Neutral Citation Number: [2024] EWHC 3322 (Comm)

Case No: CL-2023-000262

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

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

Date: 20 December 2024

Before :

SIMON BIRT KC
(Sitting as a Deputy Judge of the High Court)

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Between :

Yermek Alimov	**Claimant**
- and -	
(1) Abdumalik Mirakhmedov	
(2) Rashit Makhat	
(3) Andrey Kim	
(4) Genesis Digital Assets Limited (a company incorporated in Cyprus)	**Defendants**

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Charles Samek KC and Alexander Halban (instructed by **Sterling Lawyers Ltd**) for the **Claimant**
Edward Cumming KC (instructed by **Withers LLP**) for the **First and Third Defendants**
Neil Kitchener KC and David Caplan (instructed by **Mishcon de Reya LLP**) for the **Second Defendant**
Sonia Tolaney KC and Adam Rushworth (instructed by **Latham & Watkins (London) LLP**) for the **Fourth Defendant**

Hearing dates: 15 and 16 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIMON BIRT KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Simon Birt KC:

Introduction

1. The dispute between the parties in this litigation relates to a bitcoin mining business which is operated in Kazakhstan. These applications constitute the jurisdiction battle between the parties. In short, the Claimant contends the dispute should be heard in England; the Defendants contend it should be heard in Kazakhstan.

Factual background to the dispute

2. The Claimant, Mr Alimov, and the three individual Defendants are all businessmen with substantial links to Kazakhstan.

3. The Claimant contends that (until he moved to England, which he says was in August 2018) he was a leading specialist in the energy sector in Kazakhstan, and the former head of (a) AstanaEnergoServis JSC (the public holding company which owned all the power companies in Astana), and (b) Karaganda EnergoTsentr LLP (a private energy company which owned the Karagandinskaya TETs 3 power station and provided energy to the city of Karaganda).

4. The three individual defendants are also businessmen of Kazakhstani origin (albeit the First Defendant ("D1") was born in Uzbekistan), although they do not currently live there. The Second Defendant ("D2") was resident in Kazakhstan until 2020 and now lives in the UAE (though still also retains a residence in Kazakhstan). The Third Defendant ("D3") has been resident in the UAE since 2012, but until 2020 spent most of his time in Kazakhstan (where his family and business activities were based) and still manages the office of D1-D3 in Kazakhstan. D1 lives in the UAE and/or the UK (this is a contentious issue which I deal with below). All three continue to have substantial business interests in Kazakhstan.

5. The Fourth Defendant ("D4") is a company incorporated in Cyprus which the Claimant describes as "*one of the world's largest bitcoin-mining companies and operates (through its subsidiaries) from facilities in Kazakhstan and elsewhere.*" At one time, between them, the 3 individual defendants owned 50% of the shares in D4.

6. The factual background is highly contentious between the parties, with numerous issues of fact between them, and allegations on both sides that the other is not giving an accurate or truthful account. There are also allegations of attempts to distort or manufacture the evidential picture. There is little that is common ground between the parties.

7. I summarise below the Claimant's case on the background and the facts, taken from his Particulars of Claim and evidence filed for these applications, but noting that much of it is controversial between the parties, and also that the Defendants emphasised that parts of this case were different from the case presented on the Claimant's behalf in his detailed letter before action.

8. In summary, the Claimant says that:

i) In around April 2017, there was an agreement between a cryptocurrency and cloud mining company called Genesis Mining Limited ("GM") and D1-D3 by way of a joint venture to develop bitcoin mining in Kazakhstan, with the aim of GM owning 50% and D1-D3 owning 50% of the ultimate business (the Claimant referred to this as the "GM JV"). D1-D3 were to find a cheap source of energy, find and acquire land and buildings near the energy source, and prepare that land and buildings for bitcoin mining on a turn-key basis (specifically, arranging for full repair and completion of all necessary infrastructure including an internet connection). GM was to install bitcoin mining machines, cooling machines, internal power transformers and other necessary technological equipment for bitcoin mining, and incorporate the new bitcoin mining factories in Kazakhstan into its existing bitcoin mining infrastructure in Europe.

ii) In seeking to find a cheap source of energy, in around May 2017 D2 and D3 contacted the Claimant. This contact was made on the recommendation of Mr Kairat Satybaldy, who the Claimant described as one of the most influential businessmen in Kazakhstan at the time, who had substantial influence over the then Kazakh government and who could provide "*krysha*" (protection). The Claimant said that both he and D2 had long-standing connections with Mr Satybaldy.

iii) In May 2017, there were a series of meetings in Kazakhstan, largely it appears at the Radisson hotel in Astana, between the Claimant and D1-D3 at which D1-D3 explained what they wanted and the Claimant said he would help them. The Claimant said he owned some assets which might be suitable, namely (a) the Stal electrical sub-station 110/10 ("Stal") in the city of Karaganda, and (b) a factory near Stal (the "Vtorprom Factory") and a group of surrounding buildings (the "ABK Buildings") together with further land. He said these assets were owned by a Kazakh limited liability partnership called KKS Karagandy LLP ("KKS Karagandy") which in turn was owned by a BVI company called KPC System Solutions Limited.

iv) On 10 June 2017, the Claimant met D1 in London, and (the Claimant alleges) reached the oral agreement on which his claim is (largely) based. The circumstances of the meeting are heavily disputed. I will deal with it in greater detail later in this judgment. Suffice to say for now that the meeting took place at a house at 27 Ingram Avenue, London (a house at which the Claimant contends D1 was residing with his family) on an occasion at which the Claimant and his family had been invited to share an *Iftar* meal with D1 and his family (*Iftar* is the meal eaten after sunset, during the religious festival of Ramadan to break the fast that is kept during the hours of sunlight). The Claimant contends that he and D1 reached an agreement (which he pleads as the "London Agreement") in the following detailed terms (which I take from paragraphs 27-28 of the Particulars of Claim, in which he used the abbreviation "MMK" to refer collectively to D1-D3):

> "27. At the Ingram Avenue Meeting, Mr Alimov [the Claimant] and Mr Mirakhmedov [D1] (acting on behalf of MMK) reached the following agreement orally (the "London Agreement"):

(a) Mr Alimov would ensure that:

(i) MMK obtained a source of energy of up to 100 Megawatts for the GM JV; and

(ii) the electricity would be generated from that power station at a price of not more than US$0.04 per kWh.

(b) Mr Alimov would ensure that MMK obtained the energy source (as pleaded in sub-paragraph (a)(i) above) by:

(i) finding suitable power stations in Kazakhstan for MMK to purchase, of which there were three available options at the time (the Ridderskaya, KarGRES 1 and Sogrinskaya power stations), arranging for expert assessments of their suitability, and introducing MMK to their owners to negotiate their purchase; or

(ii) alternatively, if those negotiations to purchase those power stations failed, MMK would notify Mr Alimov of the same and, at that point, Mr Alimov would be obliged to, and would, procure that KKS Karagandy make available Stal, and such of the Vtorprom Factory, the ABK Buildings and adjacent land as might be required, for use by the GM JV and, in due course, transfer those assets to the corporate vehicle which would be used for the operation of the GM JV and the ownership of its assets. (In so doing Mr Alimov would also procure that KKS Karagandy cancel the sale to Hua Tun of Stal and any other relevant buildings.)

(c) Mr Alimov would ensure that MMK obtained electricity at a cheap rate of US$0.04 per kWh or less (as pleaded in sub-paragraph (a)(ii) above) by:

(i) arranging for the necessary technical works so that any power station which MMK obtained would be connected directly to the energy source provider, thereby avoiding the three other levels of energy power supply in Kazakhstan and avoiding the increased price associated with supply through each level (as set out in paragraph 24(a) above).

(ii) alternatively, if he was obliged to procure the transfer of Stal for use in the GM JV (as set out in sub-paragraph (b)(ii) above), Stal was already connected directly to the energy source provider and so obtained electricity at a cheap rate (as set out in paragraph 24(a) above).

(d) In consideration for Mr Alimov's said obligations in sub-paragraphs (a)-(c) above, MMK would give to Mr Alimov and/or procure that he received:

(i) 35% of the shares received by MMK collectively in the corporate vehicle which was to be established pursuant to the GM JV ultimately (directly or indirectly) to operate the GM JV and own its assets, and thus be the way in which MMK and GM were directly to participate in and receive the full economic benefit of the GM JV (including by receipt of dividends and/or profit from the GM JV and bitcoin mined by the GM JV). Mr Alimov would become entitled to those shares upon (or within a reasonable time of) the establishment of such corporate vehicle, and in any event no later than the date when each of MMK received their shares in the same;

(ii) 35% of the bitcoin, or any other cryptocurrency, mined by the GM JV which were received by MMK (whether themselves directly in the period before the said corporate vehicle was established or as received by them from the said corporate vehicle once it had been established); and

(iii) a further sum, being the difference between the maximum price of US$0.04 per kWh (as referred to in sub-paragraph (a)(ii) above) and the actual price at which electricity was obtained for the GM JV.

28. The London Agreement also contained implied terms that:

(a) Mr Alimov and each of MMK owed each other duties of good faith, and of mutual trust and confidence;

(b) MMK would keep Mr Alimov informed as to the progress in establishing the corporate vehicle referred to in paragraph 27(d)(i) above; and

(c) MMK would notify Mr Alimov when they had each received their shares in such corporate vehicle."

v) The Claimant subsequently introduced D1-D3 to the owners of various power stations in Kazakhstan and helped organise expert assessment of them by commissioning professional experts to assess their capacity and suitability. However, negotiations to purchase those power stations did not come to fruition. The Claimant therefore became obliged (under the London Agreement) to make available Stal and such of the Vtorprom factory and ABK Buildings and land as may be required. Following an inspection by a representative of GM, the Vtroprom Factory was found unsuitable, so D1-D3 and the Claimant decided

that Stal and some of the ABK Buildings and the adjacent land should be used for the purposes of the GM JV.

vi) However, KKS Karagandy had previously been in negotiations with a company called Hua Tun (Central Asia) Cable LLP ("Hua Tun") and had reached an agreement in principle in March 2017 to sell Stal, the Vtorprom Factory and certain of the ABK Buildings to Hua Tun for US$7.5 million. The Claimant pleads that he therefore procured that KKS Karagandy would not sell Stal to Hua Tun, and negotiated to exclude Stal from that sale, reducing the sale price to Hua Tun to US$5 million. His pleading does not say anything similar about the ABK Buildings.

vii) Renovation work was carried out to Stal and the ABK Buildings between August and December 2017 by KKS Karagandy at an overall cost of approximately US$ 1.9 million, half of which was paid by D1-D3, and the other half initially funded by the Claimant, for which he was subsequently repaid in bitcoin that had been mined by the GM JV.

viii) Bitcoin mining operations at this location started from December 2017, which the Claimant referred to as the "ABK Project". The Claimant determined, with D3, that the further sum due to the Claimant under the London Agreement was US$ 0.016 per kWh of electricity transmitted through Stal and used for the ABK Project (being the difference between the actual price of US$ 0.024 per kWh and US$ 0.04 per kWh).

ix) The Claimant attended meetings relating to the ABK Project in D1's offices in Moscow, Russia and in Astana and Karaganda, Kazakhstan.

x) In around December 2017 or January 2018, D1-D3 requested the Claimant to transfer Stal and the ABK Buildings to a company called Prima Investment Company Limited ("Prima"), in which D2 was the sole shareholder, to be held temporarily pending the establishment of the corporate vehicle anticipated in the London Agreement. The Claimant agreed to the transfer, requesting in return 35% of the shares in Prima pending receipt of his entitlement in the anticipated permanent corporate vehicle (which he says D1-D3 agreed to). Stal and the ABK Buildings were transferred by KKS Karagandy to Prima on 22 and 24 January 2018 respectively.

xi) From January to September 2018, the Claimant received bitcoin from the ABK Project, which he says were recorded in reconciliations provided to him by D3 which calculated his share as 35% of that received by D1-D3. This totalled 226.78 bitcoin (worth US$1,686,719.58 at the time of payment). He was not paid any bitcoin after that.

xii) At some point around September 2020, Prima became subsumed into the corporate structure ultimately owned by GDA.

9. Based on the above, the Claimant brings claims governed by the law of Kazakhstan for:

i) Breach of contract, based upon the alleged London Agreement (which he says is an agreement on joint activities under Article 228 of the Civil Code of

Kazakhstan ("the Code"), such that the relationship between the Claimant and D1-D3 constitutes an ordinary partnership under the law of Kazakhstan). He claims an order that D1-D3 transfer, or procure or cause to be transferred, to him 35% of the shares held by D1-D3 in GDA; that D1-D3 take steps to see the Claimant is registered as a shareholder of such shares; that there be an inquiry into and account of the cryptocurrency mined in the ABK Project and received by D1-D3 together with an order that D1-D3 pay to the Claimant 35% of what they have received; and an inquiry into and account of the total amount of electricity transmitted through Stal and used by the ABK Project, with an order for payment to the Claimant of a sum at a rate of US$ 0.016 per kWh.

ii) In the alternative, a claim under Article 230 of the Code for similar orders, by reason of the Claimant and D1-D3 being "*participants in an agreement on joint activities … and having regard to his contributions … of property and services.*"

iii) In the further alternative, restitution and/or "*compensation … for unjust enrichment*" under the law of Kazakhstan, on the basis that the Claimant provided assets and services to the benefit of D1-D3 and at the request of D1-D3 in the expectation he would be compensated for them. The assets and services include the transfer by KKS Karagandy of Stal and the ABK Buildings to Prima (which he says was at an undervalue), KKS Karagandy providing electricity to the ABK Project at the reduced rate of US$0.024 per kWh, and organising legal, technical, operational and expert services for the ABK Project and related matters.

10. I emphasise that the above is the Claimant's account of events. No defences have, of course, been served, but it is apparent from the evidence served for the applications and the submissions of the parties that there are very many factual disputes between the parties. By way of example only:

i) The allegations of an oral agreement are entirely denied. That is not just a matter of dispute between the two individuals (the Claimant and D1) about what they discussed and whether it amounted to an agreement – there is substantial dispute about many of the facts relating to the occasion on which it is said the agreement was made. For example, there is a dispute about the length of time the Claimant and his family spent at 27 Ingram Avenue (which has included the production of Uber receipts seeking to identify a departure time), and whether there could have been time to discuss the matters alleged, or whether the subject matter is likely to have been discussed (still less agreed) late in the evening, on the fringes of a family social occasion, when the parties had been fasting all day. There is also a dispute about whether a further discussion took place after D1 and the Claimant (with their sons) had attended prayers at the Central London Mosque. There is also disputed hearsay evidence from the Claimant's wife and son about what he told them after the discussions. Much of the context and background to the alleged agreement is also hotly disputed. I set out further aspects of this dispute below in considering the issue in the context of the questions whether there is a serious issue to be tried and a good arguable case.

ii) There is a dispute about whether D1 had any authority from D2 and D3 to commit them to an agreement. I also deal with this in greater detail below.

iii) Various points about the agreement the Claimant says he (or KKS Karagandy) had with Hua Tun, and the circumstances in which Stal and the ABK Buildings were released from it are disputed. The Defendants do not accept that a 12 March 2017 agreement between KKS Karagandy and Hua Tun pleaded by the Claimant is genuine. Also, the Claimant says that in order to persuade Hua Tun to release the property from the contract, Hua Tun's local representatives in Kazakhstan had to be offered items of residential property and two Mercedes-Benz S500s, for which D2 at least in part reimbursed the Claimant; this is something which the Defendants entirely refute.

iv) There is a dispute as to whether parties can agree cheap electricity prices in Kazakhstan or whether the prices are regulated by the relevant Kazakhstan competition authority.

v) The Defendants describe the Claimant as a "middle man" or "broker" in relation to the properties, Stal and the ABK Buildings, that they went on to acquire for proper value (as well as in relation to other properties they considered acquiring but did not do so), and say the Claimant has received all to which he was entitled in respect of those dealings. The Claimant denies that version, contending (among other things) that the sale price recorded in written agreements for the sale of those properties was not a market price, but rather their book value, because the transfer of the properties constituted his contribution to (what he described as) the joint venture.

11. There are also, it is already apparent, numerous issues between the parties in relation to the law of Kazakhstan (which it is agreed is the law governing the claims), including (but not limited to) the validity of the alleged oral agreement under the law of Kazakhstan, whether D1 was able under Kazakhstan law to bind D2 and D3 to the alleged agreement (or whether D2 and D3 ratified the alleged agreement), whether the alleged oral agreement is an agreement on joint activities such that the relationship between the Claimant and D1-D3 constitutes an ordinary partnership under the law of Kazakhstan, what is required for a claim in unjust enrichment in Kazakhstan law, as well as issues as to the availability of certain remedies.

12. In short, the Defendants describe the Claimant's claims as fabricated and a "shake-down" – claims contrived simply to try to extract a settlement in circumstances where he believes D4 is considering an IPO such that it is a good period during which to seek to bring pressure to bear. The Defendants describe the Claimant as having engaged in a parallel campaign in the media and through a website. They go as far as to describe it as something they view as "attempted extortion".

13. As mentioned above, the Defendants have also drawn attention to the differences in the account of the factual background given in the Claimant's letter before action compared to that in his Particulars of Claim (and subsequent evidence). In particular, there was no mention in the letter before action of the "London Agreement" or of the meeting on 10 June 2017 at which it is alleged to have been reached. Also, in the letter before action, it was alleged that there was an actionable conspiracy between D1-D3 which, it was there alleged, had been entered into in London in or around September 2018. It was pointed out in responses from the Defendants that the purported factual bases for the inference of a conspiracy formed in London on those dates were not correct (including

because D2-D3 were not in London at the relevant time). No claim in conspiracy was subsequently pleaded by the Claimant in his Particulars of Claim.

14. The Defendants also note that the letter before action suggested that on 13 June 2017 KKS Karagandy signed a preliminary agreement with Hua Tun to sell the assets, i.e. less than 3 days after the evening where the Claimant (now) alleges that he made the oral agreement on which his claim is based, which the Defendants suggest is inexplicable if the Claimant really believed he had made the agreement with D1-D3 he now alleges on the occasion he now alleges. The Particulars of Claim, by contrast, make no reference to that 13 June 2017 agreement, but instead refer to an agreement said to have been made with Hua Tun on 12 March 2017 (the authenticity of which, as I have already noted above, the Defendants do not accept)

15. The Defendants seek to characterise these sorts of differences as redolent of a litigant willing to fabricate a case for the purpose of trying to get within a gateway for the purposes of founding jurisdiction in England.

Procedural background

16. On 24 June 2022, the Claimant's letter before action was sent to the three individual defendants as addressees (to D1 at the 27 Ingram Avenue address in London, as well as by email, and to D2 and D3 at addresses in Kazakhstan, as well as to various email addresses) as well as to D4 "for information" at addresses in Cyprus and New York. Withers (for D1 and D3), and Mishcon de Reya (for D2), both responded on 23 September 2022.

17. There was no further pre-action correspondence. The claim form (with a general endorsement, but no particulars of claim) was issued on 12 May 2023, and Particulars of Claim were signed by the Claimant on 11 September 2023.

18. Also on 11 September 2023, the Claimant contends that he served the Claim Form and the Particulars of Claim on D1 at three addresses in London, namely: (i) the Ingram Avenue address referred to above ("27 Ingram Avenue"), (ii) 26 Holne Chase, London N2 0QN ("26 Holne Chase"), and (iii) 5A Falkland Road, London NW5 2PS ("5A Falkland Road").

19. The response sent by Withers (for D1) to the Claimant's letter before action on 23 September 2022 had contended that D1 was not resident in England, but rather now was resident in Dubai, UAE. Withers repeated this in a letter dated 26 September 2023, sent in response to the attempted service on D1 at the three addresses above, contending that service had not been effected and/or was defective.

20. On 13 October 2023, the Claimant made an application without notice for permission to serve the claim out of the jurisdiction in Dubai on D1 (without prejudice to the Claimant's primary position that D1 had already been validly served within the jurisdiction), D2 and D3, and in Cyprus on D4. The Claimant also sought permission to serve D1-D3 by alternative methods of service (including email, WhatsApp messenger and LinkedIn message). The order sought was made by Dias J on the papers dated 24 October 2024 ("the Dias J Order").

21. The Defendants have all applied to set aside the Dias J Order, and D1 has also made an application contending he was not effectively served within the jurisdiction, or alternatively for a stay of the claim against him on the ground of *forum non conveniens*.

The applications

22. The principal applications before me at the hearing were as follows:

    i) An application by D1 dated 23 October 2023 to (i) strike out the claim for failure to serve it in the jurisdiction within the time permitted for service; or (ii) stay the claim on *forum non conveniens* grounds in favour of the courts of Kazakhstan. (D3, who became represented by the same solicitors as D1, issued an application in similar terms on 8 March 2024).

    ii) Applications by D1 and D3 dated 31 October 2023, by D4 dated 7 November 2023, and by D2 dated 8 March 2024, all to set aside the Dias J Order.

23. The above applications are interlinked and many of the same grounds are relied upon. In short:

    i) The Defendants contend that D1 was not properly served within the jurisdiction, and could not have been as he was no longer domiciled or resident in the jurisdiction at the relevant time. In the alternative, D1 contends that if he was served properly within the jurisdiction, the claim against him should be stayed on *forum non conveniens* grounds.

    ii) The Defendants seek to set aside the Dias J Order on the basis that there is no serious issue to be tried, that there is no good arguable case that the requirements of the gateways relied upon under CPR PD6B are met, and that the courts of England are not the appropriate forum. In relation to "no serious issue to be tried": (i) D1-D3 contend that there was no agreement as alleged by the Claimant; (ii) D2 and D3 also contend that even if there was such an agreement they were not party to it; and (iii) D4 contends there is no serious issue to be tried against it in circumstances where the Claimant has pleaded no claim against it and claims no relief against it.

    iii) D1-D3 also seek to set aside the Dias J Order for alternative methods of service on the ground there was no basis for it.

    iv) D1-D3 also seek to set aside the Dias J Order on grounds of non-disclosure.

24. In truth, the central battle-ground between the parties was whether it was England or Kazakhstan that was the appropriate forum in which these proceedings should be tried (which arises, albeit slightly differently framed and with a different burden of proof, both on the application to stay on grounds of *forum non conveniens* and on the application to serve out of the jurisdiction). However, given that some of the other issues shape the context for the consideration of those arguments, I will consider first the position regarding D1 and whether he was served within the jurisdiction, then the issues that are raised by D1-D3 in relation to serious issue to be tried and the gateways under CPR PD6B. After that I will deal with the points relating to appropriate forum (both as they arise as a matter of the *forum non conveniens* argument and as a matter of

appropriate forum for the purposes of service out of the jurisdiction). I will deal with the position of D4 separately given that it raises a distinct issue only relevant to D4. After that I will address the application concerning alternative methods of service and the non-disclosure allegations.

25. There were also the following applications, which I will deal with in the course of this judgment:

    i) An application dated 8 March 2024 made by D2 to rely on expert evidence in respect of the law of Luxembourg in support of his position on the main applications.

    ii) An application made by the Claimant during the course of the hearing to amend the Particulars of Claim to plead a case of ratification.

Evidence served for these applications

26. There was a large amount of evidence before the court on these applications. This included 29 witness statements and 9 expert reports.

27. The Claimant relied on the following witness statements:

    i) 3 witness statements of Mihail Iatuha, a partner at Sterling Lawyers Ltd ("Sterling Law"), the Claimant's solicitors. His first statement ("Iatuha 1") was served for the without notice application.

    ii) A witness statement of the Claimant.

    iii) 6 supporting witness statements. These were statements of (i) Aydyn Alimov (the Claimant's brother), (ii) Arman Naurzaliev (Director of KKS Karagandy), (iii) Gulmira Alimova (the Claimant's wife), (iv) Noyan Alimov (the Claimant's son), (v) Sholpan Soyayeva (sole shareholder in KKS Karagandy), (vi) Andrew Wordsworth (Director at Raedas Consulting Ltd, an investigations firm engaged by the Claimant) and (vii) Asset Begaliyev (a former business assistant of the Claimant).

28. The Defendants relied on the following witness statements:

    i) D1/D3:

        a) 4 witness statements of Roberto Moruzzi, a partner at Withers LLP, D1/D3's solicitors.

        b) 3 witness statements of D1.

        c) 2 witness statements of D3

        d) A statement from Vakha Goigov (Head of Operations at D4).

    ii) D2:

a) 2 witness statements of Kasra Nouroozi Shambayati, a partner at Mishcon de Reya LLP, D2's solicitors.

b) 2 witness statements of D2

c) 3 supporting witness statements. These were from (i) Jon Abbas Zaidi and (ii) Elena Kaplunovskaya (both of whom provided some due diligence work for the Claimant in Kazakhstan), and (iii) Karlygash Yezhenova (a journalist in Kazakhstan).

iii) D4 relied on 2 witness statements from Andrea Monks, a partner at Latham & Watkins (London) LLP, D4's solicitors.

29. The expert evidence (for which the court had given permission in advance, for the Claimant in the Dias J Order, and for the Defendants in an order of Butcher J dated 16 November 2023) comprised:

i) Law of Kazakhstan (2 reports from each of the following experts):

a) For the Claimant, Askar Konysbayev (the head of dispute resolution in Kazakhstan at GRATA International, an international law firm).

b) For D1/D3, Professor Farkhad Karagussov (a Professor of Jurisprudence at "Adilet" High School of Law of Caspian University (in Almaty, Kazakhstan) and a practitioner at K&T Partners LLP).

c) For D2, Askar Kaldybayev (a qualified Kazakh lawyer working in the Centre of Corporate and Insolvency Law "Talpyn").

ii) Law of the UAE (1 report from each of the following experts):

a) For the Claimant, Ghassan El Daye (a partner at Charles Russell Speechlys LLP, registered as a legal consultant in the UAE).

b) For D1/D3, Saleh Alobeidli (the managing partner of International Consultant Law Office, a lawyer qualified in the UAE).

c) For D2, Jonathon Davidson (Managing Partner at Davidson & Co Legal Consultants in Dubai, registered as a legal consultant in Dubai).

(There was also before the court a letter from a Luxembourg lawyer, on which as I have mentioned above D2 sought permission to rely.)

Service on D1 within the jurisdiction

30. The Claimant contends that D1 has a residence in England and has been served within the jurisdiction or, alternatively, that D1's residence in the UK provides a basis for permission to serve on D1 out of the jurisdiction. The legal framework within which the two questions arise is different, although the facts and evidence which relate to the questions very largely overlap.

31. The legal contexts in which the questions arise (which were not controversial between the parties) are:

    i) In relation to service within the jurisdiction, the main question is whether D1 was served at his usual or last known residence, under CPR 6.9 (to be addressed as at the time of purported service of the claim form). The Claimant also contended D1 was properly served within the jurisdiction pursuant to section 1141 of the Companies Act 2006. Neither the Claimant nor D1 suggested any additional question arose in relation to service within the jurisdiction.

    ii) In relation to service out of the jurisdiction, the question is whether D1 was domiciled in the UK, which both parties addressed by reference to whether he was resident in the UK, for the purposes of CPR PD6B paragraph 3.1(1) (at the time of issue of the claim form).

32. I will first set out the parties' positions on the evidence as to D1's residence, before moving to the question whether D1 was properly served within the jurisdiction.

The parties' positions and the evidence

33. The Claimant contended that D1 was served, within the jurisdiction, on 11 September 2023 when the claim form was delivered to and left at one of the three addresses identified above. The Claimant maintained that D1 could be, and was, served at one of those addresses because:

    i) In respect of 27 Ingram Avenue and 26 Holne Chase, the Claimant said that one or other of those was D1's "usual or last known residence" for the purposes of CPR 6.9(2).

    ii) In respect of 5A Falkland Road, the Claimant contended that D1 could be served there under section 1141 of the Companies Act 2006 on the basis that he had given that address as a service address.

34. D1, however, contends that, although he was formerly resident in England, that ceased when he moved to Dubai (which D1 says was in September 2021). He therefore says that neither 27 Ingram Avenue nor 26 Holne Chase was his usual or last known residence at the time of service of the claim form in September 2023. He contends that section 1141 of the Companies Act 2006 does not permit service of the claim on him at 5A Falkland Road. That final point, relating to section 1141, gives rise to points of interpretation of the statute, and I will deal with it separately. I will first address the evidence relating to D1's residence, both in terms of country and particular addresses.

35. As to the two residential addresses:

    i) 26 Holne Chase is registered in D1's wife's name. D1 says this was his family home from December 2014, and that he lived there until his move to Dubai (in September 2021), and that his family lived at that address until he says they moved to join him in Dubai (on 4 September 2022).

    ii) 27 Ingram Avenue is owned by a Bahamas trust company, having previously been owned by a Jersey trust company. D1 has denied that he owns the property,

but has not identified who he says is the beneficial owner. D1's case is that his mother lives in this house.

36. The Claimant also pointed out other connections between D1 and 27 Ingram Avenue. These included the fact that D1's wife had submitted a planning permission application for the property in 2015, and it being the address at which D1 and his wife and son received the Claimant, with his wife and son, for the *Iftar* meal on 10 June 2017, describing it to the Claimant in a text message as his "home" (to distinguish it from a restaurant). (The Claimant said that, on that occasion, D1 said he had paid for renovations to the house to the tune of around £10 million and described the renovations to him in detail – D1 denied that he had said such things, and I am in no position on this application to take a view on that).

37. D1's position is that he moved to Dubai in September 2021, and has since obtained a 10-year residence visa for Dubai. He says his family followed him to live in Dubai in September 2022. He says he intends to remain living in Dubai for the remainder of his visa period. However, much of this is based on what D1 himself has said, with little produced by way of documentary support (with the exception of the travel records I refer to below). For example, no copy of the residence visa has been produced; no records for his family members (in terms of residence or travel) have been produced; no other documentary evidence relating to residence in Dubai have been produced (e.g. utility bills; evidence of school attendance by the children; no evidence about whether he has purchased or is renting accommodation).

38. It also became apparent, from investigations undertaken on behalf of the Claimant, that D1 is a British citizen. D1 himself did not volunteer this information, and has not said when he obtained British citizenship. He has not produced a copy of any passport. It appears, from the travel records that have been produced for D1 (see below) that he started to use his current British passport around September 2021, and although D1 said nothing about whether that was his first or a renewed/replacement passport, the Claimant assumed this was his first. D1 formerly had Kazakhstani citizenship, but gave that up in March 2022.

39. D1 has produced some records of his travel over the past few years. These took the form of an "Entry and Exit" report from the immigration authority in Dubai, which recorded his travel in and out of the UAE over the period 2021-2023. These were disclosed in redacted form, so that it was not possible to see where D1 had travelled to or from – only dates of exit from and entry into the UAE. He calculated that he spent around 220 days in the UAE in 2022 and around 250 days in the UAE in 2023. It also appeared that, even though D1 said he moved permanently to Dubai in September 2021, in the period from the start of September to the end of December 2021, he only appears to have spent about 17 days in the UAE. It appears, therefore, that since September 2021, D1 has spent about 40-45% of his time outside the UAE.

40. Those official records do not disclose how long D1 spent in the UK. However, D1 and his solicitors gave some evidence about that. D1 said in his second statement that during 2022 he spent 50-60 days in the UK, and during 2023 15-20 days. His solicitors subsequently looked at his passport records, and have stated that it was 45 days in 2022 and 16 days in 2023 (though, as mentioned, the passport records on which this was based have not been disclosed). D1 also says in his second statement that the only reason he has travelled to London since his move to Dubai was to visit his mother,

although that seems unlikely if it is intended to encompass the period between September 2021 and September 2022, when his wife and children were still living in London. It may be he intended only to refer to the position post September 2022 in saying this, but if so it is redolent of the slightly vague and often uncorroborated manner in which D1 has addressed the question of his residence.

41. Also relevant is what D1 has said, other than in the context of these proceedings, about his residence. This can be seen from a number of declarations made to corporate registries. The filings on which the Claimant placed particular reliance at the hearing were:

    i) A filing in 2022 for D4 in Cyprus which noted the "Last Date of Changes" as 27 June 2022. This identified D1 as a shareholder and gave his address as 26 Holne Chase.

    ii) A filing for MKM GP SARL, registered in Luxembourg, dated 5 April 2022. This gave D1's address as 26 Holne Chase. It also attached MKM GP SARL's constitution, which is dated 25 March 2022, and which identified D1 as the person appearing before the notary for the purpose of drawing up the articles of association (albeit via a proxy), and stated that he was "residing" at 26 Holne Chase (both at that start of the document and under the resolution appointing managers (including D1)).

    iii) A filing for Scalo Technologies Pte Ltd, registered in Singapore. The filing showed details on the register at 16 August 2023, and listed D1 as both a director and shareholder, and gave his address at 26 Holne Chase as well as noting his British nationality.

42. D1 says that most of the filings identified by the Claimant had been completed before he left England in September 2021 and that, since he received permission to stay in Dubai for 10 years, he has not thought about updating them. He says he did not incorporate the companies himself and was not particularly involved in the incorporation process, and that the parties involved in the companies (often, he says, D2, D3 "and others") would employ agents who, he says, "held my information on file so they would often just process the incorporation without my involvement." He recognises that two companies (MKM GP SARL and GDA Sweden AB, which was another company referred to by the Claimant in his evidence) were incorporated after he says he moved to Dubai, but he says he was not involved in incorporation and believes "the relevant agents merely used the information they had on file from previous filings."

43. He does not, however, say he has made any inquiries with the agents in question to ascertain whether or not his belief in this respect is correct, nor whether he has checked records of his communications to see whether he supplied them with details including an address and, if so, when. Moreover, there was no suggestion in the evidence or at the hearing that D1 has sought to change any of these filings, even having been informed about them, to record his residence as in Dubai.

44. D1 also set up, in March 2022, a company in the UK called Mirakhmedov Foundation Limited.

i) This company was incorporated on 9 March 2022, with a proposed registered office address c/o a corporate services provider in Hertfordshire. The Companies Register lists D1 as a Person with Significant Control ("PSC") (noting he held 75% or more of the voting rights and the right to appoint or remove a majority of the board of directors). The listing confirms D1's "Country/State Usually Resident" as the UK, and identifies a services address c/o the same corporate services provider. D1's son (Halil Mirakhmedov) was identified as a director of the company (stating he was usually resident in the UK and giving the same address as a service address).

ii) On 5 May 2023, new address details were filed with Companies House for the registered office, which was now identified as 5A Falkland Road. At the same time, D1's details, as a PSC were updated noting (with a date of change of 1 March 2023) that his service address was the company's registered office. The update also recorded "New Country/State Usually Resident: United Kingdom".

iii) D1 said very little about this company in his evidence, simply noting that he was not a director or company secretary such that, in his understanding, the addresses provided were not formal addresses for the purpose of serving legal proceedings.

45. The statement in relation to the "service address" for D1 in respect of the Mirakhmedov Foundation Limited is relied upon by the Claimant as the basis for its additional argument about service under section 1141 of the Companies Act 2006. I deal with that separately below. But the filings are also relied upon in support of the broader case that D1 continued to reside in the UK post September 2021.

46. I should also note that, insofar as there was evidence on the point, it appears that D1 was in the jurisdiction at the date of purported service (on 11 September 2023). That was suggested by the evidence of what was said to the process server by D1's mother when the claim form was served at 27 Ingram Avenue that D1 "was not in Dubai but was out working". That was consistent with the travel records, which showed him out of the UAE between 20 and 24 September (although the documents D1 had provided in evidence did not identify where he had travelled to). In any event, no point was taken by D1 to the effect that he was out of the jurisdiction at that point in time or, if he had been, that it would have had an effect on the question whether he had been properly served within the jurisdiction.

Was D1 properly served within the jurisdiction?

47. To fulfil the requirements of CPR 6.9, in the case of an individual, service must be effected at the individual's "usual or last known residence". There was no suggestion that 5A Falkland Road was or had been D1's residence and, although in the evidence it had been contended that 27 Ingram Avenue might have been D1's usual or last known residence, by the time of the hearing, the Claimant was placing the emphasis on 26 Holne Chase.

48. That was the address at which D1 had accepted he had been resident until September 2021, and was the address that had been supplied (by him or, at least, on his behalf) as his residence to the various company registries.

49. D1's case is not that he had any other residential address in the UK, but that he had ceased to be resident in the UK at all by the time of the service of the claim form (and indeed of its issue). Whether he had so ceased is therefore the first question to be addressed.

50. Guidance in addressing when, once an individual is resident in the UK, he ceases to be so resident for jurisdiction purposes was set out in ***Shulman v Kolomoisky*** [2018] EWHC 160 (Ch) (Barling J) at paragraph 28:

> "i. The inquiry is a multi- factorial and fact-dependent evaluation, in which all relevant circumstances are considered in order to see what light they throw on the quality of the individual's absence from the UK.
>
> ii. For residence to cease there should be a distinct break in the sense of an alteration in the pattern of the individual's life in the UK.
>
> iii. This may well encompass a substantial loosening of social and family ties, but does not require a severance of such ties.
>
> iv. The individual's intention to cease residing in the jurisdiction is relevant to the inquiry but not determinative.
>
> v. Actions of the individual after the material time (here, the issue of the claim form) may be relevant, if they throw light on the quality of the individual's absence from the UK.
>
> vi. If the individual has in fact ceased to be resident according to the applicable criteria, the fact that his motive for doing so was unworthy or even unlawful will not affect the position.
>
> vii. One should be careful to avoid the risk of over-analysis in applying what are ordinary English words."

51. The issue in that case primarily arose in relation to identifying whether the defendant was resident in England for the purposes of the Brussels/Lugano regime. However, the principles identified remain relevant ones in the current context.

52. Although D1 contended that he had ceased to be resident in the UK in September 2021, the evidence suggests that is not the case. At that point in time, he had no long-term visa to stay in Dubai (which was a reason he gave in his evidence for not, at that stage, changing his contact details e.g. as listed in the various company registers) and so had no certainty that he would, or could, stay there. Moreover, his wife and children remained in London (at 26 Holne Chase) and he clearly spent time visiting them in the UK. Various declarations were made to company registries in this period. This included the details given in relation to the setting up of the Mirakhmedov Foundation Limited, in March 2022, confirming he was resident in the UK. Any suggestion that the incorporating agents were using "old" details without checking with D1 is flawed where there is no suggestion that he had ever used those incorporation agents before (nor indeed any evidence that he had previously incorporated another UK company). He

would have had to confirm his own details. The only conclusion to draw from all of this is that he considered himself still to be resident in the UK (even if also in the process of establishing an additional residence in Dubai) in 2022, at least until he obtained his 10 year residence visa for Dubai and (he says) his family moved to Dubai. I therefore reject his assertion that he had no residence in England after September 2021.

53. The real issue is whether D1 maintained residence in the England after September 2022, by which point he had a 10 year visa to stay in the UAE, and when he says his family moved to Dubai to join him.

i) It is undoubtedly the case that, in 2023, D1 travelled less to the UK than he had in 2022. That was not only D1's own evidence, but it was also evidenced by the (albeit redacted) travel records that were disclosed coupled with the results of the review undertaken by D1's solicitors of the unredacted records and D1's passport.

ii) There was, however, beyond that (and beyond D1's own word) a distinct lack of evidence as to his and his family's move to Dubai and his intentions for the future. One would have supposed it would be relatively easy for D1 to provide documents and other evidence to support his case in this respect. There was, however, no evidence for example as to the property in which D1 and his family live (whether it had been purchased, or was rented and, if rented for what period of time); no evidence in relation to utility bills (so no evidence that D1 and his family are paying for utilities, which might be an indicator of a more permanent set up than if they are renting for a shorter term); no evidence from D1's wife or any other member of his family confirming their move to Dubai and that they intend to stay there; it is said one of D1's sons is working in Dubai, but there is no supporting evidence of that and it is not clear if this is the same son as is director of the Mirakhmedov Foundation Limited (a UK company for which his son has said he is UK resident).

iii) It is difficult, on an application such as this, to disbelieve the evidence in D1's statement that his family have moved to Dubai, and that his children now go to school there – there is no evidence directly contradicting it – but it is surprising that no other evidence has been produced to support it (save for D1's redacted travel records). Whilst, therefore, I proceed on the basis that the family are in Dubai and that the children are now at school there (or, in the case of one son, working there), there is a question mark over the degree of permanence intended by D1 and his family in terms of living in Dubai.

iv) Moreover, the period of time over which to assess any establishment of a new pattern of life on the part of D1 is a short one. The travel records showing D1 travelled to the UK less in 2023 than in 2022 might be the first part of a longer period of less travel to the UK, or it might be a one-off year. There has not been a sufficiently long period of time to test that. Records for 2024 might have assisted in trying to work this out (as noted in ***Shulman*** at point v.) but there was no evidence about that.

v) The filing made with the UK companies registry on 5 May 2023, with "date of change" 1 March 2023, in respect of the Mirakhmedov Foundation confirmed that D1 was usually resident in the UK. This is telling:

a) This is a formal document, which no doubt would have been completed with care. What was striking about the evidence in respect of the filings for this company is that D1 said nothing about what was on the filing in respect of his residence. He simply addressed the "service address" point, saying that he was not a director or company secretary such that his understanding of the legal rules in England was that the addresses given were not formal addresses for the purpose of serving legal proceedings. But the point that had been made in Iatuha 1 was that the filings recorded he was "usually resident" in the UK (in fact, that was the first point made in paragraph 43 of Iatuha 1 which referred to these filings) and it was clear that was something being relied upon by the Claimant.

b) Moreover, in respect of the various other corporate filings (of companies registered in other jurisdictions) the point made by D1 in his second statement was that he was not particularly involved in their incorporation, which were often processed without his involvement (often D2 and D3 being involved) and he believes the incorporation agents simply used information they had on file for him. D1 did not in his evidence make any similar point in respect of the filings concerning the Mirakhmedov Foundation Limited (whether at paragraph 41 of his second statement, where he dealt with that company's filing, or elsewhere). It is also notable that he says nothing about D2 or D3 being involved in these filings in the UK (in fact, he says elsewhere that to his knowledge neither D2 nor D3 have had any business dealings in the UK). If he had not had any involvement in the filing, he presumably would have said so. The inference to be drawn is that D1 was well aware of the fact of the filings and what was being said about him, including that he was resident in the UK, both when that was said on incorporation and when change of details was lodged in May 2023.

c) It appears, therefore, that D1 was entirely content to represent to Companies House that he was resident in the UK, and no reason has been suggested by D1 as to why he would have done that unless he did see himself as resident in the UK.

vi) That is entirely consistent with his having previously stated to various company registries that he was UK resident, and having taken no steps to amend the entries in those registries after he says he moved to Dubai (in September 2021) or when he obtained his 10 year visa. There was no evidence that he has taken any steps to change what is stated about his residence on the various registers (including the UK register) since it was drawn to his attention by the evidence in this case that they all referred to his residence in England. On his account, it is difficult to understand why he would not have done that (and, having done so, why that would not have been prayed in aid in support of his evidence that the filings in other jurisdictions had been completed without his input and using 'old' information).

vii) It is right to say that his travel records indicate that he was in the UK for a shorter total time in 2023 compared to 2022, and that is not surprising in circumstances where his wife and children are said to have moved to join him in Dubai in

September 2022, but that itself is not decisive. As the Court of Appeal in ***Relfo Ltd v Varsani*** [2011] 1 WLR 1402 made clear, residence, still less "usual residence", is not dependent upon a merely quantitative analysis where one merely compares the duration of periods of occupation (see paragraphs 27-30). However, to the extent that conclusions can be drawn about any new settled pattern of life post September 2022, it is clear he continued to regard London as a place where he lived (including because his mother continued to live there) and was content to describe himself as UK resident.

viii) He says that he does not carry out work in the UK, but that sits ill with the fact that he chose to incorporate the Mirakhmedov Foundation in the UK, and to do that *after* he says he moved to Dubai. It is also inconsistent with the evidence of what was said to the process server by D1's mother when the claim form was served at 27 Ingram Avenue (that D1 "was not in Dubai but was out working").

54. Taking all of the above matters into account, it appears to me that, after September 2022, at least up to September 2023, D1 still maintained residence in the UK, as well as establishing himself in Dubai.

55. Given my conclusion that D1 had not ceased to be resident in England by the time the claim form was served, it follows on the evidence that 26 Holne Chase remained his residence. There was no other address at which he said he was resident in the UK. It is not a bar to a finding under CPR 6.9 that an address in the UK is a defendant's "usual residence" when he also has a residence in another country: see ***Relfo*** at paragraph 28. It is possible to have more than one "usual" residence.

56. D1 contends 26 Holne Chase cannot have been D1's "usual or last known residence" at the time of purported service of the claim form because D1's solicitors had told the Claimant, in the response to the letter before action (sent in September 2022), that D1 was no longer resident or domiciled in England.

57. The fact that D1's solicitors asserted that he was no longer resident in England, of course, cannot make it so. However, what D1 relied upon was the fact of his solicitors having asserted that as a giving the Claimant a reason to believe D1 no longer resided at 26 Holne Chase such that the Claimant should have taken steps to ascertain D1's current residence (under CPR 6.9(3)) which, D1 says, the Claimant did not do.

58. It is not entirely obvious to see how that can be an answer to service on a defendant's "usual or last known residence" where the court has concluded (as I have) that the address in question (26 Holne Chase) was the defendant's *usual* residence. It might be thought odd if a defendant was in fact residing at an address, and the fact that his solicitors wrote in advance of service simply saying "we are told he does not live there" meant that he could not be served there without further steps being taken by the claimant. However, I can see that, in those circumstances, it may be that CPR 6.9(3) still requires the claimant to have taken the reasonable steps referred to and (given the findings I have reached) concluded that the defendant does still reside at the address (where he can therefore be served under CPR 6.9(4)). This may be one of the features of the CPR rule 6.9 regime that the court in ***Relfo*** had in mind when referring to "difficulties and obscurities" in the wording.

59. In any event, D1's point does not take him any further on the facts of this case. The Claimant did take further steps sufficient to satisfy CPR 6.9(3), including instructing an inquiry agent to ascertain whether D1 still resided in England at one of the addresses in question. The information the agent turned up included declarations made to corporate registries that D1 resided at 26 Holne Chase, even after the date when his solicitors had said he no longer lived in England, and a declaration made to the UK companies register in May 2023 that he was resident in the UK. They were not able to find any address in Dubai for D1 given in any publicly available documents. That was sufficient for them to conclude that D1 still resided in the UK and at 26 Holne Chase (or, at least, at one of 26 Holne Chase and 27 Ingram Avenue), or alternatively that 26 Holne Chase was D1's last known residence.

60. As a result, service at 26 Holne Chase was service at D1's usual residence within the meaning of CPR 6.9(2). Even if, contrary to that, it was not his usual residence, it was his last known residence. Service on D1 was therefore validly effected within the jurisdiction.

Sections 1140 and 1141 of the Companies Act 2006

61. The Claimant also contended that D1 was validly served with the claim form at 5A Falkland Road, pursuant to section 1141 of the Companies Act 2006. The conclusion I have reached above in relation to service at D1's usual or last known residence means that the question whether service was validly effected when the claim form was delivered to 5A Falkland Road does not affect the position in relation to jurisdiction. However, given the point was argued on both sides, I will set out my views.

62. At the date of purported service of the claim form, insofar as material, section 1140 of the Companies Act 2006 provided as follows:

> "1140 Service of documents on directors, secretaries and others
>
> (1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person's registered address.
>
> (2) This section applies to—
>
> (a) a director or secretary of a company;
>
> …
>
> (3) This section applies whatever the purpose of the document in question.
>
> It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned.
>
> (4) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.

> (5) If notice of a change of that address is given to the registrar, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered.
>
> (6) Service may not be effected by virtue of this section at an address—
>
> (a) if notice has been registered of the termination of the appointment in relation to which the address was registered and the address is not a registered address of the person concerned in relation to any other appointment;
>
> (b) in the case of a person holding any such position as is mentioned in subsection (2)(b), if the overseas company has ceased to have any connection with the United Kingdom by virtue of which it is required to register particulars under section 1046.
>
> (7) Further provision as to service and other matters is made in the company communications provisions (see section 1143).
>
> (8) Nothing in this section shall be read as affecting any enactment or rule of law under which permission is required for service out of the jurisdiction."

63. After the date of purported service in this case, section 1140 was amended to insert subsection (2)(aa):

> "(aa) a person who is a registrable person or a registrable relevant legal entity in relation to a company (within the meanings given by section 790C)".

That brought a PSC within the scope of section 1140. It is common ground that, if subsection (2)(aa) had been in force at the date of service in this case, D1 could have been served at his address registered at Companies House as PSC of Mirakhmedov Foundation Limited.

64. Section 1141 provides as follows:

> "1141 Service addresses
>
> (1) In the Companies Acts a "service address", in relation to a person, means an address at which documents may be effectively served on that person.
>
> (2) The Secretary of State may by regulations specify conditions with which a service address must comply.
>
> (3) Regulations under this section are subject to negative resolution procedure."

65. The Claimant acknowledged that D1 did not fall within the scope of section 1140 at the relevant time and he did not seek to rely on it in his argument. Rather, he said that section 1141 was sufficient for his purposes, or at least was sufficient in conjunction with two other sections that he relied upon, namely (i) section 790K(1)(b), which provides (and did so at the material time) that, as the PSC of Mirakhmedov Foundation, D1 was required to provide a service address, and (ii) section 1142, which states that "Any obligation under the Companies Act to give a person's address is, unless otherwise expressly provided, to give a service address for that person."

66. It is important, however, not to view section 1141 in isolation, but to consider it along with section 1140. It has been confirmed in a series of decisions at first instance that a director of a company, who is resident out of the jurisdiction but who has given an address within the jurisdiction as his "registered address" under section 1140, can be served at that address within the jurisdiction and that no permission to serve the proceedings out of the jurisdiction is required. See ***PJSC Bank v Zhevago*** [2021] EWHC 2522 (Ch) where Flaux C (at paragraphs 46-56) concluded that the decision to that effect in ***Idemia France SAS v Decantur Europe Limited*** [2019] EWHC 946 (Comm) (Richard Salter QC sitting as a Deputy High Court Judge) (and which had been subsequently followed in other cases) was correct. Flaux C concluded (at paragraph 55):

> "The whole point of section 1140 is that where a director has provided a "registered address" in the sense set out in subsection (4), which encompasses the "usual residential address" provided for in Form 288a, and that address is within the jurisdiction, the effect of the section is that the director can be served with proceedings at that address even if he is not physically present within the jurisdiction at the time of service. The position is different if the address given on the Form or in the records held at Companies House is an address outside the jurisdiction. As Master Marsh explained in *Key Homes* that is the situation covered by section 1140(8): if the "service" address provided is outside the jurisdiction, section 1140 cannot be used to effect service and the normal rules requiring permission to serve out of the jurisdiction to be obtained apply"

67. The detailed provisions of section 1140 are important. Section 1140(3) makes it clear that its provisions apply whatever the purpose of the document being served: "It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned." Section 1140(8) expressly preserves, as noted in the citation from ***Zhevago*** above, the need to seek permission to serve out of the jurisdiction if the address given is an address outside the jurisdiction.

68. Section 1140 was described in ***Key Homes Bradford Ltd v Patel*** [2015] 1 BCLC 402 (Master Marsh) (which was relied upon and followed by Richard Salter QC in ***Idemia***) as a "basis for serving a director which is entirely outside the provisions for service in the CPR. It is a parallel code." It was said that by section 1140 "[a] new regime for service of documents on directors was introduced and was intended to have a wide effect."

69. Part of the important context of these decisions is that in ***SSL International Plc v TTK LIG Ltd*** [2011] EWCA Civ 1170, [2021] 1 WLR 1842 (at paragraph 57) Stanley Burnton LJ had identified that: "It is a general principle of the common law that, absent a specific provision, as in the rules for service out of the jurisdiction, the courts only exercise jurisdiction against those subject to, i.e. within the jurisdiction". It was held (in ***Key Homes***, and ***Idemia***, and confirmed in ***Zhevago***) that section 1140 was such a "a specific provision" such that the "general principle" thus identified did not govern.

70. I also note that, at paragraph 126 of ***Idemia***, the Judge noted Master Marsh's reliance on the commentary on clause 747 of the Bill (which eventually became section 1140) as it was going through Parliament:

> "This clause is a new provision. It ensures that the address on the public record for any director or secretary is effective for the service of documents on that person. Sub-section (3) provides that the address is effective even if the document has no bearing on the person's responsibilities as director or secretary."

71. It is against that background that one must consider the Claimant's case in this application, where he contends that he can serve D1 at the address recorded for him at Companies House, even if D1 is resident out of the jurisdiction and even when he does not fall within section 1140, simply in reliance upon the terms of section 1141. In my view, plainly the Claimant cannot rely on section 1141 for that purpose.

i) Section 1141 simply identifies what a "service address" is (namely, an address at which documents may be served on a person) and provides that regulations may be made specifying conditions with which a service address must comply. Regulations have been made: see the Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008 (SI 2008/3000 as amended by SI 2011/1487) which include, at regulation 10, that:

> "For the purposes of section 1141 of the Companies Act 2006 (conditions with which a service address must comply) the conditions are that the service address must be a place where—
>
> (a)the service of documents can be effected by physical delivery; and
>
> (b)the delivery of documents is capable of being recorded by the obtaining of an acknowledgement of delivery."

ii) Section 1141 therefore identifies what a "service address" is, and makes provision for the regulations which specify conditions to be met for an effective service address, but it does not, by itself, create any new or separate rule whereby a person may be served with legal process. Nor does section 790K(1)(b), in requiring a PSC to give a "service address", mean that section 1141 creates such a new or separate rule permitting service of legal process.

iii) The authorities that have considered section 1140, and which have concluded that it may be used to serve a person falling within its scope at a "registered address" within the jurisdiction even when they are resident abroad, have

considered carefully the detailed provisions of section 1140 in coming to the view that it can be used for that purpose. It was intended, as described in the commentary to the Bill set out above, to ensure that the address was effective for the purpose of service, even when the document had no bearing on the role that had led to the inclusion of the registered address on the companies register. That latter intention was expressly spelt out in subsection (3). None of the authorities suggest that the conclusion arrived at would have been possible without reliance on section 1140, and none of them suggest that section 1141 by itself would have been sufficient.

iv) There was inserted at subsection (8) of section 1140 the wording preserving the need to serve out of the jurisdiction where the registered address was outside the jurisdiction. If section 1141 was intended to have the effect for which the Claimant contends, it is difficult to see why similar wording would not have been included in relation to section 1141.

v) If section 1141 did have the effect contended for by the Claimant, it would beg the question why section 1140 was necessary at all. When I asked Mr Samek (who appeared for the Claimant, along with Mr Halban) in argument what, on his interpretation of section 1141, the purpose was of section 1140, he ultimately ended up saying that it might be thought section 1140 is otiose. That cannot have been what Parliament intended.

72. As a result, the Claimant fails to establish that D1 was served by delivery of the claim form to 5A Falkland Road.

Application for permission to serve out of the jurisdiction

73. There was no dispute between the parties that, in order for a claimant to obtain permission to serve a defendant out of the jurisdiction it must satisfy the court that:

i) In relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. the claim has to have a real, as opposed to a fanciful, prospect of success.

ii) There is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which permission to serve out of the jurisdiction may be given. These are set out in paragraph 3.1 of PD6B.

iii) In all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. This is reflected in CPR 6.37(3).

See ***AK Investment CJSC v Kyrgyz Mobil Tel Limited*** [2011] UKPC 7, [2012] 1 WLR 1804 at paragraph 71; ***Brownlie v Four Seasons Holdings Inc*** [2017] UKSC 80, [2018] 1 WLR 192 at paragraph 3.

74. As the Defendants emphasised, the fact that permission was granted on the without notice application is largely irrelevant at the *inter partes* stage. As it is put in Briggs,

Civil Jurisdiction and Judgments (7th ed.) at paragraph 24-04, it "*leaves no footprint*". It is for the Claimant to establish these matters, notwithstanding that it is the Defendants applying to set aside the Dias J Order (see ***Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry*** [2013] EWHC 328 (Comm), [2013] 2 CLC 461, Andrew Smith J at paragraph 10).

Tests for serious issue to be tried and good arguable case

75. As I have noted above, it is for the Claimant to establish that there is a serious issue to be tried, i.e. the claim must have a real, as opposed to a fanciful, prospect of success. That is the summary judgment standard (see Lord Collins in ***AK Investment***, above).

76. In relation to the question whether there is a good arguable case that the claim falls within one or more of the classes of case for which permission to serve out of the jurisdiction may be given that are listed under paragraph 3.1 of CPR PD6B (often referred to as the "gateways"), the position was addressed by Lord Sumption in ***Brownlie*** (above) and in ***Goldman Sachs International v Novo Banco SA*** [2018] UKSC 34. In ***Goldman Sachs***, Lord Sumption explained as follows (at paragraph 9):

> "For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had 'the better of the argument' on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 , para 7, this court reformulated the effect of that test as follows: '(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.' It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

77. The Court of Appeal examined that reformulated test in ***Kaefer Aislamentos SA de CV v AMS Drilling Mexico SA de CV*** [2019] 1 WLR 3514 explaining how it operates in practice, how it relates to the "good arguable case" threshold and how the various limbs interact with the relative test in ***Canada Trust Co v Stolzenberg (No 2)*** [1998] 1 WLR 547 and [2002] 1 AC 1. In his judgment, Green LJ explained:

    i) In relation to limb (i), that the Supreme Court had, at least in part, confirmed the relative test in ***Canada Trust*** (***Kaefer***, paragraphs 73-74). The reference to "a plausible evidential basis" in limb (i) was a reference to "an evidential basis showing that the claimant has the better argument" (but not "much" the better argument). The test is not one of balance of probabilities and is context-specific and flexible. The burden of proof is on the claimant.

ii) Limb (ii) explains how the court is to approach that task, in a context in which evidence may well be incomplete, there has been no disclosure, and witness evidence has not been tested by cross-examination. Limb (ii) is (***Kaefer***, paragraph 78):

> "… an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence"…. It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening up the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem."

iii) Limb (iii) arises where the court is unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument (***Kaefer***, paragraphs 79-80). "To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits."

78. The Defendants sought to characterise use of limb (iii) as exceptional. For my own part, I do not find it particularly helpful to add that to the analysis set out by Green LJ. It is clear that the court should seek (under limb (ii)) to overcome evidential difficulties and arrive at a conclusion if it reliably can, using those tools that are available in the circumstances (as Lord Sumption put it in ***Goldman Sachs*** "the court must take a view on the material available if it can reliably do so" (underlining added)). However, if it cannot reliably do so, then it is into limb (iii). I note that a similar argument was made in ***Hadi Kalo v Bankmed SAL*** [2023] EWHC 2606 (Comm) which was dealt with by Foxton J at paragraph 7:

> "There was some debate between the parties as to the point at which limb (iii) cut in, the Bank, in particular, being keen to depict it as very much an option of last resort. On the face of things, the idea of the court being "unable to form a decided conclusion" on who has the better case on the evidence appears an improbable one – indeed, both sets of legal advisers are likely to have done exactly that. However, the evidence in some cases will be such that reaching a judicial decision on relative merit will be incompatible with the nature of the hearing, and the

> injunction not to conduct a mini trial. Further, the limitations of the material may be such that any decision on relative merit will lack the robustness which a judicial decision of this significance requires. Green LJ referred in his discussion of limb (iii) to Teare J's decision in *Antoni Gramsci Shipping Corp v Recoletos Ltd & Ors* [2012] EWHC 1887 (Comm), [39] and [45], in which he referred to cases where there is "a conflict of evidence which cannot be resolved without appearing to conduct a pre-trial," instancing "a stark dispute between opposing witnesses" in a case where "to seek to judge who has the better of the argument on such evidence risks a pre-trial at the interlocutory stage." Earlier in his judgment, Green LJ had cited Lord Sumption in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, where he described limb (iii) as applying where "no reliable assessment" can be made of relative merit."

79. When considering the questions that arise in relation to the gateways (as with the 'serious issue to be tried' question) the issues should ordinarily be addressed by reference to the pleaded case (see ***Okpabi v Royal Dutch Shell plc*** [2021] UKSC 3, [2021] WLR 1294 at paragraphs 103-105).

Serious issue to be tried – introduction

80. Putting the separate position of D4 to one side, there were two points taken by the Defendants in support of their position that there was no serious issue to be tried in relation to the claim against them. Both related to the question whether there was a contract that bound them:

    i) D1-D3 all contended that the Claimant had no real prospect of succeeding in his case that the oral contract he alleged existed.

    ii) D2 and D3 contended that, even if the contract was made between the Claimant and D1, there was no real prospect that it bound them under the law of Kazakhstan.

81. Those two issues only relate to the contract claims. Mr Samek said that the unjust enrichment claim was not dependent upon the existence of the alleged oral agreement, and there was no argument to the contrary by any of the Defendants. I note also that Mr Samek accepted that, as a result, the unjust enrichment claim did not fall within the contract gateway for jurisdiction purposes.

82. These two issues overlap considerably with the question whether the contract claims fall within the contract gateway for jurisdiction purposes, albeit the test to be applied is different. Given the overlap of evidence and fact (and also, in respect of the authority questions, the law of Kazakhstan) I will deal with these points relating to serious issue to be tried along with the contract gateway issues, below.

Gateway (1) - D1's domicile

83. The first gateway relied upon by the Claimant was that D1 was domiciled in England within CPR PD6B paragraph 3.1(1):

> "(1) A claim is made for a remedy against a person domiciled within the jurisdiction within the meaning of sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982."

84. Section 41 of the Civil Jurisdiction and Judgments Act 1982 states that an individual is domiciled in the UK if (a) the individual is "resident" in the UK and (b) "the nature and circumstances of his residence indicate that he has a substantial connection" to the UK. Where an individual is resident in the UK and has been so resident for the last three months or more, a "substantial connection" is presumed unless the contrary is proven: section 41(6).

85. I have already considered the evidence relating to D1's residence, and have concluded (in the context of the question whether he was properly served within the jurisdiction) that he was resident in the jurisdiction at the time of service. The result is that the issue as to whether permission to serve him out of the jurisdiction should have been granted is redundant. In any event, the answer to the question whether D1 was resident in the UK, for the purposes of the service out application, at the time of issue of the claim form (nothing material having taken place in this respect between issue and the date of purported service) follows from my findings and conclusion above – he was so resident (and, therefore on the facts of this case, domiciled). In fact, the position is, if anything, *a fortiori* given that the determination of residence for the purposes of the service out application does not require identification of a specific "usual" or "last known" address within the terms of CPR 6.9. In other words, even if my approach to CPR 6.9 in paragraphs 55-60 above was not correct, the findings in paragraphs 52-54 above are sufficient to demonstrate, to the required standard of good arguable case, that D1 was resident within the jurisdiction at the time of issue of the claim form.

86. As a result, the claims fall within gateway (1) as regards D1.

Gateway (3) - necessary or proper party

87. CPR PD6B paragraph 3.1(3) applies where:

> "(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

88. In relation to this gateway, I bear in mind the need to exercise caution in its application, given its "anomalous nature": see ***AK Investment*** at paragraph 73 and the endorsement there of what was said by Lloyd LJ in ***The Goldean Mariner*** [1990] 2 Lloyd's Rep 215 at 222:

> "I agree … that caution must always be exercised in bringing foreign defendants within our jurisdiction under [the necessary or proper party gateway]. It must never become the practice to

> bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction."

89. However, when considering the position of D2 and D3 and the nature of the claims against them (where they are alleged to be joint parties to the same agreement as D1 and jointly liable to the Claimant), there can be no real suggestion that they are not proper parties to the claim against D1 if there is a serious issue to be tried against them. Neither D2 nor D3 sought to contend to the contrary.

Gateway (6) – claim made in respect of a contract made within the jurisdiction

90. CPR PD6B paragraph 3.1(6) applies where:

> "(6) A claim is made in respect of a contract where the contract –
>
> (a) was (i) made within the jurisdiction …"

91. I will deal first with the issue relating to whether the alleged oral agreement was made, before moving to questions relating to whether D2 and D3 were bound to it.

The alleged oral agreement

92. The question whether the Claimant had a good arguable case that his claim was based on a contract made in the jurisdiction was one that was hotly contested, the particular issue in question being whether there was an oral agreement (made in London) as alleged by the Claimant. Much of the evidence served for the applications went to this point.

93. The question of whether a contract was formed is governed by the putative law of the contract – here, the law of Kazakhstan. (If there was a contract made, the question of *where* it was made for the purposes of the contract gateway is governed by English law (see below at paragraph 121), although given that the alleged contract here was an oral contract made face to face in London, there was no separate dispute about that). However, neither party sought to deploy any particular issue of the law of Kazakhstan for this purpose. Whilst it is clear that the parties do join issue on certain aspects of the law of Kazakhstan relating to oral contracts (which is something I come back to in relation to appropriate forum, below) the Defendants did not seek to advance any argument that there was no serious issue to be tried, or good arguable case, going to the existence or validity of the oral agreement based upon such a point. For the purpose of serious issue to be tried, and for the gateway question, the point was argued by reference to the facts and to what extent, on the facts, it could be said that the alleged contract had been made. I explain below the main points taken by the parties that go to that issue.

94. As set out above, the Claimant's case is that he made an oral contract with D1 (who he alleges was also acting on behalf of D2 and D3) on 10 June 2017 in a discussion at 27 Ingram Avenue, around the *Iftar* meal that they and their respective families had met to share. The Claimant says that this was the conclusion of a series of prior discussions

between the Claimant and D1-D3, the prior discussions having taken place in Kazakhstan in May 2017.

95. It is not in dispute that the Claimant, with his wife and son, attended the *Iftar* meal with D1, and his family, at 27 Ingram Avenue on the evening of 10 June 2017. It is also not in dispute that, after the meal, D1 and the Claimant, with their respective sons, travelled to a mosque for Tarawih prayers. However, that is effectively the limit of the common ground.

i) The Claimant says he and his family arrived at 27 Ingram Avenue at around 8.40pm. D1 says it was around 9.15pm. Neither has any record to substantiate their recollection in this respect.

ii) The Claimant says after he arrived, he and D1 had a discussion separate to their family members, punctuated by their joining their families to eat. During that separate discussion (before and after the food) the Claimant says they reached the agreement. D1, however, says once the Claimant and his family had arrived, there was a short, light meal, followed by evening prayers, then returning to the table for the main meal; he says it was purely a social occasion, and that no business at all was discussed. In addition, he says that "*it is considered inappropriate to discuss business on a religious occasion such as Iftar.*"

iii) The Claimant says they left the house at about 10.50pm to go to the mosque. D1 had originally recalled they had left for the mosque at about 9.55pm, but subsequently found the relevant Uber receipt showing they had in fact left at about 10.15pm. D1 contends that the (on his account) single hour would not have been sufficient for the *Iftar* meal and the discussions/agreement that the Claimant contends took place. The Claimant, of course, contends he arrived earlier and that there was time.

iv) After prayers at the mosque, they agree they walked together towards the Claimant's hotel (D1 says he would not have been able to get a taxi from immediately outside the mosque). The Claimant contends they reviewed the points of their agreement as they walked; D1 says no business was discussed.

v) The Claimant also served witness statements from his wife and his son supporting his account of events, including each of them saying that at the end of the evening, once they were on their own, the Claimant told them that he had "*become a business partner of [D1] in the bitcoin mining project and he had been offered a good share in the venture*".[1]

96. In relation to the allegations about the meeting on 10 June 2017, the Defendants draw attention to, and rely upon, the changing nature of the Claimant's story in this respect, in particular that no mention was made at all of the meeting in the Claimant's letter before action. I have already referred to this, and other similar points, at paragraphs 13-14 above.

[1] The quotation is from the Claimant's son's statement (which was made in English), but the equivalent part of the English translation of the Claimant's wife's statement (made in Russian) is in almost identical terms.

97. The Claimant also relied upon certain documents and communications, all from the period after the date he says the agreement was made, which he contends support his account but in respect of which there are substantial disputes:

i) On 23 July 2017, D3 emailed the Claimant a document listing project assets and expenses, which the Claimant contended referred to "Y. Alimov's facility" as an asset of the GM JV valued at $16 million. The Claimant says that this referred to Stal and the ABK Buildings, being his assets he was contributing to the alleged joint venture, thus recognising his contribution (albeit he recognises the $16m as an overstatement of value). D3 disputes this and gives a detailed explanation saying that this refers to a different power station – Ridderskaya – which the Claimant did not own but which he recommended to them (hence the description "Y. Alimov's facility") and that the purpose of the table was to run profitability figures for this potential site.

ii) On 10 August 2017, Mr Goigov, an employee of D1-D3, sent by WhatsApp to the Claimant a spreadsheet of income and expenditure for the GM JV ("the August 2017 spreadsheet"). That included entries for the income of the "KZ [Kazakh] side" of the GM JV (i.e. D1-D3) of around $16.6m (half of the total JV profit). That was followed by an entry for "Income of KZ partner (EA)" of around $5.8m. "EA" are the Claimant's initials in Russian, and that figure is exactly 35% of D1-D3's figure.

a) The Claimant contended this matched his case that it had been agreed he would be entitled to 35% of the bitcoin received by D1-D3.

b) The Defendants dispute the authenticity of this spreadsheet. Although the telephone number from which the WhatsApp message appears to have been sent has been confirmed by Mr Goigov as his number, Mr Goigov said in a witness statement served for these applications that he did not recognise the message or the document said to be attached to it. He said he did not recall communicating via WhatsApp with the Claimant at all, although he had spoken with him a few times on the phone. He has not been able to check whether such a message was sent because he has changed his phone since 2017, has been using a different number since 2018, and does not have access to historical messages.

c) The Defendants alleged that the spreadsheet had been amended by (or on behalf of) the Claimant, from a document that D3 had emailed to him (which was very similar), and that the line referring to "Income of KZ partner (EA)" had been added.

d) The Claimant's solicitors have confirmed that they have inspected the original WhatsApp message on the Claimant's phone, which attaches the spreadsheet in the form exhibited by the Claimant. However, neither the Claimant nor the Defendants have sought to engage any IT or forensic document expert in relation to this.

iii) The Claimant says that he chased D1-D3 for when the corporate structure would be created and when he would receive his shares. He refers to Telegram

messages (which he says were sent on 16 February 2018) that he received from D3 in the following terms (in translation):[2]

> "Besides, brother, we are all undocumented anywhere, you can see yourself, we are not hiding anything from you. Do you really think that one of us is going to cheat you?"
>
> "Brother, this is not HIS [i.e. D1's] deal, this is our deal. I think that his proposals were great, he pays for everything in full no matter what, we're becoming shareholders, it is possible to find anywhere people with such a broad SOUL nowadays?"

The Claimant contended that the reference to "we're becoming shareholders" was a reference to the represented process of establishing D4, leading the Claimant to think that the alleged London Agreement was being performed. D3 contended in response that the reference to "shareholders" was only to D1-D3, and not also to the Claimant, and said the wider context of the messages was important to show that these messages were sent in response to the Claimant's chasing for payment, and not in the context of any shareholding he was claimant.

98. The Claimant also relies on what he says was part performance of the London Agreement by way of payments which D1-D3 accept they made to him by way of bitcoin in a sum equivalent to around US $1.7 million in the period January to August 2018 (the exact sum appears to be disputed – the Claimant puts the figure at US$1.69 million; the Defendants at about US$1.75 (D3 said it was US$1,756,650)). The Claimant contends that these payments were part of his 35% share of the bitcoin received by D1-D3, and that the payments received for the first months totalled exactly 35%. The Defendants deny that calculation, saying it has been carefully constructed so that the amount matches what the Claimant says is 35%, but that in fact if the calculation is done properly it would be 9.8%. The Claimant also draws attention to spreadsheets later given to him (via other individuals including his brother), which he says were drawn up by D3, calculating a 35% share for a later period, but says he was then paid a lower figure. D3 however says he does not recognise the spreadsheets in question, which are not in a style or format he would normally use.

99. For their part, the Defendants have advanced in their evidence an explanation for the facts they admit (including the payments of bitcoin to the Claimant). They say that they did have an arrangement with the Claimant (though not necessarily a binding agreement) that he would act as some kind of "broker" or "middle man" in relation to finding and acquiring property, in relation to which he was entitled to a commission. D2, for example, says that D1-D3 were looking for sites for their bitcoin mining business, and the Claimant introduced them to a number of potential sites, of which they ended up purchasing Stal and the ABK Buildings. D2 says that, in return for his introductions, the Claimant requested that a fair market value was paid for the assets, as well as a commission fee paid to him in bitcoin to the value of US$1.75 million. D2 says "*I am not sure how Mr Alimov decided on this figure, and we never negotiated it*

[2] Initially, there were competing translations of these messages. The quotation here is from a translation relied upon by D3 in his first statement which the Claimant, in his (subsequent) statement was content to adopt for these purposes.

with him" though he said they stipulated that the payment was "*to be made dependent upon the cashflow position of the business and based on its profitability*".

100. This account, in turn, is disputed by the Claimant, who points out what he says are certain difficulties with it, including:

i) The Claimant's evidence is that he was the beneficial owner of KKS Karagandy and decisions of the company were taken on his instructions, which he says is inconsistent with the idea he was a "broker" or "intermediary" in relation to the sale of the properties he owned. Other witnesses who provided statements for the Claimant supported that, including Mr Naurzaliev (the director of KKS Karagandy) and Ms Soyayeva (said to be the nominee shareholder of KKS Karagandy).

ii) The Claimant points to D2's evidence saying that the defendants just accepted the figure of US$1.75m that the Claimant had proposed as his "commission" without any negotiation. He says it is simply unrealistic, from a commercial point of view, that the defendants would not have sought to negotiate the figure.

iii) The Claimant also notes that the figure for "commission" of US$1.75m was almost double the entire sale price of the assets as recorded in the sale agreements, which (in US$ equivalents) were $159,000 for Stal and $855,000 for the ABK Buildings. He says it does not make sense that a broker or intermediary would be paid not only more than the value of the asset sold, but almost double the sale price.

101. As for the transfer of Stal and the ABK Buildings, the Defendants say they were sold at market value, which was the price recorded on the sale agreements for the properties. They say it was an arms' length sale, in respect of which the Claimant received a commission. The Claimant, on the other hand, says that is not correct, and that the price identified on the sale contracts was simply the "nominal book value" and that the "sales" were really a transfer of the properties to the joint venture by way of his contribution to it, as per the agreement he said had been reached. The Claimant sought to support his position with evidence from Mr Naurzaliev, Ms Soyayeva and his brother, Aydyn Alimov.[3]

102. To support the Defendants' position, it was suggested by D3 that KKS Karagandy had only purchased Stal and ABK Buildings relatively recently (in either February 2017 or January 2018), and then sold them on, consistent with his role as an intermediary. However, the Claimant says that he was also the 90% beneficial owner of the company that sold the assets to KKS Karagandy, namely Temirshi LLP, such that he was already effectively the beneficial owner of the assets.

103. How the potential sale of Stal and the ABK Buildings to Hua Tun fit in is also a source of dispute between the parties.

i) The Defendants contend that the Claimant's case about the alleged agreement having been made on 10 June 2017 is inconsistent with the fact that on 13 June

[3] Aydyn Alimov describes himself as "*mainly [the Claimant's] junior partner or hired manager, depending on the business venture I was involved in with him*".

2017, KKS Karagandy signed a contract with Hua Tun to sell Stal and the ABK Buildings (along with the Vtorprom Factory) to Hua Tun. (This was an agreement described in the Claimant's letter before action as "a preliminary agreement"). They say if the Claimant had thought he had made the agreement he now contends for on 10 June (which included potentially contributing Stal and the ABK Buildings to the joint venture), he would not have agreed to sell the assets to Hua Tun only 3 days later.

ii) The Claimant responds to this by saying that there had been an earlier written agreement with Hua Tun on 12 March 2017 (although it had not been referred to or identified in his letter before action), under which KKS Karagandy was late in transferring the assets such that there was a risk of collapse of the sale to Hua Tun, and that KKS Karagandy signed the 13 June agreement with Hua Tun to "keep the sale alive" knowing that if he ended up needing to transfer Stal and the ABK Buildings to the joint venture, he could always seek to renegotiate with Hua Tun to exclude them from that sale.[4]

iii) The Defendants in turn challenge the authenticity of the alleged 12 March 2017 agreement, and rely on a letter said to be from Hua Tun denying the existence of that agreement.

iv) In response, the Claimant served a witness statement from one of his employees, Mr Begaliev, who produced email correspondence with Hua Tun's representative in Kazakhstan and its Chinese lawyer, showing amendments to travelling drafts of the agreement and a final draft along with emails confirming the date of a signing meeting.

104. The Defendants also rely on a number of oddities they say arise from what the Claimant says was agreed. These include:

i) The alleged agreement included the Claimant ensuring that the price of the electricity generated for the joint venture would be not more than (what he pleads as "*a cheap rate of*") US$0.04 per kWh and that he would receive (in addition to the shares and bitcoins) a sum being the difference between US$0.04 per kWh and the actual price at which electricity was obtained for the joint venture. In his witness statement the Claimant says he "guaranteed to [D1]" rates of around US$0.024 and US$0.027. The Defendants, however, point to the fact that, as part of discussions just a few months before, Mr Begaliev had informed Hua Tun that it was not possible to guarantee cheap electricity prices and there could be no clause in the proposed sale agreement to Hua Tun guaranteeing it, because that was a matter for the "*TPP (Thermal Power Plant) and the Agency on the Regulation of Natural Monopolies.*" This is in general terms consistent with D1's evidence that energy power rates are set by the "*Committee on Regulation of natural Monopolies of the Ministry of National Economy of the Republic of Kazakhstan.*"

[4] There is also a side dispute about what the Claimant says had to be offered to Hua Tun's local representatives in Kazakhstan in order to get them to persuade Hua Tun to release KKS Karagandy from its obligation to sell Stal and the ABK Buildings to Hua Tun. The Claimant says he gave them a residential property and two Mercedes-Benz S500s and that D2 agreed to reimburse him for that, which D2 denies.

ii) The fact that, under the alleged agreement, the Claimant would receive the same by way of payments (being 35% of D1-D3's shares, 35% of the bitcoin received by D1-D3 before the corporate vehicle was established, and the differential relating to the electricity price referred to above) whether he satisfied his obligation by (i) finding suitable power stations for D1-D3 to purchase (including introduction and negotiations), or by (ii) himself transferring ownership of Stal and the ABK Buildings. On its face, (ii) would have been a good deal more costly to the Claimant than (i).

105. The Defendants also say it is inherently unlikely that an agreement of such potential significance and intricacy as that alleged by the Claimant would have been made orally, in such brief discussions. They also rely upon the fact that the Claimant did not seek to memorialise in writing the terms of the agreement he alleges was made, even for his own purposes as an *aide memoire*.[5] The Claimant countered this in his witness statement by referring to what he describes as a "common understanding" in Kazakhstan "especially amongst 'old-school' businessmen, … that a deal is conducted on a gentleman's agreement without any written contracts in place." He also says that there was no need for any more lengthy discussion, because the details had been previously discussed at meetings that had taken place in Kazakhstan.

106. A notable feature of the submissions at the hearing was that each side spent most of their time when dealing with this issue in seeking to rubbish the other side's account of the facts, and very little seeking to explain how their own account fitted with the documentary record (such as it was).

107. I have set out, above, the main points taken by the parties in relation to the factual question whether the alleged oral agreement was made. My description of their positions is not intended to be a comprehensive digest of every one of the points made by the parties, in their evidence and their submissions, on this issue, which were very numerous (although I have considered all of the points in coming to my decision).

108. However, what is clear even from the above material, is that this is not a case which is suitable for a summary judgment type determination. To seek to resolve the disputes between the parties about whether or not an oral agreement was made, as alleged, would entail conducting what is sometimes referred to as a mini-trial, and would involve the court in an assessment of directly conflicting evidence against an inconsistent documentary background. That is not an appropriate exercise on a summary judgment application, and nor is it when assessing the "serious issue to be tried" question as it arises in an application to serve out of the jurisdiction.

109. There are certain apparent difficulties or oddities about the Claimant's case, not least (i) the changing nature of it between the letter before action and the Particulars of Claim, (ii) the fact that a detailed oral agreement is said to have been reached in a relatively short discussion around a family /social /religious occasion, and (iii) the signing of a sale agreement with Hua Tun just three days after the alleged oral agreement is said to have been made. However, none of them are decisive, and the Claimant has tendered

[5] The Defendants also referred to what was said by Popplewell J in ***Edgeworth Capital (Luxembourg) SARL v Aabar Investments PJS*** [2018] EWHC 1627 (Comm) at paragraph 34, that the absence of a contemporaneous written record by those with business experience may count heavily against the existence of an oral contract.

explanations which cannot be rejected out of hand. Moreover, the Defendants' explanations for the reason why the Claimant was paid the bitcoin he was paid (namely, "commission" on the property sales) themselves have their difficulties. There are also a number of documents relied upon by the Claimant which, on their face, support his case – including the August 2017 Spreadsheet (noting "Income of KZ partner (EA)" at 35% of the figure for D1-D3). I entirely take the point that the Defendants do not accept the authenticity of that spreadsheet, but in light of the evidence that has been given to the court about it, on this application I am not in a position to reject the Claimant's reliance upon it. Other documents that, on their face, support his case include the 23 July email (referring to "Y. Alimov's facility" as an asset of the joint venture) and the reference to "*we're becoming shareholders*" in D3's Telegram message. The Defendants do not agree with the construction put on those documents, but the Claimant's position in relation to them is not one that can be sensibly rejected without further exploration of the background which is not possible on an application such as this.

110. As a result, I cannot conclude that there is no serious issue to be tried in relation to the question whether an oral agreement was made as alleged by the Claimant.

111. The issue also arises in the context of the contract gateway, where the question is whether the Claimant has a good arguable case on this issue.

112. I have set out the authorities which identify the legal approach above at paragraphs 76-78. What was described as the first limb in ***Kaefer*** is to ask whether there is an evidential basis showing that the claimant has the better argument: a relative test. What was described as the second limb instructs the court to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. The first question, therefore, is whether I can reliably arrive at a conclusion as to who has the better argument on this issue. In my view, in the circumstances of this case, I cannot do so, even using "judicial common sense and pragmatism" as suggested by Green LJ in ***Kaefer***. My reasons for having reached that conclusion are:

i) It would involve preferring one of the Claimant's and D1's evidence regarding the content of the discussion at the 10 June 2017 meeting over the other, in circumstances where there is little (or no) independent or (uncontested) documentary evidence to shine a light on who is more likely to be correct. This would involve considering the credibility of each of them, which would pull in a potentially wide variety of other matters bearing upon that credibility. It would also involve considering the credibility of the evidence given by the Claimant's son and wife, again without any documentary context for any sort of guide.

ii) It would involve taking a view on the authenticity of at least some of the documents in relation to which questions as to authenticity have been raised. In particular, the August 2017 Spreadsheet, which on its face supports the Claimant's case, but the individual said to have sent it says he never sent the Claimant a WhatsApp, and the Defendants say the spreadsheet has been amended from another one previously sent to the Claimant. Another example is the alleged 12 March 2017 agreement between KKS Karagandy and Hua Tun, which the Claimant deploys to counter the point that his case on the oral agreement is undermined by the 13 June 2017 agreement with Hua Tun, but which again is the subject of a challenge to authenticity and the parties have

produced conflicting evidence (including, for the Defendants, a letter from Hua Tun denying its existence, and for the Claimant a witness statement exhibiting email correspondence appearing to show travelling drafts and arranging a signing meeting).

iii) It would involve taking a view on matters going to the question whether the alleged oral agreement was commercially realistic in the absence of evidence which (as at least the Defendants suggested) would be required to resolve the matter at trial e.g. expert evidence as to the regulation of the electricity market in Kazakhstan, which is said to be required to deal with the point whether the parties could ever have agreed on certain prices for electricity.

iv) It would involve an assessment of whether the sale prices of Stal and the ABK Buildings were market prices (as contended by the Defendants) or "nominal book values" (as contended by the Claimants). Counsel for D1 and D3 suggested at the hearing that expert evidence as to land valuation in Kazakhstan would be required in relation to this at trial, but that is not available on this application.

v) There are other factual issues between the parties (as I have identified in setting out their respective positions, above) on which a view may also need to be taken. I have not sought to identify each and every one, but those I have identified above seem to me to be ones that would need to be resolved but which, on an application such as this, cannot be.

113. In other words, this is one of those cases that it seems to me Foxton J had in mind in ***Hadi Kalo v Bankmed SAL*** (above) when he said that "the evidence in some cases will be such that reaching a judicial decision on relative merit will be incompatible with the nature of the hearing, and the injunction not to conduct a mini trial. Further, the limitations of the material may be such that any decision on relative merit will lack the robustness which a judicial decision of this significance requires." He went on to cite Green LJ's reference in ***Kaefer*** to Teare J's decision in ***Antoni Gramsci Shipping Corp v Recoletos Ltd & Ors*** [2012] EWHC 1887 (Comm), [39] and [45], in which he referred to cases where there is "a conflict of evidence which cannot be resolved without appearing to conduct a pre-trial," instancing "a stark dispute between opposing witnesses" in a case where "to seek to judge who has the better of the argument on such evidence risks a pre-trial at the interlocutory stage." Those references are apt to describe the situation here. This is not an issue where a reliable assessment can be made of relative merit.

114. As a result, resort must be had to limb (iii), which was explained by Lord Sumption in ***Goldman Sachs*** in this way: "there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

115. On the material before the court on these applications, there is a plausible evidential basis for the Claimant's contention that the oral agreement he alleges was made in London. In particular the key points are:

i) The Claimant's own evidence (along with that of his wife and son, albeit that only amounts to hearsay) supports his case. Whilst there may be some material on which to doubt his account, on which he would no doubt be cross-examined at trial (including but not limited to the relatively short opportunity it appears

there was for the discussion that he alleges, the points the Defendants noted as commercial oddities of his alleged agreement, and the changing nature of his case between the letter before action and the Particulars of Claim), those potential difficulties do not justify rejecting his evidence at this stage.

ii) His account is supported by some documents, at least on their face, and on this application (as I have already said above) I cannot go behind what those documents appear to be and say. The August 2017 Spreadsheet is plausible supporting evidence, as are the 23 July 2017 email from D3 and D3's Telegram messages. Those pieces of evidence may or may not survive trial as supporting material but, as I have already said, I cannot take a view on those matters on this application.

iii) The fact that the Claimant was paid substantial amounts of bitcoin, which appear to reflect what he says was his entitlement under the alleged oral agreement in the period January to August 2018, supports his account. The Defendants put forward a different explanation (which is not without its own difficulties), but I cannot determine who is right about that on this application. The payment of the bitcoin is plausible evidence supporting the Claimant's position.

iv) There is also the other evidence, which I have referred to above, which the Claimant relies upon in support of various parts of his case (and to seek to undermine the Defendants' case), which is not capable of rejection at this stage and which therefore also supports, at this stage, the plausibility of his case.

116. As a result, the third limb of the test in ***Goldman Sachs*** is here satisfied, and I conclude that the Claimant has a good arguable case that his claim in relation to the contract he alleges falls within the contract gateway.

Authority

117. An additional point taken by D2 and D3 was that, even if the Claimant had entered into the oral agreement he alleged he had made with D1, that cannot have been an agreement with D2 or D3 due to D1's lack of authority to contract on their behalf. The result, contend D2 and D3, is that there is no serious issue to be tried against them in relation to the contract claims and/or there is no good arguable case that the claims against them based on contract fall within gateway (6).

118. The manner in which it is pleaded in the Particulars of Claim that D2 and D3 were parties to the alleged oral agreement is as follows:

i) At paragraph 2, it is pleaded: "At all material times (save where pleaded to the contrary) each of [D1, D2 and D3] acted jointly, such that each acted for and on behalf of himself and also at the same time as the agent of the others, …". The Claimant referred to them throughout the Particulars of Claim as a single unit termed "MMK", pleading that "such references include any one or two of them acting on behalf of all three".

ii) At paragraph 27, it is pleaded that D1 "acting on behalf of MMK" reached the "London Agreement".

119. D2 and D3 contend that the issue whether they are bound to the alleged contract is one that is governed by the law of Kazakhstan and that, under the law of Kazakhstan, in order for D1 to have bound D2 and D3, it would have been necessary for D2 and D3 to have granted D1 a power of attorney. They point out that there is no pleading or evidence of any power of attorney, such that the claim against them based on the agreement is fatally flawed.

120. The Claimant's position was:

    i) The issue was governed by English law, not the law of Kazakhstan, although this was not a point that was pursued in Mr Samek's oral submissions.

    ii) Under the law of Kazakhstan, a power of attorney is not the only route to finding actual authority. It could also be found in the context or environment of the transaction (this was a point raised for the first time at the hearing).

    iii) In any event, ratification was available under the law of Kazakhstan, which he sought permission part way through the hearing to amend to plead.

121. In relation to the first point, I consider Mr Samek was right not to pursue it. It is the Claimant's case that if the contract was made it was governed by the law of Kazakhstan (and, indeed, there was no dispute about that). As set out at Dicey, Morris & Collins, The Conflict of Laws, Rule 223(1): "*The issue whether the agent is able to bind the principal to a contract with a third party, or a term of that contract, is governed by the law which would govern that contract, or term, if the agent's authority were established.*" (The other system of law which might bear on the question is that governing the relationship between the principal and agent (here, D1 and D2/D3), but if anything that also appears likely to point to the law of Kazakhstan, and certainly not to English law). The Claimant's initial point that the issue was governed by English law was based upon Dicey, Morris & Collins, paragraphs 11-150 and 11-151. However, those paragraphs deal with the issue of *where* a contract is made (for the purposes of Gateway 6(a)), not whether it was made or the identification of the parties to it. The issue of whether there is a contract for the purposes of the gateway is determined by reference to the rules of English private international law (***Amin Rasheed Shipping Corp v Kuwait insurance*** [1984] AC 50; see e.g. Briggs, Civil Jurisdiction and Judgments (7th ed.) at page 503). Here, as was agreed, those rules point to the law of Kazakhstan.

122. The question, therefore, is what is required under the law of Kazakhstan to bind D2 and D3 to the alleged oral agreement. The parties were agreed that the relevant provision is Article 163 of the Code, which states:

> "1. A transaction made by one person (representative) on behalf of another person (represented) by virtue of an authorisation based on a power of attorney, legislation, court decision or administrative act directly creates, changes and terminates civil rights and obligations of the represented.
>
> The authority may also be evident from the environment in which the representative acts (retail salesman, cashier, etc.).

> 2. Under a transaction performed by a representative, rights and obligations arise directly with the represented."

123. In the expert evidence of the law of Kazakhstan that was placed before the court on the without notice application (the First Report of Mr Konysbayev) there was no evidence about how D1 might have had authority to bind D2 or D3 to any contract. Iatuha 1 stated (without reference to any particular system of law) that the Claimant had a good arguable case that D1 was acting on behalf of D2 and D3 "given that (a) they were in business together since 2015 …, and (b) Mr Mirakhmedov was the most important of the three of them. Thus it [sic] Mr Makhat and Mr Kim would likely follow his directions and would be bound to a contract which he made with Mr Alimov concerning the GM JV (their joint project)."

124. The point on lack of authority was taken in the Defendants' evidence in support of the application to set aside the Dias J Order. The statements of both D2 and D3 made it clear that D1 was not authorised to reach any agreement with the Claimant on either of their behalves and D2 said that a power of attorney would have been required for that purpose (and also that such a requirement was "common knowledge amongst experienced Kazakh businessmen").

125. This was supported by the expert report of Mr Kaldybayev (for D2), where having set out the terms of Article 163, Mr Kaldybayev stated:

> "Therefore, unless authority is evident from the environment in which the representative acts (like in the examples given in the Article), only an authorised representative according to a power of attorney, legislation, court decision or administrative act may conclude contracts on behalf of someone else (the represented party)."

126. He also drew attention to Article 167(1), which provides:

> "1. A power of attorney is a written authorisation of one person (the principal) to act on his behalf, issued by him to another person (the attorney)."

He followed this with an explanatory paragraph in similar terms to the one I have already set out:

> "It is the existence of a written power of attorney that determines a person's ability to act as a representative of another person, unless the powers of a representative are derived from legislation, a court decision or an administrative act, or are evident from the environment in which the representative acts."

127. Professor Karagussov's report dealt with this issue in less detail, simply saying the position was covered by Articles 163-171, which meant that for D1 to have been able to bind D2 and D3 to the alleged oral agreement, a power of attorney was required.

128. A response on the law of Kazakhstan was given on behalf of the Claimant by way of the second report of Mr Konysbayev. He recorded the position taken by Mr

Kaldybayev, summarising the latter's position thus: "…he says that a person may create rights and obligations for another only by power of attorney, by a court decision, by an administrative act or where permitted by legislation." Mr Konysbayev, notably, did not refer to authority being evident "from the environment", even by way of description of what Mr Kaldybayev had said. Mr Konysbayev then said nothing himself about the requirements of Article 163 but instead referred only to Article 165 of the Code, which provides an equivalent to ratification as follows (in the translation supplied by Mr Kaldybayev):

> "A transaction made on behalf of another person by an individual not authorized to make the transaction, or exceeding their authority, creates, alters, and terminates civil rights and obligations for the represented party only if they subsequently approve the transaction. Subsequent approval by the represented party makes the transaction valid from the moment it was made."

129. Mr Konysbayev then stated that commentaries expressed the view that the necessary "approval" might be "evidenced in any form, including accepting goods or making payments, among other actions." He referred to two cases seeking to support that view.

130. Iatuha 3 cross-referred to Mr Konysbayev's evidence about subsequent approval, and also said that:

> "As to showing that Mr Makhat and Mr Kim are parties to the London Agreement, Mr Alimov sets out the evidential basis to show that Mr Makhat and Mr Kim were bound by the agreement because Mr Mirakhmedov was acting on their behalf, as their business partner, they treated Mr Alimov as a partner and Mr Kim even referred to "our partners" (referring to GM) in message to Mr Alimov."

131. However, there was no attempt in Iatuha 3 to rely upon the sentence of Article 163 relied upon by Mr Samek at the hearing.[6]

132. In his reply report, Mr Kaldybayev agreed that "approval" might be in any form, and also added that in his view "a Kazakh court would not find that there had been approval/ratification of an agreement unless it was clear that the person approving/ratifying knew what they were approving/ratifying, knew that the possibility of approving/ratifying the agreement in question existed and knew the consequences of approval/ratification, and did something that clearly and unambiguously showed that they were approving/ratifying the precise agreement that is alleged to have been made."

133. In the Claimant's skeleton argument, the only points that were taken were i) the point about governing law, which was not pursued orally and which I have dealt with above,

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[6] Indeed, in another paragraph of Iatuha 3, the distinct impression was given that the answer in the law of Kazakhstan to the Defendants' point about the requirement of a power of attorney was only the ratification point: "100. … As [Mr Konysbayev] explained in his second report, he disagrees that the only way a party can be bound to an agreement entered into by another is through a power of attorney: he points out that, under the [sic] Article 165 of the Civil Code, a party can also be bound by their later approval of the transaction and that approval can be evidenced in any form, including by conduct."

and ii) an argument on ratification based on Mr Konysbayev's second report. There was no attempt to support any authority case based upon Article 163.

134. However, in his oral submissions, Mr Samek sought to make a case which had not previously been foreshadowed, based on the second part of Article 163.1 i.e. the words "The authority may also be evident from the environment in which the representative acts (retail salesman, cashier, etc.)."

135. This was not a point that had been made by Mr Konysbayev, who had not given any evidence about that particular sentence of Article 163 at all or even averted to its existence. Mr Samek, however, referred to Mr Kaldybayev's report, in which Article 163 was set out, and to what Mr Kaldybayev said about it, as I have set out above. Mr Samek said, referring to the examples given in Article 163.1 (namely, "retail salesman, cashier, etc") that it covered situations where it was obvious there was authority, and he described it as authority that was "implied" or "to be inferred". He said the Claimant's case was that D1-D3 were "all in it together in the project" and that D1's authority to bind D2 and D3 was "evident from the particular environment in which [D1] was acting in this case, specifically including in London when the agreement was made."

136. This was a somewhat unsatisfactory basis to advance the point. The point that D1 had no authority to bind D2 or D3 was clearly taken in the evidence in support of the application to set aside the Dias J Order. Nowhere in the evidence filed by the Claimant, whether on the without notice application, or in response to the Defendants' evidence, was it suggested that D1's authority was to be found in this sentence from Article 163. There was no reliance on this part of the Article by Mr Konysbayev, and he gave no opinion of the types of situation (besides "retail salesman" and "cashier") that might fall within these words, nor whether there was any authority or commentary that bore upon or assisted with their interpretation. As I have said, the Claimant gave no notice that it was going to rely upon this point before Mr Samek's oral submissions.

137. As I have noted, this point arises in the context of the question whether there is a serious issue to be tried and whether the Claimant has shown he has a good arguable case. In both situations, the Claimant bears the burden of showing that the requisite standard has been met.

138. In my view, the Claimant has not demonstrated that there is a serious issue to be tried on this point under the law of Kazakhstan, still less that he has a good arguable case in relation to it. In relation to the latter, this is not a point on which there are conflicts in the evidence which cannot be resolved such that resort must be had to the third limb of the test in ***Goldman Sachs***. On the contrary, as I have noted, there is very little evidence, in terms of the law of Kazakhstan, on this point at all.

139. Given (i) that the Claimant and his expert did not address this provision at all in the evidence, and (ii) that the Claimant gave no notice of his reliance on the point to the Defendants, such that their experts did not have the opportunity specifically to address it in respect of the facts of this case in their evidence, the only argument Mr Samek was able to make was based on the words of the article (as translated into English) and to say that applied to the situation at hand. However, in my view, on the basis of the evidence adduced on this application, the Claimant does not have a real prospect of success on that point (still less the better of the argument):

i) The Claimant's expert on the law of Kazakhstan has not given any evidence about this provision at all. In particular, he did not give any evidence about what sort of situations might be caught by the words in question ("evident from the environment in which the representative acts") nor whether the words in parentheses ("retail salesman, cashier, etc") should be read as identifying the types of "environment" that would satisfy the rule or were examples from a wider category that might stretch to scenarios that were factually distant. There was no evidence of any case law or commentary that suggested how to interpret these words.

ii) Mr Konysbayev had an opportunity to do so. The authority point was put squarely in issue by the defendants in their evidence in support of the set aside application. Article 163 was set out by Mr Kaldybayev. Professor Karagussov said (at paragraph 195): "These rules require, in order for [D1] to have been able to bind [D3] and [D2] to the alleged "London Agreement", [D3] and [D2] to have provided a written power of attorney." It was clear that the case against the Claimant was that a power of attorney was required (and in addition D2 made clear that was his position at paragraph 37(b) of his statement). Mr Konysbayev put in a second report, explaining in paragraph 1 that he had been asked to comment on and reply to those two reports, and saying he disagreed with some views of each of them "for the reasons stated below". In the section of his second report responding to Professor Karagussov, he said nothing about paragraph 195 at all. In responding to Mr Kaldybayev, as I have set out above, he referred to what Mr Kaldybayev had said (without any reference to the "based on the environment" point) and said nothing about Article 163, instead moving on to deal with Article 165 and ratification. (Nor was anything said by Mr Samek at the hearing to suggest that his client's expert would have more to say about this if the point went to trial or that there was otherwise any further material that might bear on it).

iii) If Mr Konysbayev, or those acting for the Claimant in these proceedings, had contemplated that the words now relied upon by Mr Samek might have supplied authority under the law of Kazakhstan, it is very difficult to understand why nothing was said about it. The inference to be drawn is that Mr Konysbayev did not consider they were applicable.

iv) The upshot is that none of the three experts in the law of Kazakhstan who have given reports have suggested that the words now relied upon by Mr Samek might cover the situation that is alleged by the Claimant to have led to the oral agreement here.

v) In the absence of any expert evidence about these provisions, Mr Samek made his own points on what he said the words meant, and that "the environment" covered D1 acting in London when the alleged agreement was made. However, the words relied on in Article 163 are not, on their face, apt to cover the situation in this case, in particular given the examples set out as to the type of situation in which such authority would arise. It is readily understandable that a retail salesman or cashier must be taken to have the authority of the business (whether that is an individual, a company or another type of legal entity) within whose "environment" they are acting. However, the situation in this case is very far from that type of example.

vi) It is not only the words themselves which fall to be considered, however, but also the fact that the Claimant has engaged an expert in the law of Kazakhstan to deal with the issues that arise, including the issue of how D2 and D3 came to be bound to the alleged oral agreement, and that in addressing that issue, he has placed no weight at all on the words Mr Samek now identifies. To put it another way, if Mr Konysbayev had considered there was a real prospect of these words applying as the basis for authority in this case, he surely would have said so.

vii) Mr Samek's argument was put very shortly – it was, as I have noted above, that D1-D3 "are all in it together in the project", that D1 was the "main player" with authority to bind them all, and that his authority is "evident from the particular environment in which [D1] was acting in this case, specifically including in London when the agreement was made." However, it was far from clear what was meant in this submission by reference to "the environment" as it appears in Article 163. Nothing was said by Mr Samek to seek to explain that (no doubt because he would have found difficulty in doing so in the absence of any assistance from his client's expert on this issue).

viii) In determining this issue, I am not deciding anything about the allegations of fact made by the Claimant, but only whether the fact pattern that he alleges falls within the rule of Kazakhstan law identified by Mr Samek (even though not by the Claimant's expert in Kazakhstan law). So, for example, the fact that the Claimant alleges that D1 told him on 10 June 2017 that he was acting on behalf of "*all brothers*" (said to be a reference to D2 and D3) does not change the analysis. Even assuming that was said, it does not turn the situation here into a "retail salesman" type of example (a retail salesmen's authority is evident from the environment in which he/she sells, not from any oral confirmation from the salesman of his/her authority) absent any expert evidence explaining that.

140. As a result, on the current material (which is just the words of Article 163 coupled with the fact that no expert, in particular the claimant's expert, has suggested the words in question apply to this situation) the Claimant has no real prospect of success. The situation is not equivalent or analogous to the "retail salesman" or "cashier" examples given in the Article, and no attempt has been made to explain what elements of "the environment" are relied upon such that that factual scenario in this case falls within the article. Moreover, as I have noted, even if I had held there was a real prospect of success, I would not have held that the Claimant had the better of the argument on the current material – he plainly does not.

Ratification

141. The Claimant also sought to advance a case based upon ratification, contending that even if D1 had not had authority from D2 and D3 to enter into the alleged agreement at the time it was entered into, D2 and D3 later ratified the agreement under Article 165 of the Code.

142. As I have already mentioned, this was first raised in the evidence served on behalf of the Claimant in response to the applications to set aside the Dias J order. Mr Konysbayev explained that the necessary "approval" might be "evidenced in any form, including accepting goods or making payments, among other actions." Iatuha 3, having

cross-referred to that evidence, stated that "Mr Makhat and Mr Kim's conduct showed that they approved the contract, and performed it, and so they were bound by it."

143. As also mentioned above, in his reply report, Mr Kaldybayev agreed that "approval" might be in any form, and also added his view about some level of knowledge being required. (Professor Karagussov did not say anything about this in his reply report.) However, in his evidence in reply, D2 said he did not understand what conduct was being relied upon by way of approval and what was said to amount to performance. His solicitor, Mr Shambayati, in his reply statement also suggested that what had been said by the Claimant was too vague.

144. There was no plea of ratification in the Particulars of Claim. The plea of the basis that D2 and D3 were bound to the agreement was, as I have set out above, that D1-D3 acted jointly, each acting for and on behalf of himself and the others and that when he reached the alleged oral agreement, D1 was acting on behalf of all 3 (referred to as "MMK"). Although there was a faint suggestion by Mr Samek that this encompassed a plea of ratification, it seems to me that cannot be right. The words of the Particulars of Claim do not talk of ratification at all. Also, Article 165 (dealing with ratification) applies where a transaction is "made on behalf of another person by an individual not authorized to make the transaction, or exceeding their authority …". In other words, Article 167 is an alternative case to authority under Article 163 such that one cannot just "read in" to the general pleas of "acting on behalf of" some form of additional or alternative case of ratification (as seemed to be suggested).

145. Although Mr Samek did not formally concede the pleading point, he appeared to recognise its force, because part way through his oral submissions he sought to make an application to amend the Particulars of Claim to plead a positive case of ratification. This started (towards the end of the morning on the second day of the 2 day hearing) with an attempt to explain a proposed amendment orally, which was then postponed until a proposed draft one paragraph amendment was handed up at 2pm that day.

146. The text of the amendment sought to be made was:

> "New para. 29A.
>
> If (which is denied) Mr Mirakhmedov [D1] did not have authority from Mr Kim [D3] and Mr Makhat [D2] to conclude the London Agreement on their behalf pursuant to Art 163 of the Kazakhstan Civil Code, then Mr Kim and Mr Makhat subsequently approved or ratified the London Agreement so that, pursuant to Art 165 of the Kazakhstan Civil Code, it was valid as against them and they were bound by it from the time it was made on 10 June 2017. Mr Alimov [the Claimant] relies on the following matters as constituting such approval or ratification: i) the request made, in or around December 2017 or January 2018, of Mr Alimov by Mr Makhat and Mr Kim to transfer Stal and the ABK Buildings, as pleaded in paragraph 39 below; ii) the payments of Bitcoin made to Mr Alimov by Mr Kim on behalf of himself, Mr Makhat and Mr Mirakhmedov, as pleaded in paragraph 43 below; iii) the message from Mr Kim dated 16 February 2018 as pleaded in paragraph 50 below."

147. Mr Samek emphasised that the particulars given in the proposed new paragraph did not seek to introduce new matters, because they cross-referred to points that were already pleaded elsewhere in the Particulars of Claim, that he was not seeking to introduce new parties or a new cause of action, that the matters in the proposed amendment indicated there was a real prospect of success in showing that D2 and D3 were approving the alleged oral agreement, and that (he said) the defendants would suffer no prejudice from the amendment.

148. In response, Mr Kitchener (who appeared for D2 with Mr Caplan):

i) Relied upon what was said by Asplin LJ in ***Elite Property Holdings Ltd v Barclays Bank plc*** [2019] EWCA Civ 204 at paragraph 40 that "the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost."

ii) Pointed to the fact that questions about how D2's alleged liability was said to have arisen and what the case on agency was were not new ones. In particular, he placed reliance upon:

a) The fact that the point was taken in Mishcon de Reya's response (dated 23 September 2022) to the letter before action that the grouping of D1-D3 together and treating them as a single unit (as "MMK") was embarrassing and led to incoherent claims being advanced where it could not be worked out how claims against each of the individuals was said to have arisen.

b) D2's second statement (served in reply, dated 9 September 2024), which noted that Mr Iatuha's third statement (served in response to the set aside application) had suggested that D2 was bound to the alleged agreement because his subsequent conduct had "approved" and "performed" it, and said that appeared to be a fundamentally different case from that which he had understood was advanced against him (based on D1's authority to enter into the agreement on his behalf) and that he did not understand what was said to amount to "approval" or "performance".

iii) Relied upon the evidence of Mr Kaldybayev in his second report (where he responded to what Mr Konysbayev said about ratification under the law of Kazakhstan), in particular where he said:

> "…in my view a Kazakh court would not find that there had been approval/ratification of an agreement unless it was clear that the person approving/ratifying knew what they were approving/ratifying, knew that the possibility of approving/ratifying the agreement in question existed and knew the consequences of approval/ratification, and did something that clearly and unambiguously showed that they were approving/ratifying the precise agreement that is alleged to have been made."

Mr Kitchener noted that no further report was put in from Mr Konysbayev seeking to take issue with that, nor was any indication otherwise given that this

was not an accurate reflection of the law of Kazakhstan. He also pointed out that the draft amendment made no effort to address matters of knowledge.

iv) In terms of the particulars provided with the draft, he suggested only the first of them directly involved D2, dealing with the transfer of buildings, and he pointed out that was not an act unambiguously approving the alleged agreement given it was common ground that the Defendants were buying the buildings. He said there was not sufficient evidence of what constituted sufficient "approval" under the law of Kazakhstan in order to be able to test whether the pleaded particulars would be sufficient. In addition, the fact that the draft amendment had been produced so late had given the Defendants no opportunity to show those particulars to their own experts to identify whether or not they were sufficient or whether they otherwise might create potential issues under the law of Kazakhstan.

v) He also referred to the fact that there may be limitation issues that arose under the law of Kazakhstan but that, due to the lack of notice of the application to amend, there had not been an opportunity to look into those or how that might impact the position in relation to amendment.

vi) As a matter of discretion, he pointed not only to the lateness of the application, but also to the fact that, even though the issue about properly identifying the basis upon which D2 was said to be liable had been raised in the Mishcon de Reya letter of 23 September 2022, nothing was said on the without notice application seeking to deal with that.

149. Mr Cumming (appearing for D1/D3) also emphasised that the lateness of the application had deprived the Defendants of the opportunity properly to consider the points that were sought to be advanced by the amendment and that, whilst it could be rejected, it ought not therefore to be permitted at this hearing.

150. Having considered the parties' respective positions, including all of the points set out above, I take the view that I should permit the proposed amendment and allow the Claimant to run a case on ratification under Article 165 for the purposes of these applications. The key reasons for this are:

i) The Claimant's reliance on Article 165 and the concept of approval/ratification was flagged in the evidence served on 28 June 2024 in response to the set aside applications. The Defendants had an opportunity to consider and deal with it in their reply evidence, including by way of reply evidence on the law of Kazakhstan. Indeed, Mr Kaldybayev did deal with it. The Defendants emphasised that the application was made extremely late, and with no prior notice. In terms of the terms of the draft put forward, that is right. However, as I have noted, the reliance upon ratification was flagged some months earlier. This was not something that came entirely out of the blue.

ii) It is right to say that, in the Claimant's evidence in response, there was no identification of particular acts that were going to be relied upon to support the case of approval under Article 165. However, Mr Iatuha's evidence was clear (if fairly general) that D2 and D3's conduct in approving and performing the alleged agreement would be relied upon, and the inference was that this would

encompass what had been alleged in the Particulars of Claim as to their conduct in performing the alleged oral agreement.

iii) The lateness of the appearance of the draft was not a source of real prejudice to the Defendants. The particulars contained in the draft amendment were all points that were already pleaded in the Particulars of Claim. Although those particular paragraphs had not specifically previously been identified in the context of a ratification plea, it ought to have been reasonably apparent to the Defendants that it was those points (and/or any other similar points in the Particulars of Claim) that would be prayed in aid of the ratification argument.

iv) It is right to say that the draft amendment contains no plea of knowledge on behalf of D2 and D3 in any of the respects that Mr Kaldybayev suggested in his second report would be required for a Kazakh court to find ratification. However:

a) Mr Kaldybayev's evidence in this respect was not entirely categoric. He recognised that Article 165 did not set out any specific conditions and requirements for approval/ratification, and went on to say that in his view, a Kazakh court would not find approval/ratification unless there was knowledge in the various respects he identified. However, he did not refer to any cases or commentary or other authority to support that. He also did not include any further reasoning to support it – simply stating that was his view. This was notable because, in the previous paragraph, he had referred to two commentaries which had stated that "approval" may be in any form, neither of which appear to have addressed any specific knowledge requirement.

b) There was no further round of expert evidence after that report, with the result that it is difficult to have confidence in what, if any, requirement of knowledge exists in the law of Kazakhstan in order to constitute "approval" under Article 165.

c) In any event, although not spelled out in the draft amendment, it is clear from the existing paragraphs in the pleading to which the draft amendment makes cross-reference that it is alleged that D2 and D3 knew about the alleged oral agreement. For example, the allegation in paragraph 39 of the Particulars of Claim is that D2 and D3 requested the transfer of Stal and the ABK Buildings to Prima pending the establishment of the corporate vehicle referred to in the express terms of the alleged oral agreement. If (as is alleged) the request was in those terms, it includes an allegation that D2 and D3 knew about the alleged oral agreement.

d) Whilst, therefore, this issue could perhaps have been more comprehensively addressed through the expert evidence, and could have been the subject of a clearer draft pleading, I cannot say on this basis that the plea has no real prospect of success.

v) As to the point that only one of the particulars directly involves D2 and that, said Mr Kitchener, did not constitute an unambiguous approval of the alleged

oral agreement, that is not a reason not to allow the amendment. There is a factual dispute as to whether the buildings were transferred pursuant to the alleged oral agreement (as the Claimant alleges) or as a stand-alone sales contract (with commission payment to the Claimant, as the Defendants allege). I cannot resolve that on these applications and I have already held that the Claimant's account generally has a real prospect of success. That is sufficient at this stage.

vi) The Defendants say they would have liked to show the draft amendments to their respective experts in the law of Kazakhstan to discover if their particular formulation gave rise to particular points of the law of Kazakhstan that they might want to pray in aid. I have no doubt that they would have liked to show them to their respective experts, however given the very general terms in which Article 165 had been addressed by the experts thus far, it is far from clear whether any specific points would have arisen. Mr Kaldybayev's evidence was that "approval" of an agreement could be in any form, whether written or oral or in the form of conduct. Apart from what he went on to say about knowledge, he did not suggest there was any other particular aspect of the law of Kazakhstan that would confine what could constitute ratification or would otherwise bear upon it. As I say, it was clear that ratification under Article 165 was a point that was going to be taken by the Claimant, and the Defendants had had an opportunity for their experts to address it.

vii) The point made that there may have been limitation issues suffers from the same problem. If there were any such limitation issues, I would have expected the Defendants to be alive to them, given that it had been clearly set out some time ago that ratification was the (or at least a) basis on which the Claimant would be dealing with the "lack of authority" issue (albeit there was no formulated pleading of it until the hearing). However, the Defendants did not advance any particular submission in relation to limitation, and Mr Kitchener accepted the amendment did not introduce a new claim.

viii) Mr Cumming also made a point that one part of the proposed new pleading did appear to be new, namely the suggestion that the payments of bitcoin made to the Claimant had been made by D3 (on behalf of D1-D3), whereas the paragraph of the Particulars of Claim to which it cross-referred said that "*in partial performance of the London Agreement by MMK, Mr Alimov received some of the bitcoin…*". In other words, the pleading had not previously alleged that the payment had been made by D3 on behalf of D1-D3 (as opposed to "by MMK"). This point goes nowhere. There was no dispute that the payment was made by D3 (paragraph 71 of Moruzzi 1, served on behalf of D1, expressly said as much) or that it was made on behalf of D1-D3 (albeit the Defendants' case is that it was a commission payment, not a payment under the alleged oral agreement).

ix) Mr Samek was right to suggest that his client would suffer prejudice were the amendment application not permitted because the Claimant then could not bring the claim against D2 and D3. Whilst to some extent that might be said to be a problem of the Claimant's, and his legal representatives', own making, that does not seem to me to be a complete answer, given that ratification as an issue had been flagged in the response evidence.

151. In summary, therefore, the amendment has a real prospect of success, and its lateness is not a reason why the Claimant should not be permitted to make it. As a result, I would permit the amendment for the purpose of this application.

152. That leads to the question whether the Claimant has a good arguable case in relation to his ratification argument. Similarly to consideration of this issue in relation to the question whether the alleged oral agreement was made at all, I cannot reliably arrive at a conclusion as to who has the better argument on this issue given the factual disputes that permeate here. Of the three particulars given in the draft amendment said to amount to approval or ratification: the first would require a view to be taken on whether the buildings were transferred pursuant to the alleged oral agreement or not; the second a view to be taken on whether the payments of bitcoin made to the claimant were transferred pursuant to the alleged oral agreement or rather pursuant to the alleged commission arrangement; the third a view to be taken on the correct interpretation of the Telegram messages from D3 to the Claimant, including what the reference to "we are becoming shareholders" meant. Those are all disputes which are central to the factual merits of the case, and are all intertwined with each other and with the issue whether the alleged oral agreement was made at all. As I have already set out, those are not issues on which I can reliably arrive at a view as to who has the better argument at this stage.

153. As a result, the question is whether (under limb (iii) of ***Goldman Sachs***) there is a plausible (albeit contested) evidential basis for the ratification case. In my view, there is such a basis. That follows from what I have said above, as well as my conclusions in relation to the same question arising in the context whether the alleged oral agreement was made. The basis for the case on ratification exists in Kazakhstan law under Article 165. There is a plausible basis to say that the particulars given supporting approval or ratification would fulfil the requirements of Article 165, and there is a plausible evidential basis for the factual allegations supporting those particulars. The Claimant therefore has a good arguable case against D2 and D3 in relation to his contract claims.

154. As a result, the Claimant's claims in contract against D2 and D3 demonstrate a serious issue to be tried and are sufficient for the purposes of gateway (6).

Appropriate forum

155. There are two contexts in this case in which the issue of appropriate forum arises. First, on the application by D1 for a stay of the proceedings against him on the ground of *forum non conveniens*, and second on the application to set aside the Dias J Order for service out of the jurisdiction, in which the Claimant must demonstrate that England is the proper place to bring the claims. In the former case, the burden is on the defendant to show that there is another available forum which is clearly and distinctly more appropriate. In the latter case, the burden is on the Claimant to show that England is clearly the appropriate forum.

156. As is well known, Lord Goff in ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460 identified (in relation to a stay application) the two stages of the test at 476C – 478E:

> "(a) 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 for the interests of all the parties and the ends of justice.

(b) … in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. … [i]f the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which just requires that the trial should nevertheless take place in this country (see (f) below).

(c) … the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. …

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors … indicating that justice can be done in the other forum at "substantially less inconvenience or expense"… [I]t may be more desirable … to adopt the expression … the "natural forum" as being "that with which the action had the most real and substantial connection". So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience and expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction … and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay;

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; … on this inquiry, the burden of proof shifts to the plaintiff."

157. The first stage requires the defendant to establish that there is another available forum which is clearly or distinctly more appropriate than England. Here, therefore, the burden is on D1 to establish that in respect of Kazakhstan. If D1 is able to establish that, then the burden shifts to the Claimant, under what is sometimes referred to as stage 2, to show that there are circumstances by reason of which justice requires a stay should not be granted.

158. For the purposes of the service out applications (which fall to be addressed in relation to D2, D3 and D4 in any event, and which would fall to be addressed in relation to D1 if (contrary to the above) I had concluded D1 could not be, or had not properly been, served within the jurisdiction) the burden is on the Claimant under both limbs (including to show that England is the proper place to bring the claim: CPR 6.37(3)).

159. In both types of service case, the question for the Court ultimately is to identify "the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice": ***Spiliada*** (above) at 480G; ***Vedanta*** (above) at paragraphs 66, 68.

160. In relation to stage 2, where the contention made by the Claimant (as it is in this case) is that there is a real risk that he would not obtain justice in the foreign forum (here, Kazakhstan), it is necessary to distinguish between (a) mere differences in the procedural systems of the two jurisdictions, which will not suffice, and (b) a real risk of substantial injustice to the claimant, which will overcome the prima facie case for a stay (see Dicey, Morris & Collins at paragraph 12-041).

161. It is not necessary for the Claimant to demonstrate on the balance of probabilities that justice will not be done in the foreign jurisdiction, it is sufficient to show that there is a real risk that justice will not be obtained there: ***AK Investment*** at paragraphs 94-95 (though, as Lord Collins there noted, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances).

162. In ***Vedanta***, Lord Briggs said at paragraph 88:

> "If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice."

163. However, caution must be exercised before deciding there is a real risk that justice would not be done in the foreign forum, and cogent evidence is required. See Lord Collins in ***AK Investment*** at paragraph 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."

A claimant making this sort of point must assert it "candidly and support his allegations with positive and cogent evidence": ***The Abidin Daver*** [1984] AC 398 at 411C-D.

164. In ***Dynasty Co for Oil and Gas Trading Ltd v Kurdistan Regional Government of Iraq*** [2022] QB 246, Butcher J considered what was required (see paragraphs 173-177), including:

> "175. I was also referred by both sides to, and found helpful, the commentary of Professor Briggs in Civil Jurisdiction and Judgments. At para 4.30, in relation to the second stage of the Spiliada test, he says:
>
> > "What is required of the claimant is that he establish, by clear and cogent evidence, the grounds on which he says it would be unjust to leave him to go to a foreign court. An English court will not proceed on the basis of whisper or suggestion, and it will not be at all receptive to a general disparaging of a foreign court's procedure. Despite the occasional surprising decision, it is only rarely that the strong presumption of a stay will be rebutted on these grounds."

165. It is not sufficient for the Claimant simply to say that the foreign system is different and may provide a different outcome. Lord Goff in ***Spiliada*** (at 482B-D) made it clear, in considering how to treat "a legitimate personal or juridical advantage", that "the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive." And:

> "…an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach…".

166. Lord Goff underlined this in ***Connelly v RTZ Corporation plc*** [1998] AC 854 at 872G-873A:

> "…if a clearly more appropriate forum overseas has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. The same must apply to the system of court procedure, including the rules of evidence, applicable in the foreign forum. This may display many features which distinguish it from ours, and which English lawyers might think render it less advantageous to the plaintiff. Such a result may in particular be true of those jurisdictions, of which there are many in the world, which are smaller than our own, and are in consequence lacking in financial resources compared with our own. But that is not of itself enough to refuse a stay. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay…".

167. Thus, in ***Scott v Walker*** [2024] EWHC 636 (Ch), Adam Johnson J at paragraph 56 said:

> "It is not enough to say that the foreign system of law is different, and may provide a different outcome; or that the applicable procedure will be different, and may provide (for example) for more limited or more expansive rules on discovery, as the case may be."

168. There is therefore no necessary equivalence between risk of losing in the foreign jurisdiction and risk of injustice. As noted in Dicey, Morris & Collins at paragraph 12-043:

> "…if the claimant argues that he will win if permitted to sue in England, but will lose if compelled to sue in a foreign court, there is no justification for a presumption that a claimant is entitled to win or that a defendant must be found to be liable."

Similarly, Briggs, Civil Jurisdiction and Judgments (at paragraph 22-23):

> "…a claimant who can, in essence, say no more than that he may win in England but will lose if forced to go overseas has not done enough to satisfy the court that England is the proper place to bring the claim."

169. The claim is brought against D1-D3 jointly, and it would be impractical in the circumstances of this case to assess the factors relevant to this exercise separately in respect of D1, on the hand, and D2/D3, on the other, simply because the appropriate forum issue arises in relation to the claims against them in different contexts, and with a different burden of proof. Indeed, no party suggested that such an approach should be adopted. In a case such as this, the court must look holistically at the issue of appropriate forum for both the stay application and the service out application, whilst keeping well in mind the different burdens of proof that apply.

Available and appropriate forum

170. Here, the matters connecting this dispute with Kazakhstan are numerous and significant:

i) The claims are all pursued (and only pursued) under the law of Kazakhstan.

a) Whilst in some cases, this may be a factor of less weight, here it is an important factor. It is clear, even from the expert evidence on the law of Kazakhstan served in relation to the issues that arise on these applications, that there is much disagreement between the parties' respective experts, e.g. the characterisation of a key rule about the admissibility of witness testimony as one of substance or procedure under the law of Kazakhstan; whether the alleged oral agreement is an agreement on joint activities (under Article 228 of the Code) such that the relationship between the Claimant and D1-D3 constitutes an ordinary partnership under the law of Kazakhstan (as alleged by the Claimant); and what the necessary elements are of a claim to unjust enrichment in the law of Kazakhstan (including whether it is necessary for the Claimant

to prove that the Defendants did not have any legal right to possess any of the property in question).

b) One such issue is the question whether the alleged oral agreement would constitute a "*foreign economic transaction*" under articles 1084 and 1104 of the Code, such that it would be void insofar as not made in writing. Mr Karugussov (D1/D3's expert) says it would constitute such a transaction (something with which D2's expert largely agreed, though being careful not to give a view on the facts); Mr Konysbayev (the Claimant's expert) says not. It will obviously to have be resolved at trial, which is likely to be a particularly difficult issue in circumstances where Mr Konysbayev states that "*Kazakh judicial practice lacks a definition of a 'foreign economic transaction' …*".

c) This is not a case where issues arising under Kazakh law are likely to be peripheral or might not affect the ultimate outcome. They are central.

d) The Commercial Court is, of course, well used to determining issues of foreign law, and there are well-known cases where the law of Kazakhstan has been in issue, but that does not nullify foreign law as a factor, in particular where the issues that arise under the foreign law appear to be ones that have not previously been determined in the courts of the relevant forum (here, Kazakhstan): see in particular the point above about there being no definition of a "foreign economic transaction" in Kazakh judicial practice. The point made by Cockerill J in ***VTB Commodities Trading v JSC Antipinsky Refinery*** [2021] EWHC 1758 (Comm) at paragraph 201 is relevant here:

> "…it is a particularly unappealing prospect to ask a judge of this Court to express a view as to an area where Russian law appears to be hotly contentious and indeed in the process of development. This is the more so when any appeal from a decision on Russian law here would be impeded by being a decision on facts and expert evidence, where the Court of Appeal is very unlikely to interfere, whereas in Russia the full appeals process would be available."

(See also ***PJSC Bank "Finance and Credit" v Zhevago*** [2021] EWHC 2522 (Ch) (Flaux C) citing and endorsing this at paragraphs 82 and 141).

e) It is generally preferable (other things being equal) that a case should be tried in the country whose law applies, and that factor is of particular force where issues of law are likely to be important and where there are relevant differences in the legal principles or rules applicable to those issues in the two countries in contention as appropriate forum (***VTB v Nutritek*** at paragraph 46). Here, therefore, where the legal issues are complex and where it is not a case of the substantive laws of England and Wales being substantially similar to those of the governing law, the general principle that another court will apply its own law more reliably

than a foreign court is a weighty factor that points in favour of the courts of Kazakhstan.

ii) The Claimant and the three individual defendants all have substantial connections to Kazakhstan.

a) The Claimant lived in Kazakhstan until (on his account) August 2018, having been a "leading specialist in the energy sector" there (as he pleads at paragraph 1 of his Particulars of Claim), which included being the head of AstanaEnergoServis JSC, the public holding company which owned all of the power companies in Astana, and of Karaganda EnergoTsentr LLP, a private energy company which owned a power station and provided energy to the city of Karaganda. It is right that he currently resides in England, but his website confirms that he sees his future in Kazakhstan. It refers to the fact that he is currently studying a 2-year master's program at a UK university and that he "*plans to return to Kazakhstan after completing his studies and improving his knowledge and skills in the field of investments and venture capital. With knowledge and experience in the energy sector, he believes in the progressive development of the national economy.*"

b) The Particulars of Claim pleads that the three individual defendants "*are also businessmen of Kazakh origin*" (in fact D1 was born in Uzbekistan, but subsequently developed roots in Kazakhstan and has substantial business interests there). They all have substantial economic and business interests in Kazakhstan.

c) The fact that (as I have held) D1 is resident in the UK and has been served as of right within the jurisdiction is a connecting factor to England. However as I have also noted, whilst I have found D1 maintained residence in England, he is also living in the UAE and the likely position is that he is resident is both places.

d) The alternative claim in unjust enrichment is brought by the Claimant, as assignee of the claim of a Kazakhstan company, KKS Karagandy.

iii) Almost all of the events relevant to this dispute took place in Kazakhstan.

a) They concern the development of a bitcoin-mining project in Kazakhstan.

b) The events involve individuals almost all of whom were resident in Kazakhstan at the material times. Of the individual parties, D1 was no longer resident in Kazakhstan by the time the alleged oral agreement was made, but he nonetheless still had substantial business interests in Kazakhstan and spent time there (indeed, the Claimant alleges it was in Kazakhstan that he first met with D1, along with D2 and D3, in connection with the bitcoin mining project).

c) The allegations involve a number of meetings in Kazakhstan. In his statement, the Claimant described the discussions he had had with D2

and D3 in Kazakhstan (before the alleged oral agreement was made) as "*extensive*". He says he met with D1 (both before and after the alleged oral agreement) at least 6 or 7 times, of which all but i) the meeting at dinner in London on 10 June 2017, and ii) a possible meeting in Moscow,[7] were in Kazakhstan. D2 thinks he met the Claimant three or four times in total; the Claimant added in his response evidence six further meetings with D2; all of these were in Kazakhstan. The Claimant said he had "dozens" of meetings, most of which he said were with D3, and his description of those meetings included that they were all in Kazakhstan.

d) The property that was transferred (Stal and the ABK Buildings) is in Kazakhstan.

e) The only significant event relevant to the claim that appears, from the Particulars of Claim and the evidence served to date, to have taken place outside Kazakhstan is the "London meeting" when the Claimant alleges the oral agreement was made. However, there is no particular importance to that meeting having taken place in London – that is simply where the Claimant (who was on holiday) and D1 happened to be at the time. Moreover, whatever the ultimate conclusion as to whether there was a legally binding agreement reached at that meeting, it is notable (a) that the Claimant did not consider it sufficiently important to mention in his detailed letter before action, and (b) that in his evidence for these applications his explanation for the relative brevity of the discussions at the meeting in London was "*because we had already discussed the key issues and contours of our deal in our earlier discussions in Kazakhstan.*" Therefore, the fact that the alleged oral agreement is alleged to have been made in London is, in the circumstances of this case, of little weight in relation to the appropriate forum question.

iv) In relation to Stal and the ABK Buildings, not only were they situated in Kazakhstan, but also:

a) The relevant context includes the (written) agreements for the sale and purchase of the Stal sub-station and the ABK buildings. Those agreements were between Kazakhstan entities (namely, KKS Karagandy, a vehicle alleged by the Claimant to be associated with him, and Prima, a vehicle associated with the Defendants), on the basis of written agreements negotiated and executed in Russian, and which were expressly governed by the law of Kazakhstan and which contained jurisdiction clauses for the courts of Kazakhstan.[8]

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[7] D1 says it is possible that the Claimant came to his office in Moscow prior to February 2022 (when he closed that office), but he cannot recall.

[8] The agreement dated 13 June 2017 between KKS Karagandy and Hua Tun in relation to the properties was also an agreement (written in Russian) that was expressly governed by the law of Kazakhstan.

b) There is a dispute as to whether those transfers took place at nominal or market value. That may well require valuation evidence of the relevant property in Kazakhstan.

c) On the Claimant's alternative case (under the Kazakhstan law rules on unjust enrichment) it appears that he seeks to unwind these transactions and, as assignee of KKS Karagandy, seeks an order that Stal and the ABK Buildings are restored to him in kind (pursuant to Article 955 of the Code). The Defendants did not suggest that engages any particular separate jurisdictional rule, but the fact that such relief is sought is a strong connecting factor to Kazakhstan.

v) The first language(s) of all the potential witnesses for trial identified so far is Russian and/or Kazakh, both being official languages in Kazakhstan.

a) It is unlikely, therefore, that any translation of witness evidence would be required if the dispute is heard in Kazakhstan. There was no suggestion that any witness for trial would need to give their evidence in English.

b) However, many of the witnesses would need to give evidence through an interpreter if the proceedings took place in England. Eight of the witness statements served for the purposes of these applications were made in Russian and served with an English translation.[9]

c) That includes the Claimant himself (whose first witness statement states that he speaks "*limited English*" and that his oral evidence in England "*would require the assistance of an interpreter"*). That is of particular significance in a case where the central allegation is of an oral agreement that was concluded in another language, and where one would expect some emphasis to be placed on the actual words used (to the extent they can be recalled) in the discussions and their significance in terms of concluding a legally binding agreement. It is apparent that almost all (if not all) of the conversations between key people that are likely to be relevant would have taken place in Russian.

d) D2 also said in his statement that, if he was to give oral evidence, he would want to do so in Kazakh or in Russian.

e) Other potential witnesses, who have not given statements in the context of these applications, but several of whom the parties identified as possible witnesses, are also likely to be based in Kazakhstan and may well have to have to give evidence in Kazakh or Russian.

vi) Almost all of the relevant documents are in Kazakh or Russian.

a) This would increase the cost of proceedings in England, through the cost of obtaining translations of documents to be deployed in the proceedings as well as likely making disclosure exercises more difficult or more

[9] This was also the case for one of the expert Kazakhstan law reports, that of Mr Kaldybayev.

expensive (either because lawyers who speak the relevant language(s) have to be found and/or huge numbers of documents need to be translated before disclosure).

b) It is also evident, from the exchanges of evidence to date, that there is every prospect of disputes over the precise translation of documents into English from Kazakh / Russian. Such disputes have already arisen in relation to the (relatively) small number of documents deployed in evidence for these applications.

vii) It appears, from the evidence served for these applications, that the issues between the parties at trial are likely to include a number of matters that the Defendants characterised as "nuanced questions of Kazakhstani regulation and commercial practices." Examples of these include (i) matters relating to the Kazakhstani energy and electricity markets and pricing, including their regulation (in particular in relation to whether and to what extent energy power rates are set by central government committee in Kazakhstan); (ii) the Claimant's allegation, disputed by the Defendants, that amongst "*old school businessmen*" in Kazakhstan, there is a "*common understanding that a deal is conducted on a gentleman's agreement without any written contracts in place*"; and (iii) the suggestion, made in Mr Naurzaliev's statement served on behalf of the Claimant (and in the context of the ownership of KKS Karagandy), that it is "*normal practice in Kazakhstan*" for shares to be transferred "*without any documents in place.*" Whether or not expert evidence would be required in an English court to deal with these (as the Defendants suggested), it is clear that these sorts of issues are likely to be ones more easily (and, potentially, cost-effectively) determined in Kazakhstan.

viii) The location of witnesses is not a particularly powerful factor in any direction. The Claimant is currently in England. The individual Defendants are all in the UAE (even though I have held D1 is also resident in England, he appears mainly to be in the UAE). Of the other witnesses some (the Claimant's family) are in England, but most of the others identified so far are in Kazakhstan. In circumstances where giving evidence by video-link is often a possibility (and it has been confirmed by the expert evidence in this case that Kazakh courts will accept evidence given by video), this factor does not seem to me to be of real assistance either way.

171. The Claimant relied on the fact that the alleged oral agreement was made in England (which, as explained above, is a relatively fragile connection with this jurisdiction). He also relied upon the fact that none of the parties is now resident in Kazakhstan and that D1 has given up his Kazakhstani citizenship. However, in terms of their role in the proceedings as witnesses, I have dealt with that above and explained why it does not constitute a factor in either direction. In terms of their roles as litigants, it is clear that all the individual parties are very familiar with Kazakhstan and retain links to Kazakhstan (and the Claimant has expressed his intention to return there), and no-one suggested that instructing Kazakh lawyers from abroad to conduct proceedings would cause any difficulty. The fact that D1 has been served as of right in England is, as I have noted above, a factor connecting the dispute to England, and must not be overlooked. It is also a connecting factor to England that D1 has given up his Kazakhstani citizenship, and now has a British passport. However, in the circumstances

of this case, these are not factors, even combined with the fact that the Claimant currently lives in England, of sufficient weight to meet the strength of the connections of this dispute with Kazakhstan.

172. The Claimant also refers to the fact that the assets which form the subject of his claims are outside Kazakhstan, namely shares in D4 (a Cypriot company) and bitcoin received by D1-D3, which (as Mr Samek's skeleton argument put it) are "in the 'cloud' and in bitcoin wallets, accessible from wherever D1-D3 are located". It is right that those assets are not located in Kazakhstan. However, this does not give a connection of the dispute to England. Even if the bitcoin are accessible by, for example, D1 when he is in England (where he is sometimes), so are they accessible by the Defendants when they are in Kazakhstan (where they all have business interests, including the business that is generating that bitcoin). This is a neutral factor.

173. The Claimant also refers to the enforceability of a judgment (which I accept may in principle be a relevant factor), stating that an English judgment could easily be enforced against D4's shares in Cyprus, against D1-D3 in Dubai (or England, for D1) and/or against the relevant bitcoin exchange or wallets. Mr Samek's skeleton argument asserted that was likely to be easier than enforcing a Kazakhstan court judgment, but there was no evidence about that at all. The Claimant had not sought to deploy any evidence about the ease of enforcing a Kazakhstan judgment anywhere.

174. Lastly, the Claimant says D1 has a beneficial interest in two English properties (although that was not clear from the evidence, as the properties were in the name of i) his wife and ii) a Bahamas company) against which a judgment could be enforced, whereas there was no evidence of particular assets in Kazakhstan. However, it is not clear whether or not D1 has such a beneficial interest in property in England (as I have noted), or if he does what its value might be (it seems very unlikely to be anything substantial compared to the sort of amounts claimed in these proceedings). Any enforcement is likely to be elsewhere and against other assets.

175. Even taking into account all of the Claimant's points about connections with England, those connections are relatively slight compared to the very substantial connections with Kazakhstan. In summary, this case has very little connection (and none of any substantial relevance) with England, whereas it has very substantial connection with Kazakhstan.

176. Moreover, it is clear that the courts of Kazakhstan are available to the Claimant to bring his claims there. There has been no suggestion that the Defendants could not be sued there (and D1-D3 confirmed they are prepared to submit to the jurisdiction of the courts in Kazakhstan). It is also clear that the Claimant is able to conduct proceedings before the courts of Kazakhstan, given that he has done so in the recent past. In his third statement, Mr Moruzzi gave examples of such proceedings, including an appeal brought by KKS Karagandy (against Prima) in 2019 in a dispute about the ABK Buildings.

177. The Claimant contended in his evidence, and in his counsels' skeleton argument, that Kazakhstan was not a forum that was realistically available to him in this particular case because of a rule of Kazakhstan law contained in Article 153(1) of the Code to the effect that, in the case of an alleged oral contract, the parties cannot prove the existence of the contract by "witness testimony". The suggestion was that, as a result of that rule, the Claimant would not be able to prove his claim in Kazakhstan for evidential reasons

(rather than because of the merits of the claim), with the result that he said Kazakhstan was not an available forum. In his oral submissions, however, Mr Samek dealt with that point not as one going to the availability of Kazakhstan as a forum, but as one that created a real risk of substantial injustice to the Claimant if he had to pursue his claims there (under stage 2 of the *Spiliada*) test. That is clearly the right place to deal with that argument, which does not go to "availability" at all (see e.g. the discussion in Briggs, Civil Jurisdiction and Judgments at paragraph 22.09). I will, therefore, deal with that point below in that context.

178. For these reasons, I find that Kazakhstan is an available forum and is clearly and distinctly the most appropriate forum to hear these claims. It is plainly a more appropriate forum than England.

Stage 2 – is there a real risk of substantial injustice?

179. The Claimant contends that, notwithstanding that Kazakhstan is the more appropriate forum, there is a real risk that substantial justice would not be done in Kazakhstan such that the claims in England should not be stayed on the ground of *forum non conveniens*.

180. A number of points had been relied upon by the Claimant in the evidence and the run-up to the hearing in this respect, but in his oral submissions Mr Samek confirmed that there were only two points that were now relied upon. First, an argument based upon article 153 of the Code; and second, an argument based on threats that the Claimant alleges have been made to him and to some of his potential witnesses.

(1) Article 153 of the Code

181. Under Article 151 of the Code, Kazakhstan law generally recognises oral agreements (unless the law explicitly requires a written form of agreement). Article 152 requires parties to conclude a written agreement where the agreement concerns business activities (Article 152.1(1)) or where the sums of the agreement are above a certain threshold (Article 152.1(2)). It was common ground that the agreement alleged by the Claimant in this case would fall within one or both of those descriptions and therefore would require written form under Article 152.

182. However, as was also common ground, the failure to enter into a written agreement does not render an agreement invalid under Kazakhstan law. Article 153(1) of the Code states (in the translation supplied by the Claimant's expert, Mr Konysbayev):

> "…failure to comply with a simply written form of a transaction deprives the parties of the right, in the event of a dispute, to confirm the conclusion, content or execution by witness statements. The parties, however, have the right to confirm the conclusion, content or execution by written or other evidence other than witness statements."

183. Article 153(2) of the Code then provides that an agreement will only be void for the failure to use a written agreement in cases expressly specified by the law or the agreement of the parties.

184. The Claimant contends that the effect of Articles 152(1) and 153 is that there is (at least) a real risk that witness testimony from himself, and from other witnesses supporting his case of an oral agreement, would not be accepted by the Kazakhstan courts with the result (he says) that he would not be able to prove his claim in the Kazakhstan courts. He compares the position that would be reached if the case were to be tried in England where, he contends, this rule of Kazakhstan law would not be applied because it is a rule of Kazakhstan procedure, rather than one of substantive law, such that his evidence (and that of supporting witnesses) would be admissible to prove his oral agreement in an English court (notwithstanding that the agreement would be governed by the law of Kazakhstan). It would therefore be an injustice for him to have to pursue his claim in Kazakhstan because, he says, he would lose as a result of this rule.

185. In fact, the position is more nuanced than that contended for by the Claimant. The following is the position as appears from the evidence before the court.

186. First, the effect of Article 153(1) of the Code is not as exclusionary in terms of evidence as the Claimant suggested. It was clear from the expert evidence on Kazakhstan law that:

    i) The exclusion of "witness testimony" does not stop a party to proceedings from giving their own account in their "primary case document". That account would be taken into account by the court in a similar way to witness evidence. This was explained by the Defendants' experts, and was not substantially disputed by the Claimant's expert.

    ii) The Claimant would not be precluded from adducing "witness testimony" from third parties in relation to context or matrix, for example as to the behaviour and conduct of a party, as to the relevant course of events or as to other objective facts. There was no real dispute about that on the expert evidence.

187. It is right to say that the experts on Kazakhstan law were of the view (expressed in various ways) that a court in Kazakhstan is likely to be sceptical of uncorroborated witness testimony, or of an uncorroborated statement by a party in his primary case document, as to an oral agreement. However, it might also well be the case in this jurisdiction that the uncorroborated evidence of a self-interested party as to the existence of a complicated oral agreement in a commercial context would be treated with some caution by a judge and may well be afforded relatively little weight, though much would no doubt depend on the circumstances and the available documentary record. This is a question of the weight that a court might attribute to admissible evidence, and it is difficult to see how that could amount to a "substantial injustice" in this context.

188. It is right that the evidence of a third party as to the making of the agreement would be excluded by the rule, but in the present case one might in any event question the real value of such evidence where the only direct witnesses to the alleged oral agreement were the Claimant and D1, such that the evidence of others as to what was said or agreed is hearsay (such as what the Claimant is alleged to have told his wife and son about the making of the agreement).

189. Second, the Claimant would also be able, in Kazakhstan, to adduce documentary evidence in support of his alleged oral agreement. This was not controversial: the

Claimant confirmed in its skeleton argument that the parties in Kazakhstan "*have the right to confirm the conclusion, content or execution by written or other evidence other than witness testimony (witness statements).*" The Claimant adduced a number of documents for the purpose of these applications which he contended supported his alleged oral agreement (for example, the spreadsheet and Telegram messages referred to at paragraph 97 above) and he could equally well rely upon those in Kazakhstan.

190. As a result, much of the evidential picture in the courts in Kazakhstan would be similar to that before a court hearing the dispute in England.

191. The Claimant's expert gave examples in his report of previous Kazakh claims where the claimant had alleged an oral contract but the court refused to admit witness evidence to prove the contract and the claim was dismissed for lack of evidence. The Claimant also acknowledged that there were some Kazakh cases where the court had found that an oral contract had been created, based on documents, though suggested that they were generally simple cases with a document that provided clear proof. However, these cases dealt with their own particular facts and do not advance the argument as a matter of principle.

192. In any event, even if the application of the rule in question were to lead to a different result (or the real risk of a different result) in Kazakhstan to that which might be reached in England, that is not sufficient to constitute a 'substantial injustice' for this purpose.

i) Articles 152(1) and 153(1) of the Code have an understandable and rational basis. Similar provisions are found in other CIS legal systems (for example, the equivalent in Russia was the subject of argument in ***Filatona Trading Limited v Navigator Equities Limited*** [2019] EWHC 173 (Comm)). Each legal system may strike a different balance in terms of formalities required for a legal binding contract and/or the evidence that is admissible in support of a contract. The fact that another country's system has struck a different balance to that struck by English law is not, in itself, a reason why substantial justice could not be obtained in the courts of that country.

ii) It is clear on the authorities set out above that the fact that the foreign system is different and may provide a different outcome is insufficient to constitute a "substantial injustice". Moreover, if – as here – a clearly more appropriate forum has been identified, generally speaking the claimant has to take that forum as he finds it; and that includes the system of court procedure, including the rules of evidence, applicable in the foreign forum (see ***Connelly v RTZ***, above).

iii) It is not clear whether the rule in question would be characterised as procedural or substantive in character under the law of Kazakhstan. The Defendants' experts suggested it was substantive; the Claimant's expert procedural. At any trial in England, that would have to be resolved. But, even if it is properly to be regarded as procedural (which was the conclusion reached by Teare J in ***Filatona*** at paragraph 341 in relation to the equivalent provision in Russian law[10]), and therefore would not be applied in England, there would appear to be no real injustice in a party who has made an agreement which is governed by

[10] Though cf. ***Bank of St Petersburg PJSC v Arkhangelsky*** [2018] EWHC 1077 (Ch) at paragraph 829(9) where Hildyard J came to a different view.

the law of Kazakhstan having its existence subject to all the rules of the law of Kazakhstan which pertain to it, rather than only to some of them.

iv) It is, in fact, a slightly odd proposition that 'justice' can only be obtained by the Claimant through the application of some, but not all, of the rules of the law of Kazakhstan relating to contract formation. What the Claimant is attempting to do here is to bring a claim under the law of Kazakhstan, but to seek to do so outside Kazakhstan (which is the natural forum) so that one of the rules of the law of Kazakhstan, which would operate to his detriment, does not apply. It is not a substantial injustice for him not to be able to do that.

v) What the Claimant's complaint really amounts to is that he says he would win in England, but lose in Kazakhstan. But that, it is clear on the authorities, does not constitute a 'substantial injustice' for this purpose.

193. As a result, there would be no real risk of substantial injustice on this ground in the Claimant having to bring his claim in the courts of Kazakhstan.

194. As noted above, at previous stages (though not at the hearing itself) the Claimant had suggested that the rule in Article 153(1) had the result that the Kazakh Court was not available to him to pursue his claim (relevant to stage 1 of the *Spiliada* test). As I say, that point was not pursued in oral submissions. For the avoidance of any doubt, I reject any suggestion that is maintained that this point renders the courts of Kazakhstan unavailable to the Claimant to pursue his claim. It plainly does not do so. He is able to bring his claim in the Kazakhstan courts. His complaint is not that the court is unavailable to him, it is that he apprehends he will, or is more likely to, lose there.

195. As Mr Samek had said in his skeleton argument, the Claimant "*does not criticise the Kazakh Courts for having different procedures (or invite this Court to do so); he contends only that this vital procedural difference in this particular case means that a trial in the Kazakh Court is realistically not available.*" That demonstrated the point that what the Claimant was trying to dress up as a point about the availability of the foreign court was nothing of the sort. It was a complaint that the rule in question would or may cause him to lose. But that was plainly not a question of lack of availability of the court.

(2) Alleged threats

196. The second issue upon which reliance was placed at the hearing which was said to go to the question of whether there was a real risk of substantial injustice in Kazakhstan was the allegation made by the Claimant that certain of his witnesses and potential witnesses had been threatened not to give evidence for the Claimant. The matters relied upon by the Claimant were as follows.

197. First, the Claimant relied upon the evidence of Mr Arman Naurzaliev:

i) Mr Naurzaliev said in his statement that, since meeting the Claimant in 2012, he has been employed by the Claimant in a directorial role within companies where the Claimant was the ultimate beneficial owner. Since November 2016, he has been director of KKS Karagandy. He said he considered the Claimant, and the Claimant's brother Aydyn, as effectively part of his family.

ii) Having given some evidence about KKS Karagandy and the transactions involving the Stal substation and the ABK buildings, Mr Naurzaliev gave an account (without reference to any documents or other evidence) about a meeting he had had in May 2024 with a "longstanding acquaintance" of his with "connections to the criminal world in Kazakhstan" who he meets once every 2-3 months, and with whom the meetings "are more like meetings between friends". At the said meeting (which took place "in a prearranged neutral location on a road near a residential complex") Mr Naurzaliev said he was passed a message by his friend from D2 urging him to stop supporting the Claimant and warning about serious consequences if he did not do so. He said his friend had been contacted by what Mr Naurzaliev referred to as the "bandit committee" who he said were a group of individuals with connections to the criminal world in Kazakhstan (which is also how he had described his friend). He said his friend asked him not to give any witness statement about a gold-mining project (in which the Claimant and D2 were said to be involved, but in any event which does not appear to be connected to this dispute) or about the Claimant's proceedings against D2 in London or any other matters in which the Claimant is involved. Mr Naurzaliev said it would not have been worthwhile to report these threats to the law-enforcement authorities in Kazakhstan because, he said, "this "bandit committee" has its people in the law-enforcement institutions and if I had reported these threats the "bandit committee" would have found out about it within the space of half an hour, and it was not clear what consequences I might have faced as a result."

iii) Notwithstanding that account, Mr Naurzaliev gave a witness statement for the purposes of this application, dated 24 June 2024, and there was no evidence adduced at the hearing to suggest he had suffered any consequence as a result.

198. Second, the Claimant said that two other potential witnesses – namely Mr Jon Abbas Zaidi and Ms Elena Kaplunovskaya – had been threatened not to give evidence to support the Claimant. They were both involved in preparing technical reports on power stations that the Claimant said may be suitable to offer to investors for a particular project (which the Claimant says was (as he refers to it) the GM JV). Weight was not placed on what it was said they could have given evidence about (indeed, neither of these potential witnesses appear to have evidence which is likely to be central to the key issues in this dispute) but merely the allegation that they had been threatened.

i) The Claimant says that these two individuals had agreed to provide him with witness statements, but that following threats they then refused to do so. He says that in a call with him on 7 June 2024 (which he recorded and transcribed) Ms Kaplunovskaya informed him that: i) Mr Abbas was working on a project in Uzbekistan and had been told by an Uzbek government official that, if he planned to give evidence for the Claimant, he should resign from the project; and ii) that her husband had been approached by people in Kazakhstan offering money if Ms Kaplunovskaya did not testify for the Claimant and then, when that was refused, those people made threats against her, her husband and children.

ii) The Claimant recognises that he does not know who made those alleged threats, but he says he cannot imagine anyone else interested in making them other than the Defendants.

199. Third, the Claimant said he had received anonymous threats by email ("there are some people who are trying to hurt you … and they have already obtained enough information that can lead to bury you, and get you in a long dark road…") from someone who offered to "re-obtain the information and help you to get you the people who is responsible for this". However, there was nothing in the emails in question suggesting any connection to this dispute, or to any of the Defendants, or indeed to anything specific that the Claimant was involved in.

200. The Defendants entirely denied having anything to do with any "threats" that had been made. Moreover, both Mr Zaidi and Ms Kaplunovskaya gave witness statements on behalf of D2 for the applications saying they had not been threatened at all.

201. Mr Zaidi said that the Claimant had approached him to provide evidence in around March 2024, but that Mr Zaidi had felt that what he was being asked to provide evidence about was outside his own knowledge or understanding. Mr Zaidi also said that the Claimant had said he would compensate him financially, which Mr Zaidi took to be the offer of some kind of bribe. Mr Zaidi said these were among the reasons he decided not to assist the Claimant. He said the allegations that he was intimidated by or on behalf of any of the Defendants not to provide evidence for the Claimant was entirely untrue, that he had not received any threats or been intimidated by anyone in connection with these proceedings or otherwise and confirmed he had not been pressurised in any way to provide his witness statement.

202. As to Ms Kaplunovskaya:

i) She said she had also been approached by the Claimant in March 2024, and that she had been inclined to assist him given their past good relationship, although she thought her contribution as a witness would necessarily be limited to confirming which projects she had worked on. She said the Claimant told her that, if he won the case, he would share with her the amount awarded to him. She said the Claimant discussed potential pressure on her as well as threats that might be made, and asked her to testify that she had been threatened. She said she had come under no pressure and no threats had been made, and so she refused to provide the Claimant with such testimony.

ii) However, she said that the Claimant sought to "impose" on her his view that she must have been coming under pressure. She then said that she thought she could avoid participating in the legal process by telling the Claimant what he wanted to hear, which she then did. She explains that she felt her only choice was to tell the Claimant what he wanted to hear, i.e. that family members had been threatened and pressured, and that the same thing had happened to Mr Zaidi, and hoped that by telling him that, she would be spared the need to participate in the legal process.

iii) This provided the background to her explanation for the conversation with the Claimant on 7 June. She said that, before the call, she had drunk quite a lot of alcohol with friends and that on the call, which she regarded as just an "evening conversation", she was "quite drunk". She explains that she felt the best way to get herself out of the legal process was to tell the Claimant what he wanted to hear, as she had been doing, and during the call she now says she embellished those stories further. She says she did not know she was being recorded.

iv) The transcript of the call itself is not always easy to follow, but as well as containing the parts the Claimant relied upon (which Mr Kaplunovskaya says she made up) it is also clear that the Claimant was very keen to get her to say that she had been threatened and so as to use that in these proceedings ("*[i]n the English courts … just one word about being threatened to come here and testify changes the whole case fundamentally*"), even to the extent of suggesting that was the only valuable evidence she might be able to give (saying she "*[was] never a witness initially … We never even had the understanding or format of you being a witness … you were never a witness*").

v) In her witness statement she stated she had come under no pressure or threats, nor had any intermediaries pressured her or any member of her family.

203. The evidence, therefore, presents (at best) something of an unclear picture. Whilst there is some evidence of threats having been made, some of it is confused, the evidence about who made any threats is generally unclear, two of those said to have been threatened have denied, in signed witness statements, that they were threatened, and the Defendants deny having been involved in anything at all relating to threats or intimidation. In relation to the witness statements from Mr Zaidi and Ms Kaplunovskaya, Mr Samek sought to suggest an inference ought to be drawn that those statements had been produced as a result of further threats made against them, but that seems to me to involve something of a circular argument. There is, therefore, relatively little that can be drawn from the evidence about this. Taking the three matters relied upon by the Claimant:

204. First, the emails received by the Claimant contain no link to anything related to this dispute. No real weight can be placed on them in forming any view about alleged threats to do with this litigation.

205. Second, the allegations in relation to Mr Zaidi and Ms Kaplunovskaya also are not directly linked by any evidence to the Defendants, as the Claimant recognised in his own evidence. As to the fact of any threats being made to these two individuals:

i) Mr Zaidi has in a short and straightforward witness statement denied that any threats were made to him (and, in fact, suggested the Claimant tried to bribe him).

ii) Although Ms Kaplunovskaya's account is somewhat more convoluted, and might come across as slightly odd, the gist of her account (that she ended up deciding to tell the Claimant what he wanted to her so that he would go away and leave her alone, and then embellished her account in a drunken phone call) is not so implausible that (without any hard evidence suggesting it was not correct) it can be dismissed out of hand. Moreover, the transcript suggests that the Claimant never had the intention of calling her as a witness to deal with substantive matters in the case, but only to say she had been threatened.

206. Third, the allegations made by Mr Naurzaliev were, in contrast, targeted at D2 as the source of the threats (albeit his identification as being behind the threats was not straightforward, it being alleged this message had come through what Mr Naurzaliev referred to as the "bandit committee"). However, there is only the account (unsupported by any other evidence) of Mr Naurzaliev to go on (he being someone obviously close

to the Claimant, describing him in his statement as effectively part of his family). D2 entirely denies the allegations. It is also worth noting that, if and insofar as such threats have been made, they did not deter Mr Naurzaliev from providing his statement, and there is no evidence of any repercussion to him in his having done so.

207. Taking all this into account, it does not appear to me that there is any clear evidence that I can confidently rely upon on an application such as this to say that there is a real risk that the Claimant or his potential witnesses will be subject to threats in connection with this dispute were it to take place in Kazakhstan.

208. But, in any event, even on the Claimant's evidence as to the threats alleged to have been made, that does not provide a reason to conclude that there is a real risk of substantial injustice if the dispute was heard in Kazakhstan:

i) The alleged threats that are said to have been made to date (and which the Claimant relies upon) are alleged to have been made in the context of these proceedings taking place in England. The Claimant suggests that they have been effective in getting Mr Zaidi and Ms Kaplunovskaya to change their evidence (on which I cannot reach, and am not reaching, any conclusion), but if anything that suggests (on the Claimant's evidence) that any threats might be made just as well if proceedings continue in England as if they took place instead in Kazakhstan. The alleged threats against Mr Naurzaliev did not cause him not to make a statement, and he did not suggest that the position would have been any different if he was being asked to give evidence in proceedings in Kazakhstan. In other words, the (alleged) threats are not a forum-related point. Insofar as the evidence can be relied upon at all, it suggests any threats (if they were made) would appear to be directed to the pursuit of the litigation in general, rather than to litigation in a particular venue.

ii) There was no cogent evidence that the Defendants have influence over the courts in Kazakhstan, or that in any other way the courts of Kazakhstan would not be just as well placed as the courts in England to deal with any allegations of witness intimidation in the context of this dispute or to make assessments of evidence accordingly.[11] Mr Samek confirmed in his submissions that there was no cogent evidence of a risk that judges in Kazakhstan would not be true to their judicial oath, and that there was no evidence of interference with the judiciary. Although there were some vague suggestions by the Claimant and his solicitor (Mr Iatuha) in their witness statements that the Kazakh criminal authorities would not act independently and that D2 had some level of influence, these were entirely subjective and unsubstantiated allegations. Those were serious allegations of institutional (police and/or judicial) misconduct which cannot be supported on the basis of such evidence – there was no "cogent evidence" or anything approaching it. This does not go beyond the sort of "whisper or suggestion" that Briggs notes (in the passage cited by Butcher J in ***Dynasty*** (above)) is not sufficient. There was certainly no expert evidence (e.g. from any

[11] See ***Ahmed v Khalifa*** [2017] EWHC 1190 (Comm) where, at paragraph 51, Sir Jeremy Cooke (sitting as a Judge of the High Court) reached a similar conclusion in relation to the courts of Bahrain in the context of alleged threats.

of the experts in the law of Kazakhstan) that Kazakh courts or other similar institutions in Kazakhstan were not reliable.

iii) As the authorities I have referred to above make clear, caution must be exercised before deciding that there is a real risk that justice would not be done in the foreign forum and cogent evidence is required.

209. I should also add that there was some evidence in a witness statement from the Claimant's brother, Mr Aydyn Alimov, who said criminal proceedings had been brought against him in Kazakhstan for money laundering and embezzlement during his time as chairman of a company called "Karagandaliquidshakht". He said that an (unidentified) contact of his at the anti-corruption agency had told him the case was being brought against him as a "form of pressure" against the Claimant, who he said is also being investigated in Kazakhstan. There were no documents referred to or exhibited in relation to the criminal proceedings or otherwise in relation to these allegations, and I obviously cannot take any sort of view whether they might be well founded or not. Moreover, there was nothing cogent to suggest that the criminal proceedings against Mr Aydyn Alimov were in any way connected to the Defendants (simply a bare assertion by Mr Aydyn Alimov that he believes they are linked). As I have said above, there is no cogent evidence of influence over prosecuting authorities in Kazakhstan. It was notable that this particular allegation was not referred to at all in the Claimant's skeleton argument, and only barely in passing by Mr Samek orally. It does not come close to suggesting any case that the Claimant would not get substantial justice in Kazakhstan.

210. The Claimant's skeleton argument also relied upon the decision of the Jersey Royal Court in ***MB Services v United Company Rusal plc*** [2020] JRC 034 as an example of where a real risk of substantial injustice had been found as a result of evidence of threats and intimidation. However, the circumstances there were rather different. That case involved a vehicle in which Mr Oleg Deripaska had a substantial interest and it was said that Mr Deripaska was someone who, because of his wealth and power and his closeness to the Russian State, had influence and who would "not hesitate" to seek to influence a Russian court if he thought it to be in his interests (see e.g. paragraph 127). There was a good deal of expert evidence about the Russian courts and their reliability, and the experts there agreed that the Russian courts were not immune from external or political influence. Nothing of that sort is alleged here. In the ***Rusal*** case, the allegations of threats were far more detailed and cogent than those made in this case, including some examples to which there was no effective challenge (see paragraphs 136 and 139 of the judgment). The conclusions reached in that case, on the basis of the evidence before that court, do not translate across to this case and the evidence here. Moreover, there has been no cogent evidence in this case that any of the defendants could exert influence over the courts in Kazakhstan or that the courts in Kazakhstan would be susceptible to any such influence.

211. Any threats to or intimidation of any witness or potential witness is of course entirely to be deplored. However, in summary, there is simply no sufficient cogent evidence of any such threat or intimidation to make the determination here that the Claimant seeks. Moreover, the alleged threats, even if they were made out, do not relate to the question of forum – they do not suggest that the Claimant would be any less likely to obtain substantial justice in Kazakhstan as he would be in England.

Summary in relation to substantial justice allegations

212. The Claimant has not made out his case that he could not get substantial justice in Kazakhstan. He has not demonstrated a real risk of substantial injustice in Kazakhstan.

213. I should also record that, in the evidence and in the Claimant's skeleton argument, there were included other matters said to relate to the question of whether there was a real risk that substantial justice would not be done in Kazakhstan. The Defendants set out their position in response to those points in their evidence and submissions. As I have recorded above, however, Mr Samek made it clear in his oral submissions that the only two points that were relied upon by the Claimant were those set out and dealt with above. I will not, therefore, add to the length of this judgment by also dealing with those other points. I will, however, have to explain one of them in the context of the allegations relating to failure to provide full and frank disclosure on the without notice application.

Summary on appropriate forum

214. In relation to the application for a stay on the grounds of *forum non conveniens*, Kazakhstan is an available forum which is clearly and distinctly more appropriate than England for the trial of the action. D1 has clearly discharged the burden upon him under stage 1 of the *Spiliada* analysis. Moreover, there are no circumstances by reason of which justice requires a stay of the proceedings in England should not be granted.

215. To put it another way, if one steps back from the different stages of the test, and recalls that the overall inquiry is one where the court seeks to identify what the interests of justice requires (see Dicey, Morris & Collins paragraph 12-032 as cited by the Court of Appeal in ***Município de Mariana v BHP Group (UK) Ltd*** [2022] 1 WLR 4691 at 4788 (paragraph 342)), the answer is that the interests of justice require this case being heard in Kazakhstan, and not in England.

216. The position is *a fortiori* in relation to the question whether, for the purpose of the application to serve out of the jurisdiction (where the burden is on the Claimant), England is the proper place to bring the claim. It clearly is not.

217. As a result, the applications of D1-D3 in this respect succeed. The claim against D1 is to be stayed, and the order of Dias J for service out of the jurisdiction against D1-D3 is to be set aside.

The Fourth Defendant's position

218. Permission was granted to serve D4 out of the jurisdiction (in Cyprus) by the Dias J Order on the basis that it is a "necessary or proper party" to the claim against the other Defendants. It was accepted by the Claimant that, if the challenges to the jurisdiction made by each of the other Defendants succeeded, then the claim against D4 would suffer the same fate. Given the conclusions I have reached above, therefore, permission to serve D4 out of the jurisdiction should be set aside. The further arguments raised by D4 as to why permission to serve out against it should be set aside therefore are not determinative. However, I set out my conclusions on them below.

219. The additional grounds on which D4 applied to set aside the Dias J Order against it were that (a) there was no serious issue to be tried against D4, and (b) D4 was not a necessary or proper party to the claim against the other defendants. The gist of D4's position in both respects is that there is no claim brought against it and no relief sought from it.

220. The following elements of the background are relevant to this issue:

i) The Particulars of Claim state, at paragraph 6:

> "GDA is a company incorporated in Cyprus on 15 June 2017. It is one of the world's largest bitcoin-mining companies and operates (through subsidiaries) from facilities in Kazakhstan and elsewhere. It is joined as a Defendant to this claim so that it is bound by any relief granted in relation to MMK's shares in GDA and so that it can give effect to that relief." [underlining added]

ii) There were two places in the Particulars of Claim where it might have been thought possible that the Claimant was pursuing relief against the Fourth Defendant:

a) Paragraph 61(b), where it was pleaded that the Claimant claimed "an order that MMK take steps to see that Mr Alimov be registered as the shareholder of such shares [i.e. 35% of the shares in D4 held by "MMK"] and that GDA [i.e. D4] so register him"; and

b) The Prayer for Relief, paragraph (2), which reflected paragraph 61(b).

However, in his oral submissions, Mr Samek made it clear that he accepted that was not a proper claim for relief against D4.

iii) The evidence in support of the Claimant's *ex parte* application for permission to serve out at Iatuha 1, paragraph 89, stated:

> "GDA is a necessary and proper party to the claim. It is not alleged to have done anything wrongful towards Mr Alimov, but it is joined so that it can be bound by and give effect to any relief ordered in relation to its shares. This is akin to the joinder of the company in shareholders' disputes, such as unfair prejudice petitions."

iv) In Iatuha 2 (served in response to an application by D4 for expedition in the hearing of its application, which was refused), the Claimant asserted at paragraph 35 that:

> "(a)…if D1-D3 refused to comply with an order made at trial for them to transfer to C some of their shares in D4, the court could then make it effective by requiring D4 to register C as a shareholder. Otherwise, if D4 were not a party to this claim, it would not be bound by the order, and C would then have to

> start separate enforcement proceedings (potentially in Cyprus) against D4 to obtain those shares.
>
> (b) Thus, … relief can be ordered against D4, if necessary, to do so to ensure the effectiveness of any primary relief ordered against D1-D3. This is analogous to the joinder of the company in a dispute as to ownership of shares and in unfair prejudice petitions – the company is joined to bind it to the order made against the shareholders, and relief can be granted against the company relating to the shares claimed or owned by the claimant."

v) In Iatuha 3 (served in response to D4's application) it was put slightly differently (at paragraph 40):

> "GDA is a proper party to the claim because it controls the property which is the subject matter of the claim – the bitcoin generated and held by GDA (and due to MMK) and the shares in GDA itself, recorded in its share register kept at its registered office in Cyprus. If it were an English company, it would be proper to join it to a claim about the ownership of its shares and property which it holds, and so it is proper to grant permission to serve it out of the jurisdiction and join it to the claim as a foreign company."

vi) The result is that no claim is made against D4, nor is any relief sought against it, in the Particulars of Claim. The reason why the Claimant seeks to include D4 as a party is to bind it to findings and decisions in this litigation and to facilitate enforcement in the event that the Claimant succeeds against the other Defendants.

vii) In his submissions at the hearing, Mr Samek made it clear that he did not seek to say that the Claimant had any claim at the moment against D4, but rather that he could have a contingent claim against D4, in the event of success against the other Defendants, which would take the form of a claim against D4 for the Claimant "to be recognised as a shareholder, participate in the rights of all shareholders and in consequence be registered [as a shareholder]".

221. In my view there is no serious issue to be tried against D4:

i) Given Mr Samek's acceptance that the passages of the Particulars of Claim noted above (paragraphs 61(a) and prayer for relief (2)) do not advance a proper claim against D4, there is no claim advanced in the Particulars of Claim against D4 and no relief is sought from it. There is, therefore, no serious issue to be tried against it. The Claimant has no real prospect of succeeding against D4 in circumstances where it does not plead any claim against it or seek any relief from it.

ii) The Claimant sought to say that it was possible to make D4 a party to the proceedings not on the basis of a claim now advanced, but on the basis of possible contingent enforcement proceedings, for example if the Claimant were

to succeed in his claim for specific performance against the other defendants, compelling them to transfer to him a proportion of their shares in D4, if they failed to do so, the court could make an order against D4 to recognise the Claimant as a shareholder. However, in my view, that is flawed:

a) The possibility of a future claim, or future enforcement proceedings, based on one or more contingencies does not mean that there is a serious issue to be tried between the Claimant and D4, at least not where the Claimant has not actually sought to bring such a claim (even on a contingent basis) in its Particulars of Claim.

b) The English court will not generally take jurisdiction in respect of enforcement against assets in another state, as explained by the Court of Appeal in ***SAS v World Programming*** [2020] 1 CLC 816,19 at [64]:

> "It is recognised internationally that the enforcement of judgments is territorial. When a court in State A gives judgment against a defendant over whom it has personal jurisdiction, it is for that court to determine in accordance with its own procedures what process of enforcement should be available against assets within its jurisdiction. But for a court in State A to seek to enforce its judgment against assets in State B would be an interference with the sovereignty of State B."

There was no dispute that D4 was incorporated in Cyprus or that its share register is in Cyprus nor did the Claimant take any issue with D4's submission that, as a result (see ***Akers v Samba*** [2017] AC 424 at paragraph 19), the situs or location of the shares is in Cyprus. Whilst it was not possible to identify with precision the relief that the Claimant might seek against D4 (because it had not spelled it out in a pleading), at least part of what it suggested it would seek was effectively enforcement against the shares in Cyprus. Indeed, Mr Samek's suggestion that the Claimant might seek an order that D4 should recognise the Claimant as a shareholder and that the Claimant be registered as a shareholder would be, or at least would be akin to, an order that the shareholder register in a company incorporated abroad be rectified, relief which is not available in this country (see ***International Credit Investment Co (Overseas) Ltd v Adham*** [1994] 1 BCLC 66 (Harman J) at page 78[12]).

222. The other suggestions made by the Claimant in its evidence do not assist it:

i) It was said that the joining of D4 to the proceedings was akin to the joinder of a company in shareholder disputes, such as unfair prejudice petitions. However, this is not an unfair prejudice petition, and nor are the suggested potential

[12] Consistently, (i) the Companies Act 2006 only gives the Court the power to rectify the register of companies registered in England and Wales, and the Part on overseas companies does not contain a power to order rectification of the register: see Companies Act 2006, sections 1 and 125, and Part 34; and (ii) shares in companies incorporated abroad are excluded from the Charging Orders Act 1979, unless the register is kept in England and Wales: see section 2(2)(b).

contingent claims equivalent to an unfair prejudice petition (and, in fairness, in his submissions Mr Samek did not seek to suggest that they were). The reference to "shareholder disputes" more generally does not advance matters – it all depends on what the claim is and what, if any, relief is sought against the company.

ii) It was also said that D4 "controls the property which is the subject matter of the claim – the bitcoin generated and held by GDA (and due to MMK) and the shares in GDA itself". However, that does not advance matters either. It does not identify any serious issue to be tried against D4. At best, it simply seeks to set up the (flawed) argument dealt with above that it is sufficient that the Claimant might bring future enforcement proceedings against D4. Moreover, it is wrong. First, D4 does not control the bitcoin that are the subject matter of the claim. The alleged oral agreement is that D1-D3 agreed to transfer 35% of the bitcoin they received, and the relief sought includes a claim to "35% of the cryptocurrency received by MMK (or cryptocurrency to the same value"; there is no allegation that the Claimant is entitled to bitcoin held by D4. Second, it was not explained how it was said that D4, as opposed to the shareholders in D4, controlled the shares in D4. Indeed, the unsurprising premise of the relief that is sought in the Particulars of Claim is that the shares in D4 held by D1-3 are controlled by D1-D3 (such that they can be ordered to transfer, or cause or procure to be transferred, a proportion of those shares to the Claimant).

223. As a result, the Claimant has identified no serious issue to be tried against D4.

224. In the circumstances, it is not necessary to go on to consider whether D4 is a necessary or proper party to the claim against D1-D3, and indeed given the lack of any pleaded claim it is difficult to do so. In any event, the suggestion that it might prove useful to the Claimant in the future for D4 to be party, whether to be bound to any findings made in this litigation (although no relief, including no declaratory relief, is sought against it) or potentially to seek information or disclosure from it in the future,[13] does not seem to me to be sufficient in the circumstances of this case (including where it does not even seek any declaratory relief against D4) to make it a necessary or proper party (in particular in light of the citation set out above from ***AK Investment*** and ***The Goldean Mariner***).

Alternative service

225. The Claimant sought, and obtained on the without notice application before Dias J, permission to serve D1, D2 and D3 in Dubai via an alternative means (the application in relation to D1 being in the alternative to the Claimant's primary case of service within the jurisdiction). Those means included service by post in Dubai (D2 and D3), by LinkedIn (D1 and D3) and by WhatsApp and email (D1, D2 and D3). The Defendants seek to set aside the grant of that permission.

[13] It was a suggestion made for the first time in the Claimant's skeleton argument (but not mentioned or developed orally) that, if the Claimant succeeded against D1-D3 but they failed to account for the bitcoin they had received, an order for "this information" might be sought from D4. However, a party cannot be joined to proceedings simply for the purpose of obtaining disclosure (see e.g. ***Unilever v Chefaro*** [1994] FSR 135 and Briggs, Civil Jurisdiction and Judgments, page 497 at fn 122) and no attempt was made by the Claimant to explain the order it had in mind or the basis for it. or why it justified joining D4 to the proceedings now.

226. There is in place a bilateral treaty between the UK and the UAE in relation to judicial assistance in civil and commercial matters, dated 7 December 2006 ("the UK/UAE Treaty").

227. Among the relevant provisions of the UK/UAE Treaty are the following:

i) Article 5.1 states:

> "1. Requests for judicial assistance shall be made via the Central Authorities and be transmitted through Diplomatic Channels. In cases of urgency, requests may be transmitted directly to the Central Authority. In which case, copies of such requests shall also be sent through diplomatic channels as soon as practicable thereafter."

ii) Article 5.2 specifies that the Central Authorities are the Senior Master of the (now) KBD for the UK and the Ministry of Justice for the UAE.

iii) Article 7 provides that service "shall be effected in accordance with the procedure provided by the domestic law of the Requested Party, or by a particular method desired by the Requesting Party, unless such a method is incompatible with the domestic law of the Requested Party".

iv) Article 10 states:

> "1. The competent authority in the Requested Party shall serve the said documents and papers in accordance with its domestic law and rules applicable in this regard.
>
> 2. Service may be effected in a special mode or manner specified by the Requesting Party, provided that it does not contravene the domestic law of the Requested Party and further subject to the payment of costs of such special mode of service."

It was common ground between the parties' experts in UAE law that the "competent authority" in the UAE would be the local court of the place where the UAE domiciled litigant is located.

228. Expert evidence from UAE lawyers was served in relation to the rules of service in Dubai and the practicalities of service under the UK/UAE Treaty. The key matter that remained in issue by the time of the hearing was the length of time that service might take under the UK/UAE Treaty. The evidence on that point was as follows:

i) Mr El Daye (whose report was served on behalf of the Claimant) asserted that service "through the diplomatic channels" can take "anywhere from 12 to 18 months", and also that there have been instances where it took over 18 months (though he gives no details of such cases including whether or not they had particular features that contributed to the additional time required for service to be effected). He noted the part of article 5(1) dealing with "cases of urgency",

but said that what constituted "urgency" was not defined in the UK/UAE Treaty and therefore seeking the urgent route might be refused.

ii) Mr Alobeidli (whose report was served on behalf of D1 and D3) said that the timeframe for completing service through diplomatic channels could vary based on several factors, including the circumstances of the case, the geographical locations of the parties involved and the chosen method of service. He said that, in relation to an English claim being served in the UAE, and specifically in Dubai, the typical processing time was approximately 6 months. He noted that the Dubai court regularly receives requests for service of UK proceedings which are executed directly by the Notification Department at the Dubai Court. This was one of the reasons he identified why the timeframe for serving a summons relating to an English claim within the Emirate of Dubai was "notably shorter than the typical 12-18 months' duration". He suggested that a case of urgency would be one so designated by the Central Authority in the UK.

iii) Mr Davidson (whose report was served on behalf of D2) agreed with Mr El Daye in relation to what was required to effect service in the UAE under the Treaty and the usual timescales, though saying that in his experience service in a case of urgency would be about 4-7 months (though noting such cases were rare and the timescales inconsistent).

229. The matters relied upon in support of the application for alternative service in the without notice application before Dias J were:

i) Delay: the Claimant contended (based upon Mr El Daye's evidence) that service under the UK/UAE Treaty would take 12-18 months (or longer).

ii) Such delay was "particularly acute" where (the Claimant contended) D1 had already been served in England so the progress of the claim against him would be delayed waiting for service on the other Defendants in the UAE.

iii) D2 and D3 were aware of the claim, had instructed English solicitors, had engaged with the pre-action correspondence via those solicitors and had given no reason for refusing to authorise their London solicitors to accept service.

230. Those were the only points relied upon. There has, for example, been no suggestion here by the Claimant of any evasion of service or anticipated evasion of service on the part of any of the Defendants, or any other reason why service should not be effected under the UK/UAE Treaty.

231. The Defendants contended that these matters did not constitute a good reason to permit service by an alternative method.

Discussion

232. CPR 6.15(1) states:

> "(1) 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."

233. Although there is no express provision in Section IV of Part 6 permitting service of a claim form out of the jurisdiction by an alternative method, it is clear that the court has such jurisdiction, derived from the court's power to give directions as to service under rule 6.37(5)(b)(i): ***Cecil v Bayat*** [2011] EWCA Civ 135; [2011] 1 WLR 3086 and ***Abela v Baadarani*** [2013] UKSC 44; [2013] 1 WLR 2043 (at paragraph 20). This authorises the court to make an order for alternative service pursuant to rule 6.15(1).

234. In a case where the country where service is to take place is a party to the Hague Service Convention, and has stated its objection under Article 10 to service otherwise than through its designated authority, it has been held that permission under Rule 6.15 will only be granted in "exceptional circumstances": see ***M v N*** [2021] EWHC 360 (Comm) Foxton J at paragraph 8(iv) and the cases there cited. It may well be that similar reasoning would apply in a case where that country is party to a bilateral service treaty with the UK the terms of which make its provisions the exclusive manner in which service can be effected.

235. In relation to what constitutes "exceptional" circumstances, in ***M v N*** Foxton J said (at paragraph 8(v)):

> "There has been some debate as to what the requirement of "exceptional" or "special circumstances" means, but it has generally been interpreted as requiring some factor sufficient to constitute good reason, notwithstanding the significance which is to be attached to the Article 10 HSC reservation…".

236. Beyond those types of situations, there has been some debate in the authorities whether what is required to constitute a "good reason" under rule 6.15(1) to justify an order for alternative service in a service treaty case is "exceptional circumstances". The parties drew my attention to a number of decisions dealing with the point in the context of the UK/UAE Treaty. D1 relied upon ***The Libyan Investment Authority v JP Morgan Markets Ltd*** [2019] EWHC 1452 (Comm), where Bryan J preferred the view that exceptional circumstances are required in a bilateral treaty case, although it did not make any difference on the case before him (see paragraph 164), and it is not clear to what extent the question whether a treaty purported to provide an exclusive means of service bore upon the analysis. ***Integral Petroleum v Petrogat FZA*** [2021] EWHC 1365 (Comm) was also a case under the UK/UAE Treaty where Calver J adopted the test of "special or exceptional circumstances", although (given that he found such circumstances existed in the case before him, which was one of service of a worldwide freezing order) the order would have been made under either test. In ***Cesfin Ventures LLC v Al Ghaith Al Qubaisi*** [2021] EWHC 3311 (Ch), Master Kaye concluded, having examined the provisions of the UK/UAE Treaty, that it did not make service through diplomatic channels exclusive such that the court did not need to find exceptional circumstances (it is clear that she had the decision ***Integral Petroleum*** in mind, because she referred to it at paragraphs 26 and 28, but she did not refer to ***The Libyan Investment Authority*** decision). In ***Caterpillar Financial Services (Dubai) Ltd v National Gulf Construction LLC*** [2022] EWHC 914 (Comm) Julia Dias QC (sitting as a deputy High Court Judge), as she then was, adopted that decision (at paragraph 18).

237. The Defendants here said it was not necessary to resolve the question whether "exceptional circumstances" are required on the facts of this case. D2's skeleton argument suggested: "*What is required is a factor sufficient to override the significance which is to be attached to the existence of the treaty.*" I agree with that suggestion, and it resonates with what Foxton J said at paragraph 8(v) in ***M v N*** (above) about what constitutes "exceptional circumstances" where they are required to be shown.

238. There is a consistent theme running through the authorities that the fact there might be delay in the service of process if an alternative method of service is not permitted is normally not by itself sufficient to constitute a good reason to permit service by an alternative method. For example:

i) ***Cecil v Bayat*** [2011] EWCA Civ 135, Stanley Burnton LJ at paragraph 67:

> "I would consider that in general the desire of a claimant to avoid the delay inherent in service by the methods permitted by CPR r 6.40, or that delay, cannot of itself justify an order for service by alternative means."

ii) ***Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS*** [2017] EWHC 667 (Comm), Popplewell J, at paragraph 49(9)(a):

> "Where service abroad is the subject matter of the Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost."

(This was not one of the points subject to appeal: see [2018] EWCA Civ 1093 at paragraph 16).

239. In ***Caterpillar*** (above) the reason relied upon by the claimant seeking the order for alternative service was that service through the diplomatic route was taking "over eight months" (paragraph 19). The Judge found that not to be an inordinately long period, and that the claimant was unable to demonstrate any particular urgency, and in addition had not been proceeding with any great haste. The Judge said there was no good reason for alternative service.

240. Of the grounds advanced by the Claimant why an order for alternative service is justified here, the first two grounds were delay, rendered more "acute", it was said, because D1 had already been served within the jurisdiction.

241. As I have noted, the Claimant contended service under the UK/UAE Treaty would take 12-18 months (or longer, though there was no real support for "longer"). The main problem with this submission is that it is clear from the authorities, as set out above, that delay itself is not normally a sufficient reason for alternative service to be granted where there is a bilateral treaty.

242. Mr Samek pointed to the fact that the 12-18 months estimated by the Claimant's expert was longer than the periods of time anticipated for service in the UAE in the ***Caterpillar*** case ("*over eight months*"), where the anticipated delay was held not to be a sufficient

basis for an order for alternative service. However, that itself does not really assist, given that the order sought in that case was not granted. I recognise that 12-18 months is likely to be seen as a lengthy period of delay, although I also note that the 12-18 months referred to by Mr El Daye (which is not disputed by Mr Davidson) is not consistent with Mr Alobeidli's view, which was that service of UK process in Dubai generally took about 6 months. As noted above, Mr Alobeidli placed emphasis on the fact that service of English process in Dubai was quicker than was typical for the UAE, which is not a point on which Mr El Daye responded with any subsequent report. I am not in a position to decide which of them is right, and both experts in any event are giving evidence from their own experience (which may differ), but that may suggest that there is a greater prospect of speedier service under the UK/UAE Treaty than Mr El Daye suggested.

243. This is not a case where there has been any particular urgency or prejudice identified by the Claimant. The only point along those lines advanced by the Claimant was the submission that the delay was particularly acute because D1 had been served within the jurisdiction so that the progress of the claim against him would be delayed waiting for service on the other Defendants in the UAE. However, whilst it is right that moving the proceedings against D1 forward would likely have to await service on D2 and D3, in this case that is simply a part of the delay. The Claimant has not advanced any reason why there is any urgency to the proceedings (or why the claim against D1 needs to be concluded within any particular timeframe). This is not a case where any steps in the proceedings (beyond service of process) have already been taken, and there is no existing timetable that is going to be put at risk.

244. In any event, any consideration of the lack of progress in the proceedings must take into account the Claimant's own lack of urgency in progressing matters. In particular: (i) despite the responses to the letter before action being sent on 23 September 2022, the claim form was not issued until 12 May 2023; (ii) the Particulars of Claim were only signed on 11 September 2023, and service on D1 within the jurisdiction only attempted on 11 September 2023, on the eve of the expiry of the claim form for such service; (iii) the permission to serve out and alternative service applications were only made on 13 October 2023, over a month later, and in circumstances where the Claimant had then to ask for the applications to be decided urgently (as recorded at paragraph 5 of Iatuha 1) before the claim form expired for service out of the jurisdiction. If, for example, the Claimant had started the process of seeking to serve under the UK/UAE Treaty once he had issued the claim form, it would have been well underway by the time he eventually sought permission for alternative service (on Mr Alobeidli's evidence, service under the Treaty might have almost been complete by that time). There was no explanation tendered why the Claimant had waited 5 months between issuing the claim form and making the application for service out and alternative service.

245. There may be some cases where a particularly long period of anticipated delay in the service of process may itself amount to a good reason for alternative service, even where there is a bilateral treaty in place – the authorities cited above state that delay itself will not "normally" or "in general" constitute a good reason, leaving room for such cases. However, given the points I have referred to above, including the Claimant's own (unexplained) delay since issuing the claim form in seeking the order, I do not consider that this case is one of them. It is not, in the circumstances of this case, a factor

sufficient to override the significance to be attached to the existence of the UK/UAE Treaty.

246. As a result, the period of delay that might be encountered in service under the UK/UAE Treaty does not, in the circumstances of this case, amount to a good reason to permit service by an alternative means.

247. The third matter relied upon by the Claimant was his contention that D2 and D3 were aware of the claim, had instructed English solicitors, had engaged with the pre-action correspondence via those solicitors and had given no reason for refusing to authorise their London solicitors to accept service. However, these matters do not themselves amount to a good reason for permitting alternative service:

    i) If these matters were a good reason to permit alternative service, it would mean that a litigant could bypass a relevant treaty simply by sending pre-action correspondence (which will in many cases prompt the recipient to seek representation) and/or by sending a Claim Form to a prospective defendant or its solicitors (but not by way of service). That would largely subvert the value of the treaty.

    ii) It is clear that awareness of the claim form cannot of itself constitute a good reason: ***Société Générale v Goldas*** (above) at paragraph 49(4).

    iii) There is nothing in the implicit criticism made by the Claimant of the Defendants' not having authorised their London solicitors to accept service. There is no duty on a party to instruct a solicitor to accept service (see e.g. ***SMO v TikTok Inc*** [2022] EWHC 489 (QB) at paragraph 77 and ***Wragg v Opel Automotive GmbH*** [2024] EWHC 1138 (KB) at paragraph 91). Moreover, whilst the Claimant had offered to D2 and D3 to preserve arguments on *forum conveniens*, that did not extend to other points that might arise in relation to jurisdiction (such as serious issue to be tried and arguments about the gateways).

248. Accordingly, the points relied upon by the Claimant do not amount to a good reason for alternative service, let alone amounting to "exceptional circumstances" (if that is what is required). Whichever view of the law is taken, therefore, the requirements of CPR 6.15(1) are not met. I would therefore set aside the order for alternative service.

249. For completeness, I note that initially the Defendants had also contended that there was a second reason why the order for alternative service should not have been made, namely because the methods of service provided for in the Dias J Order contravened or were incompatible with UAE domestic law. As a result, the expert evidence on the law of the UAE covered that issue. However, at the hearing, Mr Kitchener (who made submissions on the alternative method of service issue on behalf of the Defendants) made no reference to it, saying he did not think it took matters very much further. I agree. On the evidence that was served, if this point had been pressed by the Defendants (which it was not) it seems to me it would not have availed them. Given, however, that the Defendants did not press this point, and given that I have already concluded there is not a good reason for an order for alternative service, I do not need to deal further with this point.

Non-disclosure complaints

250. The Defendants also sought to set aside the Dias J Order on the basis of non-disclosure on the without notice application. Given that I have already determined that the order should be set aside on the ground that England is not the appropriate forum, the outcome of the application does not turn on this point.

251. The general principles were set out in the well-known judgment of Ralph Gibson LJ ***Brink's Mat Ltd v Elcombe*** [1988] 1 WLR 1350 at 1356-1357 (omitting internal citations):

> "(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts" …
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers…
>
> (3) The applicant must make proper inquiries before making the application … . The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant…; and (c) the degree of legitimate urgency and the time available for the making of inquiries….
>
> (5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure... is deprived of any advantage he may have derived by that breach of duty" …
>
> (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" …. The court has a discretion,

> notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms."

252. The Claimant also relied upon what was said by Slade LJ at 1359C-E that the application of the principle should not be "carried to extreme lengths", and by Balcombe LJ at 1358 D-E:

> "The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained…. But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was obtained."

253. The principle applies to without notice applications for permission to serve out of the jurisdiction. The Claimant emphasised, however, that there is different context compared to other situations in which without notice applications are made. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute, and that the issues that concern the court are whether there is serious issue to be tried, a good arguable case in relation to the gateway(s) and whether England is clearly the appropriate forum, and beyond that the court is not concerned with the merits of the case: see ***MRG (Japan) Limited v Engelhard Metals Japan Limited*** [2003] EWHC 3418 (Comm) (Toulson J) at paragraph 26.

254. The principles were summarised by Bryan J in ***The Libyan Investment Authority v JP Morgan Markets Ltd*** [2019] EWHC 1452 (Comm) at paragraphs 92 to 98. He then went on to say at paragraph 120:

> "The importance of the duty of full and frank disclosure, on applications for permission to serve out, just as in the context of a freezing injunction, cannot be over-stated. There is a difference in terms of what the disclosure must be directed at, and the matters being considered, but the underlying reason and rationale for the duty remains the same, as is the need to comply with the same. A failure to comply with that duty is by its very nature serious – an individual or entity has been brought into the jurisdiction without having had any opportunity to address the court as to why permission should not be granted, and as demonstrated by the present case, they are then exposed to very considerable costs upon an application to set jurisdiction aside."

255. At paragraph 122 Bryan J cited and endorsed the guidance given by Popplewell J in ***Banco Turco Romana SA (in liquidation) v Cortuk*** [2018] EWHC 622 (Comm), at

paragraph 45, which included noting that: "Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent."

256. See also what was said by Popplewell J in ***Fundo Soberano de Angola v Dos Santos*** [2018] EWHC 2199 (Comm) at paragraphs 51 to 53, including (at paragraph 53):

> "…the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to disclosure of documents (see CPR PD31A and *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905)."

257. The Defendants made various allegations, in their evidence and submissions, of the Claimant's failure to provide full and frank disclosure. The Claimant compiled a schedule listing 20 such allegations along with his responses. Many of those allegations were mentioned in one of the witness statements, but were not the subject of submission in the skeleton arguments or developed orally. It is clear that at least some did not amount to a material failure to give full and frank disclosure.

258. However, amongst the points on which the Defendants placed weight at the hearing there were matters on which there was a material failure by the Claimant to give full and frank disclosure, which I address below. The first of those is more important than the others, and I address it more fully.

The case made on res judicata arising out of the criminal judgment in Kazakhstan

259. The first issue requires some explanation of the background. It is a point in relation to which the Claimant accepted there had been a material non-disclosure (but which the Claimant contended was inadvertent and unintentional).

260. One of the points relied upon by the Claimant on the without notice application, in support of his contention that Kazakhstan was not an available forum for the Claimant to bring this claim, was the existence of a criminal court judgment that had already been delivered in Kazakhstan referring to some of the same facts. The contention was set out in Iatuha 1 as follows:

i) A Kazakh journalist, Mr Abzhan, had reported information about D1-D3, the bitcoin mining factory and the involvement of Mr Satybaldy. That was information that the Claimant had provided to Mr Abzhan.

ii) A criminal complaint was brought against Mr Abzhan by D2 in Kazakhstan, which resulted in a criminal judgment against Mr Abzhan (for "*the distribution of false information with a group of people by prior agreement, and for criminal defamation*" as described in Iatuha 1). That judgment found that certain information reported by Mr Abzhan was false.

iii) The Claimant was not a party to the criminal proceedings and was given no procedural status (although he was named in the judgment as the party who had provided the information in question to Mr Abzhan). The criminal court refused the Claimant's request to provide evidence in the case, because he was subject to separate criminal investigation.

iv) That information was (said Mr Iatuha) important to the Claimant in his ability to advance his claim. Iatuha 1 contended that the Claimant would not be able to advance his claim without at least some of it.

v) However, (based upon evidence from Mr Konysbayev) there was a real risk that other courts in Kazakhstan, including civil courts, would apply a principle of *res judicata* and find themselves bound by the criminal court's findings without further investigation, even though the Claimant had not been a party to that criminal case. It would follow that the civil court would find that the information the Claimant needed to rely upon was (based on the criminal court judgment) false.

vi) The *res judicata* effect of the criminal court judgment against Mr Abzhan would not apply in England, because the Claimant was not a party to the criminal case that resulted in the criminal judgment.

vii) There was, therefore, a real risk of substantial injustice if the Claimant had to bring this claim in Kazakhstan.

261. As presented on the without notice application, that presented a strong (possibly compelling) case that the Claimant would not be able to get substantial justice in Kazakhstan. However, as the exchange of evidence for these applications demonstrated, it contained a number of important misrepresentations and non-disclosures. (And, for the avoidance of doubt, it was not contended at the *inter partes* hearing that there was any real risk of substantial injustice in Kazakhstan arising on this basis).

262. First, the criminal court judgment against Mr Abzhan does not have any *res judicata* effect against the Claimant. That was pointed out by the Defendants' experts, Professor Karagussov and Mr Kaldybayev in their respective first reports, where they explained that the criminal judgment could have no *res judicata* effect against the Claimant as he was not a party to the criminal proceedings against Mr Abzhan. This led to a change of position on the part of Mr Konysbayev. In his first report (filed on the without notice application) he had been clear:

> "I believe that all the other Kazakh courts (criminal or civil) or law enforcement agencies may apply a principle of *res judicata*, i.e. will accept and be bound by the findings of the Criminal Court Judgment, without any further investigation. In other words, it will accept that the information above is false, as found in the Criminal Court Judgment."

263. Mr Konysbayev's second report (served in response to those of the Defendants' experts) no longer relied on a formal principle of *res judicata*, but instead suggested that because the circumstances of the criminal case were closely related to the Claimant's claim, a judge in Kazakhstan would likely not ignore the findings and would rely on them, by way of being "guided" by them even if the judge did not formally refer to the criminal court judgment in the decision. He said that, given the workload of an ordinary judge and the time allocated to complete court proceedings, there was a real risk that a judge would find it easier to take the facts from the criminal court judgment against Mr Abzhan rather than form their own view. That position was not supported by any material or examples, and was strongly rebutted by Professor Karagussov in his reply report (who said that judges in Kazakhstan "*would conduct their cases properly and determine the issues put before them in the proper discharge of their judicial duties*"). It would have been difficult to accept Mr Konysbayev's adjusted position if that had been pursued at the hearing on the Claimant's behalf (which it was not); it certainly did not amount to "cogent evidence" of substantial injustice. However, for present purposes it can be seen that it is not a point based on a formal *res judicata* at all, which was effectively abandoned in the second report.

264. Second, it was not disclosed by the Claimant that this very point (on *res judicata*) had been the subject of an attempted appeal, by the Claimant, of the criminal judgment, and the appeal court had confirmed that the criminal judgment had no *res judicata* effect against the Claimant:

i) The Claimant, contending he was an interested party, sought to appeal the criminal judgment against Mr Abzhan in Kazakhstan. The appellate court dismissed that appeal, stating that "*the verdict against Abzhan M. M. doesn't have prejudicial value with respect to Alimov Ye.G [ie the Claimant].*"

ii) This appellate court judgment was dated 24 March 2023, before the claim form was issued in May 2023, and well before the evidence was filed for the without notice application in October 2023.

iii) It would, of course, have been highly material for the Judge looking at the without notice application to know, in considering whether a *res judicata* might arise in Kazakhstan from the criminal judgment, that an appellate court in Kazakhstan had already considered that very question and had determined that it would not. It is, in fact, difficult to see how this point could ever have been advanced as an issue of *res judicata* had the appellate court judgment been revealed.

265. At the hearing of these applications, Mr Samek accepted that the non-disclosure of the appellate court judgment had been a material one, and apologised on behalf of his client. It was admitted that the appellate judgment had been available at the time of the without notice application, and that if the Claimant's solicitors had been aware of it, it would

have been disclosed. The only explanation given as to how this situation had come about was that contained in a letter from the Claimant's solicitors (Sterling Law) dated 15 October 2024 (i.e. the first day of the hearing).

i) It was said that Sterling Law did not know about the appellate judgment until they had been made aware of it through D2's evidence in these proceedings. Nor, it was said, had Mr Konysbayev been aware of the appellate judgment when preparing his reports.

ii) In relation to the Claimant himself, the letter stated:

> "We understand from Mr Alimov that all that he understood from his Kazakh lawyer was that he had lost the appeal; that he did not read the Appeal Judgment as he saw no reason to read it because he had lost; that he in effect then put it out of his mind, not appreciating whatever significance it had."

266. This explanation of the Claimant's own position is difficult to accept. He had instigated an attempted appeal in Kazakhstan on the basis that his position in claims involving him would be prejudiced by the criminal judgment. He knew that he had lost that appeal. He must have thought that the reasons given in the judgment may well likely be relevant one way or another in making a similar point in England (either in support or against it). In any event, he ought to have taken reasonable steps to ensure that material matters were put before the courts, and his solicitors had a duty to explain that to him (see Popplewell J in ***Fundo Soberano de Angola v Dos Santos***, above). If they had done, it is very difficult to understand how the fact that the Claimant had sought to run this point on an appeal in Kazakhstan and lost could have remained "out of his mind".

267. If this was not a deliberate failure to disclose something which was obviously material to the point being taken on the without notice application, it displays on behalf of the Claimant a highly cavalier attitude to the obligations upon a party making a without notice application. Those obligations include the making of proper inquiries, and the duty applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries (see ***Brinks Mat***, above).

268. Third, the findings that the criminal court had made do not, on examination, appear to be ones that would stand in the way of the Claimant asserting his claim against the Defendants. The facts said to have been found to be false by the criminal court that were relied upon in Iatuha 1 were:

> "(a) the founders of GDA (i.e. MMK) had close connections to Mr Satybaldy;
>
> (b) MMK set up a bitcoin mining factory with a Mr Tokhtarov, in the former Karaganday woodworking plant, i.e. the ABK Project;
>
> (c) other purchasers for Sogrinskaya stepped aside when it was clear that Mr Makhat wanted to buy it; and

> (d) Mr Satybaldy owned an interest in the ABK Project via Mr Makhat (and Mr Makhat avoided transferring those assets to the Kazakh state following Mr Satybaldy's criminal conviction by transferring them to a third party)."

269. None of those facts relate to the existence of the alleged oral agreement at the centre of the Claimant's claim. It is difficult to see how the points at (a), (c) and (d) are relevant (certainly not essential) to the Claimant's claim at all, and consistently with that nothing was said about them in Iatuha 1. The only point that was made in Iatuha 1 was to say that the Claimant would not be able to advance his claim "*without showing that, in particular, MMK established the ABK Project.*" However, that is not something that appears to be disputed by the Defendants (and there was nothing in the responses to the letters before action suggesting it was) and, as Mr Kaldybayev explained in his second report, it is far from clear from the judgments that the court in the criminal case against Mr Abzhan had found such a fact to be "false". The information at (b) above is that the Defendants set up a bitcoin mining factory "with a Mr Tokhtarov", and there is nothing in the Claimant's claim that suggests it is dependent upon the Claimant establishing the involvement of such an individual (someone who is not mentioned in the Particulars of Claim at all or in any of the Claimant's own evidence on these applications).

270. The paragraph of Mr Iatuha's statement containing the quotation above about "MMK" establishing the "ABK Project" may itself have been carefully drafted in an attempt not to overstate the position, but the overall impression given (to a judge who, in particular on the without notice application, could not have been expected to delve into the detail of the Kazakh judgments and the hinterland to the claims to appreciate the significance, or lack of significance, of these points) by the section of Iatuha 1 dealing with this is that the findings of the criminal court on these points stood in the way of the Claimant's claim.

271. The result of the matters I have set out above is that there was a material non-disclosure and misrepresentation of the position on the without notice application:

i) The most serious was the complete failure to disclose the appeal judgment, or even to refer to the fact that there had been such an appeal (i.e. the second point above). On its own, that constitutes a serious failure on the part of the Claimant, for which no satisfactory reason has been provided.

ii) Mr Samek contended that it was "inadvertent and unintentional", but that does not seem to me to grapple with the obvious difficulties with the Claimant's explanation why he had not referred to it, or told his English solicitors about it, or even told them that he had sought to appeal the criminal judgment that was being referred to in the evidence. If it was not a deliberate omission on his part, his response to his English solicitors explaining to him his duty of full and frank disclosure (which there is no reason to think they did not do) must have been a complete absence of action in relation to this issue, because any inquiry (e.g. with his own Kazakhstan lawyer who had appeared for him in the appeal in Kazakhstan) surely would have reminded him about the appellate judgment.

iii) The first failure was also a serious and material misrepresentation of the application of the principle of *res judicata* in Kazakhstan. Whilst the Claimant's solicitors may have been in the hands of Mr Konysbayev in that respect, it is

difficult for the Claimant to put himself in the same position, given the appellate judgment (which, even if he did not read it (as he says) was available to him as a source of evidence about the operation of the *res judicata* point).

iv) The third point is, as is evident from the account above, more nuanced. But nonetheless, in particular in light of the other two points, it contributes to the overall misleading nature of this section of Iatuha 1 and the presentation that was given to Dias J on this point.

272. That gives rise to the question whether (if I had not already decided it should be set aside on other grounds) I would have held that the Dias J Order ought to be set aside on the basis of these failures to give full and frank disclosure. As to that, I would have so held:

i) There was a clear failure to make full and frank disclosure of material facts. That was admitted, at least in part (as regards the appellate judgment) though, as I have said, the non-disclosure went further than simply the failure to disclose the appellate judgment (although that was the most obvious of the failures).

ii) This was a substantial breach of the obligation. The court therefore inclines strongly towards setting aside the order, even where the breach is innocent (***Banco Turco Romana***, Popplewell J, above).

iii) On the part of the Claimant, if the non-disclosure of the appellate judgment was not deliberate, it could only have come about as a result of the complete disregard of his obligations to ensure he had made full and fair disclosure in relation to this issue. It is difficult to see how he can have made any inquiries without being reminded that there had been an appeal on this issue that had resulted in an appellant judgment in Kazakhstan.

iv) As Bryan J noted in ***Libyan Investment Authority v JP Morgan*** (above), the importance of the duty of full and frank disclosure on applications for permission to serve out cannot be over-stated. A failure to comply with that duty is by its very nature serious – an individual or entity has been brought into the jurisdiction without having had any opportunity to address the court as to why permission should not be granted, and they can then be exposed to very considerable costs upon an application to set jurisdiction aside.

v) The Claimant contended, in support of the argument that the Dias J Order ought not to be set aside, that the point made in the without notice application about *res judicata* did not stand alone, and that other points were made in support of the contention that there was a real risk that substantial justice could not be obtained in Kazakhstan. However, I do not find that a compelling point:

a) It is clear that the point advanced on *res judicata* was a serious one and was, as presented in Iatuha 1, at least on its face a potentially compelling point, and is likely to have played a part in the decision of Dias J to make the order sought. I cannot realistically go further in trying to work out what part it played or weight it carried compared to the other points advanced (in particular in light of the fact that I have, in any event, concluded that there is no real risk of substantial injustice in Kazakhstan

on the two grounds that the Claimant did pursue at the hearing before me).

b) I do note, however, that there are problems with both of the other two points that were advanced in favour of the substantial justice point on the without notice application. The first was the point based on Article 153 of the Code, which I have rejected, above. I also explain below why there was a failure to comply with the duty of full and frank disclosure in relation to that point as well. The second other point was a submission that a court in Kazakhstan might be disinclined to make an order for specific performance, which never appeared a promising point, and was not in fact taken in the Claimant's skeleton argument or persisted in at the hearing before me at all.

c) In a case where it was always clear that most of the factors relating to the litigation pointed to Kazakhstan as the appropriate forum, it must also have always been clear to the Claimant, and those representing him, that arguments about substantial justice in Kazakhstan were likely to play an important part in any argument about forum and, therefore, would be central to the ultimate outcome. They were never going to be peripheral points.

Other failures to make proper disclosure

273. There were also, as I have noted, several other allegations of failure to make proper disclosure on the without notice application which in my view were material. Given not only my decision to set aside the Dias J Order on other grounds, but also my indication above that the serious non-disclosures in relation to the *res judicata* point alone would have been a basis for my setting aside the Dias J Order, I will not deal with every one of the other points. I will, however, highlight three of them which appear to me particularly notable and briefly describe their nature.

274. First, in support of the Claimant's case that D1 remained resident in England, Iatuha 1 stated that, on 26 April 2023, D1's wife had been seen leaving the 27 Ingram Avenue before being driven away in a Bentley. Mr Iatuha relied on that to draw a conclusion that D1's wife, along with the rest of D1's family, were resident at 27 Ingram Avenue. The identification was said to have been made by Raedas Consulting Ltd ("Raedas"), an investigation firm engaged on behalf of the Claimant. Mr Iatuha exhibited a letter from Raedas making the identification and containing two photographs of the woman.

i) However, the woman so observed was not D1's wife. It was a photograph of his mother, who D1 explained lived at 27 Ingram Avenue.

ii) When this was explained, the Claimant's response was to distance himself from the original identification, saying "I have only met Mr Mirakhmedov's wife only once in my life, during my visit to 27 Ingram Avenue on 10 June 2017. I therefore did not recognise her and so I did not question Raedas' identification of the lady in the photograph as her. The lady in the photograph was wearing sunglasses and a headscarf, and she is small in the photograph, which was taken at some distance away, making it more difficult for me to identify her face."

These difficulties in identification ought to have been made clear in the evidence in support of the without notice application.

iii) The Claimant also deployed a statement from Mr Andrew Wordsworth, a Director at Raedas, who explained that the "identification" of D1's wife had been made by his firm without any prior knowledge of what D1's wife looked like, including no photograph to compare to the woman who had been observed, and he said (in his statement) that Raedas could not positively confirm the identify of the woman and could not confirm conclusively if she was D1's wife (in the absence of any photograph). However, that was not what had been said in the Raedas letter or in Iatuha 1, which had recorded the "identification" without caveat or explanation.

iv) In fact, as Mr Wordsworth explained in his statement the "identification" had been based on a series of assumptions, including D1's wife having had a historic connection to the property in public records (e.g. credit records and planning permission), that the woman was driven away by a chauffeur in a Bentley (and therefore, it was said, was unlikely to be an employee) and assumptions about age and ethnicity. It was acknowledged that the wearing of headscarf and glasses by the woman observed made this difficulty.

v) A proper presentation of this would, of course, have undermined the bare assertion that D1's wife had been observed at the properly. But on an application requiring full and frank disclosure, it ought to have been set out.

275. Second, the presentation in Iatuha 1 of the contention that the Claimant had properly served D1 at 5A Falkland Road based on section 1141 of the Companies Act 2006 was incomplete. There was only mention of and a short quotation from section 1141(1) without giving it any context, or explaining that it came immediately after a detailed section dealing with service (section 1140) or explaining that the Claimant could not identify any authority in which service had been validly carried out based only upon section 1141 (which I infer must have been the position because no such authority was cited at the hearing). The Claimant's response to this non-disclosure allegation that it did not rely on section 1140 in Iatuha 1, but only section 1141, does not meet the point. To suggest that the court could have taken any sort of informed view on the application of section 1141 in this context, based simply on what was said in Iatuha 1, is unrealistic. It would have been highly material to know what section 1140 provided for (and that, at the material time, service on D1 did not fall within its scope), that there had been a series of authorities considering service under 1140, and that none of them had suggested service could be effected simply based on section 1141 where section 1140 did not apply.

276. Third, the content and effect of Article 153 of the Code (which was, on the without notice application, said to demonstrate that Kazakhstan was not an available forum, but was only pursued as a "substantial justice" point at the hearing) was not properly explained. I have dealt with this issue as it arises in the "substantial justice" argument above, and do not repeat the detail here. However, it is clear that that the effect of the rule was more nuanced than had been presented on the without notice application, and there was no attempt to explain the limited extent to which the rule would actually impact on the presentation of the Claimant's case in Kazakhstan.

277. Each of these three additional points constituted a material failure to comply with the duty to give a full and frank presentation on the without notice application. They might well, on their own, have led me to set aside the Dias J Order, and in any event they would have supported the decision I would have reached that it ought to be set aside for non-disclosure based upon the *res judicata* issue.

Luxembourg law application

278. This application was made in the same application notice as D2's application to set aside the Dias J Order and sought to rely upon a letter that had been sent to D2's solicitors (Mishcon de Reya) by a Luxembourg lawyer setting out his views on some points about witness evidence under Luxembourg law. It was not in the form of an expert report and did not contain the statement required by CPR Part 35 nor did it comply with other requirements of that part. The point made by D2 which it was said to support was that other (non-CIS) civil law systems strike a similar balance in relation to reliance upon witness evidence as that reached in Kazakhstan. As it apparent from my consideration of the Article 153 issue above, I have not relied upon it and do not need to rely upon it in coming to the conclusions that I have reached.

279. The evidence was referred to in passing in D2's skeleton argument, and by Mr Kitchener in his oral submission, but the application to adduce it was not presented, whether in the skeleton argument or orally. To the extent that this application was maintained, I refuse it. In summary:

    i) Evidence that another system does things differently to both England and Kazakhstan (even if similar in some respects to the latter) does not seem to me to advance the points I needed to consider on these applications. The evidence is not directly relevant. If the application of the rule in Kazakhstan would have created a real risk of substantial injustice, I do not see that the fact a similar result would have been reached in Luxembourg would have changed that.

    ii) The deployment of expert evidence must be kept under control. It is to be restricted to that which is reasonably required to resolve the proceedings (CPR rule 35.1). The Luxembourg law evidence does not fall within that description.

    iii) Permission had already been granted for expert evidence in the law of Kazakhstan and of the UAE to be served by each party. I was not told why the court had not also been asked in advance to rule on the question whether expert evidence about the law of Luxembourg should be permitted, such that there could have been an exchange of reports, and a joint memorandum. In any event, the course that was followed meant there had not been such a process.

    iv) The evidence referred to in the application did not comply with the requirements of CPR part 35.

Overall conclusions

280. The following is a summary of the outcome of the main applications in light of the conclusions and determinations I have reached above:

    i) D1 was properly served within the jurisdiction.

ii) The proceedings against D1 are stayed on the grounds of *forum non conveniens* in favour of the courts of Kazakhstan.

iii) The Dias J Order granting permission to serve the Defendants out of the jurisdiction is set aside:

a) On the ground that England is not the proper place to bring the claim.

b) As regards D4, also on the ground that there is no serious issue to be tried against D4.

c) On the ground of failure to give full and frank disclosure on the without notice application.

iv) The order for alternative service in the Dias J Order therefore falls away, but I would in any event have set it aside.