



Neutral Citation Number: [2024] EWHC 3304 (Comm)

Claim No: CL-2022-000048

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**KING'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/12/2024

Before :

**MR JUSTICE FOXTON**

Between :

- (1) COMMERCIAL BANK OF DUBAI PSC
- (2) HORTIN HOLDINGS LIMITED
- (3) WESTDENE INVESTMENTS LIMITED
- (4) LODGE HILL LIMITED
- (5) VS 1897 (CAYMAN) LIMITED

**Claimants**

- and -

- (1) MR ABDALLA JUMA MAJID AL SARI
- (2) MR MAJID ABDALLA JUMA AL SARI
- (3) MR MOHAMED ABDALLA JUMA AL SARI
- (4) FAL OIL INC
- (5) INVESTMENT GROUP PRIVATE LIMITED
- (6) IPGL GENERAL TRADING LLC
- (7) GLOBE INVESTMENT HOLDINGS LIMITED
- (8) MENA INVESTMENT HOLDINGS LIMITED
- (9) MAS CAPITAL HOLDINGS LIMITED
- (10) MR HAMAD SAID HAMA ABDALLA

ALMHEIRI

**Defendants**

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**Anthony Peto KC and Andrew Trotter (instructed by Jones Day) for the Claimants**  
**Jonathan Cohen KC and Nicola Allsop (instructed by PCB Byrne LLP) for the Seventh,**  
**Ninth and Tenth Defendants**

Hearing dates: 12, 13, 14, 15 and 18 November 2024  
Draft judgment to parties: 9 December 2024  
Further submissions: 10, 13, 14, 16 and 17 December 2024  
Further draft judgment to the parties: 17 December 2024

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# **Approved Judgment**

This judgment was handed down remotely at 2pm on 19 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FOXTON

**Mr Justice Foxton :**

1. This judgment addresses:
  - i) The Tenth Defendant’s (“**D10**”s) application to set aside the order of Dias J granting the Claimants permission to serve proceedings on him out of the jurisdiction (“**the Service Out Application**”).
  - ii) The Claimants’ application for a Worldwide Freezing Order (“**WWFO**”) against D10 (“**the WWFO Application**”).
  - iii) The Seventh and Ninth Defendants’ application to strike out or for summary dismissal of the Claimants’ claims (“**the Summary Judgment Application**”).
  - iv) The Claimants’ application for permission to amend (“**the Amendment Application**”).
2. This case raises a number of difficult and interesting arguments. Both junior counsel handled important parts of the case, and did so extremely well, with Ms Allsop arguing the issue estoppel/preclusion issues and Mr Trotter dealing with most of the legal argument on the Claimants’ side.
3. Unfortunately, the 3 ½ day hearing estimate proved wholly inadequate for the matters to be determined. Even with the benefit of extended sitting days and an extra hearing day, I was left to follow up a large number of references and read the relevant parts of the 119 authorities the court was referred to, after the hearing. This has proved to be particularly challenging when moving from the general legal principles debated at the hearing to their application to the numerous different causes of action in the case, a problem exacerbated by the obscurity of the pleading, the fact that the skeletons addressed many of the issues raised very briefly, and no transcript of the hearing was available until 3 December 2024 (for the first day) and 10 December (for the second day). It became apparent that significant further time would be taken to obtain transcripts for the remaining three days (they became available on 18 December 2024), and I informed the parties that the judgment would need to be finalised before they became available, given the possibility of an appeal and the impending May 2025 trial date. It became apparent after the draft judgment had been circulated that there were certain points where the oral and written arguments had failed sufficiently to explain the issues for determination, or where an argument had been raised only orally and I had failed to address it. In some instances, there are issues which it is not possible to determine fairly without further argument. As a result, a further hearing will be necessary.

**BACKGROUND**

4. The claims arise out of long-running proceedings commenced by the First Claimant (“**the Bank**”) in Sharjah in 2012 seeking to recover amounts adjudged due from the Al Sari family.
5. On 17 November 2014, the Bank obtained freezing order relief under s.25 of the CJA 1982 against the First to Third Defendants and the companies who are now the Second

to Fourth Claimants (“**the BVI Companies**”) in support of the proceedings commenced by the Bank in Sharjah.

6. The Bank obtained judgment against the First to Third Defendants in Sharjah in 2016 (“**the Bank Sharjah Judgment**”) in an amount exceeding £80m. It brought an action on the Bank Sharjah Judgment in the BVI in June 2017 and, on 7 June 2018, obtained summary judgment (“**the Bank BVI Judgment**”).
7. It is the Bank’s case that the Al Saris have been engaged in a protracted campaign to frustrate the enforcement of those judgments, and that they have been assisted in doing so by the Seventh to Ninth Defendants (“**the Globe Defendants**”) and Mr Almheiri (“D10” and, with the Seventh and Ninth Defendants, “**the PCB Defendants**”).
8. The BVI Companies were once owned by members of the Al Sari family, but following enforcement proceedings they are now controlled by the Bank, which holds a 100% indirect shareholding via the Fifth Claimant. The BVI Companies own London property with a value said to be of the order of £9m which is their only asset (“**the Bridge Properties**”).
9. On 19 February 2019, the BVI Court granted charging orders in the Bank’s favour over the BVI Companies.
10. It is the Claimants’ case, and I did not understand it to be suggested that this was not realistically arguable, that in March 2019 the First Defendant asked the Bank not to take enforcement steps against the Bridge Properties. That request met with a negative response.
11. In April 2019 the Seventh Defendant (“**Globe**”) commenced proceedings against the BVI Companies in the Sharjah Courts (“**the Globe Sharjah Proceedings**”) to recover amounts said to be due under a disputed transaction by which it is said that the BVI Companies are liable to Globe. The alleged liability, said to have been owed to the Ninth Defendant (“**MAS**”) and assigned to Globe, is alleged to be recorded in a suite of documents referred to as the “**Globe Documents**”. The Claimants allege that the Globe Documents do not record or embody a genuine transaction, but are a fraudulent device used by the Al Saris, who they say control Globe, to frustrate enforcement of the Bank Sharjah and BVI Judgments.
12. The documents filed in the UAE proceedings, and the various court judgments, are not always clear or consistent in terms of the arguments raised and the reason for dismissing them, and they include some points which are not relevant to the issues before me, and, for that reason, do not feature in the summary which follows.
13. It is the Claimants’ case that the Globe Sharjah Proceedings were intentionally served on a local lawyer (Mr Ali Al Aidarous) on the BVI Companies’ behalf. It is said that Mr Al Aidarous is associated with the Al Saris and was acting under a power of attorney executed while the BVI Companies were under the Al Saris’ control. The Claimants allege that this was done because Mr Al Aidarous could be relied upon not to actively oppose the claim, and a quick judgment could be obtained. A defence of very limited scope was served.

14. While the Globe Sharjah Proceedings were in their early stages, on 27 June 2019 the Second Defendant’s lawyer sent the receiver of the BVI Companies a purported tenancy agreement relating to the Bridge Properties between the BVI Companies as landlords, and certain children in the Al Sari family and the Sixth Defendant as tenants (“**the Tenancy Agreement**”). The Tenancy Agreement was on particularly unfavourable terms so far as the landlords are concerned.
15. The Sharjah Court asked Mr Al Aidarous to evidence his authority to act on the BVI Companies’ behalf. As a result, the Globe Sharjah Proceedings came to the attention of the receiver of the BVI Companies (appointed by the BVI court). He appointed new lawyers to defend them. The BVI Companies denied the validity of the transaction sued on and the genuineness of the Globe Documents. The First Instance Sharjah Court commissioned a report from experts who held that the Globe Documents did not establish Globe’s claim, that the claim was “nothing but fraud” and the Globe Documents “fabricated”. The First Instance Sharjah Court upheld the experts’ conclusions and dismissed the claim on 17 March 2020 (“**the Globe First Instance Judgment**”).
16. On 31 January 2021, the Sixth Defendant obtained an interim injunction from the Court of First Instance of the Dubai International Finance Centre (“**DIFC**”) to prevent the BVI Companies from dealing with the Bridge Properties in breach of the Tenancy Agreement, and the Sixth Defendant also issued proceedings in the DIFC for specific performance of the Tenancy Agreement (“**the DIFC Tenancy Proceedings**”).
17. Globe appealed the Globe First Instance Judgment to the Sharjah Court of Appeal, arguing that the experts had exceeded their mandate in concluding that the Globe Documents were fabricated and asking the Sharjah Court of Appeal to appoint new experts. The Sharjah Court of Appeal appointed a panel of three experts “to determine the contractual relationship between the parties” and to answer various other questions. The experts produced a report describing the terms and legal effects of the Globe Documents, and identifying what were said to be acts of performance of the transactions, but which did not in terms address the issue of whether they were fabricated. On 6 April 2021, the Sharjah Court of Appeal overturned the Globe First Instance Judgment (“**the First Globe Appeal Judgment**”) and gave judgment for the sum said to be due.
18. By a petition issued on 21 July 2021, the Bank and the BVI Companies asked the Sharjah Court of Appeal to suspend and cancel the First Globe Appeal Judgment. These challenges were brought under Articles 169(1) and (6) of the Civil Procedure Law (as then in force). This permits “motions for reconsideration in respect of the final judgment or ruling”:
  - i) In the case of Article 169(1), “if the adverse party has committed an act of fraud which affected the underlying judgment or ruling.”
  - ii) In the case of Article 169(6), “by a party who considers that the judgment or ruling rendered in the legal proceedings is adversely affecting its interests where such a party has neither intervened in, nor been impleaded into, the underlying legal proceedings, provided that such a party proves fraud, collusion or gross negligence of the representative acting on his behalf”.

19. Article 169(1) was relied upon by the BVI Companies who were parties to the Globe Sharjah Proceedings. Article 169(6) was relied upon by the Bank, who was not. At the relevant time, Article 172 of the Civil Procedure Law provided that when a motion for reconsideration was brought, “the court shall first decide on the admissibility of the petition”, and if satisfied the petition was admissible, schedule pleadings on the merits, although it could address both issues in a single judgment in, effectively, a “rolled up hearing” (Article 172(1)). Globe submitted that the admissibility requirements of Articles 169(1) and (6) were not satisfied on the following bases:
  - i) The Bank, not being a party, could not seek reconsideration under Article 169(1).
  - ii) The BVI Companies’ petition did not set out the substance of the fraud alleged.
  - iii) The Bank had not shown that it had purchased the BVI Companies at the relevant time and that it could seek relief under Article 169(6).
20. On 22 August 2021, the DIFC Court granted immediate judgment in the BVI Companies’ favour in the DIFC Tenancy Proceedings. The DIFC injunction was continued pending the Sixth Defendant’s appeal, which was dismissed, and the DIFC injunction set aside, on 23 March 2022.
21. The petitions of the BVI Companies and the Bank in the Globe Sharjah Proceedings were dismissed by the Sharjah Court of Appeal on 5 October 2021 (“**the Second Globe Appeal Judgment**”):
  - i) The Sharjah Court of Appeal recorded the BVI Companies’ Article 169(1) grounds, including that the Globe Documents were fabricated;
  - ii) The Sharjah Court of Appeal held that Article 169(1) was concerned with attempts to deceive the court, and permitted reconsideration for “what was not apparent to the opponent throughout the duration of the hearing of the case so that it was not given the opportunity to make the defense thereof in the case and demonstrate the truth therefore to the Court and in which it was impossible for the Pleader to discover then”.
  - iii) The Sharjah Court of Appeal held that the BVI Companies had not proved fraud, “being a fraud that was not apparent to the Pleader throughout the duration of hearing the appeal” and that “what was mentioned by the Pleaders however is nothing else than a challenge against the appealed judgment, a thing for which the plea may not be filed”.
  - iv) The Sharjah Court of Appeal said that the Bank had not proved Article 169(6) was applicable and the plea “may not be filed”.
  - v) Accordingly, the pleas for reconsideration could not be filed.
22. On 8 November 2021, the BVI Companies and the Bank filed appeals to the UAE Cassation Court against the dismissals of 5 October 2021. Globe resisted the appeals:
  - i) It submitted that the Cassation Court could not hear argument on the trial court’s decision “so long as the trial court’s judgment is reasonable and sufficient to substantiate its ruling”.

- ii) It repeated its argument that the Bank had not adduced evidence to show it had purchased the BVI Companies, who had been represented by the BVI court-appointed receiver.
  - iii) It submitted that the BVI Companies had failed to substantiate the fraud, emphasised the need for “the fraud alleged ... to have affected the petitioned judgment”, and the BVI Companies had not produced “new papers appearing after rendering the petitioned judgment”, referring to a UAE Cassation judgment which it said showed that it was necessary to show “fraud that was concealed from the opponent throughout the period of considering the lawsuit” which the petitioner did not have the opportunity to reveal to the court.
23. On 28 December 2021, the UAE Cassation Court dismissed the appeal of the BVI Companies on procedural grounds (failing to file an appropriate power of attorney). It is accepted that this brought the legitimate involvement of the BVI Companies in the Globe Sharjah Proceedings to an end, although that does not appear to have prevented the BVI Companies attempting to file further arguments. The UAE Cassation Court allowed the petition of the Bank on grounds which are not entirely clear, but held that the Sharjah Court of Appeal had dismissed the claim “because the fraud by his representative was not established, but without discussing the Petitioner’s defense, the documents presented by him and the evidence therein for the obtained fraud, collusion or gross negligence”, such that the decision “lacked reasoning”. The thrust of the decision appears to be that the Second Globe Appeal Judgment was insufficiently reasoned (such that the decision was based on procedural grounds). A limited aspect of the case was remitted to a different constitution of the Sharjah Court of Appeal, on the basis that only the matters remitted were open for argument.
24. Once again, Globe resisted the remitted challenge, drawing a clear distinction between Article 169(1) and Article 169(6). It submitted that Article 169(1) required a party to establish the fraud of the opposing party which had affected the judgment, and which was “hidden from the other party while the case was being heard so to that it was not given the opportunity to present its case.” Article 169(6) required an intervening party to establish fraud, collusion or negligence on the part of its representative. It submitted that the Bank’s submission that Article 169(6) applied because the BVI Companies had been represented by the receiver and not the Bank was without merit because the Bank did not acquire the BVI Companies until after the appeal had been listed for ruling and that reliance on any fraud of Mr Al Sari did not assist because Mr Al Sari “does not represent the Petitioner Bank and there is no relationship between him and the Petitioner Bank”, and because the receiver had fully defended the proceedings.
25. The parties filed further submissions, the contents of which ranged widely, and there was an oral hearing. The Bank asked the court to appoint a further expert panel, but this request was rejected. The Sharjah Court of Appeal handed down judgment on 30 March 2022 (“**the Third Globe Appeal Judgment**”). The terms of that judgment suggest that the Bank’s challenge was now also being advanced on the basis that Mr Al Sari’s conduct in signing the Globe Documents on behalf of the BVI Companies was in breach of an English court freezing order, and that the Bank had sought to rely on both Article 169(1) and Article 169(6). The Sharjah Court of Appeal noted that only the petition of the Bank had been remitted for further consideration, and that those prior findings which did not fall within the scope of the remission remained binding. So far as Article 169(1) is concerned, the Sharjah Court of Appeal rejected the Bank’s argument that Mr

Al Sari had committed fraud by signing the Globe Documents on behalf of the BVI Companies in breach of a freezing order of the English court, holding that facts already determined in the case and falling outside the scope of the remission established that the Globe Documents were signed before the attachment order. So far as Article 169(6) is concerned, it found that the conditions of Article 169(6) had not been established “which renders the Petition lacking basis in the facts and the documents”.

26. On 18 February 2022, the Bank and the BVI Companies commenced proceedings in England and Wales to enforce the Bank Sharjah Judgment and brought various claims in respect of wrongful conduct aimed at preventing the Bank from enforcing its judgment and/or the BVI Companies from realising the proceeds of the Bridge Properties. The Claimants obtained worldwide freezing order relief from Mrs Justice Cockerill.
27. On 5 April 2022, two of the BVI Companies commenced possession proceedings against Mr Gebremedhin, the Al Saris’ housekeeper, in the Central London County Court (“**the Possession Proceedings**”).
28. On 14 April 2022, the Sixth Defendant issued a claim in the Sharjah Court of First Instance seeking a declaration that the Tenancy Agreement was valid, but on 15 June 2022 those proceedings were dismissed for want of jurisdiction (“**the Sharjah Tenancy Proceedings**”).
29. On 1 June 2022, the Sixth Defendant applied to be joined as a defendant to the Possession Proceedings, and the First and Second Defendants served witness statements in those proceedings purporting to confirm the validity of the Tenancy Agreement (which statements the Claimants contend were dishonest).
30. Meanwhile, in the Globe Sharjah Proceedings, both the BVI Companies and the Bank attempted a further appeal to the UAE Cassation Court. The petitions were dismissed on the basis that the Second and Third Globe Court of Appeal Judgments were sufficiently reasoned, and it was not open to the BVI Companies and the Bank to bring an appeal on the merits to the UAE Cassation Court.
31. The Possession Proceedings culminated in a possession order of HHJ Johns KC of 28 April 2023 who found that the Tenancy Agreement was fabricated, and in any event Abdalla Al Sari had no authority to sign it (“**the Possession Judgment**”).
32. At around that point (on 11 April 2023), for the first time, Globe began proceedings seeking to enforce the First Globe Appeal Judgment and it obtained a freezing order on a without notice application in the DIFC on 2 May 2023. That order was discharged on 19 June 2023 (“**the Globe DIFC Proceedings**”).
33. On 26 May 2023, Globe issued proceedings in the BVI seeking to enforce the First Globe Appeal Judgment and associated judgments (“**the Globe BVI Proceedings**”). There was no information before the court about the current status of the Globe BVI Proceedings.
34. On 4 July 2023, Mr Justice Bright handed down judgment on a jurisdictional challenge brought by the Globe Defendants to the claims served against them, rejecting that challenge.



35. On 16 February 2024 a Case Management Conference took place before Mrs Justice Dias. Following an application made at that hearing, Mrs Justice Dias gave the Claimants permission to join D10 to the proceedings and to serve the proceedings on D10 out of the jurisdiction.

## **THE CLAIMS AND APPLICATIONS**

### **The Claims brought against the PCB Defendants**

36. While there is a dispute as to what causes of action fall within the scope of the Claim Form, the case which the Claimants seek to advance against the PCB Defendants is broadly as follows.
37. First, “statement-based” claims:
- i) Globe represented that the Globe Documents were genuine when deploying them in the Globe Sharjah Proceedings, and in pursuing claims to enforce the First and Second Globe Appeal Judgments in the Globe DIFC and BVI Proceedings (in which it also represented that the First and Second Globe Appeal Judgments were capable of recognition and enforcement).
  - ii) The representations were false and known to be false, and made maliciously, and induced the Bank to rely upon them,
  - iii) Globe is liable in deceit and for the tort of malicious falsehood and Mr Almheiri is liable as a joint tortfeasor.
38. Second, against the PCB Defendants, a claim on the basis of the so-called *Marex* tort: that the Globe DIFC Proceedings and the associated WWFO obtained from the DIFC court were intended to violate the relevant BVI Companies’ claims under the Possession Judgment and the Globe Documents and Sharjah Globe Proceedings were intended to violate the Bank’s enforcement of the Bank Sharjah Judgment.
39. Third, against Globe, on the basis of malicious prosecution of the Globe DIFC Proceedings brought to enforce the First and Second Globe Appeal Judgments.
40. Fourth, against the PCB Defendants, for dishonest assistance in the breach of fiduciary duties owed by relevant members of the Al-Sari family to the BVI Companies, the breaches comprising the creation of the Tenancy Agreement and the Globe Documents and/or entering into the transactions embodied in the Globe Documents, if they are genuine.
41. Fifth, against the PCB Defendants, for unlawful means conspiracy to frustrate enforcement of the Bank and the BVI Companies’ rights through the creation and deployment of the Tenancy Agreement and the Globe Documents (the unlawful means relied upon embracing the other causes of action, entering into a transaction falling within s.423 Insolvency Act 1986, continuing trespass, and contempt of this court, the DIFC Court and breach of UAE criminal law and breach of freezing injunctions granted in this jurisdiction and in the BVI).
42. Sixth, relief under of s.423 of the Insolvency Act 1986 in respect of the Tenancy Agreement and the Globe Documents.

### How the various applications interrelate

43. The Service Out Application raises issues as to whether the Claimants' can show:
- i) A good arguable case that their claims against D10 fall within a jurisdictional gateway. This issue arises on two bases:
    - a) whether and to what extent the Claimants have causes of action of the requisite arguability against D10; and
    - b) whether the Claimants can serve D10 as a so-called non-cause of action defendant, the WWFO Application also being made against him on that basis.
  - ii) A serious issue to be tried on the merits.

There is also a free-standing issue of whether the duty of full and frank disclosure was complied with and, if not, what consequences should follow.

44. By the time of the hearing, it was common ground that in considering the various merits issues raised, I am concerned with the standard of serious issue to be tried.
45. The "serious issue to be tried" element involves consideration of:
- i) the preclusive effects of the First to Third Globe Appeal Judgments (which also forms the basis of D7 and D9's summary judgment application);
  - ii) whether the subject-matter of any claim benefits from absolute privilege by reason of judicial proceedings immunity ("JPI");
  - iii) the alleged absence of loss;
  - iv) the failure to plead a claim under the applicable law;
  - v) the arguability of:
    - a) the deceit claim;
    - b) the malicious falsehood claim;
    - c) the *Marex* tort claim;
    - d) the malicious prosecution claim;
    - e) the dishonest assistance claim;
    - f) the s.423 claim; and
    - g) the conspiracy claim.
46. D10 does not contend that it has not been shown that England and Wales is clearly or distinctly the most appropriate forum for the resolution of the dispute so far as the

causes of action advanced against him are concerned (in contrast to the application against him for a WWFO on the *Chabra* basis).

47. In relation to the WWFO Application, the issues which arise are:
- i) Have the Claimants shown a serious issue to be tried in respect of the causes of action advanced against D10?
  - ii) So far as WWFO relief sought on a *Chabra* basis is concerned:
    - a) Is there a good arguable case or good reason to suppose that D10 controls assets amenable to execution of the Bank Sharjah Judgment against the Al Saris?
    - b) Is there a gateway for service out of such a claim where there are no ongoing pre-judgment proceedings against the Al Saris?
    - c) Is there a proper case for bringing proceedings in this jurisdiction?
  - iii) In both cases, has a real risk of dissipation been established; and is it just and convenient to grant the WWFO, having regard to the fact the Claimants have not adequately quantified their loss and by reason of delay?
48. I propose to consider the issues in the following order:
- i) The allegedly preclusive effect of the First to Third Globe Appeal Judgments (which will also decide the Summary Judgment application).
  - ii) Do the causes of action pleaded against D10 and the other PCB Defendants have a real prospect of success?
  - iii) The remaining service out issues.
  - iv) The remaining WWFO issues.
  - v) The Amendment Application.

## **THE ALLEGEDLY PRECLUSIVE EFFECT OF THE FIRST TO THIRD GLOBE APPEAL JUDGMENTS**

### **The Law**

49. The following principles were essentially common ground:
- i) A foreign judgment may have preclusive effect in English proceedings in respect of matters which are “necessarily decided” by it (*Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] 1 AC 853, 916-917, 947).
  - ii) Some caution is required before concluding that a foreign judgment has preclusive effect in English proceedings, because “English courts are unfamiliar with modes of procedure in many foreign countries, and it may be difficult to see

whether a particular issue has been decided or that a decision was a basis of foreign judgment and not merely collateral or obiter” (*Carl Zeiss*, 918).

- iii) A foreign judgment can only have the preclusive effect it would have in its own jurisdiction (*Carl Zeiss*, 919, 927, 936, 949 and 969-70).
  - iv) A foreign judgment will not be recognised or enforced in this jurisdiction if it was procured by fraud (*Owens Bank v Bracco* [1992] 2 AC 443, 465) or results from proceedings which do not meet requirements of natural justice (*Adams v Cape* [1990] Ch 443, 563).
  - v) It is open to the judgment debtor to resist the recognition or enforcement of a foreign judgment on the grounds of fraud even where the issue of fraud was raised, litigated and rejected in the foreign proceedings (and, necessarily therefore, even where it was not litigated in foreign proceedings but the point could have been raised had due diligence been exercised): *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295. I should note that while *Abouloff* was concerned with an action to enforce a judgment, and *Owens Bank* with registration of a foreign judgment, the argument before me proceeded on the basis that the same approach applied when the court was asked to recognise the judgment and give effect to it under the doctrine of issue estoppel, consistent with the treatment in *Spencer Bower and Handley: Res Judicata* 6<sup>th</sup> [17.08].
  - vi) However, where a party has itself litigated before a foreign court the issue of whether a prior foreign judgment was procured by fraud, it may be precluded by a second foreign judgment rejecting that claim from seeking to resist recognition or enforcement of the earlier foreign judgment on the basis that it was procured by fraud: *House of Spring Gardens Ltd v Waite (No 2)* [1991] QB 241.
  - vii) An issue estoppel will not operate in “special circumstances”, which include where new material becomes available which could not have been discovered at the time of the earlier determination by the exercise of due diligence (*Arnold v National Westminster Bank* [1991] 2 AC 93, 108-109).
50. It is necessary to say a little more about the exception recognised in *House of Spring Gardens* to the rule in the *Abouloff* case:
- i) When *House of Spring Gardens* was decided, it was unclear whether an action to set aside an English judgment on grounds of fraud could only be brought where a “due diligence” condition was satisfied (whether in relation to the discovery of the fraud or of new evidence not considered at trial capable of shedding a sufficiently different light on events).
  - ii) Following *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, the position so far as an action brought to set aside a judgment of the courts of England and Wales on the basis that the judgment was procured by fraud is concerned is as follows. If no allegation of fraud had been raised at trial, the party seeking to set the judgment aside on grounds of fraud does not have to meet any due diligence requirement. Where the allegation of fraud had been raised at trial, and new evidence was relied upon, Lord Kerr of Tonaghmore expressed the view that the court had a discretion as to whether to entertain the action, but did not finally

determine the matter ([55]). The remaining Justices (save for Lord Briggs) agreed with Lord Sumption's judgment. He noted that it was "well-established" that an action to set aside a civil judgment "must be based on new evidence not before the court in the earlier proceedings", but expressed the provisional view that where the issue of fraud was raised in the earlier proceedings, but the "new evidence" condition was satisfied, there was no due diligence requirement ([66]).

- iii) The key difference, therefore, between resisting the enforcement of a foreign judgment on the basis that it was procured by fraud and seeking to set aside a judgment of this jurisdiction on the same basis where the allegation of fraud was litigated and rejected in the impugned judgment, is the absence in the former context of any requirement for new evidence (still less new evidence of some particular quality).
51. Reverting to *House of Spring Gardens*, in that case the claimant obtained judgment against three defendants in the Republic of Ireland from Costello J ("**the Costello Judgment**"). The defendants appealed to the Supreme Court of Ireland. After the hearing of the appeal, but before judgment, the defendants sought to adduce fresh evidence intended to show that Costello J had been deceived. The Supreme Court allowed the defendants' motion for a fresh trial, conditional on money being paid to court. However, the condition was never complied with, and the hearing to hand-down the Supreme Court's judgment was re-listed, and the appeal dismissed.
52. The claimant brought proceedings in this jurisdiction to enforce the Costello Judgment. In answer, the defendants pleaded that the Costello Judgment had been obtained by fraud and referred to the fact that two of the three defendants had commenced fresh proceedings in Ireland to set aside the Costello Judgment. After a 21 day hearing, Egan J dismissed that set-aside action, although no record of his judgment seems to survive in the Four Courts library. The issue then arose as to whether it remained open to the defendants to pursue their *Abouloff* entitlement nonetheless to challenge the enforcement of the Costello Judgment in this jurisdiction on the basis of the same allegations of fraud.
53. The Court of Appeal, Stuart-Smith LJ delivering the leading judgment, held that it was not. The issue is addressed in concise terms (and no reader of this judgment could regard that as anything other than a virtue). He referred to *Abouloff*, noting that it and other cases to similar effect "were decided at a time when our courts paid scant regard to the jurisprudence of other countries", but continued:

"In none of these cases was the question, whether the judgment sued upon here was obtained by fraud, litigated in a separate and second action in the foreign jurisdiction. Unless Egan J.'s decision is itself impeached for fraud, it is conclusive of the matter thereby adjudicated upon, namely, whether Costello J.'s judgment was obtained by fraud ... Mr. Swift argued that if Mr. Parish's and Mr. Waldie's evidence had been tendered before Costello J. and had been rejected, it would still have been open to the defendants, in enforcement proceedings in this country, to set up an allegation, based upon that evidence, to the effect that Mr. Sacks had given perjured evidence and so procured his judgment by fraud. Why, then, should it make any difference that the evidence is adduced, and the issue contested in a second action in Ireland? The answer is that no question of fraud

on the part of Mr. Sacks was in issue in the Costello action; it was in the Egan action.”

54. Stuart-Smith LJ went on to consider the question of whether the defendants’ *Abouloff* defence was an abuse of process, saying that he had:
- “no doubt whatever that, even if the judgment of Egan J. did not create an estoppel, it would be an abuse of process for the Waites to re-litigate the very same issue in the English courts upon which they failed in Ireland, not least because they themselves chose that forum, which was the natural forum in which to challenge the judgment of Costello J. They could, if they had wished, merely have waited for enforcement proceedings to be taken here and then attempt to set up fraud. They did not do so. They cannot try again here to obtain a different verdict.”
55. The rationale of the *House of Spring Gardens* exception appears to involve (a) the rejection of the allegations of fraud in a second and separate set of the proceedings; and (b) the voluntary choice of the defendants to commence new proceedings in Ireland to challenge the Costello Judgment on grounds of fraud. The effect of the decision would seem to be that a defendant who raised the relevant fraud by way of defence of the original action would retain their *Abouloff* entitlement if they stopped there, and a defendant who did not raise the relevant fraud in the original action (as was the case in *House of Spring Gardens*), but then commenced proceedings in the same jurisdiction to set that judgment aside, would not. The distinguishing feature between those two scenarios would seem to be between:
- i) a party raising the allegation of fraud to answer a claim the claimant had set in motion against it in the foreign jurisdiction; and
  - ii) a party raising the allegation of fraud in new proceedings after a final and enforceable judgment has been entered in earlier foreign proceedings, on the basis that that earlier judgment was obtained by fraud.
56. Quite where that line falls to be drawn between the two will not always be clear, even in common law systems such as England and Wales and the Republic of Ireland. Would an application to adduce fresh evidence of a fraud on an appeal, which was then rejected as not credible, be sufficient to oust the *Abouloff* entitlement? If the re-trial ordered by the Supreme Court of Ireland had led to same adverse outcome, would that simply have amounted to the defendants’ “one go” in the original jurisdiction, leaving their *Abouloff* entitlement intact here, or would that have been it? What of motions to reconsider without which no US court proceedings would seem to be complete?
57. Those issues become more complicated in legal systems such as the UAE, which do not appear to draw the same clear distinction between an appellate challenge to a judgment, and a fresh action to set it aside. As noted above, the UAE legal system provides for applications for reconsideration to be made to the same court where “the adverse party has committed an act of fraud which affects the underlying judgment or ruling” (Article 169(1)) and also “if the judgment or ruling has been based on documents which, after the same is rendered, are acknowledged or turned out to be forged or based on a witness testimony which, after the judgment or ruling, turned out to be a perjury” (Article 169(2)).

58. I shall assume for the purpose of this application that Article 169(1) is an equivalent of the “separate and second action” to which Stuart-Smith LJ referred, albeit it is clearly arguable that applications of this kind are more integrated into the proceedings originally commenced by the judgment creditor than the common law action to set aside a judgment procured by fraud, and may fall on the “appeal” rather than the “separate and second action” side of the divide.

### **The Evidence of Sharjah Law**

59. There is evidence before the court as to the relevant provisions of Sharjah Law. The Claimants have adduced evidence from Mr Ramadan, an independent expert. The PCB Defendants have adduced evidence in the form of four letters from Hadeef & Partners, the lawyers acting for the PCB Defendants in the UAE and who have been closely involved in what can fairly be described as bitterly fought litigation. At one stage, the PCB Defendants floated the possibility of retaining an independent expert and sought permission to adduce the evidence of such an expert. Cockerill J held that a draft of the proposed report should be adduced first. No such draft was produced, and no application made. Instead, the PCB Defendants served a second letter from Hadeef & Partners.
60. In total there are three expert reports from Mr Ramadan and three letters from Hadeef & Partners. Mr Ramadan’s instructions are before the court, but not Hadeef & Partner’s instructions. Mr Ramadan’s reports are lengthy and reasoned documents. The first is 63 pages long and the second is 22 pages (the third is a short document addressing a single point). The reports refer to various UAE court decisions and provisions of Codes and other legislation. The letters from Hadeef & Partners are also lengthy and refer to various legal sources including Egyptian decisions.
61. In *Edgeworth Capital v Maud* [2015] EWHC 2364 (Comm), Mr Justice Leggatt faced competing evidence of Spanish law on a summary judgment application in the form of letters from the parties’ Spanish lawyers. While regarding one interpretation as prima facie more compelling, he felt unable to resolve the disputed issues of Spanish law on a summary judgment hearing, explaining:

“20. The points are made by Mr Arden QC on the defendant’s behalf, first, that there is at present before the court no opinion on the meaning of the Spanish provision given by an independent expert. The opinions currently expressed on each side are from individuals who work for the law firms acting for each party. Secondly, the evidence which has been given is not subject to the CPR provisions governing expert reports and the duties imposed on experts under that regime. Those duties include, for example, the duty to draw attention to the range of opinions on an issue, including those which conflict with the expert’s own opinion. Thirdly, there is no full exegesis, and indeed the claimants’ evidence contains no real exegesis at all, of the legal methods which would be used to answer the relevant question of foreign law in the foreign legal system. In particular, there has been no full explanation of the applicable principles of statutory interpretation, the hierarchy of relevant legal sources, the status of decided cases and matters of that sort. Fourthly, I must recognise that the opinion given by the claimants’ lawyer is contradicted by an opposite opinion which is not simply a bare and unreasoned opinion but is one for which reasons have been provided. There has, at this stage, been no testing of the opinions of

the witnesses on each side such as would occur through the court process, including a meeting between experts if the case proceeds to trial and, most importantly of course, the process of cross-examination.

21. I do not say that those difficulties automatically or necessarily would preclude the court from granting summary judgment. There may well be points on which foreign law is so clear and the opinion expressed by one lawyer is so clearly right and that expressed by the lawyer on the other side so obviously wrong that the points can be decided summarily. Indeed, I take the view, although the point is no longer live, that the argument based on article 55 of the Spanish Insolvency Act fell into that category.

22. However, I am unable to say that the remaining issue in this case is as straightforward as that

...

25. In these circumstances, strong as I consider on the face of it the claimants' case on the meaning of article 97.2 to be, I do not feel able to reach the conclusion on the material now before the court, with all the inherent limitations which that material has at this early stage of proceedings, that there is no real prospect of the defendant's interpretation being accepted. I therefore do not consider that I can take the view that the argument is bound to fail and on that basis grant summary judgment to the claimants."

62. I find myself in a similar position in this case, save that the Claimant *does* have the benefit of a reasoned report from an independent expert. Without the benefit of independent experts on both sides, a joint memorandum and the full exploration of the legal sources which only a trial of some kind could facilitate, I do not feel able fairly to resolve the issues of UAE law which are in dispute on a summary basis. UAE law is an unfamiliar system, and both the legal authorities and the court filings I was referred to are translated from Arabic. The court filings are themselves open to conflicting interpretations, and do not always appear to be internally consistent or reflect a consistent position on the part of each side. These difficulties enhance the caution which the court is enjoined to adopt when determining whether a foreign judgment has preclusive effect in proceedings in this jurisdiction.

63. For present purposes I am satisfied of the following:

- i) It is strongly arguable that Article 169(1) was not available to the BVI Companies because it only applies to fraud discovered after the judgment was obtained. Mr Ramadan referred to a number of UAE court decisions to this effect (see for example the Dubai Court of Cassation, Case No 43.2011, 26 September 2011), and reference to that issue is a recurring feature of the various court filings and judgments. While the BVI Companies argued for a different approach, there does not seem to be any strong basis for such an argument, and the argument does not appear to have been accepted.
- ii) It is arguable that the BVI Companies' challenge to the First Globe Appeal Judgment was rejected at the "admissibility" stage on this basis, this being a



consistent theme of the filings and a point which features in the Second Globe Appeal Judgment.

- iii) It follows that there is a serious issue to be tried that the BVI Companies had no right to challenge the First Globe Appeal Judgment in respect of the fraud relied upon for *Abouloff* purposes, and that there has been no determination of the fraud case now relied upon by the BVI Companies in the Sharjah Proceedings (given the uncertain scope of the Second Globe Appeal Judgment).
  - iv) Turning to Article 169(6), it is strongly arguable that it only applies where the interests of a non-party are adversely affected by a judgment, and the non-party can establish fraud, collusion or gross negligence on the part of the party representing its interests in the proceedings. It is also strongly arguable that this requires the Bank to establish fraud, collusion or gross negligence by those acting for the BVI Companies in the First Globe Appeal Judgment, and that it is not enough to point to alleged fraud by one of the parties prior to, and independently of, the litigation (e.g. the Al Saris committing the BVI Companies to the transaction in the Globe Documents). That appears to be the more natural reading of Article 169(6) and derives some support from case law to which Mr Ramadan referred: in particular the Dubai Court of Cassation, Case No 204/11, 19 February 2012 and Federal Supreme Court, Case No 125/19, 30 May 1999.
  - v) It is fair to say that the various filings and the Third Globe Appeal Judgment do not track this legal structure as closely as they might, and there are passages which can be relied upon to suggest that a wider assault on the Globe Documents was being invoked and rejected, with the Bank advancing a different interpretation of Article 169(6). However, it is arguable that the Bank had no legal right to challenge the First Globe Appeal Judgment on the basis of the fraud it now invokes under the *Abouloff* principle, and that this was one of the reasons why the challenge did not succeed, such that it cannot be said that it was a necessary element of any of the Sharjah court decisions relied upon by the PCB Defendants that the fraud now relied upon by the Bank was considered and rejected on the merits.
  - vi) I am also satisfied that it is arguable that the Second and Third Globe Appeal Judgments rejected the Bank's application for reconsideration at the "admissibility" stage for the purposes of Article 172 of the Code of Civil Procedure, although the position is not clear, at least to me.
  - vii) Once again, it follows that there is a serious issue to be tried that the Bank had no right to challenge the First Globe Appeal Judgment in the UAE respect of the same fraud as can be relied upon for *Abouloff* purposes, and that there has been no determination of the fraud case now relied upon by the Bank in the Sharjah Proceedings.
64. In closing, Ms Allsop placed particular emphasis on the suggestion that it was an abuse of process for the Claimants, having sought to raise the issue of the fraudulent nature of the transaction documents in the Globe Sharjah Proceedings, to raise them now, whether or not it was in fact open to the Claimants to raise the fraud claim in the Globe Sharjah Proceedings as a matter of the applicable procedure, and even if the determination of those issues against them was not a necessary reason for the

Claimants' failure. However, the same uncertainties as to UAE law and the basis and effect of the Sharjah court rulings mean that this issue cannot be summarily determined either. It is clear from *Abouloff* itself that merely seeking to re-argue fraud allegations raised as a defence in the foreign proceedings cannot be abusive of itself. *House of Spring Gardens* indicates that there may be some positive form of voluntary engagement with the foreign court going beyond simply seeking to defend the proceedings (at first instance or on appeal) which can engage the abuse of process doctrine. Those circumstances are likely to be rare. As Lord Lowry noted in *Shaw v Sloan* [1982] NI 393, 397, "[t]he entire corpus of authority in issue estoppel is based on the theory that it is *not* an abuse of process to relitigate a point where any of the three requirements of the doctrine is missing." On the state of the evidence, I am unable to conclude that there is no triable issue as to whether the doctrine of abuse of process is engaged here.

65. In these circumstances, it is not necessary to consider the Claimants' other arguments as to why it is said that issue estoppel or some other form of preclusion does not arise in this case. This part of the Service Out Application, and the Summary Judgment application on this basis, fail.

### **DO THE CAUSES OF ACTION PLEADED AGAINST THE PCB DEFENDANTS HAVE A REAL PROSPECT OF SUCCESS?**

#### **Are Any of the Proposed Claims Barred by Judicial Proceedings Immunity?**

##### *Introduction*

66. The PCB Defendants contend that the Claimants' claims for deceit, malicious falsehood and at least elements of the unlawful means conspiracy claim are all precluded by JPI. By way of summary:
- i) The deceit and malicious falsehood claims rely upon:
    - a) The deployment of the Tenancy Agreement in the Possession Proceedings in this jurisdiction (and in the DIFC Tenancy Proceedings).
    - b) The bringing of the claim in the Sharjah Globe Proceedings on the basis of the Globe Documents.
    - c) The bringing of proceedings in the Globe DIFC Proceedings on the basis of the First and Second Globe Appeal Judgments.
    - d) The bringing of proceedings in the Globe BVI Proceedings on the basis of the First and Second Globe Appeal Judgments.
  - ii) The unlawful means / joint tortfeasor claims to the extent that they depend on the claims of deceit, malicious falsehood or contempt, rely on the same events.

#### ***Would JPI be engaged on the assumption the relevant events all took place in English court proceedings?***

##### *The authorities*

67. In *Singh v Reading BC* [2013] 1 WLR 3052, [20]-[67], Lewison LJ conducted a comprehensive review of the principles governing JPI. He began at [21] by defining “the basic rule” that “no action in defamation could be brought against a witness for anything he said in evidence before a court or tribunal”, nor against the parties, the advocate or the judge. At [23], he identified “two strands of policy underlying the rule”: that those engaged in litigation should be able to speak freely without fear of civil liability; (the “**Witness Inhibition Justification**”) and the wish to avoid a multiplicity of actions where one court would have to examine whether evidence given before another court was true or not (“**the Multiplicity of Actions Justification**”).
68. At [29] and following, he described various unsuccessful attempts to outflank the rule. The first category involved “bringing an action based on a cause of action other than defamation” and the second “bringing an action based, not on what happened in court, but on what happened out of court.”
- i) In the first category, he referred to attempts to bring claims for conspiracy to give false evidence at a trial, which had been rejected in a large number of cases including *Marrinan v Vibart* [1963] 1 KB 528, where Sellers LJ observed at 535:
- “It has been sought in this case to draw a difference between the action of libel and slander, the action of defamation, and that which is set up in this case, one of conspiracy. I can see no difference in the principles of the matter at all. Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given.”
- ii) In the second category, he referred to the decisions in *Watson v M’Ewan* [1905] AC 480 (holding that JPI prevented a witness being sued in defamation and for breach of confidence for what he had told the lawyer who took his proof of evidence) and *Taylor v Director of the SFO* [1999] 2 AC 177 (where JPI was applied to a letter one investigator had written to another).
69. At [43] and following, Lewison LJ set out a number of successful “inroads into” JPI. The first was the liability of advocates and expert witnesses for negligence (respectively) in the conduct of court proceedings and in relation to an expert report prepared for the purpose of litigation or in relation to expert evidence given in litigation.
70. Lewison LJ next referred to *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 in which the House of Lords held that the lower courts had been wrong to strike out an action for conspiracy to injure and for misfeasance in public office based on allegations that the police had fabricated evidence against the claimant. As this case featured prominently in the argument, it is helpful to consider it at rather more length. In *Darker* the claimants had been indicted for a drugs-related conspiracy, but when significant police misconduct emerged, the judge stayed the proceedings (such that there was no final determination of the charges on their merits). The House of Lords held the claim for misfeasance in public office was not barred by JPI:
- i) Lord Hope noted at p.466 that one of the justifications for JPI – the Multiplicity of Actions Justification – was not engaged, because the “core immunity ... is

limited in its application to things said or done in court” (although it was actually the fact that the proceedings had been stayed, such that there had never been a determination in court in that case, which avoided the spectre of a “multiplicity of actions”). It is important, however, that he approached the case as one in which the Multiplicity of Actions Justification was not engaged, and the application of JPI in that case had to be substantiated on the basis of the other justification of JPI, “to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say”.

- ii) He held that this alternative justification required JPI to extend to pre-hearing matters such as interviews with solicitors and investigating police officers for the purpose of proceedings in contemplation. However, at p.488, he distinguished between “statements made by police officers prior to giving evidence and things said or done in the ordinary course of preparing reports for use in evidence, where the functions that they are performing can be said to be those of witnesses or potential witnesses as they are related directly to what requires to be done to enable them to give evidence” on the one hand, “and their conduct at earlier stages in the case when they are performing their functions as enforcers of the law or as investigators” on the other. At p.499, he held that JPI did not extend to “such acts to procure false evidence as the planting of a brick or drug or the fabrication of a record of interview”, drawing a distinction between “the act itself and the evidence that may be given about the act or its consequences”:

“This distinction rests upon the fact that acts which are calculated to create or procure false evidence or to destroy evidence have an independent existence from, and are extraneous to, the evidence that may be given as to the consequences of those acts. It is unlikely that those who have fabricated or destroyed evidence would wish to enter the witness box for the purpose of admitting to their acts of fabrication or destruction. Their acts were done with a view to the giving of evidence not about the acts themselves but about their consequences. The position is different where the allegation relates to the content of the evidence or the content of statements made with a view to giving evidence, and not to the doing of an act such as the creation or the fabrication of evidence. The police officer who is alleged to have given false evidence that he found a brick or drug in the possession of the accused or that he heard an accused make a statement or a remark which was incriminating is protected because the allegation relates to the content of his evidence. He is entitled to the immunity because he was speaking as a witness, if he made the statement when he was giving evidence, or was speaking as a potential witness, if he made it during his preliminary examination with a view to his giving evidence.”

- iii) Lord Clyde said, at p 460-461 (emphasis added):

“No immunity should attach to things said or done *which would not form part of the evidence to be given* in the judicial process. The reason for admitting to the benefit of the immunity things said or done without the walls of the court is to prevent any collateral attack on the witness and circumvention of the immunity he or she may enjoy within the court.”

It cannot be that everything which is said or done in the preparation for judicial proceedings is necessarily immune.”

At p.461, he also noted:

“So far as the second purpose of the immunity is concerned, the desirability of avoiding repeated litigation on the same issue, that too has no relevance to the present case. In the event there was no concluded trial. The proceedings were stayed on the ground of an abuse of process. There is no decision against which a collateral attack can be made.”

iv) Lord Hutton stated at p 469:

“[T]he immunity in essence relates to the giving of evidence. There is, in my opinion, a distinction in principle between what a witness says in court (or what in a proof of evidence a prospective witness states he will say in court) and the fabrication of evidence, such as the forging of a suspect’s signature to a confession or a police officer writing down in his notebook words which a suspect did not say or a police officer planting a brick or drugs on a suspect.”

71. Reverting to *Singh*, at [66] Lewison LJ summarised the principles to be derived from *Darker* as follows:

- “(i) the core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court;
- (ii) the core immunity also comprises statements of case and other documents placed before the court;
- (iii) that immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked;
- (iv) whether something is necessary is to be decided by reference to what is practically necessary;
- (v) where the gist of the cause of action is not the allegedly false statement itself, but is *based on things that would not form part of the evidence in a judicial inquiry*, there is no necessity to extend the immunity (emphasis added);
- vi) in such cases the principle that a wrong should not be without a remedy prevails.”

72. The words emphasised in [71(v)] are potentially of significance because the evidence in a judicial enquiry would, on the face of things, embrace documents deployed before the court as well as witness statements and oral testimony. Lord Clyde in *Darker*, [460]-[461] also refers to “things said or done which would not form part of the evidence to be given.”

73. In *Singh*, the claimant wanted to rely on pressure applied by her employer to a co-worker (Mrs Heath) to give adverse evidence against the claimant in employment tribunal proceedings for the purposes of establishing constructive dismissal. That application to amend was made in the very proceedings in which the claimant was seeking to establish the constructive dismissal, such that there was no prior determination to be attacked, and, like *Darker*, the Multiplicity of Actions Justification for JPI was not “in play”. Applying the principles he had derived from the authorities, at [70]-[71], Lewison LJ held that JPI did not preclude the claimant from running such a case. The claim did not depend on anything Mrs Heath had said or might say in evidence, and the means by which the council procured the statement was a “free-standing act”. At [71], Lewison LJ described the employer’s argument that “the statement ... caused the damage” as “fallacious” (reflecting the fact that the statement had had no operative effect in the ongoing litigation). This was not a case in which the instrumentality by which loss was said to have been suffered was by a false statement leading to an erroneous adverse judicial decision which had harmed the claimant.
74. At this point, it is helpful to address an authority out of chronological sequence: *Surzur Overseas Ltd v Koros* [1999] CLC 601. In that case, the claimant had obtained a WWFO against the defendant (K). Before judgment, the WWFO was varied by court order to allow K to transfer certain ships to third parties pursuant to what were said to be genuine and arms-length sale contracts. For that purpose, K deployed documents and witness evidence at an interim hearing purporting to evidence the sales, and persuaded Moore-Bick J, over Surzur’s opposition, to amend the WWFO to permit the transfer. After obtaining judgment against K, Surzur brought proceedings alleging that K had entered into collusive transactions with certain third parties, in breach of the WWFO and for the purpose of defeating its judgment and sued the third parties for damages for unlawful means conspiracy.
75. The Court of Appeal held that the claim was not barred by JPI. Waller LJ characterised the objective of the unlawful means conspiracy as “concealing the assets of [K] and the deception of Surzur or any other interested party into believing that the three vessels had been sold at arm’s length and ‘if necessary to deceive the court in order to persuade it to permit the sale of the three vessels’”. He noted that “going to court was an important step in the causation of damage”. Nonetheless he held that the claim was not precluded by JPI. He held that the authorities established the following propositions:
- i) Not every cause of action which includes an averment that false evidence was given will be struck out on the basis of witness immunity, and it is not appropriate to divide allegations into those that involve giving evidence, and those that do not.
  - ii) Lord Morris’ statement in *Roy v Prior* [1071] 1 AC 470, 477 that JPI “does not involve that an action which is not brought in respect of evidence given in court but is brought in respect of an alleged abuse of process of court must be defeated if one step in the course of the abuse of the process of the court involved or necessitating the giving of evidence” was capable of a wider or narrower interpretation. The narrower interpretation was that JPI did not preclude the bringing of claims for specific torts such as malicious prosecution, malicious arrest and an abuse of process. The wider interpretation was that “if the action is not brought simply in respect of evidence given or supplied but is brought in

relation to some broader objective during the currency of which it may well be that evidence was given, witness immunity should not apply.”

- iii) On either approach, Surzur’s claim was not barred by JPI. It would be absurd if Surzur could bring a claim in conspiracy if deceived into releasing the vessels from the WWFO without the need for a court decision but not otherwise. If the conspiracy was correctly classified “as a conspiracy to hide assets and cheat Surzur by the manufacture of false documents”, JPI did not apply.
  - iv) In any event, a conspiracy to defeat the WWFO and obtain the release of assets from the scope of the order by non-parties “must be a conspiracy to abuse the process very akin to the malicious arrest which was the subject of *Roy v Prior*.”
76. Finally, I was referred to *Takhar v Gracefield Developments Limited* [2024] EWHC 1714 (Ch). In that case, the claimant had failed in proceedings to recover property. By a fresh action, she set that judgment aside on the basis that it had been procured by fraud, in the form of a forged will deployed in the case. The claimant then brought a further set of proceedings to recover damages on the basis of, inter alia, the tort of unlawful means conspiracy, the unlawful means being the fraud in procuring the second judgment. After a very careful review of the authorities, and in an obviously careful and considered judgment, HHJ Tindal concluded that the unlawful means conspiracy claim was not barred by JPI.
77. In that case, HHJ Tindal refers extensively to a (rather less considered) obiter observation of mine in *Lakatamia v Tseng Marimoto* [2023] EWHC 3023 (Comm), [79] where I had stated:
- “I have real doubts as to whether English law recognises a tort of unlawful means conspiracy dishonestly to defend a claim through the production of forged documents in those proceedings. The extension of the tort of malicious prosecution to the initiation of civil proceedings is not without controversy (see the differing views in *Willers v Joyce* [2016] UKSC 43), and there is no tort of maliciously defending proceedings. Even if it is possible to overcome those difficulties through the tort of unlawful means conspiracy, further issues would arise as to whether the deployment of forged evidence at trial can provide the basis for a private law cause of action, or is a matter to be dealt with under the court’s jurisdiction (through strike-out or committal) or under the criminal law (cf. *Marrinan v Vibart* [1963] 1 QB 234).”
78. *Lakatamia* was a case in which only the claimant appeared, and in which the scope of JPI was not debated before the court, nor any of the relevant authorities considered. This is because of the manner in which the issue arose. The claim for damages for an unlawful means conspiracy to defend or delay *Lakatamia*’s claims against the defendant’s mother through the deployment of forged documents had been the subject of a default judgment. The issue for me was whether I should accede to the claimant’s submission as to how I should quantify that judgment, in circumstances in which the evidence of loss before the court was unsatisfactory, and in which the court had a discretion as to whether to enter the default judgment in the terms sought at all. It was in that context that I referred to my scepticism about the validity of the underlying cause of action as one of the reasons why I was not persuaded to grant the relief sought. As will be apparent from this judgment, I adhere to that instinctive scepticism. However,

my comment in that case can carry no weight when addressing the difficult issues of JPI which were the subject of full argument in *Gracefield* and before me on this application.

79. HHJ Tindal noted that forging a document for use in litigation with the intention of misleading the court and its deployment in court proceedings to that end are contempts of court ([526]-[527]), and the crime of forgery under the general criminal law ([528]-[529]). Having concluded that this constituted unlawful means, he held that JPI was not engaged:
- i) *Darker* had confirmed that JPI did not apply “to the fabrication of documentary evidence then presented to a court” ([558], [559.5]).
  - ii) *Surzur* had determined that if the giving of false evidence is not a necessary allegation in the claim but merely an incidental part of a wider conspiracy, there is no JPI ([559.4]).
  - iii) JPI does not apply to a claim for abuse of process.
  - iv) The claim for forgery of the signature was not barred by JPI for each of those reasons ([562]).

*The considerations apparent in the authorities?*

80. There are a number of competing strands in this skein of legal principles, and they are not easy to disentangle. When attempting to do so, I will refer to both of the two justifications for JPI generally put forward: the Witness Inhibition Justification (viz the inhibitive effect which the prospect of civil liability might have on the willingness of those approached to give evidence, whether as part of the preparations for contemplated litigation or for deployment in a court case, to engage) and the Multiplicity of Proceedings Justification (viz the danger that a claim that a prior judgment was procured by fraud could provide a basis for re-litigating an unsuccessful case).
81. The first strand is the “act/evidence” distinction. I accept that the authorities support a distinction (which has particular force when considering the Witness Inhibition Justification) between unlawful acts which occur when giving (or in preparation for giving) evidence to the court in statement form or orally, and other unlawful acts such as forging a document or planting evidence which may become the subject of evidence in court. However:
- i) While in *Darker*, there was a relatively clear delineation between the planting of false evidence by investigating officers prior to the claimant’s arrest, and the evidence which would have been given in their subsequent prosecution, the line between those two types of unlawful act can be a fine one. Take the case where the forged document is first deployed as an exhibit to a statement, with the statement itself ascribing the false description to it; or where a genuine document is falsely presented in evidence as relating to a particular event (e.g. a receipt for a taxi to address A on a particular date when it is fact a receipt for a taxi to Address B). Further. a complaint that a relevant document was deliberately concealed will not amount to an act which is unlawful independent of the court-process, and yet



may otherwise involve conduct of a very similar level of iniquity to the creation of a false document.

- ii) In an age when it is generally documents rather than witness testimony which win cases (as Judge Tindal noted in *Takhar* at [562.1]), permitting free-standing claims that the claimant suffered loss because of an adverse court decision reached as a result of a forged document creates a very significant risk of re-litigation.
- iii) I note that in *Smart v Forensic Science Service Ltd* [2013] EWCA Civ 783, [26], Moses LJ interpreted *Darker* as holding that JPI did not extend to “fabrication or creation of evidence in circumstances where that fabrication is never intended to appear in any evidence.” While it is difficult to find that qualification in the passages in *Darker* referred to, it is a distinction which would address some of the concerns in (i) and (ii), although it may not be consistent with *Surzur* and *Gracefield*.

82. The second strand is the risk of relitigation. It is striking how few of the cases cited to the court or otherwise referred to when considering successful exceptions to JPI involve an attempt to re-litigate an otherwise unimpeached decision of a court on the merits of the substantive dispute:

- i) As I have stated, in *Darker*, the case had been permanently stayed prior to any conviction.
- ii) In *Smart v Forensic Science Service Ltd* [2013] EWCA Civ 783, in which negligent or possibly dishonest forensic evidence had led the claimant to plead guilty to a strict liability offence, the conviction had been set aside before the civil action for loss was commenced.
- iii) In *Singh*, the claimant was amending its existing claim to add a claim based on events during the proceedings and prior to any judgment.
- iv) In *Takhar*, the prior judgment which was said to have been procured by the forgery had already been set aside on that basis (although I do not understand Judge Tindal’s conclusion that forging and deploying forged documents which led to an adverse judgment being entered can form the basis of a claim in the tort of unlawful means conspiracy to be limited to cases in which an action to set aside a judgment on grounds of fraud had previously succeeded: see [560.2]).
- v) In *Surzur*, the claimant had already obtained judgment on the merits when it commenced its unlawful means conspiracy claim, and its success in that judgment was a necessary ingredient of its claim to have suffered loss from the variation to the WWFO (such that its ability to enforce that successful judgment against the three “transferred” vessels was impaired).
- vi) In *JSC BTA Bank v Khrapunov* [2018] UKSC 19, to which Judge Tindal also referred, the defendant was sued for participation in an unlawful means conspiracy to deal with assets in breach of a WWFO, the unlawful means being the contempt of court constituted by the original respondent’s breach of the WWFO. The Supreme Court rejected an argument that the claims were barred by

JPI. Once again, the decision did not involve the contention that fraud had led to a subsisting merits judgment which would not otherwise have been reached and which was the instrumentality of the claimant's loss. As Sales LJ noted in *Khrapunov* in the Court of Appeal ([2017] EWCA Civ 40, [55]):

“Mr Samek submitted that recognition of civil contempt of court as unlawful means for the purposes of the tort of conspiracy to injure by unlawful means would open the floodgates to liability and should be discounted on that ground. I do not agree. Looking first at the person who is subject to a court order, no floodgates issue arises. Since typically either the court order will directly reflect some underlying private law right of the claimant in relation to that person (e.g. where a final injunction is issued to protect such a right) or in the case of a freezing order will only protect the claimant to the extent that he can establish his underlying claim in damages against that person which the freezing order was issued to protect. If civil contempt is recognised as unlawful means for the purposes of the tort of conspiracy, it has only a duplicative rather than a floodgates effect.”

- vii) Clearly there may be cases in which proceedings seek to recover loss caused through the instrumentality of an *interim* decision reached by the court: *Surzur* is one, as the Court of Appeal emphasised. However, Moore-Bick J's decision to vary the WWFO did not involve a final determination, but an interim decision which was capable of being reviewed or set aside in the event of a material change of circumstances, still less a final merits determination of a substantive claim. “Re-litigation” of interim determinations has never raised the same level of concern about the issue of finality as attempts to re-litigate substantive determinations.
83. In the tort of malicious prosecution, one of the exceptions to JPI, the risk of re-litigation is avoided by the fact that the cause of action is confined to claims in which the claimant has ultimately succeeded (e.g. *Byrne v Bank of England* [1902] 1 KB 467), or at least that the action has ended without a decision (*Clerk & Lindsell on Torts* 24th [15-33]).
84. None of the authorities to which I have been referred address the particular issue presented by the First and Second Globe Appeal Judgments: a claim for loss by an unlawful means conspiracy or other tort to create or deploy forged evidence in legal proceedings, where:
- i) the loss is said to have been inflicted by the instrumentality of that final merits determination (and losses ancillary to such a determination, such as liability for one's own or the other party's costs following defeat on the substantive claim); and
  - ii) that final merits determination has not been set aside.
85. *Surzur* and *Khrapunov* involved cases in which a party and a non-party had conspired to take unlawful steps in litigation which made enforcement of the substantive judgment obtained by the claimants more difficult, *Khrapunov* making it clear that it is no answer to such a claim that the court's committal powers are also engaged. There are other contexts in which more difficult issues can arise when the same act has the potential to have consequences under the court's own regime for controlling its own proceedings,

and in private law. It was these I had in mind in the second part of my brief obiter observation in *Lakatamia* quoted at [77] above. Failure to serve a defence within the time permitted by an agreed consent order is unlikely to ground a claim for damages for breach of contract if the defence is effectively served later, and the contract which results in a consent order is unlikely to oust the court's power to extend time and revisit the "bargain" (*Pannone LLP v Aardvark Digital Ltd* [2011] EWCA Civ 803). In *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co (The Star Sea)* [2003] 1 AC 469, [75]-[76], Lord Hobhouse rejected the argument that an insurer could rely on steps taken in the course of legal proceedings as constituting a breach of the duty *uberrimae fidei* with a remedy under s.17 of the Marine Insurance Act 1906:

"When a writ is issued the rights of the parties are crystallised. The function of the litigation is to ascertain what those rights are and grant the appropriate remedy. The submission of the defendants in this case is that, notwithstanding this, one party's conduct of the litigation can not only change that party's substantive rights but do so retrospectively avoiding the contract ab initio. It cannot be disputed that there are important changes in the parties' relationship that come about when the litigation starts. There is no longer a community of interest. The parties are in dispute and their interests are opposed. Their relationship and rights are now governed by the rules of procedure and the orders which the court makes on the application of one or other party. The battle lines have been drawn and new remedies are available to the parties. The disclosure of documents and facts are provided for with appropriate sanctions; the orders are discretionary within the parameters laid down by the procedural rules. Certain immunities from disclosure are conferred under the rules of privilege. If a party is not happy with his opponent's response to his requests he can seek an order from the court. If a judgment has been obtained by perjured evidence remedies are available to the aggrieved party. The situation therefore changes significantly. There is no longer the need for the remedy of avoidance under section 17; other more appropriate remedies are available. The same points have been persuasively made by Callahan AJ sitting in the Supreme Court of Connecticut in *Rego v Connecticut Insurance Placement Facility* (1991) 593 A 2d 491, 497 .

I recognise that it is possible for something to be done in the litigation which may amount to a contractual act; the delivery of pleadings and similar documents are a form of communication. Such communication can have a contractual significance which can and will still be given effect to. Thus it is possible by a pleading to repudiate a contract or accept a repudiation as terminating the contract. Similarly, a claim or defence may affect the substantive rights of a landlord and tenant inter se. But the acts and omissions of the assured relied upon by the defendants in the present case are not of that character. They are solely relevant as alleged failures to observe good faith under section 17. The section 17 principle is a principle of law and if its rationale no longer applies and if its operation, the conferment of a right of avoidance, ceases to make commercial or legal sense then it should be treated as having been exhausted or at the least superseded by the rules of litigation. It will also very often be the case that by the time the litigation has started the cover has expired or its subject matter has ceased to exist so as to make the continuing relationship of insurer and insured no longer current and the observation of good faith only significant to the litigation."

At [110], Lord Scott saw “a great deal of force in the argument that the section 17 duty does not apply to conduct in the prosecution of litigation, as to which the Rules of Court that govern litigation constitute the regulatory code.”

86. Similarly, for a party to litigation who has failed to obtain an order for indemnity costs, or who contends that it has also incurred costs not recoverable under the court’s costs jurisdiction (such as the costs of lawyers not qualified in this jurisdiction) to be able to bring a contract or tort claim to recover those costs from the litigation counterparty based on wrongful conduct in litigation is not a particularly appealing prospect. In this context there may be a difference in some cases between the position of the party to the proceedings, who is directly amenable to the court’s jurisdiction, and the position of a third party. In his dissenting judgment in *Willers v Joyce* [2018] AC 779, Lord Mance at [124] noted:

“A court awarding costs in a civil action is entitled to have regard to all relevant matters, including the absence of any prospects of success and the state of mind in which it was pursued, when deciding what costs, and whether on an indemnity or standard basis; should be recoverable. To permit litigation about these issues after the close of an unsuccessful action would be to invite or risk re-litigation of issues which were or could have been decided in the first action. And in so far as the costs assessed by a costs judge are not likely to or may not enable full recovery of all costs incurred, the reason is likely to be that the costs incurred were not in the eyes of the law necessary, reasonable or proportionate in the context of the issues. To allow a claim for their recovery in a separate action for malicious pursuit of the original action would in each of these cases run contrary to the general policy of the law regarding costs.”

87. These concerns are less obviously in play where the claim is brought against a non-party to the court proceedings as a co-conspirator. Where, however, the claim against the party to the litigation would be precluded because it was inconsistent with the court’s powers of control over the litigation, a difficult issue might arise as to whether it is possible to have a claim in conspiracy where loss (or to the extent that some loss) is only recoverable from one conspirator (raising a similar issue to that considered by Diplock LJ in *Buttes Gas and Oil Co v Hammer* [1975] QB 557, 579-80). These are difficult issues, and it is not necessary to try and answer them finally here. However, they show that there may be policy concerns going beyond the Witness Inhibition and Multiplicity of Proceedings Justifications which are relevant to private law claims arising from events in judicial proceedings.
88. Finally, there is the exception relied upon in *Surzur* and *Takhar* that JPI does not apply to proceedings “brought in relation to some broader objective during the currency of which it may well be that evidence was given” (*Surzur*, 811-812). That is a challenging, and potentially wide-ranging, exception. What is its scope?
89. In *Surzur* Waller LJ attached significance to the fact that “it was not a necessary ingredient [of the conspiracy] that false evidence should be given”, and this would not have been necessary if the submission of the false documents had persuaded the claimants to amend the order by consent.
90. In *Takhar*, at [562.2], Judge Tindal found the Krishans’ evidence, statements and their Defence and Counterclaim in the original proceedings were simply part of “a broader

objective during the currency of which it may well be that evidence was given.” As I understand this finding, it rests on (i) the fact that the Krishans had been engaged in a long term plan to obtain the Properties from the Claimant in which dishonest statements had been made which they “would have used” to try and trick the Claimants to transfer the Properties prior to the commencement of proceedings; and (ii), the false evidence of the Krishans was “only part of their new scheme” to trick the court in the litigation conspiracy. This involves a rather more complicated fact pattern than that described by Waller LJ, because the forged PSA was only ever deployed in litigation for the purpose of obtaining a court order for sale, albeit different and misleading documents had been deployed by the Krishans prior to the proceedings to induce the Claimant to sell.

91. I have not found the scope of the “broader objective” exception particularly clear. It appears to be a relevant fact that the conspiracy can achieve its objective other than through the instrumentality of a court judgment (or, perhaps, settlement of court proceedings). The exception may be intended to address cases where the giving of evidence in court is, at best, an incidental aspect of the conspiracy. I am not persuaded that the mere fact that the events in the litigation are but one stage in a longer term conflict is sufficient to invoke the exception. In civil proceedings, this will almost invariably be the case, because litigation inevitably results from some pre-existing dispute which the parties have been unable to resolve.

*The position in this case*

92. I now turn to the six sets of proceedings in relation to which JPI is invoked in this case.
93. First, the reliance on the deployment of the Globe Documents to obtain the First Globe Appeal Judgment and associated judgments in the Globe Sharjah Proceedings. This involves a “core” instance of the application of JPI: a claim for loss caused by the deployment of forged evidence in legal proceedings to recover loss caused through the instrumentality of a court judgment on the merits of a substantive claim said to have been procured by that evidence (and ancillary costs liabilities), which judgment is adverse to the Claimants and has not been set aside. In this context:
- i) I am not persuaded that the fact that the false evidence deployed in court took the form of forged documents rather than witness evidence always precludes the operation of JPI, and I am not persuaded that the “act/evidence” distinction referred to at [81] above is sufficient to oust the operation of JPI in this core “re-litigation” context.
  - ii) There was no attempt to deploy the Globe Documents prior to their deployment in the Globe Sharjah Proceedings. If there are contexts in which that may be sufficient to take the claim outside the scope of JPI (as *Surzur* might suggest, albeit that decision was not reached in a re-litigation context), this is not one of them.
  - iii) I am not persuaded that the allegation of a broader purpose conspiracy to frustrate the enforcement of the Bank Sharjah and BVI Judgments is sufficient to take the claim outside of the scope of JPI, at least in this core “re-litigation” context. The immediate purpose of the alleged conspiracy was to procure a Sharjah court judgment against the BVI Companies. The fact that this may have formed a new front in a longer war does not render JPI inapplicable, nor the fact that there may

have been an ulterior intent to deploy the judgment thus obtained to frustrate enforcement of the Bank Sharjah Judgment against the Bridge Properties.

94. It follows that if the principle of JPI applies to the Globe Sharjah Proceedings at all – an issue to which I turn at [100] below – it precludes the claims for deceit and malicious falsehood, and the unlawful means conspiracy claims which depend on those unlawful means, where the claim involves the allegation that the First Globe Appeal Judgment and associated judgments was procured by the deployment of forged documents. For the same reason, it precludes the reliance on the alleged crime under UAE law of deploying forged documents in the Globe Sharjah Proceedings.
95. Second, the attempt to enforce the First Globe Appeal Judgment and associated judgments in the Globe DIFC and Globe BVI Proceedings. This aspect of the claim was scarcely touched upon in argument, and the effect of a finding that the causes of action directly based on fraud in the First Globe Sharjah Court of Appeal Judgment was precluded by JPI on the Globe DIFC and BVI Proceedings to enforce the First Globe Appeal Judgment was not explored. I would simply note the following:
- i) It is likely to be permissible in both the DIFC and BVI to resist the enforcement of a foreign judgment on the basis that it was procured by fraud. That suggests that even if JPI does apply to foreign proceedings, it does not preclude challenging enforcement on that basis.
  - ii) The Claimants do not claim that they have suffered loss through the instrumentality of a decision of the DIFC or BVI courts induced by fraud, as I understand that neither court has delivered any decision in Globe’s favour. The difficult issue which would arise if it was said that the judgments of the enforcement courts had been procured by fraud and this was relied upon as the basis of a private law claim for damages does not arise.
  - iii) The issue of whether the claim might be barred on some other basis – e.g. because it would involve outflanking costs orders of those courts – was not explored and may not arise.
96. Accordingly, I am not presently able to conclude that it is clear to the summary judgment standard that the claims relating to events in the Globe DIFC and BVI Proceedings would be precluded by JPI, if the doctrine is applicable to events in those courts.
97. Finally, the unlawful means conspiracy alleged also relied upon the deployment of the Tenancy Agreement in the DIFC Tenancy Proceedings, the Sharjah Tenancy Proceedings and the defence of the Possession Proceedings. By way of a reminder:
- i) The Tenancy Agreement was first deployed in correspondence with the receiver on behalf of the BVI Companies on 27 June 2019.
  - ii) On 31 January 2021, the Sixth Defendant obtained an interim injunction from the Court of First Instance of the DIFC to prevent the BVI Companies from dealing with the Bridge Properties in breach of the Tenancy Agreement, and the Sixth Defendant also issued proceedings in the DIFC for specific performance of the Tenancy Agreement.

- iii) On 22 August 2021, the DIFC granted immediate judgment in the BVI Companies' favour in the DIFC Tenancy Proceedings. The DIFC injunction was continued pending the Sixth Defendant's appeal, which was dismissed, with the DIFC injunction set aside, on 23 March 2022.
  - iv) On 14 April 2022, the Sixth Defendant issued a claim in the Sharjah Court of First Instance seeking a declaration that the Tenancy Agreement was valid, but on 15 June 2022 those proceedings were dismissed for want of jurisdiction.
  - v) On 5 April 2022 the Possession Proceedings were commenced in the CLCC. The Sixth Defendant applied to join the Possession Proceedings and sought to defend them on the basis of the Tenancy Agreement. On 28 April 2023, the Possession Judgment made an order for possession and declared that the Tenancy Agreement was fabricated.
98. Once again, there was insufficient time at the hearing to engage with the application of JPI to the circumstances of the deployment of the Tenancy Agreement in these various proceedings. However:
- i) In no case was a judgment on the merits obtained through reliance on the Tenancy Agreement, all of the applications ending in failure or dismissal.
  - ii) The Tenancy Agreement was deployed prior to the commencement of any relevant proceedings in an effort to persuade the receiver of the BVI Companies not to seek possession.
  - iii) The damages claims are not brought against a party to the relevant proceedings (raising arguments of how private law claims against a counterparty in litigation for costs interrelate with the relevant court's costs jurisdiction).
  - iv) The order obtained in the DIFC Tenancy Proceedings was an interim order, not a final determination, and could be and was set aside.
99. The application of JPI to preclude claims in these scenarios is an altogether more ambitious claim, and one which, if it were to succeed, might require a wider re-appraisal of the application of JPI to claims premised on the deployment of forged documents in litigation. A strike out/jurisdiction challenge before a first instance judge, under considerable time constraints, is not the occasion for an exercise of that kind, particularly when there is so much else to do.

***Does JPI arise where the relevant judicial proceedings are in another jurisdiction?***

100. At the outset of the hearing, I raised with the parties the question of whether a plea of JPI in answer to a claim brought in the courts of England and Wales was available when the relevant judicial proceedings said to attract the immunity were those of another jurisdiction.
101. The pleading context in which that question arises is as follows:
- i) In *Brownlie v FS Cairo (Nile Plaza) LLP* [2022] AC 995, [108]-[126], Lord Leggatt distinguished between the "default rule" so far as claims before the English courts governed by foreign law are concerned, and the "presumption of

similarity”. The former reflects the fact that the parties may choose not to raise issues as to the content of any foreign law, but to conduct the case entirely by reference to English law principles. The latter is an evidential presumption, which may sometimes arise in a case in which foreign law is engaged but no evidence of some aspect of that law is before the court, that the relevant foreign law is the same as English law.

- ii) The Claimants’ claims have been pleaded by reference to English law under “the default rule”. As yet, D7 and D9 (who have served defences) have not pleaded that any of the claims are governed by some other system of law, and D10 has yet to plead.
- iii) Nonetheless, in the jurisdiction and strike out challenge, the PCB Defendants have contended that some other system of law is the applicable law for certain claims.
- iv) Further, in the jurisdiction challenge of D7 and D9 dismissed by Bright J ([2023] EWHC 1797 (Comm)), Bright J at [147]-[148], [151]-[153]) suggested that the law applicable to claims under “the deceit heading” was the law of the place of relevant proceedings (UAE, DIFC and BVI respectively), and that those claims relating to “knowing false representations” in the Globe Sharjah and Globe DIFC Proceedings were governed by UAE law, with there being no claim in relation to the Globe BVI Proceedings because there was no evidence of loss.
- v) If there is a limitation of the English law doctrine of JPI that it does not (or does not always) apply to events in foreign proceedings, then it is open to the Claimants to rely upon it. To the extent that this (or a related) issue turns on what the law concerning JPI is in the relevant foreign jurisdiction, it might be argued that the effect of the parties currently advancing their case by reference to the default rule is that I should assume the application of English law principles for all purposes.
- vi) However, it is clear from the argument I have heard that the Claimants will, to the extent that I hold that their claims relating to the Globe Sharjah Proceedings are barred by JPI if applicable, advance a case that those claims would not be barred by JPI under UAE law, and they have already submitted expert evidence to that effect which, although disputed, is accepted as raising a triable issue.
- vii) In these circumstances, and having heard considerable argument on the point, I have decided that it is appropriate to address the point at this time.

#### *The authorities*

- 102. I was referred to various authorities which were said to bear on this issue, although only one in my view comes close to being a “bullseye.”
- 103. *Anderson v Gorrie* [1895] 1 QB 668 involved proceedings against a judge of the Supreme Court of a Colony (Trinidad and Tobago) for acts done in a judicial capacity. The Court of Appeal held that the claim was precluded by JPI, but the issue of whether JPI applied to foreign courts was not raised. This is scarcely surprising, as the court was “a Court of Record”, in a jurisdiction subject to English common law (p.670).



104. *Trapp v Mackie* [1979] 1 WLR 377 was a Scottish appeal to the House of Lords, where proceedings had been brought in court in respect of evidence given in a local enquiry before a commissioner appointed under statutory powers. At 378, the House of Lords confirmed that JPI was not limited to proceedings in courts of law:

“That absolute privilege attaches to words spoken or written in the course of giving evidence in proceedings in a court of justice is a rule of law, based on public policy, that has been established since earliest times. That the like privilege extends to evidence given before tribunals which, although not courts of justice, nevertheless act in a manner similar to that in which courts of justice act, was established more than a hundred years ago by the decision of this House in *Dawkins v. Lord Rokeby* (1875) L.R. 7 H.L. 744 ...

The kind of tribunal in which the evidence of witnesses is entitled to absolute privilege was described by Lord Atkin in *O'Connor v Waldron* [1935] AC 76, 81, as a tribunal which ‘has similar attributes to a court of justice or acts in a manner similar to that in which such courts act.’”

105. At 379-80, Lord Diplock put forward a four-limb test for the application of JPI to tribunals: “first, under what authority the tribunal acts, secondly the nature of the question into which it is its duty to inquire; thirdly the procedure adopted by it in carrying out the inquiry; and fourthly the legal consequences of the conclusion reached by the tribunal as a result of the inquiry”. The first test required a tribunal to be “recognised by law”, this being “a sine qua non; the absolute privilege does not attach to purely domestic tribunals”. While the description “recognised by law” was not necessarily confined to tribunals constituted or recognised by Act of Parliament, it did include such tribunals, and hence applied to the tribunal in that case. Lord Fraser referred to “authorised inquiries before tribunals” or “an authorized inquiry” (in that last context quoting *Royal Aquarium Ltd v Parkinson* [1892] 1 QB 431, 442).
106. *Trapp v Mackie* undoubtedly adopts a predominantly functional approach to the identification of the type of tribunal *recognised under domestic law* which attracts JPI but does not address the issue of whether JPI can be invoked in domestic courts in respect of claims arising from proceedings before foreign tribunals. Further, the requirement that the tribunal is “recognised by law” indicates that function is not the sole criterion.
107. *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475 can be said to engage with the issue more directly, and Mr Cohen KC submits that it constitutes binding authority for the application of JPI to claims concerning foreign court proceedings. Proceedings for defamation were brought in respect of a letter submitted by the defendant to a European Commission investigation. At first instance, Comyn J held that the claim was barred by JPI. In a memorandum requested by the Court of Appeal in which he set out his reasons for that conclusion, he stated that the European Commission was “a court which was in effect one of ours”, and that “we must recognise the new concepts of the EEC”, referring to the Commission as “a body we recognised, supported and whose orders we enforced” (pp.478-79).
108. The arguments on appeal focussed on the functional test, and did not engage with or challenge Comyn J’s finding of recognition, albeit, in response to a suggestion that it was for a statute such as the International Organisations Act 1968 to provide the

immunity sought, the defendant submitted that “the European Community systems were not international but part of our own system” (pp.486-7), noting that prior to the accession of the United Kingdom, Community organs were “foreign institutions” and were addressed by s.3 of the International Organisations Act 1968. The European Commission (who intervened on the appeal) made the same submission (“the European Court and the Commission are institutions of the United Kingdom”).

109. The Court of Appeal applied the *Trapp v Mackie* test. Applying the first limb of that test, at 494H, Sir John Donaldson noted “it is conceded, as it must be, that the Commission is recognised by the law of this country.” When the Court of Appeal came to consider the procedure applied by the Commission, it noted at pp.496-97 that it was “wholly dissimilar to that of any court or judicial tribunal operating under the common law system” but that that was “not the test”, stating:

“When in *Trapp v. Mackie* [1979] 1 W.L.R. 377, 379 Lord Diplock referred to a tribunal acting ‘in a manner similar to courts of justice’ and Lord Fraser of Tullybelton at p. 385G to tribunals having ‘similar attributes’ to courts of justice, I think that they must have had a wider concept in mind which would embrace courts of justice operating both under common law and under civil law procedures.”

110. Contrary to Mr Cohen KC’s submissions, I do not accept that this passage involves a finding that JPI applies to foreign proceedings (the fact that the proceedings before the Commission were recognised was not in dispute), but a finding that the style of procedure adopted by the recognised tribunal need not be that of the common law system for it to be “acting in a manner similar to courts of justice”. The Court of Appeal held that proceedings before the Commission were not sufficiently similar to those before a court of law to attract JPI (the decision being reached by Commissioners who had not attended the hearing on the basis of advice from member states not directly concerned), being more in the nature of administrative than judicial proceedings. However, a separate public policy was invoked, based on the public interest in ensuring that the Commission as the primary authority of the European Community should not be frustrated in its duties. That public policy arose “since this country is a member of the European Community” (p.500). At p.505, Sir John Donaldson MR also referred to the desirability of avoiding inconsistent decisions between Community institutions and national courts, and while he did not expressly say so, this appears to have been a concern at the possibility of inconsistent decisions within the same legal order.
111. It follows that I do not accept that *Hasselblad* provides binding authority in the PCB Defendants’ favour, and there are elements of the reasoning which provide some limited support for the opposite position. In reaching that conclusion, I have not relied on the Claimants’ argument that *Hasselblad* would not be binding upon me because its conclusion on JPI was one of two reasons for the Court of Appeal’s conclusion (c.f. *Membery v The Great Western Railway Company* (1889) LR 14 App Cas 179, 187).
112. Finally, there is *Erhard-Jensen Ontological v Rogerson* [2024] EAT 135, a decision of Mrs Justice Heather Williams, a judge of co-ordinate jurisdiction, sitting in the EAT. This is a comprehensive and fully reasoned judgment which directly addresses the issue and concludes that JPI is engaged by foreign proceedings. The issue which arose was whether the respondent’s act in commencing arbitration proceedings in Singapore could be relied upon by the claimant as an alleged detriment for the purposes of a claim under

s.47B of the Employment Rights Act 1996. The Employment Judge rejected an argument that this was barred by JPI, inter alia because JPI did not apply generally to overseas bodies. Heather Williams J overturned that decision.

113. In her judgment, Heather Williams J reviewed the relevant authorities:
- i) She accepted that *Hasselblad* offered support for the contention that there was no territorial restriction to JPI ([117]-[118]). It will be apparent that Heather Williams J's interpretation of the case differs from my own.
  - ii) She held that "the common law principle of comity and the strong public policy interest in ensuring harmony between English law and foreign jurisdictions in the context of foreign-seated arbitrations" supported the absence of any territorial limitation ([119]).
  - iii) In the specific context of foreign arbitrations, she accepted a submission that those comity considerations were supported by the UK's obligations under the New York Convention for the Recognition and Enforcement of Arbitral Awards ([121]-[122]).
  - iv) She concluded that there was no basis for the suggestion that JPI (including its application to foreign proceedings) breached Article 6 of the ECHR (applying *Heath v Commissioner of Metropolitan Police* [2005] ICR 329) ([131]).
114. I accept that as a fully reasoned judgment of a judge of co-ordinate jurisdiction, I should follow that conclusion unless convinced it is wrong. In *Lornmead Acquisitions Limited v Kaupthing Bank HF* [2011] EWHC 2611 (Comm), 53, Gloster J approved the following passage from *Halsbury's Laws* summarising the approach to be taken in the present circumstances:

"98. Decisions of co-ordinate Courts.

There is no statute or common law rule by which one Court is bound to abide by the decision of another Court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. ...

It is undesirable that different judges of the same division should speak with different voices."

*What assistance can be obtained from other areas of law?*

115. It is clear that fraud of the foreign court in foreign court proceedings can be relied upon in this jurisdiction for the purpose of resisting enforcement of a foreign judgment: *Dicey, Morris & Collins on the Conflict of Laws* (16<sup>th</sup>) Rule 53, [14R-134] and [14-141]. That is not, of itself, determinative – JPI co-exists in English law alongside the rule that an English judgment can be set at naught by being set aside in an action for

fraud in reliance on events which would have engaged JPI in some other form of claim, so this is a subject where the immediate legal context is important. Further, the judgment creditor's attempt to engage the English court's enforcement jurisdiction may be an answer to the comity concerns to which an investigation of this kind might otherwise give rise. However, it does suggest that there are limits to the suggestion that comity alone precludes an action based on loss caused by fraud in foreign proceedings.

116. The position regarding arbitration is interesting, and not as clear as it might be. I have found no English authority considering whether JPI applies to evidence given by witnesses in domestic or non-domestic arbitration proceedings. The industry of Mr Cohen KC produced an authority of the United States Court of Appeal for the Second Circuit in *Rolon v Henneman* 517 F.3d 140 (2<sup>nd</sup> Cir. 2008) in which Circuit Judge Sotomayer (as she then was) applied the witness immunity rule as formulated by the US Supreme Court in *Briscoe v LaHue* 460 US 325 to evidence given in arbitration. Sotomayer CJ noted that in *Austern v. Chicago Board of Options Exchange, Inc.*, 898 F.2d 882 (2d Cir. 1990), the Second Circuit had “extended the common law protection of immunity accorded to judges to arbitrators in contractually agreed upon arbitration proceedings” and continued:

“The policy rationale for witness immunity, as articulated by the Supreme Court in *Briscoe*, applies with equal or near equal force in the arbitral context: ‘[T]he truth finding process is better served if the witness’s testimony is submitted to ‘the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.’”

117. In this jurisdiction, there is a very strong public policy in favour of the finality of arbitration awards (domestic and foreign) and the English courts are astute to prevent collateral attacks on such awards other than through the mechanisms permitted by the Arbitration Act 1996 (in respect of arbitrations seated in England and Wales) or by the New York Convention: see, for example, the anti-arbitration and anti-suit injunction jurisdictions and the rationales for them as discussed in *Sodzawiczny v Smith* [2024] EWHC 231 (Comm). Actions suing witnesses in arbitration for giving false evidence in an arbitration which led to an adverse award are likely to meet a hostile response. However, the position of the arbitrator – the equivalent of the judge in the JPI context – is that there is no absolute privilege, only a qualified one in the absence of bad faith (s.29 of the Arbitration Act 1996). Before the 1996 Act, the position was complex, but the authorities generally favoured qualified immunity (see Mustill and Boyd, *Commercial Arbitration* 2<sup>nd</sup>, 224-230 and *Commercial Arbitration: 2001 Companion*, 299-300).
118. It may be that a qualified form of JPI (i.e. qualified by s.29) applies to arbitrations seated in England and Wales, as “recognised”, domestic tribunals, and as a matter of public policy this is applied to foreign arbitration proceedings as well. There is support for such an approach in *Westacre Judgments Inc v Jugoisimport-SPDR Holding Co Ltd* [2000] QB 288, in which the Court of Appeal noted at p.307 that it was “anomalous that enforcement of a foreign judgment can be attacked without any requirement that the evidence must be evidence not available at the trial, and apparently without regard to the question whether the impact of that evidence would be likely to be decisive”. The Court held that foreign awards were not to be treated in the same way as foreign

judgments, approving the decision of Mr Justice Colman to that effect at first instance. At p.309, Waller LJ stated:

“I agree with the judge that the principle in the *Abouloff* case in its extreme formulation should not be extended to arbitration awards but would put the matter a little differently but only in degree. I would suggest that the reason why the *Abouloff* principle should not be extended to foreign arbitration awards is first that an arbitration award is an award from the tribunal chosen by the parties to decide their dispute; that will very often not be the case either when a domestic or a foreign judgment has been obtained. Second, there is thus a logic in placing foreign arbitration awards into the same category as domestic arbitration awards and not into the same category as foreign judgments.”

119. It is possible to justify the application of JPI to foreign arbitration proceedings on the same basis.
120. Mr Cohen KC relied upon the principles applicable to two other areas of law. The first was the differential treatment in the law governing the privilege against self-incrimination between offences under the law of England and Wales (where the privilege is absolute) and those arising under foreign law (where the privilege is discretionary): *Brannigan v Davison* [1997] AC 238, 249. However, the “privileged” status given to English criminal law in this context does not, in my view, provide any assistance on the issue of whether there is a mandatory rule of English law that JPI applies where the judicial proceedings in question are those of another jurisdiction. Some territorial limitation will frequently (although I accept not universally) be built into the question of whether English criminal law is engaged. In any event:
  - i) The privilege against self-incrimination is essentially a procedural rule arising under the law of the forum, whereas, as I explain below, I am not persuaded that JPI is properly so classified: see [122]-[123].
  - ii) While English criminal law is given a privileged status, incrimination under foreign criminal law is not ignored.
121. Finally, Mr Cohen KC relied upon the approach to legal professional privilege (“LPP”) and “without prejudice” privilege (“WPP”), where English law is applied as the law of the forum when issues as to LPP and WPP arise in the course of English proceedings, regardless of the law applicable where the documents came into existence or which governs the legal relationship pursuant to which they were created (*Re RBS (Rights Issue Litigation)* [2017] 1 WLR 1991, [174]). Once again, I have not found this analogy instructive:
  - i) I have concluded that the application of JPI as a matter of English law does not depend on England and Wales being the relevant forum: see [122]-[123] below. Once again, the issue for the English court in the LPP and WPP context is the manner in which its own proceedings should be conducted.
  - ii) While there has been an increasing recognition of LPP as a fundamental right, and it is a right which can be invoked outside legal proceedings, it is a right which has a procedural character (conferring an immunity from document production inside and outside court proceedings), rather than a conventional private law right

or immunity. In particular, this is a context in which the English court, when asked to enforce that “fundamental right” by restraining disclosure or use of documents subject to LPP in foreign (or arbitral) proceedings, is likely to leave matters to the decision of the court or tribunal rather than pre-empt their control of the production of evidence in their own proceedings through injunctive relief: *Wang v Floreat Private Ltd* [2023] EWHC 224 (Comm).

- iii) There are particular challenges with applying anything other than the law of the forum to evidential immunities in English proceedings, including the need for both parties to be on an even-playing field, and the fact that decisions on disputes as to production of documents are determined in short interlocutory hearings rather than at trials. These are not engaged here.

### *Analysis and conclusion*

122. At the outset, I think it is helpful to determine how JPI is appropriately characterised. There are three possibilities:

- i) It is a rule of the forum, like LPP, WPP and the privilege against self-incrimination.
- ii) It takes effect as part of the *lex causae*.
- iii) It is a mandatory rule of English public policy which applies regardless of the *lex causae* under (for present purposes) Article 16 Regulation (EC) No 864/2007 of 11 July 2007 (“**Rome II**”).

123. I am satisfied that JPI is a mandatory rule of the law of England and Wales for Rome II purposes:

- i) If JPI was a rule of the forum, it would seem to follow that a claim could be brought under English law in another forum (possibly including, for this purpose, arbitrations seated in England and Wales) which, if brought in this jurisdiction would engage JPI. To my mind, this would defeat the policies underlying JPI: the Witness Inhibition Justification, because the risk of being sued in a foreign court for evidence given in English court proceedings would have every bit as chilling an effect as the risk of being sued here, and perhaps a greater one; and the Multiplicity of Proceedings Justification, because the claim in the foreign court would provide a means of re-visiting the correctness of the judgment of the English court. In *Erhard-Jensen*, [123] I understood Heather Williams J to agree with this position. If a foreign court was hearing such a claim and wished to ascertain the position under English law as the *lex cause*, in my view the evidence which should be given is that English law does not recognise a substantive right to relief in such a situation.
- ii) Similarly, I do not think the position under the *lex causae* can be determinative. If it were possible here to establish English jurisdiction in respect of a cause of action governed by foreign law which, if English law applied, would be defeated by JPI, I have no doubt the claim would fail, the foreign *lex causae* notwithstanding. Once again, both the Witness Inhibition and Multiplicity of Proceedings Justifications would be undermined were this not to be so.

- iii) For that reason, I have favoured the third classification of JPI as a mandatory rule of English public policy.
124. That leads inexorably to the identification of the scope of the rule, and in particular, whether the English rule never extends to foreign proceedings, always does so, or only does so to the extent that there is a similar rule there (“**the Modified Rule**”). My instinctive reaction favours the Modified Rule:
- i) The comity considerations which featured prominently in Heather Williams J’s judgment tell strongly against the first approach, and in a case in which the claim is governed by the applicable law of the foreign jurisdiction, it would involve treating the immunity under the law of that jurisdiction differently to the manner in which, I would suggest, we would wish a foreign court to treat a claim governed by English law in respect of English court proceedings (see [123] above). There is much to be said for a principle of “do as you would be done by”.
- ii) The difficulty with the second formulation is that neither the Witness Inhibition nor Multiplicity of Proceedings Justifications support such a course, to the extent that the relevant conduct is actionable in the place of the judicial proceedings. If the witness could be the subject of suit in respect of their evidence in the place they give it, it seems fanciful to suppose that the prospect of being sued in England and Wales in respect of the same activities could meaningfully increase the chilling effect of potential civil liability for conduct in the foreign proceedings. Further, the ability to bring the proceedings in that jurisdiction itself creates the risk of multiplicity of proceedings. English law does temper its commitment to the finality of the determination of foreign court proceedings where the result of those proceedings is not final under the law of that foreign court (*Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 918-19).
125. I accept that the English courts are never likely to countenance the prospect of a foreign judge being sued for actions in their judicial capacity in an English court. That would undermine the commitment to judicial independence, and hence the rule of law, which judicial immunity is often recognised as serving (see for example the IBA Minimum Standards of Judicial Independence 1982 paragraph 43 “A judge shall enjoy immunity from legal actions”). The House of Lords in *Jones v Minister of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 accepted that the immunity under the State Immunity Act 1978, in keeping with customary international law, extends to officials, servants or agents of a state (and to like effect, see *Propend Finance v Sing* 111 ILR 611). Lord Bingham’s reference in *Jones* at [10] to “servants or agents” of a state would appear broad enough to embrace judges. That conclusion is reinforced by his statement at [12] that a foreign state can claim immunity for any act for which it is responsible under international law in which context he referred to Article 4(1) of the International Law Commission’s Articles on State Responsibility. This states that “the conduct of any state organ shall be considered an act of that state under international law whether the organ exercises legislative, executive, *judicial* or any other functions” (emphasis added). If necessary, it would be relatively easy to fashion a specific rule of immunity in respect of judicial acts, as was done for the European Commission in *Hasselblad*. The treatment of advocates (*Arthur JS Hall v Simons* [2002] 1 AC 615) and expert witnesses (*Jones v Kaney* [2011] UKSC 13) shows that the participants in the trial process have not always marched in step so far as JPI is concerned.

126. Mr Cohen KC also argued that JPI should be extended to foreign proceedings to protect the putative witness's Article 10 ECHR right to freedom of expression. However, not only does this face difficulties because of the territorial limits on the application of the ECHR (*Al-Skeini v United Kingdom* [2011] 53 EHRR 18), but in any event the relevant limitation is imposed by the law of the place where the evidence is given, to the extent that it has no JPI rule.
127. For these reasons, I can see a principled case for the Modified Rule. It will also be apparent that I have taken a different view from Heather Williams J on the conclusions to be drawn from *Hasselblad* and concluded that the position on arbitration (which was the specific context she was faced with) can be justified on a different basis. I have also expressed the view that the comity concerns which very properly animated Heather Williams J's judgment can be accommodated within the Modified Rule.
128. In short, approaching this issue without the benefit of prior authority, I would have concluded that the Modified Rule applied. Nonetheless, Mrs Justice Heather William's judgment is a comprehensive and cogent treatment of the issue, and I can see obvious attractions in a "bright line" rule. In these circumstances, where the issue might to a significant extent depend on judicial policy, I have concluded that I should follow Heather Williams J's judgment and give permission to appeal on this point to the extent the outcome of this application turns on this issue.

*Applications to the facts of this case*

129. I have only been persuaded that, the territorial issue apart, it is established to the summary judgment standard that JPI is engaged by the claim relating to the Globe Sharjah Proceedings, and not the Globe DIFC and BVI Proceedings and the Possession Proceedings.
130. The effect of my conclusion at [128] above is that JPI applies. If the Modified Rule applied, it is accepted by the PCB Defendants that it is arguable that there is no relevant JPI in the UAE, on which basis JPI would not have precluded the claims relating to the Globe Sharjah Proceedings.
131. It is conceded by the Claimants that BVI law does recognise an equivalent JPI principle. So far as the DIFC is concerned, I accept that the DIFC is not an entirely common law based system. Mr Trotter referred me to *The Industrial Group Limited v Abdelazim El Shikh El Fadil Hamid* [2022] DIFCA CA 005 and CA 006, where the DIFC Court of Appeal held that the torts of malicious prosecution and abuse of process did not form part of the substantive law applied by the DIFC. That conclusion followed from the fact that the DIFC Law of Obligations was a complete code of the torts recognised. Nonetheless, the DIFC Court of Appeal recognised that it had "the inherent jurisdiction of a common law court" ([103]-[104]). I suspect Sir Peter Gross, who formed part of the DIFC Court of Appeal in that case, would be surprised at the suggestion that the DIFC, although a common law court, nonetheless did not apply the common law doctrine of JPI to its proceedings (and a judgment rejecting the existence under DIFC law of one of the recognised *exceptions* to JPI under English law scarcely provides strong support for the argument that DIFC law does not recognise JPI). In any event, after I raised the issue of the applicability of JPI in foreign proceedings, the Claimants had the opportunity to put in expert evidence. This was done for the UAE, but not the DIFC. That reinforces my conclusion that DIFC law recognises JPI, and I am satisfied



it is appropriate to apply the presumption of similarity as to the position of another common law court.

132. It follows that if I had been persuaded to the summary judgment standard that the claims in relation to the Globe DIFC and BVI Proceedings engaged JPI, there would have been no territorial basis for excluding the operation of JPI even if the Modified Rule had applied.

### **The Failure to Plead the Claims by Reference to UAE Law**

133. Mr Cohen KC advanced another preliminary objection that the Claimants had failed to plead claims which Bright J had found to be governed by UAE law by reference to the principles of UAE law.
134. This objection does not take the PCB Defendants anywhere:
- i) D7 and D9, whose jurisdiction challenge has already been rejected and who have served their Defence, have not pleaded that the claims are governed by UAE law, Bright J's conclusions notwithstanding, but have been content to proceed on the basis of the default rule (see [101]) above.
  - ii) As D10 is a director of D7 and D9, it was entirely reasonable for the Claimants to proceed on the same basis so far as he was concerned. It remains to be seen if D10 will seek to disapply the default rule if this action proceeds.
  - iii) In any event, evidence of UAE law is before the court. The PCB Defendants have identified the specific occasions when they say this gives them a "knock out" blow, and I will consider those submissions on their merits.

### **The Deceit Claim**

135. The Claimants do not allege that they were ever induced to believe that the Globe Documents were genuine or that the claims under them were genuine. Whilst that might once have been thought to present a considerable obstacle in the way of a claim of deceit, that ceased to be the case with the decision of the Supreme Court in *Zurich Insurance Co plc v Hayward* [2017] AC 142. In that case the defendant gave the claimant insurer a dishonest account of the extent of injuries suffered in an injury at work. The insurers suspected that the claim was deliberately exaggerated but entered into a settlement agreement nonetheless. When they acquired evidence of the suspected dishonesty, they brought a claim in deceit and for rescission of the settlement agreement. The claim was rejected by the Court of Appeal on the basis that the insurers had not relied upon the dishonest statements, in the sense of acting on their truth, in settling the claim. The Supreme Court overturned that conclusion.
136. Lord Clarke, who gave one of the two judgments, confirmed that to make out a claim in deceit, "it must be shown that the defendant made a materially false representation which was intended to, and did, induce the representee to act to its detriment", but that it was "not necessary, as a matter of law, to prove that the representee believed that the representation was true" ([18]). He referred with approval to the trial's judge statement that "the question in a case like this is not what view the employer or its insurer takes but what view the court may take in due course." In any event, this was a case in which

the amount of the settlement was much higher than it would have been but for the defendant's statements ([22]).

137. At [43], Lord Clarke noted that “as I understand it, it is accepted on behalf of Zurich that, where the representee knows that the representation is false, he cannot succeed. There is some support in the authorities for this view” (referring to *Chitty on Contracts*, *Spencer Bower & Handley on Actionable Misrepresentation* and *Gipps v Gipps* [1978] 1 NSWLR 454 , 460, per Hutley JA). At [44], Lord Clarke left that issue open but suggested that “it seems to me that there may be circumstances in which a representee may know that the representation is false but nevertheless may be held to rely upon the misrepresentation as a matter of fact.”
138. Lord Toulson agreed with Lord Clarke's judgment. At [67], he stated that “it is possible for a representor to make a false and fraudulent misrepresentation, with the intention of influencing the representee to act on it to its detriment, without the representee necessarily believing it to be true. If the representor succeeds in his object of influencing the representee to act on the representation to its detriment, there will be the concurrence of fraud and deceit in the representor and resulting damage to the representee. In principle, the representee should therefore be entitled to a remedy in deceit.” At [71], he stated:
- “Mr Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the court is likely put on it.”
139. *Zurich v Hayward* has proved a controversial decision: see Paul S Davies and William Day, “A Mistaken Turn in the Law of Misrepresentation” [2019] LCMLQ 390 and William Day, “Recent Travails in Fraudulent Misrepresentation” [2021] LMCLQ 636. Two first instance decisions (one mine) have suggested that, for a claim in deceit or some species of misstatement tort to succeed , it is still necessary to show that the representee acted as they did because of a perception that a third party might believe that the statement was true (*Holyoake v Candy* [2017] EWHC 3397 (Ch), [391]-[392] and *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), [401]). In *Zurich*, moreover, the statements were made for the purpose of inducing the representee to act on the basis that they were or might be true.
140. In this case, however, the Claimants cannot allege that the Globe Documents were deployed to induce *them* to act in a certain way. They were first deployed in proceedings served on a lawyer linked to the Al Saris. Whether genuine or not, Globe clearly had no intention of inducing the Claimants to defend those proceedings, nor the Globe DIFC and Globe BVI Proceedings. On the contrary, they would have been delighted if those proceedings had not been defended.
141. I do not accept that *Zurich* arguably establishes a principle of law that a party who makes dishonest statements in or for the purpose of litigation and who foresees that costs will be incurred in defending those proceedings and challenging that statement can be sued by the defendant in deceit, even leaving aside JPI. Nor can I accept that the tort of deceit is constituted by making false statements in litigation which cause loss

through the instrumentality of the court decision (which is the position so far as the Globe Sharjah Proceedings are concerned), once again even leaving aside JPI. To the extent that there is a deceit based claim under English law in those circumstances, it is the claim to set aside the judgment thus procured. As the Master of the Rolls noted in *Tinkler v Esken* [2023] EWCA Civ 655, [12]:

“In modern terms, we can perhaps regard the action to set aside a judgment for fraud as akin to an action for deceit. The only significant differences are that the court, rather than the opposing party to the first action, has to be shown to have been deceived, deliberate dishonesty is required, and materiality rather than simple reliance must be shown. If the elements are made out (misrepresentation or misleading conduct, made or undertaken fraudulently, with reliance for deceit and materiality for an action to set aside a judgment), the contract or the judgment can be rescinded or set aside.”

In this case, the key features of *Hayward* – the dishonest statement being made to the representee for the purposes of inducing the representee to act in a certain way, and the representee so acting because of the dishonest statement whether they believed it or not – are absent.

142. In my assessment, this is sufficient to dismiss the deceit claims at this stage in relation to the statements made in the Globe Sharjah, DIFC and BVI Proceedings, in none of which were the Globe Documents deployed for the purpose of inducing the Claimants to act in a particular way, nor in which the Claimants have acted in the manner intended.
143. The claims having been pleaded by reference to English law under the default rule, that is sufficient to dismiss these claims. The PCB Defendants also advanced a number of alternative arguments as to why the claims would fail under UAE law. Before considering those points, it is helpful to have regard to Bright J’s conclusions as to applicable law on the jurisdiction challenge brought by D7 and D9 at [2023] EWHC 1797 (Comm). He divided the deceit-based claims into two:
  - i) “Knowingly false representations by Globe about the Globe Documents” in the Globe Sharjah, DIFC and BVI Proceedings ([145]-[147]) which he found were governed by UAE law in relation to the Globe Sharjah and DIFC Proceedings, and possibly BVI law so far as the BVI proceedings are concerned (although I understand that no permission was given to serve out in respect of the Globe BVI Proceedings because there was no evidence of any loss). I am satisfied that it is also strongly arguable that the law governing the claim relating to deceit in the DIFC Proceedings is DIFC law.
  - ii) Allegations that knowingly false representations were made which led to the Sharjah and DIFC decisions (there remains no identified decision in the Globe BVI Proceedings). At [149], Bright J held that the claims relating to the Globe Sharjah and DIFC Proceedings are governed by UAE law. I am satisfied that it is also strongly arguable that the claim relating to the Globe DIFC Proceedings are governed by DIFC law.
144. No evidence of BVI and DIFC law having been adduced, and both being common law systems which draw heavily on English common law, I am satisfied that it is appropriate

to apply the presumption of similarity, with the result those claims are not realistically arguable.

145. To the extent that the claims are governed by UAE law (which Bright J held was arguably the case for the claims relating to the Globe Sharjah and DIFC Proceedings), Mr Cohen KC suggests there would be two further answers to any attempt to plead a claim under UAE law rather than by relying on the default rule.
146. First, it is said that a deceit-based claim under UAE law requires the victim to actually be deceived. While the provision quoted by the Claimants' first report on UAE law, from Professor Dr Nayla Comair-Obeid, would suggest as much, Professor Comair-Obeid's evidence is that the claims brought in the Particulars of Claim are actionable under UAE law. Mr Ramadan, the Claimants' current expert, suggests that the broad principles of UAE tort law would treat loss incurred as a result of the forgery of documents and their deployment in legal proceedings recoverable under Articles 282-283 of the UAE Civil Code. While Mr Al Heloo, for the PCB Defendants, is not aware of any judgment for fraud in the UAE courts in these circumstances, he is unable to say that such a claim would be bound to fail. In these circumstances, I am not able to conclude on the evidence that any attempt to plead that the facts currently set out in the Re-Amended Particulars of Claim to support the deceit claims give rise to a claim under UAE law has no real prospect of success on this ground. Nor can I decide whether, as Mr Al Heloo suggests, the claim would fail under UAE law on the basis that D10 was acting as a director.
147. Second, it is said that the claims are time-barred under UAE law:
- i) Article 298 of the UAE Civil Code provides for a 3 year limitation period from the date the victim becomes aware of the harm and the identity of the wrongdoer. In UAE Court of Cassation Case Number 71/2022, the Court suggest that what is required is that the claimant "knows with certainty" the identity of the wrongdoer. The Abu Dhabi Court of Cassation has suggested that the claimant must have "true knowledge of the harm" and the person responsible for it. Mere suspicions or "uncertain knowledge" are insufficient to start the limitation period.
  - ii) However, a claim for abuse of right has a 15 year limitation period under Article 473(1). There is a dispute between the UAE lawyers as to how far the claims in the Particulars of Claim could be asserted as abuse of rights claims under Article 106 of the UAE Civil Code, and whether a claim which can be asserted both as a tort and an abuse of rights can be pursued as an abuse of right claim to benefit from the 15 year limitation period. Mr Ramadan can point to a Ras Al Khaimah Court of Cassation decision in Petition No. 100/2 which provides some support for his position. To the extent that these matters are in dispute, I am unable to resolve that dispute now. Therefore, to the extent that the Claimants seek to rely on the UAE provisions governing claims for abuse of right to support the actionability of the facts currently pleaded, it is arguable that such a claim would not be time-barred.
  - iii) What of any claims which cannot be brought as an abuse of rights? I understand that the claim was issued against D7 and D9 on 18 February 2022, which is also the "relation back" date of any amendments for D7 and D9. That is within 3 years of the commencement of the Globe Sharjah Proceedings when the Globe

Documents were first deployed. While proceedings were commenced against D10 on 23 February 2024, there is disputed evidence that the commencement of proceedings against D7 and D9 would “toll” the limitation period against D10. In these circumstances, there is an arguable basis to overcome any limitation defence D10 may have under UAE law, even leaving aside the argument (which also does not lend itself to summary determination) as to when the Claimants knew “for certain” rather than merely “suspected” that D10 was a willing participant in any dishonest behaviour, rather than merely signing documents he was asked by the Al Saris to sign without appreciating their significance. It is the Claimants’ case, which the court cannot determine at this hearing, that they did not learn of D10’s personal involvement in negotiating the Globe Documents until after the proceedings were commenced in 2022. Finally, there are also disputed issues of UAE law as to whether the claims concern “continuing torts”, and whether, under UAE law, time does not start to run until harm ceases.

### **The Malicious Falsehood Claim**

148. An initial point was taken that this cause of action does not appear in the Claim Form. The Claim Form is opaque, pleading that Globe “maliciously ... relied on certain of those documents in such proceedings abroad.” However, the cause of action is clearly pleaded in the Particulars of Claim which are attached to, and expressly referred to, in the Claim Form. The documents must be read together: *Evans v Cig Mon Cymru Ltd* [2008] 1 WLR 2675, [26], [30]-[32] and [35]. Accordingly, this point goes nowhere.

149. So far as the claim pleaded by reference to English law under the default rule is concerned, the only point taken by Mr Cohen KC with specific reference to this claim is that it is time barred. Section 4A of the Limitation Act 1980 provides for a one year limitation period for claims for malicious falsehood. Section 32A provides that:

“(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

- (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.

(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A—

- (i) the date on which any such facts did become known to him, and
    - (ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
  - (c) the extent to which, having regard to the delay, relevant evidence is likely—
    - (i) to be unavailable, or
    - (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.”
150. It is accepted that the primary limitation period has expired. What is said by the Claimants is that there is an arguable basis for concluding that the court would disapply the one year-period, such that the claim against D10 (brought in February 2024) would be within time. The principal reason put forward as to why an extension of time may be granted is that it has been said that it may be “decisive” in any extension application if other claims on the same facts are proceeding anyway: *Maccaba v Liechtenstein* [2003] EWHC 1325 (QB), [19]-[20], [25] and [29] and *Qatar Airways Group QCSC v Middle East News FZ LLC* [2020] EWHC 2975 (QB), [247(i)]. I am not able at this stage to conclude that it is not arguable that the Claimants will obtain an extension under s.32A (not least because it would be necessary to see what the Particulars of Claim look like in the light of my other determinations).
151. What of the limitation position by reference to other applicable laws?
- i) I accept that claim is currently pleaded by reference to English law under the “default rule”, although the hearing did canvas the position under other laws.
  - ii) I accept that it is arguable whether Rome II applies to the tort of malicious falsehood: *Qatar Airways Group QCSC v Middle East News FZ LLC* [2020] EWHC 2975 (QB), [165]-[166] (Saini J). However, the candidates for applicable foreign law remain UAE, DIFC and BVI law for the different claims, for reasons set out above, whether Rome II applies or not.
  - iii) There was an argument as to whether any claims have to satisfy the requirement of double-actionability due to the exclusion of malicious falsehood from the Private International Law (Miscellaneous Provisions) Act 1995 by s.13. I accept that it is not necessary to determine this issue on this occasion.
  - iv) Had it been necessary to address the issue of double actionability at this stage:
    - a) So far as the position under UAE law is concerned, I am satisfied that it is arguable that the facts relied upon to establish the malicious falsehood claim are actionable (it may be under the same general delictal cause of action discussed elsewhere in this judgment).

- b) There was no evidence before me as to whether a tort of malicious falsehood exists under DIFC law. Had it been necessary at this hearing to consider the position under DIFC law, I would not have been willing to apply the presumption of similarity to a system which involves a rather careful and “business-orientated” selection of common law principles, and which operates by reference to a statute which appears to contain a comprehensive statement of the applicable principles of tort law.
- c) There was similarly no evidence of BVI law, but I would have been willing to apply the presumption of similarity to the existence of the tort under BVI law.
- d) As to limitation, if the requirement of double actionability had arisen for determination, the effect of sections 1(1) and (2) of the Foreign Limitation Act 1984 is that the limitation law of England and Wales remains relevant in a “matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.” As a result, both the English and any applicable foreign limitation period must be satisfied: *Deutsche Bahn AG v Mastercard Inc* [2018] EWHC 412 (Ch), [157]-[158].
- e) I accept for reasons I have already set out at [147] above that there is an arguable basis for overcoming any limitation defence under UAE law. I would require further evidence before being able to reach a view as to whether the special limitation provisions introduced into the Limitation Act 1980 for claims in defamation and malicious falsehood have BVI equivalents. If the ordinary six-year rule applies, then no limitation issue would arise under BVI law.
- f) It follows that determining the issue now of whether the requirement of double actionability applied would have had limited impact on the case, and I am satisfied that it is not necessary to do so.

### **The *Marex* tort**

#### ***The pleaded case***

152. The Claimants alleged that the Globe Documents were created after the entry of the Bank Sharjah and BVI Judgments “intending to violate the Bank’s rights of those judgments by preventing the recovery and/or realisation of the value of the Bridge Properties or the shares in the BVI Companies”. It is alleged that:

- i) The PCB Defendants induced or procured the Al Saris not to satisfy their liabilities under the Bank Sharjah and BVI Judgments by “providing the false pretext that Globe had enforceable rights under the Globe Documents against the BVI Companies and is entitled as a creditor to prevent the BVI Companies from disposing of the Bridge Properties.”
- ii) That was “a sufficient condition to induce the Al Sari Brothers to fail to transfer the Bridge Properties to the Bank and as a result delayed the Bank realising their value”.

- iii) The PCB Defendants deployed the Globe Documents and First Globe Appeal Judgment on 2 May 2023 to obtain the WWFO in the Globe DIFC Proceedings for the purpose of obstructing the Possession Judgment obtained by the BVI Companies on 28 April 2023.
- iv) Alternatively, in so far as the Globe Documents created enforceable obligations, the Globe Documents were entered into “to impose obligations on the BVI Companies for no or no adequate consideration” thereby prejudicing the Bank’s ability to enforce its judgments.

153. It is helpful to consider the claim, and the background to it, in more detail:

- i) The Bank had reduced the value of the judgment debt by £9 million in return for acquiring shares in the BVI Companies on 6 April 2021. The Claimants’ pleaded case acknowledges that this involved partial satisfaction of the judgment debt. That occurred after the Globe Documents had been deployed and been found to be forgeries in the Globe First Instance Judgment, after Globe had appealed that decision, and after the BVI Companies had received the expert committee’s preliminary report of 17 January 2021 which was to the same effect as its final report and which treated the Globe Documents as authentic.
- ii) The value of the BVI Companies was exclusively located in the Bridge Properties.
- iii) The only pleaded instance of the Globe Documents being deployed as a reason not to transfer the Bridge Properties into the possession of the BVI Companies was the reference to the WWFO granted in the DIFC Globe Proceedings on 2 May 2023 and discharged on 19 June 2023. That was relied upon by Mr Gebremedhin, the housekeeper, on 3 May 2023 as a reason not to hand over possession.
- iv) By this date the Bank had already executed the Bank Sharjah and BVI Judgments to the extent of the value of the BVI Companies and its assets. The Bank’s real complaint is that the realisable value of assets acquired in part satisfaction of the Bank’s Sharjah and BVI Judgments was diminished by a failure to transfer the Bridge Properties to the Bank.
- v) By contrast, the BVI Companies can point to the deployment of the DIFC freezing order as a step arguably taken to obstruct the enforcement of the Possession Judgment through the actions of Mr Gebremedhin which were arguably part of the co-ordinated strategy to resist handing over possession of the Bridge Properties.
- vi) The alternative complaint is that before the Bank acquired the BVI Companies, there was an attempt to reduce their value (and hence the value which the Bank could realise from enforcing against the BVI Companies as assets of the Al Saris) by saddling the BVI Companies with debt. I accept it is arguable that the Globe Documents were created after the Bank Sharjah and BVI Judgments were entered and that this provides an arguable basis for the *Marex* tort.

***The applicable legal principles***



154. The *Marex* tort first breathed life when Robin Knowles J held it to be arguable in *Marex Financial Limited v Sevilleja* [2017] EWHC 918 (Comm), [28] that there was a tort of “inducing or procuring another to act in wrongful violation of rights under a judgment.” The allegation in that case was that the respondents, who were company directors of the judgment debtor, had transferred monies out of the judgment debtor’s bank account into their personal control after judgment had been entered. At [24]-[25], Robin Knowles J rejected the distinction “between the inducing and procuring required by the tort, and mere prevention or interference”, holding that “the dissipation and the non-payment were two sides of the same coin. The objective was the wrongful non-payment of the Judgment Debt; on the alleged facts the dissipation was procured in order to procure that objective.” Robin Knowles J referred in this context to Lord Nicholls judgment in *OBG Ltd v Allan* [2008] 1 AC 1, [178] where he stated:

“There is a crucial difference between cases where the defendant induces a contracting party not to perform his contractual obligations and cases where the defendant prevents a contracting party from carrying out his contractual obligations. In inducement cases the very act of joining with the contracting party and inducing him to break his contract is sufficient to found liability as an accessory. In prevention cases the defendant does not join with the contracting party in a wrong (breach of contract) committed by the latter. There is no question of accessory liability. In prevention cases the defendant acts independently of the contracting party ...”

155. At [26], Robin Knowles J noted that “there is sufficient on the assumed facts and having particular regard to his relationship with and power and control over the Companies to allow the analysis that Mr Sevilleja induced and procured the Companies not to pay the Judgment Debt; and that he actively joined with the Companies to bring about that end through dissipation.”

156. The first case which entered judgment on the basis of the *Marex* tort was *Lakatamia Shipping Co v Su* [2021] EWHC 1907 (Comm) (in which the existence of the tort was not disputed: [124]). It was also common ground in that case that, given that the *Marex* tort is a development of the tort of inducing a breach of contract, that its elements stood to be identified by analogy with that tort ([125]). On that basis, at [126]-[127], Mr Justice Bryan held that the elements of the *Marex* tort are:

- i) The entry of a judgment in the claimant’s favour.
- ii) Breach of the rights existing under that judgment.
- iii) The procurement or inducement of that breach by the defendant.
- iv) Knowledge of the judgment on the part of the defendant.
- v) Realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed under the judgment.
- vi) It suffices that the defendant intended to violate the claimant’s rights under the judgment. The defendant does not need also to intend thereby to damage the claimant.

- vii) It is not essential that the defendant to a claim for the *Marex* tort has actual knowledge of the contents of the judgment.
  - viii) Blind-eye knowledge is sufficient.
  - ix) Any active step taken by the defendant having knowledge of the covenant (sc. the judgment debt) by which he facilitates a breach of that covenant falls within the ambit of the tort.
  - x) There is no need to establish “spite, desire to injure or ill will” on the part of the defendant.
157. That decision has been followed in two other first instance decisions in the same litigation and on essentially the same facts, in which the defendants did not appear, and there was no argument as to the existence or elements of the *Marex* tort (*Lakatamia Shipping Co v Tseng* [2023] EWHC 3023 (Comm) – a decision of mine – and *Lakatamia Shipping Co v Su* [2024] EWHC 11749 (Comm)). The tort, and the *Lakatamia* exposition of its elements, has since been applied by Bryan J in *Hotel Portfolio II UK Limited v Marlborough Developments Ltd* [2024] EWHC 3075 (Comm), [75]-[80], albeit once again in undefended proceedings. While the *Marex* tort is established at first instance, there remains scope for argument as to the existence and elements of the tort in a higher court.
158. Element (iii) – the procurement or inducement of that breach by the defendant – merits further discussion at this point. When discussing accessory liability for breach of contract in *Accessory Liability* (2015), Professor Paul S Davies analyses the “conduct element” on the part of the accessory (pp.145-156). He identifies the following alternative conduct elements which are of particular relevance to the consideration of the *Marex* tort.
159. First, inducement which he notes is “the conduct element most commonly associated with accessory liability in contract law” (p.145). Inducement or procurement generally involve the accessory acting “on the mind” of the contract-breaker. Professor Davies notes that the meaning accorded to the concept of “inducement” in some of the authorities can be wider than that (e.g. Lord Hodge in *Global Resources Group Ltd v Mackay*[2009] SLT 104, [13] stating “A must induce B to break his contract with C, by persuading, encouraging or assisting him to do so”). Professor Davies suggests that rather than to try and force the concept of assistance into an extended concept of inducement, the law should recognise that there are conduct elements which can establish accessory liability in contract in addition to inducement (pp.149-50).
160. Second, Professor Davies discusses the concept of prevention which, once again, for some time was treated somewhat unsatisfactorily as a species of inducement, namely “indirect inducement”, a distinction jettisoned in *OBG Ltd v Allan* [2008] 1 AC 1, [36] and [86]. In *ABFA Commodities Trading Limited v Petraco Oil Company SA* [2024] EWHC 147 (Comm), [240]-[242], I sought to summarise the legal principles applicable to prevention as follows:
- i) It had generally been supposed that mere prevention without the accessory acting on the mind of the contracting party was not sufficient, unless the conduct of the accessory was itself tortious.

- ii) A distinction between conduct which does and does not act on the mind of the contracting party receives some support from the judgments of Lord Hoffmann and Lord Nicholls in *OBG Ltd v Allan* [2008] 1 AC 1 and the Court of Appeal in *Kawasaki Kisen Kaisha Ltd v James Kamball Ltd* [2021] AC 33, suggesting that the accessory must do “something which joins in with the conduct of B in a way which makes him an accessory to the breaking of the contract by B” in the form of “persuasion, encouragement or assistance of B to break the contract with C.”
  - iii) The particular issue of whether entering into an inconsistent contract, the performance of which would prevent a contracting party from complying with an existing contractual obligation, can itself constitute “persuasion, encouragement or assistance” in the breach has been considered in two cases: *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1301, in which Toulson LJ held that the third party’s conduct “had to operate on the will of the contracting party” and *Lictor Anstalt v Mir Steel* [2011] EWHC 3310 (Ch), [49]-[52], in which David Richards J held that it was arguable that entering into an agreement to purchase equipment as part of a business which the other party had already agreed to sell to a third party was sufficient for liability in the tort of inducing breach of contract. In *Kamball* the decision in *Lictor* was explained as involving “accessory liability in the form of assistance rather than persuasion”.
161. Third, there is the concept of assisting the breach. In *Accessory Liability*, 150, Professor Davies notes that in *Mainstream Properties Ltd v Young* [2005] EWCA 861, the Court of Appeal found the conduct element for accessory liability made out where the defendant’s actions had “facilitated” the breach, and that there was support for assistance as a sufficient conduct element in *BMTA v Salvadori* [1949] Ch 556 and the approval of that case by Jenkins LJ in *DC Thomson & Co Ltd v Deakin* [1952] Ch 646, 694. Further authority in support of accessory liability on the basis of assistance as distinct from inducement is collected in Philip Sales (as he then was), “The Tort of Conspiracy and Secondary Liability” (1990) 49(3) CLJ 491, 507-509.
162. How do these conduct elements transpose to the *Marex* tort?
163. The *Marex* tort has generally been invoked in relation to steps taken to frustrate the enforcement of a monetary judgment by the dissipation or encumbrance of assets against which the judgment might be enforced:
- i) In the course of a rather limited search, I have found little discussion in the pre-judgment context of the tort of inducing breach of an obligation to pay money by conduct of this type rather than persuasion. As to the latter, in *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1995] Ch 152, 164 Sir Thomas Bingham MR stated that “if, following default by the principal debtor, a third party induced a guarantor to dishonour his secondary obligation to pay the creditor, I would need much persuasion that the third party was not liable in tort.” However, he also stated at 166:  
  
“The court will restrain a defendant and potential judgment debtor from making himself judgment-proof by dissipating his assets and may order him to give disclosure of assets in support of the injunction. But the defendant violates no legal right of the plaintiff if he makes himself judgment-proof by dissipating his assets before he is enjoined from doing so and he does

not act unlawfully in failing to give disclosure before he is ordered to do so.”

- ii) Liability in tort for assisting a debtor in dissipating assets such that the debtor can no longer meet a monetary obligation could raise complications not found in relation, for example, to contractual obligations to provide services or deliver goods, namely that the control of debtors who enter into transactions which impede their ability to pay their creditors is generally regulated by bankruptcy and insolvency laws, and by provisions which aim to increase the class of assets available for the creditor pool as a whole rather than giving a claim in damages to an individual creditor. There is, however, room to frustrate enforcement without effecting a reduction in the debtor’s net assets, such as moving assets to enforcement-hostile jurisdictions or replacing readily realisable assets with those which are harder to sell. Further, issues might also arise as to (i) how such a private law claim for damages would co-exist with remedies such as those arising under s.423 of the Insolvency Act 1986, particularly where the claims are brought by different creditors and (ii) whether participating in a transaction which is susceptible to s.423 relief can constitute unlawful means for the purpose of the law of unlawful means conspiracy (see [204] below).
- iii) Robin Knowles J identified as one argument in support of the *Marex* tort that where there was a right to payment of the sum in contract (and implicitly, accessory liability for procuring breach of that obligation) before judgment, there was no reason why the same should not apply after judgment had been entered on the debt. Reflecting the fact that the court was only concerned with the arguability of the claim, there was limited discussion of how the tort of inducing or procuring breach of contract operates in relation to obligations to pay money. Further, there is not a complete symmetry between the pre- and post-judgment positions: it seems to be the law that there is no tort of inducing breach of an obligation to pay damages (if it is meaningful to speak of such an obligation: see Sandy Steel and Robert Stevens, “The Secondary Legal Duty to Pay Damages” (2020) 136 LQR 283): see *Merkur Island Shipping v Laughton* [1983] 2 AC 507, 608; *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427, 434-435 and *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1995] Ch 152. However, the *Marex* tort would appear to be in play once judgment had been entered for damages and a judgment debt had come into being.
- iv) The core of the concept of inducement, where the accessory persuades or encourages the judgment debtor not to comply, is likely to feature rarely in the *Marex* tort (Mr Cohen KC went so far as to suggest that it could never be sufficient for the *Marex* tort, although it is not easy to identify a principled reason why this should be the position). This is because the law provides directly and readily available means to enforce judgments against judgment debtors who are able, but not willing, to discharge their judgment debts, to a much greater extent than it does, pre-judgment, for breaches of contract. Indeed, the complaint in most *Marex* tort cases (including this one) is not that the defendant has persuaded a contracting party not to perform its obligations of its own volition, but that it has taken steps which have obstructed the claimant’s ability to procure forced compliance by a recalcitrant judgment debtor with the judgment debt.

164. What of prevention? Where the complaint is that the defendant has entered into a transaction with the judgment debtor which impedes enforcement (e.g. by purchasing assets which are relatively easy to enforce against for a form of consideration which is more difficult to access or realise), then the same issue will arise as whether entering into a contract with the judgment debtor, the performance of which would impede or prevent a contracting party from complying with an existing contractual obligation, can itself ground accessory liability where the third party's conduct does not operate on the will of the contracting party. Liability in such a scenario may more readily be established when the means constituting prevention are themselves a legal wrong, and in many cases assistance in the breach will provide a more satisfactory basis for accessory liability, where the assistance was rendered with a view to causing the breach (*OBG Ltd v Allan* [2008] 1 AC 1, [70]).
165. Finally, there is accessory liability on the basis that the defendant has assisted breach of the judgment debtor's obligation. It is suggested that this would generally be the most appropriate conduct element in the *Marex* tort context, where, unlike many procuring or inducing breach of contract cases, it is the judgment debtor who is the moving spirit behind the efforts taken to frustrate enforcement, rather than the accessory who has set matters in motion.

*The position here*

166. I will first deal with a preliminary point taken by Mr Cohen KC that there could be no judgment for the purposes of a claim under the *Marex* tort until the Bank's Sharjah and BVI Judgments were registered in this jurisdiction. That submission is based on a finding of Mr Simon Colton KC in *Lakatamia Shipping Co Ltd v Arnaud Zalbadano* [2024] EWHC 1749 (Com), [110(a)]. However, Mr Colton KC was there addressing a defence of justification in relation to acts taken by a Monegasque lawyer acting on the instructions of a client in Monaco, in which context the fact that the English judgment relied upon as the basis of the *Marex* tort had yet to be registered there was highly relevant. I cannot see that the issue of registration creates a threshold requirement for the bringing of such a claim in this jurisdiction, at least where (as in this case) the judgment is one which could be enforced in this jurisdiction by an action on the judgment.
167. So far as the issue of applicable law is concerned, Bright J held that the applicable law is the law of the place where the judgment was rendered (at [156]), which I accept is clearly strongly arguable. In this case:
- i) No issue of foreign law applies in relation to the Possession Judgment.
  - ii) I am willing to apply the presumption of similarity in relation to the Bank BVI Judgment.
  - iii) There was conflicting evidence as to whether the facts relied upon to establish the *Marex* tort in relation to the Bank Sharjah Judgment gave rise to a cause of action under UAE law, and I accept it is arguable that they do.
168. There is also a potential issue as to whether the *Marex* tort under English law can apply to a foreign judgment (in any cases where the applicable law of the tort is not the applicable law of the judgment). That might be thought to raise a similar issue as to

whether the English tort of procuring breach of contract should be capable of applying to a contract governed by some other applicable law. I am not immediately aware of any authority on either scenario, but accept that it is strongly arguable that the English torts extend to interference with legal rights under foreign as well as domestic law. In each case, a legal right has been interfered with.

169. Against that background, I turn to the different ways in which the Claimants' *Marex* tort claim is put.
170. As to the alleged violation of the Bank's rights as judgment creditor in respect of the Bank Sharjah and BVI Judgments:
- i) On the Bank's alternative case that the Globe Documents are genuine, I accept that it is arguable that the PCB Defendants assisted the Al Saris in saddling the BVI Companies with debt and thereby reduced the value of those assets against which the Bank Sharjah and BVI Judgments could be enforced. I accept it is arguable that the Globe Documents were created after the Bank Sharjah and BVI Judgments were entered and possibly after the Bank obtained a final charging order over the shares in the BVI Companies on 19 February 2019. I am also satisfied that accessory liability on the basis of the "prevention" conduct element is arguable, not least because (as I explain below) it is arguable that if the Globe Documents are genuine, they involved a breach of duty by the Al Saris and dishonest assistance in that breach by the PCB Defendants (so that prevention arises through an act which is independently unlawful).
  - ii) There may be an issue as to the effect of the Bank's decision, with knowledge of the Globe Documents, to acquire the BVI Companies in return for a US\$9 million reduction in the amount of the Bank's BVI and Sharjah Judgment, such that the alleged conduct has not in fact caused the Bank loss *qua* judgment debtor. However, that issue was not explored before me.
171. On the Bank's primary claim that the Globe Documents are forgeries:
- i) I understand from the Claimants' submissions after the draft judgment was circulated that the Bank is not seeking to argue that the deployment of the Globe Documents in the course of the Possession Proceedings is actionable *by the Bank* as the *Marex* tort.
  - ii) As noted at [153(iii)] above, the only pleaded instance of the Globe Documents being deployed as a reason not to transfer the Bridge Properties into the possession of the BVI Companies was the DIFC Globe Injunction obtained on 2 May 2023 and discharged on 19 June 2023, and the reliance thereon by Mr Gebremedhin on 3 May 2023. By this date the Bank had executed the Bank Sharjah and BVI Judgments to the extent of the value of the BVI Companies and its assets. The Bank's complaint here is that the value of assets acquired in part satisfaction of the Bank's Sharjah and BVI Judgments was diminished, or the realisation of that value through the BVI Companies impeded, by the failure to transfer the Bridge Properties to the BVI Companies. Whatever legal claims that might generate, the *Marex* tort is not amongst them.

172. So far as the BVI Companies are concerned, I accept that the BVI Companies can point to the deployment of the WWFO granted in the Globe DIFC Proceedings as a step arguably taken to obstruct the enforcement of the Possession Judgment through Mr Gebremedhin. The issue of whether there is an arguable claim against the PCB Defendants in respect of that conduct is considered in the context of the conspiracy claim below.
173. What of the *Marex* tort so far as the Bank BVI and Bank Sharjah Judgments are concerned?
174. As to the position under UAE and BVI law:
- i) I am willing to apply the presumption of similarity to the position under BVI law so far as the Bank BVI Judgment is concerned.
  - ii) It is possible that a claim for loss caused by interference with the Bank's BVI Judgment can be brought under UAE law, but the evidence of UAE law (and indeed the relevant legal provisions) are in the most general terms, and the submissions received to date are not sufficient for me fairly to decide this point.
175. As to the arguability of the case on the facts:
- i) I will require further oral argument on this part of the Bank's claim, as the pleadings are not easy to follow, and I do not recall being taken through them in oral argument. This can be done at the restored hearing when the malicious prosecution claim is addressed (see below).
  - ii) So far as limitation under UAE law in relation to any cause of action based on *Marex*-tort facts, for the reasons set out at [147] above, I am unable to conclude that the PCB Defendants have a "knock out blow".

### **Malicious prosecution of the DIFC Globe Proceedings**

176. This is an issue where the question of applicable law is vital:
- i) It is common ground that DIFC law does not recognise a tort of malicious prosecution: see [131] above.
  - ii) Article 25 of Rome II provides:

"Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation."
  - iii) This raises the issue of whether the DIFC can be regarded as a "territorial unit" of the UAE with "its own rules of law in respect of non-contractual obligations". The DIFC is a special economic zone in Dubai which, by Federal Law No. 8 of 2004, is exempt from all federal civil and commercial laws within the UAE, although UAE criminal law still applies. It has a geographic area of 110 acres.

- iv) In *Harrison Jalla v Shell International Trading and Shipping Company Limited* [2023] EWHC 424 (TCC), Mrs Justice O’Farrell considered whether the Nigerian Exclusive Economic Zone constituted a territorial unit of Nigeria for Article 25 purposes. At [335]-[338], she rejected that argument, noting that the Nigerian EEZ was not a territorial unit, and did not have its own laws. Those conclusions are unsurprising. The EEZ was simply an area of the sea extending off the coast of Nigeria over which certain sovereign rights are claimed. By contrast the DIFC is a designated territorial area with its own distinct laws and institutions, whose separate and particular identity within the UAE is recognised by UAE law. I am satisfied that it falls to be treated as a country for Article 25 purposes.
177. In the Claimants’ written opening, the sum total said about the claim for malicious prosecution was:
- “Malicious prosecution: UAE law.** Although there is no UAE law tort of malicious prosecution specifically so called, such acts would nevertheless give rise to liability.”
178. In the Claimants’ written “Summary List of Points in Response” served during the hearing, this was expanded to:
- “Malicious prosecution
- (a) Applicable law. Damage occurred where the costs were incurred. That is onshore Dubai, where the Bank signed the retainers and paid the fees. UAE law applies.
- (b) No tort. Ds do not maintain the position that malicious prosecution is not actionable in UAE law. Third Hadeef Letter makes clear that it is.
- (c) Loss. No reason why Cs should not be entitled to costs as damages. Damages at \$59.6 (malicious prosecution in Tenancy/Possession Proceedings) also claimed against PCB Ds under overarching conspiracy.”
179. It therefore came as something of a surprise to receive a page and a half of single spaced submissions in support of an application for permission to appeal which:
- i) referred to one authority which had not featured on the list of 119 authorities I was asked to read after the hearing, and another which only featured as relevant to the issue of full and frank disclosure, but was now relied upon for a wholly different purpose;
- ii) suggested that the legal costs were largely made up of work done in England (and Australia);
- iii) indicated that the BVI Companies’ claim for loss from malicious prosecution was not (or at least not predominantly) legal fees but the consequences of delay in selling the Bridge Properties in England (although it was later indicated that this was only relevant so far as the PCB Defendants are concerned as an alleged unlawful means in the claim of unlawful means conspiracy and not a claim in its own right); and



- iv) suggested that the malicious prosecution claims were or might be “governed by different systems of law.”

180. In these circumstances, I have reluctantly come to the conclusion that this is an issue on which there will need to be further oral argument. A serious issue to be tried cannot be established simply because an inadequate hearing estimate has allowed insufficient time for points to be properly explained, argued and responded to. The suggestions that a claim can be brought for the malicious commencement of court proceedings without reasonable and probable cause when no such claim is recognised by the law of the place where the proceedings are commenced, and that a claimant’s unilateral decisions as to where to sign a letter of retainer with its lawyers or as to the bank account from which it pays legal fees can lead to the application of a law which does recognise such a claim, require proper consideration. The implications of the need for a further oral hearing on the May 2025 trial date will need to be explored in due course.

### **Dishonest assistance**

181. It is accepted that the Al Saris arguably owed fiduciary duties to the BVI Companies as de facto or shadow directors. The Claimants alleged that through their involvement in the Globe Documents, the PCB Defendants dishonestly assisted the breach of those duties.

182. As to this:

- i) I accept that it is arguable that this claim does not depend on the Globe Documents being genuine or the Al Saris having authority to sign them. Someone acting in a fiduciary capacity in relation to a company who helped bring about the existence of forged documents purporting to show the existence of a major liability on the part of that company would arguably be in breach of their fiduciary duties to the company and be liable for loss where those documents forced the company to incur legal fees, or because it was exposed to an adverse judgment on the transaction purportedly evidenced, or where the forgery delayed its recovery of its property. I accept that the measure of loss might differ depending on whether or not the transaction was valid. I also accept that it is possible to be a shadow or de facto director of a company without necessarily having actual authority to bind that company (*Eurohome UK v Deutsche Bank* [2022] EWHC 2408 (Ch), [36]-[37]).
- ii) If the Globe Documents are genuine, then Mr Cohen KC contended that there was no arguable breach of fiduciary duty because the Al Saris were the sole shareholders of the BVI Companies, there was no evidence that the BVI Companies had any creditors, and that it was open to the Al Saris to ratify any breach of duty on the *Duomatic* principle (*Re Duomatic Ltd* [1969] 2 Ch 365). However, I do not feel able to resolve the issue of whether the BVI Companies had any creditors on a summary basis (for example I have seen references to service charges being paid on the properties, and there may be issues of council tax). Nor was there any evidence from the Al Saris as to the fact and circumstances of any alleged ratification. In any event the effect of the Globe Documents, if genuine, was arguably to leave the BVI Companies insolvent. There was no time for consideration at the hearing of whether the *Duomatic* principle (whatever may be necessary to invoke it) applied to a transaction which

would immediately have the effect of making the company insolvent and unable to meet its obligations to the creditor in that transaction (cf. *Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447). In short, this issue was insufficiently explored for me to be able to conclude at this hearing to the summary judgment standard that the dishonest assistance claim had no real prospect of success.

183. Next, Mr Cohen KC argued that, having obtained judgment on the basis that the Al Saris did not have authority to commit the BVI Companies to the Globe Documents, it is not open to the Claimants to bring a claim on the premise that they did, having regard to the principle of approbation and reprobation as applied in *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320. In particular the DIFC Tenancy Proceedings were successfully defeated on the basis that the Tenancy Agreement had been signed without the BVI Companies' authority (where I accept it was the basis of the decision). I do not accept any issue as to the status of the Globe Documents was necessarily decided in the Possession Judgment or the DIFC Tenancy Proceedings, which were concerned with the Tenancy Agreement. Even here, the lack of authority to sign the Tenancy Agreement was an alternative basis for HHJ Johns KC's judgment, the primary basis being that the document was a forgery.
184. *Express Newspapers* is an authority which is more often cited than applied, in which the plaintiff obtained judgment for breach of copyright against a rival newspaper who had copied an article, and then sought to resist a claim for breach of copyright in identical circumstances brought by that same newspaper on the basis that a journalistic custom permitted copying stories from other papers. Sir Christopher Floyd in *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429, explained at [26] that:
- “...this form of estoppel by conduct is one which is approached by means of a broad, merits-based assessment, and is not constrained by strict rules (as, for example, issue estoppel). The matters to consider include, but are not limited to, those enumerated by Ginsburg J in the *New Hampshire case*. It is material to ask the question whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. Absent that factor, whilst the change of position may affect the credibility of the party or the witness concerned, there will not be an impression that one or other court was misled into giving its decision, so that the administration of justice risks being brought into disrepute.”
185. In *Malik v Malik* [2024] EWCA Civ 1323, [36], Zacaroli LJ held that this was ultimately a principle based on abuse of process.
186. In this case, the Claimants have brought as their primary case the contention that the Globe Documents are forgeries and signed without authority. D7 and D9 – and I suspect in due course D10 – have in answer to that case pleaded that the Globe Documents are genuine and signed with the BVI Companies' authority and that the Claimants are estopped from contending otherwise. I should take some persuading that, in those circumstances, it was not open to the Claimants to advance an alternative case for relief on the basis that the Globe Documents are genuine and authorised. This conduct is not abusive, and a “broad, merits-based assessment” does not suggest it should be enjoined.

187. Finally, it is said that if the Globe Documents are genuine, they were created in 2014 and any claim is time barred because it is not alleged that the transactions were hidden from the BVI Companies' de jure (and honest) directors. However:
- i) The Claimants challenge the 2014 date even on their alternative case (i.e. that case asserts that there was a genuine but back-dated transaction).
  - ii) While there may be difficulties with this thesis, to the extent that the Globe documents record events as far back as 2014, transactions can embrace events which have already happened as well as those which are yet to occur (particularly when the former were undertaken in anticipation of a future contract which would apply to them when concluded).
  - iii) I have seen nothing to suggest that the de jure directors had any knowledge of the Globe Documents at any point.

### **Section 423 of the Insolvency Act 1986**

188. Before addressing this issue, it is necessary to explain how the Globe Documents purported to operate:
- i) The documents suggest that the Al Saris owed certain debts to banks totalling AED 651,803,603.
  - ii) D9 agreed to pay those debts, acquiring a right to re-payment from the Al Saris which it assigned to D7 (the amount repayable was in fact AED 550 million for reasons which were not explored).
  - iii) The Al Saris transferred their liability to pay D7 AED 550 million to the BVI Companies.
  - iv) The BVI Companies acknowledged their debt of AED 550 million to Globe and agreed to pay that debt in instalments, the dates for which were later revised by a subsequent settlement agreement.
189. Section 423 of the Insolvency Act 1986 provides:
- “(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—
- (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
  - (b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or
  - (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

- (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
  - (a) restoring the position to what it would have been if the transaction had not been entered into, and
  - (b) protecting the interests of persons who are victims of the transaction.
- (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
  - (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
  - (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

...

- (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as ‘*the debtor*’.

190. In approaching s.423, it is helpful to keep the separate role of the following participants in mind:

- i) First, there is the person who “enters into a transaction” with the relevant purpose, referred to in s.423(5) as “the debtor”, but who I shall refer to as **the Principal**. For s.423(3) to apply, the actual or prospective claim motivating the transaction must be a claim against the Principal.
- ii) Second, there is “another person”, viz the person with whom the Principal “enters into a transaction” (“**the Counterparty**”).
- iii) For section 423(1)(c) to apply, the consideration provided by the Counterparty must be significantly less than the consideration provided “by himself” (“**the Consideration Provided**”). The identity of the person invoked by the reference to “himself” is considered below.

191. In *Invest Bank PJSC v El-Husseini and others* [2023] EWCA Civ 555, the Court of Appeal held that the Principal for s.423(1) purposes can “enter into a transaction” by causing a company the Principal controls to enter into a transaction with a Counterparty (an appeal to the Supreme Court has been heard and judgment is awaited). That involves the introduction of a new entity in some cases – “**the Principal’s Company**”. That, in turn, raises the issue in such cases of whether the Consideration Provided “by himself” means the consideration provided by the Principal, or the consideration provided by the Principal’s Company. The wording of s.423(1)(c) would suggest that one is ordinarily concerned with the consideration provided by the parties to the relevant transaction, which in a case involving a Principal’s Company would involve a comparison of the consideration provided by the Principal’s Company with that provided by the Counterparty, such that reference to “consideration provided by himself” would have

to be read as “consideration provided by himself *or a company which he controls*” (cf. *Invest Bank*, [42]). However, that does not appear to be the basis of the decision in *Invest Bank*. At [97], the Court approved Mr McGrath KC’s submission that “the relevant transaction was the diminution in the value of [the Principal’s] shares in the company”, such that the inquiry is whether the consideration provided in the form of reduction of the value of the shares was less than the consideration received in return for that reduction in value.

192. Against that background, I turn to consider the three alternative ways in which, by the end of the hearing, the Claimants were advancing their s.423 case. It is right to record that this case underwent significant revision during the course of the hearing, and Mr Cohen KC found himself facing something of a moving target. To the extent that the opportunity for greater reflection allows Mr Cohen KC to identify further issues with the arguability of the claim, this judgment will not shut Mr Cohen KC out from arguing those points.
193. First, it is said if the Globe Documents are genuine, the BVI Companies have entered into a transaction (that embodied in the Globe Documents) for no consideration or significantly less than the consideration provided by the BVI Companies. The issue which arises in relation to this formulation is whether it can be said that the purpose of the transaction was “putting assets beyond the reach of a person who is making, or may at some time make, a claim against” the BVI Companies. As to this:
- i) The Bank’s claim was against the Al Saris, not against the BVI Companies (which were simply an asset of the Al Saris against which the Bank sought to enforce the judgment).
  - ii) It is said that the Bank was making a claim against the BVI Companies in BVI Proceedings 115 of 2014. This is a reference to a *Chabra* freezing injunction which was obtained in the BVI on 18 November 2014.
  - iii) I am not persuaded that this constitutes the making of a claim for s.423 purposes. The claim was made against the Al Saris, the BVI *Chabra* injunction being a procedural order, which does not involve or culminate in monetary relief, made for the purpose of seeking to make any judgment against the Al Saris effective. It has been suggested that s.423 contemplates “a debtor-creditor sort of relationship” (*Westbrook Dolphin Square Ltd v Friends Life Ltd (No2)* [2015] 1 WLR 1713, [414]). I am not persuaded that it extends to claims for procedural relief enforceable by the court’s committal powers.
  - iv) Accordingly, I am not persuaded that this way of putting the Claimants’ s.423 case is arguable, and refuse permission to amend or serve out of the jurisdiction in respect of it.
194. Second, it is said that the Al Sari Defendants entered into the transaction (in the *Invest Bank* sense) with Globe for consideration which was significantly less than “the BVI Companies assuming (or the Al Sari Defendants causing the BVI Companies to assume) the obligation to pay the debt to Globe.” As to this:

- i) On the basis of *Invest Bank*, there is no difficulty with the Al Sari Defendants being treated as the Principal who caused the BVI Companies to enter into a transaction.
  - ii) However, this argument treats the Consideration Provided as that provided by the BVI Companies (i.e. the construction discussed at [191]) which, currently at least, is not supported by the authorities. The viability of that construction is likely to be resolved by the *Invest Bank* appeal, and I do not believe it would be appropriate summarily to dismiss it at this stage, while acknowledging the difficulties which Mr Cohen KC identifies.
195. Third, it is said that “the Al Sari Defendants entered into a transaction with MAS and/or Globe, in return for no consideration or significantly less than the consideration provided by the Al Sari Defendants by causing their companies to assume the obligation to pay the debts to Globe.” This appears to be an attempt to run an argument along the lines of that which succeeded in *Invest Bank* as referred to at [191] above.
196. At first blush, the argument appears challenging because, on their face, the effect of the Globe Documents appears to have benefited the Al Saris. Indeed, there are a number of assertions by the Claimants to that very effect, for example, contending that “the Globe Documents were uncommercial for every party except the Al Saris” and that “MAS agreed to discharge debts owed by the Al Sari Brothers of over AED 651 million.”
197. However, the following allegation is also made:
- “The Al Saris did not in fact receive any consideration as contemplated by the Globe MOU because (i) no debts owed by them were repaid by [D9], or (ii) as pleaded at Amended Reply §16.4(c), insofar as any such debts were repaid by [D9], they were repaid using funds ultimately sourced from the Al Sari Defendants”
- (a plea based on inference, albeit one which I am satisfied is arguable).
198. This allegation reflects the Claimants’ analysis of documents said by the PCB Defendants to evidence performance of the transactions given effect by the Globe Documents. The Claimants say that that analysis shows that many of the debts paid off were not in fact debts of the Al Saris or guaranteed by them, and that the debts relied upon were not in fact paid off by MAS.
199. This part of the Claimants’ case is complex, and, to me at least, remains somewhat opaque. It appears to involve an allegation about how the arrangements were performed rather than what was documented (“even if the Globe Documents are valid in that they imposed a debt on the BVI Companies, they were not in fact performed in the way they record”). It is not clear to me whether, and how, that factor is reflected in the proposed amendments (e.g. whether it is said to amount to an implicit variation of the transaction as documented). I do not feel able to determine that this way of putting the case has no real prospect of success at this stage. However, before giving permission to amend this case, I will require to be satisfied that there is a coherent treatment of this topic in the Particulars of Claim as a whole, or at least a clear flagging of which parts of the case are alternatives, and the assumptions on which they depend. The amendment will also

need to explain how the “as written” / “as performed” distinction is accommodated within the applicable legal principles.

200. Finally, Mr Cohen KC suggested that applicable law or jurisdiction issues might arise in relation to the s.423 claims, but did not identify them. This was not an issue which emerged solely because of the “in-hearing” revisions, and for the purposes, for example, of whether the claims fall within gateway (20), I am not persuaded that any new issues emerged during the hearing. No jurisdictional challenge beyond arguability having been advanced at the hearing, I do not believe fairness requires a separate jurisdictional hearing on the refinements to the case.

### **Unlawful means conspiracy**

201. The first issue which it is necessary to address under the heading is whether the pleaded claim against the PCB Defendants is of a single conspiracy to obstruct enforcement of the Bank Sharjah and BVI Judgments, which embraced the forgery and deployment of both the Tenancy Agreements and Globe Documents, or two separate conspiracies. If the former, then the issue arises as to whether there is an arguable case that the PCB Defendants were parties to such a conspiracy.
202. I can deal with the first point briefly. Before Mr Justice Bright, an issue arose as to whether the Particulars of Claim involved a claim of one or two conspiracies. Amendments were brought forward before Mr Justice Bright for the express purpose of making it clear that the Claimants’ case was to the former effect, and the Particulars of Claim finalised on that basis.
203. As to the second, the essential thrust of Mr Cohen KC’s submissions is that there was no arguable basis for alleging that D10 or the other PCB Defendants had any involvement in the alleged forgery and deployment of the Tenancy Agreement. I am satisfied that there is an arguable case that the deployment of the Tenancy Agreement and the Globe Documents formed part of a single conspiracy intended to obstruct the realisation of the value of the Bridge Properties and involving the PCB Defendants:
- i) From 2016, D10 was the “general manager” of D6, the supposed tenant under the Tenancy Agreement, and which intervened in the Possession Proceedings. While the PCB Defendants allege that D10 ceased to hold this role in 2017, documents appear to show D10 representing D6 in some capacity on the board of another company in 2019 and 2022, and I am persuaded that it is arguable D10 held a role with D6 when the Tenancy Agreement was produced and deployed.
  - ii) There is evidence that in March 2019, shortly before the Globe Documents were deployed for the first time in the Globe Sharjah Proceedings in April 2019, Mr Abdalla Al Sari met the Chairman of the Bank, begged the Bank not to enforce against the Bridge Properties and said that the Bank would not get its hands on those properties. No comfort was given in response. While objection is taken that this conversation is not pleaded, it is in evidence, and I am entitled to take it into account in considering whether the case has a real prospect of success. In any event, my conclusion that an arguable case has been shown does not depend on this evidence.

- iii) The following month, the Globe Sharjah Proceedings were commenced in the circumstances I have described at [13] and [15] above.
  - iv) Steps to enforce the First Globe Appeal Judgment were taken only when it was becoming clear that the reliance on the Tenancy Agreement to resist the Possession Proceedings would fail. Bright J described this timing as “striking” ([2023] EWHC 1797 (Comm), [53]) and, unexplained, I agree that it is.
  - v) The WWFO obtained in the Globe DIFC Proceedings was deployed by the housekeeper in occupation of the Bridge Properties (or one of them) as a reason not to leave the property. Once again, that provides a basis for inferring that this formed part of a concerted effort to resist transferring the Bridge Properties, of which the Tenancy Agreement and Globe Documents were separate strands.
  - vi) While Mr Cohen KC submits that this provides a weak basis for the serious allegation that D10 was involved in deploying the forged Tenancy Agreement, the inference is strengthened by the allegation (which it is accepted is arguable) that D10 was involved in forging the Globe Documents and their deployment.
204. So far as the unlawful means pleaded are concerned, I have addressed the PCB Defendants’ objections to many of them above. It is necessary to consider the following additional unlawful means relied upon. I should record that the issue of whether entering into a transaction susceptible to the granting of relief under s.423 of the Insolvency Act 1986 could constitute unlawful means was not raised, and I should not be taken as expressing a view on it (cf. *Dora v Simper* [1999] BCC 836, [4] and *Concept Oil Services Limited v En-Gin Group LLP* [2013] EWHC 1897 (Comm), [50]).
205. First, on 17 November 2014, Mr Justice Leggatt granted the Bank a WWFO under s.25 of the Civil Jurisdiction and Judgments Act 1982 in support of the Bank Sharjah Proceedings (“**the s.25 Injunction**”). The Claimants originally alleged that the unlawful means conspiracy also involved a breach of the s.25 Injunction. As to this:
- i) I accept that breach of a freezing injunction is capable of constituting unlawful means: *JSC BTA Bank v Khrapunov* [2018] UKSC 19.
  - ii) The s.25 Injunction prevented the Al Saris (the first to third respondents) from taking the following acts:
    - “Until after the return date, the First, Second and Third Respondents (and each of them) must not remove from England and Wales or in any way dispose of, deal with or diminish the value of any of their assets which are in England and Wales up to the value of AED 430,000,000”.
- The prohibition was specifically stated to apply to any beneficial interest in the Bridge Properties.
- iii) The s.25 Injunction also granted *Chabra* relief against the BVI Companies which provided that they could not “in any way dispose of, deal with or diminish the value of” the Bridge Properties.



- iv) The Claimants argued that (if genuine) the Globe Documents breached the s.25 Injunction. I am unable to accept this conclusion, which turns on the interpretation of the s.25 Injunction and can be determined now.
  - v) The Claimants did not maintain their rather improbable suggestion that the Bridge Properties were not beneficially owned by the BVI Companies but held on trust for the Al Saris: one might ask why the Al Saris would establish offshore companies simply for them to hold assets on trust for the Al Saris, thereby eliminating many of the benefits which an offshore corporate holding structure would normally bring. Further, the argument that, in effect, the BVI Companies have no assets cuts across almost the entirety of the remainder of the Claimants' arguments, the Bank's decision to acquire the BVI Companies, the manner in which the Possession Proceedings have been pursued and most of their other causes of action. In any event, I do not think the issue of whether the s.25 Injunction was breached turns on that question.
  - vi) We have been reminded in *ADM International Sarl v Grain House International* [2024] EWCA Civ 33, [64] that freezing orders are to be strictly construed. The Claimants' argument is that the entry of any economically adverse transaction by the BVI Companies amounts to the Al Saris dealing with the Bridge Properties (it is only assets in England which are caught by the s.25 Injunction) or the BVI Companies dealing with or disposing of the Bridge Properties. In my view, neither is the case. That reflects the true construction of the s.25 Injunction, and the Claimants' construction would give worldwide force to an injunction limited to assets in England and Wales.
  - vii) Having raised some of these issues at the hearing, I understood the Claimants to have abandoned this argument.
206. By way of an unpleaded alternative, reliance was at one point placed on the BVI *Chabra* freezing injunction made against the BVI Companies on 18 November 2014. This order restrained the BVI Companies from "in any way transferring, disposing of, pledging, charging, diminishing the value of or dealing with" the Bridge Properties. Once again, appropriately construed, I am not persuaded that entering into an economically adverse transaction has that effect, simply because it would generate additional creditors who might wish to claim against those assets but who had no security over them.
207. Second, contempt under the law of the DIFC for deploying forged documents in the Globe DIFC Proceedings. This received minimal attention at the hearing, and the only answer I understood the PCB Defendants to put forward to it at this stage was JPI. I have held that it is arguable that JPI is not engaged in relation to the Globe DIFC Proceedings, because no issue of re-litigation arises.
208. Finally, it is said that there were unlawful means in the breach of Article 266 of the UAE Criminal Code by reason of the deployment of forged documents in the Globe Sharjah Proceedings. I am satisfied that claim is defeated by JPI, if JPI applies to foreign proceedings, just as an unlawful means conspiracy relying on contempt in the form of the deployment in English court proceedings of forged documents or untruthful evidence would, in equivalent circumstances, be barred by JPI.
209. So far as the question of applicable law is concerned:

- i) Mr Justice Bright held that the applicable law was English law: [2023] EWHC 1797 (Comm), [167]. I accept that that is arguably the case. I also accept that it is arguable that Article 4(2) of Rome II displaces the ascertainment of applicable law by reference to where loss was suffered to UAE law so far as the Bank and D10 are concerned (an issue which did not arise before Bright J). I am also satisfied that it is arguable that the applicable law of the unlawful means conspiracy claim is UAE law under Article 4(3) of Rome II. It may be there is an arguable case that BVI law governs the claims (it is not clear to me if anyone is contending for this as a fall-back).
- ii) I will apply the presumption of similarity to the content of BVI law, if that is engaged, and I accept on the expert evidence before me that it is arguable that the facts relied upon to establish the tort of unlawful means conspiracy under English law are also actionable under the law of the UAE.
- iii) Even if the claim is governed by UAE law, I am unable summarily to determine it by reference to the UAE law of limitation for the reasons set out at [147] above.

## **THE REMAINING SERVICE OUT ISSUES**

### **Discretion**

210. If the merits threshold is overcome, D10 did not suggest that no proper case for service out had been established. It was suggested, however, that the court might nonetheless decide it was not appropriate to exercise its discretion to permit service out on D10, either because the claims against him only barely passed the serious issue to be tried test, or because, properly analysed, the arguable quantum of any claim against D10 is so low that the game was not worth the candle.
211. I deal with the issue of quantum below in the context of the WWFO application. For present purposes, I can state that I am not persuaded at this hearing that any claims pleaded do not give rise to appreciable claims in damages such that permission to serve should be refused on that basis, nor that it is appropriate in this context to undertake some further merits evaluation of those claims which have passed the merits threshold. In circumstances in which the same claims are proceeding in this jurisdiction against D7 and D9, I am satisfied that permission to serve out was appropriately given for those claims which disclose a serious issue to be tried so far as D10 is concerned.

### **Lack of full and frank disclosure**

212. Finally, so far as permission to serve out is concerned, Mr Cohen KC submits that the Claimants failed to comply with their duty of full and frank disclosure when making the application for permission to serve out to Mrs Justice Dias. I was referred to the summary of the principles relating to the duty of full and frank disclosure in *Libya Investment Authority v JP Morgan Markets Limited* [2019] EWHC 1452 (Comm), [92]-[98]. Briefly:
  - i) The innocence or culpability of any breach is a relevant, but not necessarily determinative, factor.

- ii) The court is required to assess the importance and significance to the outcome of the application of the matters which were not disclosed to the court.
  - iii) The court is also required to keep considerations of proportionality well in mind.
  - iv) An application for permission to serve out of the jurisdiction is of a very different nature to an application for without notice injunctive relief.
213. In this case, the application for permission to serve proceedings out of the jurisdiction on D10 was made after there had been a substantial inter partes hearing of D7 and D9's challenge to jurisdiction in respect of the same claims, heard over two days with a reserved judgment. The application to serve on D10 was made at a CMC at which D7 and D9 were represented by solicitors, and D7, D9 and D10 (the director of D7 and D9) have common representation at this hearing. In those circumstances, it was reasonable for the Claimants to proceed largely on the basis that the relevant issues had been raised and considered in that hearing, save in so far as D10's particular position raised further issues.
214. The skeleton argument provided to the court flagged the issue of the UAE limitation period (where the position of D10 might be different); res judicata (which had not even been argued before Bright J) and the fact that the claims had been pleaded by reference to English law. I am not persuaded, against the background I have summarised, that the Claimants were required to do more on the issue of res judicata or to flag that D10 as a director of D7 and D9 might be a privy to the issue estoppel D7 and D9 had not seen fit to raise. Nor is the failure to identify possible merits arguments which D7 and D9 had not seen fit to argue sufficient to warrant setting service out aside.
215. Nor am I persuaded that it was necessary to do more to address the issue of the authenticity of the Globe Documents, which clearly raises an arguable issue which the PCB Defendants did not seek to address before Bright J or before me. I accept that it would have been appropriate to say something in the skeleton about documents said to evidence performance of the Globe Documents and that this was not done because the Claimants' legal team had not appreciated the significance of those documents at that point. However, there remain a series of curious and unexplained features of the Globe Documents, and Dias J could only have concluded that there was a triable issue on this question. In short, there is nothing here which comes close to rendering it proportionate to set the permission to serve out aside on this basis.

## **THE REMAINING WWFO ISSUES**

216. The WWFO application against D10 falls to be approached on two bases:
- i) First, the WWFO sought in respect of the substantive claims brought against D10 ("**the Conduct WWFO**"). The specific issues which arise here are whether, following *Dos Santos v Unitel SA* [2024] EWCA Civ 1109, the claims disclose a serious issue to be tried (which I have already addressed); the operation of maximum sum order (for which purpose it is necessary to consider the amount of the arguable claim for loss and the risk of any judgment in that amount going unsatisfied), and whether it is just and convenient to grant the injunction.

- ii) Second, the WWFO sought against D10 on the *Chabra* basis against D10 as a non-cause of action defendant (“NCAD”) that he may hold assets falling within the scope of the WWFO granted against the Al Saris or against which the Bank’s judgment against the Al Saris could be enforced (“the NCAD WWFO”). This raises an issue of whether the claim falls within a permission to serve out gateway, whether permission to serve out should be given, and whether it is just and convenient to grant injunctive relief.

217. Both applications require the Claimants to persuade the court that there is a real risk that judgment will go unsatisfied by reason of the unjustified dissipation of assets unless D10 is restrained by court order from doing so. I consider that issue first.

### **Is there a risk of dissipation?**

218. I can deal with this issue relatively shortly:

- i) In this case, it is arguable that D10 was party to the forging of documents to assist the Al Saris obstruct the enforcement of the Bank Sharjah and BVI Judgments. While the existence of an arguable claim against the respondent will not always establish a real risk of dissipation, it may do, depending on the nature of the claim and its factual basis (*Lakatamia v Morimoto* [2019] EWCA Civ 2203). In this case, the substantive claim, the factual basis of which is accepted to be arguable, involves conduct which in its conception and execution is strongly suggestive of a risk of dissipation of assets to defeat any judgment which might be obtained against D10, or in respect of any assets he holds for the Al Saris.
- ii) D7 and D9, against whom a WWFO has been in place since 22 February 2022, have pleaded in their Defence that their actions are controlled by D10. D7 and D9 have themselves pleaded that the purpose of the transaction purportedly embodied in the Globe Documents is “to protect the asset from enforcement” (“the asset” being a reference to the supposed debt to MAS).
- iii) D7 and D9 failed to comply with their disclosure obligations under the WWFO for three months, only doing so after committal proceedings were commenced, and gave false information to the court about their knowledge of the proceedings (as Mr Justice Calver found: [2022] EWHC 701 (Comm)). As, on his own case, their “controlling mind”, that failure also raises legitimate concerns about D10’s readiness to comply with court orders.
- iv) D8, a company D10 claims to control, sent an email after it was placed into liquidation stating, “please do the needful to transfer the ownership of MAS Capital Holdings Limited and Globe Investment Holdings Limited to Mr Hamad Saif Hamad Abdalla Al Mheiri on an urgent basis”. That is suggestive of an attempt to move assets away from creditors.
- v) That material amply establishes a real risk of dissipation in the required sense.

219. The principal points taken by Mr Cohen KC in response are:

- i) There has been a WWFO in place against D7 and D9 since 18 February 2022, giving D10 ample opportunity to dissipate his assets should he wish to do so.

- ii) The present application was brought on notice, which itself strongly suggests that the Claimants do not believe that there is a real risk of dissipation.
- iii) In a brief submission made orally, that the Claimants had only sought a £400,000 freezing order in respect of D7 and D9 from Cockerill J in February 2022 which showed (a) there was no substance to the sum now claimed because it was so much higher and/or (b) there was no risk of dissipation because there had been no application to increase the £400,000 so far as D7 and D9 are concerned.

220. I am not persuaded by these points:

- i) As to the first, this is not a case in which there is evidence to show that D10 has *not* dissipated assets despite being on notice of a possible claim. The court has no visibility of movements in his assets during the intervening period. In any event, there are reasons why respondents who are seeking to challenge the jurisdiction (as D10 has, and to some success) may not take steps which would prejudice their standing before the court while that issue is pending, but become more sanguine about doing so once that challenge has failed. To the extent the argument is that all the dissipation will have taken place already, it is answered by Mr Justice Cooke's observation in *Antonio Gramsci Shipping Corp v Reoletos* [2011] EWHC 2242 (Comm), [28]-[29] (now too well-known to require quotation) and by the fact that some assets – e.g. real property – can take longer to dissipate than others, but may nonetheless be dissipated if sufficient time is available. That is also an answer to the alleged delay.
- ii) As to the third point, I had not recollected the third point (advanced briefly only orally on the morning of the fourth day) when I circulated the draft judgment which did not deal with it. I accept that is regrettable, and that dealing with the point now may not be the most propitious occasion from Mr Cohen KC's perspective. However, both parties have indicated that they are content I should do so. I am not persuaded by this argument either. As to the amount, Mr Peto KC said that a great deal more work had been done on quantum since the "without notice" application before Cockerill J 2 years 10 months ago, with the benefit of disclosure, and with further losses incurred. I do not feel able to go behind that explanation at this stage. The material placed before me is more extensive than that placed before Cockerill J.
- iii) As to the failure to seek additional relief from D7 and D9, D7 and D9 had provided asset disclosure. The Claimants' position is that D10 is funding D7 and D9's legal fees and that, on the basis of that asset disclosure, D7 and D9 do not have assets to repay that funding. D7 and D9 have themselves said that they lacked the assets to fund their legal fees. If that is right, it would explain why it was not thought worthwhile seeking to increase the Maximum Sum for D7 and D9.
- iv) Indeed, consideration of the position of D7 and D9 undermines the position of D10 on risk of dissipation generally. D10 is, on his own case, the controlling mind and will of D7 and D9. If there is a sufficient risk of D7 and D9 dissipating their assets, it necessarily follows that there is a sufficient risk of D10 being the controlling mind and will behind that dissipation. Yet D10 has never caused D7

or D9 to seek to challenge the conclusion of Cockerill J and Calver J that there is a real risk of D7 and D9 dissipating their assets.

221. As to the second point, I would not wish to give any encouragement to the suggestion that a freezing order application brought on timely notice is destined to fail for that reason. That would place applications which respected the principle that a party is ordinarily entitled to be heard before any order is made against them at a significant forensic disadvantage.

### **The Conduct WWFO: the maximum sum order**

222. Mr Cohen KC has mounted a considerable attack on the Claimants' attempts to quantify the monetary value of their claims against D10. Those criticisms were well made and have, to some extent, been answered by evidence filed at a late stage in the form of Mr Richards' seventh affidavit on 10 November 2024:

- i) It is right to say that I was initially unsympathetic about the PCB Defendants' complaint about the late introduction of this material, but became more sympathetic when it became apparent from post-hearing submissions that the interrelationship between the different heads of loss addressed in Mr Richards' seventh affidavit was rather more complicated than first appearances might suggest, and that on proper analysis it was said to lead to a different total to that suggested at the hearing (see [236]). I accept that more time is required properly to consider these issues.
- ii) I have, nonetheless, concluded that it is appropriate to have regard to the contents of that affidavit and its exhibits, which to a large extent pull together material which was already "in play" in a more diffuse form in the litigation, and where the PCB Defendants' criticisms largely came into focus in Mr Cohen KC's skeleton argument which, for entirely legitimate reasons, was filed 4 days after the deadline. Having reviewed the transcripts, I can see that on the first day of the hearing, without consenting to the admission of this material, Mr Cohen KC stated that he did not object to Mr Peto KC taking me to it, concluding "we can look at the situation at the end of this application, see where we have got to and work out what the objections are and the significance of those at that stage." When addressing this material, Mr Cohen KC made some short submissions about it, criticising the redaction of fee notes, referring to Justice Michael Black KC's comments on the fees claimed before him and submitting that the documents before the court suggest the value of the Bridge Properties had risen between September 2021 and today (when they are on the market for £8m). His submission concluded "you just do not have the evidence to be able to determine what the maximum sum was ... it has been wholly unevicenced even if you admit the late witness statement." I have addressed the points Mr Cohen KC raised.
- iii) Were I to have adopted the view that the argument on the Maximum Sum should be held over in its entirety, the result is that the Claimants would not have been able to obtain WWFO relief for many months. In these circumstances, I have decided that it is appropriate to fix an interim Maximum Sum amount at this hearing, but that both parties must be entitled to re-visit the amount of the Maximum Sum when more time is available.

- iv) At that hearing, fairness demands that it is open to the PCB Defendants to raise the issues raised in Mr Mascarenhas' fifth witness statement.
223. The material filed by the Claimants quantifies the legal costs claimed as £2,783,914.68, comprising the costs of the receivership of the BVI Companies, the costs of the Globe Sharjah Proceedings, costs relating to the Tenancy Agreement, the costs of the DIFC Tenancy Proceedings, the Possession Proceedings and the Sharjah Proceedings, the costs of advice relating to the Globe Document and of the DIFC Globe Proceedings and the BVI Globe Proceedings. As to the points taken:
- i) The fact that the Bank has obtained an order for costs in its favour in some of the proceedings does not diminish its loss until the order has been paid, which it has not. On the evidence, only unpaid costs feature in the amount claimed.
- ii) Judge Black KC in the DIFC found that the costs claimed there were "grossly over-inflated" and included costs of other proceedings. I accept that there is likely to be scope for argument as to the recoverability of the costs, and the matters to which they related. Nonetheless, I am satisfied that a loss figure of £2,500,000 for WWFO purposes would be appropriate before considering the effect of my rulings elsewhere in this judgment.
224. Some £300,000 is claimed for amounts paid to third parties pursuant to undertakings given in the delivery up and imaging orders made by Calver J. Whether recoverable as damages, or a costs order made against D10 in these proceedings, they are appropriately reflected in the "Maximum Sum" of the Conduct WWFO.
225. Second, there is lost management time and disbursements said to have been incurred by reason of the wrongful conduct. That totals £229,000 odd. It is not possible to go behind that figure at this stage, and I am satisfied it is appropriately reflected in the Maximum Sum.
226. Third, there is the claim for loss caused by delay in selling the Bridge Properties:
- i) Valuation reports exhibited in an earlier stage in the proceedings are relied upon by Mr Richards to suggest delay in obtaining possession of and being able to sell the Bridge Properties has led to a fall in value of their realisable value by £800,000. D10 has pointed to materials in the bundle which are said to be inconsistent with this figure and suggests that the market may have risen during the period. However, that raises an obvious dispute of fact which cannot be resolved at an interim hearing of this kind. D10 also suggests that the delay caused by the DIFC would have ended when the order was discharged, but the housekeeper remained in place in any event, and prevented the BVI Companies from taking possession. However (i) where there are two concurrent actionable causes for the failure to provide vacant possession of the Bridge Properties, it seems to me arguable that the party responsible for one of them cannot point to the other and say they are not liable at all, and that it is arguable that the full period of delay is recoverable from either of them; and (ii) the Claimants' conspiracy case would appear to embrace the continued occupation by the housekeeper in any event.

- ii) The Claimants advance a claim for loss of possession in the sum of £810,000. That would appear to provide an alternative claim to [226(ii)] above (in that if the property had been sold earlier, the Claimants would not have had the use of the Bridge Properties thereafter).
  - iii) There is a claim for loss of use of the proceeds of sale which would appear to be recoverable in addition to the fall in value at (i). The extent to which the claim for loss of use of the proceeds of sale is recoverable in addition to the claim for loss of use was not sufficiently explored at the hearing and it has been suggested that I have misunderstood Mr Richards' evidence. This matter can be addressed at a further hearing.
  - iv) There is a claim for the expenses of ownership in the amount of £557,315, which would appear to be recoverable in addition to the fall in value at (i) but not the claim for loss of use at (ii) (when the expenses, or at least some of them would have been incurred in any event).
227. An issue may at some point arise as to who is entitled to recover what loss. I accept that UAE law recognises a principle of reflective loss, such that a shareholder cannot recover for loss suffered in that capacity where the company has a cause of action for the relevant loss. The shareholder would not be barred by the principle from pursuing a cause of action for a separate loss of its own which the company could not recover. The losses set out in the preceding paragraph would appear to be those of the BVI Companies. However, as both the Bank and the BVI Companies are claimants, this issue may not matter. In any event, I reach no conclusion on this issue now, as the reflective loss issue was not explored at the hearing.
228. What, however, of the alternative claims premised on the Globe Documents creating a genuine transaction in breach of duty?
229. First, the BVI companies say that if the Globe Documents are genuine, then they have been exposed to a liability of AED 582,652,815 – over £128m – of debt to which they should not have been exposed. As to this:
- i) I am instinctively resistant to the suggestion that the Claimants should obtain a WWFO on what is very much their alternative case, the value of which so substantially exceeds that of their primary case.
  - ii) The Claimants' choice of primary and secondary case reflects their views as to the merits of that claim. On the material before me, I can well understand why they have formed the view that the Globe Documents did not document a genuine and authorised transaction which is and remains binding on the BVI Companies.
  - iii) Further, the Claimants have placed very significant reliance, for the purposes both of establishing a real risk of dissipation on D10's part and that it would be just and convenient to make a WWFO order against him, on his arguable involvement in forging and deploying the Globe Documents. The conspiracy case – to the extent that it links the Tenancy Agreement and the Globe Documents – also relies upon the fact that both are arguably forgeries. The entirety of the Claimants' case is likely to have looked very different if approached through the prism of its



alternative case in isolation. No effort was made to explain the Claimants' claims on delay and risk of dissipation if the Globe Documents are genuine.

- iv) In *Unitel SA v Dos Santos* [2024] EWCA Civ 1109, Popplewell LJ made it clear that there will be cases in which the strength of a claim, even if it has passed the "serious issue to be tried" threshold, will be relevant when considering whether it is just and equitable to grant relief ([130]).
  - v) Having regard to the apparent strength of the claims related to the fact that the Globe Documents are not binding (as reflected in the Claimants' strategy in this litigation and the judgment in the Globe DIFC Proceedings), and the matters in (i) and (iii) above, it would not be just and convenient to make a WWFO by reference to the amount claimed by the BVI Companies on their alternative case.
230. Second, the Bank suggests that if the Globe Documents are genuine, they will wipe out the value of the BVI Companies, such that a figure of £8m or £6.6m (competing figures for the value of the Bridge Properties) will be the measure of the Bank's loss (the PCB Defendants not pursuing an argument based on the reflective loss rule at the hearing). While the difference between the sum claimed on this basis and the Bank's primary claim is not as stark as that just considered, the concerns I expressed in the preceding paragraph still apply. Once again, for the same reasons, I am not persuaded it would be just and convenient to make a Conduct WWFO in respect of the amount claimed in this part of the Claimants' claims.

### **Conclusion on the Conduct WWFO**

231. On this basis, I am satisfied that, subject to the effect of my rulings (which will have to be determined after this judgment is handed down) and the "reflective loss" issue, the Conduct WWFO should, at least until the further hearing, have a "Maximum Sum" of £4,500,000 (reflecting some rounding and some allowance for interest). I note from the transcripts now available that is actually less than the £4.1m figure which Mr Peto KC submitted was the amount being sought.

### **The NCAD WWFO**

#### *The background*

232. The Bank has obtained judgment in this jurisdiction by way of an action brought to enforce the Bank Sharjah Judgment. At the same time as those enforcement proceedings were commenced, the Bank obtained WWFO relief against the Al Saris. The NCAD WWFO now sought against D10 is said to be in support of that judgment, and to be ancillary to that WWFO, its premise being that it can be shown to the requisite standard of arguability that D10 may be holding assets which are or are capable of being made amenable to enforcement of the Bank Sharjah Judgment.

#### *"Good reason to suppose"*

233. When a freezing order or ancillary relief is sought against an NCAD, the applicant must provide an evidential basis for the allegation that the NCAD is holding assets against which the judgment sought against the cause of action defendant (the "CAD") can be

enforced. In *JSC BTA Bank v Ablyazov (No 11)* [2015] 1 WLR 1287, [68], Christopher Clarke LJ observed of the test to be applied:

“[I]t is not necessary to decide which of the two formulations (good arguable case/good reason to suppose) is the most appropriate one. The former is derived from *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 and the latter from *SCF Finance Co Ltd v Masri* [1985] 1WLR 876. It was not submitted to us that, for the purposes of the present case, there was any significant difference between them and certainly none which it is now necessary to explore. Nor is it necessary to decide whether, given that Lapointec and Limia are the applicants for an order, it is sufficient for the bank to show that there is a real prospect of success in defeating that claim, i e the test under CPR 24.2 or the extent to which, if at all, there is any practical distinction between that and the other two tests.”

234. As noted in Grant and Mumford’s *Civil Fraud: Law, Practice and Procedure* (2018), [28-165]-[28-166], when a so-called *Chabra* injunction is sought, it is “generally important that the injunction should be as specific as possible in identifying those assets of the principal defendant which are said to be in the third party’s possession and control.” However, the text continues, “in an appropriate case, such as where the principal defendant has paid over monies or assets to the third party which are no longer identifiable in the latter’s hands ... a ‘maximum sum’ order in relation to that third party’s general assets (fixed by reference to the value of the substantive claim against the principal defendant, as opposed to the value of particular assets still held by the third party) may be made”. Three authorities are cited in support of that proposition.
235. The first is the decision in *Chabra* itself, [1992] 1 WLR 231. That was a case in which an injunction was obtained against a company on the basis that it was 100% owned and controlled by the CAD, and that the injunction was (in effect) necessary to prevent the CAD diminishing the value of his asset (the shareholding in the NCAD) by transactions at the NCAD level. However, that was not the basis on which the case was reasoned. Rather, Mummery J was satisfied of “a good arguable case that there are assets, apparently vested in the company, which may be beneficially the property of Mr. Chabra and therefore available to satisfy the plaintiff’s claims against him if established at trial” and “that it is arguable that the company was, in fact, at relevant times the alter ego of Mr. Chabra and that its assets, or at least some of its assets, may be available to meet the plaintiff’s claims against him if established.” The “maximum sum” of the injunction against the NCAD is not clear (the “maximum sum” of the order against Mr Chabra himself was £500,000, the claim being for £1.5m).
236. The second is *Yukong Line Ltd v Rendsburg* [2001] 2 Lloyd’s Rep 114. This was a case in which an identified sum of money had been transferred by the NCAD from the CAD (a company he controlled) to another company the NCAD also controlled. The “maximum sum” of the *Chabra* order was the value of the assets thus transferred. Potter LJ held at [44]:

“Although it is plain that the court’s *Chabra*-type of jurisdiction will only be exercised where there are grounds to believe that a co-defendant is in possession or control of assets to which the principal defendant is beneficially entitled, it does not seem to me that the jurisdiction is limited to cases where such assets can be specifically identified in the hands of the co-defendant. Once the court is satisfied that there are such assets in the possession or control of the co-defendant,

the jurisdiction exists to make a freezing order as ancillary and incidental to the claim against the principal defendant, although there is no direct cause of action against the co-defendant. Since the purpose of granting such an injunction against the co-defendant is to preserve the assets of the principal defendant so as to be available to meet a judgment against him, the form of order made against the co-defendant should be as specific as the circumstances permit in respect of the principal defendant's assets of which he has possession or control. Thus, generally, the form of injunction will be tailored to that purpose and should be no wider than is necessary to achieve it. However, subject to that requirement, if a co-defendant is mixed up in an attempt to make the principal defendant judgment-proof and the assets or their proceeds are not readily identifiable in his hands it is open to the court, where it is just and convenient to do so, to make an order which catches the co-defendant's general assets up to the amount of the principal defendant's assets of which he appears to have possession and control."

237. Finally, *Parbulk II AS v PT Humpuss Intermoda Transportasi YBK* [2011] EWHC 3143 (Comm). In that case, the NCAD was the 100% owner of the award debtor (CAD 1) and a subsidiary of a judgment debtor (CAD 2). The proceeds of various payments received by CAD 1 had been transferred to the NCAD, and the evidence "demonstrated substantial intra-group transfers of funds from [CAD 1] to [NCAD], strongly suggesting that [NCAD] was involved in assisting [CAD 1] in rendering itself judgment-proof." The "maximum sum" in the order was the amount of the NCAD's debts to CAD 1 and CAD 2, as appeared from the evidence, subject to a limit of the liability of CAD 1 and CAD 2 under the award and judgment respectively ([59]). Significantly, Gloster J did not consider it appropriate to make a freezing order in the full amount of the claim against the CADs ([60]-[63]) for the following reasons:

- i) It was not legitimate to disregard the separate corporate personalities of the NCAD and the CADs and treat the assets and liabilities of one company as the assets and liabilities of the other company.
- ii) The fact that the group, as a whole, had taken steps to render certain companies in the group judgment proof, did not per se justify an order against the NCAD or indeed against any other subsidiary in the group.

238. Before considering where those authorities lead, I will first address the issue of whether there is a good arguable case or good reason to suppose that D10 holds or controls assets which might be amenable to execution of the judgment against the Al Saris (there is no meaningful distinction in the formulation used on the facts of this case):

- i) I accept that there is good reason to suppose that D10's interest in D7 to D9 is held on behalf of the Al Saris. That was also the view of Mr Justice Calver ([2022] EWHC 705 (Comm), [20]) and Mr Justice Butcher ([2022] EWHC 2697 (Comm), [23]). It is also consistent with the submissions made by Globe in the Globe Sharjah Proceedings, in what may have been an unintended moment of candour:

"Mr Muhammad Abdullah al-Sari and Mr Majid Abdulla al-Sari ... own multiple companies including the Appellant [Globe], the Second Party in the MOU [MAS]".

- ii) I accept that there are numerous other business links between D10 and the Al Saris. For example, D10 was a director of the Al Saris' company Gulf General Investment Company PSC (“**GGICO**”) from 2012 to at least 2022, and he shared a PO Box with the Al Saris and two companies accepted to be owned by them. The evidence suggests that D10 was a director (or at least arguably a director) of numerous other companies owned or controlled by the Al Saris.
  - iii) Finally, D10 was a director of Horizon Energy (UK) Limited from 3 June 2013 and held 50% of its shares, a company which acted on behalf of another Horizon company owned by the Al Saris.
239. While freezing injunctions are a context in which we have learned never to say “never”, it is noticeable that in two of the three cases cited by Grant and Mumford, the freezing order was subject to a limit by reference to the amount of specific transfers from the CAD to the NCAD rather than simply the sum claimed against the CAD, and the third was one in which the NCAD was itself an asset of the CAD, and the “maximum sum” of the freezing order is not specifically discussed. The present application shares neither of those attributes. We are reminded that *Chabra* relief is exceptional and must be exercised with caution (*PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2013] EWHC 422 (Comm), [71]).
240. I have concluded that, if proceedings for the NCAD WWFO can be served out of the jurisdiction on D10, the appropriate order would be one which applied to the shares in any company held by D10 (where the evidence suggests there is good reason to suppose he may hold assets of this kind on behalf of the Al Saris) but which does not go further at this stage. That order would be subject to a maximum sum of the outstanding judgment against the Al Saris.
241. That order, together with the Conduct WWFO and the disclosure order in the Conduct WWFO would be sufficient in the first instance, and fairly balance the competing interests of the parties.

### ***Permission to serve out: Gateway***

#### *Introduction*

242. That leads to the final, significant, point of principle in this case. Can the application for an NCAD WWFO be served on D10 out of the jurisdiction? The Claimants say that it can under Practice Direction 6B paragraph 3.1(3):
- “A claim is made against a person (‘the defendant’) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
- (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
  - (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.”
243. In the course of argument, I referred the parties to a suggestion I had floated in a talk on freezing injunctions (“The Big Freeze: The Rise and Rise of the *Mareva* Injunction”,

a talk given to the Manchester Business & Property Courts Forum on 30 October 2024). In that talk, I noted that it has been held that paragraph 3.1(2) of Practice Direction 6B – “a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction” – does not to apply to freezing injunctions: *Owners of the Cargo Lately Laden on Board the Siskina v Distos Compania Naviera SA* [1979] AC 210; *Mercedes-Benz AG v Leiduck* [1986] AC 284 and, in circumspect terms, *Broad Idea International Ltd v Convoy Collateral Ltd* [2023] AC 389, [108], [121], [215], [221].

244. I suggested:

“While para. 3.1(2) may not be available, what about para. 3.1(20) which provides a service out gateway for claims brought under any enactment which allows proceedings to be brought?

- a. In *Orexim Trading v Mahavir Port* [2018] EWCA Civ 1660, the Court of Appeal suggested that the first question which arises in this context is whether there is a relevant territorial limit on the operation of the statute. If there is not, then presumptively it should be possible to serve the proceedings out of the jurisdiction. On that basis, it was held that a claim under s.423 of the Insolvency Act 1986 could, in principle, be served out of the jurisdiction through this gateway.
- b. In *Gorbachev v Guriev* [2023] EWCA Civ 327. the Court of Appeal held that a claim for third party disclosure under s.34 of the Senior Courts Act 1981 could be served out of the jurisdiction through the same gateway, on the basis that a claim for relief under the Senior Courts Act 1981 was brought ‘under’ any enactment.”
- c. In *Broad Idea*, [12]. [20], [40] and [118]. it was noted that the statutory power to grant injunctions is conferred by s.37(1) of the Senior Courts Act 1981.
- d. It would seem to follow that, unbeknown to Lord Diplock in *The Siskina* and the Privy Council in *Mercedes Benz* and *Broad Idea*, there was a basis for serving a freestanding application for freezing order relief out of the jurisdiction all along – just under a different gateway.”

(That last paragraph pays insufficient regard to amendments of the “enactment” gateway over time, but as a statement of the current position, it remains relevant).

245. Mr Trotter sought to adopt that suggestion during the hearing. However, the PCB Defendants had already had to cope with a significant number of new points in a hearing which was heavily time constrained, and I concluded I should limit my consideration to the gateway on the basis of which permission to serve out had been obtained.

#### *The authorities*

246. In *C Inc v L* [2001] CLC 1054, a *Chabra* order had been made against the NCAD, who had been joined to the proceedings for that purpose. That application was made after the claimant had already obtained judgment in default against the CAD. The claimant

also obtained a post-judgment freezing order against the CAD who had sworn an affidavit of assets suggesting that she had no assets of her own and was dependent on the NCAD (her husband) and held certain shares on trust for him. That prompted an application to bring a claim that the CAD had assumed the relevant liabilities as agent for her husband and was entitled to an indemnity from him, and for a freezing order against the NCAD and the appointment of a receiver over the CAD's assets, including the alleged right of indemnity. The hearing was conducted on the basis that the CAD had no assets of her own but did have a right to an indemnity from the NCAD, and the NCAD was not holding assets on behalf of the CAD.

247. Aikens J held that the English court had the “legal power” to grant an injunction against the NCAD, on the basis of the claimant’s substantive right (the default judgment) against the CAD, because there was a “necessary link” between the two (the judgment against the CAD bringing into existence the CAD’s right of indemnity against the NCAD). He also held that the court had power to join the NCAD to the proceedings under CPR 19.2 even though judgment had been entered against the CAD, because the proceedings did not come to an end with the entry of the default judgment. At [84]-[85], he accepted that it was necessary for joinder that there was an outstanding dispute between the claimant and the CAD, but held that there was such a dispute namely “a dispute between the claimant and Mrs L as to how that judgment is to be satisfied. Mrs L has not paid the debt found owing by her. She says she has no assets and will not pay it. Her refusal or inability to pay is disputed by the claimant which is trying to use the court’s procedures to get payment. So in my view there are matters in dispute in the proceedings.”
248. Significantly, Aikens J did not regard the fact of joinder under CPR 19.2 as, of itself, determinative of the availability of the “necessary or proper party” gateway – which on Mr Trotter’s argument, it should have been. Aikens J reasoned as follows:
- i) As no substantive relief was sought against the CAD, the proper procedure was to serve an application notice in the existing action on him.
  - ii) That involved applying the “necessary or proper party” test to the application. He identified a “real issue” between the parties in the context of the outstanding application to appoint a receiver over the CAD’s right of indemnity from the NCAD.
  - iii) The CAD was a proper party to that application, having an interest in opposing the appointment of a receiver (and, one might add, in disputing the existence of the right over which the receiver was to be appointed).
249. The novel feature of *C Inc v L* is the fact that the criteria for the application of necessary or proper party gateway were applied by reference to a post-judgment *procedural application* involving a dispute between the claimant and the CAD which it was desirable to determine against the NCAD, rather than a pre-judgment substantive claim. Aikens J reached the conclusion that this was permissible on the following basis:
- i) At the relevant time, CPR 6.30(2) provided “where the permission of the court is required for a claim form to be served out of the jurisdiction, the permission of the court must also be obtained for service out of the jurisdiction of any other document to be served”.

- ii) CPR r 6.18(h) and (i) stated that “claim form” includes “application form” and “claim” includes “application.”
250. In *Belletti v Morici* [2009] EWHC 2316 (Comm), proceedings were commenced in Italy (which led to a judgment there) and a freezing order in support of those proceedings was obtained in this jurisdiction under s.25 of the CJA 1982. An attempt was made to join the relatives of the judgment debtor to the English proceedings who were alleged to have assisted in breach of the English freezing injunction, and to obtain relief against them. This failed. At [36]-[37], Flaux J held:
- i) The “necessary or proper party” gateway was “limited to cases where the substantive dispute is before the English courts, because only in such a case is any ‘claim’ going to be tried between the claimant and the defendant who has been or will be served with the proceedings.”
  - ii) *C Inc v L* was a case in which there was a substantive dispute between C and the CAD before the English court.
  - iii) Even if the gateway was applicable, as matters stood, there was no dispute between the claimants and the first defendant, let alone between the claimants and the parents (as to the ownership of the assets). If the first defendant (or the parents) were to contend that the relevant assets in Monaco were in truth their assets and not their son’s, at that stage the court might order an issue to be tried but unless and until that happened, there would be no ‘claim’ to be tried.
  - iv) In *C Inc v L*, there was a real dispute between the claimant and Mrs L as to the appointment of a receiver.
  - v) The purpose of joining the parents as parties to the claim form (as was demonstrated by the relief sought in the amended claim form) was not to have any such issue tried but to obtain interim measures against the parents, by way of a *Chabra* order in aid of the worldwide freezing order against the first defendant, in circumstances where there was no (and never would be any) substantive dispute between the claimants and the first defendant to be tried in England.
251. The next case is also a decision of Flaux J, *Linsen International v Humpuss Sea Transport* [2011] EWHC 2339 (Comm). The claimant commenced an arbitration against CAD 1 and obtained awards which were converted into judgments under s.66 of the Arbitration Act 1996, and also obtained a court judgment on guarantees against CAD 2. A WWFO was obtained on a without notice application against the NCAD, a company in the same group as CAD1 and CAD2. At [161]-[166], Flaux J held that the “necessary or proper party” gateway could not be relied upon to serve the application on the NCAD out of the jurisdiction:
- i) Paragraph 3.1(3) of the Practice Direction is limited to cases where the substantive dispute is before the English courts, because only in such a case will any “claim” ever be tried between the claimant and CAD 1 who has been or will be served with the proceedings. In the present case, the claims of the claimant against CAD1 for breach of the charterparties would all be determined in London arbitration rather than by the English court.

- ii) So far as CAD 2 was concerned, there was no arguable basis for *Chabra* relief. The issue of whether the entry of judgments against CAD2 changed the position is not expressly addressed in the judgment.
252. In *JSC BTA Bank v Ablyazov* [2013] EWHC 1869 (Comm), a receivership order had been made in respect of assets out of the jurisdiction on 6 August 2010 and a WWFO extending to those assets on 23 November 2012. An NCAD applied to set that those orders aside, on the basis that after they were made, the assets had been the subject of a bona fide sale and the NCAD was now the beneficial owner of them. It also submitted that if the claimant wished to continue to enjoy the benefit of the receivership and freezing orders in relation to the assets which the NCAD claimed to own, it would need to show that there was jurisdiction to serve the applications for that relief out of the jurisdiction on the NCAD. The NCAD submitted that there was no power to grant permission to serve the application for a *Chabra* injunction out of the jurisdiction now that judgment had been entered against the CAD. The Claimant's primary argument relied upon the fact that the CAD had owned the relevant assets when the orders were made, and that it was the NCAD which had come before the court to vary that order. In the alternative, it was said that the necessary or proper party gateway was available because (at [30]):
- “There were several sets of proceedings that continued against Mr Ablyazov in which judgement had not yet been obtained and even in those actions where judgement had been entered against Mr Ablyazov, there was an issue between the Bank and Mr Ablyazov as to whether the Receivership and Freezing Orders ought to be continued in respect of the Dregon Land shares on the basis of Mr Ablyazov's beneficial ownership therein, as to which the applicants were necessary and proper parties.”
253. The issue is dealt with briefly by Field J who agreed with the claimant's primary argument, but in the alternative stated (at [33]):
- “I accept Mr Smith's alternative submission based on *C Inc plc v L* that the court has jurisdiction to make a *Chabra* order against the applicants under paragraph 3.1(3) of CPR PD 6B. In my judgement, the Bank's claim that the Dregon Land shares belong beneficially to Mr Ablyazov and not Lapointec and Limia is a classic *Chabra* claim and there is an issue between the Bank and Mr Ablyazov (who was served within the jurisdiction) as to whether he retains beneficial ownership of the Dregon Land shares which it is reasonable for the court to try and the applicants in my view are necessary and proper parties to that claim.”
254. The Judge directed a trial of the issue of whether the CAD had a beneficial interest in the relevant asset. In that case, the CAD had ceased to engage in the proceedings (he was on the run and in contempt of court) but could nevertheless have been bound into any determination of the issue of beneficial interest.
255. The Judge's decision to order a trial was appealed (*JSC BTA Bank v Ablyazov* [2014] EWCA Civ 602). The Court of Appeal agreed that the claimant had not been required to obtain permission to serve out when it became apparent, after the injunction had been granted, that there had been a purported transfer of the assets. Once the NCAD had applied for a variation, it was for the court to determine how the matters in dispute should be resolved. However, the Court of Appeal held that the order for this issue to



be tried did not permit the claimant to seek alternative substantive relief against the NCAD, for which jurisdiction would have to be established in the ordinary way. At [80], Christopher Clarke LJ stated:

“The approach argued for by the applicants would have strange consequences. The supposed requirement that there be an issue between the claimant and the defendant to the resolution of which another person is a necessary or proper party is, in this context, inappropriate. A claimant may obtain an order restraining a defendant from disposing of an asset abroad which he accepts is his and should come within the order. Someone in the country in question may then claim that, whatever the defendant says, the asset belongs to him. The court should not be disabled from making freezing orders against a defendant who is within its jurisdiction, which may impact on third parties, because there is no dispute by the defendant that the asset is his. Nor should that position change when the foreign claimant applies for the asset to be released from the order.”

256. Christopher Clarke LJ went on to consider whether paragraph 3.1(3) of Practice Direction 6B gave the court jurisdiction to determine the alternative claim which the claimant wished to bring based on alleged collusion between the CAD and NCAD to evade the freezing order. At [91]-[95], he identified two possible routes to the conclusion that it did:

- i) That there is a claim which is being made against Mr Ablyazov, on whom the claim form has been served, that he has, in relation to the Dregon Land shares, colluded with Mr Gutseriev and, thus, the applicants; and that they are necessary or proper parties to that claim: paragraph 3.1(3) of Practice Direction 6B. He observed that the difficulty with that approach is that the practice direction appears to contemplate that a claim form has or will have been served on one defendant and the same claim form served on the person outside the jurisdiction. In that case, there was no claim of the sort now under consideration advanced in any originating proceedings so that service of the claim form would not be service of a document which put forward any such claim.
- ii) For the bank (i) to issue an application in the action against Mr Ablyazov and (at least) the applicants (ii) to serve it on Mr Ablyazov; and then (iii) to apply for permission to serve that application on the applicants out of the jurisdiction (i.e. the route adopted in *C Inc v L*). Christopher Clarke LJ stated that “this appears to me to be a permissible approach. I did not understand Miss Newman to suggest the contrary”, although he did not decide the point.

257. Finally on the specific subject of *Chabra* injunctions, there is *Cruz City Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm) [70]-[81]. In that case the claimant had obtained an arbitration award against the CAD and sought to serve an application on an NCAD out of the jurisdiction in aid of enforcement of the award. Males J held that because there was no substantive claim against the CAD in the English court proceedings, the necessary or proper party gateway was not available:

- i) He referred to the judgments of Flaux J in *Belletti v Morici* and *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* referring to the need for substantive proceedings before the English court.

- ii) He also referred to *C Inc v L*, observing at [74] that Flaux J had distinguished that case in *Belletti* at [37] on the basis that the substantive dispute in the earlier case was before the English court, and stating:

“With respect I am not sure that this is a valid ground of distinction as in *C Inc plc v L* the claim against Mrs L had already been determined by the default judgment and there was nothing of substance left for the court to try. Moreover, this was not the basis of Aikens J’s reasoning. If it had been necessary to set aside the default judgment, there would have been a substantive claim against both defendants and therefore no difficulty in establishing jurisdiction over them. As it was, however, this was not necessary and jurisdiction was in fact established over Mr L on the basis that he was a necessary or proper party to the application for appointment of a receiver over his wife’s assets. It seems to me, therefore, that the decision in *C Inc plc v L* is difficult to reconcile with the *Belletti* and *Linsen* cases.”

- iii) At [75], he held that “the requirement of a substantive claim against the anchor defendant is in accordance with the language of PD 6B, para 3.1(3) and with principle”. He held that “the wording of para. 3.1(3) with its references to ‘a claim’, a ‘real issue’ and a trial (‘reasonable for the court to try’) suggest that what is required is a substantive claim against the anchor defendant. Relief which is ancillary to the enforcement of a judgment or award does not fit naturally into this language, even if such an interpretation is possible.”

- iv) At [77]-[79], he referred to the need for caution in the interpretation and application of the service out gateways, and the “necessary or proper party” gateway in particular, stating:

“To interpret the paragraph as requiring a substantive claim against the anchor defendant is also consistent with the long-standing approach to construction of the rules for service out of the jurisdiction, namely that they are generally to be construed as relating to claims which involve the determination and enforcement of legal rights, and not to applications for interim relief which involve no process of adjudication upon substantive rights”.

- v) In this context, he referred to the following passage in the Privy Council decision in *Mercedes-Benz AG v Leiduck* [1996] AC 284, 301-302:

“In their [Lordships’] opinion the purpose of Ord. 11, r. 1 is to authorise the service on a person who would not otherwise be compellable to appear before the English court of a document requiring him to submit to the adjudication by the court of a claim advanced in an action or matter commenced by that document. Such a claim will be for relief founded on a right asserted by the plaintiff in the action or matter, and enforced through the medium of a judgment given by the court in that action or matter. The document at the same time defines the relief claimed, institutes the proceedings in which it is claimed, and when properly served compels the defendant to enter upon the proceedings or suffer judgment and execution in default. Absent a claim based on a legal right which the defendant can be

called upon to answer, of a kind falling within Ord. 11, r.1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will.

Thus, at the centre of the powers conferred by Order 11 is a proposed action or matter which will decide upon and give effect to rights. An application for Mareva relief is not of this character. When ruled upon it decides no rights, and calls into existence no process by which the rights will be decided ...

This opinion, that Order 11 is confined to originating documents which set in motion proceedings designed to ascertain substantive rights, is borne out by its language ...”.

- vi) At [82], he considered the position if a substantive claim against an anchor defendant is not required, stating that “it is necessary to identify the ‘real issue’ as between the claimant and Unitech which the claimant contends that it is reasonable for the court to try” (the implication being that, if as Males J had concluded, a substantive claim was required, the “real issue” would have to be one arising in that substantive claim). He held the “real issue” could not be found in orders already made and determined, or scheduled to be determined without the NCAD’s involvement.
  - vii) At [84], he held that “the mere possibility that such issues may arise in the future, for example if there is a dispute about any particular step which the receivers require Unitech to take, is not enough to establish jurisdiction now against the Chabra defendants. Since there is no such real issue requiring to be tried, the Chabra defendants cannot be necessary or proper parties to the trial of that claim.”
258. There are two cases which do not directly relate to the issue I have to decide but inform the analysis.
259. The first is *Masri v Consolidated Contractors International (UK) Ltd* [2009] UKHL 43. A judgment creditor had obtained judgment in English proceedings against a company. It sought to serve a notice under CPR 71.2 for the examination of one of the judgment debtor’s officers out of the jurisdiction. The Court of Appeal had held that the CPR 71.2 application could be served out of the jurisdiction under CR r 6.30(2) which provided:
- “Unless paragraph (3) applies, where the permission of the court is required for a claim form to be served out of the jurisdiction the permission of the court must also be obtained for service out of the jurisdiction of any other document to be served in the proceedings.”
260. The House of Lords held that a CPR 71 order could not be served out of the jurisdiction under CPR r.6.20 and r.6.30. Lord Mance delivered the judgment:
- i) At [28]-[29], he held that the primary purpose of CPR r 6.30(2) was to require leave for service out of the jurisdiction on a defendant to proceedings and that the Court of Appeal’s conclusion that it provided a basis for service on a non-party “leads to a surprising result.”

- ii) At [36], he approved Tomlinson J's decision in *Vitol SA v Capri Marine Ltd* [2009] Bus LR 271 that CPR r 6.30(2) was concerned with the service of documents on parties to the proceedings.
261. In 2008, by Civil Procedure (Amendment) Rules 2008 (SI 2008/2178), CPR r 6.39 was introduced. In its current iteration, this provides:
- “Service of application notice on a non-party to the proceedings
- 6.39**
- (1) Where an application notice is to be served out of the jurisdiction on a person who is not a party to the proceedings rules 6.35 and 6.37(5)(a)(i), (ii) and (iii) do not apply.
- (2) Where an application is served out of the jurisdiction on a person who is not a party to the proceedings, that person may make an application to the court under Part 11 as if that person were a defendant, but rule 11(2) does not apply.”
262. The second case not concerned with *Chabra* relief is *Gorbachev v Guriev* [2022] EWHC 1907 (Comm); [2022] EWCA Civ 1270. In that case, the claimant sought permission to serve an application under s.34 of the Senior Courts Act 1981 on a non-party out of the jurisdiction for the purpose of obtaining a document for use in a trial.
263. At first instance, Jacobs J noted that CPR 6.39 “implicitly applies the ordinary rules for service out of the jurisdiction to cases where an application notice is to be served out of the jurisdiction on a non-party” ([24]). The principal argument in that case was whether an application under s.34 of the Senior Courts Act 1981 constituted a “claim” within Practice Direction 6B para. 3.1(20) (“a claim is made ... under an enactment”). Jacobs J held that the concept of a claim extended to an application for third party disclosure under CPR 3.17, given the width of the definition of “claim” in CPR 6.2. He also held that s.34 of the SCA 1981 was “an enactment” for gateway (20) purposes which allowed a claim to be brought against persons outside the jurisdiction. Jacobs J also offered tentative support for the view that the necessary or proper gateway was available as well, because an application had been issued against an NCAD in the jurisdiction in respect of the same document ([100]). On that approach, the “common issue” would not have been between the claimant and a party against whom substantive relief was sought and a non-party, but between two NCADs who were respondents to applications for procedural orders, neither of whom was a substantive defendant.
264. That (if I may respectfully say so, impressive) judgment was upheld by the Court of Appeal. The court rejected the suggestion “that the word ‘claim’ in paragraph 3.1 of Practice Direction 6B refers to a claim to enforce a substantive as distinct from a procedural right” ([33]-[34]). The Court of Appeal did not consider the possible application of the “necessary or proper party” gateway.
265. Finally, I was also referred to two commentaries on this issue:

- i) Steven Gee KC, *Commercial Injunctions* (7<sup>th</sup>) [6-093] states that *C Inc v L* “cannot be supported for the reasons given in *Cruz City I Mauritius Holdings Inc v Unitech*”. At [13-051], the text continues:

“In *C Inc v L*, CPR r.6.20(3) (broadly equivalent to what is now CPR PD 6B 3.1(3)) was relied upon to enable there to be a claim for interim relief against the third party husband when there was judgment in the action against the wife. This decision is incorrect because: (1) the gateway itself only applies when there is a substantive claim against the third party, as well as a substantive claim against the anchor defendant; (2) there needs to be a substantive claim against the anchor defendant; and (3) even if (1) and (2) were satisfied there still needs to be satisfaction of each of (a) and (b). CPR PD 6B para.3.1(3) applies to substantive claims made in England, the justification for allowing the substantive claim against the second defendant being the bringing of the substantive claim against the anchor defendant and the fulfilment of the requirements in (a) and (b). When there is only a Chabra claim against a third party for Mareva relief and no substantive claim against the third party to which the injunction would be ancillary, para.3.1(3) does not apply.”

- ii) Grant and Mumford, *Civil Fraud: Law, Practice and Procedure* (2018), [18-171] state:

“If the substantive claim against the cause of action defendant is being heard in the English Court, then (arguably) the claimant can rely on the necessary or proper party gateway under para.3.1(3) of Practice Direction 6B. If, however, the substantive claim is proceeding in a foreign court or in arbitral proceedings, or has already resulted in judgment, it is thought that there is no “claim” to be heard by the English Court for the purposes of the necessary or proper party gateway and so jurisdiction against the *Chabra* defendant cannot be established on that basis.”

### *Analysis*

266. A number of issues emerge from the various authorities, which fall to be read against a backdrop of ongoing changes to the CPR.
267. The first is whether CPR 3.1(3) requires substantive proceedings to have been commenced against “the defendant” for the purposes of that rule (whether or not at the date of the application to serve out, those proceedings are pre- or post-judgment). There is very strong support for the view that it does, both from Gee and from Grant and Mumford, and, in the authorities, from *Belletti v Morici*, [36]; *Linsen International*, [161] and *Cruz City*, [751]. CPR 6.39 would support the view that there remains such a requirement in any case in which that rule is relied upon – the reference to “a person who is not a party to the proceedings” pre-supposes that there are proceedings. While, as noted at [263], Jacobs J was willing to contemplate the possibility that it might be enough in a case involving substantive proceedings against a CAD, for gateway (20) to apply when “the defendant” for the purpose of the gateway was an NCAD, and an application made to join another NCAD, this appears to be against the weight of the authorities, although a principled argument can be advanced in its favour.

268. What of the position here, however, where the “substantive proceedings” are brought to enforce a judgment? Or a case where the “substantive proceedings” are an action brought on an arbitration award? In *Linsen International v Humpuss Sea Transport* the entry of arbitration awards as judgments under s.66 of the Arbitration Act 1996 (which is generally treated as a shortened form of the action on the award: see *Coastal States Trading (UK) Ltd v Mebro Mineraloelhandelsgesellschaft GmbH* [1986] 1 Lloyd’s Rep 46, 467) was not identified as a basis for the application of the necessary or proper party gateway. However, there seems no reason in principle why it should not be. Gateway (3), unlike gateways (4A) and (16A), is not limited in its operation to cases where other particular gateways can also be invoked, and where there are issues arising for determination in relation to a defendant in, say, proceedings served out of the jurisdiction under gateway (10) (“a claim is made to enforce any judgment or arbitral award”) to which a third party is a necessary or proper party, there seems to be no reason in principle why gateway (3) could not be invoked. The limiting factor is likely to be the existence of such an issue.
269. The second and third questions are closely related: whether the claim against the party to be served must itself be a substantive claim and whether “the real issue which it is reasonable for the court to try”, to which the party to be served must be a “necessary or proper party”, must itself be substantive in nature:
- i) That is the position taken in *Gee* (in respect of both questions) and it derives some, more qualified, support from *Grant and Mumford*. It is also supported by *Cruz City*, [74].
  - ii) There is support for the contrary view in *C Inc v L*, the explanation of that case offered in *Belletti v Morici*, [37] (although *Belletti* can be read as supporting the requirement of substantive claims) and in the comments of Christopher Clarke LJ in *Ablyazov*, [94], although when an issue of ownership of property arises in the context of a freezing order (as it did in *Ablyazov*), and is to be finally determined on the basis of a trial, the distinction between substantive and procedural relief begins to blur.
  - iii) To the extent that both gateway (3) and (20) use the word “claim”, the decision in *Gorbachev v Guriev* is also inconsistent with such a requirement, as is Jacobs J’s brief observation on gateway (3) in that case. I respectfully question whether the interpretation of the word “claim” in gateway (3) in *Cruz City*, [76] can stand with the interpretation of the word “claim” in gateway (20) in *Gorbachev*. If gateway (3) is to operate differently to gateway (20), that must be because of the words “a real issue which it is reasonable to ask the court to try” (which is also mentioned in *Cruz City*, [76]).
  - iv) However, in circumstances in which CPR 6.39 contemplates applications against non-parties (which will generally not involve substantive claims) being served out of the jurisdiction, it is suggested that the word “try” cannot carry sufficient weight such that gateway (20) applies to claims for non-substantive relief but gateway (3) does not.
  - v) There are cogent reasons why the second and third questions should be answered in the same way, because the necessary commonality of investigation or enquiry which gateway (3) pre-supposes (cf. *AK Investments CJSC v Kyrgyz Mobil Tel*

*Ltd* [2012] 1 WLR 1804, [87]) is unlikely to be present as between a substantive claim against an anchor defendant and an application for a procedural order against an NCAD.

- vi) On the basis of the current authorities, I conclude that provided there is a substantive claim against the defendant proceeding in the jurisdiction, gateway (3) can apply where procedural relief is sought against that defendant, and the NCAD is a necessary or proper party to such relief. It is not necessary in this case to address the issue of whether gateway (3) can be invoked where there is a substantive claim against the defendant proceeding in the jurisdiction, an application has been served for procedural relief against NCAD1 in the jurisdiction, and permission is sought to serve NCAD2 out of the jurisdiction on the basis that it is a necessary or proper party to the relief sought against NCAD1.
270. The fourth question is whether there must be a “live” issue to be determined as between the claimant and the anchor defendant, to which the party to be joined is a necessary or proper party, or whether it suffices that the party to be joined satisfied the CPR 19.2 criteria and the proceedings have not come to a final end (e.g. because, although judgment has been obtained, it is still being enforced).
271. The argument advanced by Mr Trotter was, in summary terms, as follows:
- i) The meaning of the words “necessary or proper party” are to be answered by asking whether, if both parties had been in the jurisdiction, it would have been appropriate that they both be parties to the proceedings: *Massey v Haynes* (1881) 21 QBD 330, 338; *United Film Distribution v Chhabria* [2001] 2 All ER (Comm), [36]-[38].
  - ii) The court should therefore ask itself if there was no issue as to jurisdiction, would it be appropriate to exercise the power to join the NCAD to the proceedings under CPR 19.2(2).
  - iii) The court can exercise the joinder power after proceedings against the existing defendant have culminated in a judgment: *Prescott v Dunwoody Sports Marketing* [2007] 1 WLR 2343, [23].
  - iv) When an issue arises in relation to a *Chabra* defendant, it is appropriate to join the *Chabra* defendant to the proceedings.
  - v) Where this is done, there is a legal power to serve proceedings on that *Chabra* defendant out of the jurisdiction under gateway (3) (by definition, because the exercise of the joinder jurisdiction conclusively determines that the “necessary or proper party” requirement is satisfied).
272. Persuasively as it was put, I am unable to accept this argument.
273. First, in my assessment it fails to accord sufficient weight to the principle underlying the “necessary or proper party” gateway. As Lord Collins noted in *AK Investments CJSC v Kyrgyz Mobil Tel Ltd*, [73]:

“The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts: *Tyne Improvement Comrs v Armement Anversois SA (The Brabo)* [1949] AC 326, 338, per Lord Porter. *Piggott, Foreign Judgments and Jurisdiction*, 3rd ed (1910), Pt III, p 238, said: ‘This is perhaps the most important of the sub-rules, for it throws the net of jurisdiction over a wider area; and the principle of considering the nature of the cause of action which pervades the whole subject, appears here to be ignored.’ Consequently, as Lloyd LJ said in *Golden Ocean Assurance Ltd v Martin (The Goldean Mariner)* [1990] 2 Lloyd’s Rep 215, 222:

‘I agree ... that caution must always be exercised in bringing foreign defendants within our jurisdiction under Ord 11, r 1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.’”

274. When seeking to identify the principles which underpin the various service out gateways, I suggested that gateways (3), (4) and (4A) were concerned with “the efficient trial of disputes: ... by ensuring that related claims are tried together so as to avoid a multiplicity of proceedings and the risk of inconsistent findings” (“The Jurisdictional Gateways: Some (Very) Modest Proposals” [2022] LMCLC 70, 79). To keep gateway (3) within sensible bounds, it seems to me that for the gateway to apply, there must be some common factual enquiry or determination involving the anchor defendant and the party to be joined, and that is not enough that obtaining information from the NCAD may assist the enforcement of the judgment obtained against the CAD. The contrary interpretation, particularly in the context of interim applications, would run contrary to the spirit, at least, of the decision in *Masri*. If there is to be a general power to serve proceedings out of the jurisdiction to assist the enforcement of an English judgment debt, that is a matter for the Rules Committee.
275. Put another way, the criteria of “necessary or proper party” cannot be applied in the abstract, but by reference to the “real issue which it is reasonable for the court to try” against the anchor defendant. If that interpretation of gateway (3) is no longer available, at least at first instance, then the absence of any common issue to be investigated and determined at a hearing involving both the anchor defendant and the NCAD would be a factor strongly weighing against the grant of permission at the discretionary stage.
276. Further, in my view, Mr Trotter’s approach would be too all-encompassing. It would seem to mean that service out would be possible in all *Chabra* cases, where the NCAD is usually joined (cf *TSB Private Bank v Chabra* [1992] 1 WLR 231, 238). NCAD’s who are the subject of costs orders under s.51 of the Senior Courts Act 1981 are usually joined to the proceedings (*Symphony Group Plc v Hodgson* [1994] QB 179, 193) which would suggest that the “necessary or proper party” gateway is always, in principle, available for such applications. However, in *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd. (No. 2)* [1999] 2 Lloyd’s Rep 621, 627-28, Rix LJ stated:
- “there might at first blush always seem to be O. 11 jurisdiction under sub-r. (1)(c) – ‘necessary or proper party.’ Since, however, the joinder is only for the purpose of costs and not in respect of any substantive cause of action, it is not at



all clear to me that such use of O. 11 is within the rationale of *The Siskina*, [1979] A.C. 210 or *Mercedes-Benz A.G. v Leiduck*, [1996] A.C. 284. Moreover, R.S.C., O. 11, r. 4(1)(d) requires that in the case of sub-r. (1)(c) the applicant must provide evidence of grounds for the belief -

. . .that there is between the claimant and the person on whom a claim form has been served a real issue which the claimant may reasonably ask the court to try.

That may work in the (unusual) case where the non-party has been joined for the purpose of costs at a stage in the proceedings before trial. Once, however, judgment with costs has been given against the party served within the jurisdiction, it is by no means clear to me how any applicant could bring himself within r. 4(1)(d), for there is no longer any issue, not even one regarding costs, for trial involving that party.”

277. On appeal, the Court of Appeal found that service out had to be effected pursuant to the court’s inherent jurisdiction ([2000] 1 Lloyd’s Rep 129) and a specific gateway – gateway (18) – was subsequently introduced.
278. Further, it is noteworthy that in *C Inc v L*, Aikens J did not regard the issue of joinder as determinative of the issue of jurisdiction: see [248] above.
279. In my view, the principle which best fits with the cases, and best reconciles the application of Part 6B to applications as well as claims and to applications for procedural as well as substantive relief (given CPR 6.39 and *Gorbachev v Guriev*), while maintaining the spirit of a gateway which allows considerations of efficient dispute management to override the usual requirement for some form of territorial nexus before proceedings can be served out of the jurisdiction, is that there needs to be an issue arising as between the claimant and an anchor defendant, even if in a procedural context, which also arises as between the claimant and the NCAD and which will be the subject of investigation and determination for both at the same hearing:
- i) In *C Inc v L*, Aiken J referred to the dispute as to whether a receiver should be appointed. That embraced the issue of whether Mrs L had a right to an indemnity over Mr L over which the receiver could be appointed. Had there been a hearing involving Mrs L which determined that there was such a right of indemnity, and then Mr L had resisted enforcement by the receiver on the basis that there was not, there would have been an obvious risk of inconsistent judgments (as well as the duplication of resources arising from trying the same issue twice in two jurisdictions).
  - ii) In *Belletti*, [39], Flaux J contemplated a scenario in which “the first defendant (or the parents) were to contend that the relevant assets in Monaco were in truth their assets and not their son’s, at that stage the court might order an issue to be tried” at which point he appeared to accept that there would be a “‘claim’ to be tried.”
  - iii) That is exactly the common issue which arose in *Ablyazov*, and which Field J did order to be tried with the involvement of the NCAD.

280. The following further factors also need to be considered:

- i) First, there must actually be a common issue to be investigated as against the anchor defendant and the NCAD. The mere possibility that such an issue might arise at some point cannot be sufficient. As Males J observed in *Cruz City*, [84]:

“the mere possibility that such issues may arise in the future, for example if there is a dispute about any particular step which the receivers require Unitech to take, is not enough to establish jurisdiction now against the Chabra defendants. Since there is no such real issue requiring to be tried, the Chabra defendants cannot be necessary or proper parties to the trial of that claim.”

See also *Belletti*, [39].

- ii) If there is to be a hearing of a “live” issue against the anchor defendant, an issue arises as to the significance of the fact that the anchor defendant is not actually engaging with the proceedings (cf *Ablyazov*). In the context of a substantive claim, this issue was discussed in *Erste Group Bank AG v JSC (VMZ Red October)* [2015] EWCA Civ 379, in which it was suggested that if the anchor defendant is unlikely to defend the claim, it is unlikely that there will be a real issue between the claimant and the anchor defendant which it is reasonable for the court to try ([78] and [136]). However, there may be reasons why, even in a case with a non-engaging anchor defendant, it is reasonable to ask the court to determine an issue and bind the anchor defendant and the NCAD to its outcome, e.g. as to the ownership of property (*Satfinance Investment Ltd v Athena Art Finance Corpn* [2020] EWHC 3527 (Ch), [92]-[94]) or for reasons of enforcement (as suggested in *Lakatamia Shipping Co v Su* [2024] 1 WLR 746, [87]).
- iii) If the relevant issue is being determined against the anchor defendant in a hearing which will take place without the NCAD’s involvement (as in *Cruz City*) the requirements of gateway (3) are unlikely to be satisfied.
- iv) The extent of the NCAD’s participation will be defined by reference to the issues satisfying the gateway (3) requirements, and to the extent that further relief is sought against the NCAD, it will be necessary to show a separate jurisdictional justification for those additional claims: *Ablyazov* in the Court of Appeal.

#### *The position in this case*

281. Applying these principles to the present proceedings, I am not satisfied that the application for the NCAD WWFO can be served out of the jurisdiction under gateway (3), and in any event I am not satisfied that it would be appropriate for the court to exercise its discretion to permit service out on this basis:

- i) The proceedings to which the NCAD WWFO relates are proceedings to enforce a foreign judgment, in which judgment has been entered in these proceedings on that judgment. With the exception of the Bridge Properties, which have now been returned to the possession of the BVI Companies, there is no evidence of any assets in this jurisdiction against which the Bank Sharjah Judgment might

be enforced (and indeed the Bridge Properties ceased to be objects of even indirect enforcement by the Bank when it acquired the BVI Companies).

- ii) There appear to be no live post-judgment applications in this jurisdiction against the Al Sari defendants to which D10 is a necessary or proper party, and there was no attempt to justify the application for permission to serve out by reference to any such application. Indeed, there is no evidence of ongoing enforcement activity in this jurisdiction at all.
- iii) I do not accept that the mere possibility that such issues might arise in the future is sufficient for the court to grant permission to serve out on this basis.
- iv) In any event, on the basis of the material before the court, it is highly unlikely that the Al Saris will engage in the post-judgment phase of the English proceedings – in Mr Peto KC’s words, “they have dropped out of these proceedings”, and they would face a two year prison sentence for contempt if they did come to this jurisdiction.
- v) The real purpose of the application was, in my view, revealed by Mr Peto KC’s submission at the close of the case that I could confine any order in the first instance to one for disclosure of assets. However, as free-standing relief on a *Chabra*-basis (in contrast to the position on the Conduct WWFO), I am not persuaded that gateway (3) is applicable merely because the information is sought to support the enforcement of what is now a judgment debt of this court.

***Permission to serve out: Discretion***

282. If, contrary to my determination in the preceding paragraph, the NCAD WWFO application could be brought within the letter of gateway (3), I am not satisfied that it would be appropriate for the court to exercise its discretion to grant permission to serve the application out of the jurisdiction, essentially for the reasons I have given in [281]. The links between this case and the English court are limited, the *Chabra*-relief being sought in relation to a “meta-judgment” against a now non-engaging judgment debtor, in circumstances in which there is no evidence of any realistic ongoing enforcement activity in this jurisdiction, and in which the real purpose of the application is to obtain information about assets elsewhere.

**THE AMENDMENT APPLICATION**

283. Subject to the issues raised and dealt with above, I did not understand there to be any independent opposition to the application for permission to amend in the final iteration placed before the court. The draft will now need to address my findings in this judgment, including where I have indicated greater clarity is required, and incorporate the case on loss put forward in affidavit evidence. If there remain any outstanding objections to that final version, they will have to be dealt with at the consequential hearing. That includes those matters referred to in PCB’s email of 15 August 2024, to the extent that they remain live.

284. However, both parties accepted that any amendment should be on terms which preserve the parties’ existing limitation arguments for trial (both whether the amendments introduce any new causes of action and if so, whether they arose out of the same, or

substantially the same, facts and matters as are already in issue). To the extent that the amendments introduce new causes of action which do not benefit from “relation back”, the parties are asked to agree that they will be treated as having been commenced for limitation purposes on the date the relevant draft was provided to the PCB Defendants.

## **CONCLUSION**

285. That concludes the issues raised by this interim applications hearing to the extent they can fairly be decided at this point. The parties will need to work out the cumulative effect of my findings so far and are asked to seek to narrow any consequential issues.
286. There will need to be a further hearing of two days to address the outstanding points. The parties are asked to arrange for transcripts to be made of that hearing.
287. Neither party should regard the fact of the further hearing as an opportunity to adduce further evidence. Its sole purpose is to provide the time which was not available at this hearing for sufficient oral submissions on certain points.