THE HIGH COURT

COMMERCIAL

[2016 No. 9981 P.]

BETWEEN

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

PLAINTIFFS

AND

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

DEFENDANTS

(FOURTH AND FIFTH DEFENDANTS' MOTION SEEKING CROSS-EXAMINATION)

JUDGMENT of Mr. Justice David Barniville delivered on the 1st day of February, 2021

Introduction

1. This is my judgment on an application by the fourth and fifth named defendants, Eurotoaz Limited and Andrey Gennadyevich Babichev, ("Eurotoaz defendants") for an order under O. 40, r. 1, RSC granting them liberty to cross-

examine Leonard Ke-Chung Waller-Diemont ("Mr. Waller-Diemont"), a director of the fourth named plaintiff, Bairiki Incorporated ("Bairiki"), on foot of an affidavit which he swore in the proceedings on 12th October, 2020.

2. Mr. Waller-Diemont swore that affidavit on behalf of Bairiki in support of an application by the plaintiffs for an order amending the proceedings. That application is listed to be heard by me next week, on 2nd and 3rd February, 2021. In the event that the court decides to grant liberty to the Eurotoaz defendants to cross-examine Mr. Waller-Diemont, they ask the court to make consequential orders under s. 11(3) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020 (the "2020 Act") that the cross-examination of Mr. Waller-Diemont (who is based in Curacao) should take place remotely using the Trialview remote hearing platform.

Plaintiffs' Amendment Application

3. The plaintiffs' application to amend the proceedings (the "amendment application") was brought by a notice of motion issued on 4th June, 2020. In that motion, the plaintiffs seek an order giving them leave to amend the proceedings in a manner identified in a draft second amended statement of claim and a draft amended plenary summons. The amendments are intended to give effect to an alleged migration or re-domicile of the first named plaintiff (Trafalgar Developments Limited ("Trafalgar")) from Anguilla to St. Lucia (and a change of name of the company) and of Bairiki from Nevis to the British Virgin Islands (the "BVI"). Between them, Trafalgar and Bairiki are said to be the owners of approximately 32% of the share capital of a Russian company called OJSC Togliattiazot ("ToAZ") which is at the heart of the proceedings.

4. It is unnecessary to describe in any detail the claims made in the proceedings, save to note that the plaintiffs claim to be the victims of an alleged raider attack by the

defendants (including the Eurotoaz defendants) designed to enable the defendants to acquire the plaintiffs' shares in ToAZ at a gross undervalue and to gain control of ToAZ. The claims are strenuously denied and rejected by those defendants who are represented in the proceedings. A brief description of the claims and allegations in the proceedings can be seen in the judgment I delivered on various discovery issues between the plaintiffs and the Eurotoaz defendants which is reported at [2019] IEHC 610.

5. The plaintiffs' amendment application is grounded on an affidavit sworn by their solicitor, Michael Cooney of McCann Fitzgerald, on 4th June, 2020 and on a number of other affidavits, including affidavits of experts in the laws of the relevant Caribbean jurisdictions which exhibited the reports or opinions of those experts. The most relevant of the plaintiffs' legal experts, for present purposes, is Mr. Jonel Powell, a Lawyer in St. Kitts and Nevis (and the current Minister of Education, Youth, Sport and Culture in that jurisdiction).

6. The Eurotoaz defendants have opposed the application. Of the other defendants in the proceedings, the first, second, third, sixth and tenth named defendants (known as the "UCCU defendants") have also opposed the application and have put in a replying affidavit in support of their opposition (sworn by Mr. Vladimir Nikolaevich Melnikov on 16th November, 2020).

7. A replying affidavit was initially sworn on behalf of the Eurotoaz defendants by Keith Smith of Arthur Cox on 21st August, 2020. The Eurotoaz defendants have also provided affidavits and reports from experts in the laws of other relevant jurisdictions. The most relevant of these experts, for present purposes, is Ms. Jean Dyer, a lawyer based in Anguilla, who is qualified to practise in Nevis.

8. Several other lawyers have sworn affidavits and provided reports in connection with the plaintiffs' amendment application which are not relevant to the cross-examination issue which is focussed on the purported migration of Bairiki from Nevis to the BVI and, in particular, on the steps taken in Nevis in connection with that alleged migration.

9. One of the affidavits relied on by the plaintiffs in support of their amendment application is the affidavit sworn by Mr. Waller-Diemont on behalf of Bairiki on 12th October, 2020. Mr. Waller-Diemont swore that affidavit in response to Mr. Smith's replying affidavit and in response to Ms. Dyer's first report of 21st August, 2020. Ms. Dyer's report was in turn a response to Mr. Powell's first report on behalf of Bairiki of 2nd June, 2020. While it will be necessary to refer in a little more detail later to what is said in those reports and in the further reports provided by Mr. Powell and Ms. Dyer, it is sufficient to note at this point that, in his affidavit of 12th October, 2020, Mr. Waller-Diemont was responding to what Mr. Smith said in his replying affidavit and to what Ms. Dyer said in her first report. Ms. Dyer expressed the opinion in that report that the applicable statutory requirements in Nevis were not complied with by Bairiki in the migration process for two reasons.

10. First, she stated that the Certificate of Departure signed by Mr. Waller-Diemont on 12th November, 2019 was incorrect and did not comply with s. 130(2) of the Nevis Business Corporation's Ordinance, 2017 (the "NBCO") for various reasons, including that it did not refer to the fact that, on 5th July, 2019, Judge Kirillov in the Komsomolsky District Court in Russia gave judgment in proceedings brought under Article 159(4) of the Russian Criminal Code (the "Russian judgment") in which he awarded damages of a sum approximating to $1.38bn against (inter alia) the plaintiffs in these proceedings, including Bairiki. That judgment was essentially confirmed on

appeal by the Samara Court of Appeal on 26th November, 2019. Ms. Dyer stated that under s. 130(2) of the NBCO, Bairiki was required to set out the names and addresses of the judgment creditors under the Russian judgment in the Certificate of Departure and that the failure to do so constituted a material non-disclosure and a breach of the NBCO. She expressed the opinion that it could reasonably be inferred from the withholding of that information that the transfer or migration was not in good faith as stated by Mr. Waller-Diemont in the Certificate of Departure. She expressed the view that this was *"one of the rare situations"* in which the Registrar of Corporations in Nevis would have refused to allow Bairiki to migrate out of Nevis or would, at least, have required Bairiki to put the creditors on notice.

11. The second reason provided by Ms. Dyer for her view that the migration of Bairiki from Nevis to the BVI was ineffective was that a Certificate of Continuance providing proof that the company had continued into the foreign jurisdiction was not filed with the Registrar of Companies in Nevis within 30 days of the filing of the Certificate of Departure, as required by s. 131(4) of the NBCO. Ms. Dyer concluded that the migration of Bairiki from Nevis to the BVI was invalid and that it remains domiciled in Nevis.

12. Mr. Powell and Ms. Dyer exchanged further reports dealing with these and other points relevant to the validity and effectiveness of the migration of Bairiki from Nevis to the BVI. As the issues considered by those experts in their reports will be the subject of extensive consideration at the hearing of the plaintiffs' amendment application, I will attempt to confine my consideration of the relevant issues in those reports to those that are strictly necessary for the resolution of the Eurotoaz defendants' cross-examination application.

13. As noted above, Mr. Waller-Diemont swore his affidavit on 12th October, 2020, partly in response to Ms. Dyer's first report as well as in response to Mr. Smith's replying affidavit. At para. 6 of his affidavit, Mr. Waller-Diemont contended that the questioning of the migration of Bairiki to the BVI by the Eurotoaz defendants was part of the raider attack the subject of the proceedings and was an abuse of process. In that context, he referred to and relied on a judgment of the High Court of the Eastern Caribbean (Ellis J.) of 19th July, 2018 (the "Ellis judgment") in proceedings brought by two indirect shareholders in ToAZ, Magnum Investment Trading Corporation and Niteroi Limited. Mr. Waller-Diemont's description of the Ellis judgment in that paragraph of his affidavit is disputed by the Eurotoaz defendants. Mr. Waller-Diemont then explained (at para. 7 of his affidavit) why Trafalgar and Bairiki chose to migrate and re-domicile to St. Lucia and the BVI respectively, which he said was due to the unavailability of local corporate agents in their original jurisdictions.

14. At para. 8 of his affidavit, Mr. Waller-Diemont stated that, having reviewed the Certificate of Departure following consideration of Ms. Dyer's first report, he accepted that *"in error"* he had overlooked referring to the Russian judgment. He said that the Declaration was prepared on the basis of Bairiki's latest annual accounts at the time, which had been prepared prior to the delivery of the Russian judgment. He said that he regretted that that had happened and that he did not pick up on the *"error"*. He stated that there was no attempt to conceal the Russian judgment, which is a matter of public record, and that he rejected any suggestion of bad faith on his part.

15. Mr. Waller-Diemont then went on to state (at para. 9 of his affidavit) that while it was not an excuse for his omission to refer to the Russian judgment in making

the Declaration, he understood that the judgment was not in force at the time of the Declaration because it was still under appeal and that the plaintiffs had always strenuously disputed the propriety of the judgment. He proceeded to elaborate on why that was so.

16. Further affidavits were exchanged in respect of the plaintiffs' amendment application, including another affidavit sworn by Mr. Smith on behalf of the Eurotoaz defendants on 19th November, 2020. In that affidavit, Mr. Smith disputed the contention that his clients' attempt to question the migration of Bairiki was in furtherance of the alleged raider attack and an abuse of process. At para. 11 of his affidavit, Mr. Smith stated that he did not propose addressing or commenting on the adequacy or otherwise of the explanation furnished by Mr. Waller-Diemont for the plaintiffs' conduct in relation to the purported migrations. He did, however, refer to the explanation provided by Mr. Waller-Diemont at para. 8 of his affidavit and noted that Mr. Waller-Diemont had not exhibited the accounts of Bairiki referred to by him. Mr. Smith also disputed Mr. Waller-Diemont's description of the Ellis judgment by reference to another expert opinion obtained by the Eurotoaz defendants from another legal expert.

17. Mr. Powell provided a second report on 13th October, 2020 and in response to that, Ms. Dyer provided her second report on 19th November, 2020. In his second report, Mr. Powell disagreed with Ms. Dyer's view that the failure to refer to the Russian judgment in the Certificate of Departure amounted to substantial non-compliance with the Nevis statutory requirements. He accepted that there was non-compliance with those requirements but expressed the view that it was inconsequential. He also disagreed with Ms. Dyer's view that it could reasonably be inferred that the transfer of domicile of Bairiki from Nevis to the BVI was not in good

faith and that the Registrar of Corporations in Nevis would have refused to allow the migration or at least would have required Bairiki to put the creditors on notice. He stated that good faith was a subjective matter which would have to be determined by the relevant tribunal considering the issue on the basis of all of the facts. He went on to refer to what he said was the reasoning given by Mr. Waller-Diemont in his affidavit for his failure to disclose the Russian judgment. He stated (at para. 6):-

> *"...we will see that the omission resulted out of the perceived improper basis for the judgment and expectation of it being overturned. This suggests a logical thought process in relation to the validity of the judgment and not one fuelled by any sinister motive. Although it is not for counsel to assume what the Registrar would or would not have done, it is reasonable to expect that had the Registrar known of the judgment she would have required the non-disclosure to be rectified. This however does not negate the proposition that the failure to disclose was not detrimental and that the Registrar had a discretion to accept the Certificate of Departure as is."*

18. Mr. Powell also disputed the second reason for disputing the effectiveness of the migration referred to by Ms. Dyer concerning the filing of the Certificate of Continuation. Mr. Powell had addressed that issue in his first report. Mr. Powell stated (at para. 13 of his second report):-

> *"The Registrar has deemed the company as having migrated and such is its status on the register as evidenced by the letter from the Registrar to PCG Trust Services Limited dated 24th February, 2020. As the status of the company's migration has never been challenged successfully before the Registrar or the Courts of St. Kitts and Nevis, until such time, the Certificate*

of Departure stands as being properly filed and the company properly migrated."

19. Mr. Powell concluded (at para. 18) that the Registrar of Companies recognises, and the Register of Companies reflects, the successful migration of Bairiki, that the non-disclosure of the Russian judgment in and of itself was not detrimental to the migration of Bairiki, that the date stamped on the Certificate of Departure can be proved to be incorrect and that until such time as the migration process is successfully challenged by competent courts in St. Kitts and Nevis, the migration of Bairiki stands.

20. Ms. Dyer responded in her second report of 19th November, 2020. She disagreed that the noncompliance with s. 130(2)(a) (by reason of the failure to refer the Russian judgment) was inconsequential. She opined that that noncompliance on its own means that the Certificate of Departure, and therefore Bairiki's migration is invalid (para. 10). As regards good faith, Ms. Dyer stated that it was for the Irish courts to consider Mr. Waller-Diemont's explanation for overlooking the Russian judgment. Ms. Dyer then referred to what she saw as an apparent discrepancy between what Mr. Powell had said was the reason for Mr. Waller-Diemont's omission to refer to the Russian judgment in the Certificate of Departure and the explanation for the omission given by Mr. Waller-Diemont himself in his affidavit. Ms. Dyer expressed the view (at para. 12) that "*it matters not*" if the failure to disclose the Russian judgment was in good faith or not, and that, in her view, the failure to refer to the judgment was still a breach of s. 130(2)(a) of the NBCO rendering the migration of Bairiki from Nevis to the BVI invalid. That would be the case, even if Mr. Waller-Diemont had acted in good faith, as required under s. 130(2)(d), in Ms. Dyer's opinion.

21. Ms. Dyer also maintained her view in relation to the second reason as to why Bairiki's migration to the BVI was invalid, namely, the failure to comply with s. 131(4) of the NBCO by reason of the alleged filing of the Certificate of Continuation outside the required 30-day period. Ms. Dyer restated her opinion at (para. 20) that Bairiki's migration was invalid by reason of a "*procedural irregularity*" which cannot be cured, that Bairiki remains domiciled in Nevis, that it could recommence the migration process and that, if it did, the Certificate of Departure should not contain the material non-disclosures evident in the filed certificates.

Directions Hearing 24th November 2020

22. That was the state of the relevant evidence in relation to the relevant evidence in relation to the plaintiff's amendment application on 24th November, 2020 when the proceedings came before me for a directions hearing. Several different related issues in the proceedings were considered on that occasion. One of them concerned the plaintiff's amendment application.

23. Counsel for the Eurotoaz defendants requested that the amendment application be listed for hearing on 2nd and 3rd February, 2021, which are the first two days fixed for the hearing of an interlocutory injunction application brought by the plaintiffs against the UCCU defendants, in connection with the enforcement of the Russian judgment. While that was the first time the plaintiffs were aware of the fact that the Eurotoaz defendants would be seeking to have the amendment application listed for those days, there was no objection to the court listing the application as requested. Counsel for the Eurotoaz defendants also stated that he thought that it would be necessary to cross-examine Mr. Waller-Diemont on the basis that it was going to be alleged that the explanation contained in his affidavit was not "*compatible*" in terms of its reasoning with the evidence of Mr. Powell, Bairiki's legal expert. The

possibility of cross-examination of Mr. Waller-Diemont had not been raised in correspondence between the parties before it was mentioned in court by counsel for the Eurotoaz defendants. He stated that the issue would be raised with the plaintiff's side after the plaintiff's further round of affidavits in connection with the amendment application were provided, which would be on 11th January, 2021. There was no particular objection from the plaintiff's side to this proposed course of action. Nor did I have a problem with it.

24. The plaintiffs then delivered two further affidavits in connection with the amendment application as well as an affidavit and expert opinion on Russian law on 11 January 2021. The affidavits were sworn by a Ms. Kimberly Wesenhagen (a director of the second named plaintiff) and by Ms. Mistica Kastaneer-Eisden (a director of Trafalgar).

Eurotoaz Defendants' Cross-Examination Application

25. There was a further directions hearing before me on 13 January 2021. At that hearing, I was informed that the Eurotoaz defendants did wish to cross-examine Mr. Waller-Diemont. I gave directions for a motion seeking liberty to cross-examine him to be issued by the Eurotoaz defendants which I listed for hearing on 25th January, 2021, one week prior to the hearing of the amendment application. Several further affidavits were sworn in accordance with the directions I gave which I should now refer.

26. Mr. Smith swore the grounding affidavit on behalf of the Eurotoaz defendants for the cross-examination motion on 15th January, 2021. He referred to the affidavits sworn and to the expert reports exchanged in connection with the amendment application, including Mr. Waller-Diemont's affidavit of 12th October, 2020 and the expert reports of Mr. Powell and Ms. Dyer referred to earlier. At para. 32 of his

affidavit, Mr. Smith stated that it would be the submission of Eurotoaz defendants at the hearing of the amendment application that the explanation offered by Mr. Waller-Diemont for signing the Certificate of Departure containing the incorrect information is "*demonstrably untrue*" and that the court should reject his evidence as untrue.

27. At para. 33 of his affidavit, Mr. Smith said that the Eurotoaz defendants would be asking the court to reach six conclusions. These essentially provided the reasons why the Eurotoaz defendants are contending that liberty to cross-examine Mr. Waller-Diemont should be granted. In summary, those six conclusions (some of which are related and overlap) which the Eurotoaz defendants urge on the court may be summarised as follows:-

(i) That the averment by Mr. Waller-Diemont that the incorrectness of the Certificate of Departure was inadvertent is untrue;

(ii) That such averment is not credible and is untrue for three reasons –

(a) It was not supported by any exhibited accounts (the relevant accounts have since been exhibited);

(b) It is contradicted by other averments made by Mr. Waller – Diemont in relation to his state of knowledge of the issues in the proceedings and, by extension, the proceedings in Russia, and,

(c) It is contradicted by the content of Mr. Powell's report (i.e. his second report).

(iii) That the contention that the Eurotoaz defendants were seeking to interrogate the commercial rationale for the migrations and that their conduct in that regard is an abuse of process and part of the alleged raider attack is without foundation and untrue;

(iv) That Mr. Waller – Diemont has mischaracterised the import of the Ellis judgment; and

(v) That relevant information and facts were not provided to the plaintiffs' experts (including information concerning the Russian judgment).

28. Replying affidavits were sworn on behalf of the plaintiffs by Mr. Coonan, Mr. Powell, and Mr. Waller-Diemont. In his affidavit, Mr. Coonan addressed each of the reasons relied on by Mr. Smith as to why cross-examination of Mr. Waller-Diemont was necessary and asserted that they do not afford any basis on which such cross-examination should be permitted. He maintained that there is no conflict of evidence which would justify cross-examination at all, still less which would justify such cross-examination on an amendment application. He also stated that McCann Fitzgerald was involved in briefing the experts and that, in the case of Bairiki, they gave the expert (presumably, Mr. Powell) a "*full oral briefing in relation to the background to the proceedings, focusing however on whether Bairiki had migrated out and migrated in successfully as a matter of local law*" (para. 16).

29. In his affidavit, Mr. Powell sough to clarify what he had said in his second report concerning Mr. Waller-Diemont's explanation for his failure to refer to the Russian judgment in the Certificate of Departure. At para. 5 he stated:-

> "*However, following a further review of Mr. Waller-Diemont's affidavit, I see that para. 9 does not record Mr. Waller-Diemont's explanation for that omission. On a further review, I note that the reason provided by Mr. Waller-Diemont for the omission in the Certificate of Departure was his error which he fairly accepted at para. 8 of his affidavit, namely that he had relied on Bairiki's then – latest accounts, which had been prepared prior to the delivery of the* [Russian] *judgment and that 'in error* [he] *overlooked referring to the*

[Russian judgment]*'. I now see that Mr. Waller-Diemont's remarks in para. 9 of his affidavit in fact only give context as to why Bairiki does not accept the* [Russian] *judgment. Paragraph 9 of Mr. Waller-Diemont's affidavit does not offer an explanation as to why the* [Russian] *judgment was omitted from the Certificate of Departure."*

30. Mr. Powell stated (at para. 6) that, notwithstanding the clarification he had just given, he had reached the same conclusion on the question of "*good faith*" as he had in his second report but he did proceed to correct para. 6 of that report in order to refer to the omission to refer to the Russian judgment as resulting from a "*simple error*" on the part of Mr. Waller-Diemont and to include a reference to the certificate being based on the accounts which did not refer to the Russian judgment because they predated the handing down of that judgment.

31. In his affidavit in response to the cross-examination application, Mr. Waller-Diemont Stated (at para. 9) that he overlooked the Russian judgment when signing the Certificate of Departure "*in error*". He stated that "*the certificate was prepared (by a member of the staff in my office) based on the last accounts of Bairiki*", that when he read it prior to execution of the Certificate he did not think of the Russian judgment in that context and that it was an error on his part for which he apologised. Mr. Waller-Diemont exhibited a copy of the relevant accounts of Bairiki (Interim Report 2019) which were signed by him on 13th November, 2019 (the day after he signed the Certificate of Departure which is dated 12th November, 2019). Those accounts disclose no activity by Bairiki for the relevant period, no assets and no liabilities ($1 liability in respect of issued capital being offset by "*other reserves*" of $1 in the accounts). Mr. Waller-Diemont also stated that he was not involved in briefing the plaintiffs' legal experts. He asserted that the plaintiffs' concerns that the attempt to

cross-examine him is part of the raider attack cannot be resolved by the court on the amendment application.

32. Both sides exchanged concise written submissions on the cross-examination application which I found to be of considerable assistance. Further correspondence was exchanged between parties in advance of the hearing of the application, including letters from Arthur Cox on behalf of the defendants on 21st January, 2021 and the response from McCann Fitzgerald on behalf of the plaintiffs on 25th January, 2021. I do not consider it necessary to refer to this correspondence in this judgment but I have considered the contents of the correspondence in reaching my conclusions on the application. I heard the application on the 25th and 27th of January, 2021. The UCCU defendants did not participate in the cross-examination application.

Eurotoaz Defendants' Case for Cross-Examination

33. Counsel for the Eurotoaz defendants submitted that at the hearing of the amendment application the Eurotoaz defendants will be making the case that the evidence of Mr. Waller-Diemont that he had overlooked the Russian judgment when signing the certificate declaration is not credible and will be asking the court to reject that evidence. He submitted that the reason given by Mr. Powell (in his second report) for not inferring bad faith in the preparation of the certificate was advertence by Mr. Waller-Diemont to the Russian judgment and his view as to the unenforceability and improper basis for the judgment, as well as his expectation that the judgment would be overturned on appeal. Counsel noted that a different position was advanced by Mr. Powell in his affidavit in response to the cross-examination application. In that affidavit, Mr. Powell stated that, following further review, he realised that the reason for Mr. Waller-Diemont's omission to refer to the Russian judgment was contained in para. 8 of his affidavit and that was that he had relied on the latest Bairiki accounts

and was not contained in para. 9 of that affidavit which Mr. Powell now realised was providing context only as to why Bairiki did not accept the Russian judgment. Nonetheless, Mr. Powell had reached the same conclusion on the question of good faith. Counsel pointed out that Mr. Powell's previous conclusion on good faith was based on advertence whereas his subsequent conclusion on good faith was based on inadvertence and that Mr. Waller-Diemont had in error overlooked the Russian judgment in reliance on the Bairiki accounts. He submitted that these two propositions were entirely different and that Mr. Powell was now basing his opinion that the migration of Bairiki was valid entirely on what Mr. Waller-Diemont was now saying, namely, that he had overlooked the Russian judgment because he (or a member of his staff) had relied on the Bairiki accounts.

34. Counsel noted that in their written submissions on the amendment application (at para. 36), the plaintiffs referred to Mr. Waller-Diemont's evidence concerning the explanation as to why he had not referred to the Russian judgment as being "*unchallenged*" by the Eurotoaz defendants, on the basis of what Mr. Waller-Diemont had said in his affidavit of 12th October, 2020. However, counsel pointed out that the Eurotoaz defendants are challenging that evidence on the basis that it is not credible given the background facts, including the fact that the sole business of Bairiki is its interest in the Irish proceedings and in the Russian proceedings and that contemporaneously with the Certificate of Departure, the appeal from the Russian judgment was at hearing (and judgment was subsequently given on 26th November, 2019). Counsel submitted that it was simply not credible that Mr. Waller-Diemont could have overlooked it.

35. Counsel went through the six points set out in Mr. Smith's affidavit as to the conclusions which the Eurotoaz defendants would be asking the court to draw on the

amendment application and as to why cross-examination of Mr. Waller-Diemont was necessary. He submitted that the Eurotoaz defendants were obliged to bring the application if they wished to challenge the evidence of Mr. Waller-Diemont by reference to contemporaneous facts and documents and to ask the court to reject that evidence as being untrue.

36. The Eurotoaz defendants relied on cases such as *RAS Medical Ltd v. Royal College of Surgeons* [2019] 1 I.R. 63 ("*RAS*"), *McNamee v. The Revenue Commissioner* [2016] IESC 33 ("*McNamee*") and *Perrigo Pharma International DAC v. John McNamara and Ors* [2020] IEHC 552 ("*Perrigo*") in support of the necessity to have Mr. Waller-Diemont cross-examined.

37. Counsel submitted that the Eurotoaz defendants would be making the case that the principles which the court should apply in determining the plaintiff's amendment application were those applicable to applications for the substitution of parties (under O. 17 RSC) (set out, for example, in cases such as *IBRC v. Lavelle* [2015] IEHC 321 ("*Lavelle*") and *Stapleford Finance Ltd v. Lavelle* [2016] IECA 104 ("*Stapleford*")) and not the principles applicable to amendment applications under O. 28 (such as in *Croke v. Waterford Crystal Ltd* [2005] 2 I.R. 383 ("*Croke*")). It was submitted, therefore, that the plaintiffs would have to establish a *prima facie* basis for the amendments they were seeking, that the court would be required to scrutinise the evidence more than it would do on a simple amendment application and the Eurotoaz defendants wished to challenge the credibility of that evidence. Both in opening submissions and in reply, counsel stressed that the burden of proof on the amendment application rests with the plaintiffs.

38. While accepting that it is rare to allow cross-examination on an interlocutory application, counsel submitted that this is an exceptional case and that cross-examination should be permitted.

Plaintiffs' Case for No Cross-Examination

39. At the outset, counsel for the plaintiffs made two overall points. First, he submitted that the UCCU defendants appear to be directing the litigation strategy of the Eurotoaz defendants and that the request to list the amendment application before the hearing of the interlocutory injunction involving the plaintiffs and the UCCU defendants and their request to cross-examine Mr. Waller-Diemont is intended to achieve a perceived tactical advantage and should be seen by the court in that regard. Second, counsel submitted that the amendment application is a simple application to amend the pleadings in the case and that the issue is whether they should be permitted to plead that the migrations had taken place and not to find that they had been validly done. That would be a matter for the trial. Counsel submitted that it would not be appropriate to decide the underlying issues concerning the validity of the migration of Bairiki (or Trafalgar) on the amendment application.

40. Counsel for the plaintiffs disputed the contention that the approach which the court must take in considering the amendment application is that applicable to an application to substitute a party and that the relevant principles are those contained in the case law under O. 28, such as *Croke*. However, he submitted that even if the principles were those applicable to substitution applications, cross-examination would still not be appropriate in that such cross-examination would be unnecessary to determine whether a *prima facie* case for the substitution had been made out.

41. In brief summary, the plaintiffs made three legal points in support of their objection to the cross-examination application. First, they submitted that there were

limits on the circumstances in which cross-examination is permitted by the court under O. 40 r. 1. Counsel referred to *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369 ("*Seymour*"), *Somague v. Transport Infrastructure Ireland* [2015] IEHC 723 ("*Somague*") and *IBRC v. Moran* [2012] IEHC 295 ("*Moran*") as well as to extract from *Delaney & McGrath Practice and Procedure in the Superior Courts (4th ed.)* para. 21-108. Counsel submitted that in order to permit cross-examination on affidavits, there must be a conflict of evidence on affidavit and it must be necessary to resolve that conflict in order to determine the issue before the court. He submitted that there was no conflict of fact on the evidence and that, even if cross-examination were to be permitted on the basis that it was said that the evidence was not to be believed, the particular issue had to be one which it was necessary for the court to resolve in order to determine the matter or application before the court. He submitted that the test is not satisfied in this case.

42. The second principle relied on was that cross-examination was generally not permitted in interlocutory applications where the court is not final in determining the rights and obligations of the parties, resolving conflicts of evidence or deciding whether a witness is or is not to be believed. Reliance was placed on cases such as *IBB Internet Services Ltd v. Motorola Ltd* [2013] IESC 53 ("*IBB*"). Counsel argued that cases such as *Tara Mines v. Cosgrave* [2010] IESC 62 ("*Boliden"), RAS* and *Perrigo* all concerned the final determination of substantive rights and liabilities and were not concerned with interlocutory applications. The decision of the Supreme Court in *IBB* was expressly directed to interlocutory applications. Counsel submitted that not only was cross-examination generally inappropriate on an interlocutory application, that was even more so in the case of an amendment application.

43. Third, it was submitted that cross-examination would be particularly inappropriate in the case of an amendment application where the authorities indicate that the court will not resolve the facts underlying the proposed amendments. Reliance in that regard was placed on *Woori Bank v. ADB Ireland Ltd* [2006] IEHC 156 ("*Woori bank*") and *Cuttle v. ACC Bank Plc* [2012] IEHC 105 ("*Cuttle*"). Counsel submitted that this was so even if the principles applicable to a substitution application applied. The court would still not get involved in resolving the merits of the case or of the facts underlying the amendments sought.

44. The plaintiffs also relied on an alleged delay on the part of the Eurotoaz defendants in bringing the application. Counsel submitted that the application ought to have been brought in November, 2020 and not just prior to the hearing of amendment application.

45. Counsel then went through each of the grounds on which the Eurotoaz defendants contended that cross-examination should be permitted, by reference to the six conclusions set out in Mr. Smith's affidavit. In respect of each of them, it was submitted that no basis for cross-examination had been established and that the court should not decide on an amendment application as to whether Mr. Waller-Diemont's evidence was untrue. While the plaintiffs accepted that the Eurotoaz defendants were now challenging the evidence of Mr. Waller-Diemont and that it could not now be said that his evidence was uncontested (as had been said in the plaintiffs' written submissions on the amendment application), nonetheless they submitted that cross-examination should not be permitted on the basis that the court cannot and should not decide that issue on the amendment application. The plaintiffs accepted that if amendments were permitted by the court and if the migrations were denied or put in issue by the Eurotoaz defendants, the plaintiffs would have to call evidence in respect

of the validity of the migrations (including that of Bairiki) and, if expert evidence were required to establish the migration, expert evidence would have to be called. Those witnesses could be cross-examined at the trial between the plaintiffs and the Eurotoaz defendants.

46. The plaintiffs further submitted that on an analysis of the expert reports, even if the court were to form the view that Mr. Waller-Diemont's explanation was not credible and that he had not acted in good faith, Mr. Powell had put forward other reasons why the migration of Bairiki was valid, including that the decision of the Registrar of Corporations in Nevis stood until successfully challenged in the Nevis courts. It was also pointed out that Ms. Dyer had acknowledged that the issue of bad faith did not matter and she had advanced different reasons for why the migration was not valid. The plaintiffs submitted, therefore, that Mr. Powell's evidence did not depend on the court's view on the credibility of Mr. Waller-Diemont. On that basis, it was neither necessary nor sufficient to decide the issue as to Mr. Waller-Diemont's credibility on the amendment application. His credibility is irrelevant to the status of the migration under Nevis law, in circumstances where the decision of the Registrar remains unchallenged in that jurisdiction. Nor is his cross-examination relevant to the issue as to the filing of the Certificate of Continuation.

47. The plaintiffs submitted that cross-examination was not necessary or appropriate on the issue as to whether the disputation of the migrations of Bairiki and Trafalgar and the attempt to cross-examine Mr. Waller-Diemont formed part of the raider attack alleged in the proceedings and an abuse of process. Those were not issues in which cross-examination was required, in the plaintiffs' submission. Nor is it necessary or appropriate to have cross-examination as to Mr. Waller-Diemont's stated

understanding of the import of the Ellis judgment or as to his role in the engagement of experts or as to the briefing of those experts.

Relevant Legal Principles

48. The Eurotoaz defendants' application for leave to cross-examine Mr. Waller-Diemont is made under O. 40, r. 1 RSC which provides:-

> *"Upon any petition, motion, or other application, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit."*

49. In *Somague*, Baker J. in the High Court concisely summarised the principles applicable to applications for leave to cross-examine. The application in that case was made in the context of judicial review proceedings which challenged the tendering process in respect of a contract for the design and construction of the extension of part of the Luas light railway in Dublin. Baker J. granted the application but directed that the cross-examination be confined to certain areas. She cited with approval the statement of principle outlined by O'Donovan J. in *Seymour* and summarised the statement by way of a series of points of principle at para. 17 of her judgment. Those points were as follows:-

> *"(a) Cross-examination will be permitted if there are material conflicts of fact apparent from affidavits.*
>
> *(b) Cross-examination may be required in order to allow a judge to resolve that material conflict.*
>
> *(c) The court should tend towards permitting cross-examination but*
>
> *(d) The discretion must nonetheless be exercised only if cross-examination is necessary for disposing of the issues.*

(e) There may be examined not merely facts taken in a narrow sense but also the construction, or interpretation, or conclusions that a person draws from those facts, and cross-examination may be permitted in those circumstances even if there is no real dispute as to those material facts.

(f) Thus, opinions and conclusions may be tested by cross-examination both as to their reliability or reasonableness as the case may be."

50. Baker J. referred to the judgment of Kelly J. in *Moran* where the court refused leave to cross-examine on the basis that there was no *"sufficient conflict on the affidavits on any issue relevant to the question"*. Baker J. stated, therefore, that:-

"Thus, the test is twofold: there must be a conflict of evidence on affidavit and it must be necessary to resolve that conflict in order to determine the issue before the court." (para 19).

51. The position was neatly summarised by *Delany and McGrath* at para. 21-04 as follows:-

"The general approach of the courts has been that leave to cross examine will only be granted if there is a conflict of fact upon the affidavits that it is necessary to resolve in order to determine the proceedings or the application before the court. In order for the requisite conflict to arise, it will be necessary for the party seeking cross examination to have filed an affidavit challenging the accuracy of the matters upon which cross examination is sought. It follows that cross examination will not be ordered so that the deponent can be cross examined as to factual matters that are not addressed in his or her affidavit. Neither can cross examination be used in an attempt to depose the deponent to obtain evidence for later use at trial".

52. At para. 21-108, the authors stated:-

"Although the decision in Seymour has been followed in a number of subsequent cases, and, Kelly J. in Irish Bank Resolution Corporation Ltd v. Quinn rejected the contention that O'Donovan J. had gone beyond the parameters of the previous authorities, subsequent decisions have reiterated the orthodoxy that there has to be a conflict of evidence on affidavit, the resolution of which is necessary to decide an issue before the court in order for cross examination to be ordered. In Irish Bank Resolution Corporation Ltd v. Moran, Kelly summarised the position by saying that:

> *'It is incumbent upon an applicant for such an order to demonstrate (1) the probable presence of some conflict on the affidavits relevant to the issue to be determined and (2) that such issue cannot be justly decided in the absence of cross examination.'"*

53. I agree that these are the general principles applicable when considering whether to permit cross-examination in a case heard on affidavit. However, there is a further series of cases which stress that affidavit evidence should not be rejected, where the deponent is not subject to cross-examination, unless there are inherent obvious flaws in the affidavit evidence. Those cases include *Boliden* and *Re McInerney Homes Ltd (No. 2)* [2011] IEHC 4 ("*McInerney*"). In *Boliden*, the Supreme Court was considering an appeal in a case involving a claim for rectification of a trust deed in respect of a pension fund. The evidence before the High Court was given on affidavit with no cross-examination. On appeal, Hardiman J. in the Supreme Court stated:-

"It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a notice

of intention to cross examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. In a case where there is no contradictory evidence an attack on the evidence which is made before the court must include cross examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it is produced at its height." (at p. 17)

54. In *McInerney*, Clarke J. noted that while Hardiman J. was dealing with a case in which there was no contradictory evidence, similar considerations applied where there was such contradictory evidence but where the evidence on both sides was given on affidavit without cross-examination. That case concerned the confirmation of a proposed scheme of arrangement in an examinership. Similar statements were made by Laffoy J. in the Supreme Court in *McNamee*, which involved a challenge to a s. 811 notice issued by the Revenue Commissioners on the grounds that the Revenue had been guilty of prejudgment bias, by Clarke C.J. in the supreme court in *RAS* and, very recently, by McDonald J. in the High Court in *Perrigo*. *RAS* was a judicial review heard on affidavit. The Supreme Court had to consider the difficulty that arises in a case which is tried on affidavit where parties seek to persuade the court to determine contested questions of fact on the basis of affidavit evidence without cross-examination. In the course of his judgment, Clarke C.J. made the following comments:-

"7.4 ... Just as it is inappropriate to argue in a trial conducted on oral evidence that the evidence of a witness should not be accepted, either on grounds of lack of credibility or unreliability, without having given that witness a fair opportunity to answer any issues arising in that

context, so also is it impermissible to ask a decider of fact … to determine contested questions of fact on the basis of affidavit evidence or documentation alone.

…

7.6 But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.

7.7 A similar principle applies where it is suggested that there is documentary evidence, properly before the court, which might cast doubt on the reliability of sworn testimony. It is not permissible to invite a court to reject sworn testimony either on the basis that there is sworn testimony to the contrary or that the testimony might be said to

> *be either lacking in credibility or unreliable (on the basis of, for example, a documentary record) without giving the witness concerned an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to credibility or reliability."*

55. Those passages were cited with approval by McDonald J. *Perrigo*. He concluded that in the absence of cross-examination, the applicant was not entitled to call into question the evidence given by the deponents of affidavits on behalf of the respondent. The Eurotoaz defendants rely on this line of authority and, particularly, on the principles set out by Clarke C.J. in *RAS.*

56. In my view however, the principles stated in *RAS* and in the other cases just mentioned are applicable to a situation where the court is engaged in a process which finally determines substantive rights and liabilities. They are not concerned with the approach which should be taken on interlocutory applications. That was made clear (by reference to the principles stated in *Boliden* and *McInerney*) by the Supreme Court in *IBB*. Having referred to *Boliden* and *McInerney,* Clarke J. distinguished those cases from the case at hand (which was an appeal from a refusal to order security for costs). Clarke J. stated (at para. 7.3):-

> *"A number of points should be made. First, the cases relied on were all cases where the court was required to make a final order and where, therefore, the substantive rights and obligations of all interested parties were to be finally determined. Insofar as the making of a final order requires a court to take a view on the facts, and insofar as material facts may be the subject of conflicting evidence placed before the court on affidavit and where the contested facts have a bearing on the order which the court will have to make, then the comments made in those cases clearly apply."*

57. Precisely the same applies to the statements of principle contained in *McNamee* and *RAS* as applied by McDonald J. in *Perrigo.* They were all cases in which the court was being asked to make a final order where the substantive rights and obligations of the parties were being finally determined in circumstances where the contested facts (or the credibility of the witness or witnesses in question) had a bearing on the final order which the court had to make. That was also the case in *McNamee* (where there was a challenge to the s. 811 notice), in *RAS* (a judicial review) and in *Perrigo* (also a judicial review). It was also the case in *Seymour* (which was a disqualification application) and *Somague* (a judicial review). However, as the Supreme Court made clear in *IBB,* those principles do not generally apply where cross-examination is sought on an interlocutory application. The reason for this was explained at paras. 7.3 and 7.4 of the judgment of Clarke J. in *IBB.* It is extremely rare for cross-examination to be permitted on an interlocutory application, precisely because the court is not, on such an application, involved in the final determination of substantive rights and obligations and is not involved in an exercise of resolving contested facts for the purposes of making any such final determination.

58. At para. 7.4 of his judgment for the Supreme Court *IBB,* Clarke J. explained why the court should generally refuse to permit cross-examination on an interlocutory application. He stated:-

> *"However, there are sound reasons of principle and policy as to why, save in exceptional circumstances, courts should not contemplate cross-examination in interlocutory matters. … While not ruling out the possibility that, in an exceptional case, some level of limited cross-examination might be necessary, nonetheless it seems to me to be important to emphasise that, ordinarily, a court hearing* [a security for costs application] *should simply do the best it can*

on the basis of all of the affidavit evidence which the parties choose to put before it. The court is not making a final decision determining rights and obligations. Rather the court is making an, admittedly important, interlocutory order which, while it of course may have an effect on the run of the proceedings (including, in some cases, perhaps, stifling the proceedings) nonetheless is just that, an interlocutory order. A court should, in those circumstances, in my view, be very slow to entertain an application for cross-examination. …"

59. I must approach the cross-examination application by the Eurotoaz defendants by reference to these principles, as the amendment application is an interlocutory application and the court will not be making any final orders or determining any substantive rights and obligations of the parties in determining that amendment application, irrespective of whether the court applies the principles applicable to amendment under O. 28 RSC (such as those discussed by the Supreme Court in *Croke)* or those under O. 17 RSC concerning substitution applications. I do not intend to say anything in relation to the issue between the parties as to which principles should be applied as that will be the subject of argument next week on the amendment application. I do, however, wish to observe that in a judgment I delivered in *Allied Irish Banks Plc v. McKeown* [2020] IEHC 155 ("*McKeown*"), I commented on the principles applicable to substitution applications under O. 17 r. 4 (which the High Court and Court of Appeal in *Lavelle* stated was the appropriate provision). I noted that the courts have made clear that an application for an order under O. 17 r. 4 was intended to be a simple, straightforward and purely procedural application and is not intended to be in the nature of a "*mini-trial*": *Irish Bank Resolution Corporation Ltd v. Comer* [2014] IEHC 671 ("*Comer*") and *Bank of Scotland Plc v. McDermott* [2019]

IECA 142 ("*McDermott*"). I then referred to three judgments of the Court of Appeal: *Irish Bank Resolution Corporation Ltd v. Halpin* [2014] IECA 3 ("*Halpin*"), *Bank of Scotland Plc v. O'Connor* [2017] IECA 54 ("*O'Connor*") and *McDermott*. Having done so, I concluded (at para. 72) that:-

> *"... based on that trio of Court of Appeal judgments, the normal position is that the court decides an application to substitute or add a party under O. 17, r. 4 RSC on the basis that a prima facie case must be established by the applicant for such an order. That is the standard to be applied where it would be open to the opposing party (normally the defendant to the proceedings) to raise issues in relation to the assignment or transfer of the facilities in question at the subsequent enforcement stage. ..."*

60. In other words, the *prima facie* standard applied in determining the substitution application in circumstances where it is open to the opposing party to challenge the underlying facts and legal entitlements at a subsequent stage of the proceedings. It seems to me, therefore, that if the Eurotoaz defendants are correct in their contention that the court should apply the principles applicable to substitution applications, if the court were to grant the amendments sought by the plaintiffs, it would be open to the Eurotoaz defendants to dispute the facts underlying the amendments (including the facts surrounding, and the validity of, the migration of Bairiki) in their amended defence and, if issue is joined, the plaintiffs (who bear the burden of proof on this issue) would have to lead evidence which could be challenged by the Eurotoaz defendants at the trial, including by cross-examination. In the event that the appropriate principles to apply are those applicable to amendment applications under O. 28 RSC, the court would be likely to take the approach outlined by Clarke J. in *Woori Bank* and by Kelly J. in *Cuttle*. In *Woori Bank*, which was an

application to amend a defence, Clarke J. referred to a judgment he had given in *Hynes v. The Western Health Board & Anor* (unreported High Court 8th March, 2006) ("*Hynes*"), which concerned the joinder of a party, and held that the same principles should be applied to an amendment application. He continued (at para. 5.2):-

> *"Therefore the court should lean in favour of allowing an amendment if, in the words of Hynes, it is otherwise appropriate so to do, unless it is manifest that the issue sought to be raised by the amended pleading must necessarily fail. The court should not, on a procedural motion to amend, enter into the merits or otherwise of the issue sought to be raised save to the extent of asking itself whether the issue which would be required to be tried as a result of the amended pleading is one which must necessarily fail from the perspective of the party seeking the amendment."*

61. In Cuttle, having referred to the terms of O. 28 r. 1 and to the decision of the Supreme Court in *Croke,* Kelly J. observed that on an amendment application *"it is not the task of the court to adjudicate on the merits of the proposed amendments or to speculate on the likelihood of their success file"* (para. 8).

62. I do not intend to resolve the dispute between the parties as to the principles which are to be applied to the amendment application but if I were to accept that the applicable principles were those governing substitution applications, the plaintiffs would have to establish a *prima facie* case to obtain the amendments which they seek. However, they would be doing so on an interlocutory application grounded on affidavit and the court would generally determine such an application on the basis of the affidavit evidence, save in exceptional circumstances.

63. Those appear to me to be the relevant legal principles which I must consider and apply in determining the Eurotoaz defendants' cross-examination application.

Application of Principles to Eurotoaz Defendants' Cross-Examination Application

64. I have concluded that the Eurotoaz defendants' application for liberty to cross-examine Mr. Waller-Diemont should be refused for several reasons.

65. The first, and most obvious, point to make is that the amendment application which I am due to hear next week is an interlocutory application. The court is being asked by the plaintiffs to allow them to plead the fact and effectiveness of the migrations of Trafalgar and Bairiki from Anguilla to St. Lucia and from Nevis to the BVI, respectively. In deciding whether to permit the plaintiffs to so plead, the court will not be concerned with, and will not have to resolve, any of the facts underlying the proposed amendments. Indeed, the authorities all make clear that it would not be appropriate for the court to embark upon a consideration of the merits of the proposed amendments or their prospects of success at the trial: *Woori Bank* and *Cuttle*.

66. That is so, in my view, irrespective of whether the court is persuaded in determining the amendment application to apply the principles applicable to applications to amend under O. 28 RSC (as outlined in cases such as *Croke*), as the plaintiffs contend, or the principles applicable to substitution applications under O. 17, r. 4 RSC (as discussed in cases such as *Halpin*, *O'Connor*, *McDermott* and *McKeown*), as the Eurotoaz defendants contend. If the court determines that the principles to be applied are those applicable to substitution applications, the authorities discussed earlier make clear that the application for a substitution is intended to be a simple, straightforward and purely procedural application and is not intended to be in the nature of a *"mini-trial"*: *Comer*, *McDermott* and *McKeown*. Those authorities also make clear that the court will determine such an application on the basis that the moving party must demonstrate a *prima facie* case on the basis of

which the substitution order should be made: *Halpin*, *McDermott* and *McKeown*. These authorities strongly imply that cross-examination will not be permitted on a substitution application. It is normally the case on such applications that in the event that the court grants the application, it will be open to the opposing party to contest the facts alleged to support the substitution at a later stage in the proceedings, such as at the trial. Normally, the question as to whether a *prima facie* case has been established is determined by the court on the basis of the affidavit evidence before it. In my view, if the Eurotoaz defendants are correct that the principles to be applied in determining the amendment application are those applicable to substitution applications, the question as to whether a *prima facie* case has been established will be determined on the basis of the affidavit evidence before the court.

67. The amendment application is an interlocutory application and the authorities such as *IBB* strongly suggest that cross-examination should not be permitted in such applications, save in exceptional cases, and that the court should be very slow to permit cross-examination on an interlocutory application. That is the approach I am required by the Supreme Court to adopt in considering the Eurotoaz defendants' application to cross-examine Mr. Waller-Diemont as part of the plaintiffs' amendment application. In determining the amendment application, the court will not be resolving any substantive rights or obligations of the parties and will not be making any final order affecting those rights and obligations.

68. It was submitted on behalf of the Eurotoaz defendants that if the amendments are permitted, it will be open to the plaintiffs to proceed with their interlocutory injunction application against the UCCU defendants and it may never be possible to reverse the effects of the amendment, in the event that the Eurotoaz defendants are successful at trial on the issue as to the validity and effectiveness of the migration of

Trafalgar and, more particularly, Bairiki. I do not accept that were the court to grant the amendment application, it would be determining any substantive rights and liabilities or making any final orders. All of the issues underlying the purported migration of Bairiki would have to be established by the plaintiffs at the trial and would be open to challenge by the Eurotoaz defendants, including by cross-examination.

69. It will be recalled that in para. 7.4 of his judgment in *IBB*, Clarke J. made the point that, notwithstanding that an order for security for costs is an interlocutory order which may have an effect on the running of the proceedings including, in some cases, stifling the proceedings, it is nonetheless an interlocutory order. It seems to me that any order which might be made on the amendment application would not have the same or even equivalent effect as an order for security for costs, which Clarke J. noted might even lead to the stifling of the proceedings. While I want to make clear that I am not determining any issue which will be argued by the parties on the amendment application, it does seem to me that if the court were to permit the amendment sought, it would not have the sort of consequences which an order for security for costs might have. It would not, for example, have the effect of stifling the proceedings. If the issues concerning the migrations of Trafalgar and Bairiki were to remain in dispute between the parties (in the event that the plaintiffs succeed on the amendment application), they would have to be considered in the ordinary way at the trial. The Eurotoaz defendants would not be shut out from disputing the issues at that stage. It would be at that point that the court would be concerned with determining the substantive rights and liabilities of the parties and making final orders, which may include determinations and orders reflecting the merits of the purported migrations of Trafalgar and Bairiki.

70. I do not believe that the statements of principle made by Clarke C.J. in *RAS*, by Hardiman J. in *Boliden*, by Laffoy J. in *McNamee* and by McDonald J. in *Perrigo* are applicable to the resolution of this cross-examination application. As I indicated when considering those cases earlier, those statements were all made in the context of a hearing where the court was being asked to determine substantive rights and obligations and to make final orders. Those cases do not address what should happen in interlocutory applications. The approach to be taken in the case of such applications is, in my view, that described by Clarke J. in the Supreme Court in *IBB.*

71. Nor do I believe that there exists a conflict of fact which the court must resolve on the amendment application, necessitating the cross-examination of Mr. Waller-Diemont. On that basis, I do not believe that the cross-examination is appropriate in light of the principles set out in *Seymour, Somague* and *Moran*. While the Eurotoaz defendants do dispute on several grounds the validity and effectiveness of the migration of Bairiki from Nevis to the BVI, including on the ground that the Certificate of Departure did not comply with the requirements of Nevis law for various reasons, one of which was that it did not refer to the existence of the Russian judgment and that Mr. Waller-Diemont's explanation should be rejected, that does not mean that the Eurotoaz defendants should be permitted to cross-examine Mr. Waller-Diemont on the amendment application. I agree with the plaintiffs, and disagree with the Eurotoaz defendants, that the credibility of Mr. Waller-Diemont is not a matter which it is appropriate for the court to get into or to resolve on the amendment application (whether or not amendment or substitution principles are to be applied) as it is an interlocutory application and not a mini-trial.

72. It is also the case, although perhaps somewhat unappealing, that if the court were to permit cross-examination and to disbelieve Mr. Waller-Diemont's explanation

for why the Russian judgment was not referred to in the Certificate of Departure, that would not necessarily mean that the court would be compelled to conclude that the migration of Bairiki from Nevis to the BVI was invalid and ineffective. While it would not be right for me to express any view on the merits or otherwise of the positions advanced by the respective legal experts on this issue, on this cross-examination, it is notable that the plaintiffs' expert, Mr. Powell, has expressed the opinion that the migration stands until it is successfully challenged in the Nevis Courts and in accordance with the law applicable to that jurisdiction. Mr. Powell may be right or wrong about that, but that is not an issue that can be resolved on the amendment application. It is also the case that Ms. Dyer seems to focus her expert evidence on the validity of the migration on the fact of the failure to refer to the Russian judgment and on the alleged late filing outside the 30-day period of the Certificate of Continuation and not on the absence of good faith or on the credibility of Mr. Waller-Diemont. She correctly observes that his credibility is a matter for the court. In my view, that is something which may arise at the trial but not on the amendment application. Insofar as it is suggested that if Mr. Waller-Diemont's evidence in terms of his explanation for the failure to refer to the Russian judgment is rejected, then Mr. Powell's evidence falls, I do not accept that that is so but, in any event, I do not believe that it is appropriate to resolve that issue on the interlocutory amendment application. That is an issue that may have to be decided at the trial involving the Eurotoaz defendants, in the event that the plaintiffs succeed on the amendment application.

73. I have concentrated in this judgment on the first and second grounds on which cross-examination of Mr. Waller-Diemont is sought, namely, the contention that his evidence is not credible. I have done so as that was the main area on which the parties

directed their submissions on the cross-examination issue. For clarity, however, I should confirm that for the same reasons just discussed, I do not accept that cross-examination is either necessary or appropriate on the other bases advanced by the Eurotoaz defendants. I will deal with those other bases briefly in turn. First, I do not accept that cross-examination is necessary or appropriate on the question as to whether the plaintiffs are correct in their assertion that the attempts by the Eurotoaz defendants to question the migrations at issue and to seek cross-examination of Mr. Diemont are all part of the alleged raider attack the subject of the proceedings and are an abuse of process. Those questions do not arise on the amendment application and, in any event, even if they did, I cannot see how cross-examination would advance the position one way or the other.

74. Second, I do not accept that cross-examination is necessary or appropriate on the issue as to the proper interpretation of the Ellis judgment. That issue does not arise on the amendment application. Even if it did, I have been provided with a copy of the judgment and can read it for myself. I do not see how cross-examination advances the position in relation to that issue at all.

75. Finally, I do not accept that cross-examination is necessary, or appropriate, on the issue as to the briefing of the plaintiffs' legal experts. Again, I do not see how that issue arises on the amendment application or how, in light of Mr. Waller-Diemont's affidavit and the correspondence, cross-examination of him could conceivably be relevant to any issue which might be raised in the course of the amendment application.

76. To permit cross-examination in this case would turn the amendment application into a mini-trial and would involve the court in the resolution of issues which it is unnecessary and inappropriate for the court to resolve on the interlocutory

amendment application. Neither side was able to point to any case in which cross-examination was permitted on an amendment or substitution application.

77. I am not persuaded by the Eurotoaz defendants that this is one of the rare and exceptional cases in which cross-examination should be permitted on an interlocutory amendment application, irrespective of whether the principles to be applied are those applicable to substitution applications as they contend. If cross-examination were permitted in this case, it would be easy to see why parties would seek such cross-examination in other interlocutory applications, including applications for interlocutory injunctions. As Clarke J. noted in *IBB*, there are sound reasons of principle and policy as to why this should not be permitted, except in exceptional cases. I do not believe that this is an exceptional case. The Eurotoaz defendants will be in a position to challenge the evidence, if the issues remain in dispute, at the trial, if the amendments are permitted.

78. The parties accept that the cross-examination order sought is a discretionary one. The plaintiffs argue that among the reasons why the application should be refused in the exercise of my discretion is that it forms part of a litigation strategy for the Eurotoaz defendants which has been dictated by the UCCU defendants. I have not taken that contention into account in the exercise of my discretion. It is not something I can or should decide at this stage of the proceedings.

79. The plaintiffs have also argued that the application should be refused on the grounds of delay and that it ought to have been brought, if at all, in November, 2020 rather than on the eve of the hearing of the amendment application. I do not accept that the application should be refused on the grounds of delay. The issue was raised by counsel for the Eurotoaz defendants on 24th November, 2020, a course of action was proposed, it was not disputed by the plaintiffs and was ultimately endorsed by the

court in the directions which were given on that and on the next occasion the proceedings were before the court. The Eurotoaz defendants complied with those directions and brought their application following receipt of the last round of affidavits from the plaintiffs in respect of the amendment application. While it has been inconvenient for everyone to have the application heard and determined on an urgent basis in advance of the hearing, that was the course of action proposed, not disputed and accepted by the court.

80. Nor have I considered in the exercise of my discretion the fact that cross-examination would have to be set up at short notice and on a remote basis with Mr. Waller-Diemont being cross-examined remotely through the Trialview platform from Curacao. I am satisfied that if I felt that it was necessary or appropriate for Mr. Waller-Diemont to be cross-examined, the appropriate arrangements could have been made for his remote cross-examination on the Trialview remote hearing platform (which has worked well in other cases) and an order could have been made to provide for that under s. 11 of the 2020 Act. However, since I have decided that such cross-examination is neither necessary nor appropriate, those arrangements do not now arise.

Conclusion

81. In conclusion, therefore, I refuse the Eurotoaz defendants' application for liberty to cross-examine Mr. Waller-Diemont on the amendment application on the grounds that that application is an interlocutory application, and the court will not be determining the underlying issues including the validity or otherwise of the migrations of Trafalgar and Bairiki to other Caribbean jurisdictions. The court will not be making any final orders affecting substantive rights and obligations of the parties on the amendment application. If the amendment application is granted and if the validity

and effectiveness of the migrations remain in issue, those issues can be dealt with and addressed fully at the trial and it would be inappropriate for the amendment application to be turned into a mini-trial. I do not believe that this is one of the rare and exceptional cases in which cross-examination should be permitted. Therefore, in the exercise of my discretion and in accordance with the principles set out in the various cases discussed in this judgment, I refuse the Eurotoaz defendants' application.