

THE HIGH COURT

COMMERCIAL

[2022] IEHC 167

[2016 No. 9981 P.]

BETWEEN

**TRAFALGAR DEVELOPMENTS LIMITED, INSTANTANIA HOLDINGS
LIMITED, KAMARA LIMITED AND BAIRIKI INCORPORATED**

PLAINTIFFS

AND

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

DEFENDANTS

(CHALLENGE TO JURISDICTION BY UCCU DEFENDANTS)

JUDGMENT of Mr. Justice David Barniville delivered on the 24th day of March,

2022

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A. Introduction

(1) The Application the Subject of this Judgment

1. This is my judgment on an application brought by five of the defendants in these commercial proceedings (referred to as the “UCCU defendants”) for various different orders on jurisdiction related grounds.
2. The orders sought are as follows. First, an order under O. 12, r. 26 (a) discharging an order made by the High Court (McDermott J.) on 7 November 2016 which gave liberty to the plaintiffs to issue and serve notice of the proceedings on a number of the defendants, including the first, second, sixth and tenth defendants (the “Russian UCCU defendants”) at various addresses in Russia and by various different methods and (b) setting aside service of the notice of the proceedings on those defendants, on the grounds that the plaintiffs’ claim does not fall within O.11, r.1(h) and that the case is not a proper one for service out of the jurisdiction. Second, an order pursuant to O. 12, r. 26 RSC setting aside service of the proceedings on the third defendant, Uralchem Holding Plc (“Holdings”), a Cypriot company, which is one of

the UCCU defendants, on the ground that the court does not have jurisdiction to hear and determine the plaintiffs' claim against that defendant under the terms of Art. 8(1) of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 (the "Recast Brussels Regulation"). Third, an order dismissing the proceedings on the grounds that the court does not have jurisdiction to hear and determine the plaintiffs' claim against the UCCU defendants. Fourth, an order setting aside the order of 7 November 2016 and service of notice of the proceedings on the Russian UCCU defendants on the grounds that the court ought not to have permitted service other than in accordance with the Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters (15 November 1965) (the "Hague Service Convention" or the "Convention"), that the purported service of notice of the proceedings on the Russian UCCU defendants in Russia was not in compliance with the Convention and that the order, and such service, should be set aside on that basis.

(2) The Proceedings: Brief Overview

3. The UCCU defendants' application is made in proceedings which were commenced by the plaintiffs in the High Court in November 2016 against eleven defendants, five of whom have brought the application the subject of this judgment. The Russian UCCU defendants are individuals based in Russia and a Russian company. The other UCCU defendant is Holdings, a Cypriot company. The other defendants in the proceedings include the fourth defendant, Eurotoaz Limited ("Eurotoaz"), an Irish company and the fifth defendant, Mr. Babichev who is a director of Eurotoaz who resides in Russia. The remaining defendants include two other individuals based in Russia: the sixth defendant, Ms. Bolotnikova, and the eleventh defendant, Mr. Sedykin. The seventh defendant, Belpport Investments

Limited (“Belport”), is a British Virgin Islands company (“BVI”). The eighth defendant, Mr. Minkovski, is based in Bulgaria. The ninth defendant, Ms. Charilaou, is based in Cyprus.

4. The plaintiffs are all companies incorporated in various different jurisdictions in the Caribbean. Two of the plaintiffs, the first and fourth plaintiffs, Trafalgar Developments Limited (“Trafalgar”) and Bairiki Incorporated (“Bairiki”) have purported to re-domicile themselves from one Caribbean jurisdiction to another in the course of the proceedings. The plaintiffs have sought to amend the proceedings to reflect those developments. I heard the plaintiffs’ amendment application in February 2021. On 30 July 2021, I informed the parties that I had decided to grant the plaintiffs’ application on terms that the plaintiffs produced a more detailed and fully pleaded Second Amended Statement of Claim to plead more fully the steps taken in the re-domiciliation process relied upon by the plaintiffs.

5. Very briefly stated for the purpose of this introduction, the proceedings concern an alleged scheme in which the plaintiffs claim the defendants are co-conspirators and which it is alleged is intended wrongly to divest the plaintiffs of their shares, or the benefit of their shares, in a company incorporated in the Russian Federation called OJSC Togliattiazot (“ToAZ”) for the benefit of the first defendant, Mr. Mazepin. The plaintiffs claim that ToAZ is the largest producer of trade ammonia in Russia and one of the largest producers and exporters of ammonia in the world. The plaintiffs claim that as of the date of the commencement of the proceedings, they owned in excess of 70% of the shares in ToAZ. Mr. Mazepin is alleged to be the ultimate beneficial owner and controller of the second defendant, OJSC United Chemical Company Uralchem (“UCCU”), another company incorporated in Russia, whose business is the production and sale of chemical products, including ammonia and ammonia-based

products. It is alleged that UCCU is a direct competitor of ToAZ, that it acquired a minority shareholding in ToAZ in 2008 and that, as of the commencement of the proceedings, it held approximately 9.9% of the issued share capital of ToAZ.

6. The plaintiffs claim that the alleged scheme is in the nature of a “raider attack”, the purpose of which is to defraud the plaintiffs of their shares in ToAZ and that it has a number of different manifestations.

7. A series of allegations are made against the fourth and fifth defendants, Eurotoaz and Mr. Babichev. It is claimed that they have been involved in a campaign of vexatious civil and criminal litigation in Russia in support of a claim by Eurotoaz that it is entitled to a percentage shareholding in ToAZ.

8. The plaintiffs claim that UCCU, and various of the other defendants, including the Russian UCCU defendants, embarked on a campaign of vexatious civil and criminal litigation against ToAZ and its officers in furtherance of the alleged scheme in which freezing orders were made in respect of the plaintiffs’ shares in ToAZ and certain officers of ToAZ were detained and suspended from their positions. Serious threats are also alleged to have been made by and on behalf of the first defendant, Mr. Mazepin.

9. The plaintiffs claim that the acts in furtherance of the alleged scheme are ongoing in Russia and have sought separate anti-enforcement relief in respect of steps taken in Russia following a judgment of Judge Kirillov of the Komsomolsky District Court in July 2019. I have heard that application and have reserved judgment.

10. It can be seen, therefore, that the plaintiffs claim that the Russian UCCU defendants and Eurotoaz/Mr. Babichev are parties to a conspiracy and that they have suffered loss, including the *de facto* expropriation of their shares in ToAZ, the loss of

dividends, and the loss in value attributable to their ToAZ shares as a consequence of the acts complained of.

(3) Jurisdiction Issues: Overview

11. The plaintiffs have asserted that the High Court has jurisdiction in relation to its claims against the various defendants, including the UCCU defendants. With respect to the Russian UCCU defendants, the plaintiffs sought and obtained an order from the High Court (McDermott J.) on 7 November 2016 permitting service of the proceedings in Russia on the Russian UCCU defendants pursuant to O.11, r.1(h). The plaintiffs claim that the High Court has jurisdiction in relation to their claims against Holdings, the Cypriot company, pursuant to Art. 8(1) of the Brussels Recast Regulation.

12. Central to the plaintiffs' claim that the High Court has jurisdiction in respect of all of the UCCU defendants is the fact that it has made claims in the proceedings against Eurotoaz, an Irish company, which the plaintiffs have sued as a right pursuant to Art. 4 of the Recast Brussels Regulation.

13. The plaintiffs maintain that the Russian UCCU defendants are necessary and proper parties to the action which they say is properly brought against Eurotoaz which has been duly served with the proceedings within the jurisdiction and that the Court had the power to and properly exercised its discretion to allow service of the proceedings on the Russian UCCU defendants in Russia pursuant to O.11, r.1(h).

14. With respect to Holdings, the Cypriot company, the plaintiffs claim that the High Court has jurisdiction in respect of their claim against that defendant under Art. 8(1) of the Recast Brussels Regulation on the basis that Holdings is a co-defendant with Eurotoaz and that the claims made against Holdings and Eurotoaz are "*so closely*

connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

15. The UCCU defendants maintain on this application that, insofar as the Russian UCCU defendants are concerned, those defendants are not necessary or proper parties to the proceedings brought against Eurotoaz, that the plaintiffs did not at the time of the *ex parte* application, and have not now, demonstrated a good arguable case in relation to its claims against Eurotoaz and against the Russian UCCU defendants and/or in relation to its claim that the jurisdictional gateway under O.11, r.1(h) applies, that the joinder of Eurotoaz to the proceedings is a “*mere device*” to attempt to establish jurisdiction against the Russian UCCU defendants and that the plaintiffs have failed to demonstrate that this was and is a proper case to permit service out of the jurisdiction for various reasons. Among those reasons are that the plaintiffs have sought to impugn or call into question decisions of the Russian Courts and Russian administrative and regulatory authorities in a manner which offends the doctrine of “*act of state*” and that the court should in the exercise of its discretion, for various reasons, have refused to permit service out of the jurisdiction. As a consequence, they maintain that the order of 7 November 2016 permitting such service and the service itself should be set aside.

16. With respect to the plaintiffs’ claim against the third defendant, Holdings, the Cypriot company, the UCCU defendants contend that the High Court does not have jurisdiction in respect of the plaintiffs’ claim against that defendant under Art. 8(1) of the Recast Brussels Regulation. They maintain that the claims made by the plaintiffs in the proceedings against Holdings and against Eurotoaz are not so closely connected such that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments and that the plaintiffs have abused Art. 8(1), in

circumstances where the sole object of the joinder of Eurotoaz was to remove Holdings from the jurisdiction to which it would otherwise be subject, namely, Cyprus, in circumstances where no sustainable case has been demonstrated by the plaintiffs as against Eurotoaz when assessed in accordance with the requisite standard, which they maintain is that set out by the Supreme Court in *Ryanair Limited v. Billigfluege. de GmbH* [2015] IESC 11 (“*Ryanair*”).

17. The UCCU defendants further contend that service of the proceedings which was purported to be effected on the Russian UCCU defendants in Russia in accordance with the order made on 7 November 2016 was not in accordance with the Hague Service Convention and that the court should not have permitted service in that manner. They maintain, therefore, that although the proceedings may in fact have been served, such service was not valid and should be set aside.

18. In response, the plaintiffs maintain that the burden of proof rests on the UCCU defendants to demonstrate that the order of 7 November 2016 permitting service upon the Russian UCCU defendants in Russia was not properly made under O.11, r.1(h). The plaintiffs maintain that they had clearly demonstrated a good arguable case, both on the merits of their claims against Eurotoaz and against the Russian UCCU defendants, as well as demonstrating a good arguable case that the claims fell within the jurisdictional gateway under O.11, r1(h) and that the Russian UCCU defendants are necessary and proper parties to the action brought against Eurotoaz in the High Court. They reject the contention that the joinder of Eurotoaz is a “*mere device*” designed to secure jurisdiction in respect of its claims against the Russian UCCU defendants. They further contend that, for various reasons, including the fact that many of the important witnesses on the plaintiffs’ side would be unable to travel to Russia for any trial by reason of the threats, detention orders and other events alleged

in the proceedings and the serious procedural disadvantages to which the plaintiffs would be subject were it required to bring the case in Russia justice requires that they be permitted to litigate their claim against the Russian UCCU defendants in Ireland, and that the case is, therefore, a proper one for service out of the jurisdiction for the purposes of O.11, Rules 2 and 5. The plaintiffs dispute the applicability of the doctrine of “*act of state*” and contend, in any event, that their case is not dependent on establishing that decisions of the Russian courts or of Russian administrative and regulatory authorities are unlawful but rather the cause of action which they assert against the defendants is conspiracy which could involve lawful and/or unlawful acts. In the alternative, they assert that it would be inappropriate for the court to resolve the disputed application of the “*act of state*” doctrine to the facts of this case on an interlocutory application such as this and that that issue should be left to the trial.

19. With respect to the claims against Holdings, the plaintiffs maintain that the High Court has jurisdiction under Art. 8(1) of the Recast Brussels Regulation. They contend that, on the pleaded case and on the evidence they have demonstrated, to the required standard, that Art. 8(1) applies and that the sole object of the joinder of Eurotoaz was not to remove Holdings from the jurisdiction of its domicile and to subject it to the jurisdiction of the Irish courts.

20. With respect to the UCCU defendants’ claims concerning the failure to comply with the Hague Service Convention, the plaintiffs maintain that the High Court (McDermott J.) was entitled, on the basis of the evidence before him on the *ex parte* application, to make an order under O.10, r. 1 permitting service of the proceedings on the Russian UCCU defendants in the manner directed, notwithstanding the terms of the Convention. They further maintain that the evidence before the Court on this application supports the correctness of the order made by the court. They contend that

it is open to the court to permit service of proceedings, other than in a manner permitted by the Convention, in certain circumstances, including those which pertain in this case, having regard to the likely delays in effecting service and the real risk of interference by the Russian authorities in the event that service were required to be effected under the Convention. They say, in any event, that the proceedings were in fact actually served on the Russian UCCU defendants who have been well aware of the proceedings, both from such service and from the involvement of a number of them in separate proceedings in aid of these proceedings which were brought in the courts of Cyprus. They maintain, therefore, that the Russian UCCU defendants have not been prejudiced by the manner in which the proceedings were served and that it is open to the court to make an order, and the court should make an order, under O.9, r.15 deeming the service actually effected good and sufficient service on them.

(4) Other Issues Including Preliminary Objections

21. This is a very broad brush and high-level summary of the principal contentions of the relevant parties on this application. I expand in much greater detail on the arguments advanced by the parties in the body of this judgment.

22. I also deal with various preliminary objections made by both sides. For example, the plaintiffs contended that the UCCU defendants should be precluded from maintaining this application by reason of their delay in bringing it and that the court should dismiss their application *in limine*.

23. The plaintiffs further contended that the UCCU defendants were precluded from maintaining this application by reason of the judgment of the High Court (Haughton J.) on an application brought by Eurotoaz and Mr. Babichev for orders dismissing or striking out the claims' against them pursuant to O.19, r.28 or, alternatively, pursuant to the inherent jurisdiction of the Court on the grounds that those claims were (*inter*

alia) unsustainable and bound to fail and an application brought by Mr. Babichev for an order staying the action against him on the grounds of *forum non conveniens*. The High Court (Haughton J.) dismissed those applications in a judgment delivered on 23 November 2017 (which bears the neutral citation [2017] IEHC 721). Eurotoaz and Mr. Babichev appealed to the Court of Appeal from the refusal by Haughton J. to dismiss or strike out their claim. The Court of Appeal dismissed the appeal in a judgment delivered for that Court by Costello J. on 18 July 2019 (which bears the neutral citation [2019] IECA 218). The Supreme Court subsequently refused to grant leave to appeal in a determination dated 20 January 2020 (neutral citation [2020] IESCDET 1). The plaintiffs contended that the UCCU defendants were precluded from maintaining any challenge to the validity or sustainability of the plaintiffs' claim against Eurotoaz by reason of the conclusions reached by Haughton J. in his judgment (as subsequently upheld by the Court of Appeal).

24. The UCCU defendants also raised a preliminary objection to the material on which the plaintiffs relied in their response to the UCCU defendants' application. They objected to the late delivery of certain affidavits and expert reports and to what they claimed was the hearsay nature of the material relied upon by the plaintiffs.

25. For reasons which I set out briefly in this judgment, I concluded that I ought not accede to any of these preliminary objections. I concluded that, while the UCCU defendants had been guilty of substantial delay in bringing their application, and while that delay is a factor which should be taken into account and weighed up in the balance when the Court comes to consider whether to exercise its discretion to permit service out of the jurisdiction, it is not such as to require the Court to dismiss the UCCU defendants' application *in limine*. I also concluded that the findings made by Haughton J. in his judgment on the application by Eurotoaz and by Mr. Babichev do

not preclude the UCCU defendants from seeking to attack the case made by the plaintiffs against Eurotoaz in support of their challenge to jurisdiction under O. 11, r. 1 and under Art. 8(1) of the Recast Brussels Regulation.

26. In addition, I have also concluded that the defendants' objection to the late delivery of affidavits should not be sustained. I was and am satisfied that there were good reasons for the late delivery of the affidavits, that the UCCU defendants were afforded ample time to respond to those affidavits and that they were not in any prejudiced by the late arrival of the affidavits. Nor was I satisfied that their objection on hearsay grounds should be sustained. I was satisfied that the plaintiffs adduced ample direct evidence for the purpose of this application and that it would be grossly unfair on the plaintiffs to accede to the UCCU defendants' objection on hearsay grounds.

B. Decision on UCCU Defendants' Application: A Summary

27. I informed the parties of my decision on the UCCU defendants' application on 30 July 2021. As will be apparent from the procedural history, several events intervened between the conclusion of the hearing of that application and my decision. For reasons set out in detail in this judgment, I have refused the UCCU defendants' application.

(1) Order 11 RSC: Jurisdiction re Russian UCCU Defendants

28. With respect to the Russian UCCU defendants' and the leave granted by the High Court to permit service out of the jurisdiction on those defendants under O. 11, r. 1(h), I am satisfied that the plaintiffs, on whom the burden of demonstrating the applicability of O. 11, r. 1(h) in the case of their claims against the Russian UCCU defendants lies, have demonstrated to the required standard of a "good arguable case"

(a) that the jurisdictional gateway provided for by O. 11, r. 1(h) applies to its claims against those defendants, (b) that the Russian UCCU defendants are necessary and proper parties to the action properly brought by the plaintiffs against Eurotoaz, (c) that the plaintiffs' joinder of Eurotoaz was not a '*mere device*' to secure jurisdiction in respect of their case against the Russian UCCU defendants and (d) that this was and is, in all the circumstances, a proper case to permit service of the proceedings outside the jurisdiction on the Russian UCCU defendants.

29. I have reached that latter conclusion for several reasons. I am not satisfied that the plaintiffs' claim against the Russian defendants is, at this stage at least, precluded by reason of any "*act of state*" or related doctrine and I believe the ultimate resolution of that issue is a matter for the trial judge. In the event that it is necessary for me to resolve that question, I am satisfied that the "*act of state*" doctrine should not preclude the Irish courts from hearing the plaintiffs' claims against any of the defendants, including the Russian UCCU defendants.

30. I am also satisfied that the plaintiffs have demonstrated that, notwithstanding many connecting factors with Russia, justice nonetheless requires that the proceedings against the Russian UCCU defendants be heard in Ireland.

31. My reasons for so concluding include the fact that the plaintiff will, in any event, be proceeding with their claims in the Irish Courts against Eurotoaz, Mr. Babichev and Ms. Charilaou and against Belpport and Mr. Sedykin, against whom judgment in default of appearance was granted by the court in a judgment I delivered on 17 January 2019 (neutral citation [2019] IEHC 7). If compelled to bring their claim against the Russian UCCU defendants in Russia, the plaintiffs' case in conspiracy will be fragmented, with part of its claim in conspiracy proceeding in Ireland and part in Russia. This is a significant factor to weigh into the balance. Further considerations

include the fact that many of the plaintiffs' witnesses will be unable to travel to Russia for any trial, and that the plaintiffs' case against the defendants, including the Russian defendants, is brought in conspiracy where the plaintiffs' inability to obtain relevant documents and to cross examine relevant witnesses would substantially impede their ability to pursue their case were they required to do so in the Russian courts. To require them to do so would, in my view, not serve the interests of all the parties and the ends of justice. I am satisfied, therefore, that the High Court (McDermott J.) correctly exercised its discretion to allow the plaintiffs to issue and serve notice of the proceedings outside the jurisdiction on the Russian UCCU defendants under O. 11, r. 1(h).

(2) Art. 8(1) Recast Brussels Regulation: Jurisdiction re Holdings

32. I am also satisfied that the plaintiffs have demonstrated, to the required standard, that the High Court has jurisdiction in relation to their claim against Holdings, the Cypriot company, under Art. 8(1) of the Recast Brussels Regulation. I am persuaded that the plaintiffs' claims against Eurotoaz and Holdings are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings in Ireland and Cyprus. I am also satisfied that the plaintiffs' reliance on Art. 8(1) is not an abuse of that provision or of other provisions of the Recast Brussels Regulation, such as Art. 4, and that, insofar as it is necessary that I be so satisfied, it has not been demonstrated that the plaintiffs' joinder of Eurotoaz was with the sole object of removing Holdings from Cyprus, the jurisdiction of its domicile. I have concluded, therefore, that the High Court clearly has jurisdiction in respect of the plaintiffs' claim against Holdings under Art. 8(1) of the Recast Brussels Regulation.

(3) Hague Service Convention

33. With respect to the UCCU defendants' complaints arising from the service of the proceedings on the Russian UCCU defendants other than in accordance with the provisions of the Hague Service Convention, I am satisfied that service was actually effected on the Russian UCCU defendants in compliance with the terms of the Order of the High Court (McDermott J.) of 7 November 2016. I have also concluded that the plaintiffs provided good and sufficient reasons to McDermott J. to enable him properly to exercise his discretion to make an order permitting substituted service of the proceedings on the Russian UCCU defendants other than in accordance with the Convention. I am satisfied that it was open to the court to make an order for substituted service on those defendants under O. 10, r. 1 and that service by the methods directed was not precluded by O. 11E, r. 2(2) or by any of the case law relied upon by the UCCU defendants. In my view, the plaintiffs provided sufficient information to the High Court in their *ex parte* application for permission to serve the proceedings outside the jurisdiction on the Russian UCCU defendants to enable the court properly to exercise its discretion to permit service other than in accordance with the Hague Convention, having regard to the potential likely delay in effecting service in accordance with the Convention together with the real risk of interference by the Russian authorities with service were it required to be effected in the manner provided for under the Convention.

34. In any event, I am satisfied on the basis of the evidence provided by the plaintiffs, including the affidavits of service provided by them, that the Russian UCCU defendants have in fact been served with the proceedings and that, on the particular facts of this case, it is undoubtedly appropriate to make an Order pursuant to O. 9, r. 15 deeming such service sufficient.

35. In those circumstances, as I informed the parties on 30 July 2021, I refuse the UCCU defendants' application in its entirety. I set out my reasons in full for that decision in the judgment that follows here.

(4) Other Relevant Matters

36. As will be apparent from the description of the events relevant to the UCCU defendants' application, this judgment is given in circumstances where almost immediately after the hearing of the UCCU defendants' application, an application was brought by the plaintiffs for interlocutory injunctive relief which was in the course of being heard by me before being compromised by the parties in June 2019 and where a further application seeking anti-enforcement relief in circumstances with a judgment handed down in Russia was brought by the plaintiffs in 2020 which was heard over the course of several weeks in February/March 2021 on which judgment was reserved and remains to be delivered by me.

37. I should make clear that my decision on the UCCU defendants' application is on the basis of the factual position as set out in the affidavits sworn and submissions made for the purposes of that application and, save where absolutely necessary, I avoid commenting on matters which are the subject of further evidence generated in the course of the subsequent applications to which I have alluded. I should also make clear that there were on this application numerous affidavits, expert reports and exhibits, which included the affidavits arising on the applications by Eurotoaz and Mr. Badachev seeking the dismissal of the proceedings and, in the case of Mr. Badachev, seeking a stay on grounds of *forum non conveniens*. It is important to stress, as the courts here and elsewhere, including the Courts of England and Wales and the Court of Justice of the European Union ("CJEU"), made clear, applications such as this are not and should not degenerate into state trials or mini-trials and the court should

endeavour to ensure that they do not and should avoid being drawn into making findings and resolving disputed issues unless the resolution of those issues is very clear and is absolutely necessary for the purposes of determining the issues arising on the application.

38. Having set out in very high-level terms the nature of the application and the Court's conclusions on that application, I now outline the overall structure of my judgment.

C. Structure of Judgment

39. Having just provided an overview of the UCCU defendants' application and my decision in that application, I propose to adopt the following structure in this judgment. I will first set out a brief description of the parties. I will then provide a description of the plaintiffs' claims against the various defendants as they appear in the amended statement of claim (noting, of course, that the plaintiffs and, to a lesser extent, the UCCU defendants have adduced additional relevant evidence for the purposes of this application). I will then set out the relevant steps in the complex procedural history of the proceedings, starting with the plaintiffs' *ex parte* application for leave to issue and serve the proceedings outside the jurisdiction on the Russian UCCU defendants in November 2016 and continuing up to and including the present application, making brief reference to the subsequent applications brought by the plaintiffs to which I have just referred. I will then address the preliminary objections raised by the plaintiffs and by the UCCU defendants in respect of this application.

40. Following that I will turn to the UCCU defendants' application and its various component parts, starting with that part of the application which seeks to set aside the order made by the High Court (McDermott J.) on 7 November 2016 giving liberty to the plaintiffs to issue and serve notice of the proceedings on the Russian UCCU

defendants in Russia under O. 11(the “Order 11 issue”). In that part of the judgment, I will consider several sub-issues, including where the burden of proof lies on an application such as this, the standard of proof applicable to various aspects of the application, the evidence adduced by the plaintiffs in respect of the application in support of their claim that the case falls within O. 11, r. 1(h), the “*act of state*” doctrine and its relevance to the present application and then whether this is a proper case in which to permit service outside the jurisdiction.

41. I will next turn to consider that part of the UCCU’s defendants’ application which seeks to challenge the plaintiffs’ reliance on Art. 8(1) of the Recast Brussels Regulation to found jurisdiction in respect of their claim against Holdings (the “Art. 8 issue”).

42. Finally, I will address the UCCU’s defendants’ objection to service on the Russian UCCU’s defendants based on the Hague Service Convention and their contention that such service was invalid as having been purportedly effected in a manner which did not comply with the provisions of that Convention.

D. The Parties

43. The plaintiffs are all companies incorporated in various different jurisdictions in the Caribbean. The plaintiffs claim together to own approximately 70% of the shares in ToAZ. ToAZ is a company incorporated in Russia. It is involved in the production and sale of mineral based fertilisers and is one of the world’s largest producers and exporters of ammonia.

44. At the time of the commencement of the proceedings, it was that the first plaintiff (Trafalgar) was a company incorporated in Anguilla. It has since purported to change its domicile and to migrate to St. Lucia. It is claimed that Trafalgar owns 15.95% of the shares in ToAZ.

- 45.** The second plaintiff (Instantania Holdings Limited (“Instantania”)) is a company incorporated in the BVI and claims to own 18.75% of the shares in ToAZ. The third plaintiff (Kamara Limited (“Kamara”)) is a company incorporated in St. Lucia and claims to own 19.9% of the shares in ToAZ. The fourth plaintiff (Bairiki) was incorporated in Nevis and has since purported to change its domicile and to migrate to the BVI. It claims to own 16.8% of the shares in ToAZ.
- 46.** An application by the plaintiffs to amend the proceedings in order to give effect to the alleged migration or re-domicile of Trafalgar and by Bairiki was issued by the plaintiffs in June 2020 and was heard by me in February 2021. I informed the parties that I was acceding to that application on terms outlined by me on 30 July 2021.
- 47.** The beneficial owners of the plaintiff companies are said to be Russian individuals, including Vladimar Makhelai and Sergei Makhelai.
- 48.** The first defendant, Mr. Mazepin, is described in the Amended Statement of Claim as a Belarus born Russian businessman and the ultimate beneficial owner and controller of the Uralchem Group. The second defendant (UCCU) is a company registered in the Russian Federation involved in the business of producing and selling chemical products, including ammonia and ammonia-based products. It is alleged to be a direct competitor of ToAZ and acquired a minority shareholding in ToAZ in 2008. As of the date of the commencement of the proceedings, UCCU was said to hold approximately 9.9% of the shares of ToAZ. It is alleged by the plaintiffs that UCCU has conducted a campaign of vexatious litigation against ToAZ in Russia in furtherance of an alleged scheme to damage and injure the plaintiffs.
- 49.** The third defendant (Holdings) is a company registered in Cyprus and is alleged to be the holding company of UCCU. The plaintiffs plead that the ultimate beneficial owner and director of Holdings is Mr. Mazepin. He is said to be the controlling mind

and will of Holdings. It is alleged that Holdings has knowledge of and is a party to the alleged scheme the subject of the proceedings and that it has caused or permitted UCCU to carry out the alleged unlawful and improper acts in furtherance of that scheme.

50. The fourth defendant is Eurotoaz and, as noted earlier, it is a company incorporated in Ireland. The plaintiffs claim that it has been central to the alleged scheme and has conducted a campaign of vexatious litigation based on false or sham evidence in furtherance of a claim that it holds or is entitled to payment of dividends in respect of 4.4% or 8.806% of the issued shares in ToAZ. The plaintiffs claim that it is to be inferred, based on facts and matters set out in the amended statement of claim and on the basis of an alleged admission, that Mr. Mazepin owns and controls Eurotoaz. The fifth defendant is Mr. Babichev. He was appointed a director of Eurotoaz in December 2011. It is alleged that he was the person responsible for submitting evidence to the Russian authorities in support of the alleged campaign of vexatious litigation allegedly undertaken by Eurotoaz. He resides in Russia and is alleged to be a business associate of Mr. Mazepin. Following various initial procedural and other objections, Eurotoaz and Mr. Babichev have delivered full defences to the plaintiffs' claims.

51. The sixth defendant (Ms. Bolotnikova) is also a resident of Russia. She is alleged to be a lawyer and Head of the Contract Department in the Legal Administration section of UCCU. It is alleged that she has also described herself as an "*attorney for Eurotoaz*" in other Irish proceedings brought by ToAZ against Eurotoaz (which proceedings were discontinued by ToAZ in circumstances set out in a judgment delivered by the High Court (Noonan J.) on 3 May 2019 (neutral citation [2019] IEHC 342)). It is alleged that Ms. Bolotnikova gave evidence for UCCU in

civil proceedings brought by it and in criminal proceedings instigated by UCCU against ToAZ which are described in the amended statement of claim.

52. The seventh defendant, Belport, is a company registered in the BVI but alleged by the plaintiffs to be operating from Cyprus. It is alleged that Belport was the counterparty to an alleged false share purchase agreement entered into with UCCU. Judgment in default of appearance was granted against Belport on 17 January 2019 together with various ancillary orders in aid of execution. The damages (if any) payable by Belport are to be assessed at a later stage. The circumstances in which and the reasoning for the grant of such judgment against Belport are set out in a written judgment I delivered on 17 January 2019 (neutral citation [2019] IEHC 7).

53. The eighth defendant (Mr. Minkovski) is a resident of Bulgaria. He is alleged to be the beneficial owner of Belport. Issues have arisen on the service of the proceedings on Mr. Minkovski. He has not yet entered an appearance to the proceedings.

54. The ninth defendant (Ms. Chaorilaou) is alleged to be a director of Belport and is alleged to have signed the false share purchase agreement entered into between Belport and UCCU. Ms. Chaorilaou resides in Cyprus. After a motion for judgment in default of appearance was issued against a number of the defendants, including Ms. Chaorilaou, an unconditional appearance was entered on her behalf on 25 July 2018. In a judgment delivered on 17 January 2020, I refused to make an order for costs of the motion for judgment of default of appearance against Ms. Chaorilaou on a solicitor and client basis but awarded such costs against her on a party and party basis (that judgment bears the neutral citation [2020] IEHC 13). Ms. Chaorilaou subsequently delivered a full defence. In a further judgment delivered on 31 July

2019, Ms. Chaorilaou was ordered to make discovery of certain documents to the plaintiffs (that judgment bears the neutral citation [2019] IEHC 611).

55. The tenth defendant (Mr. Konyaev) is alleged to be the CEO and a member of the board of directors of UCCU. He is alleged to be a business associate of Mr. Mazepin. He is a citizen of and resides in Russia.

56. The eleventh defendant (Mr. Sedykin) is also a citizen of and resides in Russia. Various allegations are made against him with respect to the alleged campaign of vexatious litigation undertaken by Eurotoaz against ToAZ. It is alleged that he acted under a power of attorney on behalf of Eurotoaz in the claims allegedly brought by Eurotoaz against ToAZ as part of that campaign. It is further alleged that he attempted unlawfully to gain control of the board of ToAZ by allegedly generating or causing to be generated false documents, including purported resolutions and minutes of a ToAZ board meeting for which it is alleged Mr. Sedykin was convicted in Russia (with that conviction being altered in one respect on appeal). The plaintiffs obtained judgment in default of appearance against Mr. Sedykin. Further orders in aid of execution were also made against him in the circumstances and for the reasons set out in detail in my judgment of 17 January 2019 to which I referred earlier when referring to Belport.

57. It can be seen, therefore, that the plaintiffs are all companies incorporated and registered in various Caribbean jurisdictions but ultimately said to be beneficially owned by Russian individuals. Five of the defendants are Russian citizens residing in Russia. One of the defendants (UCCU) is a Russian company. One of the defendants (Eurotoaz) is an Irish company. There are also defendants from Cyprus, Bulgaria and the BVI.

E. Overview/Summary of Essential Elements of Plaintiffs' Case

58. The plaintiffs' case and its claims against the various defendants are pleaded in considerable detail in an amended statement of claim delivered (with leave of the Court) in April 2018 and in the various affidavits sworn on their behalf in connection with the UCCU defendants' application. I have touched earlier on the essential elements of the plaintiffs' case. I will expand somewhat on the description of the plaintiffs' case in this section of the judgment. However, I am conscious of the fact that I am not conducting a trial of the dispute between the parties at this stage, I set out this summary primarily for the purposes of conveying the essential elements of the plaintiffs' case in order that my decision on the jurisdiction and other issues raised by the UCCU defendants in their application can be properly understood.

59. The plaintiffs claim that the defendants are all guilty of a tort of conspiracy and have combined together to carry out acts with the aim and objective of damaging the plaintiffs by defrauding them of their shares in ToAZ, by substantially devaluing the shares, by preventing the plaintiffs from exercising the rights attached to their shares and otherwise by damaging the plaintiffs' property rights in their ToAZ shares. It is claimed that this alleged conspiracy has taking the form of a scheme (referred to in the amended claim as the "scheme") involving several acts designed to enable the defendants or their nominees to acquire the plaintiffs' shares in ToAZ at a gross undervalue and thereby to gain control of ToAZ and its assets.

60. A summary of the alleged scheme is set out at Paras. 5-12 of the amended statement of claim. To further summarise, it is alleged that the first defendant (Mr. Mazepin) has led the other defendants in this scheme and that the methods employed in the scheme include unlawful actions carried out for the purposes of defrauding the

plaintiffs of their shares in ToAZ. It is alleged that those actions include the following:

- (a) making direct and indirect unlawful threats against shareholders and officers of ToAZ and persons connected with ToAZ to the effect that improper legal proceedings will be brought against them if the plaintiffs' shares in ToAZ were not sold to the defendants at an undervalue;
- (b) repeatedly bringing multiple unfounded civil actions, including actions brought in the name of ToAZ, against officers of and persons connected with ToAZ in Russia, including fraudulent claims that Eurotoaz was entitled to shares in ToAZ;
- (c) repeatedly making multiple unfounded criminal complaints in Russia, including complaints made in the name of ToAZ, against ToAZ officers and persons connected with ToAZ in Russia;
- (d) creating, procuring and deploying false evidence against ToAZ, its officers and persons connected with ToAZ in those criminal and civil proceedings;
- (e) producing forged or sham documents against ToAZ, its officers and persons connected with ToAZ in those proceedings;
- (f) procuring oppressive and unjust court orders against the plaintiffs, including improper and unlawful freezing orders in respect of the plaintiffs' shares in ToAZ and the dividends attaching to those shares on false pretexts;
- (g) procuring improper arrest warrants and Interpol "Red Notices" against officers and persons connected with ToAZ;

- (h) illegally procuring the suspension of the chairman of ToAZ from its Board;
- (i) purporting to remove ToAZ's directors and to replace them with nominees of the defendants through unlawful means;
- (j) unlawfully purporting to pass board resolutions to empower the board of ToAZ to dilute the value of ToAZ shares or to misappropriate some or all of them; and
- (k) putting undue and unlawful pressure on judges, criminal investigators, Court appointed experts and judicial officers in Russia, to make improper and unfounded adverse orders against ToAZ and its officers and shareholders. (para. 6 of amended statement of claim).

61. The plaintiffs claim that the purpose of the actions just summarised (some of which they claim are continuing) is to cause damage to ToAZ and its business in order that the plaintiffs would be forced to sell their shares to the defendants or their nominees at an undervalue, to ensure that a Russian court would make an award of damages in favour of certain of the defendants and an order that the plaintiffs' shares in ToAZ would be sold to satisfy that award, to ensure that a purchaser owned or controlled by the defendants would then purchase the plaintiffs' shares at an undervalue and to deprive the plaintiffs of the rights attached to their shares on a false pretext. The plaintiffs claim that the defendants are jointly and severally liable in respect of the alleged acts undertaken as part of the scheme which they claim has the features of a "*raider attack*" (see paras. 36-44 amended statement of claim.) The plaintiffs claim that the acts comprising the alleged scheme commenced in or about late 2008 and have continued to date.

62. The amended Statement of Claim provides details of the alleged conspiracy under various different headings. I will refer to the essential elements as alleged by the plaintiffs. First, the plaintiffs refer to threats allegedly issued by the first defendant (Mr. Mazepin) and the tenth defendant (Mr. Konyaev) against Andreas Zivvy, a beneficial owner of a minority share in ToAZ, and Beat Ruprecht, an employee of a trading partner of ToAZ called Ameropa, in May 2012 and March 2013 (paras. 49-51). They also refer to threats allegedly made by the first defendant (Mr. Mazepin) to Sergei Makhlai, the Chairman of ToAZ until his suspension in September 2015, in August 2012, April 2013 and June 2013 in which it is alleged Mr. Mazepin threatened to use various means, including bringing criminal and other proceedings, to obtain control of the plaintiffs' ToAZ's shares (paras 52 and 53).

63. The second element of the alleged scheme relied on by the plaintiffs concerns the alleged campaign of vexatious litigation by Eurotoaz against ToAZ which is alleged to have begun in July 2009 (paras. 55-89). This in turn is said to involve vexatious criminal complaints by Eurotoaz commencing in July 2009 and comprising a number of criminal complaints by Eurotoaz claiming that it had been deprived of its rights as an alleged shareholder in ToAZ and a number of regulatory complaints in 2009/2010 to the Russian Federal Service for the Securities Markets ("FSSM") (paras. 57 to 67). In the course of one of the criminal complaints made by Eurotoaz, it is alleged that the eleventh defendant, Mr. Sedykin, acting for Eurotoaz under a power of attorney, deployed false evidence (paras. 62-57). The second element of the alleged campaign of vexatious litigation undertaken by Eurotoaz consists of vexatious civil litigation which it is alleged Eurotoaz embarked upon from 2010 on the basis of the same false evidence as was deployed in the content of the criminal/regulatory complaints (paras. 68-89). At para. 69, the plaintiffs plead that Eurotoaz, owned by

Benstock Finance Limited (“Benstock”), another BVI company, is beneficially owned by Mr. Mazepin and was “*central to the scheme*” by conducting the alleged campaign of vexatious and fraudulent litigation to further Mr. Mazepin’s aim of obtaining a majority share in ToAZ by seeking falsely to establish that Eurotoaz owns shares in ToAZ.

64. The plaintiffs plead (at para. 73) that there is objective reason to believe that Eurotoaz is beneficially owned by Mr. Mazepin for various reasons pleaded at paras. 73(a) to (f), including that Mr. Mazepin informed Sergei Makhelai in June 2013 that he had bought Eurotoaz.

65. The third element of the alleged scheme pleaded by the plaintiffs in the amended statement of claim is that UCCU allegedly carried out a campaign of vexatious litigation against ToAZ and its officers, supported, in some instances, by false evidence (paras. 90-109). It is alleged that in 2011 and 2012, UCCU brought civil and criminal proceedings against ToAZ and its officers claiming to have suffered a loss of over US\$200 million as a result of ToAZ’s alleged failure to supply to UCCU a list of ToAZ shareholders to which it is alleged UCCU was entitled. The plaintiffs allege that such a claim was false as ToAZ had supplied the relevant list to UCCU and that the Arbitrazh Court had so found in December 2011. Details of the civil and criminal claims commenced by UCCU pursuant to the alleged campaign are set out in the Statement of Claim.

66. The plaintiffs refer to the commencement of civil proceedings by UCCU concerning the alleged failure by ToAZ to provide a Shareholders List to it in October 2011 and to the dismissal of that claim by the Arbitrazh Court of the Samara Region in December 2011 (para. 91). They then referred to the making by UCCU of a criminal complaint against the management of ToAZ for the alleged failure to permit

UCCU to inspect the shareholders list which in turn led to documents being seized which provided the basis for subsequent criminal proceedings under Art. 159(4) of the Russian Federal Criminal Code and which it is alleged were abusive proceedings under Russian law (paras. 92-97). The plaintiffs allege that sham documents were used to support a claim for an alleged loss of almost US\$240m. in the shareholder list criminal proceedings, referring to an alleged sham share purchase agreement between UCCU and Belport dated 8 August 2011 providing for the sale of UCCU's shares in ToAZ to Belport (paras. 98-102). The plaintiffs also rely on the alleged provision of false evidence in the shareholder list criminal proceedings by the sixth defendant (Ms. Bolotnikova), the eight defendant (Mr. Minkovski) and the eleventh defendant (Mr. Sedykin) (paras. 103-107). Further particulars concerning the alleged sham agreement are provided at para. 108.

67. Next, the plaintiffs refer to the commencement by UCCU of the Art. 159(4) criminal case and related proceedings in which the freezing orders and other decisions, including the suspension and the removal of directors from the board of ToAZ (including Sergei Maklhai) were made (paras. 110-133). The complaint made by UCCU in the Art. 159(4) criminal case, and the allegation made by the Russian investigative authorities was that those in control of ToAZ had wrongfully diverted funds from the company. In February 2013, UCCU gave notice of its intention to make a civil claim in those proceedings in the event that the criminal complaint was upheld seeking civil compensation for alleged losses suffered by it as a result of the alleged diversion of funds from ToAZ. At that stage the losses alleged were in the region of US\$55m. That claim was subsequently increased to reflect a claim for reflective loss in favour of UCCU and a derivative claim on behalf of ToAZ of more than US\$1.35bn. in circumstances which are the subject of a further application by the

plaintiffs for anti-enforcement relief arising from the judgment given by Judge Kirillov in July 2019 in the Art. 159(4) criminal case. The plaintiffs claim that in the context of those Art. 159(4) proceedings, orders were made freezing their shares in ToAZ, further criminal proceedings were brought and domestic and international arrest warrants were issued against key officers of ToAZ and others and that Sergei Makhlai was suspended from the board of directors of ToAZ. It is alleged that all of this was done and procured “*at the ultimate instigation of Mr. Mazepin and his accomplices*” (Para. 113). Particulars of the orders freezing the shares and assets in the Art. 159(4) proceedings are set out at paras. 115-122 and, in particular, at paras. 121(a) to (d). It is alleged that the total value of funds and property the subject of the freezing orders referred to by the plaintiffs was more than US\$600m. and the value of the plaintiffs’ ToAZ shares (and those of certain other shareholders) frozen is in excess of US\$2bn. in the context of what was then a claim by UCCU with a value of US\$55m. (para. 122). The plaintiffs’ allegations with respect to the unlawful pre-trial detention orders made in respect of officers of ToAZ and the issuing of Interpol “Red Notices” are contained at paras. 123-128.

68. The plaintiffs plead that a number of individuals, namely, Mr. V. Makhlai, Mr. S. Makhlai, Mr. Korolev, Mr. Ruprecht and Mr. Zivy were subjected to criminal charges under Art. 159(4) and placed on a Russian domestic wanted list. They were subsequently placed by the Russian authorities on an international wanted list maintained by Interpol and Interpol “Red Notices” were issued. Those “Red Notices” were subsequently withdrawn by Interpol. Those individuals were also the subject of pre-trial detention orders in the context of the Art. 159 criminal proceedings. It is alleged that no court acting properly would have made those orders and that Mr. Mazepin and his agents wrongfully procured the issuing of the “Red Notices” and the

improper pre-trial detention orders in furtherance of the alleged scheme or conspiracy the subject of the proceedings. The plaintiffs also rely on the suspension of Mr. S. Makhlai from the board of directors of ToAZ (of which he was appointed Chairman in 2011) on foot of an order of a Russian court made in September 2015 in the context of the Art. 159(4) proceedings which it is alleged are all part of the alleged scheme (paras. 129-132). Another element of the alleged scheme as pleaded in the Statement of Claim consists of the alleged unjust, procedurally unfair and improper conduct of, what are described as, the transfer pricing cases (para. 133). It is alleged that ToAZ has been the subject of numerous tax investigations at the instigation of UCCU and/or Mr. Mazepin and was assessed as being liable to pay additional tax for 2009 and 2010 on the basis of findings that it was liable for such tax under transfer pricing rules. It is alleged that the courts in Russia hearing the appeals by ToAZ against the tax inspector's findings for those years breached Russian rules of procedure and evidence which would not have been permitted by a court acting properly. Particulars are set out at paras. 133(a)(d).

69. It is further alleged that in furtherance of the alleged scheme, the defendants caused improper pressure to be placed on or offered inducements to members of the Russian investigative and judicial authorities involved in overseeing cases in which ToAZ or its officers were involved (paras. 134-138). Particulars are provided in the amended statement of claim. The position adopted by the plaintiffs on this application is that they are not asking the Court to overturn or effectively to overturn decisions or actions of the Russian state authorities or the courts, but are alleging that the defendants placed improper pressure on those investigative and judicial authorities dealing with cases involving ToAZ and that in certain instances that pressure has yielded results. They contend that the susceptibility of the Russian State and judicial

authorities to pressure has enabled the scheme to be carried out (see, for example, para. 13 of the second affirmation of James Walfenzao dated 18 January 2019). A number of other allegations against the defendants are made in the amended statement of claim.

70. It is alleged that the plaintiffs have suffered catastrophic loss and damage as a result of the alleged wrongful acts of the defendants in connection with the alleged conspiracy complained of, including (but not limited to): (a) the *de facto* expropriation of the plaintiffs' shares in ToAZ; (b) the loss of dividends in respect of those shares which have been declared and which would otherwise have been paid to the plaintiffs; (c) the loss in value attributable to the plaintiffs' shares in ToAZ as a result of the removal of rights to those shares; (d) the loss of value attributable to the effect of the alleged raider attack on ToAZ which it is alleged have rendered the plaintiffs' shareholding unmarketable and unsellable; and (e) the alleged loss of the plaintiffs' entitlement to approximately 70% of its shares in ToAZ. The plaintiffs seek various declarations against the defendants as well as damages for conspiracy and other alleged torts. They also seek injunctive relief preventing the defendants (including ToAZ) from continuing the alleged wrongful acts or from interfering with the plaintiffs' rights.

71. Defences have been delivered in response to the amended statement of claim by Eurotoaz and Mr. Babichev (the fourth and fifth defendants) and also by Ms. Charilaou (the ninth defendant). However, because of their challenge to jurisdiction, the UCCU defendants have not yet delivered a defence or defences to the amended Statement of Claim. However, in the affidavits sworn in connection with this application and in connection with subsequent applications (including the anti-dash

enforcement injunction application) the UCCU defendants have denied the claims made against them by the plaintiffs.

F. Procedural History

72. These proceedings have a complicated and lengthy procedural history. I propose focusing on the main elements of that history as are relevant to the UCCU defendants' application.

73. On 7 November 2016 the plaintiffs made an *ex parte* application to the High Court (McDermott J.) for leave to issue and serve the proceedings on a number of the defendants, including the Russian UCCU defendants, Mr. Babichev, Belpport and Mr. Sedykin in reliance on Ord. 11, r. 1(h). The plaintiffs' application was grounded on an affidavit sworn by Ms. Karyn Harty of McCann Fitzgerald on 4 November 2016. In her affidavit, Ms. Harty provided a summary of the claims made against the various defendants. She referred to the "*Irish connection*" (at paras. 43-51) through the involvement of Eurotoaz (the fourth defendant). She asserted that there was objective reason to believe that Eurotoaz was controlled by Mr. Mazepin, UCCU and Mr. Sedykin and that it was beneficially owned by Mr. Mazepin. She set out the basis on which the plaintiffs were maintaining a claim in the proceedings against Eurotoaz through its involvement in a campaign of what is alleged to be vexatious litigation beginning in July 2009 (paras. 44-50 of Ms. Harty's affidavit). Ms. Harty stated that the plaintiffs believed that Eurotoaz played a "*central role*" in the alleged scheme and that the Irish courts had jurisdiction to hear the claim against (*inter alia*) the Russian UCCU defendants (para. 51).

74. Ms. Harty contended that it was appropriate to grant the Orders giving liberty to issue and serve the proceedings outside the jurisdiction on the relevant defendants on the basis that those defendants were co-conspirators with Eurotoaz and that all of the

defendants were bound together with a common purpose, to damage the plaintiffs by means of the alleged scheme.

75. She asserted that the plaintiffs had a good cause of action against the defendants and that it was just and convenient that the proceedings be heard and determined in Ireland for the reasons set out in her affidavit. She asserted that each of the defendants the subject of the application was an active participant or co-conspirator and that it was beyond doubt that if they were domiciled within the jurisdiction that the plaintiffs would proceed against them in the same proceedings as were brought against Eurotoaz. She contended, therefore, that they were necessary and proper parties to the proceedings (para. 54). Ms. Harty further asserted that the plaintiffs have a good cause of action against the defendants and set out the reasons for that belief. She also explained why the plaintiffs believed that it was just and convenient that the proceedings be heard and determined in Ireland (paras. 56-62)). She referred to the fact that key individuals connected with ToAZ included Mr. S. Makhelai and Mr. E. Korolev were placed on a Russian domestic wanted list in the context of the Art. 159(4) criminal proceedings and were also placed on Russian international wanted list and the subject of Interpol "Red Notices" (para. 56). She referred to the pre-trial detention orders made by the Russian Court in December 2014. She asserted that key witnesses in the proceedings would be unable to attend and participate in the proceedings were they to be brought in Russia and that that would amount to an effective denial of justice (paras. 57 and 58). She also asserted that if the plaintiffs could not proceed against all of the relevant defendants in this jurisdiction there would be a real and substantial risk that inconsistent judgments would issue by the Irish Court and by the Russian Courts (para 59).

76. Ms. Harty then referred to those parts of the Statement of Claim (then in draft form) which referred to orders allegedly being made by the Russian Courts without any proper legal basis and contended that her instructions were that the Russian UCCU defendants had procured the making of those orders in furtherance of the alleged scheme and had done so through the “*collaborative support*” of officials in the Russian administration. She claimed that the only reasonable explanation for the orders made and the procedures followed was that “*pressure or inducement was brought to bear on the Russian judicial and investigative authorities*” by the Russian UCCU defendants (para. 60). She referred, in that context, to the extradition proceedings brought in the UK in respect of the requested extradition of Mr. V. Makhelai and to the decision of the English Court (Senior District Judge Workman) to refuse that extradition and to the findings of that court that improper pressure had been placed on Russian judges. She asserted that there was a significant risk that the plaintiffs would be unable to secure a fair hearing with regard to the matters the subject of the proceedings if they were required to be heard in Russia (para 61 and 62).

77. In addition to seeking to issue and serve the proceedings outside the jurisdiction, the plaintiffs also sought orders of substituted service under Order 10 r. 1. Ms. Harty informed the court that while Irish proceedings would ordinarily have to be served on a Russian defendant in Russia in accordance with the Hague Service Convention, there were good grounds why substituted service should be ordered in this case (paras. 67-75). She explained that in her experience it took on average 1-2 years for the Russian designated authority (the Russian Ministry of Justice) to process and issue a certificate of service in respect of service under the Convention. She stated that that timeframe would not serve the interests of justice in this case. Ms. Harty outlined

certain concerns the plaintiffs had in relation to the involvement of the Russian authorities in service under the Hague Service Convention. She referred to the commencement of the Art. 159(4) criminal proceedings against officers of ToAZ and against Mr. Zivy and Mr. Ruprecht and the commencement by UCCU of a civil claim in those proceedings, which she asserted had been used as a pretext to the making of the orders by the Russian courts in the context of those proceedings (including those referred to in the amended Statement of Claim subsequently delivered). Ms. Harty contended, on instructions, that the Russian UCCU defendants had procured the making of those orders in furtherance of the alleged scheme and that the only reasonable explanation for them was that pressure or inducement was brought to bear on the Russian judicial and investigative authorities by those defendants. She explained that the plaintiffs were concerned that those defendants would be able to influence the relevant Russian officials and effectively frustrate service of the proceedings through the Russian Ministry of Justice in accordance with the Hague Service Convention. She asserted that there were, therefore, exceptional circumstances, such as to permit service to be effected other than in accordance with the Convention.

78. The High Court (McDermott J.) made orders on foot of the plaintiffs' application giving the plaintiffs liberty to issue and serve proceedings on (*inter alia*) the Russian UCCU defendants and a number of the other defendants under O. 11, r. 1(h). The court also gave leave to the plaintiffs to effect service of the intended proceedings on those defendants at various addresses in Russia and, in the case of two of the defendants, through their social media platforms under Order 10.

79. Notice of the plenary summons together with the original statement of claim and the order of 7 November 2016 were served on the Russian UCCU defendants in the

manner directed by the court. The proceedings were also served on Eurotoaz and on Mr. Babichev.

80. In February 2017, Eurotoaz and Mr. Babichev brought a motion seeking various orders including orders dismissing or striking out the proceedings against them under O. 19, r. 28 or, alternatively, under the inherent jurisdiction of the Court on the grounds that the proceedings were frivolous and vexatious, unsustainable and bound to fail or, alternatively, an abuse of process and, in the case of Mr. Babichev, an order under the inherent jurisdiction of the Court staying the proceedings against him on the grounds of *forum non conveniens*. Several affidavits were sworn in the context of that motion. Those affidavits were exhibited to one of Ms. Harty's affidavits in response to the present application and they were relied upon by the plaintiffs in resisting the application.

81. The application by Eurotoaz and Mr. Babichev was refused by the High Court (Haughton J.) in a judgment delivered on 23 November 2017 (neutral citation: [2017] IEHC 721). It will be necessary to refer later to some parts of that judgment, including those parts of the judgment which addressed Mr. Babichev's *forum non conveniens* application. Suffice to say, at this point, the court accepted the plaintiffs' evidence that key witnesses (including, Mr. S. Maklhai, Mr. Ruprecht and Mr. Zivy) would be unlikely to attend any trial in Russia on the basis that "*they would run the very real risk of politically motivated criminal charges, arrest and detention.*" (per Haughton J. at para.60). The court held that the difficulty with assembling witnesses was enough in itself to persuade the Court not to find with Mr. Babichev. Various other reasons were given for refusing that application which will be addressed later.

82. Eurotoaz and Mr. Babichev appealed to the Court of Appeal from that part of the judgment and order of Haughton J. in which he refused to dismiss the claim

against them on the grounds that the action was frivolous and vexatious, factually unsustainable and bound to fail. The Court of Appeal dismissed that appeal in a judgment delivered for the Court by Costello J. on 18 July 2019 (neutral citation: [2019] IECA 218). Mr. Babichev did not appeal from the rejection of his *forum non conveniens* application. As noted earlier, one of the preliminary objections raised by the plaintiffs in response to the UCCU defendants' application was that they were precluded from bringing the application or challenging jurisdiction on the grounds advanced by reason of the decision of Haughton J. (the Court of Appeal had not delivered judgment when the application was heard). The Supreme Court refused to grant leave to appeal from the Court of Appeal in a determination dated 20 January 2020 (neutral citation: [2020] IESCDET 1).

83. In due course, unconditional appearances were entered by Eurotoaz on 22 October 2017 and by Mr. Babichev on 8 February 2018.

84. The High Court (Haughton J.) made another order under O. 11, r. 1(h) and 11 on 13 February 2018 giving leave to the plaintiffs to issue and serve on a number of the defendants, including the Russian UCCU defendants, Belport and Mr. Sedykin, any motions, pleadings or documents required including motions for judgment or for the amendment of the plaintiffs statement of claim. The court also made an order under O. 10, r. 1 giving the plaintiffs leave to serve those motions, pleadings or documents by post and by various other means set out in the order.

85. The plaintiffs brought an application to amend the statement of claim which was heard and determined by me on 10 April 2018. Various affidavits of service were provided to the court for the purpose of that application. Eurotoaz and Mr. Babichev were represented on the application. However, none of the other defendants appeared. The court was satisfied that service was properly effected on those defendants

(including the Russian UCCU defendants) in accordance with the order of Haughton J. of 13 February 2018. The court was also satisfied that service was properly effected on Holdings and on Ms. Charilaou. The plaintiffs were given liberty to deliver an amended statement of claim and directions were made for the service thereof on certain of the defendants, including the Russians UCCU defendants, in the manner provided for in the Order of Haughton J. of 13 February 2018.

86. On 6 June 2018 the plaintiffs issued a motion seeking judgment in default of appearance and various ancillary reliefs against the number of the defendants, including the Russian UCCU defendants, Holdings, Belport and Mr. Sedykin. That motion was listed for hearing on 28 July 2018. Following service of the motion papers, William Fry, representing the UCCU defendants, wrote to McCann Fitzgerald, the plaintiffs solicitors on 13 July 2018 enclosing a conditional appearance filed that day for the purposes of contesting jurisdiction and referring to their intention to bring an application to contest jurisdiction at the earliest opportunity.

87. On 25 July 2018 an unconditional appearance was filed on behalf of Ms. Charilaou. No appearance was filed on behalf of either Belport or Mr. Sedykin.

88. The plaintiffs' motion for judgment was struck out as against the UCCU defendants and as against Ms. Charilaou. The plaintiffs proceeded with their motion as against Belport and Mr. Sedykin.

89. In a judgment delivered on 17 January 2019 (neutral citation: [2019] IEHC 7), I granted judgment in default of appearance as against Belport and Mr. Sedykin in the terms of the prayer for relief in the amended statement of claim and directed that the plaintiffs were entitled to damages as sought therein for any loss suffered by them. I further directed that such damages (if any) should be ascertained at the same time as the trial of the proceedings as against the other defendants. I was also satisfied that

the plaintiffs were entitled to the injunctive relief sought in the prayer for relief and granted injunctive relief in aid of execution and made disclosure orders against Belport and Mr. Sedykin.

90. Defences were delivered by Eurotoaz and Mr. Babichev on 30 July 2018. A defence was delivered by Ms. Charilaou on 22 October 2018. Various discovery issues arose as between the plaintiffs and Eurotoaz, Mr. Babichev and Ms. Charilaou which are the subject of further reserved judgments (neutral citation: [2019] IEHC 610 (re Eurotoaz and Mr. Babichev) and [2019] IEHC 611 (re Ms. Charilaou)).

91. The UCCU defendants brought the present application on 3 October 2018. The plaintiffs issued a further motion for judgment against the UCCU defendants around the same time which has awaited the determination of the UCCU defendants' jurisdiction challenge.

G. UCCU Defendants' Jurisdiction Application

92. The UCCU defendants brought this application on 3 October 2018. In it the UCCU defendants seek:

- (a) Orders pursuant to O. 12, r. 26 discharging the Order of the High Court (McDermott J.) of 7 November 2016 granting leave to the plaintiffs to issue and serve notice of the proceedings on the Russian defendants in Russia and setting aside such service;
- (b) An order pursuant to O. 12, r. 26 setting aside service of notice of the proceedings on Holdings;
- (c) An order dismissing the proceedings on the grounds that the High Court does not have jurisdiction to hear and determine the claims against the UCCU defendants.

93. As part of their application, the UCCU defendants maintain that proceedings were not validly served on the Russian UCCU defendants as they were not served in accordance with The Hague Service Convention.

94. Numerous affidavits and expert reports were exchanged by the parties for the purposes of the application. The UCCU defendants relied on three affidavits sworn by Garret Breen of William Fry and on a number of affidavits and expert reports from two experts in Russian law, Professor Roman Bevzenko and Mr. Feodor Vyacheslavov. In response, the plaintiffs relied on three affidavits sworn by Ms. Harty, three affirmations made by Mr. Walfenzao (then a director of Trafalgar) and affidavits and expert reports of a Russian law expert, Dr. Vladimir Gladyshev. The plaintiffs also sought to rely on several of the affidavits sworn for the purposes of the unsuccessful application by Eurotoaz and Mr. Babichev for the dismissal of the proceedings and, in Mr. Babichev's case, for an order staying the proceedings on the grounds of *forum non conveniens*. Included among those affidavits were an affidavit and expert opinion of Professor Richard Sakwa, who was put forward by the plaintiffs in connection with those applications as an expert in contemporary Russian affairs and politics. Affidavits were sworn right up to, during and after the completion of the hearing of the UCCU defendants' application.

95. Prior to the conclusion of the hearing of this application, the plaintiffs brought a further application seeking interlocutory injunctive relief restraining UCCU from taking further steps to prosecute a civil claim in damages against the plaintiffs in Russia as part of the ongoing Art. 159(4) proceedings. That application was issued by the plaintiffs on 29 March 2019. A large volume of material was exchanged by the parties for the purposes of the application which was heard on 25, 26 and 27 June 2019 before being compromised by the parties on foot of an undertaking given to the

court by UCCU on 27 June 2019. It was subsequently claimed that UCCU was in breach of that undertaking and on 15 July 2020 the plaintiffs brought an application for further interlocutory injunctive relief restraining UCCU, its servants or agents, from taking steps to execute or enforce the judgment in the civil claim brought by UCCU in the Art. 159(4) proceedings given by Judge Kirillov of the Komsomolsky District Court on 5 July 2019 as against the plaintiffs' assets.

96. On 30 July 2020, the court listed that application for hearing to commence on 2 February 2021 (for three weeks) and made directions for the exchange of affidavits and submissions. Further directions were made over the coming months and the plaintiffs' motion was amended to seek further interlocutory orders. The plaintiffs also brought an application to amend the plenary summons and the amended statement of claim to reflect the purported re-domiciliation steps and migration taken by two of the plaintiffs. That application was in turn also listed to be heard in February 2021. An enormous amount of material was exchanged for the purposes of those applications which were heard by me between 2 February 2021 and 2 March 2021. Judgment was reserved in respect of both those applications.

97. On 30 July 2021, I informed the parties of my decision on the UCCU defendants' jurisdiction challenge (the subject of this judgment) and on the plaintiffs' application to amend the proceedings. I have not yet reached a final decision on the plaintiffs' further anti-dash enforcement application and am continuing to finalise my judgment on that application.

98. I will first address the various preliminary objections and applications made by the parties. I will then deal with the Order 11 issue. Next, I will deal with the Art. 8 issue. Finally, I will deal with the Hague Service Convention issue.

H. Preliminary Objections/Applications

99. The plaintiffs and the UCCU defendants each made a number of preliminary objections at the start of their written and oral submissions to the court. I will first deal with those objections made by the plaintiffs and then turn to those made by the UCCU defendants:

(1) Plaintiffs' Preliminary Objections

100. The plaintiffs contended that the UCCU defendants' application is an abuse of process on three grounds.

(a) Delay

101. First, they contended that the UCCU defendants were guilty of very substantial delay in bringing their application. They were served with the proceedings (as evidenced by the various affidavits of service provided in the papers) in November 2016, did not enter an appearance until the conditional appearance was entered on 13 July 2018 and did not bring their application seeking to contest jurisdiction until 3 October 2018. The plaintiffs contended that this delay had not been properly explained by the UCCU defendants in their affidavits and arose in circumstances where not only had those defendants been served with the proceedings in November 2016 on foot of the order of 7 November 2016 but they were also clearly aware of the nature and detail of the claims made in the proceedings by reason of their awareness of and involvement in proceedings issued by the plaintiffs in Cyprus in November 2016 in aid of these proceedings in which certain freezing orders and related reliefs were sought against Holdings and other companies within the UCCU group of companies. The plaintiffs relied on affidavit evidence adduced by the respondents in

these Cypriot proceedings to demonstrate the awareness of Holdings (and other companies within the UCCU Group) of these proceedings.

102. The plaintiffs argued, in reliance on the judgment of Murphy J. in the Supreme Court in *Intermetal Group Limited v. Worstlade Trading Limited* [1998] 2 IR 1 (“*Intermetal*”) and the judgment of the High Court (McDonald J.) in “*MV Connoisseur* [2018] IEHC 699 (“*Connoisseur*”) that the UCCU defendants’ application should be dismissed on the grounds of delay.

103. The UCCU defendants disputed the allegations of unreasonable delay and submitted that the plaintiffs themselves were guilty of delay in prosecuting their claim. They argued that the plaintiffs took no substantive steps in the prosecution of their claim against the UCCU defendants until June 2018 when the motion for judgment in default of appearance was issued. It was contended that the UCCU defendants had acted appropriately in awaiting the prosecution of the claim against them by the plaintiffs. It was argued that the facts of this case can be distinguished from those in *Intermetal* and in *Connoisseur* as, unlike in *Intermetal*, the UCCU defendants raised the jurisdiction issue in the first letter sent by their solicitors, William Fry, on 13 July 2018. They argued that as in *Connoisseur*, it was at all times within the power of the plaintiffs to progress the proceedings themselves.

104. I accept the plaintiffs’ submission that there was very considerable delay on the part of the UCCU defendants in bringing this application. The Russian UCCU defendants were served with the proceedings in late November 2016 in accordance with the Order of the High Court (McDermott J.) of 7 November 2016. Holdings were served in Cyprus in February 2017. In addition to that, I am also satisfied that the UCCU defendants were aware of the proceedings and of various steps taken in the proceedings here as a result of the involvement of Holdings and various other UCCU

companies in the proceedings brought by the plaintiffs in Cyprus in aid of these proceedings in 2016/2017. Nonetheless, the UCCU defendants sat back and decided not to participate in any way in the proceedings. They did not, for example, participate in the application by the plaintiffs to amend the statement of claim in April 2018, notwithstanding that the court was satisfied that they had been served with the papers in respect of that application.

105. The UCCU defendants only brought their application to challenge jurisdiction when faced with the plaintiffs' motion for judgment in default of appearance which was issued in early June 2018 and listed to be heard on 28 July 2018. Only then did the UCCU defendants instruct their solicitors in Ireland to correspond with the plaintiffs' solicitors seeking to contest jurisdiction and only then was a conditional appearance entered and this application brought. There was, therefore, very considerable delay by the UCCU defendants in challenging jurisdiction and in bringing their application.

106. I do not accept that there was any culpable delay on the part of the plaintiffs in seeking to bring on their proceedings. Having seen off the applications both by Eurotoaz and Mr. Babichev during 2017, the plaintiffs then moved to bring their application to amend the statement of claim and after that for judgment in default of appearance. Various applications were necessary to obtain directions in relation to the bringing of those applications and the service of the required documents on the relevant defendants.

107. However, while I am satisfied that the UCCU defendants delayed in bringing their application and only did so when faced with an application for judgment in default of appearance, I do not believe that that delay is such as to require me to dismiss the UCCU defendants' application *in limine*. The plaintiffs were not

significantly prejudiced in responding to the UCCU's defendants' application by the delay as they were dealing with other issues involving other defendants such as Eurotoaz and Mr. Babichev in the meantime. However, the delay by the UCCU defendants in challenging jurisdiction and in bringing this application is a relevant factor for the court to consider in its consideration of whether this is a proper case in which to permit service of the proceedings outside the jurisdiction under O. 11. Both *Intermetal* and *Connoisseur* show that delay is relevant and can, depending on the particular circumstances, be a very significant factor in the court's assessment as to whether the case is a proper one for service out of the jurisdiction under O. 11. I will, therefore, consider the question of delay in that context and will not dismiss the UCCU's defendants' application on that ground.

(b) Judgment of Haughton J. (Court of Appeal) on Eurotoaz

Babichev Applications

108. The second preliminary objection raised by the plaintiff centred on the decision of the High Court (Haughton J.) to refuse the applications by Eurotoaz and Mr. Babichev to dismiss the plaintiffs' claims against them. The Court of Appeal's subsequent dismissal of the appeal by those parties is also highly relevant in the context of this second preliminary objection. It was argued by the plaintiffs that the common and central focus of the UCCU defendants' challenge to jurisdiction under O. 11 in respect to the Russian UCCU defendants and under Art. 8 of the Recast Brussels Regulations in respect of Holdings was on the case made by the plaintiffs against Eurotoaz, and since the High Court (and subsequently the Court of Appeal) refused to dismiss the plaintiffs' claim against Eurotoaz, it could not be said that the joinder of Eurotoaz was a "*mere device*" to establish jurisdiction against the UCCU defendants under O. 11, r. 1(h) and the joinder of Eurotoaz could not be said to have

been done with the sole object of removing Holdings from the jurisdiction to which it would otherwise have been subject for the purposes of Art. 8 of the Recast Brussels Regulations. The plaintiffs argued, therefore, that the High Court (and Court of Appeal) had already closely examined the plaintiffs' claim against Eurotoaz and concluded that there was reality to that claim. They argued that it was not open now to the UCCU defendants as part of this application to attack the plaintiffs' claim against Eurotoaz on the basis of new arguments which had not been made as part of the application brought by Eurotoaz and Mr. Babichev.

109. The plaintiffs contended that the findings by Haughton J. are binding on the court as a matter of precedent in respect of the plaintiffs' case against Eurotoaz and that, while that judgment may not have prevented the UCCU defendants from bringing their application, their pursuit of the application, combined with their delay and the absence of admissible evidence on their behalf, amounts to an abuse of the process of the Court.

110. The UCCU defendants argued that they were not precluded by reason of the decision on the Eurotoaz/Babichev application from bringing their application. They made the point that the respective applications are different and legally distinct. Eurotoaz and Mr. Babichev did not challenge the jurisdiction of the Irish courts, although Mr. Babichev did seek to stay the proceedings on the grounds of *forum non conveniens*. While accepting that there was some overlap in some of the considerations relevant to a *forum non conveniens* application and a challenge to jurisdiction, the UCCU defendants stressed the differences between their application and the applications brought by Eurotoaz and Mr. Babichev. They maintained that Eurotoaz and Mr. Babichev sought the dismissal of the plaintiffs' claims against them

on very narrow grounds which do not in any way affect the UCCU defendants' entitlement to bring their application.

111. I do not believe that the UCCU defendants were precluded from bringing their application by virtue of the decision by Haughton J. to refuse the application by Eurotoaz and Mr. Babichev for the dismissal of the plaintiffs' claims against them or, for that matter, by the decision by the Court of Appeal to dismiss their appeal. The UCCU defendants were not a party to that application and did not participate in it. Notwithstanding the undisputed connections between the UCCU defendants (and Mr. Mazepin and UCCU itself, in particular) and Eurotoaz and Mr. Babichev, I do not believe that those connections are such as to preclude the UCCU defendants from bringing this application. The Eurotoaz/Babichev applications to dismiss the case against them was based on narrow grounds which were conveniently summarised by Costello J. in the Court of Appeal at paras. 25 and 26 of her judgment for the court as follows:

“25. Eurotoaz and Mr. Babichev characterised the plaintiffs’ case against them as an allegation that they conspired with the other defendants to participate in, and that they have participated in, ‘raider attacks’ against ToAZ, in which the plaintiffs are the majority shareholders. They say that the plaintiffs’ assertion that Eurotoaz is participating in the ‘raider attacks’ is that it has pursued litigation in Russia which it knows is without merit and has relied in that litigation upon forged documents.

26. Eurotoaz and Mr. Babichev contend that if the pursuit of the litigation in Russia is genuine, the allegation of participation in the ‘raider attacks’ falls away. The plaintiffs’ case is that the pursuit of the litigation is not genuine

because it is said to be based on forged documents. If the documents upon which the plaintiffs rely can be shown not to be forged documents, then the case that the litigation is not genuinely being pursued must fail. Eurotoaz and Mr. Babichev maintain that they have established, on the basis of undisputed or indisputable facts or documents, that this is so. They argue that Eurotoaz has demonstrated that the forgery claim cannot succeed and when one considers the balance of the claim it is clear that, shorn of the forgery claims, the balance of the plaintiffs' claim cannot succeed either."

112. The Court of Appeal's conclusion upon the appeal was neatly summarised by Costello J. at paras. 105 to 108 of her judgment as follows:

"105. In essence, this application was misconceived and never had any prospect of success. The appellants engaged in extensive arguments in relation to the substance of the disputed facts. At all times the focus of the argument was too narrow. It cannot be definitively said by a court that the plaintiffs' case falls away if the allegation of forgery pleaded in the statement of claim, and in particular at paragraph 65, cannot be proved in the manner it is pleaded. The premise of the argument ignores the pleading in para. 6 of the statement of claim which identifies eleven methods allegedly employed by all of the defendants to give effect to the unlawful Scheme. The case against the appellants is clearly not confined to whether they produced, or relied upon, forged or sham documents, but extends to an allegation that they made multiple fraudulent claims that Eurotoaz was entitled to shares in ToAZ and, made multiple unfounded criminal complaints in the name of Eurotoaz against ToAZ officers and persons perceived to be connected with ToAZ in Russia. The appellants' submissions do not attempt to deal with the greater part of the

plaintiffs' case against them. Mr. Babichev does not deny the central allegation that the appellants were active participants in a corrupt and unlawful scheme to wrest control of ToAZ from the plaintiffs, a scheme which was orchestrated by Mr. Mazepin.

106. The appellants adduced no admissible evidence to substantiate the arguments advanced in support of the application which, accordingly, must fail.

107. The substance of the arguments of the appellants do not meet the threshold required in an application to strike out proceedings on the basis that they were bound to fail.

108. The appellants have failed to identify any errors in the judgment of the High Court which would entitle them to succeed on this appeal.”

113. Eurotoaz and Mr. Babichev failed to persuade the High Court and the Court of Appeal that the plaintiffs' case against them should be dismissed on the basis claimed. While it is, in my view, relevant that the High Court and the Court of Appeal have considered the plaintiffs' claim against Eurotoaz and have refused to dismiss that claim, that is by no means determinative of the issues which arise for consideration on the UCCU defendants' application as to the plaintiffs' case against Eurotoaz and is not such as to preclude the UCCU defendants from bringing their application or to render the application an abuse of process. I would add that the findings of Haughton J. on Mr. Babichev's application to stay the proceedings on the grounds of *forum non conveniens* are relevant and of assistance to the Court's consideration as part of the O. 11 issue of whether this is a proper case to permit service of the proceedings outside the jurisdiction for the purposes of O. 11, r. 5, but are not determinative of the issues which must be decided on this application.

114. I am not satisfied, therefore, that the UCCU defendants' application should be refused or dismissed by reason of the decision by the High Court to refuse the application by Eurotoaz and Mr. Babichev to dismiss the plaintiffs' claims against them and the subsequent decision by the Court of Appeal to dismiss their appeal.

(c) Nature of the Evidence Relied on by UCCU Defendants

115. The third objection raised by the plaintiffs concerned the evidence relied on by the UCCU defendants in support of their application. That evidence consisted of affidavits sworn by their solicitor, Garret Breen of William Fry, and affidavits sworn by two experts of Russian law which exhibited their expert opinions. The plaintiffs were extremely critical of the fact that none of the UCCU defendants themselves swore any affidavit denying the serious allegations against them.

116. While one might have expected that the UCCU defendants would have sworn affidavits to dispute the plaintiffs' claims against them, and while that course was adopted in the more recent applications involving these parties, including the anti-enforcement injunction application brought by the plaintiffs, I am nonetheless satisfied that the UCCU defendants were entitled to proceed on the basis of the affidavits which they put before the Court. Having regard to the nature of the exercise in which the court was engaged in considering the objections to jurisdiction based on O. 11 and on Art. 8 of the Recast Brussels Convention and in considering the complaints about service for the purposes of the Hague Service Convention, I am satisfied that the UCCU defendants put sufficient evidence before the Court in the form of Mr. Breen's affidavits and in the form of the affidavits and expert opinions of the Russian lawyers, Professor Bevzenko and Mr. Vyacheslavov. In fairness to the plaintiffs, they did not really press the objection based on the quality or admissibility of the evidence relied on by the UCCU defendants in support of their application. I

am satisfied that the UCCU defendants were entitled to proceed on the basis of the evidence relied on by them.

(2) UCCU Defendants' Preliminary Objections:

(a) Late Affidavits

117. The first preliminary objection raised by the UCCU defendants concerned the entitlement of the plaintiffs to rely on affidavits provided by the plaintiffs shortly before the hearing of the application. Three affidavits were furnished (some in unsworn form) in the days leading up to the hearing. They consisted of the third affidavit of Ms. Harty sworn on 28 February 2019, the third affidavit and expert opinion of Dr. Gladyshev sworn on 4 March 2019 and the third affirmation of Mr. Walfenzao dated 5 March 2019. The UCCU defendants did not object to Ms. Harty's affidavit or Mr. Walfenzao's affirmation on the basis that they be afforded an opportunity of replying, if necessary. They did, however, object to the third affidavit of Dr. Gladyshev on the basis that they had been unable to obtain comments from their Russian legal expert. The objection was dealt with in a pragmatic fashion at the time. The UCCU defendants were given an opportunity of responding to the late affidavits. That opportunity was availed of by them. Further affidavits and expert reports from Mr. Bevzenko and Mr. Vyacheslavov both sworn on 3 April 2019 were subsequently provided to the court. For completeness, I was satisfied that there were good reasons for the late delivery of the plaintiffs' affidavits and that the appropriate way of resolving the UCCU defendants' application was to afford them time to respond. I was not satisfied that they would be prejudiced as a result of the late affidavits. There is nothing, therefore, to this first objection.

(b) Hearsay Evidence

118. The second and more fundamental preliminary objection raised by the UCCU defendants concerned the nature of the evidence relied upon by the plaintiffs in resisting the application. They argued that the affidavits relied upon by the plaintiffs consisted almost entirely of hearsay evidence and ought not to be admitted. They contended that those affidavits, which were relied on by the plaintiffs in order to demonstrate the plaintiffs' entitlement to rely on O. 11, r. 1 and Art. 8 of the Recast Brussels Regulation, were required to comply with the rules of evidence and could not include hearsay.

119. The plaintiffs disputed the contention that they were relying on hearsay evidence and referred to the affirmations of Mr. Walfenzo and to the affidavits of a number of individuals including Mr. S. Makhelai, Mr. E. Korolev, Mr. A. Zivy, which were sworn in the context of the applications by Eurotoaz and Mr. Babichev determined by Haughton J. in the High Court and were exhibited by Ms. Harty to her first affidavit, together with the affidavits of the legal experts retained by the plaintiffs for the purposes of this application. The plaintiffs argued that this was all direct evidence on which they were entitled to rely in response to the UCCU defendants' application. I agree. I am satisfied that the plaintiffs put forward sufficient direct evidence for the purpose of responding to the UCCU defendants' application and for the purpose of discharging the relevant burdens which rested upon them. In proceedings of such complexity involving so many parties and proceedings in a number of different jurisdictions, it is often convenient for the relevant events to be collated and presented in an understandable form by the solicitor responsible for the conduct of the case. That was the essential purpose served by Ms. Harty's various affidavits. Mr. Walfenzao was at the relevant time a director of Trafalgar and confirmed in his various affirmations that he was authorised to give evidence not just

for Trafalgar but for the other plaintiffs. I am satisfied that he was in a position to give direct evidence in relation to the matters dealt with in his various affirmations. I am also satisfied that he was careful to confine his evidence to matters which were within his own knowledge (see, for example, para. 3 of his first affirmation).

120. The evidence contained affidavits of Mr. S, Mr. Maklhai, Mr. E. Korolev and Mr. Zivy is all direct and not hearsay evidence. The plaintiffs were entitled to rely on those affidavits for the purposes of this application. It was at all times open to the UCCU defendants to respond on affidavit, but they chose not to do so. The plaintiffs were, in my view, also entitled to rely on Professor Sakwa's affidavits and on the expert opinions exhibited to them. He was a properly qualified expert to speak to the matters addressed in his affidavits and opinions.

121. I am satisfied that none of this evidence should have been excluded as being impermissible hearsay in the UCCU defendants' application. I have considered all of that evidence in the context of the tests which the court has to apply in determining the O. 11 issue and the Art. 8 issue and, bearing in mind the warnings repeatedly giving by the Irish and other courts as to the importance of applications such as this not being turned into mini trials. I am satisfied, therefore, that the UCCU defendants' second preliminary objection should be rejected.

I. Jurisdiction re Plaintiffs' Claim Against Russian UCCU Defendants:

Order 11 RSC

(1) General Observations

122. I turn now to consider the UCCU's defendants' challenge to the jurisdiction of the High Court to hear and determine the plaintiffs' claims against the Russian UCCU's defendants on the ground that the Court does not have jurisdiction and ought

not to have granted leave to issue and serve notice of the proceedings outside the jurisdiction on those defendants under O. 11, r. 1(h).

123. In considering this part of the UCCU defendants' application, it is necessary first to identify the relevant provisions of O. 11. It will then be necessary to consider the disputed question of the burden of proof on this application. After that it will be necessary to consider the relevant test or standard of proof which applies on an application such as this. Having identified that test or standard, it will be necessary to consider the relevant evidence adduced by the parties on the issue as to whether the test or standard has been met in this case. This will involve consideration of the affidavit evidence relied on by the parties. Next, I will consider the case made by the UCCU defendants that the Court should not entertain the plaintiffs' case on the ground that it would offend the "*act of state*" doctrine or related principles. Finally, I will consider the issue as to whether this is a "*proper case*" for the court, in the exercise of its discretion, to grant leave to serve the proceedings on the Russian UCCU defendants out of the jurisdiction under O. 11. This will involve the consideration of the legal principles applicable to that assessment as well as the evidence itself, including the expert evidence, put forward by the parties.

124. Before turning to a consideration of these various issues, it is important to make the overarching point, touched on already, that a challenge to jurisdiction (whether under O. 11 or under the Recast Brussels Regulation) is generally made at a relatively early stage in the proceedings, before the pleadings have closed, before discovery has been made and on the basis of affidavit evidence which is not tested by cross-examination. The Irish courts and courts in other jurisdictions have consistently warned against applications such as this being turned into mini-trials or "*state trials*" and have cautioned against delving into, and making findings, on the merits of the

underlining case, save in the clearest possible of cases. This point was very clearly made by O’Hanlon J. in the High Court in *Short v. Ireland* [1996] 2 IR 188 (upheld by the Supreme Court) (“*Short (No. 1)*”). Similar warnings have been expressed in a number of the leading English cases and apply not only to applications which challenge orders giving leave to serve out of the jurisdiction under O. 11, but also to jurisdiction challenges under the Recast Brussels Regulation: see, for example: *VTB Capital plc v. Nutritek International Corporation Space* [2013] 2 AC 337 (U.K. Supreme Court) per Lord Neuberger at paras. 82-83; *Sabbagh v. Khoury & Ors.* [2017] EWCA Civ 1120 (Court of Appeal of England and Wales) (“*Sabbagh*”) (para. 32) and *Vedanta Resources plc v. Lungowe & Ors.* [2019] UKSC 20 (UK Supreme Court) (“*Vedanta*”) per Lord Briggs (paras. 6-14). Those cases stress the importance of judicial restraint when dealing with jurisdiction disputes. Similar sentiments were expressed by the Supreme Court in *Irish Bank Resolution Corporation Limited (in special liquidation) & Ors. v. Quinn & Ors.* [2016] 3 IR197 (“*IBRC v. Quinn*”) where, in the course of discussing the test to be applied, whether to permit service out under O. 11, the Supreme Court repeatedly stressed that it was not necessary or appropriate for the court to resolve issues as to the substance of the case “*save to the minimal extent necessary to determine whether the claim is reasonably capable of being proven.*” (per Clarke J. at para. 40, p.211). The court stressed that it was only in very limited cases where the defendant could demonstrate a “*knock-out blow*” to the case would it be appropriate for the court to engage extensively with defence evidence (per Clarke J. at paras. 41 and 42, p.211). Clarke J. stressed that the court was not engaged in an assessment of the relevant strengths of the case on the merits of the respective parties (para. 43, pp. 211-212). It will, of course, be necessary to return to *IBRC v.*

Quinn when considering many of the other issues which arise on the UCCU defendants' application.

125. I make these observations to put in context the exercise on which the Court is engaged in an application such as this. It is not determining the merits of the dispute, save to the limited extent required by the applicable test as discussed in the cases.

(2) Relevant Provisions of O. 11

126. The plaintiffs sought leave and obtained leave to serve out of the jurisdiction on the Russian UCCU defendants under O. 11, r. 1(h). Under that provision, service out of the jurisdiction of notice of the proceedings may be allowed by the court where:

“any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.”

127. The plaintiffs persuaded McDermott J. on their *ex parte* application that the Russian UCCU defendants were necessary or proper parties to the proceedings properly brought against Eurotoaz which was duly served within the jurisdiction. While it is only necessary for a party to demonstrate that the person to be served out of the jurisdiction is a necessary or proper party to such an action, the plaintiffs maintain that the Russian UCCU defendants are necessary and proper parties to the proceedings brought here against Eurotoaz.

128. Order 11, rules. 2 and 5 are also relevant. Order 11, r. 2 provides that in considering an application for leave to serve out of the jurisdiction, the court “*shall have regard to the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant’s residence... ”.*

129. Order 11, r.5 provides that an application for leave to serve out of the jurisdiction must be supported by an affidavit or other evidence:

“stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a citizen of Ireland or not, and where leave is asked to serve a summons or notice thereof under r.1 stating the particulars necessary for enabling the Court to exercise a due discretion in the manner in r.2 specified; and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.”

130. This part of the UCCU defendants’ application is brought under O. 12, r. 26.

This provides for the jurisdiction of the High Court to discharge an order made under O. 11, r. 1 and to set aside service made on foot of such an order. O. 12, r. 26 provides:

“A defendant before appearing shall be at liberty to serve notice of motion to set aside the service upon him of the summons or of notice of the summons, or to discharge the order authorising such service.”

(3) Burden of Proof on Set Aside Application

131. The first issue to be considered in respect of this part of the UCCU defendants’ application is on which party does the burden of proof on such an application lie?

The parties were in dispute on this issue. The UCCU defendants contended that, notwithstanding that they brought the application to set aside service and to discharge the order permitting such service, the burden of proof was on the plaintiffs to establish the various elements necessary to be established under Order 11 such as that the jurisdictional gateway under O. 11, r. 1(h) applied to the plaintiffs’ application for

service out of the jurisdiction on the Russian UCCU defendants and that the case was a proper one for service out of the jurisdiction for the purposes of O. 11, rr 2 and 5.

They argued that the grant of leave on an *ex parte* basis did not shift the burden of proof to them to establish that the jurisdictional gateway did not apply or that this was not a proper case for service out of the jurisdiction under Order 11. The UCCU defendants relied in that regard on the judgment of Hogan J. for the Court of Appeal in *Albaniabeg Ambient Sh.pk v. Enel S.p.A* [2018] IECA 46 (“*Albaniabeg*”).

132. The plaintiffs, on the other hand, maintained that the burden of proof did shift to the UCCU defendants as it was their application and they bore an initial burden of proof to raise grounds (factual or legal) to demonstrate that the *ex parte* order of the High Court (McDermott J.) of 7 November 2016 ought not to have been made. In the event that the UCCU defendants discharged that initial burden, the burden would then shift to the plaintiffs to demonstrate that the UCCU defendants, as the applicants, were wrong. The plaintiffs relied principally in support of that proposition in the judgment of the High Court (Finlay Geoghegan J.) in *Chambers v. Kenefick* [2007] 3 IR 526 (“*Chambers*”).

133. I have concluded that the UCCU defendants are correct in their contention that the plaintiffs bear the burden of proving that their case against the Russian UCCU defendants is one which falls within the jurisdictional gateway provided by O. 11, r. 1(h) and that the case is a proper one for service out of the jurisdiction under O. 11, rr. 2 and 5. I will explain in a moment my reasons for so concluding. However, the resolution of this issue is not critical to the determination of this part of the UCCU defendants’ application, as I am satisfied that the plaintiffs have clearly discharged the relevant burden of proof and have clearly demonstrated that the jurisdictional gateway

under O. 11, r. 1(h) applies and that the case is a proper one for service out of the jurisdiction, for reasons I explain in detail later.

134. My reasons for concluding that the burden of proof does lie on the plaintiffs are as follows. First and foremost, the Court of Appeal in *Albaniabeg* so decided. That was an appeal from a decision of the High Court (McDermott J.) which set aside an *ex parte* order of the High Court which granted the plaintiff, an Albanian company, leave to serve proceedings outside the jurisdiction on two Italian companies under O. 11, r. 1(q). The plaintiff had brought the proceedings to enforce a judgment of an Albanian court in Ireland. The defendants applied to set aside the *ex parte* order giving leave to serve out of the jurisdiction. The High Court acceded to that application. The Court of Appeal dismissed the defendants' appeal.

135. Hogan J. dealt with the question of the burden of proof in the course of his judgment for the Court of Appeal. He referred to a judgment he had given as a judge of the High Court *Cornec v. Morrice* [2012] 1 IR 804 ("*Cornec*") (which was an application to set aside an order made *ex parte* under s.1 of the Foreign Tribunals Evidence Act 1856). In that case, Hogan J. had held that where a party sought to set aside an *ex parte* order, the party which had obtained that order continued to carry the burden of demonstrating that the order should be made. The *ex parte* order had a "*provisional status*" only and courts could not constitutionally make an *ex parte* order which finally affected the rights of the parties. Among the cases cited by Hogan J. in *Cornec* in support of that principle was the judgment of Finlay Geoghegan J. in *Chambers*. Hogan J., therefore, concluded in *Albaniabeg* that the party who obtained the *ex parte* order for service out of the jurisdiction under O.11 "*must carry the burden of demonstrating that the order in question had been properly granted*" (para. 19). He noted that both sides in that case accepted that that was the position. It is

significant, in light of the plaintiffs' reliance on *Chambers* for the contrary position that Finlay Geoghegan J. was a member of the Court of Appeal which decided *Albaniabeg* and agreed with the judgment of Hogan J in that case.

136. I should add that in *Microsoft Ireland Operations Ltd. v. Arabic Computer Systems & Anor* [2020] IEHC 549 ("*Microsoft*"), which was heard around the same time as the present application, I gave some consideration to this issue, albeit that both parties in that case accepted that the burden of proof continued to rest with the plaintiff in the event of a subsequent application to set aside service brought by the defendants. In the course of that judgment, I drew attention to another judgment of the Court of Appeal which pre-dated *Albaniabeg*, namely, *O'Flynn & Others v. Carbon Finance Ltd. & Others* [2015] IECA 93 ("*O'Flynn*") which was not referred to in *Albaniabeg* and might on one view be seen to have taken a different approach. I expressly declined to resolve what, one view might have appeared to be a conflict between the two Court of Appeal judgments as it was unnecessary for me to do so in light of the parties' agreement in that case as to where the burden of proof rested. I proceeded to deal with the application on the basis that, notwithstanding that the application to set aside had been brought by the defendants, the burden of proof remained on the plaintiff to establish that the *ex parte* order permitting service out of the jurisdiction had been properly granted under the relevant paragraph of O. 11, r. 1. Having re-read the judgment in *O'Flynn* which was not referred to by the parties in this case but which expressly endorsed the approach set out by Finlay Geoghegan J. in *Chambers*, in light of the submissions made by the parties in *Chambers*, I have come to the view that there is in fact no conflict between the approach taken in *O'Flynn* and that taken in *Albaniabeg*.

137. I accept the submission made on behalf of the UCCU defendants that Finlay Geoghegan J. in *Chambers* was not addressing the question as to where the burden of proof lay where an application was made to set aside an earlier *ex parte* order. The UCCU defendants submitted, and I accept, that what Finlay Geoghegan J. was addressing in *Chambers* was the onus (or obligation) on a defendant who seeks to set aside an *ex parte* order (in that case renewing a summons). She concluded that it was not necessary for such a defendant to point to facts which, had they been known at the time of the *ex parte* application, would have satisfied the court that the order ought not to have been made and that a defendant could “*by submission . . . seek to demonstrate to the court that, even on the facts before the judge hearing the ex parte application, upon a proper application of the relevant legal principles the order for renewal should not be made*” (at p. 529). This was because the defendant did not have any opportunity of making submissions at the time of the making of the *ex parte* order. While on one reading of that part of her judgment, it might be understood that Finlay Geoghegan J. had decided that the burden of proof shifted to the defendant in the case of an application to set aside an *ex parte* order, however I accept that later in her judgment the judge makes it clear that the burden continues to lie with the party who sought the *ex parte* order. This, I believe, is demonstrated by what the judge set out as the “*proper approach*” to be taken at p. 530 of her judgment. I tend to agree, therefore, that *Chambers* is not authority for the proposition that the burden of proof on an application to set aside service out of the jurisdiction or an order permitting such service shifts to the party making that application. A closer reading of *O’Flynn* would seem to support that conclusion.

138. One of the appeals dealt with by the Court of Appeal in *O’Flynn* was an appeal from an order of the High Court refusing an application by one of the defendants

under O. 12, r. 26 to set aside an *ex parte* order made by the High Court giving leave to issue and serve proceedings on that defendant out of the jurisdiction under O. 11, r. 1(f). At para. 101 of its judgment, the Court of Appeal stated that an application by a defendant under O. 12, r. 26 is not an appeal against the *ex parte* order but is in effect a re-hearing of that application in the presence of both parties. The Court then considered the nature of such an application and the onus upon the moving party by reference to the approach adopted by Finlay Geoghegan J. in *Chambers* which the court considered to be the correct approach to adopt on an application to discharge an *ex parte* order for service out the jurisdiction. In other words, the defendant could put additional facts before the court or alternatively could make submissions on the basis of the facts which were before the court at the *ex parte* stage to demonstrate that the *ex parte* order should not be made. Nonetheless the Court of Appeal was not saying that the burden of proof of demonstrating the various elements required under O. 11 was shifted to the party making the set aside application. On the contrary, subsequent statements of the Court in its judgment appeared to recognise that the burden remained with the plaintiffs, albeit that in considering whether the plaintiffs had discharged that burden, the submissions by the defendant moving party, had to be considered: see, for example, paras. 110, 111 and 112.

139. In conclusion therefore, *Albaniabeg* is clear authority for the proposition that the burden of proof in the case of an application by a defendant to set aside an earlier *ex parte* order giving leave to serve proceedings out of the jurisdiction remains with the plaintiff who continues to bear the burden of demonstrating the various matters required to be shown under O. 11. A careful reading of *Chambers* persuades me that Finlay Geoghegan J. did not intend to decide that the burden of proof as such shifted to the defendant moving party on an application to set aside an earlier *ex parte* order.

The fact that Finlay Geoghegan J. was a member of the court which decided *Albaniabeg* and agreed with the judgment of Hogan J. in that case supports that conclusion. So too does a careful reading of the judgment of the Court of Appeal in *O'Flynn*.

140. I am satisfied, therefore, that the plaintiffs continue to bear the burden of proving the various matters required under O. 11 and of demonstrating that the *ex parte* order permitting service out of the jurisdiction was properly made.

(4) The Relevant Test/Standard of Proof

141. The next issue to address is a test which the court must apply and, in particular, the standard of proof which the plaintiffs must satisfy in order to persuade the court that it should exercise its discretion under O. 11 to grant leave to serve proceedings out of the jurisdiction. This question has been considered on a number of occasions by the Supreme Court. It is also the subject of a vast number of judgments of the English Courts. However, the English cases must be approached with some caution as the test identified by the Supreme Court here appears, at least, to differ in one significant respect from the test applied by the English courts. I say “appears” as ultimately the difference between the approaches taken here and in England and Wales may turn more on semantics than on the application of the test in practice.

142. Before turning to the relevant test, it is necessary to stress, as the UCCU defendants correctly pointed out in their submissions, that the court must be cautious in its consideration of an application for leave for service out of the jurisdiction and must approach such applications with “*care and circumspection*”. Fennelly J. emphasised that point in the Supreme Court in *Analog Devices B.V. v. Zurich Insurance Company* [2002] 1 IR 272 (“*Analog*”), one of the most significant cases for present purposes. He said:

“When the court grants leave for the service out to the jurisdiction of proceedings, it requires a person, not otherwise within the jurisdiction of our courts, to appear here and to answer the claim of a person made in what is for him a foreign court rather than leaving the plaintiff to pursue his remedy against that person in that other jurisdiction. The international comity of the courts have long required, therefore, that our courts examine such applications with care and circumspection.” (at p.281)

143. That approach was reiterated by Hogan J. in the Court of Appeal in *Albaniabeg* by reference to the well-known judgment of Farwell L.J. in *The Hagen* [1908] P. 189 (at p. 210).

144. The courts have held that the need for caution is even greater in the case of an application for leave to serve proceedings outside the jurisdiction under O. 11, r. 1(h) or its equivalent: *Tyne Improvement Commissioners v. Armement Anversois SA (The Brabo)* [1949] AC 326 and *Golden Ocean Assurance Limited v. Martin (the Golden Mariner)* [1990] 2 Lloyd’s rep 215, both quoted with approval by Lord Collins in the Privy Council in *Altimo Holdings and Investment Ltd. & Others v. Kyrgyz Mobil Tel Limited & Others* [2012] 1 WLR 1804 (“*Altimo Holdings*”) at para. 73, pp 1823–1824. The reason for caution in the case of such an application is that O. 11, r. 1(h) or its equivalent has been referred to as “*anomalous*”, in that unlike the jurisdiction gateway provided for in many of the other paragraphs of O. 11, r. 1, the necessary or proper party gateway is not dependent on the existence of any territorial connection between the claim the subject matter of the proceedings and the jurisdiction of the Irish courts. While the need for super caution may be questionable in circumstances where the connection with Ireland is an Irish company which has been served within the jurisdiction and where some of the other paragraphs of O. 11, r. 1 do not require

territorial connection between the claim and the jurisdiction of the Irish courts (such as para. (l) (proceedings for the enforcement of an award made by an arbitral tribunal which has its seat outside the jurisdiction)), and para. (q) (proceedings to enforce a foreign judgment), I have nonetheless proceeded on the basis that the cautious approach referred to in the cases should be adopted and that is the approach that I have adopted here.

145. While, as already noted, the test to be applied or the standard of proof to be met by a party which bears the burden of proof on an application such as this, namely, the plaintiffs in the present case, has been the subject of much consideration and discussion in the cases here and in the courts of England and Wales, and while many authorities were cited to the court in the present application, ultimately the parties were agreed on a description of the component parts of the test, although, not surprisingly, they were poles apart on the issue as to whether the plaintiffs had satisfied that test.

146. Leaving aside for a moment the requirements imposed on a plaintiff under O. 11, rr. 2 and 5, the end result of the exchanges between the parties, which continued throughout the hearing and in post-hearing written submissions, was that in order to establish primary jurisdiction under the Rules of the Superior Courts, an applicant for leave to serve proceedings out of the jurisdiction under one of the paragraphs of Order 11 r. 1 must provide evidence and submissions to demonstrate:

- a) that it has a good arguable case on the merits of its claim against the foreign defendant in respect of which leave is sought; and
- b) that there is a good arguable case that the cause or causes of action relied upon by the applicant as against the foreign defendant falls or fall within one or more the jurisdictional gateways in O. 11, r. 1.

Such an applicant would also have to address the various matters referred to in O. 11, rules 2 and 5 and demonstrate, again to the good arguable case standard, that the case is a proper one for service out of the jurisdiction.

147. I must confess that the cases (including the leading Irish cases) are not always easy to follow and in other cases parties have agreed that a slightly different test applies on an application such as this. For example, in *Microsoft*, in which an application was made to set aside service of proceedings on defendants in Saudi Arabia and to discharge the *ex parte* order which permitted such service under another paragraph of O. 11, r. 1, the parties were in agreement that the good arguable case standard applied to the question as to whether the case fell within one of the paragraphs of O. 11, r. 1 and that with respect to the merits of the case against the foreign defendant, the test was whether the plaintiff had put forward a “serious issue to be tried” on the merits. I proceeded on the basis of the parties’ agreement in that case but without reaching a definitive decision on the point (as it was in issue in the present case). It was, however, necessary in *Microsoft* to go on to consider in some detail what the standard of a “good arguable case” entails and how the court should apply that test.

148. Having considered the submissions of the parties in the present case and having considered all of the relevant authorities, I am satisfied that the agreement reached by the parties in this case as to the relevant test or standard of proof is correct and gives effect to the principles set out by the Supreme Court in *Analog Devices* and in the subsequent decision of that Court in *IBRC v. Quinn*. I will explain in a moment why that is so. I note, however, that that test or standard differs from that applied by the courts of England and Wales, as is apparent from cases such as *Altimo Holdings* (per Lord Collins at pp 1822 – 1823) and *Bazhanov & Another v. Fosman & Others* [2017]

EWHC 3404 (Comm) (High Court of England and Wales) (per Daniel Toledano QC at para. 34). In England and Wales, the test to be applied in assessing the merits of the case is that there must be a “serious issue to be tried” rather than a “good arguable case” (if there is indeed any real difference in practice between the two). The test agreed by the parties in *Microsoft* and applied by me in that case on the basis of that agreement is more consistent with the test as expressed in the English cases rather than the test agreed by the parties in this case, which I accept is the correct test on the basis particularly of *Analog Devices*.

149. The decision of the Supreme Court in *Analog* is important to the resolution of this part of the UCCU defendants’ application in a number of respects. First, Fennelly J. stressed the caution which must be exercised where it is sought to require a foreign defendant to go and defend a claim against it in Ireland.

150. Second, Fennelly J. confirms that the Court must assess the strength of the cause of action asserted by the plaintiff by applying the test of a “good arguable case” (at p. 281). He observed that is what Barrington J. meant when he referred to a “good arguable case” in his judgment in the Supreme Court (at p. 215). Barrington was referring to the merits of the plaintiffs’ substantive claim against British Nuclear Fuels, the foreign party. In confirming that the court must assess the merits of the cause of action (against the proposed foreign defendant) on the basis of a “good arguable case”, the Supreme Court was departing from the approach taken in respect of this part of the test by the Courts of England and Wales. As I have indicated, while the parties’ position shifted somewhat between the written and oral submissions and the supplemental written submissions, they ultimately fixed on the common position that the strength of the cause of action had to be assessed by reference to the “good

arguable case” standard, although they were not in agreement as to what that standard entailed.

151. Third, Fennelly J. confirmed that the court also had to assess the claim that the cause of action sought to be advanced against the foreign defendant fell within one of the jurisdictional gateways in O. 11, r. 1 by reference to the “good arguable case” standard (at p.282). The parties to this application were agreed on that. Fennelly J. stated that in applying a test so worded or similarly described, it had to be “*borne in mind that the issue of jurisdiction is been determined irrevocably and that a foreign defendant is been summoned involuntarily before our Courts.*” He continued:

“Therefore, I believe that, though disputes of fact cannot always be satisfactorily resolved on affidavit, the court must look at the matter carefully. It is not a case where the applicant’s allegations must be presumed to be true. The foreign party’s affidavit evidence must also be considered.” (at p.282)

152. Fourth, Fennelly J. described the approach which the court should take when considering an application for leave to serve out of the jurisdiction in reliance on O. 11, r. 1(h), the necessary or proper party jurisdictional gateway. I will return to consider in more detail what he said on this point when addressing the particular requirements of that gateway. It is important, however, when considering what the “good arguable case” standard entails to refer to what Fennelly J. stated had to be established in an application made in reliance on O. 11, r. 1(h) when leave was sought to serve a party outside the jurisdiction on the basis that the party was a necessary or proper party to an action brought against a defendant within the jurisdiction. He said:

“Naturally, there must be a sound basis for the contention that a party to be served out of the jurisdiction is a proper party. There must be reality in law and in fact in the case made against the party within the jurisdiction. His inclusion

must not be a mere device to get a foreign party before the Irish courts. There must be a substantial element to the claims against the two parties...” (at p.286)
(emphasis added)

153. This is a very significant passage for the purposes of the present application. The UCCU defendants contend that there is no reality in law or in fact to the case which the plaintiffs make against Eurotoaz. They contend that the inclusion of Eurotoaz as a defendant in the proceedings is a “*mere device*” to get the Russian UCCU defendants before the Irish courts. They further contend that there is no “*substantial element*” to the claims against (a) Eurotoaz and (b) the Russian UCCU defendants. This is obviously hotly contested by the plaintiffs who maintain that they have clearly demonstrated, to the required standard with admissible evidence, that they have a good arguable against Eurotoaz by reason of its alleged involvement in the scheme, the subject of the proceedings, as well as against the Russian UCCU defendants. They reject the contention that the joinder of Eurotoaz is a “*mere device*” to get the Russian UCCU defendants before the court and rely on the substance of their claims against Eurotoaz and the reliefs which they seek (notwithstanding Eurotoaz’s apparent lack of assets). They maintain that they would in any event proceed against Eurotoaz (and the other defendants properly before the court) even in the absence of the Russian UCCU defendants in the proceedings. They rely on evidence and have advanced submissions which they contend demonstrates that there is “*substantial element*” to the claims against Eurotoaz and against the Russian UCCU defendants. I will shortly consider the further legal issues which arise from the plaintiffs’ reliance on O. 11, r. 1(h) and then the evidence on which they rely. But first it is necessary to consider further what must be established in order to satisfy the “good arguable case” standard with reference to (1) the merits of the case and (2) the

claim that the case falls within the jurisdictional gateway contained in O. 11, r. 1(h).

For that purpose, I now turn to *IBRC v. Quinn*.

154. Like *Analog*, *IBRC v. Quinn* was also a case in which the Supreme Court considered O. 11, r. 1(h). Clarke J. gave the judgment for the Supreme Court in that case. There the plaintiffs obtained leave to serve notice of the proceedings on one of the defendants, Mecon, a UAE company, outside the jurisdiction under various paragraphs of O. 11, r. 1, including O. 11, r. 1(h). The plaintiffs alleged that Mecon was involved in a conspiracy to place assets beyond the reach of the first plaintiff, IBRC. Mecon's joinder was sought on the basis that it was a necessary or proper party to proceedings brought against other persons duly served within the jurisdiction. Mecon applied unsuccessfully to the High Court for an order under O. 12, r. 26 discharging the order giving the plaintiffs liberty to serve the proceedings outside the jurisdiction and staying the proceedings against it under the inherent jurisdiction of the court. Mecon appealed to the Supreme Court which dismissed its appeal. In the High Court, Mecon argued that the plaintiffs had provided insufficient evidence in support of the allegations made by the plaintiff that Mecon was involved in the wrongful removal of assets on which the plaintiffs were relying. The plaintiffs argued that there was sufficient evidence in respect of their claim against Mecon and that that claim fell under the various paragraphs of O. 11, r. 1 on which it relied. Charleton J. in the High Court was satisfied that the plaintiffs had placed sufficient evidence or materials before the court to demonstrate that the wrongs alleged by the plaintiffs against Mecon were capable of being proved at the trial. The court also rejected the application to stay the proceedings on the grounds of *forum non conveniens*. Mecon appealed.

155. What is relevant at this point of the analysis is how the Supreme Court approached the jurisdiction issue under O. 11. In his judgment for the Supreme Court, Clarke J. started by summarising the requirement on a party who seeks leave to serve proceedings outside the jurisdiction under O. 11. He said:

“It is clear, for reasons which will be briefly addressed in due course, that, so far as the claim which is said to warrant the granting of leave to serve outside the jurisdiction is concerned, it is necessary that the Court be satisfied that there is a claim which comes within one of the relevant sub-paragraphs of O.11 and which is shown to be reasonably capable of being proven so as to justify that proceedings being maintained in this jurisdiction rather than somewhere else.” (para. 40, pp. 210-211)

156. Clarke J. continued:

“In that context it is not necessary for the Court to resolve any issues as to the substance of the case (whether of fact or law) save to the minimal extent necessary to determine whether the claim is reasonably capable of being proven. In the main the assessment will be based, therefore, on evidence or materials put forward by the plaintiff, for the fact that the plaintiff’s claim may be denied, however strenuously, will not normally mean that there is nonetheless a sufficient claim which requires to be determined. The fact that the claim is contested however strongly is irrelevant to the question of whether leave to serve outside the jurisdiction should be granted.” (para. 40, p.211)

157. Clarke J. did acknowledge that there might be some cases where an argument or evidence could be put forward by a relevant defendant which could provide a “knockout blow to the case”, unless countered or explained by the other side. He gave an example of where a claim was based on a contract, but the defendant could

establish that it was not a party to the contract. In those circumstances, there could be no claim against that defendant which was “*capable of being proven*” and the order granting leave would have to be set aside (para. 41, p.211). However, Clarke J. acknowledged that the plaintiff might be able to point to some other reason or further evidence to explain how that defendant was, nonetheless, arguably liable under the contract.

158. Clarke J. referred to the “*overriding consideration*” which was that “*the starting point of an assessment of whether the plaintiff has established a sufficient case must be an assessment of the claim as pleaded together with such evidence as the plaintiff may put forward.*” (para. 24, p.211). He continued:

“Defence evidence which goes no further than establishing that the claim is disputed will not be relevant. There may, however, be limited cases where the defence evidence might, unless explained or countered by sufficient argument, amount to a knockout blow. In such a case the defence evidence may be relevant not merely to assert the immaterial fact that the claim is contested but to assert the highly material fact that the claim is unstateable.” (para. 42, p. 211)

159. Clarke J. stressed that in an application such as this the court “*is engaged in some assessment of the relevant strengths*” of the case made by the respective parties.

He said:

“Rather the Court has to determine whether there is a sufficient basis for the proposition that [the plaintiff] may have a claim under one of the qualifying categories in O.11 which could justify bringing [the foreign defendant] to this jurisdiction to answer the claim concerned.” (para. 43, pp. 211-212).

160. Clarke J. continued:

“The bar is a low bar. It is simply designed to prevent a defendant being brought to this jurisdiction to answer an unstateable claim which has no reasonable prospect of being capable of proof.” (para. 43, p. 212)

161. He objected to the criticism that the court should not rely on evidence which was not open to being tested on the ground that in an application such as this, the court is concerned with *“whether there was a claim sufficient to warrant proceedings being brought”* and that *“the time to test whether that claim can actually be made out is at the trial when there will be every opportunity to test the credibility of any evidence proffered.”* (para. 43, p.211). He continued:

“Except in quite extraordinary circumstances it is difficult to envisage on what basis it could be contended that there should be a testing of evidence purely designed to meet a very low threshold of demonstrating that the plaintiff has a claim which is reasonably capable of proof.” (para. 43, p. 212)

162. Having referred to the standard by which the claim against the foreign defendant had to be assessed, Clarke J. went on to consider the issue as to whether the claims sought to be brought against Mecon in the proceedings came within any of the relevant sub-paragraphs of O. 11, r. 1. He found that it was difficult see how a *“credible argument”* could be made that O. 11, r. 1(h) did not apply. He referred to the allegations of conspiracy made in the case in which it was alleged Mecon was involved and made the point that, whether or not those allegations were correct was a matter for the trial. He stated that, given that it was alleged that Mecon was a central part of at least one aspect of the alleged conspiracy, it was very difficult to see how it could not be regarded as a proper party to the proceedings brought against other defendants within the jurisdiction (para. 45, pp. 211-213).

163. Clarke J. reiterated some of these points in setting out the Court's conclusions on the service out of the jurisdiction issue. At para. 53, he noted that it was necessary that the statement of claim make claims which come within one or other of the categories specified in O. 11, r. 1. He continued:

"...when it comes to the question of determining whether the undoubtedly very low threshold for establishing that there is a sufficient case to justify the bringing of the defendant to this jurisdiction is concerned, it seems to me that the Court can and should look at any relevant affidavit evidence proffered...the Court should come to a view as to whether it has been established that whatever is alleged may be reasonably capable of being proven in evidence to an extent that a judge might reasonably hold in favour of the plaintiff. It is not necessary for a plaintiff to establish, on affidavit evidence, a prima facie case. Rather the plaintiff is required to put forward sufficient evidence on affidavit to meet the test identified by the trial judge which is that its case is, both on the law and the facts, reasonably capable of being proven. (para. 53, pp. 214-215)

164. Clarke J. noted in the same vein as follows:

"The issue, at the stage of an application for leave to serve outside the jurisdiction or to set aside such leave, is simply whether it is appropriate to bring the defendant to this jurisdiction to answer the claim. The low barrier is designed to exclude imposing on defendants the obligation to come to Ireland to defend cases which have no prospect of being capable of being proven. The bar needs to be seen in the light of that underlying requirement..." (Para. 54, p. 215)

165. Clarke J. again rejected Mecon's submissions based on the weight to be attached to the relevant evidence. He said:

“The overall test is as I have described it. The question of whether that test is met does not involve attaching weight to differing evidence or, indeed, argument. It simply involves determining whether a very low threshold has been met by the plaintiff.” (Para. 55, p. 215)

166. At para. 56, Clarke J. stressed that there was no necessity for the trial judge to resolve any questions of fact for the purposes of the application before the court and that any purported resolution would have been *“entirely irrelevant”*. The reason for this was that *“the only issue was as to whether [the plaintiff] had demonstrated that it had a case which was reasonably capable of proof”* (para. 56, p. 215). He was satisfied that the trial judge was entitled to conclude that the plaintiff had put forward *“sufficient evidence and materials to establish that its case against Mecon was reasonably capable of proof”* (para. 56, p. 215). He noted that the High Court had found that there was *“potential evidence”* that a judge at trial *“might draw a legitimate inference of wrongdoing”* on the part of Mecon. It was not necessary to go any further. Clarke J. held that there was *“an entirely sustainable basis for the determination of the trial judge that the appropriate standard had been met on the materials available.”*

167. The parties explored in their submissions the extent to which the standard or test to be applied on an application such as this as described in these passages from the judgment of Clarke J. in *IBRC v. Quinn* could be reconciled with the description of the test by Fennelly J. in *Analog*. The end point for both sides was that the Supreme Court did not intend *IBRC v. Quinn* to alter or vary the test set out in *Analog*. The plaintiffs argued that the Supreme Court in *IBRC v. Quinn* was describing in a practical way in a case such as this how the “good arguable case” standard should be applied. The UCCU defendants agreed that *IBRC v. Quinn* could not be regarded as

altering or varying the test in *Analog* and that the court should, in effect, focus more on the test as described in *Analog*.

168. I considered *IBRC v. Quinn* in some detail in my judgment in *Microsoft* (paras. 93-119). I pointed to some areas of possible ambiguity in some of the passages from the judgment in *IBRC v. Quinn*. However, I concluded in that case, and I am reinforced in my conclusion based on the arguments made in this case, that the Supreme Court did not intend in *IBRC v. Quinn* to disagree with *Analog* in terms of the test to be applied on an application for leave to serve out of the jurisdiction under O. 11, r. 1 or on an application to set aside service effected on foot of such an order or to discharge that order. There are at least two reasons for so concluding. The first is that in *IBRC v. Quinn* the Supreme Court did not refer to *Analog* in the relevant part of its judgment. It did refer to *Analog* in another part of its judgment dealing with the issue of *forum non conveniens*. If the Supreme Court had intended to disagree with or to depart from the test set out in *Analog* it would undoubtedly have expressly said so. The fact that it did not leads me to conclude that it was not disagreeing with or departing from the test as described in *Analog*.

169. Second, in his judgment for the Court of Appeal in *Albaniabeg*, Hogan J. stated that he did not think that “*the test articulated by Clarke J. in Quinn greatly changes our existing understanding with regard to the application of O.11*” (para. 29).

Although Hogan J. did not discuss *Analog* and referred to it only as part of a quotation from the judgment of the High Court (McDermott J.) in that case, the High Court had expressly adopted and applied the “good arguable case” test by reference to *Analog* in its judgment (at para. 22). The Supreme Court had not given judgment in *IBRC v. Quinn* at the time of the High Court judgment in *Albaniabeg*. It seems to me that

Hogan J. in that case was proceeding on the basis that *IBRC v. Quinn* did not alter the test in *Analog*.

170. In any event, I am bound by both *Analog* and *IBRC v. Quinn*. Despite some of the possible ambiguities in parts of the judgment, I agree with the plaintiffs that Clarke J. in *IBRC v. Quinn* was setting out in a practical way how a court should deal with an application for leave to serve out of the jurisdiction under O. 11, r. 1(h) in terms of the evidence to be adduced, the weight to be attached to that evidence (including evidence adduced by the defendant), and the approach to be taken by the court to the assessment of the evidence and submissions with a view to determining whether a plaintiff has satisfied the two relevant limbs of the test, which, for present purposes, are, whether it has a good arguable case in terms of its claim against the proposed foreign defendant and whether it has a good arguable case that its claim falls within one of the paragraphs of O. 11, r. 1. I must, therefore, approach the evidence and submissions relied on by both sides in this application by reference to the test in *Analog* as described and as applied in *IBRC v. Quinn*.

171. The parties helpfully provided supplemental written submissions after the conclusion of the hearing in which they sought further to assist the court as to how it should apply the “good arguable case” test in assessing the merits of the plaintiff’s case and whether their case against the UCCU defendants came within O. 11, r. 1(h). Those submissions were of considerable assistance and I have taken them into consideration in reaching my conclusions.

172. It seems to me that based on the authorities just discussed, I must adopt the following approach. I must assess the evidence and arguments advanced by the parties on the O. 11 issue by reference to the test and principles set out by Fennelly J. in *Analog* and by reference to those set out by Clarke J. in *IBRC v. Quinn*. In assessing

whether the plaintiffs have a good arguable case on the merits, I must bear in mind the care, caution and circumspection referred to by Fennelly J. in *Analog*. I must carefully consider the affidavit evidence and submissions put forward by the parties including the affidavit evidence put forward by the Russian UCCU defendants. I must consider whether there is a sound basis for the plaintiffs' contention that the UCCU defendants are necessary or proper parties to the case against Eurotoaz. I must in that context consider whether there is reality in law and in fact to the case the plaintiffs make against Eurotoaz and must be satisfied that the joinder of Eurotoaz was not a "*mere device*" to get the Russian UCCU defendants before the court. I must also be satisfied that there is a substantial element to the claim against Eurotoaz and against the Russian UCCU defendants.

173. In carrying out these tasks I must take into account and apply the guidance given by Clarke J. in *IBRC v. Quinn*. I must consider the pleadings and affidavit evidence (including that adduced by the UCCU defendants) and must be satisfied that the plaintiffs' claim falls within O. 11, r. 1(h) and is one which is shown to be "*reasonably capable of been proven*". I must refrain from resolving disputed issues as to the substance of the case (whether of fact or law) unless such is necessary to determine whether the plaintiffs' claim (whether as against Eurotoaz or as against the Russian UCCU defendants) is "*reasonably capable of been proven*". In that regard, while I must assess the UCCU defendants' affidavit, the fact that a plaintiff's allegations are denied on affidavit or by submissions is not conclusive or even relevant unless they demonstrate that the claim is unstateable. I must not engage in an assessment of the relevant strengths of the respective parties. I must be satisfied that the plaintiffs' claim falls within one of the paragraphs of O. 11, r. 1 and that it is not an unstateable claim which has no reasonable prospect of being capable of proof. It

seems to me that I must be satisfied that that is so, both in relation to the claims against Eurotoaz and in relation to the claims against the Russian UCCU defendants. Both of those claims must be reasonably capable of proof. However, I must proceed on the basis that there is a “*low bar*” a “*low barrier*” and a “*very low threshold*” as Clarke J. has stated. I must be satisfied that the Russian UCCU defendants are not being brought to Ireland to defend proceedings which have “*no prospect of being capable of been proven*”. I must bear in mind that it is not necessary for the plaintiffs to establish a *prima facie* case and it is enough if they put forward sufficient evidence on affidavit to persuade the court that their case, on the law and on the facts, is “*reasonably capable of being proven*”. I must do my best to assess the evidence and submissions by reference to these criteria.

174. Another issue addressed by the parties in their oral and written submissions was whether or not the court should, in considering whether the plaintiffs have established a “good arguable case” in respect of the various matters to be established under O. 11, have regard to some recent developments in England and Wales on this question.

175. The three English cases which were addressed by the parties in their submissions are *Brownlie v. Four Seasons Holdings International* [2018] 1 WLR 192 (“*Brownlie*”), *Goldman Sachs International v. Nova Banco S A* [2018] UKSC 34 (“*Goldman Sachs*”) and *Kaefer Aislimientos SA de CV v. AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 (“*Kaefer*”). *Brownlie* and *Goldman Sachs* are decisions of the UK Supreme Court. *Kaefer* is a decision of the Court of Appeal of England and Wales. I considered the judgments in those cases together with some of the earlier English cases in my judgment in *Microsoft* (at paras. 72-90). I did so as in that case the defendants argued that the court should adopt the approach taken in some of the English cases which appeared to require that in order for a plaintiff to satisfy the test

of a “good arguable case”, the plaintiff had to demonstrate that it had the “*better of the argument*” on the material available and that the test was, therefore, a relative one. While the parties in the present case referred to *Brownlie*, *Goldman Sachs* and *Kaefer* neither side pressed the court to adopt the “*better of the argument*” approach. The UCCU defendants did argue, on the basis of certain passages in those three cases, that the test to be applied by the court in determining whether the plaintiffs had established a “good arguable case” was a relative one in that the court had to assess the evidence and arguments put forward by both sides in determining whether the plaintiffs had satisfied the requirement to establish a “good arguable case” and that it was clear from the statement of Fennelly J. in *Analog* that the court had to consider the foreign defendant’s affidavit evidence as well as that of the plaintiff and could not proceed on the presumption that the plaintiff’s allegations were true. However, the UCCU defendants did not press the court to follow through and apply the approach propounded in those recent English cases. The plaintiffs, while accepting that the English cases did provide in part for a relative test, stressed that the Supreme Court in *IBRC v. Quinn* had clearly emphasised the “absolute” aspect of the test and warned against engaging in an assessment of the relative merits or a resolution of disputed issues, save to the minimal extent necessary to determine whether the claim was reasonably capable of being proven.

176. In my view, the plaintiffs are correct in stressing the guidance given in that respect by Clarke J. in *IBRC v. Quinn*. Time and space do not permit a more detailed analysis of the English cases. For completeness, however, I adopt the analysis of those cases to be found in *Microsoft* (at paras. 72-90) and my ultimate conclusion (at paras. 116-117) that the judgment of Clarke J. in *IBRC v. Quinn* would not be consistent with any requirement for a plaintiff to establish that it had the “*better of the*

argument” in order to satisfy the court that there was a “good arguable case” on the merits and on whether their claim fell within one of the paragraphs of O. 11, r. 1. I concluded in *Microsoft* that that sort of relative test would invite the court to embark on an exercise which would be inconsistent with what the Supreme Court envisaged the court should do in assessing whether leave to serve out of the jurisdiction should be granted or whether an order permitting such leave should be set aside. I concluded that Clarke J’s admonition that the trial was the place to test the claims and allegations was inconsistent with the sort of exercise which a court would have to carry out in determining whether a plaintiff had the “*better of the argument*” in order to demonstrate a “good arguable case”. I remain of that view and reiterate that applying the test in a relative fashion, such as would be required in order to determine would had the “*better of the argument*”, would run the risk of the court having to embark on the sort of mini trial without cross examination and discovery in the context of a jurisdiction challenge which is precisely what the authorities here and elsewhere deprecate. I concluded in *Microsoft* (at para. 117) that the “*better of the argument*” gloss on the “good arguable case” test for determining whether a claim falls within one of the paragraphs of O. 11, r. 1 or indeed whether the plaintiff has met that test in terms of the merits of the claim, does not form part of Irish law and should not be applied. I explained in *Microsoft* (at para. 117) that the “good arguable case” test is a “*flexible test*” which is not conditional upon the relative merits of the case on jurisdiction and which can be satisfied by the plaintiff establishing a sound and plausible case on the facts and on the evidence that the claim falls within one of the paragraphs or sub rules of O. 11, r. 1 RSC, even though that case is contested by the defendant. I expressed the view that that test could be met “*where a plaintiff can show that it has good arguments on the jurisdiction issue without necessarily having*

to demonstrate that its arguments are better or more impressive or persuasive than those which might or could be raised by opposing parties.” (para. 117). I remain of that view. Those observations can equally be applied to the court’s assessment on the merits of the case by reference to the “good arguable case” standard. I remain of the view that that conclusion is consistent with the judgment of the Supreme Court in *IBRC v. Quinn* and also with *Analog*.

177. To the extent that the UCCU defendants’ submissions may be interpreted as requiring the court to go further and to conduct a more extensive relative assessment of the respective cases of the parties on the application of the relevant jurisdictional gateway under O. 11, r. 1 and on the merits, and it is by no means clear that they were so contending, I do not agree. I prefer the plaintiffs’ submission that the court should apply the “good arguable case” test, as interpreted and applied in *Analog* and *IBRC v. Quinn*, which sets a low evidential threshold and avoids the court being dragged into the sort of mini trial condemned in the authorities. Clearly, where a defendant has a “knockout blow” it will prevail on the application of the test as explained in *IBRC v. Quinn*.

(5) Necessary or Proper Party

178. I now turn to consider the particular issues which arise where reliance is placed on the jurisdictional gateway under O. 11, r. 1(h), the necessary or proper party gateway, was relied on to support an application for leave to serve proceedings out of the jurisdiction, as it was in this case. It will be recalled that the same gateway was considered in *Analog* and *IBRC v. Quinn*. To come within this gateway, a plaintiff must establish to the “good arguable case” standard that the foreign defendant is a necessary or proper party to the action brought against the defendants served in

Ireland. It is not necessary to establish that the foreign defendant is both a necessary and proper party.

179. In *Analog*, the foreign defendant was not a necessary party and the question was whether it was a proper party. In considering how to approach this question, Fennelly J. observed that the courts adopt a “*flexible and pragmatic approach*”. He referred to and approved the statement of principle made by Barrington J. in the Supreme Court in *Short (No. 1)*, based on well-established authority, that “*the standard to be applied in exercising this jurisdiction is whether the person out of the jurisdiction would, if he were within the jurisdiction, be a proper person to be joined as a defendant in the action against the other defendants.*” (per Barrington J. at p.216, quoted by Fennelly J. at pp. 283-284). Fennelly J. also referred *Massey v Heynes* (1881) 21 Q.B.D. 330 (“*Massey*”) where Lord Esher M.R. asked the same question: “*...supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?*” (at p. 338, quoted by Fennelly J. at p.284).

180. The plaintiffs here say that the Russian UCCU defendants are both necessary and proper parties to the action for several reasons to which I will shortly turn. However, they do not have to establish both. It is sufficient if they establish, on the “good arguable case” standard, that the Russian UCCU defendants are proper parties to the action brought against Eurotoaz in this jurisdiction. As I explain below, I have no doubt but that they are. Indeed, I am also satisfied for the reasons set out later that they are, in addition, necessary parties to the action.

181. Further on in his judgment in *Analog*, Fennelly J. expressed the requirement for a “*sound basis*” for the contention that the foreign defendant is a proper party. He stated that there must be “*reality in law and in fact*” to the case made against the party within the jurisdiction, that the joinder of that party (in this case Eurotoaz) must

not be a “*mere device*” to get the foreign defendants before the Irish courts and that there must be a “*substantial element*” in the claims against the Irish party and the foreign parties. In approaching that exercise, Fennelly J. cited with approval the following dicta of Dillon L.J. in the English Court of Appeal in *Multinational Gas and Petrochemicals v. Multinational Gas and Petrochemicals Services Ltd.*[1983] Ch 258 (“*Multinational*”):

“*Whether an action is properly brought against a particular defendant within the meaning of [the relevant provision in England and Wales] must surely depend on the substance of the matter in the light of all the circumstances, and not on the mere form of the pleading and whether there is technically a cause of action.*” (per Dillon L.J. at 286)

182. Fennelly J. considered the cases and the “*common sense of the matter*” and concluded that there was “*little doubt*” but that the foreign defendant was a proper party to the action against the Irish defendant in that case and that, if both were within the jurisdiction, it was “*scarcely conceivable that the two actions would be heard separately*” when claims against both defendants arose under separate, but linked, insurance policies and a virtually identical ground of repudiation was advanced in respect of both. He made the point that “*economy and efficiency*” demanded that the complex issues be heard in one action and to hear them separately before two different courts would be “*to court the danger of inconsistent decisions*” (p.286).

183. The Supreme Court in *Analog* did not have to consider what the position would be if it was the case that the plaintiff had a good arguable case on the merits against the Irish defendant but, nonetheless, only sued that defendant in order to bring in the foreign defendant. It did not have to decide on the facts of that case whether the joinder of the Irish defendant in such a situation would be a “*mere device*”.

184. That issue was, however, expressly considered by the Privy Council in *Altimo Holdings*. In that case, relying on the English Court of Appeal decision in *Multinational*, the Privy Council held that the fact that the domestic defendant was sued only for the purpose of bringing in the foreign defendant was a factor in the exercise of the court's discretion but did not mean that the action was not "*properly brought*" against the domestic defendant (for the purposes of the equivalent of O. 11, r. 1(h)), provided that there was a "*viable claim*" against the domestic defendant. It is not necessary for me to decide whether this conclusion is consistent with *Analog*, although I note that the Privy Council based its conclusion in *Altimo Holdings* on the decision in *Multinational* which was, as I have said, cited with approval by Fennelly J. in *Analog*.

185. I do not have to decide that issue here as, for reasons I explain below, I am satisfied that (a) there is a "*sound basis*" for the plaintiffs' contention that the Russian UCCU defendants are proper parties; (b) there is "*reality in law and in fact*" in the case made against Eurotoaz; (c) the inclusion of Eurotoaz is not a "*mere device*" simply to get the Russian UCCU defendants before the Irish courts and (d) there is a "*substantial element*" in the claims against (i) Eurotoaz and (ii) the Russian UCCU defendants. I am satisfied that on the basis of all the evidence that the joinder of *Eurotoaz* was not solely for the purpose of bringing in the Russian UCCU defendants.

186. I will deal first with the question as to whether the plaintiffs have demonstrated a "good arguable case" that the jurisdictional gateway in O. 11, r. 1(h) applies and that the Russian UCCU defendants are "*necessary*" or "*proper*" parties to an action "*properly brought*" against Eurotoaz. The plaintiffs claim that they have satisfied the "good arguable" test, both as matter of law and on the facts. They contend that the Russian UCCU defendants are both "*necessary*" and "*proper*" parties. However, it

is clear from the terms of O. 11, r. 1(h) that it is only necessary for the plaintiffs to establish one of those requirements. I will, therefore, first consider whether the Russian UCCU defendants are “*proper parties*” to the action brought against Eurotoaz. The requirement in O. 11, r. 1(h) that the action against Eurotoaz must have been “*properly brought*” is closely connected with the requirement that its joinder cannot have been a “*mere device*” to bring the Russian UCCU defendants before the Irish courts. I will, therefore, consider that aspect of the rule when I consider whether the plaintiffs have demonstrated a “good arguable case” on the merits of their claim against Eurotoaz.

187. The plaintiffs maintain that the Russian UCCU defendants are “*proper*” parties to the action brought against Eurotoaz. They rely on the principle or test referred to by Barrington J. in *Short (No. 1)* and approved by Fennelly J. in *Analog* referred to above. They say that if the Russian UCCU defendants were within the jurisdiction they would clearly be “*proper*” persons to be joined as defendants in the action against Eurotoaz. The plaintiffs also rely on *IBRC v. Quinn* and on the fact that in that case Mecon (the UAE company) was found to be a proper party to the conspiracy proceedings brought against the other defendants, in circumstances where it was alleged that Mecon was part of that conspiracy.

188. The plaintiffs say that they have a claim in conspiracy against Eurotoaz and the Russian UCCU defendants as well as against the other defendants in the proceedings. The conspiracy alleged against all of the defendants is the alleged scheme to acquire the plaintiffs’ ToAZ shares at an undervalue. They set out in the amended statement of claim detailed allegations concerning the involvement of Eurotoaz in the alleged conspiracy consisting of its conduct of vexatious litigation concerning its entitlement to shares in ToAZ or to the benefit of those shares. The plaintiffs also make extensive

allegations of conspiracy against the Russian UCCU defendants concerning their role in the conspiracy alleged. While the specific actions alleged against the Russian UCCU defendants display different features to those alleged against Eurotoaz and include the maintenance of other litigation and the securing of oppressive orders of various kinds, the plaintiffs do allege a connection between Eurotoaz and the Russian UCCU defendants, relying on various different strands of evidence and inferences, including (a) the acquisition of Eurotoaz by Benstock Finance Limited (“Benstock”), a company allegedly beneficially owned by UCCU, in December 2011, (b) the acquisition by UCCU of shares in ToAZ in 2008, (c) the commencement of the alleged campaign of vexatious litigation by Eurotoaz in 2009, (d) the alleged involvement of Mr. Sedykin (the eleventh defendant) in the conduct of Eurotoaz’s litigation prior to 2011, (e) the confirmation on affidavit by Mr. Babichev (the fifth defendant) that Eurotoaz will continue its litigation in Russia and (f) the expert evidence from Dr. Gladyshev, that if the facts alleged by the plaintiffs are established, Eurotoaz would be liable in conspiracy “*solidarily liable*” as a “*solidary tortfeasor*” under various articles of the Russian Civil Code (including Art. 1080). These are just some of the relevant allegations made by the plaintiffs in the amended statement of claim and in its affidavit evidence in response to the present application. The plaintiffs assert, therefore, that as their claim is that the Russian UCCU defendants are party to the alleged conspiracy with Eurotoaz, they are at least “*proper*” parties to the action against Eurotoaz.

189. The Russian UCCU defendants maintain, moreover, that they are not “*proper*” parties and have not been “*properly joined*” essentially cause the plaintiffs have advanced no “good arguable case” on the merits of their case against Eurotoaz and against the Russian UCCU defendants and that the joinder of Eurotoaz is a “*mere*”

device” to bring them before the Irish courts. They seek to challenge the evidence put forward by the plaintiffs with respect to the plaintiffs’ case against Eurotoaz and their case against the Russian UCCU defendants. I will consider in a little more detail what they say in relation to the allegations and evidence relied on by the plaintiffs when considering whether the plaintiffs have demonstrated a “good arguable case” from the merits. However, for present purposes, I note that the UCC defendants stress the following: (a) the absence of any connection between the allegations made against Eurotoaz and those made against the Russian UCCU defendants, (b) the fact that the plaintiffs allege that the Eurotoaz campaign of litigation commenced in 2009 and yet it is not alleged that UCCU/Mr. Mazepin acquired beneficial ownership of Eurotoaz (through Benstock) until December 2011, (c) that Eurotoaz had been asserting a claim to a shareholding in ToAZ for many years prior to the commencement of the litigation in 2009 and (d) the lack of assets held by Eurotoaz and the consequent lack of any benefit to the plaintiffs in proceedings against Eurotoaz as well as their choice to do so in Ireland as opposed to in Russian.

190. They assert that the plaintiffs would not have sued Eurotoaz if the Russian UCCU defendants were within the jurisdiction. They contend that, by reason of the absence of any assets, the plaintiffs could gain no benefit from proceeding against Eurotoaz and that they are only doing so in order to bring in the Russian UCCU defendants. In support of their contention that the absence of any benefit to the plaintiffs is relevant and potentially decisive, the UCCU defendants relied on a number of cases including *Albaniabeg*, *Yukos S.A.R.L. v. OAO Tomskneft VNK* [2014] IEHC 115 (“*Yukos*”), *Tasarruf Mevduati Sigorta Fonu v. Demirel* [2007] 1 WLR 2508 (“*Tasarruf*”) (English Court of Appeal) and *Bazhanov*. They maintain that the Russian UCCU defendants are not “*proper*” parties to the action brought against

Eurotoaz in that there is no reality to their case against Eurotoaz on the merits and by reason of the absence of any practical benefit to the plaintiffs in pursuing Eurotoaz due to its lack of assets. In addition, they contend that the plaintiffs have pointed to no losses allegedly sustained as a result of the litigation conducted by Eurotoaz in which Eurotoaz has to date generally been unsuccessful.

191. In response to this, the plaintiffs sought to distinguish the cases on which the UCCU defendants relied on in support of its argument. They maintain that they do intend to proceed with their case against Eurotoaz even if the UCCU defendants' application is successful and that their case will proceed against Eurotoaz and against the other defendants who are defending the proceedings or against whom judgment in default of appearance has already been obtained, namely Mr. Babichev, Belport (the seventh defendant), Mr. Charilaou (the ninth defendant) and Mr. Sedykin (the eleventh defendant). The plaintiffs dispute the claim they will derive no benefit from proceeding against Eurotoaz in light of its financial situation and point to the fact that, in addition to seeking damages, they also seek declaratory and injunctive relief against Eurotoaz as well as arising questions as to the financial support provided by Benstock to Eurotoaz. They further rely on their expert evidence from Dr. Gladyshev that, under Russian law, damages could be awarded against Eurotoaz, as one of the parties to the alleged conspiracy, even if that party, by itself, did not directly cause any loss.

192. I am satisfied that applying the applicable legal principles to the circumstances of this case, the Russian UCCU defendants are clearly "*proper*" parties to the action brought against Eurotoaz. As Fennelly pointed out in *Analog*, the cases show that in considering whether a party is a "*proper*" party for the purposes of O. 11, r. 1(h), the courts adopt a "*flexible and pragmatic approach*". As Barrington J. pointed out in *Short (No. 1)*, the "*standard test*" is whether the foreign defendant would, if it were

within the jurisdiction, be a “*proper*” person to be joined as a defendant in the action against the other defendants. As Lord Esher M.R. stated in *Massey*, the question to be asked is whether if the Russian UCCU defendants were within the jurisdiction, would they have been “*proper*” parties to the action against Eurotoaz? In my view, when one considers the amended statement of claim together with the affidavit evidence before the court, including the reports of the various experts in Russian law and, in particular, the reports of Dr. Gladyshev, it is beyond argument that the Russian UCCU defendants are “*proper*” parties to the action against Eurotoaz. If they were within the jurisdiction, I have no doubt but that they would have been joined as co-defendants to the action with Eurotoaz in light of the overall conspiracy case made against them and Eurotoaz. The fact that the case made by the plaintiffs against Eurotoaz and against the Russian UCCU defendants is in conspiracy (albeit that they are alleged to be involved in different aspects of that overall conspiracy) is particularly significant and, in my view, renders obvious the answer to this issue. It is notable that in *IBRC v. Quinn*, the Supreme Court regarded it as pretty obvious that the foreign defendant in that case was a “*proper*” party to the case brought against the defendants properly served in Ireland where the case against the foreign defendant (Mecon) was that it was party to a broad conspiracy with the other defendants and that the particular actions alleged against the foreign defendant were said to be part of the general conspiracy (see para. 45 of the judgment of Clarke J.). Clarke J. found that it was difficult to see how a “*credible argument*” could be made that the foreign defendant was not a “*proper*” party to the case in those circumstances. He stated that whether or not the allegations were correct was a matter for trial but what was relevant was the case which the plaintiffs were making. Clarke J. stated that since it was alleged that Mecon formed a central part of “*at least one aspect*” of the alleged

conspiracy then it was “*very difficult indeed*” to see how it could not be regarded as a “*proper*” party to the proceedings.

193. Although there are undoubtedly differences between the circumstances involved in *IBRC v. Quinn* and the present case, in my view, notwithstanding those differences, the principle is the same and it is very difficult to see how it could be argued that the Russian UCCU defendants are not “*proper*” parties to the case in conspiracy brought against Eurotoaz.

194. Additionally, I am satisfied that the plaintiffs have pointed to significant factors to connect the case being made against Eurotoaz with the case which the plaintiffs wish to make against the Russian UCCU defendants. Some of those connecting factors have been referred to earlier. Whilst there are allegations made in the amended statement of claim in respect of which it is said there is supporting affidavit evidence, and the correctness or otherwise of those allegations is a matter for the trial, I have no doubt the plaintiffs have demonstrated a “good arguable case” that the Russian UCCU defendants are “*proper*” parties to the case against Eurotoaz. Conspiracy with the same objective is alleged against the two sets of defendants. The alleged connecting factors are potentially significant, including the circumstances in which it is alleged that UCCU/Mr. Mazepin acquired beneficial ownership of Eurotoaz in December 2011 with UCCU having acquired its shareholding in ToAZ in 2008 with the alleged campaign of vexatious litigation being commenced by Eurotoaz in 2009 and continued in the period after Benstock acquired Eurotoaz in 2011, as is apparent from the “*Chronology of Eurotoaz Proceedings*” provided to the court by the plaintiffs during the hearing. That chronology shows that Eurotoaz’s litigation continued after December 2011 and further proceedings commenced thereafter (including the filing of a further civil claim by Eurotoaz with the Arbitrazh Court of

the Samara Region against ToAZ in October 2014 referred to in the chronology as the second civil proceedings).

195. I am satisfied that, if the Russian UCCU defendants were present in the jurisdiction, they would have been sued alongside Eurotoaz in the proceedings. I accept the plaintiffs' submission that were the Russian UCCU defendants to be successful in their jurisdiction challenge, the plaintiffs would nonetheless proceed with their case against Eurotoaz and the other defendants who are defending the claim or against whom judgment in default of appearance has been obtained. A feature of the litigation to date between the plaintiffs and the UCCU defendants and indeed against a number of the other defendants (such as Eurotoaz and Mr. Babichev) is that all issues are vigorously fought, and no ground is conceded. In my view, it is highly unlikely that the plaintiffs would choose not to proceed against Eurotoaz in light of the serious allegations which they have made and maintained against it in the proceedings. None of the main protagonists in the proceedings have been reticent or shy in bringing applications and in litigating issues in the proceedings and I have no doubt that the plaintiffs will continue to litigate their case against Eurotoaz whether or not the Russian UCCU defendants remain as defendants in the case.

196. I also accept that, notwithstanding the apparent financial position of Eurotoaz, as disclosed in the most recent set of accounts put before the court (for the year ended 31 December 2015), the plaintiffs believe that they will obtain a benefit from continuing their case against Eurotoaz. The plaintiffs seek declaratory and injunctive relief against Eurotoaz as well as damages. The declarations sought are that the defendants (including Eurotoaz) have been engaged in a conspiracy to defraud and injure the plaintiffs and that they have taken steps in pursuance of that conspiracy. The injunctive relief sought seeks to prevent the defendants (including Eurotoaz)

continuing the wrongful acts alleged by them. Whether or not the declaratory or injunctive relief granted by the court may be enforced in Russia or elsewhere does not, in my view, necessarily mean such relief would not be of practical benefit to the plaintiffs. Declarations or injunctive relief of the type sought could, if the plaintiffs were to succeed in their case against Eurotoaz and to obtain those reliefs, be of practical benefit to the plaintiffs and would represent the considered and solemn views of an Irish court on the actions of an Irish company. This is particularly so in circumstances where Mr. Babichev has said on affidavit that Eurotoaz intends to continue litigating its claimed entitlement to a shareholding in ToAZ in the Russian courts.

197. I agree with the plaintiffs that the cases on which the UCCU defendants rely such as *Albaniabeg*, *Yukos*, *Tasarruf* and *Bazhanov* can all be distinguished. I have referred already to the circumstances at issue in *Albaniabeg*. The High Court and the Court of Appeal set aside the order permitting service on the Italian companies of proceedings which sought to enforce an Albanian judgment. Relying on *Tasarruf* and *Yukos*, both the High Court and the Court of Appeal found that the plaintiff had not demonstrated that it would obtain “*some practical benefit*” from the enforcement proceedings, even an indirect or prospective one. The High Court and the Court of Appeal were satisfied that no such practical benefit would be achieved. There was no connection whatsoever between that case and Ireland. There was no Irish defendant and the Italian defendants had no assets in Ireland. Here, however, there is an Irish defendant (Eurotoaz) against whom the plaintiffs intend to proceed and, to that extent, an Irish Connection.

198. Similarly, in *Yukos*, where the plaintiff (a Luxembourg company) sought to enforce an international arbitration award in Ireland against a Russian company and

obtained leave to do so under O. 11, r. 1(q). Applying the principles set out by the English Court of Appeal in *Tasarruf*, Kelly J. in the High Court set aside the order granting leave to serve out of the jurisdiction on grounds which included the fact that the plaintiff had failed to demonstrate that there was any “*solid practical benefit*” to be gained by permitting the proceedings to be brought here, in circumstances where the case had no connection with Ireland, there were no assets in Ireland and no real likelihood of assets coming into the jurisdiction. Again, there was no Irish defendant in the case as there is here. In *O’Flynn*, the Court of Appeal described *Yukos* as having been “*decided on very particular facts, ... where the only proposed defendant was one outside the jurisdiction...*”, in contradistinction to the facts in *O’Flynn* where there were already proceedings in existence in Ireland against a number of defendants, including Irish companies (at para. 113 of the judgment of the Court of Appeal). It seems to me, therefore, that *Albaniabeg* and *Yukos*, both of which applied principles derived from *Tasarruf*, can clearly be distinguished. So too can *Bazhanov*, not least because it was not concerned with the necessary or proper party gateway under the equivalent provisions of the English Rules and all three of the defendants (two individuals and a company) were based in Russia. There was, therefore, no defendant equivalent to Eurotoaz in the present case. It has no relevance, therefore, to the question as to whether the Russian UCCU defendants are “*proper*” parties to the proceedings against Eurotoaz.

199. For these reasons, I am satisfied that the plaintiffs have clearly demonstrated a “good arguable case” that the Russian UCCU defendants are “*proper*” parties to the proceedings brought in this jurisdiction against Eurotoaz and that they are entitled to rely on the jurisdictional gateway contained in O. 11, r. 1(h).

200. Strictly speaking, therefore, it is not necessary for me to consider whether the plaintiffs are correct in also ascertaining that they have a “good arguable case” that the Russian UCCU defendants are “*necessary*” parties to the case. The plaintiffs contend that they are on the basis that they are concurrent wrongdoers and any failure to pursue the Russian defendants as concurrent wrongdoers with Eurotoaz could diminish or otherwise adversely affect their claim against Eurotoaz, having regard to the provisions of ss. 34 and 35(1)(i) of the Civil Liability Act 1961 (the “1961 Act”). They relied on the recent decision of the Supreme Court in *Hickey v McGowan* [2007] 2 IR 196 (“*Hickey*”) and what was then the decision of the High Court (Twomey J.) in *Defender Limited v. HSBC France and Ors.* [2018] IEHC 706, in which the Supreme Court subsequently gave judgment in July 2020 [2020] IESC 37 (“*Defender*”).

201. The UCCU defendants dispute these contentions and assert that issues arising under the 1961 Act do not fall for consideration at this stage, where the focus is on the plaintiffs’ basis for suing Eurotoaz.

202. For the reasons I have already mentioned, it is not necessary for me to resolve this issue in light of my conclusion that the Russian UCCU defendants are “*proper*” parties. However, for completeness, it seems to me that there is much force in the argument made by the plaintiffs that the fact that they may suffer adversely in the pursuit of their claim against Eurotoaz by the non-joinder of the Russian UCCU defendants having regard to the identification provisions of the Civil Liability Act 1961 and that those defendants are, therefore, “*necessary*” parties. Were it necessary for me to express a definitive conclusion on this question, I would have concluded that the plaintiffs have demonstrated a “good arguable case” that the Russian UCCU defendants are also “*necessary*” parties to the plaintiffs’ against Eurotoaz.

(6) Good Arguable Case on the Merits

203. I must now consider whether the plaintiffs have demonstrated a “good arguable case” on the merits of their claim. The UCCU defendants focused their attack on the arguability of the merits of the plaintiffs’ case against Eurotoaz. They did, however, also address the merits of the plaintiffs’ case against the Russian UCCU defendants particularly in the context of their submissions on the “*act of state*” doctrine. As both *Analog* and *IBRC v. Quinn* make clear, the plaintiffs must demonstrate to the standard set out in those cases a “good arguable case” on the merits against Eurotoaz and against the Russian UCCU defendants. I am satisfied that the plaintiffs have done so.

204. With respect to their case against Eurotoaz, I am satisfied on the basis of the allegations contained in the amended statement of claim supported by the evidence set out in the affidavits and affirmations on which they rely and by the submissions made by the plaintiffs that they have clearly demonstrated a “good arguable case” on the merits in respect of their case against Eurotoaz. I rely in that regard on the affirmations of Mr. Walfenzao filed on 15 November 2018, 18 January 2019 and 8 March 2019 (and his earlier affirmations dated 5 April 2017), on the affidavits of Mr. Makhelai, Mr. E Korolev, Mr. Zivy and Professor Sakwa (together with the expert opinions exhibited to his affidavits) (some of which were sworn in the context of the application brought by Eurotoaz and Mr. Babichev) as well as the affidavits and expert reports of Dr. Gladyshev relied on by the plaintiffs on this application. I have also relied on the affidavits sworn by Ms. Harty which, although for the most part not constituting direct evidence, do draw together in a comprehensible manner an indication or road map of what that evidence is and where it is to be found.

205. In considering the merits of the plaintiffs’ case against Eurotoaz to the “good arguable case” standard, I have also considered the affidavit evidence relied on by the UCCU defendants in support of their application. That evidence consists of three affidavits sworn by Mr. Breen of William Fry and a number of affidavits sworn by the Russian law experts retained by the UCCU defendants, namely, Professor Bevzenko and Mr. Vyacheslavov (and the expert opinions exhibited to their affidavits). I am acutely conscious of the fact that I am required (by *Analog*) to consider the UCCU defendants’ affidavits but, as stated by Clarke J. in *IBRC v. Quinn*, the court is not engaged in “*some assessment of the relative strengths*” of the respective cases of the plaintiffs and of the UCCU defendants on this application. I have applied the principles set out in those cases which I summarised earlier in reaching my conclusion that the plaintiffs have demonstrated a “good arguable case” on the merits in respect of their claim against Eurotoaz and against the Russian UCCU defendants. I am satisfied that, on the basis of the pleadings and on the basis of the affidavit and affirmation evidence relied on by both parties in respect of this application, there is “*reality in law and in fact*” to the case made by the plaintiffs against Eurotoaz. Its joinder is not as a “*mere device*” to bring the Russian UCCU defendants before the Irish courts. I consider that there is a “*substantial element*” to the plaintiffs’ case against (a) Eurotoaz and (b) the Russian UCCU defendants. I am satisfied that the plaintiffs’ case on the merits against both those sets of defendants is “*reasonably capable of being proven*”. Neither can, in any sense, be said to be unstateable or having no reasonable prospect of being capable of proof at the trial. I am satisfied, having considered the affidavit evidence on both sides, that the plaintiffs have put forward sufficient evidence to demonstrate that their case is, on the law and on the facts, “*reasonably capable of being proven*”. I am also satisfied that the UCCU

defendants' submissions and evidence do not provide a "*knockout blow*" to the case which the plaintiffs make against Eurotoaz or against the Russian UCCU defendants.

206. With respect again to the plaintiffs' case on the merits as against Eurotoaz, I have concluded that the plaintiffs have placed sufficient evidence before the court to demonstrate compliance with the test set out in the cases, both as regards the alleged campaign of vexatious litigation conducted by Eurotoaz before the Russian courts in the period from 2009 onwards and as regards the connection between that alleged campaign and the UCCU defendants. As regards the alleged campaign itself, I am satisfied that the evidence of Dr. Gladyshev discloses that the plaintiffs have a "good arguable case" that the alleged campaign of vexatious litigation falls within the concept of abusive behaviour which is arguably prohibited by Art. 10 of the Russian Civil Code as applied in case law of the Russian Supreme Court for which the remedy under Russian law is a claim in tort. I accept that Professor Bevzenko, on behalf of the UCCU defendants, does not agree and disputes the application of Art. 10 of the Russian Civil Code to the alleged campaign. However, I am satisfied that, notwithstanding that disagreement, the plaintiffs' evidence meets the test of being a "good arguable case" and that, judged in accordance with that standard, the alleged campaign would be unlawful under Russian law.

207. I have derived considerable assistance from the parties in my consideration of the expert evidence and I am indebted to them for providing me with two sets of documents identifying the points of agreement/commonality in the expert reports on Russian law and a further index to a table of issues of Russian law raised in the expert reports. I do not think, in light of the test which I am required to apply on this application, that it would be appropriate for me to express any further views on this aspect of the merits of the plaintiffs' case against Eurotoaz.

208. With respect to the connection between the alleged campaign conducted by Eurotoaz and the UCCU defendants, I am satisfied that the plaintiffs have established a “good arguable case” on the merits that such connection exists. The UCCU defendants challenge the existence of that connection and strenuously argue that there is no connection between the case the plaintiffs seek to make against Eurotoaz and the case against the Russian UCCU defendants. Bearing in mind the approach which I am required to take on an application such as this, I must be careful in my assessment of the arguments on this issue and must refrain from expressing anything more than is strictly necessary in order to address the issue as to whether a “good arguable case” has been made out by the plaintiffs.

209. In brief summary, the UCCU defendants advance a number of reasons in support of their contention that the plaintiffs do not have a “good arguable case” that Eurotoaz is part of a conspiracy with the UCCU defendants. First, they say that the alleged Eurotoaz campaign of vexatious litigation only commenced in 2009. Second, they say that there was no connecting link between Eurotoaz and the UCCU defendants before December 2011. Third, they say that first alleged actions by the UCCU defendants on foot of the alleged scheme occurred in 2011. Fourth, they say that the actions of Eurotoaz have not caused any damage to the plaintiffs. These issues have all been addressed in the affidavits and affirmations exchanged between the parties for the purpose of this application; see, in particular, the affidavits sworn by Mr. Breen and the affirmations of Mr. Walfenzao. They are also addressed in summary form in the parties’ written submissions and were expanded upon in oral submissions at the hearing. For a number of reasons, including those set out below, I am satisfied that the plaintiffs have demonstrated a “good arguable case” that Eurotoaz is party to the alleged scheme or conspiracy with the UCCU defendants.

210. In setting out some of the matters which have persuaded me that the plaintiffs have established a good arguable case on the merits against Eurotoaz and against the Russian UCCU defendants, I reiterate that the UCCU defendants (through Mr. Breen and through counsel) dispute many of those matters which will have to be determined in accordance with the normal civil standard of proof at the trial. However, I consider the following matters relevant to the plaintiffs' demonstration of a "good arguable case" on the merits:

211. Eurotoaz began its alleged campaign of vexatious litigation in 2009, one year after UCCU acquired shares in ToAZ. Although Eurotoaz claimed to have acquired shares in ToAZ in 1995, the plaintiffs allege that Eurotoaz took no steps to assert its shareholding until 2009, after UCCU acquired shares in ToAZ.

212. Eurotoaz is alleged to have put forward multiple contradictory versions of how it allegedly obtained the shareholding in ToAZ (three of those alleged versions were set out by Mr. Walfenzao in his affirmation of 7 April 2017 sworn in connection with the Eurotoaz/Babichev application).

213. Eurotoaz is alleged to have engaged in repeated attempts to litigate matters already decided by the Russian courts with respect to its claimed entitlement to a shareholding in ToAZ, as pleaded in the amended statement of claim and in the chronologies of events and proceedings provided by the parties in the course of the hearing and referred to by Mr. Walfenzao in his various affirmations. I (sworn in connection with his and Eurotoaz's applications) note that Mr. Babichev confirmed in his affidavit of 17 February 2017 that Eurotoaz will seek to continue its litigation in Russia (paras. 40(j) and 44)).

214. Mr. Sedykin (the eleventh defendant against whom judgment in default of appearance has been obtained by the plaintiffs) is alleged to be objectively linked to

Mr. Mazepin. The plaintiffs maintain that Mr. Sedykin was involved in the conduct of the alleged campaign of vexatious litigation on behalf of Eurotoaz on foot of an agreement with Eurotoaz under which it is alleged that he would receive a 50% share of the proceeds of the litigation if Eurotoaz was successful in its proceedings. The plaintiffs further allege that Mr. Sedykin was charged and convicted of criminal offences consisting of attempted forgery by the Krasnoglinsky District Court of the Samara Region, which conviction was upheld by the Judicial Panel for Criminal Cases of the Samara Regional Court (save on one charge which it is said was time barred). It is further alleged by the plaintiffs that Mr. Sedykin was involved in attempts to usurp the board of ToAZ by using false minutes of shareholder and Board meetings. It is also alleged that Mr. Sedykin was a central figure in the prosecution by UCCU of proceedings known as the “shareholder list proceedings” concerning the provision of a list of shareholders in ToAZ to UCCU which resulted in the bringing of the Art. 159(4) criminal proceedings.

215. Mr. Babichev (the fifth defendant), who was a director of Eurotoaz, is also alleged by the plaintiffs to be linked to Mr. Mazepin and UCCU in various respects. It is claimed by Mr. Walfenzao that Mr. Babichev was responsible for submitting evidence to the Russian authorities in support of the alleged campaign of vexatious litigation by Eurotoaz and signed one of the criminal complaints in February 2014. He is alleged to be a business associate of Mr. Mazepin through his involvement in an airline company in Russia, OAO Voronezhavia.

216. Mr. S Makhlai has sworn that Mr. Mazepin admitted to him on 13 January 2013 that he had bought Eurotoaz and had lost money as a result and made clear that he wished to obtain further shares in ToAZ in the course of a conversation referring to

proceedings initiated, or to be initiated, against ToAZ, including criminal proceedings (para. 9(c) of Mr. Makhelai's affidavit of 5 April 2017).

217. The plaintiffs also rely on certain pleas in the defence delivered in the proceedings by Eurotoaz and Mr. Babichev concerning the relationship between UCCU, Mr. Babichev and Eurotoaz. At para. 24.5 of that defence, those defendants plead that the shares in Eurotoaz are owned by Benstock and admit that Benstock and Mr. Babichev are connected to the management of UCCU and that UCCU is the ultimate beneficial owner of the shares in Eurotoaz. They further admit (at para. 26.3) that UCCU is the ultimate beneficial owner of Eurotoaz. The plaintiffs rely on this admitted connection between Eurotoaz and Mr. Babichev, on the one hand, and UCCU and the other UCCU defendants, including Mr. Mazepin, on the other, in support of their case on the merits concerning the alleged scheme or conspiracy.

218. The plaintiffs rely on other alleged links including these: Eurotoaz was represented in proceedings it brought against ToAZ by Ms. Bolotnikova (the sixth defendant). In a witness statement she signed in 2013 in the context of criminal proceedings in Russia, she described herself as the "*Contract Department Head For Legal Administration*" of UCCU. She swore an affidavit on behalf of Eurotoaz on 13 March, 2015 in defamation proceedings brought before the High Court by ToAZ against Eurotoaz in which she described herself as an "*attorney*" for and to Eurotoaz. The witness statement which she signed in 2013 concerned an alleged false share purchase agreement between UCCU and Belport for the acquisition of shares in ToAZ. The plaintiffs state that Ms. Bolotnikova is also a former director of a company (CI – Chemical Invest Limited) which is said to own 95% of Holdings. It is also alleged that Eurotoaz has been represented in some of its proceedings by another

in-house lawyer in UCCU, Ms. Shvedskaya (as recorded in various decisions of the Russian courts).

219. Mr. E Korolev swore an affidavit on 7 April 2017 in the context of the Eurotoaz/Babichev applications. He was a former senior employee of ToAZ who was dismissed as a member of the board of directors of that company in September 2015 by a ruling of the Bazmanny District Court in Moscow. Prior to that he was directly involved in ToAZ's defence of actions and proceedings brought against ToAZ by UCCU and Eurotoaz. He swore that he was personally aware of certain matters, including the litigation brought against ToAZ by Eurotoaz and that that litigation was part of a wider campaign aimed at gaining control of ToAZ by Mr. Mazepin. He swore that the actions of Eurotoaz and Mr. Babichev and of the UCCU defendants (which term, of course, includes but is more extensive than the Russian UCCU defendants) were interconnected and formed a "*single campaign*". He referred to the alleged campaign of litigation brought by Eurotoaz and also the actions of the UCCU defendants (paras. 8 -27). He successfully resisted extradition to Russia on foot of a ruling by an English court in December 2016 in which it was held that Mr. Mazepin was a corporate raider who had engaged in a raider attack on ToAZ with a view to forcing the majority shareholders in ToAZ into giving up their shares in that company. In a second affidavit in July 2017, Mr. Korolev confirmed his belief that Mr. Mazepin was the ultimate beneficial owner of Eurotoaz and that it was at his direction that Eurotoaz pursued various civil and criminal claims in Russia as part of Mr. Mazepin's alleged overall raiding activities against ToAZ and he explained the basis for that belief (para. 4).

220. The plaintiffs rely on an affidavit of Professor Sakwa sworn on 5 April 2017 which commented on the allegations contained in the statement of claim (prior to its

amendment) and expressed his expert view and opinion that the alleged actions of Eurotoaz and Mr. Babichev, “*if established, have all the hallmarks of being connected to the corporate raid against ToAZ*” by UCCU (para. 17).

221. These are some of the matters on which the plaintiffs rely and on which they have provided evidence in response to the present application in support of the “good arguable case” which they maintain they have against Eurotoaz (and also against the Russian UCCU defendants).

222. They also rely on the allegations contained in the amended statement of claim and various affidavits and affirmations, including those of Mr. Walfenzao, Mr. S. Makhlai, Mr. E. Korolev, Mr. Zivy and Professor Sakwa to show a “good arguable case” on the merits against the Russian UCCU defendants in order to satisfy the test in *Analog* and *IBRC v. Quinn*. It is unnecessary to record the detail of what was said in those affirmations and affidavits as Mr. Breen and counsel for the defendants made clear that they are disputed (although not on affidavit for the purpose of this application). It is sufficient to record my conclusion that those deponents have given direct affidavit and affirmation evidence to support the various allegations against the Russian UCCU defendants in the amended statement of claim. In very brief summary, Mr. S. Makhlai gave evidence in his affidavit of his unlawful suspension from the Board of ToAZ, the personal impact of the scheme on him, including the issuing of Interpol “Red Notices”, the alleged threats by Mr. Mazepin at at least three meetings in 2012 and 2013 and the damage allegedly done to him. Mr E. Korolev in his affidavit also gives direct evidence as the effect of the alleged scheme on him. As does Mr. Zivy. Mr. Walfenzao also gives evidence in his affirmations on these matters on behalf of the plaintiffs. Although his evidence was criticized as hearsay, I am satisfied that he was in a position to give evidence as a director of Trafalgar who

had authority to give evidence on behalf of all of the plaintiffs. Professor Sakwa's affidavits and expert reports also supports the "good arguable case" which the plaintiffs make on the merits of their claim against the Russian UCCU defendants.

223. I acknowledge, of course, that the UCCU defendants strenuously reject and deny the allegations in the amended statement of claim and dispute the admissibility and accuracy of the evidence given in the affirmations and affidavits to which I have referred. The truth of those allegations is ultimately a matter for the trial. However, for present purposes, applying the test as outlined in *Analog* and applied in *IBRC v. Quinn*, I am satisfied that the plaintiffs have demonstrated a "good arguable case" on the merits of their case against Eurotoaz and against the Russian UCCU defendants. They have persuaded me that there is "*reality in law and in fact*" in the case against Eurotoaz, that its inclusion as a defendant in the proceedings is not a "*mere device*" to get the Russian UCCU defendants before the Irish courts and that there is a "*substantial element*" in the claims against the two sets of defendants. They have also persuaded me that the claims against both sets of defendants are not unstateable and are reasonably capable of being proven, such that there is a sufficient basis for the conclusion that the plaintiffs may have a claim against those defendants to justify bringing the Russian UCCU defendants before the Irish courts. I am satisfied that that is so, notwithstanding that it appears from the most recent accounts put before the court that Eurotoaz does not have assets and as at 31 December 2015 had total borrowings from Benstock of just over US \$8m. As I have indicated earlier, despite the apparent lack of assets, I am satisfied that the plaintiffs will derive a practical benefit from its proceedings against Eurotoaz, if successful.

224. For these reasons, therefore, I have concluded that the plaintiffs have demonstrated to the required standard that they have (a) a "good arguable case" that

their claims fall within the jurisdictional gateway contained in Order 11, r. 1(h) and (b) a “good arguable case” on the merits of their claims against Eurotoaz and against the Russian UCCU defendants. It follows, therefore, that the action has been “*properly brought*” against Eurotoaz for the purposes of O. 11, r. 1(h).

(7) Act of State/Related Doctrines

225. Before turning to the relevant aspects of O. 11, rr. 2 and 5, I must address the UCCU defendants’ contention that the court does not have jurisdiction to consider the claims in the proceedings or, alternatively, that such claims are not justiciable on the ground that to do so would offend against the “*act of state*” and closely related doctrine as the court would be asked to pronounce on matters the subject of decisions and actions of judicial and other public bodies in Russia. This point was made for two purposes. First, it was argued that the plaintiffs could not establish a “good arguable case” on the merits as the court’s consideration of the case would offend against the “*act of state*” doctrine or would involve the court considering matters which are not justiciable, having regard to the principle of comity of courts. Additionally, they argue that because consideration of the plaintiffs’ case would offend against that doctrine or would involve a breach of the comity principle, the plaintiffs are unable to demonstrate that the case is a “*proper*” case for the purposes of O. 11, r. 5 in which service out of the jurisdiction should be permitted.

226. The UCCU defendants maintain that an essential part of the plaintiffs’ case involves decisions taken by the Russian courts and by regulatory and administrative authorities in Russia. They refer to the allegations contained in the amended statement of claim concerning the alleged oppressive and unjust court orders made against the plaintiffs, including the freezing orders with respect to their ToAZ shares

and the dividends associated with those shares, the issuing of allegedly improper arrest warrants and Interpol “Red Notices” against the persons connected with ToAZ and allegedly putting undue and unlawful pressure on judges, criminal investigators, court appointed experts and judicial officers in Russia to make improper and unfounded adverse orders against ToAZ and its officers and shareholders and to bring or initiate improper and inappropriate proceedings, tax cases and investigations. The UCCU defendants maintain that the Irish courts clearly have no power to overturn or invalidate the decisions of the Russian courts or those of Russian administrative and regulatory authorities and have no jurisdiction to adjudicate upon the plaintiffs’ claims concerning the Russian courts, prosecution authorities, administrative and regulatory and tax authorities, either by reason of the doctrine of “*act of state*” or on the basis that those types of disputes are not properly justiciable before the Irish courts because of the doctrine of international comity of courts.

227. While acknowledging that the English Courts have held in a series of cases that the “*act of state*” doctrine does not apply to judicial decisions (*Yukos Capital Sarl v. Rosneft (No.2)* [2014] QB 458 (“*Yukos (No.2)*”) (English Court of Appeal) and *Belhaj v. Straw* [2017] AC 964 (“*Belhaj*”) (U.K. Supreme Court)), they note that a different approach was taken in at least one American case in which it was held that the “*act of state*” doctrine can be applied to the judicial acts of a foreign court (*Philippine National Bank v. United States District Court for the District of Hawaii* (2005) 397 F 3d 768 (9th Cir.) (the “*Philippine*” case), a decision of the United States Court of Appeals for the Ninth Circuit). They also point to the fact that even if the “*act of state*” doctrine is found not to apply to foreign judicial decisions, the plaintiffs’ case includes allegations of wrongful and improper conduct on the part of non-judicial public bodies in Russia and refer in that context to the evidence of Prof. Bevzenko in

which he described some of the relevant authorities in Russia as being part of the executive rather than judicial branch of the State, including the Investigation Committee, which investigates alleged criminal acts and decides whether to prosecute and the Tax Inspectorate. They also rely on a number of Irish cases including, *Short v. Ireland (No.2)* [2006] 3 IR297 (“*Short (No.2)*”) and *O’Fallun v. Governor of Clover Hill Prison* [2005] IEHC 284 (“*O’Fallun*”) (Peart J.), which they maintain support their objection to jurisdiction and to the non-justiciability of these issues. They do, however, fairly acknowledge that the issue remains to be conclusively decided by the Irish Courts.

228. In response, the plaintiffs contend that the resolution of an issue such as this, particularly in circumstances where the Irish courts have not yet conclusively ruled on the scope of application of the “*act of state*” doctrine, is not appropriate for an application such as this and should be left to be considered at trial. Without prejudice to that, the plaintiffs maintain that their case is not directed to the unlawful acts of the Russian courts or other Russian administrative or regulatory bodies but concerns the actions of the defendants, including the UCCU defendants. Their cause of action is based in conspiracy and encompasses both types of conspiracy, namely, conspiracy by lawful and by unlawful means. Their case is not dependent on establishing that the particular decisions of the Russian courts or other Russian authorities are unlawful. A significant part of their case is directed to the alleged unlawful threats, the deployment of allegedly false evidence and the criminal conduct of certain of the defendants, including Mr. Sedykin (the 11th defendant). The plaintiffs maintain that *Short No. 2* and *O’Fallun* are clearly distinguishable from the present case. They rely on the approach taken by the English Courts in *Yukos* and *Belhaj* and submit that the doctrine of “*act of state*” or non-justiciability on the grounds of international comity

has no application or at least should await full determination at trial and should not be used to rule out the plaintiffs' case at this stage.

229. I am satisfied that I should not decline jurisdiction in the proceedings by reason of the "*act of state*" doctrine or otherwise prevent the plaintiffs' case from proceeding on the grounds of non-justiciability or judicial restraint on the grounds of international comity. While I fully accept the need to exercise caution and restraint in circumstances where an Irish court is asked to consider proceedings before a foreign court or courts or proceedings or procedures before foreign administrative, regulatory or executive bodies, I am not satisfied that the exercise of such caution or restraint requires me to accede to the UCCU defendants' application in this case. Without deciding definitively on which party the burden of proof on this issue should lie, and proceeding on the assumption that the plaintiffs bear the burden of demonstrating that the court should not decline jurisdiction on the basis of the "*act of state*" doctrine or the related principle relied on (although there is a good argument that the burden of proof on this issue rests with the UCCU defendants), I am satisfied that the plaintiffs have demonstrated to the standard required in *Analog* and *IBRC v. Quinn* that the proceedings are not precluded on either of these related grounds. Nor could it be said, in my view, that there is a "*knockout blow*" or unanswerable point in the UCCU defendants' favour on this issue for a number of reasons.

230. First, I accept the plaintiffs' submission that their claim is for damages, declaratory and other relief against the defendants, including the UCCU defendants, arising from the involvement of the defendants in the alleged scheme or conspiracy pleaded in the amended statement of claim. While the plaintiffs are undoubtedly very critical of various decisions of a number of different Russian courts and of investigations, proceedings and procedures of various different Russian

administrative, regulatory and executive bodies, the plaintiffs do not seek to overturn, reverse or quash those decisions, proceedings or procedures or seek to prevent them from taking effect as is clear from their claim set out in the amended statement of claim. No issue arises on this application of the plaintiffs seeking relief which would have the effect of overturning, reversing or quashing any of those decisions, proceedings or procedures or preventing them from taking effect in Russia. I accept also that the plaintiffs' case does not depend on the plaintiffs demonstrating the unlawfulness or otherwise of any of those decisions, proceedings or procedures, although it is undoubtedly a significant part of the plaintiffs' claim for damages, declarations and injunctive relief that the defendants, including the UCCU defendants, have exercised improper influence on the courts and other authorities in Russia to achieve the particular aim and objective alleged by the plaintiffs. Notwithstanding all of that, however, the claim is one for damages, declarations and injunctive relief and not a direct challenge to the decisions, proceedings and procedures themselves.

231. Second, it has not been suggested, nor could it be suggested, that an Irish court is absolutely precluded from considering allegations of impropriety or improper conduct against foreign courts. It can certainly do so in the context of the question of *forum non conveniens* and the enforcement of foreign judgments. That point was made in a number of the cases including, for example, *AK Investments (Privy Council)*, *Cherney v. Deripaska (No. 2)* [2009] 1 All ER Comm 333 and *Yukos (No. 2)*.

232. Third, while great stress was placed by the UCCU defendants on the allegations contained in the amended statement of claim concerning decisions of certain Russian courts, there is a very real question as to whether the “*act of state*” doctrine or the related doctrine of non-justiciability applies at all to foreign judicial acts. The

overwhelming weight of the English authorities is that the “*act of state*” doctrine does not apply to foreign judicial acts or decisions. That is clear from cases such as *Altimo Holdings, Yukos (No.2)* and *Belhajand* was more recently confirmed by the U.K. Supreme Court in “*Maduro Board*” of the *Central Bank of Venezuela v. “Guaido Board”* [2021] UKSC 57 (the “*Venezuela*” case”).

233. In *Altimo Holdings*, the Privy Council had to consider the potential application of the “*act of state*” doctrine in the context of a case made by Manx parties that they would not obtain justice in the courts of Kyrgyzstan because of alleged endemic corruption in the foreign court system. The appellants in the case contended that the court was precluded from considering whether justice would or might not be done because of such alleged corruption by the “*act of state*” doctrine or the related principle of judicial restraint described in *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] AC 888 (“*Buttes*”). The Privy Council held that such an enquiry was not precluded by either doctrine or principle. Lord Collins said (at para. 97):

“Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required. But, contrary to the appellants’ submission, even in what they describe as endemic corruption cases, (ie where the court system itself is criticised) there is no principle that the court may not so rule....”

234. Later in his judgment (at para. 101) he said:

“The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of

international comity will militate against any such finding in the absence of cogent evidence....”

235. It was considerations of international comity and not the “*act of state*” doctrine or the principle of judicial restraint in *Buttes* which was the basis for the requirement set out in cases such as *The Abidin Daver* [1984] AC 398, for requiring cogent evidence to support a claim that justice could not be obtained in the foreign jurisdiction, according to Lord Collins in *Altimo Holdings*.

236. Those two passages were quoted with approval by the English Court of Appeal in *Yukos (No. 2)*, where one of the issues was whether the claimant was prohibited from alleging, and whether the court was prohibited for adjudicating upon, allegations that the Russian judiciary was not impartial or independent but was guided by the interests of the Russian State and instructed by the executive, on the grounds of “*act of state*”, non-justiciability or comity. The English High Court held that the court was not so prohibited, and that decision was upheld by the Court of Appeal. In its judgment the Court of Appeal made clear in its judgment that the “*act of state*” doctrine did not apply to foreign judicial acts. Having considered the source of the doctrine and the separate, but analogous, doctrine of non-justiciability discussed by Lord Wilberforce in *Buttes*, and having referred to the two passages from the judgment of Lord Collins in *Altimo Holdings*, the Court of Appeal concluded that judicial acts were not acts of state for the purposes of the “*act of state*” doctrine. It further concluded that the principle of non-justiciability was not a separate doctrine from the “*act of state*” principle but rather had “*to a large extent subsumed it as the paradigm restatement of that principle*” (per Rix LJ at para. 66). At para. 73, he stated:

“Where, however, a foreign court may act in a way which is an abuse of its own responsibilities as a court of law, the courts of this country are not obliged to give effect to the potential jurisdiction or past acts of such a court, provided that the failings of the foreign court are sufficiently cogently brought home to the English court.”

237. At para. 86, Rix LJ stated, following the Privy Council in *Altimo Holdings* that:

“...the ‘act of state’ doctrine does not prevent an investigation of or adjudication upon the conduct of the judiciary of a foreign state, whether that conduct lies in the past, or in the future, and whether or not its conduct in the past is relied upon as the foundation for an assessment of the risk as to its conduct in the future.”

238. The court did make clear that comity *“cautions that the judicial acts of a foreign state acting within its territory should not be challenged without cogent evidence”* (para. 87) and that *“judicial acts are not ‘acts of state’ for the purpose of the ‘act of state’ doctrine”* (also para. 87). The court disagreed with the conclusion in the *Philippine* case in the United States Court of Appeals (9th Circuit) that a judgment of a foreign court which had been sought by a foreign government could qualify as an act of state. While the UCCU defendants contend that I should follow that approach and not the approach taken in the English cases such as *Yukos (No. 2)* (and recently confirmed by the U.K. Supreme Court in the *Venezuela* case), I do not think that it would be appropriate for me to do so on this application. It is open to the UCCU defendants to make that case at the trial, but there is more than sufficient authority for me to conclude on this application that there is a good arguable case that the *“act of state”* doctrine does not apply to preclude the plaintiff from raising, and the court from considering at trial, the plaintiffs’ allegations concerning improper procedures

allegedly followed in and by the various Russian courts referred to, and whether this was brought about by the actions of any of the defendants, and that the “*act of state*” doctrine or non-justiciability does not prevent the court from undertaking that task as part of its consideration of the plaintiffs’ claims against the defendants, including the UCCU defendants.

239. At para. 90 of its judgment in *Yukos*, Rix LJ stated:

“In our judgment, therefore, the act of state doctrine does not apply to allegations of impropriety against foreign court decisions, whether in the case of particular decisions or in the case of a systemic dependency on the dictates or interference of the domestic government...”

240. The Court of Appeal gave consideration to whether what is known as the *Kirkpatrick* exception (named after the U.S. Supreme Court case: *WS Kirkpatrick & Co Inc v. Environmental Tectonics Corporation International* (1990) 493 US 400) could apply in the case before it, but concluded that it could not. Under that exception, the “*act of state*” doctrine is not engaged where the only issue is whether certain acts had occurred but not whether they are invalid or wrongful. That exception could potentially apply to the allegations made by the plaintiffs against the administrative and executive bodies in Russia, but it is unnecessary for me to express any conclusion on the potential application of that exception here. That too would be a matter for the trial.

241. Returning to *Yukos (No.2)*, the Court of Appeal concluded that the doctrine of “*act of state*” did not bar any part of the claimant’s case. Its conclusion applied not only to the Russian court decisions themselves but also to decisions emanating from the tax courts or tribunals in Russia which took as their starting point certain tax assessments. Those assessments operated within a tax code which was designed to

operate according to law and to be subject to legal and judicial rulings. The court concluded, therefore, that the tax assessments could not be separated from the tax decisions themselves and a consideration of those assessments was not precluded by the “*act of state*” doctrine (paras. 133-135).

242. It seems to me that the conclusion reached in relation to the tax assessments in that case assists the plaintiffs in their establishment of a good arguable case that the “*act of state*” doctrine does not preclude the court from considering the acts of the executive bodies in Russia about which complaint is made in the amended statement of claim and that a consideration of those acts would not offend against the “*act of state*” doctrine or any principle of non-justiciability.

243. The non-application of the “*act of state*” doctrine to judicial decisions was confirmed by the UK Supreme Court in *Belhaj*. In his judgment, Lord Mance referred with approval to *Altimo Holdings* and *Yukos (No. 2)* (at para. 73). Those cases were again very recently considered by the U.K. Supreme Court in the *Venezuela* case in which there is an extensive discussion of the “*act of state*” doctrine, most of which is not relevant for present purposes. It is sufficient, I think, to note that at para. 136 of its judgment the court expressly referred to one of the limitations and exceptions of the “*act of state*” doctrine as being that judicial acts will not be regarded as acts of state for the purpose of the doctrine.

244. It is agreed between the parties that the scope of application of the doctrine has not received extensive consideration by the Irish courts. The UCCU defendants, however, rely on two cases, namely, *Short (No. 2)* and *O’Fallun*. I agree with the plaintiffs that both of those cases can be distinguished. In *O’Fallun*, the applicant brought an Art. 40.4 application claiming that his detention on foot of a European Arrest Warrant was unlawful because the warrant was invalid as it was based on a

warrant of arrest issued at Bow Street Magistrates Court in London, which itself had to be regarded as unlawful and void in light of what was said by the Supreme Court in an earlier case, *O'Rourke v. Governor of Cloverhill Prison* [2004] 2 IR 456. In the High Court (Peart J.) refused the relief sought. Peart J. stated that “*due respect should be given to a judicial act of another sovereign State*” and that there was no “*suggestion or hint of fraud or underhandedness*” in the manner in which the warrant was obtained in the U.K. or with respect to the earlier warrant on which it was based, which was for the arrest of the applicant. Peart J. stated that:

“The Courts of one sovereign state refrain from attempting to declare unlawful in a judicial review sense the actions of an administrative body in another sovereign state. Similarly, they will refrain from doing so in respect of an order made by the court of such a state. This results from the respect which the Courts of one State hold for those of the other – the comity of Courts, and as part of the comity of nations...” (at p.5)

245. The court referred to the principle of “*judicial restraint in relation to the administrative acts of another sovereign*” (at p. 6) and referred in that regard to *Adams v. The DPP* [2001] 1 IR 47 where the Supreme Court refused to quash a certificate of the British Home Secretary. Having referred to some of the then leading authorities on “*act of state*” including *Buttes* and the two well-known decisions of from the U.S. Supreme Court, *Underhill v. Hernandez* (1897) 168 US 250 (“*Underhill*”) and *Oetjen v. Central Leather Co.* (1918) 246 US 297, which referred to the application of the doctrine to administrative acts rather than judicial acts, Peart J. concluded that the principle must be “*equally applicable*” to judicial acts. However, it seems to me that what was at issue in that case was very different to the case which the plaintiffs seek to make against the defendants in the present case and

in respect of which it is said by the UCCU defendant the doctrine of “*act of state*” or non-justiciability must apply. In *O’Fallun*, the applicant was in effect asking the Irish court to render invalid a warrant issued by an English court. Understandably, the court was reluctant to do so and, in that context, referred to judicial restraint and the “*act of state*” doctrine. However, that case involved a much more direct challenge to the validity of a decision by an English court to issue a warrant at the request of the authorities there. The court did not have to explore the parameters of the doctrine or whether an Irish court could be precluded from considering steps taken in a foreign court where they might be relevant to a cause of action asserted against parties to proceedings in Ireland. It might also be noted that *O’Fallun* was decided before the extensive consideration of the doctrine and its non-application to judicial acts in *Altimo Holdings, Yukos (No.2)* and *Belhaz* (and most recently in the *Venezuela case*). In any event, in my view, it does not in any way detract from the demonstration by the plaintiffs of a good arguable case to the effect that the doctrine does not apply in the present case.

246. The decision of the Supreme Court in *Short (No.2)* is, in my view, of no assistance to the UCCU defendants. In that case, the Supreme Court held that the Irish courts did not have jurisdiction to determine the lawfulness and validity of administrative procedures and decisions of another Member State which authorised or permitted the operations of the THORP nuclear fuel reprocessing plant. In his judgment for the Supreme Court, Fennelly J. noted that what was at issue was “*the jurisdiction of an Irish court to determine the lawfulness or validity, under the law of the United Kingdom, of administrative decisions made in that jurisdiction in accordance with national law and procedures*” (para. 48, p. 315). He stated that it was:

“elementary that our courts have no power to review the lawfulness of administrative decisions made by English administrative bodies under English law...The courts of each country alone have the power to review the legality, within their own frontiers, of decisions of their own government and administration.” (para. 48, p.315).

247. Fennelly J. considered the (then) leading cases on the “*act of state*” doctrine, including *Buttes* and *Underhill* but observed that it was not necessary to lay down any broad principles to determine the case at hand. The court was not concerned with sovereign immunity or “*acts of state*”. He said:

“We are concerned with the much simpler and narrower question of whether the courts of one state have jurisdiction to determine the validity of administrative acts of the authorities of another state which are not claimed to have any legal effect outside the borders of the latter state.” (para. 55, p.318)

248. The Supreme Court answered that question in the negative, upholding the decision of Peart J. at first instance. However, the issue considered and decided by the Supreme Court in *Short (No. 2)* is fundamentally different to the issue under consideration in this application. I agree with the plaintiffs that *Short (No. 2)* is clearly distinguishable. It is important to note that the judgment did not concern the tort claims in respect of which the plaintiffs had previously obtained leave to issue and serve proceedings outside the jurisdiction under various paragraphs of O. 11, r. 1. The Supreme Court in *Short (No. 1)* had dismissed an appeal from the High Court refusing to set aside the *ex parte* order giving leave to serve out of the jurisdiction (see *per* Fennelly J. at paras. 28-35, pp. 308-310). The plaintiffs’ entitlement to maintain the tort claims against British Nuclear Fuels was, therefore, unaffected by the subsequent judgment of the Supreme Court in *Short (No. 2)*.

249. I am satisfied, therefore, that while the precise parameters of the “*act of state*” doctrine and its close cousin, the related doctrines of non-justiciability and judicial restraint, have not yet been considered and determined by the Irish courts, the plaintiffs have for the reasons just outlined demonstrated at least a good arguable case that they are not precluded from maintaining the allegations which have been challenged on the basis of those doctrines by the UCCU defendants in this application. It certainly cannot be said that the UCCU defendants have put forward a “*knockout blow*” or unanswerable response to the plaintiffs’ case that those doctrines do not apply. In my view, the plaintiffs are entitled to advance the allegations they make in the amended statement of claim and it will be a matter for the trial judge to determine whether the plaintiffs succeed on them.

250. I have concluded, therefore, that the plaintiffs are not precluded from advancing, and the court is not precluded from considering, the impugned allegations on the basis of either or both of those two doctrines. A definitive decision on whether or not the doctrines apply to preclude any aspect of the plaintiffs’ case must await trial.

(8) O. 11 r. 2 and r. 5: Proper Forum

251. Having demonstrated to the requisite standard that their claims fall within the jurisdictional gateway provided for under O. 11, r. 1(h) and having persuaded me, for the purposes of this application, that the pursuit of their claims in these proceedings does not offend against the “*act of state*” doctrine or the related non-justiciability principle, the plaintiffs must also demonstrate compliance with the requirements of O. 11, rr. 2 and 5.

252. The fact that the proceedings fall within one of the gateways in O. 11, r. 1 does not mean that the plaintiffs are entitled as of right to obtain service out of the jurisdiction. They must also satisfy the court that the other requirements in O. 11 and,

in particular, in rr. 2 and 5 have been met (see *Yukos per Kelly J.* at para. 85). Under O. 11, r. 5, the plaintiffs are required to provide affidavit or other evidence stating their belief that they have a good cause of action against the foreign defendants and showing where they may be found and must also provide evidence enabling the court to exercise its discretion under O. 11, r. 2, namely, that having regard to the amount or value of the claim or property affected and the comparative costs and convenience of proceedings in Ireland or in the place of the defendants' residence, Ireland is a "*convenient*" forum i.e. a suitable or appropriate forum to hear and determine the proceedings. In that context the plaintiffs must demonstrate that the case is a "*proper*" one for service out of the jurisdiction. Before referring to the respective contentions of the parties on these issues, it is appropriate that I identify the relevant legal principles which have been considered in many of the cases discussed earlier.

253. In *Analog*, which involved not only an application to set aside service of the proceedings out of the jurisdiction but also an application by one of the foreign defendants to stay the proceedings on the grounds of *forum non conveniens*. The UCCU defendants have not brought such an application in this case. However, as we shall see, the courts have found it helpful in addressing the issue under consideration have to refer to some of the principles derived from the *forum non conveniens* cases. Fennelly J. confirmed the approach which the court is required to take when considering whether to grant leave to serve out of the jurisdiction. He confirmed that the making of such an order is a matter of discretion. He continued:

"The court should grant leave only after careful consideration, not only of the existence of grounds upon which the court is empowered to grant leave, but of the appropriateness of the courts of this jurisdiction to try the case. The latinism, 'conveniens,' may, as has been pointed out in some of the cases,

mislead; the proper translation is not 'convenient,' but suitable or appropriate. This is illustrated, in particular, by Order 11 Rule 5...which obliges the applicant to state 'the particulars necessary for enabling the court to exercise a due discretion in the manner in rule 2 specified.' The latter provision obliges the court to 'have regard to the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence....' Rule 5 goes on to lay down a fundamental principle regarding the exercise of what has been stated to be a discretionary power;... 'and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this order.' (at p. 287)

254. Fennelly J. made clear that by virtue of those provisions of the Rules, an applicant for service out must satisfy the court, and has the burden of proving at the *ex parte* stage, that Ireland is the *forum conveniens* (p.287). He explained what is meant by that term by reference to what Lord Goff said in *Spiliada Maritime Corporation v. Cansulex Limited* [1987] 1 AC 460 (“*Spiliada*”) at p.480, namely, “*the forum in which the case can be suitably tried for the interests of the parties and for the ends of justice*”. Fennelly J. confirmed that the burden of proof in the case of an application for service out of the jurisdiction (and where an order permitting such service is challenged) rests on the party seeking or who has obtained such an order, whereas in the case of an application to stay proceedings on the grounds of *forum non conveniens*, the burden of proof lies on the party applying for such stay (*per* Fennelly J. at pp. 288, 289).

255. The Court of Appeal in *O’Flynn* confirmed that in an application to set aside service of proceedings outside the jurisdiction, the burden of establishing that Ireland

was the appropriate forum rested with the party that had obtained the *ex parte* order (see: *O'Flynn* at para. 111).

256. The legal principles applicable to an application to stay proceedings on the grounds of *forum non conveniens* were set out by the Supreme Court in *Intermetal* and they were followed and approved by that court in *Analog*. They were most recently discussed by the Supreme Court in *IBRC v. Quinn* to which I return shortly.

257. In *Yukos*, Kelly J., when considering the provisions of O. 11, rr. 2 and 5, also derived assistance from the *forum non conveniens* cases. When considering the evaluation of the comparative cost and convenience of proceedings in Ireland and elsewhere in that case, for the purposes of O. 11, rr. 2 and 5, Kelly J. quoted with approval the description by Fitzgibbon L.J. in *McCrea v. Knight* [1876] 2 IR 619 of the meaning of the word “*conveniens*” in this context. Fitzgibbon L.J. stated that:

“*It means fitness, propriety and suitability – each and all three in the general sense.*” (at pp. 625-626: quoted with approval by Kelly J. in *Yukos* at para. 93)

258. Kelly J. also referred to and applied the principles set out in *Intermetal* where the Supreme Court had approved the *dicta* of Lord Goff in *Spiliada* which in turn had been approved by Bingham LJ re *Harrods (Buenos Aires) Ltd.* [1992] Ch 72 (“*Harrods*”), (as did Haughton J. in his judgment on the Eurotoaz/Babichev applications at para. 57). Lord Goff had said in *Spiliada* that:

“*...The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably in the interests of all the parties and the ends of justice.*” (at p.476)

259. Murphy J. in the Supreme Court in *Intermetal* approved that passage and the following *dicta* of Bingham LJ in *Harrods* where he said:

“The words I have emphasised make clear, as does the reference to justice, that a broad overall view must be taken: the primary task is not to decide which forum is advantageous or disadvantageous to any particular party. The court should look first to see what factors there are, taking this broad overall view, which point in the direction of another forum...: at that stage it is connecting factors (including convenience, expense, availability of witnesses, governing law, place of residence and place of business) which must be considered:...If it is shown that there is some other available forum which prima facie is clearly more appropriate for the trial of the action a stay will ordinarily be granted unless on a consideration of all the circumstances justice requires that a stay should not be granted.” (per Bingham L.J. at p.124; quoted by Murphy J. at pp.33-34)

260. Lord Goff made the point in *Spiliada* that the burden of proof rested on the applicant who was seeking or who had obtained the order for service out to persuade the court that the domestic forum was the appropriate forum for the trial of the action and that he had to show that this was clearly so. In other words, he stated that the burden was the obverse of that applicable where a stay was sought of proceedings started as of right in the domestic forum: *per* Lord Goff at p.481.

261. It is clear from the cases that the court must take account of the interests of both parties to the litigation and not merely the applicant: *Spiliada*, *Harrods*, *Intermetal* and *Yukos* per Kelly J. at para. 134.

262. That approach was followed by the Court of Appeal in *O’Flynn* where one of the arguments raised by the relevant defendant which sought to set aside an order

permitting service out of the jurisdiction under. One of the issues was whether the plaintiffs had established that Ireland was the appropriate jurisdiction for the resolution of conspiracy claims made against the applicant/defendant and other parties to the proceedings. While accepting that it was said in *Yukos* that it was necessary to have regard to the interests of both parties to the litigation, the court noted that *Yukos* was decided on “*very particular facts where the only proposed defendant was one from outside the jurisdiction.*” That was not the case in *O’Flynn* where there were already proceedings in the jurisdiction against a number of other defendants arising out of the same matrix of facts which gave rise to the claim sought to be made against the applicant/defendant (para. 113). It had been argued by that defendant that the plaintiffs had not put in any evidence as to the cost and convenience of having matters determined in Ireland on the *ex parte* application. However, the court held that it was unnecessary to do so in circumstances where there were already in existence proceedings between the same plaintiffs and a number of defendants, in respect of whom the claims would in any event fall to be determined in Ireland and it had been averred by the plaintiffs that if they did not obtain the order permitting service out of the jurisdiction then there would be proceedings in different jurisdictions each involving claims arising from the alleged conspiracy. The court accepted that that evidence was sufficient to satisfy the requirements of O. 11, rr. 2 and 5.

263. In *IBRC v. Quinn*, the UAE defendant, Mecon, brought an application pursuant to O. 12, r. 26 seeking to discharge the order permitting service outside the jurisdiction and also applied to stay the proceedings on the grounds of *forum non conveniens*. It argued that similar proceedings had previously been commenced in India by persons connected to IBRC and that India was a more convenient or appropriate location to deal with the case against it. As discussed earlier, IBRC

alleged that Mecon was party to a conspiracy with a number of the other defendants in the Irish proceedings. The Supreme Court dealt separately with the application to discharge the order and with the stay application. The court proceeded on the assumption that the *forum non conveniens* jurisdiction existed. It was agreed that the relevant principles were those set out in *Spiliada* as endorsed in *Intermetal* and in *McCarthy v. Pillay* [2003] 1 IR 592 (“*McCarthy*”). It was, therefore, common case that the burden of proof rested on the moving party, namely, Mecon, to establish the basis for the stay sought (para. 49). It had the onus of persuading the court that India was the more appropriate forum. As regards the standard by reference to which that had to be demonstrated, Clarke J. noted (at para. 74) that in *Analog*, Fennelly J. had approved the statement of Lord Goff in *Spiliada* that the alternative forum had to be shown to be “*clearly or distinctly more appropriate*” and that in *McCarthy*, Hardiman J. suggested that the alternative forum had to be “*distinctly more appropriate*” (at p.601). That is the approach which the court took in *IBRC v. Quinn*. The difference between that case and the present case, however, is that the UCCU defendants have not sought to stay the proceedings on the grounds of *forum non conveniens*. Mr. Babichev (the fifth defendant) did seek such a stay which was refused by Haughton J. in the judgment referred to earlier and which I will refer to again shortly. On this application, the plaintiffs bear the burden of demonstrating that Ireland is a more appropriate forum than Russia for its case against the Russian UCCU defendants.

264. *IBRC v. Quinn* is very significant for present purposes in one other respect. In his judgment, Clarke J. placed a lot of weight on the relevance of claims being fragmented or broken up and heard in more than one jurisdiction, as part of the court’s consideration as to whether a stay should be granted. He quoted from Dicey, Morris

and Collins *The Conflict of Laws* (15th ed, 2012) (“Dicey”) which identified a number of key principles in the area since *Spiliada*. Most of these principles have already been mentioned in my discussion of the relevant cases. However, one is of particular importance. In the passage quoted by Clarke J. at para. 66, one of the principles referred to by the authors is that the court will look to see what factors point in the direction of another forum being the natural forum with which the action had the most real and substantial connection. Those include factors affecting convenience or expense (such as the availability of witnesses) and also “*whether the claim is part of a larger overall dispute which would be damaged by being fragmented*” (p. 553, quoted by Clarke J. at para. 66).

265. From the passage quoted, Clarke J. distilled a number of “*straightforward principles*”. While noting that on a stay application, the initial onus of proof rests with the applicant for the stay, if the respondent maintains that the interests of justice require that the proceedings be tried in Ireland despite practical factors clearly pointing to another forum, then the onus rests on the respondent in that regard. In the present case, of course, the position is reversed. The plaintiffs must establish to the required standard that Ireland is the more appropriate forum. Clarke J. noted that the court exercises a “*broad adjudicative role*” and can take into account any practical factor “*which is relevant to the issue as to which jurisdiction may be more appropriate*”. He noted that the sort of factors that most normally arise are those of “*convenience, expense, applicable law and location of the parties*” (at para. 70). He noted that the fact that a plaintiff may be deprived of a “*legitimate personal or juridical advantage*” would not in itself be sufficient to prevent a stay being granted “*provided that substantial justice would be done in the available alternative forum*”

(at para. 70). The final principle identified by Clarke J. is that of fragmentation. He said (at para. 71):

“Finally, there is the question of cases, of which this is clearly one, where the applicant is but one defendant and where a stay being granted on the proceedings insofar as they relate to that applicant will necessarily lead to the case which the plaintiff wishes to bring being fragmented. It may be possible to look at fragmentation as being one of the practical factors which might make it less appropriate to stay the proceedings in favour of the alternative forum or, at a minimum, may allow the plaintiff to establish that the alternative forum is not clearly or distinctly more appropriate. It might also be possible that a fragmentation of the case might give rise to the risk of injustice which would allow a court properly to retain jurisdiction even though the alternative forum might, so far as determining the case made against the defendant who sought the stay was concerned, be considered to be clearly more appropriate.

Whichever of those approaches may be appropriate in a particular case there can be little doubt but that fragmentation can be an important factor depending on all of the circumstances of the case in question.” (para.71) (emphasis added)

266. Clarke J. explained that the weight to be attached to fragmentation would depend on the extent to which the case against the defendant seeking the stay was distinct from the case against the other defendants. If the case against the two sets of defendants were relatively distinct, then the weight to be attached to fragmentation would not be particularly great (para. 72). However, if the claims were inextricably wound up with each other than a stay of the proceedings against one of the defendants could give rise to significant problems by making it “*significantly more difficult and*

expensive for the plaintiff to have to attempt to prove the case in two different jurisdictions” (para. 73). Clarke J. continued:

“That might well involve having to prove aspects of the case twice with the obvious risk of inconsistent decisions. That latter factor might in itself be regarded as putting justice at risk in a way which would warrant declining a stay even though the alternative forum, looked at from the narrow perspective of the case as against the applicant defendant, might have considerable advantages.” (para. 73) (emphasis added)

267. In my view, these latter considerations arising from the consequences of the fragmentation of clearly linked claims are of particular relevance to this application.

268. Later in his judgment, Clarke J. returned to the question of fragmentation. He found that there was a significant connection between the issues arising in the claims against Mecon and against the other defendants. He agreed with the comment contained in Dicey that:

“An overall adjudication on which may be the more natural or appropriate forum requires the court to consider ‘whether the claim is part of a larger overall dispute which would be damaged by being fragmented’.” (para. 80)

269. Clarke J. observed that the weight to be attached to the fragmentation of claims would depend on all the circumstances of the case, and while it needed to be emphasised that the fact of fragmentation could be important, it was not to be elevated to a principle that had any greater application than might be required in the particular circumstances of the case. He concluded, however, that it was a *“very important factor”* in the case before the court. He noted that the claim involved allegations of concerted action across various jurisdictions in which IBRC might wish to ask the court to draw inferences from actions across different counties in order to demonstrate

overall intent in the alleged conspiracy. He concluded that that was “*exactly the kind of case which would be significantly impaired by fragmentation*” (para. 81). Those are, to my mind, very relevant principles and considerations in the context of in this case.

270. I would note, however, that as Clarke J. made clear in *IBRC v. Quinn*, the relevance of fragmentation will very much depend on the particular facts of the case and much will depend on the claims being made in the proceedings and the extent to which the claims against the different sets of defendants are clearly linked and whether, for example, the foreign defendant is an integral part of the case being made by the plaintiff. Depending on all the circumstances, the risk of fragmentation can be decisive.

271. Before turning to the arguments and evidence put forward by the parties on the appropriateness of Ireland as a forum for the case against the Russian UCCU defendants, there are a small number of further points to be made. First, since one of the arguments advanced by the plaintiffs is that it would not be possible for them to obtain substantial justice were they required to run their case against the Russian UCCU defendants in Russia, it is necessary to describe the test which the court will adopt in considering that argument. It was made clear by the Privy Council in *Altimo Holding* that the party who bears the burden of proof on this issue can satisfy that proof by showing that there is a “*real risk that justice will not be obtained in the foreign court*” for whatever reason (*per* Lord Collins at para. 95). Again, it seems to me that consistent with the approach taken in *Analog* and in *IBRC v. Quinn* on the relevant standard of proof, the party bearing that burden can satisfy it by demonstrating the risk on the basis of the “good arguable case” standard.

272. Second, as mentioned earlier, delay on the part of a party seeking to stay proceedings on the grounds of *forum non conveniens* is a relevant factor in the exercise by the court of its discretion as to whether or not to grant such a stay. That is clear from *Intermetal* and from *Connoisseur*. It must follow, in my view, that delay on the part of a defendant who seeks to discharge an order permitting service out of the jurisdiction on the ground that another forum is more appropriate must also be relevant when it comes to the exercise of the relevant discretion by the court. The Supreme Court in *Intermetal* and the High Court (McDonald J.) in *Connoisseur* regarded a failure on the part of the relevant defendant to signal an intention to contest jurisdiction at an early stage as a significant factor in weighing up where the interests of justice lay for the purposes of a *forum non conveniens* application: *Intermetal per* Murphy J. at p.38; *Connoisseur per* McDonald J. at para. 66, pp.30-31. Both courts also pointed to the importance that there be no delay in the determination of interlocutory proceedings, having regard to the nature of the claims being made in the proceedings. In *Connoisseur*, for example, the vessel at issue was under arrest. The plaintiffs contend that these cases are of particular importance in light of the alleged delay on the part of the UCCU defendants in bringing this application in circumstances where, for example, the plaintiffs' ToAZ shares and any dividends payable thereunder have been frozen.

273. Third, it is again relevant to note in the context of this part of the application that Haughton J. delivered a detailed judgment on the application by Mr. Babichev (the fifth defendant) to stay the proceedings on the grounds of *forum non conveniens*. He applied the test set out by the Supreme Court in *Intermetal* and *McCarthy*. He refused Mr. Babichev's application for various reasons, including the likely absence of key witnesses such as Mr. S. Makhlai, Mr. V. Makhlai, Mr. E. Korolev, Mr. Zivy

and Mr. Ruprecht. Haughton J. regarded the difficulty in assembling witnesses alone as being enough to persuade him not to stay the proceedings. He also attached weight to the non-availability of discovery and other restrictions on the ability to obtain evidence in proceedings in Russia which, in light of the nature of the claim and the likely defences which would be raised in the proceedings, amounted to a “*strong reason*” for refusing the stay. While Haughton J. accepted that from Mr. Babichev’s perspective Russia might be a more convenient forum, there were countervailing reasons which persuaded him that it would not be a proper or suitable forum and that granting a stay would not achieve justice. He did not regard it as necessary to consider whether, in other respects, the plaintiffs would be unable to obtain a fair trial in Russia. While I have already concluded that I am not bound in deciding this application by the findings and conclusions of Haughton J. on the application by Eurotoaz and Mr. Babichev and while I must decide this application by the UCCU defendants on the basis of the evidence before me, the findings and conclusions of Haughton on the *forum non conveniens* application are undoubtedly relevant.

274. Although the burden of proof rests on the plaintiffs to demonstrate that this is a “*proper*” case for service out of the jurisdiction on the Russian UCCU defendants and, in that context, to satisfy the court that Ireland is the forum in which the case can be “*suitably tried for the interests of all parties and for the ends of justice*”, as the UCCU defendants have brought this application, put in their affidavit evidence and made their submissions as the moving parties, I will first summarise their position on this aspect of the application.

275. They submit that this is not a “*proper*” case for service out of the jurisdiction and that Ireland is clearly not the proper or appropriate forum for the case against the Russian UCCU defendants. They point to the many connecting factors between the

case against the Russian UCCU defendants and Russia. Most of the parties are Russian or connected with Russia. It is apparent from the amended statement of claim that the allegations made against all of the defendants relate mainly to events in Russia and mainly to Russian entities and persons. They say that most, if not all, of the witnesses will be Russian who will give their evidence in Russian. If the proceedings were to be heard in Ireland interpreters would be necessary. They contend that there will be significant factual disputes which will require extensive cross-examination if the case were heard in Ireland, all of which would have to be conducted with the aid of interpreters. The documents would mainly be in Russian. Russian law would apply to determine the substantive rights and obligations of the parties. If the case were heard in Ireland, that would require expert evidence on Russian law and there would likely be disputes between the experts on Russian law, which would in turn likely require cross-examination of the experts.

276. Dealing with the various points made by the plaintiffs in support of their contention that Ireland is the appropriate forum to hear the plaintiffs' claims against the Russian UCCU defendants, those defendants make a number of points. First, with respect to the issue of fragmentation, the UCCU defendants submit that in the event that they are successful in their application to have the order permitting service on the Russian UCCU defendants outside the jurisdiction discharged, there is no reality in the plaintiff's continuing their proceedings against the other defendants, Eurotoaz, Mr. Babichev and Ms. Charilaou (or proceeding to assess damages against Belpor and Mr. Sedykin). I have, however, concluded that it is likely that the plaintiffs will proceed against those defendants, even if the UCCU defendants succeed on this application. Their alternative argument is that, if fragmentation occurs it will be as a result of the plaintiffs' choice to go ahead with the proceedings in Ireland as against

the other defendants and to proceed against the Russian UCCU defendants in Russia and that the plaintiffs could choose to proceed against all of the defendants in Russia. In other words, fragmentation would come about as a result of the plaintiffs' choice and should, therefore, be given little weight in the balance.

277. As regards the plaintiffs' reliance on the absence in Russia of procedures available in this jurisdiction, such as extensive discovery and disclosure and the cross-examination of witnesses, they maintain that these are factors which should not be taken into account by the court in that they are mere procedural differences between the two jurisdictions which are said to give rise to procedural advantages for the plaintiffs. They contend that, the court must consider the interests of all parties and not just the plaintiffs. They rely on the *dictum* of Lord Goff in *Spiliada* where he referred to the various different discovery procedures in different countries and said that:

"...generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas." (at p.482)

278. The Russian UCCU defendants maintain that these observations apply both to the relevance of the absence of discovery in Russia and to the absence of oral evidence and cross-examination in the form in which it exists under the common law system. They rely on the expert reports of Professor Bevzenko in respect of both of those procedural questions.

279. With respect to the absence of discovery, they point to Professor Bevzenko's evidence that parties can obtain evidence from the opposing parties, albeit that the procedure is not the same as discovery or disclosure of common law. Under the relevant provisions of the Code of Procedure in the Commercial Courts (CPCC),

parties can ask the court for assistance to obtain documents from the other side. The court can order the documents to be provided. In the event that the party does not provide the documents ordered, it is liable to a fine and to have the relevant burden of proof in the case reversed. They point to the absence of any real disagreement between Professor Bevzenko and the plaintiffs' expert, Dr. Gladyshev on this issue.

280. With respect to the absence of oral evidence and cross examination, they rely on the evidence of Professor Bevzenko and also on the evidence of the plaintiffs' expert, Dr. Gladyshev. They point to Dr. Gladyshev's evidence as to the marginal place which oral evidence has in the Russian system and the inherent distrust of such evidence by Russian judges who have an overwhelming preference for documentary evidence over oral testimony. There is, therefore, no need, it is said, for the cross examination of witnesses as under the common law system. However, they also refer to Professor Bevzenko's evidence that the Russian Commercial/Arbitrazh courts apply flexible rules and procedures which allow the taking of oral evidence if really necessary and to the fact that the courts themselves can agree to call witnesses, with opposing lawyers being permitted to ask questions. They stress the flexibility of the rules in the CPCC. They contend, therefore, that even if it were the case that certain witnesses could not physically attend a trial in Russia, that would not prevent the plaintiffs from bringing their case in Russia and from presenting their evidence. They rely in that regard on the *Bazhanov* case (referred to earlier) where it was held that it was open to the plaintiff to bring his claim in the Russian Arbitrazh courts while remaining in England and that there was no legal requirement for the plaintiff to appear in person in the Russian court and no practical reason for him to do so.

281. With respect to the plaintiffs' claim that they would not receive a fair trial in Russia were they required to bring their claim against the Russian UCCU defendants

in the Russian courts, the UCCU defendants contend that the plaintiffs have provided no evidence which could satisfy the court that they would not receive justice or a fair trial in Russia. They submit that the plaintiffs rely on mere assertion and allegation and not on cogent evidence. They also note that Eurotoaz has been unsuccessful in many of the cases which they have brought as part of the alleged campaign of litigation in the Russian courts against ToAZ (and, ultimately, on appeal were successful in all of the cases). They refer to the consensus between the respective Russian law experts that a fair trial can be obtained in the Russian Commercial/Arbitrazh courts and rely on Professor Bevzenko's reports in that regard. They also note that Dr. Gladyshev, the plaintiffs' expert, appears to accept that, in general, a fair trial can be obtained in the Russian Arbitrazh courts, albeit that he says that such would not be possible in this case, notwithstanding Eurotoaz's many losses in the cases which it has brought. They refer to Dr. Gladyshev's agreement that, for the most or overwhelming part, the Russian Arbitrazh courts are independent and produce high quality decisions (although he refers to evidence suggesting that the ToAZ case is one of the exceptions to that rule). They also refer to Dr. Gladyshev's third/additional report in which he observed (at para. 11) that more often than not the Russian Arbitrazh courts give fair judgments. I do note, however, that significantly in the immediately following paragraph of that report Dr. Gladyshev said:

“However, in a limited number of civil cases that are improperly influenced, and in the bulk of criminal cases, a fair trial in Russia is not available. ToAZ's case, in my opinion, is in this reduced category. This has been confirmed by an objective examination of the record of the case in Russia by the English court in the Korolev extradition case, by multiple articles in the professional Russian

press (never challenged by Professor Bevzenko) that have identified the ToAZ case as a quintessential case of corporate raiding...” (para. 12)

282. I also note that in his fourth report in reply Professor Bevzenko disagreed (paras. 16-26). He repeated his conclusion that “*in general Russian judicial system of resolution of commercial disputes could provide fair justice in b2b disputes.*” (at para. 26)

283. The UCCU defendants contend that the court should be circumspect about claims that the plaintiffs will not receive a fair trial in Russia. They rely again in that regard on *Bazhanov*, in which reference was made to the fact that it was only in “*rare cases*” that a claimant had been able to provide “*positive and cogent evidence*” that a fair trial could not be obtained in Russia and that the case of *Cherney v. Deripaska* [2008] EWHC 1530 (Comm) was one of the exceptional cases. (para 97 of the judgment in *Bazhanov*)

284. The plaintiffs’ response to the points must be considered by reference to the relevant evidence before the court. The plaintiffs made their application for leave to serve the proceedings outside the jurisdiction on various defendants, including the Russian UCCU defendants on the basis of an affidavit sworn by Ms. Harty on 4 November 2016. In that affidavit Ms. Harty sought to demonstrate compliance by the plaintiffs with the requirements of O. 11, r. 2 and 5. She asserted (at para. 55) that the plaintiffs had a good cause of action against the relevant defendants, including the Russian UCCU defendants. She then set out various grounds on which it was contended by the plaintiffs that it was just and convenient that the proceedings be heard and determined in Ireland. At para. 56, she explained that certain key individuals connected with, or perceived to be connected with, ToAZ, including Mr. S. Makhelai and Mr. E. Korolev, had been placed on the Russian domestic wanted list

in the context of what were then intended criminal proceedings under Art. 159(4) of the Russian Criminal Code, were placed on the Russian international wanted list and were the subject of Interpol “Red Notices”. At para. 57, Ms. Harty stated that those individuals (and in fact others as well) were ordered to be detained pre-trial in December 2014 by the Bazmanny District Court in Moscow. Ms. Harty stated that Mr. S. Makhlai’s name had since been deleted from the public most wanted list and that Interpol had confirmed that the charges against him may have been politically motivated. She contended that the charges, pre-trial detention orders and Interpol “Red Notices” were all measures which had previously been threatened by Mr. Mazepin in 2013. She asserted, therefore, (at para. 58) that key witnesses in the proceedings would be unable to attend and participate in the proceedings were they brought in Russia and that that would amount to an effective denial of justice to the plaintiffs.

285. Ms. Harty also asserted (at para. 59) that if the plaintiffs could not proceed against all of the defendants in Ireland, and were confined only to their claim against Eurotoaz and other EU defendants, there would be a real and substantial risk of inconsistent judgments which would not serve the interests of justice and would leave the plaintiffs without an effective remedy against the Russian UCCU defendants, notwithstanding that it was alleged that they were co-conspirators in the alleged scheme with Eurotoaz.

286. It was also alleged by Ms. Harty that various orders made in Russia were not appropriately made and were made with the collaborative support of officials in the Russian administration and that pressure or inducement was brought to bear on Russian judicial and investigative authorities by the Russian UCCU defendants. She referred in that context to the Interpol “Red Notices” and to other alleged features of a

raider attack which she claimed were present in the alleged scheme or conspiracy the subject of the proceedings. She referred to a judgment of Senior District Judge Workman in England in May 2009 in which he refused to exercise Mr. V. Makhlai to face criminal charges in Russia in which she said there was a finding that improper pressure had been placed on Russian judges, although the judge in that case had resisted such pressure. It was held that others would not have done so. Ms. Harty concluded (at para. 62) that for these various reasons there was a significant risk that the plaintiffs would be unable to secure a fair hearing of the matters the subject of the proceedings if required to proceed in Russia.

287. The plaintiffs put in additional evidence to support the various contentions made in Ms. Harty's affidavit in the course of their response to the UCCU defendants' application. Included in that evidence were various affidavits relied on by the plaintiffs in response to the applications brought by Eurotoaz and Mr. Babichev. They included affidavits sworn by Mr. S. Makhlai, Mr. E. Korolev, Mr. A. Zivy and Professor Sakwa, as previously noted. The plaintiffs also relied in support of their contention that Ireland is the appropriate forum to hear the entirety of these proceedings on further affidavits sworn by Ms. Harty and on further affirmations by Mr. Walfenzao. They also relied on the expert opinions of Dr. Gladyshev.

288. In broad terms, the plaintiffs maintain that they have clearly demonstrated on the basis of cogent evidence that Ireland is the appropriate forum to hear and determine the proceedings and that they have done so not only in the course of this application by the UCCU defendants, but also in the course of the applications brought by Eurotoaz and Mr. Babichev in which they persuaded the High Court (Haughton J.) that a stay of the proceedings against those defendants should not be granted on the grounds of *forum non conveniens*. The plaintiffs maintain, therefore,

that Ireland is the appropriate forum and that this is a proper case in which service out of the jurisdiction should be permitted, in that the case can be tried here more suitably in the interests of all the parties and the ends of justice. They maintain that there is a real risk of an unfair trial in the event that they were required to proceed against the Russian UCCU defendants in Russia.

289. The principal reasons advanced by the plaintiffs in support of that contentions are: First, they contend that if they were required to litigate their claims against the Russian UCCU defendants in Russia while proceeding with their claims against Eurotoaz and the other remaining defendants in Ireland, their case will be fragmented which, having regard to the fact that the proceedings involve a claim of conspiracy to which all of the defendants are allegedly party would lead to a real injustice for the plaintiffs. They contend that in a conspiracy action it is particularly important to have all of the parties before the court for various reasons, including difficulties which might arise under the 1961 Act (as touched upon earlier) and difficulties in obtaining discovery in the event that parties allegedly involved in the conspiracy the subject of the proceedings are no longer defendants in the proceedings and are located outside the jurisdiction. They also point to the real possibility of inconsistent judgments in the event that their case against Eurotoaz and the other remaining defendants is heard and determined by the Irish courts and their case against the alleged co-conspirators is heard and determined in the Russian courts. The plaintiffs place considerable stress on the injustice which they maintain will be caused if their case is fragmented in this way. They place much reliance on the treatment of the question of fragmentation by Clarke J. in *IBRC v. Quinn*.

290. Second, the plaintiffs contend that key witnesses for the plaintiffs who are connected to or perceived to be connected to ToAZ will be unable to attend and

participate in proceedings in Russia against the Russian UCUU defendants. They rely on the fact that in December 2014 the Bazmanny District Court in Moscow ordered that Mr. S. Makhlai, Mr. V. Makhlai, Mr. E. Korolev, Mr. Zivy and Mr. Ruprecht should be the subject pre-trial detention as part of the Art. 159(4) criminal proceedings. As a consequence, they were charged with serious criminal offences, placed on Russian and international Interpol wanted lists and made the subject of Interpol “Red Notices” which were subsequently lifted by Interpol on the grounds that they may have been politically motivated. The plaintiffs rely on these persons as key witnesses and they all reside outside Russia. Mr. S. Makhlai, Mr. E. Korolev and Mr. Zivy all swore affidavits concerning these matters in the context of the applications by Eurotoaz and Mr. Babichev. Those affidavits were in turn exhibited by Ms. Harty to her affidavit of 6 November 2018 and relied on by the plaintiffs to oppose the UCCU defendants’ application.

291. Third, the plaintiffs rely on the non-availability in the Russian legal system on what they maintain are essential procedures in a case such as this, including discovery/disclosure and the cross examination of witnesses. The plaintiffs contend that the absence of these procedures in Russia is particularly significant in a conspiracy case. They accept that the absence of mere procedural or juridical advantages in the other potential forum would not be decisive. However, they maintain that in a conspiracy case the absence of discovery/disclosure and the opportunity to cross-examine witnesses is particularly acute and that significant weight should be given to the absence of these procedures in the Russian Commercial/Arbitrazh courts. They rely in this regard on the expert evidence of Dr. Gladyshev. Time and space does not permit a detailed analysis here of Dr. Gladyshev’s evidence or indeed of the evidence in response provided by Professor

Bevzenko. Both experts however acknowledge that discovery/disclosure which exists in common law systems does not exist in the Russian system. While a party is obliged to provide the evidence which it expressly relies upon, it is not obliged to provide unfavourable evidence. While a party can request the Russian court to produce a specific document and the court can direct the production of that document, the plaintiffs maintain that the consequences of failing to do so are insignificant, namely, a small fine and, in certain circumstances, the reversal of the burden of proof. The plaintiffs say that none of that is of any assistance in the context of the conspiracy case where, by virtue of the inherent covert nature of the conduct involved it will generally not be possible to identify specific documents and even if they could be identified, the relatively insignificant consequence of a failure to comply with an order to provide such specific documents would not deter the opposing parties from refusing to produce them.

292. The plaintiffs also rely on the absence of cross examination in the Russian system and again rely on Dr. Gladyshev's evidence and, in particular, his statement that oral evidence has a marginal place in the Russian system with no proper cross examination being permitted. They note that Professor Bevzenko accepted that oral evidence could be permitted in certain circumstances. They maintain that this is such a case because of the nature of the allegations made as appears from the amended statement of claim and from the affidavits on which the plaintiffs rely. They also rely on the absence of cross examination which they say would be critical having regard to the nature of those allegations. They submit that the non-availability of key witnesses and the absence of any opportunity to cross-examine opposing witnesses is, therefore, critical. The plaintiffs contend that as a result of these factors, combined with the

fragmentation of a case involving allegations of conspiracy meaning that justice would not be served if the UCCU defendants' application were to succeed.

293. Finally, the plaintiffs maintain that they have provided cogent evidence demonstrating a real risk that they would not obtain a fair trial in the Russian courts if required to litigate their claim against the Russian UCCU defendants in that country. In support of that claim, they rely on the various orders and steps taken in relation to persons connected or perceived to be connected to ToAZ, including the pre-trial detention orders made in December 2014, the inclusion of those persons on Russian and international wanted lists and in Interpol "Red Notices", the refusal by the English courts to extradite to Russia Mr. V. Makhlai (in the context of a prior alleged radar attack involving the former owners of UCCU) and of Mr. E. Korolev (in the context of the ToAZ case) and the comments made by English judges in their judgments refusing those extraditions as well as what they allege are systematic infirmities in the Russian legal and judicial system, all of which they maintain give rise to the real risk of an unfair trial in Russia. In that regard, they rely on the evidence of Dr. Gladyshev and Professor Sakwa as well as the affidavits referred to earlier. While acknowledging that Professor Bevzenko has disputed many of the claims and that Dr. Gladyshev has accepted that, for the most/overwhelming part, the Russian Commercial/Arbitrazh courts are independent and give fair and high quality judgments, the plaintiffs rely on Dr. Gladyshev's evidence that the ToAZ case is an exception to the general rule. They rely on his evidence that ToAZ is a case of corporate raiding co-ordinated and conducted by the UCCU defendants and that there is strong evidence that criminal proceedings in Russia have been used to advance the corporate raiding objective. Further they rely on Dr. Gladyshev's evidence (at para. 12 of his additional/third report) that a fair trial is not possible in Russia in a limited

number of civil cases which are improperly influenced by the Russian authorities and in the bulk of criminal cases. His evidence is that cases associated with ToAZ fall within that “*reduced category*” which he says was confirmed by “*an objective examination of the record of the case in Russia by the English court in the Korolev extradition case, by multiple articles in the professional Russian press...that have identified the ToAZ case as a quintessential case of corporate raiding.*” (para.12). I should note here again that Professor Bevzenko disagrees with Dr. Gladyshev and the UCCU defendants through their counsel vigorously dispute the plaintiffs’ contentions on these issues.

294. While I have attempted in the previous paragraphs of this section of the judgment to summarise the main points made by the parties and to touch on the evidence on which they have relied on the question of the appropriateness of Ireland as a forum for hearing the plaintiffs’ claim against the Russian UCCU defendants, the sheer volume of the material provided to the court on this application (including many affidavits and expert reports) meant that this was not an altogether easy task.

Although I have not referred to every point made by the parties and to all relevant parts of the evidence on which they have relied, I have carefully considered all of the affidavits, materials and submissions made by the parties in reaching my decision. Having done so, I have reached the clear and inescapable conclusion that the plaintiffs have done more than enough to discharge the burden of showing that Ireland is an appropriate forum for the determination of their case against the Russian UCCU defendants, that Russia is not a more appropriate forum and that this is a “*proper*” case for service out of the jurisdiction on the Russian UCCU defendants. I am also satisfied that the plaintiffs have complied with all of the requirements of O.11, rr. 2 and 5 in the materials they have put before the court.

295. In reaching my decision on this issue, I am required to take a “*broad overall view*” and to take into account the interests of both sets of parties involved in deciding how to exercise the discretionary jurisdiction, or the “*broad adjudicative function*” (to use the words of Clarke J. in *IBRC v. Quinn* at p.217), and in deciding, as between the Irish courts and the Russian courts, where the plaintiffs’ case against the Russian UCCU defendants can be tried more suitably in the interests of all of the parties and the ends of justice.

296. As the UCCU defendants correctly point out, the vast majority of factors would appear on the face of it to point in the direction of Russia as being the more appropriate forum, with many of the parties being Russian individuals or companies or companies in which there are direct or indirect Russian interests. While the plaintiffs are companies incorporated in various jurisdictions in the Caribbean, there are undoubtedly substantial Russian interests involved. The plaintiffs’ case is directed to protecting their shareholding in a Russian company, ToAZ. Of the defendants, Mr. Mazepin, UCCU, Mr. Babichev, Ms. Bolotnikova, Mr. Konyaev and Mr. Sedykin are all Russian and based in Russia. However, it must be noted that a number of the defendants are not Russian or based in Russia. They include Holdings (Cyprus), Eurotoaz (Ireland), Belport (BVI), Mr. Minkovski (Bulgaria) and Ms. Charilaou (Cyprus).

297. At the heart of the case is an alleged conspiracy, the aim of which is allegedly for Mr. Mazepin and others to acquire ownership of the plaintiffs’ shares in ToAZ, a Russian company at an undervalue. Most of the events and conduct referred to in the amended statement of claim are alleged to have occurred and to be ongoing in Russia, but not exclusively so. The threats allegedly made by Mr. Mazepin and others to Mr. S. Makhelai were allegedly made on various dates between 2012 and 2013 in Budapest

and Zurich. Threats were allegedly made against Mr. Zivy and Mr. Ruprecht in Basel and in Zurich. Other events relevant to those two men and their company, Amefopa, are also alleged to have occurred in Switzerland. The extradition of relevant persons such as Mr. V. Makhlai and Mr. E. Korolev was sought in the United Kingdom. Relevant events are also alleged to have taken place in Cyprus. And last but not least, Eurotoaz, an Irish company, is the entity which has allegedly been conducting a campaign of vexatious litigation in Russia against ToAZ and persons connected with that company. It is accepted that the ultimate owner of Eurotoaz is UCCU/Mr. Mazepin. If an Irish company is used to conduct litigation which is alleged to form part of a conspiracy, the court might be expected to be sceptical about complaints that litigation concerning that alleged conspiracy would be heard by the Irish courts. That might be said to be part of the price of incorporating or acquiring an Irish company which chooses to initiate and to involve itself in proceedings in Russia.

298. It is true that the vast majority of the witnesses in the case are likely to be Russian or to be based in Russia. They are likely to have to give their evidence in Russian with the aid of interpreters. While the vast majority of witnesses may have to come from Russia, not all of them will. Many of the witnesses on the plaintiffs' side appear now to be based outside Russia. For example, Mr. S. Makhlai says on affidavit that he has resided in the United States since 1993 and has been an American citizen since 2008. He also states that his father, Mr. V. Makhlai, has been a permanent resident of London since 2005. Mr. E. Korolev also appears to be based in London. Mr. Zivy and Mr. Ruprecht are based in Switzerland. Dr. Gladyshev, the plaintiffs' Russian legal expert, has his permanent residence in London. A number of the witnesses, including Ms. Charilaou (the ninth defendant) are based in Cyprus.

299. Many of the issues of law in the case are likely to have to be determined by reference to Russian law on which Russian legal experts will have to give evidence and may have to be cross examined on their evidence and some may require interpreters.

300. Many of the above factors undoubtedly point to a strong connection between the plaintiffs' case against the Russian UCCU defendants and Russia. However, that does not mean that, notwithstanding those strong connecting factors, there are not other factors which could persuade the court that Ireland is the more appropriate forum for that case to be heard in the interests of all of the parties and in the interests of justice. For example, in *Intermetal*, many of the factors pointed to a strong connection between the disputed issue in the case and Russia. Russian law applied to the agreements at issue. The Supreme Court was satisfied that the “*overwhelming*” number of witnesses were resident in Russia and that the determination of the issues would involve testing the credibility of those witnesses, most of whom would presumably have to give their evidence in Russian. Murphy J. stated that those factors establish the “*very close relationship*” between the relevant issues and the jurisdiction of the Russian courts (*per* Murphy J. at p.36). Nonetheless, the Supreme Court was satisfied that, for various reasons, justice required that the proceedings which, were brought against an Irish company, be heard in Ireland.

301. Similarly, in *IBRC v. Quinn*, notwithstanding many connecting factors between IBRC's case against Mecon and the Indian courts, including the fact that similar proceedings had previously been commenced in India by persons and entities acting in the interests of IBRC and the fact that those proceedings related to a share transaction involving a company which owned property in India and sought to reverse the effect of that transaction. Although there were significant connecting factors

between the dispute and the Indian courts, the Supreme Court nonetheless accepted that, for various reasons, primarily the fact that the dispute formed part of a larger dispute with Mecon involving allegations of conspiracy, Ireland was the more appropriate forum for the case against Mecon to be heard (subject to not exposing Mecon to the costs of having to meet the claim in both jurisdictions). While acknowledging Clarke J.'s warning that many of the cases in this area will turn on the specific facts rather than on principle, it is nonetheless useful to note that, notwithstanding potentially strong connecting factors with a competing jurisdiction, the Irish courts have nonetheless held that justice may require that the case be heard by the Irish courts. In my view, this is such a case.

302. I am persuaded by the plaintiffs that for the following reasons, Ireland is the most appropriate forum.

(i) Fragmentation

303. First and most significantly, if the UCCU defendants were to succeed in their application, the plaintiffs, if they wish to pursue their claim against the Russian UCCU defendants, would have to do so in the Russian courts. At the same time they would have their claim against Eurotoaz and the other defendants over which the Irish courts indisputably have jurisdiction, including Mr. Babichev, Ms. Charliaou, Belport and Mr. Sedykin. For reasons outlined earlier, I am satisfied that there is a clear connection between the case which the plaintiffs make against Eurotoaz and Mr. Babichev arising from the alleged campaign of vexacious litigation in Russia and the case they make in the amended statement of claim against the Russian UCCU defendants. Put simply, it is said that both sets of defendants are party to a conspiracy

or scheme which has the objective of enabling Mr. Mazepin/UCCU to acquire the plaintiffs' shares in ToAZ at an undervalue. It is said that both sets of defendants are co-conspirators in that alleged conspiracy.

304. In my view, the question of fragmentation of the plaintiffs' case against the various defendants is hugely relevant in this case. The principles outlined by Clarke J. in *IBRC v. Quinn* on that question are directly applicable to this case. As Clarke J. stated, fragmentation can be seen in two different but related ways. First, it can be seen as one of the practical factors demonstrating the appropriateness of Ireland as a forum for the case. Second, it can also be seen as an important factor in demonstrating the risk of injustice which would be caused if the court were to accede to the UCCU defendants' application and to require the plaintiffs to pursue their claim against the Russian UCCU defendants in Russia or not at all.

305. In my view, fragmentation is a very important factor in the circumstances of this case. That is so because of the close connecting factors between the case which the plaintiffs make against Eurotoaz and Mr. Babichev and the case they make against the other defendants, including the Russian UCCU defendants. Apart for Eurotoaz and Mr. Babichev, the Irish courts already have jurisdiction over a number of the defendants who are alleged to be parties with the Russian UCCU defendants to the alleged conspiracy, including Belpart, Ms. Charliaou and Mr. Sedykin (and also in light of my conclusions on the next issue, Holdings). There are both practical and other reasons why, in my view, it would be fundamentally unjust to require the plaintiffs to proceed against the Russian UCCU defendants in Russia or not at all. Most of those stem from the fact that the plaintiffs' is one alleging a conspiracy. To require the plaintiffs to run what is the same, or at least a very closely related case alleging the same conspiracy in two jurisdictions, would both in principle and on the

facts of this case be unjust. Even if the difficulties concerning the attendance of key witnesses on which the plaintiffs rely (and which I will separately deal with) did not exist, having to run a conspiracy case in two jurisdictions involving many of the same witnesses would, in my view, be unjust and would require the plaintiffs unnecessarily to incur the costs of doing so in both jurisdictions. It would also create the real possibility of irreconcilable judgments between the courts of the two jurisdictions.

306. The absence of the Russian UCCU defendants in the Irish proceedings would have other significant consequences for the plaintiffs. They include the potential implications arising from the identification provisions of the 1961 Act referred earlier. The application of those provisions could arguably lead to the plaintiffs' claim against the existing defendants being diminished or reduced or otherwise adversely affected by the absence of those defendants.

307. In addition, the absence of those defendants in the Irish proceedings would probably preclude the plaintiffs from obtaining discovery from them as non-parties under O.31: *Fusco v. O'Dea* [1994] 2 IR 93. The plaintiffs would, therefore, have to run their case alleging a conspiracy in circumstances where some of the alleged co-conspirators were not before the court and where it can be inferred that the relevant witnesses would not be made available.

308. While the UCCU defendants argued that there is no reality to the plaintiffs in pursuing their claim against the balance of the defendants who are before the Irish courts, I do not accept that that is so for the reasons given earlier. I am satisfied that it is likely that the plaintiffs will continue with their case against those remaining defendants.

309. The UCCU defendants advanced the alternative argument that if the plaintiffs do chose to continue their case against the remaining defendants, then that is their

choice and that cannot be a determining or even a strong factor in the balance the court has to strike. However, I do not see that as a real choice at all. In the circumstances of this case and bearing in mind the range of allegations made by both sides and what is alleged to have happened to persons on the plaintiffs' side of the dispute in Russia, it is fanciful to proceed on the basis that the plaintiffs have a real choice as to whether to proceed against the remaining defendants in Ireland or whether to bring their case against all of the parties to the alleged conspiracy in the Russian courts. The idea that, in light of all that is said by the plaintiffs to have occurred in Russia, the plaintiffs could simply proceed, or have proceeded, against the Russian UCCU defendants in Russia without any problems is stretching credibility beyond breaking point. I am satisfied that it is the plaintiffs' entitlement to bring their case in Ireland against the remaining defendants and the fact that they could potentially have proceeded against all parties in Russia does not undermine their decision to proceed in Ireland or the weight to be attached to that decision.

310. In my view, the fragmentation of the plaintiffs' claim in conspiracy which would occur if the UCCU defendants were to succeed in their application is sufficient in itself to lead me to conclude that justice requires that the plaintiffs be entitled to proceed against all of the defendants, including the Russian UCCU defendants in Ireland and that it would be fundamentally unfair were they required to proceed against the Russian UCCU defendants in Russia. However, if I am wrong in that conclusion there are a number of other reasons to support my view that the plaintiffs have discharged the onus of demonstrating to the required standard of a "good arguable case" that Ireland is the more appropriate forum for the case against all of the defendants in the interests of all parties and in the interest of justice. These are set out below.

(ii) Absence of Key Witnesses

311. Second, I am persuaded on the basis of the evidence on this application that several key witnesses for the plaintiffs would not and could not attend any trial of the plaintiffs' case against the Russian UCCU defendants or indeed against any of the defendants in Russia, in the event that the UCCU defendants were to succeed in this application. There is no dispute on the facts that several key witnesses were placed on Russian domestic and international wanted lists and were the subject of Interpol "Red Notices" which were subsequently withdrawn, including Mr. S. Maklhai, Mr. Zivy and Mr. Ruprecht. A number were the subject of prosecution in the Art. 159(4) criminal proceedings, including Mr. V. Maklhai, Mr. S. Maklhai, Mr. E. Korolev, Mr Zivy and Mr. Ruprecht and orders were made in December 2014 by the Bazmanny District Court in Moscow that those persons be subject to pre-trial detention orders as part of those proceedings. I am satisfied that the plaintiffs have demonstrated that there is at least an arguable case that there is a link between those measures and the alleged scheme the subject of the proceedings. Also relevant in that context is the failed extradition from the United Kingdom to Russia of Mr. V. Maklhai and Mr. E. Korolev.

312. I have no doubt but that these persons are all relevant and indeed key witnesses to the case the plaintiffs make against the defendants, including the Russian UCCU defendants. I have taken into account in assessing the relevance of those witnesses and their key importance to the case the plaintiffs wish to make against the defendants, including the Russian UCCU defendants, the direct evidence contained in the affidavits of Mr. S. Maklhai, Mr. E. Korolev and Mr. Zivy.

313. While the UCCU defendants understandably seek to down-play the significance of this factor in light of what is said to be the relative unimportance of witness

evidence (whether oral or by witness statement) in Russia, even the UCCU defendants' Russian law expert, Professor Bevzenko, accepts that in appropriate cases Russian courts will permit detailed questioning of witnesses and decide cases on oral evidence, particularly in the Russian Commercial/Arbitrazh courts and gave a number of examples in his reports of such cases. It is, in my view, highly relevant, therefore, that witnesses who I accept are key witnesses to the plaintiffs' case would likely not be in a position to attend any trial in Russia.

314. I agree entirely with the conclusions reached by Haughton J. on this issue in his judgment rejecting Mr. Babichev's *forum non conveniens* application (at para. 60). I disagree with the conclusion reached by the English High Court in *Bazhanov* that it is a sufficient answer to this concern that the plaintiffs could bring their claim in the Russian Arbitrazh courts while remaining outside Russia on the basis that there is no legal requirement for them to attend in Russia. I do not accept, on the facts of this case at least, that that would be at all fair. On the contrary, in my view it would be fundamentally unfair. That is particularly so in circumstances where Professor Bevzenko accepts that there is no real possibility of witnesses giving their evidence from outside Russia via remote video technology.

315. I agree, therefore, with Haughton J. that the fact that key witnesses will likely be unable to attend any trial of the proceedings against the Russian UCCU defendants in Russia is a very significant factor pointing to the appropriateness of the Irish courts as the proper forum in the interests of all the parties and in the interests of justice.

(iii) Absence of Discovery/Disclosure and Cross-Examination

316. Third, I also consider that the absence of discovery/disclosure, save in very limited circumstances, and of effective cross-examination of witnesses in the event that the plaintiffs were required to litigate their claim against the Russian UCCU

Defendants in the Russian Commercial/Arbitrazh courts is another factor strongly pointing towards the appropriateness of the Irish courts as a proper forum for the dispute rather than the Russian courts. I have reached that conclusion because of the very nature of the case, being a claim in conspiracy.

317. While, of course, I cannot resolve the disputes between the parties' respective Russian law experts, on the question of discovery/disclosure, there is general agreement between them that discovery of the type available in common law jurisdictions is not available in the Russian courts. A much more limited form of document provision is available. While it is open to a party to request a court to direct the opposing party to provide specific evidence (Art. 125, Part 2 of the CPCC), there appears to be many limitations to that procedure. Most significantly for present purposes is that specific evidence must be requested. It will often be extremely difficult in a conspiracy case to pin point specific evidence to be requested from the other side, in circumstances where much of the activity in a conspiracy case operates in a covert and surreptitious manner thereby making it extremely difficult to utilise the type of procedure apparently available in Russia. That problem is particularly acute in a conspiracy case such as this.

318. There are further limitations to the procedure in Russia where the party directed by the court to provide specific evidence fails to do so. The consequences appear to be relatively minor, such as a small fine and, in certain circumstances, the reversal of a burden of proof.

319. In my view, the restrictions on a party obtaining evidence in the form of documents from the opposing party combined with the marginal place given to witness testimony and the absence of an entitlement to engage in proper cross-examination (apart from basic curtailed questioning), as discussed in the parties'

respective Russian law experts' reports, together and in combination provide further and additional reasons why, on the particular facts of this case and having regard to the nature of the claim being one in conspiracy, the Irish courts are the proper forum and are the more appropriate forum for the hearing and determination of these proceedings rather than the Russian courts.

320. I fully accept, of course, that the case law on *forum non conveniens* applications shows that the mere deprivation of a procedural or juridical advantage in another more appropriate jurisdiction does not amount to a good basis for refusing to stay the proceedings in favour of that other jurisdiction: see, for example, Lord Goff in *Spiliada* at pp. 482-483 and Murphy J. in the Supreme Court in *Intermetal* at pp. 35-36. Relatively minor procedural differences between the two competing jurisdictions should not be determinative of the issue as to whether one forum is more appropriate than the other. However, I am satisfied that in the particular circumstances of this case and having regard to the nature of the cause of action alleged (conspiracy) and the nature of the allegations involved (including, for example, alleged personal threats to key witnesses for the plaintiffs, the making of which threats is disputed by the UCCU defendants), the procedural limitations in Russia to which I have referred are more than mere minor procedural differences and are relevant to the appropriateness of the Irish court as a proper forum for the case and significant to the court's assessment as to where the case can best be tried in the interests of justice. I am satisfied that these two additional factors combined support my conclusion that Ireland is the more appropriate forum.

(iv) Fair Trial in Russia

321. Fourth, I have also given careful consideration to the evidence adduced by the parties on another factor advanced by the plaintiffs in support of the appropriateness

of Ireland, as opposed to Russia, as a forum for the determination of these proceedings, namely, the claimed inability of the plaintiffs to obtain a fair trial in Russia by reason of the alleged lack of independence on the part of certain sections of the Russian judiciary and the alleged ability of the UCCU defendants improperly to influence the administrative and judicial authorities in decisions referable to ToAZ in a manner which render the plaintiffs unable to obtain a fair trial of the proceedings in Russia. I have referred to aspects of the evidence relied on by the parties in support of, and for the purposes of disputing, the merits of this factor in the assessment the court has to make. I must also bear in mind that the case law makes clear that an Irish court would have to exercise particular restraint before concluding that a party would not receive substantial justice by reason of the lack of independence or other systemic inadequacies in the other jurisdiction, having regard to the requirements of international comity of courts. Clear and cogent evidence is required in order to sustain this factor as a reason for either refusing a stay on *forum non conveniens* grounds or for rejecting a challenge to jurisdiction on some other basis, such as a claimed lack of jurisdiction under O. 11.

322. I must also bear in mind, in considering this factor, that both parties' Russian law experts are of the view that, for the most or overwhelming part at least, the Commercial/Arbitrazh courts in Russia are independent and do provide justice to the parties before them. If the plaintiffs were to bring their conspiracy action against the Russian UCCU defendants or indeed against any of the defendants in the Russian courts the claim, would likely be heard by the Commercial/Arbitrazh courts in Russia. However, it should also be said that various aspects of the issues which the plaintiffs would wish to litigate have been dealt with and are the subject of criminal and civil proceedings in other courts apart from the Commercial/Arbitrazh courts .A

particularly striking example of this is the Art. 159(4) criminal proceedings about which substantial complaints have been made by the plaintiffs and their experts, to Dr. Gladyshev.

323. It seems to me, however, that in view of the conclusions I have reached on the other factors relied on by the plaintiffs and having regard to my decision that those factors do clearly point to Ireland as being the more appropriate forum for the determination of the plaintiffs' case against all of the defendants, including the Russian UCCU defendants in the interests of all the parties and in the interest of justice, it is unnecessary for me to express any concluded view on this factor. That is particularly so in the light of the restraint which the court is required to exercise in the interests of international comity. In my view, unless it is necessary to express a conclusion on the strength or otherwise of this factor in the court's assessment, the court should refrain from doing so in the interests of international comity. That does not mean, however, that in a case where it is necessary to reach a view on this question the court should shirk from doing so, provided that it is satisfied that there is cogent evidence for the court to make that assessment in accordance with the requisite standard of proof. However, for the reasons discussed, I do not believe that it is necessary for me to do so in this case and it is better that I withhold expressing any conclusions unless and until it is necessary to do so. I note that Haughton J. adopted a similar position in his judgment on Mr. Babichev's *forum non conveniens* application (see para. 63).

(v) Delay

324. The final factor that I must consider in relation to this part of the UCCU defendants' application is delay. I have touched on this factor earlier. I have refused to dismiss the UCCU defendants' application *in limine* by reason of their delay in

bringing the application. I did, however, conclude that delay is relevant to the discretionary element of the decision which the court has to take on an application to set aside service out of the jurisdiction. It seems to me that there is considerable merit to the plaintiffs' case that the UCCU defendants were responsible for very considerable delay in bringing their application. The Russian UCCU defendants were served with the proceedings on foot of the Order of the High Court of November 2016 (McDermott J.) within a matter of weeks thereafter. I was provided with the various affidavits of service. I am satisfied that they establish that service was effected on them in accordance with the order. The Russian UCCU defendants in particular, therefore, had the proceedings since late November 2016 and were served with further documents on foot of further court orders made since then providing for the service of further documents, including the orders providing for the service of motions to amend the statement of claim and for judgment in default of appearance. Again, I was provided with affidavits of service proving that the relevant documents and applications were served on the Russian UCCU defendants in the terms ordered and I am satisfied that they were. In spite of all that, it was not until 13 July 2018, a couple of weeks before the plaintiffs' motion for judgment in default of appearance, that William Fry solicitors for the Russian UCCU defendants (and the other UCCU defendants) wrote to the plaintiffs' solicitors objecting to jurisdiction. I agree with the views expressed by Murphy J. in the Supreme Court in *Intermetal* and by McDonald J. in the High Court in *Connoisseur* that where a party intends to contest the jurisdiction of the Irish courts it must do so expeditiously and must not leave the plaintiff and, importantly, the court in a state of uncertainty as to whether jurisdiction will be accepted or contested.

325. The UCCU defendants did, in my view, delay unreasonably in bringing the application. I do not accept that the plaintiffs were guilty of delay in moving the proceedings along. They were faced with challenges to jurisdiction and otherwise by Eurotoaz and Mr. Babichev and other practical challenges brought about by the failure by the UCCU defendants to instruct solicitors to correspond with the plaintiffs in the proceedings until July 2018. However, while the UCCU defendants' delay is significant, I would probably not have regarded it as sufficient in itself, without the other several factors discussed above, to lead me to exercise my discretion in the plaintiffs' favour on this aspect of the application. I regard the delay involved, therefore, as relevant but not decisive or determinative of the discretionary element of the application.

326. For completeness, I have given separate consideration to the question as to whether the plaintiffs have provided sufficient evidence and other material to the court to enable the court to consider for the purposes of O. 11, r. 2 the comparative cost and convenience of proceedings in Ireland and in Russia. It should be said that this was not a point specifically advanced by the UCCU defendants in their application, save as part of its submissions on the combined effect of O. 11, rr. 2 and 5. In my view, they were right not to press the point. I am quite satisfied that it was not necessary for the plaintiffs to put evidence setting out the respective comparative costs of proceedings in Ireland and Russia. The evidence of the clear connection and linkage between the case which the plaintiffs make against Eurotoaz and the other defendants in respect of whom the Irish courts unquestionably have jurisdiction and the case they make against the Russian UCCU defendants, with the risk of separate actions in different jurisdictions and of inconsistent judgments, together provide a sufficient basis for the court's conclusion that Ireland is a proper forum and indeed the

more appropriate forum for the determination of the proceedings against all the defendants. A similar conclusion was reached on the basis of somewhat similar evidence by the Court of Appeal in *O'Flynn* (see pp. 115-123).

327. In conclusion, therefore, I am satisfied that in all the circumstances the plaintiffs have shown that this is a proper case for service out of the jurisdiction under O. 11, r. 1(h), and that Ireland is an appropriate forum for the determination of the proceedings in the interests of the parties and in the interests of justice. While the UCCU defendants have shown many connecting factors between the case against the Russian UCCU defendants and Russia, the plaintiffs have persuaded me for the various reasons set out above, that, in all the circumstances, Ireland is the more appropriate forum for the determination of the proceedings in the interests of all the parties and in the interests of justice. I, therefore, exercise my discretion, or the broad adjudicative function which I have, to refuse the UCCU defendants' application under O. 12, r. 26 to set aside the order permitting service on the Russian UCCU defendants outside the jurisdiction and to set aside such service.

**J. Jurisdiction re Plaintiffs' Claim Against Holdings: Art. 8(1) Recast
Brussels Regulation**

328. The UCCU defendants' application also seeks to challenge the jurisdiction of the Irish courts to hear and determine the plaintiffs' claim against Holdings, the third defendant. Holdings is a company incorporated in Cyprus. It has been joined as a defendant on the basis that it is the holding company of UCCU (the second defendant). It is alleged that Mr. Mazepin (the first defendant) is a director and the ultimate beneficial owner and the controlling mind and will of Holdings.

(1) Relevant Provisions of Recast Brussels Regulation

329. Before briefly summarising the parties' respective contentions on this issue, I set out below the relevant terms of Arts. 4, 5 and 8(1) of the Recast Brussels Regulation.

330. Under Art. 4.1, a person domiciled in a Member State of the European Union shall be sued in the courts of that Member State. Under Art. 5, a person domiciled in a Member State may be sued in the courts of another Member State, only by virtue of rules set out in subsequent sections of Chapter II of the Regulation.

331. One of those rules is the rule contained in Art. 8(1). It provides that a person domiciled in a Member State may also be sued:

“ where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; ”

(2) Parties' Respective Contentions on Art. 8(1) Issue

332. I should also note that under Art. 8(2), a person domiciled in a Member State may also be sued as a third party in certain actions or in any other third party proceedings *“in the court seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case; ... ”*

333. In very brief summary, the UCCU defendants' position is that Holdings is domiciled in Cyprus and any claim the plaintiffs wish to bring against that company should be brought in Cyprus under Art. 4.1 Art. 8(1) is an exception to the general rule contained in Art. 4.1 and that exception must be construed narrowly. They

maintain that the burden of proof is on the plaintiffs to demonstrate unequivocally that their case against Holdings comes within the exception contained in Art. 8(1) and that the plaintiffs must establish all of the necessary elements entitling them to rely on the exception on the balance of probabilities. They rely in that regard on the judgment of the Supreme Court in *Ryanair Limited v. Billigflüge.de Capital GmbH* [2015] IESC 11 (“*Ryanair*”).

334. The UCCU defendants assert that, insofar as the plaintiffs rely on their claim against Eurotoaz, which is domiciled in Ireland, to give jurisdiction to the Irish courts over their claims against Holdings, the plaintiffs have failed to demonstrate to the required standard that those claims are “*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*” in Ireland and in Cyprus. They maintain that the plaintiffs have brought their claim against Eurotoaz in Ireland for the sole purpose of seeking to establish jurisdiction over Holdings and that that amounts to a breach, and an abuse, of Art. 8(1). They rely on the same or similar grounds advanced by them in support of their challenge to jurisdiction under O. 11 that the joinder of Eurotoaz is a “*mere device*” to bring the Russian UCCU defendants before the Irish courts. In a similar vein, they contend that the plaintiffs only sued Eurotoaz in order to establish the jurisdiction of the Irish courts over Holdings and that that is not permitted by Art. 8(1) but rather is an abuse of that provision.

335. The UCCU defendants rely on case law of the Irish courts, including *Gannon v. British & Irish Steam Packet Company Limited* [1993] 2 IR 359 (“*Gannon*”), *Handbridge Limited v. British Aerospace Communications Limited* [1993] 3 IR 342 (“*Handbridge*”) and *Ryanair*; case law from the CJEU, including *Reisch Montage A.G. v. Kiesel Baumaschinen Handels GmbH* Case C-103/05 [2006] ECR I-6827

(“*Reisch Montage*”) and *Freeport plc v. Arnoldsson* Case C-98/06 [2007] ECR I-8319 (“*Freeport*”); and case law from England and Wales including *Sabbagh v. Khoury* [2017] EWCA Civ 1120 (Court of Appeal) (“*Sabbagh*”) and *PJSC Commercial Bank Privat Bank v. Kolomoisky* [2018] EWHC 3308 (High Court) (“*Kolomoisky*”) and *Vedanta Resources plc v. Lungowe* [2019] UKSC 20 (UK Supreme Court) (“*Vedanta*”). The judgment of the U.K. Supreme Court in *Vedanta* was delivered after the hearing and was the subject of subsequent written submissions by the parties. The decision of the High Court (Fancourt J.) in *Kolomoisky* was reversed on appeal by the English Court of Appeal subsequent to the hearing. The judgment of the English Court of Appeal was brought to my attention by the parties following the hearing.

336. The plaintiffs dispute the UCCU defendants’ challenge to jurisdiction under Art. 8(1). They maintain that they are entitled to sue Holdings under Art. 8(1) and that the conditions in that provision have been satisfied. They maintain that their claims against Eurotoaz and against Holdings are “*so closely connected*” for the purposes of Art. 8(1) that it is “*expedient*” to hear and determine those claims together to avoid the risk of irreconcilable judgments from separate proceedings in Ireland (against Eurotoaz) and in Cyprus (against Holdings). While accepting that they bear the burden of proving an entitlement to rely on Art. 8(1) as an exception to the general rule on jurisdiction in Art. 4.1, the plaintiffs dispute the contention that they must prove that entitlement of the balance of probabilities. They contend that to the extent that they must establish anything on the balance of probabilities, it is only that their claims against Eurotoaz and Holdings are so closely connected that it is necessary to avoid the risk of irreconcilable judgments. They maintain that, insofar as the merits of their claim against Eurotoaz is concerned, it is not necessary for them to prove on

the balance of probabilities that they will succeed in their claim against Eurotoaz and that the standard by which to assess the merits of that claim is as set out in cases such as *Gannon* and *IBRC v. Quinn*. They rely in that regard on a further decision of the CJEU in *Kolassa v. Barclays Bank plc* Case C-375/13 ECLI:EU:C:2015:37 (“*Kolassa*”).

337. The plaintiffs’ position is that that they have clearly demonstrated that the respective claims have the required connection to attract the application of Art. 8(1), even applying the balance of probabilities standard referred to by the Supreme Court in *Ryanair* to that issue. They rely on all of the factors which connect case against Eurotoaz and Mr. Babichev with their case against the UCCU defendants, including Holdings, as the holding company of UCCU itself, being the same factors as are relied on in respect of their claim that the various Russian UCCU defendants are necessary and proper parties to their case against Eurotoaz under O. 11, r. 1(h). The plaintiffs dispute the claim that the sole object of joining Eurotoaz was to establish the jurisdiction of the Irish courts in respect of their claim against Holdings and to remove Holdings from the jurisdiction of the court to which it would otherwise be, namely, Cyprus. They say that they have at least a good arguable case on the merits of their case against Eurotoaz for all of the reasons outlined earlier. They dispute, therefore, the claim that the reliance on Art. 8(1) to establish jurisdiction for their claim against Holdings is in breach of, or an abuse, of Art. 8(1). In support of their arguments on this issue, the plaintiffs rely on the same cases on which the UCCU defendants rely in addition to the judgment of the CJEU in *Kolassa*. They further rely on the judgments of the English Court of Appeal in *Kolomoisky* and of the U.K. Supreme Court in *Vedanta*, both of which were delivered after the hearing.

(3) Consideration of and Decision on Art. 8(1) Issue

338. I am satisfied that the UCCU defendants' challenge to the jurisdiction of the Irish courts to hear and determine the plaintiffs' proceedings against Holdings under Art. 8(1) must fail. I set out below the relevant legal principles and my consideration of the various arguments made by the parties on this issue together with my reasons for rejecting this aspect of the UCCU defendants' application.

(i) Relevant Legal Principles

339. The primary rule on jurisdiction is contained in Art. 4.1 of the Recast Brussels Regulation: a person domiciled in a Member State must be sued in the courts of that Member State. By virtue of Art. 5.1, a person domiciled in a Member State may be sued in the courts of another Member State only by virtue of rules set out elsewhere in the Regulation. One of those Rules is that contained in Art. 8(1). It is the successor to Art. 6(1) of the original Brussels Convention (and Art. 6(1) of the Lugano Convention) and Art. 6(1) of the Brussels Regulations (Council Regulation (EC) No. 44/2001 which replaced the Brussels Convention.)

340. Art. 6(1) of the Brussels Regulation made a significant change to Art. 6(1) of the Brussels Convention which simply provided that a person domiciled in a contracting state could be sued "*where he is one of a number of defendants, in the courts for the place where any one of them is domiciled*". When enacting the Brussels Regulation, the Community legislators introduced the additional words into Art. 6(1) which are now contained in Art. (1) of the Recast Brussels Regulation containing the proviso that a person domiciled in a Member State could be sued where he is one of a number of defendants in the courts for the place where any one of them is domiciled "*provided the claims are so closely connected that it is expedient to hear*

and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.” The close connection requirement introduced by Art. 6(1) of the Brussels Regulation is now found in Art. 8(1) of the Recast Brussels Regulation. The inclusion of the proviso came as a result of the decision of the CJEU in *Kalfelis v. Bankhaus Shroder* Case 189/87 [1988] ECR 5565 (“*Kalfelis*”). In *Kalfelis*, the CJEU noted that Art. 6(1) of the Brussels Convention constituted an exception to the general principle that jurisdiction was vested in the courts for the state of the defendant’s domicile and that such an exception “*must be treated in such a way that it cannot call into question the very existence of the principle*” (para. 8). The CJEU continued (at para. 9):

“That might be the case if a plaintiff were free to bring an action against several defendants for the sole purpose of removing one of them from the court of the State where he is domiciled....” (emphasis added)

341. The court concluded (at para. 12):-

“Therefore, the rule laid down by Art. 6(1) applies where actions against different defendants are connected at a time when they are commenced, that is to say, when it is expedient to hear and determine them together to avoid judgments which might be irreconcilable if the actions were determined separately. It is for the national courts to ascertain whether this condition is satisfied in each particular case.”

342. A similar conclusion was expressed by the CJEU in *Reunion Europeenne SA* Case C-51/97 [1998] ECR I 6511 (“*Reunion*”). The wording introduced into Art. 6(1) of the Brussels Regulation and now contained in Art. 8(1) of the Recast Brussels Regulation gave effect to those two decisions of the CJEU, but notably did not include any express provision precluding a plaintiff from relying on the exception contained

in that provision where proceedings were brought against several defendants for the sole purpose of removing one of them from the courts of the state where it is domiciled. Such an express provision was included in Art. 6(2) of the Brussels Regulation and is now contained in Art. 8(2) of the Recast Brussels Regulation with respect to third party proceedings.

343. The CJEU has repeatedly held that exceptions to the general rule on jurisdiction contained in what is now Art. 4 of the Recast Brussels Regulation (previously Art. 2 of the Brussels Convention and Art. 2 of the Brussels Regulation) must be construed restrictively. The CJEU made that clear in *Reisch Montage* (at para. 23) and in *Freeport* (at para. 35). Both of those cases concerned Art. 6(1) of the Brussels Regulation. In *Freeport*, the CJEU stated at para. 35:-

“Moreover, it is settled case law that those special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by Regulation No. 44/2001 (Reisch Montage, para. 23, and the case law cited).”

344. In *Reisch Montage*, the claimant brought proceedings in Austria to recover a debt against an individual who was domiciled in Austria and against a German company which had guaranteed the debt. At the time the action was commenced, the Austrian individual had been made bankrupt in Austria and could not, therefore, be made a defendant in such proceedings. The action against him was dismissed as inadmissible. The question was whether, in those circumstances, the Austrian court had jurisdiction in respect of the claim against the German company. Stressing the requirement that Art. 6(1) of the Brussels Regulation had to be interpreted independently by reference to its scheme and purpose and that it could not be

interpreted in a way as to make its application dependent on the effects of domestic rules, the CJEU stated (at para. 31):

“In those circumstances, Art. 6(1)...may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant”.

345. The Court continued (at para. 32):

*“However, the special rule on jurisdiction provided for in Art. 6(1)...cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled... [referring to *Kalfelis* and *Reúnion*]... However, this does not seem to be case in the main proceedings.”*

346. The observations of the CJEU in para. 32 just quoted led to some debate as to whether a court must be satisfied, in a case in which Art. 6(1) of the Brussels Regulations/Art. 8(1) of the Recast Brussels Regulation is relied on to found jurisdiction, that the proceedings were not brought against a number of defendants for the “sole purpose” or with the “sole object” of removing one of them from the jurisdiction in which it is domiciled. That point was considered by the CJEU in *Freeport*. In that case, the claimant brought proceedings in Sweden against a Swedish company and its English parent company. The action against the English parent company was based on contract and the action against the Swedish company was based in tort. The claimant relied on Art. 6(1) of the Brussels Regulation to establish the Swedish court’s jurisdiction over the English parent. The Swedish court referred

various questions to the CJEU. The Court held that it was not necessary in order to rely on Art. 6(1) for the claims against the defendants to have the same legal bases. One of the questions referred was whether the application of Art. 6(1) of the Brussels Regulation presupposed that the action was not brought against a number of defendants with the “*sole object*” of ousting the jurisdiction of the courts of the Member State where one of them was domiciled. Having referred to the earlier case law, including *Kalfelis*, the CJEU ruled (at para. 54) that Art. 6(1) of the Brussels Regulation applied:

“...where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.”

347. That conclusion appears to establish that once it could be demonstrated that the close connection requirement was satisfied, there was no further requirement to demonstrate (or for the court to be satisfied) that the proceedings were not brought for the “*sole object*” or “*sole purpose*” of ousting the jurisdiction of the courts of one of the defendants and that there was, therefore, no additional implicit “*sole object*” test. That is an issue that has been considered by the English courts, most recently by the Court of Appeal in *Kolomoisky* which I will refer to shortly. The plaintiffs in the present case contend that, at the very least, *Freeport* establishes that, provided that they can demonstrate the requisite close connection between their claims against Eurotoaz and their claims against Holdings (being one of the UCCU defendants), it is

not necessary for them further to demonstrate that the proceedings were not brought against Eurotoaz with the “*sole object*” of removing Holdings from the jurisdiction of the courts of Cyprus. I observe here that the English Court of Appeal in *Kolomoisky* held that the CJEU was not concerned in *Freeport* with the question of the burden of proof. It concluded that there is no implied “*sole object*” test in Art. 6(1) of the Lugano Convention, which, if correct, would mean that there is no such implied test in Art. 8(1) of the Recast Brussels Regulation: See the conclusions expressed at paras. 102-111 of the majority judgment of the English Court of Appeal in *Kolomoisky*. Ultimately, it is unnecessary for me to express a view on whether the English Court of Appeal was correct in so concluding as I am in any event satisfied that the proceedings were not brought by the plaintiffs against Eurotoaz with the “*sole object*” of giving the Irish Courts jurisdiction over Holdings. Many of the reasons I outlined earlier in support of my conclusion that the plaintiffs have demonstrated a “good arguable case” on the merits in respect of their claim against Eurotoaz are relevant to the issue, as are my conclusions that, even in the absence of the Russian UCCU defendants, the plaintiffs would continue to prosecute their claim against Eurotoaz.

348. The CJEU had cause to consider Art. 6(1) of the Brussels Regulation again in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV* Case C 352/13 [2015] QB 906 (“*Cartel Damage*”). In that case, an action was brought in Germany by CDC, a Belgian company established to pursue claims for damages for undertakings affected by a cartel. The proceedings were brought against a number of companies domiciled in various Member States. One of the defendants was domiciled in Germany. After the commencement of the proceedings, the claimant settled its claim against the German company and withdrew its action against that company. The remaining defendants then challenged the jurisdiction of the German courts. One

of the questions referred by the German court concerned Art. 6(1) of the Brussels Regulation. The question asked whether it was significant that the action against the German defendant was withdrawn after the proceedings had been served on all of the defendants. In considering the risk of irreconcilable judgments resulting from separate proceedings against the various defendants, the CJEU stated (at para. 25) that: *“determining separately actions for damages against several undertakings domiciled in different Member States which, contrary to EU competition law, participated in a single and continuous cartel main led to irreconcilable judgments within the meaning of Art. 6(1) of [the Brussels Regulation]”*.

349. The Court then considered whether the claimant’s withdrawal of its action against the German defendant was capable of rendering the rule of jurisdiction provided for in Art. 6(1) inapplicable. Having repeated the passages from the judgments in *Reisch Montage* and *Freeport* (referred to above), the Court went on to state (at para. 29):-

“It follows that where, when proceedings are instituted, claims are connected within the meaning of Art. 6(1) of [the Brussels Regulation], the court seised of the case can find that the rule of jurisdiction laid down in that provision has potentially been circumvented only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of, that provision’s applicability.” (emphasis added)

350. The Court then stated that an allegation that the parties had deliberately delayed the settlement until the proceedings were instituted for the sole purpose of securing jurisdiction had to be *“supported by firm evidence that, at the time that proceedings were instituted, the parties concerned had colluded to artificially fulfil, or prolong the fulfilment of, that provision’s applicability”* (para. 31). The Court held, therefore, that

Art. 6(1) could apply even where the claim against the sole co-defendant domiciled in the relevant State was withdrawn “*unless it was found that at the time the proceedings were instituted, the applicant and that defendant had colluded to artificially fulfil, or prolong the fulfilment of, that provision’s applicability*” (para. 33).

351. The CJEU in *Cartel Damage* was considering not only what was required in order to demonstrate compliance with the requirements of Art. 6(1) the Brussels Regulation (now Art. 8(1) of the Recast Brussels Regulation) and followed the approach taken in the earlier cases, but was also considering the related principle of abuse of law, in the sense of abuse by a party of the jurisdictional rule contained in Art. 6(1)/Art. 8(1). The Court’s judgment in *Cartel Damage* demonstrated the very limited circumstances in which the abuse of law principle will apply, effectively confining it to a situation where there is collusion between the relevant parties artificially to fulfil or prolong the applicability of Art. 6(1)/Art. 8(1). The limited scope of application of the abuse of law principle in this respect was commented on by the UK Supreme Court in *Vedanta* (paras. 34-36) and by the English Court of Appeal in *Kolomoisky* (paras. 86-87).

352. The UCCU defendants did not, expressly at least, rely on any alleged abuse of law principle to contest the plaintiffs’ reliance on Art. 8(1) to establish jurisdiction in respect of their claim against Holdings. It is not, therefore, necessary to comment further on the potential application of that principle to the facts of this case. Were it necessary to do so, however, I would want to make clear that, in my view, there is no question of the plaintiffs abusing the jurisdictional rule in Art. 8(1). The UCCU defendants do, however, contend that the plaintiffs failed to demonstrate compliance with the requirements in Art. 8(1) and that the Irish courts do not, therefore, have jurisdiction over Holdings.

(ii) Burden of Proof

353. To examine the UCCU defendants' contention in that regard, it is first necessary to consider on whom the burden of proof lies in order to establish jurisdiction under Art. 8(1) and, then to identify the relevant standard of proof which must be met by the party having that burden.

354. As regards the burden of proof, there was no dispute between the parties. It was accepted that the plaintiffs bear the burden of demonstrating that they have satisfied the requirements of Art. 8(1) in order to be entitled to sue Holdings in Ireland. They maintain that what they have to establish in order to discharge that burden of proof is that their claims against Eurotoaz and their claims against Holdings (being one of the UCCU defendants) are "*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*" in Ireland and in Cyprus. The plaintiffs contend, however, that they do not bear the burden of proving that the proceedings against Eurotoaz were not brought in Ireland for the "*sole object*" of removing Holdings from the jurisdiction of the courts of Cyprus.

355. The UCCU defendants, in their submissions through counsel at the hearing, appeared to suggest that the plaintiffs did have the burden of proving that the proceedings were not brought in Ireland for the "*sole object*" of removing Holdings from the jurisdiction of the courts of Cyprus. Indeed, they went so far as to argue that the plaintiffs had to demonstrate that on the balance of probabilities (Transcript Day 2, pp. 121-122). I do not believe that that is correct.

356. It is clear from the judgment of the CJEU in *Freeport* and from the cases since then, such as *Cartel Damage*, that once the requisite close connection and risk of irreconcilable judgments is established, there is no further need separately to establish

that the claims were not brought with the “*sole object*” of ousting the relevant defendant from the courts of its Member State. Whether or not there exists an implied “*sole object*” test under Art. 8(1), the judgment of the CJEU in *Freeport* cannot be interpreted as imposing any burden on a plaintiff to prove that the proceedings were not brought for the “*sole object*” of removing one of the defendants from the courts of the Member States in which it is domiciled. There is no support in any of the authorities for the submission to that effect by the UCCU defendants and I reject it. What the plaintiffs must demonstrate is the requisite close connection and risk of irreconcilable judgments expressly referred to in Art. 8(1).

(iii) Standard of Proof

357. The next issue to consider is the standard of proof which the plaintiffs must meet in seeking to discharge the burden of demonstrating compliance with Art. 8(1). At one point there was considerable dispute between the parties as to the applicable standard of proof. Ultimately, however, during the course of the oral submissions and in the written submissions furnished to the court after the hearing, the area of disagreement narrowed very considerably. I have referred earlier to the cases relied on by the parties in support of their respective contentions on this issue. It is fair to say, I think, that the case on which the UCCU defendants placed most reliance is *Ryanair*. Before coming to that case, I should refer to some of the earlier cases which help to put in context the conclusions reached by the Supreme Court in *Ryanair* on the standard of proof applicable in the circumstances which arose in that case.

358. The starting point for this analysis is the decision of the Supreme Court in *Gannon*. That case concerned Art. 6(1) of the Brussels Convention. The plaintiff had entered into a contract with the first defendant (B&I), an Irish company, for a package trip to Liverpool. Under that agreement, the plaintiff was to travel by ferry from

Dublin to Holyhead and then by coach from Holyhead to Liverpool. The second defendant was the owner and operator of the coach. During the course of the coach journey, the coach collided with a lorry owned by the third defendant as a result of which the plaintiff was injured. The second and third defendants were both English companies. The plaintiff sued all three defendants in Ireland. She relied on Art. 6(1) of the Brussels Convention to establish jurisdiction against the second and third defendants. They challenged jurisdiction. The Supreme Court ultimately upheld that challenge. In his judgment for the Supreme Court, Finlay C.J. referred to the importance of the general principle governing jurisdiction under Art. 2 of the Brussels Convention, namely, that jurisdiction vested in the courts of the state of the defendant's domicile. He held that the importance of that principle could not be "*called in question by any interpretation of the derogation or exception contained in Art. 6(1)*" (p.374). He said:

"It seems to me that the court in considering a claim for jurisdiction made to it under Art. 6(1) must closely enquire not only as to the making of a claim against a defendant domiciled in this jurisdiction but must also enquire as to the plausibility of such a claim in a prima facie fashion." (pp. 374-375) (emphasis added)

359. Finlay C.J. considered the circumstances of the claim and concluded that that test had not been met in respect of the claim against the first defendant. He held, therefore, that the "*sole object*" of adding the Irish defendant as a party was to oust the jurisdiction of the English courts in respect of the claim against the second and third defendants and that the court, therefore, had to refuse to accept jurisdiction under Art. 6(1). The plaintiffs rely on the description of the enquiry which Finlay C.J. stated the court had to make with respect to the claim against the Irish domiciled defendant,

namely that it had to enquire as to the “*plausibility of such a claim in a prima facie fashion.*”

360. The next case on which the UCCU defendants rely is the decision of the Supreme Court in *Handbridge*. That case did not concern Art. 6(1) of the Brussels Convention but rather an assertion of jurisdiction under Art. 5(1) under which a person sued in a contracting state could be sued in another contracting state in “*matters relating to a contract, in the courts for the place of performance of the obligation in question...*” (now Art. 7(1) of the Recast Brussels Regulation). Having again stressed the importance of the primary rule of jurisdiction under Art. 2 of the Brussels Convention, Finlay C.J. then considered what a plaintiff had to establish in order to rely on the exception contained in Art. 5(1). He said:

“The onus is on the plaintiff who seeks to have his claim tried in the jurisdiction of a Contracting State other than the Contracting State in which the defendant is domiciled to establish that such claim unequivocally comes within the relevant exception.” (page 358) (emphasis added)

361. The UCCU defendants rely on the inscription of the obligation on the plaintiff as having to show that its claim “*unequivocally*” comes within the relevant exception to the general rule on jurisdiction.

362. The UCCU defendants place most reliance in the terms of standard of proof in the case of a challenge to jurisdiction under Art. 8(1) of the Recast Brussels Regulations on the decision of the Supreme Court in *Ryanair*. They contend that that case is authority for the proposition that the standard of proof which the plaintiffs must meet in the case of such a challenge is the balance of probabilities and that to discharge the burden, the plaintiffs must provide “*unequivocal proof*” that the exception to the general rule on jurisdiction now contained in Art. 4(1) applies.

Ultimately, the plaintiffs accepted that they have to establish the requisite close connection for the purposes of Art. 8(1) on the balance of probabilities but that that did not require them to prove their case on the merits to such a standard on an application such as this.

363. It is important to recall precisely what was at issue in *Ryanair*. Ryanair brought separate proceedings against two entities, a German company and an English company, which it is alleged were engaged in unlawful screen scraping activities. The plaintiff relied on the terms of its contract with all users of its website in order to establish the jurisdiction of the Irish courts to hear the cases. The relevant contract contained a jurisdiction clause providing for the exclusive jurisdiction of the Irish courts and an Irish choice of law clause. The plaintiff contended that the jurisdiction clause constituted an agreement conferring jurisdiction for the purposes of Art. 23 of the Brussels Regulation (now Art. 25 of the Recast Brussels Regulations). The defendants challenged the jurisdiction unsuccessfully in the High Court and their appeals to the Supreme Court also failed. In his judgment for the Supreme Court, Charleton J. carefully considered the proper approach to be taken where jurisdiction is claimed on the basis of an agreement for the purposes of Art. 23 of the Brussels Regulation.

364. At para. 21 of his judgment, Charleton J. made clear that the principles he was setting out were those applicable to cases where jurisdiction was asserted on the basis of an agreement for the purposes of Art. 23. He then set out a series of principles, including the principles that the primary rule of jurisdiction under the Brussels Regulation was that of domicile and that exceptions to that primary rule had to be carefully considered and construed restrictively (referring (*inter alia*) to cases such as *Benincasa* Case C-269/95 [1997] ECR I-3767 (“*Benincasa*”), and *Besix SA* Case C-

256/00 [2002] ECR I-1699 (“*Besix*”) (paras. 22 and 23). It is clear from the judgment that the third, fourth and fifth principles set out by Charleton J. were all referable to a choice of jurisdiction based on a consensus or contract between the parties (paras. 25 to 30). It is important, therefore, to recognise that the situation the Supreme Court was considering in *Ryanair*, and the principles set out by the court in that case, were directed to an analysis of the jurisdiction rules applicable where jurisdiction is asserted on the basis of a jurisdiction agreement. This is not such a case. That must also be borne in mind when considering the discussion contained in the judgment on the standard of proof.

365. In concluding that the standard of proof which the court has to apply in the case of a dispute as to whether there is an agreement or consensus on jurisdiction for the purposes of Art. 23 of the Brussels Regulation, Charleton J. considered the judgment of the High Court (O’Neill J.) in *Stryker Corporation v Sulzer Metco AG* [2006] IEHC 60 in which the court came down in favour of the balance of probabilities standard (para. 40) and the judgment of the Supreme Court in *Handbridge* and, in particular, the principles set out by Finlay C.J. in that case (discussed earlier), including the requirement to establish that a claim “*unequivocally*” came within the relevant exception to the primary rule on jurisdiction. Charleton J. concluded that the good arguable case standard at which the Supreme Court held in *Analog Devices* applied in O. 11 cases did not apply in the case of jurisdiction agreements under Art. 23 of the Brussels Regulation. Charleton J. specifically noted (at para. 42) that *Analog Devices* “*was concerned not with contract formation but a dispute as to whether an exclusion clause applied.*” Relying on the principles of legal certainty and “*ease of knowledge by a proposed defendant*” as to jurisdiction referred to by the CJEU in *Besix*, Charleton J. concluded that it would be contrary to those principles were “*a mere*

statement of the application of an arguable case allowed to usurp the general principle that unequivocal proof of the exception” to the general rule on jurisdiction contained in Art. 2 of the Brussels Regulation (now Art. 4 of the Recast Brussels Regulation) was required (para. 43). He concluded that as the probability standard was required throughout the European Union for establishing contentious issues “no lesser standard than that is required to prove an exception to the domicile of the defendant as the ordinary rule for jurisdiction.” (para. 43).

366. In the concluding two paragraphs of his judgment Charleton J. stated that the burden of proof was on the plaintiff and that the standard of proof “*in respect of a dispute over consensus as to jurisdiction*” under the Brussels Regulation “*is the balance of probabilities*” as provided for in the case law and in accordance with national and EU law. (paras. 46 and 47)

367. While the UCCU defendants rely on the conclusion in *Ryanair* that the balance of probabilities standard applies in relation to contentious issues relevant to the application of an exception to the primary rule of jurisdiction under Art. 4(1) of the Recast Brussels Regulation, and while the plaintiffs accept this to a certain extent, it is strongly arguable both from the facts of *Ryanair* and from the reasoning leading to the conclusion that the balance of probabilities standard applied that the Supreme Court was addressing the standard to be applied to the determination of disputed issues, such as the existence or otherwise of a contract, where jurisdiction is asserted on the basis of a contract either in the form of an agreement on jurisdiction under what is now Art. 25 of the Recast Brussels Regulation or where the claim relates to a contract under, what is now, Art. 7(1) of that Regulation (which was what was at issue in *Handbridge*). The application of a balance of probabilities test in cases where jurisdiction is asserted other than on the basis of an agreement to jurisdiction or in a

contract claim, where the relevant agreement or contract is disputed, would not seem to be entirely consistent with the decision of the Supreme Court in *Gannon*. As noted earlier, when considering whether the exception contained in what was then Art. 6(1) of the Brussels Convention (now Art. 8(1) of the Recast Brussels Regulation), the Supreme Court stated that the court had to enquire into the plausibility of the claim made against the defendant in the jurisdiction in a *prima facie* fashion. That is what the Supreme Court proceeded to do in that case. It did not examine the case against the Irish defendant on the basis of the balance of probabilities.

368. Nor would the application of such a test in a non-jurisdiction agreement or non-contract case seem to be consistent with the judgment of the CJEU in *Kolassa*, on which the plaintiffs rely. One of the questions referred to the CJEU by the Austrian court in that case was whether, in the context of its examination as to jurisdiction under Art. s 25 and 26 of the Brussels Regulation, the court had to conduct a comprehensive taking of evidence in relation to disputed facts relevant both to the question of jurisdiction and to the existence of the claim itself or whether, when determining jurisdiction, the court could start from the premise that the facts asserted by the applicant were correct. In answering that question, the CJEU first noted that the Brussels Regulation did not “*explicitly define the extent of the verification obligations to which national courts are subject to in the course of determining their international jurisdiction.*” (Para. 59). The Court further noted that, although that was an aspect of national procedural law which the Brussels Regulation was not intended to unify, the application of the relevant national laws “*must not, nevertheless, impair the effectiveness*” of the Brussels Regulation (citing *Shevill & Ors.* Case C-68/93 EU:C:1995:61, para. 36 and the case law cited there) (para 60).

369. The Court then stated that it had previously held that the aim of legal certainty required that the national court seised of the case to be able readily to decide whether it had jurisdiction without having to consider the substance of the case (referring to *Benincasa*, at para. 27). The Court then distinguished between a contract case and a case brought in tort, delict or quasi delict. With respect to a contract case, it stated:

“...the Court has, on the one hand, held that a court hearing a contractual dispute may examine, even of its own motion, the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned establishing whether in fact the contract exists (judgment in Effer 38/81, EU:C:1982:79 para. 7).” (para. 61)

370. However, with respect to tort claims, the Court stated:

“On the other hand, in relation specifically to Art. 5(3) of [the Brussels Regulation] the Court has held that at the stage at which jurisdiction is determined, the court seised does not examine either the admissibility or the substance of the application in the light of national law, but identifies only the points of connection with the State in which that court is sitting that support its claim to jurisdiction under that provision (Judgment in Folien Fisher & Fofitec, C-133/11, EU:C:2012:664, at para 50). Thus, the court seised may regard as established, solely for the purposes of ascertaining whether it has jurisdiction under that provision, the applicant’s assertions as regard the conditions for liability in tort, delict or quasi-delict. (judgment in Hi Hotel HCF, C-387/12, EU:C:2014:215, para.20). (para 62)” (emphasis added)

371. The Court further stated that an obligation to conduct at an early stage “a comprehensive taking of evidence as regards the facts relevant both to jurisdiction and substance risks prejudicing the assessment of the substance” (para. 63). The

Court held, therefore, that the national court was not required to conduct a “*comprehensive taking of evidence*” at the stage of determining jurisdiction, although it had to be able to examine its international jurisdiction “*in the light of all the information available to it, including, where appropriate, the defendant’s allegations.*” (para. 64).

372. The CJEU delivered its judgment in *Kolassa* on 28 January 2015 three weeks before the Supreme Court gave judgment in *Ryanair*. *Kolassa* appears to provide support for the treatment of contract cases somewhat differently from cases brought in tort since jurisdiction is claimed on the basis of the contract (whether because the cause of action is one in contract or because the parties to the contract contains an agreement on jurisdiction). On the other hand, in tort claims, it appears from *Kolassa* that the court is required to identify points of connection with the state to support the claim that the courts of that state have jurisdiction under what is now Art. 7(2) of the Recast Brussels Regulation (previously Art. 5(3) of the Brussels Regulation).

373. The approach taken in *Kolassa* to the effect that the court is not required to engage in a comprehensive taking of evidence as regards the facts relevant to jurisdiction and to the substance of the case but that it must be in a position to have regard to all information available to it, including the allegations made by the defendants, is consistent with the repeated statements of the Irish and English courts that a jurisdiction challenge should not be turned into a mini-trial and that the appropriate place to decide the facts is generally at the trial: see, for example, *Short* (per *O’Hanlon J.*); *IBRC v. Quinn; Sabbagh* at paras. 52-55. While it is arguable that the decision in *Ryanair* to the effect that the balance of probabilities test applies where jurisdiction is ascertained on foot of jurisdiction agreement for the purposes of Art. 25 of the Recast Brussels Regulation, that test may not be applicable where

jurisdiction is asserted in a tort case under Art. 7(2), or where jurisdiction is claimed under Art. 8(1). However, it is unnecessary to express a concluded view on that point. That is because the plaintiffs have accepted that they must satisfy the court on the balance of probabilities that the necessary close connection exists between their case against Eurotoaz and their case against Holdings for the purposes of Art. 8(1). They do not, however, accept that the balance of probabilities test is to be applied to the court's consideration of the merits of their claim against Eurotoaz.

(iv) Application of Relevant Principles

374. The plaintiffs maintain that they have established on the balance of probabilities that their claim against Eurotoaz is so closely connected with their claim against Holdings that it is expedient to hear and determine both claims together to avoid the risk of irreconcilable judgments resulting from separate proceedings against Eurotoaz in Ireland and against Holdings in Cyprus. Proceeding on the assumption that the plaintiffs must establish this on the balance of probabilities but, for reasons just discussed, not definitively deciding that that is the appropriate standard, I have no doubt that the plaintiffs are correct in their contention.

375. The plaintiffs' claim against Eurotoaz and its claim against Holdings (as one of the UCCU defendants) are brought in conspiracy arising from the alleged scheme in which Eurotoaz and the UCCU defendants and others are alleged to be co-conspirators. I referred in detail earlier in this judgment to the claims made against Eurotoaz and those made against the UCCU defendants and Russian UCCU defendants to the connecting factors between Eurotoaz and the UCCU defendants, including Holdings. While I did so in the context of my assessment as to whether the plaintiffs had put forward a good arguable case on the merits of their claims against Eurotoaz and against the Russian UCCU defendants for the purposes of the O. 11

issue, it seems to me that those conclusions are also applicable to the assessment as to whether the claims against Eurotoaz and those against Holdings have the close connection required under Art. 8(1), albeit that a different standard may apply. That does not, however, affect my conclusion that the plaintiffs have satisfied the balance of probabilities standard for the purposes of the Art. 8(1) analysis. The plaintiffs claim that Eurotoaz and Holdings are involved in one overall conspiracy, albeit having different elements, in which they are both alleged to be co-conspirators. There is, in my view, a clear connection between the two sets of claims. To require the plaintiffs to litigate their claim against Eurotoaz in Ireland and their claim against Holdings in Cyprus would, in my view, clearly give rise to the risk of irreconcilable judgments and it is expedient and appropriate to hear those claims together in one jurisdiction. For reasons I have outlined earlier, because of the nature of the claims being made, it would not be appropriate to fragment the claims against Eurotoaz and the claims against Holdings and the other UCCU defendants. My conclusions in relation to the problems arising from the fragmentation of the claims set out earlier when considering the appropriateness of Ireland as a forum apply equally here. Also highly relevant is the fact that it is either accepted or has already been determined by the court that the Irish courts have jurisdiction in relation to the plaintiffs' claims, not only against Eurotoaz but also against a number of other defendants including Mr. Babichev, Belport, Ms. Charilaou and Mr. Sedykin. While the close connection between the plaintiffs' claims against Eurotoaz and their claims against Holdings and the other UCCU defendants are most relevant for the purposes of Art. 8(1), the fact that the Irish courts have jurisdiction over those other defendants is also relevant to the potential for irreconcilable judgments in the event that the plaintiffs were required to pursue their claim against Holdings in Cyprus. I am satisfied, therefore, that the

plaintiffs have established the requisite close connection for the purposes of Art. 8(1) of the Recast Brussels Regulation and that they have done so on the balance of probabilities.

(v) Merits of Plaintiffs' Case Against Eurotoaz: Art. 8(1)

376. The court does, however, have to give some consideration to the merits of the plaintiffs' claim against Eurotoaz, as the anchor defendant, for the purposes of Art. 8(1). While I do not accept the UCCU defendants' argument that the balance of probabilities standard must be applied to all of the facts including those relevant to the merits of the plaintiffs' case against Eurotoaz, as that would require the court to engage in a mini-trial of the facts relevant to the merits of the case at the jurisdiction stage without the procedural tools necessary for the resolution of disputed facts such as discovery and cross-examination, it is clear from the authorities that some consideration does have to be given to the merits of the plaintiffs' claim against Eurotoaz, as the anchor defendant.

377. This issue has been considered in some of the cases already mentioned. In *Gannon*, as I have noted, the Supreme Court held that it was necessary closely to enquire into the claim against the defendant domiciled in the jurisdiction and that it had to enquire as to the plausibility of the claim against that defendant in a *prima facie* fashion (*per* Finlay C.J. at pp. 374-375). Having done so, the Supreme Court concluded that the claim against the Irish defendant (B&I) in that case was not plausible when considered on a *prima facie* basis.

378. In *Freeport*, Advocate General Mengozzi, in commenting on the circumstances in which a claimant might be found to have abused its entitlement to rely on Art. 6(1) of the Brussels Regulation (now Art. 8(1) of the Recast Brussels Regulation), suggested that in order to establish such abuse it had to be shown that the action by

the claimant against the anchor defendant was “*manifestly unfounded in all respects – to the point of proving to be contrived – or devoid of any real interest for the claimant.*” (para. 66). In commenting on the court’s requirement to assess the risk of irreconcilable judgments, the Advocate General considered that such assessment might also include an evaluation of the likelihood of success of the claim brought against the anchor defendant. He said:

“*However, that evaluation will be of real practical relevance for the purpose of excluding the risk of irreconcilable judgments only if that claim proves to be manifestly inadmissible or unfounded in all respects.*” (para. 70) (emphasis added)

379. The CJEU in *Freeport* did not consider it necessary to answer the question as to whether the likelihood of success of the claim against the anchor defendant was relevant to the determination of the issue as to whether there was a risk of irreconcilable judgments for the purposes of Art. 6(1) in light of its conclusion that that provision could apply where the actions against the anchor defendant and the other defendant had different legal bases, provided they had the requisite connection (paras. 55-58).

380. The English courts have considered whether the merits of the claim against the anchor defendant are relevant and, if so, by what standard the court should assess the merits in a number of recent cases. In *Sabbagh*, a majority of the English Court of Appeal decided that the merits of the claim against the anchor defendant did have to be considered where jurisdiction was asserted under Art. 6(1) of the Lugano Convention (which, as already noted, is in the same terms as Art. 8(1) of the Recast Brussels Regulation). The majority concluded that:

“... it would be wrong to invoke Art. 6(1) by bringing a claim against an anchor defendant which raises no serious issue to be tried because that would allow claimants to remove foreign defendants from the jurisdiction of the courts of the Member State in which they are domiciled, in a way deprecated by the CJEU.” (para.67) (emphasis added)

381. The majority judgment continued:

“In our view, a claim against an anchor defendant that is hopeless or presents no serious issue to be tried should fall with the ‘sole purpose’ or ‘sole object’ exception is identified in [32] of the judgment in *Reisch Montage*. This is particularly because taking jurisdiction is a derogation from the general rule which confers jurisdiction on the courts of the defendants’ domicile and such derogations must be restrictively interpreted. In bringing an unsustainable claim against an anchor defendant, it can be inferred that the purpose of making the claim is to remove the co-defendant(s) domiciled in other Member States from the jurisdiction of the courts of those states.” (para. 68) (emphasis added)

382. The majority held that it would be a misuse of Art. 6(1) “to allow hopeless claims to oust the jurisdiction of domicile of foreign co-defendants.” (para.69.) The court did ultimately conclude that the claimant had a real prospect of establishing its claim against the anchor defendant.”

383. In *Vedanta*, the UK Supreme Court gave consideration to Art. 8(1) of the Recast Brussels Regulation, even though it was not directly relevant as there was no co-defendant to the claim against the English domiciled anchor defendant (*Vedanta*) which was domiciled in another Member State. In his judgment for the Court, Lord Briggs referred to the opinion of Advocate General Mengozzi in *Freeport* and to the

judgments of the CJEU in that case and in *Cartel Damage* to illustrate the very limited circumstances in which the abuse of law principle applied where jurisdiction was asserted under Art. 8(1), effectively requiring collusion between the claimant and the anchor defendant. He referred with approval to the Advocate General's reference to the claim against the anchor defendant having to be "*manifestly unfounded in all respects*" (paras. 31-35).

384. The English Court of Appeal gave further extensive consideration to these issues, in the context of Art. 6(1) of the Lugano Convention in *Kolomoisky*. The parties' written and oral submissions in the case were made on the basis of the judgment of the English High Court in that case. The UCCU defendants strongly relied on the judgment in the High Court in which Fancourt J closely examined the claim against the two anchor English defendants and concluded that for various reasons the claimant had sued the English defendants in order to establish the jurisdiction of the English courts under Art. 6(1) of the Lugano Convention over the first and second defendants who were domiciled in Switzerland. Fancourt J held that, while bringing a "*hopeless claim*" against the anchor defendant was an example of an abuse of Art. 6(1), abuse could occur in other circumstances. The court found that, in principle, the fact that there may be a "good arguable case" against the anchor defendant should not prevent a co-defendant from establishing abuse on some other ground, including on the ground that the "*sole object*" of the claim against the anchor defendant is to provide jurisdiction against the foreign domiciled co-defendant (para. 93). Although he found that the claimant had a "*good arguable claim*" in respect of part of its claim against the English defendants, Fancourt J nonetheless concluded that the English defendants were only sued to establish jurisdiction against the two foreign defendants.

385. The English Court of Appeal delivered judgment on the appeal after the hearing of this application had concluded. The court allowed the appeal. In a very detailed and well-reasoned judgment, which considered all of the relevant authorities, a majority of the Court of Appeal comprehensively overturned the High Court judgment on which much reliance was placed by the UCCU defendants. The majority concluded that a claimant who had a “*sustainable claim*” against an anchor defendant, which it intended to pursue to judgment in the proceedings to which a foreign defendant is joined as a co-defendant, is entitled to rely on Art. 6(1) of the Lugano Convention (and also on Art. 8(1) of the Recast Brussels Regulation), even though the claimant’s “*sole object*” in bringing the action against the anchor defendant is to establish jurisdiction over the foreign defendant (para. 102). Seven reasons were given for that conclusion (paras. 104-110). It is unnecessary to recite those reasons here. Newey LJ dissented on that one issue.

386. As I have noted earlier, it is unnecessary for me to express a view one way or the other on whether I agree with the majority decision on the “*sole object*” point as I am satisfied that the plaintiffs have not brought these proceedings against Eurotoaz for the “*sole object*” of bringing in the other defendants including, for present purposes, Holdings. The relevance of the decision of the Court of Appeal in *Kolomoisky* for present purposes is the court’s consideration of whether the claimant had a “*sustainable claim*” against the English defendants. The majority, having expressed the view that Art. 6(1) of the Lugano Convention (and the other corresponding measures) were not subject to a “*sole object*” test, then went on to consider the merits of the claim against the English defendants and warned again against the turning the application challenging jurisdiction into a mini-trial, something deprecated by the European and domestic courts (para. 120). The court concluded

that if, contrary to the majority's decision, the "*sole object*" test did apply, the High Court's assessment could not stand, and the correct assessment was that the sole object of suing the English defendants was not to bring in the foreign defendants. Leave to appeal to the Supreme Court was subsequently refused. Of most relevance, for present purposes, is the court's consideration of the merits of the claim against the English defendants. It considered the merits in terms of whether the claim against them was "*sustainable*" or not and, as noted, warned against turning the application into a mini-trial.

387. I should finally mention, in this context, the judgment of the English Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 ("*Kaefer*"). An issue arose in that case as to whether an agreement between two of the parties contained an exclusive jurisdiction clause for the purposes of Art. 25 of the Recast Brussels Regulation. The court had to consider how case law from the CJEU which required that consensus between the parties for the purposes of an agreement conferring jurisdiction under Art. 25 had to be "*clearly and precisely demonstrated*" (similar to the Supreme Court's conclusion in *Ryanair*) could be reconciled with the domestic "good arguable case" test. Green LJ, in giving judgment for the court, quoted that as was held by the Privy Council in *Bols Distillery v. Superior Yacht Services Limited* [2006] UKPC 45, the "*clear and precise*" test had to be taken into account as a component of the domestic test and the two had to be melded together to ensure that domestic law remained consistent with the Brussels Recast Regulation (para. 83). He stated that while it was not easy to define with precision what was meant by "*clear and precise*", he relied on it as providing "*at least an indication of the quality of the evidence required*" (para. 83). The observations I made earlier in relation to the possible application of a different test in

the case of jurisdiction agreements or claims based on contract are equally apposite here in connection with *Kaefer*. The obligation to adapt the domestic test to reflect the requirements of the CJEU does not necessarily apply here where jurisdiction is not asserted in reliance on any agreement. This is not, of course, a jurisdiction agreement case. I would not, however, disagree with the conclusion that it may be necessary, in certain circumstances, carefully to consider the quality of the evidence in considering whether the domestic test applicable to the consideration of the merits of a claim for the purposes of Art. 8(1) is satisfied.

388. I agree with the plaintiffs that in considering the merits of the claim against the anchor defendant for the purposes of Art. 8(1) of the Recast Brussels Regulation, the test is not to consider the merits of the claim on the balance of probabilities but rather to engage in the sort of analysis the Supreme Court identified in *Analog Devices* (“good arguable case”), in *IBRC v. Quinn* (a case which is “*reasonably capable of being proving*”) and in *Gannon* (a case which is plausible when considered in a *prima facie* fashion). It seems to me that it is in accordance with the standard described in those cases that the merits of the plaintiffs’ claim against Eurotoaz must be considered for the purposes of Art. 8(1) of the Recast Brussels Regulation. In the event that there is any real difference between the test described in those three cases (and I do not believe that there is any real difference between them), the relevant test is probably that contained in the most recent of the three judgments, namely *IBRC v Quinn*. However, whether the test is expressed by reference to the “good arguable case” standard, the plausibility of the case when considered in a *prima facie* fashion or in terms of whether the claim is one which is reasonably capable of being proven, I am completely satisfied that the plaintiffs have met the required standard in terms of the merits of its case against Eurotoaz. All of the findings and conclusions set out

earlier with respect to the merits of the plaintiffs' case against Eurotoaz for the purpose of the O. 11 issue are equally applicable here. I have no doubt that on the evidence before the court and on the basis of the arguments advanced by the parties, on this jurisdiction application, the plaintiffs have not only demonstrated on the balance of probabilities that the requisite close connection exists between its claims against Eurotoaz and its claims against Holdings, but have also demonstrated that, with respect to the merits of their claim against Eurotoaz, (a) they have a good arguable case, (b) it is a plausible case when considered in a *prima facie* fashion and (c) it is a case which is reasonably capable of being proven at trial.

389. For all of these reasons, therefore, I reject that part of the UCCU defendants' application which seeks to challenge the jurisdiction of the Irish courts to hear and determine the plaintiffs' claim against Holdings under Art. 8(1) of the Recast Brussels Regulation.

K. Application to Set Aside Service Due to Non-Compliance with Hague Service Convention

390. The final ground on which the UCCU defendants seek to set aside service of the proceedings on the Russian UCCU defendants is that such service was not effected in compliance with the Hague Service Convention, which they maintain provides for an exclusive means of serving proceedings in Russia. This argument is advanced without prejudice to the UCCU defendants' challenge to jurisdiction on the grounds considered earlier.

**(1) Summary of UCCU defendants' Position on Hague Service
Convention Issue**

- 391.** In brief summary, the UCCU defendants contend, first, that service of the proceedings which was purportedly effected in the manner provided for in the order of the High Court (McDermott J.) of 7 November 2016 by service on the Russian UCCU defendants through a combination of post, e-mail, fax and messages to social media accounts was not permitted in Russia under the Hague Service Convention. The only service permitted under the Convention, they say, is service through the central Authority designated in Russia, namely, the Ministry of Justice of the Russian Federation. Possible alternative means of service under the Convention are not permitted in Russia as the Russian Federation has issued declarations that service under Arts. 8 and 10 of the Convention are not permitted in Russia. Art. 8 permits service to be effected through diplomatic or consular agents. Art. 10 preserves the ability to serve persons abroad by postal channels and by certain other means. However, service under Art. s 8 and 10 is not permitted in Russia. The UCCU defendants contend, therefore, that the High Court did not have the power to permit service of the proceedings by the means ordered and did not have jurisdiction to make the order for substituted service under O.10 r.1.
- 392.** As part of that argument, they maintain that the alternative means of service ordered by the High Court was not permitted by O. 11E, r. 2(2) in that the methods of service directed by the court were not "*prescribed*" by the RSC or "*permitted*" under the Convention or by Russia itself.
- 393.** Second, and without prejudice to that fundamental contention, they argue that even if the court did have the jurisdiction to make an order for substituted service,

notwithstanding the terms of the Convention and O.11E, r.2(2), the court should nonetheless not have made an order for substituted service under O. 10, r. 1 of the basis of the evidence before it.

394. Third, they contend that the order permitting substituted service should be set aside on the grounds of non-disclosure by the plaintiffs of material facts relevant to the plaintiffs' request to the court to direct substituted service. The material facts not disclosed to the court were publicly available statistics concerning the time taken for service of proceedings under the Convention in Russia.

395. In support of both their fundamental point that the court did not have jurisdiction to permit service of the proceedings in Russia by the methods directed having regard to the terms of the Convention and their contention that, even if the court did have jurisdiction to order substituted service, it ought not to have done so on the basis of the evidence before the court, the UCCU defendants rely upon, in particular, a number of English cases including *Knauf UK GmbH v. British Gypsum Limited* [2002] 1 WLR 907 ("*Knauf*"), Court of Appeal; *Cecil v. Bayat* [2011] 1 WLR 3086 ("*Cecil*"); *Deutsche Bank AG v. Sebastian Holdings Inc.* [2014] EWHC 112 (Comm) ("*Deutsche Bank*"); *Marashen Limited v. Kenvett Limited* [2018] 1 WLR 288 ("*Marashen*") and *Société Generale V. Goldas* [2019] 1 WLR 346 ("*Société Generale*").

396. They contend that those cases make clear that the service of proceedings on a person in a Contracting State to the Convention must be effected in accordance with the terms of the Convention, that service by alternative means can only be permitted in exceptional circumstances and that mere delay or expense in serving proceedings other than in accordance with the Convention cannot, without more, constitute exceptional circumstances. They contend that no exceptional

circumstances existed in this case for the court to direct service other than as permitted by the Convention.

- 397.** In support of their contention that the court ought not to have ordered substituted service under O. 10, r. 1 on the basis of the evidence before it, the UCCU defendants rely on the decision of the Supreme Court in *Shelswell-White v. O'Connor* (1961) 95 ILTR 113 ("*Shelswell-White*"). In support of their claim that the order should be set aside on the grounds of material non-disclosure, they rely on the judgment of Clarke J. in the High Court in *Bambrick v. Cobley* [2006] 1 ILRM 81 ("*Bambrick*").
- 398.** They rely on the expert evidence of Mr. Vyacheslavov, both as to the permitted means of service under the Convention in Russia and by way of rebuttal of the evidence given on the *ex parte* application for substituted service as to the alleged delays and difficulties in serving proceedings in Russia under the Convention. They acknowledge, however, that, insofar as there are disputes between Mr. Vyacheslavov's evidence and that of Dr. Gladyshev., the court cannot resolve those disputes on this application.
- 399.** Finally, they dispute the entitlement of the court to make an order deeming service good under O. 9, r. 15 and seek to distinguish this case from the facts at issue in *Kavanagh v. Fenty* [2018] IEHC 404 ("*Kavanagh*") as in that case an attempt, at least, was made to serve the proceedings in New York under the provisions of the Convention, albeit that the attempt was unsuccessful.

(2) Summary of Plaintiffs' Position on Hague Service Convention Issue

- 400.** In response, the plaintiffs' position can be summarised as follows. First, the plaintiffs contend that the UCCU defendants' application to set aside service of the proceedings under this heading should be refused on the grounds that their set

aside application was not made within “*a reasonable time*” as required under O. 124, r. 2 and that the delay on the part of the UCCU defendants in bringing the application was wilful and strategic and consistent with an obstructive pattern of behaviour. The plaintiffs rely on the fact that the Russian UCCU defendants were in fact served with the proceedings in November 2016 on foot of the Order of the High Court of 7 November 2016 and yet no application was made to set aside such service until this application was brought on 3 October 2018.

401. Second, the plaintiffs contend that the High Court did have jurisdiction under O. 10 r. 1 to make the order it made on 7 November 2016 for substituted service of the proceedings on the Russian UCCU defendants, notwithstanding that such service in Russia was not in compliance with the permitted method of service in Russia under the Convention. The plaintiffs rely on the statutory basis for the court’s jurisdiction to order substituted service, being s. 34 of the Common Law Procedure (Ireland) Amendment Act 1853 (the “1853 Act”). They argue that since that jurisdiction is based in statute, it cannot be taken away by another provision of the RSC, including O. 11E, r. 2(2) on which the UCCU defendants rely. In any event, the plaintiffs contend that O. 11E, r. 2(2) should not be interpreted in the manner suggested by the UCCU defendants. The plaintiffs claim that substituted service is a method of service which is “*prescribed*” by the RSC and that, therefore, service effected on foot of an order for substituted service under O. 10, r. 1 is a method of service which falls within O. 11E, r. 2(2) and is allowed under that provision. They rely on the judgment of Finnegan J. in the High Court in *FMcK v. MB* [2005] IEHC 164 (“*FMcK*”) in support of their contention that the Convention does not remove the power of the court to direct substituted service in an appropriate case.

402. Third, the plaintiffs submit that the High Court properly exercised its discretion on the basis of the material before it when making the order under O. 10, r. 1 for substituted service of the proceedings on the Russian UCCU defendants. The plaintiffs also rely on a number of the English cases on which the UCCU defendants rely and accept the general principles set out in those cases. The plaintiffs accept that it was necessary for them to demonstrate exceptional circumstances before the court could direct substituted service in Russia in a manner which did not comply with the permitted methods of service of proceedings in Russia under the Convention. However, they maintain that the evidence which they put before the court in the form of Ms. Harty's affidavit of 4 November 2016 demonstrated the existence of the necessary exceptional circumstances.

403. In that affidavit, Ms. Harty referred not only to the delay in serving through the Russian Ministry of Justice in a manner provided for under the Convention, but also to the plaintiffs' concerns relating to the involvement of the Russian authorities in the service of proceedings under the Convention, having regard to a number of the matters forming part of the plaintiffs' substantive case against the UCCU defendants. I have referred to these concerns earlier in the judgment but they include the commencement of the Art. 159(4) criminal proceedings and the various orders made by the court in those proceedings, including the arresting of shares, property and cash of ToAZ, the bringing of criminal charges and the issuing of domestic and international arrest warrants against key officers of ToAZ and others and the suspension of Mr. S. Makhelai as chairman of the board of directors of ToAZ. Ms. Harty set out the plaintiffs' concern that the Russian UCCU defendants would be able to influence the relevant Russian officials in

obstructing service of the proceedings through the Russian Ministry of Justice in accordance with the Hague Service Convention. The plaintiffs also rely on the additional material set out in the affidavits sworn in response to the UCCU defendants' application, including the further affidavits of Ms. Harty, the affirmations of Mr. Walfenzao and the various expert reports of Dr. Gladyshev. They rely on the experience of Ms. Harty in the service of proceedings in other cases in Russia and on the evidence of Mr. Walfenzao concerning the service in Russia of Cypriot proceedings brought by ToAZ on many of the same defendants, including Mr. Mazepin, UCCU and Mr. Konyaev. I should note here that, notwithstanding Mr. Walfenzao's assertion that service in Russia of the Cypriot proceedings brought by ToAZ was sought to be effected through the Hague Service Convention, in fact, as pointed out in response by the UCCU defendants, such service was in fact to be effected on foot of a bilateral treaty between Cyprus and Russia and not the Hague Service Convention.

404. Fourth, the plaintiffs reject the contention that they were guilty of any material non-disclosure in their *ex parte* application to the High Court on 7 November 2016. They rely on the evidence contained in Ms. Harty's affidavit of 4 November 2016 and reject the contention that their failure to refer to or exhibit certain statistics concerning service of proceedings in Russia under the Convention amounted to material non-disclosure.

405. Fifth, without prejudice to their contention that the proceedings were properly served on the Russian UCCU defendants on foot of the Order of the High Court of 7 November 2016, if the court is not satisfied that such service was validly effected, the plaintiffs seek an order under O. 9, r. 15 deeming good the service actually effected on those parties. In that regard, they rely upon *Kavanagh and Re*

Sean Dunne [2015] 2 ILRM 183 (“*Dunne*”). They point to the fact that proof of service of the proceedings on the Russian UCCU defendants has been provided to the court, that a number of the UCCU defendants were involved in the Cypriot proceedings which were brought in aid of these proceedings and, in that context, were clearly aware of these proceedings and that no prejudice would be caused to any of the Russian UCCU defendants were service deemed good in those circumstances.

(3) Decision on Hague Service Convention Issue

406. For the reasons set out below, I have concluded that the UCCU defendants’ application to set aside service of the proceedings on the grounds of a failure to serve the Russian UCCU defendants in the manner required by the Hague Service Convention for the service of proceedings in Russia must be refused. Further, and for the avoidance of any doubt in relation to the question of service, I have concluded that it would be appropriate for me to make an order under O. 9, r. 15 deeming the actual service of the proceedings on the Russian UCCU defendants good and sufficient service.

407. Before setting out the various reasons for so deciding, I make a number of preliminary and introductory observations.

(4) Observations on Hague Service Convention Issue

408. At the heart of the UCCU defendants’ service set aside application is the Hague Service Convention. Ireland is a party to the Convention as is the Russian Federation. O. 11E was originally inserted into the RSC in 1994 to give effect to the Convention and has subsequently been amended on a number of occasions. It sets out the procedure for the service of judicial and extra-judicial documents in

civil and commercial proceedings, including summonses and other pleadings, outside the jurisdiction and in another state or country which is a party to the Convention (excluding a country which is a Member State of the European Union). The primary procedure for the service of such documents outside the jurisdiction under O. 11E is through the designated central authorities of the respective states involved. In other words, if Irish proceedings are to be served on a defendant in another Convention country, the primary method for serving the proceedings is through the respective central authorities of Ireland and of that other country (Articles 2-4 of the Convention). The central authority of the state in which the defendant is to be served must itself serve the relevant document or arrange to have it served by an appropriate agency, either by a method proscribed by its internal law for the service of documents in domestic actions on persons who are within its territory or by the particular method requested by the applicant, unless that method is incompatible with the law of the state addressed. Other possible methods of service may be permitted under the Convention unless the state in which the document is served has objected. As noted earlier, under Art. 8, judicial documents may be served on parties in another contracting state through diplomatic or consular agents. Under Art. 10, judicial documents may be sent by postal channels directly to the person to be served abroad, provided the state of destination does not object. However, the Russian Federation has made declarations objecting to service by the methods referred to in Arts. 8 and 10. It is clear from the evidence of the Russian law experts acting for the plaintiffs and for the UCCU defendants (Dr. Gladyshev and Mr. Vyacheslavov) that, in those circumstances, the only permitted method of service under the Convention on

persons in Russia is through the central authority of the Russian Federation, namely, the Ministry of Justice of the Russian Federation.

409. As explained by Dr. Gladyshev (at para. 110 of his first expert report dated 1 November 2018), the following is the manner in which proceedings are required to be served in Russia under the Convention:

“The service under the Hague Convention, in Russia, is effected by a foreign agency or a court sending the documents to be served to the Russian Ministry of Justice, and the Ministry then sending the documents to the court at the place of residence of the Russian party. The Russian party is then subpoenaed to come to court hearings where the documents are handed over by the court. A special protocol of the court and an order confirming the service are then issued and are sent back to the foreign party, again via the Ministry of Justice.”

410. The position is also explained in Mr. Vyacheslavov’s first expert report dated 29 November 2018 (at paras. 37-40). The relevant procedure within Russia is governed by Art. 407 of the Civil Procedural Code of the Russian Federation and Art. 256 of the Commercial Procedural Code of the Russian Federation.

411. It is clear, therefore, on the evidence before the court that the only method of serving proceedings on persons in Russia in compliance with the Hague Service Convention is through the central authority, the Russian Ministry of Justice.

(5) The Order of 7 November 2016 and Service on Russian UCCU

Defendants

412. The High Court (McDermott J.) made an order on 7 November 2016, on the *ex parte* application of the plaintiffs giving the plaintiffs liberty to serve the proceedings on a number of the defendants including the Russian UCCU defendants through a combination of post, e-mail, fax and messages to social

media accounts. That was an order for substituted service which was made by the court under O. 10, r. 1. The various methods of service of the proceedings in Russia permitted by the order were not in compliance with the permitted method of service in Russia under the Convention. The plaintiffs explained why they were seeking liberty to serve by means of those other methods. I consider below what that evidence was and whether it was open to the court to permit service in the manner requested. The plaintiffs provided evidence to the court (in the form of several affidavits of service) that the proceedings were served on the Russian UCCU defendants in compliance with the terms of the order of 7 November 2016 on various dated in November 2016.

- 413.** It is fair to say that the UCCU defendants did not dispute the fact that the proceedings were served on those defendants in the manner provided for in the order. In any event, having considered the relevant affidavits of service, I am satisfied that the proceedings were served on the Russian UCCU defendants in a manner provided for in the order.
- 414.** Further documents were served on the Russian UCCU defendants in the manner provided for in subsequent orders made by the High Court, including those made by Haughton J. on 13 February 2018 and by me on 10 April 2018. The order made on 10 April 2018 records the fact that the court was satisfied that service of the relevant application (which was to amend the statement of claim) had been served on the Russian UCCU defendants and others in accordance with the order of Haughton J. of 13 February 2018. In its order of 10 April 2018, the court gave further directions for the service of the amended statement of claim in a similar manner on the Russian UCCU defendants and others. The plaintiffs subsequently served a motion for judgment in default of appearance against a number of the

defendants, including the Russian UCCU defendants by the same methods of service and there is no dispute that the relevant documents were received by those defendants. As explained earlier, the motion for judgment in default of defence was struck out against a number of the defendants including the Russian UCCU defendants following the entry of an appearance to contest jurisdiction.

415. There is no doubt, therefore, that the Russian UCCU defendants were served with the proceedings and were aware of the proceedings from at least the date of service in late November 2016.

416. I am satisfied that they were also aware of the proceedings through the involvement of Holdings in the proceedings brought in Cyprus in aid of these proceedings, as explained by Ms. Harty at paras. 23-31 of her affidavit of 6 November 2018. An affidavit was sworn in the proceedings in Cyprus on 18 April 2017 by Ms. Anastasia Tolstoya on behalf of Holdings in which reference was made to these proceedings and to the fact that an opinion had been obtained for the benefit of Holdings from Irish solicitors and counsel in relation to them. Holdings is the parent company of UCCU, and I have no doubt that the Russian UCCU defendants were aware of the Irish proceedings from the date of service in November 2016 and from the involvement of Holdings in the Cypriot proceedings which were brought in aid of these proceedings.

(6) Burden of Proof on Hague Service Convention Issue

417. While it might be said that the burden of proof on the application to set aside service of the proceedings on the Russian UCCU defendants must rest with the moving party, namely, the UCCU defendants and while there is authority for that proposition (*Heffernan v. Ryan* [2015] 1 IR 32, *per* Herbert J. at para. 23 and *Kavanagh, per* O'Regan at para. 20), I believe that it is safer for me to proceed on

the basis that, since the order of 7 November 2016 was made on the *ex parte* application of the plaintiffs, they should bear the burden of establishing that the order was properly made. In other words, I believe I should proceed on the basis that just as the plaintiffs continue to bear the burden of proving that the order permitting service out of the jurisdiction under O. 11, r. 1(h) was properly made on an application to set aside the service and the order made, so too should the plaintiffs continue to bear the burden of proving that the order permitting service in Russia by means not permitted there under the Convention was properly made.

(7) Relevant Provisions of the RSC

418. It is appropriate now to set out the provisions of the RSC relevant to the UCCU defendants' set aside application.

419. Order 9, Rule 15 provides:

“In any case the court may, upon just grounds, declare the service actually effected sufficient.”

420. Order 10, Rule 1 which deals with substituted service provides:

“If it be made to appear to the court that the plaintiff is from any cause unable to effect prompt personal service, or such other service as is prescribed by these Rules, the court may make an order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise.”

421. The court's jurisdiction to order substituted service has a statutory basis in s.34 of the 1853 Act.

422. Order 11E provides for the service of documents outside the jurisdiction in Hague Service Convention cases. Order 11E, r. 2(1) states that Order 11E applies to the service of documents including summonses, notices, affidavits, pleadings and orders, including those where service is required to be effected out of the

jurisdiction and in a Convention country where for such service leave has been granted or is unnecessary and where a request for service has been made to the Irish Central Authority in the form prescribed.

423. O. 11E, r. 2(2) is important for present purposes. It states:

“This Order is without prejudice to any other method of service prescribed by these Rules or permitted under the Convention or by a State a party to the Convention or which is otherwise compatible with the law of the State in which service is to be effected.” (emphasis added)

424. There is an issue of interpretation between the parties as to the meaning of the phrase *“any other method of service prescribed by these Rules”*.

425. Finally, O. 124 concerns the effect of non-compliance with the RSC. O. 124 r. 2 states:

“No application to set aside any proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.”

(8) Reasons for the Decision on Hague Service Convention Issue

426. I will set out now my reasons for rejecting the UCCU defendants’ application by reference to each of the points raised by the parties.

(i) O.124 r.2: Delay

427. I will deal first with the plaintiffs’ contention that the UCCU defendants’ application should be refused on the basis that the application was not made within a *“reasonable time”* as required by O. 124 r. 2.

428. Where a party is of the view that service of proceedings upon it in another country is defective or irregular as being in breach of the Hague Service

Convention the party has a choice. It can ignore the defect and participate in the proceedings. It can decide to ignore the proceedings and take its chances by resisting, if necessary, any application to enforce a judgment in the proceedings on the basis that service was defective or irregular. Or it can decide to apply to set aside service of the proceedings on the basis of that defect or irregularity.

However, if the party decides to take that latter option and to apply to set aside the service, it is incumbent upon the party to act with expedition and to do so within a “*reasonable time*”. O. 124 r. 2, in imposing an express requirement in the RSC to that effect, is merely reflecting what a court would, in any event, require, as it is important that the parties and the court know from an early stage whether the party served disputes such service or disputes the jurisdiction of the court. That imperative is seen in cases such as *Intermetal* and *Connoisseur*, discussed earlier in the context of the delay in applying to set aside service under O. 11. The position must be the same in the case of an application to set aside service abroad on the grounds of an alleged defect or irregularity in service. In this case, I have already concluded that the Russian UCCU defendants were served in accordance with the Order of 7 November 2016 on various dates in late November 2016 as explained in the various affidavits of service put before the court by the plaintiffs. I am also satisfied that they were aware of the proceedings from involvement of Holdings in the proceedings in aid in Cyprus. They were also served with various other documents in the course of the proceedings, including the plaintiffs’ motion to amend the statement of claim which was dealt with by the court in April 2018. However, notwithstanding all of that, the UCCU defendants did not respond at all and did not raise any issue, whether in relation to service or jurisdiction or

otherwise until the William Fry letter of 13 July 2018. The present application was not brought until 3 October 2018.

429. In that context, it is hard to view the application as having been brought within a “*reasonable time*” within the meaning of that term in O. 124, r. 2. It plainly was not. I agree with the plaintiffs that the UCCU defendants’ delay in bringing the application was a deliberate decision to hold off on taking any step in the proceedings until just before the plaintiffs’ motion for judgment in default of appearance was to be heard by the court in late July 2018. To that extent, therefore, I accept the plaintiffs’ contention that the delay in bringing the application was a deliberate strategy on the part of the UCCU defendants. I do not accept that the UCCU defendants were in any way prevented or precluded from bringing the application by reason of any step which the plaintiffs took or failed to take in the proceedings up to the point in time at which the UCCU defendants first raised their objection. I accept that the plaintiffs were actively pursuing the proceedings claim and were involved in the applications brought by Eurotoaz and by Mr. Babichev as well as having to bring an application to amend the statement of claim. While the UCCU defendants may have decided to sit back and take no steps until they first raised the issue of jurisdiction in July 2018 and then brought this application in October 2018, they must bear the risk that a court would find that they had unreasonably delayed in bringing the application. I am satisfied that they did unreasonably delay in doing so but I do not propose to dismiss their application on that ground and would prefer to consider the substantive grounds for the application. The UCCU defendants’ delay does, however, provide considerable support for the plaintiffs’ decision to seek the court’s permission to serve the proceedings in a more expeditious manner than permitted in Russia

under the Hague Service Convention. It might be said retrospectively to corroborate the concerns expressed by Ms. Harty in her affidavit grounding the application to the court for substituted service as well as the concerns expressed by Dr. Gladyshev as to how persons who are required to be served in Russia through the central authority and the local court can frustrate the process in various ways, including by failing to appear at the relevant court hearing. Nonetheless, I will not refuse the UCCU defendants' application on the grounds that it was not made within a "*reasonable time*" under O. 124, r. 2, but will proceed to consider the substantive points raised in favour of and against their application.

(ii) O.11 r. 2(2): Prescribed or Permitted

430. I do not accept the UCCU defendants' contention that the High Court did not have jurisdiction to make an order for substituted service under O. 10, r. 1 where the service directed was not in conformity with the permitted method of service in Russia under the Hague Service Convention. I do not agree with their suggested interpretation of O. 11E, r. 2(2). In my view, to read the phrase "*any other method of service prescribed by these rules*" as excluding the court's power to order substituted service under O. 10 is to give it an unduly narrow interpretation. I take the view that a method of service directed by the court by way of substituted service under O. 10, r. 1 is a method of service "*prescribed*" by the RSC. Order 10, r. 1 gives the court the power to order substituted or other service where a plaintiff is unable to effect prompt personal service "*or such other service as is prescribed by these rules*". While the UCCU defendants seek to contrast the use of the term "*prescribed*" with the term "*permitted*" in O. 11E, r. 2(2), such that in order for a method of service to be "*prescribed*" it must be actually mandated by

the RSC rather than merely provided for under the RSC which, as they say is the case with respect to an order for substituted service made under O. 10, r. 1, I do not agree. That in my view is to give an unduly narrow interpretation to the terms used and in particular to the term “*prescribed*” used in O. 11E, r. 2(2). Since substituted service is provided for in O. 10, r. 1, it is in my view another method of service which is “*prescribed*” by the RSC for the purposes of O. 11E, r. 2(2). That is not to say, however, that when considering whether to order substituted service in a case where the service sought would not be consistent with the permitted methods of service under the Hague Service Convention in the relevant country, the court should not take that into account in deciding whether to permit such service. The court should, of course, do so and should require a good and sufficient reason as to why service by the particular method is being sought. In my view, the provisions of O. 11E, r. 2(2) should not be so restrictively interpreted as the UCCU defendants contend. It has been repeatedly stated that the court is the “*master of its procedures*” and is “*not necessarily hide bound*” by a particular rule of court: *Dome Telecom v. Eircom* [2008] 2 IR 726, *per* Geoghegan J. at para. 12, p.736 and *McCambridge Limited v. Joseph Brennan Bakeries* [2013] IEHC 569, *per* Kelly J. at para. 55. However, recourse does not have to be made to that general principle as the High Court has already decided this issue.

431. The High Court (Finnegan P.) held in *FMcK* that, notwithstanding the Hague Service Convention, the court still retains the power to make orders for substituted service or notice in lieu of service under the RSC. In that case, an order was made under O. 11 permitting the plaintiff to serve notice of the proceedings on the defendant in the UK in proceedings brought under the Proceeds of Crime Act,

1996. The address for service of the summons on the defendant was a prison in England. The defendant sought various orders including orders setting aside the order permitting service out of the jurisdiction on the grounds that service was not effected in accordance with the Convention. The court rejected the application. Having referred to O. 11 and the jurisdiction of the court to permit service of proceedings outside the jurisdiction, Finnegan P. stated:

“In each case the Rules of Court require personal service but the Court may also make Orders for substituted service or notice in lieu of service. Nothing in the texts opened to me by Counsel on behalf of the Defendant suggests that these provisions of the Rules of the Superior Courts have been amended or abrogated by the Convention.” (pp. 6-7)

- 432.** While the court in *FMcK* did not expressly refer to O. 11E, r. 2(2), the conclusion reached by the court in that case is consistent with what I believe to be the correct interpretation of that provision.
- 433.** Additionally, the court’s jurisdiction to order substituted service is one which derives from statute: s. 34 of the 1853 Act. If it were necessary to so decide, I would agree with the plaintiffs’ submission that since the power to order substituted service is derived from primary legislation, it would not have been open to the Superior Court Rules Committee to render inapplicable by an amendment to the RSC the power to order substituted service in cases to which the Convention applies. In light of my conclusion on the correct interpretation of O. 11E, r. 2(2) and in light of the judgment of the High Court in *FMcK*, it is unnecessary for me definitively to rule on this point.
- 434.** I am satisfied, therefore, that the High Court (McDermott J.) did have jurisdiction to make an order for substituted service under O. 10, r. 1 permitting

service of the proceedings in Russia on the Russian UCCU defendants, notwithstanding that the method of service directed by the court was not one permitted in Russia under the Convention.

(iii) Substituted Service in Hague Service Convention Cases: Relevant

Principles

435. The next question is what considerations ought to be taken into account when a court is asked to make an order for substituted service of the type sought by the plaintiffs on 7 November 2016 and whether the material put before the court by the plaintiffs could have enabled the court to make the order it made, having regard to the relevant legal principles.

436. In ascertaining the approach which a court should take in deciding whether to permit service out of the jurisdiction in a manner that does not comply with the Hague Service Convention, considerable assistance can be derived from a number of the English cases referred to by the parties, at least one of which, namely, the decision of the English Court of Appeal in *Cecil*, was drawn to the attention of McDermott J. by the plaintiffs on the *ex parte* application. Before looking at some of the English cases, it is important to note that they were all dealing with the power of the English court to permit service by alternative means under CPR Rule 615(1) which states:

“Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.”

437. The English courts have considered the approach which the court should take when asked to make an order permitting alternative service under this provision in

a Convention country when the method of service sought is not one permitted under the Hague Service Convention.

438. The first of the English cases is *Cecil*, a decision of the English Court of Appeal. In that case, the court reversed the decision of the English High Court granting permission to serve the defendants by alternative measures. The court's decision on that issue was *obiter* in light of its decision on other points. However, the principles set out were referred to in subsequent cases. In his judgment, Stanley Burnton LJ made the point that the purpose of service of proceedings is not only to bring the proceedings to the attention of the defendants but is also an exercise of the power of the court and, in the case of service out of the jurisdiction, is an exercise of sovereignty within the foreign country (para. 61). *Dicta* in subsequent cases have downplayed somewhat the emphasis on the interference of sovereignty where proceedings are served in another country. In *Abela v. Baadarani* [2014] WLR 2043 ("*Abela*"), (which was not a case involving the Hague Service Convention), Lord Sumption stated that it was no longer realistic to view the service of proceedings in another jurisdiction as amounting to an assertion of sovereign power over the person being served and a corresponding interference with the sovereignty of the state in which the service was been effected. He felt that in modern times, a decision permitting service in another jurisdiction is a "*pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum*" (para. 33). The other members of the court agreed with those observations. So too did the English Court of Appeal in *Soci t  Generale*: see *per* Longmore LJ at para. 33. As did O'Regan J. in the High Court in *Kavanagh* (paras 32 and 33).

439. Having referred to sovereignty, Stanley Burnton LJ in *Cecil* went on to refer to the particular considerations which arose where permission was sought for service abroad in a manner which was not permitted by the Convention. At para. 65, he stated:

“Because service out of the jurisdiction without the consent of the State in which service is to be effected is an interference with the sovereignty of that state, service on a party to the Hague Convention by an alternative method under CPR r. 6.15 should be regarded as exceptional, to be permitted in special circumstances only.”

440. He continued (at para. 66):

“It follows, in my judgment, that while the fact that proceedings served by an alternative method will come to the attention of a defendant more speedily than proceedings served under the Hague Convention is a relevant consideration when deciding whether to make an order under CPR r. 6.15, it is in general not a sufficient reason for an order for service by an alternative method.”

441. Stanley Burnton LJ stated that in general the desire of a claimant to avoid the delay inherent in serving under the Convention and the delay itself could not justify an order for service by alternative means and that if speed of service could justify such an order then compliance with the requirements for service under the Convention would be optional and service by alternative means would become the norm. He noted that that view was also supported by the earlier judgment of the English Court of Appeal in *Knauf* where the court stated (at para. 47) that *“a mere desire for speed is unlikely to amount to good reason, for else, since claimants nearly always desire speed, the alternative method would become the primary way”*. In his judgment in *Cecil*, Rix LJ noted that it may be that *“some*

flexibility” should be shown in considering whether “*good reason*” exists to permit service by alternative means, particularly where otherwise litigation could be prejudiced by lengthy delays. However, he too noted that in *Knauf*, the court observed that “*mere desire for speed was unlikely to amount to good reason*” (para. 113).

442. That is the approach which has been taken in subsequent English cases. In *Deutsche Bank*, the English High Court (Cooke J.), having referred to *Abela* and having noted that that was not a case involving service in a country which was party to the Convention, applied the principles set out by Stanley Burnton LJ and Rix LJ in *Cecil*. He stated (at para. 27):

“Although the Supreme Court considered that to talk of ‘interference with the sovereignty of a foreign state’ was to overstate the position, the fact remains that where there is an applicable convention, the two states in question have specifically agreed to the service of foreign process in accordance with it. In such circumstances this must represent the prime way of service in such a contracting state. Even if service by alternative means is not to be seen as ‘exceptional’ and to be permitted in special circumstances only, there must still be good reason for allowing service by a means other than that...in accordance with a relevant convention. Otherwise the Convention would be subverted.”

(emphasis added)

443. Cooke J. stated, therefore, that there must be some good reason beyond speed and convenience for the reasons set out in *Knauf*. He could find no good reason on the facts of that case, other than convenience and possible speed to justify service by alternative means which was not sufficient to persuade him to permit

such alternative service. In *Kavanagh*, O'Regan J. referred with approval to the judgment of Cooke J. in *Deutsche Bank*: see paras. 25-32.

444. These principles were also applied by the English High Court in *Marashen*.

Applying *Deutsche Bank*, the court stated that in Hague Service Convention cases “*exceptional circumstances*” rather than merely “*good reason*” had to be shown before an order for alternative service other than in accordance with the terms of the Convention could be used and that “*mere delay or expense*” in serving in accordance with the Convention could not “*without more*” constitute such “*exceptional circumstances*”. The court continued:

“I say ‘without more’ because delay might be the cause of some other form of litigation prejudice or be of such exceptional length as to be incompatible with the due administration of justice.” (para. 57)

445. That case concerned service of proceedings in Russia other than in accordance with the Hague Service Convention. The evidence before the court was that service in Russia could take between eight and ten months from the receipt of the request from the UK authorities together with an additional two months for translation. The court did not believe that that level of delay “*rises beyond the level of mere delay*” (para. 72). However, in an earlier judgment of the English Court of Appeal in *Joint Stock Asset Management Company v. BNP Paribas SA* [2012] 1 Lloyd’s Rep 649, the court referred to evidence that it could take two years to effect service in Russia under the Convention. On the particular facts, Stanley Burnton LJ stated that he had no doubt that if the High Court had been asked, it would have granted permission to serve the relevant defendant by alternative means in the particular circumstances, having regard to the need for a speedy *inter partes* hearing which could not be achieved if service had to be

effected under the Convention. He felt that there was, therefore, good reason as explained in *Cecil* to order service by alternative means (para. 75, p.660).

446. In *Société Generale*, the English Court of Appeal applied the test in *Cecil* that service by an alternative method could be permitted “*in special circumstances only*”. The Court of Appeal upheld the decision of the High Court (Poplewell J) which refused to permit service by alternative means. In *Kavanagh*, O’Regan J. cited with approval the judgment of the High Court in *Société Generale* in that case (see para. 34). While noting that Poplewell J had stated that service other than in accordance with the Hague Convention should only be permitted in “*exceptional circumstances*”, he went on to say:

“*That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Convention case.*” (per Poplewell J. at para. 49, cited with approval by O’Regan J. in *Kavanagh* at para. 34)

447. Some examples of the types of factors or considerations which have been held to be sufficient to justify an order for substituted service in a Hague Service Convention case include where an attempt is made to join a new party to existing proceedings and the effect of delay in serving that new party under the Convention would either substantially interfere with the directions in the existing proceedings or require claims which ought to be heard together to be heard separately (see: *M v. N* [2021] EWHC 360 (Comm) at para. 9, referring to *Avonwick Holding Limited v. Azitio Holdings Limited* [2019] EWHC 1254 (Comm) and *Evison Holdings Limited v. International Company Finvision Holdings LLC* [2020] EWHC 239 (Comm)). Other cases in which alternative service has been permitted is where an urgent hearing or an expedited trial is required: see for example *Griffin Underwriting Ltd. v. Varouxakis* [2021] EWHC 226 (Comm) and *Daiichi Chuo*

Kiasha v. Chubb Seguros Brasil SA [2020] EWHC 1223 (Comm). It appears also that orders for alternative service are routinely made by the Commercial Court of England and Wales in Hague Convention cases in claims for relief under the Arbitration Act 1996: *Kyrgyz Republic v. Finrep GmbH* [2006] 2 CLC 402 and the other cases referred to by Foxton J. in *M v. N* at para. 12. In *M v. N*, the court held that the order for alternative service which had been made *ex parte* was amply justified, notwithstanding that the service directed was not in accordance with the Convention because for various reasons, including the need for a speedy finality and the need to urgently bring the relevant proceedings to the attention of the respondent.

448. While most of the above cases are English cases dealing with the power of the court there to permit alternative service under a particular provision of the CPR, Rule 6.15(1) which requires that “*good reason*” be shown before such service can be ordered, it seems to me that the principles set out in those cases are also relevant and applicable to applications for substituted service under O. 10, r. 1 where the method of service sought is not in accordance with the Hague Service Convention. The relevance and applicability of those principles was confirmed by O’Regan J. in *Kavanagh*, although in that case service was unsuccessfully attempted under the Hague Convention and was then effected without any order of the court by different means. O’Regan J. was satisfied on the evidence that the proceedings had been brought to the attention of the defendant and made an order deeming service good under O. 9, r. 15.

449. It seems to me, therefore, that a party applying to the court under O. 10, r. 1 for substituted service of proceedings on a person or persons in a state which is party to the Hague Service Convention must provide a good reason to the court to make

the order sought. Since the primary means of service in such circumstances is in accordance with the Convention, it should only be in special or exceptional circumstances that the court should permit service other than in accordance with the Convention. The jurisdiction to permit such service should be capable of being exercised in a flexible manner but the court should recognise that the primary means of service is by means permitted under the Convention. The desire for speed in the service of proceedings, without more, will generally not be sufficient. There may, however, be cases where the desire for speed in the context of urgent proceedings may provide a basis for the court to permit service by other means. Whether or not special or exceptional circumstances are present very much depends on the facts of the case as disclosed in the evidence before the court. The desire for speed in combination with other reasons may well be sufficient to justify the court in permitting substituted service.

450. In my view, therefore, it is incumbent on the party seeking an order for substituted service of proceedings on a person in a Convention country by a method of service which is not permitted in that country under the Hague Service Convention, to provide sufficient material to the court to enable the court to decide whether there is a good reason to permit such substituted service, notwithstanding the terms of the Convention. The court must take into account the fact that Ireland and the other state are parties to the Convention. However, there is no reason in principle why the court cannot permit substituted service by means not permitted by the Convention, provided it is satisfied that there is a sufficient basis for doing so. In most cases, mere delay in itself will not be sufficient. In some cases, it may be. In others, an additional factor or factors may be required.

(iv) O.10 r. 1: *Shelswell-White*

- 451.** Before considering whether there was sufficient material before the court to support the decision to make the order for substituted service made on 7 November 2016, I must deal with the point made by the UCCU defendants in reliance on the decision of the Supreme Court in *Shelswell-White*.
- 452.** The UCCU defendants maintain, in reliance on a passage in the judgment of Lavery J. in the Supreme Court in *Shelswell-White*, that in order to obtain an order for substituted service, it must be shown that there is a “*practical impossibility of actual service*”. They maintain that the evidence before the High Court (McDermott J.) on 7 November 2016 was insufficient to comply with that requirement.
- 453.** However, in my view, that submission is made on the basis of a misunderstanding of the requirements of O. 10, r. 1 and what was decided by the Supreme Court in *Shelswell-White*. In that case, the High Court had refused to make an order for substituted service of proceedings on the solicitors for the first defendant who had, by the time of the commencement of the proceedings, left the jurisdiction for the United States. In reversing the decision of the High Court and in permitting substituted service under what was then Order IX, Rule 5 (which was in almost identical terms to what is now O. 10, r. 1). Lavery J. cited with approval a passage from *Halsbury Laws of England* (Hailsham Edition) Volume 26 at p.30 which did state that in an application for substituted service of a writ or notice of a writ for service out of the jurisdiction “*it must be shown that there is a practical impossibility of actual service, and that the method of substituted service asked for will in all reasonable probability be effective to bring knowledge of the writ or notice to the defendant.*” Clearly on the facts of that case it was a

“practical impossibility” to effect actual service on the relevant defendant who had left the jurisdiction. The Supreme Court applied the relevant rule and was satisfied that the plaintiff was unable to effect prompt personal service on that defendant and that substituted service on his solicitor would enable the proceedings to come to the notice of the relevant defendant. Therefore, the requirements of the rule were satisfied.

454. In the present case, as of November 2016, there was a *“practical impossibility”* of effecting actual service on the Russian UCCU defendants in Ireland as they were to be found in Russia. However, it is clear from the judgment of Lavery J. that he directly applied the provisions of the relevant rule, which are identical to the requirements in O. 10, r. 1, by first being satisfied that the plaintiff was unable to effect prompt personal service on the relevant defendant, as he had left the jurisdiction. I do not see how the judgment can be interpreted as meaning that the plaintiffs were precluded from seeking substituted service of the proceedings on the Russian UCCU defendants by the methods of service sought, in circumstances where *“prompt personal service”* was not possible and where it was claimed (correctly, as it happens) that the methods of substituted service sought would be effective to bring notice of the proceedings to the attention of the relevant defendants. It should also be noted in that regard that in *Danske Bank v. Meagher* [2014] IESC 38 the Supreme Court held that:

“There is no requirement, express or implied, in the Rules which confer jurisdiction on the Superior Courts to make an order for substituted service that the person sought to be served is personally within the jurisdiction, either when the application for substituted service is made or when service is effected. The only requirement in Order 10, r. 1 is that the court is satisfied that prompt

personal service cannot be effected on the person sought to be served...” (per Laffoy J. at para. 47)

455. I am satisfied, therefore, that *Shelswell-White* did not provide any bar to the High Court granting the plaintiffs’ application for substituted service on the Russian UCCU defendants.

(v) Whether Order Properly Made Under O.10 r. 1 on the Evidence

456. Having explained why I am satisfied that there was no jurisdictional bar to the High Court making the order for substituted service which it made on 7 November 2016, I now outline why I have formed the view that the evidence before the court was sufficient to enable the court to conclude that it was an appropriate case to permit substituted service in a manner ordered.

457. I am satisfied that the evidence before the High Court was sufficient to enable the court to exercise its discretion to direct substituted service on the Russian defendants in Russia by the means of service set out in the order. That is so, notwithstanding that under the Convention service in Russia must be effected through the designated central authority, the Russian Ministry of Justice. None of the additional evidence put forward by the UCCU defendants in support of their application to set aside service is, in my view, sufficient to undermine the exercise by the High Court of its discretion to direct substituted service on the basis of the evidence before it. Moreover, I am satisfied that the additional evidence put forward by the plaintiffs serves to reinforce the appropriateness of the order made by the court.

458. I start by considering the evidence which was before the High Court when it made its order on 7 November 2016. I have referred already to the detail of that evidence which is set out in paras. 66 to 75 of Ms. Harty’s affidavit of 4

November 2016. It is clear from that affidavit that, at the time of their application, the plaintiffs informed the court that the only method of service permitted in Russia under the Hague Service Convention is service through the designated central authority, the Russian Ministry of Justice (para. 68 of Ms. Harty's affidavit). The plaintiffs also informed the court that it was necessary for them to demonstrate "*exceptional circumstances*" in order for the court to authorise substituted service by an alternative method under O.10 (para. 67). The plaintiffs referred the court at the time of their *ex parte* application to a number of authorities, including *Cecil*, which made clear that service in a country which is party to the Convention by alternative means is exceptional and can only be permitted in exceptional circumstances (para. 66 of the plaintiffs' first outline legal submissions). There can be no doubt, therefore, that the court was aware that the only service permitted in Russia under the Convention was service through the designated central authority, the Russian Ministry of Justice, and that in order to permit service by other means, the court would have to be satisfied that the plaintiffs had demonstrated exceptional circumstances.

459. The exceptional circumstances relied upon at the time of the *ex parte* application were (a) delay and (b) the plaintiffs' concerns that the Russian UCCU defendants would be able to influence Russian officials effectively to prevent or impede service being effected through the Russian Ministry of Justice in accordance with the Convention. With respect to (a), Ms. Harty's evidence was that in her experience it takes "*on average one to two years for the Russian designated authority to process an application and issue a certificate of service to effect service*" (para. 68). Ms. Harty's evidence setting out the plaintiffs' concerns arising from the involvement of the Russian authorities in service under

the Convention were set out at paras. 69-73 of her affidavit. As mentioned earlier, in those paragraphs, Ms. Harty referred to the Art. 159(4) criminal proceedings and to the subsequent civil claim filed by UCCU in those proceedings and, in particular, to the various orders made in the context of those proceedings including the arrest of shares, property and cash of ToAZ and of the plaintiffs, the bringing of criminal charges and the issuing of domestic and international arrest warrants against key officers of ToAZ and the suspension of Mr. S. Makhlai as chairman of the board of ToAZ. Ms. Harty set out her instructions that those orders were made without proper legal basis and were wrongfully procured by the Russian UCCU defendants through the collaborative support of officials within the Russian administration. She explained, therefore, that the plaintiffs were concerned that the Russian UCCU defendants would be able to influence relevant Russian officials to prevent service being made through the Russian Ministry of Justice in accordance with the Convention. Ms. Harty contended that those factors provided evidence of exceptional circumstances to justify departing from the usual means of service under the Convention.

460. I have no doubt that on the basis of the principles set out in the cases referred to earlier, including *Cecil*, the High Court was fully entitled to exercise its discretion to permit substituted service on the basis of the matters set out in Ms. Harty's affidavit and did so in the full knowledge of the requirement on the plaintiffs to establish exceptional circumstances. The court had evidence not only of the delay in effecting service of proceedings in Russia under the Convention, but also of the plaintiffs' concerns arising from the involvement of Russian officials in effecting service in Russia under the Convention. On the basis of the material before the

court, it is easy to see why the court decided that it was appropriate to exercise its discretion to permit substituted service.

461. It is, however, also necessary now to consider the additional evidence and material put before the court on the UCCU defendants' application to set aside service of the proceedings on foot of the order made on 7 November 2016. I stress, however, that the court cannot resolve disputed issues of fact on this application and, like other aspects of the UCCU defendants' application, this part of the application should also not proceed as if it were a mini-trial of the issues between the parties.

462. The UCCU defendants rely on affidavits sworn by Mr. Breen of William Fry and on three expert reports of Mr. Vyacheslavov. Mr. Breen disputed Ms. Harty's evidence that it takes on average one to two years to effect service in Russia through the Russian central authority. He referred to the "*Practical Handbook on the Operation of the Service Convention*" (the "Handbook"), a publication issued by the HCCH (the Inter-Governmental organisation responsible for administering the Convention) and to the statistics in respect of service in Russia through the Hague Convention which showed that only 0.5% of incoming requests were executed in more than twelve months. Mr. Breen also referred to Russia's response to a 2013 questionnaire showing that in 2012 the majority of requests for service under the Convention were executed in under six months and 81% were executed in under twelve months. He also referred to correspondence from the Russian Ministry of Justice stating that in the period between 2016 and September 2018, the average time it took to execute requests for service under the Convention was "*approximately six months*". The UCCU defendants were critical of the fact that these statistics were not put before the court by the

plaintiffs on the *ex parte* application. They also rely on the evidence of Mr. Vyacheslavov and his experience that service under the Convention in Russia usually takes no more than six to eight months.

463. That evidence is disputed by the plaintiffs, both in Ms. Harty's affidavits in response to the UCCU defendants' application and in Dr. Gladyshev's expert reports. Ms. Harty commented on the statistics, noting that for a large proportion of cases a period of more than six months or more elapses prior to service being processed in Russia. She also noted the distinction between the processing of an application for service by the Russian authorities and the actual service being effected. Dr. Gladyshev was also critical of the statistics which he claimed, "*obfuscate an unimpressive reality*". He stated:

"It would take several years for a particularly insistent party, sending repeated service requests to Moscow, to effect an actual service on the Russian party and even this is uncertain..." (para. 119 of Dr. Gladyshev's full expert report dated 5 November 2018).

464. While Dr. Gladyshev and Mr. Vyacheslavov agree on certain matters, including the permitted methods of service in Russia under the Convention and the consequences in terms of enforcement of a judgment in Russia in circumstances where service was not effected in compliance with the Convention, they disagree on many other matters including the length of time it can take to serve proceedings through the Ministry of Justice in Russia and the opportunities for recalcitrant defendants to thwart such service by repeatedly failing to appear at court hearings. They also disagree on the question as to whether a party who brings a jurisdiction challenge such as this will be found in Russia to be estopped from disputing the effectiveness of service. Mr. Vyacheslavov disagreed. I am

unable, in the absence of cross-examination as to experts, to resolve that and other conflicts in their evidence on this application. They may be relevant matters for the trial. Alternatively, and more likely, they will be matters to be addressed at a later stage, if necessary, in Russia.

465. The thrust of Dr. Gladyshev's evidence is that the Russian procedure for service under the Hague Service Convention is lengthy and uncertain. Mr. Vyacheslavov disagrees and refers to his personal experience of cases to support his evidence that the average length of time for service in Russian is six to eight months. Both Dr. Gladyshev and Mr. Vyacheslavov refer to a judgment of the English High Court (Warby J.) in *Sloutsker v. Romanova* [2015] EWHC 545 ("*Sloutsker*"). It appears that in that case, after many apparently unsuccessful attempts to serve the defendant by reason of her non-appearance before the Russian court and the certification of non-service by the Russian court, Warby J. nonetheless found that the proceedings had been served on the defendant pursuant to Russian law in accordance with the Convention. The experts were in disagreement as to the import of that judgment. Dr. Gladyshev stood by his evidence that a defendant can thwart service in Russia by failing to appear before the court whereas Mr. Vyacheslavov stood by his evidence that a defendant cannot do so and that after two or three court hearings where the defendant does not appear, the court will certify the proceedings as having been served and return the papers to the Regional Unit of the Ministry of Justice (although I note that is not what happened in *Sloutsker*). I cannot resolve that dispute between the experts.

466. For present purposes however, I am satisfied that Dr. Gladyshev's evidence supports the position adopted by the plaintiffs on the *ex parte* application and would, if it had been before the court at that stage, have amounted to additional

material on which the court could properly have concluded that exceptional circumstances had been demonstrated by the plaintiffs.

467. In her affidavit of 6 November 2018, Ms. Harty gave further evidence of her experience and that of her firm in the service of proceedings in Russia. She was understandably concerned about the need to preserve the confidence and professional privilege of other clients and so was constrained in providing greater detail of the cases to which she alluded. However, she explained that in her experience local counsel in Russia consistently recommend obtaining orders for service by alternative means rather than relying on service under the Convention in Russia on the basis that serving under the Convention is very protracted. She further explained that her firm had experience of unsuccessfully trying to serve proceedings in Russia under the Convention which proved impossible due to the influence of the Russian Ministry of Justice. While the UCCU defendants dispute this in Mr. Breen's affidavits and in Mr. Vyacheslavov's expert reports and criticise the absence of detail, I cannot, of course, resolve that dispute at this stage. However, I am satisfied that Ms. Harty's evidence provides additional support for the order made on 7 November 2016, notwithstanding that it is disputed by the UCCU defendants.

468. I accept, therefore, that the plaintiffs have provided sufficient material for the court to conclude, for the purposes of an application for substituted service, that service in Russia under the Hague Service Convention would take at least twelve months and could be thwarted or frustrated by the Russian UCCU defendants refusing to appear at the court hearing or hearings necessary actually to effect such service on them. I am satisfied that in the light of the approach taken by the UCCU defendants in strategically delaying bringing their jurisdiction challenge

and in applying to set aside service, it is highly likely that the Russian UCCU defendants would similarly have sought to delay service in Russia by failing or refusing to co-operate with the process for service in that country. While mere delay in itself may not, on the authorities, be sufficient to amount to an exceptional circumstance, delay as a result of a deliberate strategic approach by the Russian UCCU defendants might well be. Further, the impact of such delay in circumstances where there are other defendants in the case may also be sufficient. In this case, there are other defendants over which the Irish courts have jurisdiction including Holdings, Eurotoaz, Mr. Babichev and Ms. Charilaou, as well as those defendants against whom judgment in default of appearance has since been obtained (Belport and Mr. Sedykin). An inability to serve the Russian UCCU defendants for more than twelve months would inevitably impact upon the plaintiffs' conduct of the proceedings as a whole and is also a relevant factor in the court's consideration as to whether exceptional circumstances exist.

469. Another relevant factor is the concern on the part of the plaintiffs about possible interference by the Russian authorities, at the instance of the Russian UCCU defendants, with service through the Russian Ministry of Justice and the Russian Courts. While Mr. Breen strenuously denies any such interference in his replying affidavits on behalf of the UCCU defendants, as does Mr. Vyacheslavov who referred to the effective service of proceedings in connection with the Mueller investigation in the U.S. under the Hague Service Convention on foot of requests from a Cypriot court. He noted that the Russian Ministry of Justice proceeded without delay to process the service of those controversial proceedings. Dr. Gladyshev, on the other hand, sought to distinguish the cases mentioned by Mr. Vyacheslavov. The plaintiffs provided additional evidence in support of their

concerns in the form of the second affirmation of Mr. Walfenzao dated 18 January 2019. Mr. Walfenzao referred to unsuccessful attempts to serve UCCU, Mr. Mazepin and Mr. Konyaev in Russia with Cypriot court proceedings brought by ToAZ. He initially stated that such service was sought to be effected in accordance with the Hague Service Convention. However, when it was pointed out to him by Mr. Breen in a replying affidavit (Mr. Breen's third affidavit sworn on 18 January 2019) that service of the proceedings in the Cypriot case was governed not by the Hague Service Convention but rather by a separate Treaty on Legal Assistance between the USSR and Cyprus of 19 January 1984 (the "Treaty"), Mr. Walfenzao acknowledged that permission to serve the relevant defendants under the Treaty was sought but that leave to serve the proceedings by other means permitted under Russian law was also sought and that that would include service under the Convention. Mr. Walfenzao was unable to ascertain from ToAZ's lawyers the particular means by which service of the Cypriot proceedings was actually attempted. I must admit to finding this dispute difficult to follow. Whether or not service of the Cypriot proceedings brought by ToAZ on those defendants in Russia was sought to be effected under the Treaty or under the Convention is a matter which I cannot determine on this application. However, irrespective of the legal basis upon which service was sought to be effected on those defendants in Russia, Mr. Walfenzao's evidence does provide some further support for the plaintiffs' concerns that some, or all, of the Russian UCCU defendants may seek to frustrate service by failing to appear at the court hearings at which the relevant documents were to be served. Mr. Walfenzao's affirmation shows that almost two years were spent by ToAZ unsuccessfully seeking to effect service on those defendants in Russia through the Russian Ministry of Justice and

that issues arose in effecting service due (*inter alia*) to the non-appearance at hearings by those defendants (Mr. Mazepin, UCCU and Mr. Konyaev) and an alleged lack of cooperation on the part of the Russian Ministry of Justice in processing the documents and returning them to Cyprus. It appears from Mr. Walfenzao's affirmation that the Cypriot court eventually determined that the proceedings were deemed to have been served without those defendants having ever actually made themselves available to accept service in Russia (para. 59 of Mr. Walfenzao's second affirmation). While the UCCU defendants have sought to challenge Mr. Walfenzao's evidence on the basis of his role as a professional independent director (retired as of March 2018), I am satisfied that this is evidence to which I can have regard on this application and it provides some additional support for the plaintiffs' position on the application. It is, however, by no means determinative.

470. I am also satisfied that, notwithstanding that the UCCU defendants strenuously deny (through Mr. Breen and Mr. Vyacheslavov) the potential for interference by the Russian UCCU defendants with the Russian Ministry of Justice's role in effecting service of the proceedings in Russia, the material put forward by the plaintiffs, both on the original application to the High Court on 7 November 2016 and in response to the UCCU defendants' application, does support the plaintiffs' claim that exceptional circumstances exist such as to justify the making of an order for substituted service in the terms ordered by the court.

471. In summary, my conclusion is that the material put before the court on the plaintiffs' *ex parte* application on 7 November 2016 was sufficient to amount to exceptional circumstances entitling the court to exercise its discretion to direct substituted service by the methods set out in the order, notwithstanding that

service by those methods was not compliant with the Hague Service Convention in Russia. While there are significant disputes between the parties and their respective experts in the material exchanged in the course of the UCCU defendants' application, I have concluded that none of the material undermines the existence of exceptional circumstances to justify the making of the order and much of the material, in fact, supports the existence of such circumstances. While mere delay in itself in serving might not be sufficient, delay combined with other factors mentioned including the fact that delay could be prolonged by a deliberate tactical strategy on the part of the Russian UCCU defendants, the impact on the progress of the plaintiffs' case against the other defendants and the plaintiffs' concerns in relation to the potential for interference by the Russian UCCU defendants with the Russian Ministry of Justice and other authorities involved in the service of documents under the Convention in Russia, does, in my view, amount to exceptional circumstances providing a sufficient basis for the order for substituted service made by the court.

(vi) Material Non-Disclosure

472. I reject the UCCU defendants' claim that the plaintiffs were guilty of material non-disclosure at their *ex parte* application to the court on 7 November 2016. As I have already indicated, the plaintiffs made clear to the court that the only method of service under the Convention in Russia was through the designated central authority, the Russian Ministry of Justice. They acknowledged that they had to demonstrate exceptional circumstances in order to obtain the order for substituted service sought. While they did not refer to the statistics to which Mr. Breen referred in his grounding affidavit, I do not accept that the failure to do so

amounted to material non-disclosure. There are legitimate arguments as to the import and interpretation of those statistics.

473. Ms. Harty's affidavit of 4 November 2016 grounding the plaintiffs' *ex parte* application was a comprehensive affidavit consisting of some 76 paragraphs and exhibits. The plaintiffs drew to the attention of the court the relevant authorities demonstrating the need to establish exceptional circumstances in order to obtain the order for substituted service sought. The fact that additional material was provided by the plaintiffs in their response to the UCCU defendants' application does not mean that that additional material ought to have been put before the court (and by the UCCU defendants themselves) at the time of the *ex parte* application or that the failure to put it before the court amounted to a material non-disclosure. I am quite satisfied that there is no basis for the UCCU defendants' allegation of material non-disclosure by the plaintiffs on the basis of the principles discussed by the High Court (Clarke J.) in *Bambrick*.

(9) Order Deeming Service Good: O. 9 r. 15

474. Finally, I must address briefly the alternative application made by the plaintiffs in respect of service of the proceedings, namely, that the court should make an order deeming service good under O.9, r.15.

475. While the plaintiffs' principal position is that service has been properly effected on the Russian UCCU defendants in Russia in accordance with the order of 7 November 2016 and that that should be the end of the matter, they say that nonetheless, if they are wrong, or the court disagrees, the court has jurisdiction to make an order deeming the service actually effective, good and sufficient service under O.9, r.15. While the plaintiffs did not bring a formal motion before the court seeking an order deeming service good under O.9, r.15, I am satisfied,

nonetheless, that the court is entitled to consider such an application by the plaintiffs. It was referred to in the plaintiffs' written submissions (paras. 71-73) and quite properly, no objection was raised by the UCCU defendants to the court considering whether an order deeming service good could be made in response to the UCCU defendants' application. I note that a similar approach was taken by the High Court in *Kavanagh*, in which, at the hearing of the defendant's application to set aside service, the plaintiff, without formal application, indicated that she was seeking an order deeming service good and the defendant was prepared to deal with such an application on the basis of the material before the court: see para. 2 of the judgment of O'Regan J. in *Kavanagh*.

476. It is, in my view, appropriate that I consider whether, notwithstanding my conclusions in relation to the appropriateness of the order for substituted order made by the court on 7 November 2016, I should nonetheless, for the avoidance of any doubt, make an order deeming service good under O.9, r.15. I am satisfied that I have the jurisdiction to make such an order and that, in the interest of legal certainty, I should do so upon the basis of the evidence before the court. As I have mentioned at various points throughout this judgment, the plaintiffs have provided evidence that the proceedings were in fact served on the Russian UCCU defendants in Russia by the means directed by the court on 7 November 2016. The plaintiffs have provided affidavits of service verifying such service in late November 2016. The fact of service and the means of service have not been disputed on affidavit by the UCCU defendants. Their position is that the service effected was not in accordance with the Hague Service Convention. I have just addressed and rejected their arguments on that issue.

477. One of the essential objectives of the Hague Service Convention is that the documents to be served abroad (including proceedings) should be brought to the notice of the person being served in sufficient time. That objective was referred to by O'Regan J. in *Kavanagh*. In that case, the court was satisfied to make an order deeming service good where the plaintiff had attempted to comply with the Hague Service Convention in serving documentation but was unsuccessful at doing so, although the court was satisfied that that the relevant documentation had been brought to the attention of the defendant on the basis of the affidavit evidence in that case. The judge was satisfied in all the circumstances to make an order deeming service good.

478. The circumstances in which such an order can be made are summarised by the authors of *Delaney & McGrath on Civil Procedure (4th Edition)* (2018) at para. 3.21 as follows:

*“Where an issue arises or is likely to arise as to the sufficiency of service effected, an application may be made pursuant to Order 9, r. 15 to have the service actually effected declared sufficient. This rule provides that the court may “upon just grounds, declare the service actually effected sufficient”. The exercise of the court’s power in that regard is informed by what Morris J. identified in *Lancefort Limited v. An Bord Pleanála* [1997] IEHC 83 as the purpose and object of proper service, namely ‘to ensure that the party concerned is adequately informed of the matters contained in the notice so as to suffer no prejudice.’ Thus, in general, failure to effect service in strict compliance with the requirements laid down in the Rules will not be fatal and service will be deemed good where the proceedings have actually been brought*

to the attention of the defendant and he has not suffered any prejudice by reason of the defect in service.” (para. 3.21, p.182)

479. The equivalent paragraph in the 3rd edition of *Delaney & McGrath* was cited with approval by Laffoy J. in the Supreme Court in *Dunne*. That was not a case concerned with the Hague Service Convention. However, the appellant contended that a bankruptcy adjudication order annulled on the ground that the service of the petition on him was defective. In that case, the High Court had made an order for substituted service of the petition on the appellant at an address understood to be his then residence in Connecticut and at his lawyer’s address. There were complications in serving the papers at both addresses. The High Court was satisfied that there had been compliance with the order for substituted service. For various reasons, which are not relevant here, Laffoy J. in the Supreme Court found that it was not possible to conclude that the petition was served in accordance with the RSC and the order for substituted service. However, she found that that was not fatal to the petitioner’s entitlement to obtain an adjudication order, assuming that the court was entitled on just grounds to declare the service actually effected sufficient. Having referred to the equivalent passage in the 3rd edition of *Delaney & McGrath*, Laffoy J. was satisfied that the petition had been brought to the attention of the appellant and that the High Court was wholly justified in proceeding with the hearing of the petition on the basis that the service actually effected on the appellant was sufficient (para. 85). Laffoy J. did state that it would have been “*procedurally preferable*” if the petitioner had made a separate application to the court on the date the petition was heard for an order deeming service on the appellant to be good and that such an application could have been brought *ex parte* (para. 89).

- 480.** It is clear, therefore, that where the court is satisfied that the proceedings have actually been brought to the attention of the relevant defendants and they have not been prejudiced by reason of any possible defect in service, the court has the power under O.9, r.15 to deem the service actually effected sufficient.
- 481.** As I have indicated, I am satisfied that the proceedings were actually brought to the attention of the Russian UCCU defendants as they were served on various dates in late November 2016 by the means of service directed by the court on 7 November 2016. I do not believe that the Russian UCCU defendants have been prejudiced by reason of the fact that the proceedings were not served through the designated essential authority in Russia in compliance with the Hague Service Convention. The UCCU defendants, through Holdings, participated in the Cypriot proceedings in aid of these proceedings in 2017 and the evidence discloses that Holdings was well aware of these proceedings and that advice had been obtained from Irish solicitors and counsel in respect of the proceedings. Bearing in mind that Holdings is the ultimate parent of UCCU, one of the Russian UCCU defendants, it is reasonable to infer that the Russian UCCU defendants were aware of the proceedings, both from the actual service of the proceedings upon them and from the involvement of Holdings in the Cypriot proceedings in aid of these proceedings. All of the UCCU defendants, including the Russian UCCU defendants, have fully participated in the UCCU defendants' application the subject of this judgment and in other subsequent applications, including the anti-enforcement injunction application dealt with by way of undertakings in June 2019 and the subsequent anti-enforcement application heard in February/March 2021. The UCCU defendants participated in those applications without prejudice to their challenge to jurisdiction. However, their participation is relevant to the

question of prejudice. I am satisfied that no prejudice has been caused to the Russian UCCU defendants arising from the service of the proceedings and that they are and have at all times since service been aware of the proceedings.

482. In those circumstances, for the avoidance of any doubt, and in the interest of legal certainty, it is appropriate to make an order deeming service of the proceedings actually effected on the Russian UCCU defendants in the manner set out in the affidavits of service of Luke Tansey and Eamonn Gordon of 23 November 2016 and of Bebhinn Dunne of 24 November 2016 (Ms. Dunne swore two affidavits of service on that date) good and sufficient service of the proceedings on them for the purposes of Order 9, r. 15. I will, therefore, make an order in those terms.

L. Summary of Conclusions

483. In summary, in this judgment I have set out my reasons for dismissing the application by the UCCU defendants, namely, the first, second, third, sixth and tenth defendants, in its entirety. In summary, I am satisfied of the following:

- (1) The UCCU defendants' application to set aside service of the proceedings on the Russian UCCU defendants, namely, the first, second, sixth and tenth defendants, and to discharge the order of the High Court of 7 November 2016 permitting such service under Order 11, r. 1(h) must be refused. I am satisfied that the plaintiffs have discharged the burden of proving to the requisite standard that the order of 7 November 2016 was properly made and that the Irish Courts have jurisdiction to hear and determine the plaintiffs' claims against the Russian UCCU defendants under Order 11, r. 1(h). In that regard, I am satisfied that the Russian UCCU defendants are proper parties to the action brought against

Eurotoaz, the fourth defendant, in the High Court. I am also satisfied that the plaintiffs have demonstrated to the required standard that they have a good cause of action against Eurotoaz and against the Russian UCCU defendants, that the case is a proper one for service out of the jurisdiction and that Ireland is the more appropriate forum for the proceedings to be heard in the interests of all the parties and in the interest of justice. I have also rejected the UCCU defendants' contention that the court should decline jurisdiction by virtue of the "*act of state*" doctrine or the related doctrine of non-justiciability or judicial restraint or the grounds of international comity.

- (2) The UCCU defendants' application challenging the jurisdiction of the Irish Courts to hear and determine the plaintiffs' claim against Holdings, the third defendant, under Art. 8(1) of the Recast Brussels Regulation must also be rejected. I have concluded that the plaintiffs have demonstrated to the required standard that Art. 8(1) applies to their claim against Holdings, that their claims against Eurotoaz and their claims against Holdings are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings against Eurotoaz in Ireland and against Holdings in Cyprus. I am also satisfied, in that regard, that the plaintiffs have a good arguable case on the merits of their case against Eurotoaz and that the sole object of joining Eurotoaz to the proceedings was not for the purpose of removing Holdings from the jurisdiction of its domicile.

(3) The UCCU defendants' application to set aside service of the proceedings on the Russian UCCU defendants in Russia pursuant to the order made by the High Court on 7 November 2016 under Order 10, r. 1 must also be refused. I have concluded that the High Court had jurisdiction to make the order for substituted service which it made, notwithstanding that the methods of service directed by the court were not permitted methods of service of proceedings in Russia under the Hague Service Convention. I have concluded that the plaintiffs demonstrated to the High Court in their *ex parte* application on 7 November 2016 that there were exceptional circumstances to justify the making of the order sought and that the High Court was entitled in the exercise of its discretion to make the order in the terms sought. For the avoidance of doubt, having regard to the fact that the Russian UCCU defendants were actually served in accordance with the order of 7 November 2016 and were otherwise fully aware of the proceedings, it is appropriate, in the interest of legal certainty, in addition to refusing the UCCU defendants' application to set aside service, to make an order under Order 9, r. 15 declaring that the service actually effected on the Russian UCCU defendants in Russia in accordance with the order of 7 November 2016 was good and sufficient service.

484. Therefore, for the reasons set out in detail in this judgment and summarised above, I refuse the UCCU defendants' application in its entirety.

485. This judgment is being delivered electronically. I will afford the parties an opportunity of considering the judgment. I will list the matter for mention at 10 a.m. on 25 April 2022 and will, on that date, make final orders, including orders as

to costs, or give any further directions as may be necessary in order for such final orders to be made.