Neutral Citation Number: [2022] EWHC 19 (Comm)

Case No: CL-2021-000397

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

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 10/01/2022

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

BARCLAYS BANK PLC	**Claimant**
- and –	
BAVAGUTHU RAGHURAM SHETTY	**Defendant**

- -
- -

Adrian de Froment (instructed by Simmons & Simmons LLP) for the **Claimant**
Kajetan Wandowicz (instructed by Farrer & Co LLP) for the **Defendant**
Hearing date: 17 December 2021
Draft judgment circulated: 23 December 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 January 2022 at 10:30 am

Mr Justice Henshaw:

(A) INTRODUCTION

1. The Claimant ("***Barclays***") brings these proceedings in order to enforce at common law a judgment dated 22 April 2021, and an associated judgment on quantum dated 4 May 2021, against the Defendant *("**Dr Shetty**")* made by Justice Wayne Martin in the Court of First Instance of the Dubai International Financial Centre Courts *("**the DIFC Court**")* in the matter of *Barclays Bank PLC v Bavaguthu Raghuram Shetty* (Claim number CFI-061-2020). I refer to Justice Martin's two judgments (including the Schedule of Reasons forming part of the 22 April 2021 judgment) together as the "***DIFC Judgment***". They amount to a monetary judgment against Dr Shetty for US$131,440,346.22, plus costs and interest at 9% per annum until satisfaction of the judgment debt.

2. This present judgment follows the hearing on 17 December 2021 of (i) an application by Barclays, made by notice dated 27 August 2021, for summary judgment on its claim for enforcement of the DIFC Judgment ("***the Summary Judgment Application***"), and (ii) an application dated 9 December 2021 by Dr Shetty to adjourn the hearing of the Summary Judgment Application ("***the Adjournment Application***").

3. The Summary Judgment Application had been listed for 17 December 2021 since 30 September 2021. On 17 December 2021, I first heard the Adjournment Application. Having decided to dismiss that application, I informed the parties of my decision. I indicated that I would provide my reasons in a reserved judgment, and that I would proceed to hear the Summary Judgment Application. That was, as I indicated, because any other course of action would have prevented me from hearing the Summary Judgment Application on 17 December 2021, in effect resulting in an adjournment being obtained despite my decision not to grant one.

4. For the reasons set out below, I have decided to grant the Summary Judgment Application. I also set out below my reasons for having dismissed the Adjournment Application.

(B) FACTUAL BACKGROUND

(1) The Parties

5. Barclays is a bank incorporated and headquartered in England. It has an unincorporated branch in the DIFC, which is a special economic zone in Dubai in the United Arab Emirates.

6. Dr Shetty is a semi-retired businessman ordinarily resident in the UAE but currently resident in India. He is the chairman and founder of UAE Exchange Centre LLC ("***UAEEC***"), a company incorporated in Abu Dhabi. UAEEC is a foreign exchange business which provides global remittance, foreign exchange ("***FX***") and payment services. Finablr Plc ("***Finablr***"), a financial services company founded by Dr Shetty, owns 40% of UAEEC, and Dr Shetty and his son own approximately 65% of Finablr. Dr Shetty is also the founder of NMC Health Plc, a company formerly listed on the London Stock Exchange, which went into administration on 9 April 2021 following the discovery of fraudulent activities and significant undisclosed borrowings at the company.

(2) UAEEC's foreign exchange transactions with Barclays

7. On 3 August 2012, Barclays and UAEEC entered into an agreement based on the International Swaps and Derivatives Association ("***ISDA***") 2002 Master Agreement to govern transactions between them. This agreement comprised the Master Agreement, the Schedule thereto and the Credit Support Annex thereto (collectively "***the Master Agreement***").

8. Pursuant to the Master Agreement, Barclays and UAEEC entered into a range of FX transactions including spot, forward and swap transactions. Each FX trade involved a pair of transactions in which one party was required to deliver one currency and the counterparty was required to deliver another currency on the value date.

9. In a series of FX transactions in various currencies with transaction dates between 6 March and 13 March 2020, Barclays paid out sums with a value equivalent to US$129,019,386.28. UAEEC was obliged to pay amounts of other currencies to Barclays but failed to do so. On 24 March 2020, Barclays sent UAEEC a Notice of Early Termination pursuant to section 6(a) of the Master Agreement. On 1 April 2020, Barclays sent UAEEC a Statement of Payment on Early Termination pursuant to clause 6(d)(i) of the Master Agreement, which identified the Early Termination Amount to be paid as US$129,543,839.27 (excluding interest) ("***the Early Termination Amount***"). UAEEC failed to pay the Early Termination Amount or any interest on it.

(3) The Guarantee

10. On 7 January 2015, Dr Shetty had executed as a deed an Unlimited Guarantee and Indemnity in favour of Barclays ("***the Guarantee***"). By Clause 1.1(i), Dr Shetty irrevocably and unconditionally:

> "guarantees to Barclays the punctual performance by [UAEEC] of each and every obligation and liability [UAEEC] may now or hereafter have to Barclays in whatever currency denominated (whether due, owing, deliverable, or incurred from time to time, whether present or future, actual or contingent, solely or jointly with one or more persons, several or otherwise, in connection with the Banking Facilities ("the Liabilities")."

"*Banking Facilities*" were defined to mean:

> "…such facilities or other accommodation as Barclays may make or continue to make available to [UAEEC], including, without limitation, any derivative, risk management or hedging products, facilities or transactions entered into or to be entered into with [UAEEC]."

11. By Clauses 1.1(ii) and (iii), Dr Shetty gave the following indemnities:

> "(ii) [the Guarantor] undertakes to Barclays that whenever the Customer does not pay any amount when due under or in connection with the Banking Facilities, the Guarantor shall immediately on demand pay that amount as if it was the primary obligor; and
>
> (iii) agrees with Barclays that if any obligation guaranteed by it is, or becomes, unenforceable, invalid or illegal, it will, as an independent and primary obligation, indemnify Barclays immediately on demand against any cost, loss or liability it incurs as a result of the Customer not paying any amount which would, but for such unenforceability, invalidity or illegality, have been payable by it in connection with the Banking Facilities on the date when it would have been due. …"

12. By clause 2, Dr Shetty provided the following "*Further indemnity*":

> "As a further separate and independent obligation, the Guarantor will indemnify Barclays in full and on demand against all losses, costs and expenses suffered or incurred by Barclays arising from or in connection with: (a) the failure by the Customer fully and promptly to perform [UAE Exchange's] obligations in connection with the Banking facilities, (b) the enforcement of the Customer's obligations, (c), the failure of the Guarantor promptly to perform [his] obligations under this Guarantee, and (d) the enforcement of this Guarantee."

13. Clause 3.2 of the Guarantee provided as follows:

> "Neither the obligations of the Guarantor in this Guarantee nor the rights, powers and remedies conferred in respect of the Guarantor upon Barclays by this Guarantee or by law shall be discharged, impaired or otherwise affected by:
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> …
>
> (ii) any of the Liabilities or any of the obligations of the Customer or any other person under any security relating to the Liabilities being or becoming illegal, invalid, unenforceable or ineffective in any respect;
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> (iii) any time or other indulgence being granted or agreed to be granted by Barclays to, or any composition or other arrangement made with or accepted from:
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> (a) The Customer in respect of the Liabilities or any of them, or
>
> (b) any person in respect of any such other security, rights or claims in respect of any of the Liabilities;
>
> (iv) any amendment to, or any variation, waiver or release of, any of the terms of any of the Liabilities or any other security, rights or claims, however material;
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> …
>
> (vii) any other act, event or omission which, but for this Clause 3.2, would or might operate to discharge, impair or otherwise affect any of the obligations of the Guarantor in this Guarantee or any of the rights, powers or remedies conferred upon Barclays by this Guarantee or by law."

14. Clause 6 provided *inter alia* that:

> "All payments to be made by the Guarantor to Barclays under this Guarantee shall be made without set-off or counterclaim and without any deduction or withholding whatsoever."

15. The Guarantee was governed by English law pursuant to clause 19. Clause 20 provided as follows:

> "20.1. Subject to Clause 20.3 below, the DIFC Courts have exclusive jurisdiction to settle any dispute arising from or connected with this Guarantee (including a dispute regarding the existence, validity or termination of this Guarantee or relating to any non-contractual or other obligation arising out of or in connection with this Guarantee) or the consequences of its nullity (a "Dispute").
>
> 20.2. Both parties irrevocably submit to the jurisdiction of the DIFC Courts and waive any objection they may have to any Dispute being heard in the DIFC Courts on the grounds that it is an inconvenient forum (forum non conveniens)."

(Clause 20.3 gave Barclays the option to sue instead in any other court with jurisdiction.)

16. On 28 April 2020, Barclays served on Dr Shetty a formal demand under the Guarantee for the Early Termination Amount plus accrued interest ("***the Demand***"). The total sum demanded at that date was US$129,807,261.93. Dr Shetty failed to pay any of the amount claimed in the Demand.

(4) The DIFC Claim

17. By a claim form dated 28 July 2020 (subsequently amended on 24 August 2020 to include an additional address in India for Dr Shetty), Barclays commenced proceedings against Dr Shetty before the DIFC Court claiming the monies due under the Guarantee *("**the DIFC Claim**")*.

18. On 15 September 2020, Barclays applied for a worldwide freezing and asset disclosure order in respect of Dr Shetty's assets up to the value of US$135 million. The order was granted by Justice Wayne Martin on 17 September 2020 ("***the WFO***"). The WFO applied "*in particular*" to assets listed in Schedule C to the WFO. One such asset was a London property, Flat PH2, North Gate, Prince Albert Road, London NW8 7RE ("***Flat PH2***"). Justice Martin fixed a return date of 22 September 2020 on which Dr Shetty could apply to set aside the WFO, but no such application was made and the order remains in force.

19. On 26 October 2020, Barclays applied for "*Immediate Judgment*" (the approximate equivalent of summary judgment) in the DIFC Court ("***the Immediate Judgment Application***"). The application was heard at a one-day hearing on 24 January 2021 by Justice Martin ("***the Immediate Judgment Hearing***"). Dr Shetty opposed the application. He was represented by solicitors and counsel who filed extensive witness evidence, expert evidence and skeleton arguments on his behalf prior to the hearing, as summarised in §§ 33-48 (evidence) and §§ 49-62 (skeleton arguments) of the DIFC Judgment. The evidence included an expert report by Mr Hanif Virji, analysing the data for the trading on 10-13 March 2020 and expressing the view that Barclays' reaction to non-payment appeared unusual and not to be in line with risk management practices, because they appeared not to have taken timely action despite large defaults

on multiple transactions over a number of days (DIFC judgment § 35). After the Immediate Judgment Hearing, Dr Shetty's counsel then filed what Justice Martin described as "*an avalanche of further applications*" (DIFC Judgment § 67) and a "*cavalcade*" of further evidence (DIFC Judgment § 87) in the period before the date on which the DIFC Judgment was issued, as set out in some detail in the DIFC Judgment §§ 64-86.

20. The arguments advanced on behalf of Dr Shetty at the Immediate Judgment Hearing appear to have included contentions that:

    i) a version of the Master Agreement had been forged and the signatories on behalf of UAEEC lacked the authority of UAEEC to execute the Agreement on its behalf;

    ii) the FX transactions were outside the scope of the Guarantee because they did not fall within the definition of "*Banking Facilities*";

    iii) Barclays' "*losses*" must have been the result of "*a major systemic failure*", "*gross incompetence*" or a conscious decision by Barclays amounting to dishonest conduct. Any one or a combination of these scenarios would amount to multiple breaches of the prudential and financial regulatory regime administered by the Bank of England;

    iv) by continuing to trade in the face of the losses being accumulated, there must have been a variation to or replacement of the trading relationship under the Master Agreement;

    v) UAEEC was not liable to Barclays because Barclays did not terminate its commercial dealings with UAEEC promptly, when failed settlements started accumulating on 10 March 2020;

    vi) Dr Shetty was entitled to notice as soon as Barclays continued trading with UAEEC after any default had occurred, because this constituted a change in the contractual arrangements between Barclays and UAEEC;

    vii) Barclays' claim was unenforceable on the grounds of illegality;

    viii) the transactions subsequent to the first default were outside the terms of the Master Agreement; and

    ix) the doctrine of "*purview*" precluded Barclays' claim (i.e. the principle that a surety is discharged by variations of the agreement guaranteed that are outside the 'general purview' of the guarantee: DIFC Judgment § 156).

21. By a judgment dated 22 April 2021, Justice Martin granted the Immediate Judgment Application. He found *inter alia* as follows:

    i) Dr Shetty's contentions with respect to the validity of the execution of the Master Agreement had been "*shown to be entirely without substance*" and provided "*no plausible support whatsoever for the proposition that there should be a trial of the issues in this case*." (§ 95).

ii) The contention that the FX transactions giving rise to UAEEC's liability fell outside the terms of the guarantee was "*entirely without substance*" (§ 123).

iii) Neither negligence nor breach of regulatory obligation, even if established, would give rise to any defence to Barclays' claim: citing Bingham J's observations in *Bank of India v Patel* [1982] 1 Lloyds Rep 506, 515. Further, there was "*no evidence whatever to support any assertion of dishonesty, fraud, impropriety, concealment or connivance in the defaults by Barclays*" (§ 136).

iv) For the same reasons, it did not matter when Barclays first became aware of the defaults by UAEEC (§ 136).

v) No "*reason in law or logic*" had been advanced in support of the "*perverse proposition*" that UAEEC should not be obliged to repay Barclays for funds which it advanced on its behalf merely because Barclays could or should have refused to undertake those transactions and advance those funds in protection of its own interests. There was "*absolutely no evidence*" to support any "*wild speculation*" that Barclays had "*connived with fraudsters within UAEEC in order to perpetrate a fraud on that company*" (§ 138).

vi) No source of Barclays' alleged obligation to give notice to Dr Shetty had been identified, nor any authority provided in support of the proposition. There was no provision in the Guarantee capable of supporting this proposition, nor any general principle of law to this effect (§ 140).

vii) Neither the circumstances of the case nor any of the authorities to which reference was made provided "*any support whatever*" for the proposition that the doctrine of illegality might provide a realistic prospect that Dr Shetty might successfully defend the claim (§ 149).

viii) The assertion that dealings between Barclays and UAEEC fell outside the terms of the Master Agreement was "*without substance*" and would not in any event provide Dr Shetty with any realistic prospect of successfully defending the claim (§ 154).

ix) It was "*inconceivable*" that the doctrine of purview could have any application to the circumstances of the case (§ 157).

22. Justice Martin was critical of Dr Shetty's litigation strategy, stating that "*I have formed the firm conclusion that since the hearing of the application for immediate judgment Dr Shetty and his legal advisors have embarked upon a strategy of seizing upon any point whatsoever, irrespective of its substance, in an attempt to delay the delivery of my decision…"* (§ 96(c)). The judge also found that Dr Shetty had made assertions, which the evidence showed to be "*simply false*", to the effect that the signatories to the ISDA Agreement lacked UAEEC's authority (§ 93).

23. By his order dated 22 April 2021, Justice Martin granted the Immediate Judgment Application, ordered that Dr Shetty pay Barclays' costs on the indemnity basis, and continued the WFO as a post-judgment WFO with exceptions for living expenses and legal costs removed. He required Barclays to provide an updated statement of account of the sum owing by Dr Shetty (see §159), which Barclays did.

24. On 4 May 2021, Justice Martin gave a further judgment, on quantum, ordering that judgment be entered in the amount of US$131,440,346.22 plus simple interest at the rate of 9% per annum on the outstanding balance as at 22 April 2021 until satisfaction of the judgment debt in full.

(5) The Indian Orders

25. In addition to the WFO granted by the DIFC Court, Dr Shetty claims to be subject to freezing orders made in other countries, including at least three Indian freezing orders ("***the Indian Orders***"):

i) An order dated 15 July 2020 made by the District Court, D.K. Mangaluru, on the application of ICICI Bank, granting a "*temporary injunction as prayed under [Interim Application] No.1*", namely "*exparte ad-interim order of temporary injunction*" "*granted till next date*" that:

> "The defendant, his agents is hereby restrained from directly or indirectly alienating, selling, transferring, encumbering, mortgaging, creating charge or right of any third party or otherwise dealing with any assets and properties including shares, mutual funds, amount deposited in Bank etc., without prior written consent of the plaintiff, till next date of hearing."

ii) An order dated 14 August 2020 made by the Commercial Court in Bengaluru, on the application of the Commercial Bank of Dubai. This also appears to have been an "*exparte ad-interim order of temporary injunction*" and to have restrained Dr Shetty:

> "and/or anybody claiming through him from transferring, alienating or otherwise dealing with, disposing of or creating any third party interests or encumbering in any manner any property and assets not detailed in the Schedule-A,B,C or D annexed to the Plaint and including shares, bonds, mutual funds, investments, money deposited in bank account and fixed deposits."

I have not been referred to any of the Schedules. The return date was stated to be 7 September 2020. A further order in the same case dated 24 September 2021 appears to have extended the order until the next hearing stated to be on 2 November 2021.

iii) An order dated 17 April 2021 made by the High Court of Karnataka, Bengaluru, on the application of the Bank of Baroda. This order applied to both Dr Shetty and his wife, Dr Chandrakumari Raghuram Shetty. The order provided that *"There will be a temporary injunction against the defendants in terms of prayers made in I.A. Nos. I and II of Commercial Original Suit No. 1 of 2020. However, as regards the other assets (other than immoveable property described in item Nos 1 to 13 and 16 of plaint schedule) held by the first defendant, it will be always open for the first defendant to apply to the plaintiff Bank for grant of permission to transfer the same".* The prayer made in I.A. No. I related to Dr Shetty and sought to restrain him:

> "his agents, or any person acting under or through him, from, in any manner whatsoever, directly or indirectly, alienating, selling, transferring, encumbering, dissipating, mortgaging, pledging, creating a lien, creating any third party rights or otherwise dealing with any of his assets or properties, movable or immovable, tangible or intangible, including without limitation, the immovable properties specified in the Schedule to the Letter of Undertaking with Negative Lien and Creation of Mortgage dated 21.04.2020 as owned by [Dr Shetty], his shares, mutual funds, monies deposited in bank accounts and fixed deposits, in the interest of justice and equity."

26. Dr Shetty filed a witness statement dated 9 December 2021 from Mr Waseem Pangarkar, Senior Partner in a Mumbai law firm MZM Legal who has acted for Dr Shetty in several matters. He states that the orders referred to above all remain in place and that they prevent Dr Shetty from having access to any assets, worldwide, including for the purpose of funding legal advice.

(6) The present proceedings

27. The Claim Form seeking to enforce the DIFC Judgment in England and Wales was issued on 1 July 2021 and accompanied by Particulars of Claim of the same date.

28. On 2 July 2021, Barclays issued an application seeking permission *inter alia*: (1) to serve the Claim Form and Particulars of Claim on Dr Shetty out of the jurisdiction; and (2) to serve them on Dr Shetty by an alternative method ("***the Service Out Application***"). On 12 July 2021, Knowles J granted the Service Out Application.

29. On 13 July 2021, Dr Shetty was served with the Claim Form, Particulars of Claim, response pack and evidence in support of the Service Out Application. He was deemed served with the Claim Form on 15 July 2021 and with the other documents on 14 July 2021. The deadline for Dr Shetty to file an acknowledgement of service was 9 August 2021.

30. On 27 August 2021, Barclays issued the Summary Judgment Application. Barclays also sought judgment in default under CPR r.12.3(1) on the basis that Dr Shetty had failed to file an acknowledgement of service. However, that application was not pursued because Dr Shetty later did file an acknowledgement of service.

31. On 22 September 2021, Barclays's solicitors, Simmons & Simmons LLP, emailed Dr Shetty indicating that the Commercial Court listing office had offered the dates 3 and 17 December 2021 for the hearing of their summary judgment application, and asked Dr Shetty to indicate any objections to the hearing being listed on either date.

32. In a letter dated 26 September 2021, Dr Shetty wrote to Simmons & Simmons stating that he understood that Barclays was seeking to enforce the DIFC Judgment against him. He said he would be acting as a litigant in person in any UK proceedings due to his "*restrained financial circumstances*", and explained that *"[w]hile I have the benefit of limited legal advice to assist me in relation to some of the matters in which I am engaged, I do not have the means to support Legal Counsel in the UK to represent me in this matter"*.

33. Dr Shetty went on to say, in the same letter, that he believed he had a counterclaim against Barclays, on which he would rely by way of set-off. The substance of this counterclaim was that in failing to stop trading with UAEEC after 10 March 2020, either Barclays acted negligently or there was a more sinister purpose and/or fraud involved. Dr Shetty referred to the same report of Mr Virji that he had relied upon in the DIFC proceedings, and alleged that Barclays was in breach of various regulatory obligations under the FCA Principles, the PRA's Fundamental Rules, the FCA's prudential source book for banks, building societies and investment firms (BIRPU), and a paragraph of the Global FX Code (which appears not to form part of the FCA or PRA rules). Dr Shetty alleged that Barclays' actions in failing to intervene "*breached the FCA's Rules and Principles and, consequently, render the Bank liable to pay me damages under section 138D of the Financial Services and Markets Act 2000*".

34. On 30 September 2021, Dr Shetty attended (virtually) an appointment at the listing office at which the hearing of the summary judgment application was listed for 17 December 2021.

35. On 3 October 2021, Dr Shetty chased Simmons & Simmons for a response to his letter, stating "*I refer to my letter of 26 September 2021 to which I have yet to receive a response. Please provide me with a substantive response no later than 4 pm on 10 October 2021*." Simmons & Simmons replied the following day, 4 October 2021, indicating that they considered the issues raised in the letter to have already been litigated before the DIFC court, and recommended that Dr Shetty seek legal advice.

(C) THE ADJOURNMENT APPLICATION

(1) Further background to the application

36. More than two months after Simmons & Simmons' 4 October 2021 response referred to above, Farrer & Co on 7 December 2021 wrote to Simmons & Simmons seeking an adjournment on Dr Shetty's behalf. Farrer & Co stated that they were not instructed by Dr Shetty in these proceedings but were acting for him in other proceedings which shared a common background with the DIFC proceedings and had agreed to assist him with this correspondence. They requested an adjournment of the summary judgment hearing on the basis that Dr Shetty was unable to engage any firm to act for him as a result of the Indian Orders, which he was seeking to vary. The adjournment was sought until "*an available date after 1 April 2022*" to enable Dr Shetty to obtain a variation of the Indian Orders and to take legal advice in relation to the present proceedings and the intended counterclaim referred to in his 26 September 2021 letter.

37. In the same letter, Farrer & Co sought Barclays' consent to the sale of Flat PH2 "*so as to pay various legal costs*". Flat PH2 is the UK asset identified by name in Schedule C to the WFO granted by the DIFC Court.

38. Simmons & Simmons responded on 8 December 2021 refusing both adjournment and consent to the sale of Flat PH2, noting that Dr Shetty was seeking consent to the sale in order to pursue and defend other legal proceedings around the world when the primary purpose of the present proceedings was to realise the value of Flat PH2 in order to satisfy a small part of Dr Shetty's debt to Barclays.

39. On 9 December 2021, Dr Shetty issued the Adjournment Application, stating that he was a litigant in person unable to defend the claim without legal representation and advice, and that he required an adjournment until after 1 April 2022 in order to seek variations of the Indian Orders and thereafter obtain legal advice and representation in these proceedings. Dr Shetty's witness statement indicated that:

    i) he is subject to freezing orders in various jurisdictions which are limited in value, such as the WFO granted by the DIFC Court up to the value of US$ 135 million, or which contain exemptions allowing sums to be spent on legal advice and/or representation;

    ii) however, he understands that the Indian Orders have no such limitations or exemptions, so that they in essence paralyse him financially and prevent him spending money on lawyers;

    iii) Farrer & Co represent him in other proceedings in this court, for which they are paid directly by insurers. These relate to the fraud concerning his NMC business whose holding company is now in administration in London. Dr Shetty adds that he has, in that connection, brought proceedings in New York against a former senior manager, Mr Manghat, and his associates;

    iv) Farrer & Co have also kindly agreed to assist him with the adjournment application even though he cannot currently pay for their services, but he cannot expect them (or any other solicitors) to represent him without payment on a claim for US$130 million, nor would he want to: he has always paid for professional services;

    v) he is *"now only represented in proceedings where my lawyers are paid by insurers, or whether they agree to extend credit to me, or if they are paid by my well-wishers where such expenses are comparatively low"*;

    vi) his lawyers in India, MZM, "*are preparing applications on my behalf to vary*" the Indian Orders, "*I hope and expect that these orders will be varied within about 3 or 4 months*", and "*I can confirm, assuming that MZM will be content to represent and act on my behalf either on credit or some payment made by my well-wishers for the time being that I have instructed them to apply for the necessary variations so that I can at least pay for legal expenses*";

    vii) although as an international businessman he is fluent in English, and would feel comfortable giving oral evidence in English, he does not have the necessary command of legal language, or knowledge of the law or procedure, to defend himself in the present proceedings; and

    viii) he normally lives in the UAE, but when he attempted to return there in November 2020 he was stopped by Indian border officials.

40. The witness statement of Mr Pangarkar, filed on the same date, stated that Dr Shetty "*has instructed my firm to apply to vary the orders*" and that *"[w]e have agreed to act for him in this matter as per terms of our engagement which are privileged and confidential*."

41. On 10 December 2021, Farrer & Co came on the record for Dr Shetty in the present proceedings.

42. In response to the adjournment application, Mr Payam Beheshti of Simmons & Simmons Middle East LLP filed a third witness statement dated 13 December 2021 making a number of points including the following:

    i) Dr Shetty had had the benefit of Farrer & Co's support in these proceedings since at least 7 September 2021, when Farrer & Co emailed Simmons & Simmons indicating that they had been consulted by Dr Shetty and were taking instructions from him;

    ii) although Dr Shetty's letter of 26 September 2021 stated that he would be acting as a litigant in person, it appears to have been prepared by or with the assistance of lawyers;

    iii) De Shetty had been formally represented by Farrer & Co for the last week, since they came on the record on 10 September 2021;

    iv) Dr Shetty had the benefit of legal representation throughout the DIFC Court proceedings, and the opportunity to have all his arguments and defences heard with the benefit of that legal representation;

    v) two of the three Indian Orders pre-dated Barclays' Immediate Judgment application in the DIFC, and the extensive legal representation Dr Shetty had in those proceedings, making it hard to see how Dr Shetty could have had that representation if the effect of the orders were to prevent him being represented now in the present proceedings;

    vi) Dr Shetty has also been able to fund other international litigation in which he is the claimant, in particular a suit he has filed in New York against Bank of Baroda, Credit Europe Bank NV, Ernst & Young Global Limited, Ernst & Young EMEIA Limited and various others as co-conspirators in an alleged fraud alongside former executives of NMC Health, in which Dr Shetty claims around US$ 7 billon;

    vii) Dr Shetty had ample opportunity to advance his alleged counterclaim in the DIFC proceedings;

    viii) no explanation has been provided for why Dr Shetty waited until nine days before the present hearing to request an adjournment; and

    ix) Farrer & Co's letter of 7 December 2021 requested Barclays' consent to the sale of Flat PH2, raising the concern that Dr Shetty's only known English asset might be dissipated. The flat was currently subject to a worldwide freezing order by ADCB, but a decision was expected in January 2022 on Dr Shetty's application in those proceedings to challenge the jurisdiction and unfreeze his assets. If the flat were sold then Barclays' claim here would become meaningless.

43. Dr Shetty did not file any reply to that evidence.

(2) Legal principles

44. The decision to adjourn a hearing to a later date is a case management decision, to be exercised in accordance with the overriding objective (White Book note 3.1.3). The overriding objective includes, so far as practicable, ensuring that the parties are on an equal footing (rule 1.1(2)(a)), saving expense (rule 1.1(2)(b)) and ensuring that a case is dealt with expeditiously and fairly (rule 1.1(2)(d)).

45. If the Court concludes that it is necessary to adjourn a hearing in the interest of fairness, then it must be adjourned, for the court cannot countenance an unfair hearing.

46. Reviewing the principal cases cited by the parties in chronological order, in *Teinaz v Wandsworth LBC* [2002] EWCA Civ 1040, Peter Gibson LJ gave general guidance as follows:

> "20. Before I consider these points in turn, I would make some general observations on adjournments. Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account … Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. …
>
> 21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."

47. In *Terluk v Berezovsky* [2010] EWCA Civ 1345 the Court of Appeal dismissed an appeal against the refusal of an application to adjourn, made on the eve of trial in a long-running case, to enable the defendant to obtain legal representation. The Court of Appeal made clear that the relevant question was whether the decision on the adjournment application was fair (§ 18). On the facts, the Court of Appeal said:

> "31. …The point on which Mr Davenport lays all emphasis is the fact that proper legal representation was now within the defendant's grasp if the judge would adjourn the case. If that

> meant three months' delay, it was, he submits, an entirely fair price to pay for equality of arms.
>
> 32. It is this which has given us the greatest pause. In deciding whether it was a factor which made it clearly unfair to proceed with the trial, however, it is necessary to look a little further. ...
>
> 33. What confronted Eady J, however, was an assertion that money, in a large sum and from a still mysterious source, was going to be available. What was strikingly absent was so much as a letter from McGrigors or any other firm of solicitors confirming their preparedness to act and the reliability of the promised funding. It is unsurprising in these circumstances that the judge took the view that there was "no clarity" about it. It was less significant in this situation that he was also dubious about counsel's availability. If sound evidence of dependable funding had been put before him, we might very well have held that individual counsel's availability was not a sufficient reason for denying the defendant the benefit of it. But what was critical for the judge, as it has to be for us, is that even on the Monday it appeared unlikely that an adjournment would achieve anything because there was no sufficient reason to believe that the promised money would materialise."

Terluk was, Dr Shetty says, an extreme case where there had been years of delay, to the claimant's disadvantage, and there was no prospect of the defendant obtaining legal representation in the future, but merely a vague promise of a large sum of money appearing from a mysterious source.

48. In *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101 the Court of Appeal, reversing the judge, emphasised that the issue was one of whether it would be fair to hold the hearing. The appellant had sought an adjournment on the ground that, following further medical assessments, his doctor had advised him that he was not fit to stand trial. The court cited *Terluk*:

> "… the authorities make clear that, in reviewing the exercise of discretion, the Court of Appeal has to be satisfied that the decision to refuse the adjournment was not "unfair": for example, see *Terluk v Berezovsky* [2010] EWCA Civ 1345 (per Sedley LJ at paras 18-20), quoted below, particularly in circumstances where his right to a fair trial under Article 6 ECHR is at stake"

and the passages from *Teinaz* §§ 21 and 22 quoted above. On the facts, the court concluded:

> "44. In my judgment, therefore, this was one of the rare circumstances, as considered by Peter Gibson LJ in *Teinaz*, where an adjournment had to be granted, because not to do so amounted to a denial of justice. The consequences of the refusal of an adjournment in this case, apparently based on the judge's

> personal assessment of a litigant in person's health, notwithstanding the appellant's general practitioner's view that he was suffering from depression, were particularly severe. The appellant's defence was struck out and he was deprived of an opportunity to give live evidence, to cross-examine any of the respondents' witnesses or to call evidence on his own behalf. The respondents' evidence was adduced without any challenge since the two witnesses called did nothing more than state that their witness statements were true. Moreover, the appellant faced a claim for what, so far as he was concerned, was a substantial sum in damages and resultant legal costs.
>
> 45. I have no doubt that, on a proper evaluation of the relevant considerations, the appellant's Article 6 rights and the irreversible prejudice occasioned to him as a result of the refusal of an adjournment, clearly outweighed the costs and unavoidable inconvenience to the respondents that would have been occasioned by a short adjournment."

49. In *Bilta (UK) Ltd (In Liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221, the Court of Appeal held that a trial should have been adjourned where an important witness for the defendant, who was accused of dishonesty, was unable to attend trial to give oral evidence for *bona fide* medical reasons, but (in the light of a new and much improved prognosis) there was every reason to think that she would be able to attend if the adjournment were granted. The court considered authorities including *Teinaz*, *Terluk* and *Solanki*, and made the following statements of principle:

> "30. … the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for."

and (by reference to the appellant's submissions):

> "49. Mr Scorey's propositions were as follows:
>
> (1) Whether as a matter of the common law's insistence on a fair trial, or the requirements of Article 6 , or the application of the

> overriding objective, the test is the same, namely whether a refusal of an adjournment will lead to an unfair trial.
>
> I agree. This is a consistent thread from the early cases … which refer to a miscarriage of justice or an injustice, through *Teinaz* ("a denial of justice") to the more recent cases, which repeatedly identify the question as one of fairness: see in particular *Terluk* at [18] and *Solanki* at [32].
>
> …
>
> (3) When considering whether a particular outcome is fair, it should not be assumed that only one outcome is fair.
>
> This is established by the authorities: *Terluk* at [20], *Dhillon* [*Dhillon v Asiedu* [2012] EWCA Civ 1020] at [33(b)]. But equally in some circumstances there is really only one answer: see *Teinaz* at [20] ("*some adjournments must be granted*").
>
> (4) Fairness involves fairness to both parties. But inconvenience to the other party (or other court users) is not a relevant countervailing factor and is usually not a reason to refuse an adjournment.
>
> This is again established by the authorities. As to fairness involving fairness to both parties, see *Dhillon* at [33(a)], *Solanki* at [35]. As to the requirements of a fair trial taking precedence over inconvenience to the other party or other court users, see *Teinaz* at [21]. But Mr Scorey acknowledged, as can be seen from the earliest cases, that uncompensatable injustice to the other party may be a ground for refusing an adjournment."

50. While *Bilta* and *Solanki* concerned adjournment for medical reasons, the same framework, in particular the guiding principle of fairness, applies also when considering an application to adjourn so as to enable the applicant to be professionally advised and represented. In both *Bilta* and *Solanki*, the Court of Appeal, when setting out the applicable principles, cited *Terluk*: which, as noted above, concerned legal representation.

51. As to the circumstances in which legal representation is required in order for a hearing to be fair, Dr Shetty refers to the case law the European Court of Human Rights (ECtHR), which places the emphasis on effective participation, and indicates that the right to a fair hearing is violated where a party is neither represented nor capable of effectively representing himself. Thus in *Airey v Ireland* (1979-80) 2 EHRR 305 there was a breach of Article 6 where an unemployed woman seeking separation from her abusive husband could not obtain legal aid and could not effectively represent herself. The question was:

> "whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the

> sense of whether she would be able to present her case properly and satisfactorily" (§ 24)

On the facts, the court concluded that the answer was no:

> "It seems certain to the Court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person.
>
> In Ireland, a decree of judicial separation is not obtainable in a District Court, where the procedure is relatively simple, but only in the High Court. A specialist in Irish family law, Mr. Alan J. Shatter, regards the High Court as the least accessible court not only because 'fees payable for representation before it are very high' but also by reason of the fact that 'the procedure for instituting proceedings … is complex particularly in the case of those proceedings which must be commenced by a petition', such as those for separation.
>
> Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.
>
> For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position … can effectively present his or her own case. This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer ….
>
> The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an effective right of access and, hence, that it also does not constitute a domestic remedy whose use is demanded by Article 26 ..." (§ 24, footnotes omitted)

52. In *Steel & Morris v UK* [2005] EMLR 15, the applicants were sued by McDonalds after distributing a leaflet critical of the restaurant. McDonalds was represented by solicitors and counsel throughout; the defendants acted in person. The ECtHR held that the inequality of arms, due to unavailability of legal aid, meant that they were deprived of

their right to a fair trial under Article 6. The proceedings in that case were very extensive and complex:

> "64. As for the complexity of the proceedings, the Court recalls its finding in the *McVicar* judgment that the English law of defamation and rules of civil procedure applicable in that case were not sufficiently complex as to necessitate the grant of legal aid. The proceedings defended by Mr McVicar required him to prove the truth of a single, principal allegation, on the basis of witness and expert evidence, some of which was excluded as a result of his failure to comply with the rules of court. He had also to scrutinise evidence submitted on behalf of the plaintiff and to cross-examine the plaintiff's witnesses and experts, in the course of a trial which lasted just over two weeks.
>
> 65. The proceedings defended by the present applicants were of a quite different scale. The trial at first instance lasted 313 court days, preceded by 28 interlocutory applications. The appeal hearing lasted 23 days. The factual case which the *429 applicants had to prove was highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses, including a number of experts dealing with a range of scientific questions, such as nutrition, diet, degenerative disease and food safety. Certain of the issues were held by the domestic courts to be too complicated for a jury properly to understand and assess. The detailed nature and complexity of the factual issues are further illustrated by the length of the judgments of the trial court and the Court of Appeal, which ran in total to over 1,100 pages.
>
> 66. Nor was the case straightforward legally. Extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue, including the meanings to be attributed to the words of the leaflet, the question whether the applicants were responsible for its publication, the distinction between fact and comment, the admissibility of evidence and the amendment of the Statement of Claim. Overall, some 100 days were devoted to legal argument, resulting in 38 separate written judgments.
>
> 67. Against this background, the Court must assess the extent to which the applicants were able to bring an effective defence despite the absence of legal aid. In the above-mentioned *McVicar* case, it placed weight on the facts that Mr McVicar was a well-educated and experienced journalist, and that he was represented during the pre-trial and appeal stages by a solicitor specialising in defamation law, from whom he could have sought advice on any aspects of the law or procedure of which he was unsure." (§§ 64-67, footnotes omitted)

53. Barclays cited the decision of Coulson J in *Elliott Group Ltd v GECC UK (formerly GE Capital Corp)* [2010] EWHC 409 (TCC); [2010] 3 WLUK 11, where he said this:

> "7. The applicable principles on an adjournment application can be traced back to the overriding objective in CPR 1.1 ; the notes in the White Book at paragraph 3.1.3; and the decision of the Court of Appeal in *Boyd and Hutchinson (a firm) v Foenander* [2003] EWCA Civ 1516 . In particular, the court must endeavour to ensure that:
>
> (a) the parties are on an equal footing;
>
> (b) the case is dealt with proportionately, expeditiously and fairly;
>
> (c) a proportionate and appropriate share of the court's resources is allocated to the case, taking into account the need to allot resources to other cases.
>
> 8. In paragraph 9 of the judgment in *Fitzroy Robinson v Mentmore Towers No 2* [2009] EWHC 3070 TCC , I identified a number of particular matters which may be relevant to a contested application for an adjournment, although at least some of these are specifically referable to applications made at the eleventh hour. They were:
>
> "(a) The parties' conduct and the reason for the delays;
>
> (b) The extent to which the consequences of the delays can be overcome before the trial;
>
> (c) The extent to which a fair trial may have been jeopardised by the delays;
>
> (d) Specific matters affecting the trial, such as illness of a critical witness and the like;
>
> (e) The consequences of an adjournment for the claimant, the defendant, and the court"
>
> 9. In essence, on an application of this sort, the court is faced with a balancing exercise between, on the one hand, the obvious desirability of retaining a fixed trial date (which promotes certainty) and avoiding any adjournment (which can only add to the costs of the proceedings) and, on the other, the risk of irredeemable prejudice to one party if the case goes ahead in circumstances where that party has not had proper or reasonable time to prepare its case."

Coulson J concluded that the case could be properly and fairly prepared in the 4½ months remaining before the (unadjourned) trial date, and refused an adjournment.

54. Finally, as to the relevance of the apparent merits of the case, White Book note 3.1.3 includes reference to *Lloyds Bank v Dox* (CA 26.10.00), where the trial judge had refused an adjournment that would have given the defendant the opportunity to advance

a reformulated counterclaim. The Court of Appeal held that an adjournment would have made no difference because the counterclaim, even in its revised form, would not provide a defence in law to the claim. Neither party submits that the apparent merits of a claim are a matter directly bearing on the decision whether to grant an adjournment: though, as I indicate below, the absence in this case of any arguable ground for resisting enforcement of the DIFC Judgment could have indirect relevance to the question of whether Dr Shetty's claimed inability to obtain legal representation is a genuine problem or a self-inflicted one pursuant to a strategy of delay.

(3) Discussion

55. Dr Shetty contends that it would be unfair to proceed with the hearing of a US$130 million enforcement claim where Dr Shetty has been acting in person and without proper advice on his options, in circumstances where he has put forth a credible prospect of being able to obtain legal representation in a few months' time, when the India Orders are varied and he can consider monetising some assets. Dr Shetty highlights that he is 79 years old, with no legal training or knowledge, for whom English is a second language, and is currently stranded in Mangalore, India. He submits that this is one of those situations where "*there is really only one answer*" (*Bilta* § 49(3)) and the adjournment must be granted. By contrast with the situation in *Terluk*, the proceedings are still very recent; Dr Shetty has a clear, realistic, and time-limited plan to obtain representation; and he is not asserting that money has been or will be found from some mysterious source, but giving evidence that he intends to use his own assets. There is, Dr Shetty submits, no real countervailing prejudice to Barclays that would flow from the adjournment sought.

56. One of the striking features of Dr Shetty's evidence is the absence of evidence of any efforts to vary the Indian Orders before now, or any explanation as to why it is only now – a year and a half after the first such Order was made, in July 2020 – that instructions have been given to seek such variations. Dr Shetty's witness statement indicates that "*I have instructed*" MZM to apply to vary the orders, and that he hopes and expects that the orders will be varied "*within about 3 to 4 months*". Mr Pangarkar states that Dr Shetty has instructed his firm to apply to vary the orders and that *"[w]e have agreed to act for him in this matter as per terms of our engagement which are privileged and confidential"*. However, there is no evidence from either of them as to when such instructions were given or when any application to vary will actually be made.

57. Dr Shetty's counsel told me on instructions that the applications were starting to be prepared now. However, the present claim was served in mid July 2021, 5 months ago; the summary judgment application was served on 27 August 2021, more than 3½ months ago; and the application was listed on 30 September, 2½ months ago. Neither Dr Shetty nor Mr Pangarkar explains what, if any, steps were taken during any of those periods to seek any necessary variation to the Indian Orders, nor why it appears still to be the case that no application has yet been made. Dr Shetty's counsel told me, again on instructions, that MZM were unable to take the work on earlier, but there is no evidence to that effect from either Dr Shetty or Mr Pangarkar.

58. Counsel suggested that supplementary witness evidence might be served to address these points. However, that course would be very unsatisfactory, since in practice it would mean the adjournment application *de facto* succeeding despite having been made

without any adequate evidential basis. It must have been obvious from the outset that if an adjournment was going to be sought, then the court would wish to know why steps could not be taken earlier – if indeed that was the case. As Peter Gibson LJ indicated in *Terluk* § 21 (a passage later quoted in *Solanki*), it is relevant to consider whether a litigant's inability to participate has arisen *"through no fault of his own",* and "*the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment*". It was for Dr Shetty to establish the grounds for an adjournment, and his application was made with professional advice and assistance. Considerations of fairness do not entitle a defendant, particularly one who has had professional assistance (even if informally) for several months, to fail to take steps which were (at least on Dr Shetty's case as to the effect of the Indian Orders) obviously necessary as soon as the claim was commenced, and then to make a last minute adjournment application based on lack of legal representation.

59. Moreover, when viewed in the context of the circumstances as a whole – including Judge Martin's observations quoted in § 22 above, the plainly unmeritorious nature of the arguments advanced before the DIFC Court, the absence of any suggestion of an arguable defence to the present enforcement claim, and the other deficiencies in Dr Shetty's evidence to which I refer below – the unexplained and ongoing failure to seek promptly to vary the Indian Orders tends to suggest that the adjournment application is in reality a deliberate last minute tactic designed to seek to delay the proceedings.

60. A second striking feature of Dr Shetty's evidence is the lack of any reasoned explanation as to the length of time it would take to vary the Indian Orders. Dr Shetty states merely that he hopes and expects that the order can be varied "*within about 3 to 4 months*". Mr Pangarkar is silent on the topic, even though as the lawyer tasked with the applications he would be the obvious person to comment. Neither of them explains why it would take so long to achieve even such a basic variation as permission to pay legal costs, nor (for example) why any necessary variation could not have been achieved during the periods of time since the present application was served or listed for hearing.

61. The considerations set out in the preceding paragraphs would by themselves leave me unpersuaded that any problem of lack of legal representation is anything other than one of Dr Shetty's own making, by reason of having delayed far too long before seeking any necessary variation of the Indian Orders.

62. A third obvious deficiency in Dr Shetty's evidence is the failure to explain how he claims to be unable to fund a defence to the present application, in circumstances where he has been able to defend or pursue other major litigation. Mr Beheshti's witness statement served on 13 December 2021 points out that, despite the Indian Orders having been made on 15 July 2020, 14 August 2020 and 17 April 2021, Dr Shetty was able (a) to have extensive legal representation in the proceedings before the DIFC court, including at the hearing on 24 January 2021, a post hearing disclosure application on 3 February 2021, further applications made on 7 and 9 February 2021, and the filing of further evidence on 11 February 2021 and 7 March 2021; and (b) in July 2021 to file the major lawsuit in New York to which I refer earlier.

63. It is surprising that Dr Shetty filed no evidence in response to these points, and nor were they addressed in his counsel's skeleton argument. Dr Shetty's witness statement in support of his adjournment application indicated, as noted earlier, that he is now

represented in legal proceedings only where his lawyers are paid for by insurers, or agree to extend credit to him, or if they are paid by well-wishers where such expenses are comparatively low. However, Dr Shetty did not explain into which of those categories the DIFC proceedings or the claim in New York fell. Dr Shetty's counsel told me, on instructions, that the answer was a mixture of family handouts and a contingency fee. Since the DIFC action was a claim against Dr Shetty for money due under a guarantee, with no counterclaim, it is not easy to see how realistically it could have been funded on a contingency fee. In so far as Dr Shetty's representation in the DIFC was paid for by family handouts, Dr Shetty does not explain how they enabled him to be able to pay for representation in the DIFC case itself, which must have cost a very substantial amount, but not for representation on the far more limited issues which arise at the enforcement stage in the present action. These considerations tend to reinforce the view that, rather than arising from a genuine problem, Dr Shetty's present application is a delaying tactic.

64. A fourth matter which is notable from its absence in Dr Shetty's evidence is any mention of a plausible ground on which enforcement of DIFC judgment could be resisted. As indicated later in this judgment (and as those who have assisted Dr Shetty over the last few months will have appreciated), the grounds on which enforcement can be resisted are limited and, in principle, straightforward. Based purely on the documents, there can be no doubt that the DIFC Judgment is a final and conclusive judgment for a definite sum of money (not being for tax, charges or the like) given by a court of competent jurisdiction. Dr Shetty would thus need to allege that it had been obtained by fraud, contrary to public policy, or contrary to principles of natural justice; or that there was some other compelling reason for a trial.

65. Dr Shetty on 26 September 2021 sent Barclays a letter whose contents and style clearly indicate that it was written with the benefit of legal advice, but which did not put forward any such ground. It included a repeat of allegations made before the DIFC Court about Barclays' alleged failure to act promptly after the first default by UAEEC. This time, the argument was framed as a proposed counterclaim for damages under section 138D of the Financial Services and Markets Act 2000. However, it was undisputed before me that such a claim for damages cannot be founded on any of the FCA or PRA rules cited in Dr Shetty's letter (namely, five of the FCA's Principles, a provision of the FCA's Prudential Sourcebook for Banks, Building Societies and Investment Firms (BIPRU § 14.3.3) and six of the PRA's Fundamental Principles (see sections 138D(1) and (3), PRIN 3.4.4, BIPRU § 1.4.1 and the lack of any conferral of a right of action in the PRA Fundamental Principles).

66. Dr Shetty's counsel suggested that a full review of the record of the DIFC proceedings might nonetheless reveal some apparent bias or failure to comply with English law principles of natural justice, perhaps in a respect that would not have contravened the principles applied by the DIFC Court. However, quite apart from the inherent unlikelihood of Justice Martin (a retired Chief Justice of Western Australia) applying a significantly different approach to procedural fairness from an English court, the simple fact is that there has been not a hint of a suggestion anywhere in Dr Shetty's evidence or correspondence of any such failing. Dr Shetty's counsel submitted that that might not be surprising in circumstances where Dr Shetty, as a layman, would not understand the relevant legal principles. However, (a) Dr Shetty had extensive legal representation in the DIFC proceedings themselves, who can reasonably have been expected to take

issue with any conceivable procedural unfairness, (b) Dr Shetty has had informal help from English lawyers for several months, and (c) a procedural unfairness of the kind that might justify refusal to enforce a judgment would be likely to be obvious as a matter of fact even to a lay person: let alone an international businessman such as Dr Shetty who has evidently had very substantial contact with litigation over the years in a variety of jurisdictions.

67. I have already made the point that the apparent merits of the claimant's claim are not directly relevant to the question of whether an adjournment should be granted. However, taken together with all the other circumstances of the present case, the absence of any real suggestion of an arguable defence seems consistent with the view I have already come to that the adjournment application is a delaying tactic.

68. In addition, the facts that (a) Dr Shetty had and availed himself of a very full opportunity to advance arguments on the merits in the DIFC proceedings, with the benefit of legal representation, and (b) this court may refuse to enforce a DIFC judgment only on very limited grounds, have a bearing on the fairness of proceeding to hear Barclays' summary judgment application without Dr Shetty having legal representation. It is not unusual for litigants in person to appear from time to time in commercial cases. The scope for legal and evidential argument on the present summary judgment application is in reality very limited. Although the judgment Barclays seeks to enforce is for a large sum, the issues are relatively straightforward. This court cannot reopen the merits of the case, nor review the DIFC Judgment other than on a very restrictive range of grounds. The proceedings cannot realistically be compared to the situations in (for example) *Airey* and *Steel & Morris*, where the litigants in person could not effectively and fairly participate in the complex and extensive legal proceedings involved in those cases.

69. Finally, as to the specific prejudice mentioned in Barclays' evidence to which I refer in § 42.ix) above, Barclays accepted before me that even if the ADCB freezing order were set aside, the London flat would remain subject to the DIFC WFO. It is possible that Barclays' concession overlooked the point that the DIFC WFO is limited in value, such that Dr Shetty might have grounds for seeking to sell the flat on the basis that he retained other assets of sufficient value. However, as this point was not debated before me, and bearing in mind also that Dr Shetty's solicitors offered (through counsel) an undertaking to notify Barclays of any proposed sale of the flat, I do not take this particular form of possible prejudice into account.

70. Even in the absence of specific prejudice to Barclays, over and above the delay and likely extra cost which an adjournment would cause, I am unpersuaded that Dr Shetty has made out his case for an adjournment. For the reasons set out above, he has not satisfied the onus of establishing that it would be unfair to proceed with the summary judgment application. He has not shown that any problem arising from lack of legal representation has arisen for any reason other than his own unexplained delay in taking steps to rectify matters. On the contrary, the evidence as a whole persuades me that his last minute application, replete with obvious evidential gaps, has been brought as a delaying tactic.

71. For these reasons, I declined to accede to Dr Shetty's adjournment application, and indicated that after a short break I would hear the summary judgment application. Dr Shetty's counsel continued to participate in that part of the hearing and made

submissions on Dr Shetty's behalf, on the basis that he was making such submissions as he could within the constraints arising from the dismissal of the adjournment application: including that counsel and Farrer & Co had not obtained or read the full file of the DIFC proceedings.

(D) SUMMARY JUDGMENT: PRINCIPLES

(1) Enforcement of DIFC judgments

72. I summarised the principles relevant to the enforcement of DIFC judgments in *GFH Capital Limited v Haigh and others* [2020] EWHC 1269 (Comm) §§ 33-36:

> "33. There is no treaty dealing with the recognition and enforcement of judgments between the United Kingdom and United Arab Emirates ("UAE"). As such, judgments of the DIFC courts can be enforced only at common law.
>
> 34. At common law, where a foreign court of competent jurisdiction determines that a certain sum is due from one person to another, a legal obligation arises on the debtor to pay that sum, which can be enforced in the courts of England & Wales. The relevant common law principles are summarised in *Dicey, Morris & Collins on the Conflict of Laws* (15th ed) ("*Dicey*") § 14R-020 (Rule 24) and in the Memorandum of Guidance as to Enforcement between the DIFC Courts and the Commercial Court, Queen's Bench Division, England and Wales issued in January 2013 ("the Memorandum").
>
> 35. The Memorandum includes a helpful summary of the requirements for common law enforcement of foreign judgments:
>
> > "10. In order to be sued upon in the Commercial Court, a judgment of the DIFC Courts must be final and conclusive. It may be final and conclusive even though it is subject to an appeal.
> >
> > 11. The Commercial Court will not enforce certain types of DIFC Court judgments, for example judgments ordering the payment of taxes, fines or penalties.
> >
> > 12. The DIFC Courts must have had jurisdiction, according to the English rules of the conflict of laws, to determine the subject matter of the dispute. The Commercial Court will generally consider the DIFC Courts to have had the required jurisdiction only where the person against whom the judgment was given:
> >
> > > a. was, at the time the proceedings were commenced, present in the jurisdiction; or

> b. was the claimant, or counterclaimant, in the proceedings; or
>
> c. submitted to the jurisdiction of the DIFC Courts; or
>
> d. agreed, before commencement, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the DIFC Courts.
>
> 13. Where the above requirements are established to the satisfaction of the Commercial Court, a DIFC Court judgment may be challenged in the Commercial Court only on limited grounds. Those grounds include (but are not limited to):
>
> a. where the judgment was obtained by fraud;
>
> b. where the judgment is contrary to English public policy; and
>
> c. where the proceedings were conducted in a manner which the Commercial Court regards as contrary to the principles of natural justice.
>
> 14. The Commercial Court will not re-examine the merits of a DIFC Court judgment. The judgment may not be challenged on the grounds that it contains an error of fact or law. A DIFC Court judgment will be enforced on the basis that the defendant has a legal obligation, recognised by the English court, to satisfy a judgment of the DIFC Courts.
>
> …
>
> 26. In most cases, a party will be entitled to apply to obtain summary judgment without trial under Part 24 of the Civil Procedure Rules 1998 (as amended), unless the debtor can satisfy the Court that it has a real prospect of establishing at trial one of the grounds set out in paragraph 13 above. Applications for summary judgment are dealt with swiftly, without the need for oral evidence."
>
> (footnote omitted)
>
> 36. Following *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443, a claim for enforcement of a foreign judgment may be made for the amount of the judgment in the currency in which it was rendered: Dicey § 14-029."

(2) Summary judgment

73. CPR 24.2 provides as follows:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

74. In *The LCD Appeals* [2018] EWCA Civ 220, the Court of Appeal quoted with approval the following considerations applicable to summary judgment applications, taken from passages in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and *Swain v Hillman* [2001] 1 All ER 91 at 94:

i) the court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) a "*realistic*" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 § 8;

iii) in reaching its conclusion the court must not conduct a "*mini-trial*": *Swain v Hillman*;

iv) this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* § 10;

v) however, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 3;

vii) on the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725; and

viii) a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose; and it is in the interests of justice. If the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position: *Swain v Hillman* [2001] 1 All ER 91 § 94.

(E) SUMMARY JUDGMENT: APPLICATION

75. The key issues may be summarised as follows:

i) Does Dr Shetty have a real prospect (in the sense outlined above) of successfully arguing that:

a) the DIFC Judgment is not final and conclusive;

b) the DIFC Judgment is not for a definite sum of money (other than a sum payable in respect of taxes or other charges of a like nature);

c) the DIFC Court was not a court of competent jurisdiction; or

d) the DIFC Judgment is impeachable on the basis that it is –

i) obtained by fraud,

ii) contrary to public policy, or

iii) contrary to the principles of natural justice?

ii) If not, is there any other compelling reason for a trial?

76. I consider these issues in turn below.

(1) Final and conclusive

77. The test of finality in this context is the treatment of the judgment by the foreign court as *res judicata*. A judgment is final and conclusive even if it can be appealed or is

subject to a pending appeal: see *Nouivon v Freeman* (1889) 15 App. Cas. 1 per Lord Herschell at pp 9-10.

78. Barclays' evidence, set out in the second witness statement of Mr Beheshti, is that the DIFC Judgment is a final and conclusive judgment on the merits that cannot be altered or reopened by the DIFC Court. That evidence is consistent with the text of the DIFC Judgment itself, which is expressed in terms of a judgment on the merits in similar terms to an order of an English court granting summary judgment in favour of a claimant on the whole of its claim. No contrary suggestion is made by or on behalf of Dr Shetty. I accept Barclays' evidence on this point.

79. For completeness, Barclays adds (while noting that it is immaterial to the question of finality) that pursuant to the DIFC Court procedural rules Dr Shetty had 21 days from the date of issue of the DIFC Judgment to file an appeal, but did not do so. I accept Mr Beheshti's evidence that no appeal was filed and that the time for doing so has expired.

(2) Definite sum of money

80. The DIFC Judgment is on its face for a definite sum of money and is not a fine, tax or penalty. It relates to an ordinary contractual claim under a guarantee. This is confirmed by Mr Beheshti in his second witness statement, and I accept that evidence.

(3) Court of competent jurisdiction

81. The judgment of a foreign court is enforceable at common law only if that court had jurisdiction according to English conflict of laws principles. Rule 43 of Dicey, Morris & Collins on the *Conflict of Laws* (15th ed) ("***Dicey***") sets out four cases in which a foreign court will have jurisdiction. These include where there has been: (1) submission by agreement, or (2) voluntary submission by appearance in the proceedings.

82. In relation to (2), Dicey states:

> "This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction. Where such a litigant, though a defendant rather than a claimant, appears and pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission. The same is the case where he does indeed contest the jurisdiction but nevertheless proceeds further to plead to the merits, or agrees to a consent order dismissing the claims and crossclaims, or where he fails to appear in proceedings at first instance but appeals on the merits." (§ 14-069)

83. In the present case the DIFC Court had jurisdiction for two reasons, either of which would be sufficient on its own:

    i) the parties to the Guarantee agreed to submit to the jurisdiction of the DIFC Court: see § 15 above; and

ii) Dr Shetty submitted to the jurisdiction of the DIFC Court by participating in the proceedings before it, including by defending on the merits Barclays' application for Immediate Judgment.

(4) Impeachability

84. The general position is that a foreign judgment is final and conclusive as to any matter adjudicated by it, regardless of any error of fact or law: see *Dicey* § 14R-118.

85. There are three circumstances in which a foreign judgment might be impeached: where it was obtained by fraud, its enforcement would be contrary to public policy, or the proceedings in which it was obtained were contrary to the principles of natural justice: see *Dicey* §§ 14R-137, 14R-152 and 14R-162.

(a) Fraud

86. A foreign judgment cannot be enforced where it has been obtained by fraud, by either the parties or the court itself. *Haigh* §§ 69-76 summarises the key authorities. These include the point that where an allegation of fraud was raised or could have been raised in the foreign court, then:

i) there is a general principle that a decision by a foreign court that a judgment from the courts of that country was not obtained by fraud can create an estoppel in English proceedings to enforce that judgment: *Owens Bank Ltd v Bracco* [1992] 2 A.C. 443 (Court of Appeal) per Parker LJ at pp 470 and 472, commenting upon *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241; and

ii) it may also be an abuse of process of the English court to raise for a second time an argument which was raised and disposed of in the foreign court: *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241 per Stuart-Smith LJ at pp 254-255. In *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44 a French court gave judgment in favour of Etoile on a bank guarantee, rejecting the bank's allegation of fraud and forgery on the part of the plaintiff. A claim brought by the bank in St Vincent against Etoile for damages for fraud was struck out by the court. In subsequent proceedings in St. Vincent to enforce the French judgment, the Privy Council struck out, as an abuse of process, the bank's attempt to plead fraud as a defence.

87. Dr Shetty's letter of 26 September 2021 hints at the possibility that some form of fraud might have been involved in Barclays permitting the transactions giving rise to his liability to occur. However, Judge Martin rejected all the allegations of fraud which Dr Shetty advanced before the DIFC Court. Most importantly for present purposes, Dr Shetty has not advanced any argument to the effect that the DIFC Judgment was itself obtained by fraud. There is accordingly no arguable case that enforcement could be resisted on this ground.

(b) Public policy

88. As indicated in *Haigh* § 102, examples of circumstances when a foreign judgment may be impeached on public policy grounds are:

i) where a judgment is inconsistent with a previous decision of a competent English court in proceedings between the same parties or their privies, *res judicata* being capable of expression as a rule of public policy (Dicey § 14-156 citing *Vervaeke v Smith* [1983] 1 A.C. 145, 160G);

ii) where a judgment has been obtained in disobedience of an injunction not to proceed with the action in a foreign court, in circumstances of evidently discreditable behaviour on the part of the court concerned (Dicey § 14-156 citing *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7);

iii) where enforcement of a foreign judgment would be contrary to the European Convention on Human Rights (that being the effect of the Human Rights Act 1998). There is arguable authority in support of the proposition that where a foreign court (such as the DIFC Court) is not a party to the Convention, such shortcomings must be "*flagrant*" (*Government of USA v Montgomery (No.2)* [2004] UKHL 37, discussed at Dicey § 14-160); and

iv) (possibly) where the foreign judgment is exemplary or punitive or for manifestly excessive damages (Dicey § 14-157).

89. In the present case, there has been no evidence or suggestion that any of these circumstances arise, nor that the enforcement of the DIFC Judgment would in any other way be contrary to English public policy.

(c) Natural justice

90. Dicey summarises the relevant principles as follows:

> "In a celebrated passage in his judgment in *Pemberton v Hughes* (a case on the recognition of a foreign divorce decree), Lord Lindley observed: *"If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice."* This passage refers to irregularity in the proceedings, for it is clear that a foreign judgment, which is manifestly wrong on the merits or has misapplied English law or foreign law, is not impeachable on that ground. Nor is it impeachable because the court admitted evidence which is inadmissible in England or did not admit evidence which is admissible in England or otherwise followed a practice different from English law. In *Jacobson v Frachon* Atkin L.J., after referring to the use of the expression "*principles of natural justice*," said: "*Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.*"

> *Adams v Cape Industries Plc* appears to have been the first English case in which the defence of breach of natural justice was established in relation to a judgment in personam. The Court of Appeal held that the defence of breach of natural justice was not limited to the requirements of due notice of the hearing to a litigant and opportunity to put a case to the foreign court. It confirmed that the basic question was that stated in *Pemberton v Hughes*, namely whether there was a procedural defect which constituted a breach of the English court's view of substantial justice, which would depend on the nature of the proceedings under consideration. The principle was applied in *Masters v Leaver*, where the Court of Appeal considered that a substantial failure to follow its own procedure for an assessment of damages meant that proceedings before a Texas court had led to a judgment in denial of substantial justice.
>
> A mere procedural irregularity would not offend English concepts of substantial justice. In *Adams v Cape Industries Plc* the foreign judgment was for damages in default of appearance, and notice was given to the defendants of the application for a default judgment on an unliquidated claim. Under United States law (as under English law) the assessment of damages is effected (even in cases of default) by the court, but the United States judge did not hold any form of hearing, and the judgment was not based on an objective assessment by the judge of the evidence. The Court of Appeal did not decide that a lack of judicial assessment of damages is per se a breach of natural justice; but it is a breach where the foreign legal system contains provision for judicial assessment and the judgment debtor therefore has a reasonable expectation that there will be a judicial assessment." (§§ 14-163 to 165, footnotes omitted)

91. There is no evidence or suggestion of any breach of natural justice by the DIFC Court in the present case.

(F) ANY OTHER COMPELLING REASON FOR A TRIAL

92. I have considered whether the "*counterclaim*" indicated by Dr Shetty in his letter of 26 September 2021, or any other features of this case, provide either a compelling reason why this case should proceed to trial, or a reason for a stay of execution of any judgment.

93. As I noted earlier, a claim for damages under section 138D of the Financial Services and Markets Act 2000 could not be founded on any of the FCA or PRA rules cited in Dr Shetty's letter. Counsel for Dr Shetty suggested that a fuller review of the matter might indicate that there were breaches of other provisions of the FCA Handbook that could found a counterclaim for damages. He added that Barclays had been wrong to take the position in correspondence (on 4 October 2021) that these matters have been addressed already in the DIFC Judgment: Judge Martin made no finding as to whether Barclays acted negligently or breached their regulatory obligations, but merely that any

such breach would not amount to a defence in law to Barclays' claim. That latter point is correct. However:

i) since the Guarantee is governed by English law, it is unclear why any such counterclaim could not have been pursued before the DIFC Court, rendering it an abuse of process to seek to litigate it now in response to an application for enforcement of the DIFC Judgment;

ii) deploying any such counterclaim by way of set-off would arguably be inconsistent with clause 6 of the Guarantee, which provides that

> "All payments to be made by the Guarantor to Barclays under this Guarantee shall be made without set-off or counterclaim and without any deduction or withholding whatsoever. If the Guarantor is obliged by law to make any deduction or withholding from any such payment, the amount due from the Guarantor in respect of such payment shall be increased to the extent necessary to ensure that, after the making of such deduction or withholding, Barclays receives a net amount equal to the amount Barclays would have received had no such deduction or withholding been required to be made."

Counsel for Dr Shetty submitted that this provision would no longer be relevant, Barclays' claim under the Guarantee having now merged in the DIFC Judgment. Even if that be the case, though, the presence of clause 6 in the Guarantee would in my view provide good reason to conclude that (in the context of a claim for equitable set-off) it would not be inequitable for Barclays to seek to enforce its judgment in full leaving Dr Shetty to pursue any counterclaim by separate action; and

iii) the point is any event hypothetical, since no such arguable specific breach that could found a damages claim has been identified: notwithstanding the fact that Dr Shetty has evidently received at least a degree of professional assistance not only in the DIFC proceedings themselves, but also in the formulation of his letter of 26 September 2021 (which in addition to the Principles did make reference to one specific FCA rule, namely BIPRU 14.3.3, albeit one for which any right to damages has been excluded), and to a degree subsequently. If Dr Shetty were later to ascertain that he might have a claim against Barclays whose pursuit would not amount to an abuse of process, then he may remain entitled to pursue it. The mere speculative possibility that such a claim might exist does not provide a reason, let alone a compelling reason, for this case to proceed to trial.

94. Further, insofar as any counterclaim might be founded on allegations that were ruled on as part of the DIFC Judgment, its pursuit would amount to an impermissible attack on the substantive merits of that judgment, and (in any event) Dr Shetty would be estopped from raising it, it being well established that a foreign judgment can give rise to such an estoppel: see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1966] 3 W.L.R. 125 [1967] 1 A.C. 853, 918B, 927G, 948G, 966C-D, 967F and *Dicey* Rule 42(2) and 14-032)).

95. No other matter has been put forward as being a compelling reason for the matter to proceed to trial.

(G) CONCLUSION

96. For these reasons, I conclude that Barclays is entitled to summary judgment. I shall hear submission on the precise form of relief and consequential matters. I am grateful to both counsel for their very helpful submissions.