bankruptcy order is made against him. I am also prepared to accept that there is some small overlap between those proceedings and this Claim and that the possibility exists that if the Claimant effects recovery in

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[194] [1983] BCLC 186.
[195] [2021] EWCA Civ 505.
[196] [2015] EWHC 3832 (Ch).
[197] [2014] EWHC 2158 (Ch).
[198] (1876) 3 Ch D 749.
[199] (1877) 5 Ch. D 282.
[200] (1871) 6 Ch App 643.
[201] (1873) W.N. 127.
[202] [1969] 2 Ch. 201.

proceedings brought in Russia or any other foreign jurisdiction, there may be the possibility of a "double recovery". However, none of these factors carries the sort of weight that is contended for by the Defendants. So far as double recovery is concerned, this Court is sufficiently equipped to, and will, deal with it if it arises.

[322] What about the position of the Trader Defendants?

[323] They raise several points to support the premise that the BVI is not the proper forum.

[324] Significantly, as noted above, none of the Trader Defendants have either agreed to submit to the jurisdiction of any foreign court or suggested a more suitable forum. Their position is essentially that the BVI is not the appropriate forum for the Claim to be tried. Unhelpfully, they say no more than that.

[325] The Trader Defendants are, of course, properly entitled to maintain that position, as Mr. Matthews advanced on behalf of the Appleby Defendants. However, it would be inappropriate for this Court to determine that the BVI does not constitute the appropriate forum for the trial of the Claim without first satisfying itself as to whether the Claim could be tried with greater efficacy and convenience in an alternative jurisdiction. It would amount to an abdication of the Court's duty to decline jurisdiction on the ground that the BVI is not the proper forum, without establishing that there exists a more suitable alternative forum in which substantial justice can be achieved. As Lord Goff observed in **The Spiliada**, a court must be satisfied that there is another available forum which is clearly or distinctly more appropriate than the domestic forum. Absent evidence that the proceedings could be prosecuted more suitably elsewhere — taking into account considerations of convenience, expense, availability of witnesses, governing law, and the interests of justice —this Court would be acting prematurely in relinquishing jurisdiction.

[326] In **Livingston Properties Equities Inc v JSC MCC Eurochem** ("Eurochem"),[203] the Privy Council agreed with Wallbank J that the appropriate forum for the claim in that case to be tried was the BVI. Wallbank J had ruled

[203] [2020] UKPC 31, at [20], [34], [36] and [38].

out Russia as the proper forum and, in the absence of the defendants suggesting another forum, he allowed the claim to continue in the BVI.

[327] I agree with Mr. McGrath that it is not appropriate for the Trader Defendants simply to hide behind the burden of proof and make no observations about any other forum being appropriate for the trial of the Claim, even if they are legally entitled to maintain that position. How it has to be questioned, it may be asked rhetorically, that the Court can decide that the BVI is not the most appropriate forum if it does not have the information to compare the BVI with other fora.

[328] Whether or not I am correct that this is a tactic by the Defendants to make it as difficult as possible for those parties involved in the alleged fraud to be held accountable for their conduct, it is right to refer to what Wallbank J said about this in **Eurochem**: [204]

> "[the Russian Defendants] should expect that if they use[d] BVI vehicles to perpetrate their frauds, the BVI courts [would] hold their companies and them to account."

[329] I agree with the Claimant's position. It is manifest that the Trader Defendants will systematically challenge jurisdiction in every forum where proceedings are instituted, thereby impeding the effective adjudication of the Claim in any single jurisdiction. The proliferation of jurisdictional disputes and the concomitant delay occasioned thereby materially increases the risk that the Claimant will encounter procedural obstacles, including but not limited to limitation defences and enforcement difficulties, in prosecuting the Claim. The cumulative effect of such tactical challenges is to render a satisfactory determination of the Claim in any competent jurisdiction substantially difficult, if not entirely impractical. It will thus enable the Trader Defendants to avoid accountability for their alleged participation in what, if proved, constitutes an unlawful means conspiracy of substantial magnitude and complexity.

[330] The Claimant contends that in a case such as this, where the conspiracy to defraud is alleged to cover multiple parties, the claim must be tried in one

[204] *Ibid*., at [20].

jurisdiction, not just to avoid the costs of litigation in multiple jurisdictions but also to avoid inconsistent decisions being made in different jurisdictions, which may be binding on the Parties either based on the application of the doctrines of *estoppel per rem judicatam* (or the broader doctrine of issue estoppel) or abuse of process (based on the impermissibility of a BVI court allowing a collateral attack to be mounted on an earlier decision of a competent court, even if that court happens to be a foreign court). In addition, there may be issues about whether findings made or conclusions reached in a foreign jurisdiction would be admissible in the BVI or any other jurisdiction in which the Claim is tried against any other defendant.

[331] The Defendants counter this argument by contending that this factor is of little significance or, at any rate, is more than outweighed by the other factors which the Court must take into account in deciding the proper forum for the Claim or, to put it in the way in which was advanced by the Defendants, whether the BVI is the appropriate forum for the Claim to be tried.

[332] On behalf of the Appleby Defendants, Mr. Matthews summarises this point in the following terms in his skeleton argument.

[333] First, referring to the Claimant's assertion about the factors that connect the Defendants with the alleged conspiracy, he says this:

> "205. In relation to connecting factors, NBT's contention that the BVI is clearly or distinctly the appropriate forum for the trial of the action begins from a most unpromising foundation. Its own case is that the alleged scheme was "*devised and/or perpetrated and/or facilitated by multiple Defendants, based in multiple jurisdictions*" other than the BVI. The only connection with the BVI jurisdiction relied on by NBT is that some of the companies which are alleged to have been involved in a fraudulent scheme (through actors who were based and acting outside the jurisdiction), and which were defunct until revived shortly before the commencement of the proceedings for the purpose of using them as Anchor Defendants, were incorporated in the jurisdiction. Further, as noted above, the incorporation occurred well before their alleged participation in the scheme and in several cases a number of years before the conspiracy is alleged to have begun.

206. NBT has accordingly been driven to assert (in its responsive evidence) that the dispute needs to be resolved in a single trial, in one place; that, if this does not happen, there is a risk of a multiplicity of proceedings leading to inconsistent judgments; that the BVI is the only forum in the world in which the claims against all Defendants could sensibly be tried in one place; and that no other forum could operate as a common jurisdiction.

207. In cases in which there are multiple defendants domiciled in different jurisdictions, there is a risk that the court's decision in relation to a stay or set aside application could lead to a multiplicity of proceedings giving rise to inconsistent judgments, especially when one or more defendants have been served within the jurisdiction and one or more other defendants have been served out of the jurisdiction. This will be referred to below as '**the Multiplicity Factor**'."

[334] The argument then continues as follows:

"208. The Multiplicity Factor has been considered in numerous authorities in recent years. In **Vedanta**, Lord Briggs explained that there is no doubt that, when Lord Goff formulated the concept of "*the forum in which the case can suitably be tried for the* interests *of all the parties and for the ends of justice*" in the **Spiliada** case, he "*would have regarded the phrase … as referring to the case as a whole, and therefore as including the anchor defendant among the parties. Although the persuasive burden was reversed, as between permission to serve out against the foreign defendant and the stay of proceedings against the anchor defendant, the court was addressing a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried. The concept behind the phrases 'the forum' and 'the proper place' is that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried.*"

209. As Lord Briggs further explained, prior to the decision of the European Court of Justice in **Owusu v Jackson**[205] **…** in cases in which an English court decided that the natural forum was the jurisdiction in which a foreign defendant was domiciled, it '*took a two-handed approach*', both staying the proceedings against the Anchor Defendant(s) and setting aside permission to serve the foreign defendant(s) out of the jurisdiction. By dealing with the claims against both sets of defendants in that way, the Court '*neatly avoided*' the risk of a multiplicity of proceedings and inconsistent judgments.

[205] (Case C-281/02) [2005] QB 801.

210. However, in **Owusu** the ECJ held that, where an English domiciled defendant had been sued in England pursuant to what is now Article 4.1 of the Brussels Regulation Recast, the English court was not permitted to stay the proceedings against that (anchor) defendant on the grounds of *forum non conveniens*, even when the competing forum was a non-Member State rather than another Member State. The consequence of the Owusu decision was that the English court could no longer take the "*two-handed approach*" referred to above. Instead, when it came to consider the issue of appropriate forum in relation to a set aside application, it was faced with a situation in which it was within the claimant's gift to pursue its claims against the Anchor Defendant in the English Court regardless of what the Court decided to do in relation to the claims against the foreign defendant(s). The risk of a multiplicity of proceedings giving rise to inconsistent judgments could no longer be neatly avoided.

211. In cases in which the court was '*persuaded that, whatever happens to the claim against the foreign defendant, the claimants will in fact continue in England against the anchor defendant*', the Multiplicity Factor was "*frequently … found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction*". In **OJSC VTB Bank v Parline Ltd**, [206] it was argued that, although the claimant had chosen to sue the Anchor Defendants in England, it had available an alternative forum which was more convenient in terms of connecting factors and that, if the claimant nevertheless chose to pursue its claims against the Anchor Defendants in England even if it was unable to join the foreign defendant, that was a choice which the claimant was making and it should negate (or at least substantially diminish) the weight which would otherwise be attached to the Multiplicity Factor. Leggatt rejected that argument, stating that the claimant was entitled to sue the Anchor Defendants in England and there was '*no reason why the claimant should be expected or required to relinquish that right in order to avoid duplication of proceedings*'.

212. However, in **Vedanta** the Supreme Court held that Leggatt J's analysis was "*wrong*" and that there was "*no possible reason*" why a claimant should not have to make a choice when "*another proper, convenient or natural forum is available for the pursuit of the case against all the defendants*". That was the position in **Vedanta** itself because the Anchor Defendant was prepared to submit to the jurisdiction of the domicile of the foreign defendant. Lord Briggs noted that this did not mean that, when the court came to apply its national rules of private international law to the question as to whether to permit service

[206] [2013] EWHC 3538 (Ch).

out of the jurisdiction upon the foreign defendant, the Multiplicity Factor was "*thereby altogether removed as a relevant factor*". But it did mean that it ceased to be a '*trump card*'.

213. It was only because of the **Owusu** decision that the Multiplicity Factor had become a trump card in cases in which that decision applied. The effect of **Vedanta** was that, even in cases in which **Owusu** applied, it was no longer a trump card. Following Brexit, the Brussels Regulation Recast no longer applies in England. Nor, therefore, does the **Owusu** decision. Moreover, that decision has never applied in the BVI. In this jurisdiction, the Multiplicity Factor has only ever been one factor for the court to weigh in the balance.

214. Particularly in cases involving a single overarching allegation of conspiracy against multiple defendants, the Multiplicity Factor has been a powerful factor. However, those cases are **Owusu** era cases which predate *Vedanta* and/or are readily distinguishable.

215. If the claimant was contractually bound by virtue of an exclusive jurisdiction clause to sue certain defendants in the local forum and not to sue them in an alternative forum, that would be relevant — but that is not this case.

216. In a case in which the claimant had a choice as to where to bring the proceedings and chose to sue the Anchor Defendants in the local forum, the Court will consider whether it has provided an explanation for that decision which is rational and legitimate.

217. It was held by Christopher Clarke LJ in **JSC BTA Bank v Granton**,[207] that a decision concerning the appropriate forum in a case such as this '*must necessarily take account of the relative importance in the case of different defendants*' because '*it may make little sense to have the venue determined by where the claim against the most insignificant player will be heard*'. That would be to "*allow the tail to wag the dog*". It is therefore relevant to consider whether the Anchor Defendants are the "*chief protagonists*" as opposed to "*minor players*" or "*minor, secondary or subsidiary parties*". The Court of Appeal has recently confirmed that this principle remains good law: see **Limbu.**[208]

218. The allegations in the **Granton** case bore certain similarities to those in the present case. The claimant Kazakh bank (BTA) alleged that Messrs Ablyazov and Zharimbetov had used a series of eight foreign companies which Mr. Ablyazov

[207] [2010] EWHC 2577 (Comm), at [24]-[29].
[208] [2024] EWCA Civ 1564, at [24].

controlled to extract funds from it for their own personal benefit. Messrs Ablyazov and Zharimbetov had been served within the jurisdiction, while the companies had been served out of the jurisdiction pursuant to the necessary or proper party gateway and brought a set aside application. At para [29], the judge stated:

> *'[Counsel for the companies] submitted that it would be wrong, in circumstances where the claim is for around US $1 billion against all the defendants, to characterise the applicants as minor, secondary or subsidiary parties and Mr. Ablyazov and Mr. Zharimbetov as major ones. I do not agree. It is plain that Mr. Ablyazov and Mr. Zharimbetov are the most significant parties on the defence side. It is they who appear to have brought about the disposition of the Bank's funds with which the claim is concerned, either to enrich themselves or their associates, as the Bank claims, or in order that the Bank might lend to other persons unknown, as appears to be the gist of the applicants' case. They and, in particular, Mr. Ablyazov, are the persons from whom the Bank has the best likelihood of substantial recovery. Mr. Ablyazov is said by the Bank to be worth over $1 billion. [One set of the companies] say that they have no assets. [The other set of the companies] are said to have (indirectly) interests in oil and gas exploration contracts but their value is wholly uncertain, and in the case of Granton a decision of the Almaty Court dated 15th January 2010 has set aside the transactions by which it acquired those interests*'.

219. Likewise, in **Limbu** the Court of Appeal considered that the claim against the Anchor Defendant was '*the primary claim*'. The claimant had intended to pursue claims solely against the Anchor Defendant and had added the foreign defendant only in response to the position adopted by the Anchor Defendant in pre-action correspondence. The "*reality*" was that the Anchor Defendant was '*the principal protagonist'* and that the foreign defendant was '*a more minor and ancillary defendant*'.

220. Finally, the Court must consider whether it is really the case that the claims against the Anchor Defendant(s) will continue in the local forum regardless of what the Court decides in relation to the claims against the foreign defendants, such that, if the Court were to set aside permission to serve the foreign defendants out of the jurisdiction, there would necessarily be a risk of a multiplicity of proceedings giving rise to inconsistent judgments. As Lord Briggs recognised in **Vedanta**, there may be cases where the claimant has "*no genuine intention to seek a remedy against the anchor defendant*.'

221. The earlier decision of the Court of Appeal in **Erste** … was such a case. The Court of Appeal held that there was no "*utility*" in trying any of the claimant's claims (under a loan agreement, under a guarantee and for conspiracy) against the Anchor Defendants, with the consequence that it was not "*reasonable*" to do so and that the necessary or proper party gateway was not available. At the end of its analysis of those issues, the Court stated:

> "*81. Finally, even if this court's conclusion that the threshold requirements of [the necessary or proper party gateway] are not satisfied were wrong, nonetheless all the factors which we have identified above support the conclusion that, when the court comes to consider the third stage of the test articulated in* Altimo *at paragraph 61 and has to decide whether:*
>
> > *(i) in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute pursuant to CPR rule 6.37(3), and*
> >
> > *(ii) in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction, the only answer is that England is not the appropriate forum for the trial of the dispute and that the court ought not to exercise its discretion to permit service of the proceedings out of the jurisdiction…*

222. The Court of Appeal later stated that "*on any basis this was overwhelmingly a Russian case and (if there was one) a Russian conspiracy. It had no connection whatsoever with England other than the exclusive jurisdiction clauses in the Loan Agreement and the Guarantee*" (para [131]).

223. At para [135], the Court of Appeal noted that the first factor which the judge below had relied upon in finding that England was the appropriate forum was that the claimant had stated that it intended to proceed in England with its conspiracy claims against the Anchor Defendants, as well as another defendant which had been served out of the jurisdiction but had not brought a set aside application, and that it would seek a determination of the issues at a trial on the merits even if those three defendants did not participate. The judge considered that it would be "*verging on the perverse for [the claimant] to have to litigate the conspiracy and other tort claims against companies in arguably the same group as [the Anchor Defendants] in Russia …"*

[335] On an initial reading of what Mr. Matthews says in his skeleton argument, one might think that there is force in what he says. However, when analysed in more detail, there is little merit in them — several of the points he makes amount to little more than a series of *non-sequiturs*.

[336] So far as the above paragraphs of Mr. Matthews' skeleton argument purport to set out the law governing what he describes as the "multiplicity factor", in my respectful judgment, his treatment of the law is incomplete. More importantly, however, the application of the law to the facts of this case amounts to little more than bare assertions unsupported by any reasoning.

[337] First, it is established by a preponderance of authority that the determination of the appropriate forum in a given case requires the court to reach an evaluative judgment upon whether, in the light of the relevant considerations, the BVI is clearly the more appropriate forum: see, for example, **VTB**, above. [209]

[338] It follows that the detailed citation of authorities, largely repeated by the other Defendants in their skeleton arguments, is unlikely to assist the Court in concluding whether the BVI is the appropriate forum for the Claim to be tried. Each case will be fact-specific. The position could not have been made clearer by the Editors of the **White Book** in their summary of what a court is required to do, at para. 6.37.16, referred to above.

[339] It bears repeating what Lord Templeman said in **The Spiliada**:[210]

> " … it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in

[209] [2013] 2 A.C. 33, at [97], per Lord Neuberger, and at [156], per Lord Wilson.
[210] [1987] A.C. 460 at 465.

> hours and not days. An appeal should be rare and the appellate court should be slow to interfere."

[340] This case, like many others in both the BVI and England, has lasted days rather than hours, contrary to what both Lords Goff and Templeman had hoped in **The Spiliada**, might be the case in the future. However, I have had ample time to study the evidence in the quiet of my chambers and have fully considered their lordships' comments in **The Spiliada** when deciding how to address the Jurisdictional Challenge.

[341] The point to make here is that assertions such as "the **[BTA]** case is on all fours with the current case and is dispositive of it" (per para. 10 of the skeleton argument of the Cargill Defendants), "[t]he position is difficult … to distinguish from that described in **Magomedov**" (per para. 75.8 of the First Defendant's skeleton argument), "[t]he allegations in the **Granton** case [bear] certain similarities to those in the present case" (per para. 218 of the Appleby Defendants' skeleton argument) or (perhaps to a lesser extent) that "[h]ere … a parallel [may be drawn] with … **[BTA]**" (per para. 93 of the Bunge Defendants' skeleton argument) are of little assistance to me in deciding how I should determine the Jurisdictional Challenge.

[342] The fundamental deficiency in the Trader Defendants' submissions lies in their failure to identify an appropriate alternative forum for the adjudication of claims against all, or at a minimum, the majority of the Defendants, notwithstanding their rejection of the BVI as the appropriate forum. Only the First Defendant proposes any alternative venue. The Trader Defendants' sole riposte, as articulated in the Appleby Defendants' skeleton argument, is that the multiplicity factor does not necessarily override all other connecting factors to establish the BVI as the proper forum. I make it clear that their failure is not determinative of the Jurisdictional Challenge. However, without that piece of information, it is difficult to obtain a complete picture of the validity of the submissions made by the Defendants on this issue.

[343] To the extent the Claimant advances such an absolutist proposition, i.e., that multiplicity trumps all other factors — which I do not believe it does — I reject that contention.

[344] Multiplicity constitutes merely one factor among several that must be evaluated in determining the proper forum. The weight accorded to this factor is case-specific. However, in the present circumstances, it assumes considerable significance, given that several of the Trader Defendants are based in multiple jurisdictions.

[345] The Defendants rely upon Wallbank J's reasoning in **BTA** to argue the contrary. However, that case is materially distinguishable on its facts.

[346] In assessing *forum conveniens* in **BTA**, Wallbank J identified several critical considerations militating against the BVI as the appropriate forum. They included the following.

[347] First, his Lordship determined that, considered in isolation, claims against the BVI SPVs lacked utility, noting that "any enforcement overseas would have to be against the BVI SPVs themselves, not other foreign defendants" and these entities "appear to be well and truly dead, without assets and already raked over for many years during a now discharged receivership." Consequently, Wallbank J discerned "no utility nor advantage to BTA in having this Court try the claim against the BVI Defendants alone."

[348] Significantly, he observed that BTA had straightforward contractual remedies against the BVI SPVs that could have been pursued directly, rather than instituting conspiracy proceedings against both the BVI SPVs and the commodity traders. Absent cogent justification for this procedural choice, there existed no compelling reason to subject the commodity traders to BVI proceedings for conspiracy. Uncomplicated contractual claims against the BVI SPVs alone, unencumbered by the complexities inherent in pursuing conspiracy claims against multiple defendants, could properly be litigated in the BVI.

[349] Wallbank J's judgment makes this point in the clearest terms:

> "[37] Upon a close reading of this summary, and indeed the entire pleading, which is very lengthy and has appended to it a large number of detailed appendices, it becomes clear that

> something is missing. What is present, and is applied to all the Defendants, including the BVI SPVs, are claims for conspiracy and/or equitable compensation. But the careful reader will note that BTA sought the restoration to the Register of the BVI SPVs not just as an intended claimant with causes of action against these companies, but as a creditor, that is to say, as someone who is owed money by the BVI SPVs pursuant to contracts. The careful reader will also have picked up that, as stated at paragraph 226 of the Amended Statement of Claim, BTA has claims arising from 'the failure of the Offshore SPVs to repay BTA Bank under the relevant L/Cs'. What BTA is saying is that the offshore SPVs — that is to say the BVI, Seychelles and Cyprus SPVs owed money to BTA under the relevant L/Cs. However, missing from this Amended Statement of Claim is any relief sought in respect of this asserted cause of action for breach of contract. **No claim in breach of contract has been brought, even pleaded in the alternative, by BTA against the offshore SPVs**. This is curious, since BTA's learned Counsel himself acknowledged that claims in conspiracy and for equitable compensation are particularly complex legally and factually. In contrast, claims in contract are relatively straight-forward. This omission begs the question: why the omission? BTA contents itself with running only the apparently more complex and difficult claims against the offshore SPVs, instead of the apparently more straight-forward claims in contract. Ordinarily, one, of course, sees a claimant concentrating upon its more straight-forward claims What one rarely, if ever, sees, is the converse — exclusive focus upon a most complex claim, with the **complete omission** of the apparently more straight-forward claim. This omission begs the question how serious BTA really was about pursuing and succeeding in claims against the offshore SPVs?
>
> [38] It also warrants observation that such claims in contract could only be brought by BTA against its direct contractual counterparts, i.e. the offshore SPVs. BTA could not bring such claims in contract against the other peripheral actors, such as the commodity traders (such as ADM, Bunge, Grove) and BTA's officers."

[350] Second, the manner in which the conspiracy was thought to have occurred in **BTA** was much clearer than it is here. For example, Wallbank J found that "the alleged scheme … was perpetrated mainly in Kazakhstan, by officers and employees, located in Kazakhstan, of a Kazakhstani bank, dealing with commodity traders operating out of various jurisdictions, such as Germany and Switzerland … but not from the BVI, with funds being channelled to a bank in

Latvia." [211] He also accepted the defendants' contention that "the key participators and key decision makers were all based in Kazakhstan; the alleged conspiracy was 'hatched' in Kazakhstan; and the most significant events took place in Kazakhstan."[212] The commodity traders' position was that "[a]n appreciation of the Kazakh centric claim and cast of characters makes it entirely obvious that the BVI is not the 'natural forum' — and indeed would be an entirely unnatural forum."[213] In contrast, pending disclosure, little is known about the Scheme's operation or the full extent of the BVI Defendants' involvement in it. This is made clear in many of the Documents included in the Bundles, such as paras. 80-82 of the Statement of Claim, reproduced below.

[351] Finally, in **BTA,** some commodity traders had suggested an alternative jurisdiction. Grove (i.e., Grove Services Inc.) had considered that Switzerland was the more appropriate forum,[214] and the ADM Defendants (i.e., 44th and 45th defendants) favoured Germany as the proper forum.[215] In the present case, other than contesting that the BVI is the appropriate forum, no suggestion is made by any of the Trader Defendants about where the Claim could be tried against all the Defendants.[216] As noted above, the Trader Defendants' failure to suggest a more appropriate forum is telling. The most they say is summarised in para. 253 *et seq*. of the Appleby Defendants' skeleton argument, but even then, it is in the vaguest terms possible:

"The 'only forum' argument is plainly wrong: the example of Singapore

> "253. It is sufficient to take Singapore as an example. That is the country in which the largest number of Trader Defendants (9) are domiciled.200 In her second expert report concerning issues of Singaporean law, Ms Amy Seow confirms that, as one would expect, those nine Defendants could be served within the Singaporean jurisdiction as of right. So far as concerns the remaining Defendants, her report shows that the Singaporean rules concerning service out of the jurisdiction are closely analogous to the English and BVI rules, but are in fact more generous to the claimant than those rules in relation to what

[211] *Ibid*, at [205].
[212] *Ibid*, at [130].
[213] *Ibid*, at [131].
[214] *Ibid*, at [127].
[215] *Ibid*, at [205].
[216] *Ibid*, at [126].

might be called the gateway element. As she explains:… *[W]hereas under the [previously applicable Rules of Court 2014] permission to serve out could only be granted if the claimant was able to demonstrate that the claim fell within one or more of the gateways set out in Order 11 Rule 1 (as well as satisfying the other two conditions for service out), the claimant may now be able to obtain permission to serve out even if it cannot demonstrate that the claim falls within one of more of the sub-paragraphs of paragraph 63(3) of the SCPD 2021, as long as it can nevertheless demonstrate that there is a good arguable case that there is a sufficient nexus to Singapore*".

254. As Ms Seow further explains, the Singaporean gateways include a necessary or proper party gateway and a tort gateway. Each of those gateways is in essentially the same terms as the English and BVI gateways.

255. Given that the Trader Defendants which are domiciled in Singapore include active companies which are engaged in international trade, the Court may consider that, if NBT had commenced proceedings in Singapore, served those Defendants within the Singaporean jurisdiction and used them as Anchor Defendants there for the purpose of obtaining permission to serve all other Defendants out of that jurisdiction pursuant to the necessary or proper party gateway, it would have had substantially better prospects of satisfying the Reasonable To Try Condition than it had in the BVI. It may also have been able to satisfy the requirements of the tort gateway in relation to at least some of its claims"

[352] What is particularly pertinent to observe in this case is that while the Appleby Defendants are content to speak for the nine defendants in Singapore about the right of the Claimant to serve the Claim on them in that jurisdiction without permission, they: (a) do not state and nor do those nine defendants <u>whether they would contend that Singapore was an appropriate forum for the Claim to be heard</u>; (b) (i.e., the Appleby Defendants) do not even state whether they would challenge Singapore as the appropriate forum to try the Claim; and (c) do not set out the position maintained by those Appleby Defendants that are not based in Singapore. The clear inference from this, as stated above, is that they will use every means at their disposal to make it difficult, if not impossible, for the Claim to be tried against all the Defendants in any jurisdiction.

[353] The other Trader Defendants adopt the substance of the criticisms made by the Appleby Defendants. For example, on behalf of the Cargill Defendants, Mr. Weekes said this on the third day of the Hearing:[217]

> " … we would say this, multiplicity of proceedings is not an issue in this case, or put alternatively, it's not a weighty factor in the context of forum conveniens. This is for four reasons at least.
>
> Reason number one, the starting point in an application to serve out is the fact that refusing jurisdiction will result in multiple proceedings is not a reason to grant jurisdiction… It cannot be the case that an applicant can come before the Court and say that BVI Court should hear cases because otherwise there will be multiple proceedings…
>
> Second point, the multiplicity issue doesn't arise in this case anyway. This is because there will be no extant BVI proceedings if the BVI Court declines jurisdiction over the Defendants who are represented here today. It is simply unreal to suppose that NBT will pursue insolvent BVI Companies to judgment for a 12-week trial in the absence of the deep pocketed Trader Defendants. It is unreal to suppose that there will be any trial. Certainly unreal to suppose there will be any trial in which NBT will pay both for its own representation and the representation of the BVI companies. That NBT would pay in effect to defend the claims which NBT itself brought.
>
> The third point, My Lord, in this case anyway there is inevitably or in this scenario, rather, in this scenario anyway, there is inevitably a multiplicity of proceedings and inevitably a risk of inconsistent judgments, and that is NBT's own decision. NBT has chosen to bring multiple proceedings against the First Defendant related to the subject matter of the same case. NBT is entitled to do that, but having done that, they can't turn around and say, oh, well, there is a multiplicity of proceedings, the BVI Court should assume jurisdiction. NBT has chosen to sue in relation to the subject matter of these claims in Russian and also in England.
>
> Fourth point is this, there is no necessary connection between the claim that NBT brings or the claims that NBT brings in relation to all the Trader Defendants. <u>It is not alleged that the Trader Defendants were in some conspiracy. It is not alleged that they agreed with each other in relation to any of these schemes</u>.
>
> So, My Lord, in any event this is a matter which could be proceeded by way of different claims in different jurisdictions.
>
> It is only if My Lord all of those points were rejected by the Court that it would be relevant to ask whether there was some other alternative jurisdiction for the claims. And in that regard, My Lord, we do no more than adopt what Mr. Matthews has said about the Singapore

[217] Court Transcript, Day 3, p. 48, line 6 to p. 50, line 14.

jurisdiction, but we do so with the strong emphasis that we say it is not actually a relevant question in this case."

[354] I reject all four points.

[355] The first point, as stated by Mr. Weekes, is correct, so far as he states that the possibility of there being multiple claims in different jurisdictions is not, by itself, a determinative factor in the evaluative judgment that the Court needs to make. However, to then go on to state that it "cannot be the case that an applicant can come before the Court and say that [the] BVI Court should hear cases because otherwise there will be multiple proceedings" is meaningless and, at best, a *non sequitur*.

[356] The second point made by Mr. Weekes is that "the multiplicity issue doesn't arise in this case anyway because there will be no extant BVI proceedings if the BVI Court declines jurisdiction over the Defendants who are represented here today. It is simply unreal to suppose that NBT will pursue insolvent BVI Companies to judgment for a [12]-week trial in the absence of the deep pocketed Trader Defendants. It is unreal to suppose that there will be any trial. Certainly unreal to suppose there will be any trial in which NBT will pay both for its own representation and the representation of the BVI companies. That NBT would pay in effect to defend the claims which NBT itself brought."

[357] I must confess that this point eludes my understanding. Firstly, it appears to conflate the issue of the forum with that of the substantive "real issue" to be tried. Secondly, it wrongly assumes that no valid claim exists or will exist against the BVI Defendants — a position that I have explicitly rejected at several places within this Judgment.

[358] The third point is incomprehensible. I am not sure what Mr. Weekes means when he says that "there is inevitably a multiplicity of proceedings and inevitably a risk of inconsistent judgments, and that is NBT's own decision. NBT has chosen to bring multiple proceedings against the First Defendant related to the subject matter of the same case. NBT is entitled to do that, but having done that,

they can't turn around and say, oh, well, there is a multiplicity of proceedings, the BVI Court should assume jurisdiction."

[359] This point may be intended to be a reference to the observations made by Lord Briggs in **Vedanta,** in which he said that if a claimant had chosen a forum which was not the obvious one for a claim to be tried against multiple defendants, he did so at his peril. He could not subsequently complain about the consequences of having done so (such as the possibility of inconsistent judgments and the like) by choosing that forum. However, that is not the position here. In the first place, the Claimant was entitled to select the BVI as the proper forum, based on its case, in the absence of any of the Trader Defendants having suggested what they thought was the appropriate forum. But also, having contested jurisdiction, none of the Defendants (apart from the First Defendant) has suggested another more suitable forum or agreed to submit to the jurisdiction of a different court if the Claim was brought in that forum, as happened in **Vedanta** — see below.

[360] Leaving aside the fact that the overlap, as I find, is not significant, and the fact that if the Claimant had sought to issue the claim in England, where one of the claims is proceeding, which is bound to have been contested by the Trader Defendants, I cannot see how, by choosing the BVI (which is, at least a more appropriate forum than Russia), the Claimant can be said, as Mr. Weekes seems to be suggesting, that it was the author of its own misfortune by allowing the possibility of proceedings against multiple defendants taking place. The position might have been different if the Claimant had randomly chosen a jurisdiction with no connection to the Claim or the parties to the Claim. There might even have been some slight force in this point if the Cargill (and the other) Defendants (apart from perhaps the First Defendant) had gone on to say that they would willingly have submitted to the jurisdiction of the Russian courts. But they do not.

[361] The position in this case may be contrasted not just with **BTA** but also with other cases on that issue, such as **Re Fundão Dam Disaster Município de Mariana (and other claimants) v BHP Group plc**.[218]

[218] [2020] EWHC 2930 (TCC).

[362] In **Re Fundão Dam Disaster**, the court found that the defendants' offer to submit to the jurisdiction of the Brazilian courts (where substantial parallel proceedings were being conducted on the same or similar issues) made it inappropriate to continue any proceedings in England. Turner J stated:

> "In this case, both defendants have offered to submit themselves to the jurisdiction of Brazil. Thus the force of any suggestion that there may be a risk of irreconcilable judgements against each defendant is attenuated. Notwithstanding the conspicuously close corporate relationship between the two defendants, I am satisfied that the remaining arguments concerning the appropriate forum are, when taken as a whole, so strong as to lead to no other conclusion than that the first stage of *Spiliada* is made out."

[363] The same position was taken in **Vendanta**.

[364] In **Vendanta,** Lord Briggs made it clear that the "multiplicity of proceedings" factor was not decisive of a jurisdiction challenge in any case. Its relevance would depend on the facts of the particular case which was under consideration.

[365] While the case was decided on the principles of EU legislation (now of little practical relevance) governing the case at the time, Lord Briggs said:

> "66. … [E&W] CPR r 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" (my emphasis) … 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 JSC in the *Altimo* case 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.'

67. Thus far, the search for these connecting factors gives rise to no difficult issues of principle, even though they may not all point in the same direction. The problems thrown up by this appeal all arise from the combination of two factors. The first is that the 'case' involves multiple defendants domiciled in different jurisdictions. The second is that, following *Owusu* … the court is disabled from the exercise of its traditional common law power to stay the proceedings against the domiciled anchor defendant …

68. There can be no doubt that, when Lord Goff originally formulated the concept quoted above, he would have regarded the phrase 'in which the case can be suitably tried for the interest of all the parties' as referring to the case as a whole, and therefore as including the anchor defendant among the parties. Although the persuasive burden was reversed, as between permission to serve out against the foreign defendant and the stay of proceedings against the anchor defendant, the court was addressing a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried. The concept behind the phrases 'the forum' and 'the proper place' is that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried…

69. An unspoken assumption behind that formulation of the concept of forum conveniens or proper place, may have been (prior to *Owusu*) that a jurisdiction in which the claim simply could not be tried against some of the multiple defendants could not qualify as the proper place, because the consequence of trial there against only some of the defendants would risk multiplicity of proceedings about the same issues, and inconsistent judgments. But the cases in which this risk has been expressly addressed tend to show that it is only one factor, albeit a very important factor indeed, in the evaluative task of identifying the proper place. For example, *in Société Commerciale de Réassurance v Eras International Ltd*, [219] Mustill LJ said: 'in practice the factors which make the party served a necessary or proper party … will also weigh heavily in favour of granting leave to make the foreigner a party, although they will not be conclusive.'

70. In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments **has frequently been found to be decisive in**

[219] [1992] 1 Lloyd's Rep 570 at 591,

favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction: see e.g. *VTB*. [220]

71. That is a fair description of the judge's reasoning in the present case. Having found that, looking at the matter as between the claimants and KCM, all the connecting factors pointed towards Zambia, the judge concluded that, factoring in the closely related claim against Vedanta, which he found as a matter of fact that the claimants were likely to pursue in England in any event, the risk of irreconcilable judgments arising from separate proceedings in different jurisdictions against each defendant was decisive in identifying England as the proper place … He said that: 'The alternative — two trials on opposite sides of the world on precisely the same facts and events — is unthinkable."

72. It is obvious from his analysis (assuming that substantial justice could be obtained in Zambia) that, had the English court retained its jurisdiction to stay the proceedings as against Vedanta, as it was thought it did prior to *Owusu,* the judge would have done so, and thereby ensured that the case was brought to trial against both defendants in Zambia …

75. I have, however, been much more troubled by the absence of any particular focus by the judge upon the fact that, in this case, the anchor defendant, Vedanta, had by the time of the hearing offered to submit to the jurisdiction of the Zambian courts, so that the whole case could be tried there. This did not, of course, prevent the claimants from continuing against Vedanta in England, nor could it give rise to any basis for displacing article 4 as conferring a right to do so upon the claimants. But it does lead to this consequence, namely that the reason why the parallel pursuit of a claim in England against Vedanta and in Zambia against KCM would give rise to a risk of irreconcilable judgments is because the claimants have chosen to exercise that right to continue against Vedanta in England, rather than because Zambia is not an available forum for the pursuit of the claim against both defendants. In this case it is the claimants rather than the defendants who claim that the risk of irreconcilable judgments would be prejudicial to them. Why (it may be asked) should that risk be a decisive factor in the identification of the proper place, when it is a factor which the claimants, having a choice, have brought upon themselves?...

79. After anxious consideration, I have come to the conclusion that … the judge, is wrong. At the heart of [his approach] lies the proposition that, because a claimant has a right to sue the anchor defendant in England, there is "no reason why the claimant should be expected or required to relinquish that right

[220] [2013] EWHC 3538 (Comm), at [16], per Leggatt J

in order to avoid duplication of proceedings". In my judgment, there is good reason why the claimants in the present case should have to make that choice, always assuming that substantial justice is available in Zambia (which is a necessary but hypothetical predicate for the whole of the analysis of this issue).

80. There is nothing in article 4 which can be interpreted as being intended to confer upon claimants a right to bring proceedings against an EU domiciliary in the member state of its domicile in such a way that avoids incurring the risk of irreconcilable judgments. On the contrary, article 4 is, as was emphasised in *Owusu* … blind to considerations of that kind. The mitigation of that risk is available in a purely intra-EU context under article 8(1) (where that risk is expressly recognised). But it is unavailable where the related defendant is (as here) domiciled outside any of the member states.

81. Looking at the matter from an intra-member states perspective, a person wishing to bring related claims against a number of defendants which, if litigated separately, would give rise to a risk of irreconcilable judgments, has a choice. The claimant may bring separate proceedings against each related defendant in the member state of that defendant's domicile, thereby incurring a risk of irreconcilable judgments. Or the claimant may bring a single set of proceedings against all the defendants in the member state of the domicile of only one of them, so as to avoid that risk. That choice is what article 8(1) expressly permits.

82. If the risk of irreconcilable judgments is one which, as in the present case, exists to the prejudice only of the claimants, I can see no possible reason why a right to sue in England under article 4 should not give rise to the same choice, where the alternative jurisdiction lies outside that of the member states, in a place where the claimant may sue all the defendants, not because of article 8(1), but because they are all prepared to submit to that jurisdiction. The alternative view…that the right conferred by article 4 should not expose the claimants to the need to make such a choice would appear to convert the right conferred by article 4 to an altogether higher level of priority, where the alternative forum lies outside that of the member states, than it does where the alternative forum lies inside, under article 8. In short, if the article 4 right is not a trump card for the purpose of avoiding irreconcilable judgments within the confines of the member states, why should it become a trump card outside those confines?

83. The recognition that claimants seeking to avail themselves of their article 4 rights to sue an anchor defendant are none the less exposed to a choice whether to do so at the risk of

irreconcilable judgments, even in cases where article 8 is not available, but another proper, convenient or natural forum is available for the pursuit of the case against all the defendants is, to my mind, the answer to the conundrum posed in para 40 above. It does not in any way bring into play forum conveniens considerations as a reason for denying the claimants access to the jurisdiction of England as a member state, against the anchor defendant. It simply exposes the claimants to the same choice, whether or not to avoid the risk of irreconcilable judgments, as is presented by the combination of article 4 and article 8 in an intra-EU context.

84. That analysis does not mean, when the court comes to apply its national rules of private international law to the question whether to permit service out of the jurisdiction upon KCM, that the risk of irreconcilable judgments is thereby altogether removed as a relevant factor. But it does in my view mean that it ceases to be a trump card…"

[366] The fourth point is equally without substance. I am not sure I understand Mr. Weekes' statement that the Claimant does not allege that the Trader Defendants were in a conspiracy. It may be that I have missed the point that he was seeking to advance before me or misunderstood it. This case is all about an unlawful means conspiracy involving the BVI Defendants and the Trader Defendants.

[367] One need only go to the Statement of Claim to see what the Claimant is saying.

[368] On my reading of the Statement of Claim, the Claimant says the precise opposite to the point made by Mr. Weekes: see, for example, paras. 80-82 of the Statement of Claim, which state:

"80. On a date or dates presently unknown to NBT but no later than July 2014, each of the Defendants or a combination of them combined with intent to injure Rost Bank (alternatively, such entity as would ultimately finance, but remain uncompensated for, the satisfaction of the BVI Companies' liabilities: the Financing Entity) by the use of unlawful means.

81. Pending disclosure, the precise terms and dates of the combination are unknown to NBT, but it is to be inferred from the Defendants' knowledge that the purported Trade Finance Arrangements were instruments of fraud; alternatively, shams. … Further, the Defendants were all aware of the full terms of at least those Sub-Arrangements in which they participated, inter alia, because all the agreements constituting each Sub-

Arrangement were apparent from the face of the Assignment Agreements, Discharge Agreements and Security Waivers … Each of the Defendants is liable for the entire loss and damage caused by the combination, regardless of the stage at which they joined it and/or ceased to participate in it.

82. In the alternative, there were a number of separate but similar combinations between at least Mr. Shishkhanov, at least one BVI Company, and each Trader or Trader Group, in respect of each of the Sub-Arrangements in which that Trader or Trader Group participated. In the further alternative, each of the Sub-Arrangements constituted its own combination between the relevant Trader, the relevant BVI Company and Mr. Shishkhanov."

[369] I have dealt above with the argument advanced by the Defendants that the Claimant is the author of its own misfortune, having created this situation by failing to choose an alternative forum where this did not arise. I have also explained why I consider that position to be misconceived.

[370] I have also explained why this factor is not decisive but is important in this case.

[371] It follows that the Defendants' contention that the factor is irrelevant in this case simply does not pass muster.

[372] Indeed, the importance of this factor continues to be emphasised in case after case where the point arises.

[373] For example, in **Republic of Angola and another v Perfectbit Ltd and others**,[221] Bryan J observed:

"116. In the context of a single defendant case and where there is another available forum (such as Angola) there is no risk of parallel proceedings and inconsistent judgments. However this has the potential to be a very real factor where there are multiple defendants including defendants sued as of right in England, and in relation to which the claimant is entitled to proceed to trial. The risk of parallel proceedings and inconsistent judgments is a factor to be considered in weighing up whether or not the Court ought to conclude that this jurisdiction is an appropriate forum: *Donoghue v Armco*.[222]

[221] [2018] EWHC 965 (Ch).
[222] [2001] UKHL 64, at [27].

117. In this respect, I have been referred to a number of decisions addressing the significance of the risk of parallel proceedings and inconsistent judgments in the context of multi-partite litigation. I address these below. I bear in mind that each case depends on its own particular facts. As was recognised by the Court of Appeal in *Jong*,[223] the reported decisions of first instance judges in deciding whether or not to permit a foreign defendant to be served outside of the jurisdiction are illustrations of circumstances in which a discretion has been exercised, and are not binding authority on how that discretion is to be exercised (citing what Millett LJ said in a different context in *Jaggard v Sawyer*.[224] Nevertheless, the reasoning in such cases is equally applicable in the present case.

118. In *VTB Bank*,[225] [at first instance], a Russian bank brought proceedings within this jurisdiction against three defendants. The claim advanced by the claimant bank was that the defendants had unlawfully rendered a Russian company unable to pay its debts to the claimant. The first defendant was an English company. The third defendant was a Russian national domiciled in England. The second defendant was a Russian national domiciled in Russia.

119. The first and third defendants were therefore served as of right in England. Leave had been given to serve the second defendant outside of the jurisdiction. The second defendant then sought to set aside that leave, on the basis that England was not clearly the appropriate forum.

120. It was argued that the claimant's motive in suing the first and third defendants was to enable it to bring the second defendant into proceedings in England, that all parties could have been sued in Russia thereby avoiding any duplication of proceedings and the risk of inconsistent judgments, and that it was not in the interests of justice for the English court to take jurisdiction over the second defendant (as the protagonist) on the basis of its jurisdiction over the minor players.

121. Leggatt J held that it was clearly more appropriate that the claim against the second defendant be tried in England. In reaching this conclusion, Leggatt J stated:[226] 'I accept that if the claim against the second defendant were a freestanding claim, all those factors would point overwhelmingly to Russia being the appropriate forum for the claim. However, the context is that the claim against the second defendant is not a freestanding claim, and it has to be considered in circumstances where the

[223] [2015] EWCA Civ 1057, at [18] and [21].
[224] [1995] 1 WLR 269 at 288
[225] [2013] EWHC 3538 (Comm).
[226] *Ibid*, at [5].

claimant has chosen to bring, and is entitled to bring, claims against the first and third defendants in England, which it says it anyway wishes to pursue, regardless of whether the second defendant is brought into these proceedings or not. What therefore has to be considered, as [counsel for] the claimant submits, is not whether England or Russia is the more suitable forum for the claim against the second defendant, other things being equal, but whether it is appropriate to have proceedings against the second defendant in Russia in circumstances where proceedings involving identical or virtually identical facts, all the same transactions, witnesses and documents, will anyway be taking place in England. The real question, in other words, is whether the factors which connect the claim against the second defendant with Russia carry weight in circumstances where to require the claim to be pursued in Russia would result in duplication of cost and the risk of inconsistent judgments — the same factors which make the second defendant a necessary or proper party'.

122. To similar effect are the earlier observations of Cooke J in *Credit Agricole Indosuez v Unicof Ltd*.[227] There proceedings were initially brought against eight defendants. The first defendant was an English company, owned by the fifth to seventh defendants, with these defendants having been served within the jurisdiction. The second, third and eighth defendants were foreign companies — being in Kenya, Tanzania and Dubai respectively. The claimant then applied to join another entity, SDV, to the proceedings, and also sought permission to serve the (re-amended) claim form on the second to ninth defendants. Permission was given by Langley J to serve out upon SDV, with SDV then applying to set aside that permission. Cooke J dismissed that challenge, stating: [228] 'Although the burden is on a claimant to show, when seeking leave to serve out of the jurisdiction, that England is the appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice, the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognise the undesirability of duplication of proceedings and the lis alibi pendens cases make this clear. Although there are connecting factors with Kenya to which I refer later in this judgment, if proceedings are going on in this jurisdiction on the self-same or linked issues, this is clearly the most appropriate forum for those common or connected issues to be tried between all relevant parties".

123. The connecting factors identified by Cooke J were the Kenyan domicile of three of the defendants, the location of the

[227] [2004] 1 Lloyd's Rep 196.
[228] *Ibid*, at [19].

witnesses (including one who was compellable in Kenya with there being no reason to suppose he would be willing to give evidence in England), the factual connections with Kenya and the need for expert evidence from Kenyan coffee growers.

124. The passages I have quoted were quoted by the Court of Appeal in *Lungowe v Vedanta* [in the Court of Appeal] … with approval. Simon LJ (with whom Jackson and Asplin LJJ agreed) also referred to the following observations made by the editors of the then edition of Dicey & Morris[229]:

> "113. At paragraph 12-033, the editors of Dicey note the classic exposition of Lord Goff's forum non conveniens test in the *Spiliada* case, but add: Lord Goff could not have foreseen, however, the subsequent distortion which would be brought about by the decision of the European Court in Owusu. The direct effect of that case is that where proceedings in a civil or commercial matter are brought against a defendant who is domiciled in the United Kingdom, the court has no power to stay those proceedings on the ground of forum non conveniens. Its indirect effect is felt in a case in which there are multiple defendants, some of whom are not domiciled in a Member State and to whom the plea of forum non conveniens remains open: it is inevitable that the ability of those co-defendants to obtain a stay (or to resist service out of the jurisdiction) by pointing to the courts of a non-Member State which would otherwise represent the forum conveniens, will be reduced, for to grant jurisdictional relief to some but not to others will fragment what ought to be conducted as a single trial … There is no doubt, however, that the Owusu factor will have made things worse for a defendant who wishes to rely on the principle of forum non conveniens when a co-defendant cannot."

125. In *Jong*, Ms Jong brought proceedings in this jurisdiction against HSBC Private Bank (Monaco) S.A. and two companies within the HSBC group domiciled in England and Wales. Her claim against HSBC Monaco was that it had carried out unauthorised trading and had also failed to place trades in accordance with instructions. The contract between Ms Jong and HSBC Bank (Monaco) provided for the application of

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229 Now Dicey, Morris and Collins on the Conflict of Laws, 16th Edition, 2022, Eds: Lord Collins of Mapesbury, Professor Jonathan Harris *et al*.

Monégasque law. Almost all of the trades were effected in Monaco and governed by that law. Her claim against the English companies was that they failed to adequately consider her complaints made to HSBC Monaco so she continued trading for longer than she would otherwise have done.

126. Ms Jong initially obtained permission to serve out of the jurisdiction upon HSBC Monaco. This was subsequently set aside by HHJ Purle QC, with great weight having been attached to HSBC Monaco's right to only be sued in Monaco. Ms Jong appealed unsuccessfully. Lewison LJ addressed a number of decisions touching upon the relevance of the relative importance of defendants to the question of whether permission to serve out of the jurisdiction should be granted. Reference was made to the judgment of Christopher Clarke J in *JSC BTA Bank v Granton Trade Ltd* and to *VTB Bank v Parline Ltd*. In JSC BTA Bank … Christopher Clarke J expressed the view that 'a decision as to the appropriate forum must necessarily take account of the relative importance within a case of different defendants and particularly those against whom proceedings in England are practically bound to continue.' Having then considered Parline, Lewison LJ concluded that HHJ Purle QC was correct in seeing the claim against HSBC Monaco as being the most important, observing that it was difficult to see what practical advantage Ms Jong would gain by suing the English defendants alongside HSBC Monaco."

[374] In **Manek v IIFL Wealth (UK) Ltd**, [230] the appellants alleged that they had been the victims of a fraud, pursuant to which the second and third respondents ('R' and 'P'), via their company, had persuaded the appellants' representative to sell them their minority shares in an Indian company. An earlier decision had allowed the appellants' appeal against the trial judge's conclusion that the appellants had not shown that sufficiently substantial or efficacious acts had been committed within England and Wales.[231] However, further issues remained, including whether R and P were subject to an arbitration agreement contained in a share purchase agreement ('SPA'), or whether they were subject to an ad hoc arbitration agreement that was included in a letter, either of which had the effect that the seat of arbitration of any dispute was India, and whether England and Wales was the natural forum for the claim to be heard.

[230] [2021] EWCA Civ 625.
[231] [2021] EWCA Civ 264.

[375] The Court of Appeal held that England was the natural forum for the claim to be heard. The events in England could, on the evidence, be seen as the critical element of the alleged evolving fraud, which was a powerful pointer to England as the most suitable place to resolve the claims. Further, the first and fourth defendants to the claim had acknowledged the jurisdiction of the English court, with the effect that the claim would be litigated in London in any event; the risk of duplication and irreconcilable judgments was a further factor, as was the domicile of the relevant personnel. In the circumstances, the appellants had successfully discharged the burden of showing that England was the proper place for the claim to be heard.

[376] Coulson LJ observed that the court would usually look for a single jurisdiction in which the claims against all the defendants could most suitably be tried. In that case, the claim was said to arise out of a misrepresentation "… made in England about the onward sale of the shares in an Indian company (Hermes) to a company (EMIF) domiciled in Mauritius, without revealing the fact that the ultimate purchaser, a German company (Wirecard), was going to pay much more for the same shares. There was never going to be one jurisdiction which would emerge as the only candidate for the hearing of this claim". It was because that was so that Coulson LJ posed the question to be decided as being "… whether, in all the circumstances, and taking a realistic approach to the numerous jurisdictions that might potentially be involved, the Appellants have demonstrated that England and Wales is clearly the place where the claims against all the defendants may most suitably be tried."

[377] In his view, that observation:

> "65 has a particular resonance in the present case. This was, on the Appellants' case, an international fraud. It arose out of critical misrepresentations made in England about the onward sale of the shares in an Indian company (Hermes) to a company (EMIF) domiciled in Mauritius, without revealing the fact that the ultimate purchaser, a German company (Wirecard) was going to pay much more for the same shares. There was never going to be one jurisdiction which would emerge as the only candidate for the hearing of this claim. The issue is whether, in all the circumstances, and taking a realistic approach to the numerous jurisdictions that might potentially be involved, the Appellants have demonstrated that England and

Wales is clearly the place where the claims against all the defendants may most suitably be tried."

[378] He concluded:

> "79 Standing back from the detail for a moment, it seems to me that there has to be a degree of realism when considering the proper place for a claim of this sort to be heard: see paragraph 65 above. It cannot be enough for the defendant(s) to such a claim to point to other jurisdictions round the world where the case might be heard and then say that, because the situation is complicated and involves so many different countries, the claimant has not discharged the necessary burden of proof. That could give rise to a never-ending carousel of unsuccessful applications across the world.
>
> 80. In my view, the first stage of the *Spiliada* test presupposes that, despite the competing claims of different jurisdictions, a consideration of all the relevant evidence will indicate one jurisdiction as the proper place for the claim to be heard. For the reasons that I have given, I consider that the Appellants have successfully discharged the burden of showing clearly that England and Wales is the proper place for this claim to be heard."

[379] In his well-known monograph on **Private International Law**, Professor Briggs makes this point strongly, stating:[232]

> "Perhaps the most influential point of general application is a very practical, managerial one. If the dispute will involve multiple parties, a stay of English proceedings which makes it more likely that the entire dispute may be brought before a single court for an adjudication by which all parties are bound will generally be more attractive than allowing a complex case to be litigated in fragments."

[380] It is not surprising that the preponderance of authorities on the forum issue regard the "multiplicity of proceedings" as an essential factor in the evaluative judgment a court must make in deciding the appropriate forum. Not a single convincing reason has been provided by the Defendants about why this should not be so in the present case. Indeed, there is every reason why, in the present case, this factor should be accorded significant, if not substantial, weight.

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[232] See Briggs, A, "Private International Law in English Courts", *op cit*, p. 175.

[381] In addition, if the Claimant is forced to bring claims in multiple jurisdictions, complex issues of *estoppel per rem judicatam* (or the broader doctrine of issue estoppel) or abuse of process will arise. I have alluded to this above, but it warrants a bit more mention here.

[382] Foreign decisions can give rise to issue estoppel, though the circumstances in which this will be so are narrowly drawn.

[383] The relevant principles are set out in **Dicey & Morris** as follows:

> "14-036 It was established by a majority of the House of Lords in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2),* [233] that a foreign judgment could give rise to an issue estoppel, i.e. prevent a party from denying any matter of fact or law necessarily decided by the foreign court. For there to be such an issue estoppel, three requirements must be satisfied: first, the judgment of the foreign court must be (a) of a court of competent jurisdiction in relation to the party who is to be estopped, (b) final and conclusive and (c) on the merits; secondly, the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation; and, thirdly, the issues raised must be identical. A decision on the issue must have been necessary for the decision of the foreign court and not merely collateral.[157] But Lord Reid emphasised that special caution is required before a foreign judgment can be held to give rise to an issue estoppel: English courts are unfamiliar with modes of procedure in many foreign countries, and it may be difficult to see whether a particular issue has been decided or that a decision was a basis of a foreign judgment and not merely collateral or obiter; and it might be unjust for a litigant to be estopped from putting forward a case in England because of a failure to do so in an earlier case of a trivial character abroad."

[384] In **Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)**, [234] Lord Reid, with whom, on this point, Lord Hodson, Lord Upjohn and Lord Wilberforce agreed, observed: [235]

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[233] [1967] 1 A.C. 853.
[234] [1967] 1 A.C. 853.
[235] [1967] 1 A.C. 853 at 918.

> "I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or *obiter*. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him. to see what were the grounds on which the West German judgment was based. … It is clear that there can be no estoppel of this character unless the former judgment was a final judgment on the merits. But what does that mean in connection with issue estoppel? When we are dealing with cause of action estoppel it means that the merits of the cause of action must be finally disposed of so that the matter cannot be raised again in the foreign country..."

[385] The decision in **Carl Zeiss** has been applied in many subsequent cases. They include **The Sennar**.[236]

[386] In **The Sennar**, a cargo of groundnuts was shipped from Sudan to the Netherlands under a bill of lading containing an exclusive jurisdiction clause in favour of Sudanese courts. The ship's master fraudulently misdated the bill of lading (30 August 1973 instead of 7 September 1973), causing GfG, a buyer in a chain of contracts, to suffer losses when subsequent buyers rejected the documents. After the Dutch courts dismissed GfG's fraud claim on the ground that the exclusive jurisdiction clause applied, GfG's successors brought proceedings in the English Admiralty Court. The respondents applied for a stay of the proceedings, arguing the appellants were estopped by the Dutch court's decision.

[387] The House of Lords dismissed the appeal and upheld the stay, finding:

(a) a foreign court's decision is considered 'on the merits' for issue estoppel purposes when the foreign court determines it has jurisdiction to adjudicate on an issue and its judgment is final

[236] [1985] 1 W.L.R. 490, [1985] 2 All ER 104,HL.

and conclusive (not subject to variation or reopening by that court or coordinate courts), even if appealable to a higher court;

(b) the Dutch Court of Appeal's decision created an issue estoppel because it established facts, applied relevant legal principles, and concluded that the exclusive jurisdiction clause in the bill of lading applied to the appellants' claim—the same issue before the English court, regardless of whether the claim was framed in tort or contract; and

(c) the stay was properly granted despite the fraud and potential procedural disadvantages in Sudan, as the claim had no connection with England but was connected to both the Netherlands and Sudan.

[388] In **The Sennar**, Lord Brandon of Oakbrook set out the conditions that applied for an estoppel to operate:[237]

> "Having regard to the decision of your Lordships' House in *Carl Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* … two matters were not in dispute. The first matter is that, if an estoppel exists at all, it is that kind of estoppel which is known as *issue estoppel per rem judicatam.* The second matter is that, 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."

[389] That does not, of course, mean that the Claimant would have to pursue a claim against all the Defendants in the same action. However, what it does mean is that if a decision on the merits is made against a Defendant, it cannot be relitigated against them. This makes it possible for the claim to be pursued

[237] [1985] 2 All ER 104 at 110.

against the other Defendants and for a court to come to inconsistent decisions on the same facts.

[390] Quite apart from the application of issue estoppel, it may be that relitigating an issue already decided by a court of competent jurisdiction would constitute an abuse of process, even where the parties were not the same. That this is so, where the prior decision is of another court in England and Wales (or, in the present case, the BVI), is clear and has been established by a wealth of authority: see, by way of examples, **Hunter v Chief Constable of West Midlands**,[238] **Johnson v Gore Wood & Co**,[239] and **Ashmore v British Coal Corp**,[240] including the summary of the relevant principles set out in **Re Queen's Moat House Plc, Secretary of State for Trade and Industry v Bairstow.**[241] Under this principle, the court will stay proceedings on the ground of abuse of process where to allow them to continue would be unfair to the defendant and bring the administration of justice into disrepute among right-thinking people.[242]

[391] There is very little authority on the application of the abuse of process principle where the prior decision is of a foreign court. It is likely to be available in a case like the present one.[243]

[392] However, in **Iberian UK Ltd v BPB Industries Plc**,[244] which concerned English proceedings raising competition issues previously determined by the European Commission, Laddie J held that "whether expressed in terms of *res judicata* or abuse of process, it would be contrary to public policy to allow persons who have been involved in competition proceedings in Europe to deny here the correctness of the conclusions reached there."[245]

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[238] [1982] AC 529.
[239] [2002] 2 A.C. 1.
[240] [1990] 2 Q.B. 338.
[241] [2003] EWCA Civ 321, [2004] Ch 1.
[242] *Ibid*.
[243] See Halsbury's Laws of England, 5th Edn, Reissue, Volume 19, 2024, Conflict of Laws,para. 223 *et seq*., para. 299 *et seq*., para 308 *et seq*., and para. 317 *et seq*; and Dicey & Morris, Rule 46.
[244] [1996] 2 CMLR 601.
[245] [1996] 2 CMLR 601, at [72]. This principle has been recognised in a number of subsequent decisions: see, for example, Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH [2003] EWHC 2403 (Comm); Inntrepreneur Pub Company (CPC) v Crehan [2006] UKHL 38; Enron Coal Services Ltd (in liq) v English Welsh & Scottish Railway Ltd [2011] EWCA Civ 2; Ryanair Holdings plc v Office of Fair Trading (Case No 1174/4/1/11) [2011] CAT 23; 2 Travel Group plc (in liq) v Cardiff City Transport Services Ltd (Case No 1178/5/7/11) [2012] CAT 19; Kamoka v Security Service [2017] EWCA Civ 1665; Micula v Romania

[393] The upshot of all this is that a civil court will not permit a claim to be brought or continued, or an issue in it to be litigated against a defendant, or for a defendant to defend or continue to defend a claim or to litigate an issue in it, if to do so would amount to an abuse of its process or to obstruct the just disposal of the proceedings.

[394] Even in instances where neither issue estoppel nor abuse of process applies to determinations rendered in proceedings initiated across multiple jurisdictions, intricate legal issues arise regarding the admissibility and evidential weight of findings or conclusions made in one forum when tendered in another. While such findings are not conclusive, their admissibility may nonetheless be subject to complex governing principles.

[395] In England and Wales, the foundational authority governing such admissibility is the rule established in **Hollington v Hewthorn**,[246] with its attendant exceptions. This rule holds that findings of fact by one tribunal are generally inadmissible as evidence in another, on the principle that each tribunal must independently assess the facts before it, unswayed by prior judicial conclusions. However, in various jurisdictions, this doctrine is qualified by statutory provisions. For example, s. 90 of the BVI Evidence Act 2006 expressly stipulates, subject to enumerated exceptions, that "evidence of the decision in legal or administrative proceedings shall not be admissible to prove the existence of a fact that was in issue in the legal or administrative proceedings." This provision significantly curtails the use of prior determinations as evidence, reinforcing the independence of each adjudicative process. However, this principle may not apply across every jurisdiction in which the Claim is tried. The extent to which this statutory provision — or analogous provisions in other foreign jurisdictions — applies remains a matter of considerable legal ambiguity and is contingent upon the interpretative frameworks of the courts involved.

(European Commission intervening) [2018] EWCA Civ 1801; and Re Barings plc (No 3), Secretary of State for Trade and Industry v Baker (No 3) [1999] 1 BCLC 226; affirmed on appeal: [1999] 1 W.L.R. 1985.
[246] [1943] KB 587, CA.

[396] Consequently, the Parties would need to navigate this complex interplay of procedural rules and statutory mandates in cross-jurisdictional litigation, balancing the principles of finality and fairness whilst guarding against duplicative litigation and inconsistent findings. This underscores the necessity of meticulous strategic consideration when relying on prior findings from separate legal arenas.

[397] The reason for my setting out a somewhat more detailed analysis of the principles governing issue estoppel, abuse of process, and the admissibility of evidence from foreign courts or proceedings — beyond the treatment afforded to them in the Parties' written and oral submissions — is to remind myself of the considerable complexities identified in the authorities discussed above, and of how those complexities may arise if this Claim is not determined within a single jurisdiction. It is unsurprising that Coulson LJ observed that, unless properly contained, such matters may give rise to an unending carousel of applications across multiple jurisdictions, each contending to be the most appropriate forum for the trial of the issues. Similar observations have been made by other judges who have had to grapple with this question.

[398] The Defendants' attempt to persuade the Court to disregard the significance of these principles — on the basis that they are inapplicable, immaterial, non-essential, or otherwise lacking in weight — is both legally misconceived and factually unsustainable. While this consideration is not, of itself, determinative of the matter, it nonetheless carries substantial weight in my overall assessment.

[399] There is some dispute between the Parties regarding the role of what has been described as the BVI's "public policy" in the choice of forum. In **BTA**, Wallbank J expressly rejected the case advanced by BTA that there was a BVI public policy that BVI courts should "extend their services to police and vindicate international fraud using companies incorporated in the BVI". However, he appears to have taken the opposite view in **Eurochem**, [247] in which he said that defendants "should expect that if they use[d] BVI vehicles to perpetrate their frauds, the BVI courts [would] hold their companies and them to account."

[247] [2020] UKPC 31, at [20].

[400] Wallbank J's view in **BTA** may be contrasted with the observations made by Bannister J (Ag) in **Black Swan Investment ISA v Harvest View Ltd**,[248] in which, in a different context (about whether a free-standing freezing injunction can be granted in support of foreign proceedings), he said that there were "sound policy reasons why important offshore financial centres, such as Jersey and the BVI, should be in a position to grant orders in aid where necessary", stating that the "business of companies registered within such jurisdictions is invariably transacted abroad, and disputes between parties who own them and others are often resolved abroad. It seems to me that when a party to such a dispute is seeking a money judgment against someone with assets within this jurisdiction, it would be highly detrimental to its reputation if potential foreign judgment creditors were to be told that they could not, if successful, have resort to such assets unless they were to commence substantive proceedings here in circumstances where, in all probability, they would be unable to obtain permission to serve them abroad…"

[401] While the context here is different, there is much to commend Bannister J's observations.

[402] I should perhaps start with the observations of Lord Hope in **Lubbe v Cape**[249] in which he stated in emphatic terms that the principles on which the doctrine of *forum non conveniens* rest "leave no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case which is before the court."

[403] In **Lubbe**, the House of Lords held that although South Africa was the natural forum for claims by several South African plaintiffs against an English parent company for asbestos-related injuries, the proceedings should not be stayed because substantial justice could not be obtained there. The court emphasised that public interest favoured the case being heard in England, since, without legal aid or practical means to pursue complex group litigation in South Africa, the plaintiffs would effectively be denied access to justice. Thus, the public

[248] BVIHCV 2009/399, 23 March 2010, at [15].
[249] [2000] 1 W.L.R. 1545 at 1566.

interest in ensuring that justice is done outweighed considerations of convenience or locality of the dispute.

[404] I am not sure that the type of "public interest" the House of Lords was referring to in **Lubbe** is the type of alleged "public interest" that arises in the present case. I am not even sure that the kind of alleged public interest in this case is the kind that can properly be called "public interest". The type of public interest that was involved in **Lubbe** related to claims brought by some 3,000 claimants for personal injury, and in some cases, death, against the defendant, arising from their injurious exposure to asbestos. The public interest recognised in that case was, *inter alia*, the claimants' inability to obtain funding to pursue their claim. Lord Hope's *obiter* comments made it clear that, absent those matters, the proper forum would have been South Africa.

[405] If Wallbank J's comment in **BTA** referred to above can properly be classified as giving rise to "public policy" considerations, then it is right that the Court does everything to protect it.

[406] In **Telesystem International Wireless Inc v CVC Opportunity Equity Partners**,[250] the Court of Appeal of the Cayman Islands took a different view. Rowe JA said:[251]

> "We are in entire agreement with the submissions of [Counsel for the claimants] that for public policy reasons (a) the status of the Cayman Islands as an advanced and reputable financial centre and (b) as a jurisdiction which can and does deal with international business disputes between parties who use the Cayman Islands companies in their structure, are factors that can be taken into consideration in an appropriate case when deciding *forum non conveniens* issue …"

[407] I respectfully agree with these observations.

[408] The Defendants' contention that the "public policy factor," as articulated in **Black Swan Investment ISA** and **Telesystem**, ought to be disregarded cannot withstand principled analysis. In substance, that submission invites the Court to

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[250] Appeal Nos 15, 17 and 18 of 2001, 1 August 2002.This information has been extracted from the Caribbean Civil Court Practice, 2024, LexisNexis, Eds: Mr. Justice Adrian Sanderson *et al*, Chapter 7, NOTE 7.12.
[251] *Ibid*, at p. 23.

avert its gaze from the utilisation of corporate structures and mechanisms within this jurisdiction as instruments of fraud against innocent parties, on the basis that such considerations of public interest or policy are immaterial to the question of forum.

[409] With respect, I am unable to accept that contention. Considerations of public policy form an integral part of the Court's evaluative exercise, and to exclude them would be inconsistent with both principle and authority.

[410] It is vital to the status of a jurisdiction such as the BVI, which enjoys the reputation as one of the leading offshore jurisdictions in the world, that it does not allow the structures it facilitates for free trade and entrepreneurship to be set up and abused by those who use them unlawfully. If any part of the alleged conspiracy has involved or has been facilitated by or through the BVI Defendants, then those who use the BVI jurisdiction lawfully and play by the rules must know that the BVI Courts will bring those who do not do so to account for their conduct. The encouragement of good practices among those who use the BVI — *pour encourager les autres* — is a legitimate factor to consider when deciding on the proper forum.

[411] The companies in the UK seldom use complex structures that one typically finds in offshore jurisdictions, designed to benefit from the generous tax treatment they receive if set up there, and the benefit of having their affairs kept secret. It is possibly for that reason that public policy issues of the type referred to in **Telesystem** do not carry as much, if any, weight in deciding the appropriate forum in E&W. However, in my judgment, public policy considerations are relevant for the Court to take into account.

[412] A further point that the Defendants make, relying on Wallbank J's observations in **BTA**, is that this Court should not add to the already overburdened and under-resourced court system, which may not have the judicial manpower to cope with a lengthy trial lasting (on current estimate) some three months. As stated below, I reject that assertion.

[413] Wallbank J correctly observed in **BTA** that no member of the judiciary welcomes the prospect of presiding over protracted litigation (in the instant matter, estimated to require 12 weeks of trial time), a sentiment with which this Court concurs. However, the availability or paucity of judicial resources cannot, in any circumstances, constitute a legitimate basis for a court to decline jurisdiction in favour of an alternative forum. The insufficiency of judicial resources is not a phenomenon peculiar to any single jurisdiction. Just as His Majesty's Courts and Tribunals Service in England and Wales may avail itself of the services of deputy High Court judges pursuant to s. 9 of the Senior Courts Act 1981 (E&W), and may deploy Court of Appeal Judges to sit as additional judges of the High Court of England and Wales, analogous mechanisms exist within the BVI for the appointment and deployment of judges of equivalent standing and capacity.

[414] In any event, Wallbank J's comments in the **BTA** case were made in the context of there being nothing for the Court to try over the lengthy period of trial for which the claim would have been listed if the Jurisdictional Challenge in that case had been unsuccessful. As he observed in his judgment, "BTA's answer was to avow an intent to pursue claims against them, as if they were normal, active, corporate defendants in good standing, and to exude brave optimism that they might yet participate in the proceedings and they might yet be found to hold assets amenable to execution; in other words, that there was simply nothing to see in their apparent ephemeral, decrepit, empty, long-dead state." Accordingly, he rightly concluded that there were no public policy considerations to take into account when the trial of a claim for some 12 weeks would be a pointless waste of time and that taxpayers' money would unnecessarily be wasted in having a determination of the claim which would be of no benefit to anyone. For the reasons mentioned in this Judgment, that is not the position here.

[415] Of course, the "public policy" factor is not decisive and may not even carry substantial weight. Nonetheless, it is a factor that I am perfectly entitled to take into account in the balancing exercise which I need to undertake. However, even if I am wrong about "public policy" as a factor that I can take into account, I would reach the same conclusion on the forum as I have in this Judgment.

[416] What is essential, in this context, is that the Defendants should not, by raising jurisdiction challenge after jurisdiction challenge, make it impossible for the Claim to be tried and, thereby, be brought to book for any fraud in which they may have participated.

[417] So far as the other factors are concerned, the Claimant states that these are not powerful factors in favour either of BVI or any other jurisdiction.

[418] I agree with the Claimant. However, as the Defendants do not entirely agree with this statement, I must consider them. I do so briefly.

[419] I believe it is common ground that the location of the documents (i.e., the documentation relating to the Claim) is of scant relevance to the forum question. Wherever the documents are located, they can be made available at the trial of the Claim in a suitable format without undue difficulty. So far as there is any disagreement on this issue, I respectfully adopt the Claimant's (now changed) position that this is a neutral factor that does not have any significant bearing on the question. As Cockerill J observed in **Al Mana Lifestyle Trading LLC v United Fidelity Insurance Co PSC**,[252] "in the modern world, the location of witnesses and documents is neither a factor which weighs heavily as it used to do. The legal resources available in this jurisdiction for dealing with document management and evidence are excellent."

[420] Nor is the place of incorporation of a company a significant factor in determining forum. It is, at best, neutral: see, by way of examples, **Best Grain K/S 7 Samoran v Emerwood Ventures Ltd**;[253] **BTA**;[254] and **Livingston Properties Equities Inc v JSC MCC Eurochem**. [255]

[421] I do not ascribe the same importance to the location of the witnesses as the Defendants do.

[252] [2022] EWHC 2049 (Comm), at [98].
[253] BVIHC(COM) 153 of 2018), at [17].
[254] BTA, at [214].
[255] [2020] UKPC 31, at [34]-[36].

[422] I do not accept the submission advanced by the Defendants that, because "the Defendants (and others) may wish to have their witnesses give evidence in person … the BVI would actually be the least convenient because none of the Defendants' witnesses are likely to be based in the BVI."

[423] In the first place, not all the Defendants' witnesses are in one jurisdiction. It means that witnesses in a different jurisdiction (including in the BVI) would have to travel to the jurisdiction where the Claim was being tried, if it was not the BVI. In terms of inconvenience, therefore, there would be little to choose between the BVI and any alternative forum.

[424] Second, the reference to the BVI being the least convenient forum for witnesses is a bare assertion, unsupported by any evidence or information. I am not clear how a witness or witnesses would be inconvenienced by having to travel to the BVI. There might have been some slight support for this assertion if those witnesses could not easily obtain a visa to travel to the BVI (or if there were other restrictions on travel to the BVI), or if they had a disability that made travel difficult for them. But none of these matters are relied upon by the Defendants.

[425] Third, I infer from the Defendants' assertion that their witnesses would like to give evidence in person as suggesting that if they gave evidence in some other way, the Court would not be able to observe their demeanour in the same way as if they gave their evidence in person in deciding the veracity of their evidence. I respectfully disagree with this assertion.

[426] The Defendants' desire to have their witnesses present in person is important only if that evidence cannot be given in some other, perfectly satisfactory way.

[427] This Court would usually expect a witness to give evidence in person. However, where that was impracticable, the Court would readily make facilities available for that witness to give evidence remotely under CPR 29.3 and regularly does so. The Defendants are unlikely to be prejudiced by such witnesses giving evidence remotely. It has long been established that an impression as to the demeanour of a witness ought not to be adopted by a judge without testing it against the whole of the evidence of the witness in question. The position was

expressed by Leggatt LJ in **R (on the application of SS (Sri Lanka)) v Secretary of State for the Home Department**[256] in the following terms:

> ''29. The term "demeanour" is used as a legal shorthand to refer to the appearance and behaviour of a witness in giving oral evidence as opposed to the content of the evidence. The concept is, in the words of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd* that: [257]'witnesses may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page.' The opportunity of a trial judge or other finder of fact to observe the demeanour of witnesses when they testify and to take this into account in assessing the credibility of their testimony used to be regarded as a peculiar advantage over an appellate court, which insulated findings of fact based on such observation from challenge on appeal. Nowadays the reluctance of an appellate court to interfere with findings of fact made after a trial or similar hearing is generally justified on other grounds: in particular, the greater opportunity afforded to the first instance court or tribunal to absorb the detail and nuances of the evidence, considerations of cost and the efficient use of judicial resources and the expectation of the parties that, as Lewison LJ put it in *Fage UK Ltd v Chobani UK Ltd*:[258] 'The trial is not a dress rehearsal. It is the first and last night of the show.''
>
> '30. Generally speaking, it is no longer considered that the inability to assess the demeanour of witnesses puts appellate judges 'in a permanent position of disadvantage as against the trial judge'. That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval: [259] 'I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking

[256] [2018] EWCA Civ 1391.

[257] 1919 SC (HL) 35 at 36.

[258] [2014] EWCA Civ 5, at [114(ii)].

[259] "Discretion" (1973) 9 Irish Jurist (New Series) 1, 10, quoted in Devlin, "The Judge" (1979) p. 63 and Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal ProbleMs 1 (reprinted in Bingham, "The Business of Judging", p, 9).

> time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help'."

[428] It follows that I reject the Defendants' assertion of the importance of the inconvenience to their witnesses to give oral evidence if this Claim were tried in the BVI.

[429] For essentially the same reasons as those mentioned above, I cannot see how the place of incorporation or the "domicile" (or residence) of one or more of the Parties carries any or any significant weight in the present case.

[430] So far as the language of the Proceedings (both in terms of the documents and the oral evidence) is concerned, this has to be a neutral factor. Even if the Defendants are correct (and I am not sure they are) that most of the documents will be in Russian and most witnesses will give evidence in languages other than English, those documents can be easily translated into English and those witnesses can provide evidence through an interpreter. It follows that whether the documents are in English, Russian, or any other language, and whether the oral evidence (and the Proceedings) take place in English or any other language, are of scant relevance to where the trial of the Claim should take place.

[431] The reliance of the "double actionability" rule by the Defendants, in this context, is misplaced. That rule concerns the choice of law to be applied in determining issues arising in a claim that is pleaded in tort.

[432] Put simply, the "double actionability" rule provides that an act done abroad is actionable as a tort in the BVI if the following conditions are satisfied: (a) if the act would have been actionable as a tort if it had been done in the BVI; and (b) it is actionable, though not necessarily as a tort, under the law of the foreign country.

[433] The "double actionability" rule has been described as flexible.[260] However, a detailed consideration is not required here for two main reasons.

[434] First, based on the material I have seen so far, it is far from clear what the law governing the Claim will be. Whether it is Russian Law, the BVI Law, or the law of any other jurisdiction is neither agreed nor clear to me. The principal reason is that the manner in which the alleged conspiracy is supposed to have occurred is far from clear at this stage. This was the same difficulty that faced the Court in **Wilton Trustees v AFS Trustee**, [261] and is the difficulty that faces this Court.

[435] But perhaps more importantly, the "governing law" is just one of the factors this Court must consider in deciding the appropriate forum. That point was expressly made clear by Justice Michael Green QC, sitting as a Judge of this Court, in **Wilton Trustees**:[262]

> "[73] While governing laws may not turn out to be a significant feature of the disputed issues at trial, it is relevant to consider this question to see if that inquiry yields a predominant jurisdiction that may be a strong connecting factor.
>
> [74] Breach of trust claims are governed by the law of the Trust, which is Liechtenstein … this was the basis for Mr. Clarke's [counsel for the first, second, twelfth and thirteenth Defendants in that case] suggestion that Liechtenstein was the appropriate forum — 'the jurisdiction of the proper law of the trust must be a strong contender as an appropriate forum'. Mr. Plewman QC [counsel for the ninth, fifteenth, sixteenth and seventeenth defendants] did not endorse that statement. Obviously Liechtenstein would have the same substantial defects as Switzerland, although it operates in another language, German.
>
> [75] The Claimants obtained short opinions from a Liechtenstein lawyer … [and] from a Swiss lawyer … These opinions show that the Liechtenstein law of trusts is similar to that of the BVI, meaning that issues that may arise in the course of these proceedings in relation to the Liechtenstein law of trusts would be able to be resolved by the BVI judge with the benefit of expert evidence. By contrast, there is no specific domestic law

[260] For examples, see Chaplin v Boys [1971] A.C. 356; Red Sea Insurance Co Ltd v Bouygues SA [1995] 1 A.C. 190, PC; Johnson v Coventry Churchill International Ltd [1992] 3 All ER 14; Re T & N Ltd [2005] EWHC 2990 (Ch); and Pearce v Ove Arup Partnership Ltd [2000] Ch 403, CA.
[261] BVIBC (Com) 2018/154.
[262] *Ibid*, at [73]-[79].

on trusts in Switzerland, even though it has ratified the Hague Convention on the Law Applicable to Trusts and their Recognition. Therefore, if these claims had to be tried in Switzerland, there could be substantial problems with the court having to grapple with alien concepts of Liechtenstein trust law and the claims that flow from breach of trust, such as knowing receipt and dishonest assistance. Accordingly, the fact that Liechtenstein is the governing law for breach of trust claims would be a factor against Switzerland being the appropriate forum.

[76] The dishonest assistance and knowing receipt claims are treated in the BVI as restitutionary claims for the purposes of choice of law rules. Restitutionary claims are normally governed by the laws of "the country with which the obligation has its closest and most real connection" — see paragraphs 51 and 54 of *Eurochem.*[263] That could be the BVI because of the situs of the Wellcourt shares; alternatively it could be said that FiHAG received those shares in Switzerland which is where FiHAG was incorporated.

[77] The governing law of the tort claims is also not straightforward. In paragraph 52 of *Eurochem,* Webster JA [Ag] referred to the double actionability rule and the exception to it, originating in *Philips v Eyre* ... and as explained by the House of Lords in *Boys v Chaplin* ... I do not need to decide whether, as a result of double actionability, the BVI court will apply BVI law or whether it may, under the exception, look to the country which has the most significant relationship with the occurrence and the parties. There is no reliable evidence as to where the alleged conspiracy was hatched and the alleged misrepresentations were made in England and Israel and apparently acted on in Switzerland. Any damage sustained as a result of the torts was possibly sustained in Liechtenstein as the seat of the Trust.

[78] The unfair prejudice claims are brought under the Act and are therefore governed by BVI law.

[79] Accordingly, there is not much assistance to be gained from looking at the governing law or laws as such laws cannot be determined at this stage and, in any event, there are likely to be a number of different governing laws in respect of the issues arising in the proceedings. It therefore does not provide a connecting factor with any particular jurisdiction."

[263] I.e., Livingston Properties Equities Inc v JSC MCC Eurochem and another BVIHCMAP2016/0042-0046.

[436] Likewise, in the present case, the application (or otherwise) of the double actionability rule, while plainly a matter which I need to consider in deciding how to undertake the balancing (and which I have), does not carry any significant weight in undertaking that exercise.

[437] It follows that for all the above reasons, I am entirely satisfied that the BVI is the appropriate forum for the Claim (and the issues in the Claim) to be tried.

Exercise of Discretion

[438] Even if the Court is satisfied that the relevant gateways have been passed and that the appropriate forum is the BVI, it retains a residual discretion to refuse to allow the Claim to be tried in the BVI.

[439] The Editors of the **White Book** provide the following summary about the scope of that residual discretion, at 6.37.22:

> "The court's general discretion
>
> … certain principles apply where the court is required to determine whether or not a claimant should be granted permission to serve a claim form out of the jurisdiction... Judicial summaries of the principles not uncommonly have appended reference to a residual 'general discretion', to the effect that the applicant for permission must satisfy the court that, in all the circumstances, the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction (e.g. *Ashton Investments Ltd v OJSC Russian Aluminium (Rusal);*[264] *Altimo;*[265] and *VTB.*[266]
>
> Presumably, this general discretion can be exercised only in one way, that is, in favour of the foreign defendant, in the event of the judge finding that the burdens placed on the claimant by the principles have not been satisfied.
>
> Doubtless the discretion does exist and exists independently; it is not bound up in and (as it were) exhausted within the forum conveniens principle or within r.6.37(3). For obvious reasons, cases in which the granting of an order for permission to serve out of the jurisdiction, or of an order setting aside permission, will turn on the correct exercise of the general discretion alone are likely to be rare. In *Erste* … where the judge granted the claimant bank permission to serve the claim form on

[264] [2006] EWHC 2545 (Comm), at [86].
[265] [2012] UKPC 7, at [99]
[266] [2012] EWCA Civ 808, at [100].

them out of the jurisdiction (in Russia) under certain paragraphs in para. 3.1 of PD 6B, the appellant defendants argued that, in concluding that it was appropriate in all the circumstances to grant permission, the judge had erred by going outside the reasonable ambit of his general discretion. The Court of Appeal accepted this submission, finding that 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 the principal defendants was to enable a claim to be brought against the appellant defendants 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.

It has been said that inordinate delay in seeking permission to serve the claim form may be a ground for refusing permission (*Schothorst and Schuitema v Franz Dauter GmbH (The Nimrod)*[267] (two-and-a-half year delay between issuing writ and seeking permission to serve, during which the limitation period expired)).

In *National Bank of Greece SA v Outhwaite*,[268] it was said it would be appropriate only in very limited circumstances to allow service out the jurisdiction where to do so would enable a claimant to escape the consequences of their not issuing and serving the proceedings more promptly."

[440] The making of the Order by Wallbank J involved the exercise of that residual discretion, albeit that the exercise of that discretion was provisional only, based on the material placed before the Judge and hearing the submissions of the Claimant alone. Of course, neither the exercise of the discretion nor the appropriateness of exercising it in favour of the Claimant on an *ex parte* basis can be considered as final (or even as representing the provisional view of the Judge who dealt with the *ex parte* hearing) without hearing others who might be affected by the exercise of that discretion in favour of the Claimant.

[441] The essential point here is that, where a judge is exercising the residual discretion of a court, as I am doing afresh in the present case, it is important to note that there are limitations on the exercise of that discretion.

[442] While the discretion is wide and unfettered, it is subject to the limitation that it should be exercised judicially, taking into account all the circumstances of a

[267] [1973] 2 Lloyd's Rep. 91, Kerr J.
[268] [2001] C.P. Rep. 69, at [46] and [50], per Andrew Smith J.

particular case and having regard to the purpose for which the discretion exists. As Parker LJ observed in **Ottway v Jones**,[269] in the context of the exercise of a discretion in another context:

> "[A discretion may], on the face of it, [be] completely unfettered. I say 'on the face of it' because, of course, the discretion cannot be exercised arbitrarily; it must be exercised judicially and on fixed principles dictated by reason and justice."

[443] In determining how discretion should be exercised, the Court must be guided by the particular facts and circumstances of the case before it. The mere existence of factual similarities between one case and another does not oblige the Court to follow the earlier decision mechanistically or without independent evaluation.

[444] It follows that fact-specific authorities, whether emanating from England and Wales or from this jurisdiction, will seldom provide more than limited assistance in guiding the Court's exercise of a broad and unfettered discretion. It is a fundamental principle of discretionary decision-making that the Court cannot resort to any form of mechanistic scoring exercise — allocating weight or numerical value to individual factors and then resolving the matter by reference to the aggregate. Discretion must instead be exercised in light of all the circumstances, having regard to the particular factual matrix of the case. In short, the Court must adopt a holistic approach in deciding how to exercise the residual discretion.

[445] The Defendants advance two principal bases for submitting that the Court's discretion on the PTSO application ought to be exercised against the Claimant.

[446] The first is encapsulated in paras. 263–270 of the Appleby Defendants' skeleton argument. The second concerns the alleged failure by the Claimant to provide full and frank disclosure when seeking PTSO on an *ex parte* basis.

[447] There is nothing in paras. 263–270 that would warrant refusing the PTSO in the exercise of the Court's residual discretion. Those paragraphs largely revisit the Defendants' submissions on the jurisdictional gateways and the forum

[269] [1955] 1 W.L.R. 706 at 714.

challenge. They disclose no basis upon which this Court should conclude that the BVI is not the appropriate forum for the trial of the Claim. If anything, it might be said that, in the light of the recent amendments to the CPR (effective 31 July 2023), issues of the type addressed at the hearing are now less likely to arise, which could, in principle, weigh in the Claimant's favour. As the Claimant did not seek to rely on that point, I have left it out of account.

[448] The second limb of the Defendants' argument is addressed below under the heading "The Disclosure Issue."

Issue 3 – the Disclosure Issue

[449] The Defendants assert that the Claimant failed in its duty of full and frank disclosure and fair presentation at the *ex parte* hearing on 11th May 2023. They say the failure was serious and deliberate, i.e., it was not an "innocent" failure and that: (a) the Order should be set aside for that reason; and (b) if set aside, it should not be re-granted.

[450] Paragraph 9-001 of **Gee on Commercial Injunctions,** 7th Edition, Steven Gee KC, 2020 ("Gee"), contains the following statement of principle about the importance of an applicant complying with his duty of full and frank disclosure when he applies for an order without notice or on short notice:

> "Any applicant to the court for relief without notice must act fairly in all material respects in preparing and presenting the application and afterwards in connection with it and the *ex parte* order obtained. This includes a duty to act in the utmost good faith and to disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so, on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice, or on short notice."

[451] In **Brink's Mat Ltd v Elcombe**,[270] Ralph Gibson LJ set out the applicable principles about the duty of full and frank disclosure, in the context of a **Mareva** injunction, as follows:

[270] [1988] 1 W.L.R. 1350 at 1356–1357.

"(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *Rex v Kensington Income Tax Commissioners Ex p. Princess Edmond de Polignac*. [271]

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers:[272]

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour*.[273] The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J) of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc v Robinson*;[274] and (c) the degree of legitimate urgency and the time available for the making of inquiries. [275]

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure…is deprived of any advantage he may have derived by the breach of duty'. [276]

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A *locus penitentiae* may sometimes

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[271] [1917] 1 K.B. 486 at 514, per Scrutton LJ.

[272] Referring to Rex v Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at 504, citing Dalglish v Jarvie (1850) 2 Mac & G 231 at 238; and Browne-Wilkinson J in Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295..

[273] [1985] FSR 87.

[274] [1987] Ch. 38.

[275] Referring to Bank Mellat v Nikpour [1985] FSR 87 at 92–93, per Slade LJ.

[276] See Bank Mellat v Nikpour, *ibid*, at 91, per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Commissioners' case [1917] 1 KB 486 at 509.

be afforded': see *Bank Mellat v Nikpour.*[277] The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

> '…when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed'."[278]

[452] Although Ralph LJ's above observations were made in the context of freezing and other injunctions, as the author of **Gee** states, they apply in every situation in which an application for an *ex parte* order is made or an order is sought on short notice. It therefore applies in a situation such as this, where an applicant seeks a PTSO order.

[453] While the law is that the duty is the same in any *ex parte* application, it does make a difference as to what kind of *ex parte* application is being made. That is because this is relevant to the consequences of non-disclosure and, in particular, to whether the order is to be set aside. As Kerr LJ pointed out in **A/A D/S Svendborg v Maxim Brand**, [279] in relation to a case concerning an application to discharge a PTSO order granted under the former RSC Ord 11, as well as Mareva relief: "in principle the same duty of disclosure arises in relation to Order 11. But in practice such oversights are more likely to be penalised only in the form of costs, since it would not be right to drive the plaintiffs to an inappropriate jurisdiction or to bar a bona fide claim from a proper one. To that extent, the practice may be different in relation to Order 11 from cases involving injunctions." The substance of this point has been acknowledged in many cases. Examples, referred to in **Gee**, at footnote 20 of 9-003, include **Pacific Bank NA v Bell**,[280] **Payabi v ArMstel Skipping Corp (The Jay Bola)**;[281] **Arab Business Consortium International Finance and**

[277] [1985] F.S.R. 87 at 90, per Lord Denning MR.
[278] Lloyd's Bowmaker Ltd v Britannia Arrow Holdings Plc [1998] 1 W.L.R. 1337 at 1343H–1344A, per Glidewell LJ.
[279] Court of Appeal, Civ Div, Transcript No.39 of 1989, 23 January 1989.
[280] Court of Appeal, Civ Div, Transcript No.143 of 1991, 27 February 1991.
[281] [1992] Q.B. 907 at 918B–918D, per Hobhouse J.

Investment Co v Banque Franco-Tunisienne;[282] **Nicekind Holdings v Yim Wai Ning**; [283] and **MRG (Japan) Ltd v Engelhard Metals Japan Ltd**.[284]

[454] It is also worth pointing out that the duty of full and frank disclosure extends only to those issues that are material to the decision the judge had to make on the application. At para. 9-003, **Gee** states that "[m]ateriality depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing that application."

[455] **Gee** goes on to state in the same paragraph:

> "In the case of an application for permission to serve proceedings out of the jurisdiction what is relevant is what the court has to be satisfied of to grant permission and matters which go to whether permission is to be granted. This does not usually require a detailed analysis of the merits of the substantive claim. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case. In particular it is not correct that anything going to the merits of the claim will be relevant on the application for permission to serve out of the jurisdiction."

[456] The general principles relating to full and frank disclosure were summarised by Carr J in **Tugushev v Orlov**[285] as follows:

> i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
>
> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted

[282] [1996] 1 Lloyd's Rep. 485 at 490, per Waller J: "it does of course make a difference what form of ex parte application the Court is dealing with…"; on appeal: [1997] 1 Lloyd's Rep 531.
[283] [2001] HKCA 106, per Stock JA.
[284] [2003] EWHC 3418 (Comm), at [25]–[32]: on an application for permission to serve out of the jurisdiction under CPR r.6.21 it is not necessary to set out all matters which go to the strength of the merits as opposed to matters which might have gone to the granting of the permission.
[285] [2019] EWHC 2031 (Comm), at [7].

in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;

iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the

action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts; [and]

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example, by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

[457] If the failure to disclose is deliberate (in the sense that it was intentionally designed to mislead the Court or to enable the applicant to obtain some procedural or other advantage in a claim which would not otherwise be available

to him), the Court is likely, other than in an extreme case, to set aside the order granting PTSO almost *ex debito justitiae*.

[458] Lest there was any doubt, Carr J stated that the principles relating to full and frank disclosure applied in the same way to an application made for an order for PTSO as they did to a freezing order.[286]

[459] It is important, however, that the Court maintains a due sense of proportion in dealing with a breach of the duty of disclosure. This applies even where the Court is considering whether to continue a freezing order. **Gee** makes this point at para. 9-019:

> "In exercising the discretion, the overriding question for the court is what is in the interests of justice. This includes the need for a penal jurisdiction to deter non-disclosure and encourage disclosure of material circumstances, culpability of the applicant for the non-disclosure, the degree of materiality and taking into account the consequences of discharging the injunction, including the risks of injustice to the applicant were the order to be discharged. When the failure is substantial and important to the case advanced, the starting point for the exercise of the discretion is likely to be discharge of the order. Where facts are material there are degrees of relevance and it is important to preserve a due sense of proportion. A matter not disclosed should be looked at in the context of the whole of the evidence before the court to assess how relevant it was to the judge on the ex parte application, and whether it is proportionate to discharge the order. A failure of disclosure may be marked in some other way, for example, by a suitable order as to costs."

[460] In his skeleton argument in response to the contention advanced by the Defendants that the Order should be discharged without being re-granted, Mr. McGrath makes several points which he says it is important that the Court should consider:

> "94 There are certain further points which bear particular emphasis:
>
> 94.1 Allegations of serious non-disclosure should not be made lightly and should be clearly articulated and

[286] *Ibid*, at [8], referring, by way of examples, to PJSC Commercial Bank PrivatBank v Kolomoisky [2018] EWHC 3308 (Ch), at [169]; and Sloutsker v Romanova [2015] EWHC 545 (QB), at [52].

properly supported. They are not intended to be *a tabula in naufragio*. [287]

94.2 It is established that 'a failure to provide full and frank disclosure is to be treated as innocent if the party in question did not intentionally omit information which they thought to be material'. [288]

94.3 The Court should not consider the supporting affidavit as though it were marking an examination paper, deciding one way or the other merely on the basis of the extent to which the affidavit could have been improved. What matters is whether the effect of the affidavit was such as to mislead the court in a material respect concerning its jurisdiction. [289]

94.4 A failure to refer to arguments on the merits that the defendant might make 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 might mislead the Court in exercising its jurisdiction under the rules and its discretion whether to grant permission. [290]

94.5 It is necessary to retain a sense of proportion, and to bear in mind that there are degrees of relevance.[291] The duty of full and frank disclosure is an important but inadequate substitute for the absence of the respondent in an ex parte application. It is not realistic to expect or demand an ex parte applicant to present the case and possible arguments of the absent respondent in a manner comparable to the respondent, had they attended: **Columbia Picture Industry v Robinson**.[292]

94.6 The return date hearing of an ex parte order is not intended to be a rehearsal for trial, nor should it require the Court to become embroiled in the detail of the arguments on the merits of substantive issues, e.g., limitation: '… it is **inappropriate** to seek to set aside a

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[287] Referring to the observations of Slade LJ in Brink's Mat v Elcombe [1988] 1 W.L.R. 1350 at 1359, as a "plank in a shipwreck". In other words, a submission of last resort, once all else has failed.
[288] Referring to Akbar v Ghaffar [2023] EWHC 1275 (Ch), at [26].
[289] Referring to Federal Republic of Nigeria v Royal Dutch Shell [2020] EWHC 1315 (Comm), at [91]
[290] *Ibid*, at [92].
[291] Referring to Jalla v Royal Dutch Shell [2020] EWHC 459 (TCC), at [254].
[292] [1987] Ch. 38 at 75, per Scott J . The duty does not extend to seeking to foreshadow every possible defence that a sophisticated defendant, armed with a heavyweight legal team, may seek to run, particularly where the application of a possible defence or arguments may turn on complex and
disputed points of foreign law: per Slade LJ in The Electric Furnace Co v Selas Corporation of America [1987] RPC 23 at p.29; and per Kerr J in BP Exploration Co.(Libya) Ltd v Hunt [1976] 3 All ER 879 at 893H, cited with approval by Slade LJ in The Electric Furnace, *ibid*.

freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly **so plain** that they can be **readily** and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself', as explained in **Kazakhstan Kagazy Plc v Arip**. [293]

94.7 The '… more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is… that the judge should not lose sight of the woods for the trees.' [294] And it is only 'those trees which are of particular importance'[295] that merit close scrutiny in a discharge application."

[461] Mr. McGrath then asks the Court to conclude that the present case is not one in which the Order should be discharged. Alternatively, if the Court discharges it, it should make a new order, based on the material that the Parties have now put before the Court and the fact that the Court now has the full arguments of all the parties on the issue.

[462] Mr. McGrath's skeleton argument continues:

"95 … in deciding whether a sanction for any breach of the obligation of full and frank disclosure is warranted, and if so, what sanction, the distinction between injunctive relief and service out is important. Whilst the duty applies on the latter type of application as much as the former, the Court will bear in mind when deciding on the relevant sanction that (as explained in Tugushev v Orlov [296] that 'it is one thing to be deprived of draconian relief in the form of a freezing order for nondisclosure. It is another to be deprived of the ability to pursue a claim in a chosen (and otherwise appropriate) jurisdiction at all.'

96 Moreover, Tugushev emphasises the causative nature of the link required between the non-disclosure and the order obtained. In the absence of deliberate non-disclosure, a court

[293] [2014] EWCA Civ 381, at [36], citing with approval Toulson J in Crown Resources AG v Vinogradsky (15 June 2001), unreported.
[294] [2014] EWCA Civ 381, at [36].
[295] National Bank Trust v Yurov [2016] EWHC 1913 (Comm), at [21] per Males J.
[296] [2019] EWHC 2031 (Comm), at [47].

will be slow to discharge an order for non-disclosure unless it was causative of the order obtained. [297]

97 Although one can readily find statements purportedly summarising the law on nondisclosure, which start with the proposition that the 'usual' response to a non-disclosure is to discharge the injunction[298] … in truth and in practice, that ultimate sanction is reserved for clear examples of deliberate non-disclosure, or substantive non-disclosure that plainly would have cast a completely different complexion on the merits. [299] Thus:

97.1 If discharge were, in fact or in practice, the general rule, it would have every prospect of becoming an "instrument of injustice"— precisely what we are told it must not become (see Brink's Mat). [300]

97.2 Further, whilst all cases turn on their own facts, the authorities reveal a clear practice in the Court of not discharging in respect of non-disclosures that are not deliberate or which do not strike at the heart of the merits …

97.3 In Brink's Mat itself, the Court of Appeal allowed the claimant's appeal from the discharge of a freezing order, notwithstanding that there had been material non-disclosures: Slade LJ [observed]: 'I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction'…"

[463] The grounds upon which the Defendants assert that there was a failure on the Claimant to comply with the duty of full and frank disclosure may be summarised as follows, derived from the skeleton argument of the Cargill Defendants:

"129. NBT has now (and very belatedly — nearly 11 months after the Service Out Order was made) admitted that it committed a breach of its duty of full and frank disclosure in relation to the NPP gateway. More particularly, NBT acknowledges (as it must) that:

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[297] *Ibid.,* at [7(xii)].
[298] Referring, by way of example, to Arena Corporation v Schroeder [2003] EWHC 1089, at [213].
[299] Referring to Males J in National Bank of Trust v Yurov [2016] EWHC 1913, at [18(b)] (discharge where non-disclosure is 'substantial or deliberate').
[300] [1988] 1 W.L.R. 1350 at 1359.

a) It did not separately address the requirement that it be '*reasonable for the court to try'* its claim against the BVI Companies;

b) The relevant points in the *Sabyrbaev* case could be "derived from" the Erste and Diaz cases (this is a huge understatement: the actual position is that the propositions are clearly set out, in terms, in those judgments … and they were nevertheless not drawn to the Court's attention;

c) Those points '*could and should have been raised at the ex parte stage*';

d) The point was '*to some extent'* put in issue by Clifton 1262 (and nevertheless NBT still did not properly address the Court as to the point); and

e) These matters were (and would have been) material to NBT's application to serve out and this was a material breach of its duty."

[464] The Claimant accepts the substance of these breaches.

[465] The Defendants state that there were other breaches that the Claimant has not admitted. They include the following.

[466] First, the claim that the trade finance transactions involving the Cargill Defendants conformed to established market practices for structured letters of credit, as detailed in the International Trade and Forfaiting Association's 2021 Guide to Structured Letters of Credit. The transactions used a recognised variant called high seas trade loan offsets ("HSTLOs"), involving sale and purchase agreements, deferred payment letters of credit, collateralisation, pre-payment of discounted funds, and full repayment. The Cargill Defendants allege that the Claimant failed to explain that: (a) most of the elements of HSTLO transactions are consistent with market practice for structured LC transactions; (b) the variation is the loan offset; and (c) offsetting remains a known feature of structured LC transactions. In addition, the Claimant failed to draw the Court's attention to relevant industry guidance regarding HSTLO transactions.

[467] Second, the Cargill Defendants allege that the Claimant failed to properly explain that restoring the BVI companies was intended to use the NPP Gateway against the Trader Defendants, creating a potential conflict as the Claimant funded the liquidator defending claims brought by NBT itself. This raises concerns about whether the claim was artificial and whether the Court should hear it.

[468] Third, the Cargill Defendants contend that the Claimant failed to address the Tort Gateway test adequately. It failed to explain why the Tort Gateway might be unavailable and made unsupported assertions about damage occurring within the BVI jurisdiction. The Claimant did not address key legal tests or potential defences, and has since abandoned this aspect of its claim, highlighting a failure to present it fairly at the *ex parte* stage.

[469] Finally, it is said that the Claimant did not adequately justify why the BVI was clearly the appropriate forum for claims against the Cargill Defendants. The Claimant's submissions confused the correct legal test with an incorrect *forum conveniens* test, and key arguments relied on the wrong legal standard. Essentially, those key arguments were that the BVI was not clearly or distinctly the appropriate forum for the Claimant's Claim against the Cargill Defendants. The alleged tort (conspiracy) was not committed in the BVI, and the Claimant did not allege that any agreement was made there. The only link to the BVI was that the BVI Defendants were incorporated in the BVI. However, no acts occurred in the BVI, and those companies were mere conduits, making the connection casual or adventitious. There was no meaningful procedural or evidential nexus (witnesses, documents, language or the like) to the BVI; the choice-of-law did not favour it; and none of the jurisdiction or arbitration clauses contained in any document pointed to it.

[470] In relation to the NPP Gateway, the Claimant accepts and apologises for its breach of the duty of full and frank disclosure. Among other things, it draws attention to the following.

[471] The *ex parte* hearing took place on 11th May 2023, and Wallbank J's judgment in **BTA** was handed down on 7th December 2023. However, it did not become

publicly available on the Court's website until 13th February 2024. The Claimant's legal team did not become aware of the judgment until after that date. On the basis that the Defendants do not seriously dispute that the failure to disclose was not deliberate (in the sense that it was deliberately designed to mislead the Court), several of the points made by the Defendants against the Claimant would not have arisen if that judgment had become available to the Claimant and been referred to at the *ex parte* hearing on 11th May 2023.

[472] There is much force in this point. Whether the failure to provide the proper disclosure to the Court was due to a failure on the part of the Claimant to realise the importance of the duty of full and frank disclosure or a failure to understand the enormous complications (both legal and factual) that arose from the Claim, or otherwise, the failure was, as I find, completely innocent. I entirely reject any suggestion on the part of the Defendants that it was any more than that. I also find that the various nomenclatures used to describe that failure (such as "non-innocent", "non-innocent but deliberate, though not constituting a deliberate attempt to deceive", "grossly negligent" and even "reckless") are inappropriate and incorrect. The Defendants have somewhat over-egged the pudding by describing the Claimant's culpability for its admitted breaches in pejorative terms, when, in reality, this was an innocent breach, certainly "negligent", but little more than that.

[473] Culpability is a matter for the Judge to assess, based on the material placed before him and the submissions made to him. Fact-specific cases will rarely help the Judge to evaluate the degree of culpability. However, one describes the culpability of the Claimant, whether in the terms described by the Defendants or by the various cases on the subject, in the present case, I am clear that the Claimant's culpability should not result in the discharge of the Order.

[474] It should also be mentioned that, even though the Order was made some time before the **BTA** case, it was made by Wallbank J, a judge with not an insignificant amount of expertise and experience in this area of law, who had plainly read the papers, as is clear from the transcript of the *ex parte* hearing at p. 4, line 4 in which he says that he is aware of the nature of the application

made by the Claimant, and expressed confirmation that he had read into the papers, including the skeleton argument placed before him, even if only briefly.

[475] Of course, that did not obviate the need on the part of the Claimant to provide proper disclosure, which counsel for the Claimant quite plainly failed to do adequately. However, the application was heard by a Commercial Court judge who was better equipped to deal with it than many other judges.

[476] In addition, it has long been held that an applicant does not have to make every conceivable point that a respondent might adopt to an application for an *ex parte* order, particularly where the applicant could not have anticipated the point that the respondent might take: see **Boreh v Republic of Djibouti** [301] and **Millhouse UK Ltd v Sibir Energy Plc**.[302] Some of the points which the Cargill Defendants maintain that the Claimant should have disclosed to the Judge could not conceivably have been anticipated by it.

[477] The Claimant concedes that it failed to distinctly address the bifurcated limbs of the legal test governing the NPP Gateway in its application for the Order. This procedural oversight was only identified subsequent to the publication of the **BTA** judgment in February 2024.

[478] Furthermore, the Claimant acknowledges that it should have engaged more explicitly with potential counterarguments regarding the Tort Gateway. Nevertheless, it firmly denies any intention to mislead the Court, contending that its submissions were confined to a narrowly defined case and adequately encompassed all material points. In particular, the Claimant clarifies that it did not allege conduct extending beyond the act of incorporation within the British Virgin Islands jurisdiction.

[479] I respectfully agree with the Claimant.

[480] In response to the Cargill Defendants' assertion that the Claimant ought to have disclosed that the alleged fraudulent elements bore semblance to legitimate market practices, the Claimant advances several points: (i) such disclosure is

[301] [2015] EWHC 769 (Comm), at [6], per Flaux J.
[302] [2008] EWHC 2614 (Ch), at [106], per Christopher Clarke J.

wholly irrelevant given the Defendants' acceptance of a serious issue to be tried; (ii) the issue raised pertains to contested merits appropriate for trial determination; and (iii) resemblance to legitimate market conduct does not *ipso facto* negate allegations of fraud, as sophisticated fraudulent schemes frequently mimic bona fide transactional frameworks to enhance their deceptive credibility.

[481] More precisely, the Claimant accepts that it should have provided clearer rebuttals to counter-arguments within paragraphs 239 to 264 of Popkov 1 and acknowledges that it should have provided a synopsis of the **Metall** decision alongside the *ex parte* skeleton argument at paragraphs 36 to 42.

[482] Notwithstanding the above, the Claimant rejects the proposition that it omitted relevant arguments or evidence capable of undermining its contention that it satisfied the Tort Gateway or that it misled the Court through any material omission. The Claimant reiterates that its case on this gateway was narrowly circumscribed, underscoring that: (a) no conduct apart from incorporation was alleged within the BVI; (b) the limitations of its claim were transparent *ab initio*; and (c) any non-disclosure was devoid of any intent to deceive.

[483] Given, as I accept, that the Claimant's Tort Gateway case was advanced on a narrow basis, the majority of the Defendants' responses constitute non-engagement with the Claimant's actual submissions or simply articulate disputed contentions relevant to the "substantial and efficacious act(s)" requirement.

[484] I agree with the Claimant that such responses do not constitute breaches of the duty of full and frank disclosure.

[485] With respect to the "Clifton Declarations" submitted in the New York proceedings under section 1782 of Title 28 of the United States Code, the Claimant asserts that: (a) these declarations primarily comprised denials contesting the applicability of the Tort Gateway; (b) criticisms referencing these declarations misconstrue the actual contents thereof; and (c) the Claimant addressed these declarations comprehensively in its *ex parte* skeleton

argument, specifically at para. 48. In addition, Popkov 1 further engaged with many of the Defendants' points, as evidenced by extensive citation to that evidence in their submissions.

[486] In addition, to the extent that the Claimant's position has evolved following the *ex parte* hearing, it respectfully invites the Court to exercise its discretion to permit such changes in the exercise of its judicial discretion and principles of procedural fairness.

[487] Addressing specific allegations of non-disclosure relating to the purported similarity between the Scheme and legitimate market practice, the Claimant submits that: (a) the Cargill Defendants acknowledge a serious issue to be tried, rendering the argument immaterial in the context of a jurisdictional challenge; and (b) these contentions engage the merits of the Claim, which are to be adjudicated at the trial.

[488] In addition, the argument advanced by the Defendants does not approach the rigorous threshold required to establish a "knock out" point sufficient to defeat the Jurisdictional Challenge by demonstrating that there is no serious issue to be tried on the merits.

[489] Specifically, the Claimant makes five points in response to this argument.

[490] First, the Claimant says that even if the Defendants' assertions are accepted at face value, they do not negate the allegation of fraud. Complex fraudulent schemes often incorporate elements that mimic legitimate market practices to enhance their deceptive design. The critical enquiry must be directed at those aspects of the conduct that diverge from authentic or accepted practice, constituting the substance of the alleged fraud.

[491] Second, the Claimant's case is that the Scheme was meticulously crafted to appear lawful and thus evade detection. Any fraudulent scheme that is overtly obvious as fraudulent or improper would fail to deceive and, consequently, could not achieve its illicit objective.

[492] Third, the Claimant points out that the Defendants concede that not all components of the Scheme conform to recognised market practices. They acknowledge deviations in at least two elements of the scheme and recognise the absence of a singular standardised industry practice, highlighting the bespoke nature of such arrangements. These factual disputes can only be appropriately resolved at trial, reinforcing the preliminary nature of the Jurisdictional Challenge.

[493] Fourth, to sustain their analogy, the Defendants would have to concede pivotal aspects of the Claimant's case — most notably, that the BVI Defendants were subject to control by Binbank's management. The Defendants expressly repudiate this concession. Such contradictory positions undermine the validity of their analogy, as consistency demands either acceptance or rejection.

[494] Fifth, the Defendants rely upon assertions extraneous to the pleaded cases of both them and the Claimant, including the proposition that Binbank was an emergent bank seeking financing and that the trades' purpose or effect was to finance Binbank's operations. These contentions lack foundation at this interlocutory stage and fall beyond the scope of the existing pleadings.

[495] Accordingly, the Claimant has sufficiently demonstrated the existence of a serious issue to be tried, rendering the jurisdictional challenge premature and unsustainable at this juncture.

[496] In short, the Claimant makes it clear that, while it ought to have disclosed relevant industry guidance, such omission does not amount to a material breach, given the disputed nature of the issue and Cargill's acknowledgement that the merits threshold is satisfied. In addition, the Claimant also emphasises that matters raising "merits points" are appropriately reserved for trial, during which the disputed factual matrix can be fully explored. Indeed, the Defendants concede that market practices are not homogenous but bespoke, which underscores the appropriateness of resolving these issues at trial.

[497] In conclusion, the Claimant accepts its failure to distinctly address both limbs of the jurisdictional test under CPR 7.3 is attributable to an innocent and non-

deliberate procedural oversight, stemming from reliance on the BVI authority, which did not explicitly delineate the bifurcated test. This oversight arose from an error by legal representatives rather than the Claimant itself. However, the Court must consider that the Claimant promptly took remedial steps upon recognising the omission.

[498] I agree with the Claimant that these matters gave rise to no, and certainly no material, breach of the Claimant's duty of full and frank disclosure. Even if they do, they do not warrant the draconian step of discharging the Order.

[499] I reject out of hand the additional point prayed in aid by the Claimant that the Court should take into account that the failures referred to above were those of the Claimant's legal practitioners rather than the Claimant.

[500] The Claimant cannot relinquish its duty to provide full and frank disclosure by attributing blame solely to its legal advisors. The actions and omissions of counsel are imputed to the Claimant as their principal, thereby constituting breaches by the Claimant for which it remains responsible. This point is made in **Gee**, at para. 9-001: [303]

> "Once breach is established it will normally be irrelevant to investigate where culpability lies between the claimant and his legal team or to distinguish between the advocate's own responsibility to the court and the collective responsibility of the claimant and his team. The policy of enforcing scrupulous fairness should not be diluted or undermined by allowing a client to blame his legal team. If there has been material non-disclosure the court should normally not engage in, or permit, an enquiry as to whether this was one person's fault or another. Such an enquiry is inappropriate because it could be expected to concern privileged communications. Investigations in apportioning blame between solicitor and counsel, on the one hand, or between themselves and their client, on the other, would be "almost impossible" to conduct. Such a procedure would place a legal team in a situation of conflict of interest both to have to defend its professional reputation and to defend its client from criticism. Compliance with the duties is a condition of the court proceeding in circumstances where a defendant is not able to defend himself, and the claimant proceeds on the basis that he is responsible for both his own conduct and that of his legal team."

[303] See, by way of example, Hytec Information Systems Ltd v Coventry City Council [1997] 1 W.L.R. 1666 at 1675H.

[501] The submission of the Note by the Claimant is important.

[502] I accept that there was a delay between the making of the Order and the submission of the Note. Mr. McGrath explains part of that reason as being the following:[304]

> " … it's said against us that we could have done all this a lot quicker, and that really is a counsel of perfection, but the answer to it in any event, My Lord, is there's an assumption that we didn't fail to appreciate. That is, the explanation. We failed to appreciate the significance of the principles set out in Erste and Gunn, and it was not until properly considering the impact of [BTA] as Ms. Morris has made clear, that the point was appreciated.
>
> So there is no answer to our explanation to say we should have done it quicker because it ignores the explanation that has been given. In any event, My Lord, the fact that we could have, in their view, acted quicker is no basis to say that the delay in acting is evidence of a deliberate attempt to depart from the duty of full and frank disclosure.
>
> There was a lot more in that Note than just simply [BTA] on its own, as Your Lordship saw at the counter event there, was dealt with in some detail and purportedly so.
>
> We say it's unrealistic, My Lord, to expect a busy BVI practitioner to be reviewing event after the order has been granted without good reason.
>
> … The trigger that you have been told, that in fact apply on the facts of this case is [BTA]. That is supported in the Note and also in Ms. Morris's affidavit evidence."

[503] Mr. McGrath makes it clear that:[305]

> "… the Note … was prepared by NBT's legal team and that was, the decision to prepare was made of its own volition because it was considered that that was the right and proper step to take given the ongoing nature of the full and frank disclosure … We don't accept, My Lord, that the Note was triggered by the Notice of Application by [unclear] on that same Friday… That simply wasn't the case and as somebody whose name is at the bottom of that Note, I am telling Your Lordship that is not the position and I would not have said so nor allowed my skeleton to go in if that was not the case and I pull no punches about that."

[304] Court Transcript, Day 5, p. 82, line 15 to p.84, line 5.
[305] Court Transcript, Day 5, p. 42, lines 8 to 23.

[504] So far as the Defendants suggest that the trigger for the submission of the Note was the so-called Clifton Declarations, Mr. McGrath stated in his oral submissions: [306]

> "It's said against us that, no doubt, Clifton 1 or Clifton 2 should have been the trigger.
>
> Well, My Lord, the answer to that is it wasn't, and we've accepted that there should have been more, a better appreciation even before Clifton 1 and 2 arising from Erste and Gunn itself, but it wasn't, and that's the evidence that's before you. And that evidence we say is unambiguous from an officer of this Court, and Your Lordship has no reason and should not go behind it, and suggesting otherwise amounts to unwarranted speculation."

[505] Mr. McGrath went on to say: [307]

> " … there are two allegations of a serious nature that we see raised as regard updated Note. Neither have been pursued with any vigour already before Your Lordship, but both have a basis in their skeletons that were produced, and so I just want to knock them on the head, if I may.
>
> The first of those is that the Note was produced by way of a response to the liberty [i.e., the 23rd Defendant's] Notice of Application, the suggestion being here that we saw the Notice of Application and produced the Note in response to it in order -- because we could see how the land lay at that point and that we would not, therefore, have produced the Note had the point not been taken by liberty or indeed subsequently by any of the Defendants.
>
> … that isn't the case. The evidence of Ms. Morris in the affidavit is clear and unambiguous, that the trigger for the voluntary decision to comply with the duty of full and frank disclosure came from the appreciation of the significance and impact of [NBT] and not from the liberty application.
>
> That application, in any event, My Lord, was one that was lodged at 4:00 p.m., approximately, on Friday, the 26th of April, 2024 and by 7:25 p.m. that same evening the judge, the Court was being informed that there was a Note, and that they wanted a sealing application, et cetera.
>
> … so we couldn't have produced the Note in that short period, not a 35-page document where everyone is in more than one jurisdiction on such a difficult issue. And, My Lord, the Note itself is dated the 12th of April. So if this argument is to be carried through and not withdrawn formally

[306] Court Transcript, Day 5, p. 84, lines 6 to 16.
[307] Court Transcript, Day 5, p. 84, line 17 to p.89, line 18.

by having been made, then the obvious point is that it must be being suggested that the Note was backdated, and that's not suggested. So, My Lord, then this point falls away.

The Note was dated the 12th and therefore not a response to the liberty application.

The second one is that somehow if that doesn't work that there was a deliberate decision to wait and see if the point be taken, so maybe the Note had already been prepared and there was a wait and see whether or not anybody would pick up the point.

My Lord, that again, Your Lordship has seen that the evidence is that we did it on the basis of the decision that it was the right thing to do, a voluntary decision. There was no holding back to see if the Defendants would take the point, and it would be quite wrong to have done so.

And also there has been some doubts of realism here, My Lord, that the idea that in the light of [BTA], the teams and the heavy-weight teams that are based here for the Defendants would not have picked up on the point and not have addressed the point, and that we would sit there and not respond because we thought they might not pick up on a point is just manifestly absurd.

So we say, My Lord, neither of those two allegations hold any water at all and should not, we say, have been made.

It is also then said, My Lord, and this is part of the oral submissions, that there was, there are two periods, the 23rd of June or the 13th of July to the 4th of March, 4th of March being the directions hearing that we had before Your Lordship, and then the second period being the date of the publication of the [**BTA**] judgment down to the 4th of March. And it's said against me that these are the periods in which we made deliberate non-disclosures because we were aware from Clifton 1 and 2 and the exchange between Mr. Emery and Clifton in the U.S. 1782 Proceedings, that we were aware of that and should have therefore have addressed it at that stage.

Well, My Lord, we accept, as part of the apology, and have accepted in the evidence, that we should have appreciated the point, but that the point wasn't in fact appreciated, and so it is no answer to that to say, well, you did appreciate the point. I mean, the evidence before you, we say, is clear that we didn't, and therefore, or it wasn't appreciated and therefore we say that Your Lordship is left with clear evidence from an officer of the Court as to what was and is not appreciated. And Your Lordship has reason, we say, to go behind that, and certainly not in order to make a finding based on inference and speculation of deliberate non-disclosure.

And as regards the second period, My Lord, the period post [BTA], the answer is the same, that unless and until the full significance of BTA was appreciated, service continued, and it's regrettable, My Lord, and

> we accept that the significance of [BTA] and indeed the principles in Erste and Gunn and Diaz before the English cases was not appreciated sooner, and that even after the publication of BTA, but before its full implications were properly appreciated, it's regrettable that it wasn't properly considered that service should be put to a halt.
>
> But, My Lord, the overall position is that until the view was formed as to the significance of the BTA case, there was not an appreciation of the failure and its significance, and, therefore, there wasn't a pulling of service during this period. But his period, My Lord, February 24th, is the very period in which the team, as you've seen, is considering and preparing the Note of 35 pages, and so, and all the other issues that go with it. And we say, My Lord, that if you were to consider that during this period there was a deliberate decision to depart from their duty, it would be a very odd conclusion, with respect to Your Lordship, because during that period we're considering how best to respond to [BTA] and the consequences of the 35-page Note whilst Your Lordship would be, at the instigation of the Defendants, finding that you're on the same page we were deliberately or somebody was taking a deliberate decision not to comply with the duty.
>
> The two are looking at different, in different directions, My Lord, and we just simply say the obvious conclusion is that until the conclusions were reached as to [BTA] service continued.
>
> But then one would ask, My Lord, well, what is the prejudice in this scenario, and none is actually suggested in terms of material prejudice suffered."

[506] I agree with the substance of what Mr. McGrath says. I cannot see how the Defendants can contend otherwise. They have produced no evidence to support any contrary position. If the Court were to draw any of the inferences of the type that they invite it to do, it would do so on speculation.

[507] I will refer briefly to the written reply submissions filed by the Cargill Defendants on 10 October 2025 in response to Mr. McGrath's oral submissions on the "full and frank disclosure" issue.

[508] I acknowledge the established principle articulated in **Tugushev**, in which it was held that in circumstances involving a serious or deliberate breach of the duty of full and frank disclosure, the *prima facie* position is that any *ex parte* order granting a PTSO order ought to be discharged. However, Carr J made explicit in that case that the question of whether any non-disclosure was innocent constitutes an important — albeit not necessarily determinative — consideration

for the Court's exercise of its discretion. I have already found that the failure to disclose in the present case was neither deliberate in nature nor serious in its consequences, particularly given that no material prejudice was occasioned to the Defendants as a result of the alleged breach.

[509] Accordingly, the presumptive starting point contended for by the Defendants does not properly apply to the circumstances of the present case. Moreover, even if this Court were to accept that such a starting point applied, there are several countervailing factors and mitigating circumstances that strongly militate against the Court adopting the Defendants' proposed course. The Court has set out these factors in detail in the preceding paragraphs of this judgment.

[510] The Defendants resist the application of the *dictum* of Toulson J in **Kazakhstan Kagazy Plc v Arip**,[308] in which he observed that "the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is … that the judge should not lose sight of the wood for the trees."

[511] The Defendants advance three principal arguments in support of their contention that this principle does not apply to the present proceedings.

[512] First, the Defendants submit that the principal — and admittedly material — non-disclosures involved the Claimant's failure to properly appraise the Court of the fundamental legal principles applicable to both jurisdictional gateways upon which it relied in support of its application for the PTSO.

[513] I find this particular ground to be without merit. The assertion is both factually inaccurate and legally misconceived.

[514] There exists no authority in support of the premise advanced by the Defendants, nor is there any other basis to suggest that this alleged breach should inexorably lead the Court to conclude that the Order must be set aside. While it is well-established that neither the expertise nor the experience of the presiding judge obviates or diminishes the applicant's obligation to provide full and frank

[308] [2014] EWCA Civ 381.

disclosure at an *ex parte* hearing of a PTSO application, the Court cannot ignore the relevant context: Wallbank J was both expert and highly experienced in this specialised area of law. It must carry some weight in the Court's assessment that his Lordship would possess a profound appreciation, if not extensive substantive knowledge, of the legal principles governing the various jurisdictional gateways under consideration.

[515] Furthermore, para. 36 *et seq*. of the skeleton argument filed in support of the *ex parte* application set out the applicable legal framework concerning the jurisdictional gateways that Wallbank J was required to consider. While the inclusion of such material in the skeleton argument does not, in itself, obviate the continuing obligation to inform the learned Judge of all applicable legal principles during oral submissions at the *ex parte* hearing, it should be noted — as previously observed — that Wallbank J had reviewed the papers in advance of the *ex parte* hearing and had specifically directed Mr. Emery to address only the discrete question of full and frank disclosure.

[516] It follows, therefore, that the suggestion advanced by the Defendants that the Court was not appraised adequately of the fundamental legal principles relating to the jurisdictional gateways is factually incorrect and cannot be sustained.

[517] In this context, it is important to examine the actual exchanges that transpired between Wallbank J and Mr. Emery during the *ex parte* hearing.

[518] Wallbank J directed Mr. Emery in the following terms: "if there are some matters to bring to my attention by way of full and frank disclosure, which you think I really need to take into account, then just address the Court on those."[309]

[519] Mr. Emery appears to have reasonably understood that indication to mean that he was required to address only those matters by way of full and frank disclosure that had not already been comprehensively addressed in his skeleton argument. It is pertinent to note Mr. Emery's response: "Notwithstanding that, My Lord, and

[309] Court Transcript of the ex parte hearing, p. 4, lines 16 to 20.

appreciating the indication of brevity with this Application … I have discussed …"[310]

[520] Mr. Emery may perhaps be forgiven for forming the view that the only matters requiring oral disclosure were those not already expressly addressed in the skeleton argument. There exists an understandable apprehension on the part of any advocate that, when a judge provides such an indication, persisting to state matters already included in written submissions — which the judge has indicated he has read — might be perceived as trying the Court's patience or appearing to question the judge's competence to comprehend the written materials.

[521] I would expect a judge of Wallbank J's distinguished reputation and exemplary conscientiousness to have thoroughly reviewed all written materials before the ex parte hearing. Whether or not this interpretation accurately reflects Mr. Emery's subjective understanding at the time, he ought nonetheless to have persisted in providing a comprehensive, full and frank disclosure of all material matters, including those already set out in the skeleton argument. Alternatively, he should have sought express confirmation from Wallbank J that it was unnecessary to rehearse orally those matters already addressed in the written submissions. Had such confirmation been provided by Wallbank J, many — if not most — of the points now relied upon by the Defendants would be rendered moot.

[522] I wish to make clear that I am not making excuses for Mr. Emery's conduct. Undoubtedly, he should have made a proper and comprehensive disclosure of both the material facts and the applicable legal principles to Wallbank J. However, the suggestion advanced by the Defendants — that this failure was somehow deliberate or intentional in nature — is not a characterisation that I accept, having undertaken a careful and thorough consideration of all the papers and evidence placed before me.

[523] Regardless of Mr. Emery's subjective understanding or interpretation of Wallbank J's directions, the plain and incontrovertible fact is that, while the

[310] Court Transcript of the ex parte hearing, p. 6, lines 4 to 8.

above matters were disclosable and required disclosure, the failure is not nearly as egregious or reprehensible as Mr. Weekes would have me accept. What is abundantly clear to me is that this breach should not attract the draconian sanction of the Order being set aside in its entirety, as the Defendants contend.

[524] Second, the Defendants submit that the Claimant was expressly "informed" by the Cargill Defendants of the applicable legal principles and, in any event, was "put on notice" by the Cargill Defendants as to the relevant principles of law through the declarations of Mr. Clifton (referred to as "Clifton 1" and "Clifton 2" respectively in these proceedings).

[525] I have already indicated that I accept the second aspect of this submission: namely, that once the Clifton Declarations were served and came to the attention of the Claimant, there arose an obligation upon the Claimant to incorporate the relevant legal principles — particularly those articulated in **Erste** and **Gunn** — into its subsequent disclosure obligations to the Court.

[526] A recurrent theme in the Cargill Defendants' case on the Disclosure Issue is the contention that, because they have now identified what they characterise as the material issues in this case, Mr. Emery should likewise have identified them at the material time, i.e., at the hearing of the ex parte application on 11th May 2023.

[527] This assertion fails to account of the materially different circumstances in which the respective parties found themselves. The Defendants have enjoyed the considerable advantage of time and the comfort of their legal practitioners' offices and counsel's chambers to carefully analyse, research, and formulate their arguments. Mr. Emery, by contrast, did not have the luxury of such favourable circumstances when preparing the documentation for the *ex parte* hearing.

[528] It is all too facile and superficial to criticise a legal practitioner for alleged shortcomings without properly appreciating or giving due weight to the pressurised and time-constrained circumstances under which he was required

to prepare the papers in support of the *ex parte* application and present his case to the Court at short notice.

[529] The critical and dispositive point in this regard is that, with the benefit of hindsight and mature reflection, Mr. Emery has candidly accepted and acknowledged that he fell significantly short of the exacting standards that a court reasonably expects a legal practitioner to demonstrate when making an *ex parte* application.

[530] However, unlike other reported cases where there have been even more serious and material failures to comply with a legal practitioner's duty of full and frank disclosure — and where practitioners have offered no or only perfunctory or qualified apologies — Mr. Emery not only unreservedly apologised for his shortcomings but also took the proactive step of submitting the Note, thereby rectifying those failures, albeit later than would have been optimal or ideal.

[531] I am not persuaded that it is appropriate to adopt the rather more condescending characterisation by the Cargill Defendants that the Claimant was "told" by the Defendants what the applicable law was. I do not consider it to be within the proper province or function of one party to adversarial proceedings to "tell" or "instruct" another party as to the content of the law.

[532] In any event, I have addressed comprehensively above the Claimant's failure to bring certain relevant matters to the attention of the Court and have concluded that, while this undoubtedly constituted a breach of the duty of full and frank disclosure, the significant mitigating circumstances and contextual factors relied upon by the Claimant render it inappropriate for me to adopt the course of action that the Defendants invite me to take.

[533] Setting aside the point I have made about the inherent limitations and potential unfairness of applying an overly-critical retrospective analysis, I make this further observation. When I initially heard the Defendants' oral submissions on this issue, it appeared *prima facie* that there was considerable substance and merit in their arguments.

[534] However, having subsequently reflected upon and carefully analysed those submissions —together with the totality of the written evidence — in the

considered quietude of my chambers, in line with the approach commended by the House of Lords in **The Spiliada**, I find that there is substantially less merit to support the Defendants' contentions than initially appeared to me.

[535] In the final analysis and in my judgment, the non-disclosure ground advanced by the Defendants amounts to little more than an opportunistic attempt to bolster their case, motivated by the paucity of other substantive grounds that genuinely support their contention that the Jurisdictional Challenge should be allowed.

[536] The third point that Mr. Weekes made is that the Claimant "must have understood those principles, since Mr. Emery must have read and understood both declarations and the **Erste** decision to which they referred: he gave expert evidence in response to both declarations (in Mr. Emery's first and second declarations, "Emery 1" and "Emery 2") and, in the latter, gave his own expert evidence about that decision."

[537] This point appears to me to be directed towards the allegation on the part of the Defendants that the breach of the duty of full and frank disclosure on the part of the Claimant was "non-innocent". For the reasons already indicated, I disagree with this.

[538] Mr. Weekes' next point is that the attempt to distinguish between freezing orders and search orders on the one hand, and applications to serve out of the jurisdiction, on the other "by focussing on the factual differences between the orders" is wrong. He says that all such applications share key features: they are made *ex parte*, have coercive effects, and can cause serious prejudice to the defendant.

[539] Mr. McGrath did not, at any time, suggest that the duty of full and frank disclosure was different in the two situations highlighted by the Defendants. What he said was: [311]

> " … we accept that the duty of full and frank disclosure is an important duty in all *ex parte* applications whatever their nature … the distinction, so I make it clear from the outset, we say, lies not in the existence of the duty but the response by way of sanction to a breach of duty, given the

[311] Court Transcript, Day 5, p. 6, lines 12 to 22.

nature of the different relief that would have been obtained as a result of the ex parte application."

[540] I agree with Mr. McGrath. The duty of full and frank disclosure applies to an application for a PTSO in the same way as it does to an application for a freezing order. That is made clear by Carr J's observations above.[312] However, the effect of a breach is separate between the two types of order and for good reason.

[541] Mr. McGrath is correct when he says that the interference in the right of an individual (or company) by the grant of a freezing order is substantially more extensive than an order for PTSO. It does not require any ingenuity on the part of a person to come to that conclusion.

[542] As Mr. McGrath said in his oral submissions:[313]

> "I start with the proposition that it is a central duty to recall ex parte applications. However, the case law tells us that we have to be realistic about compliance with that duty. And that, it is said … and recognised that the solicitor or attorney that is presenting the ex parte application is an inadequate replacement for the party that's not there, plainly must do their best because nevertheless recognising the case law that they are an inadequate replacement and that they cannot expect and that the Court cannot expect or any other side cannot expect they would present the case as well and as forcefully as the absent defendant might well have done so.
>
> And …just to make good that point, is the well-known case **Columbia Pictures**.[314] And there, Mr. Justice Scott [as then was], he knows a thing or two about this area, says,
>
> > 'It's to borne in mind that the solicitor when taking his decision as to what is relevant to be included in the affidavits in support of the Anton Piller application, will be likely already to have satisfied himself, as his clients will have been satisfied, that the respondent is a rogue against whom an Anton Piller order ought to be granted. The solicitor does not and cannot be expected to present the available evidence from the Respondent's point of view.'
>
> … that statement from an eminent chancery judge is not seeking to undermine the duty, but is recognising that when one has already formed a conclusion that on the merits the order, whatever it be, and there it is

[312] Tugushev v Orlov [2019] EWHC 2031 (Comm), at [7(x)].
[313] Court Transcript, Day 5, p. 123, line 6 to p.7, line 25.
[314] I.e., Columbia Pictures v Robinson [1987] Ch. 38.

> one of those nuclear weapons of the Anton Piller or search order in modern parlance and having formed that view, plainly the submissions are going to flow from a perspective that the relief is one that the client is entitled to on that perspective of the evidence. That doesn't mean that the duty doesn't exist. It's simply being realistic as to what can be expected of a solicitor or advocate when presenting the material. And it's unrealistic, we say, to expect the Claimant, therefore, to present and identify every possible point which may arise, let alone to subject each such point to a detailed analysis."

[543] Before I deal with the rest of Mr. McGrath's submissions on this point, it is essential to note that, even in the context of a freezing injunction, this — what Mr. McGrath referred to as a counsel of perfection — has not been lost on judges who regularly deal with the making of freezing orders. This was made clear not just by Carr J in **Tugushev v Orlov**, but also by Ralph Gibson LJ in **Brink's Mat Ltd v Elcombe**,[315] considered above.

[544] **Gee** also makes this clear at paras. 9-020 to 9-023 in the context of freezing injunctions and Anton Piller orders.

[545] At para. 9-020, **Gee** says:

> "In practice the courts have adopted an approach which enables all relevant factors to be taken into account while maintaining, as a matter of policy, a sufficiently penal approach[133] that would-be applicants for ex parte relief are deterred from making less than full and frank disclosure to the court of all relevant matters.[134] The purpose of the penal aspect is to uphold the integrity of the judicial process on without-notice applications.[135]
>
> [133] *Brink's Mat Ltd v Elcombe* [1988] 1W.L.R. 1350 at 1359, per Slade LJ.
>
> [134] *Brink's Mat Ltd v Elcombe* [1988] 1W.L.R. 1350 at 1358, per Balcombe LJ and 1359, per Slade LJ; and *Behbehani v Salem* [1989] 1W.L.R. 723 at 726–729, per Woolf LJ
>
> [135] *Kuwait Oil Tanker Co SAK v Al Bader (No.1)* [1995] Lexis Citation 3976.

[546] Then, at para. 9-021 (with footnotes):

[315] [1988] 1 W.L.R. 1350 at 1356–1357.

"Whether or not the relevant non-disclosure was 'innocent', in the sense that there was no intention to omit or withhold or misrepresent information which was thought to be material,[149] is an important factor to be taken into account by the court.[150] The court should assess the degree and extent of culpability. The more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it, however prejudicial the consequences.[151] Where the non-disclosure was 'innocent' in this sense, the court will take into account the degree of culpability of the applicant and his advisers.[152] In complex cases the borderline between what is material and what is not may not be clear when preparing the application.[153] Culpability is not a matter to be assessed with hindsight. It will be relevant to take into account whether the non-disclosure was of matters which were important or only of peripheral importance on the application. If there has been a sustained attempt to give proper disclosure and criticisms are made with the benefit of hindsight in respect of non-disclosure of information which is not of critical importance, this will be a factor in favour of maintaining the relief.

[149] *Behbehani v Salem* [1989] 1 W.L.R. 723 at 728; and *Bokhari v Shah* [2019] 8 WLUK 165 … and declining to set aside a freezing injunction when an innocent mistake had been made about whether a sum had been withdrawn leading to an overstatement of the claim, when this had been promptly communicated to the court and rectified.

[150] *Franses v Al Assad* [2007] B.P.I.R. 1233, at [105]–[106] (where an award of indemnity costs was made to the defendant, set off against the judgment debt, and the injunction was continued in more limited terms); *U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2014] EWHC 3250 (Comm), at [95]–[96]; *Ali and Fahd Shobokshi v Moneim* [1989] 1 W.L.R. 710 at 719–720; *Brink's Mat Ltd v Elcombe* [1989] 1W.L.R. 1350, at 1358 and 1360; and *Behbehani v Salem* [1989] 1W.L.R. 723 at 728.

[151] *Millhouse UK Ltd v Sibir Energy Plc* [2010] B.C.C. 475; and *Anglo Financial S.A. v Goldberg [*2014] EWHC 3192 (Ch), at [92]–[93].

[152] *Millhouse UK Ltd v Sibir Energy* [2008] EWHC 2614 (Ch), at [106]; *Behbehani v Salem* [1989] 1W.L.R. 723 at 729; *Dubai Bank v Galadari* [1990] 1 Lloyd's Rep. 120 at 126; and *Hytec Ltd v Coventry City Council* [1997] 1W.L.R. 1666 at 1675C.

[153] *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm), at [64].

[547] And, at para. 9-022 (with footnotes):

> "It is important to the due administration of justice, both in the case before the court and for future cases, to uphold the need for compliance with the rules on disclosure, and in this, the court is exercising a discretion where penal consequences encourage compliance with the rules. For this reason, it has been said that the jurisdiction to renew or re-grant the order should be exercised 'sparingly'[157]
>
> If there has been non-disclosure which was material and otherwise than 'innocent', then it would only be in exceptional circumstances that the court would decline to discharge the order[158] …"
>
> [157] *Arena Corp Ltd* **v** *Schroeder* [2003] EWHC 1089 (Ch) 1089, at [180(6)], [213], proposition (3); *Dar Al Arkan Real Estate Development Co v Al Refai* [2012] EWHC 3539 (Comm), at [148]; *Brink's Mat Ltd v Elcombe* [1988] 1 W.L.R. 1350 at 1358, per Balcombe LJ, followed in [2002] J.L.R *Goldtron Ltd v Most Investment Ltd.* 424, at [21]–[24] (injunction discharged and then re-granted when there had been innocent non-disclosure of possible grounds for challenging the foreign arbitration award which the plaintiff was seeking to enforce); and *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (t/a Sin Kwang Wah***)** [2000] 2 S.L.R. 750, at [38] (where an application for a second interlocutory injunction was refused where there had been culpable non-disclosure and the plaintiff had not diligently pursued the case to trial).
>
> [158] *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M***)** [2008] EWHC 1615 (Comm); [2008] 2 Lloyd's Rep 602, at [62]; *Arab Business Consortium International v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep. 485 at 490 (upheld on appeal at [1997] 1 Lloyd's Rep. 531); and *St Merryn Meat Ltd v Hawkins* [2001] C.P. Rep. 116, at [106]–[108]."

[548] This passage from **Gee** supports the broad proposition advanced by the Defendants: that if there has been non-disclosure that was material and otherwise than 'innocent', the court will not usually allow the *ex parte* order to stand unless there are exceptional circumstances warranting its continuation (or discharge and re-grant). However, that position is no more than the starting point in the approach that the court must take.

[549] However, **Gee** then continues in the same paragraph:

> "The court should take into account if a refusal to continue or renew may work a real injustice,[160] including to innocent persons,[161] and in claims of alleged fraud by the defendant it may be positively unjust to discharge the injunction on this ground. Where there is a clear prima

facie case of a substantial fraud, innocent albeit careless non-disclosure may not result in the discharge of the ex parte relief. Whilst a penal jurisdiction is necessary in order to deter non-disclosure, when there is non-deliberate material non-disclosure which is not of central importance in a serious fraud case, courts have, in the exercise of their discretion, often been willing to continue the relief on the ground that the need to do substantive justice outweighs that consideration.[162] In such cases, once the first instance judge has exercised his discretion, the Court of Appeal will only interfere with it when it was not legitimately open to the judge to take that view.[163] There are still occasions on which the breach of the disclosure duty is so serious that the court will refuse freezing relief to the claimant even though this may result in an alleged fraudster against whom a prima facie case has been made out, not being held to account.[164]

In exercising the discretion, the overriding question for the court is what is in the interests of justice.[165] This includes the need for a penal jurisdiction to deter non-disclosure and encourage disclosure of material circumstances, culpability of the applicant for the non-disclosure, the degree of materiality and taking into account the consequences of discharging the injunction, including the risks of injustice to the applicant were the order to be discharged. When the failure is substantial and important to the case advanced, the starting point for the exercise of the discretion is likely to be discharge of the order. Where facts are material there are degrees of relevance and it is important to preserve a due sense of proportion.[166] A matter not disclosed should be looked at in the context of the whole of the evidence before the court to assess how relevant it was to the judge on the ex parte application, and whether it is proportionate to discharge the order. A failure of disclosure may be marked in some other way, for example, by a suitable order as to costs.[167]

[160] *Alternative Investment Solutions (General) Ltd v Valle De Uco Resort & Spa SA, Jonathan Crossick, Alise Crossick* [2013] EWHC 333 (QB), at [50].

[161] *Amedeo Hotels Ltd Partnership, v Faith Zaman* [2007] EWHC 295 (Comm), at [65] (the people of Brunei).

[162] *Marc Rich & Co Holding GmbH v Krasner* [1999] EWCA Civ 581; *Kuwait Oil Tanker Co SAK v Al Bader (No.1)* 1995] Lexis Citation 3976; *Fitzgerald v Williams* [1996] Q.B. 657 at 667–669 reversing the first instance judge; and *Thai-Lao Lignite (Thailand) Co Ltd v Lao People's Democratic Republic* [2013] 2 All E.R. (Comm) 883, at [38].

[163] *Dubai Bank v Galadari* [1990] 1 Lloyd's Rep. 120; *Kuwait Oil Tanker Co SAK v Al Bader (No.1)* [1995] Lexis Citation 3976.

[164] *The Arena Corp Ltd v Schroeder* [2003] EWHC 1089 (Ch), at [233]–[234].

[165] *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm), at [18](c)]; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] 2 Lloyd's Rep 602, at [63]; *U&M Mining Zambia Ltd v Konkola CopperMines Plc* [2014] EWHC 3250 (Comm), at [94], last sentence (post award, Mareva relief was not discharged notwithstanding "innocent" non-disclosures which were serious and numerous. An award of indemnity costs was made against the party responsible for these).

[166] *Kazakhstan Kagazy Plc v Arip* [2014] 1 CLC 451 at [36]; and *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm), at [20].

[167] *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm), at [18]; and *Blockchain Optimization SA v LFE Market Ltd* [2020] EWHC 2027 (Comm), at [31].

[550] These passages from **Gee**, with supporting case authorities, demonstrate three crucial points.

[551] First, the Court will not usually allow an order for PTSO to stand unless the breach complained of is "innocent". That is because the Court's jurisdiction to grant a freezing order and, by analogy, an order for PTSO, is penal or quasi-penal in nature, and the Court must deter non-disclosure and encourage proper disclosure of material circumstances, i.e., *pour encourager les autres.*

[552] However, second, the exercise of jurisdiction to discharge the order involves a discretion. In deciding how to exercise its discretion, the Court will take into account all the circumstances of a case. The overriding consideration for the Court is what is in the interests of justice. In deciding that question, the Court will consider the following non-exhaustive circumstances: (a) the culpability of the applicant for the non-disclosure; (b) the degree of materiality; (c) any prejudice to the respondent if the court allows the order to stand; (d) whether the applicant has taken steps to bring the breaches to the attention of the court and, if so, how quickly; and (e) the consequences of discharging the injunction

(or the order for PTSO) to the applicant, including the risks of injustice were the order to be discharged.

[553] Third, in exercising its discretion, the Court will take a holistic approach to the facts of the case. As **Gee** states, where the disclosure is material, there are degrees of relevance, and it is essential to preserve a due sense of proportion. A matter not disclosed should be looked at in the context of the whole of the evidence before the court to assess how relevant it was to the judge on the *ex parte* application, and whether it is proportionate to discharge the order.

[554] Mr. Weekes states that in the case of a service out order which has been wrongly granted, the consequence is that the defendant is brought "to the jurisdiction when they ought not to have been". However, as Mr. McGrath points out, the traditional characterisation of the service out jurisdiction as the exercise of an exorbitant jurisdiction is no longer realistic. The perception that service of proceedings abroad on a defendant is an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served no longer holds. It is a reality of modern commercial life that in international commercial disputes involving parties in different jurisdictions, the courts will have to decide where the disputes should be determined. In modern-day commercial times, the decision whether to grant an order for PTSO must now be seen as a pragmatic and practical way to determine where a dispute involving foreign parties should be determined, rather than as an interference with the right of a foreign defendant to be brought to litigate in a jurisdiction they ought not to have been.

[555] In any event, a freezing order is substantially more intrusive than a PTSO order. This is clear from the obvious fact that a freezing order will almost invariably require the applicant to give a cross-undertaking in damages before it is made. In contrast, an order for PTSO does not require such an undertaking. This difference recognises that a freezing order that is wrongly made may cause the respondent irreparable or substantial damage, for which he would need to be compensated. The main consequence of an order for PTSO that has been wrongly made is largely the incurring of costs by the respondent, which he may not be able to recover from the applicant if the applicant does not have the

means to pay those costs. This situation does not apply (or applies with less force) in the present case. That is because the Defendants have the benefit of security for costs orders made by this Court for substantial amounts in relation to the Jurisdictional Challenge, which would be liable to be paid towards their costs if the Order were set aside.

[556] It is frankly absurd to suggest that the consequences of the two types of order are the same. They are not. As Mr. McGrath pointedly observed: [316]

> "…[T]he duty applies on both. The duty is the same in both, but the issue is to proper response is, we say, different because the very nature of the advantage and the prejudice that can be caused by one of the nuclear weapons, whether it be the freezing order or the search order is in a completely different category to the consequence that flows from a search, from a service out order.
>
> …
>
> And in the meantime, the normal operation, put aside the reputational issues, the financial implications from third parties looking in and assessing the Respondent to the order, put aside all of that, the normal operation of the freezing order has immediately stymied the freedom of the Respondent to deal with their own assets. So suddenly now the Claimant solicitor is exercising control via the order over the everyday conduct and spending of the Respondent. They are the ones that are determining level of expenditure. That's why it's such a draconian order. The Respondent has to go cap in hand, explaining to the Claimant what their weekly or monthly expenditure is. …
>
> And similar difficulties arise, My Lord, on the other nuclear weapon that one can obtain in search order, but the principal one I would just emphasize is that it is an oddity because although it isn't the equivalent of a search warrant, should you refuse to allow the holder of that search order into your property, then you are subject to contempt of court. And, My Lord, it's a tremendous intrusion and invasion of privacy to have the instructing solicitors and a team of the Claimants rifle through your drawers, uncover some files, and carry out the search order. That will not be taken away even if the search order is subsequently discharged. That can be quite a dramatic and harrowing experience, let alone an invasion of privacy.
>
> …

[316] Court Transcript, Day 5, p. 28, line 11 to p. 33, line 9.

> And then, My Lord, the consequence of a service order is simply in a completely different league to those consequences I seek to outline with the injunctive relief because if there's going to be a challenge to draw distinction, there's going to be a challenge and all of these Defendants have run challenges that are not based upon full and frank disclosure. So all of these Defendants would have had to come before Your Lordship in any event to answer the jurisdictional issue and to make their jurisdictional challenge, so although Your Lordship might have heard expression about dragging us to a foreign court, et cetera, well, the full and frank disclosure is not dragging any of these here. No one has based their case simply and solely on full and frank disclosure. That's very much at the bottom of the list, the last issue on the list. They all run arguments on the merits as to jurisdictional challenge and, therefore, My Lord, they would all be here any way.
>
> And even if, which isn't the case, one was dealing with full and frank as the only issue, what, that consequence, the need to deal with that issue pales, compared to the consequences of one of the two nuclear weapons and injunctive relief. There is no lasting stigma or reputational impact of a service out jurisdiction application having gone wrong. The consequence is, at its highest, that a hearing has to take place where it is challenged and if they succeed on their challenge, whether on merits or otherwise, and the service order is set aside, then the Court award the costs of the exercise and it may be that in a divvying up of the issues, more or less of costs are ordered to one side or another.
>
> So we do say that the attempt to equate the consequences of a Service Out Application having gone wrong for whatever reason with that which occurs in the context of the other forms of ex parte relief is a wrong comparison and a dose of realism and perspective is necessary to see the distinction between the two."

[557] Support for what Mr. McGrath says comes from the observations of Carr J in **Tugushev v Orlov**, in which she said: [317]

> "… it is one thing to be deprived of draconian relief in the form of a freezing order for non-disclosure. It is another to be deprived of the ability to pursue a claim in a chosen (and otherwise appropriate) jurisdiction at all. Appropriate sanction and deterrent can be found in an order that Mr. Tugushev should pay the costs of the application to serve out of the jurisdiction in so far as it related to the AA conspiracy claim."

[317] [2019] EWHC 2031 (Comm), at [47].

[558] It is also appropriate to mention that the ECHR applies in the BVI by virtue of the fact that the United Kingdom, which is responsible for the international relations of the BVI, has accepted the competence of the European Court of Human Rights in the territory of the BVI. This is recorded in and evidenced by a document entitled "Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)", which refers to a letter from the Permanent Representative of the United Kingdom dated 19th November 2010, stating that the BVI, among other territories, is subject to the ECHR.

[559] The making of a freezing order engages several of a person's Convention rights, most notably articles 6 and 8, in a way that is not engaged by the making of an order for PTSO. The package of measures accompanying the making of a freezing order, such as a cross-undertaking in damages and the requirement of full and frank disclosure, reflects this. That package of measures is designed to ensure that any interference with those rights is no more than is necessary and proportionate. Courts rightly treat an infringement of those rights in the case of a freezing order (involving the matters referred to above) as extremely serious and will more readily be willing to set aside an interference with that right than in the case of a PTSO where there has been a material non-disclosure.

[560] The Cargill Defendants say that the Order "has caused very considerable prejudice to the Cargill Defendants [as] [t]hey essentially have nothing to do with the BVI [and] have nevertheless been forced to this jurisdiction as defendants to a claim in purported fraud, for more than US$2 billion." This largely repeats what they said in para. 156(c) of their skeleton argument for the Hearing.

[561] I disagree.

[562] It is difficult to see what conceivable prejudice the Cargill Defendants have suffered over and above the inherent prejudice that any party suffers as a result of a claim being made against that party, which is later found to be incorrectly brought or is unsuccessful. This type of "general prejudice" will rarely be taken into account by a court in deciding whether a party should be deprived of the relief he seeks unless it is accompanied by some sort of "specific prejudice" or

unless the circumstances associated with the general prejudice are so extreme that to grant the relief sought by the applicant would, *inter alia*: (a) infringe the right of the respondent to obtain a fair trial or any of his other convention rights; (b) amount to an abuse of the process of the court or (c) otherwise bring the administration of justice into disrepute among right-thinking people.[318] The prejudice that the Cargill Defendants claim to have suffered is no way near sufficient to constitute the type of prejudice that the Court can properly take into account.

[563] I do not find any support for the reasoning set out in paras. 6 to 9 of the Reply Skeleton Argument about whether the non-disclosure matters would have made any difference to the outcome of the application.

[564] I cannot say whether Wallbank J would have made the Order if he had known of the matters which the Defendants say should have been disclosed to him. I consider that it is appropriate to infer that he would have made the Order anyway because, after the Note was submitted to him, he did not discharge the Order or invite the Claimant to make representations about the non-disclosed matters.

[565] He plainly received the Note because it was sent to his judicial assistant. He did not think it appropriate to either discharge or vary the order. I can say unequivocally that if I had made the Order, I would not have discharged or varied it, and have decided by this Judgment, not to discharge or vary it now. I might have asked the Claimant to explain why the disclosures were not made, and if the explanation now proffered to the Court had been given to me at the time, I would have allowed the Order to stand.

[566] The authorities cited by the Cargill Defendants in the above paragraphs of the Reply Skeleton Argument provide no support for what they say.

[567] A shorter, more succinct summary of the authorities that Mr. Weekes cites is captured in the following passage at para. 9-021 of **Gee** (including footnotes):

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[318] Such as in a case of grossly inordinate delay: see, for example, Icebird Ltd v Winegardner [2009] UKPC 24.

"If the non-disclosure is such that the court, on reviewing the matter inter partes, is of the opinion that the ex parte relief was inappropriate and should not have been granted, then the court will discharge the order.[144] But the 'acid test' for whether or not the order will be discharged is not whether or not the original judge who granted, the order ex parte would have been likely to have arrived at a different decision if the material matters had been before him.[145] It has been said that in considering whether to discharge for non-disclosure, the answer to the question is not 'a matter of great significance unless the facts which were not disclosed would have resulted in a refusal of the order'."[146]

[144] *Ali and Fahd Shobokshi Group v Moneim* [1989] 1 W.L.R. 710.

[145] *Behbehani v Salem* [1989] 1 W.L.R. 723 at 729, per Woolf LJ; *Sal Oppenheim JR & Cie KGaa v Rotherwood (UK) Ltd,* Court of Appeal (Civil Division) Transcript No.386 of 1996 (19 April 1996). See also *Boyce v Gill* (1891) 64 L.T. 824 at 825: 'what the court would have done if all the facts had been known, I cannot say'.

[146] Cited with approval in *Purbrick v Cruz* [2020] EWHC 1465 (QB), at [58]; and *Behbehani v Salem* [1989] 1W.L.R. 723, at [729].

[568] In the present case, I have reached the clear conclusion that:

(a) even if the matters complained of had been disclosed to Wallbank J, he is likely to have made the same order as the Order. This is reflected in the fact that, when the Note was submitted to him, he took no action in relation to it. He allowed the Order to continue without seeking any explanation from the Claimant about the lack of proper disclosure;

(b) if I had dealt with the *ex parte* application for the PTSO, I would have made the same order as the Order, even if all the areas of non-disclosure had been fully disclosed at the time of the *ex parte* hearing;

(c) if I had made the Order, as Wallbank J did, without the disclosures complained of by the Defendants being made by the Claimant, I, like Wallbank J, would not have varied or discharged the Order once I found out about the non-disclosure

if I had the thorough explanation provided by the contents of the Note submitted to the Court; and

(d) further, and in any event, I have decided by this Judgment that the basis for setting aside the Order, based on non-disclosure, is simply not made out, and that, in the circumstances, I must not discharge or vary the Order now.

[569] In paras. 10 to 14 of the Reply Skeleton Argument, the Cargill Defendants set out why the Note does not amount to any mitigation of the Claimant's failure to provide full and frank disclosure, still less exculpate the Claimant from that failure or from the consequences of that failure.

[570] I disagree with the Cargill Defendants for the reasons already indicated.

[571] It is appropriate to refer to what Mr. Weekes says in para. 13 of his skeleton argument:

> 13. … the Note did not bring NBT's breaches of its duty to an end anyway. This is because (i) there is no evidence that the Court was made aware of this breach of duty; and (ii) NBT did not ensure it was so aware. In this regard:
>
> a. NBT has said it simply received no response from the Court to its Note. NBT ought therefore not to have reached any conclusion that the Court was aware of NBT's breach, still less that the Court had concluded the Service Out Order should be set aside. The obvious inference to draw from an absence of a response would be that the Court had not read the Note and not made any decision in relation to it.
>
> b. NBT could have ensured that (i) its breach was drawn to the Court's attention; and (ii) the Court considered whether the Service Out Order should be set aside or revoked. NBT ought to:
>
> i. Have said in its email to the Court that it had breached its duty of full and frank disclosure in making its ex parte application for the Service Out Order and wished the Court to consider whether,

in light of that breach of duty, that order should be set aside. Instead, Mr. Emery attached to his email (of 29 April 2024 (at 8.21)) to Ms Alexander the 35 page Note and an 11 page affidavit and then said:

> 'Further to my below email, please find attached the Note to update the court, in line with the Claimant's ongoing duty of full and frank disclosure, which persists while the proceedings remain on an ex-parte basis and which was referred to in my previous email, which had attached an application to seal the file in relation to a confidential annex to this note and affidavits thereto. Please also find attached an affidavit in support of the Note (which is referred to in the Note and accompanying documents as "Morris 1" and please also find attached an exhibit to the affidavit ("MFM 1").

ii. Have copied at least those Defendants which NBT had served to its email: this would include the Cargill Ds and Mr. Shishkhanov.

iii. Have asked the Court to re-list its application for the Service Out Order or request a short appointment: by simply filling out and filing the relevant form.

iv. At the very least, followed up with the Court when it received no response to the email - and sought (and obtained) confirmation that the learned Judge had read and considered the Note and had decided that the Service Out Order should not be set aside. This is common sense. There is no good reason to suppose that a busy Judge would have been able to read a lengthy Note, let alone when (i) NBT had not suggested the Court was required to make any decision; and (ii) the Note was filed in connection with a sealing application that was apparently not pursued."

[572] Mr. Weekes also said the following in the course of his oral submissions: [319]

> "… the point I should have made and I make now is that also applies to all the Defendants that were served below that third grey line, below the Note to Update the Court by way of continuing full and frank disclosure up and until the directions hearing on the 4th of March 2025.

[319] Court Transcript, Day 3, p. 13, line 25 to p.14, line 24.

> Why, My Lord? Well, because the Note to Update the Court didn't do anything to actually inform the Judge who made the Order that the Order had been improperly obtained. I say that because there is no evidence of which we are aware that Mr. Justice Wallbank saw this Note to Update the Court and took any decision to continue the order and not to revoke it.
>
> I am not aware that any communication from NBT to the Court asking the Court to reconsider the order. I am not aware of any application by NBT to the Court to convene a hearing. I am not aware of any application by NBT asking the Court whether or not there should be a hearing, whether further submissions should be made, whether or not it should continue to enforce the order for service out.
>
> My Lord, this is just a document which has been put on the court file. It doesn't stop the continuing breach of the duty of full and frank disclosure."

[573] Then, referring to the circumstances in which the Note came to be submitted to the Court, Mr. Weekes said this:[320]

> "[quoting from Emery Cooke's email to the Court], 'I refer to the above captioned matter which is before the learned judge, Justice Wallbank, on the 11th of May 2023, wherein Justice Wallbank granted permission for the Claimant to serve proceedings out of the jurisdiction. The Claimant is mindful,' I think it should say 'of its continuing obligation to give full and frank disclosure to the Court and to keep it updated with matters as they progress. To that end, please find attached a Notice of Application for a sealing order and Morris 3 in affidavit in support thereof.'
>
> And then refers to the notice of the application forming the basis of the request to seal the file in relation to certain confidential and sensitive documents, being the confidential (unclear) and Morris 2, each of which is attached.
>
> 'We would be grateful if the application could be considered on the papers in accordance with Practice Note No. 4 of 2016. The confidential and sensitive documents are supplementary to a note to follow which is intended to update the Court by way of our client's ongoing duty of full and frank disclosure which subsists while the proceedings remain on an ex parte basis.'
>
> And then, My Lord, the second message is on the front page … 'Further to my below e-mail, please find attached the note to update the Court in line with the Claimant's ongoing duty of full and frank disclosure which persists while the proceedings remain on an exparte basis and which

[320] Court Transcript, Day 3, p. 53, line 15 to p.56, line 7.

was referred to in my previous e-mail which had attached an application to seal the file in relation to a confidential ... note and affidavits thereto.'

'Please find attached an affidavit in support of the note referred to in a note in the accompanying documents as Morris 1 and an exhibit to 7 the affidavit. I would be grateful, rather if the attached could be passed on to the learned judge.'

So, My Lord, here by these two e-mails, the note and Morris 1 are sent to Ms. Alexander and asked to be passed on to the learned judge. My Lord, we make two points in respect of these e-mails.

Firstly, they do nothing to absolve NBT of the duty, of the breach of the duty of full and frank disclosure as regards my clients, the Cargill Defendants, because the Cargill Defendants were served on the 1st of March. So this is not material to their breach of the duty of full and frank disclosure vis-a-vis my clients. That duty has been breached and it's not been corrected and it therefore does not offer any absolution or mitigation.

As regards the other trader defendants, My Lord, who were served after that date, we would say also it does not involve any proper mitigation or absolution, because what this e-mail does not do, neither e-mail, says the court should reconsider the ex parte order which it has made; that the court should consider whether the order should be revoked; or that the court should convene a hearing to consider any further directions. There's not even an admission in the covering e-mail that there has been a breach of the duty of full and frank disclosure."

[574] This led to the following exchanges between Mr. Weekes and the Court: [321]

"THE COURT: So what happened in response to this e-mail that was sent? Did the court respond?

MR. WEEKES: Well, My Lord, we don't know, because we were not copied to these e-mails. And My Lord will recall when I was on my feet I referred to not having seen any evidence, and that may indeed have prompted those sitting behind me, Emery Cooke, to have sent this e-mail. We don't know. We've not seen, I believe, a sealing order in respect of --

THE COURT: It may be that was just put before the judge and he decided – I assume it must have been Wallbank.

MR. WEEKES: Yes. … My Lord, I've been directed very helpfully by my learned friend, Mr. Matthews, to paragraph 107 of the Appleby skeleton argument.

[321] Court Transcript, Day 3, p. 56, line 8 top. 58, line 13.

…

MR. WEEKES: My Lord, the position is insofar as we are aware, because we have seen no evidence, we have seen no evidence to suggest that the judge did consider the note or certainly did reach any position in relation to whether the order should be continued or not. Plainly, if the judge were to have reached any such decision, one would have expected it to have been communicated not only to Emery Cooke, but also to the parties to the proceedings by that stage, such as my clients having acknowledged service on the 1st of March.

So, My Lord, I'm afraid we simply don't accept that this is sufficient to draw the court's attention properly to what is a serious breach of the duty of full and frank disclosure and to invite the Court to consider whether or not the order should be continued."

[575] I reject those assertions, again for the reasons referred to above.

[576] Having sent the Note to Wallbank J through his judicial assistant, it is difficult to see what else the Claimant could have done to alert the Judge about the Claimant's non-disclosure.

[577] It is shocking for the Cargill Defendants to suggest that "the Note did not bring NBT's breaches of its duty to an end anyway … because (i) there is no evidence that the Court was made aware of this breach of duty; and (ii) NBT did not ensure it was so aware."

[578] The Note was sent by email. I agree that it perhaps should have been copied to at least those Defendants who had purportedly been served with the Order or who knew about it. However, that reason does not, by itself, make it appropriate for this Court to interfere with the Order.

[579] However, to suggest (or invite the Court to draw the inference) that the failure of Wallbank J to respond to the Note must mean that the Court could not have received it, or was not aware of it, is scandalous. The most obvious explanation is also the most likely one — that having received the Note, Wallbank J was satisfied that the Order did not need to be discharged or varied or felt that it

could be dealt with if there was a challenge to it by the Defendants. Any alternative possibility posited by the Cargill Defendants seems to me to be wholly inappropriate, based, as it is, on not a scintilla of credible evidence.

[580] Nor is the Cargill Defendants' suggestion that the Claimant should have said in the email from its legal practitioners accompanying the Note that it had breached its duty of full and frank disclosure in making its *ex parte* application for the PTSO order a valid one.

[581] At para. 13(b)(iv) of his skeleton argument, Mr. Weekes made the following specific point:

> "At the very least, followed up with the Court - when it received no response to the email - and sought (and obtained) confirmation that the learned Judge had read and considered the Note and had decided that the Service Out Order should not be set aside. This is common sense. There is no good reason to suppose that a busy Judge would have been able to read a lengthy Note, let alone when (i) NBT had not suggested the Court was required to make any decision; and (ii) the Note was filed in connection with a sealing application that was apparently not pursued.

[582] The suggestion implicit in that assertion is that, without the covering email informing Wallbank J that the Claimant had been guilty of a breach of its duty of full and frank disclosure as set out in the affidavit, the Claimant's conduct is frankly an insult to his intelligence. It proceeds on the premise that a judge who receives communication from a party will not look at any accompanying document attached to it unless he is informed of what the document says. I entirely reject that premise and the suggestion that "a busy Judge would [likely not] have been able to read a lengthy Note", without being signposted to a summary of the contents of the Note.

[583] The Cargill Defendants' suggestion that the Claimant should have asked the Court to re-list its application for the PTSO application is also without substance. Even if the Cargill Defendants are correct that this would have required no more than seeking a short appointment by simply filling out and filing "the relevant form", I am not sure that course would have been appropriate here. A party usually needs to file an application to bring a matter to the Court and pay a fee.

It is not clear what the Claimant would be seeking in any application — surely not to seek a discharge or variation of the Order that had been made on its application. The Claimant took the correct course: it submitted the Note setting out why the disclosure was inadequate and awaited the Court's response on whether the Judge required an explanation from its legal practitioners about the adequacy of the disclosure. It heard no further from the Court and was entitled to treat that as an indication that no further action was required from them.

[584] I agree with the Cargill Defendants that the Claimant should, as an abundance of caution, have followed up on the absence of a response from the Court with Wallbank J's judicial assistant. However, two points need to be made in this context: the first is that there was no reason for Mr. Emery to think that Wallbank J had not considered the Note; and the other is that by the time the Order was made or a short time thereafter, applications to discharge the Order had been made by at least some of the Defendants so that the matter would have been brought to the attention of one of the judges of this Court anyway.

[585] Most, if not all, of the other matters relied upon by the Cargill Defendants are either not "reply submissions" or have been dealt with by me above. In addition, the type of detail that the Cargill Defendants (and the other Defendants) contend should have been provided at the hearing of the *ex parte* application for PTSO, as already stated above, is unrealistic and wrong. **Gee** makes the position clear in the commentary at para. 9-003:

> "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. Materiality depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing that application. In the case of an application for permission to serve proceedings out of the jurisdiction what is relevant is what the court has to be satisfied of to grant permission and matters which go to whether permission is to be granted. This does not usually require a detailed analysis of the merits of the substantive claim. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case. In particular, it is not correct that

anything going to the merits of the claim will be relevant on the application for permission to serve out of the jurisdiction.[29] [Libyan Investment Authority v JP Morgan Markets Ltd [2019] EWHC 1452 (Comm) at [94]–[98]; Evison Holdings Ltd v International Co Finvision Holdings LLC (aka Finvision Holdings Ltd) [2020] EWHC 239 (Comm) at [28]–[30]] "

[586] Finally, on this issue, I need to revisit **BTA**. That is because the Defendants draw parallels from that case with the present case.

[587] In that case, Wallbank J stated that he would have discharged the order for PTSO even if the gateways relied upon by the claimant had been passed.

[588] Wallbank J stated in his judgment why:

"[216] The Claimant's failure to draw to the Court's attention the principles set out in **Erste** and **Gunn v Diaz**; and to anticipate the Defendants' arguments in this regard were both extremely serious and, for a clearly experienced Counsel team, inexcusable.

[217] Whilst the threshold for a claimant to show that it is reasonable for the Court to try the claim is low, and whilst the number of authorities on the point are few, the authorities are quite prominent when the point is looked into and they should have been brought to the Court's attention.

[218] BTA is correct in submitting that usually this criterion does not present an issue. I can readily say this I the first time I have come across the problem in almost 12 years sitting in this Court. But that makes it all the more important for Counsel to bring such authorities to the Court's attention.

[219] The difficulty for BTA was — so it would appear — that it had no real answer to the objection that it would not be reasonable for the Court to try the claim, including the claim for the declaration, so BTA did not deal with it.

[220] This alone warrants the immediate setting aside of the ex parte Service Out Order and denial of a re-grant.

[221] I would go further and accept that the Court had been misled into believing that the BVI SPVs 'are key to the present claim' and that the Court had not been made aware that there was absence of any evidence to support this representation.

[222] I also accept that BTA had misrepresented that '[t]he full gamut of claims (in BVI law and Kazakh law) are pursued against the BVI SPVs, and would be pursued even if the Foreign Defendants were

not party to the Claim'. That appears not to be so: not least because the more straight-forward claims in contract against the BVI SPVs have not been brought — only those which could be brought against the foreign, non-contractual counterparty, Defendants.

[223] BTA moreover failed to give full and frank disclosure at the Ex Parte Hearing that by the time of the Ex Parte Hearing four of the BVI SPVs had been (or remained) struck off the Register (three on 22nd March 2022); and nine of the BVI SPVs had received (on 23rd September 2021) the Strike Off Warnings.

[224] BTA also failed to bring the circumstances concerning the discharged receivership order to the Court's attention. From the fact that the BVI SPVs had been subject to a lengthy receivership which had eventually been discharged, it can readily be inferred that its utility had been exhausted. This was extremely relevant to a proper understanding of whether it would be reasonable for this Court to try the claim against the BVI SPVs. This was an important omission.

[225] BTA also failed to bring to the Court's attention the authorities in relation to the Company Gateway and arguments the Defendants might raise in respect thereto. Again, for an experienced Counsel team, this was inexcusable.

[226] In my respectful judgment these omissions were not innocent. The Court was presented with a pre-packaged case concept by BTA, and that which did not fit that narrative was omitted. I am persuaded that the omissions must have been deliberate.

[227] Following these failures, BTA's response was to double down on its positions, raising barely comprehensible arguments and frankly far-fetched and opportunistic 'evidence' of invented BVI public policy, and not to forget the inexcusable and crudely misleading summary of the Cyprus law opinion that 'it may take up to 18 months to restore' the Cyprus SPV to the register."

[589] I have already indicated above why the Defendants cannot derive any assistance from fact-specific cases, such as **BTA**.

[590] While accepting, of course, that in **BTA**, Wallbank J would have set aside the order granting PTSO, based on the ground of non-disclosure on its own, it is important to observe that he had also found that none of the gateways relied upon by the claimant in that case had been passed. In exercising his discretion on the failure to disclose point, he might have been more willing to exercise his discretion in favour of the claimant if one or more of the gateways had been passed.

[591] However, even disregarding the above, several matters apply in the present case that distinguish it from **BTA**.

[592] First, Wallbank J found areas of non-disclosure to be "both extremely serious and, for a clearly experienced Counsel team, inexcusable." I have reached no such conclusion in the present case. I accept that the disclosures in question needed to be made by the Claimant's legal practitioners, but my findings do not extend to the failure to disclose being "extremely serious" and "inexcusable" (other than in the manner I have indicated above).

[593] Second, Wallbank J found that BTA had no real answer to the objection that it would not be reasonable for the Court to try the claim. I have made no such finding.

[594] Third, Wallbank J expressly found that the Court had been misled into believing that the BVI SPVs were key to the claim in that case, and that the Court had not been made aware that there was an absence of any evidence to support this representation. Not only have I made no such finding, but the one area of disclosure for which the Claimant cannot be criticised is that they gave a complete account of why the BVI Defendants were being restored to the Register of Companies: see Court Transcript of the *ex parte* hearing, p. 5, line 1 to p.7, line 12.

[595] Fourth, Wallbank J found that BTA had misrepresented that "[t]he full gamut of claims (in BVI law and Kazakh law) are pursued against the BVI SPVs, and would be pursued even if the Foreign Defendants were not party to the Claim." Wallbank J found that "that was not so, not least because the more straightforward claims in contract against the BVI SPVs had not been brought — only those which could be brought against the foreign, non-contractual counterparty, Defendants." I have made no such finding in the present case; rather, the finding I have made is to the contrary effect.

[596] Fifth, Wallbank J found that in **BTA**, the claimant had failed to disclose, by the time of the *ex parte* hearing, that four of the BVI SPVs had been (or remained) struck off the Register and nine of the BVI SPVs had received (on 23rd

September 2021) strike off warnings. That is not the case here. All the BVI Defendants had either been restored or were in the process of being restored when the *ex parte* application was made.

[597] Sixth, in **BTA**, the claimant also failed to bring the circumstances concerning the discharged receivership order to the Court's attention. From the fact that the BVI SPVs had been subject to a lengthy receivership, which had eventually been discharged, it can readily be inferred that their utility had been exhausted. This was highly relevant to a proper understanding of whether it would be reasonable for this Court to try the claim against the BVI SPVs. Wallbank J rightly regarded that as a significant omission. This fact does not apply in the present case.

[598] Seventh, Wallbank J found that none of the omissions were innocent. I have reached the contrary position in the present case.

[599] Eighth, Wallbank J found that, following the claimant's failures, its response was to "double down on its positions, raising barely comprehensible arguments and frankly far-fetched and opportunistic 'evidence' of invented BVI public policy, and not to forget the inexcusable and crudely misleading summary of the Cyprus law opinion that 'it may take up to 18 months to restore' the Cyprus SPV to the register." This does not apply in the present case.

[600] Ninth, although the Note was arguably not submitted to the Court as quickly as it should have been, it was complete and thorough, drawing all relevant matters (and many more) to the Court's attention. This did not occur in **BTA**.

[601] Finally, it appears that in **BTA**, the claimant proceeded on the basis that the non-disclosure was not material. In the present case, the Claimant has not only accepted full responsibility for the breach but has unreservedly apologised to this Court.

[602] The Claimant's failure to provide proper disclosure and any alleged prejudice the Defendants claim they suffered in dealing with the costs of the Applications must, of course, be taken into account by me, and I will hear submissions on

this. But there is no (or no satisfactory) basis upon which the Order should be set aside on the ground of non-disclosure.

[603] It follows that the "non-disclosure" ground for setting aside the Order also fails.

[604] Further, and in any event, even if, contrary to what I have said above, I had concluded that the Order should be discharged, I would have had no hesitation in re-granting it.

[605] I consider this to be a classical case in which the failure to provide proper disclosure should be visited with an appropriate sanction in costs, rather than by the Order being discharged or, if discharged, by not being re-granted.

Conclusion and Disposal

[606] The Applications are dismissed.

[607] The Order will stand.

[608] It scarcely requires statement that the arguments set out above do not comprise the whole of those advanced by the parties. I have confined my consideration to such matters as I regard as essential to the determination of the issues arising on the Applications. The submissions and accompanying materials were extensive, and it is evident that each party has devoted substantial industry, reflection, and ingenuity to presenting its case. I record this observation lest any party, dissatisfied with the outcome, should contend that I have omitted to refer to some matter or failed to address some line of reasoning to which that party attaches greater significance than I have judged appropriate. In this respect, the Parties will be aware that, as is the case with the substantive trial of a claim, a judge does not need to decide every point that the parties have raised in connection with an application: see, by way of examples, **Weymont v Place**[322] **and English v Emery Reimbold & Strick Ltd**.[323] It is only necessary for the judge to determine whether the Defendants' case on the application is made

[322] [2015] EWCA Civ 289, at [4]–[6], per Patten LJ.
[323] [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409.

out, based on the documents he has seen and the submissions he has heard. I have found that it is not.

Matters Outstanding and Arising

[609] There are several matters that the Court will need to deal with arising from this Judgment, such as costs.[324] However, the following matters seem to me to require immediate attention.

[610] First, the listing of the various applications relating to the extension of the Claim Form.

[611] Second, the setting aside of any service of the Claim where such service is challenged. So far as this issue is concerned, it is common ground between the Parties that service on LDC Uruguay must be set aside because it was contrary to Uruguayan Law.

[612] Third, if the Defendants decide to appeal this Judgment, consideration will need to be given to whether the listing of these and any other outstanding applications should be deferred until the application for permission to appeal (and, if permission is granted), and the appeal, are finally determined.

[613] I invite counsel to lodge an approved minute of an order to reflect my judgment at least 48 hours before the hearing, including on the issue of costs if agreement on that issue can be reached.

Acknowledgments

[614] I again express my deep and sincere gratitude to counsel for the manner in which they presented their clients' cases and for their cooperation throughout the Hearing.

Abbas Mithani KC
High Court Judge (Ag.)

[324] This will need to include the costs of some of the interlocutory matters that were held over to be determined at the Hearing.

By the Court

Registrar