



Neutral Citation Number: [2022] EWHC 871 (Comm)

Case No: Claims CL-2019-000412; CL-2020-000432

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2022

Before :

MR JUSTICE FOXTON

Between :

- (1) PJSC NATIONAL BANK TRUST
(2) PJSC BANK OTKRITIE FINANCIAL
CORPORATION

**Claimants/
Applicants**

- and -

- (1) BORIS MINTS
(2) DMITRY MINTS
(3) ALEXANDER MINTS

**Defendants/
Respondents**

- (4) IGOR MINTS
(5) VADIM BELYAEV
(6) EVGENY DANKEVICH
(7) MIKHAIL SHISHKHANOV
(8) MAPLESFS LTD

Defendants

NATHAN PILLOW QC, DAVID DAVIES QC, ANTON DUDNIKOV and BIBEK MUKHERJEE (instructed by **Steptoe & Johnson UK LLP**) for the **Claimants/Applicants**
PHILIP EDEY QC, SARAH TRESMAN and TETYANA NESTERCHUK (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **First Defendant/Respondent**
LAURENCE RABINOWITZ QC, SIMON PAUL and NIRANJAN VENKATESAN (instructed by **Enyo Law LLP**) for the **Second and Third Defendants/Respondents**
RICHARD GREENBERG (instructed by **Stephenson Harwood LLP**) for the **Fourth Defendant**

Hearing dates: 24 and 25 February 2022
Draft judgment to the parties: 31 March 2022

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII and The National Archives. The date and time for hand-down is deemed to be Monday 11 April 2022 at 10:30am.

Mr Justice Foxton :

A INTRODUCTION

1. This judgment concerns the Claimants' (**the Banks'**) applications:
 - i) for permission to amend the Particulars of Claim, to allege that the First to Third Defendants (**D1, D2 and D3** and collectively **the Respondents**) are precluded in this action from challenging certain findings made by an LCIA arbitration tribunal (**the Tribunal**) in an arbitration between the Banks and three companies alleged to be under the Respondents' control (**the LCIA Award**), either on grounds of issue estoppel or to prevent an abuse of process (**the Preclusion Arguments**); and
 - ii) for summary judgment (or at least a summary determination) of the Preclusion Arguments in the Banks' favour, alternatively for orders requiring the Respondents to pay money into court as a condition of being permitted to defend the Preclusion Arguments.
2. While it will be necessary to consider aspects of the chronology in a little more detail, in broad terms:
 - i) D1 founded a group of companies held through O1 Group Limited (**the O1 Group**), which operated real estate and other businesses in Russia, and in which D2 and D3 (D1's sons) were also involved.
 - ii) The O1 Group obtained financing from the Second Claimant (**Bank Otkritie**) which was secured by various pledges including pledges provided by three Cypriot companies associated in some way with the O1 Group: Nori Holdings Limited (**Nori**), Centimila Services Limited (**Centimila**) and Coniston Management Ltd (**Coniston**) (collectively **the LCIA Claimants**).
 - iii) On 9-10 August 2017, Bank Otkritie entered into certain transactions (**the Otkritie Replacement Transactions**) which purported to have the effect of releasing the pledges granted by the LCIA Claimants. The Banks claim that the Otkritie Replacement Transactions involved a fraud on Bank Otkritie, in which (inter alios) the Respondents were implicated.
 - iv) The Otkritie Replacement Transactions were subject to LCIA arbitration agreements. When Bank Otkritie commenced proceedings against the LCIA Claimants in Russia to impugn the Otkritie Replacement Transactions, Nori and Centimila commenced LCIA arbitrations against Bank Otkritie (on 2 January 2018), seeking (a) a declaration that the Pledge Agreements they had entered into with Bank Otkritie had been validly terminated by the Otkritie Replacement Transactions; and (b) a declaration that they had no liability in damages. Coniston also commenced an LCIA Arbitration (on 14 February 2018), and the arbitrations commenced by the LCIA Claimants were consolidated (on 5 June 2018) (**the LCIA Arbitrations**).
 - v) The LCIA appointed Sir Stephen Tomlinson, Sir Christopher Clarke and Sir Rupert Jackson as the Tribunal. The particular eminence of the Tribunal has

understandably been emphasised on more than one occasion during the course of this litigation.

- vi) On 15 January 2018, Nori and Centimila applied for without notice injunctive relief in Cyprus in support of the LCIA Arbitrations.
 - vii) On 19 January 2018, Bank Otkritie commenced proceedings in Cyprus against various O1 Group entities and others. The affidavit of Anton Smirnov for the Banks alleged that the Otkritie Replacement Transactions formed part of a dishonest scheme in which D1 was involved.
 - viii) Following an application issued by the LCIA Claimants on 20 February 2018, on 6 June 2018 Males J granted an anti-suit injunction restraining the pursuit by Bank Otkritie of the Russian proceedings against those parties. In due course, Bank Otkritie attempted to discontinue its claims in those proceedings but was refused permission by the Russian court to do so.
 - ix) On 7 September 2018, Bank Otkritie counterclaimed in the LCIA Arbitrations for damages for fraud against the LCIA Claimants. That counterclaim was advanced on the basis that the (allegedly) dishonest acts and intentions of (inter alios) the Respondents were attributable to the LCIA Claimants and gave rise to claims in dishonesty against the LCIA Claimants under Cypriot law.
 - x) On 28 June 2019, the Banks commenced these proceedings against the Respondents, and also the Fourth Defendant (**D4**) and obtained a without notice worldwide freezing order against them. Those claims, which were advanced under Russian law, involved allegations of dishonesty against the Respondents and D4 in relation (inter alia) to the Otkritie Replacement Transactions and also another set of transactions entered into with another Russian bank, Rost Bank (**the Rost Replacement Transactions**).
 - xi) In August 2020, D5 to D7 were joined to these proceedings.
 - xii) The arbitral hearing took place over 5 weeks, at a cost of at least £16m.
 - xiii) On 23 June 2021, the Tribunal handed down the LCIA Award on liability, dismissing the claims for declaratory relief made by the LCIA Claimants, and upholding the Banks' counterclaims.
 - xiv) On 28 June 2021, D8 was joined to these proceedings.
 - xv) The applications before me were issued on 30 September 2021.
3. These applications raise a number of issues for determination, in the context of two different procedural frameworks:
- i) The Banks' application for permission to amend requires the Banks to persuade the court that the Preclusion Arguments, or either of them, give rise to a serious issue to be tried (i.e., one which is not susceptible to summary determination in the Respondents' favour).

- ii) The Banks' application for summary judgment or determination (assuming it is open to the Banks to seek such an order) requires the Banks to persuade the court that the relevant Respondent's (individual) answer to the Preclusion Arguments does not have a realistic prospect of success.

In my summary of the issues below, the expression "the requisite degree of arguability" is intended to embrace both of these points. While it might be thought surprising that each side should contend that the other's case was unarguable, that reflects the nature of the issues raised, which have the capacity to generate a visceral reaction to one or other effect, well captured in the opening paragraphs of the parties' skeleton arguments.

- 4. It will be apparent that the Preclusion Arguments arise in a context in which:
 - i) The determination which is said to give rise to them is an arbitral award, rather than a court decision.
 - ii) The Respondents were not parties to the LCIA Arbitrations.
 - iii) The counterclaims advanced by the Banks in the LCIA Arbitrations asserted causes of action against the LCIA Claimants under Cypriot law, while the present action is concerned with Russian law claims against the Respondents personally.
- 5. Against this background, the issues capable of arising for determination are as follows:
 - i) By way of a threshold question, in circumstances in which the Banks accept that the court cannot give summary judgment on the Respondents' liability at this hearing, is it open to the Banks to seek a summary determination that the Respondents (or some of them) are precluded from disputing certain issues?
 - ii) Is the LCIA Award capable of giving rise to an issue estoppel against the Respondents in circumstances in which the Respondents were not parties to the LCIA Arbitrations? That breaks down into a number of sub-issues:
 - a) Is the test to be applied when determining whether an arbitration award gives rise to an issue estoppel against a non-party in subsequent court proceedings the same as that which applies when determining the effect of a prior court judgment in such circumstances?
 - b) If the test is the same, what is the correct test?
 - c) Having regard to the appropriate test (at either (a) or (b)), has the requisite degree of arguability been made out?
 - iii) Are there any issues arising between the Banks and the Respondents in these proceedings which were determined in the LCIA Arbitrations (**Relevant Issues**), and, if so, what are they?
 - iv) If the relevant test is satisfied in respect of some Relevant Issues, in what circumstances would it nonetheless be open to the Respondents (or any of them) to re-argue the Relevant Issues:

- a) What is the scope of any exception to the doctrine of issue estoppel?
- b) Is the exception engaged (or engaged to the requisite degree of arguability) here?
- v) If and to the extent that there is no issue estoppel, would it be an abuse of process for the Respondents to seek to litigate any of the Relevant Issues:
 - a) Can the doctrine of abuse of process be engaged by attempts to litigate issues determined between non-identical parties in an arbitration, and if so in what circumstances?
 - b) Would any attempt to dispute the Relevant Issues here be abusive (to the requisite degree of arguability)?
- vi) Should the Respondents' entitlement to dispute the Relevant Issues be conditional upon a payment into court?

B Is it open to the Banks to seek a summary determination that the Respondents are precluded from disputing Relevant Issues?

- 6. This issue arises because the Banks' claims against the Respondents are advanced under Russian law, and there is a dispute between the parties as to whether the findings made by the Tribunal, even on the Banks' case as to what they are, are sufficient to establish liability for the relevant Russian law causes of action.
- 7. The Respondents say they are not, and have served an expert report from Professor Asoskov to this effect. The Banks do not suggest that the court can determine the disputed issues of Russian law in the two-day hearing fixed for these applications, and have (understandably) not served responsive evidence.
- 8. In these circumstances, the Respondents argue that it is not open to the Banks to seek summary judgment of any kind under CPR 24. Mr Edey QC for D1, who made the running on this argument, has pointed to the fact that under CPR 24.2, the court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if the party has no real prospect of succeeding on or defending the claim and there is no other compelling reason why the case or issue should be disposed of at a trial. As Mr Justice Fancourt noted in Anan Kasei Co v Neo Chemicals & Oxides (Europe) Ltd [2021] EWHC 1035 (Ch), [82]:

“The ‘issue’ to which rule 24.2 (‘the claimant has no real prospect of defending the claim or issue’) and PD24 refers is a part of the claim, whether a severable part of the proceedings (e.g., a claim for damages caused by particular acts of infringement or non-payment of several debts) or a component of a single claim (e.g., the question of infringement, or the existence of a duty, breach of a duty, causation or loss). It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong

and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage.”

9. That decision has been followed by two judges of co-ordinate jurisdiction (Mrs Justice Steyn in Vardy v Rooney [2021] EWHC 1888 (QB), [69]-[75] and Sir Nigel Teare in ADL Advanced Contractors Ltd v Patel [2021] EWHC 2200 (Comm), [15]-[20]) and I accept that I too should follow it.
10. However, the present application raises a rather different issue – how far (if at all) the Respondents are precluded from raising the Relevant Issues in this action? When an issue of preclusion is raised, it can be determined on an application to strike out the precluded pleading or as a preliminary point (*Spencer Bower & Handley: Res Judicata* 5th edition, [18.09]). In Bright v Bright [1954] P 270, 278, Wilmer J expressed a preference for the former course:

“The proper way to deal with it would have been to apply in Chambers before trial for an order striking out the offending part or parts of the petition, so as to get these questions decided without waiting for the trial, and without incurring the expense of collecting the witnesses and making all the other preparations for trial”.
11. There may, of course, be cases when the determination of the preclusion challenge requires the trial of a preliminary issue so that contested issues of fact can be resolved on the evidence in the conventional way. However, in those instances where the existence and extent of any preclusive effect can be determined without the need for such a hearing, by applying the conventional summary determination test, I do not believe the terms of CPR Part 24 prevent the court from doing so. The summary judgment test reflects, in its particular context, the fact that there is ordinarily no need for a trial to determine issues which do not have a realistic prospect of success. That is equally true where the court is being asked to determine whether a party is precluded by a prior determination or the related doctrine of abuse of process from advancing a particular point or a particular case. The precise order giving effect to such a determination would, no doubt, require careful thought, but I am not persuaded that, if there is no realistic prospect of defending the Banks’ arguments that the Respondents are precluded from raising the Relevant Issues, there is any procedural bar to determining that now.
12. However, I should note at this point that Mr Pillow QC’s acceptance that the Russian law points themselves raise a triable issue excludes any possibility of the court making a conditional order requiring the Respondents (or any of them) to pay money into court as a condition of being permitted to defend the action. Paragraph 4 of Practice Direction 24 provides that “where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order”. Having heard no argument at all on the Russian law issues, I cannot conclude that it is “improbable” that they will succeed.

C Is the LCIA Award capable of giving rise to an issue estoppel against the Respondents in circumstances in which the Respondents were not parties to the LCIA Arbitrations?

C1 Is the test to be applied when determining whether an arbitration award gives rise to an issue estoppel against a non-party in subsequent court proceedings the same

as that which applies when determining the effect of a prior court judgment in such circumstances?

13. There is no dispute between the parties that an issue estoppel can arise between the parties to an arbitration award, which can then be deployed if there is an attempt to relitigate that issue between those parties in court proceedings. That has been clear since at least the decision of the Court of Appeal in Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630, and possibly since Doe on the demise of Davy v Haddon (1783) 3 Doug KB 310. However, as a matter of English law, issue estoppels which arise from court judgments bind not only the parties, but also their “privies”. There is a significant body of English case law which has developed since the decision in Gleeson v Wippell & Co Ltd [1977] 1 WLR 510, 514-515 which proceeds on the basis that the concept of privity extends not only to the parties’ successors in title in respect of the litigated right which has given rise to the issue estoppel, but also a wider class of persons where “having due regard to the subject matter of the dispute, there [is] a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is party”. I will refer to that wider class of potential privies beyond successors in title as **Gleeson privies**.
14. As I explain at section C2 below, Mr Rabinowitz QC and his team argue that, even when considering the position of court judgments, there is in fact no class of Gleeson privies, that Gleeson (to the extent that it did formulate such a category of privies) is wrong and that none of the authorities which have proceeded on the basis of the Gleeson test are binding on me. Logically, that ought to be my starting point, but (as Mr Rabinowitz QC accepted) that is a very big topic with very significant implications. For that reason, I intend to begin with Mr Rabinowitz QC’s *entrée* rather than his *plat principal*. That is the argument that, whatever the position may be for judgments, arbitration awards cannot bind Gleeson privies, with privies to arbitrating parties being limited to the successors in title to the parties or the relevant rights.
15. I should immediately acknowledge, at the abstract level, the attractions of an argument which would bring the doctrine of privity for the purposes of issue estoppel in arbitrations into line with the doctrine of contractual privity, in what is ultimately a consensual process of dispute resolution. However, it is a conclusion which might well have significant consequences, and its merits require testing. It is an issue which has received limited attention in judicial decisions to date. Among the 150 authorities cited for the hearing, I was referred to only three decisions on the subject:
 - i) Dadourian v Simms [2006] EWHC 2973 (Ch), in which Warren J observed at [742]-[744]:

“Although the doctrine of privity is an aspect of issue estoppel, it does not necessarily follow that all of the rules which have been developed in relation to issue estoppel between the same parties is applicable in the case of privies. Thus, arbitration is at root based on agreement: the parties have to agree to submit their dispute to arbitration (an agreement in the present case to be found in the Option Agreement itself).

It is not immediately apparent, to me at least, why a non-party to the agreement should, in effect, be bound by the consequences of that

agreement so as to make him personally liable for something which he wishes to dispute, although I notice that Hillyer J in Laughland v Stevenson [1995] 2 NZLR 474 (one of the authorities referred to by Mr Simms) addressed the question of privity (he held, on the facts, that there was no privity) on the basis that the doctrine could come into play in relation to an issue estoppel arising out of an arbitration. This point has not been argued before me and I have not thought it necessary to ask the parties for further argument.

However, even if it is correct that an arbitration (pursuant to an arbitration agreement between A and B) can in principle give rise to an issue estoppel binding on C if he is a privy in interest to A or B, the fact that the arbitration agreement is not one to which C is a party is a factor, in my judgement, which needs to be brought into account”.

(I note that in an application for permission to appeal from an earlier decision in that litigation, reported at [2004] EWCA Civ 686, [13], Dyson LJ described the issue of what amounts to being “privy to an arbitration” as “one of some considerable difficulty” and “a difficult area of law in which there is some uncertainty”).

- ii) There was also no argument on the issue in Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd [2017] 1 Lloyd’s Rep 387, [397]-[408], in which Walker J proceeded on the basis that an arbitration award was capable of binding Gleeson privies, but found that the relevant entities in that case did not fall within that category.
 - iii) Finally Popplewell J appears to have assumed (again without argument) that there could be Gleeson privies to an arbitration award in Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd [2013] EWHC 1240 (Comm), [33], while rejecting the argument on the facts. He did note, however that “in the context of an arbitration award it will be rarer for a non-party to be subject to estoppel as a privy because by virtue of the private and confidential nature of arbitration, he will normally have no opportunity to intervene, nor access to the materials in the reference”.
16. In addition, while writing this judgment, I became aware of the decision of the Court of Appeal in Vale SA & ors v Steinmetz & ors [2021] EWCA Civ 1087, in which Males LJ also assumed, at [31], that the privy extension to issue estoppel could apply to an arbitration award:

“However, while the award is final and binding as between Vale and BSGR, it is not binding on third parties. It is elementary that an arbitrator cannot make an award which is binding on third parties who have not agreed to be bound by his decision (*Mustill & Boyd, Commercial Arbitration*, 2nd Ed (1989), pages 149-150; *Russell on Arbitration*, 24th Ed (2015), para 6-183). The position is different if the third party can be regarded as a privy of one of the parties for the purpose of the doctrine of *res judicata*, but that is not suggested here”

(although once again the issue was not argued).

17. In the absence of any clear authority on the issue, it is necessary to approach it from first principles.
18. Mr Rabinowitz QC's first argument is that the category of persons bound by an arbitration award falling within Part 1 of the Arbitration Act 1996 is defined (and delineated) by s.58(1), which provides:

“Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them”.

(s.11 of the Arbitration (Scotland) Act 2010 adding the words “(but does not itself bind any third party)” immediately afterwards).
19. S.82(2) of the Act defines “a party to an arbitration agreement” (rather than to the award) as including “any person claiming under or through a party to the agreement” (the reason for reversing the “under or through” wording in s.58 not being clear), which definition is carried through into, for example, s.9 dealing with the stay of court proceedings. However, the issue of who is a party to the arbitration agreement (and therefore able to take the benefit or be made subject to the burden of the contractual promise to arbitrate when the court is asked to enforce that promise through a stay) is not, *ex facie*, the same question as who is bound by an award once made. The former is a question which is essentially contractual in nature, the latter one capable of engaging wider public interests of finality.
20. As Mr Rabinowitz QC submitted, both of these provisions can be traced back to the Arbitration Act 1889. The forebear of s.58 was the provision to be implied (as a term) into any submission to arbitrate that “the award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively” (Schedule 1). S.82(2) can be traced back to s.4 dealing with the power to stay court proceedings commenced by, or against, a party to the submission or persons claiming “through or under” such a party. As I have noted, Mr Rabinowitz QC's submission effectively treats s.58 (and its predecessors) not only as identifying persons who are bound by an arbitration award, but as circumscribing the categories of those who may be bound. There are statutory contexts in which that would be a very formidable argument. Before determining whether this is one of them, it is convenient to consider Mr Rabinowitz QC's second argument.
21. By reference to National Ability SA v Tinna Oils and Chemicals Ltd (The Amazon Reefer) [2009] EWCA Civ 1330, [14], he submits that an arbitration agreement is enforceable “because of the implied contractual promise to pay an arbitration award” (an observation made when dismissing an argument that enforcement of an award under s.26 of the Arbitration Act 1950 was not subject to a limitation period, whereas enforcement by an action of the award would have been). Mr Rabinowitz QC then contends that the rule that an arbitration award gives rise to an issue estoppel also rests on the implied promise the parties have made in their arbitration agreement to perform the award. For that proposition, he is able to point to the not inconsiderable authority of Lord Hobhouse in the Privy Council in Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] UKPC 11. The immediate issue in that case was whether the arbitral obligation of confidentiality prevented a party

to one arbitration from relying on the award to found a defence of issue estoppel in another. Lord Hobhouse noted at [9] that:

“As section 58 of the United Kingdom Arbitration Act 1996 says, ‘an award made by the tribunal pursuant to an arbitration agreement is final and binding ... on the parties’. It is an implied term of an arbitration agreement that the parties agree to perform the award”.

22. Lord Hobhouse went on to hold that the preclusive effect of an arbitration award by way of an issue estoppel between the arbitrating parties reflected that implied term, and the confidentiality obligation could no more prevent reliance on the award to enforce that right than it could prevent reliance on the award for the purposes of other forms of enforcement ([15]). Given that the normative force of the award derives in the vast majority of cases from the parties’ agreement to arbitrate, it can certainly be said the preclusive effect of the award is ultimately derived from the contract to arbitrate, or from a statutory prohibition on denying such a contract (for an exception see [25(iii)] below). I do not accept, however that it follows from the AEGIS decision that the capacity for an award to generate an issue estoppel in subsequent proceedings is limited to the parties to the arbitration agreement pursuant to which the award was rendered.
23. That analysis assumes that the preclusive effect of a prior determination in a subsequent dispute is a legal incident of rights arising from the original determination, rather than the result of a rule of law applicable by the second tribunal as to the legal effect of that original determination. However, the doctrine of issue estoppel appears to me to depend on a rule of law of the “receiving” tribunal rather than the rights adjudicated on by the “transmitting” tribunal:
 - i) The traditional justifications of issue estoppel offered by English authorities identify it as a substantive rule of law which gives effect to a general rule of public policy that there should be finality in litigation (e.g., Diplock LJ in Mills v Cooper [1967] 2 QB 459, 469; and Lord Wilberforce in The Amphill Peerage Case [1977] AC 547, 569).
 - ii) While the position under foreign law will be relevant to whether the foreign judgment meets the English law requirement of finality, the doctrine of estoppel is part of the law of the forum, not a legal attribute of the foreign judgment (see Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853, 919).
 - iii) When a foreign arbitration award or judgment is relied upon to establish an issue estoppel in English court proceedings, it is English law which determines, for example, whether the estoppel extends to collateral matters or whether the special circumstances exception is engaged. More pertinently, in the present context, the issue of whether a foreign judgment binds privies of the parties in English proceedings is a matter for English law. At least it was so treated in cases such as Carl Zeiss (No 2), e.g., at 928-29, 936-37 and 945-46 and Seven Arts Entertainment Ltd v Content Media Corp Plc [2013] EWHC 588 (Ch). The position is not, as Mr Rabinowitz QC submitted to me, that when looking at foreign judgments or awards, “one has to look at the foreign law and see ... how, under that foreign law, it deals with which parties are to be bound and why”.

24. It follows, therefore, that while I accept (for reasons which I explain at [27] below) that the contractual source of the tribunal's jurisdiction is a highly relevant factor when considering whether the findings in an award bind a non-party to the arbitration, I do not accept that the existence and ambit of any issue estoppel arising from an award is essentially a question of contract, dependent on which parties were entitled, and bound, by the scope of any implied promise to perform the award.
25. I am pleased to have reached this conclusion, because of a number of difficulties which would follow from Mr Rabinowitz QC's analysis:
- i) First, while English law implies a promise into the agreement to arbitrate to honour any award, I do not feel able to assume that every legal system does so. For some, the normative status of the award may rest on procedural provisions. I note that Filip de Ly and Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration* (2009) 25 *Arbitration International* 35, 50, observe of the position in civilian jurisdictions (at least at that time) that *res judicata* was generally characterised as a procedural issue for the *lex fori*. In France the *res judicata* effect of domestic and international awards was enshrined in statute (Articles 1476 and 1500 of the French New Code of Civil Procedure). In Germany, at least at that time, Articles 322, 325 and 1055 of the Civil Procedure Code gave the *dispositif* of an arbitral award the same status as a judgment. I am not attracted by the suggestion that the status of an award, for the purposes of an issue estoppel in English proceedings, depends on whether there is an express or implied promise in the arbitration agreement to that effect.
 - ii) Second, the position becomes more complicated when regard is had to the fact that s.58 of the Act, (which is said to embody the principle of law for which Mr Rabinowitz QC contends that there can be no Gleeson privies to arbitration awards) applies to arbitrations with an English seat even if the arbitration agreement is not governed by English law: Enka Insaat Ve Sanayi AS v OOO Insurance Company v Chubb [2020] UKSC 38, [92]. That makes the attempt to read these provisions as the statutory manifestation of a principle that the effect of an award is limited to those bound by the implied promise to honour it even more challenging.
 - iii) Third, a determination by an arbitration tribunal sitting in England in exercise of its power under s.30 of the Arbitration Act 1996 that it has no jurisdiction is capable of binding the parties, if not challenged in time under s.67 of the Arbitration Act 1996 (s.70(3)). The binding nature of that determination in any subsequent dispute cannot depend on an implied promise to honour the award but must have some other basis.
 - iv) Fourth, the argument would seem to involve a differential treatment of the issues of whether a judgment gave rise to an issue estoppel in an arbitration, and whether an award gave rise to an issue estoppel in subsequent court proceedings (although I accept that the doctrine of abuse of process appears to operate differently as between these two scenarios).
 - v) Fifth, while it might be said (if Mr Rabinowitz QC is wrong on the issue considered at C2 below) that the absence of any rule relating to Gleeson privies in arbitration could be addressed through the doctrine of abuse of process, there

would be particular difficulties in applying such a concept if the second hearing took place in arbitration rather than court, given the controversial nature of any doctrine of abuse of arbitral process (Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada [2004] EWCA Civ 1660, [63], [83]). Filip de Ly and Audley Sheppard in *ILA Interim Report on Res Judicata and Arbitration* (2009) 25 *Arbitration International* 35, 46 observe that they “are not aware of any case in which an arbitral tribunal has applied, or a court has approved the application of, the abuse of process doctrine in arbitration”. Even the application of the rule in Henderson v Henderson is a matter of controversy in that context (see Toby Landau QC, “Arbitral Groundhog Day: The Reopening and Rearguing of Arbitral Determinations” (2020) 2 *SiArb J* 1, 29-46).

- vi) Sixth, it would be necessary to consider how such a rule might operate when a judgment is entered in terms of the award under s.66(2) of the Arbitration Act 1996, given the live issue as to whether the implied obligation to honour the award merges in such a judgment (London Steamship Owner’ Mutual Insurance Association Ltd v Kingdom of Spain [2020] EWHC 1920 (Comm), [90(3)]). A similar issue arises in relation to the action on an award which culminates in a judgment. The argument that the ability of an arbitration award to bind third parties may vary (in either direction) depending on whether or not the award has been entered as a judgment is unattractive. An analysis in which, in both scenarios, the fact that the original determination was made in a private arbitration was a relevant but not determinative factor is intuitively more appealing.
- vii) Finally, the position of statutory arbitrations is wholly unclear. S.95(1) of the 1996 Act provides that the provisions of Part 1 of the Act apply to a statutory arbitration “as if the arbitration were pursuant to an arbitration agreement and as if the enactment were that agreement” and “as if the persons by and against whom a claim subject to arbitration in pursuance of the enactment may be or has been made were parties to that agreement”. Ss.58 and 82 of the Act are not among those provisions excluded from applying to statutory arbitrations (s.97). The effect of Mr Rabinowitz QC’s argument would appear to be that the potential preclusive effect of awards in statutory arbitrations and their application to privies differs from the decisions of other kinds of statutory tribunal. That is, once again, an unattractive analysis.
26. For these reasons, I reject Mr Rabinowitz QC’s submission that the effect of the AEGIS case and ss.58(1) and 82(2) of the Arbitration Act 1996 (and their predecessor provisions) is to confine the scope of issue estoppel arising from an arbitration award to contractual privies (i.e., effectively to successors in title to or those engaged in the derivative exercise of the relevant contractual right). That does not mean, however, that the contractual source of an arbitral tribunal’s substantive jurisdiction is irrelevant to the application of the doctrine of issue estoppel by the receiving court. Far from it. I accept that it is one of a number of reasons why any attempt to establish the preclusive effect of an award against anyone except the parties or their contractual privies will be an extremely challenging task.
27. In particular, I am satisfied that the following features of the arbitration process require a more restrictive approach to giving an award a preclusive effect in the context of Gleeson privies (just as they have been held to require a more restrictive approach when

determining whether it would be an abuse of process for a non-party to advance a case which is inconsistent with a prior arbitration award in court proceedings: see [81] below):

- i) The contractual foundation of arbitration significantly impacts the ability of third parties to the arbitration agreement to participate in the arbitration and to challenge any award. A non-party will generally have no or only a limited right of participation in the arbitration process, which of itself will weigh strongly against an award having preclusive effect (Poplewell J in Golden Ocean, [31] citing Sales J in Seven Arts Entertainment Ltd v Content Media Corp Plc, [73]). It also makes the application of any species of issue estoppel which is rationalised on the basis that a third party has “stood by” and allowed another person to “fight its battle” (Lord Penzance in Wytcherley v Andrews (1869-72) LR 2 P&D 327, 328) much more difficult.
- ii) Some arbitral rules – including the LCIA Rules which applied in this case – provision for a limited exception to this position. In particular, Article 22(x) of the LCIA Rules (version effective from 1 October 2020) gives the tribunal power “to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented expressly to such joinder in writing ... and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration”. While a predecessor of this provision has been held to be effective by the Commercial Court (in C v D1 [2015] EWHC 2126 (Comm)), there are other jurisdictions which view provisions which might extend the tribunal’s power to cover the involvement of non-parties to the arbitration agreement with some scepticism (see for example PT First Media TBK v Astro Nusantara International BV [2013] SGCA 57). The status of any such award, so far as it favoured or burdened the joined party, would appear to be an open question under the New York Convention. Certainly, the ability of a non-party to join and participate in even LCIA proceedings is much more circumscribed, and of uncertain effect, as against the power of the court to join an interested party (under CPR 19.2(2) and CPR 19.8A) or the power of a non-party affected by an order or judgment to apply to vary it or set it aside (under CPR 40.9).
- iii) Not only are the powers of challenge to an award heavily circumscribed (by ss.68 and 69 of the Arbitration Act 1996, assuming the arbitration agreement has not contracted out of the power of legal review), but they do not appear to extend to persons falling outside the narrow definition in s.82(2). While that definition applies to “parties to an arbitration agreement” rather than “parties to arbitral proceedings”, it is difficult to see how the latter expression can extend beyond those on whom the award has effect under s.58. If so, then a Gleeson privy could not make an application under s.24(1) to remove an arbitrator, nor challenge an award under ss.68 and 69, nor would the arbitrator’s general duty of fairness (s.33(1)(a)), the right of legal representation (s.36) or the court’s power to give effect to peremptory orders (s.42) extend to or for the benefit of such a person. This is to be contrasted with the wider powers of appeal available for court judgments, which in appropriate cases can extend to non-parties affected by a decision (George Wimpey UK Ltd v Tewkesbury BC [2008]

EWCA Civ 12 and Re W (A Child) (Care Proceedings): Non-party Appeal [2016] EWCA Civ 1140).

- iv) The confidential nature of arbitration proceedings, as compared with the generally public nature of court proceedings. While it is clear from AEGIS that this is not an insuperable objection to a party availing itself of a substantive right to which the arbitration award (by whatever legal mechanism) has given rise, it militates against the award binding non-parties save in exceptional cases, both as a matter of practicality, and because it illustrates the difference between the private, bilateral and consensual character of arbitral proceedings, as against the public, sovereign and coercive character of court proceedings.

C2 What is the correct test of privity for the purposes of the doctrine of issue estoppel?

C2.1 Was Gleeson wrongly decided?

28. Perhaps encouraged by the view expressed by the Honourable KR Handley in *Spencer Bower & Handley: Res Judicata* (5th), [9.42] that “the requirements for privity in interest were settled until the decision of Megarry VC in Gleeson v Wippell”, Mr Rabinowitz QC argued that the concept of privity is limited to “a successor in title, i.e. a person who claims through or under a party to the prior proceedings such as an executor, trustee in bankruptcy or assignee”, and that the test which Megarry VC has been treated as formulating in Gleeson was “wrong in principle and contrary to authority”. Although accepting that “the Gleeson test has been endorsed (often obiter) in a number of first instance and some Court of Appeal cases”, it was suggested that these decisions were not binding on me because the criticisms made by Mr Rabinowitz QC of the Gleeson decision had not been raised.
29. It is important to note how extensively Gleeson has been cited with approval since 1977. I shall not attempt a comprehensive list, but relevant decisions include Lord Bingham’s (obiter) approval of the test, whose application had been conceded, in Johnson v Gore Wood [2002] 1 AC 1, [31]; the Court of Appeal in House of Spring Gardens v Waite [1990] 1 QB 241, Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 924 and Ward v Savill [2021] EWC Civ 1783; and numerous first instance decisions. The case has also been mentioned without disapproval in many more Court of Appeal decisions. Against that background, I hope Mr Rabinowitz QC will not think me unduly pusillanimous for not embarking on a detailed analysis of an argument which I am satisfied is not realistically open before a first instance judge.
30. I confine myself to three observations:
- i) I am not satisfied that, even before Gleeson, the concept of privity was quite as narrow as the “derivative title” formulation for which Mr Rabinowitz QC contends. The example given by Lord Reid in Carl Zeiss, 911-912 of someone who uses an employee to relitigate a right it has does not fall within that narrow compass (nor the reverse situation which arose in in Re Walton (1873) 28 LT 12, 16, although the effect of the prior judgment against an employee of the defendant corporation appears to have been only one factor in the court’s decision). While this theory explains why an issue estoppel against a trustee will bind the beneficiary (who has “rights against the trustee’s rights”), it works less satisfactorily the other way around, yet privity in interest appears equally to arise

there (*Spencer Bower & Handley*, [9.44] citing Churchill and Sim v Goddard [1937] 1 KB 92, 103-104).

- ii) It is not entirely clear where the “standing by” cases would fit into this analysis (cf. decisions such as Nana Ofori Atta II v Nana Abu Bonsra II [1958] AC 95, 102-103, PC).
 - iii) Any attempt to re-draw the boundary between the doctrine of issue estoppel, properly so-called, and the doctrine of abuse of process, and to subsume the Gleeson cases within the latter, is not a neutral act of taxonomical reclassification between substantive and procedural law (cf. Lord Sumption in Virgin Atlantic Ltd v Zodiac Seats UK Ltd [2013] UKSC 46, [25]) but might have very significant consequences: see [25(v)] above. For that reason, the suggestion that Gleeson privies are “better dealt with under the abuse of process jurisdiction” (*Zuckerman on Civil Procedure*, 4th, [26.103]) has to be approached with some care.
31. These three paragraphs do scant justice to the detailed argument I received on this issue. However if the English law on the preclusive effect of prior determinations is to be extensively restructured in the manner contended for, a two-day hearing before a puisne judge is not the appropriate occasion to begin that process.

C2.2 The Gleeson test

32. In Gleeson, 515, Megarry VC formulated the test for a privy in interest as follows:
- “Privy ... is not established merely by having ‘some interest in the outcome of the litigation.’ ... [T]he doctrine of privity for this purpose is somewhat narrow and has to be considered in relation to the fundamental principle *nemo debet bis vexari pro eadem causa* I do not think that in the phrase ‘privity of interest’ the word ‘interest’ can be used in the sense of mere curiosity or concern I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party”.
33. Megarry VC described the concept of privity as “protean”, and his “test” is criticised in *Spencer Bower & Handley* as “circular”. It is fair to say that the “test” is essentially conclusory, and that it falls to be applied in circumstances in which there are a wide variety of combinations of factors which might lead to a conclusion of privity, or be insufficient to support it, in different cases. To that extent, it is a multi-factorial rather than rule-based principle. This limits the extent of the guidance which can be obtained from cases considering particular applications of the test. Without in any way purporting to identify all relevant factors (which I suspect would be an impossible task, as well as a pointless one when it is the particular combination of factors which matters),

the authorities to which I was referred provided a number of “signposts” which I have found of particular assistance in this case:

- i) The starting point – or “basic rule” – is that “before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it” (Sales J in Seven Arts Entertainments Ltd v Content Media Corp plc [2013] EWHC 588 (Ch), [73]). As Sales J noted, “the importance of the general rule and fundamental importance of the principle of fair treatment to which it gives expression indicate the narrowness of the exception to the rule”.
 - ii) The test of identification is sometimes approached by asking if the party sought to be bound can be said “in reality” to be the party to the original proceedings (Resolution Chemicals, [52]).
 - iii) That argument must be approached with particular caution when it is alleged that a director, shareholder or another group company is privy to a decision against a company, because it risks undermining the distinct legal personality of a company as against that of its shareholders and directors. The danger is particularly acute as the company must necessarily act through and be subject to the ultimate control of natural persons, and directors and shareholders who “control” the company in this sense will frequently have a commercial interest in the company’s success. The need for particular caution about privity arguments in this context is emphasised in Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd [2015] EWHC 1640, [143]-[145] and MAD Atelier International BV v Manès [2020] EWHC 1014 (Comm), [67]-[69]. Nonetheless, there are cases which, on their particular facts, have found privity between a company and a controlling director/shareholder: for example Secretary of State for Business, Innovation & Skills v Potiwal [2012] EWHC 3723, (Ch) (decision of VAT tribunal against company binding on its director, controller and significant shareholder in director’s disqualification proceedings).
34. It has been suggested that a relevant factor is whether the party sought to be bound could have been compulsorily joined to the original proceedings (which is to say that it is suggested that if it could not have been so joined, that is likely to tell against a finding of privity): Standard Chartered Bank, [145] (and see also the Court of Appeal, [31]) and Mad Atelier [64], [70]. I do not accept the suggestion that these cases establish that the ability to join the purported privy to the original proceedings is a necessary condition for the application of the doctrine (not least because it would render the application of the (domestic) doctrine of issue estoppel subject, in foreign judgment cases, to the vagaries of the relevant foreign procedural code). The rationale for this factor is not entirely clear – it may reflect the fact that too ready a recognition of the doctrine of privity in interest in such circumstances could circumvent the territorial or other limits of the original court’s jurisdiction. However, where it is open to the claimant to join the proposed privy to the original proceedings, but it does not do so, the claimant’s failure to remove any doubt as to the effect of a decision on that party at a time when the outcome of the dispute was not yet known might also be thought relevant (and I note that Sales J was of this view in Seven Arts, [65]). If the proposed privy sought to join the original proceedings, but that joinder was resisted by the successful party, that should also tell against a finding of privity (see by analogy the position so far as abuse

of process is concerned in Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132, 137 and Michael Wilson & Partners Ltd v Sinclair [2017] 1 WLR 2646, [90]).

35. Mr Pillow QC placed some reliance, having regard to the decision in House of Spring Gardens v Waite [1990] 1 QB 241, on the allegation that the LCIA Claimants and the Respondents were alleged to be joint tortfeasors. By way of explanation, in House of Spring Gardens judgments had been entered in Ireland against three defendants as joint tortfeasors. Two of the defendants (D1 and D2) had applied to set the judgment aside on the ground that it had been procured by fraud and failed. The third (D3) had not joined in that application, but later sought to resist enforcement of the judgment in England on the same grounds. It was held that he was precluded by the doctrines of abuse of process and issue estoppel from doing so. The significance of the joint and several liability in that case was that the application to set aside brought by D1 and D2 necessarily engaged the interests of D3, because, if it had succeeded, the judgment would have been set aside against all three defendants (p.254G). That apart, I am not persuaded that there is any special rule which makes proceedings by one alleged joint tortfeasor seeking to challenge a liability already established against another joint tortfeasor more susceptible to a Gleeson-estoppel or a finding of abuse of process (and I note Mr Justice Arnold was of a similar view in Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWHC 739 (Pat), [122]).
36. Finally, I have already referred at Section C1 above to the even greater caution required in finding that a non-party is bound by the terms of an award as a privy.

C3 Having regard to the appropriate test, does the Banks' issue estoppel case meet the requisite standard of arguability?

C3.1 The material relied upon and my findings in relation to it

37. Without presuming that anyone other than the parties to this litigation will have any interest in any part of this judgment, the section which now follows, addressing the particular facts of this case, will undoubtedly only be of interest to the parties. For that reason, and in order to reduce the length of that part of the judgment which considers and applies the relevant legal principles, I address the particular matters relied upon by the Banks as establishing privity in this case in an annex.
38. By way of a summary of my conclusions:
- i) It is clearly arguable that the Respondents were the moving spirits behind the decision of the LCIA Claimants to commence and progress the LCIA Arbitrations. However, I am unable to make that finding to the summary judgment standard.
 - ii) It is clearly arguable that the LCIA Claimants' legal costs and security requirements were funded by companies under the control of the Respondents, and as a result of decisions taken by or with the approval of the Respondents in the exercise of those powers of control. Once again, I am unable to make that finding to the summary judgment standard.

- iii) It is not disputed that the Respondents gave voluntary disclosure in the arbitration (as those associated with corporate arbitral parties often do), gave evidence in witness statement form and orally at the arbitration, and were in very regular attendance both at the many procedural hearings and throughout the merits hearing.
- iv) In a case in which what mattered was the knowledge of the LCIA Claimants, from whatever source it was attributed, the Respondents' involvement in the LCIA Arbitrations reflected what was essentially a collective interest in which a "common position" was taken in a single case presented by a single legal team. That is likely to have required some co-ordination of the positions taken, and the potential for compromise.
- v) The Respondents were aware from at least early 2018 that the Banks' case in relation to the Okritie Replacement Transactions involved or was likely to involve allegations of personal dishonesty against them, and the contrary is not realistically arguable.
- vi) I accept that it was the Respondents' clear preference for an LCIA arbitration tribunal to pronounce first on the allegations made relating to the Otkritie Replacement Transaction, and not a Russian court (and, if that is disputed, the contrary position is not realistically arguable).
- vii) It is not arguable that there was any clear strategy or intent on the part of the Respondents to procure findings in the LCIA Arbitration which would be legally determinative as between the Banks and themselves.
- viii) The Banks, in their outwards posture at least, were proceeding on the basis that, however significant they might be in changing the perception of the dispute and the "atmospherics", the findings in the LCIA Arbitrations would not be legally determinative in these proceedings (and the contrary is not realistically arguable).
- ix) It cannot clearly be said that this is a "joint tortfeasor" case (if, contrary to my view, that matters), but I am unable to exclude a realistic possibility that this may prove to be the correct analysis with the benefit of Russian law evidence.

C3.2 Conclusion

- 39. On my findings, there can be no question of there being a summary determination in the Banks' favour that any of the Respondents are privies of the LCIA Claimants, not least because I have been unable summarily to determine all of the underlying factual issues on which the Banks rely in their favour, or sufficient of them to make a summary determination a realistic prospect.
- 40. The issue which arises in these circumstances is whether I should simply give permission to amend, or go further and refuse permission to advance the issue estoppel plea. The former course would require a merits hearing dealing with the "live" factual issues relied upon in the context of the issue estoppel plea, together with a repetition of the extensive legal arguments I have heard. That is not a particularly attractive prospect. In any event, I do not believe the dispute in this case turns on the finer points of the

parties' competing factual cases, so much as a fundamental difference of view as to the proper approach having regard to the dispute's broader outlines (cf [3] above).

41. Having regard to those parts of the Banks' case which are either clear or arguable, but also:
- i) the exceptional nature of the Gleeson principle binding non-parties to an earlier decision to which they were not a party;
 - ii) the even greater difficulty in establishing that a non-party is bound by an arbitration award (for the reasons set out at C1 above);
 - iii) the fact that, in substance, this is an attempt to preclude the Respondents from raising the defence raised by the LCIA Claimants, and from raising a defence to allegations of dishonesty; and
 - iv) the further issue referred to at [38(iv)] above;

I have concluded that it is not realistically arguable that the matters relied upon by the Bank, to the extent that they could realistically be established at a trial, can support a finding of privity.

42. In particular, many of those acts – control or the funding of a litigating company, taking decisions on its behalf or giving evidence for it – are common actions on the part of directors or controllers of corporate bodies, requiring the particular caution identified at [33(iii)] above. Having regard to the cumulative effect of the issues I have referred to in this and the preceding paragraphs, the Respondents' desire that an LCIA arbitration tribunal pronounce on the status of the Otkritie Replacement Transactions before a Russian court did so, because of the benefits which it was perceived that could bring in the context of the alleged "campaign against the OI Group and the Mints family", does not change the position. This is particularly the case when it cannot realistically be claimed (i) that the LCIA Arbitrations were being conducted on the basis that they would be legally determinative so far as any liability of the individual Respondents was concerned; or (ii) that that was the Banks' own position.

D Are there Relevant Issues arising between the Banks and the Respondents in these proceedings which were determined in the LCIA Arbitrations and, if so, what are they?

43. In view of the conclusion I have just reached, I intend to deal with this issue briefly.

D1 The applicable principles

44. In this context, there are three relevant requirements.

45. The first is that the determination of that issue must be necessary for the decision: *Spencer Bower & Handley*, [8.23]. This is sometimes explained in positive terms (the issue must be "fundamental", "essential" or an "ultimate" issue) and sometimes in negative terms (it must not be "collateral" or merely "an evidentiary fact"). I accept that the test I should apply is whether the issue was "an essential step in the reasoning" of the first tribunal (*Spencer Bower & Handley*, [8.01]) or whether "the determination [is] so fundamental that the decision cannot stand without it" (*ibid*, [8.24]).

46. The second is that the determination of that “ultimate” issue must be clear. That requirement is even more important when the original determination is said to have been made by an arbitration award. Consistent with the distinct roles of the court and the arbitral tribunal, and the policy expressed in s.1(c) of the Arbitration Act 1996, as Gross J noted in Norsk Hydro ASA v State Property Fund of Ukraine [2002] EWHC 2120 (Comm), [17]-[18] the court will not second-guess the intentions of the arbitration tribunal or “stray into the arena of the substantive reasoning and intentions of the arbitration tribunal” where the relevant issue is not crystal clear on the face of the award.
47. The third is that for an issue estoppel to arise, the issue must be the same in both sets of proceedings. This proposition is sometimes qualified by the adjective “substantial” (*Spencer Bower & Handley*, [8.05] and Butcher J in Carpatsky Petroleum Corp v PJSC Ukrnafta [2020] Bus LR 1284, [122]). I accept some such qualification is appropriate, both to reflect the fact that the doctrine will sometimes require applying determinations under one system of law to claims under another, and to avoid an over-technical application of a doctrine which gives effect to an important public policy.

D2 Are the Respondents seeking to re-litigate Relevant Issues?

48. The proposed pleading of issue estoppel in this case is advanced by quoting extensive passages from the LCIA Award in the Amended Particulars of Claim in compendious form against all three Respondents. With the benefit of hindsight, this gave rise to a number of difficulties:
- i) in working out which paragraphs of the LCIA Award were relied on as containing ultimate issues and which were not;
 - ii) in knowing which particular matters which the Respondents had sought to put in issue were said to be precluded by which passages of the LCIA Award; and
 - iii) in distinguishing appropriately between the position of the Respondents.
49. There are clearly a number of matters pleaded which could not on any view constitute “ultimate issues”. By way of some (amongst many) examples:
- i) Paragraph 57D.1 pleading “the background to the Otkritie Replacement Transaction”.
 - ii) Paragraph 57D.3 alleging that O1GL did not have a credit rating as at August 2017, but its real credit rating in August 2017 should have been CCC.
 - iii) Paragraph 57D.10 alleging that the accounting covenants given by O1GL were of little value because by the time they were triggered, it would be too late for the bondholder to retrieve the situation (LCIA Award, Chapter IV, para. 204).
 - iv) Paragraph 57D.15 alleging that “it made no commercial sense in light of what was being lost (denomination in dollars, regular coupon and security) and the risks involved for Bank Otkritie to think it wise to get rid of short term secured loans in relation to which there were some potential problems on the basis that the borrowers would have a long period to turn things around at the end of which Bank Otkritie would, all being well, enjoy a profitable reward. Such an approach

could not have been acceptable to, or decided on, by an honest management of Bank Otkritie (LCIA Award, Chapter VII, para. 65).”

50. In the course of the hearing, at my request, Mr Pillow QC produced (on very short notice) a list of the ingredients of the causes of action raised by the Banks in the LCIA Arbitrations, to allow this issue to be explored in terms more appropriate to the identification of ultimate issues. Given the sheer volume of material and points which had to be addressed during the two-day hearing, there was only limited consideration of the implications of this analysis for the issue estoppel argument. For present purposes, I should note that I formed a necessarily preliminary view that findings on the following issues in the LCIA Award might arguably be said to concern substantially the same issue as an issue arising in this case:
- i) Any findings that Mr Dankevich was acting dishonestly and in breach of his duties to Bank Otkritie in causing Bank Otkirite to enter into the Otkritie Replacement Transactions.
 - ii) Any finding that a particular Respondent knew at the time of the Otkritie Replacement Transactions of i) above.
 - iii) Any finding that a particular Respondent dishonestly assisted Mr Dankevich breaching the duties in i) above or was a party to an agreement with him to do so.
 - iv) Any finding that entering into the Otkritie Replacement Transactions caused the Banks loss.
51. Had I reached the conclusion that the Respondents (or any of them) were arguably privies, before giving permission to amend I would have required the Banks to serve a further document which set out clearly, for each Respondent, which particular paragraphs of their Defence were said to be precluded by which “fundamental” or “ultimate” issues which had been determined by the LCIA Award. I would then have heard further argument on the question of “identity of issue” by reference to that formulation before reaching a conclusion on the application for permission to amend. For that purpose, it might have been necessary to engage with some of the Russian law evidence which featured only fleetingly at the hearing.
52. However, there are three further issues I should mention.
53. First, I would not have accepted Mr Rabinowitz QC’s argument that a finding that an LCIA Claimant had knowledge because (i) a particular Respondent had that knowledge and (ii) the knowledge of the particular Respondent was attributable to that LCIA Claimant did not embrace the same issue as whether that same Respondent had that same knowledge. On Mr Rabinowitz QC’s approach, a finding against employer A that it was vicariously liable for the negligence of employee B would determine the issue of B’s negligence on the basis of the “employee’s tort” theory of vicarious liability, but not if the “employer’s tort” theory had prevailed. Such an approach could only commend itself to the most committed legal conceptualist.
54. Second, I would not have accepted Mr Pillow QC’s submission that because the LCIA Claimants had originally sought a negative declaration as to the status of the Okritie

Replacement Transactions in wide terms, that meant that the Tribunal was necessarily determining “any realistic ingredient of any realistically arguable claim”. The practical position in the LCIA Arbitrations is that the Banks’ counterclaim served to define the issues to be determined, and the scope of the determinations made. In any event, I was referred to no passage in the LCIA Award in which the Tribunal was said to have made any determination which went wider than the specific allegations brought in the Banks’ counterclaim.

55. Third, it is necessary to say something more about the position of D1. In short, but highly effective, submissions, Mr Edey QC submitted that the LCIA Award did not arguably contain any finding of the requisite clarity that D1 had held the knowledge or dishonest state of mind alleged against him in these proceedings. I have been persuaded that he is right:
- i) Reflecting the fact that the Tribunal was concerned with the question of whether the LCIA Claimants could be said (by attribution) to have the relevant knowledge (from whatever source), the LCIA Award did not need to directly address the position of each of the Respondents in turn, and did not do so.
 - ii) In places, the LCIA Award uses the expression “the Mints family” without definition. However, the conclusions of the LCIA Award – where any findings of “ultimate issues” of the requisite clarity would be expected to be found – find that:
 - a) D2 and D3 “must have realised Mr Dankevich was not acting in good faith” and that D2 and D3 “could not honestly have thought he was” (para. 81(b));
 - b) D2 and D3 were not acting honestly (para. 81(c));
 - c) the knowledge of D2 and D3 was to be attributed to the LCIA Claimants (para. 81(d));
 - d) the LCIA Claimants, Mr Dankevich and D2 and D3 were parties to a conspiracy to damage Bank Otkritie (para. 81(g)); and
 - e) D2 and D3 intended to procure a breach of Mr Dankevich’s fiduciary duties (para. 81(g)).
 - iii) Against that background, I do not accept that the reference to “the Mints family” being party to a conspiracy in para. 81(h) can fairly, or sufficiently clearly, be read as extending beyond D2 and D3, and I am satisfied it is far more likely that it is a reference back to the finding of participation in a conspiracy made against D2 and D3, but not D1, in para. 81(g).
 - iv) Nor do I accept Mr Pillow QC’s submission that there could be an issue estoppel as against D1 in respect of findings made by the Tribunal as to D2 and D3’s dishonesty. Such findings would not be an ultimate issue so far as D1 is concerned in the LCIA Arbitrations, nor do they appear to be an ultimate issue in the claims made against him in these proceedings.

56. For these reasons, I would have refused permission to plead an issue estoppel case against D1 in any event.

E If the relevant test is satisfied, in what circumstances would it nonetheless be open to the Court to permit the Respondents (or any of them) to re-argue the Relevant Issues?

57. I will also deal with this issue briefly.

E1 What is the scope of any exception to the doctrine of issue estoppel?

58. It was common ground that even if the ingredients of an issue estoppel are otherwise established, the court may nonetheless refuse to give effect to the estoppel in “special circumstances”. In Arnold v National Westminster Bank plc (No 1) [1991] 2 AC 93, 109, Lord Keith explained the position as follows:

“In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the Carl Zeiss case [1967] 1 A.C. 853 , 947”.

59. I accept the observation in *Spencer Bower & Handley*, [8.32] that “the exception should be kept within narrow limits to avoid undermining the general rule and provoking increased litigation and uncertainty”. I also accept that there is no closed list of special circumstances: R (East Hertfordshire District Council) v First Secretary of State [2007] EWHC 834 (Admin), [24].

60. One issue which does not appear to have been considered in the authorities – at least in those to which I was referred – is whether there is any scope for arguing that the “special circumstances” exception should be wider in the case of Gleeson privies than for the original parties or their successors in title. I am not attracted by that argument, because the premise of the estoppel binding a privy is that it is just and fair to treat them in the same way as a party. In those circumstances, it would be inconsistent then to apply a wider “special circumstances” exception on the rationale that it would not be fair to treat the non-party in the same way as a party.

E2 Is the exception engaged (or engaged to the requisite degree of arguability) here?

61. Given my conclusion in [60] above, I have approached this issue by considering what the position would be if the LCIA Claimants had sought to re-fight ultimate issues determined in the LCIA Arbitration. So approached, I was not persuaded that it was arguable that the matters relied on here were sufficient to engage the “special circumstances” exception.

62. The “special circumstances” relied upon by the Respondents fall into three categories.

63. First, it is said that there will or may be evidence before the court at the trial which was not available in the LCIA Arbitrations:
- i) Evidence from Mr Dankevich who did not give evidence in the LCIA Arbitrations but is a participating defendant (at least to date) in these proceedings.
 - ii) Evidence from Mr Nazarychev and Mr Shishkhanov, who again did not give evidence in the LCIA Arbitrations. The former has confirmed his intention to give evidence in these proceedings. The latter (D7) has served a defence.
 - iii) Documents which it is said were not captured during the disclosure process in the LCIA Arbitrations.
 - iv) Expert evidence from reliable experts on bond valuation (the Tribunal having found both bond experts in the arbitration highly unsatisfactory).
64. If the question is asked whether any of these matters could have constituted “special circumstances” so as to permit the LCIA Claimants to re-fight their liability, the answer would surely have been no. The different evidential regimes between court and arbitral process, in circumstances in which no one suggests that the s.68 jurisdiction is engaged, cannot amount to “special circumstances” sufficient to deprive an award of whatever preclusive effect it would otherwise have, nor could the fact that the LCIA Claimants had instructed an unsatisfactory expert (the Banks’ failure to do so being something which, in the ordinary course, should have been a positive benefit for the LCIA Claimants). The submission made on behalf of D2 and D3 that the issues on disclosure “comprised matters which might be acceptable in arbitration but not in these proceedings” is wholly out of kilter with the policy of English arbitration law. As the Departmental Advisory Committee on Arbitration Law observed in its *Report on the Arbitration Bill* (February 1996) when discussing what would become s.68 of the Act at [280]:
- “The test [of substantial injustice] is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice”.
65. I would also note, although I have not relied on this factor, that Mr Dankevich (who was very much at the forefront of the Respondents’ submissions on this issue) was in Israel during the LCIA Arbitration. I was shown nothing to suggest that the court’s assistance could not have been sought to obtain his evidence through letters rogatory if anyone had thought it sufficiently worth their while (or been willing to take the risk), utilising the court’s powers under s.44(2)(a) of the Arbitration Act 1996 (see Dame Sara Cockerill, *The Law and Practice of Compelled Evidence in Civil Proceedings*, [5.41]).
66. Second, it is said that the court will hear evidence of a potential commercial justification for the Otkritie Replacement Transactions from Bank Otkritie’s perspective, namely that they avoided the need to provision for certain loans. That point did feature, albeit late, in the LCIA Arbitrations. No explanation has been given for why it could not have been advanced at an earlier stage if it was believed to have merit and could be reconciled

with the case theory then being advanced. On the hypothesis on which the present argument is proceeding (that the Respondents are the LCIA Claimants' privies), the failure to run a particular argument sufficiently early in the LCIA Arbitrations could not begin to amount to a special circumstance. No doubt anyone who has ever lost a case can identify in retrospect alternative arguments which might have been more viable, or which offer at least a prospect of a way through the wreckage, but that is no basis for depriving the original decision of the preclusive effect it would otherwise have.

67. The final point raised by the Respondents is the risk of inconsistent findings on the issue of the dishonesty of the Otkritie Replacement Transactions and those involved in them as between any persons estopped by the LCIA Award, and those such as D4 to D7 (and on my findings, D1) who are not. It was suggested that the risk was particularly acute here because there is nothing which would prevent the estopped individuals from giving evidence on behalf of other defendants. The overall effect, it was said, would be to create an "affront to justice".
68. The Respondents relied in this regard on Tugushev v Orlov [2021] EWHC 926 (Comm). In that case, there was a dispute between three parties (T, O and R) as to whether there was a three-way joint venture between them in relation to a fishing boat, or a two-way joint venture involving O and R. There had been unfair prejudice proceedings involving O and R in Hong Kong (conducted on the basis that O and R held 50% each in the joint venture company). T's putative interest was noted, and R asked the judge to provide for it, but no mechanism for doing so was identified. The judge made an order requiring R to buy out O's 50% stake, observing that he was not persuaded that it would not be possible satisfactorily to address T's position if the existence of a three-way agreement was ultimately established. In English proceedings commenced by T to assert his rights under a three-way joint venture, R counterclaimed against O on the basis that if the three-way agreement alleged by T was established, he would have paid O too much when buying out his stake, to be met with the response that R was estopped by the Hong Kong proceedings from raising that argument. Sir Nigel Teare concluded that the "special circumstances" exception was engaged because:
- i) O could not prevent T pursuing his claim that there was a three-way joint venture, which significantly reduced the injustice of O facing a claim by R on the same basis.
 - ii) If T established his case, the finding that there was a three-way agreement would be binding on all three parties, which would be a new or later circumstances arising since the Hong Kong judgment.
 - iii) There was a risk of inconsistent findings if the court gave effect to the three-way agreement between T and O and R in the claim, but not between O and R in the Part 20 claim.
69. In Tugushev, the injustice identified by Sir Nigel Teare arose because a stranger to the original proceedings raised a claim, and the claim which was sought to be precluded was contingent on that stranger's claim being established. The case did not involve, therefore, a unilateral attempt by one of the original parties or their privies to re-open the earlier determination. It was also a case in which the judge in Hong Kong appeared

to have contemplated that it would remain possible to work out the financial consequences if T did have a one third interest. Those features are not present in this case which (on the current hypothesis) would involve the same parties or their privies litigating the same point for their own purposes, not contingently in response to a third-party claim.

70. While I do not pretend I would have been able to contemplate the scenario outlined in [67] with any degree of sanguinity, I am not persuaded that the risk of inconsistent findings between parties who are estopped, and parties who are not, in respect of the same transaction or issue of itself gives rise to special circumstances. This risk arises inevitably whenever some parties to an overall dispute are subject to arbitration agreements and others are not (as Sir Nigel Teare noted in Tugushev, [54]). It can also arise when the same transaction features in successive High Court actions with overlapping but not identical parties and common witnesses. Current and former commercial practitioners of a certain vintage will recall a vivid example of this in the Orion v Sphere Drake litigation, in which the effect of a three-way arrangement was determined in Orion's favour in proceedings between Orion and Sphere Drake ([1990] 1 Lloyd's Rep 465; [1992] 1 Lloyd' Rep 239), in which the relevant witness from the third party, Baloise, gave evidence, and then determined to contrary effect in subsequent proceedings between Orion and Baloise after hearing from some of the same witnesses (Sphere Drake Insurance Plc v Basler Gesellschaft [1998] 1 Lloyd's Rep (Insurance and Reinsurance) 35). While Sphere Drake eventually succeeded in setting aside the original judgment on the basis that it had been procured by fraud ([2001] Lloyd's Rep IR 1), such that the estoppel fell away, it was never suggested that the risk of inconsistent findings alone was sufficient to free Sphere Drake from the effect of the earlier judgment. I cannot think that if Sphere Drake had been joined to the second action, this would have circumvented the need to apply to set aside the judgment, nor that if Sphere Drake and Baloise had been jointly sued for failing to pay amounts due under the pool arrangements, it would have been open to Sphere Drake to renew the argument that these had been finally settled at the famous 23 April 1975 meeting simply because the court would be hearing argument from Baloise to that effect, relying on the same witnesses.

F If and to the extent that there is no issue estoppel, would it be an abuse of process for the Respondents to seek to litigate any of the Relevant Issues?

F1 Can the doctrine of abuse of process be engaged by attempts to litigate issues determined in an arbitration between non-identical parties, and if so in what circumstances?

71. There is no dispute that the court has an inherent power to prevent the abuse of its procedures by actions which, although not involving an express breach of the rules, would give rise to manifest unfairness to another party or bring the administration of justice into disrepute: Hunter v Chief Constable of the West Midlands Police [1982] AC 529, 536 (Lord Diplock). Such an abuse may arise from an attempt to relitigate an issue determined in other proceedings, even though no issue estoppel has arisen. However, it is likely to be a rare case in which this is so. As Lord Lowry noted in Shaw v Sloan [1982] NI 393, 397:

“The entire corpus of authority in issue estoppel is based on the theory that it is *not* an abuse of process to relitigate a point where any of the three requirements of the doctrine is missing”.

72. It has been said that in order to determine whether proceedings which seek to re-litigate such an issue are abusive, it is necessary to “engage in a close ‘merits based’ analysis of the facts” (Michael Wilson & Partners Ltd v Sinclair [2017] 1 WLR 2646, [48]).
73. There are decisions in which findings of abuse have been made in respect of attempts to relitigate issues raised in prior litigation and where the identity of parties necessary for an issue estoppel is lacking. Mr Pillow QC placed particular reliance on two such cases.
74. The first is Secretary of State for Business, Innovation & Skills v Potiwal [2012] EWHC 3723, (Ch). In that case, the VAT tribunal in proceedings brought by HMRC against a company, Red 12, found that Red 12 through its sole director Mr Potiwal had engaged in fraudulent MTIC transactions. Mr Potiwal was the sole source of instructions for Red 12 and its sole witness at that hearing, at which he was subjected to a lengthy cross-examination. The Secretary of State then sought to rely on those same findings in director’s disqualification proceedings brought against Mr Potiwal. The parties to both proceedings were different, and while Briggs J found Mr Potiwal to be a privy of Red 12, he was not persuaded that the Secretary of State was a privy of HMRC. Given that both HMRC and the Secretary of State were (to adopt language used in another context) emanations of the UK state, that might be thought to be a “near miss” in privity terms (assuming the correctness of the decision so far as Red 12 and Mr Potiwal are concerned), and, to that extent, the case might be said to fall within the “spirit” of the doctrine of issue estoppel (adopting a phrase used by Lord Hoffmann in Arthur J Hall & Co v Simon [2002] 1 AC 615, 701 when describing the role of abuse of process in re-litigation cases).
75. Briggs J found that Mr Potiwal’s attempt to require the Secretary of State to prove his knowledge of and involvement in the fraudulent transactions an abuse of process, a rare example of a finding of abuse against a defendant seeking to raise arguments determined against a closely-related party in prior proceedings (see further [76]-[77] below). Briggs J laid particular emphasis on the fact that the tax payer was meeting the costs of both sets of proceedings ([27]), and the lack of evidence that Mr Potiwal could meet any order requiring him to reimburse those costs. The case undoubtedly represents the “high watermark” of abuse findings in cases concerned with the re-litigation of issues where there is no identity of parties. The dilution of the rule in Hollington v Hewthorn suggested by cases decided since Potiwal might provide an alternative means of addressing the vice in that case (see JSC BTA Bank v Ablyazov [2016] EWHC (Comm) 3071, [24]).
76. The second case is Tinkler v Ferguson [2021] EWCA Civ 18, in which it was held to be abusive for a claimant, who had lost litigation in the Commercial Court against a company said to be vicariously liable for breaches of fiduciary duty by other directors in issuing a press release referring to him, to sue those directors for malicious falsehood in relation to the contents of the same press release in separate proceedings. In that case, there was no identity of parties, but there was something close to it because the litigation in the Commercial Court concerned the vicarious liability of the defendants for the alleged wrongs of the directors who were defendants in the malicious falsehood action

in respect of substantially the same alleged wrongs. To that extent, it might also be said that the case fell within the “spirit” of the doctrine of issue estoppel, and I note that Peter Jackson LJ described the case as one which was “not *formally* between the same parties or their privies” (emphasis added) (at [62]), although he also noted that the absence of identity of parties was a “powerful factor” against any finding of abuse ([66]).

77. I accept the Respondents’ submission that it is likely to be easier to establish an abuse where the claimant seeks to re-litigate a claim which has failed against another defendant than where a defendant seeks to run a defence which failed in proceedings brought by the same claimant against a different defendant. The sentiments to that effect expressed by Ward LJ in Conlon v Simms [2008] 1 WLR 484 and Blair J in OMV Petrom SA v Glencore International AG [2014] 2 Lloyd’s Rep 308, [30] have the same intuitive appeal which animated the words of a traditional French song: “ce chien est très méchant; quand on l’attaque, il se défend”. As those decisions show, the intuitive appeal of that argument is likely to be stronger still when an attempt is made to rely on a prior determination to preclude the defendant from defending allegations of dishonesty, although Potiwai would suggest that even these considerations have a finite reach.
78. The Banks referred me to a passage in Zuckerman on Civil Procedure, 4th edition, [26.145], questioning the utility of the distinction between the position of claimants and defendants in the abuse context. While I agree that the formal character of a party is unlikely to be determinative (e.g., where proceedings are initiated by a party seeking a negative declaration as to the other’s claim, with a counterclaim following), I accept that there is a difference to be drawn between those who positively invoke the court’s processes in order to secure substantive relief from the other party, and those whose involvement is essentially defensive in response to the latter’s claims. The actions of the former more readily lend themselves to the characterisation of “vexing” an opponent than the latter. In any event, I note the relevance of the distinction is also supported by the Court of Appeal in Michael Wilson, [93] and Bragg, p.137.
79. Finally, it may, in appropriate circumstances, be an abuse of process to seek to relitigate in court an issue which had already been determined in an arbitration award, even where there is no “identity of parties” for issue estoppel purposes: Hamblen J so held in Arts and Antiques Ltd v Richards [2014] Lloyd’s Rep IR 219, [20], as did Reyes J in Hong Kong in Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd [2010] HKCFI 817 (Reyes J emphasising the need for caution when applying this doctrine to a prior arbitral determination ([173])). The Court of Appeal in Michael Wilson agreed ([67]). On this basis, there may be an asymmetry between the effect of a prior court decision on arbitral proceedings, and the effect of a prior arbitral award on court proceedings: see [25(v)].
80. Arts and Antiques involved an attempt by an unsuccessful arbitral claimant (and hence a party to the arbitration agreement) to re-litigate a dispute as to the terms of an insurance contract in court proceedings against the insurer and broker, having failed on the same arguments in an arbitration against the insurer. Hamblen J relied on another case (Taylor Walton (A Firm) v David Eric Laing [2997] EWCA Civ 1146) in which a party had lost litigation against its contracting party as to what the terms of the contract were, and then sought to bring a claim against its solicitors in subsequent proceedings premised on its (failed) case as to the terms of the contract. They were both cases,

therefore, in which the foundation of a second action against an agent was a particular contractual state of affairs which had been held not to exist in litigation between the contracting parties.

81. The caution which I have found is required before finding that a non-party will be bound by an arbitration award as a privy of an arbitrating party (see [27] above) also applies when an attempt is made to argue that a prior determination in an arbitration award makes it an abuse of process for the non-party to seek to raise a particular issue in subsequent litigation. Indeed, if anything, the fact that the non-party does not meet the requirements for Gleeson privity would suggest that this should be an even more challenging argument. It is not surprising, therefore, that Simon LJ in Michael Wilson, [68] suggested it would be “perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process”.

F2 Has the Banks’ abuse of process case been established to the requisite degree of arguability?

82. The factors at [41]-[42] above which led me to conclude that it is not arguable that the Respondents are privies of the LCIA Claimants in this case themselves provide compelling grounds for concluding that there is no abuse of process in the Respondents raising issues in their defences which are inconsistent with the findings in the LCIA Award. This is not a case in which I have found the issue estoppel case failed on some technical requirement, such that it can be said that preventing the Respondents from advancing their defences in a manner which was inconsistent with the LCIA Award falls within the “spirit” of an issue estoppel.

83. The Banks have failed to identify some special feature of this case which arguably requires the court to conclude that there would be an abuse of process here, whereas the Respondents are able to point to further strong reasons why there would not:

- i) The Respondents are seeking to defend the Banks’ claims, rather than themselves actively engaging the court’s jurisdiction to obtain substantive relief.
- ii) The Respondents were not parties to the LCIA arbitration agreements (in contrast to Art & Antiques).
- iii) One of the factors relied upon by the Banks (the allegation that the Respondents were funding the LCIA Claimants) was specifically held not to be a factor of material weight in this context in Michael Wilson, [96]-[97].
- iv) In considering the suggestion that it would be abusive for the Respondents to advance a case which was inconsistent with the LCIA Award, it is highly material that the Banks were clearly reserving the right to do exactly that: see Annex [29]-[33]. That substantially nullifies any suggestion that it would be “manifestly unfair” to the Banks to allow the Respondents to advance their defences as they see fit (picking up the language of Sir Andrew Morritt V-C in Secretary of State for Trade and Industry v Bairstow [2004] Ch 1, [38]).
- v) That fact, and the fact that the Banks are in any event going to be required to establish their case in respect of the Otkritie Replacement Transactions against D4 to D7, and against all the Defendants in relation to the Rost Replacement

Transactions, also strongly militate against any suggestion that it would bring the administration of justice into disrepute if the Respondents were to be permitted to advance their defences unconstrained by the findings in the LCIA Award.

84. For all these reasons, I have concluded that the abuse of process amendment is not realistically arguable either.

G CONCLUSION

85. For these reasons, the Banks' application for permission to amend is refused, and the further applications do not arise.
86. The parties are asked to agree proposals for the court's approval as to what consequential issues arise for determination, and how they should be resolved.

Post-script

87. It will be apparent that the (important) issues and (high quality) arguments involved in this application required a great deal more time than the two days set aside to do them justice. Although the court sat extended hours, and the pace of submissions was such that the two days' argument generated 208 and 223 pages of transcript respectively, there were a significant number of authorities or other documents for which the court was simply given references "for your Lordship's note" to read in its own time. My experiences in this regard bear some similarities to those described by His Honour Judge Pelling QC in Libyan Investment Authority v Credit Suisse International [2021] EWHC 2684 (Comm), [139]-[140]. It goes without saying that this is not a satisfactory way in which to conduct heavy interim applications in this court (as the recent Practice Notice from the Judge in the Commercial Court dated 29 March 2022 makes clear).



Neutral Citation Number: [2022] EWHC 871 (Comm)

Case No: Claims CL-2019-000412; CL-2020-000432

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2022

Before :

MR JUSTICE FOXTON

Between :

- (1) PJSC NATIONAL BANK TRUST
(2) PJSC BANK OTKRITIE FINANCIAL
CORPORATION

**Claimants/
Applicants**

- and -

- (1) BORIS MINTS
(2) DMITRY MINTS
(3) ALEXANDER MINTS
(4) IGOR MINTS
(5) VADIM BELYAEV
(6) EVGENY DANKEVICH
(7) MIKHAIL SHISHKHANOV
(8) MAPLESFS LTD

**Defendants/
Respondents**

Defendants

ANNEX

C3.1.1 Did the Respondents commence and conduct the LCIA Arbitrations?

1. On 28 June 2019, the Banks commenced these proceedings against the Respondents and D4, obtaining without notice freezing order relief at the outset from Moulder J. The Respondents instructed Simmons & Simmons LLP (**S&S**), who were acting for the LCIA Claimants in the LCIA Arbitrations, to act for them in the Commercial Court proceedings. S&S continued to act for D1 until 14 October 2019, when Quinn Emanuel Urquhart & Sullivan UK LLP came on the record, and for D2 and D3 until 8 October 2021 when Enyo Law LLP came on the record.
2. In response to the commencement of these proceedings, on 2 July 2019 S&S wrote a 10-page letter to the Banks’ solicitors on behalf of D2 (but stating that instructions were anticipated from D1 and D3). The Banks rely heavily on the terms of this letter. It is helpful to take the relevant parts of this letter thematically, rather than in the order in which they appear. The letter stated:
 - i) “Far from seeking to avoid the dispute being determined on the merits, our clients commenced LCIA arbitral proceedings on 2 January 2018, through the relevant contracting entities, to seek a declaration as to the validity and effectiveness of the [Otkritie Replacement Transactions]”. The Respondents had “fully supported” the steps taken by the LCIA Claimants in “fighting hard and successfully to require your clients to submit to the jurisdiction of the LCIA arbitration”.
 - ii) “Far from seeking, as you suggest to shy away from the merits of the dispute, or evade enforcement, relevant members of the Mints family have: (1) taken an active role in the arbitral proceedings, including through attendance at procedural hearings” and “(2) provided £791,125 by way of security for the costs of those proceedings”.
 - iii) These statements were made by way of criticism of the Banks’ decision to seek freezing order relief on a without notice basis, and to attack the alleged risk of dissipation, and were clearly making the positive assertion that, far from being “frit” about the allegations of fraud the Banks were making, the Respondents had themselves been pro-active in ensuring they were brought before a distinguished tribunal for resolution (“an arbitral tribunal comprising three former justices of the Court of Appeal of England and Wales”) and were fully supporting the arbitral process.
 - iv) The LCIA Arbitrations “raise virtually identical allegations, against individuals and companies in the O1 Group, to the accusations now raised again in [this court]”.
 - v) The “arguments on the merits are already well-rehearsed in the arbitral proceedings” and “[t]hat is where the merits of the dispute should and will be determined, and where our clients are confident that their position will be vindicated”.
 - vi) The “arbitral proceedings will almost certainly be determined well before any proceedings before the High Court and ... your clients will be bound by the

outcome of that decision on the facts: a point of fundamental importance to the claim in respect of which interim relief was sought”.

- vii) These paragraphs were principally concerned with the allegation that the Banks had failed, in breach of their duty of full and frank disclosure, to inform Moulder J during the “without notice” application of the detail of the LCIA Claimants’ defence as set out in the LCIA Arbitrations, and of the potential impact of those proceedings on the Banks’ claim in the High Court action. The basis on which it was said that *the Banks* would be bound by the outcome of the arbitration is not clear and was not explained.
 - viii) The Respondents “have no desire to waste time or money on satellite litigation and would prefer to focus on fighting the merits of the underlying dispute so as to vindicate their names in the arbitral proceedings”.
 - ix) This paragraph was clearly included in order to provide an explanation, should one be needed, for the fact that the Respondents were not applying to set aside the freezing order on the basis that there was no good arguable case.
3. These themes were also evident in the submissions made on behalf of the Respondents in the run-up to and at the return date for the freezing injunction. In a skeleton argument filed on their behalf on 10 July 2019, Mr Midwinter QC (who also acted for the LCIA Claimants in the LCIA Arbitrations) submitted:
- i) that the Respondents should be “allowed to focus on fighting and winning the underlying dispute on the merits in the arbitration”;
 - ii) “the Mints family deny any wrongdoing and started the arbitration in London (and obtained antisuit relief to force the Banks to participate) precisely because they believe that a proper examination of the facts will show that the allegations against them are unfounded”; and
 - iii) “the Mints family has not shied away from having the Banks’ claim determined – it welcomes it”.

Once again the clear purport of these paragraphs was to suggest that the Respondents had been pro-active in commencing and progressing the LCIA Arbitrations, because they were not in any way afraid of the Banks’ allegations but keen to have them determined by an impartial tribunal at the earliest opportunity.

4. The position taken by the Respondents was accurately summarised in Jacobs J’s judgment following the return date hearing ([2019] EWHC 2061), [46] as follows:

“Mr. Midwinter also relied upon the fact that it was Nori, Centimila and Coniston which, in January and February 2018, had started arbitration proceedings in London. This demonstrated that those companies, and by implication the Defendants, were actively seeking to vindicate their rights, and were hotly disputing the Claimants’ case.”

5. On 12 July 2019, an article referring to the High Court proceedings appeared in the *Financial Times*. It stated that “Mr Mints and his sons deny committing fraud and are

contesting the allegations in arbitration proceedings scheduled to be heard next April in London”. The article included the following quotation:

“We are committed to ensure that an independent and robust decision is sought from the Tribunal in the LCIA arbitration, which is not possible in Russia. In that arbitration, we will be pursuing a substantial claim for damages against the Bank”.

The source of the article was a public relations company called W Communications. Save that it can be said to reflect the same themes as the S&S letter and Mr Midwinter QC’s skeleton, the article is not particularly illuminating, and the precise provenance of the quotations, and who is embraced within the collective “we”, remain unclear. That is also true of an article published on 19 July 2019 in *Forbes Russia*. In that article, D1 is quoted as referring to “two identical lawsuits against him”, and stating that “he agreed with Otkritie to deal [with the dispute] specifically in the LCIA”. There is evidence to suggest that this was also the work product of W Communications. I have not found either of these articles of particular assistance, because neither is a context in which words will have been chosen with the same legal deliberation as in the S&S letter or in a skeleton argument.

6. Finally, in a further skeleton submitted on behalf of the LCIA Claimants in the LCIA Arbitrations on 23 July 2019, Mr Midwinter QC once again stated that the Respondents “remained committed to vindicating their position and reputation (and incidentally also thereby vindicating the Mints family) in this arbitration”.
7. I am satisfied that the clear and consistent effect of the materials prepared by lawyers acting for the Respondents is that the Respondents were each asserting that they were active participants in the decision to commence the LCIA Arbitrations, were actively supporting the pursuit of the LCIA Arbitrations, and that they were seeking to make a virtue of this fact in the context of the “without notice” freezing order relief which the Banks had obtained. Whether, in any individual case, that decision took the form of giving the relevant directions themselves, or supporting others, was not made clear.
8. What is said in response?
9. For D2 and D3, Mr Brook of Enyo Law LLP provided a witness statement stating that:
 - i) the Respondents had not taken the decision to commence the LCIA Arbitrations;
 - ii) none of the Mints family were “in any way involved in any of the claims” when the LCIA Arbitrations were commenced;
 - iii) Mr Crosse (the lead partner on the S&S team acting for the LCIA Claimants) had never met or spoken to D2 or D3 before September 2018 (when the Banks served their counterclaim in the LCIA Arbitrations) and then only interacted with them as potential witnesses;
 - iv) the S&S letter, with its reference to the Respondents commencing the LCIA Arbitrations “through” the relevant contracting entities “was obviously a factually mistaken comment given that D1-D3 were not parties to those proceedings and could not have commenced those proceedings”;

- v) Mr Crosse had informed Mr Brook that he agreed that the S&S letter, “drafted at speed and under pressure in light of the circumstances (with the return date hearing only two weeks after the freezing injunction was issued) does not reflect the facts, or his engagement terms, and is wrong in this respect”; and
- vi) “the language used by Mr Midwinter QC [in the skeleton] is somewhat loose and obviously inaccurate. It was not possible for the Mints family to have started arbitrations given that they were not parties to the relevant arbitration agreements, nor to the arbitrations that were instituted. However, it is hardly surprising that counsel might have allowed himself to lapse into such loose expression given that Mr Midwinter QC, when making this comment, is unlikely to have had in mind the significance of the distinction to be drawn between the O1 Group and its major shareholders which has become relevant in the present context”.
10. D2 and D3 did not provide statements addressing these issues and Mr Brook’s second witness statement provided no clear attribution of the various statements he had made to their sources. However, in a third witness statement of 9 February 2022 (for which the directions made no provision) D2 was identified as the source of certain information. No statement was provided by Mr Crosse of S&S.
11. There was also a statement from Mr Bunting of Quinn Emanuel Urquhart & Sullivan UK LLP, on behalf of D1. That statement adopted what Mr Brook had said; stated that D1 was “not involved” in the LCIA Arbitrations, did not give instructions in relation to the LCIA Arbitrations or exercise control over them and that “the decision to commence [the LCIA Arbitrations] was not made by him and no discussions concerning the decision to commence proceedings were had with D1”. D1 did not provide evidence to address this issue himself.
12. I do not find the attempts to explain away the clear position adopted in the S&S letter and in Mr Midwinter QC’s skeleton particularly satisfactory. Much of the “evidence” deployed to this end involved an attempt to topple the Aunt Sally that the Respondents could not have commenced the LCIA Arbitrations as such because they were not personally parties to the relevant arbitration agreements, which was clearly not the point that either the S&S letter or Mr Midwinter QC’s skeleton were making. The evidential basis of the statements made by Mr Brook and Mr Bunting was thin and unsatisfactory, as was the absence of statements from the Respondents themselves. Further, neither the statements nor the skeleton arguments filed for this hearing contained any sufficient acknowledgment of the fact that, on the account of events now being espoused, the picture of the Respondents as pro-active parties and the moving spirits behind the LCIA Arbitrations presented to the Banks and the court in 2019 would have been inaccurate. At the hearing, I expressed my concern at the lack of any direct evidence from Mr Crosse if it really was being said that that impression had been conveyed unintentionally or erroneously. I asked for the transcript exchanges to be brought to Mr Crosse’s attention, and was told they would be. I also informed the Respondents that I would “not be proceeding on the basis that [Mr Crosse] or Mr Midwinter have got it wrong without some fairly clear explanation of what Mr Crosse would say about this”. However, no further information was forthcoming.
13. Against this background, I am satisfied that it is clearly arguable that the Respondents were the moving spirits behind the decision of the LCIA Claimants to commence and

progress the LCIA Arbitrations. I do not feel able to go further, however, and conclude that there is no realistic scope for the contrary argument. That is not only (or even largely) because that would require me to reject the hearsay evidence given through Mr Brook and Mr Bunting as incredible, but because identifying what the actual position was is likely to be a nuanced enquiry, which offers scope for different kinds of participation by different Respondents at different points in time. The evidence is also less than clear as to the position after Nori and Centimila were placed into creditors' voluntary liquidation on 12 April 2019, and Mr Nicolaou appointed as their liquidator, although once again I accept that there is an arguable case that this did not change the position so far as day-to-day control of the LCIA Claimants' case in the LCIA Arbitrations was concerned. For what it is worth, however, I am satisfied that the hearsay evidence filed on behalf of the Respondents at this hearing does not provide the full picture of the Respondents' roles in relation to initiating and progressing the LCIA Arbitrations.

C3.1.2 Did the Respondents fund the LCIA Claimants in the LCIA Arbitrations?

14. On 13 November 2018, the LCIA tribunal ordered both sides to put up security for costs in the sum of £791,125, observing that it was highly likely that the LCIA Claimants had only limited assets. Both sides put up further security of £2,833,440 in July 2019.
15. The evidence as to who was funding the LCIA Claimants' own costs, and enabling them to provide security for the Banks' costs, is as follows:
 - i) The S&S letter of 2 July 2019 said that the security had been provided by "relevant members of the Mints family".
 - ii) On 16 August 2019, S&S corrected the position (there having been, I am fully satisfied, a wholly unintentional over-simplification of a complex position), stating that in the period before Nori and Centimila went into liquidation, the costs of the LCIA Claimants, and the security for the Banks' costs, were funded "by or through companies in which members of the Mints family had an economic interest by virtue of their interests as beneficiaries under the trust which have been described in the High Court proceedings". Although the letter referred to "companies", as I explain below, Mr Brook now says that it was one company, Trixtru, which provided the funding. From May 2019, S&S said that "a funder took over".
 - iii) The Banks applied to the LCIA Tribunal for an order requiring Nori and Centimila to disclose the identity of the funder. That application was successfully resisted, the LCIA Claimants expressing concern that pressure might be brought to bear on the funder. It is fair to observe that the application was conducted by the Banks and the Tribunal on the assumption that the funder was a third party to the arbitration (for example when discussing confidentiality issues which might arise from the provision of documents to the funder). An email from S&S of 17 March 2020 stated "the Respondents are banks backed by the Russian state ... The Claimants by contrast do not have such unlimited resources. They have been able to secure funding for the £3.62m security for costs and their own costs ... They do not believe that funding will be extended by the funder to cover the costs of another trial".

- iv) Mr Brook has confirmed in evidence filed for this hearing that the funder was in fact the third of the LCIA Claimants, Coniston, although the source of that statement is unclear.
16. On this evidence, I am satisfied that it is arguable that the LCIA Claimants' legal costs and security requirements were funded by companies under the control of the Respondents, and as a result of decisions taken by or with the approval of the Respondents in the exercise of those powers of control. While the ownership of Coniston remains obscure, there is evidence suggesting that the Mints family had been in a position to commit it to the Otkritie Replacement Transactions, Coniston appears to have instructed the OI Group legal team in connection with the LCIA Arbitrations, and Coniston's admitted funding of Nori and Centimila after April 2019 all provides an arguable basis for drawing the inference that it is controlled by some or all of the Respondents, as does the fact that the undertakings were varied on 9 April 2020 to allow the Respondents to pay legal costs of the LCIA Claimants. In any event, whatever the position so far as the beneficial ownership of Coniston is concerned, it is arguable that the funding it provided came from assets under the control of the Respondents (the terms of S&S's email of 20 March 2020 providing an arguable basis for such an inference). However, the contrary position is also arguable, and the overall effect of the evidence remains obscure.

C3.1.3 Participation in LCIA Arbitrations

17. The Respondents gave personal disclosure for the purposes of the LCIA Arbitrations, while formally taking the jurisdictional objection that the Tribunal had no power to order them to provide that disclosure – an objection referred to by the Tribunal in a ruling of 11 December 2019 as “resorting to and relying on form rather than substance”. The position of the “Mints family”, as passed on through S&S, was to maintain the jurisdictional objection but make it clear there was no objection in practice because “the Claimants and the Mints family, who have a personal interest in the proceedings, wish the Tribunal to have the fullest possible picture”.
18. There is nothing particularly surprising or unusual about the Tribunal making it clear they expected non-parties linked to the arbitrating parties to provide disclosure, nor that such parties did so. This practice is reflected in Article 3(10) of the International Bar Association Rules on the Taking of Evidence in International Arbitrations (2010) which provides that an arbitral tribunal can “request any party to use its best efforts to take ... any step that it considers appropriate to obtain Documents from any person or organisation”. Such orders are backed by the “soft”, but often highly effective, “sanction” of the arbitral tribunal's power, in an appropriate case, to draw the inference that the reason requested documents have not been produced is that they would be unhelpful.
19. It is also not in dispute that the Respondents all produced factual witness statements in the LCIA Arbitrations, on which they were cross-examined; that between them D2 or D3 attended all or the vast majority of the multiple procedural hearings in the LCIA Arbitrations, and that one or more of the Respondents “remotely attended” every day of the merits hearing. Once again there is nothing particularly surprising or unusual in this.

20. There is a feature of the LCIA Arbitrations which merits mention at this point. From the perspective of the Banks or the arbitral tribunal, provided relevant findings of dishonesty could be made and attributed to the LCIA Claimants, the individual positions of any particular Respondent was not of ultimate significance. In supporting the LCIA Claimants in resisting that case, the Respondents' involvement in the LCIA Arbitrations can be said to have reflected a collective, or as it was put "family", interest, in which a single and common position was adopted and presented through a single legal team, rather than a series of different positions each best calculated to advance the individual interest of the relevant Respondent, whatever the consequences for the others. That feature of the case, and the co-ordination and potential for compromise inherent within it, is a matter of some relevance when considering the argument that findings in the LCIA Award are binding on the Respondents in their individual capacity (and represents, for example, an obvious point of distinction with Secretary of State for Business v Potiwal [2012] EWHC 3723 (Ch)).

C3.1.4 The alleged strategy

21. The Banks allege that the Respondents adopted a strategy:

“to ensure that the substantive merits of the dispute between themselves and [the Bank] were determined in the LCIA Proceedings”;

or “to have the bona fides of the [Otkritie Replacement Transactions] and therefore their own honesty, determined by the Tribunal; and they directed active steps to be taken that end”.

22. I should acknowledge that Mr Pillow QC described the Banks' "strategy case" as "a label, if you like, for the evidence we rely on in all the various respects". It is necessary to unpack this allegation, for the purpose of distinguishing arguable inferences of fact from forensic characterisation.
23. First, it is alleged that the Respondents were aware that the allegations made by the Banks in relation to the Otkritie Replacement Transactions involved (or were likely to involve) allegations of dishonesty against them personally, and that this was knowledge which they had when causing the LCIA Claimants to commence and/or progress the LCIA Arbitrations.
24. I accept that there is strong evidence to this effect:
- i) The S&S letter of 2 July 2019 said as much, stating “[y]our clients have been alleging fraud against the Mints family for close to 20 months ... The true position is that the Mints family have known for close to 20 months that they were being accused of fraud by your clients” (i.e., since September 2017).
 - ii) Mr Midwinter QC's skeleton argument of 10 July 2019 similarly submitted “the Bank has been alleging that the restructuring transaction was a fraud on it to which the O1 Group and Boris Mints in particular were party since October 2017 ... It has thus been obvious to the 1st-3rd Defendants that the Bank alleges that they were parties to the alleged fraud since January 2018 at the latest”.

- iii) These positions were consciously taken to advance the “stable door” arguments that (a) if the Respondents were going to dissipate assets, they would have done so before and (b) if the Banks genuinely believed that they would dissipate assets, they would have sought freezing order relief before. As Jacobs J observed at [2019] EWHC 2061:

“[42] The principal argument advanced was that there was insufficient recent evidence of any dissipation. Mr. Midwinter submitted that it was clear, from documents filed in the Cyprus proceedings, that by January 2018 the Claimants intended to come after the Mints family. Proceedings had already been started in Russia by that time. There was, however, no good evidence of any dissipation in the 18 months that had elapsed since that time.

[54] [It] is clear that by no later than September 2018 ... there had been various sets of proceedings in existence; in particular, Russian proceedings which had been commenced in October 2017, the LCIA arbitration proceedings commenced by Nori and Centimila in January 2018, and proceedings in Cyprus also commenced in January 2018 by Bank Otkritie. All of these proceedings involved various OI companies, rather than the Mints family as personal defendants. They do, however, show that from an early stage, and certainly by January 2018, there were potential claims in fraud certainly against the 1st Defendant, and possibly against other members of the Mints family.”

25. What do the Respondents say now?

- i) Mr Brook for D2-D3 states in his third witness statement:

“Mr Dooley [for the Banks] refers to various materials which, he suggests, support the conclusion that it must always have been understood that the Claimants would pursue D2 & D3 individually, alleging fraud. That is not correct, and the statements *apparently* made to the contrary in the materials filed in support of D2 & D3’s position at the return date must be read in the context in which they were prepared. The service of the WFO on D1-D4 came as a shock ... In the context of an argument that the WFO should not be continued on grounds of delay, *it is unsurprising* that D1-D4’s representatives would *seek to make the case* that proceedings were ‘on foot’ for some time”.

(emphasis added).

- ii) Mr Bunting for D1 does not address the issue, save insofar as he adopts the contents of Mr Brook’s witness statement.

26. I do not regard the explanation advanced through Mr Brook’s witness statement as satisfactory. The Respondents’ representatives could not “make the case” that the Respondents had known that they faced fraud allegations by the Banks for many years unless those were the instructions they had received. What would be wholly “surprising” would be for such a case to be made in the absence of such instructions. I am satisfied that the position of the Respondents was that set out by Mr Crosse and Mr

Midwinter QC (which reflects the overwhelming probabilities, in a case which the Respondents have characterised as part of a “campaign” by the Russian state “against the O1 Group and the Mints family”). I find any contrary suggestion is not realistically arguable.

27. Against the background of the campaign they allege, I also have little doubt that it was the Respondents’ clear preference for an LCIA arbitration tribunal to pronounce first on the allegations made relating to the Otkritie Replacement Transactions, and not a Russian court. A favourable decision would undoubtedly have assisted in shaping public perceptions of the conflict, and in all the circumstances, it seems unlikely that the Respondents would have anticipated a favourable decision on the status of the Otkritie Replacement Transactions from a Russian court. If that it is what the Banks mean by the alleged “strategy”, then I accept it is not only strongly arguable this was the Respondents’ hope, but (if it is disputed) that the contrary is not realistically arguable.
28. I do not accept, however, that it is arguable that there was any clear strategy or intent on the part of the Respondents to procure findings in the LCIA Arbitration which would be legally determinative as between the Banks and themselves. The only reference to that effect was the rather throwaway line in the S&S letter of 2 July 2019 (long after the LCIA Arbitrations were commenced) that an award from the LCIA tribunal would bind *the Banks*. The LCIA Claimants’ submissions of 17 March 2020 in the context of an application by the Banks to adjourn the LCIA Arbitrations referred to the serious allegations which had been made publicly against “the Mints family”, the fact that “this arbitration will *in practice* be likely to determine” the allegations of fraud made against them and that “although not parties to the arbitration, the Mints family could reasonably expect that the High Court proceedings and the associated WFO would *in practice* be likely to move to a swift conclusion once the arbitration had been concluded and the award issued”. If the Banks’ submission that “the Mints family understood and accepted that the substantive issue as to the bona fides of the replacement transaction would be decided once and for all by the Tribunal” is intended to go any further than these statements, I am not persuaded that there is an arguable factual basis for such an inference.
29. For their part, in their outwards posture at least, the Banks too were clearly proceeding on the basis that, however significant they might be in changing the perception of the dispute and the “atmospherics”, the findings in the LCIA Arbitrations would not be legally determinative in these proceedings. At the return date hearing before Jacobs J on 11 July 2019, Mr Pillow QC made the following submission about the relationship between the High Court proceedings and the LCIA Arbitrations:

“The reality is that the arbitration, my Lord, as I hope you have gathered, does not have these defendants, these individual gentlemen as parties. They cannot be parties, they cannot be made parties by us because they were not parties to the relevant arbitration agreements, and the people who are parties to that arbitration, Nori and Centimila and Coniston, pledged shares and certainly so far as Nori and Centimila are concerned, which are admittedly properly owned or were properly owned by the O1 Group on the evidence, I think admittedly so, they are in liquidation”.

30. On 8-9 March 2021, a hearing took place of the Banks' application to join D5 to D7 to the proceedings brought against D1 to D4 as "necessary or proper parties". It will be immediately apparent that if, and to the extent that the claims between the Banks and D1 to D3 would be determined in the LCIA Arbitrations in reliance on the privity doctrine, that might have consequences for the discretionary aspect of the "service out" test, and this issue was raised by Sir Nigel Teare with Mr Pillow QC for the Banks:

"The Judge: If you lost, if your side lost the arbitration, would you pursue the claim against the four defendants?"

Mr Pillow: I have no particular instructions on that, my Lord, no instructions at all, on that at the moment but I would see no reason why not on the basis that we would say it was not a res judicata against the individuals ...

[T]hey were not running the litigation [the LCIA Proceedings] or at least they were saying they were not running the litigation. They were witnesses, D1 to D3, but the companies who were the claimants were in insolvent liquidation apparently being run by an independent liquidator. So that would probably tell against the privityship argument, at the very least, but it would be one reason why the Mints defendants could say they were not, in fact, running the litigation for themselves.

Judge: Oh, I see that. I had thought that they were running the arbitration.

Mr Pillow Oh, no, my Lord, no. That's not what they were saying. I mean, we have our doubts, I suppose it is fair to say, as to who was really pulling the strings. But their position was that the claimants were being -- were in insolvent liquidation and necessarily, therefore, being run by an independent liquidator from Cyprus.

Judge Oh, I see.

Mr Pillow That's really important".

31. A little later, the Judge asked:

"What do you say to the point that, because these issues, at least in relation to Otkritie, are being arbitrated and will be decided upon, that the notion of this court seeking to ensure that all these claims are tried in the same place is meaningless because, manifestly, they are not going to be tried all in the same place?"

Mr Pillow replied:

"My Lord, that, in a sense, is my very point. One of the great and possibly severe disadvantages of the arbitration proceedings is that they are like Hamlet without the prince in respect of the new defendants. The problem with arbitration proceedings for a claimant in a fraud case like this is, of course, there is, in

reality, as far as English law is concerned, nothing that can be done to prevent English arbitration, English-seated arbitration proceedings, going ahead.”

32. Mr Pillow QC went on to state:

“So, my Lord, whatever the outcome of the arbitration, your Lordship cannot, I'm afraid, safely proceed on the assumption that there will not be a full trial against the Mints defendants. As of today, and certainly as of the hearing also before his Honour Judge Pelling, that assumption is totally unsound. The banks, as I understand it, are intending to press these proceedings against the Mints defendants to their conclusion. And by that they mean, of course, the banks, a successful judgment against them.”

33. Mr Pillow QC's submissions are entirely understandable, not simply because his client is unlikely to have wanted to take a position on what the effect of the award in the LCIA Arbitrations would be before knowing what the outcome was, but more fundamentally, because those submissions reflected the reality of the position – the LCIA Arbitrations had not been conducted on the assumption or basis that they would be legally determinative as between the Banks and the Respondents.

C.1.4 The causes of action advanced

34. If, contrary to the view I have reached, there is a greater readiness to find privity of interest between joint tortfeasors who are parties to separate proceedings, transposing any such rule to this particular case would not be straightforward. While the Banks' claim in the LCIA Arbitrations pleaded a conspiracy involving the LCIA Claimants and the Respondents, there is no cause of action in Russian law in conspiracy, and it is not clear to me whether, under Russian law, the Respondents would be joint tortfeasors with the LCIA Claimants, and, if so, whether that would have the particular consequences which would follow under English law (in particular whether there would be a single, joint, cause of action). However, I accept that the contrary may be arguable, depending on the Russian law evidence.