

# THE HIGH COURT

COMMERCIAL

[2023] IEHC 235

[No. 2016/9981 P.]

BETWEEN

TRAFALGAR DEVELOPMENTS LIMITED, INSTANTANIA HOLDINGS

LIMITED, KAMARA LIMITED AND BAIRIKI INCORPORATED

PLAINTIFFS

AND

DMITRY MAZEPIN, OJSC UNITED CHEMICAL COMPANY URALCHEM,  
URALCHEM HOLDING PLC, EUROTOAZ LTD, ANDREY GENNADYEVICH  
BABICHEV, YULIA BOLOTNIKOVA, BELPORT INVESTMENTS LTD, MILKO  
EMILOV MINKOVSKI, ANDROULA CHARILAOU, DMITRY KONYAEV AND  
YEVGENIY YAKOVLEVICH SEDYKIN AND BY ORDER JSC KHIMAKIVINVEST

AND AKTUM LIMITED LIABILITY COMPANY

DEFENDANTS

**JUDGMENT of Mr. Justice Denis McDonald delivered on 5<sup>th</sup> May 2023**

**(Application to add plaintiffs)**

## **The application before the court**

1. The existing plaintiffs in these proceedings have brought an application seeking to join a number of additional parties as plaintiffs. These parties are identified in Appendix 1 to the notice of motion. They comprise ten companies, two of whom are incorporated in Cyprus, one in Switzerland and the remaining seven are incorporated in Tortola in the British Virgin Islands.

2. The application is made pursuant to a number of provisions of the Rules of the Superior Courts. In the first place the order is sought pursuant to O. 15, r. 18 and/or O. 17, r. 4. In the alternative, the application is put forward pursuant to O. 15, r. 13. An order is also sought pursuant to O. 28, r. 1 and/or O. 28, r. 6 permitting the plaintiffs to further amend the amended plenary summons, the amended concurrent plenary summons and the second amended statement of claim. While most of these amendments can be said to be consequential upon the joinder of additional parties, it is also proposed to amend the statement of claim in relation to the status of the existing plaintiffs. As explained in more detail below, the existing plaintiffs are described in the second amended statement of claim (and in previous versions of the statement of claim) as “*owners*” of the shares in issue in these proceedings. That is how they have been described in the pleadings since the outset of the proceedings. No indication was ever given that the form of ownership asserted by the plaintiffs was limited in any way or that it fell short of the ordinary meaning of ownership under Irish law.

3. It is now proposed to describe the existing plaintiffs in the third amended statement of claim as trust managers of the shares and the proposed additional plaintiffs will, instead, be described as owners of the shares and as “*settlers*” under the trust management agreements entered into by them with the existing plaintiffs as trust managers. It is also proposed to record that, in February 2022, the twelfth named defendant (“*Kai*”) acquired the shares in question albeit that the plaintiffs challenge the legality of the steps by which Kai acquired the shares. The acquisition of the shares by Kai occurred as a consequence of certain steps taken in Russia which the plaintiffs contend were part of an alleged conspiracy to injure them (as described in more detail below).

4. Ordinarily, the need to amend a pleading to reflect a change in status of a party will only arise where the change in status occurs after the relevant pleading has been delivered. But that is not the position here. It is not contended that the change in status of the existing plaintiffs

from “owners” to trust managers occurred after the delivery of the second amended statement of claim or even that it occurred after the proceedings were commenced. The proceedings were commenced on 9<sup>th</sup> November 2016. Most of the appointments of the existing plaintiffs as trust managers occurred long prior to that date. The majority of the relevant trust management agreements appointing the plaintiffs as trust managers were executed in January 2009 but some were executed in April 2011 and January 2013. The most recent is dated 27<sup>th</sup> October 2016. Absent the trust management agreements, the plaintiffs would have no role in relation to the shares in issue. Notwithstanding the way in which the case has previously been pleaded, it is now clear that the plaintiffs’ sole status from the outset was that of trust managers of the shares.

5. The final part of the application before the court is for an order dispensing with the requirement to serve the notice of motion and grounding affidavit on the eighth named defendant, Mr. Minkovski. That is not something which requires to be addressed in this judgment. It is sufficient to note that, so far, Mr. Minkovski has not participated in these proceedings.

### **Background**

6. The background to these proceedings is described in a number of judgments given by Barniville J. (as he then was) and in a judgment given by me in respect of the challenge to Irish jurisdiction brought by Kai. In very brief terms, the existing plaintiffs in these proceedings allege that the defendants have conspired together to unlawfully take control of a Russian company called OJSC Togliattiazot (“ToAZ”). The first four named plaintiffs previously held 70% of the shares in ToAZ as trust managers. ToAZ is said to be a very valuable company. It is the largest producer of ammonia in Russia (principally for use as fertiliser). The plaintiffs claim that the defendants have engaged in a scheme to take the shares held by the plaintiffs in ToAZ and to place them at the disposal of the first named defendant, Mr. Mazepin, or a company under his control. The plaintiffs contend that this scheme involved making multiple

unfounded criminal complaints to the Russian authorities, relying on false evidence in support of those complaints, procuring unjust court orders and putting undue and unlawful pressure on judges in Russia with a view to forcing the plaintiffs to sell their shares in ToAZ to the defendants or their nominees at an undervalue. As part of this conspiracy, the plaintiffs allege that proceedings were taken in Russia which were designed to ensure that an award of damages would be made against the plaintiffs such that the plaintiffs' shares in ToAZ would have to be sold in order to satisfy those damages. The plaintiffs further contend that, in furtherance of this alleged conspiracy, the second defendant ("*UCCU*") obtained an award of damages from the Komsomolsky District Court in July 2019. That award was made against a number of parties including Mr. Sergei Makhelai who the defendants contend was, at all material times, the beneficial owner of the ToAZ shares held in the names of the existing plaintiffs. The Komsomolsky District Court made a number of findings consistent with this contention. The plaintiffs claim that this award of damages arose as a consequence of what they describe as grave violations of fair procedures in the Russian proceedings. Nonetheless, the decision of the Komsomolsky District Court was upheld on appeal. In the meantime, the existing plaintiffs in these proceedings brought an application before the court here in Ireland seeking an injunction restraining UCCU from proceeding with the damages claim against the plaintiffs in Russia. In the course of the hearing of that application in June 2019, an undertaking was given by those defendants not to take any steps to execute or to enforce or to authorise the execution or enforcement of any judgment obtained in the District Court proceedings in Russia. However, subsequently, the Russian court itself intervened and directed that the writs of execution which had issued against the plaintiffs should be returned by UCCU on the basis that they would be sent, instead, directly by the court to the bailiff for execution. In making that direction, the Russian District Court said that this would not breach the undertaking given to the High Court here. The plaintiffs allege that, thereafter, Mr. Makhelai was declared bankrupt in Russia on the

application of UCCU on the basis of the damages award made by the Russian courts. The bankruptcy administrator in Russia then took steps to take control of the shares held by the existing plaintiffs in ToAZ and to put those shares on the market. At that point, Kai (which the plaintiffs contend is subject to the ultimate control of Mr. Mazepin and is a party to the alleged conspiracy) successfully made a bid for the shares at an auction organised by the bankruptcy administrator. In the meantime, UCCU (which was, at the time, a minority shareholder in ToAZ) applied to ToAZ to convene extraordinary general meetings of the shareholders of ToAZ to pass resolutions to remove the board and replace it with a new board made up entirely of UCCU representatives. UCCU subsequently transferred its shares to Kai. Extraordinary general meetings of ToAZ took place and the board was replaced. In that way, the existing plaintiffs allege Mr. Mazepin has acquired the plaintiffs' shares in ToAZ and obtained complete control of that company at the expense of the existing plaintiffs. The plaintiffs allege that, in this way, the defendants have secured the object of the alleged conspiracy and have achieved the result which the plaintiffs always feared (as reflected in the case made in the statement of claim originally delivered in these proceedings).

7. The defendants vigorously dispute the claims made by the plaintiffs. They also strongly make the case that the plaintiffs were engaged in wrongful conduct in relation to ToAZ. They claim that the plaintiffs diverted funds from ToAZ through the sale of ToAZ products, at a gross undervalue, to parties affiliated to the plaintiffs and that they have thereby enriched themselves at the expense of ToAZ. In turn, these allegations are rejected and denied by the plaintiffs.

8. It is apparent from the affidavits grounding the application to join the intended plaintiffs that, as a consequence of the sale of the plaintiffs' shares in ToAZ by the bankruptcy administrator, the plaintiffs have a concern about their ability to continue to maintain these proceedings in their sole names. In this context, the Russian law evidence (in the form of a

report from Mr. Alexander Vaneev, a Russian lawyer) is to the effect that, had the ToAZ shares been lawfully sold under Russian law, this would have terminated the trust management agreements appointing the existing plaintiffs as trust managers and would have discharged them from their position as trust managers. However, the plaintiffs make the case (and this is supported by the opinion of Mr. Vaneev) that, where the sale was involuntary and unlawful, this should not affect their right to maintain these proceedings as a matter of Russian law. Nonetheless, they say that they are concerned that there is a risk that the court may take a different view as to the effect of Russian law and, in those circumstances, they say that it has now become necessary to join the intended additional plaintiffs to the proceedings as owners of the shares and as “settlers” under the trust management agreements. The plaintiffs stated position in this context was very succinctly described by counsel for the plaintiffs in the course of his oral submissions as follows: -

*“And Mr. Vaneev has made it clear that as far as he is concerned as a matter of Russian law, the Plaintiffs are nevertheless entitled to pursue the action, but there's a risk that they are not, and the Defendants oppose this application. And that's, I suppose, remarkable on a number of levels, Judge. The first because the necessity to make this application is brought about by the very wrongs of which we complain. There is a very real risk in this case that the Defendants will say that they are entitled to take advantage of their pursuit of the scheme in order to claim that the Plaintiffs, whom they have deprived of the shares, are, as a consequence of that, no longer entitled to pursue the claim.*

*Secondly, there is an easy way to address that risk and that's the way that we seek in this motion. We seek to join the settlers. But the Defendants oppose that, thereby, as I say, raising the risk that at the full trial of this action, the Court will be met by a point*

*from the Defendants saying, well, the Plaintiffs no longer own the shares, don't have title to pursue the action, the settlors aren't parties and therefore the case will be at risk of being defeated by non-joinder of parties.*

*I suppose the third remarkable aspect, Judge, of the exchange of submissions on this, and the way in which this has come to pass, is that the Defendants have submitted a great deal of expert evidence to say that, for various reasons, neither the Plaintiffs nor the intended Plaintiffs have standing to sue for a number of reasons, inter alia because they say that the shares aren't owned by them, they are owned by Mr. Makhlai.*

*But they have offered no view and no expert evidence of whether they'll rely as an additional point on the recent forced sale of the shares, and that's a startling feature of the exchange of affidavits. I mean, this entire problem could be met by the Defendants saying that they won't take that point. They have deliberately and carefully avoided saying that they won't make that point."*

9. It is important in this context to consider the evidence as to Russian law placed before the court by the plaintiffs in the form of the report from Mr. Vaneev. In his report, Mr. Vaneev considers the potential impact of the sale of the shares to Kai on the standing of the existing plaintiffs to pursue these proceedings. According to Mr. Vaneev, a transfer of assets to a new owner usually terminates a trust management agreement. At para. 26 of his report, he says: -

*"26. According to the position of the Russian Courts, a transfer of asset to the new owner terminates the trust management agreement between the trust manager and the settlor. I should note that this position was elaborated by the courts in relation to cases where an asset transferred to the trust management was alienated voluntarily. The asset was sold to a new owner."*

**10.** However, Mr. Vaneev suggests that a different view can be taken where the sale is involuntary. At para. 27 of his report, he says: -

*“In situations where an asset is sold/alienated not voluntary against the will of the settlor or trust management or trust manager and the trust manager is willing to challenge such sale or seek the return of an asset or claim related damage, the trust manager should still be able to file/pursue or pursue such claim in the interests of the settlor of the trust management.”*

**11.** Mr. Vaneev explains that any contrary view would be inconsistent with Article 1020(3) of the Russian Civil Code. At para. 28, he says: -

*“To say otherwise would be contrary to the very idea of what Article 1020(3) of the Civil Code which enables the trust manager to protect the rights to property held in trust management accounts against any violation. Thus, the very idea of this rule is to give the trust manager the right to protect his rights in relation to asset transfer to the trust management in court in all cases when the trust manager considers he was deprived of an asset illegally.”*

**12.** On that basis, Mr. Vaneev expresses the view that the existing plaintiffs should still be able to pursue the Irish proceedings in respect of the shares notwithstanding the sale of those shares by the bankruptcy administrator in Russia. At para. 29 of his report, he says: -

*“Accordingly, the Plaintiffs should still be able to pursue the Irish proceedings even after the Plaintiffs' shares were sold at the auction. If the Irish High Court agrees that the sale was illegal, depending on the remedy used, the settlors and the Plaintiffs rights in relation to involuntarily alienated shares may be restored.”*

**13.** However, counsel for the plaintiffs submitted that there was, nonetheless, a very real risk that the defendants will argue at trial that, referring back to what Mr. Vaneev says at para. 26 of his report, the existing plaintiffs no longer have title to sue. Moreover, there could well



be a dispute at trial between the Russian law experts as to the legal effect of the sale of the shares to Kai on the continued operation of the trust management agreements.

**14.** Mr. Vaneev also addresses the question as to whether a trust manager has the right to take legal action in respect of property over which he has been appointed as trust manager by the owner of that property. This is obviously relevant to the question as to the entitlement of the existing plaintiffs to prosecute these proceedings. In para. 50 of his report, Mr. Vaneev refers to Article 1012(2) of the Russian Civil Code which provides that, in carrying out trust management of property, a trust manager has the right to take any legal action in respect of the property in accordance with the trust management agreement for the benefit of the *“settlor of the trust management”*. Mr. Vaneev also refers to Article 1020(1) of the Code which provides that the trust manager exercises the owner’s powers over the property in question *“to the extent provided for by law and the trust management agreement”*. Having set out these two provisions of the Russian Civil Code, Mr. Vaneev expresses the opinion in para. 52 of his report that a trust manager has the right to bring court proceedings to protect the property transferred into trust management. He also draws attention to Article 1020(3) of the Code which provides that the trust manager, in order to protect the rights of the property held in trust management, has the right to demand that any violation of his rights be remedied. According to Mr. Vaneev, this means that a trust manager can demand the cessation of any violation of his rights using any remedy provided by the law.

**15.** With regard to the right of a trust manager to pursue a damages claim in the interests of the settlors, Mr. Vaneev notes in para. 54 of his report that there is *“practically no court practice on this issue”* but that there are *“some cases before the Russian courts”* where the trust manager sought damages incurred by the settlor. Mr. Vaneev then says: -

*“It seems that the court did not see any problem with that (the claim was not satisfied, but not for the procedural reasons).”*

Having referred to two cases to that effect, Mr. Vaneev then continued in para. 56 of his report to express the view that a trust manager is entitled to claim damages and other remedies that protect the property held under trust management. In paras. 56 and 57, he says-

“56. *I believe that as Article 1020(3) entitles the trust manager to ‘demand that any violation of his rights be remedied’, the trust manager is entitled to claim damages, if the claim in damages is an appropriate remedy for the specific factual circumstances ...*

57. *Accordingly, in my opinion, the trust manager is entitled to use any remedy and to make any claims that seek to protect the property transferred into trust management and/or the settlor’s interests, including the claim in damages. Further, the Plaintiffs are of course entitled to claim compensation for any loss that was suffered by them because of the Defendants’ conspiracy.”*

16. In addition, Mr. Vaneev expresses the opinion that the “*settlers*” also have standing to pursue any such claims on their own behalf. In para. 58 of his report, he says: -

“58. *Moreover, since the settlers are the owners of the assets and the trust managers are protecting, inter alia, the interests of the settlers by filing the claims for damages suffered by the settlers, the settlers also have standing to pursue such a claim on their own behalf.”*

17. In his report, Mr. Vaneev also deals with an issue (which is strongly contested by the Russian law experts retained by the defendants) in relation to the legality of the steps taken by the bankruptcy administrator of Mr. Makhlai to take control of the shares held in ToAZ and to dispose of those shares. At para. 59 of his report, Mr. Vaneev stated: -

“59. *The bankruptcy administrator was not entitled to consider the shares which the Plaintiffs hold as trust managers and which are owned by the settlers to be Mr.*

*Makhlai's property and auction them without a Court Order permitting him to do so."*

18. In this context, Mr. Vaneev refers to Article 149(2) of the Russian Civil Code which provides as follows: -

*"The rights under an uncertificated security are transferred to the purchaser from the moment that person records the rights to uncertificated securities makes the appropriate entry in the purchaser's account."*

19. In para. 61 of his report, Mr. Vaneev states that, in accordance with Article 149(2), Russian law links the existence of the rights of a person in respect of shares of this kind with the existence of an appropriate entry on that person's account. He then expresses the opinion that the effect of Article 149(2) in the context of the actions taken by the bankruptcy administrator is as follows: -

*"62. Thus, in order to state that Mr. Makhlai is an owner of the Plaintiffs' shares and to become able to sell these shares, [the bankruptcy administrator] should have persuaded [the depository bank] to transfer the shares from the Plaintiffs' depo accounts to the depo account of Mr. Makhlai. Such a transfer technically involves writing off the shares from the Plaintiffs' depo accounts and making an entry in Mr Makhlai's or Mr Makhlai's Bankruptcy Administrator's depo account. As stated above, this change of the entries in the depo accounts from the Russian law perspective effectively means the change of the ownership of the shares. Thus, to make such a transfer [the depository bank] should have received documents confirming that in accordance with Russian law there are grounds for transfer of the ownership (in an ordinary situation it could be a sale and purchase agreement, court judgment etc)."*

**20.** In para. 63 of his report, Mr. Vaneev highlights that this course of action was not taken by the bankruptcy administrator. In para. 70 of his report, Mr. Vaneev states that, if the bankruptcy administrator wished to proceed in the way that he did, he “*should have applied to the court with a claim demanding to establish that Sergei Makhlai is a ‘de facto’ owner of the shares in ToAZ...*”. For completeness, it should be noted that attempts were made by the plaintiffs before the Russian courts to have the shares taken out of Mr. Makhlai’s bankruptcy but those proceedings were unsuccessful.

**21.** The views expressed by Mr. Vaneev are contested by the Russian law experts retained by the defendants. In particular, Mr. Vladimir Nikolaevich Melnikov has expressed the view that Mr. Vaneev’s analysis and conclusions are “*very fragile*” in circumstances where Mr. Melnikov contends that Mr. Vaneev does not consider all of the relevant circumstances that should be taken into account by an expert. Mr. Melnikov highlights in this context that the intended plaintiffs are “*shell holding companies without genuine business activities registered mostly in Caribbean jurisdictions*” and that there is no information as to their source of funds that could have allowed them to acquire shares in one of the largest Russian “*chemical plants*”. Mr. Melnikov also emphasises that no explanation has been given as to why the intended plaintiffs would have entered into trust management agreements with the existing plaintiffs in circumstances where they are also “*four offshore shell companies without genuine business activities*”. On that basis, Mr. Melnikov submits that the intended plaintiffs are a part of a “*sham asset holding structure*”. Mr. Melnikov contends, accordingly, that even if the ToAZ shares were registered in their depo accounts in the past, the plaintiffs can have no title to the shares under Russian law. Mr. Melnikov also expresses the view that the plaintiffs are bound by the outcome of the proceedings taken by them in Russia in which they sought to argue that the shares belonged to them and that the bankruptcy administrator was wrong in including the shares in the bankruptcy estate of Mr. Makhlai. Mr. Melnikov observes that, by that application,

the plaintiffs voluntarily submitted to the jurisdiction of the Samara Court to decide whether they have an entitlement to the shares in ToAZ and whether the bankruptcy administrator was correct to include the shares in Mr. Makhlai's bankruptcy estate. On that basis, Mr. Melnikov expresses the view that neither the existing plaintiffs nor the intended plaintiffs are now entitled to argue that the intended plaintiffs were owners of the shares.

**22.** Mr. Melnikov also draws attention to the fact that the plaintiffs did not challenge the proceedings brought by the wife of Mr. Sergei Makhlai to ownership of a proportion of the shares. Mr. Melnikov expresses the view that the failure of the plaintiffs to challenge the proceedings brought by Mr. Makhlai's wife in respect of the shares demonstrates that neither the existing plaintiffs nor the intended plaintiffs own the shares. Mr. Melnikov advances the view that the only reasonable explanation for the approach taken in respect of the claim advanced by Mrs. Makhlai is that both the intended plaintiffs and the existing plaintiffs act as nominees for Mr. Makhlai. On that basis, none of them could have title to sue in respect of the claim made in these proceedings.

**23.** In addition to the points outlined above, Mr. Melnikov also expresses the view that the management agreements and activity statements put in evidence on behalf of the plaintiffs for the purposes of the present application do not prove the title of the intended plaintiffs to the shares in ToAZ. A significant number of issues are raised by him in this context in paras. 26 to 29 of his affidavit. Among the points made by Mr. Melnikov are that the management agreements appear to have been arranged by the same person and that many of them were executed on the same day with the main purpose being "*to complicate the ToAZ ownership structure and to hide the real owner*". This is just a sample of the points made by Mr. Melnikov in this regard. By way of further example, Mr. Melnikov suggests in para. 28(d) of his affidavit that Magnum Investment Trading Corporation (one of the proposed intended plaintiffs) ("*Magnum*") could not have acquired the shares on 24<sup>th</sup> December 2012 (which is the date

shown on the relevant transfer order) because the transferor had, prior to that date, been dissolved. Mr. Melnikov highlights, in this context, the final report of the liquidator of the named transferor (dated 2<sup>nd</sup> February 2012) in which the liquidator states that the transferor had no assets as of the date of liquidation. On that basis, Mr. Melnikov expresses the view that Magnum could not be a shareholder and that Mr. Jordaan (who has sworn an affidavit in support of the present application in his capacity as a director of Magnum and of the third plaintiff) can have no standing to act in these proceedings as a director of Magnum.

**24.** The documents and materials relied upon by the plaintiffs to prove their title are also strongly contested in the expert report of Mr. Feodor Vyacheslavov, the Russian law expert, retained by UCCU. Mr. Vyacheslavov contends that the activity statements on which the plaintiffs rely provide no evidence that the intended plaintiffs are in fact the owners of the shares and not merely nominal holders or fiduciary managers. Mr. Vyacheslavov expresses the view that Russian courts do not consider such evidence as proper and sufficient evidence of ownership. Mr. Vyacheslavov also contests the further views expressed by Mr. Vaneev in his eighth report which provided a response to Mr. Melnikov's opinion. In that eighth report, Mr. Vaneev had taken issue with the views expressed by Mr. Melnikov and he reiterated the views previously expressed by him. In particular, in paras. 18-20 of his eighth report, Mr. Vaneev reiterates the view previously expressed by him. In those paragraphs, he said: -

*“18. ...Russian law clearly and unambiguously says that a person having the shares on the account is the owner of the shares. In our case, as the shares were registered in the trust managers' accounts, the owners of the shares (meaning the persons having the absolute proprietary rights to the shares) were the settlors of the trust management, i.e., the Intended Plaintiffs (by virtue of Articles 209(4) and 1012(1) of the Civil Code).*

19. *The fact that Mr. Melnikov thinks that the ownership structure might be a sham one is not a valid ground to disregard what the law says... UCCU should have gotten a court judgement confirming that Mr. Makhlai was a de facto owner of the shares and ordering that the shares be transferred to the actual owner (“reverse piercing of the corporate veil”) in order to be entitled to disregard the ownership structure... [T]he concept of “reverse piercing of the corporate veil”, which is not provided for by Russian law and was applied by the courts only in singular cases...*
20. *As there was no court judgement confirming that Mr. Makhlai was a de-facto owner of the shares and the shares had not been transferred to Mr Makhlai or any other person, the Plaintiffs and the Intended Plaintiffs were the owners of the shares by virtue of the mandatory rule of Article 149.2(2) of the Civil Code...”*
25. Mr. Vyacheslavov suggests in his report that Mr. Vaneev is engaged in “*linguistic speculation*” insofar as the use of the word “*owner*” is concerned. In particular, he contends that Mr. Vaneev is trying to make use of a Russian language nuance that an owner may sometimes be referred to as “*possessor*” in circumstances where there is no requirement to distinguish between physical possession and ownership. In para. 10 of his report, Mr. Vyacheslavov states that he strongly disagrees with para. 18 of Mr. Vaneev’s eighth report. He advances a number of reasons in support of this proposition. He also disagrees with Mr. Vaneev’s view that Russian law does not allow a court to disregard the corporate structure and recognise the property of a company acting as a nominal owner as the property of the beneficial owner. Mr. Vyacheslavov refers to a number of Russian court decisions in this context. He also expresses the view that the Russian courts recognise and apply the concept of “*piercing the*

*corporate veil*". He also agrees with the view expressed by Mr. Melnikov that there was detailed evidence before the Russian courts that the shareholding in ToAZ was a "*sham for the purposes of concealment of the actual owner*" and that the conclusion reached by the Russian court was "*fully grounded on the discrepancies and errors in the documents allegedly proving the ownership*". He expresses the following view in para. 25 of his report: -

*"I am of the opinion, and it is confirmed by the Court practice cited above, that in case of such abuse of the concept of a legal entity by the persons in control, an appropriate consequence is disregard of the principle of limited liability of the legal entity, and application of the theory of fiction of such legal entities."*

**26.** In support of this view, Mr. Vyacheslavov refers to a number of academic works in Russia and what he describes as the practice of the Russian courts. In later parts of his report, he disagrees with the view expressed by Mr. Vaneev that the decision reached by the Russian courts to refuse the plaintiffs' application to exclude their shares from Mr. Makhlai's bankruptcy was not in accordance with Russian law. He advances a number of reasons in support of that proposition. As previously noted, he also addresses the question of whether activity statements provide evidence of the ownership rights of the intended plaintiffs over the shares. However, counsel for the plaintiffs has suggested that Mr. Vyacheslavov does not comment on whether Mr. Vaneev is correct that a nominee is, in principle, entitled to exercise rights of share ownership. Counsel for the plaintiffs also highlighted the difference in view between Mr. Vyacheslavov and Mr. Vaneev insofar as the share structure is concerned. While Mr. Vyacheslavov expressed the view that the existence of "*unreasonably overcomplicated corporate structures*" can lead to abuse of the principle of limited liability, Mr. Vaneev had stressed in his reports that arrangements of this nature are not uncommon in Russia and that there is nothing improper about them such as to justify a court ignoring that structure.



27. Counsel for the plaintiffs submitted that there has been no fundamental change of position on the part of the plaintiffs. He argued that the case made by the plaintiffs remains the same. He said that the plaintiffs always contended that they had standing to sue because they were on the share register and, on that basis, they are to be treated as owners. He accepted that there was a dispute between the Russian law experts on that issue but he stressed that this is not a dispute that could be resolved by the court at this stage. Counsel submitted that, based on Mr. Vaneev's views, it was legitimate for the plaintiffs to describe themselves as owners and he also relied on Mr. Vaneev's view that both the plaintiffs and the intended plaintiffs have standing to sue in respect of the shares. He also highlighted that the defendants have known that the existing plaintiffs were trust managers and he referred, in this context, to Mr. Babichev's first affidavit sworn on 17<sup>th</sup> February 2017. Counsel contended that it was incorrect to suggest (as the defendants do) that the plaintiffs have not explained the position. On the contrary, he maintained that the plaintiffs have explained why they were described in the statement of claim before now as owners and the basis upon which that case was made. As I understand it, counsel was relying on the reports of Mr. Vaneev in support of this proposition.

**The plaintiffs' submissions in respect of O. 15, r. 8**

28. Against that backdrop, counsel turned to the three bases on which the present application is made. In the first place, he referred to O. 15, r. 8 which is in the following terms:

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*“Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties.”*

**29.** Counsel submitted that the rule applies to all proceedings where trustees act on behalf of or represent the property or estate of persons beneficially interested. He submitted that there is no limit to the type of case in which the rule applies. Secondly, he submitted that, having regard to the express language of the rule, the jurisdiction to add parties can be exercised at any stage of the proceedings. Counsel acknowledged that the effect of the rule is that it permits the court to join parties who are beneficially interested in the relevant trust. In particular, he acknowledged that it must be established “*that the person you are joining is a person who is beneficially interested in the trust*”.

**30.** Counsel for the plaintiffs highlighted that there is not much guidance on the application of O. 15, r. 8. It is referenced in passing in two modern cases, namely, *Re Stanley Deceased* [2016] IEHC 8 and *O’Hagan v. Grogan* [2013] ILRM 394. The jurisdiction has been exercised, in older cases, in circumstances where an issue arises as to whether trustees or other representative plaintiffs are not or may not properly be in a position to protect the interests of the parties beneficially entitled. Thus, for example, in *Payne v. Parker* (1866) LR 1 Ch 327, the court made an order joining the *cestuis que trust* to the proceedings as plaintiffs so that their interests could properly be protected in circumstances where there was a potential conflict of interest as between the trustees.

**31.** Counsel submitted that there is nothing in the text of O. 15, r. 8 to suggest that its application is limited to situations where the interests of the representative plaintiffs are or may be in conflict with the interests they represent; the rule could also apply in any situation where, during the currency of the proceedings, some doubt or question arises as to whether or not the interests sought to be protected in the proceedings by the representative plaintiffs might be called into question by reason of the absence of the interested parties as plaintiffs in the proceedings. It was also submitted that, on the evidence, it is clear that such a situation arises in the unusual circumstances of this case having regard to the potential implications of the

forced sale of shares in Russia on the continued operation of the trust management agreements pursuant to which the existing plaintiffs act for and on behalf of the intended plaintiffs. Counsel submitted that this was especially so given the relative dearth of authority on the issue in Russia which Mr. Vaneev has acknowledged in his report.

**32.** Counsel submitted that the evidence of Mr. Vaneev makes clear that the functions of the plaintiffs as trust managers under Russian law are closely analogous to those of trustees under Irish law. While they have the rights that are described by Mr. Vaneev, they are acting on behalf of the settlors (i.e. the intended plaintiffs). On the basis of Mr. Vaneev's views, the existing plaintiffs are and were entitled to sue as trustees in that sense without joining the settlors. Counsel submitted that, accordingly, they are the persons whose job it is to vindicate the interests of the persons with the relevant proprietary rights (here, the intended plaintiffs).

**33.** In the course of counsel's oral submissions, I asked him to address the meaning of the words "*persons beneficially interested*". Counsel submitted that it was sufficient for the intended plaintiff to show that it is the person on whose behalf the trustee was exercising the powers of a trustee.

**34.** Counsel submitted that, in this context, one does not look behind the company comprising the settlor in question to consider who the shareholders in that company might be or who the ultimate owners of the company might be. Counsel referred to the decision of the Supreme Court in *O'Donnell v. Governor and Company of the Bank of Ireland* [2014] IESC 77. In that case, an issue arose as to the legal and beneficial ownership of a property which was held in the name of a company called Vico Ltd. A question arose as to whether the property was in fact held on trust for the beneficiaries of a trust over the shares in that company. The High Court found that the beneficiaries of the trust were beneficial owners of the shares in Vico Ltd but that they held no beneficial interest in the underlying properties held by that company in its own name. That decision was upheld by the Supreme Court. In her judgment in the

Supreme Court, Laffoy J. rejected an argument made by the beneficiaries of the trust that the property was held on trust for them. In substance, the effect of her judgment was that it was inappropriate to ignore the separate corporate personality of Vico Ltd. In para. 107 of her judgment, she referred to a decision of the UK Supreme Court in *Prest v. Petrodel Resources Ltd* [2013] 3 W.L.R. 1. where Lord Sumption had concluded, on the particular facts of that case, that certain properties acquired in the name of a company referred to as PRL were held in trust for a shareholder in that company. In para. 48 of his judgment in that case, Lord Sumption said: -

*“All of these properties were acquired by PRL before it began commercial operations and began to generate funds of its own. This was the main basis on which the judge found that the matrimonial home was held on trust for the husband from its acquisition in 2001. Since, as the judge found, no rent was paid to PRL for the family's occupation of the matrimonial home, this is a particularly clear case of the husband using PRL as a vehicle to hold legal title on trust for himself.”*

35. In the *O'Donnell* case, the beneficiaries of the trust of shares in Vico Ltd submitted that, similarly, the property in issue was purchased and held by Vico Ltd for their benefit and that Vico Ltd had no other purpose. This argument was rejected by Laffoy J. At para. 108 of her judgment, she said: -

*“...all of the contemporaneous documentary evidence clearly proves that Vico Limited was the beneficial owner of Gorse Hill from the respective dates of the completion of the purchases of the unregistered portion (February 1998) and the registered portion (June 2000) and that it became the legal owner as well as the beneficial owner of all of Gorse Hill in May 2006. The documentary evidence also clearly proves that it was the issued share capital of Vico Limited which became part of the Trust Fund settled by the Discretionary Trust. Moreover, the documentary evidence also establishes aspects of*

*the relationship of Mr. O'Donnell and Mrs. O'Donnell with Vico Limited in relation to Gorse Hill, which are material to the determination of where the beneficial ownership of Gorse Hill lies, namely:*

- (a) that a debtor/creditor relationship exists between Vico Limited, as debtor, and Mr. O'Donnell and Mrs. O'Donnell, as creditors, in relation to the costs of acquisition and re-development of Gorse Hill; and*
- (b) that there was an arrangement between Mr. O'Donnell and Mrs. O'Donnell and Vico Limited under which Mr. O'Donnell and Mrs. O'Donnell and their children would be entitled to reside in Gorse Hill.*

*In simple terms, what the evidence establishes is that Mr. O'Donnell and Mrs. O'Donnell jointly decided that their family home, not using that expression in any technical sense, would be acquired by them through the medium of an Isle of Man company, Vico Limited, which would be indebted to them for the acquisition and re-development costs, but which would allow them reside there with their children. Contemporaneously, they jointly decided to settle the issued share capital of Vico Limited on the terms of the Discretionary Trust. What Lord Sumption referred to in the Prest case as "the ordinary principles and presumptions of equity" cannot be stretched to justify a finding that the intention of Mr. O'Donnell and Mrs. O'Donnell was that Vico Limited would hold Gorse Hill in trust for the ultimate beneficiaries of the Discretionary Trust."*

**36.** Counsel for the plaintiffs submitted that the same position applies here. He maintained that the existing plaintiffs, as trust managers, hold the shares for the settlors. The fact that the settlors comprise companies does not mean that one can go behind those companies to look at who the shareholders or ultimate owners of those companies might be. Counsel submitted that,

were it otherwise, it would be difficult to see how O. 15, r. 8 would operate fairly. He submitted that, if these proceedings had been commenced with the settlors as plaintiffs, nobody could have complained about that. He submitted that the purpose of O. 15, r. 8 must be to allow the intended plaintiffs to be joined at a point when it is, according to him, entirely appropriate to do so.

**The plaintiffs' arguments in respect of O. 17, r. 4**

37. The second basis on which the present application is advanced is O. 17, r. 4. It provides as follows: -

*“Where by reason of death or bankruptcy, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, ...it becomes necessary or desirable that any person not already a party should be made a party, ...an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.”*

38. Counsel for the plaintiff emphasised that, while the rule specifically mentions a change or transmission of interest or liability arising as a result of death or bankruptcy, the rule also refers to “*any other event*”. Counsel submitted that those words cover a very broad spectrum of events. Counsel also referred, in this context, to the judgment of Baker J. in *Irish Bank Resolution Corporation Ltd (In Special Liquidation) v. Lavelle* [2015] IEHC 321 where, Stapleford Finance Ltd., an assignee of the debt owed by the defendant to the plaintiff sought an order pursuant to O. 17, r. 4, that the proceedings should continue in its name as plaintiff. The assignment in question was made under the provisions of the Judicature Act (Ireland) 1877 (“*the 1877 Act*”) which post-dated the introduction of a rule in the terms of O. 17, r. 4. At the

time of the introduction of that rule, there was no facility to assign debts in the way subsequently permitted under the 1877 Act and, on that basis, it was argued on behalf of the defendant that an assignment under the 1877 Act could not be said to fall within the ambit of the rule. This argument was rejected by Baker J. who, in para. 39 of her judgment, set out the principles that must be borne in mind in considering the meaning of the words “*change... in interest*”: -

- “(i) *The words are, in the absence of a historical context, simple and clear: per Peart J in IBRC v. O'Driscoll*
- (ii) *The interpretative process may be conducted bearing in mind changes in the law, including those effected by the Act of 1877, and changes in the meaning of words that might flow from legislative change or the common law thereafter.*
- (iii) *There has been a change in the ownership of the relevant loan book, effected by means of the procedure provided by the Act of 1877, and there has been therefore in the plain meaning of the word a "change", a change in the identity of the person or body who now owns the chose in action*
- (iv) *The word "interest" is a broad term and connotes "rights, titles advantages, duties, and liabilities connected with a thing, whether present or future, ascertained or potential" per "Murdoch's, Dictionary of Irish Law" (5th ed. 1988) page 634.”*

**39.** Baker J. rejected the argument that the term “*change in interest*” was to be interpreted by reference to the language used in the Chancery Ireland Acts of 1853 and 1868 where it was used as a term of art confined in its meaning to the transmission of interest or liability as a

consequence of death or other cause and was not intended to address a transfer of a legal right of interest which only became possible subsequently after the enactment of the 1877 Act which, for the first time, provided a means for a legal assignment of debt. Counsel stressed the way in which Baker J. concluded that the word “*interest*” is to be construed broadly rather than narrowly. For completeness, it should be noted that the decision of Baker J. was subsequently upheld by the Court of Appeal in *Stapleford Finance Ltd. v. Lavelle* [2016] IECA 104 (“*Stapleford*”).

**40.** Having referred to the judgment of Baker J., counsel for the plaintiffs then explained why, in his submission, the rule is applicable here: -

*“So, trying to apply that, Judge, to this case: Is this a case in which there has been an event occurring after the commencement of a cause or action causing a change or transmission of interest or liability? And it's an interesting point in the case, Judge, where does the jurisdiction lie? Because the central point made by the Defendants under this heading is that, well the Plaintiffs' case is that their right to protect the shares haven't changed as a result of the forced sale of the shares. And they say that that's what Mr. Vaneev says. That, of course, is true and they say, therefore, how can you say that there has been an event which has caused a change of transmission of interest or liability?”*

*That raises a question, Judge, as to the breadth of the rule. Because it's clear that there has been an event - that's the forced sale of the shares - which may have given rise to a change in the interests of the Plaintiffs. That's the loss of their right to sue in respect of the shares having regard to the potential termination of the trust management agreements which might ordinarily follow from the sale of the shares. And, if that's*



*correct, lest that be correct, it's appropriate to operate on the basis of Order 17 Rule 4.*

*So I suppose the question for the court is: When I apply to the court under Order 17 Rule 4, am I allowed to do so where I say that the other side says, or may say, that as a consequence of an event occurring after the commencement of the case which has caused you to lose your title to sue, you're now no longer entitled to sue, does that lead or fall within Order 17 Rule 4? In my respectful submission it must, Judge. It cannot be reserved to a case in which -- sorry, it can't exclude a case in which the defendant is saying, or may well say, that there has been an event here that has caused the Plaintiffs to lose their title to sue; cause or change of transmission of interest or liability is such that in this case there is a loss of title to sue."*

**41.** I put it to counsel for the plaintiff that my understanding of the object and purpose of O. 17, r. 14 was to address a change or transmission of interest which allows the successor to that interest, as a consequence of the change of interest, to apply to be joined as a party to the proceedings in place of that party's predecessor in title. I indicated that I have never come across a situation, such as the present, where, on the plaintiffs' case, there has been no change of interest as between the existing plaintiffs and the intended plaintiffs. Counsel accepted that the rule is ordinarily utilised in the manner in which I described, but he submitted that this does not mean that those are the only circumstances in which the rule can be invoked. Counsel submitted that the rule covered the present situation in circumstances where there has been an event occurring after commencement of the proceedings which, depending on the view ultimately taken as to the effect of Russian law, caused a change or transmission of interest or liability.

**The Plaintiffs' submissions in respect of O. 15, r. 13**

42. The third basis on which the application is advanced is O. 15, r. 13. That rule provides as follows: -

*“No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties ... whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. ...”*

43. Counsel for the plaintiffs submitted that, while the rule uses the terms “*necessary*”, this does not mean necessary in an absolute sense. In support of this proposition, he cited the decision of Haughton J. in *Re CTO Greenclean Environmental Solutions Limited (in Liquidation)* [2017] IEHC 246. In that case, Haughton J. noted, at para. 17, that the main purpose of the rule is to ensure that no cause or matter is defeated by reason of the misjoinder or nonjoinder of parties. At para. 20, Haughton J. rejected a submission that it had to be demonstrated that the joinder of the party was necessary – in the absolute sense of that word – in order to enable the court to adjudicate upon all issues. He stated as follows: -

*“...While O. 15 r. 13 does use the word ‘necessary’ it does not do so in any absolute sense. In fact, it uses the phrase ‘may be necessary’ and this is a further recognition that O. 15 r.13 is an enabling procedural provision which is availed of before a court is called upon to make any adjudication or final determination. Where the presence of a party ‘may be necessary’ it is appropriate that they be joined, whether as a defendant or plaintiff/applicant.”*

44. In the same case, Haughton J., at para. 21, drew attention to the mischief that would arise if the application to join the additional plaintiffs was refused: -

*“It is also clear that the fact that a person who is not a party could initiate separate proceedings cannot be an answer to an application to join a co-applicant. If that were so there would be no purpose in having a provision in the Rules permitting joinder of a co-plaintiff or co-applicant – they would be compelled to initiate their own proceedings in every case. The resulting duplication of proceedings and inevitable additional costs cannot have been the intention of the Rules Committee drafting O. 15 r.13. ...”*

**The plaintiffs argue that an applicant for an order under O. 15 or O. 17 is not required to establish anything more than a stateable case**

45. It was also submitted on behalf of the plaintiffs that, for the purposes of an application under either O. 15 or O. 17, the applicant for relief need only establish a stateable case for the joinder of the proposed new party. The plaintiffs referred, in this context, to the decision of Laffoy J. in *Allied Irish Coal Supplies Ltd v. Powell Duffryn International Fuels Ltd* [1998] 2 I.R. 519, the decision of Kelly J. (as he then was) in *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671 and also the decision of Baker J. in *Lavelle*. They also referred to the judgment of Barniville (as he then was) in his judgment in these proceedings ([2021] IEHC 69) where he said, at para. 66: -

*“If the court determines that the principles to be applied are those applicable to substitution applications, the authorities discussed earlier make clear that the application for a substitution is intended to be a simple, straightforward and purely procedural application and is not intended to be in the nature of a “mini-trial”: Comer, McDermott and McKeown. Those authorities also make clear that the court will determine such an application on the basis that the moving party must demonstrate a*

*prima facie case on the basis of which the substitution order should be made: Halpin, McDermott and McKeown. These authorities strongly imply that cross-examination will not be permitted on a substitution application. It is normally the case on such applications that in the event that the court grants the application, it will be open to the opposing party to contest the facts alleged to support the substitution at a later stage in the proceedings, such as at the trial. ...”*

### **The position taken by the defendants**

46. Submissions were made on behalf of the fourth and fifth named defendants (“Eurotoaz”) and by counsel for the remaining defendants other than Mr. Minkovski (who I shall refer to as the “UCCU defendants”, UCCU being an acronym derived from the name of the second named defendant). Both sets of defendants contended that the plaintiffs’ application should be refused under each of O. 15, r. 8, O. 17, r. 4 and O. 15, r. 13. However, none of the defendants disputed that the standard to be applied is as described in para. 45 above. Counsel for Eurotoaz drew attention in this context to the decision of Murray J. in the Court of Appeal in *Pepper Finance v. Macken* [2021] IECA 15 which confirms the approach taken in the earlier case law. That was the only issue on which there was no dispute.

47. Counsel for Eurotoaz characterised the present application as unprecedented. Counsel submitted that the existing plaintiffs have, up to this point, maintained the proceedings on the basis that they were the “owners” of the shares in ToAZ and he highlighted that this was the way in which they were described, without any qualification, in each iteration of the statement of claim delivered up to now. He stressed that they now wish to abandon the premise of the case which they had pursued for the past six years. The assertion now is that the existing plaintiffs do not own the shares and have never owned the shares. Counsel submitted that no sufficient explanation has been put forward as to how this striking change in position has come about.

**48.** In addition, counsel for Eurotoaz highlighted that the proposed third amended statement of claim fails to plead the principles of Russian law upon which the existing plaintiffs and intended plaintiffs seek to rely. Counsel highlighted that none of the matters addressed by Mr. Vaneev in his report are pleaded in the proposed amended statement of claim. Thus, none of the Russian law cited by Mr. Vaneev is invoked in the proposed amended statement of claim to support the case that the plaintiffs, as trust managers, have a right to seek any of the relief claimed. Other than disclosing that the existing plaintiffs are no more than trust managers, the proposed amended statement of claim does not address the issue as to how trust managers have the right, as a matter of Russian law, to pursue a claim for damages in respect of the shares owned (or purported to be owned) by the intended additional plaintiffs. Similarly, the proposed amended statement of claim does not address the different types of “owner” which are explained by Mr. Vaneev in his report.

**49.** Counsel for Eurotoaz submitted that, on this application, the court is being invited under O. 15, r. 8 to assume that the case has been brought to date by the existing plaintiffs as trust managers on behalf of the intended additional plaintiffs as settlors. In this context, counsel drew attention to the way in which the existing plaintiffs have pleaded their case to date, not just in the text of the statement of claim but also in response to requests for particulars. Eurotoaz sought particulars of the allegations made in the original statement of claim to the effect that the existing plaintiffs were the owners of the shares. The response given by the existing plaintiffs on 2<sup>nd</sup> July 2018 is in the following terms: -

*“1(e) The capacity in which the Plaintiff owns the shares, i.e. as trustee, beneficial owner, nominee or otherwise;*

*Paragraph 1(e) is not an appropriate matter for particulars. It has no relevance to the case as pleaded and is unnecessary. It does not relate in any way to the case the*

*Defendants are to meet in these proceedings, which is set out in great detail in the Amended Statement of Claim. Without prejudice to the foregoing:*

*The share register of ToAZ and latest report for the first quarter of 2018 published on 15 May 2018 by Public Joint Stock Company "Togliattiazot" records and confirms that the Plaintiffs are the majority shareholders in ToAZ, owning approximately 70% of the said shares. Under Russian law the share register is dispositive proof of ownership. **The share register also records that the Plaintiffs hold the said shares as 'trust managers' and the Plaintiffs are suing as owners and trust managers.***

*1(f) In the event that Plaintiff holds the shares in trust for, as nominee for, or to the order of any third party or parties please furnish details of the party or parties concerned together with details of the basis upon which the plaintiff holds the shares for that party;*

*The basis for pleading is a matter for evidence, and not particulars. Without prejudice to that, see reply to request 1(e). **The Plaintiffs are fully entitled to vindicate the full suite of rights which they enjoy as their position corresponds to the position of full owners of their shares.** Further, and in the alternative, the further detail requested in paragraph 1(f) is unnecessary.” (emphasis in the written submissions of Eurotoaz)*

**50.** In contrast, counsel for Eurotoaz drew attention to the way in which Mr. Vaneev, in his report, explains that the existing plaintiffs are not the owners of the shares. In particular, Mr. Vaneev said, in para. 7 of his fifth report: -

*“Therefore, generally, the effect of the TMA’s [Trust Management Agreements] is that the trust managers are entitled to exercise all rights of the owner in relation to the shares in TOAZ in the interests of the settlors, **but the ownership of the shares in***

*TOAZ remains with the settlors.*” (emphasis in the written submissions of Eurotoaz)

51. Counsel for Eurotoaz submitted that it is, therefore, clear that the existing plaintiffs have put forward their claim on the basis that the shares were their own property. It was never pleaded that the word “*owner*” had a special meaning under Russian law which is not the meaning it has under Irish law. If the plaintiffs are so contending (as appears now, belatedly, to be the case), counsel argued that they are obliged to explain that and to plead the specific Russian law on which they rely. Counsel submitted that, in accordance with long-established principles, foreign law is treated as a matter of fact to be pleaded and proven like any other fact on which a party may seek to rely. According to counsel for Eurotoaz, it is insufficient for the plaintiffs to simply plead (as they currently propose to do as set out in the draft third amended statement of claim) that they intend to adduce expert evidence of Russian law.

52. In support of the position that foreign law must be pleaded, counsel for Eurotoaz drew attention to r. 25(1) in *Dicey, Morris & Collins on the Conflict of Laws* (15<sup>th</sup> Ed.) (2012) which provides at p.318 that: -

*“In any case in which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.”*

53. Counsel also referred to the fact that, in the context of a previous application by the existing plaintiffs to amend their statement of claim (to reflect the fact that the first and fourth of those plaintiffs had re-domiciled to different Caribbean jurisdictions), Barnville J. had advised the parties that he had decided to allow the amendment but added: -

*“I intend to grant the plaintiffs' application, but I will be making it conditional on the production of a more fully pleaded draft second Amended Statement of Claim, which must plead more fully the steps taken by -- the steps taken in the redomiciliation process relied on by the plaintiffs, so that the defendants who oppose that application, namely*

*the fourth- and fifth-named defendants, can now properly put in issue at the trial the validity and efficacy of the steps taken in the course of those procedures. Again, I will set out the reasoning for that decision in the course of my judgment.”*

54. Counsel for Eurotoaz also referred to a number of English authorities including *Ascherberg, Hopwood and Crew Ltd. v Casa Musicale Sonzogno* [1971] 1 W.L.R. 173. In that case, proceedings were brought by the plaintiffs in England claiming that the copyright in *Cavaleri Rusticana* and another opera by Pietro Mascagni had been infringed by the defendants. In support of their claim to title to the copyright in Mascagni’s works, the plaintiffs relied on a number of agreements under which the copyright had been assigned by Mascagni. At a very late point in the proceedings, the defendants argued that the contracts fell to be construed by reference to certain provisions of Italian law and that Italian law also imposed certain limits on the assignment of copyright. In his judgment, Ungood-Thomas J. said, at pp. 178-179: -

*“In my view, a party intending to rely upon and to call evidence of the “peculiar sense and construction” under foreign law of any passage in a foreign agreement should allege that sense and construction because such a peculiar sense and construction would, by the very reason of its peculiarity, import a meaning other than the meaning which the language of the passage in its normal meaning would convey. So, without such an allegation, it would thus be apt to take other parties by surprise and prejudice their preparation for trial, which it is the very object of the pleadings to avoid. Further, it would bear the peculiar meaning by reason of foreign law: **and foreign law is a fact in English law and has to be adequately pleaded.***

...

*The applicants indicated in general terms, though without formulation or precision, that they wish to call evidence on Italian law on matters including rules of*



*construction, and, independently of questions of construction, the limits imposed by Italian law upon the assignment of copyright. The conclusions to which I have arrived on the need to plead a peculiar sense and construction of passages in the agreement seem to me to apply a fortiori to such matters.”*

(emphasis in the written submissions of Eurotoaz)

**55.** In *Ascherberg*, the applicants sought to amend the pleadings to plead that the agreements “*fall to be construed according to the laws of Italy,*” and that they “*will contend that the following provisions of Italian law are material to the matters in issue in this action*”. Ungood-Thomas J. held that that form of amendment was not sufficient. He held that they did “*not plead the statements of what is the relevant Italian law as facts at all...*” and that: -

*“further, and indeed independently of the objections to the adequacy of the proposed amendments as raised, any amendment made at this stage of the proceedings must be made with full particulars so as to limit as far as possible, in the interest of the other parties, the need for preparation and delay, trouble and expense. So I conclude that evidence of Italian law cannot be given on the pleadings as they stand and that the proposed amendments are inadequate.”*

**56.** Counsel for Eurotoaz drew attention to the nature of the order made in the *Ascherberg* case which is replicated at p. 180 of the report as follows: -

*“That subject to paragraph 1 above the defendants Domenico Mascagni and Mrs. Caulder shall within 21 days from today serve the re-re-re-amended defence or defences raising all points of Italian law upon which they seek to rely, whether to explain the meaning of terms used in such of the agreements in the agreed bundle as were in the Italian language in the original or to state the effect under Italian law of such agreements, such pleading to include full particulars of the statements and propositions of Italian law including rules of construction relied on, with reference in*

*each case to the Italian legal authorities relied on in support of it, and of any agreement and any passage or terms therein to which they are directed.”*

**57.** Counsel highlighted that it is clear from the decision in *Ascherberg* that the need to plead particulars of foreign law is not confined to cases which involve the construction of legal agreements under that foreign law. As noted above, it was claimed by the defendants in that case that Italian law was relevant not only to the interpretation of the agreements in issue but also to the limits imposed on an assignment of copyright.

**58.** On behalf of Eurotoaz, it was submitted that the failure to plead foreign law was relevant in two respects: -

- (a) In the first place, the proposed amended statement of claim is defective and, if the settlors are to be joined to the proceedings, all of the plaintiffs should be directed to deliver an amended statement of claim that properly pleads the particulars of foreign law upon which the plaintiffs rely;
- (b) Secondly, and more fundamentally, the failure to properly plead foreign law means that the court and the defendants have no idea of the basis upon which it is said that the existing plaintiffs had the right to pursue the case to date and the basis upon which it is proposed that the existing plaintiffs and the intended additional plaintiffs will carry on the case into the future.

**59.** Insofar as O. 15, r. 8 is concerned, counsel for Eurotoaz emphasised that there is no evidence before the court that the intended plaintiffs are actually “*beneficially interested*” in the ToAZ shares. Counsel submitted that there is no evidence to suggest that the intended plaintiffs’ interest in the shares is any less restricted than that of the current plaintiffs. In addition, counsel for Eurotoaz highlighted that, notwithstanding that the claim now sought to be made by the current plaintiffs is that they are trust managers of the shares, neither the proposed amended summons nor the proposed amended statement of claim contain any

endorsement of the kind stipulated by O. 4, r. 9 which requires that, where a plaintiff sues in a representative capacity, the nature of the representation must be endorsed in the manner described in Appendix B, Part I. In this context, O. 4, r. 9 provides as follows: -

*“If the plaintiff sues ... in a representative capacity, the indorsement shall show in manner appearing in such of the forms in Appendix B, Part I, as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff ... sues....”*

**60.** In turn, Appendix B, Part I provides: -

*“PART I: INDORSEMENT OF CHARACTER OF PARTIES*

*O. 4, r. 9*

*Executors.*

*The plaintiff's claim is as executor [or administrator] of C.D., deceased, for, &c.*

*The plaintiff's claim is against the defendant A.B., as executor [or, &c.] of C.D., deceased, for &c.*

*The plaintiff's claim is against the defendant A.B., as executor of X.Y., deceased, for &c., and against the defendant C.D., in his personal capacity, for, &c.*

*Assignee in bankruptcy.*

*The plaintiff's claim is as assignee under the bankruptcy of A.B., for*

*Trustee.*

*The plaintiff's claim is as [or the plaintiff's claim is against the defendant as] trustee under the will of A.B. [or under the settlement upon the marriage of A.B. and X.Y. his wife].”*

**61.** Counsel for Eurotoaz relied in this context on the observations made by Charleton J. in the Supreme Court in *Hickey v. McGowan* [2017] 2 I.R. 196, at paras. 111-112: -

*“111. On a consideration of the transcript of the trial in the High Court, it is notable*

*that, after Brother McGowan is mentioned on the first line of the first day, 28 November 2012, there is silence as to who he is, his position and the structure within which he operated throughout the entire trial... Order 15, rule 9 of the Rules of the Superior Courts provides that in a case where there are “numerous persons having the same interest in one cause” then by order of the High Court one of them take an action “or be authorised by the court to defend” for the benefit of or “on behalf... of all persons concerned.” Order 4, rule 9 provides that where an action is taken or defended “in a representative capacity, the indorsement shall show ... in what capacity the plaintiff or defendant sues or is sued.”... The statement of claim, dated 31 July 2002, is not indorsed in that way...*

112. *...The strictures in the Rules should be followed because then everything is clear to the parties.”*

**62.** Eurotoaz submits that there is nothing in the evidence before the court that would enable the court to conclude that these proceedings have been brought and maintained by the current plaintiffs in a representative capacity or *qua* trustees. The “*draft second amended plenary summons*” attached at Appendix 2 to the notice of motion before the court does not contain the indorsement required by O. 4, r. 9. The draft plenary summons does not contain any amendments to reflect the fact that the first to fourth plaintiffs are not the owners of the shares and instead continues to blandly refer to “*the plaintiffs’ shares*” without making any distinction between the position of the first to fourth plaintiffs and the position of the settlors.

**63.** Counsel for Eurotoaz made the case that the plaintiffs’ submissions and affidavits do not engage at all with the fact that the current plaintiffs have not pleaded that they act in a representative capacity and have not endorsed the summons accordingly. Counsel noted the

terms of the written submissions on behalf of the plaintiffs where the representative capacity of the existing plaintiffs is acknowledged as follows: “... *the functions of the Plaintiffs as trust managers under Russian law are closely analogous to those of trustees ... and this is an appropriate application of the rule on that basis.*”

**64.** Eurotoaz also says that O. 17, r. 4 is inapplicable. As noted above, Eurotoaz accepts that, under O. 17, r. 4, it is inappropriate for the court to engage in a “*mini trial*”. However, Eurotoaz maintains that the plaintiffs have not adduced any evidence on a *prima facie* basis or otherwise that there has been an event “*causing a transmission or change of interest*” within the meaning of O. 17, r. 4. In fact, the evidence that they have adduced is to the opposite effect, i.e. they say that the sale of the shares has not caused a change of interest. On that basis, the application under O. 17, r. 4 should be rejected. Eurotoaz submits that the plaintiffs cannot approbate and reprobate the effect of the sale of the shares. It was also submitted that the rule could never be relied upon in the context of an application such as this which counsel characterised as an application “*to join a group of people as parties to the case who could have been plaintiffs from the outset...*”. Furthermore, it was argued that the intended plaintiffs should not be entitled to pursue claims as the actual owners of the shares as though they had been plaintiffs in the proceedings from the outset. For the court to do so, it would have the effect of circumventing the right of Eurotoaz to rely upon the Statute of Limitations 1957.

**65.** With regard to O. 15, r. 13, counsel for Eurotoaz submitted that there is no properly pleaded summons or statement of claim before the court that would allow the court to engage with the question as to whether or not the joinder of the intended additional plaintiffs is necessary. In the course of his oral submissions, counsel said: -

*“The court is being invited to look at affidavits, to consider things, to have regard to expert evidence, but the foundational element, the pleadings, are absent; because there*

*is no properly pleaded case explaining how it is that these Plaintiffs have brought the case to date, no properly pleaded case explaining how it is that they claim damages of up to \$2.3 billion is the number that's put when it is now said that they didn't incur those damages, they were claiming them on behalf of a third party in the absence of any endorsement; and then, insofar as there are damages claimed now on behalf of the current Plaintiffs and the intended Plaintiffs, it's not pleaded who is claiming what damages, in what capacity, the provisions of Russian law, none of it is pleaded."*

**66.** It was also submitted on behalf of Eurotoaz that the proposed additional plaintiffs have not placed any evidence before the court in relation to the alleged fraud pleaded in the amended statement of claim. The case was made that an amendment of a pleading to include a claim of fraud should not be permitted in the absence of evidence in respect of the alleged fraud. Counsel submitted in this context that, although there is an extant claim of fraud pleaded in the second amended statement of claim, that claim was made on the part of the existing plaintiffs rather than the proposed additional plaintiffs and, to that extent, the claim of fraud now sought to be made on behalf of the additional plaintiffs was a new claim such as to require that appropriate evidence be placed before the court in support of it.

**67.** Counsel for Eurotoaz also relied on the discretionary nature of the jurisdiction of the court under O. 15, r. 13 and submitted that the plaintiffs had failed to provide an affidavit explaining how the existing plaintiffs came to bring and maintain the proceedings up to now on the basis that they are full owners of the shares. He argued that this alleged failure to explain is very relevant to the exercise of the court's discretion under the rule. Counsel argued that it was incumbent upon the plaintiffs to explain how it is that the proceedings have been maintained for approximately six years on what the plaintiffs now say is a factually inaccurate basis. In addition, counsel submitted that the plaintiffs had failed to address the findings made

in Russia that Mr. Makhlai is the ultimate beneficial owner of the shares. In the written submissions of Eurotoaz, reference was also made to the way in which Senior Counsel for the plaintiffs, in the course of submissions to the court on a previous occasion, referred to Mr. Makhlai as the owner of the shares. Eurotoaz also referred to the judgment of Judge Kirillov of 5<sup>th</sup> July 2019 in which he found that Mr. Makhlai was a beneficial owner of the shares. It was argued on behalf of Eurotoaz that the judgment of Judge Kirillov was based upon (*inter alia*) documentary evidence obtained from the authorities in the British Virgin Islands.

**68.** Counsel for the UCCU defendants adopted the submissions made by counsel for Eurotoaz. Counsel for the UCCU defendants highlighted the relevant passage from the judgment of Judge Kirillov in which he found that Mr. Makhlai and his father are the beneficial owners of each of the proposed additional plaintiffs. While counsel accepted that this Court cannot determine, on an application of this kind, whether the findings made by Judge Kirillov were correct or incorrect, counsel submitted that the plaintiffs cannot come to court in the teeth of those findings and “*simply ignore them as if they didn’t exist*”. Counsel also submitted that the plaintiffs: -

*“have declined to identify who the [true] beneficial owner of the shares are, they’ve declined to identify who in truth is conducting this litigation, who is giving the instructions in this case? They don’t engage at all with the fact that Mr. Makhlai never denied his beneficial ownership, but, despite that, despite the findings of the Kirillov court and appeals, despite the dismissal of the Plaintiffs own application in the bankruptcy estate, they proffer the intended Plaintiffs as some sort of suitable co-plaintiffs to assert a right to damages and other relief in respect of the shares without ever adequately explaining the standing and entitlement of these intended Plaintiffs to make that application.”*

**69.** Counsel for the UCCU defendants also argued that the affidavits grounding the present application are replete with hearsay evidence where the deponent has entirely failed to set out the grounds on which the deponent believes those hearsay statements to be true. Counsel argued that this did not comply with the requirements of O. 40, r. 8 (as explained in the case law) and, therefore, is technically not admissible evidence. However, counsel clarified that his main purpose in making the point should not be seen as a merely technical objection to the admissibility of the evidence but as illustrating the extent to which (so he submitted) the plaintiffs had failed to be frank with the court in explaining to the court who they are and who they truly represent and who are the true beneficial owners of the shares. Counsel also made the point that the proposed amended statement of claim is: -

*“spectacularly uninformative about these intended Plaintiffs. The draft statement of claim describes the proposed new Plaintiffs as settlors without any further information about how they hold the shares or do they have management agreements themselves. And what does the expression "settlor" mean? It's not referred to in the statement of claim.”*

**70.** With regard to O. 15, r. 8, counsel for the UCCU defendants submitted that the rule is clearly aimed at a situation where there may be a conflict between the interests of the trustees or representatives and the beneficiaries. Secondly, counsel highlighted the words *“beneficially interested”* in the rules and submitted that it is plain that the proposed additional plaintiffs constitute no more than a further layer between the current plaintiffs and the beneficiaries of the shares. Counsel rejected the suggestion that the *O'Donnell* case is of any assistance to the court in understanding what is meant by the words *“beneficially interested”*. Counsel submitted that the decision of the Supreme Court in that case was no more than a straightforward application of the rule in *Salomon v. Salomon* [1897] A.C. 22 and that it would only be relevant if someone was asserting an interest in the underlying assets of ToAZ but not



in the shares. Counsel submitted that the words “*beneficially interested*” should be interpreted in the usual way in which those words (or similar words such as “*beneficial ownership*”) have been interpreted. He referred in this context to a decision of the House of Lords in *Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd* [1976] A.C. 167. That case concerned the interpretation of s. 17 of the Finance Act 1954 (UK) under which a successor company to the trade of a predecessor could, in certain limited circumstances, continue to set off losses of the predecessor against its profits for tax purposes. In particular, s. 17 permitted such a set off to occur where there was a continuation of trade carried on by the successor company and where that successor company was a subsidiary company of the predecessor company which carried on the trade in question. However, the successor company could only be treated as a subsidiary of a parent company as predecessor in circumstances where not less than three-quarters of its ordinary share capital was in the “*beneficial ownership*” of the parent company. The problem which arose for the successor company in the *Ayerst* case was that the parent company had gone into liquidation. After the making of the winding up order, the parent company had continued to trade until the assets and good will of the trade were transferred to the successor and, crucially, the shares in the successor were, at that point, sold to a third party purchaser. The issue which arose in the case was whether it could be said that the shares were still in the “*beneficial ownership*” of the parent company at the time of the transfer notwithstanding that, by that time, the parent company had been ordered to be wound up. The House of Lords held that the parent company could no longer be said to be the beneficial owner of the shares in the subsidiary and was, therefore, not entitled to take the benefit of s. 17. The decision was given by Lord Diplock. He made a number of observations which counsel suggested are helpful in understanding what is meant by “*beneficially interested*”. In particular, counsel submitted that the decision makes it clear that beneficial ownership is concerned with the ability to enjoy “*the fruits of the property*”. In *Ayerst*, Lord Diplock said, at pp. 177-178: -

*“...the concept of legal ownership of property which did not carry with it the right of the owner to enjoy the fruits of it or dispose of it for his own benefit, owed its origin to the Court of Chancery. The archetype is the trust. The ‘legal ownership’ of the trust property is in the trustee, but he holds it not for his own benefit but for the benefit of the cestui que trust or beneficiaries. Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the ‘legal ownership’ in the trustee, what came to be called the ‘beneficial ownership’ in the cestui que trust... No one would suggest that an executor, who was not also a legatee, was beneficial owner as well as legal owner of any of the property which was in the full ownership of the deceased before his death. He could not enjoy the fruits of it himself or dispose of it for his own benefit.”*

**71.** Counsel for the UCCU defendants submitted that, before reliance could be placed on O. 15, r. 8, there would have to be evidence before the court to show that the proposed additional plaintiffs have an entitlement to the shares to use them for their own benefit and enjoyment and to exploit the value of them for their own sake and not for someone else’s sake.

**72.** Turning to O. 17, r. 4, it was submitted on behalf of the UCCU defendants that it can have no application in circumstances where no evidence has been advanced that there has been *“a change or transmission of interest or liability”* which is an essential element of the rules. The UCCU defendants maintain that, on the contrary, the plaintiffs continue to make the case that the existing plaintiffs remain entitled to pursue these proceedings.

**73.** Insofar as O. 15, r. 13 is concerned, the case was made on behalf of the UCCU defendants that it is difficult to see how this rule has application. It was argued that this is not a case of mis-joinder or non-joinder in the sense intended in O. 15, r. 13. In addition, the UCCU

defendants argued that, for the reasons previously identified, the court should, in the exercise of its discretion under the rule, refuse the relief sought.

### **The response of the plaintiffs**

74. Counsel for the plaintiffs commenced his reply by observing that none of the defendants have said whether they will argue in these proceedings that the forced sale of the shares by the bankruptcy administrator has removed the right of the existing plaintiffs to pursue these proceedings. On that basis, counsel argued that this is precisely the position that O. 15, r. 13 and the other rules are designed to avoid. Counsel for the plaintiffs submitted that there is a serious risk that this case could be defeated as a consequence of the non-joinder of the proposed additional plaintiffs. On that basis, counsel argued that it is “*absolutely clear*” that, to use the language of O.15, r. 13, it “*may be necessary to join these Plaintiffs*”.

75. Insofar as the alleged necessity to plead foreign law is concerned, counsel argued that it would be extremely unusual that a foreign plaintiff would plead foreign law demonstrating its standing to sue under that law. He suggested that proceedings are commenced on a regular basis in this jurisdiction by plaintiffs who are established abroad and it is not customary or necessary for those plaintiffs to set out the basis upon which they sue or the foreign law that gives them the right to do so. Counsel characterised the *Ascherberg* case as being concerned with the construction under foreign law of a foreign agreement and that it, therefore, is not an authority suggesting that it is necessary or customary to plead foreign law in a case like this. That said, counsel emphasised that the plaintiffs are prepared to plead foreign law in the event that the court considers it appropriate for the plaintiffs to do so.

76. Counsel for the plaintiffs made a further point in relation to *Ascherberg*. He suggested that the underlying principle is concerned with the avoidance of surprise. He submitted that this is not a case where these defendants can say that there is any surprise as to the basis upon which it is contended that the existing plaintiffs have standing to sue or the basis on which the

plaintiffs now say that the proposed additional plaintiffs likewise have standing to sue. This, he said, has been made “*perfectly clear*” in Mr. Vaneev’s reports.

77. Counsel for the plaintiffs rejected the suggestion that Mr. Vaneev’s reports confirm that the existing plaintiffs have no entitlement to maintain a damages claim. He also highlighted that, as counsel for Eurotoaz accepted, no expert has been retained on behalf of Eurotoaz to put forward the proposition that there is no entitlement on the part of the existing plaintiffs to claim damages. Counsel noted that Prof. Vyacheslavov (the expert retained by the UCCU defendants) does not go that far.

78. Insofar as hearsay evidence was raised as an issue, counsel for the plaintiffs submitted that the court, on an interlocutory application of this kind, can proceed on the basis of hearsay evidence. Furthermore, he submitted that, when one looks at Mr. Jordaan’s affidavit, he is dealing with uncontroversial material such as the relevant transfers of shares from the proposed additional plaintiffs to the existing plaintiffs. Counsel suggested that the real point made on behalf of the UCCU defendants is that Mr. Jordaan does not go into detail in relation to the matters raised by the defendants questioning the proposed additional plaintiffs’ claim to ownership of the shares. Counsel for the plaintiffs rejected the suggestion that there is any requirement to provide more evidence. Counsel submitted that there is a full explanation of why the plaintiffs sued originally – namely because they are the registered shareholders. He also submitted that there is a full explanation of the basis upon which they say they are entitled to do so and that there is a full explanation of why the position has changed – namely as a consequence of the forced sale of the shares in Russia.

79. Counsel for the plaintiffs submitted that there is *prima facie* evidence before the court that the proposed intended plaintiffs are the owners of the shares and he argued that the plaintiffs do not have to establish who is the owner of those intended plaintiffs. Counsel submitted that it is manifest that O. 15, r. 13 must apply. Otherwise, he said that this “*is a*

*classic case in which there is a real risk that these Defendants through their own actions, whether right or wrong, will have arrived at a position in which they will be able to defeat this claim by reason of a point about non-joinder”.*

**80.** With regard to the suggestion made by counsel for Eurotoaz that there is a new claim of fraud in the proceedings, counsel for the plaintiffs maintained that the claim that is pleaded against Eurotoaz is exactly the same now as it was at the beginning. He also drew attention to the way in which the application by Eurotoaz to strike out the claim against it was defeated both in the High Court and on appeal in the Court of Appeal.

**81.** With regard to O. 15, r. 8, counsel noted that there might be others who are the beneficial owners of the proposed additional plaintiffs but he submitted that this does not mean that the proposed additional plaintiffs do not have the beneficial ownership of the shares. He reiterated his reliance on the *O'Donnell* case and he argued that the *Ayerst* case does not undermine this in any way.

**82.** Counsel for the plaintiffs also rejected the arguments made by reference to O. 4, r. 9. He submitted that the presence or absence of such an endorsement is a matter to be addressed at a later stage in the proceedings if it is shown to be relevant.

**83.** Insofar as O. 17, r. 4 is concerned, counsel for the plaintiffs submitted that it must apply where there is a *prima facie* case that there has been a transmission of interest consequent upon an event. While the plaintiffs do not advocate for the existence of such a transmission of interest, counsel argued that it is a possible effect of what has occurred in Russia and, in those circumstances, O. 17, r. 4 applies.

### **Determination of the issues**

**84.** While the arguments of the parties have been wide-ranging, there are essentially four issues before the court:

- (a) Whether the plaintiffs have established a sufficient case that the proposed additional plaintiffs should be joined under O. 15, r.8;
- (b) Whether the plaintiffs have established that O. 17, r. 4 applies;
- (c) Whether the plaintiffs have established that the proposed additional plaintiffs should be joined under O. 15, r. 13.
- (d) If the proposed additional plaintiffs are added to the proceedings, it will also be necessary to consider the application to amend the summons and statement of claim.

85. I now address those issues in turn.

**Order 15, r. 8**

86. It is clear from the express terms of O. 15, r. 8 that trustees may sue or be sued on behalf of or as representing the “*property ... of which they are trustees*” without joining “*any of the persons beneficially interested in the trust*”. It is equally clear that the court is given the power to join “*any of the persons beneficially interested in the trust*” either in addition to or in lieu of the existing parties. While the rule is most often utilised where a conflict arises between the interests of the trustee and the persons “*beneficially interested*”, I agree with the submission of counsel for the plaintiffs that there is nothing in the language of the rule that confines its application solely to such situations. However, in order to be in a position to invoke the rule, it is plainly necessary to show that the proposed additional party is a person who is beneficially interested in the property. That immediately raises the issue of what is meant by the words “*any of the persons beneficially interested in the trust*”. As I have noted previously, this is an issue that I raised with counsel for each of the parties. I asked them to address the meaning of those words. In response, my attention was drawn to two cases namely *O’Donnell* and *Ayerst*. I was not referred to any textbooks or any other commentary and the issue was not addressed by counsel in any depth.

**87.** I did not find *O'Donnell* to be of any assistance. I believe that counsel for the UCCU defendants was right in suggesting that *O'Donnell* is essentially an application of the rule in *Salomon's Case*. There, the court was asked to ignore the separate corporate personality of Vico Ltd. in circumstances where there was no sufficient legal or evidential basis to do so. It does not assist in understanding the meaning of the words "*beneficially interested*". Counsel for the plaintiffs argued that it shows that one does not look behind the owner to see who might have an interest in the owner. That is certainly consistent with the approach taken by the courts ever since *Salomon's Case*. But, as noted above, the court's power under O. 15, r. 8 only arises where there is an application to join any of the persons beneficially entitled. In contrast to *O'Donnell*, that necessarily requires an examination of beneficial interest. That is precisely what the rule mandates.

**88.** The decision of the House of Lords in *Ayerst* is of some assistance albeit that it was principally concerned with the proper interpretation of a British taxation statute. The key point to be drawn from the decision in that case is the way in which Lord Diplock characterised beneficial ownership as the right to enjoy the fruits of a property. That might, at first sight, appear to be no more than a passing comment by Lord Diplock but, in my view, his observation is consistent with the way in which the words "*beneficially interested*" would ordinarily be understood. Thus, for example, *Murdoch's Dictionary of Irish Law* defines "*beneficial interest*" as "*The interest of a beneficial owner ... or beneficiary as contrasted with the estate or interest of a nominal or legal owner such as a trustee*". In turn, *Murdoch* defines "*beneficial owner*" as "*The person who enjoys or is entitled to the benefit of the property ...*". In substance, that equates with Lord Diplock's definition as the person who enjoys the fruits of the property.

**89.** While the words "*beneficially interested*" in O. 15, r. 8 must be interpreted in accordance with Irish law, I believe that *Jowitts' Dictionary of English Law* provides some helpful guidance which is, again, consistent with Lord Diplock's observation and is also on all

fours with the explanation given by *Murdoch*. According to *Jowitt*, beneficial interest means: “*The interest in a trust of a beneficiary. Also known as an equitable interest. It is established as a property right. The beneficiary is entitled to the ‘fruits of the tree’, such as income or right to occupy property. This interest is to be distinguished from the legal interest or title to the property. ...*”

**90.** In my view, the approach taken in *Murdoch* and *Jowitt* is correct. The fact that it chimes with the approach taken by Lord Diplock in *Ayerst* (albeit that he dealt with it in a relatively fleeting way) provides powerful support for this view. I will therefore proceed on the basis that the words “*the persons beneficially interested in the trust*” mean the persons entitled to the benefit or the fruits of the shares in issue. It follows that O. 15, r. 8 cannot be invoked in this case unless the plaintiffs can show that they have a *prima facie* case that the proposed additional plaintiffs are entitled to enjoy the fruits of the ToAZ shares in issue. In considering that issue, it is necessary to keep in mind that the entitlement of a person to enjoy the fruits of a property (of which that person is not the legal owner) can arise in a number of ways. It can arise as consequence of a resulting trust where, for example, a person has provided the purchase money (or a part of the purchase money) for a property. It can also arise under an express trust where a trust is created over property for the benefit of a person (in the sense that the person is entitled to the fruits of that property). Another way in which it can arise is where the law imposes a constructive trust in circumstances where it would be unconscionable for a legal owner of property to enjoy the fruits of that property to the detriment of another person. An example is to be found in the decision of Barron J. in *Murray v. Murray* [1996] 3 I.R. 251 which is cited by *Murdoch* in the context of the definition of beneficial interest. Another example is to be found in the decision of Costello J. (as he then was) in *HKN Invest Oy v. Incotrade Pvt. Ltd* [1993] 3 I.R. 152.



**91.** It is accordingly necessary to consider the evidence which the plaintiffs have placed before the court in order to assess whether a *prima facie* case has been made out that the proposed additional plaintiffs are entitled to the fruits of the shares. The evidence comprises the affidavits of Mr. Michael Coonan, a partner in McCann FitzGerald, the solicitors acting on behalf of the plaintiffs and the affidavit of Menno Jordaan, a director of the third plaintiff and also of Magnum who, as previously noted, is one of the proposed additional plaintiffs together with the reports of Mr. Vaneev. The affidavit evidence does not expressly address the question of beneficial interest. There is not even a high-level averment that the proposed additional plaintiffs are beneficially interested in the shares. The relevant paras. of Mr. Jordaan's affidavit (in particular paras. 26 to 29) address issues which are more relevant to the application under O. 15, r. 13 (considered below). That said, para. 4 of his affidavit states that the shares in ToAZ were transferred by the proposed additional plaintiffs to the existing plaintiffs pursuant to trust management agreements and, later, in paras. 8 to 10 of his affidavit, Mr. Jordaan briefly refers to those agreements and exhibits them. Furthermore, in para. 10, Mr. Jordaan states that, pursuant to the agreements, the existing plaintiffs undertook to manage the shares on behalf of the proposed additional plaintiffs and to exercise the latter's rights as owners including the right to vote at meetings and the right to receive dividends. It also appears from Mr. Vaneev's report that the role of the existing plaintiffs under the trust management agreements is somewhat similar to the role which trustees would play under Irish law.

**92.** However, none of this evidence addresses the critical issue as to whether the proposed existing plaintiffs are entitled to enjoy the benefit of the shares. I accept that, as between the existing plaintiffs and the proposed additional plaintiffs, the former may have obligations to the latter which arguable equate to those which a trustee under Irish law owes to a beneficiary. But that is not the focus of O. 15, r. 8. As I have already sought to explain, the rule (in so far as it provided for the joinder of additional parties) is concerned with persons who are entitled

to enjoy the benefit of the property held under a trust. That seems to me to follow from the language of the rule and I have heard no sufficient argument from the plaintiffs to suggest otherwise. In order to invoke the rule, there would have to be evidence as to the basis on which the proposed additional plaintiffs have an entitlement to enjoy the benefit of the shares such as, for example, evidence that they supplied the purchase money for the shares or that they had received the shares as a gift. No explanation whatever is given which would enable the court to hold that they have any beneficial interest. The affidavits simply fail to address the issue of beneficial interest. In those circumstances, I cannot see any proper basis to make the order sought under O. 15, r. 8. In expressing that view, I should make clear that this is not a finding that the proposed additional plaintiffs do not have any beneficial interest in the shares. All I have held is that the plaintiffs have failed to put forward a *prima facie* case for the purposes of the application under O. 15, r. 8.

**93.** For completeness, it should be kept in mind that O. 15, r. 8 remains relevant in one respect. As previously noted, the rule permits proceedings to be pursued in the name of the legal owner of property even where the beneficial interest in that property is owned by another person who is not a party to the proceedings. That is clear from the opening words of the rule. Thus, the fact that the proposed additional plaintiffs have not made out a *prima facie* case that they are beneficially interested in the shares would not prevent their joinder as plaintiffs under O. 15, r. 13 – provided, of course, that they put forward evidence (to paraphrase Murray J. in *Pepper Finance Corpn. (Ireland) Ltd. v. Macken* [2021] IECA 15 at para. 26) capable of substantiating their claim that they have legal title to the shares so as to sustain the claim to the substantive relief sought.

**Order 17, r. 4**

**94.** In my view, the present application does not fit within the ambit of O. 17, r. 4. The purpose of that rule is to allow actions to continue where there has been a transmission of

interest (or liability) from an existing party to a different person or entity. The rule allows the person to whom the interest of the existing party has been transmitted to be joined to the proceedings. In the context of transmissions of an interest, it is clear that the rule is intended to provide a simple and straightforward application to be made by the successor of the interest to be joined in place of the existing party. The fact that the rule provides for this to be done by means of an *ex parte* application demonstrates that the framers of the rule considered such applications to be uncontroversial. In *Stapleford*, Costello J. in the Court of Appeal referred to the way in which Peart J., in *Irish Bank Resolution Corpn. v. O'Driscoll*, had described the nature of the application as “*somewhat procedural and simple*”. The rationale for the uncontroversial nature of the rule is well explained by Millett L. J. (as he then was) in *Yorkshire Regional Health Authority v. Fairclough Building Ltd.* [1996] 1 W.L.R. 210. While that case concerned a slightly different formulation of the rule then in force in England & Wales (O. 15, r. 7), the explanation given by Millett L.J. at pp. 214-215 is illuminating: “*It will be observed that rule 7(2) is specifically designed to cater for the situation which arose in the present case, where in the course of subsisting proceedings the interest of the original plaintiffs ... devolved upon another party, viz: the trust. Universal succession is quite common especially in other countries ... but it is not uncommon in England where it is often effected by statute as, for example, on the reorganisation of local government or (as in the present case) the National Health Service. But a similar situation arises whenever a plaintiff assigns the benefit of a contractual obligation after he has commenced proceedings; or a plaintiff or defendant dies or becomes bankrupt. In all these cases the substitution of the new party is necessary ... It is therefore not surprising that an Order to enable substitution for this purpose to be effected has been in existence ever since the original rules were introduced under the Judicature Act 1875 ... and can be traced back even before that to section 52 of the Chancery Procedure Act 1852... No system of law could view with equanimity the absence of some procedure to cater for the*

*transmission or devolution of the cause of action ... during the course of subsisting proceedings; and any contention that the court has been deprived of this necessary jurisdiction must be jealously scrutinised.”*

**95.** In *Stapleford*, Costello J. also referred to the decision of Mance J. (as he then was) in *Industrie Chimiche Italia Centrale v. Alexander G. Tsarvliris & Sons* [1995] C.L.C. 1461. At pp. 1467 to 1468, Mance J. provided the following very helpful commentary on the equivalent English rule as follows: *“The problem addressed by O.15, r. 7 is different: during the course of the proceedings there has been some change affecting the identity of the correct claimant which could not have been dealt with (or normally even predicted) when proceedings were originally issued. The self-evident nature of the relief which it affords is demonstrated by the provision that application may be made ex parte ... A legal assignment of a debt or even a cause of action for damages may occur at any stage of proceedings. There is ... legislation, for example in the fields of insurance and building societies, providing for transfer of a business ... to a successor body ... In all such situations ... it seems self-evident that any existing proceedings properly constituted within the limitation period, should be allowed to continue for ... the party to whom the relevant right or obligation has been transferred in law; and this should be permitted whether the transfer occurs before or after the expiry of the limitation period”.*

**96.** The rule is therefore designed to allow proceedings to continue notwithstanding the happening of an event which has caused a transmission of interest as between an existing party and the successor to that party. The rule recognises that the general law permits and sometimes mandates such transmissions of interest and that it is therefore necessary to reflect those changes of interest in legal proceedings which were commenced prior to the event which triggered the change of interest in question. It is true that, as the Court of Appeal has held in *Stapleford*, the word “*event*” is capable of having a very wide meaning. However, that is only

one aspect of the rule. The word “*event*” cannot be read in isolation. It must be read in the context of the rule as a whole. The only events that are contemplated by the rule are those which occur after the commencement of proceedings and which cause a transmission of interest. It is also clear that, on the happening of an event of that kind, the party to whom the interest has been transferred can then be joined so that the proceedings can be carried on between the continuing parties. The present case is wholly different. Here, no interest has been transmitted to or has devolved upon the proposed additional plaintiffs since the commencement of these proceedings. As the dates of the various trust management agreements confirm, the interest which the proposed additional plaintiffs have in the ToAZ shares pre-dates the institution of these proceedings in November 2016. The dates of execution of those agreements range from 2009 to October 2016. Moreover, it is not contended by the plaintiffs that the Russian decisions had the effect of transferring an interest in the shares to the proposed additional plaintiffs which they did not already own. The concern expressed by the plaintiffs is that it will be argued by the defendants that the decisions in Russia had the effect of terminating the title of the existing plaintiffs to maintain these proceedings. But the plaintiffs do not make the case that the proposed additional plaintiffs did not always have title to maintain the proceedings in their own name. In such circumstances, it seems to me that O.15, r. 13 is a more obvious and more appropriate basis on which to consider the joinder of the proposed additional plaintiffs. That rule is expressly applicable (inter alia) where it is sought to join a party who could have been joined at an earlier time. Thus, the rule speaks of “*no cause or matter*” being defeated by the “*non joinder*” of parties and the court is empowered to make an order adding the names of any parties “*who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter*”.

**97.** For all of these reasons, I can see no proper basis on which the present application can be said to fall within the ambit of O.17, r. 4. In addition, I believe that it would be wrong to give an overly broad scope to the application of the rule. In this context, I note that the Court of Appeal in England & Wales has held in the *Yorkshire Regional Health Authority* case that the joinder of a party under the English equivalent of O. 17, r. 4 does not give rise to any issues under the U.K equivalent of the Statute of Limitations; such a joinder is not considered to involve the making of a new claim. At p. 215, Millett L.J. explained that the rule “*does not contain, and none of its predecessors ever has contained any reference to limitation. This is as it should be, since the circumstances in which the rule may be invoked do not give rise to any question of limitation. Even though the rule permits a new party to be substituted for an original party, this does not involve a new cause of action; the new party is substituted because he has succeeded to a claim ... already represented in the action and sues ... in respect of the existing cause of action. The substitution of the successor does not deprive the defendant of an accrued limitation defence. There is no good reason why the substitution should not be made at any stage of the proceedings and whether a limitation period has expired or not; the expiry of the limitation period is completely irrelevant.*”

**98.** While I am not aware of any Irish authority to similar effect in the context of O.17, r.4, there must be a very real possibility that a similar view would be taken by an Irish court. Thus, if the order to join the proposed additional plaintiffs were to be made under O. 17, r. 4, it may have the effect of depriving the defendants of the potential to rely on the Statute of Limitations 1957 in so far as the claim of the proposed additional plaintiffs is concerned. That seems to me to give rise to potential unfairness in circumstances where it is clear from Mr. Vaneev’s fifth report that the proposed additional plaintiffs could have been joined as plaintiffs from the outset. In contrast, if the application is addressed under O. 15, r. 13, the defendants’ rights to raise any point under the Statute of Limitations would be preserved. In this context, I should

make clear that, at this point I cannot make any determination as to whether the claim of the proposed additional plaintiffs would or would not be statute barred. As noted above, counsel for Eurotoaz has asserted that it is statute barred as against his clients. A similar point was made in the written submissions delivered on behalf of the UCCU defendants. On the other hand, counsel for the plaintiffs has confidently stated that he is not concerned about the potential application of the Statute of Limitations. There are certainly arguments that could be made as to why the Statute might not apply. In this context, it is important to recall that the plaintiffs allege a continuing conspiracy which only came to culmination relatively recently at the point when the twelfth defendant acquired the shares. Furthermore, the existing plaintiffs may ultimately be able to establish at trial that they continue to have title to sue notwithstanding the sale of the shares to the twelfth defendant. One could also speculate that, depending on the facts ultimately found at trial, there may also be other bases on which the proposed additional plaintiffs might seek to rebut any attempt by the defendants to rely on limitation defences (such as those discussed by Geoghegan J. in the Supreme Court in *Murphy v. Grealish* [2009] 3 I.R. 366 at p. 377). At this point, it is simply impossible to form any view on the potential application of the Statute. But, in my opinion, it would plainly be wrong to seek to unduly stretch the ambit of O. 17, r. 4 in order to grant the relief sought and thereby to close off the ability of the defendants to raise any limitation defences against the proposed additional plaintiffs in the event that they are joined. As I have already indicated, it seems to me that O. 15, r. 13 is the obvious rule by reference to which the proposed joinder should be assessed and it is to that rule to which I now turn.

### **Order 15, r. 13**

**99.** The text of the rule has already been set out in para. 42 above and it is unnecessary to repeat it here. It is clear from the judgment of Haughton J. in *Re: CTO Greenclean Environmental Solutions Ltd. (in liquidation)* [2017] IEHC 246 that, although the rule speaks

of the joinder of additional parties whose presence before the court “*may be necessary to enable the Court to effectually and completely adjudicate upon ... the questions involved ...*” (emphasis added), the word “*necessary*” is not to be interpreted in an absolute sense. Haughton J. stressed that the rule does not say that the joinder of additional parties “*is*” necessary to enable the court to fully adjudicate on the issues in dispute; instead, the rule uses the words “*as may be necessary*”. At para. 20, Haughton J observed that those words recognise that the rule is an enabling provision and that, where the presence of a party may be necessary, it will be appropriate to order the joinder of that party. At para. 21, he added that it would make no sense to require a party, whose presence in proceedings may be necessary, to bring their own separate proceedings. He said: “*The resulting duplication of proceedings and inevitable additional costs cannot have been the intention of the Rules Committee*” and he stated that the joinder of the additional party in that case would not prejudice the respondents in respect of any defence that they might wish to raise under the Statute of Limitations.

**100.** It is also necessary to bear in mind that, on an application of this kind, the court is not concerned to establish whether the proposed additional plaintiffs will prove their claim at trial. As Murray J. made clear in *Pepper Finance Corpn. (Ireland) Ltd. v. Macken*, at para. 26, the court’s task is to evaluate whether the plaintiffs have put sufficient evidence before the court to persuade the court to permit the plaintiffs to advance that case. In Murray J’s words: “*... it is not the function of the court in an application of this kind to embark upon a detailed inquiry into the facts or to resolve disputed issues of fact, the fact that there is other evidence appearing to contradict [the] evidence adduced and relied upon by the applicant does not mean that it hasn’t established a prima facie case: the resolution of those conflicts is a matter for the ultimate trier of fact*”. While that statement was made in the immediate context of O. 17, r. 4, it is clear that the same approach should be taken under O. 15, r. 13. As noted in para. 45 above,



that is the approach that was taken, for example by Laffoy J. in the *Allied Irish Coal* case (which was decided under O. 15, r. 13).

**101.** Bearing those principles in mind, it seems to me that the plaintiffs have established a sufficient case that the joinder of the proposed additional plaintiffs may be necessary in order to enable the court to effectually and completely adjudicate on all of the matters in issue in these proceedings. This emerges from the affidavit of Mr. Jordaan and the reports of Mr. Vaneev. In so far as the proposed additional plaintiffs claim to be owners of the shares, Mr. Jordaan, in his affidavit, exhibits the trust management agreements and activity statements in respect of each trust management arrangement put in place between the proposed additional plaintiffs and the existing plaintiffs. While the defendants strongly contend that these documents do not prove that the proposed additional plaintiffs are owners of the shares, there is a clear statement in para. 34 of Mr. Vaneev's eighth report that the activity statements constitute good evidence under Russian law that the proposed additional plaintiffs are owners of the shares. In para. 35 of the same report, Mr. Vaneev expressly rejects Mr. Melnikov's view to the contrary. He also rejects Mr. Melnikov's contention that proof of ownership would require production of the relevant share purchase agreements ("*SPAs*"). In para. 36, he states that: "*As Russian law associates the emergence and existence of the rights under the shares with their registration on the account of a particular person, the account statements are good evidence of the ownership of the shares. In our case, as the shares had been transferred to the trust management and were registered in the Plaintiffs' accounts, the Activity Statements ... are strong evidence of the Intended Plaintiffs ownership of the shares. To the contrary, the SPAs cannot prove ownership ... as Russian law associates the emergence of rights under the shares with registration of the shares in the account of a particular person. Thus, if the SPAs were concluded, but for some reason the shares were never transferred to the purchaser, the*

*purchaser would not own them under Russian law. Thus, the account statements are necessary proofs of ownership of the shares, not the SPAs.”*

**102.** In paras. 37 to 38 of his report, Mr. Vaneev also addresses the contention of Mr. Melnikov that the form of the activity statements does not comply with the form of securities stipulated by the Russian bank which held the shares as depository and he also deals with the suggestion made by Mr. Melnikov that the source and nature of the activity statements is unclear. Mr. Vaneev draws attention to the way in which the statements are drawn up on paper bearing the bank’s letterhead and are signed on behalf of the bank by the chairman of its board. He also highlights that they bear the seal of the bank. He says: *“The fact that the Activity Statements are not in one of the standard forms does not diminish their probative value, as they are signed on behalf of the company by an authorised person”*. As previously noted, Mr. Vaneev also expresses the opinion that the proposed additional plaintiffs have title to sue.

**103.** In light of the evidence described above, I believe that a *prima facie* case has been made out that the proposed additional plaintiffs are owners of the shares under Russian law (or at least that they were owners until the transfer of the shares to the twelfth defendant) and that they have standing to pursue the claims made in these proceedings. While I note the case made to the contrary both by Mr. Melnikov and Mr. Vyacheslavov, I cannot resolve a dispute of that kind on an application such as this. As Murray J. stressed in *Pepper Finance Corpn. (Ireland) Ltd. v. Macken*, that can only be done at the trial.

**104.** In my view, Mr. Jordaan’s affidavit also puts forward a sufficient case to show that it may be necessary that the proposed additional plaintiffs should be joined as plaintiffs to these proceedings in order to enable the court to effectually and fully adjudicate on the matters in dispute. In the first place, it is clear from the material before the court that there is at least a possibility that, at a full trial, the existing plaintiffs may ultimately be found, as a consequence of the sale of shares, to have lost any standing they may once have had to pursue these

proceedings. Given that the proposed additional plaintiffs have established a *prima facie* case that they have standing to sue as owners, one can immediately see why it would then be necessary that they should be parties to the proceedings in order to advance the claim made and in order for the court to effectually and fully determine the issues in dispute in relation to the alleged conspiracy. That being so, this application seems to me to plainly fall within the ambit of O. 15, r. 13. Their joinder does not cause any real prejudice to the defendants. Despite the fact that the proceedings were commenced in 2016, they are still at a very early stage. Against the backdrop of challenges to the jurisdiction of the Irish courts, the UCCU defendants have yet to deliver defences. The joinder of the proposed additional plaintiffs will therefore not cause any significant prejudice in terms of delay. It is true that Eurotoaz is in a somewhat different position but the case against Eurotoaz would not go forward on its own. Unless the UCCU defendants are ultimately successful with their challenges to jurisdiction before the Court of Appeal, the case against Eurotoaz would only go forward for trial at the same time as the case against the UCCU defendants.

**105.** Nor would the defendants suffer any prejudice in so far as they may have any defence under the Statute of Limitations against the claim of the proposed additional plaintiffs. It is clear from the case law that they will be free to raise any such defences by reference to the date when the joinder of the proposed additional plaintiffs actually occurs. Their joinder under O. 15, r. 13 does not relate back to the original commencement of the proceedings. So, the defendants will be free to raise any limitation defences in due course. As I have previously sought to explain, this is not a case where it is clear that the claims of the proposed additional plaintiffs are statute barred. Accordingly, it would be inappropriate to refuse the order sought on limitation grounds. Instead, any such issues will have to be addressed in the course of the proceedings.

**106.** There is nonetheless a further issue that I must address in relation to the admissibility of Mr. Jordaan's affidavit. In the course of his oral submissions, counsel for the UCCU defendants raised an issue under O. 40, r. 8 in relation to the admissibility of Mr. Jordaan's evidence. That rule prescribes that affidavits should be confined to such facts as the deponent is able to prove. It also requires the deponent to state his or her means of knowledge. The rule is, however, subject to the following exception: "*except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted*". Counsel for the UCCU defendants argued that these words make clear that hearsay evidence can be admitted only where the deponent complies with the condition that the grounds for his or her belief are expressly stated. Counsel referred in this context to the judgment of Hogan J. in *IBM (Sudan) v. Refugee Appeals Tribunal* [2012] IEHC 58 which was handed into court in the course of the hearing. Counsel submitted that Mr. Jordaan has not explained in his affidavit how he can give evidence on behalf of any party other than the third plaintiff and Magnum. Those are the only entities of which he is a director.

**107.** It should be noted that this objection under O. 40, r. 8 to the admissibility of Mr. Jordaan's evidence was not taken in the replying affidavit sworn by Mr. Melnikov on behalf of the UCCU defendants. Nor was it taken in the written submissions of the UCCU defendants. I am concerned that it would be unfair to the plaintiffs if I were to uphold this objection and were to exclude Mr. Jordaan's evidence on the basis of O. 40, r. 8. While that rule applies irrespective of any arguments raised by the parties, I must keep in mind a long-established feature of proceedings in the Commercial List that parties should apprise the opposing side of the case they propose to make. In the words of Kelly J. (as he then was) in his foreword to the first edition of *Dowling on the Commercial Court*: "*Gone ... are the days ... of trial by ambush...*". It seems to me that, if such a point was to be made, it should have been addressed in the written submissions of the UCCU defendants which were directed to be furnished in

advance of the hearing. While a point was made in the written submissions that Mr. Jordaan had given no details of his authority to make his affidavit on behalf of all of the existing and proposed additional plaintiffs, nothing was said about the admissibility of his evidence under O. 40, r. 8. If an objection of that kind was to be advanced, I believe it should have been expressly raised in the written submissions.

**108.** Quite apart from the considerations addressed in para. 107 above, I have come to the conclusion that O. 40, r. 8 does not create a difficulty in this case. In so far as his affidavit contains hearsay evidence, it seems to me that Mr. Jordaan has, in substance, complied with the requirements of the rule. In the first place, Mr. Jordaan states in para. 1 of his affidavit that he is authorised to make the affidavit on behalf of all of the existing and the proposed additional plaintiffs and he also says that he was formerly managing director of Corpag, the plaintiffs' former corporate services provider, and that, in that capacity he is familiar with the role of the proposed additional plaintiffs. He has therefore identified that role as a source of his knowledge of the affairs of the proposed additional plaintiffs. Secondly, and very importantly, he exhibits the various trust management agreements and activity statements in relation to the shares (on which, as outlined above, Mr. Vaneev expresses an opinion). Those documents seem to me to provide the grounds for the belief expressed by Mr. Jordaan in his affidavit as to the status of the proposed additional plaintiffs as owners of the shares. While it would have been preferable for Mr. Jordaan to expressly invoke the documents as supporting his grounds of belief, it seems to me to follow from the fact that they are exhibited to his affidavit, that they can be relied upon as supporting what is stated by Mr. Jordaan in his affidavit. To my mind, which amounts to substantial compliance with the requirements of O. 40, r. 8.

**109.** It is true that Mr. Jordaan also goes further and purports to describe what has happened in Russia in respect of the shares but the events described in his affidavit are not seriously in dispute save that the defendants strongly make the case that what happened in Russia was

entirely lawful and well justified and that the plaintiffs and the proposed additional plaintiffs are bound by the outcome of the decisions reached by the Russian courts.

**110.** In all of the circumstances, I believe that this is an appropriate case in which to make an order pursuant to O. 15, r. 13 joining the proposed additional plaintiffs as plaintiffs to these proceedings. That being so, it also becomes necessary to consider the proposed amendments to the summons and statement of claim.

**The proposed amendments to the summons and statement of claim**

**111.** In light of the order proposed in para. 110 above, it clearly follows that amendments will have to be made to both the statement of claim and the summons. A number of issues have been raised by the defendants in this context. In the first place, counsel for Eurotoaz has submitted that, in accordance with the case law on amendment of pleadings, an amendment to add a fraud claim to the proceedings should not be permitted in the absence of evidence in relation to the alleged fraud. The authors of *Delany & McGrath on Civil Procedure* (4<sup>th</sup> ed., 2018, at paras. 5-257 to 5-259) refer to two relevant authorities namely *Moorview Developments Ltd. v. First Active plc* [2008] IEHC 211 and *James Elliott Construction v. Lagan* [2016] IEHC 5. I fully accept that the court must be cautious in relation to an amendment of a claim of such seriousness as that advanced in these proceedings. However, I do not believe that counsel for Eurotoaz was correct in characterising the claim sought to be made by the proposed additional plaintiffs as a new claim in fraud. It is certainly advanced by a new set of parties but, in substance, it remains the same claim as that advanced up to now by the existing plaintiffs. It is true that the status of the existing plaintiffs will be pleaded in quite different terms to that previously pleaded. As noted above, they will now be described as trust managers rather than as owners. But the basis for their alleged ability to pursue the claim in that capacity has been described in the reports of Mr. Vaneev and the defendants accordingly know the case that will be advanced against them in that regard. Crucially, the case of conspiracy pleaded will

not change at all. There has been no “*shift*” in the details of that case (to borrow the language of Clarke J. in *Moorview*). Moreover, all of the amendments are being made well in advance of any trial so that the defendants have ample time to address them. For all of these reasons, I do not believe that this ground of opposition to the proposed amendments is a good one.

**112.** Next, it was very strongly argued that the plaintiffs are obliged to plead any Russian law on which they rely in advancing their case. Reliance was placed, *inter alia*, on the extract from *Dicey Morris & Collins* quoted in para. 52 above and on the approach taken by Ungood-Thomas J. in the *Ascherberg* case. In response, counsel for the plaintiffs argued that those authorities are confined to cases involving the construction of documents subject to foreign law. I disagree. Professor Binchy in *Irish Conflicts of Law* (1988) states unequivocally at p. 104 that: “*As a general rule, when foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the court.*” That view is entirely consistent with that expressed by the authors of *Dicey Collins & Morris* and with the decision in the *Ascherberg* case and the older English authorities cited by Ungood-Thomas J. While *Ascherberg* may have been primarily concerned with the interpretation of documents governed by foreign law, I do not believe that the requirement to plead foreign law is confined to cases concerning the interpretation of such documents. Counsel for the plaintiffs did not identify any authority in support of his submission that the requirement to plead foreign law is confined to such cases. Neither *Dicey Morris & Collins* nor *Binchy* suggest that it is confined in that way.

**113.** Professor Binchy also refers to the decision of the Supreme Court in *MacNamara v. Owners of S.S. ‘Hatteras’* [1933] I.R. 675. That case does not address the requirement to plead foreign law but the judgment of Fitzgibbon J. strongly emphasises that, in cases where it is in dispute, foreign law is required to be proved as a matter of fact. At p. 698, Fitzgibbon stated: “*Before I deal with the appeal itself I think it is well that I should state my view upon the real issue of fact which the learned Judge had to decide. Foreign Law, i.e. the law of a foreign*

*country, must be proved as a matter of fact in our Courts, if a question depending on that law is in dispute*". It seems to me to follow that the same pleading requirements therefore apply to foreign law as apply to any other fact on which a party relies in advancing a case made, whether by way of claim or defence.

**114.** In this context, it is clear from O. 19, r. 3 that every pleading must contain a statement in summary form of the material facts on which the party relies for the claim or defence (as the case may be). Thus, quite apart from the very clear English authorities on which Eurotoaz relies, it follows from the express requirement of that rule and from the decision of the Supreme Court in *MacNamara* that foreign law must be proved as a fact, that foreign law must also be pleaded. That is especially so in this case where it is clear from the evidence before the court that there is a significant dispute between the parties as to the effect of Russian law. It would be wholly wrong in those circumstances for a party to plead (as the plaintiffs do here) that they intend to rely on Russian law evidence without also setting out a summary of the material aspects of that law on which they rely.

**115.** In my view, it is not plausible to draw a parallel (as the plaintiffs seek to do) between the present case and the way in which foreign corporations routinely put forward their cases in Irish court proceedings without expressly pleading their title to sue under the law of their incorporation. In the vast majority of such cases, there is no dispute or controversy that the relevant party has title to sue. As the exchange of affidavits and expert reports makes clear, this case is quite different. The case made by the plaintiffs as to the meaning and effect of Russian law is very strongly disputed by the defendants. Moreover, given the fact that the existing plaintiffs now propose to describe themselves as trust managers (a concept unknown in Irish law) there is a very obvious need in the present case to explain the Russian law concept of trust management and to plead the basis in Russian law for the alleged ability of trust managers to pursue the claims made in these proceedings. I appreciate that, as counsel for the plaintiffs has



argued, the defendants are in possession of Mr. Vaneev's reports and accordingly have a good picture of the case the plaintiffs propose to make on Russian law. However, that argument fails to take account of the very important function of pleadings. As Finnegan J. (as he then was) explained in *A.S. I. Sugar Ltd. v. Greencore Group plc* [2003] IEHC 131 at p. 2: "*The function of pleadings is to define with clarity and precision the issues of fact and law between the parties. Where issues are so defined each party will have given fair and proper notice to his opponent of the case he has to meet and each party will be enabled to prepare his own case for trial*". Similar observations were made by the Supreme Court in *Mahon v. Celbridge Spinning Co. Ltd.* [1967] I.R. 1 at p. 3. Furthermore, as Clarke J. stressed in *Moorview Developments Ltd. v. First Active plc* [2008] IEHC 211 at paras. 3.1 to 3.3, parties are confined at trial to the case made by them in their pleadings. Pleadings therefore serve a dual purpose namely to define the issues to be tried and to confine the parties, at trial, to those issues. In these circumstances, it is essential that the plaintiffs should plead the material aspects of Russian law relevant to the claim made so that the defendants can, in turn, respond to that case in their respective defences and both sides will then know precisely what elements of Russian law are in issue for the trial. The defendants should not have to go beyond the pleadings to seek to identify and understand the case made by the plaintiffs in relation to Russian law.

**116.** For the reasons outlined in paras. 112 to 115 above, I am of the view that the plaintiffs will have to plead the relevant provisions of Russian law on which they rely and will also have to plead what they contend is the effect of that law for the purposes of the case proposed to be made by them. Accordingly, while I am, in principle, prepared to make an order giving liberty to the plaintiffs to further amend the amended plenary summon, the amended concurrent plenary summons and the second amended statement of claim, I believe that it is premature to make such an order until the draft documents attached to the plaintiffs' motion at Appendices 2 to 5 have been revised to plead Russian law in the manner outlined above.

**117.** It also seems to me that the amended pleadings should address in more detail the basis on which the existing plaintiffs are alleged to be entitled to pursue the claim in their capacity as trust managers. It may well be that, when the relevant elements of Russian law are pleaded, this will become self-evident. However, at present, there is an apparent “*disconnect*” in the draft third amended statement of claim between the bald assertion in para. 30 that the existing plaintiffs are trust managers and the balance of the draft which is pleaded in virtually identical terms to the previous version of the statement of claim in which it was pleaded that the existing plaintiffs are owners of the shares. It also seems to me that the plaintiffs need to consider whether, in light of what is now said about the existing plaintiffs’ role, their claim falls within the ambit of O. 4, r. 9. If it does fall within that rule, there is a clear requirement under that rule to plead the claim in the summons in the manner described in Appendix B Part I. At this point, I believe that it would be premature for me to express any view on that issue. In my view, such an assessment could only be made after sight of the revised draft third amended statement of claim.

**The orders to be made**

**118.** In light of the views expressed above, it seems to me that the following orders should be made:

- (a) The applications made by the plaintiffs under O. 15, r. 8 and O. 17, r. 4 should stand refused;
- (b) Subject to the taking of the steps at (c) below, an order should be made pursuant to O. 15, r. 13 joining the entities named in Appendix 1 to the plaintiffs’ motion as plaintiffs to the proceedings;
- (c) The application to further amend the amended plenary summons, the amended concurrent plenary summons and the second amended statement of claim should be adjourned to allow the plaintiffs in the meantime to prepare revised draft documents in

which the plaintiffs should plead the material elements of Russian law on which they rely and the effect they contend that law has for the purpose of the case they advance in these proceedings. The concept of trust management and the role of the existing plaintiffs as trust managers should be also explained in the drafts. To the extent that the claim of the existing plaintiffs falls within its ambit, the requirements of O. 4, r. 9 should also be addressed.

**119.** I will hear counsel in relation to costs and in relation to the form of the orders to be made at a hybrid sitting of the court at 10.30 a.m. on Thursday 18 May 2023. I will also deal at that time with any application the plaintiffs may have in relation to service of the orders made herein on the eighth defendant who has to date not taken part in these proceedings.

**High Court practice direction HC 101**

**120.** Finally, in accordance with the above practice direction, I direct the parties to file their respective written submissions (subject to any redactions that may be permitted or required under the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.