Neutral Citation Number: [2025] EWHC 59 (Comm)

Case No: CL-2023-000401

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

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

Date: 17 January 2025

**Before** :

**MR JUSTICE BRIGHT**

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**Between :**

**(1) ZIYAVUDIN MAGOMEDOV**
**(2) SGS UNIVERSAL INVESTMENT HOLDINGS LIMITED**
**(3) INTIMERE HOLDINGS LIMITED**
**(4) HELLICORP INVESTMENTS LTD**
**(5) SIAN PARTICIPATION CORP. (IN LIQUIDATION)**
**(6) MAPLE RIDGE LIMITED**
**(7) WIREDFLY INVESTMENTS LIMITED**
**(8) SMARTILICIOUS CONSULTING LIMITED**
**(9) ENVIARTIA CONSULTING LIMITED**
**(10) PORT-PETROVSK LIMITED** **Claimants**

**- and -**

**(1) TPG GROUP HOLDINGS (SBS), LP**
**(2) TPG PARTNERS VI, LP**
**(3) TPG FOF VI SPV, LP**
**(4) TPG PARTNERS VI-AIV, LP**
**(5) TPG VI MANAGEMENT, LLC**
**(6) TPG ADVISORS VI, INC**
**(7) TPG ADVISORS VI-AIV, INC**
**(8) DOMIDIAS LIMITED**
**(9) HALIMEDA INTERNATIONAL LIMITED**
**(10) LEYLA MAMMAD ZADE**
**(11) MIKHAIL RABINOVICH** **Defendants**

**(12) ERMENOSSA INVESTMENTS LIMITED**
**(13) KONSTANTIN KUZOVKOV**
**(14) FELIX LP**
**(15) ANDREY SEVERILOV**
**(16) KATINA PAPANIKOLAOU**
**(17) STATE ATOMIC ENERGY CORPORATION ROSATOM**
**(18) DP WORLD RUSSIA FZCO**
**(19) PJSC FAR-EASTERN SHIPPING COMPANY**
**(20) PJSC TRANSNEFT**
**(21) MARK GARBER**
**(22) GARBER HANNAM AND PARTNERS HOLDING LIMITED**

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Richard Power (instructed by Gresham Legal) for the Twenty-First and Twenty-Second Defendants
Hearing dates: 10, 11, 12, 13, 16, 17, 18, 19, 20 September and 19, 20, 21, 22 November 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 17/01/25 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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**Mr Justice Bright:**

## A: INTRODUCTION [1]-[12]

1. This judgment is concerned with various applications made by all of the active Defendants, all of whom say that the claims that the Claimants bring against them should not be tried in England.

2. Those claims relate, essentially, to two alleged conspiracies. One is what has been called the 'NCSP Conspiracy', which relates to an interest that the First Claimant ('Mr Magomedov') had in PJSC Novorossiysk Commercial Sea Port ('NCSP'). That conspiracy is said to have involved the Tenth Defendant ('Ms Mammad Zade') and the Twentieth Defendant ('Transneft'), a Russian state-owned oil pipeline company. The other conspiracy, which is said to have involved Ms Mammad Zade and all the other Defendants except Transneft, is what has been called the 'FESCO Conspiracy', which relates to Mr Magomedov's stake in the Nineteenth Defendant ('FESCO'). The Claimants say that these two alleged conspiracies were separate (hence their involving different alleged conspirators) but related.

3. These alleged conspiracies were both advanced to me primarily as unlawful means conspiracies. The Claimants also advanced a subsidiary case in relation to each, as a conspiracy to injure, as well as some freestanding allegations of tortious claims against various Defendants. However, the Claimants have made it clear that the case should be treated, first and foremost, as one where the NCSP conspiracy and the FESCO conspiracy are both alleged to have been conspiracies to use unlawful means.

4. NCSP is a Russian public company, which is said to be the third largest port operator in Europe and Russia's largest commercial seaport operator, controlling ports on the Baltic and Black Seas. FESCO is also a Russian company and is the parent company of a transportation and logistics group which (among other things) owns the Commercial Port of Vladivostok. Thus, both conspiracies relate to valuable and strategically important assets in Russia.

5. The main applications I have to determine are as follows:

    (1) The First to Seventh Defendants do not challenge jurisdiction, but make a strike-out/summary judgment application in relation to the claims pleaded against them.

    (2) The Twenty-First Defendant was served when he came to England on a brief visit. He too applies for summary judgment, but in addition he challenges English jurisdiction on the basis that England is not the appropriate forum.

    (3) The other Defendants all bring jurisdictional challenges. In addition, a number of the Defendants make various alternative applications to set aside service or alternative service.

    (4) While the applications are not all the same, and have been presented on different bases by the various Defendants, the common thread that runs through all of

them is the contention that the Claimants' case does not raise a serious issue to be tried.

(5) In addition, the Defendants who challenge jurisdiction all dispute the applicability of the jurisdictional gateways relied on by the Claimants against each of them.

(6) These Defendants also contend that England is not the appropriate forum for the claims. They all say that there is no real connection with England and that the natural forum for the claims is Russia. In relation to the alleged FESCO conspiracy, most of them say that, if the claims cannot be tried in Russia, then the most appropriate forum is Cyprus.

6. For logistical reasons, the applications were dealt with in two phases. I heard submissions in relation to the alleged FESCO conspiracy first, over two weeks in September 2024. I then heard submissions in relation to the alleged NCSP conspiracy (plus some remaining submissions from Ms Mammad Zade on the FESCO conspiracy) over a further week in November 2024.

7. Because the Claimants sought to emphasise the relationship between the two alleged conspiracies, it is desirable to deal with them in a single judgment. I have chosen to structure this judgment by addressing the NCSP conspiracy first, despite it having been addressed in the second phase of the hearing, because the events relevant to it generally preceded chronologically those relevant to the FESCO conspiracy.

8. By comparison with many jurisdictional challenges, this was a lengthy hearing involving substantial evidence and detailed submissions. In consequence, this is a relatively long judgment.

9. It is not unusual for judgments on jurisdictional applications to complain about the excessive quantity of material provided to the court and the unnecessary prolixity of Counsel. I therefore should make it clear from the outset that I have no such complaints. Every single one of the numerous Counsel who addressed me conducted themselves from first to last in a measured, co-operative and disciplined manner. They co-ordinated between themselves who would address which points, so as to avoid duplication; they all confined themselves narrowly and addressed only the points that were truly crucial; and they did so succinctly. The materials provided to me were extensive, but they were not difficult to absorb, with the benefit of the targeted assistance that I have received from the parties (both in writing and orally).

10. The reason that the overall hearing was so lengthy was simply that the Claimants' case is itself lengthy and complex. Further, it involves a very large number of Defendants, nearly all of whom were facing different allegations and, necessarily, had different things to say. A long hearing therefore was inevitable.

11. Scheduling a hearing of this length, with so many parties, was not straightforward. It was achievable only because the hearing of the Defendants' applications was expedited (on the Claimants' application, but without resistance from the Defendants) and accommodated largely outside the normal judicial sitting-dates. This was inconvenient to the court and

(more importantly) to other court users, over whose needs this lengthy hearing was given priority, by reason of the decision to expedite.

12. I mention this at the outset because honesty requires me to acknowledge that I have been conscious, throughout, that, if the Claimants' action proceeds in this court, the strains it will place on the court's resources will be acute, and the adverse effects on other court users will be real. These are not factors that have predisposed me in my decision. If this court has a responsibility to decide claims, it will do so, no matter how challenging that may be. However, they are also not factors which the court can or should simply ignore.

## B: PROCEDURAL HISTORY [13]-[23]

13. As will become apparent, this action was preceded by a number of proceedings in various other jurisdictions that involved at least some of the parties.

14. This action was commenced and the Claim Form was issued on 20 July 2023. The Particulars of Claim were finalised and dated 31 August 2023. On 4 September 2023, following a without notice hearing on 1 September 2023, I granted permission to the Claimants to serve the claim out of the jurisdiction. I also granted permission for alternative service on various Defendants, but refused this in relation to Ms Mammad Zade.

15. On 10 to 12 October 2023, Butcher J heard the Claimants' application for notification orders against some of the Defendants and worldwide freezing orders against other Defendants, all said to have been involved in the FESCO conspiracy. By a judgment handed down on 27 October 2023, he refused to grant the notification and freezing orders: [2023] EWHC 2655 (Comm). This was primarily because he was not satisfied that there was a real risk of dissipation; but in relation to some Defendants (but not all) he was also not persuaded that there was a good arguable case.

16. On 10 November 2023, Butcher J heard the Claimants' application for a notification order against Transneft, in relation to the NCSP conspiracy. By a judgment handed down on 6 December 2023, [2023] EWHC 3134 (Comm), he granted a notification order against Transneft.

17. The hearings before Butcher J were both contested hearings. In the course of arriving at his judgments, Butcher J had to consider whether there was a good arguable case on the merits against some of the Defendants. One of the matters I have had to consider is whether I am bound by Butcher J's views on this, as between the Claimants and the relevant Defendants. I deal with this in section G below.

18. On 22 January 2024, Jacobs J granted an extension of 6 months to the period of validity of the Claim Form for the purposes of service on Ms Mammad Zade.

19. At a hearing on 19 April 2024, I gave directions relating to the expedition, progression and determination of the applications now before me. I also fixed the hearing dates.

20. On 17 May 2024, I granted permission for various amendments to the Particulars of Claim, but refused permission for certain amendments relevant to the NCSP conspiracy. The amendments for which permission was refused chiefly related to Ms Mammad Zade and

the Thirteenth Defendant ('Mr Kuzovkov'), and, if allowed, would have made Mr Kuzovkov a defendant in respect of the NCSP conspiracy. Their subject-matter consisted of allegations regarding the involvement of Ms Mammad Zade and Mr Kuzovkov in relation to a UAE company they are said to have jointly owned – Epitikhia Advisors FZC, now Epitikhia Advisors FZE ('Epitikhia').

21. On the same date, at a without notice hearing attended only by the Claimants' representatives, I granted permission for alternative service on Ms Mammad Zade.

22. Amended Particulars of Claim were finalised and dated 23 May 2024.

23. Drafts of the Re-Amended Particulars of Claim were produced on 7 June 2024, 16 September 2024 and 18 September 2024.

## C: THE PARTIES [24]-[49]

24. The relationships between the parties are best approached with the aid of the structure charts that form Annex 1 and Annex 2 to this judgment. These structure charts have from the outset been used by the Claimants to explain matters and I understand them to be important to the Claimants' case.

### C1: The Claimants [25]-[34]

25. Mr Magomedov, the First Claimant, is a Russian businessman who is the ultimate beneficial owner of various Claimants, as set out in Annexes 1 and 2 and as further explained below. Through these complex corporate structures, in 2018 he and his brother Mr Magomed Magomedov were the ultimate beneficial owners of a 25.05% stake in NCSP, and he had a 65.09% ultimate beneficial interest in a 49.99997% stake in FESCO.

26. The Second Claimant ('SGS') is a company incorporated under the laws of the British Virgin Islands ('BVI') with company number 1736539. It is wholly owned and controlled by Mr Magomedov. It was through SGS that Mr Magomedov held his stake in FESCO and this stake was referred to by the parties as the 'SGS Branch' (i.e., the companies in the left-hand column in Annex 1). At all material times, Mr Shagav Gadzhiev – a close confidant of Mr Magomedov and key source of evidence for the Claimants – served as a director of SGS. Until 16 November 2020, he was also on the board of FESCO.[1]

27. The Third Claimant ('Intimere') is a company incorporated under the laws of the BVI with company number 1749769. SGS is the registered member in respect of 65.09% of the share capital of Intimere, with the remaining 34.91% held by the Fourteenth Defendant ('Felix').

28. The Fourth Claimant ('Hellicorp') is a company incorporated under the laws of the BVI with company number 1749732. It is wholly owned by Intimere.

29. The Fifth Claimant ('Sian') is a company incorporated under the laws of the BVI with company number 1705188. It is wholly owned by Hellicorp. Between 2018 and 2020, Sian

[1] For a significant period, it seemed that Mr Shagav Gadzhiev would not give evidence at trial on behalf of the Claimants. I was told in the course of the hearing in September 2024 that he is now prepared to give evidence on behalf of the Claimants, and I have proceeded on that basis. Otherwise, this judgment would have been much shorter.

was temporarily removed from the BVI register for non-payment of an annual fee. On 19 May 2021 Sian was placed into liquidation by the BVI Court.

30. The Sixth Claimant ('Maple Ridge') is a company incorporated under the laws of Cyprus with company number HE283756. It is wholly owned by Sian.

31. The Seventh Claimant ('Wiredfly') is a company incorporated under the laws of Cyprus with company number 300315. It is wholly owned by Maple Ridge.

32. The Eighth Claimant ('Smartilicious') and the Ninth Claimant ('Enviartia') are both companies incorporated under the laws of Cyprus with company numbers 320536 and 320546, respectively. They are both wholly owned by Wiredfly. Until 24 November 2022, each held a 24.9999% shareholding in FESCO. Thus, via Intimere, SGS and Felix shared a 49.9997% shareholding in FESCO – the rights over 65.09% of this 49.9997% shareholding being with SGS, and the rights over 34.91% being with Felix.

33. The Tenth Claimant ('Port Petrovsk') is a company incorporated under the laws of the BVI with company number 1394123. It is wholly owned by Shevronne Investments Limited ('Shevronne'), another BVI company the ultimate owners of which are Mr Magomedov and his brother, Magomed Magomedov, as shown in Annex 2. From 25 February 2014 until 7 August 2018, Port Petrovsk's sole director was Mr Elias Economou. From 7 August 2018 until 25 January 2023, Port Petrovsk's sole director was Mr Zaur Karmokov. Until 2018, Port Petrovsk was the indirect owner of 25.05% of NCSP.

34. Until 28 October 2020, Mr Elias Economou was a director of both Intimere and Hellicorp and its subsidiary Sian. Until 7 August 2018, Mr Economou was sole director of Port Petrovsk, when he was replaced by Mr Karmokov. Mr Ioannis Tsantekides was a director of Maple Ridge, Wiredfly, Smartilicious and Enviartia.

## C2: The Defendants [35]-[49]

35. The First to Seventh Defendants (collectively, 'TPG') are all directly owned or controlled by TPG, Inc., an alternative asset management corporation. TPG conducts business in a number of jurisdictions, including England and – until November 2020 – Russia, but its headquarters are in Texas. Its Chairman was at all material times the late Mr David Bonderman, a US citizen. Until its exit from Russia in November 2020, TPG controlled the Fourteenth Defendant, Felix. It was represented in its Russian operations by Mr Dmitry Shvets, who was also a director of FESCO until 18 November 2020. Also relevant is Mr John Viola of TPG. Mr Shvets and Mr Viola were among the directors of Intimere and Hellicorp until late 2020.

36. The Eighth Defendant ('Domidias') is a company incorporated under the laws of the BVI with company number 1738784. Until around October 2020, it was beneficially owned and controlled by the Twenty-First Defendant ('Mr Garber'), whereafter it was acquired by the Fifteenth Defendant ('Mr Severilov'), via companies incorporated in Cyprus. Until 11 January 2023, Domidias held a 23.765% stake in FESCO, via Merbau Synergy Ltd ('Merbau', a company incorporated in the BVI) and, below Merbau, via a number of companies incorporated in Cyprus.

37. The Ninth Defendant ('Halimeda') is a company incorporated under the laws of Cyprus with company number HE350809. Mr Konstantin Privalov has at all material times been a director of Halimeda. It is a subsidiary of FESCO.

38. Ms Mammad Zade, the Tenth Defendant, is a Dutch citizen resident in Austria, who is a former business associate of Mr Magomedov. Ms Mammad Zade is alleged to have played a key role in both conspiracies, by virtue of her several positions of responsibility in companies associated with Mr Magomedov. Until 10 May 2018 she was the General Director of Summa Group LLC ('Summa Group'), a Russian-incorporated company responsible for managing Mr Magomedov's key assets. She was also a member of the FESCO Board of Directors from 12 February 2016, serving as the Chair of the Board from 7 June 2018 until she tendered her formal resignation in January 2020 and was eventually replaced in November 2020.

39. The Eleventh Defendant ('Mr Rabinovich') is a Russian businessman. He is the ultimate beneficial owner of the Twelfth Defendant ('Ermenossa').

40. Ermenossa is a company incorporated under the laws of Cyprus with company number HE404852. On 18 November 2020, Ermenossa acquired Felix from TPG.

41. Mr Kuzovkov, the Thirteenth Defendant, is the former Chief Financial Officer of the Summa Group. He was a director of FESCO until 16 November 2020. He is a Russian national resident in Cyprus.

42. Felix, the Fourteenth Defendant, is an exempted limited partnership registered in the Cayman Islands with company number 69792. Until 18 November 2020, it was owned by TPG; since that date, it has been owned by Ermenossa.

43. Mr Severilov, the Fifteenth Defendant, is a Russian lawyer. His clients are said to include Mr Rabinovich. He became a director of FESCO on 16 November 2020 and shortly after this was appointed as Chairman, succeeding Ms Mammad Zade.

44. The Seventeenth Defendant ('ROSATOM') is the Russian State Atomic Energy Corporation, a state-owned enterprise incorporated under the laws of Russia with company number 1077799032926. It is now the 92.5% owner of FESCO, following two transfers on 20 December 2023 and 12 March 2024, both pursuant to a presidential decree issued by President Putin on 8 November 2023.

45. The Eighteenth Defendant ('DP World Russia') is a company incorporated in the Jebel Ali Free Zone in Dubai, United Arab Emirates. It is a subsidiary of DP World Limited, a global logistics company owned by the Government of Dubai. In 2021, it concluded a series of agreements with ROSATOM and FESCO to create a container shipping and transport hub in Vladivostok. Mr Sergey Chemarda was a director of DP World. From some point in 2020, he was also a director of Ermenossa.

46. FESCO, the Nineteenth Defendant, is a company incorporated in Russia with company number 10222502256127. As already noted, FESCO is the umbrella company owning a logistical group, which (among other interests) owns the Commercial Port of Vladivostok.

47. Transneft, the Twentieth Defendant, is a company incorporated in Russia with company number 1027700049486. As already noted, it is a Russian state-owned oil pipeline company. At all material times, its President was Mr Nikolai Tokarev. In 2018, its subsidiary, Fenti, acquired Port Petrovsk's indirect 25.05% shareholding in NCSP from Port Petrovsk.

48. Mr Garber, the Twenty-First Defendant, is a Russian businessman. He was a member of the FESCO Board until 16 November 2020 and was the beneficial owner of Domidias, until its sale to Mr Severilov on 4 October 2020. I do not know where he is resident, but I believe that it is neither in this jurisdiction nor in Russia.

49. The Twenty-Second Defendant ('GHP') is a company incorporated under the laws of Russia with company number 1157746783347. Mr Garber has, at all material times, been a director and the ultimate beneficial owner of GHP.

## D: OVERVIEW OF THE CLAIMANTS' CASE [50]-[83]

50. The summary that follows is taken from the draft Re-Amended Particulars of Claim ('RAPOC'), in the form provided to the court on 18 September 2024 (i.e., nearly half-way through the September hearing). The Defendants did not consent to the draft re-amendments (their collective position being that the allegations in them were of no arguable merit), but they were content for the hearing to proceed on the basis of this text.

51. The version provided on 18 September 2024 differed from previous drafts of the RAPOC, largely because of developments during the hearing (including some observations from the bench). It can in no sense be regarded as a perfected version, in part because of a number of obvious typographical errors but also because of further errors that came to light during the remainder of the hearing. One area of particular importance concerns the role of the Russian State, which I refer to in section D6 below.

### D1: The criminal proceedings against Mr Magomedov in Russia [52]-[55]

52. On 30 March 2018, Mr Magomedov and his brother, Mr Magomed Magomedov, were arrested and detained in Russia by the Russian Ministry of Internal Affairs and the Federal Security Service ('FSB'). They were charged with organized crime and embezzlement and held in prison pending trial.

53. On 28 April 2018 onwards, the Russian prosecuting authorities obtained a series of arrests over shares in the Summa Group and various companies controlled by it, including FESCO. There were also arrests over Mr Magomedov's personal funds and those of Port Petrovsk. These arrests were extended by orders of 24 September 2019 and 29 August 2022.

54. On 24 November 2022, Mr Magomedov and his brother were convicted. They were then sentenced, respectively, to 19 and 18 years in prison. They appealed, their appeals being rejected on 18 December 2023 (but with each sentence reduced by 6 months). The sentences passed included the confiscation of all Mr Magomedov's and his brother's assets. They appealed, without success.

55. Others associated with Mr Magomedov were also arrested and questioned by the FSB on 30-31 March 2018, including Ms Mammad Zade. Unlike Mr Magomedov and his brother,

she was not detained. Shortly after this she left Russia, and has since been resident elsewhere – for the last several years, in Austria. At about the same time, she also indicated her wish to resign her position as General Director of Summa Group. This was formalised at a board meeting on 10 May 2018, and she left the board entirely with effect from 1 July 2018. She nevertheless remained in contact with Mr Magomedov, and still had some influence within Summa Group, until at least January 2020. This was in addition to her role at FESCO, which did not finally come to an end until November 2020.

## D2: The alleged political campaign against Mr Magomedov in Russia [56]-[58]

56. The Claimants' case is that the criminal proceedings were part of a campaign waged against Mr Magomedov for political reasons, with the aim of wresting assets from Mr Magomedov for the benefit of the Russian State. As explained in the First Affidavit of Mr Bushell, and further explained to me in submissions, this was not because Mr Magomedov was engaged in political activities. It was because NCSP and FESCO were considered to be of strategic significance to the Russian State, and it was considered expedient that they should be owned and controlled by or for the benefit of the Russian State.

57. The Claimants contend that the criminal proceedings were conducted unfairly at every stage.

58. The Claimants say that the political campaign, and the arrest and criminal proceedings that were central to it, provided the background against which both conspiracies formed and were played out.

## D3: Summary of the alleged NCSP conspiracy [59]-[69]

59. In January 2011, Omirico Limited ('Omirico'), a company incorporated in Cyprus, acquired indirect ownership of 50.1% of the shares in NCSP. Omirico was a joint venture, the participants in which were Port Petrovsk (and, thus, Mr Magomedov and his brother Magomed Magomedov) and Fenti Development Limited ('Fenti'), a Swiss company owned by Transneft.

60. In late 2017 and early 2018, Summa Group (for Port Petrovsk) and Transneft (for Fenti) were discussing the potential sale of Port Petrovsk's interest to Fenti. In February 2018, they reached an agreement in principle for the sale at a total price of about US$1.3 billion. By 29 March 2018, draft agreements were prepared and there was a meeting between Mr Magomedov, his brother and Mr Tokarev of Transneft.

61. It was on the following day, 30 March 2018, that Mr Magomedov and his brother were arrested. The Claimants say that the arrest had been discussed at a meeting that Mr Tokarev held that very day with President Putin. The Claimants say that Mr Tokarev and President Putin discussed seizing control of NCSP, given its strategic importance to the Russian State.

62. As a result of the arrests, the proposed sale did not conclude. However, the Claimants say that, in June or July 2018, Ms Mammad Zade communicated a message to Mr Magomedov in prison via his criminal lawyers. She told Mr Magomedov that Mr Tokarev had indicated that he would speak to President Putin to stop the prosecution of the Magomedov brothers and would secure their release from prison, but only if they first agreed to sell Port Petrovsk's shares in Omirico for a reduced price of US$750 million. The Claimants further

say that Mr Tokarev, acting on behalf of Transneft, represented that he was capable of procuring the release of Mr Magomedov and his brother, that he intended to and would do so if Mr Magomedov and Port Petrovsk sold Port Petrovsk's interest in Omirico for US$750 million. Mr Tokarev thereby (i) threatened that Mr Magomedov and his brother would continue to be detained unless Port Petrovsk sold on these terms (this is referred to in the RAPOC as the 'Threat') and (ii) represented that he could and would cause Mr Magomedov and his brother to be released if Mr Magomedov and Port Petrovsk agreed to these terms (referred to in the RAPOC as the 'Representations').

63. The Claimants say Mr Magomedov and his brother did not agree to these terms. Nevertheless, on 31 August 2018 an agreement for the sale was concluded for a price of US$750 million. It is apparent that the person managing the transaction on the seller's side, at least in the sense of reviewing and approving the transaction documents, was Ms Mammad Zade – with assistance from members of the team who normally reported to her, including Mr Denis Kant Mandal. She made a public statement to this effect in an interview with a Russian media outlet on 20 October 2018 (in which, however, she claimed that Mr Magomedov had approved the deal). The key transaction document was the sale and purchase agreement, which was signed by Mr Karmokov on behalf of Port Petrovsk ('the Omirico SPA'), on 31 August 2018.

64. The Claimants say that the agreement of the Omirico SPA happened without Mr Magomedov's knowledge or approval and was for substantially less than the true value. They further say that a sale on the terms of the Omirico SPA was not in the interests of Port Petrovsk.

65. The transaction proceeded. As required under the Omirico SPA, the purchase price was paid to a specified account at Sberbank. On 18 September 2018, following execution of the Omirico SPA but prior to completion, the Russian General Prosecutor sought and obtained, from the Tverskoy District Court of Moscow, an order that funds deposited or to be deposited in that account be seized. On completion of the transaction on 27 September 2018, the proceeds were arrested (in effect, frozen).

66. The Claimants say that the arrest of the funds happened because Transneft (and/or Fenti) informed the Russian prosecuting authorities about the account and the impending payment. They say that the arrest was orchestrated pursuant to the NCSP conspiracy. Transneft and Fenti, as parties to the NCSP conspiracy, knew before entering into the Omirico SPA that the monies paid under it would be arrested and would not be at Port Petrovsk's disposal. They do not make these allegations in relation to Ms Mammad Zade.

67. These funds were later confiscated, following an order of the Moscow court of 27 May 2022 and the rejection of Port Petrovsk's and Mr Magomedov's appeals (ultimately, in August 2023). The result is that Mr Magomedov and Port Petrovsk have lost their interest in NCSP but have received nothing in return.

68. These alleged facts are said by the Claimants to give rise to wrongs committed against them: primarily by Transneft in intimidation, duress, misrepresentation and dishonest assistance; but also by Mr Karmokov and Ms Mammad Zade in that they acted in breach of fiduciary duties that they are said to have owed to Port Petrovsk (he as director, she as a de facto director or shadow director). These matters, together with the Threat, constitute the unlawful means relied on by the Claimants.

69. The Claimants do not assert that Mr Karmokov was a party to the NCSP conspiracy. On the contrary, Mr Dougherty KC made it clear to me that the Claimants' case is that Mr Karmokov was not a conspirator. However, they assert that Mr Tokarev and Ms Mammad Zade were party to the NCSP conspiracy; and, via Mr Tokarev, so were Transneft and Fenti. Mr Dougherty KC explained this case as follows:

    (1) The principal allegations against Mr Tokarev, Transneft and Fenti relate to the Threat and the Representations, which influenced and/or coerced Mr Karmokov so that he acted under duress and/or intimidation.

    (2) The Claimants do not criticise Ms Mammad Zade for passing on to Mr Magomedov what Mr Tokarev is reported to have said to her. In this respect, she is not said to have been acting as a conspirator with Transneft, or pursuant to the NCSP conspiracy.

    (3) However, the Claimants say that, if Ms Mammad Zade instructed or pressured Mr Karmokov to sign the Omirico SPA, this was a breach of her fiduciary duties to Port Petrovsk; and in any event she should have prevented him from doing so.

    (4) The Claimants say that Transneft's (and Fenti's) actions in negotiating and entering into the Omirico SPA amounted to dishonest assistance in the breach by Mr Karmokov of his fiduciary duties.

    (5) The Claimants also have an alternative case: if Ms Mammad Zade was not acting pursuant to and as a party to the NCSP conspiracy, then she (like Mr Karmokov) was influenced and coerced by the Threat and/or the Representations and acted under duress and/or intimidation.

## D4: Summary of the alleged FESCO conspiracy [70]-[78]

### D4.1: Background [70]-[71]

70. The Claimants' case as to the alleged FESCO conspiracy is complex, involving a number of different limbs, each in turn comprised of several elements. They arise out of the following features:

    (1) By an agreement dated 28 November 2012 between Sian and Domidias (the '2012 Option Agreement'), Domidias granted Sian a call option (the 'Merbau Call Option') to acquire the entire issued share capital in Merbau (i.e., the company by which Domidias held shares in FESCO, via a series of further companies). The Merbau Call Option expired on 28 November 2019.

    (2) The relationship between SGS and Felix in respect of Intimere was governed by an agreement dated 21 December 2012 (the 'Intimere SHA'). By section 9.03(a), if any Shareholder was proposed to be subject to a change of control, that Shareholder was obliged to first offer all its shares in Intimere to the other Shareholder ('ROFO Offer').

(3) The transaction by which SGS acquired its interest in FESCO (via Intimere) was a leveraged buyout, incorporating financing raised from a number of different sources. These included sums raised by Halimeda, which it then loaned to Sian and to Maple Ridge (the 'Sian Loan' and the 'Maple Ridge Loans'), under loan agreements between them (the 'Loan Agreements').

(4) Russian public companies such as FESCO are required to re-elect their board of directors annually. Shareholders with a stake of at least 2% of the voting shares are entitled to nominate candidates. The FESCO Company Charter stipulates that the board should be comprised of 9 persons. It follows that, in the ordinary and proper course, Smartilicious' and Enviartia's combined 49.9997% stake would have enabled them (and, through them, the SGS Branch) to secure the election of 5 nominees to the FESCO board.

71. The various limbs of the Claimants' case as to the FESCO conspiracy are set out in section E of the RAPOC. It is convenient to identify them by reference to the relevant sub-sections of Section E of the RAPOC. The matters dealt with under the first two sub-headings below, in sections D4.2 and D4.3 – the threats allegedly made in late August 2020, and the bribe allegedly received by Mr Kuzovkov – are critical to the Claimants' case in relation to the FESCO conspiracy and put the other matters into context.

D4.2: The threats made at meetings on 26 and 28 August 2020: E10 [72]

72. The Defendants said to be involved in the meetings of 26 and 28 August 2020 are Mr Rabinovich, Mr Severilov, ROSATOM and DP World. This limb of the Claimants' case on the FESCO conspiracy is comprised of the following alleged elements:

(1) In August 2020, DP World considered financing SGS's purchase of Felix's stake in Intimere. In late August 2020, Mr Chemarda (acting for DP World) told Mr Shagav Gadzhiev (acting for SGS) that DP World would not be proceeding and invited him to a meeting with Mr Rabinovich and Mr Severilov, who he said were corporate raiders hired by ROSATOM to force Mr Magomedov out of FESCO and were being assisted by Ms Mammad Zade. The purpose of the meeting was for ROSATOM and DP World to make an offer to buy Intimere's stake in FESCO.

(2) The meeting took place on 26 August 2020. Mr Rabinovich did not attend, but Mr Severilov and Mr Chemarda did. Mr Severilov said that it had been decided by ROSATOM's senior management that FESCO would become part of a joint venture between ROSATOM and DP World and that they would pay US$150 million for the entirety of FESCO, with SGS receiving a proportion relative to its stake in Intimere. If not, there would be a hostile takeover, under which ROSATOM would acquire Felix and then enforce the repayment of the SGS Branch debts and so force Mr Magomedov out.

(3) Separately, Mr Shagav Gadzhiev was invited to a meeting on 28 August 2020, attended by Mr Khabib Magomedov, his friend Ruslan, and two very large men, who Mr Shagav Gadzhiev has said he inferred were from the FSB. One of these men, identified only as "Konstantin", said (i) that he represented the interests of ROSATOM, (ii) that he had been told there had been an argument at the

previous meeting, (iii) that he had been asked to re-present ROSATOM's proposal so that future meetings could be held with Mr Severilov without conflict, and (iv) that if Mr Shagav Gadzhiev, the SGS Branch companies and Mr Magomedov were to refuse the offer again, his principals would use force to take over FESCO.

(4) Shortly after these meetings, Mr Rabinovich confirmed that what Mr Severilov had said at the 26 August 2020 meeting represented ROSATOM's final offer. It is not alleged that Mr Rabinovich made any reference to the 28 August 2020 meeting.

D4.3: The bribe apparently received by Mr Kuzovkov: E2 [73]

73. The Defendants said to be involved in this limb are Mr Kuzovkov, Mr Rabinovich, Ermenossa and Mr Severilov. It is comprised of the following elements:

(1) In November 2021, a banker in London (Mr Bedjaoui) received an approach from an intermediary in Liechtenstein (Mr Muggli) who said he had a client wishing to invest US$20 million that stemmed from an option agreement over shares in FESCO. The monies were to be transferred from an account at Locko Bank. The client was identified as Mr Kuzovkov, and a copy of Mr Kuzovkov's passport was provided.

(2) The Claimants say that there is no legitimate explanation for how Mr Kuzovkov could have such a large sum of money.

(3) The Claimants say that it should be inferred from the reference to the FESCO shares that this was a bribe relating to the FESCO conspiracy, probably paid by Mr Rabinovich or Ermenossa, in circumstances where Mr Rabinovich acquired a 9% shareholding in FESCO in September 2021 (and because Mr Rabinovich has a shareholding in Locko Bank).

(4) The Claimants further say that the bribe had probably been promised in about September 2020, in connection with the 3 September FESCO board meeting mentioned below.

(5) These allegations form part of the case set out at RAPOC section E2.

D4.4: The Merbau Call Option: E1, E8 [74]

74. The Defendants said to be involved in this limb are Ms Mammad Zade, Mr Garber, GHP, TPG, Domidias, Mr Rabinovich, Ermenossa, Mr Severilov and Mr Kuzovkov. It is comprised of the following alleged elements:

(1) During 2018 and 2019, Mr Magomedov instructed Ms Mammad Zade to cause Sian to exercise the Merbau Call Option. She failed to do so.

(2) In late 2019 and early 2020 there were negotiations with Domidias/Mr Garber/GHP about the exercise of the Merbau Call Option. Those negotiations ended in July 2020 when Domidias said it was unwilling to proceed with the sale. The Claimants say that the directors of Hellicorp (including Mr Shvets

and Mr Viola – and, through them, TPG) owed a duty to ensure that the Domidias Option Agreement was extended, i.e. beyond its expiry date of 28 November 2019. These allegations correspond to the case set out at RAPOC section E8.

(3) In late 2019 there were also negotiations for a fresh option agreement, to be entered into between Hellicorp and Domidias (the 'Draft 2019 Option Agreement'), albeit no such agreement was ever concluded. The draft terms provided for an increased price in specified circumstances involving Hellicorp and Merbau being sold to third parties. This would have given Mr Garber an incentive to sell to someone other than Mr Magomedov/SGS and was negotiated in breach of Mr Garber's (and others') duties to FESCO, and also (again) in breach of the duties of the Hellicorp directors. These allegations correspond to the allegations set out at RAPOC section E1.

(4) Sian purported to exercise the Merbau Call Option by notice of 4 November 2020. Domidias replied by a letter of 11 November 2020, refusing to comply.

(5) Rather than Domidias selling its shares in Merbau to Sian or Hellicorp, on 4 October 2020 Mr Garber sold his shares in Domidias to Mr Severilov.

D4.5: The Sian & Maple Ridge Loans: E2, E3 [75]

75. The Defendants said to be involved in this limb are Ms Mammad Zade, TPG, Mr Garber, Halimeda, FESCO, Mr Rabinovich, Ermenossa and Mr Kuzovkov. It is comprised of the following alleged elements:

(1) The Sian Loan and the Maple Ridge Loan fell due to be repaid and Halimeda demanded repayment by a letter dated 12 February 2020 (the 'Halimeda Demand Letter').

(2) During the course of 2020, KPMG, who were FESCO's auditors, produced a presentation (known as 'Project Moonlight') looking at the tax efficiency of the group structure. It was presented to FESCO's Strategy, Investment and General Affairs Committee ('the Strategy Committee') in March 2020. It set out various proposals to address tax inefficiencies and, among other things, would have involved extending and restructuring the Maple Ridge Loans. (The Project Moonlight recommendations do not appear to have affected the Sian Loan.)

(3) Consideration of Project Moonlight by the full FESCO board was postponed by Ms Mammad Zade. Instead, she convened a board meeting on 3 September 2020 at which the board approved the commencement of proceedings by Halimeda against Sian and Maple Ridge. The Claimants say that this was contrary to FESCO's interests.

(4) The Claimants further say that it is to be inferred that those FESCO directors who voted in favour of the commencement of proceedings (or who did not vote) were bribed by Mr Rabinovich and/or Ermenossa, and/or that Ms Mammad Zade had suborned directors to act in this way. These allegations correspond to the case set out at RAPOC section E2.

(5) Halimeda's conduct in then commencing proceedings in the BVI against Sian (the 'Sian BVI proceedings') and in LCIA arbitration against Maple Ridge (the 'Maple Ridge Arbitration') constituted abuse of process, the proceedings having been commenced in furtherance of the FESCO conspiracy and so for an ulterior and improper purpose. In so far as the directors of FESCO authorised the proceedings, they were responsible. These allegations correspond to the case set out at RAPOC section E3.

D4.6: FESCO corporate governance: E4, E5, E6, E7 [76]

76. The Defendants said to be involved in this limb are TPG, Halimeda, Ms Mammad Zade, and Mr Kuzovkov. It is comprised of the following alleged elements:

(1) On 24 February 2020, Smartilicious and Enviartia nominated 14 candidates to the FESCO board. Between 11 and 18 September 2020, ahead of the AGSM scheduled to take place on 30 September 2020[2], each of the 14 SGS Branch nominees (save Mr Shagav Gadzhiev) wrote to Ms Mammad Zade withdrawing their consent to being nominated to the board. Their letters withdrawing consent were all in near identical terms.

(2) The Claimants say that they were coerced into withdrawing, or at least persuaded, by Ms Mammad Zade; and that the letters by which they withdrew consent to be nominated were drafted on their behalf. These allegations correspond to the case set out at RAPOC section E6.

(3) By this time, Mr Tsantekides (the SGS Branch nominated director of Smartilicious and Enviartia, among others) had stopped responding to the requests of the SGS Branch. SGS engaged with TPG to ask for its co-operation in appointing a new SGS-nominated director for Smartilicious and Enviartia.

(4) The Claimants say that TPG deliberately stalled the process. These allegations correspond to the case set out at RAPOC section E7.

(5) On 28 September 2020, Halimeda obtained an ex parte interim court order in Cyprus against Maple Ridge and against Smartilicious and Enviartia, prohibiting them from exercising any voting rights at the next FESCO AGSM (the 'Cypriot Injunctions'). The effect was to prevent Smartilicious and Enviartia from electing their preferred candidates to the FESCO board, and to hand practical control of FESCO to Domidias.

(6) The Claimants say that it is to be inferred that the Cypriot Injunctions were obtained by Halimeda for the unlawful, improper and illegitimate purpose of furthering the FESCO conspiracy, and so were a deliberate abuse of process. These allegations correspond to the case set out at RAPOC section E4.

(7) The ex parte Cypriot Injunctions were set aside on 16 November 2020, but by this time they had had the effect of preventing Smartilicious and Enviartia from

[2] In the event, it was postponed until 16 November 2020.

being represented at the FESCO AGSM.

(8) Mr Economou had notice of the Halimeda Demand Letter. Mr Tsantekides had notice of the Cypriot Injunctions. They failed to inform promptly anyone else within the SGS Branch, in breach of the duties that they owed (respectively) to Hellicorp, Intimere and Sian and to Maple Ridge, Smartilicious and Enviartia.

(9) The Claimants say that it is to be inferred that Mr Economou and Mr Tsantekides were pressured or induced by Ms Mammad Zade and/or Mr Kuzovkov. These allegations correspond to the case set out at RAPOC section E5.

D4.7: The Intimere SHA and the ROFO Offer: E9, E11, E12 [77]

77. The Defendants said to be involved in this limb are TPG, Ms Mammad Zade, Mr Rabinovich, Ermenossa, Mr Kuzovkov, Felix, ROSATOM and DP World. It is comprised of the following alleged elements:

(1) On or about 14 July 2020, TPG and Ermenossa agreed terms for the sale to Ermenossa of TPG's shares in Felix at a price of US$35 million. This triggered SGS's right under the Intimere SHA to a ROFO Offer, which Felix sent on 15 July 2020 (copied to Ms Mammad Zade and Mr Kuzovkov). SGS and Felix negotiated and reached a concluded agreement by 7 October 2020 for (in effect) the same price as had been agreed under the transaction with Ermenossa. SGS paid US$35 million to Felix's nominated account on 9 October 2020. The funds were provided to SGS by Mr Alexander Evdokimov.

(2) In breach of contract, Felix made demands for information as to the source of the funds (said to be necessary for anti-money laundering ('AML') requirements) and returned the funds on 12 October 2020.

(3) On 13 October 2020, Felix said (wrongly) that it could not proceed to close the transaction without the approval of the Federal Anti-monopoly Service ('FAS'). FAS's interest in the transaction had been provoked by a letter sent to FAS on 18 August 2020 by Ermenossa, on the instruction of Mr Rabinovich.

(4) On 5 November 2020, an associate of Mr Evdokimov was called to a meeting with senior members of the Russian government, including the Prime Minister, the Head of the FAS and the Director General of ROSATOM. He was told to ensure that Mr Evdokimov stepped aside, or the FSB would "work on" the people involved. On 10 November 2020, Mr Evdokimov withdrew his support from SGS and asked for the return of his funds within 5 days.

(5) As stated above, TPG sold its shares in Felix to Ermenossa on 18 November 2020.

(6) SGS commenced LCIA arbitration proceedings against Felix (the 'Felix Arbitration'). The LCIA Tribunal has issued various Awards finding that Felix acted in breach of contract. My understanding is that SGS's claim for damages remains to be decided.

D4.8: FESCO's civil claim against the Claimants: E13 [78]

78. The only Defendants said to be involved in this limb are FESCO and Mr Severilov. It is said to be comprised of the following elements:

(1) On 25 October 2022, FESCO commenced civil proceedings against Mr Magomedov, SGS, Felix, Maple Ridge, Smartilicious and Enviartia. FESCO said that the purpose was to recover in respect of the Maple Ridge Loans.

(2) On 11 November 2022 FESCO obtained interim relief injuncting Smartilicous and Inviartia from exercising their voting rights in FESCO and seizing their shares in FESCO (the 'FESCO Seizure Order').

(3) In the event, the FESCO Seizure Order was overtaken by the confiscation order that followed Mr Magomedov's criminal conviction and sentencing, on 24 November 2022.

(4) FESCO's civil claim succeeded against Mr Magomedov, SGS, Maple Ridge, Smartilicous and Enviartia (but not against Felix) at a hearing held on 7 April 2023 (with judgment on 20 April 2023).

(5) The Claimants say that the proceedings were unfair and that FESCO's claim was intended to target Mr Magomedov rather than a genuine attempt to recover losses. It is said that pursuit of the claim for this purpose was a breach of duty by FESCO's directors, in particular Mr Severilov.

**D5: The objective of the conspiracies [79]**

79. Both alleged conspiracies are said to have had the same objective, set out in paragraphs 46, 48 and 49 of the RAPOC:

> "46. This Claim concerns two conspiracies which between them involve all of the Defendants, and which each involve other persons acting or purporting to act on behalf of the Russian State and unknown others (the "**Hostile Parties**" and the "**Conspiracies**"). The Conspiracies had and have as their ultimate objective the wresting of assets from Mr Magomedov or obtaining them for less than their fair value, and for the sole benefit of the Hostile Parties (including Transneft and ROSATOM, each of which are companies owned by the Russian State) and/or some of them and/or those that control them."
>
> ''
>
> "48. The Conspiracies form part of a campaign waged against Mr Magomedov (and Magomed Magomedov) by and on behalf of the Russian state for political reasons. The imprisonment of the Magomedovs is a further part of the same political campaign.
>
> 49. Such assets as remained in Mr Magomedov's hands have been arrested and confiscated by orders of Russian Courts, on applications by Russian prosecuting authorities and FESCO. These arrests and confiscations form part of the Conspiracies and

> have the same ultimate aim, i.e. the wresting of assets from Mr Magomedov for the benefit of the Hostile Parties (and/or some of them) and the Russian state."

## D6: The role of the Russian State [80]-[83]

80. The paragraphs in the RAPOC that I have just cited make it necessary to consider the role of the Russian State. The pleaded text leaves it unclear whether the Russian State is said to be one of the Hostile Parties and, more specifically, whether the Russian State is said to have been party to either of the alleged conspiracies. Unhappily, the Claimants' answer to this question remained unclear throughout the hearing in September 2024. Submissions made on the final day appeared to suggest unequivocally that the Claimants did indeed say that the Russian State was party both to the NCSP conspiracy and to the FESCO conspiracy.

81. However, a letter from the Claimants' solicitors very shortly after the September hearing closed indicated that the Claimants' case is, in fact, that the Russian State was party to the NCSP conspiracy, but not to the FESCO conspiracy:

> "In particular, no case is run that (i) that the FESCO Conspiracy involves (i.e. as conspirators) persons acting or purporting to act on behalf of the Russian State; (ii) that Russian prosecutors were parties to the FESCO Conspiracy; or (iii) the parties to the FESCO conspiracy include members of the Russian State."

82. This is an important distinction between the NCSP conspiracy and the FESCO conspiracy.

83. Ultimately, all the confiscated shares in FESCO (92.5% of its total shares) were transferred to ROSATOM, by two transfers on 20 December 2023 and 12 March 2024, both pursuant to a Presidential Decree issued by President Putin on 8 November 2023. This is unequivocally an act of the Russian State, but it is not relied on by the Claimants as an act that was carried out as part of the FESCO conspiracy.

## E: LEGAL PRINCIPLES: THE DEFENDANTS' APPLICATIONS [84]-[150]

### E1: Strike-out and summary judgment [84]-[86]

84. The Court may strike out Particulars of Claim under CPR rule 3.4(2)(a) if it appears to the Court that, even if the facts pleaded are assumed to be true, they "*disclose no reasonable grounds for bringing […] the claim*". The commentary in the White Book states that CPR rule 3.4(2)(a) covers "*statements of case which are unreasonably vague, incoherent […] or obviously ill-founded and other cases which do not amount to a legally recognisable case or defence*". Examples of the cases where the court may conclude that the Particulars of Claim fall within CPR rule 3.4(2)(a) are given in PD 3A ¶1.2, including particulars that are "*incoherent and make no sense*" and those which "*contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant*".

85. Under CPR rule 24.3, the Court may give summary judgment against a claimant on the whole of a claim or an issue if the claimant "*has no real prospect of succeeding on the*

*claim […] or issue*" and "*there is no other compelling reason why the case or issue should be disposed of at a trial*". The test is materially the same as for striking out, save that the Court is not required to assume the truth of the pleaded facts: *Allsop v Banner Jones* [2021] EWCA Civ 7 at [7].

86. Many authorities dealing with summary judgment applications have endorsed the well-known guidance in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> "The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91.
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*.
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10].
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence

> necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

**E2: Jurisdiction: serious issue to be tried [87]-[91]**

87. In the context of a challenge to jurisdiction, the first matter to be considered is whether the claim raises a serious issue to be tried, this being the first of the three requirements set out in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 453-457. The onus is on the Claimants and the test is the same as that for summary judgment: *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, per Lord Collins (giving the opinion of the Privy Council) at [71]:

> "…the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457, para 24."

88. My attention was also drawn to *Elite Property Holdings Ltd Barclays Bank Plc* [2019] EWCA Civ 204 at [41]-[42] (per Asplin LJ), dealing with the proper approach in the analogous situation of a contested amendment:

> "41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences:

> *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon."

89. It is notable that Asplin LJ's remarks are entirely consistent with those of Lewison J in *EasyAir Ltd v Opal Telecom Ltd* at [15] – unsurprisingly, given that they both drew on the judgment of the Court of Appeal in *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472.

90. Furthermore, when evaluating whether there is a serious issue to be tried in the context of a challenge to jurisdiction, the court's task is to assess the case as pleaded in the Particulars of Claim: *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell plc* [2021] UKSC 3 at [22] and at [103]-[105]:

> "22. …Where… there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue."
>
> …
> "103. This was a jurisdiction challenge and concerned whether it was appropriate to grant permission to serve proceedings out of the jurisdiction on a foreign defendant. Those proceedings were meant to be as defined in the particulars of claim for which permission to serve out was sought. In this case the challenge was made on the grounds that the claimants had no arguable case against the anchor defendant. Where, as in this case, there are particulars of claim, that is an issue which should ordinarily fall to be addressed by reference to the pleaded case.
>
> 104. If the issues are addressed by reference to the pleaded case, then the focus of the inquiry is clearly circumscribed and problems of lack of proportionality should generally be avoided.
>
> 105. In the present case, not only did the parties choose to swamp the court with evidence, but it appears that the claimants chose not to update their pleadings to reflect the evidence. We were told that this is because they wanted to avoid producing various iterations of the pleading, but if they wanted to advance a case

> which was not reflected by their existing pleading then they should have amended it. In that way the proper focus of the inquiry can be maintained. Whilst one can understand that this may not have been possible in relation to documents produced during the appeal hearing, the claimants' laissez-faire attitude to the pleadings set in long before that."

91. Because of the confirmation in *Altimo Holdings* that the merits test for a challenge to jurisdiction is the same as that for a strike-out/summary judgment application under CPR 3.4(2)(a) and/or CPR rule 24.3, it follows that the observations made by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* at [15] (v) to (vii) are just as relevant in this context. The court must take into account not only the evidence before it, but also the evidence that can reasonably be expected to be available at trial, or evidence that might arise from a fuller investigation at trial. On the other hand, the claimant cannot simply argue that something may turn up.

**E3: Jurisdiction: good arguable case re a gateway [92]**

92. The second *Seaconsar* requirement is that the Claimants must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given (or is not necessary) – i.e., that the case passes through one of the jurisdictional gateways under CPR rule 6.33 and CPR PD 6B paragraph 3.1. In this context, 'good arguable case' has the meaning explained in *Canada Trust Co v Stolzenberg (No. 2)* [1998] 1 WLR 547, as further clarified by Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 at [7]:

> "An attempt to clarify the practical implications of these principles was made by the Court of Appeal in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547. Waller LJ, delivering the leading judgment observed, at p 555:
>
> > "'Good arguable case' reflects … that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."
>
> …In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice*. What is meant is (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. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

**E4: Jurisdiction: the English law contract gateway [93]-[119]**

93. Subject to some minor points that are more conveniently addressed in the context of the relevant claim/Defendant, there was no real dispute between the parties as to the legal principles applicable to the individual jurisdictional gateways – with one exception.

94. The exception relates to CPR PD 6B paragraph 3.1(6)(c):

> "(6) A claim is made in respect of a contract where the contract–
>
> … (c) is governed by the law of England and Wales."

95. This provision – referred to in some of the authorities, and below, as 'gateway (6)' – is relevant because the Omirico SPA, the 2012 Option Agreement, the Loan Agreements and the Intimere SHA were all expressly subject to English law.

96. There is a wealth of authority confirming that the words "in respect of" have a wide meaning, and that, in the specific context of this jurisdictional gateway (including its previous incarnation as CPR rule 6.20(5)), they mean something broader than a claim "under" a contract. They require only that the claim relates to or is connected with the contract: *Albon v Naza Motor Trading Sdn Bhd* [2007] EWHC 9 (Ch), [2007] 1 WLR 2489, [27] (Lightman J). Gateway (6) encompasses, in particular, a claim that is based on rights said to arise out of a contract: *Cherney v Deripaska (No. 2)* [2009] EWCA Civ 849, [67] (per Moore-Bick LJ). The contract does not have to be one to which the intended claimant and defendant are both parties: *Greene Wood & McLean LLP v Templeton Insurance Ltd* [2009] 1 WLR 2013, [18]-[19] (per Longmore LJ).

97. What is less clearly established is precisely what kind of relationship or connection is required between the claim and the contract; and whether the defendant (at least) must be a party to the contract.

98. *Cecil v Bayat* [2010] EWHC 641 (Comm) involved claims in conspiracy, the claimants' case being that the defendants conspired to deprive them of the benefit of pre-existing contracts, some of which were governed by English law (the Cecil and Bentham contracts) and some of which were not (the Grinling and Lehmkuhl contracts; although the Grinling contract was made in England). At [47] to [49], [135](1), Hamblen J (at first instance) considered the applicability of the gateway (at that time, under CPR rule 6.20(5)). At [49], he said:

> "In my judgment, at least in respect of contractual claims, some relevant legal connection between the claim and the other contract is required. If that contract needs to be referred to and relied upon in order to assert the relevant cause of action then that requirement is likely to be satisfied since it will be a

> necessary part of the cause of action. However, a mere factual connection between the two contracts is not enough."

99. He therefore concluded at [135](1) that:

> "The jurisdictional gateways relied upon are… [t]hat the conspiracy claims are each "a claim in respect of" the Cecil and Bentham contract (the latter of which was made within the jurisdiction and/or is governed by English law, as above), 6BPD3.1(6) (a) and (c), and the Grinling contract. The claims are to deprive them of their contractual benefits and the contract does form a necessary part of that cause of action, although it is not its legal foundation. As such, I would, if necessary, be prepared to hold that the Cecil and Bentham claims are sufficiently connected to their contract to fall within this jurisdictional gateway, and likewise Grinling with his contract. This, however, would not assist Lehmkuhl. As far he is concerned the conspiracy is in respect of his contract, not that of Cecil and Bentham or Grinling. His contract was neither made in the jurisdiction nor subject to English law."

100. This part of Hamblen J's reasoning was obiter and his judgment was later reversed by the Court of Appeal (not on grounds concerned with this point). It follows that the dicta that I have set out do not bind me, but they are nevertheless significant.

101. It is also important to note that, in *Cecil v Bayat*, two of the defendants ('Bayat' and 'TSI') were parties to these contracts; a further relevant defendant ('Warner') was not party to any of the contracts, but the Cecil and Bentham contracts were said by the claimants to confer benefits on him. The relationship between these defendants and the contracts was not something on which Hamblen J focussed, but it was highlighted when *Cecil v Bayat* came to be considered by the Court of Appeal in the next important authority.

102. This is *Alliance Bank JSC v Aquanta Corp* [2012] EWCA Civ 1588; [2013] 1 All ER (Comm) 819. It was another conspiracy case. As regards some defendants (referred to by Tomlinson LJ, giving the leading judgment, as 'D3' and 'D4'), the claimants asserted that the conspiracy had resulted in loans that a third party ('Reachcom') had made to those defendants being guaranteed by the claimant. The Reachcom loans were subject to English law and jurisdiction. However, the claimants' guarantees, and the implied contracts of indemnity associated with D3 and D4's requests to the claimants to provide those guarantees, were subject to arbitration, although governed by English law. A further group of defendants ('Ds 6-9') were individual conspirators: the former chairman of the board of the claimant bank and his brothers, who were said to have been prime movers in the conspiracy and the owners of the companies where the funds ended up, but not party to any relevant contract.

103. Tomlinson LJ suggested at [60] and [63] (without yet having analysed the authorities closely) that it would seem anomalous that gateway (6) could be relied on against a defendant that is not party to the relevant contract.

104. He then considered the authorities from [64] onwards, beginning with *Albon v Naza Motor Trading Sdn Bhd*, *Greene Wood & McLean LLP v Templeton Insurance Ltd* and *Cherney v Deripaska (No. 2)*– all of which, he noted, were cases where the defendants sought to be served out of the jurisdiction were parties to the relevant contract.

105. Next he considered *Cecil v Bayat*, saying at [67]:

> "What the judge said about the claim in conspiracy falling within gateway (6)(a) and (c) was I think strictly obiter, since he also concluded that each claim qualified as a claim in tort where damage was sustained within the jurisdiction and so fell within the tort gateway, gateway (9). Moreover, of the three parties to the conspiracy upon whom he permitted service out of the jurisdiction, two, Bayat and TSI, were parties to relevant contracts with the claimants. The nature of the conspiracy was said to be to ensure that the claimants did not receive the shares to which they were entitled under those contracts. The third defendant out of the jurisdiction upon whom he permitted service in this respect, Warner, was not a party to those contracts, but the conduct alleged against him was that, in agreement with Bayat, he wrongly disposed of shares which he was holding on trust for the claimants. He was holding the shares on trust for the claimants because they were constituted shareholders by the agreement to which the claimants, Bayat and TSI, were party. It was therefore conduct closely related to the implementation of the contracts which it was the purpose of the action to enforce. Hamblen J's preparedness, albeit obiter, to treat the conspiracy claim against Warner as a claim 'in respect of a contract' notwithstanding Warner was not a party to that contract is I think the high-water mark of the assistance afforded to Mr Toledano by the authorities. Longmore LJ in the *Greene Wood & McLean* case spoke in broad terms of a claim having a connection with a contract as rendering it, for these purposes, a claim in respect of that contract, but he was speaking only in the context of a contract to which the intended defendant was party."

106. Next, Tomlinson LJ referred to *Global 5000 Ltd v Wadhawan* [2012] EWCA Civ 13, noting that Rix LJ (albeit obiter and in a slightly different context) drew attention to the anomaly of obtaining jurisdiction against a defendant by reference to a contract to which he is not party.

107. Tomlinson LJ then set out his views at [69] to [72]. His comments on *Greene Wood & McLean LLP v Templeton Insurance Ltd* and *Cecil v Bayat* are especially significant:

> "**[69]** It would I think be similarly anomalous were jurisdiction here to be established against Ds 6–9 in reliance upon contracts to which they are not party. The nature of the required connection between the claim and the contract in respect of which it is made is the more elusive in circumstances where the

intended defendant is not party to the relevant contract. GWM was relying upon the contract between Templeton and the miners as generating the right to contribution under the 1978 Act, because it was the instrument under which Templeton was liable to the miners in the same way as GWM was liable to the miners. That is a straightforward connection.

**[70]** Furthermore, like Rix LJ in the *Global 5000* case at [64], I wonder what is the relevance of sub-r (d) of para 3.1(6) of the Practice Direction unless it is implicit that the intended defendant is bound by that term and that agreement. Indeed I would go a little further, in that I wonder what is the relevance, for the purpose of founding jurisdiction, of the circumstance that the contract has been made within the jurisdiction, or made by or through an agent trading or residing within the jurisdiction, unless it is the intended defendant who has 'come into' the jurisdiction to make the contract, or has used the services of an agent trading or residing within the jurisdiction for the purpose of making the contract.

**[71]** Notwithstanding the width of the language used by Longmore LJ in the *Greene Wood & McLean* case, plainly that case does not compel us to decide that connection of a claim with a contract to which an intended defendant is not party is a qualifying jurisdictional link under gateway (6). That point was left open. I am for my part attracted by the argument that a claim is not for that purpose properly described as 'made in respect of a contract' where the contract in question is not one to which the defendant is party. For my part I see great force in the argument that it is implicit in the rule that the contract upon which reliance is placed must be one to which the intended defendant is party. I am also attracted by Mr Morgan's formulation which I would tentatively restate as follows: unless the claimant is suing in order to assert a contractual right or a right which has arisen as a result of the non-performance of a contract, his claim is not in this context properly to be regarded as one made in respect of a contract. I think it likely that ordinarily such claims can only be made in respect of contracts to which the intended defendant is party. However the case of the intended defendant, Warner, considered by Hamblen J in *Cecil v Bayat* may show that that will not always be so. It is sufficient to dispose of the point in this case to indicate that the required connection between claim and contract must inevitably be the more difficult to establish in a case where the intended defendant is not party to the contract upon which reliance is placed than in a case where he is party to it. Longmore LJ was able to say in the *Greene Wood & McLean* case [2009] 1 WLR 2013 that the claim for contribution *clearly* had a connection with the Templeton contract which established the liability of Templeton to the miners, because that (contractual) liability was a prerequisite to Greene Wood

> claiming contribution from Templeton. Here there is in my judgment no clear connection, or no connection with any real content, between the claims in tort or delict against Ds 6–9 and the Reachcom loan agreements. Those agreements may be an incidental product of the conspiracy but it puts the cart before the horse to describe the claim in respect of the conspiracy as a claim in respect of the contracts to which it may, incidentally, have given rise. It would be more natural, but still in my judgment artificial, to regard the claim as made in respect of the contracts of guarantee between Alliance and Reachcom rather than the loan agreements between Reachcom and Ds 3 and 4, since it was by the former that Alliance was deprived of its money. Similarly, I consider that the claims in unjust enrichment against the wrongdoers who allegedly participated in the scheme to divert Alliance's assets and the equitable claims for dishonest assistance and knowing receipt arising from the breach of fiduciary duty that arguably occurred when the contracts of guarantee were executed have a closer affinity to those contracts than to the contracts of loan. In these cases too however the necessary connection between the claim and the contracts is in my view lacking. In none of these formulations is Alliance suing Ds 6–9 in order to assert a contractual right or a right which has arisen as a result of the non-performance of a contract.
>
> **[72]** Where then does this leave the non-contractual claims against Ds 3 and 4? It is the claims in contract against Ds 3 and 4 which are brought in order to assert contractual rights *under* the contracts of implied indemnity. Nor is the conspiracy claim brought in order to assert a right arising as a result of non-performance of the implied contracts of indemnity. The essence of the conspiracy allegation is that the conspirators, including Ds 3 and 4, used contracts such as the Alliance guarantees as instruments pursuant to which they extorted money from Alliance. Adopting the analysis which I have favoured, I do not think that these claims can properly be said to be made in respect of the implied contracts of indemnity. The implied contracts of indemnity are merely incidental products of the conspiracy. The claims made in respect of those contracts are the contractual claims made under them."

108. In *Abu Dhabi Commercial Bank PJSC v Shetty* [2020] EWHC 3423 (Comm), having cited Tomlinson LJ's judgment in *Alliance Bank JSC*, Bryan J said at [80] (obiter):

> "… this is a situation where the relevant defendants are not party to the agreements concerned. I consider it would be a very rare case indeed where the gateway could be used in those circumstances. I am not satisfied that the matters identified by him suffice in order to meet the requirements of that gateway."

109. In *Abu Dhabi Commercial Bank PJSC v Shetty*, the factors that had been prayed in aid by the claimant (even though the defendants were not party to the English-law contract relied on for gateway (6)), and which Bryan J rejected as insufficient, were that:

(1) The English-law contracts were signed by two of the defendants.
(2) The defendants were the owners and officers of a company that was a guarantor under both agreements.
(3) A number of the pleaded representations arose out of the contracts.

110. I was also referred to *Charterhouse Asset v Latchworth Ltd* [2021] EWHC 3072 (Ch), where Master Kaye referred to *Global 500* and to *Alliance Bank JSC* and set aside service on the basis that the defendant was not a party to the relevant documents and knew nothing about the transaction or the documents at the relevant time and had done nothing to interfere with the claimant's contractual rights. Her conclusion at [60] was that there was "simply no connection or nexus or proximity".

111. Other cases I have considered include the following:

(1) *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry (The 'Lucky Lady')* [2013] EWHC 328 (Comm): Andrew Smith J at [14] applied *Alliance Bank JSC*, identifying the ratio as Tomlinson LJ's comment at [71] that "unless the claimant is suing in order to assert a contractual right or a right which has arisen as a result of non-performance of a contract, his claim is not in this context properly to be regarded as one made in respect of a contract."

(2) *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat VE Ticaret AS* [2015] EWHC 258 (Comm): Teare J held at [46] that gateway (6) was applicable. The defendant was not originally a party to the contract with the claimant Club, but it had the benefit of a direct right of action against the Club, which was largely circumscribed by the terms of the (English-law) contract between the Club and its member.

(3) *Dili Advisors Corp v Production Investment Management Ltd* [2020] EWHC 2669 (Comm): Moulder J held at [185] that gateway (6) was not applicable. The claims arose out of an investment, which itself arose from various alleged discussions and an alleged oral agreement. However, the English-law contracts relied on for the purposes of gateway (6) were concluded later, as part of the structure for the making of the investment. Moulder J said (adopting the language in *Alliance Bank JSC* at [71]) that those contracts might be an "incidental product" of the claims, but "it puts the cart before the horse" to describe the claims as in respect of the contracts to which the matters complained may, incidentally, have given rise.

112. These cases are all concerned to tease out the kind of relationship that must exist between the claim and the English-law contract that is prayed in aid. The phrase used by Hamblen J in *Cecil v Bayat* at [49] was "relevant legal connection". The phrase used by Tomlinson LJ in *Alliance Bank JSC v Aquanta Corp* at [71] was "no clear connection, or no connection with any real content." The phrase used by Master Kaye in *Charterhouse Asset v Latchworth Ltd* was "connection or nexus or proximity".

113. Applying a concept such as connectedness as a legal test is complex, in that it is relative in nature, rather than absolute, and it is multi-factorial. There is seldom a yes/no binary answer, and there are often countervailing indications – some features suggesting a close connection, others pointing the other way. This means that it is difficult if not impossible to formulate a brightline test or single criterion that will give the right answer in all cases. I have no doubt that this is why Tomlinson LJ in *Alliance Bank JSC* said at [71] that he was "attracted by" the two tests that he there set out, but was careful to make it clear that his views were tentative and that there might be exceptions.

114. I of course consider myself bound by Tomlinson LJ's views, and in any event I agree that, to pass through gateway (6), the claim ordinarily must (i) be in respect of a contract to which the intended defendant is party and (ii) must assert a contractual right or a right which has arisen as a result of the non-performance of a contract; furthermore, (iii) the contract must not be simply the incidental product of the conduct giving rise to the claim. However, this leaves room for debate about whether satisfying one or more of these tests is necessarily enough to allow passage through the gateway, and also about the scope for exceptions.

115. It must be right to approach gateway (6) by reference to its rationale, and bearing in mind its context within CPR PD 6B and its relationship with other gateways. The most obvious purpose for allowing claims involving English-law contracts to be made justiciable in England is that the English courts are the most suitable courts for deciding issues as to the meaning and effect of English-law contracts. The paradigm of such a claim will be where there is (or at least may be) an issue as to the meaning and effect of an English-law contract, as against a defendant who is party to the contract.

116. Conversely, a claim that mentions the existence of an English-law contract but is not one that asserts any right under it and which (therefore) can be said with certainty not to raise an issue as to its meaning and effect, especially not as against a party to that contract, is not an obvious case for gateway (6).

117. Similarly, gateway (6) should not be enlarged unnecessarily so as to encompass claims that pass more naturally through other gateways. In particular, a claim for causing or assisting the breach of an English-law contract most naturally falls within gateway (8A). The existence of this gateway suggests that such a claim does not fall under gateway (6), because the words "in respect of" in gateway (6) are not wide enough to include a claim for causing or assisting a breach of contract. If they were, gateway (8A) would not have been necessary.

118. Even if the intended defendant is not party to the contract, it may be sufficient if he has rights and/or obligations that are subject to it and because the claim involves issues in respect of such rights/obligations – perhaps because of a status that would qualify under or be proximate to the Contracts (Rights of Third Parties) Act 1999, or in circumstances such as those applicable to Warner in *Cecil v Bayat* and to the defendant in *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat VE Ticaret AS*. Those were both cases where the nature of the claim was such that the meaning and effect of the English-law contract was in issue and mattered, as against the defendant.

119. By contrast, even where the intended defendant is a party to the English-law contract, my own tentative view (pace Hamblen J) is that it cannot be sufficient merely that the contract needs to be referred to and relied on, if the reference and reliance are purely incidental, and if the claim therefore is incapable of giving rise to any issue in respect of the contract. In such a case, the connection between the claim and the English-law contract would be too tenuous. It would not be a relevant legal connection.

## E5: Jurisdiction: appropriate forum [120]-[146]

### E5.1: Burden of proof [120-[122]

120. In so far as Defendants have been served within the jurisdiction, it is for those Defendants to show that another available forum is more appropriate than England, in order to have the proceedings stayed: *Spiliada Maritime Corp. v Cansulex Ltd* [1987] AC 460, 476F-477F (per Lord Goff). In so far as Defendants have been served out of the jurisdiction with the permission of the court, it is for the Claimants to show that England is clearly or distinctly the most appropriate forum: *Altimo Holdings* at [88].

121. This seems straightforward, but some observations are necessary:

(1) When these landmark cases were decided, and until relatively recently, there was a distinct contrast between service on a defendant within the jurisdiction, for which no permission was necessary, and service outside the jurisdiction, for which permission generally was necessary. The former situation was frequently referred to as service "as of right" including by Lord Goff in *Spiliada* at p. 476F. However, that phrase could also be used with a different sense, as explored below.

(2) It is now commonplace for service out of the jurisdiction, and out of the United Kingdom, to be effected without the permission of the court, in the circumstances addressed by CPR rule 6.33. In such cases, the claimant does not need to persuade the court to grant permission to effect service; but the extraterritorial jurisdiction thus conferred remains "exorbitant", or at least "extraordinary": see *Spiliada* per Lord Goff at p. 481E-F. Neither party was able to direct me to an authority which expressly considered whether the burden in such cases is on the defendant to show that England is clearly not the appropriate forum, or is on the claimant to show that England is appropriate. There are obvious arguments that could be developed either way. As it happens, this does not matter: few cases turn on the burden of proof, and this is not one of them.

122. Irrespective of where the burden lies, determining the appropriate forum requires the court to follow the process explained by Lord Goff in *Spiliada*. Primarily, the court considers whether the appropriate forum for the trial of the action is England or whether it is some other available forum.

### E5.2: "Appropriate" forum [123]

123. The "appropriate" forum means the forum where the case can most suitably be tried, by reference to the interests of all the parties and the ends of justice: *Spiliada* per Lord Goff at p. 476C. This requires considering the connecting factors that link the case to England

and to whatever other available forum may be under consideration. There were only limited issues between the parties as to the kind of connecting factors that may in principle be relevant. I consider them in their context, in section O below.

E5.3: "Available" forum [124]-[146]

124. There was, however, argument about the requirement that the foreign forum be "available". It is clear that the foreign forum must be one that has jurisdiction to determine the dispute: *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37, [96]. The Claimants contended that this requires the foreign forum to have jurisdiction "as of right". By this, I understood them to be drawing a distinction between jurisdiction that unequivocally exists under the applicable jurisdictional rules (or which arises from the defendant's submission to jurisdiction), and jurisdiction that depends on the court exercising a discretion in favour of such jurisdiction. Specifically, I understood them to be contending that jurisdiction that would depend on the foreign court giving permission for such jurisdiction to be exercised – comparable to cases coming under CPR rules 6.36 and 6.37 and CPR PD 6B paragraph 3.1, where the permission of the court is required for service upon the defendant – should not be considered sufficient to make the foreign court "available".

125. In many foreign systems, the foreign forum either has jurisdiction or it does not as a matter of pure legal principle, without permission or other decision being required by its courts. For example, under many such systems, one common situation where extraterritorial jurisdiction can be asserted over a defendant not present in the relevant country is if that defendant has assets within the country. In such cases, once the jurisdictional rules that apply under the relevant system have been identified, and when it has been established on the facts whether the criteria under those rules are satisfied (e.g. sufficient presence of the right kind of assets) there can be no doubt whether the forum is or is not available. There is no discretionary element.

126. I suppose there may also be foreign systems (although I do not know of any) where jurisdiction may depend on a discretionary decision that is so unpredictable that it would not be fair for the English court to decline its own jurisdiction in favour of the foreign court, because of the unquantifiable risk that the foreign court might also decline jurisdiction. In such a case, the foreign forum could not properly or safely be considered "available", because it is wholly uncertain whether the claimant will or will not be able to avail himself of its jurisdiction.

127. However, if the situation were reversed and a foreign court had to consider whether the jurisdiction of the English courts is available in a case where permission would be required under CPR rules 6.36 and 6.37 and CPR PD 6B paragraph 3.1, I apprehend that it would not analyse the English system in the way that I have just outlined. If properly informed as to English law, the foreign court would conclude that English jurisdiction would depend on whether the necessary legal criteria were satisfied – i.e., (i) serious issue to be tried, (ii) applicable gateway and (iii) appropriate forum; all of which are illuminated by a large body of established caselaw which gives a high degree of predictability. The foreign court would then determine whether those criteria were satisfied on the facts of the case. If so, it would proceed on the basis that the English court has jurisdiction under the applicable jurisdictional rules, viz. the CPR and the clear principles established by the authorities; therefore, the English court would give permission to serve out, and would then exercise

jurisdiction over the case.[3] On this basis, the foreign court would treat England as an available forum.

128. Considering how a foreign court might go about assessing whether England is an "available" forum in a case where service out requires permission is not merely an illustrative hypothetical exercise. It is highly relevant to this case, because the alternative foreign forum that was suggested to me with the greatest enthusiasm (at least in the context of the FESCO conspiracy) was Cyprus. I was told (without challenge) that the Cypriot legal system resembles that of England in many respects; and, specifically, that its procedural rules are drawn from our White Book, with service out of the Cypriot jurisdiction being possible with the permission of the Cypriot court in certain specified circumstances, including on a "necessary or proper party". Some of the Defendants before me are Cypriot companies (Halimeda, Ermenossa) or resident in Cyprus (Mr Kuzovkov), so that Cypriot proceedings can be served on them without permission. The others could in principle be served as necessary or proper parties – assuming that the relevant criteria are established, and with permission. There might also be other gateways available in Cyprus, with permission.

129. In support of their argument that for the foreign forum to be "available" it must have jurisdiction "as of right" the Claimants relied on *Hindocha v Gheewala* [2003] UKHL 77 at [22]. The Claimants acknowledged that this part of the judgment was expressly not part of the reasoning, but noted that the Privy Council said:

> "… it is clear that an alternative forum is not available (in the relevant sense) unless it is open to the plaintiff to institute proceedings as of right in that forum (for the law as it stood in 1999 see Dicey and Morris, *The Conflict of Laws* 13th (2000) edition, para. 12–023). But this topic has recently been reviewed (as noted in the second supplement to Dicey and Morris, para. 12–023) by the House of Lords in *Lubbe v Cape plc* [2000] 1 WLR 1545. The House upheld the general principle that an available forum must be one in which the plaintiff can sue as of right, but treated an undertaking to submit to the alternative jurisdiction (in that case, an undertaking by the English holding company to submit to the jurisdiction of the South African court) as sufficient to show that the forum is available even though given after the application for a stay."

130. It is striking that the Privy Council referred both to the law as it stood in 1999, as set out in the 13th edition of *The Conflict of Laws*, and to the law as set out by the House of Lords in *Lubbe v Cape plc* [2000] 1 WLR 1545. While it is right that paragraph 12-023 of the 13th edition of *The Conflict of Laws* said that an alternative forum is not "available" unless the claimant can institute proceedings there "as of right", it did not explain the meaning of this phrase. Furthermore, the footnote reference used to support this statement was *Lubbe v Cape plc* [1999] ILPr 113, i.e. the decision of the Court of Appeal that was reversed by the House of Lords.

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[3] Unless justice required otherwise – see section E6 below. However, this exception applies even where permission to serve out of the jurisdiction is not required and the defendant is served "as of right". The existence of this residual discretion therefore does not assist the Claimants in contending for a distinction between the two situations.

131. Understanding how the phrase "as of right" was being used in this context, whether in 1999 or in 2000, and also whether the proposition that a forum is not "available" unless proceedings can be commenced there "as of right", therefore necessitates close reading of the judgments in *Lubbe v Cape plc*.

132. In *Lubbe v Cape plc*, the alternative forum under consideration was South Africa. The defendant, Cape, had previously owned mines and mills in South Africa, but they had closed and Cape had no presence in South Africa, nor any assets there which (under South African law) would have been the other route on which to found jurisdiction. See further the speech of Lord Hope in the House of Lords [2000] 1 WLR 1545, 1563F-G.

133. Cape therefore could only become amenable to South African jurisdiction if it consented; which it did, after proceedings had been commenced in England. Giving the leading judgment in the Court of Appeal, Evans LJ identified the question before the Court as follows at [41] (adopting the paragraph numbering in the report at ILPr 113):

> "[41] … The question is, whether the courts of another country can be said to offer an "available forum" to a plaintiff who cannot bring proceedings there, without the defendant's consent."

134. Here, therefore, Evans LJ indicated that the relevant dichotomy was between (i) an "available" forum and (ii) a forum where proceedings can only be brought with the defendant's consent.

135. The same dichotomy was also presented at [47], in the following terms:

> "Whether the court's jurisdiction will become effective depends on the defendant's willingness to submit to it: the antithesis of jurisdiction asserted "as of right"."

136. However, at [48] Evans LJ cited Lord Goff's speech in *Spiliada* [1987] AC 460, 476F, where Lord Goff used service "as of right" to mean service within the jurisdiction, without permission; and Evans LJ then himself used the phrase "as of right" with the same meaning in [49], [50] and [52].

137. In any event, it is important to bear in mind that, in *Lubbe v Cape plc*, jurisdiction in South Africa could not be established with the permission of the South African court. It depended on non-discretionary factors.

138. In the House of Lords, the phrase "as of right" was used by Lord Bingham [2000] 1 WLR 1545 at p. 1553H and p. 1554E to mean service within the jurisdiction, but not in a context that suggests one way or another whether he was equiparating this with the necessary characteristics of an available forum. Lord Hope also used the phrase at p. 1566D, in a citation from the decision of the Court of Session in the Scots case of *Societe du Gaz de Paris v. Societe Anonyme de Navigation "Les Armateurs Francais,"* 1925 S.C. 332, where, as he noted, jurisdiction was established over a defendant who was not present or resident in Scotland, by an arrestment to found jurisdiction. As I understand it, no permission of the court was required for this, so it could perhaps be treated as a form of extraterritorial jurisdiction established without permission, analogous to CPR rule 6.33. As with Lord

Bingham, however, Lord Hope was not here considering what is necessary for a foreign forum to be regarded as "available". The overall result is that I do not find that the fact that the phrase "as of right" was used in *Lubbe v Cape plc* sheds any real light as to what was meant by "available" forum – either in the Court of Appeal, or in the House of Lords.

139. In the House of Lords, the question whether South Africa should be treated as an available forum was considered by Lord Hope at pp. 1562G-1566C. The immediate issue for the House of Lords was whether a submission to the South African jurisdiction made after proceedings had already been commenced in England was sufficient. In explaining why his conclusion was different from that of the Court of Appeal, Lord Hope drew his analysis chiefly from Scots law cases, not from any cases involving extraterritorial jurisdiction exercised with permission. However, he did say this:

> "In *Societe du Gaz de Paris* v. *Societe Anonyme de Navigation "Les Armateurs Francais,"* 1925 S.C. 332, 347 the Lord Justice-Clerk, Lord Alness, said that the result of the cases was that it must be plain that "another forum is open to the parties." His analysis of the law was approved by Lord Dunedin, 1926 S.C. (H.L.) 13, 18, in your Lordships' House. There is no indication here or in any of the other Scottish cases that this matter ought to be approached on any other basis than that this is a requirement that must be satisfied in a practical manner when the question of forum non conveniens is being considered by the court."

140. The other speeches, including that of Lord Bingham, adopted the reasoning of Lord Hope in relation to whether South Africa should be treated as an available forum in the light of Cape's undertaking to submit to South African jurisdiction. Lord Hope's citation of the words of Lord Alness suggests that the relevant question is a pragmatic one: has it been made plain that another forum is open to the parties?

141. The approach suggested by the Claimants before me would mean that, where the relevant foreign country has jurisdictional rules similar to those of England, it would be considered "available" if the defendant had been served without permission – typically because of residence or incorporation in the foreign country, or (as with Mr Garber in this case) because of personal service during a fleeting visit; but potentially also because of service outside the foreign country under CPR rule 6.33, e.g. because the claim is in respect of a contract that contains a term for jurisdiction in that country. However, in any case where service had only been accomplished with the permission of the foreign court, under the equivalent of CPR rules 6.36 and 6.37 and CPR PD 6B paragraph 3.1, the alternative forum would not be considered available; and, the Claimants say, this must be so no matter how clearly it could be shown that the foreign court would inevitably decide any challenge to its own jurisdiction by dismissing that challenge and exercising its jurisdiction.

142. I accept that there is an analytical difference between the origin of the court's jurisdiction in the two situations. There is also a difference between the mechanics required in each situation, before service is effected. However, once it has been established (ex hypothesi) that there is a reasonably arguable claim that passes through at least one jurisdictional gateway, the only real practical difference is that in one situation the burden is on the defendant in the relevant jurisdiction to show that it is clearly not the appropriate forum,

and in the other the burden is on the claimant to show that it is appropriate. Thus, in this case, if one focusses on Cyprus as the potential alternative jurisdiction for the determination of the Claimants' claims on the FESCO conspiracy, the only difference between the availability of the Cypriot court (i) as against Halimeda, Ermenossa and Mr Kuzovkov and (ii) as against the other relevant Defendants is that, in Cyprus, if any of the Defendants wish to contend that Cyprus is not an appropriate forum, the burden of proof will fall differently.

143. Where the burden of proof will lie overseas is not a rational basis for distinguishing between cases where the English court should allow a defendant before it to argue that another court is more appropriate, and cases where it should not. The fact that relatively few cases ever ultimately turn on the burden of proof illustrates this: it is, in general, a distinction of no real significance.

144. I therefore prefer the pragmatic question suggested by Lord Hope in *Lubbe v Cape plc*: has it been made plain that another forum is open to the parties?

145. There is scope for debate about the burden of proof on this question. My instinct would be that the burden should fall as it does in relation to whether England is the appropriate forum – including the grey area of CPR rule 6.33. Once again, however, this is not a question that I have to decide as this case will not be affected by the incidence of the burden of proof.

146. A further consideration to bear in mind is that, even if the English court concludes that the alternative foreign forum is plainly open and available, it may nevertheless wish to acknowledge the existence of a residual risk that the foreign court might in due course come to a different conclusion and decline jurisdiction. This will sometimes be appropriate, because the one golden rule about litigation is that things change: what looks plain and obvious today may look less so tomorrow; not least, if the evidence presented to the foreign court is different from the evidence considered by the English court. If this risk is too real to be neglected, it may be salutary for the English court to be cautious and to stay itself, while giving liberty to the parties to apply if the foreign court does not exercise jurisdiction over some or all defendants.

**E6: The requirements of justice [147]-[150]**

147. If the English court decides that there is no other available forum that appears to be more appropriate than England, then it will retain jurisdiction. However, if the English court is, provisionally, persuaded that a foreign forum is both available and more appropriate than England, the English court will stay the English proceedings and/or decline jurisdiction unless justice requires otherwise.

148. One particular situation where justice may require the court not to grant a stay but to retain jurisdiction is where the claimant will not obtain justice in the foreign jurisdiction: *Spiliada* per Lord Goff at p. 478D-E. Here, the Claimants said that they, and in particular Mr Magomedov, would not be able to obtain justice in Russia.

149. This is a topic that has received significant recent attention in this court – most recently in *Zephyrus Capital Aviation Partners 1d Limited v Fidelis Underwriting Limited* [2024] EWHC 734 (Comm), where Henshaw J summarised the law at [157], as follows:

> "In order to establish a real risk of injustice, the claimant must adduce "*positive and cogent evidence*": *The Abidin Daver* [1984] AC 398, 411B-D; *Cherney v Deripaska* (Court of Appeal) [60]; *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 [89-102]; *Dynasty Co for Oil and Gas Trading Ltd v Kurdistan Regional Government of Iraq* [2022] QB 246 [173]-[178]; *Bazhanov & Anr v Fosman & Ors* [2017] EWHC 3404 (Comm) [96]-[105]. It is not sufficient for a claimant to make "*broad and conclusory allegations*" about the judicial system in the contractual forum, but the claimant may be able to identify specific features of the claim which give rise to a real risk of injustice: *Cherney v Deripaska* (Christopher Clarke J) at [238]-[248]."

150. I consider this in section O1 below.

## F: LEGAL PRINCIPLES: UNLAWFUL ACT CONSPIRACY [151]-[171]

### F1: The basic elements of unlawful act conspiracy [151]-[167]

151. The essence of unlawful act conspiracy was set out authoritatively by the Court of Appeal in *Kuwait Oil Tanker Co SAK v Al-Bader (No. 3)* [2002] 2 All ER (Comm) 271, at [108]:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so. "

152. Many other authorities were cited to me, not least *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm), at [94], where Cockerill J gave a very useful overall summary of the authorities as at the date of her judgment:

> "94. The elements of the cause of action are as follows:
>
> i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: *Kuwait Oil Tanker* at [111].
>
> ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: *Kuwait Oil Tanker* at [108]. Moreover:

a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see *Kuwait Oil Tanker* at [120-121], citing *Bourgoin SA v Minister of Agriculture* [1986] 1 QB:

> "… [i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them".

b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: *Lonrho Plc v Fayed* [1992] 1 AC 448, 465-466; see also *OBG Ltd v Allan* [2008] 1 AC 1 at [164-165].

c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: *OBG* at [166].

iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in *OBG v Allan*, referring to cases where:

> "The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

iv) Concerted action (in the sense of active participation) consequent upon the combination or understanding: McGrath *[Commercial Fraud in Civil Practice (2nd ed.)]* at [7.57].

v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: *Revenue and Customs Commissioners v Total Network* [2008] 1 AC 1174 at [104].

vi) Loss being caused to the target of the conspiracy.

95. However, a person is not liable in conspiracy if the causative act is something which the party doing it believes he has a lawful right to do: *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303; [2008] Ch 244, per Arden LJ (paragraphs [126]- [127]) and Toulson LJ (paragraph [174]); *Digicel v Cable & Wireless* [2010] EWHC 774 (Ch) at Annex I, paragraphs [117]-[118] (Morgan J)."

153. As well as Cockerill J's judgment and the cases cited by her, I was also taken to (among other cases) Bryan J's detailed review of the law in *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm), at [76]-[115]; and his further observations in *Lakatamia Shipping Co Ltd v Su* [2023] EWHC 1874 (Comm), at [106]. Another case I found valuable was *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1276 (Ch), per Briggs J at [842]-[848].

154. What follows is not intended as an encyclopaedic re-statement. It draws from Cockerill J's summary, taking as read the points that seem to me clear and well-established, but elaborating, as appropriate, where relevant to an issue that I have to determine. It is a practical précis, tailored to this case.

155. The basic elements of unlawful means conspiracy are:

(1) A combination between two or more people.

(2) A shared intention to injure another person; this need not be the sole or predominant intention.

(3) Concerted action by the conspirators, consequent upon the combination.

(4) The use of unlawful means as part of the agreed concerted action.

(5) Loss caused thereby.

156. As to element (1) – combination – the words used in *Kuwait Oil Tanker Co SAK v Al-Bader (No. 3)* at [108] were "a combination or agreement", but there is no requirement for anything amounting to an agreement in law. Most commentators prefer "combination" or "understanding", and in *Kuwait Oil Tanker* at [111] it was said to be sufficient if they "… deliberately combine, albeit tacitly, to achieve a common end." See also the passage later in [111]:

> "… the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of."

157. With this in mind, I understand the concept of "combination" to mean that the relevant persons have deliberately co-ordinated their efforts to advance a common aim. I have in mind David Hume's example of two men silently rowing a boat together: they work in combination, albeit wordlessly.[4]

158. It is not necessary that all the conspirators join at the same time. Nor is it necessary that every conspirator knows who all the other conspirators are or precisely what each of them will do. However, it is necessary that each conspirator knows of the involvement of at least one other conspirator, and that his efforts are deliberately co-ordinated with the others he knows about.

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[4] Hume, *A Treatise of Human Nature* (1740): "Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other." Credit for seeing the aptness of Hume's insight as an example for legal analysis belongs to Lord Leggatt, not to me.

159. Thus, in a conspiracy involving A, B, C and D, for A to be liable in conspiracy it is not necessary that he knows of the involvement of C and D, still less that he knows their identities or how the work of executing the conspiracy will be shared out between them. However, he must at least know of the involvement of B; and A and B must deliberately co-ordinate their efforts.

160. As to element (2) – shared intention to injure – this does not have to be the predominant purpose of A or of any of the other conspirators, but it must have been at least a purpose of all of them. Anyone who does not share it cannot be a conspirator. Mere foresight is not sufficient, but the intention can be inferred from the fact that loss to the claimant was inevitable. This means that, at a relatively early interlocutory stage (as in this case), it will often be difficult to rule out the possibility that any alleged conspirator had the necessary intention, as long as harm to the claimant was foreseeable. This may depend on the way the case has been pleaded.

161. As to element (3) – concerted action consequent upon the combination – this does not necessarily require action in the sense of positive steps. In *FM Capital Partners Ltd v Marino*, Cockerill J's reference at [94(iv)] to McGrath paragraph 7.57 might suggest that she approved of the distinction drawn there between active participation and mere facilitation. However, McGrath then goes on at paragraph 7.58 to consider a bank clerk who does not check the credentials and identity of a new customer. This example shows that inaction can, in fact, be sufficient. If the bank clerk fails to carry out the proper checks because of mere negligence, then his inactivity has no connection with the conspiracy. If, however, it is deliberate and happens in order to advance the conspiracy, this will suffice, as McGrath accepts.

162. I note that Bryan J also concluded that passive participation might suffice, in *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm), at [105]. He emphasized that, when considering this, the court must look carefully at the combination in question, on the particular facts of the case. He referred to a passage in the judgment of Connor LJ in *R v Siracusa* (1990) 90 Cr App R 340 at 349, which the Court of Appeal in *Kuwait Oil Tanker* adopted at [111] as applicable to unlawful means conspiracy. However, his main source was the judgment of Morgan J in *Digicel (St Lucia) Ltd v. Cable & Wireless Plc* [2010] EWHC 774 (Ch) Annex I, especially at [74]:

> "In my judgment, before a court can determine whether a defendant has been a party to a combination, it is necessary to identify what the combination is said to be and what part the defendant played in that combination. I can see that if a defendant is in a position of authority over other persons and those other persons want to feel that they have the defendant's authority to proceed before they do proceed, then the defendant's omission to stop their activity might be regarded as a sufficient signal to them that they have the defendant's backing in what they are doing. Such a defendant could be held to be participating in the combination. However, I do not think that the passage quoted above [from *R v Siracusa*] is authority for saying that every person who knows unlawful acts are being committed and who does nothing to stop those acts, is a party to a combination to carry out those acts."

163. Whether active or inactive/passive, the participation must be concerted and it must be consequent upon the combination. In some cases, this will make it necessary to keep in mind who the relevant defendant is said to have combined with, and the scope of their combination: see *Bank of Tokyo-Mitsubishi v Baskan* [2009] EWHC 1276 (Ch) at [846]-[847]:

> "… where a bit-player in a multifaceted fraud knows only of one aspect of the fraud, and is ignorant of the others, he may not be liable for anything more than the loss properly attributable to that part of the fraud of which he is aware.
>
> 847. In my judgment there is no simple doctrinaire answer to the conundrum presented by such a case. The answer lies in a painstaking analysis of the extent to which the particular defendant shared a common objective with the primary fraudsters, and the extent to which the achievement of that objective was to the particular defendant's knowledge to be achieved by unlawful means intended to injure the claimant."

164. Thus, if A only knows about B, and so only conspires with B, the scope as regards A may be narrower than if A also knew about, and conspired with, C and D. Again, therefore, much will depend on how the case is put against A, and against the other alleged conspirators.

165. As to element (4) – the use of unlawful means as part of the concerted action – A's liability does not require that A himself has used unlawful means. It is enough if one of the other conspirators has done so, as part of the concerted action: *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm), at [83]. But the requirement that it be "as part of the concerted action" again makes it relevant to consider, as against A, who A combined with, and the scope of their combination.

166. If A knew that someone within the overall conspiracy would use unlawful means such as were in fact used, that will suffice, on the basis that the unlawful means were within the scope of the combination: see *Kuwait Oil Tanker* at [133]. However, the corollary is that, if one of the conspirators has ended up using unlawful means that were not in A's contemplation and were outside the scope of the relevant combination, those unlawful means will not suffice as against A (although they may as regards some other alleged conspirators).

167. As to element (5) – loss caused thereby – it is required that the claimant has suffered loss that has been caused by the use of the unlawful means: *Digicel (St Lucia) Ltd v Cable & Wireless Plc*, at Annex (I) [70]-[71]; *Palmer Birch v Lloyd* [2018] EWHC 2316 (TCC), at [239].

## F2: The role of inference and pleading requirements [168]-[171]

168. A great many of the authorities make the point that conspiracies are usually concealed, so there is seldom direct evidence of the conspiracy (especially before disclosure). Conspiracy claims therefore are usually based on circumstantial evidence, and are often based on inferences to be drawn from the events: see for example *Kuwait Oil Tanker* at [112]. This point is frequently illustrated by referring to a bank robbery: there will

probably be no direct evidence showing that the people involved all conspired together, but the fact that one man supplied the gun, a second used it to threaten the bank staff, a third removed the cash and a fourth drove the getaway vehicle, makes it legitimate to infer that they did.

169. A claim framed in unlawful act conspiracy generally involves allegations of serious wrongdoing: *Jarman & Platt Ltd. v I. Barget Ltd, and Others* [1977] FSR 260, per Megaw LJ at 267. As such, it must be clearly pleaded: *Ivy Technology v Martin* [2019] EWHC 2510 (Comm), at [12]; *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm), at [42]. The obligations on the claimant in this regard are at their highest if the claim asserts dishonesty.

170. Where the claim is based on inferences, the primary facts relied on must be properly particularised: *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699, at [23(ii)]. Such facts fall to be assessed, in this context, as explained by Flaux J in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), at [20]:

> "The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it [in *Three Rivers District Council v Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1, at [186]], there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge. This is made absolutely clear in the passage from Lord Hope's speech [in *Three Rivers*] at [55]-[56] which I quoted above."

171. Above all, as Cockerill J warned in *King v Stiefel* [2021] EWHC 1045 (Comm):

> "What the cases do not say is that one can jumble together a vast array of different, apparently trivial or marginally suspicious facts relating to different matters and turn them into a valid pleading of fraud."

## G: THE EFFECT OF BUTCHER J'S JUDGMENTS [172-198]

### G1: The decision of Miles J in *Harrington v Mehta* [172]-[180]

172. In *Harrington v Mehta* [2023] EWHC 2420 (Ch), the claimant obtained a worldwide freezing order against some of the defendants. Those defendants applied in October 2022 for the worldwide freezing order to be set aside, primarily on the basis that there was no good arguable case against them. The hearing of that application lasted 3 days and involved substantial materials (see Miles J's judgment at [50]). Judgment was reserved.

In a 113 page judgment, Edwin Johnson J dismissed the application, concluding that there was a good arguable case.

173. The relevant defendants sought to appeal Edwin Johnson J's judgment, but were refused permission to appeal by the Court of Appeal on 29 August 2023.

174. The same defendants had also applied for the claims against them to be struck out under CPR rule 3.4(2)(a), and/or for summary judgment under CPR rule 24. Their applications were heard in July 2023, in a hearing that again lasted 3 days. The claimants contended that for the relevant defendants to argue that the claims against them had no realistic prospect of success was an abuse of process, given that Edwin Johnson J had already decided that there was a good arguable case. They said that the applications amounted to a collateral attack on Edwin Johnson J's judgment.

175. Miles J reserved judgment. Because of the summer vacation, he was unable to hand down his judgment until 3 October 2023 – i.e., after the Court of Appeal's refusal of permission to appeal the judgment of Edwin Johnson J.

176. Miles J reviewed the relevant authorities on abuse of process at [63]-[69], including *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, per Lord Diplock at p. 536, and *Johnson v Gore Wood & Co* [2002] 2 AC 1, per Lord Bingham at p30H-31F. He paid particular attention to *Koza Limited v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018, where Popplewell LJ (with whom Asplin LJ agreed) referred to the judgment of Nugee J in *Holyoake v Candy* [2016] EWHC 3065 (Ch) describing it as a helpful summary of those cases. The passage from *Holyoake v Candy* that Popplewell LJ cited with approval included Nugee J's statement at [13]:

> "Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."

177. Miles J then considered the parties' submissions as to the legal principles to be derived from these cases.

(1) At [79], Miles J rejected the defendants' argument that, in order for there to be an abuse of process in interlocutory proceedings, there must be successive applications by the same party for the same relief. He said that the principle arises where, in substance, the same battle is sought to be fought over again.

(2) At [80], he rejected the defendants' argument that there can only be a collateral attack where there has been a final decision in separate proceedings. He said that principle can apply where there is a collateral attack on an earlier interlocutory decision in the same proceedings. The test is whether the decision being sought is inconsistent with an earlier one.

178. He then applied the legal principles to the facts of the case, at [84]-[109], before concluding at [110] that the abuse of process doctrine precluded the defendants' applications because they amounted to a collateral attack on the judgment of Edwin Johnson J.

179. However, critical to this conclusion was the fact that the case was not one where there had been any relevant change of circumstances. Indeed, this appears to have been common ground between the parties:

(1) At [71], Miles J recorded the claimants' submission that the defendants had not shown a relevant change of circumstances.

(2) At [74] he noted that the defendants did not suggest that there had been any relevant change of circumstances since the judgment of Edwin Johnson J; nor did they suggest that their arguments were substantially different from those advanced at the earlier hearing.

(3) At [100] he again noted that the defendants had not relied on or shown any relevant change of circumstances.

180. My impression is that Miles J's decision would have been different, if there had been a significant change of circumstances. This must include, but is not limited to, circumstances such as the relevant party becoming aware of facts which he could not reasonably have known, or found out, in time for the earlier hearing.

**G2: Butcher J's judgments [181]-[184]**

181. Butcher J's first judgment, [2023] EWHC 2655 (Comm), related to the FESCO conspiracy. The hearing had been substantial, and had taken three days. Not all the defendants to the FESCO conspiracy allegations took part in the hearing and not all of those who took part argued that there was no good arguable case: see the judgment at [81].

182. Those who did were Mr Rabinovich, Ermenossa, Mr Severilov, ROSATOM, Mr Garber and GHP. Butcher J's conclusions on this were as follows:

(1) Butcher J held that there was a good arguable case against Mr Rabinovich and Ermenossa. However, he was not persuaded that there was a good arguable case that Mr Rabinovich or Ermenossa had paid bribes to Mr Garber or to Mr Kuzovkov: [97]. In any case, he decided that the Claimants had failed to establish a risk of dissipation. For this reason, he refused to grant a freezing order against Mr Rabinovich or Ermenossa.

(2) Butcher J held that there was a good arguable case against Mr Severilov: [107]. However, he again found against the Claimants on risk of dissipation and therefore refused to grant a freezing order.

(3) Butcher J said that he was prepared to hold that there was a good arguable case against ROSATOM: [132]. However:

> "I do not, however, consider that it is necessary to delve into this in greater detail, because I am of the clear view that there is no real risk of dissipation supported by solid evidence."

(4) Butcher J held that there was not a good arguable case against Mr Garber or GHP: [142], [154]. He then went on to say that he would have refused to grant

a freezing order in any event, the Claimants not having established a risk of dissipation.

(5) Butcher J noted that Halimeda and FESCO did not argue the point: [81] and [117]. This meant that he did not have to decide whether there was a good arguable case against those Defendants. He nevertheless did not grant a notification order against them, because he again found that risk of dissipation had not been established.

(6) Mr Kuzovkov was in a special category, because he was not represented. My understanding is that he attended remotely, but did not address the court: [161]. Butcher J concluded that there was not a good arguable case against Mr Kuzovkov. This was in part because the evidence from Mr Bedjaoui supporting the allegation that a bribe was paid to Mr Kuzovkov was only served very shortly before the hearing, and without revealing Mr Bedjaoui's name, meaning that Mr Kuzovkov had not had any real opportunity to investigate the relevant matters. In any event, Butcher J said that he would have refused to grant a freezing order, because the Claimants had not established a risk of dissipation: [166]. Furthermore, it was not just and convenient to grant an order against Mr Kuzovkov: [167].

183. Butcher J's second judgment, [2023] EWHC 3134 (Comm), related to the NCSP conspiracy. The only Defendant that took part in the relevant hearing was Transneft. On this occasion, the hearing lasted only one day, but there were then two rounds of post-hearing submissions.

184. Transneft argued that there was no good arguable case against it. Butcher J found that there was. He also found that the Claimants had established risk of dissipation, and he granted a notification order against Transneft.

## G3: The contentions of the relevant parties before me [185]-[193]

185. When Butcher J decided the applications for notification and freezing orders, it was not entirely clear what the "good arguable case" test comprised. Butcher J made it clear in both judgments – but especially in the second, where there was a lively debate as to the correct formulation of the test – that he applied the test set out by Mustill J in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The 'Niedersachsen')* [1983] 2 Lloyd's Rep 600. The Court of Appeal recently considered this and confirmed not only that Butcher J had applied the right test, but also that the "good arguable case" test applied in the context of freezing orders (and notification orders) should be regarded as the same as the summary judgment test: *Dos Santos v Unitel SA* [2024] EWCA Civ 1109, at [122].

186. It follows that this case in some respects resembles *Harrington v Mehta* rather closely. In both, an application for an order affecting the defendants' assets led to an early challenge by the defendants as to the merits of the claims, which was fiercely contested and argued at some length, with the benefit of substantial material. In both, one or other party has then sought to advance an argument about the merits that at first sight appears inconsistent with the court's earlier findings.

(1) The Claimants said that it was not open to Mr Rabinovich, Ermenossa, Mr Severilov, ROSATOM or Transneft to contend that the claims against them did not have realistic prospects of success or raise a serious issue to be tried.

(2) By contrast, they denied that the abuse of process doctrine applied as between them and any of the other Defendants.

(3) Mr Garber and GHP contended that Butcher J's conclusions were effectively binding in that it was an abuse of process for the Claimants to contradict them.

(4) Mr Rabinovich, Ermenossa, Mr Severilov, ROSATOM and Transneft all contended that the abuse of process doctrine was not applicable.

187. In so far as parties submitted that the abuse of process doctrine was not applicable, they did so, at least in part, on the basis that there had been significant changes of circumstances. This is the key difference between this case and *Harrington v Mehta*; although I think it is also realistic to note that, in his first judgment, Butcher J was clearly greatly affected by his views on risk of dissipation – which meant that, either way, his conclusions on good arguable case were not determinative. This is apparent not only from his disposal as against Halimeda and FESCO (who chose not to contest the "good arguable case" issue) but also from his comments in relation to ROSATOM, at [132].

188. As regards changes of circumstances, one important change is the shift in the Claimants' position as regards the involvement of the Russian State in the FESCO conspiracy; see Butcher J's first judgment at [67] and [86].

189. Above all, however, considerably more evidence was deployed before me than before Butcher J. This is true on all sides.

190. So far as the Claimants are concerned, before Butcher J the evidence of Mr Bedjaoui was anonymised, and had been served very recently, with the result that Butcher J effectively disregarded it. By the time of the hearing before me, Mr Bedjaoui's name had been revealed and Mr Kuzovkov and the other relevant Defendants had been given a reasonable opportunity to investigate it. Mr Kuzovkov complained that, in the circumstances, it was still difficult for him to investigate matters as he would have liked, but on any view the position is not as it was before Butcher J.

191. So far as the Defendants are concerned, Transneft has provided significant new evidence regarding the formal approval and performance of the Omirico SPA, in particular during the period between Mr Karmokov's signature on 31 August 2018 and the completion of the transaction on 27 September 2018. This additional evidence is discussed in more detail in section I below. Also new was the evidence as to Russian law that was relied on before me to support its case on matters such as time-bar. This is discussed in section K3 below. None of this was relied on by Transneft before Butcher J, I assume because Transneft had not had sufficient time to pull the relevant materials together. If so, I do not find this surprising, because Transneft was not able to instruct solicitors until two weeks before the date for service of its evidence for the hearing before Butcher J.

192. Mr Rabinovich's position on the evidence has also developed since the hearing before Butcher J, not least because the de-anonymisation of Mr Bedjaoui, and the further

investigations that have ensued, affect him just as much as they do Mr Kuzovkov. Furthermore, any significant change as regards Mr Rabinovich has consequential significance for the other Defendants whose positions are related to him – above all his company Ermenossa, but also (less directly) Mr Severilov (said to be Mr Rabinovich's lawyer) and ROSATOM (for whom Mr Rabinovich was allegedly acting as its hired "corporate raider").

193. In addition, the background to the Claimants' case in relation to the Merbau Call Option has altered, in the light of various findings made by Moulder J in *Sian Participation Corp. v Domidias Limited* [2024] EWHC 458 (Comm) ('the Option Proceedings'). I refer to Moulder J's decision in more detail in Section L6 below.

**G4: Conclusion [194]-[198]**

194. The changes outlined above do not affect all parties in the same way or to the same extent. It may fairly be said that there has not been much change at all, as regards Mr Garber and GHP. However, because this is a conspiracy case, a change that may affect the merits as against one party may indirectly affect the merits as against another party with whom that party is alleged to have conspired. In *Lakatamia Shipping Co Ltd v Su* [2023] EWHC 1874 (Comm), Bryan J said at [801] that, in conspiracy cases, it was:

> "… best to avoid compartmentalising particular points relied upon, or treating points in "silos", or adopting a piecemeal approach to evidence relied upon."

195. I agree. Looking at matters in the round, the case has developed considerably since the hearing before Butcher J. The Claimants have amended their Particulars of Claim several times, and the evidence on both sides has increased enormously. Some of the points remain essentially the same, but the arguments on all of them have shifted (albeit to varying extents) and there are a number of entirely new points (albeit, again, this affects some parties more than others – in particular, Transneft).

196. In *Harrington v Mehta*, Miles J was inveighing against parties seeking to re-fight the same battles; see his judgment at [100]. In this case, I do not believe that any of the parties before me has, in substance, sought to re-fight the same battles. There are some similarities, but the precise battleground is in general slightly different, and so are the weapons.

197. Furthermore, Miles J's conviction that the defendants in his case were making a collateral attack on the judgment of Edwin Johnson J was reinforced by the fact that they effectively ignored that judgment, making no attempt to engage with its reasoning. In this case, those parties seeking to persuade me to come to a different conclusion from those reached by Butcher J have risen to this challenge – and have done so not by asserting merely that Butcher J was wrong, but by contending that matters have moved on since the hearings before him.

198. My conclusion therefore is that the developments that have occurred in the case since the hearings before Butcher J are sufficiently significant that none of the parties is precluded by the abuse of process doctrine from contesting the merits of the claims, either way.

## H: OBSERVATIONS ON APPLYING THESE PRINCIPLES [199]-[212]

199. Before I apply the legal principles identified above to the individual claims advanced by the Claimants, it is convenient to set out some observations on the application of the principles that I have reviewed in sections E, F and G above.

200. First, it is crucial to focus on the way that the claims have been pleaded in the RAPOC. This is important in any jurisdictional challenge, as explained in *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell plc*. It is all the more important where the case is framed in unlawful means conspiracy, at any rate where the allegations of unlawful means involve serious wrongdoing. Furthermore, where the case depends on inferences, the pleading must set out the primary facts relied on clearly and with particularity.

201. I made it clear to all parties in the course of the hearing that my approach would be to consider only the case set out in the RAPOC, and only the issues capable of arising from the allegations in the RAPOC. The parties' evidence may affect my conclusions as to whether the issues arising from the RAPOC are serious, and whether they deserve to be tried, or not. However, the evidence cannot alter what the case is or what issues it may raise.

202. The Claimants suggested that, when analysing the pleaded case and the issues arising from it, a degree of generosity was appropriate, bearing in mind that the proceedings are at an early stage and that in this area the facts are often deliberately concealed: *King v Stiefel* [2022], at [25(iii)]; *Persons Identified in Schedule 1 v Standard Chartered Bank* [2024] EWCA Civ 674, per Newey LJ at [49]. I accept this, up to a point. However, parties and their lawyers are enjoined to take care when settling pleadings. If it becomes apparent, prior to or even during a hearing such as this, that the pleading does not properly capture the intended case, the party affected should amend. Here, the Claimants have made several amendments, the last being finalised part-way through the September hearing. I have also allowed the Claimants to clarify their case on one point (the role of the Russian State) by their solicitors' letter. I consider this to be generous.

203. Second, while the bank-robbery example is often used to explain the role of inferences in the context of unlawful means conspiracy (and was to me, in submissions), it bears no real resemblance to a case like this. In a bank robbery, not only is the overall aim inherently unlawful, so too are the separate actions of every individual involved: supplying a firearm, threatening the bank staff, appropriating the bank's property, driving the (stolen) getaway vehicle. It is straightforward to infer not only that the participants acted in combination, but also that every single one of them knew that the combination would involve the use of multiple unlawful means.

204. By contrast, it was not inherently unlawful for Transneft's subsidiary, Fenti, to buy shares from Port Petrovsk, or for Mr Garber to sell his shares in Domidias to Mr Severilov, or for the FESCO board to approve the commencement of proceedings by Halimeda against Sian and Maple Ridge (rather than pursuing Project Moonlight), or for TPG to sell its shares in Felix to Ermenossa. It was not even inherently unlawful for Mr Severilov to threaten a hostile takeover, at the meeting on 26 August 2020 – as the Claimants accepted before me.

205. Various specific features of the Claimants' case were inherently unlawful – notably, the Threat allegedly made by Mr Tokarev in June/July 2018, and the threat of force allegedly

made by "Konstantin" on 28 August 2020. But the inferences that can be drawn in relation to a party who is said to have been involved in, or at least known about, matters like these may well be different from the inferences that can be drawn in relation to a party who is not – no matter how closely associated he may be with other alleged conspirators. It therefore may be necessary to consider carefully the specific allegations made in relation to each of the Defendants before me, to see what inferences are appropriate as regards that particular Defendant. In saying this, I acknowledge Bryan J's warning against putting points into silos. There is a potential tension here, which has to be addressed by pragmatic judgecraft.

206. Third, the question whether there was a combination between the alleged conspirators may or may not be the best issue to start with – that will vary from case to case. However, it is often fundamental. Conspiracy allegations are frequently criticised by those affected on the basis that they are circular. This criticism takes the form of asserting that the claimant wants the court to assume, as a premise, that the defendants were party to a conspiracy; because, on this premise, any step taken by any of them can be said to have been pursuant to the conspiracy.

207. It therefore is often valuable to pay particular attention from the outset to the pleaded case as to the existence of the alleged combination. Where that case is one based on inference, the court should consider with care whether the matters relied on as primary facts make an inference of conspiracy more likely than an explanation that does not involve conspiracy: per the approach commended by Flaux J in *JSC Bank of Moscow v Kekhman*.

208. Fourth, in a case like the present, the court must remind itself that the fact that A's actions may complement and assist B's does not necessarily mean that A and B have acted in combination. It is no less possible that, having noted what B was doing, A saw an opportunity that could work to his own personal profit and took advantage of it, without ever communicating with B and, even, without B being aware. Such opportunism may be tortious in itself, and thus unlawful, without giving rise to a claim in conspiracy.

209. The driving force behind a great deal of human conduct is self-interest. This is important to keep in mind when considering what inferences should be drawn from primary facts. Acting out of self-interest is certainly not inconsistent with also sharing the aim of injuring the claimant that is the purpose of the conspiracy: *OBG v Allan*, per Lord Nicholls at [167]. On the other hand, the court should not be too quick to leap from the fact that A had an indirect interest in injury to the claimant, to the conclusion that A conspired with others to achieve it. Occam's razor is an important part of the judicial toolkit.

210. Fifth, while it is always necessary for the reasons for the judge's determination be set out so as to be comprehensible, the court should never descend into unnecessary detail and, in some circumstances, should make a positive effort to be economical. In particular, where the court has to assess the merits at an interlocutory stage, but does so to a standard (e.g. "good arguable case" or "serious issue to be tried") which means that a positive conclusion is not an indication that the case will probably succeed at trial, it is best to be circumspect. I note Butcher J's comments in his judgment on the application for a notification and freezing injunctions in the FESCO conspiracy, [2023] EWHC 2655 (Comm), at [84]:

> "I have also taken the approach that, in cases in which I have found there to be a good arguable case against a Defendant, it is

> best not then to give any much more detailed analysis of the strengths and weaknesses of the case made against that Defendant, unless necessary to deal with the position of another Defendant. Any such analysis would be likely to be overtaken by what will emerge during the course of the case and/or, as it was put by Knox J in *In Re a Company 005009 of 1987* [1988] 4 BCC 424, be such as 'merely [to] embarrass the judge who will have to determine the question at the trial'. That was said in the context of a strike out, and the relevant considerations are not identical, but it nevertheless appears to me to be apt in the present context, and to be, as was said by Lloyd J in *Bank of America Trust v Morris* (22 October 1988), 'wise guidance'."

211. I agree with this. Indeed, I said something similar myself, in *Unitel SA v Unitel International Holdings BV* [2023] EWHC 3231 (Comm), at [112].

212. By contrast, where the effect of the interlocutory decision is terminatory (subject, of course, to any appeal), the party affected is entitled to a full explanation of the decision on any point that contributes to that decision.

## I: NCSP CONSPIRACY: OTHER FEATURES [213]-[227]

213. In section D3 above, I have summarised the Claimants' case in relation to the NCSP conspiracy, as captured in the RAPOC. However, there are some important matters that are relevant to the Omirico SPA and the wider NCSP transaction, which did not feature in the RAPOC or in the Claimants' evidence when they applied for permission to serve out of the jurisdiction and for alternative service, nor at the time of the hearing before Butcher J. These matters came out in, or in consequence of, evidence served by Transneft and Ms Mammad Zade for this hearing. The responsive evidence from the Claimants and their submissions before me indicate that these matters are not disputed by the Claimants, as set out below.

214. Before the agreement in principle that was reached in February 2018 at a price of US$1.3 billion, in May 2017, Mr Magomedov and Summa Group (for Port Petrovsk) had first offered to buy Transneft out, on a basis that valued Fenti's share in Omirico at US$710 million. Then, in December 2017, they offered either to buy Fenti's share or for Transneft to buy Port Petrovsk's share, at US$1.3 billion.

215. As set out above, the RAPOC noted that Mr Economou stopped serving as sole director of Port Petrovsk, and Mr Karmokov took over that position, on 7 August 2018. What was not explained was that Mr Karmokov had for some years been head of security at the Summa Group and since 15 June 2017 had been General Director of Investor LLC, one of Mr Magomedov's investment vehicles. It seems he may have held his position within Investor LLC as a mere nominee, rather than taking an active role, but this all indicates that he was trusted by Mr Magomedov. He was not an associate of Ms Mammad Zade and did not report to her, and there is no suggestion that his appointment as sole director of Port Petrovsk was something she or Transneft had any hand in – i.e., it was not part of the conspiracy.

216. Furthermore, the Claimants have recently provided evidence that Mr Economou stood down as director of Port Petrovsk because he was not prepared to execute documents in relation to the NCSP transaction, as he was not confident it was in the interests of Mr Magomedov and his brother. This suggests that Mr Economou was not a conspirator, at least in 2018. It also suggests that Mr Karmokov accepted the position because he had a different view from Mr Economou, i.e., he was confident that the NCSP transaction was in the interests of Mr Magomedov and his brother. The fact that he signed not only the Omirico SPA but also the other documents referred to below in this section confirms that this must have been his view (unless he was acting in bad faith – which, however, is not the Claimants' case).

217. There is very limited evidence about the negotiations in summer 2018 that led to the eventual concluded agreement. In particular, it is not clear whether there was any discussion about price, rather than (as the Claimants say should be inferred) Transneft simply demanding that it be US$750 million, on a 'take it or leave it' basis. It is clear from the limited exchanges available that, as well as Ms Mammad Zade and Mr Kant Mandal, others involved within the team on the seller's side, operating under Ms Mammad Zade and reporting to her, included Stanislav Akindinov (Summa Group's head of finance) and Konstantin Kurlanov (Summa Group's head of legal). The transaction lawyers on the seller's side were Cleary Gottlieb ('Cleary'), albeit that their letter of engagement did not come from Port Petrovsk but from Epitikhia.

218. As already stated, Mr Karmokov signed the Omirico SPA 24 days after his appointment as sole director of Port Petrovsk. Nothing is known about the circumstances in which he did this – i.e., there was no evidence on this point from the Claimants, from Ms Mammad Zade or from Transneft. However, it is important that Port Petrovsk's sole shareholder was Shevronne. Shevronne is jointly owned by Mr Magomedov and his brother, Mr Magomed Magomedov, through holding companies. The holding company for Mr Magomedov's share in Shevronne is Global Logistics Ltd ('Global Logistics'), the sole director of which was Mr Economou. Mr Magomed Magomedov's share of Shevronne was held for him via a company not shown in Annex 2 – Group Partners Financial Limited ('Group Partners Financial') – which in turn was the sole shareholder and director of Marionni Capital Corporation ('Marionni'), which owned 50% of Shevronne. Mr Andrey Mironov was the sole director of Group Partners Financial.

219. On 14 September 2018, Global Logistics' appointee to the board of Shevronne was Mr Economou, and Marionni's Mr Ioannis Konstantinidis. On that date, Mr Economou was replaced by Mr Karmokov, and Mr Konstantinidis was replaced by Mr Muslim Gadzhiev, who is the brother of Shagav Gadzhiev. Once again, nothing is known about the circumstances in which Mr Karmokov was appointed to Shevronne's board. However, the Claimants provided evidence shortly before the hearing to the effect that the person who asked Mr Muslim Gadzhiev to accept his appointment was Ms Galina Petrunina, who was (and, I think, is) the wife of Mr Magomed Magomedov. His appointment was then administered by Mr Mironov.

220. Under the Omirico SPA, the purchase price from Fenti was to be paid into a nominated account held by Port Petrovsk with Sberbank. On 14 September 2018, Port Petrovsk and Sberbank entered into an agreement which entitled Sberbank to apply funds in this account in respect of debts owed to Sberbank by another of Mr Magomedov's key assets, PJSC Yakutsk Fuel and Energy Company ('YATEK'). I was not provided with a copy of this

agreement, but it is common ground that it exists. I assume that it must have been signed by Mr Karmokov, as the sole director of Port Petrovsk at this time. The Claimants do not allege that this agreement between Port Petrovsk and Sberbank was part of the NCSP conspiracy, or that the debts owed by YATEK to Sberbank were not real. This is important because it provides a prima facie commercial rationale for some aspects of the transaction – broadly, the need to liquidate funds to pay Sberbank and discharge YATEK's indebtedness.

221. On 24 September 2018, Mr Karmokov, as director of Port Petrovsk, signed a resolution which "confirms, approves and ratifies the entry into, and execution of" the Omirico SPA as being in "the best interests of the Company".

222. On 25 September 2018, Mr Karmokov and Mr Muslim Gadzhiev, as directors of Shevronne, signed a shareholder resolution, made by Shevronne as Port Petrovsk's sole shareholder, stating that Shevronne "confirmed, approved and ratified [the transaction] in all respects" and confirmed that entering the Omirico SPA "is in the Company's best interests". Muslim Gadzhiev and Mr Karmokov also signed a separate resolution of Shevronne of the same date, confirming that they were "duly authorised to execute Shareholder's Resolution for and on behalf of [Shevronne] in their capacity as Directors of [Shevronne] in its capacity as corporate shareholder of Port-Petrovsk."

223. Once again, there is no evidence as to the circumstances in which Mr Karmokov signed any of these three resolutions. Once again, however, the Claimants provided evidence shortly before the hearing regarding signature by Mr Muslim Gadzhiev. They say that the two resolutions that he signed were provided to him by Ms Galina Medvedeva, who was Mr Magomed Magomedov's personal lawyer, who asked him to sign them. He believed that this meant that Mr Magomed Magomedov knew of and approved the Omirico SPA, and the deal as a whole, and he signed the resolutions on this basis.

224. These resolutions were required under the terms of the Omirico SPA, by clause 4.2 and Schedule 1. Clause 4.1 required there to be a closing meeting, held in Cyprus, to be attended by representatives of the purchaser. There was no contractual requirement for attendance by representatives of the seller, but the closing meeting was in fact attended not only by lawyers on both sides but also by (on the seller's side) Mr Kant Mandal, Mr Mironov, Mr Economou, Mr Karmokov and Ms Medvedeva. It took place on 27 September 2018, in Limassol.

225. As already noted, Transneft/Fenti duly paid the purchase price under the Omirico SPA, but it was immediately arrested. On 4 October 2018, Port Petrovsk applied to the Ministry of Internal Affairs for the seizure to be released, on the basis that Port Petrovsk needed access to the funds in order to discharge the debts owed to Sberbank by YATEK. This application was signed on behalf of Port Petrovsk by Mr Karmokov. It was not asserted by the Claimants that this happened without Mr Magomedov's knowledge or approval or that Mr Karmokov lacked authority in any way.

226. On 9 January 2019, Mr Magomedov personally petitioned the Ministry of Internal Affairs to release the funds, on the basis that they were needed to pay taxes. In this document, he explained this as being: "Within the framework of the completed transaction on the sale of my block of shares in OAO NCSP and the consequent need to pay individual income tax…"

227. On 4 March 2020, Mr Karmokov again signed a petition on behalf of Port Petrovsk applying for the Ministry of Internal Affairs to cancel the arrest. The petition stated that "as a result of the transaction for the sale of shares in PJSC NCSP to PJSC Transneft, funds in the amount of USD 750 million were transferred to the above bank account", with such funds having been "legally transferred to the company's account as a result of a civil law transaction which is not the subject of the above criminal case" and which "has not been challenged by anyone and is therefore considered legal." Once again, it was not asserted by the Claimants that this happened without Mr Magomedov's knowledge or approval or that Mr Karmokov lacked authority in any way.

## J: NCSP CONSPIRACY: SERIOUS ISSUE UNDER ENGLISH LAW [228]-[291]

228. The Claimants' primary case is that their claims in both conspiracies, all of which are tortious in nature, fall to be considered under English law. That is a proposition that I consider in more detail in section K below. However, it is convenient to begin on the assumption that English law applies, and to consider whether, on that assumption, the Claimants' claims against either Transneft or Ms Mammad Zade in respect of the NCSP conspiracy raise a serious issue to be tried.

### J1: The position as against Transneft [229]-[255]

229. At the heart of the case against Transneft is the alleged Threat. On this, very little has changed since Butcher J's second judgment. Like him, I accept that the Claimants' case that Transneft made the Threat (in the person of Mr Tokarev, and via Ms Mammad Zade, to whom it was communicated so that she would pass it to others, in particular Mr Magomedov) is not supported by much if any evidence apart from that of Mr Magomedov, as reported, indirectly by Mr Bushell. However, it is striking that the ultimate sale price to Fenti precisely matches that mentioned in the Threat (although I acknowledge that when giving his account of the Threat, Mr Magomedov of course knew what the ultimate sale price had been).

230. It is also striking that, approximately one year after Butcher J commented on the fact that there was no real evidence showing that the price had been the subject of arms' length negotiations, there is still no such evidence. Transneft suggested various factors that might be said to justify a drop in price from US$1.3 billion to US$750 million, and I accept that these factors may well have come into play. However, if so, I would expect there to have been written evidence of negotiations in which these points were raised. At the very least, I would have expected a witness – whether Ms Mammad Zade or a witness from Transneft/Fenti – to explain how these factors had been relied on by either side in the negotiations.

231. As well as the alleged Threat, the Claimants also rely on the alleged Representations. In paragraph 89 of the RAPOC, they say that it is to be inferred from the fact that Mr Magomedov remains in prison that the Representations were false when made, and were made fraudulently, alternatively negligently. I find this part of the pleaded case extremely unsatisfactory, in that it is not clear to me whether it is said that the court should infer (i) that Mr Tokarev knew, in June/July 2018, that he did not have the power to secure Mr Magomedov's release, if Port Petrovsk's share of Omirico were sold for US$750 million or (ii) that Mr Tokarev may have had this power, but did not intend to try to secure Mr

Magomedov's release, if Port Petrovsk's share of Omirico was sold for US$750 million. I am not clear why it is said that the court should not infer that Mr Tokarev might have negligently or innocently misunderstood his ability to influence Mr Magomedov's release, or that Mr Tokarev might have intended to try to secure Mr Magomedov's release in June/July 2018 but later changed his mind. However, I am not sure that this matters. The Claimants' case as to the Threat is clear, and this by itself is enough to constitute unlawful means under English law.

232. Transneft denies that it, or Mr Tokarev, made the Threat or any of the Representations. Interestingly, in her main witness statement, Ms Mammad Zade addressed paragraph 82 of the RAPOC (where the Threat and the Representations are both alleged) as follows:

> "I am not certain what, if any, complaint of wrongdoing is being made against me personally in relation to paragraph 82 of the APOC[5], but I also wish to make clear that Transneft did not ever indicate to me, and I did not convey to Mr Magomedov, that Transneft had the power to negotiate with Mr Putin so as to procure Mr Magomedov's release from prison."

233. I understand from this that Ms Mammad Zade denies having communicated the Representations. However, in this statement she did not say one way or the other whether Mr Tokarev communicated the Threat to her, or whether she passed it onto Mr Magomedov. If it was to be her case that none of this ever happened, I would have expected her witness statement to have said so.

234. This part of the Claimants' case relies, if only as a matter of inference, on there having been a combination involving (at least) Mr Tokarev, Transneft, Fenti and (at least possibly) unnamed persons acting on behalf of the Russian State.

235. The nature of the relationship between Mr Tokarev, Transneft and Fenti makes it inherently likely that they acted in combination, so in this respect the inference that the Claimants contend for is straightforward. Transneft criticised the fact that the involvement of the Russian State is put so vaguely. I do not accept this criticism. While I would expect the Claimants to provide more particulars in due course, it is not surprising that the Claimants are unable at present to provide such details, and I do not consider that the case as presently put is one that Transneft is unable to understand or meet.

236. I therefore accept that the Claimants have raised a serious issue that Transneft acted in combination with others, in the knowledge of the unlawful means – i.e., the Threat (and, possibly, the Representations). The objective was to wrest from Mr Magomedov and Port Petrovsk their share of Omirico, because of the value and strategic importance of NCSP. This necessarily involved causing injury to Port Petrovsk; and, indirectly, to Mr Magomedov.

237. It also seems to me inevitable that, if Ms Mammad Zade passed the Threat to Mr Magomedov, others close to him would be bound to have heard of it, very likely including Mr Karmokov (not least because of his role as head of security). That being so, it seems

[5] As I have noted, and as Mr Dougherty KC made clear at the hearing, the Claimants do not in fact allege any wrongdoing on the part of Ms Mammad Zade, as regards her involvement in receiving the Threat and/or Representations from Mr Tokarev, and then passing them to Mr Magomedov.

to me that there must also be a serious issue as to Mr Karmokov having been influenced by the Threat (and, possibly, the Representations), as the Claimants allege. This satisfies the requirement that the unlawful means caused the loss.

238. Thus far, my views are similar to those of Butcher J. However, unlike him, I next have to consider the significance of the matters that I have set out in section I above.

239. On behalf of Transneft, Mr Dunning KC submitted that, even if Mr Karmokov's signature of the Omirico SPA on 31 August 2018 had been without Mr Magomedov's authorisation and in breach of Mr Karmokov's duties to Port Petrovsk, he acted within the normal authority of a director. As director of Port Petrovsk, he was directly responsible not to Mr Magomedov but to the shareholder of Port Petrovsk, i.e. Shevronne. The resolutions of 24 and (more particularly) 25 September 2018 were in clear terms. Mr Dunning KC therefore said that it is not open to the Claimants to say that Mr Karmokov acted in breach of his fiduciary duty to Port Petrovsk, in light of these resolutions.

240. An important feature of Mr Dunning KC's argument was that the Claimants' case wrongly proceeds on the basis that their loss occurred upon signature of the Omirico SPA on 31 August 2018. Clause 3 of the Omirico SPA provided that the sale and purchase would not occur, and the transfer of Port Petrovsk's shares in Omirico therefore would not take place, until the closing; and the closing was subject to a number of conditions, which were to be satisfied subsequent to 31 August 2018. These included the relevant corporate approvals. These conditions had to be satisfied by 19 September 2018, and, in any event, before the closing. If the closing had not occurred by 28 September 2018, either party could terminate the SPA.

241. Therefore, it was not sufficient for the Claimants to say that Mr Karmokov was not fully authorised when he signed the Omirico SPA on 31 August 2018, or whether he was then acting in breach of duty to Port Petrovsk. The relevant question was whether he was fully authorised, or whether he was acting in breach of duty, by the date of the closing – i.e., 27 September 2018.

242. The Claimants' answer to this was that the three resolutions of 24 and 25 September 2018 could only ratify something done without authority if there had been full disclosure; otherwise, they were ineffective. They cited *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, per Lord Reed at [23]:

> "It has long been established that a company is normally bound in a matter which is intra vires the company by a resolution of the shareholders in general meeting. Authorisation in advance of the directors' act or ratification after the event by the shareholders in general meeting, after full disclosure, results in the treatment of the directors act as the act of the company, on principles of the law of agency, and therefore eliminates the possibility of the company bringing a claim against the directors for breach of their duties to the company."

243. The burden must be on the Claimants to plead and prove that there had not been full disclosure. In all the circumstances, they would have to plead and tender evidence showing that, when the relevant documents were signed by Mr Karmokov and/or Mr Muslim

Gadzhiev (but, probably, both), this happened on the basis of incomplete or misleading information.

244. Subject to one point in relation to Ms Medvedeva (whose position is relevant to Mr Muslim Gadzhiev), the Claimants had no pleaded case on this at all, because the RAPOC simply does not deal with any of these matters.

245. As regards evidence, it is difficult to see how a case that there was not full disclosure to Mr Karmokov could succeed without evidence from him as to what happened. However, Mr Karmokov has failed to respond to any of the Claimants' requests for information. I have to proceed on the basis that the Claimants will not be able to call him as a witness. It is because of Mr Karmokov's failure to co-operate that the Claimants were unable to state positively how Mr Karmokov came to sign either the Omirico SPA or the later resolutions. So far as he is concerned, the Claimants were only able to fall back on the possibility that he was instructed or coerced by Ms Mammad Zade. This is doomed, as I explain in section J2, below.

246. As regards Mr Muslim Gadzhiev, I have already noted that the information that the Claimants have received from him is that he signed the resolutions at the instruction of Mr Magomed Magomedov's lawyer, Ms Medvedeva, and that he understood that the transaction had already been approved on Mr Magomedov's side. He further assumed that the transaction had been approved by Mr Magomed Magomedov, because of Ms Medvedeva's role as Mr Magomed Magomedov's lawyer. He has confirmed that, when he signed the resolutions, he understood that the effect would be to retrospectively ratify the Omirico SPA. However, he acted on the basis of information from Ms Medvedeva and, essentially, did what she told him he should do.

247. Ms Medvedeva is not alleged to have been part of the NCSP conspiracy. This makes it necessary to consider why she wanted Mr Muslim Gadzhiev to sign the resolutions, if not as part of the conspiracy. The RAPOC includes the allegation in paragraph 97 that Ms Medvedeva "was pressured by a Vice President of Transneft in order to ensure that she and Magomed Magomedov's nominee directors on the boards of Shevronne and the other companies through which his stake was held would support the transaction and would do what was necessary for it to be concluded." The evidence supporting this allegation is in Mr Bushell's First Affidavit, as follows:

> "I understand from one of MM's lawyers in Russia that MM's representative in these discussions was Ms Galina Medvedeva ("Ms Medvedeva"). MM has told ZM that he believes that Ms Medvedeva was pressured by *"vice-presidents of Transneft"* (this is the description relayed to ZM, and he understands it to include at least Mr Grishanin) to support the transaction and help the deal go through at USD 750 million."

248. Leaving aside the fact that this is multiple hearsay, no explanation at all is given for the grounds of Mr Magomed Magomedov's belief that Ms Medvedeva was pressured by Mr Grishanin. There is no indication that the original source for this belief was Ms Medvedeva herself; but it is inconceivable that it was Mr Grishanin. With no explanation of why Mr Magomed Magomedov believes that Ms Medvedeva was pressured by Mr Grishanin, or what form this pressure took, it is impossible to attach any weight to this evidence. I

regard it as significant that, when relaying all this, Mr Bushell did not say that he also believed that Ms Medvedeva had been pressured by Mr Grishanin. I consider that he was prudent not to do so.

249. Mr Muslim Gadzhiev's evidence amounts to saying that he relied on Ms Medvedeva to tell him what to do. The question of full disclosure therefore is transferred to her: it is necessary to know whether she had received full disclosure, before she presented the resolutions to Mr Muslim Gadzhiev for his signature. The Claimants have gone to some trouble to explain how their efforts to obtain assistance from some potential witnesses have failed (notably, Mr Karmokov), but I was not told whether they have made any efforts to obtain evidence from Ms Medvedeva. All I know is that none seems to have been forthcoming so far. Without her assistance, I do not see how they will be able to prove at trial a case (if there is to be one) that Mr Muslim Gadzhiev signed the resolutions without full disclosure.

250. In addition, it is important to note the individuals who attended the closing in Limassol. Those present included not only Mr Karmokov and Ms Medvedeva, but also Mr Economou – the sole director of Global Logistics, which held Mr Magomedov's shareholding in Shevronne; and Mr Mironov – the sole director of Group Financial Partners, which (via Marionni) held Mr Magomed Magomedov's shareholding in Shevronne. Thus, not only did Port Petrovsk's shareholder Shevronne know and approve the deal; it is self-evident that Shevronne's own shareholders also knew; and it is difficult to see, in the circumstances, how the closing can have happened without Global Logistics and Marionni/Group Financial Partners not merely knowing of it but also approving it. Furthermore, neither Mr Economou nor Mr Mironov is alleged to have been part of the NCSP conspiracy.[6]

251. A further difficulty for the Claimants is that their case is largely (although not entirely) dependent on Mr Karmokov having acted in breach of duty. This is relied on as unlawful means in itself, but it is also then relied on to say that it was unlawful for Ms Mammad Zade to instruct or pressure Mr Karmokov to sign the Omirico SPA and for Transneft to dishonestly assist in Mr Karmokov's breach of duty. This is particularly important in relation to the conspiracy claim against Ms Mammad Zade. If Mr Karmokov's signature of the Omirico SPA was not a breach by him of any legal duty, then it is difficult to see why she was not at liberty to try to persuade him to sign it, if she herself considered it a good idea.

252. At times, the Claimants' submissions appeared to elide the difference between (i) the moral duty of loyalty that Mr Karmokov no doubt owed to Mr Magomedov, meaning that as a matter of morality he should not have acted without Mr Magomedov's approval, and (ii) the legal duty that he owed as a director to Port Petrovsk, meaning that he was legally obliged only to act in Port Petrovsk's best interests. In principle it must have been possible for Mr Karmokov to consider a particular course of action to be in Port Petrovsk's best interests, even if Mr Magomedov thought otherwise.

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[6] Mr Economou (but not Mr Mironov) is alleged to have been part of the FESCO conspiracy. However, (i) this conspiracy did not come into existence until significantly later and (ii) while I have not had to decide whether there is a serious issue against Mr Economou (because he is not a Defendant), the case alleged against him on the FESCO conspiracy does not amount to anything significant.

253. Above all, however, a director can only be in breach of duty towards a company if he acts in bad faith: *Bristol and West Building Society v Mothew* [1998] Ch 1, per Millett LJ at p. 18:

> "Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty."

254. The Claimants have not alleged that Mr Karmokov acted in bad faith, or contrary to any legal duty of loyalty. On the contrary, they have expressly said that he was not a conspirator (in Mr Bushell's Seventh Witness Statement), and their position was said in Mr Bushell's First Affidavit to be that "Mr Karmokov, whether intentionally or not**,** breached his duties to Port-Petrovsk." The acceptance that he may have acted contrary to Port Petrovsk's best interests without intending to do so means that their case cannot support a claim that requires bad faith.

255. I therefore consider that the RAPOC does not raise a good arguable case or a serious issue to be tried, as against Transneft, in that there is no real prospect of the Claimants succeeding in their case of unlawful act conspiracy against Transneft. This is essentially because of the resolutions that the Omirico SPA always envisaged would come into existence, and without which there could be no closing and so no transfer of shares. In the event I have not found it necessary to deal with the arguments that arose as to the further acts of ratification comprised by the various petitions made to the Ministry of Internal Affairs.

**J2: The position as against Ms Mammad Zade [256]-[291]**

256. Ms Mammad Zade disputes the Claimants' assertion that she knew Mr Magomedov had not authorised the NCSP transaction. Her evidence is that she was told more than once by his ex-wife, Mrs Olga Magdomeva (whom he divorced when the criminal prosecution was impending, but who remained close to him), that the transaction should go ahead. She has also referred to a video call that she had with Mr Karmokov in September 2018, which also involved others including Ms Ekaterina Vlasova, the head of Mr Magomedov's family office. Ms Mammad Zade says that, in the course of this video call, Mr Karmokov (who was in Russia) confirmed that he had received full formal authority from Mr Magomedov to complete the transaction, and he held up a typed note which had been signed by Mr Magomedov.

257. The Claimants are not able to produce any evidence that comes, directly or indirectly, from Mr Karmokov or from Ms Vlasova (who has also failed to respond to requests from the Claimants' solicitors, Seladore Legal Ltd ('Seladore')). However, Mr Magomedov and Mrs Magomedova both contradict Ms Mammad Zade's account. Neither of them can directly address the video call referred to by Ms Mammad Zade, but they both maintain that Mr Magomedov never authorised the transaction, that Ms Magdomeva never told Ms Mammad Zade otherwise, and that it therefore is not possible that Mr Karmokov could have shown Ms Mammad Zade a typed note, signed by Mr Magomedov, which confirmed such authority. On this point, there is a serious issue.

258. However, raising a serious issue as to whether the NCSP transaction was authorised by Mr Magomedov does not mean that there is also a serious issue in respect of the claim in

unlawful means conspiracy against Ms Mammad Zade. For that, the Claimants need to satisfy (to the relevant standard) the criteria that I have discussed in section F above.

259. The combination asserted by the Claimants, as against Ms Mammad Zade, is between her and Transneft. My conclusion that there is no good arguable case against Transneft is, therefore, sufficient also to dispose of the case against Ms Mammad Zade, in relation to the NCSP conspiracy. However, I will nevertheless consider how matters would stand if there were a good arguable case against Transneft.

260. There is no direct evidence of any combination between Ms Mammad Zade and Transneft. The Claimants' case is that the combination can be inferred from what happened and what Transneft and Ms Mammad Zade, respectively, did. It therefore is necessary to consider carefully the primary facts that the Claimants allege, and from which (they say) this inference is to be drawn.

261. So far as Transneft is concerned, the main allegations relate to Mr Tokarev and the Threat and Representations, which allegedly were communicated to Ms Mammad Zade and passed by her to Mr Magomedov. However, these facts are not relied on as against Ms Mammad Zade, because she is not said to have been acting improperly, or as part of the conspiracy, merely by communicating what Mr Tokarev had said to her. The Claimants may also rely, against Transneft, on the pressure allegedly applied to Ms Medvedeva by (at least) Mr Grishanin; but it is not alleged that Ms Mammad Zade had any role in this or any knowledge of it.

262. So far as Ms Mammad Zade is concerned, the Claimants' case was explained in their written and oral submissions in the terms of paragraph 28 of their skeleton argument, as follows:

> "28. It is the Claimants' case that it is most likely that Ms Mammad Zade directly procured Mr Karmokov's signing of the Omirico SPA for the reduced price, knowing that it had not been approved or negotiated; or at the very least, having put forward the deal, stood by, contrary to her obligations to Port Petrovsk, and permitted Mr Karmokov to sign it in those circumstances. Given what is set out above, the obvious inference is that she colluded with Transneft so as to ensure that the transaction proceeded at the lower price and different terms. Her motivation for doing so was personal profit and/or seeking to protect or promote her personal position vis-à-vis the Russian authorities. To those ends, Ms Mammad Zade was willing to undermine ZM's business interests and to procure or permit Mr Karmokov's breach of his duties as director of Port Petrovsk."

263. Unfortunately, the first sentence of this is inaccurate, in that this summary does not, in fact, reflect the Claimants' case – i.e., the RAPOC. The only part of the RAPOC which makes allegations as to what Ms Mammad Zade did, in the context of the NCSP conspiracy, is paragraph 92. This states as follows:

> "92. As to Ms Mammad Zade:
>
> (1) if Ms Mammad Zade instructed and/or pressured Mr Karmokov to sign the Omirico SPA on behalf of Port Petrovsk,

> that was a breach by Ms Mammad Zade of her fiduciary duties owed to Port Petrovsk; and
> (2) in any event, it was a breach of the same fiduciary duties for Ms Mammad Zade not to prevent (or to take any steps to prevent) Mr Karmokov from doing so."

264. The primary case set out in the first limb of paragraph 92 of the RAPOC is significantly different from the first limb of the first sentence of paragraph 28 of the Claimants' skeleton: because of the small but important word, "if". The pleading does not seek to advance a positive case that Ms Mammad Zade in fact instructed and/or pressured Mr Karmokov to sign the Omirico SPA.

265. This is not the result of an accident or an inadvertent error on the part of the pleader. On the contrary, the RAPOC here faithfully reflect the evidence on which the pleading was based. Paragraph 47 of Mr Bushell's First Affidavit, made on 30 August 2023, stated as follows:

> "47. As to Ms Mammad Zade, ZM firmly believes that she was part of the NCSP Conspiracy by this point. ZM does not know how precisely she influenced events in relation to execution of the transaction. ZM believes she could have instructed or pressured Mr Karmokov to sign for Port-Petrovsk or that, if not, she would likely have had the opportunity to step in and dissuade Mr Karmokov from acting on the threat; it would have been inconceivable for Mr Karmokov to have taken such a step without speaking to Ms Mammad Zade. If so, then either by acting (by instructing or pressuring Mr Karmokov) or by not acting (by not stepping in to prevent the transaction), Ms Mammad Zade would have furthered the conspiracy. As described above ZM understands (and believes) that Ms Medvedeva was pressured. At the very least, this suggests that Transneft was willing to take untoward steps to bring about this transaction. ZM believes that improper pressures or incentives were brought to bear on Ms Mammad Zade."

266. This was not capable of justifying a positive pleaded case that Ms Mammad Zade in fact instructed or pressured Mr Karmokov, and it would have been impossible for Mr Bushell to have signed the statement of truth (which he did) if any such positive case had been included. On the basis of Mr Bushell's First Affidavit, the Claimants were not in a position to say, before me, that it was "most likely" that Ms Mammad Zade did so (I refer again to paragraph 28 of their skeleton argument). The reality is that, as Mr Magomedov frankly conceded for the purposes of Mr Bushell's First Affidavit, they do not know. It is possible that she did. It is equally possible that she did not – in which case, presumably, someone else may have done so.

267. This fits with paragraph 45.8 of Mr Bushell's First Affidavit, where he said:

> "ZM believes that various directors and representatives of ZM and MM-owned companies, including Ms Medvedeva and Mr Zaur Karmokov…, at least initially, would have feared being

> arrested and prosecuted since the Russian government is generally known to use such tools to achieve its goals"

268. Here, there was no suggestion at all that the person responsible for Mr Karmokov having this fear was Ms Mammad Zade. On the contrary, his position was assimilated to that of Ms Medvedeva – in relation to whom the Claimants do have a positive case as to the person responsible for frightening her, or at least pressurising her. However, the person they accuse is not Ms Mammad Zade, but Transneft's Mr Grishanin.

269. By the time of Mr Bushell's Seventh Witness Statement, made on 23 October 2024, his reports as to Mr Magomedov's state of belief indicated a distinct shift. In paragraph 26.2, in a passage seeking to explain why Mr Karmokov was not responding to the Claimants' requests for assistance with their evidence, he said:

> "26.2 The Claimants have made several attempts to obtain evidence from Mr Karmokov regarding the Claimants but without success. ZM believes that Mr Karmokov (as well as others) is afraid of becoming involved with the proceedings in case of reprisals from the Russian state. He has repeated his belief[7] that Mr Karmokov (who, so far as I am aware, is based in Russia) was likely told by Ms Mammad Zade (or otherwise feared) that he could be arrested if he did not co-operate by authorising the transaction with Transneft, and that he was in any event influenced by the threat from Transneft that ZM would remain in prison if the deal was not agreed on their terms."

270. Mr Bushell's use of the word "repeated" is objectionable. Far from repeating what he had said before, what Mr Magomedov is reported as saying was, in fact, a distinct hardening of his belief as to Ms Mammad Zade's involvement, over the intervening 14 months. However, neither here nor anywhere else is there any indication of new information that provides any ground for this change in Mr Magomedov's state of mind. On the contrary footnote 7, which relates to the words "…repeated his belief", directs the reader back to paragraph 45.8 of Mr Bushell's First Affidavit – which I have already addressed, and which must be read together with paragraph 47 of the same document.

271. My emphasis on the fact that paragraph 92(1) of the RAPOC cannot be read as advancing a positive case should not have been a surprise to the Claimants. On 17 May 2024, at a hearing dealing with the amendments in the RAPOC, I noted in my extempore judgment at [13] that the only positive case as to what Ms Mammad Zade did, in the context of the NCSP conspiracy, relates to her receiving and then passing on the Threat. My point (which I see with hindsight I could have made more clearly) was that she is not said to have been acting as a conspirator in doing so; but there is no other positive allegation in the RAPOC as to how she acted as a conspirator.

272. The same point was made better and more clearly by Transneft and by Ms Mammad Zade, in the skeleton arguments that they served in advance of the hearing. They both drew attention to the significance in paragraph 92(1) of the word "if".

273. In submissions, I took up with Mr Dougherty KC paragraph 28 of the Claimants' skeleton. I suggested that it was not open to him to submit positively that Ms Mammad

Zade had "directly procured" Mr Karmokov's signing of the Omirico SPA, or that she instructed or pressured him into doing so, because this did not properly reflect paragraph 92(1) of the RAPOC. Mr Dougherty KC's instinctive response was to suggest that the Claimants might seek to amend. I then drew his attention to the relevant evidence in Mr Bushell's First Affidavit and in his Seventh Witness Statement and indicated my view that there was no evidential basis for such an amendment. The upshot was that there was no application to amend.

274. Paragraph 92(1) therefore remains as set out above. By itself, this is obviously insufficient to support the Claimants' case against Ms Mammad Zade. The Claimants cannot rely on the mere possibility that Ms Mammad Zade may have instructed or pressured Mr Karmokov as the basis for an inference that she did so as part of a conspiratorial combination with Transneft.

275. This leaves the second limb of the case against Ms Mammad Zade. As set out in paragraph 92(2) of the RAPOC, this is that it was a breach of Ms Mammad Zade's fiduciary duties to Port Petrovsk not to prevent (or take any steps to prevent) Mr Karmokov from signing the Omirico SPA. As set out in paragraph 28 of the Claimants' skeleton, the relevant facts relied on are that she stood by and permitted Mr Karmokov to sign it.

276. As pleaded, the primary case appears to be that Ms Mammad Zade owed not merely a duty to try to prevent Mr Karmokov from signing the SPA, but an absolute duty to succeed in preventing him. This seems ambitious. Furthermore, no clues are given as to what steps she should have taken but failed to take, in order to prevent him. This, I suppose, is the inevitable consequence of the fact that (ex hypothesi) the Claimants do not know what or who initially caused Mr Karmokov to wish to sign; which makes it difficult for them to say how Ms Mammad Zade might best have sought to change his mind.

277. Leaving aside these points, here, even more than under paragraph 92(1) of the RAPOC, it is essential to the Claimants' case that Ms Mammad Zade owed Port Petrovsk a duty to act. The pleaded basis of this duty is set out in paragraph 20 of the RAPOC, as follows:

> "18. Ms Mammad Zade owed fiduciary duties to members of the SGS Branch and to Port Petrovsk, by virtue of her management position, and/or because she was a *de facto* and/or a shadow director of each of those companies."

278. It was common ground that the test for owing duties as a de facto director is as set out in *Secretary of State for Trade and Industry v Hollier* [2006] EWHC 1804 (Ch), per Etherton J at [81]:

> "On the basis of the analysis above, I would summarise as follows the principles to be applied in determining in proceedings under the 1986 Act whether the defendant was a de facto director. (1) The touchstone is whether the defendant was part of the corporate governing structure. (2) Inherent in that touchstone is the distinction between someone who participates, or has the right to participate, in collective decision making on corporate policy and strategy and its implementation, on the one hand, and others who may advise or act on behalf of, or otherwise for the benefit of, the company, but do not participate

> in decision making as part of the corporate governance of the company. Accordingly, the test is not satisfied by someone who was at all times and in all material decisions subordinate to the de jure directors. (3) The defendant may have been a de facto director even though he or she did not have day-to-day control of the company's affairs, and even though he or she was only involved in part of the company's activities. (4) The issue is to be determined objectively on the basis of all relevant facts. Whether the defendant was held out by the company, or claimed or purported, to be a director, and whether the defendant had access or the ability to obtain access to relevant company information is likely to be highly relevant and may be decisive. Factors such as a family relationship with other admitted directors and the defendant's financial interest in the company may also be relevant, sometimes supporting and sometimes negating the allegation that the defendant was a de facto director. (5) De facto directorships and shadow directorships are alternatives, although there may be cases, particularly where the defendant's influence in the corporate governance was partly concealed and partly open, where it may not be entirely straightforward which of the two descriptions is most apposite."

279. It was common ground that that a shadow director is a person in accordance with whose directions or instructions the directors of the company are accustomed to act. The Claimants also referred to *Smithton Ltd v Naggar* [2013] EWHC 1961 (Ch), per Rose J at [54] (whose judgment was upheld on appeal, [2014] EWCA Civ 939, albeit without specific approval of this passage in the judgment below):

> "54. The leading authority on shadow directors is *Secretary of State for Trade v Deverell* [2001] Ch 340. The principles set out in the judgment of Morritt LJ can be summarised as follows:
> i) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. It should not be strictly construed;
> ii) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities;
> iii) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence;
> iv) Non-professional advice may come within that statutory description;
> v) It is sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But it is not necessary to do so in all cases."

280. Otherwise, the Claimants relied on Ms Mammad Zade having assumed the responsibilities of a director/fiduciary.

281. As to the contention that Ms Mammad Zade acted as a de facto director, beyond the bare allegations in paragraph 18 and some additional vague generalities in paragraph 20, the RAPOC does not support this case. Nor does the Claimants' evidence. On the contrary, the Claimants and Ms Mammad Zade are at one in saying that Ms Mammad Zade had no power to make decisions in respect of corporate governance or strategy, because such decisions were known by everyone to be reserved to Mr Magomedov. Both Ms Mammad Zade and Mr Bushell, in his Seventh Witness Statement, referred to what was called at the hearing the "Responsibilities" document. I understood it to be common ground that this accurately set out the limits of Ms Mammad Zade's role, and was understood to do so by everyone at the time. It expressly stated that Ms Mammad Zade was responsible for giving recommendations on the affairs of various companies (including Port Petrovsk). Having the power to recommend is different from the power to decide. It is not enough to give rise to a fiduciary duty as a de facto director.

282. As to the contention that Ms Mammad Zade acted as a shadow director, there is (as already noted) no positive case pleaded that she gave instructions to Mr Karmokov either in relation to the Omirico SPA or at all. There is also no evidence that he acted subserviently to her or surrendered his discretion to her.

283. As to the contention that Ms Mammad Zade in some other way assumed the responsibilities of a director, notably by purporting to negotiate the terms of the Omirico SPA, this fails to acknowledge that Ms Mammad Zade never purported to have the power to bind Port Petrovsk by making a decision on its behalf. It must have been clear that this could only be done by the sole director, i.e., Mr Karmokov; who, furthermore, would require the authority of the shareholder, i.e., Shevronne. This is evident from the conditions subsequent that the Omirico SPA stipulated must be satisfied before closing.

284. This is sufficient to dispose of the Claimants' case against Ms Mammad Zade. However, even if the Claimants were to establish that Ms Mammad Zade instructed and/or pressured Mr Karmokov to sign the Omirico SPA, this by itself in my judgment would not suffice as the grounds for an inference that she did so in combination with Transneft.

285. The Claimants relied on two agreements or draft agreements involving Epitikhia. The first was a draft engagement letter between Epitikhia and Port Petrovsk, under which Epitikhia stood to earn a very substantial commission on the NCSP transaction. The second was a draft services agreement between Epitikhia and Torresant Industry Ltd ('Torresant'), under which Epitikhia would have earned a very substantial commission on repayment of a loan that Omirico owed to Torresant, which at one point was a potential feature of the NCSP transaction. The Claimants accepted that it was not clear that either agreement was ever concluded, or that Epitikhia ever in fact received the sums provided for in these drafts (save for a very modest sum which reflected Cleary's fees and which seems to have duly been paid onwards to Cleary). However, the Claimants said that the fact that Ms Mammad Zade sought to have these agreements concluded was evidence that she had a powerful incentive to ensure that the transaction proceeded.

286. I accept that these materials suggest that Ms Mammad Zade may have stood to benefit if the transaction proceeded, or at least that she may have believed that she might benefit if

the transaction proceeded. However, I refused the Claimants permission to amend in relation to Epitikhia on 17 May 2024 on the basis that I could not see a sufficient connection with their case in unlawful means conspiracy, and I am still unable to see it. On the facts alleged by the Claimants, and in the circumstances indicated by the evidence before me, the mere fact that Ms Mammad Zade may have stood to benefit from the NCSP transaction does not seem to me to justify the inference that she conspired with Transneft.

287. I again have in mind David Hume's two rowers. In that example, each rower is continuously and immediately aware of the actions of the other rower, as each plies his oar; and each adjusts his own efforts accordingly, to complement the other's. Thus, the boat follows the course that they jointly desire, by means of their combination. The example would not work, nor would the boat's journey be as satisfactory, if one rower was oblivious to the other to the point of not even knowing that he/she was in the same boat.

288. In this case, Ms Mammad Zade was very aware of Transneft's role in the conspiracy – i.e., the Threat. However, the Claimants' case contains nothing to suggest that Transneft knew of anything done by Ms Mammad Zade – if that is, anything was, in fact, done by Ms Mammad Zade (as to which, I repeat, the Claimants have no positive case.

289. In the bank-robbery paradigm, it is obvious that the various participants must have known in advance that someone would provide the gun, use it, take the cash, drive the car, etc. In this case, it is not clear that Transneft had any reason to expect or indeed want Ms Mammad Zade to do anything at all to secure Mr Karmokov's signature of the SPA. They may have considered the Threat and/or the Representations sufficient to achieve their aims; especially if reinforced by additional pressure from Transneft on Mr Karmokov, as is alleged to have been the case with Ms Medvedeva).

290. Ms Mammad Zade was not in the same boat as Transneft. If she was doing any rowing, it was in her own single scull, which she was propelling for her own purposes. Such a craft is incapable of accommodating a conspiracy.

291. For this reason as well for the other reasons already discussed, I do not consider the Claimants' case to raise a serious issue to be tried, as against Ms Mammad Zade, in relation to the alleged NCSP conspiracy.

## K: APPLICABLE LAW & RUSSIAN LAW DEFENCES [292]-[358]

### K1: Why it matters which system of law applies [292]-[295]

292. The applicable law is relevantly chiefly to the NCSP conspiracy. In that context, one of the jurisdictional gateways relied on by the Claimants, CPR PD 6B paragraph 3.1, is gateway 9(c) – i.e. that the claim is made in tort and is governed by English law. This jurisdictional gateway was not relied on by the Claimants for the FESCO conspiracy.

293. The applicable law also has substantive importance in relation to the claims against Transneft (i.e., by way of the NCSP conspiracy) and against Ms Mammad Zade (i.e., by way of both alleged conspiracies, but predominantly in relation to the NCSP conspiracy), because Transneft and Ms Mammad Zade both assert that they have defences under

Russian law. The most prominent of these defences is time-bar, but some other points also arise.

294. In order to decide whether gateway 9(c) is available, it is only necessary to decide whether English law applies. If not, it does not matter which other system of law may be applicable.

295. In order to decide whether any Russian law defences are available, it is necessary to go further, deciding not only that English law does not apply, but also that Russian law does.

## K2: NCSP conspiracy: applicable law [296]-[317]

296. It was common ground that the applicable law falls to be determined by reference to Regulation (EC) 854/2007 ('Rome II'), as domesticated into English law.

297. The normal starting point for any analysis of the law applicable to a tort under Rome II is Article 4. This was how the Claimants approached the issue of applicable law when they applied for permission to serve out of the jurisdiction, in September 2023.

298. However, at the hearing in November 2024, the Claimants for the first time referred to Article 14 of Rome II, in relation to the claims in respect of the alleged NCSP conspiracy.[7] Article 14 provides that parties may agree to submit non-contractual obligations to a law of their choosing either before or after the event giving rise to the damage occurs. The Claimants contended that both Transneft and Ms Mammad Zade should be treated as parties to the Omirico SPA, which provided for the application of English law.

299. The parties to the Omirico SPA were expressly defined on its first page as being Port Petrovsk (as Seller) and Fenti (as Purchaser). Some of its provisions referred to "Affiliates" (which was defined so as to include Transneft) and to "Connected Persons" (which was defined so as to include Ms Mammad Zade). The Claimants relied on clause 15 (headed "Whole Agreement") and on clause 16 (headed "Waiver, Rights and Remedies") and said that it followed that all claims in tort against either Transneft or Ms Mammad Zade were subject to English law by reason of clause 22:

> "22. Governing Law and Jurisdiction
> 22.1 This Agreement and any non-contractual obligations arising out of or in connection with this Agreement shall be governed by, and interpreted in accordance with, English law, without giving effect to any choice or conflict of law provision or rule (whether of England or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than England.
> 22.2 Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce."

[7] Article 14 of Rome II was never relied on in relation to the claims in respect of the alleged FESCO conspiracy

300. I accept that clause 22 is of wide application, in the sense that it applies not only to claims for breach of contract but also to non-contractual obligations. However, it can only be applicable to parties who have agreed to its application to them and to their non-contractual obligations arising out of or in connection with the Omirico SPA.

301. Clause 15, the Whole Agreement clause, says nothing that imposes or gives rise to any non-contractual obligation owed by anyone other than Port Petrovsk and Fenti. On the contrary, it first stipulates that neither Omirico nor Fenti has relied on anything said by the other (or by any of its Connected Persons) that is not set out in the Omirico SPA, and then provides at 15.1(d):

> "(d) except for any liability in respect of a breach of this Agreement, no Party or any of its Connected Persons) shall owe any duty of care or have any liability in tort or otherwise to the other Party (or its respective Connected Persons) in relation to the transaction."

302. With that in mind, I do not see how clause 22.1 can have been intended to result in English law applying to a claim in the tort of conspiracy by Port Petrovsk or Mr Magomedov against either Transneft or Ms Mammad Zade. On the contrary, clause 15.1(d) is intended to ensure that there can be no such claim in tort in relation to the Omirico SPA, at least of the kind envisaged as potentially falling under clause 22.

303. As to clause 16, the Waivers Rights and Remedies clause, the relevant part is 16.2, as follows:

> "16.2 Without prejudice to any provision of this Agreement and with effect from Closing, a Party, both for itself and on behalf of its respective Affiliates, hereby releases the other Party (including in relation to the Purchaser, Transneft) or its respective Affiliates from, and waives, any claims against, and liabilities of, such persons that may have potentially arisen during the period prior to the date of this Agreement (or may arise in future), whether in contract, tort or otherwise, in connect with, or relating to, such Party holding its respective shares in Omirico and/or the such Party or its Affiliates participating in management of Omirico, the Omirico Subsidiary and/or the NCSP Group…"

304. Again, I do not see how this waiver provision supports the contention that the intended effect of clause 22.1 was to achieve the result that a claim in conspiracy by Port Petrovsk and/or Mr Magomedov against Transneft should be subject to English law. Clause 16 has no bearing on such a claim.

305. Furthermore, Mr Dougherty KC faced the difficulty of persuading me that the conspiracy claims against Transneft and Ms Mammad Zade fell within clause 22.1 of the Omirico SPA, so that English law applied, but did not fall within clause 22.2, so as to be subject to compulsory arbitration in Stockholm. He was not able to explain this to me, except by

reference to the use of the word "Parties" (with a capital P) in clause 22.6, which deals with the effect of an award from the Swedish arbitration. Mr Dougherty KC said that this indicated that clause 22.2 – but not clause 22.1 – only applied to Port Petrovsk and Fenti, these being the only persons identified as defined "Parties" elsewhere in the Omirico SPA. I found this completely unpersuasive.

306. I therefore reject the Claimants' argument that Article 14 of Rome II is applicable to the claims in respect of the alleged NCSP conspiracy.

307. I therefore turn instead to Article 4, which provides as follows:

> "Article 4
> General rule
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

308. In their skeleton argument for the application for permission to serve out of the jurisdiction in September 2023, the Claimants had suggested that the Claimants had incurred legal costs in investigating and resisting both the FESCO conspiracy and the NCSP conspiracy, which were separate from the costs of this action and which were incurred in England, being owed to English firms of solicitors. On this basis, it was said, damage had occurred in England for the purposes of Article 4.1.

309. By the time of the hearing in November 2024, this position was maintained in relation to the FESCO conspiracy, but not in relation to the NCSP conspiracy. I did not understand it to be said by the Claimants that any costs had been incurred in England prior to September 2023 in relation to the NCSP conspiracy which were not costs in or associated with the claims in this action. The only satellite proceedings relevant to the NCSP conspiracy are arbitration proceedings commenced by Port Petrovsk against Fenti in Stockholm, under the Omirico SPA; but these were not commenced until after September 2023, so Mr Dougherty KC was unable to say that any costs had been incurred at the time when the Claimants sought permission to serve out of the jurisdiction. This, I suspect, was why in November 2024 the Claimants preferred to rely on Article 14 of Rome II, rather than Article 4.

310. In these circumstances, Mr Dougherty KC now said that the damage resulting from the NCSP conspiracy had occurred not in England but in Cyprus. He said that it was only at the closing meeting in Cyprus that the transaction agreed by the Omirico SPA became unconditionally effective, and that the immediate, direct damage suffered by Port Petrovsk (and, by extension, Mr Magomedov) was the loss of the shares in Omirico – which was incorporated in Cyprus.

311. I agree with this analysis. It follows that Cypriot law is prima facie applicable to all the NCSP conspiracy claims, except that of Mr Magomedov against Transneft.

312. Mr Magomedov's claim against Transneft is different because it is a claim by a Russian resident against another Russian resident, and so it falls within Article 4.2 of Rome II. Mr Dougherty KC suggested that *KMB International NV v Chen* [2019] EWHC 2389 (Comm) indicated that Article 4 is not applicable to a claim for reflective loss. However, that decision is not concerned with identifying the applicable law of a tort, it is concerned with the question whether the English law rule against reflectivd loss is applicable as the lex fori even where the applicable law (as lex causae) is not English law. The answer given by Christopher Hancock KC was "no" (correctly, I have no doubt). What the decision in fact means, therefore, is that if the applicable law is not English law, then the English law rule against reflective loss is not relevant; instead, it will be the equivalent rule (if any) under the applicable foreign law that governs. I therefore conclude that Russian law applies to Mr Magomedov's claim against Transneft.

313. My conclusion that Cypriot law is prima facie applicable to all the other claims is subject to Article 4.3 of Rome II. Mr Dunning KC, on behalf of Transneft, and Ms Powell, on behalf of Ms Mammad Zade, both said that the claims against them were manifestly more closely connected with Russia than with any other country.

314. With the exception of the closing meeting, all of the relevant events occurred in Russia – and certainly all of the relevant events that are positively alleged in the RAPOC. With the exception of Ms Mammad Zade, all of the relevant individuals were in Russia throughout, and still are. The purchase price was paid in Russia, and then promptly arrested in Russia. The real subject-matter of the conspiracy was the control of NCSP, a Russian company whose physical assets (the port facilities) are in Russia. The alleged objective of the conspiracy was to wrest these assets from Mr Magomedov, for the benefit of Transneft (a state-owned company) and/or the Russian State. The underlying reasons are said to have related to the strategic significance of NCSP to Russia. The Russian State is alleged to have been party to the NCSP conspiracy. The specific event that appears to be identified as the start of the critical chain of events is the meeting on 30 March 2018 between Mr Tokarev and President Putin.

315. I therefore agree with Transneft and Ms Mammad Zade that the NCSP conspiracy, as alleged in the RAPOC, is manifestly more closely connected with Russia than with any other country, including Cyprus or (if relevant) England.

316. Mr Dougherty KC suggested that, even if not determinative under Article 14, the Omirico SPA was still relevant in relation to Article 4.3, because as an English law contract, it demonstrated a real connection between the conspiracy and England. However, any connection with England, under clause 22.1, is no stronger than the connection with

Sweden, under clause 22.2. Given that neither provision applies to the claims before me, they have no real significance for present purposes. Mr Dougherty KC referred me to *Marshall v Motor Insurer's Bureau* [2015] EWHC 3421 (QB), per Dingemans J at [20], but this does not assist him. The fact that the contract between Port Petrovsk and Fenti means that any tortious claim by Port Petrovsk against Fenti must be brought in arbitration in Sweden, with English law applying, does not make England the overall centre of gravity for claims against others.

317. I therefore find that the system of law applicable to the NCSP conspiracy claims in this action is Russian law.

## K3: Time-bar under Russian law [318]-[331]

318. The principal substantive defence that Ms Mammad Zade and Transneft rely on, under Russian law, is time-bar.

319. It was common ground before me that the applicable limitation period pursuant to Articles 195 and Article 196 of the Russian Civil Code is three years from when a claimant is or ought to have become aware (i.e. actual or constructive knowledge) of the alleged violation of their rights and the identity of the alleged defendant. It was also agreed that knowledge of the quantum of the alleged loss does not affect the commencement of the limitation period.

320. On the Claimants' own case, they knew of the alleged violation of their rights and alleged harm, and that Transneft and Ms Mammad Zade were potential defendants, at the latest by late September 2018 – considerably more than three years before the commencement of these proceedings. On the face of it, therefore, the claims are time-barred.

321. When applying for permission to serve out in September 2023, the Claimants acknowledged in their skeleton argument that it might be contended that the NCSP conspiracy claims were time-barred under Russian law. They said, however, that it was unlikely that Russian law would arise. It must be remembered that their primary position at that time was that English law was applicable; but this had changed by November 2024.

322. At the hearing in November 2024 the Claimants relied on expert evidence from Mr Drew Holiner, which raised a number of answers to the prima facie time-bar defence, even if Russian law was applicable.

323. The first was that limitation defences in Russia are (generally) considered alongside the merits. Therefore, the court will proceed to hear the claim on the merits, even though the ultimate outcome may be to dismiss the claim due to the time-bar. This is not really an answer at all. It only means that time-bar defences are not (generally) dealt with in Russia as preliminary issues. A claim that would be bound to fail later, rather than sooner, is still bound to fail. It therefore is not a claim that raises a serious issue to be tried.

324. The second was that time only runs from the confiscation of Port Petrovsk's assets and/or from the confiscation of Mr Magomedov's assets, in 2022. This argument is not consistent with the way that the case has been pleaded and explained. The immediate damage alleged to have been caused by the NCSP conspiracy was the loss of Port Petrovsk's shares in

Omirico. The confiscation in 2022 is not alleged to have been part of the conspiracy (unlike the arrest of Port Petrovsk's funds in 2018).

325. The third was that the Claimants could rely on the Russian doctrine of "abuse of rights", set out in Article 10 of the Russian Civil Code:

> "Article 10. Limits on Exercising Civil Rights
> 1. Civil rights cannot be exercised solely with the intent to harm another person, to circumvent the law for illegal purposes, or in other clearly dishonest ways (abuse of rights). Civil rights cannot be used to restrict competition or to abuse a dominant market position.
> 2. If the requirements of paragraph 1 of this article are not met, the court, arbitrazh court, or tribunal will, considering the nature and consequences of the abuse, deny the person protection of their rights, either fully or partially. The court may also apply other measures provided by law.
> 3. If the abuse of rights involves actions taken to circumvent the law for illegal purposes, the consequences outlined in paragraph 2 of this article will apply, unless other consequences for such actions are specified in this Code.
> 4. If the abuse of rights results in the violation of another person s rights, that person has the right to demand compensation for the damages caused.
> 5. The good faith and reasonableness of participants in civil legal relations are presumed.."

326. Mr Holiner said that this doctrine could be relied on for the disapplication of a time-bar defence on a very broad basis. Transneft's expert, Professor Asoskov, quoted from the *Belzer* case, (per the 17th Arbitrazh Appellate Court in the case of *Belzer*, No. A50-10438/2011), where the court said that what must be shown is "an abuse that would directly prevent the claimant from bringing the present claim". Similarly, in the *Dalina* case (per the Arbitrazh Court of the West-Siberian District No. A03-4956/2013), the court did not support the claimants' objection to a time-bar defence based on the abuse of rights, because there was no proof that the defendant's actions had prevented the claimants from bringing the claim in time.

327. I consider Prof. Asoskov's evidence more compelling, in that it is both supported by the decisions and other sources cited by the experts, and more consistent with principle, including the text of Article 10 itself – which requires the court to consider the consequences of the abuse. I also draw comfort from the fact that there are at least two earlier judgments of this court where the same view has been expressed: *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm), per Christopher Clarke J at [325]-[335]; *PJSC Tatneft v Bogolyubov* [2021] EWHC 411 (Comm), per Moulder J at [620]-[632].

328. Here, the Claimants have no real case that anything done by Transneft or Ms Mammad Zade prevented them from bringing a claim in respect of the NCSP conspiracy. On the contrary, it seems that they simply chose to prioritize the investigation and litigation of the

FESCO conspiracy – in which proceedings first began in Cyprus, in the BVI and in London arbitration proceedings, in 2020.

329. Finally, the Claimants invoked Article 26 of Rome II, on the basis that the Russian time-bar period of three years is "manifestly incompatible" with English public policy. The mere fact that Russian law prescribes a different limitation period from that generally applied under English law is not sufficient, for this test. As Leggatt J stated in *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), at [827]:

> "Private international law is founded on principles of comity and mutual respect and on the recognition that in many areas of law different approaches may be reasonably taken. That is obviously true in the field of limitation law, which involves striking a balance between allowing claimants to assert their legal rights and protecting defendants against stale claims. Different legal systems may legitimately strike this balance in different ways. An English court should for this reason be very slow to substitute its own view for the solution adopted by the foreign legislature."

330. In *Tatneft*, Moulder cited this paragraph before rejecting the contention that the Russian three-year time-bar was "manifestly incompatible" with English public policy. That was in a case where (unlike here) the claimant was protesting that it had been unable to plead out its case within three years, because it had not yet been able to identify the right defendant: see at [640]. Here, even that argument is not available to the Claimants. I would have followed Leggatt J and Moulder J, in any event. There is nothing inherently unjust or objectionable about a limitation period of three years, in particular when softened by the abuse of rights doctrine as explained by Prof. Asoskov.

331. I therefore am satisfied that Transneft and Ms Mammad Zade have a sound time-bar defence, under Russian law, as regards the NCSP conspiracy.

## K4: Other Russian law defences [332]-[338]

332. Transneft said that there is a Russian law principle against competing concurrent claims, such that a claim cannot be brought in tort where there is a claim in contract. It was common ground between the experts that this principle exists and operates in a two-party situation, i.e. where the claimant has a contract with the defendant, and could in principle claim in contract or in tort: he must bring his claim in contract first, and can only claim in tort if the contractual claim fails or is insufficient. The experts did not agree whether, or how, this principle would apply in a three-party situation: where the claimant has a contract with one potential defendant, and has a claim in tort against another. They both cited Russian authorities which I did not find easy to reconcile.

333. In this regard, I was referred to the decision of this court in *ABFA Commodities Trading Limited v Petraco Oil Company SA* [2024] EWHC 147 (Comm), per Foxton J at [181]-[189], noting that there may be a Russian rule requiring the court to be satisfied that the claimant was unable to recover from its contractual counterpart before bringing a claim in tort, but that he was not persuaded that there was a substantive Russian law requirement to prove that enforcement has been attempted and failed.

334. Foxton J was considering the point at trial. My position is different. I do not require the Claimants to persuade me, today, that Port Petrovsk cannot recover from Fenti. That is not something that can be predicted with sufficient confidence, bearing in mind that I have limited information about the arbitration in Stockholm save that I believe that it has not yet progressed very far.

335. It is sufficient for the Claimants to persuade me that there is a real (as opposed to a fanciful) prospect that it may be the case, in due course, that Port Petrovsk cannot recover from Fenti. If so, then I should not shut the Claimants out of Port Petrovsk's claims against Transneft and Ms Mammad Zade, because of the mere possibility that the principle against concurrent claims may be applicable. I do not have the data to evaluate reliably whether this a likely outcome.

336. In any event, this point is only relevant as against Port Petrovsk. It cannot apply as against Mr Magomedov, who does not have a contractual remedy against anyone.

337. Another point canvassed by Transneft on Russian law was that the test for causation is different: it said that Article 1064 of the Russian Civil Code (on which the Claimants relied as the general basis of non-contractual liability for damage) requires a "direct and immediate connection" between the loss and the unlawful act. I do not consider it helpful, let alone safe, to apply such an epithet to hypothetical facts. Transneft again referred me to a number of English judgments, but I note that, in the most recent – again, *ABFA* – Foxton J in fact concluded at [188] that the approach to causation under Russian law does not appear to differ materially from that under English law.

338. Further points concerned whether Mr Magomedov could bring a claim for reflective loss under Russian law, and whether Ms Mammad Zade could be the subject of a tort claim in Russia arising from the alleged breach of fiduciary duties owed to a non-Russian company. These are complex points which cannot be resolved satisfactorily at an interlocutory hearing, rather than being explored in live evidence. In other words: there are serious issues to be tried.

## K5: FESCO conspiracy: applicable law [339]-[358]

339. I heard very limited argument on the question of the applicable law in relation to the FESCO conspiracy, because for most of the Defendants it could make no real difference to the outcome of their applications whether English law was applied or Russian law; and even for Ms Mammad Zade the relevance of the applicable law to her position in relation to the FESCO conspiracy was very confined. However, she raised the point, so I must decide it, as best I can – at least, as between her and the Claimants.

340. In so far as the FESCO conspiracy involves a claim by Mr Magomedov against Mr Rabinovich, Mr Severilov, ROSATOM, FESCO and GHP, Article 4.2 of Rome II applies and the prima facie applicable law is that of Russia. However, this is not relevant to Ms Mammad Zade.

341. In so far as the relevant question is where damage occurred for the purposes of Article 4.1, it is possible to identify damage as having occurred in a number of countries:

(1) Fundamentally, the claim is concerned with the SGS Branch being unable to acquire or take control of additional shareholdings in FESCO, and ultimately losing its existing shareholdings in FESCO. FESCO is a Russian company. These losses can be said to have occurred in Russia.

(2) The effect of the alleged frustration of Sian's exercise of the Merbau Call Option under the 2012 Option Agreement, and the effect of the alleged improper conduct in relation to the Draft 2019 Option Agreement, was that Sian/Hellicorp did not acquire the shares held by Domidias in Merbau – a company incorporated in the BVI. This loss can be said to have occurred in the BVI.

(3) The effect of the allegedly improper demands under the Sian Loan and under the Maple Ridge Loans, and of the proceedings that ensued, was suffered directly by Sian and Maple Ridge. The resulting loss can be said to have occurred in the countries in which those companies are located, i.e., in the BVI and in Cyprus (respectively). It can also be said that the loss occurred where the relevant debts had to be repaid – i.e. to Halimeda, in Cyprus.

(4) The effect of TPG's sale of its shares in Felix to Ermenossa and of Felix's alleged failure to observe the Intimere SHA was that SGS did not acquire the shares that Felix held in Intimere – a company incorporated in the BVI. This loss can be said to have occurred in the BVI.

(5) The FESCO corporate governance complaints relate to various matters all of which are alleged to have prevented SGS, via Maple Ridge, Smartilicious and Enviartia, from appointing nominees to the FESCO board. This loss can be said to have occurred in Russia, where FESCO is incorporated and where its board meetings take place, along with the associated corporate governance. It can also be said that the Cypriot Injunctions obtained by Halimeda caused loss in Cyprus (to Maple Ridge, Smartilicious and Enviartia, as the parties injuncted).

(6) The civil claims commenced by FESCO were proceedings in Russia. This loss can be said to have occurred in Russia. It can also be said that the loss occurred where the relevant defendants to those proceedings were situated – i.e. Russia (Mr Magomedov), the BVI (SGS) and Cyprus (Maple Ridge, Smartilicious and Enviartia).

342. The Claimants relied on the legal costs incurred in investigating the FESCO conspiracy and in contesting the many legal proceedings that have ensued – not including, of course, the costs incurred in relation to this action. These proceedings include the Maple Ridge Arbitration, as well as successful arbitration proceedings commenced by SGS against Felix under the Intimere SHA and an unsuccessful claim brought by Sian and Hellicorp in relation to the 2012 Option Agreement and the Draft 2019 Option Agreement, all of which took place in England. However, they also include the costs of proceedings overseas – the Cypriot Injunctions proceedings and the Sian BVI proceedings. These matters have since July 2020 been handled by English solicitors, who have overseen all these proceedings.

343. When applying for permission to serve out of the jurisdiction in September 2023, the Claimants relied on these legal costs as constituting damage that occurred in England, in support of an argument that English law applied to the FESCO conspiracy, on a distributive

basis, as explained in *Celgard LLC v Shenzhen Senior Technology Material Co. Ltd* [2020] EWCA Civ 1293, per Arnold LJ at [61]:

> "61. Fourthly, although counsel for Senior argued that it was desirable to locate the direct damage caused by misuse of confidential information in a single country, that is contrary to the approach laid down by both Article 4 and Article 6. This was the legislative intention: the European Commission's Explanatory Memorandum accompanying the proposal for the Rome II Regulation stated at page 11 that the rule in what is now Article 4(1) "entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as 'Mosaikbetrachtung' in German law". Similarly, it stated at page 16 what is now Article 6 "provides for connection to the law of … the market where competitors are seeking to gain the customer's favour". It went on to state that it was important that "only the direct substantial effects of an act of unfair competition" should be taken into account in international situations "since anti-competitive conduct commonly has impact on several markets and gives rise to the distributive application of the laws involved"."

344. Thus, I do not understand the Claimants to contend that English law applies to the FESCO conspiracy to the exclusion of all other systems of law. They say, rather, that it applies alongside the other systems of law – Russian, BVI and Cypriot law - pursuant to the Mosaic principle. Thus, English law is only applicable to the claim for damages suffered in England. Russian law is applicable to the damages suffered in Russia; BVI law to the damages suffered in the BVI; Cypriot law to the damages suffered in Cyprus.

345. There are obvious practical difficulties in applying different systems on a distributive basis in a case where, as here, it may be difficult to differentiate between (say) (i) the damage suffered by reason of the loss of control of FESCO and/or associated with the complaints relating to FESCO's corporate governance (i.e., in Russia) and (ii) the damage that occurred elsewhere – say, by reason of the Cypriot Injunctions, which were granted in Cyprus but (the Claimants say) were intended to and did impact on the appointment of nominee directors to FESCO. I think that this was the problem that concerned Foxton J in *Kingdom of Sweden v Serwin* [2022] EWHC 2706 (Comm), at [84], where he suggested a possible distinction, in this context, between:

> "… torts which have horizontal multi-jurisdictional effects, and those which have vertical multi-jurisdictional effects. The publication of a libellous tweet which is read and causes loss in a number of jurisdictions, or the use of confidential information to sell infringing products in a variety of countries, may present a rather stronger case for a "Mosaikbetrachtung" of applicable laws than a case such as the present, in which the defendants began causing loss to the claimant in one country, but adjusted their modus operandi so as to continue causing loss of essentially the same kind to the same claimant in another country"

346. The present case does not precisely mirror either of Foxton J's examples, but it is a case

where I can see that applying the Mosaic principle might well be difficult for the trial judge in due course – at least, in so far as it would be necessary to distinguish between damage that occurred in Russia (subject to Russian law) and damage that occurred in the BVI or Cyprus. I do not think that this is an exercise that can be conducted satisfactorily at this interlocutory stage, on the facts. I therefore proceed on the basis that, for the present, it is possible that all or any of Russian law, BVI law or Cypriot law may be applicable. I should emphasise that I do so without enthusiasm and, indeed, without any real conviction that the Mosaic principle should be applied, but because none of the parties sought to persuade me that it should not be applied, for the purposes of this hearing. Whether the Mosaic principle should be applied, and, if not, which single system of law should be applied, are not questions that I have to decide at this interlocutory stage.

347. I have briefly considered whether Article 4.3 of Rome II might have the effect that Russian law applies pervasively and to the exclusion of all other systems of law, on the basis that the FESCO conspiracy claims are manifestly more closely connected to Russia. I heard no argument on this, so I will only say that the position here is less clear-cut than in relation to the NCSP conspiracy, not least because the Russian State is not alleged to have been party to the FESCO conspiracy. This too, therefore, is a point that I consider cannot be decided at this interlocutory stage.

348. By contrast, I am able to decide the Claimants' case that English law is applicable on a distributive basis – which must mean, in relation to the costs incurred in England. This argument seems to me to have no merit at all.

349. First, incurring legal costs in order to investigate the FESCO conspiracy and then to contest satellite litigation that arose consequentially cannot be anyone's idea of direct loss – which is what Article 4.1 is expressly concerned with, rather than indirect consequences.

350. Second, I am not persuaded that the Claimants have suffered any loss at all in respect of these legal costs, still less that they have suffered it in England. In Mr Bushell's First Affidavit, it was acknowledged that the relevant legal costs have in fact been discharged not by the Claimants but by a separate entity, outside the SGS Branch and not party to the proceedings. The evidence given by Mr Bushell in his First Affidavit was as follows:

> "The Claimants' costs of defending the various claims and of advancing their conspiracy claims are primarily funded by an entity outside of the SGS Branch and not party to the proceedings, but entirely owned and controlled by ZM. This entity in turn is funded from a number of other sources of funding controlled by ZM. Ultimately, the Claimants are liable to the funding entity for the costs incurred in resisting the Conspiracies, and it is on this basis that the claimants claim the costs of proceedings, as well as the costs of investigating and defending themselves from the acts comprising the Conspiracies more generally."

351. No further details have been provided regarding the funding entity, save that it is not itself in England. Accordingly, on the assumption that the Claimants are liable to the entity, this is not itself a liability that arises, or falls to be discharged, in England.

352. My understanding from Mr Dougherty KC's oral submissions was that none of the relevant legal fees have been paid directly by any of the Claimants to their solicitors. I have no doubt that the various solicitors that the Claimants have used since July 2020 have been engaged on written retainers. Someone with disposable assets will have undertaken to pay their charges, and/or will have undertaken to put them in funds in advance. I regard it as inconceivably unlikely that the solicitors chose to agree that Mr Magomedov – by then in prison in Russia – or any of the other Claimants – companies all on an uncertain legal and financial footing – would be accepted as a credit risk.

353. The Claimants have chosen not to reveal the details of their solicitors' engagement, as is their right. However, I am not obliged to assume that there is no written agreement between the solicitors and the un-named funding entity and Mr Dougherty KC did not suggest that there was no such written agreement.

354. In oral submissions, Mr Dougherty KC said that there was a rule, or at least a presumption, that when work is undertaken by a solicitor for a client, the client incurs at least a residual liability to pay for it, referring to *Adams v London Improved Motor Coach Builders Ltd* [1920] 1 KB 495 and *Robinson v EMW Law LLP* [2018] EWHC 1757 (Ch), per Roth J at [22]. These cases both turned on whether it had been proved that there was no agreement that the client would be liable to the solicitor for costs, if they were not paid by a third party. In both cases this was treated as a presumption, which must be displaced but on which there had been no evidence.

355. Here, however, it is for the Claimants to show that they suffered damage in England, which means (in the first instance) that they incurred real liability to the solicitors to pay the relevant legal fees. Unlike *Adams* and *Robinson*, there has been evidence given on this point – the evidence of Mr Bushell, together with the information given to me by Mr Dougherty KC on instructions. In my judgment that evidence displaces the normal presumption. It indicates an unusual set of circumstances far removed from *Adams* or *Robinson*. Indeed, it indicates an arrangement that was intended to result in the Claimants never being required to pay any money to the solicitors; and this is what has happened.

356. Finally, while Mr Dougherty KC relied on the fact that any residual obligation to the solicitors would have to be discharged by payment in England, Mr Pillow KC said on behalf of Mr Severilov that the situs of the debt is where the debtor is to be found, citing Dicey, Morris & Collins, *The Conflict of Laws* (16th ed.) §23-026 (while acknowledging that the position is different if there is an exclusive jurisdiction clause or arbitration agreement in favour of another place). I accept Mr Pillow KC's submission.

357. In these circumstances, I do not see that the Claimants have a proper basis on which to argue that damage occurred in England. This disposes of the argument that English law applies to the FESCO conspiracy, whether on a distributive basis or at all.

358. This conclusion is also of some importance to at least one of the jurisdictional gateways relied on by the Claimants, which I consider in section N below.

## L: FESCO CONSPIRACY: SERIOUS ISSUE TO BE TRIED [359]-[475]

359. Despite my conclusion that English law cannot be applicable to the FESCO conspiracy, it is convenient to proceed as if it might be. This is because none of the Defendants except Ms Mammad Zade suggested that there is any material difference between English law and Russian law, for the purposes of this hearing (while reserving the right to do so at trial). Still less did they contend that there is any material difference between English law and BVI law or Cypriot law.

360. Ms Mammad Zade again relied on the three-year time-bar that would arise under Russian law. However, since I have to proceed on the basis that it may be that BVI law or Cypriot law would apply to at least some elements of the FESCO conspiracy claim against Ms Mammad Zade, this does not really matter. As with the other FESCO Defendants, it was not suggested on Ms Mammad Zade's behalf that there is any material difference between English law and BVI law or Cypriot law, for the purposes of this hearing.

**L1: The threats made at meetings on 26 and 28 August 2020 [361]-[370]**

361. I have outlined the basic facts asserted and relied on by the Claimants in section D4.2 above. A number of features are worth accentuating and setting out in more detail.

362. Above all, this part of the case comprises events that unquestionably involved parties acting in combination – specifically, Mr Rabinovich, Mr Severilov, DP World (in the person of Mr Chemarda) and ROSATOM (because Mr Severilov, at the meeting on 26 August 2020, and "Konstantin", at the meeting on 28 August 2020, both claimed to be speaking for ROSATOM). Accordingly, there is clear evidence of the first basic element of unlawful act conspiracy, as summarised in section F1 above.

363. Furthermore, the Claimants' evidence on this means that it is clear that this combination came into existence in about the second half of August 2020. It cannot have been any earlier, because, in the first half of August 2020, DP World was still discussing working with the Claimants, rather than against them, and a draft term sheet had been produced. Mr Bushell's evidence is that this changed in late August 2020. This evidence also indicates that this change came about because of an agreement between the Director General of ROSATOM and the CEO of DP World:

> "… in late August 2020, before the term sheet was finalised, Mr Chemarda contacted Mr Gadzhiev by telephone to inform him that DP World would not be proceeding with the deal they had been negotiating. Mr Chemarda explained that Mr Alexei Likhachev, the Director General of ROSATOM (D17), and Sultan Ahmed Bin Sulayem, the CEO of DP World, had spoken and that DP World now wished to form a joint venture in Russia with ROSATOM, through which they wished to acquire SGS's and Felix's entire stakes in FESCO."

364. The events that ensued, as alleged by the Claimants and summarised in section D4 above, included Mr Severilov purchasing Domidias and Ermenossa purchasing TPG's shares in Felix, as well as pressure being put on the Claimants by the calling in of the Sian and Maple Ridge Loans and by Smartilicious and Enviartia being prevented from nominating directors to the FESCO board. Ultimately, ROSATOM became the 92.5% owner of FESCO.

365. Even allowing for the fact that the final stage of this process – the transfer of shares pursuant to the Presidential Decree of 8 November 2023 – is not said to have been part of the FESCO conspiracy, when these events are considered in the light of the combination that came into existence in late August 2020, they are significant. As well as the combination itself, there is a prima facie case of concerted action pursuant to that combination, involving Mr Rabinovich (via Ermenossa) and Mr Severilov, acting as ROSATOM's hired "professional corporate raiders" (as described by Mr Chemarda when setting up the meeting of 26 August 2020) and carrying out a "hostile takeover" (as threatened by Mr Severilov at the meeting of 26 August 2020).

366. Thus far, this satisfies all the basic elements of unlawful means conspiracy identified in section F1 above, except one: element (4), which requires the use of unlawful means as part of the agreed concerted action. Nothing that the Claimants allege to have been said at the meeting of 26 August 2020 indicates or (in my judgment) can support an inference that the parties to the combination had expressly or impliedly agreed, or had reached a silent understanding, that unlawful means would be used.

367. Furthermore, Mr Bushell's evidence – which relies here on information received by him from Mr Shagav Gadzhiev – does not state that Mr Shagav Gadzhiev understood this; nor do I see that he could have. In particular, the use of professional corporate raiders is not intrinsically unlawful, and hostile takeovers are not intrinsically unlawful. Although Mr Bushell says that he understood that a threat was being made by Mr Severilov (who did most of the speaking, for ROSATOM), the threat was as follows:

> "Mr Gadzhiev specifically recalls him using the Russian equivalent of the phrase *"hostile takeover"*. He also told Mr Gadzhiev that, as soon as ROSATOM had closed the deal with TPG, they would enforce Felix's rights to repayment of its preference shares, effectively driving SGS (and ZM) out of FESCO. After this threat was made, the discussions broke down and Mr Gadzhiev left the meeting."

368. While this cannot have been pleasant to hear, it was not a threat to use unlawful means. It was, explicitly, a threat to use lawful means – by relying on legal rights under Felix's preference shares. I understood Mr Dougherty KC to accept that nothing said at the meeting on 26 August 2020 amounted to a threat/agreement to use unlawful means.

369. The meeting on 28 August 2020 went significantly further. On this occasion, "Konstantin", who said that he represented the interests of ROSATOM, told Mr Shagav Gadzhiev that the SGS Branch companies should accept the offer being made by Mr Severilov on behalf of ROSATOM, and said that, if not, his principals would use force. This was a threat to use unlawful means.

370. The unlawful means threatened on 28 August 2020 was not the unlawful means actually used. The Claimants do not say that there has been force or violence against them or against anyone associated with them. However, in so far as any party to the combination accepted that one kind of unlawful means to be used, it is relatively easy to infer that that party may also have accepted the use of other kinds of unlawful means.

**L2: Serious issue against ROSATOM, Severilov, Rabinovich & Ermenossa (but not DP World) [371]–[380]**

371. The relevant Defendants all criticised Mr Shagav Gadzhiev's evidence, on the basis that on this point – and in particular in relation to the meeting on 28 August 2020 – Mr Shagav Gadzhiev did not set out the matters in the same way when he gave his first account. This was when Mr Shagav Gadzhiev gave evidence in the Sian BVI proceedings. This may (or may not) be a fruitful line to explore in cross-examination, but it is not a matter that I can determine. In practical terms, I have to proceed on the basis that Mr Shagav Gadzhiev's evidence might be accepted at trial as correct.

372. On that basis, it seems likely that ROSATOM intended the use of unlawful means, because "Konstantin" said in terms that he represented the interests of ROSATOM. Mr Shagav Gadzhiev's evidence suggests that "Konstantin's" threat of force was made on behalf of ROSATOM.

373. On the same basis, it seems likely that Mr Severilov also intended the use of unlawful means, because "Konstantin" also referred to Mr Severilov, and because his purpose in making the threat was to frighten Mr Shagav Gadzhiev into accepting the offer made by Mr Severilov on behalf of ROSATOM.

374. If (again) Mr Shagav Gadzhiev's evidence is correct, ROSATOM hired both Mr Rabinovich and Mr Severilov, to act together as corporate raiders. This is consistent with the fact that Mr Severilov is said to be Mr Rabinovich's lawyer (even if Mr Severilov may also have other clients). Furthermore, shortly after the meeting on 28 August 2020, it was Mr Rabinovich who confirmed the offer previously made by Mr Severilov, which "Konstantin" had said should not be refused. In all the circumstances, the primary facts justify the inference that Mr Rabinovich also was willing for unlawful means to be used. By extension, the same must be true for Ermenossa.

375. However, this does not apply to DP World. DP World's agreement to work together with ROSATOM was formed at a high level – on DP World's part, the decision was made by Sultan Ahmed Bin Sulayem, who I understand to be the CEO of the head company, DP World Limited. I have seen no evidence to suggest that this gentleman knew or intended that any unlawful means would be used. On the contrary, it seems very unlikely that he did.

376. Mr Chemarda, acting as a director of the DP World subsidiary operating in Russia, knew that ROSATOM had hired Mr Rabinovich and Mr Severilov as corporate raiders, and heard Mr Severilov make the threat of a hostile takeover at the meeting on 26 August 2020. However, I am not prepared to infer from this that he knew of the threat of force that followed from "Konstantin" on 28 August 2020, when he was not present. The fact that, at some point, Mr Chemarda became a director of Ermenossa is irrelevant here; his knowledge as director of Ermenossa is not attributable to DP World, and there is in any event no pleaded case that he acquired any particular knowledge as director of Ermenossa.

377. It also bears emphasis that the RAPOC nowhere allege that DP World took any active steps to further the conspiracy, or even that it did so passively, save that Mr Chemarda set up the meeting on 26 August 2020. This is very different from the position in relation to Mr Rabinovich, Ermenossa and Mr Severilov.

378. It follows that, if the Claimants can make out, to the standard required for this hearing, a case that unlawful means were used in the context of the FESCO conspiracy, I am persuaded that there is a serious issue to be tried against (at least) ROSATOM, Mr Severilov, Mr Rabinovich and Ermenossa.

379. However, there is no serious issue to be tried as against DP World.

380. In my judgment the Claimants can make out the necessary case as to the use of unlawful means, notably in relation to the bribe apparently received by Mr Kuzovkov – which I therefore turn to next.

**L3: Serious issue against Mr Kuzovkov [381]-[387]**

381. The Claimants have produced evidence that a banker in Liechtenstein told a banker in London that Mr Kuzovkov wished to invest US$20 million that stemmed from an option over shares in FESCO. At the time of the hearing before Butcher J, the evidence provided to the court was served just before the hearing, and did not reveal the name of either banker, so none of the relevant Defendants had been able to investigate. For this hearing, the Claimants provided unredacted copies of the relevant exchanges between the two bankers, now identified as Mr Muggli in Liechtenstein and Mr Bedjaoui in London.

382. The Claimants' case on this was that this is at least prima facie evidence that Mr Kuzovkov was in possession of US$20 million that appeared to have been derived from a transaction to do with FESCO; and that there was no legitimate explanation for how Mr Kuzovkov could be in possession of this sum.

383. Mr Kuzovkov relied on an email from the lawyers for the Liechtenstein bank, who said that Mr Kuzovkov and his companies had never worked with the bank, and there had been no communication between Mr Kuzovkov and the bank before December 2023. This made it unclear why Mr Muggli sent an email in November 2021 to Mr Bedjaoui which identified Mr Kuzovkov as a client and provided personal details including a copy of his passport.

384. I cannot resolve this. I can only say that the Claimants have a more than fanciful prospect of showing that, in November 2021, Mr Kuzovkov was in possession of US$20 million that related in some way to FESCO.

385. Mr Head, for Mr Kuzovkov, did not suggest that there might be a legitimate explanation for this. Accordingly, if it is right that Mr Kuzovkov had US$20 million that related to FESCO, this would constitute primary grounds justifying the inference that the money was the proceeds of a bribe. In the light of the evidence regarding the meetings on 26 and 28 August 2020, it would also be reasonable to infer that this bribe was paid by Mr Rabinovich (or Mr Severilov, or Ermenossa) in connection with the FESCO conspiracy.

386. It follows that there is a serious issue to be tried against Mr Kuzovkov.

387. The RAPOC allege that Mr Kuzovkov was involved in a number of the limbs said to comprise the FESCO conspiracy. The only aspect of his involvement that seems to me to capable of justifying the inference that he was involved in an unlawful means conspiracy

concerns the alleged bribe. The other aspects have no features that would justify such an inference, by themselves, in the absence of the materials relied on as showing the alleged bribe. I set out my reasons for this conclusion when I deal with the relevant allegations, later on in section L.

## L4: Serious issue against Ms Mammad Zade [388]-[401]

388. Ms Mammad Zade was not directly involved in either of the meetings on 26 and 28 August 2020. However, the Claimants say that, in the course of the telephone conversation during which Mr Chemarda encouraged Mr Shagav Gadzhiev to come to the meeting that took place on 26 August 2020, Mr Chemarda said not only that Mr Rabinovich and Mr Severilov had been hired by ROSATOM as corporate raiders, but also that they were being assisted by Ms Mammad Zade.

389. In itself, the fact that Ms Mammad Zade was assisting Mr Rabinovich and Mr Severilov is not necessarily indicative that Ms Mammad Zade was involved in or knew of anything unlawful. This would depend on the circumstances in which she was assisting and what the assistance consisted of. Certainly, the mere fact that she was assisting them would not justify the inference that she knew of the threat of force made at the meeting on 28 August 2020.

390. Section E of the RAPOC, setting out the alleged limbs of the FESCO conspiracy, contains many allegations that involve Ms Mammad Zade. I take it that these allegations are the Claimants' best positive case as to the assistance that Ms Mammad Zade may be said to have provided to Mr Rabinovich and Mr Severilov. Most of them do not assist the Claimants' case that Ms Mammad Zade had knowledge of unlawful means or was involved in an unlawful means conspiracy. As with Mr Kuzovkov, I deal with them below in the limbs of section L that deal with the relevant allegations.

391. However, there is one exception. This concerns the circumstances in which, in mid-September 2020, the candidates whom Smartilicious and Enviartia had nominated to represent the SGS Branch on the FESCO board all withdrew their consent to be nominated. I have summarised the Claimants' case on this in section D4.6. It is worth setting out in full the evidence that supports this part of the RAPOC, in Mr Bushell's First Affidavit:

> "146. As described in the POC at paragraphs 148-149, between 11 and 18 September 2020, 13 of the 14 individuals that the SGS Branch had put forward (long before, on 24 February 2020) as nominated candidates for the FESCO Board (i.e. all of them save for Mr Gadzhiev), suddenly and without prior warning to SGS, wrote to Ms Mammad Zade withdrawing their consent to being nominated to the FESCO Board at the upcoming AGSM **{SJB-1/4019-4044}**. I understand from Mr Gadzhiev that he spoke to one nominee and at the time a director on the boards of Intimere, Hellicorp and Sian (C3 to C5), Mr Bill Shor ("**Mr Shor**"), who told him that Ms Mammad Zade had asked to speak to him urgently. By this point (which Mr Gadzhiev believes was on or around 14 September 2020), some SGS candidates had already given notice to withdraw their consent and so, understanding this

> was the reason Ms Mammad Zade wanted to speak to him, Mr Gadzhiev suggested he ignored her requests.
>
> 147. Mr Gadzhiev informs me that on or around 18 September 2020 Mr Shor told him that that he had had a telephone conversation with Ms Mammad Zade who had stressed to him how, due to FESCO's allegedly perilous financial situation around the time of the AGSM, were he to take up his role as a director of FESCO he would be held personally liable for FESCO's debts in the event of a subsequent FESCO insolvency. It is the Claimants' case that this was an attempt to threaten Mr Shor because this is specifically how Mr Gadzhiev recalls Mr Shor describing the call to him previously. Indeed, Mr Shor promptly withdrew his consent to nomination as a FESCO director following the call. So one way or the other he was deterred. In a recent conversation with my partner, Mr Keillor, Mr Shor confirmed that he had spoken with Ms Mammad Zade (as maintained by Mr Gadzhiev and the Claimants) but when specifically asked whether he was either threatened or felt threatened as a result of his call with Ms Mammad Zade, Mr Shor denied that he received any threat or felt threatened. Whilst Mr Shor was previously comfortable with the suggestion that he was threatened or intimidated, he is now evidently resiling from that position, and Mr Gadzhiev has informed me that he believes that is because he no longer wants to get drawn into this dispute, for fear of the personal consequences. This seems to me to be an entirely reasonable inference.
>
> 148. Mr Gadzhiev is also aware from others that they received threats from representatives of FESCO, including threats of litigation and referral to the criminal authorities with accusations of complicity with ZM's alleged crimes (which as explained above had nothing to do with FESCO). Mr Gadzhiev has asked me not to name these others out of respect for their wish to discontinue their involvement with the Claimants as a result of the threats they received, and because to the extent they remain in Russia they are vulnerable to reprisals."

392. I have considered all the letters sent to Ms Mammad Zade by the SGS Branch nominees, exhibited by Mr Bushell at SJB-1 pp. 4019 to 4044. I agree that they are all nearly identical and I accept that (subject to other evidence) it would be reasonable for the trial judge to infer that they were all drafted by the same person, and then provided by that person to the nominees, for them to send to Ms Mammad Zade.

393. The evidence in paragraphs 147 and 148 is troubling. While it is important (if correct) that Mr Shor initially told Mr Shagav Gadzhiev that Ms Mammad Zade had threatened him, it is disturbing that Mr Shor has since denied that he was threatened; and it is obviously unsatisfactory that Mr Shagav Gadzhiev is unwilling to name the others referred to in paragraph 148. I assume that, at trial, the Claimants will not call evidence from Mr Shor

or from the other SGS Branch nominees and will rely only on evidence from Mr Shagav Gadzhiev, as outlined by Mr Bushell.

394. Ms Mammad Zade's evidence in response was in her First Witness Statement, as follows:

> "I also note that various sweeping allegations are made against me to say that I threatened proposed members of the FESCO Board (including Mr Shor)…. This is completely untrue. I did not threaten anyone. In relation to the Board decision on 3 September, the loans were due and owing to FESCO and, as part of our duties to the company as directors to act in its best interest, we had to take steps in order to recover the sums owing. I was concerned that if the Board did nothing, the directors would be in breach of their duties to the company and risked being personally liable. This belief came from legal advice received at the time, as I have set out above. I completely reject the allegation that I took this position in order to improperly threaten or pressure other members of the Board. Nor was I trying to maintain control: I had already tendered my resignation, but I was obliged to carry out my duties properly in the meantime. I note that the only example of my apparent threatening that the Claimants rely upon is in respect of Mr Shor, which even on their own case Mr Shor confirmed did not happen…"

395. This is opaque. Ms Mammad Zade denies that she threatened anyone, but it is not clear that she denies that she contacted the SGS Branch nominees or that she told them that they risked being personally liable for FESCO's debts.

396. In oral submissions, it was suggested to me on behalf of Ms Mammad Zade that, if Ms Mammad Zade said this to any of the SGS Branch nominees, there was nothing wrong or improper in her doing so, because it was true. I can see that this could be the case. However, I can also envisage circumstances in which for the Chair of the FESCO board to proactively discourage the nominees of some shareholders from taking up board positions, with the result that those shareholders had no board representation, when important decisions were taken that affected those shareholders and their affiliates, could constitute a breach of the duties that Ms Mammad Zade owed to FESCO. Much would depend on precisely what was said, in what circumstances, and why.

397. I assume that Ms Mammad Zade's legal advisors have told her that she must keep all her emails and any other records of communications relevant to the Claimants' allegations – if she has not already provided these to her solicitors. Thus far, Ms Mammad Zade has chosen not to reveal any of these materials to the Claimants or to the court. However, if the case proceeds to trial, the disclosure process will reveal whether Ms Mammad Zade provided draft letters to the SGS Branch nominees in about mid-September 2020, for them to withdraw their consent. It will also reveal whatever other written communication she had with them over the relevant two or three weeks.

398. In cases where there are allegations of fraud or dishonesty or illegality, the claimants will often say it naturally cannot produce concrete evidence of wrongdoing, because the

malefactors sought to act surreptitiously; but that, if the matter proceeds to trial, the evidential gaps will be filled in by disclosure. In such cases, the defendants routinely respond denouncing the claimants' approach as pure fishing; often with references to Mr Micawber (who duly featured in the submissions before me, much to my pleasure).

399. It is not easy to identify, in the abstract, a principled formulation that differentiates satisfactorily those cases that should be allowed to proceed from those that should not. In this case, however, the Claimants' case on the relevant point is focussed on the communications between Ms Mammad Zade and a limited number of identified people over a brief period. It stems from the letters sent by those people. There is a prima facie basis to believe that Ms Mammad Zade is likely to have maintained documentary records relating to her exchanges with these individuals; that they will show that there either were, or were not, exchanges involving her which preceded and led up to those letters; and that they will show whether she contacted those individuals because she had been asked to do so by others, at about the same period.

400. The evidential basis that provides the foundation for this case – i.e., Mr Bushell's evidence as to what he has been told by Mr Shagav Gadzhiev about what Mr Shagav Gadzhiev was told by Mr Shor and about Mr Shor's subsequent retraction – is shaky[8]. However, it is not, quite, so shaky that the case should not be allowed to proceed.

401. It follows that there is a serious issue to be tried against Ms Mammad Zade, in relation to the FESCO conspiracy (albeit not in relation to the NCSP conspiracy).

## L5: Serious issue against Halimeda [402]-[406]

402. While the RAPOC contains a number of allegations that relate to Halimeda, the only part of the Claimants' case that, by itself, is in my judgment capable of giving rise to a serious issue to be tried is that relating to the Cypriot Injunctions - RAPOC section E4, summarised in section D4.6 above. The critical allegations are in the RAPOC at paragraphs 134 and 135:

> "134. Halimeda asserted to the Cypriot Court that the Cypriot Injunctions were necessary so as to prevent the Cypriot Respondents from causing FESCO to destroy its ability to recover the Maple Ridge Disputed Loans. However, the relief obtained by Halimeda pursuant to the Cypriot Injunctions – purportedly pursuant to the *Chabra* jurisdiction – went so far as to prohibit the Cypriot Respondents from exercising any voting rights at the Annual General Shareholders' Meeting ("**AGSM**") of FESCO. Indeed, in a filing before the Insolvency Court in relation to the application described at paragraph 125[9], above, witness evidence specifically stated that the purpose of the injunction "*was to ensure that the management of FESCO is not replaced with new people*" – something that is the right of the shareholders by law.

[8] In which context, see again footnote 1.
[9] This application was in the Sian BVI Proceedings

> 135. The effect of the Cypriot Injunctions was indeed to prevent the Cypriot Respondents from electing their preferred candidates for the FESCO Board notwithstanding the fact that they together controlled 49.9997% of the shares in FESCO. As a result, the Cypriot Injunctions handed practical control of FESCO to Domidias (which owned shares in FESCO through its subsidiaries in the Domidias Branch), Novator and Nautilius, and those of the Hostile Parties that controlled them (including, from time to time, Mr Garber, Mr Severilov and Mr Rabinovich, as pleaded above) notwithstanding Domidias', Novator's and Nautilius' much smaller shareholdings."

403. The fact that Halimeda sought court orders in Cyprus against Maple Ridge, Smartilicious and Enviartia, to prohibit them from exercising any voting rights at the next FESCO AGSM and to prevent Smartilicious and Enviartia from electing their preferred candidates to the FESCO board, is unusual and striking. When the court in Cyprus later set aside the Cypriot Injunctions, it did so on the basis that they were unnecessary and disproportionate, because any directors appointed to the FESCO board would be constrained by the duties that they owed to FESCO, as directors, under Russian law. This is such an obvious point that it is hard to see how Halimeda can ever have thought it right to prevent entities that were shareholders in FESCO from exercising their legal rights as shareholders – i.e., to prevent them from ensuring that the outgoing directors were "replaced with new people".

404. Furthermore, the fact that the Cypriot Injunctions gave practical control of FESCO to Domidias is particularly significant in circumstances where Domidias was sold to Mr Severilov on 4 October 2020. The Cypriot Injunctions were obtained a few days before this – on 28 September 2020. In the light of my conclusion that there is a serious issue to be tried in unlawful means conspiracy against Mr Severilov, I consider that the trial judge would be entitled to infer that Halimeda applied for the Cypriot Injunctions for an ulterior purpose which was unlawful, improper and illegitimate – namely, to assist Mr Severilov and (thus) to further the FESCO conspiracy. On this basis, Halimeda's conduct in relation to the Cypriot Injunctions was arguably unlawful as an abuse of process; the Claimants also alleged that it constituted the tort of malicious prosecution.

405. Halimeda's main response to this was to contend that the Cypriot Injunctions would not have prevented the appointment of new nominees as directors, if the Claimants (specifically, Smartilicious and Enviartia) had applied promptly for them to be set aside. However, it simply is not an answer to say that the Claimants could and should have responded more swiftly. In any event, the Claimants denied that there was any significant delay for which they were to blame. This gave rise to detailed factual issues that I cannot decide properly on an interlocutory basis.

406. It follows that there is a serious issue to be tried against Halimeda.

## L6: The Merbau Call Option [407]-[416]

407. When the Claimants started these proceedings in late August 2023, their case in relation to the Merbau Call Option was advanced on the basis that, under the 2012 Option

Agreement, the Merbau Call Option did not expire until 28 November 2020, unless extended by agreement; that the 2012 Option Agreement had been extended by agreement in 2019; that the Draft 2019 Option Agreement was, in fact, a fully binding agreement, which conferred a new call option on Hellicorp; and that the Merbau Call Option was validly exercised by notices given on 4 November 2020, under the 2012 Option Agreement or under the new option agreement that they said had been concluded in 2019. The Option Proceedings in respect of these contentions were on foot between the parties/putative parties, having been commenced in 2021.

408. The Option Proceedings came to a summary judgment/strike out hearing in February 2024. On 6 March 2024, Moulder J gave judgment against the relevant Claimants (Sian and Hellicorp) and in favour of Domidias and Merbau. She held that the Merbau Call Option under the 2012 Option Agreement expired on 28 November 2019; that it had not been extended; and that the Draft 2019 Option Agreement was not a concluded agreement and was not binding. It follows that Merbau Call Option had not been validly exercised, because the notices relied on by the Claimants were given out of time.

409. The Claimants of course cannot be blamed for not anticipating this outcome back in September 2023, when they applied for permission to serve out of the jurisdiction. However, when handed down, Moulder J's judgment made the Claimants' original case on the Merbau Call Option in these proceedings more or less impossible.

410. The way that the Claimants' case on the relevant points has evolved since Moulder J's judgment reflects well on the ingenuity of the Claimants' legal advisors, but that is about as much as can be said for it.

411. It was said that Ms Mammad Zade was instructed by Mr Magomedov to exercise the Merbau Call Option in 2018 and 2019, but failed to do so. This is hopeless, if it is intended to form part of the case in unlawful means conspiracy (this never became entirely clear).

(1) No-one else is said to have been involved in the FESCO conspiracy in 2018 or 2019, so there was no-one for Ms Mammad Zade to have been conspiring with. In fact, as set out above, it seems clear to me that the earliest possible date for any conspiratorial combination is late August 2020.

(2) Even if Ms Mammad Zade had received such instructions from Mr Magomedov in 2018 or 2019, she had resigned from her position in the Summa Group and was under no legal obligation to comply with any instructions that he gave her. I asked Mr Dougherty KC about this and did not understand him to say that Ms Mammad Zade was, in fact, under any legal obligation to comply with any such instructions. (There is a pleaded case in paragraphs 18 and 20 of the RAPOC that Ms Mammad Zade continued in practice to exercise management control over the SGS Branch, as a de facto or shadow director, but I did not understand Mr Dougherty KC to rely on this. If he had, I would have rejected it, on the same basis that I have rejected the similar contentions addressed in section J2 above.)

(3) The Claimants' evidence that such instructions were given to Ms Mammad Zade was, on this occasion, not merely shaky but incoherent. In the Sian BVI proceedings, Mr Shagav Gadzhiev said that he gave these instructions, and did

so orally. In these proceedings, Mr Bushell's evidence – based, as ever, on instructions from the same Mr Shagav Gadzhiev – was that Mr Magomedov gave the instructions, in writing. Either way, Mr Magomedov's wishes would have been communicated (whether to Mr Shagav Gadzhiev for onward transmission or to Ms Mammad Zade) via his Russian lawyers. This is because it has throughout been they who visit him in prison and are the conduit for his communications. Accordingly, there must be a written record. Furthermore, if Ms Mammad Zade failed to comply with instructions over a two-year period, one would expect this itself to have generated some kind of written contemporary remonstrance. But no written material of any kind has been produced by the Claimants, save one letter purportedly dated 25 March 2020, which it is not clear was actually signed or sent to Ms Mammad Zade and which has every appearance of having been brought into existence after the event, simply to create a written record. (It was written in English, despite being a letter from one Russian-speaker to another; and it looks to my eyes to have been drafted with assistance from lawyers.)

412. Next, in the light of Moulder J's conclusion that the 2012 Option Agreement had not been extended, it was said that a duty to extend it had been owed to Sian by (at least) Mr Economou (who was at this time a director of Sian), TPG (as a de facto director of Sian), Ms Mammad Zade and Mr Kuzovkov. It was also said that similar duties were owed to Hellicorp by Mr Shvets and Mr Viola to protect the position of its subsidiary, Sian; and that the breach of those duties was attributable to TPG.

(1) Moulder J found at [88] to [92] that the view taken at the time by everyone involved, above all by Mr Economou and Cleary (on this occasion, acting as TPG's lawyers) was that it was not possible to extend the 2012 Option Agreement because Sian was not in good standing. This was why the focus of everyone's efforts shifted to the negotiation of the Draft 2019 Option Agreement.

(2) The Draft 2019 Option Agreement was never concluded. It is not obvious how Mr Economou might have succeeded in obtaining Domidias's agreement to an extension of the 2012 Option Agreement, given that there was ultimately no agreement on the Draft 2019 Option Agreement. This is also fatal to the complaints relating to Mr Shvets and Mr Viola, as directors of Hellicorp; whatever duties they may have owed cannot have extended to achieving the unachievable.

(3) Once again, it is not clear how Ms Mammad Zade or Mr Kuzovkov can properly be said to have owed any director's duties (or quasi-director's duties) to Sian. Similarly, there is no properly pleaded case to support the contention that TPG acted as de facto director of Sian (which, furthermore, had been removed from the BVI register between 2018 and 2020).

413. Next, it was said that the terms being negotiated for the Draft 2019 Option Agreement offered a financial incentive to Domidias to sell to someone other than Mr Magomedov/SGS, and the act of negotiating for such terms was a breach of Mr Garber's director's duties to FESCO. Taking part in and/or assisting such negotiations therefore was a breach of director's duties to FESCO by Ms Mammad Zade, Mr Kuzovkov and Mr Shvets

of TPG (who were all directors of FESCO at the time) and/or a breach of the director's duties owed to Hellicorp (by Mr Shvets and Mr Viola) and/or this amounted to unlawful means for the conspiracy claim.

(1) This case was rejected by Butcher J in his first judgment, even though he had to approach matters on the basis that the Draft 2019 Option Agreement was binding – and it is now established that it was not. The reasons that he gave at [145] to [148] were that (i) the case was incoherent and implausible, because it made no sense for people acting in the context of a conspiracy to have behaved in this way (rather than simply not agreeing any option agreement at all); (ii) the terms had the agreement of Hellicorp, in the person of Mr Economou, and there was no evidence that Mr Economou was acting contrary to Mr Magomedov's interests or that Mr Garber knew this; (iii) the terms only took effect if the directors of Hellicorp (not all of whom are alleged to have been conspirators) did not pass a resolution that the third-party acquisition was against the views of Mr Magomedov – in which case Domidias (and, therefore, Mr Garber) would not get the financial incentive; (iv) they also only took effect if Hellicorp was funded by a loan from FESCO, but this was not inevitable; and (v) if matters had proceeded to the point where this was necessary, Mr Garber would have had to declare an interest to FESCO, but this point was never reached.

(2) One year on from Butcher J's first judgment, the Claimants still had no real answers to these points. They suggested that the merits threshold for service out of the jurisdiction is lower than that for a notification or freezing injunction, but this is not the case: see section G3 above and *Dos Santos v Unitel SA* [2024] EWCA Civ 1109, at [122].

(3) On the contrary, before me it was accepted by the Claimants in their skeleton argument that the Draft 2019 Option Agreement was not necessary for the FESCO conspiracy. In other words, on this point at least, it was conceded that Butcher J had been right.

414. The only new point, which I think may not have been advanced before Butcher J, was that the negotiations for the Draft 2019 Option Agreement took place by emails involving Mr Economou and Cleary/Mr Shvets. The number of individuals involved or copied into these exchanges was fairly limited. They included Ms Mammad Zade (essentially as a conduit, rather than an active negotiator) and Mr Kuzovkov (essentially as a mere copy party). In one of these emails, Ms Mammad Zade asked the others involved to "keep this correspondence within the closed circle". The Claimants suggested that this was indicative of subterfuge. I think this goes too far. It is equally consistent with the sensible desire to limit the number of people involved in the drafting process, until the document had reached the point where it was ready to be presented to others; but matters never in fact got to that point, because the negotiations failed.

415. I therefore reject the FESCO conspiracy case, in so far as relates to the Merbau Call Option.

416. This is particularly important to the position of Domidias and GHP, because the only involvement Domidias and GHP are alleged to have had in the FESCO conspiracy relates to the Merbau Call Option. It follows that there is no serious issue to be tried against

Domidias or GHP.

## L7: The Sian & Maple Ridge Loans [417]-[433]

417. The first matter relied on by the Claimants in the RAPOC in relation to the Sian and Maple Ridge Loans is Halimeda's action in sending the Halimeda Demand Letter of 12 February 2020. This was long before the meetings of 26 and 28 August 2020. It is not obvious how it can have been any part of the alleged FESCO conspiracy, which in my judgment cannot have come into existence until shortly before those meetings. In any event, there is nothing odd or suspicious in the mere fact that Halimeda formally demanded the payment of debts that had fallen due.

418. Next, the Claimants rely on Project Moonlight, produced by KPMG in March 2020. It was considered by FESCO's Strategy Committee in about April 2020, which recommended that it be put to the full FESCO board. However, consideration by the full FESCO board was postponed by Ms Mammad Zade, as set out in her email of 24 April 2020.

419. The Claimants asserted that no proper reasons were given by Ms Mammad Zade. However, she said in that email that those board members who were not on the Strategy Committee and had not seen it before would need more time to consider it, in light of their fiduciary duties. She therefore suggested that it should first be considered by the Audit Committee and then put to the full board only after the end of the May holidays. This not only (once again) preceded the alleged conspiracy (at least, in so far as it involved ROSATOM, and Mr Severilov and Mr Rabinovich as ROSATOM's corporate raiders), it also seems objectively reasonable.

420. Ms Mammad Zade then outlined her own substantive reasons for being sceptical about the merits of Project Moonlight in an email to the board of 18 May 2020. Once again, her comments seem objectively reasonable.

421. Project Moonlight was relevant to FESCO's next board meeting, which took place on 3 September 2020, after Ms Mammad Zade (as Chair) had called an emergency meeting on the previous day. Why there was no meeting before this, and why Project Moonlight therefore was not considered before 3 September 2020, was not clear – although the fact that there were uncertainties around the directorships in the nomination of Smartilicious and Enviartia appears to have played some part. However, the fact that Ms Mammad Zade acted on 2 September 2020 to call an emergency meeting for the next day is striking, on the basis that (as alleged) the FESCO conspiracy seems likely to have sprung up in late August 2020, and in light of the evidence that Ms Mammad Zade was assisting those involved.

422. Nevertheless, there is nothing intrinsically striking or suspicious about the decision taken at the meeting on 3 September 2020, which in effect was to pursue Sian and Maple Ridge for their debts, rather than proceeding with Project Moonlight. Project Moonlight in fact would not have affected the Sian Loan, so there was no inconsistency in the decision to pursue Sian. Beyond that, it was common ground that Project Moonlight was not a fully developed plan, in September 2020. On any view, it would have required subsequent development before it could be implemented – as Mr Bushell accepted in evidence. It seems likely that it would also have required the consent of the Russian authorities, because

its elements appear to have included various dealings with companies/assets that had been frozen by the arrests in the Russian criminal proceedings. There was no obvious reason at the time to expect such consent to be forthcoming.

423. Mr Kuzovkov and Mr Garber (both of whom attended the meeting on 3 September 2020) said in witness statements that, while Project Moonlight was not a formal agenda item for that meeting, the view of the majority of the FESCO board members at the relevant time was that Project Moonlight was not capable of being implemented. While Mr Kuzovkov focussed on that board meeting in a way that Mr Garber did not, their evidence as to why Project Moonlight was not attractive largely overlapped. Together, they gave the following reasons:

(1) It was a high-level outline and not a series of specific transactions capable of approval by the board.

(2) It would not generate any cash for the FESCO Group in the short to medium term and its potential for long-term benefits was uncertain. KPMG suggested that implementation could take two years to complete.

(3) The tax implications were unclear; various regulatory consents would be required; the consent of VTB Bank would also be required. Furthermore, shareholder approval/consents would be required.

(4) Shareholder approval/consents were likely to be particularly difficult, because Mr Magomedov's interest, via the SGS Branch, had been seized or frozen by the authorities following his arrest. KPMG highlighted this as a potential obstacle.

(5) The intended effect of the proposal was heavily in favour of specific FESCO Group shareholders and those behind them (i.e., the SGS Branch, and thus Mr Magomedov), rather than the shareholders of FESCO as a whole.

(6) The financial position of FESCO had by this time become perilous and it was necessary to act swiftly.

424. All of these points except the last are undoubtedly correct. It is inherently likely that they influenced the thinking of the board members – indeed, they are all matters that the board members were bound to take into account.

425. As to the final point, the Claimants disputed the assertion that FESCO was in financial difficulties in September 2020, but it seems to me entirely possibly that board members could have held this view in good faith. At the meeting, the board also voted to appoint Alvarez & Marsal LLP as restructuring advisors; this certainly supports the Defendants' case that the majority of board members thought that FESCO was in financial trouble.

426. It should be noted that the FESCO board meeting of 3 September 2020 was also attended by Mr Gadzhiev, who was the only director present who voted differently. The Claimants relied on evidence from Mr Gadzhiev (given through Mr Bushell) to the effect that Mr Gadzhiev resisted the meeting taking place on 3 September 2020 and said that it was not urgent. However, the Claimants have not produced any evidence suggesting that the

reasons given by Mr Kuzovkov and Mr Garber as underlying the majority votes were not in fact concerns held by the relevant individuals. I am not sure how the Claimants might seek to establish this, at trial.

427. Accordingly, even though it would be possible to infer that the circumstances that gave rise to the board meeting being called on 2 September 2020 and held on 3 September 2020 arose from the alleged FESCO conspiracy, I do not regard the fact that any individual director chose to vote by approving the commencement of proceedings by Halimeda against Sian and Maple Ridge, and thus implicitly rejecting Project Moonlight, as justifying the same inference. It was not contrary to the interests of FESCO to do so. At any rate, it was not obviously contrary to the interests of FESCO to do so, such that no directors who voted in that manner can have been acting in good faith and consistently with their director's duties. It seems to me more likely that such directors genuinely believed (rightly or wrongly) that they were indeed acting in FESCO's best interests.

428. Against this, the Claimants said that Sian and Maple Ridge had no assets. They argued that it therefore was pointless to pursue them and it would undoubtedly have served FESCO's interests better to proceed with an alternative strategy, i.e. Project Moonlight. As to this, I accept that there was every chance that it would not prove possible to recover the debts from Sian and Maple Ridge, but I do not accept that it was irrational or contrary to FESCO's interests to pursue them.

429. Several of the Defendants drew my attention to a letter dated 20 May 2022 from what appears to be a separate KPMG entity in Russia, stating that Project Moonlight had been initiated by Mr Shagav Gadzhiev (which I did not understand to be in issue) and that its objectives were in the sole interest of the principal shareholder (i.e., Mr Magomedov). The Claimants objected to this document and questioned its authenticity (just as they had before Butcher J). I did not consider that this debate really took matters forward. This letter was not considered by the board of FESCO when it made its decision more than 20 months earlier, so what it said cannot have affected them. However, the fact that Project Moonlight would have favoured the SGS Branch is apparent from the proposal itself, and must have been apparent to the board at the time. The letter of 20 May 2022 merely confirms what the FESCO directors saw for themselves (as Ms Mammad Zade, Mr Kuzovkov and Mr Garber have all stated in their contemporaneous emails and in their witness statements).

430. I therefore reject the Claimants' case that for directors to vote in favour of Halimeda taking legal proceedings against Sian and Maple Ridge, on 3 September 2020, was in itself a breach of their duties to FESCO. I further reject the case that, merely because any individual director voted in favour of the legal proceedings (or did not vote), it can be inferred that such director was bribed or otherwise suborned.

431. This has no bearing on my earlier conclusions that there are serious issues to be tried as against Mr Kuzovkov, Ms Mammad Zade and Halimeda; or the others alleged to have been involved in the FESCO conspiracy, notably Mr Rabinovich and Ermenossa. Furthermore, if it is right that either of Ms Mammad Zade or Mr Kuzovkov was involved in an unlawful means conspiracy in relation to FESCO, it is possible that their own conduct on and in relation to the board meeting on 3 September 2020 may have been coloured by that involvement.

432. However, this particular limb of the FESCO conspiracy does not raise a serious issue to

be tried as against Mr Garber, or against TPG or their nominee on the FESCO board, Mr Shvets (who did not attend the meeting of 3 September 2020 and did not vote – understandably, given that TPG was about to sell its shareholding in FESCO, via Felix). Nor can there be a serious issue to be tried against FESCO itself.

433. This conclusion is particularly important in relation to Mr Garber, because the only involvement Mr Garber is alleged to have had in the FESCO conspiracy relates to the Merbau Call Option and to the Sian and Maple Ridge Loans – both of which have I have now rejected. It follows that there is no serious issue to be tried against Mr Garber.

## L8: FESCO corporate governance [434]-[466]

434. The most cogent elements of this limb of the FESCO conspiracy have already been addressed – the allegation that, in September 2020, Ms Mammad Zade coerced or persuaded Smartilicious and Enviartia's nominees to the FESCO board to withdraw; and the complaints relating to the Cypriot Injunctions. These elements directly involved Ms Mammad Zade and Halimeda.

435. As alleged in the RAPOC, there are two further elements. The first is that TPG stalled the process of appointing a new SGS-nominee director to replace Mr Tsantekides as director of Smartilicious and Enviartia. The Claimants' case on this is set out in the RAPOC in section E7, at paragraphs 153 and 154:

> "153. However, Cleary (on the instructions of TPG) deliberately stalled the process. In particular:
>
> (1) In an email dated 21 September 2020 and (after that email went unanswered) a further email the next day, SGS emphasised that Smartilicious and Enviartia needed to provide all the signed documents, notarised and apostilled, on 28 September 2020 at the latest in order to vote at the AGSM.
>
> (2) By its emails to SGS dated 22 and 23 September 2020, Cleary requested information on a peripheral issue (namely the formalities and status of the appointment of new directors to Maple Ridge) and appeared to be looking for obstacles rather than taking the necessary action to ensure that Smartilicious and Enviartia were able to take part in the AGSM.
>
> 154. On the same day as Cleary's email dated 23 September 2020, Halimeda submitted an application seeking the Cypriot Injunctions (see section E.4 above). It is to be inferred that:
>
> (1) TPG knew that the FESCO Board members party to the FESCO Conspiracy (at that time being at least Ms Mammad Zade, Mr Kuzovkov and Mr Garber) planned to act to prevent Smartilicious and Enviartia taking part in the AGSM, and supported those aims by stalling the placement of new SGS nominee directors to the boards of Smartilicious and Enviartia ahead of the AGSM scheduled for 30 September.

> (2) In deliberately stalling the process to appoint to new SGS-nominated directors to Smartilicious and Enviartia, TPG acted in concert with Halimeda, Ms Mammad Zade and those directors of the FESCO Board who supported Ms Mammad Zade."

436. I have set this out in full in order to show how narrowly drawn the allegations against TPG are, in this part of the case. SGS sent emails to TPG's lawyers Cleary, on 21 and 22 September 2020, emphasizing a deadline of 28 September 2020. Cleary responded with queries on 22 and 23 September 2020 – still well inside SGS's deadline. The only way that this case can be presented as an attempt by TPG to prevent the appointment from taking place is if not only (i) Cleary were being deliberately difficult (on TPG's instructions), but also (ii) Cleary/TPG knew that Halimeda were about to apply for the Cypriot Injunctions on 23 September 2020.

437. I have read the two emails from Cleary. There was nothing obviously wrong, inappropriate or surprising about their questions, which seem exactly the kind of careful checking that I would expect from competent and prudent transaction lawyers. They give off no whiff of stalling.

438. In any event the Claimants' case provides no basis for inferring that Cleary/TPG knew that Halimeda were about to apply for the Cypriot Injunctions or acted in concert with anyone. The fact that Halimeda applied on 23 September 2020 is hardly surprising: the application was bound to be made a few days before the AGSM, which was to take place on 30 September 2020.

439. Furthermore, while Halimeda applied for the Cypriot Injunctions on 23 September 2020, they were not granted until 28 September 2020. The only reason no progress was made in appointing new directors between 23 and 28 September 2020 was that SGS failed to provide the information Cleary had requested. DLA Piper UK LLP ('DLA Piper') responded on behalf of SGS on 24 September 2020, in terms that did not provide clarity and were bound to leave Cleary unsure about the propriety of proceeding.

440. In any event, TPG were under no obligation to assist SGS. As Cleary commented, a dispute had developed and it was incumbent on TPG to proceed cautiously so as to ensure that it and its own nominated director acted in accordance with their legal duties.

441. I therefore do not accept that there is a serious issue to be tried in respect of the case that TPG stalled the process of appointing a new director of Smartilicious and Enviartia, to replace Mr Tsantekides.

442. The remaining element to be considered in respect of the allegations relating to FESCO's corporate governance is that Mr Economou (as director of Hellicorp, Intimere and Sian) failed to inform SGS about the Demand Letter, after its receipt in February 2020; and Mr Tsantekides (as director of Maple Ridge, Smartilicious and Enviartia) failed to inform SGS about the Cypriot Injunctions, after their service on 23 September 2020. The Claimants say that it is to be inferred that this is because Mr Economou and Mr Tsantekides were pressured or induced by Ms Mammad Zade and/or Mr Kuzovkov.

443. I find this aspect of the Claimants' case hard to understand. As regards the Demand Letter, no demand was required for the outstanding sums under the Sian and Maple Ridge Loans to become due, and the Claimants were undoubtedly aware that they had fallen due – hence Mr Shagav Gadzhiev commissioned KPMG to produce Project Moonlight. As regards the Cypriot Injunctions, they were obtained on 28 September 2020 and were sent not only to Mr Tsantekides but also to the Claimants' then lawyers, DLA Piper, and to Mr Shagav Gadzhiev. In reality, therefore, whatever Mr Economou and Mr Tsantekides did or did not do to inform SGS was of no real materiality.

444. Furthermore, the RAPOC provides no basis on which the trial judge could infer that either of them was pressured or induced by Ms Mammad Zade and/or Mr Kuzovkov.

445. I therefore reject this element as well.

446. As before, the fact that I have rejected the Claimants' case on these two elements has no bearing on my earlier conclusions that there are serious issues to be tried as against Mr Kuzovkov, Ms Mammad Zade and Halimeda. However, in relation to the corporate governance of FESCO, there is no serious issue to be tried as against TPG.

## L9: The Intimere SHA and the ROFO Offer [447]-[471]

### L9.1: Distribution of the ROFO Offer [447]

447. The first element of this limb of the Claimants' case relates to the fact that, after TPG and Ermenossa agreed terms for the sale of TPG's shares in Felix, the ROFO Offer that this triggered was sent to SGS by an email also addressed to Ms Mammad Zade and Mr Kuzovkov. I see nothing odd or sinister in this and it cannot have had any real effect. Cleary explained at the time that their understanding of the Intimere SHA was that the ROFO Offer had not been notified to Ms Mammad Zade and Mr Kuzovkov. In any event, Mr Rabinovich and Ermenossa must have known that a ROFO offer would be made by Felix to SGS. It was not a secret.

### L9.2: Complaint to SGS's bank in Armenia [448]

448. The next element is that, on 9 October 2020, after SGS and Felix had agreed terms and SGS had signed the ROFO SPA, SGS paid the US$35 million price to Felix's nominated account. The payment came from an account opened by SGS with a bank in Armenia. It is alleged that, within hours, Ms Mammad Zade called the bank to complain that it should not have opened this account, given Mr Magomedov's imprisonment. If true, this is supportive of the case that Ms Mammad Zade was involved in the alleged FESCO conspiracy. However, this particular allegation goes no further and does not advance the case against any other Defendant. I accept that, logically, if it is right that Ms Mammad Zade made this telephone call, she must have had the relevant bank account details. However, given that the Claimants rely on the fact that Ms Mammad Zade still had influence within the Summa Group into 2020, I do not see why it must be inferred that she received this information from TPG (where she had no influence) rather than from someone within the Summa Group (where she still had contacts).

## L9.3: Cleary's AML requirements [449]-[451]

449. The next element is that, following receipt of monies from SGS on 9 October 2020, Cleary (acting for TPG/Felix) raised AML concerns. SGS was unable to provide all the information requested by Cleary. The LCIA tribunal in the Felix Arbitration found that Cleary's AML requests went beyond the information that SGS was obliged to provide, under the terms of the Intimere SHA. However, there was no finding that the requests were not made in good faith or upon Cleary's advice. On the contrary, the LCIA arbitrators clearly hesitated before finding against Felix on this point, which they said in terms was not straightforward (in paragraph 44 of the Partial Final Award of 26 April 2022).

450. I was not shown the AML exchanges in the course of the hearing, but was invited to read them afterwards – in the free time that counsel so often assume judges have for additional reading. Having taken up that invitation, it is apparent that TPG's concerns about AML requirements did not begin on 9 October 2020.

(1) As early as 1 September 2020, DLA Piper (for SGS) said that a Russian entity (implicitly, not SGS itself) would be the payor and asked what KYC information Cleary required.

(2) Cleary responded on the same day expressing surprise that the payor would not be SGS and asked a number of preliminary questions. DLA did not respond until 20 September 2020 – a surprising delay, given the general urgency. This message identified Mr Evdokimov as the funder but was vague about the specific arrangements, which did not yet seem to have been finalised.

(3) Cleary gave a preliminary response on 23 September 2020. Following clarification from DLA Piper as to who the purchaser would be, Cleary then gave a substantive response on 28 September 2020, stating (among other things) that they needed to know the source of the funds to be provided by Mr Evdokimov.

(4) There then followed a series of email exchanges, generally at least one per day from each side, about the disclosure required in relation to the source of the funds. It is not necessary to identify each of them. It is sufficient to quote, as an example, Cleary's email of 3 October 2020:

> "These shifting explanations of multiple mooted sources of financing only serve to underscore our concerns that issues extraneous to the process provided for by the SPA/SHA are getting in the way of what should be a straightforward path to closing.
> Relatedly, it's somewhat surprising to us that providing standard AML should cause you consternation or be difficult to quickly satisfy. AML obviously is a legal regime that applies to all the parties and is not a matter that one can contract in or out of. TPG as a global PE firm based in the United States needs to see that appropriate AML is carried out. There is nothing burdensome or unusual here. Again, one aspect of taking care of our AML would be your confirming SGS' bank (given its own AML

responsibilities, it would be especially helpful were this a leading Western bank); this could help resolve this issue.
We think we have reached a point where it is incumbent on you to identify asap your means of financing (rather than giving us a list of shifting options). Please keep in mind any financing must comply with clause 2.2 of the SPA, so, once you identify what your financing is, it would be helpful if you provide us with information/documentation to confirm compliance with clause 2.2"

(5) This set the tone for all the emails that followed from Cleary, because DLA Piper never provided the information that Cleary sought. Following the payment on 12 October 2020, Cleary wrote on 13 October 2020, as follows:

"As we stated In our email to you of 30 September, if the source of funding here is Mr Evdokimov, then, as we asked before, we need a copy of the loan agreement between SGS and Mr Evdokimov, as well as documentation on his source of funds – (1) the prior documents delivered were materially incomplete eg the interest-free loan agreement of 18 August 2020 between Olga Kravchenko and Alexander Evdokimov lacked amount, date, signatures, making it useless for AML purposes; (2) we were not provided with any documentation that such loan was disbursed to Evdokimov; and (3) we were not provided with any confirmation of such funds now being held by Evdokimov (e.g., up-to-date bank statement).
The failure to provide the requested documentation over the past two weeks gives rise to serious concern on the TPG side. Your unilateral and extracontractual decision to wire transfer $35 million to TPG's JPM bank account on a Friday afternoon and then tell us about such transfer afterwards only heightens our concerns.
Obviously, and as you are well aware from all of our correspondence, that money could not be retained or used as consideration for these purposes where its provenance and the surrounding circumstances have not been established in accordance with our agreement. We cannot accept keeping such funds where we have not reached contract (and thus there is no contract to support making or receiving such payment), and where our outstanding AML requests have been ignored for weeks. The money has been immediately returned by JP Morgan to Citi."

(6) After this, Cleary's concerns about AML requirements were overtaken by concerns about FAS, which I turn to next.

451. Cleary's messages were palpably not drafted for them by TPG. They represented Cleary's own work product and their contents were said by Cleary, I have no doubt in good

faith, to represent "standard AML", i.e. "nothing burdensome or unusual". The Claimants do not allege that Cleary were party to the alleged FESCO conspiracy. Accordingly, when viewed in their full context, the contemporaneous exchanges on AML that the Claimants rely on do not provide any support for the allegation that TPG was acting pursuant to a conspiracy.

## L9.4: Letters from FAS [452]-[458]

452. The next element is that Ermenossa wrote to the FAS on 18 August 2020 raising concerns about the proposed sale by Felix of its shares in Intimere to SGS and suggesting that FAS approval was required. This is said to have resulted in two letters from the FAS, the first to Felix dated 8 October 2020 and the second to SGS dated 19 October 2020, both indicating that FAS approval was required. These letters (initially, the first) were major factors in TPG's decision to return the funds paid by SGS – which it did on 12 October 2020, and in its ultimate decision not to proceed with the sale by Felix to SGS. The Claimants say that Ermenossa acted wrongfully in writing to the FAS, and that TPG acted wrongfully in returning the funds and relying on the letters from FAS. These matters are relied on as providing grounds for the inference that TPG conspired with Mr Rabinovich/Ermenossa.

453. There was nothing unlawful in Ermenossa writing to the FAS as it did. The RAPOC does not allege any unlawfulness and at an earlier hearing the Claimants confirmed that they did not assert that Ermenossa's letter contained any deliberate untruths.

454. As to TPG's reliance on the two letters sent by the FAS, the Claimants first said that, properly understood, the letter of 8 October 2020 did not relate to the proposed sale by Felix to SGS, but to the proposed sale of Felix to Ermenossa. This may be right, although my own reading would be that the letter of 8 October 2020 was capable of relating to both proposed transactions – it is evident from its terms that FAS's interest arose from the fact that the transaction(s) would result in a change of control over FESCO and the Port of Vladivostok, not from the precise transaction structure.

455. In any event, that is not how the FAS letter of 8 October 2020 was for a while understood by the Claimants themselves (not least, in the RAPOC); and Mr Bushell was at least in two minds about this in his First Affidavit. I also note that, when DLA Piper (acting for SGS) wrote to Cleary about this on 13 October 2020, they expressed the view that FAS were not addressing the ROFO transaction, but only for two reasons which were wrong: (i) because SGS was ultimately owned by Mr Magomedov so no FAS authorisation was required[10] and (ii) because they thought nobody had notified FAS of the ROFO transaction (in fact, Ermenossa had done so). In all the circumstances, I am not surprised that Clearly disagreed with DLA Piper. Nor am I surprised that the letter of 8 October 2020 alarmed TPG.

456. Beyond this, the Claimants said that both FAS letters were wrong and that there was no need for FAS approval, under Russian law. The background to this relates to findings made by the LCIA tribunal in the Felix Arbitration. In the course of deciding the liability issues in SGS's favour, the Felix Arbitration tribunal found that FAS approval was not

[10] The LCIA tribunal ultimately agreed with this view, but FAS evidently did not – hence the further letter of 19 October 2020.

required and said (in its Partial Final Award of 26 April 2022):

> "107. Whilst it might at first be surprising that a statement by a regulatory body such as the FAS that a transaction should be suspended does not itself produce legal effects, ultimately the Tribunal prefers the evidence of Ms Akimova [who, per paragraph 106, concluded that there would be no breach of Russian law if SGS proceeded with the ROFO Transaction notwithstanding the FAS Suspension Letter]."

457. I cannot say whether the Felix Arbitration tribunal were right to conclude that FAS approval was not required and I have not been asked to decide this question. However, it is significant that the LCIA tribunal acknowledged that it seemed surprising that a statement by the FAS does not produce legal effects; that the expert evidence was not all one-way; and that the tribunal's decision was obviously arrived at with the benefit of assistance from both sides and after considerable thought ("... ultimately the Tribunal prefers…").

458. Having read both the FAS letters, I do not find it surprising that TPG withdrew from the sale by Felix to SGS. This may well have been a breach of the Intimere SHA, as the Felix Arbitration tribunal has found. However, it is in no way suggestive of a conspiracy between TPG and Mr Rabinovich/Ermenossa.

## L9.5: Emails from Mr Bonderman [459]-[463]

459. The Claimants also referred to the fact that the Chairman of TPG, Mr Bonderman, wrote two emails to Mr Magomedov on 30 July and 13 November 2020, which the Claimants said demonstrated duplicity. I see nothing untoward in them, let alone untrue or suspicious. On the contrary, I consider it very courteous and mannerly of Mr Bonderman to have written to Mr Magomedov at all. I suspect that few chairmen of a group as large as TPG often take the trouble to write directly to their counterparts in such circumstances; especially where that counterpart is in prison facing corruption charges.

460. Mr Bonderman's email of 13 November 2020 dealt with a number of matters raised by SGS. In relation to the ROFO Offer, he said:

> "Fourth, your team engaged in the ROFO process quite slowly and in a way which we found confusing and irregular. After your team did not engage for weeks to move a deal forward, it was suggested that a third party, identified as Mr Evdokimov, buy our shares, rather than SGS. We made clear we could only sell to SGS per the terms of our contract, but your team insisted we sell to Mr. Evdokhimov. When at last your team agreed that SGS would be the buyer, we repeatedly requested that its bank account and funding be identified, as we must in order for us to comply with our AML procedures, but our requests were ignored. As the deadline for your purchase under the ROFO neared, your team at the last minute team decided to send us, without prior warning, without first identifying the bank being

> used, without providing the documentation we had asked for, and without having any contract with us in place, $35 million to our US bank account. Per TPG compliance procedures and on the instructions of our counsel based on AML risks, we returned these funds immediately to the small Armenian bank from which they originated.
> Finally, as I assume you must be aware, SGS and TPG have now each received a letter from the Russian Federal Anti-monopoly Service stating that our transaction cannot proceed without the approval of the Foreign Strategic Investment Committee, and should it proceed without that approval, then it would be void. This is not something that we have any control over, or any part in. If the approval is timely issued, then we are prepared to make the sale to SGS so long as SGS complies with the terms of the documentation. This has been the position of our team throughout and remains the case today."

461. There is no basis on which it can properly be asserted that Mr Bonderman's email was not sent by him in good faith. All the underlying materials suggest that it was, and I have no doubt that it was prepared with legal assistance from Cleary, who certainly must be assumed to have acted in good faith – not merely because they are lawyers, but because the Claimants do not advance a case to the contrary.

462. The reality of the situation in about October 2020 was that TPG wanted to withdraw from Russia, in particular by selling its interest in FESCO. Following its agreement to sell to Ermenossa, TPG knew that it would soon sell at a price of US$35 million – either to Ermenossa, or to SGS further to the ROFO offer. It could make no real difference which transaction proceeded, as long as there were no regulatory or other obstacles. Indeed, precisely because TPG's intention was to achieve a permanent exit from Russia, it had no interest in gaining favour with President Putin or with the Russian State. It therefore had no reason to wish to pursue what is said to have been the objective of the FESCO conspiracy – i.e., to wrest assets from Mr Magomedov for the benefit of the Russian State; specifically, to ensure that FESCO was owned and controlled by ROSATOM.

463. What TPG wanted was to complete successfully its exit from Russia, by selling its interest in FESCO for US$35 million. Given Mr Magomedov's legal difficulties and the apparent interest of the FAS, it is possible that TPG took the view that selling to Ermenossa was likely to be achieved more easily (and with fewer obstacles or repercussions) than selling to SGS. If (notwithstanding my view to the contrary) there is anything to the Claimants' suggestion that Cleary's AML requests were a mere pretext, this is the likely explanation. It seems to me a much more reasonable inference than any conspiracy.

**L9.6 Meeting of 5 November 2020 [464]-[465]**

464. The next element in the Claimant's case in relation to the ROFO Offer concerns the pressure said to have been applied to Mr Evdokimov (via his associate), at the meeting of 5 November 2020, to withdraw his support from SGS. This element has a number of features that merit comment:

(1) First, the primary source of the allegations is Mr Evdokimov, who is said to have told Mr Shagav Gadzhiev about the meeting of 5 November 2020. However, Mr Evdokimov is not assisting the Claimants and it must be assumed that he will not give evidence at any trial. Mr Shagav Gadzhiev will give evidence, but his initial account of the withdrawal of Mr Evdokimov's support did not include the explanation that Mr Evdokimov had been threatened. On the contrary, in his First Affidavit in the Sian BVI Proceedings, Mr Shagav Gadzhiev said: "I cannot speculate as to his reasons".

(2) Second, it is alleged that ROSATOM's General Director attended this meeting. Otherwise, all those present appear to have been associated with the Russian State, and the direct threat of attention from the FSB again relates to the Russian State. There is, accordingly, a degree of tension between the facts relied on as comprising this element, and the Claimants' ultimate clarification that they do not allege that the Russian State was involved in the FESCO conspiracy. In the end, this left me unclear what significance this element has for the Claimants' case.

465. The RAPOC alleges that it is to be inferred that pressure was applied to Mr Evdokimov at the instigation of Mr Rabinovich and/or ROSATOM. I do not see much force behind the suggestion that Mr Rabinovich is likely to have been involved. At best, it supports the general case that ROSATOM wanted ownership and control of FESCO and was prepared to make threats in order to achieve that goal; and its co-conspirators may have been aware of this.

**L9.7: Sale to Ermenossa [466]-[469]**

466. The final element in the Claimants' case in relation to the Intimere SHA and the ROFO Offer is that TPG sold its shares in Felix to Ermenossa on 18 November 2020, in breach of its obligations under the Intimere SHA. I have already addressed the fact that Felix has been found to have been in breach of its obligations, by the LCIA tribunal in the Felix Arbitration. This assists the Claimants in their case that TPG induced or procedured Felix's breach of the Intimere SHA (which I consider in section P3 below), but it does not assist in establishing a claim against TPG in unlawful means conspiracy. It does nothing to support the case that TPG combined with the other alleged FESCO conspirators.

467. In short, I repeat my reference in section H above to Occam's razor. TPG had an interest in exiting from Russia. It therefore had a reason to prefer to sell by a transaction that would not face legal or regulatory challenges, rather than by one that might; and this may have given TPG an incentive to ignore the terms of the Intimere SHA. I emphasise that I am not making a finding that this is what happened; my view is in fact to the contrary. However, even if that were what happened, it would not justify the conclusion that TPG conspired with others to achieve its exit from Russia, as a participant in the alleged FESCO conspiracy. That is not necessary in order to explain the events alleged by the Claimants, and it would not be a reasonable inference.

468. It follows that, with the very marginal exceptions of (i) the allegations relating to Ms Mammad Zade calling the bank in Armenia and (ii) the circumstances in which Mr Evdokimov withdrew his support, I do not consider that the Claimants' case in relation to

the Intimere SHA and the ROFO Offer advances its overall case on the FESCO conspiracy.

469. In particular, it does not advance the Claimants' case against TPG.

## L9.8: Conclusion [470]-[471]

470. Taken with the conclusions set out above in this section L as to the other limbs of the FESCO conspiracy, in so far as they relate to TPG, it follows that there is no serious issue to be tried as against TPG.

471. The position in relation to Felix is slightly more complex:

(1) Until 18 November 2020, Felix was owned by TPG. There is no serious issue to be tried as against Felix in respect of matters prior to this date, for the same reasons that there is no serious issue as against TPG.

(2) Thereafter, Felix falls to be treated along with its owner, Ermenossa, and those associated with Ermenossa – in particular, Mr Rabinovich.

(3) However, my understanding of the RAPOC is that the complaints made against Felix relate to matters before 18 November 2020. In particular, they relate to Felix's failure to perform the transfer of its shares in Intimere pursuant to the agreement concluded with SGS on October 2020; which, pursuant to section 9.03(b) of the Intimere SHA, had to take place by 13 October 2020 (I refer to the RAPOC at paragraph 174).

(4) Other complaints were made about Felix in evidence and in submissions – notably, that it leaked the Partial Final Award of 26 April 2022 to the Russian prosecuting authorities. However, none of this is pleaded in the RAPOC and it is not directly relevant to the claims in unlawful means conspiracy.

(5) The end result is that there is also no serious issue to be tried as against Felix.

## L10: FESCO's civil claim [472]-[473]

472. Given Halimeda's difficulty in enforcing its debt claims in respect of the Maple Ridge Loans, it is not surprising that FESCO commenced civil proceedings against several of the Claimants, including Mr Magomedov, claiming damages referable to the Maple Ridge Loans.

473. I do not see how the pursuit of these proceedings – which succeeded – was a breach of directors' duties by the members of the FESCO board. It is not alleged that FESCO's directors did not have a bona fide belief in the merit of the proceedings. Given that the claims succeeded, it seems highly likely that they did have such a belief. That being so, it is hard to see why the proceedings were not in FESCO's best interests and why they cannot have believed them to be in FESCO's best interests.

## L11: Overall conclusion as to serious issues re the FESCO conspiracy [474]-[475]

474. In relation to the FESCO conspiracy, there are serious issues to be tried in relation to Halimeda, Ms Mammad Zade, Mr Rabinovich, Ermenossa, Mr Kuzovkov, Mr Severilov and ROSATOM.

475. The Claimants have no real prospect of success and/or there is no serious issue to be tried as against TPG, Domidias, Felix, DP World, FESCO, Mr Garber or GHP.

## M: OTHER MERITS POINTS [476]-[483]

476. In setting out my conclusions in sections J, K and L above as to serious issues to be tried, I have not addressed all the merits points raised by some of the Defendants in relation to each alleged conspiracy. I should now briefly explain why these points do not seem to me to be significant, for the purposes of this hearing. In essence, this is because a hearing of this kind is not the right occasion for detailed consideration of the merits. Any point taken by a Defendant must be extremely powerful and clear-cut, if it is to establish that there is no good arguable case/no serious issue to be tried.

477. The principal such point relates to causation. Several Defendants argued that, even if there were otherwise a good arguable case in unlawful means conspiracy, it foundered because neither alleged conspiracy caused loss. The Claimants' loss would have occurred anyway, because of the confiscation of Port Petrovsk's assets and the confiscation of Mr Magomedov's assets, in 2022 (as confirmed in 2023, following unsuccessful appeals). The relevant confiscation orders were associated with the criminal proceedings against Mr Magomedov and his brother, but are not said to been part of either alleged conspiracy.[11] Nor is the presidential decree issued by President Putin on 8 November 2023, which required the confiscated shares of FESCO to be transferred to ROSATOM.

478. The Claimants' answers to this were, in summary, as follows:

(1) Some loss was caused before the confiscation orders.

(2) It must be for the Defendants to plead and prove a break in causation. It is arguable that the Claimants' interests in NCSP and FESCO would not have been confiscated, were it not for the earlier conspiratorial manoeuvres, including the arrest orders that were associated with the two alleged conspiracies (or, at least, with the alleged NCSP conspiracy).

(3) The confiscations were themselves tortious and wrongful. Even if they were not part of either alleged conspiracy, the first tort (here, the relevant alleged conspiracy) must be treated as the 'cause': *Clerk & Lindsell on Torts* (24th ed).,

[11] It is not clear to me that this is an entirely correct characterisation of the Claimants' case. Paragraphs 81 and 84 of their skeleton argument for the November hearing suggested that it was their case that the confiscations were part of the NCSP conspiracy, referring to the RAPOC at paragraphs 215, 216 and 229. However, my understanding was that they were not alleged to be part of the FESCO conspiracy, which ultimately was not said to have involved the Russian state. In so far as the confiscation orders are said to have been part of the alleged NCSP conspiracy, this is a further reason why the Defendants' causation arguments are not sufficient, at this stage and in relation to the alleged NCSP conspiracy.

§§2-100 ff; *McGregor on Damages* (22nd ed.), §9-009; *Lakatamia v Su* [2021] EWHC 1907 (Comm) at [938].

479. These are not points that I can decide satisfactorily, beyond observing that the Claimants' arguments are not so weak that they have no real prospect of success.

480. Some Defendants also suggested that the alleged conspiracies were inherently unlikely, because their alleged objects could always have been achieved by State confiscation without the need for conspiracy. The Claimants said that this ignored the desire of those involved for a veneer of legitimacy. I find this sufficiently arguable.

481. A further point was that at least some of the Claimants (notably, Mr Magomedov) were really claiming losses comprised by the diminution in the value of their shareholdings in the various companies in the structures shown in Annex 1 and Annex 2 to the RAPOC. Accordingly, as a matter of English law – and, if relevant, as a matter of Russian law – they are caught by the rule against reflective loss.

482. The Claimants' answer to this was that, even under English law, some Claimants have clear claims to have suffered direct losses; and that even Mr Magomedov has suffered some direct losses (the cost of investigating and mitigating the conspiracies, at least in so far as he can show that he has incurred and/or discharged the relevant costs). They also said that their legal position was less clear under Russian law; and, if relevant, under Cypriot law.

483. Again, I do not consider the Claimants' case on reflective loss to be so weak that it has no real prospect of success. In any event, this point would not negate all of the Claimants' claims.

## N: JURISDICTIONAL GATEWAYS [484]-[515]

### N1: Gateway (3): Necessary or proper party [484]-[497]

484. TPG and Mr Garber could be and were served within the jurisdiction. I have no doubt that one of the reasons for including them as Defendants was to enable the Claimants to rely on the "necessary or proper party" gateway, CPR PD 6B paragraph 3.1(3).

485. In the event, I have found that the claims against TPG and Mr Garber in unlawful means conspiracy should be struck out or summarily dismissed. The Claimants therefore are unable to rely on the fact of service on TPG or Mr Garber as providing a way to rely on gateway (3). Nevertheless, it is appropriate to indicate how I would have approached gateway (3) if I had decided that the claims against TPG or Mr Garber in unlawful means conspiracy should proceed (and the same applies to Domidias, against whom there was a much less clear-cut case that the Claimants were entitled to service without permission under CPR PD 6B paragraph 3.1).

486. These Defendants were alleged to have taken part in the FESCO conspiracy, but not the NCSP conspiracy. On the hypothesis that there was a proper claim against TPG or Mr Garber in unlawful means conspiracy, I would have accepted that any other Defendant against whom there was a serious issue to be tried in relation to the FESCO conspiracy –

i.e., Halimeda, Ms Mammad Zade, Mr Rabinovich, Ermenossa, Mr Kuzovkov, Mr Severilov and ROSATOM – should be regarded as a "necessary or proper party" to the claims against TPG/Mr Garber.

487. The test for "necessary or proper party" was considered in *Altimo Holdings* at [87]:

> "Third, the question whether D2 is a proper party is answered by asking: supposing both parties had been within the jurisdiction would they both have been proper parties to the action? : Massey v Heynes & Co 21 QBD 330, 338, per Lord Esher MR. D2 will be a proper party if the claims against D1and D2involve one investigation: Massey v Heynes & Co, p 338, per Lindley LJ; applied in Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame) [2001] 1 Lloyd s Rep 203, para 33 and in Carvill America Inc v Camperdown UK Ltd [2005] 2 Lloyd s Rep 457, para 48, where Clarke LJ also used, or approved, in this connection the expressions closely bound up and a common thread : at paras 46, 49/"

488. These authorities were reviewed by Marcus Smith J in *Microsoft Mobile Oy (Ltd) v Sony Europe Limited* [2017] EWHC 374 (Ch). His summary of the text was as follows, at [135]:

> "I conclude that the circumstances in which a party is a "proper" party to proceedings already commenced or to be commenced against an anchor defendant are significantly wider than those contended for by the Defendants. I consider the test simply to be whether the foreign defendant could, if within the jurisdiction, properly have been joined pursuant to CPR Part 19."

489. On the basis of this approach, any other Defendants who could properly be said to have been party to the alleged FESCO conspiracy must be "necessary or proper parties" to the unlawful conspiracy claims (if there were any) against TPG or Mr Garber.

490. However, I would not have accepted that any of the claims in respect of the alleged NCSP conspiracy were sufficiently closely connected to the alleged FESCO conspiracy such that any Defendant to the alleged NCSP conspiracy should (in that capacity) also be regarded as a "necessary or proper party" to the claims against TPG or Mr Garber.

491. In the event, this does not arise, because of my conclusion that there is no serious issue to be tried in respect of the alleged NCSP conspiracy against either of the relevant Defendants, i.e., Transneft and Ms Mammad Zade. However, even if I had concluded that there was a serious issue to be tried in respect of the alleged NCSP conspiracy, I would not have permitted the Claimants to rely on gateway (3).

492. I recognise that Ms Mammad Zade is a named Defendant in relation to both alleged conspiracies.[12] I also recognise that both conspiracies involve allegations to the effect that the criminal proceedings against Mr Magomedov and various other Claimants have been

[12] If the Claimants succeed in their appeal against my decision of 17 May 2024, this would also be true of Mr Kuzovkov; but that would not affect the analysis that follows in this section.

conducted unfairly. However, none of the events that are integral to either conspiracy overlap.

493. One significant distinction between them concerns timing. The alleged NCSP conspiracy is said to have commenced on 30 March 2018. Its main essence was completed either upon the signing of the Omirico SPA on 31 August 2018 (this being the Claimants' principal pleaded case in the RAPOC) or at the latest upon the closing of the transaction on 27 September 2018. The Claimants also rely on the seizure of the purchase price received by Port Petrovsk; this began with the arrest order of 18 September 2018. That process was not completed until the final confiscation was confirmed in 2023, but that is not really germane to the timing point now under consideration.

494. However, the most significant distinction concerns the fact that the alleged NCSP conspiracy is said to have involved the Russian state, whereas the alleged FESCO conspiracy is no longer said to have done so. This means, amongst other things, that no aspect of the criminal prosecution against Mr Magomedov – including the arrest or confiscation of funds – is relied on as part of the alleged FESCO conspiracy. Thus, the unfairness of the Russian criminal proceedings is relevant to the alleged FESCO conspiracy as mere background, whereas it is (I think) directly relevant to the alleged NCSP conspiracy. More broadly, the alleged involvement of the Russian state in the NCSP conspiracy will make it necessary to consider both the habitual conduct of Russian state actors, in particular in relation to "corporate raiding", and their alleged conduct in relation to NCSP. This will involve a mass of evidence (in particular, expert evidence) and issues that will not arise in the context of the alleged FESCO conspiracy.

495. If all the relevant parties were in England, and there were an application to join the claims in respect of the alleged NCSP conspiracy to existing proceedings involving the claims in respect of the alleged FESCO conspiracy, I would have refused the application. I would have come to this conclusion primarily because the connections are too tenuous to justify joinder. However, I would also have refused joinder for pragmatic reasons.

496. I said in section A above that, if this matter were to go ahead in its current form, the strains that it would place on the court's resources would be acute, and the adverse effects on other court users would be real. I had in mind that the effect of combining into one action the two separate sets of claims, in relation to the two separate alleged conspiracies, creates a behemoth that is extremely difficult to manage – above all, for listing purposes. If I had been considering a joinder application under CPR 19, this would have been a factor (albeit not the principal factor) which would have led me to refuse to allow any joinder.

497. Similarly, if it had been explained to me when I gave permission to serve out of the jurisdiction in September 2023 that only the alleged NCSP conspiracy was said to have involved the Russian state, I doubt that I would have dealt with the application as I did. Quite apart from the effect on my willingness to grant permission to serve out of the jurisdiction, I am certain that I would have foreseen even at that point the case management problems that proceedings of this magnitude would present, and would have scrutinised much more carefully than I did whether it was right for the separate claims to be brought in a single set of proceedings. Above all, I would have questioned whether it was appropriate for the Claimants to rely on gateway (3), in the context of the alleged NCSP conspiracy. If I had known then what I know now, I would have ruled that it was not.

**N2: CPR 6.33(2B)(c): Jurisdiction agreement (Domidias) [498]**

498. As against Domidias, the Claimants relied on the fact that the 2012 Option Agreement contained at Clause 17.2 an agreement conferring exclusive jurisdiction on the English courts to settle "any dispute arising from or connected with this Agreement". Moulder J's judgment has made this untenable. There is no longer any claim arising from or connected with the 2012 Option Agreement, in the light of her finding that it expired on 28 November 2019, long before the Claimants purported to exercise the option.

**N3: Gateway 6(c): Contract governed by English law [499]-[505]**

499. This gateway was relied on in relation to the alleged NCSP conspiracy by way of the Omirico SPA, and in relation to the alleged FESCO conspiracy by way of the 2012 Option Agreement, the Sian and Maple Ridge Loan Agreements and the Intimere SHA. These agreements all expressly provided for English law.

500. As regards the Omirico SPA, neither Transneft nor Ms Mammad Zade were party to this contract, and certainly not in any meaningful sense (see section K2 above). Furthermore, the Omirico SPA is alleged to have been concluded in consequence of the NCSP conspiracy. It therefore is its "incidental product", in the phrase used by Tomlinson LJ in *Alliance Bank JSC v Aquanta Corp* at [71].

501. As regards the 2012 Option Agreement, the Claimants' problem here is the same as that identified in section N2 above.

502. As regards the Sian and Maple Ridge Loan Agreements, these were consistently referred to in the RAPOC, in the Claimants' evidence and in their written submissions as the "Disputed Loans". However, the reality is that there is no longer any dispute about them. The relevant sums were undoubtedly loaned; they were undoubtedly owed by Sian and Maple Ridge; they undoubtedly fell due; they were undoubtedly not paid; and Halimeda was undoubtedly entitled to claim them.

503. They are, at least, contracts to which Halimeda was party; and I have concluded that there is a serious issue to be tried, as against Halimeda. However, the Claimants are not seeking "to assert a contractual right or a right which has arisen as a result of the non-performance of a contract" – the test tentatively accepted by Tomlinson LJ in *Alliance Bank JSC v Aquanta Corp* at [71].

504. Even if one applies the test suggested by Hamblen J in *Cecil v Bayat* at [49] – "If that contract needs to be referred to and relied upon in order to assert the relevant cause of action" – the answer is that there is no need for them to be referred to or relied on by the Claimants. The fact that they have in fact been pleaded out in the RAPOC does not affect this. I stress that I make this point not because I have concluded that Hamblen J's test is the correct test (in the light of *Alliance Bank JSC v Aquanta Corp*, that would be difficult), but because it is the most generous test for which the Claimants felt able to contend.

505. As regards the Intimere SHA, the only Defendant that was party to this was Felix. I have concluded that there is no serious issue to be tried as against Felix.

## N4: Gateway (9)(a): Tort damage in the jurisdiction [506]-[510]

506. Originally this gateway was relied on in relation to both alleged conspiracies. Ultimately, it was only relied on in relation to the alleged FESCO conspiracy, in which context it was confined to the legal costs said to have been incurred before these proceedings, in investigating and mitigating the FESCO conspiracy.

507. I have in mind that, to succeed in relation to gateway (9), the Claimants must establish a good arguable case in the meaning explained in *Canada Trust Co v Stolzenberg (No. 2)* [1998] 1 WLR 547, as further clarified by Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKHL 80 at [22]. In section K5 above, I have explained my reasons for rejecting the Claimants' case that they have suffered any loss at all in respect of these legal costs, still less that they have suffered it in England. For these reasons, I do not consider that the Claimants have established the necessary good arguable case. This is enough to dispose of gateway (9)(a).

508. However, even if I were persuaded that the Claimants had (or might have) suffered loss in England in respect of the relevant legal costs, it is important that, in the overall context of the losses claimed in these proceedings, those legal costs are a very small proportion. The total claim is said to be "in the region of US$13.8 billion", according to Mr Bushell's First Affidavit. The legal costs in question must run to several million, but they must be a small fraction of 1% of the claim as a whole. The overwhelming bulk of the claims is not formed by legal costs, but by the loss of interests in or rights over NCSP and FESCO – losses which have not been incurred in England but elsewhere (Russia or, possibly, the place where one of the relevant holding companies is situated – BVI, Cayman or Cyprus).

509. Furthermore, some of the legal costs (although not all[13]) would have been incurred in England only through the Claimants' own choice – rather than in the BVI, in Cyprus or in Sweden, where the relevant litigation/arbitration has actually occurred.

510. In these circumstances, even if the Claimants could show that they had suffered legal costs in England so as to satisfy the requirements of gateway (9), the disproportionality of English jurisdiction being founded on this basis would give rise to a strong case for it nevertheless being concluded that England was not the appropriate jurisdiction and/or that the court should decline to exercise jurisdiction in its discretion.

## N5: Gateway (9)(c): Tort governed by English law [511]

511. I have given my reasons for concluding that none of the claims in tort and unlawful means conspiracy were governed by English law, in sections K2 and K5 above.

[13] Not the Maple Ridge Arbitration or the Felix Arbitration proceedings, which had to be conducted in London. The proceedings decided by Moulder J in relation to the 2012 Option Agreement and the Draft 2019 Option Agreement also had to be conducted in England, but those proceedings were misconceived.

**N6: Gateway (4A): Further claim against the same Defendant [512]-[513]**

512. This gateway was only relied on in relation to the alleged NCSP conspiracy, and only in relation to Transneft. I have found that there is no serious issue to be tried as against Transneft.

513. Even if I had found a serious issue to be tried as against Transneft, this gateway would not be applicable. It applies only where a further claim is made against the same defendant, against whom there is already a claim which arises out of the same or closely connected facts and which (a) was served on the defendant within the jurisdiction without the need for the defendant's agreement to accept such service, (b) falls within CPR rule 6.33 or (c) falls within one or more of paragraphs (1A), (2), (6) to (16A) or (19) to (23) of CPR PD 6B paragraph 3.1. None of criteria (a), (b) or (c) is satisfied.

**N7: Gateway (25): Norwich Pharmacal [514]**

514. This gateway applies where a Norwich Pharmacal claim or application is made in support of proceedings in England. There are no existing or intended proceedings in England, apart from these proceedings. Accordingly, this gateway could only apply if there were at least one Defendant against whom the Claimants could show a serious issue to be tried and against whom they could establish English jurisdiction. There is no such Defendant.

**N8: Conclusion [515]**

515. It follows that none of the jurisdictional gateways relied on by the Claimants is available to them.

**O: APPROPRIATE FORUM & JUSTICE [516]-[535]**

**O1: Russia [516]-[520]**

516. The natural forum for the trial of these claims is unquestionably Russia, in the sense that Russia is the country with which there are the most numerous and the strongest connecting factors. It is where most of the alleged tortious conduct occurred; it is where (at least) much of the direct damage was sustained; it is where Mr Magomedov is as well as several other important parties; it is where most of the witnesses are located; it must also be where most of the relevant records are located; and its legal system is (at least) highly relevant.

517. I did not understand the Claimants to contend that Russia is not an available forum, whether in the sense that I have decided this phrase should be applied or in any sense. There was however a dispute as to whether Russia should be considered an appropriate forum in the sense of the Claimants being able to obtain justice there.

518. Cases where it is asserted that it will not be possible to obtain justice in another available forum are unusual. This case is unusual even within that already narrow class, in that the Claimants' contention that they cannot obtain justice in Russia is not one that they make merely for the purposes of the contest on jurisdiction. It is part of their substantive case on the merits, because of the allegations as to the political campaign against Mr

Magomedov, the allegations that the criminal proceedings have been conducted unfairly at every stage and the specific allegations in relation to the arrest and confiscation of the assets that are the central subject-matter of the alleged conspiracies. These features are material to both alleged conspiracies. They are particularly critical to the NCSP conspiracy because of the further allegation that the Russian state was party to the conspiracy.

519. I have to approach this on the hypothesis that the allegations in the RAPOC are accepted, if not in their entirety then at least against Halimeda, Ms Mammad Zade, Mr Rabinovich, Ermenossa, Mr Kuzovkov, Mr Severilov and ROSATOM, in respect of the alleged FESCO conspiracy. Even if I confine myself to the allegations relevant to those specific Defendants in respect of that specific conspiracy, it is not hard to see that accepting the factual premises of the Claimants' case already makes out a real risk of injustice.

520. I was provided with expert evidence from both sides on this topic. The Claimants' evidence was from Professor Bowring, Professor of Law at Birkbeck College. The Defendants' evidence was from Professor William Simons of Leiden University and Professor Mikhail Antonov of the National Research University Higher School of Economics, St Petersburg. I do not propose to review their evidence or to provide a detailed evaluation, because I do not consider this to be necessary, in light of the point made in the preceding paragraph; nor would it be appropriate, in light of the fact that the issues arising will have to be decided at any trial (cf. the final observation made in section H above). I will confine myself to saying that I was persuaded by Professor Bowring's evidence that, where strategic interests of the Russian State or powerful individuals are concerned, there is a real risk that substantial justice will not be done.

## O2: England & Wales [521]-[527]

521. The Claimants contended that this jurisdiction is the most appropriate forum. Aside from the presence here of TPG, and the fact that some of the contracts were drafted in English and subject to English law, the Claimants relied on the 'Cambridgeshire' factor – the fact that expertise and knowledge had been built up in England by them before these proceedings in the context of the FESCO conspiracy and developed since then.

522. This was a reference to the speech of Lord Goff in *Spiliada* at pp. 485F-486B. In that case, the issues at trial were bound to resemble those in separate proceedings already taking place in England – the *Cambridgeshire* proceedings. Lord Goff regarded it as legitimate and important to take into account the expertise and knowledge already present here:

> "I believe that anyone who has been involved, as counsel, in very heavy litigation of this kind, with a number of experts on both sides and difficult scientific questions involved, knows only too well what the learning curve is like; how much information and knowledge has to be, and is, absorbed, not only by the lawyers but really by the whole team, including both lawyers and experts, as they learn about the interrelation of law, fact and scientific knowledge, having regard to the contentions advanced by both sides in the case, and identify in their minds the crucial matters on which attention has to be focused, why these are the crucial matters, and how they are to be assessed. The judge in the present

> case has considerable experience of litigation of this kind, and is well aware of what is involved. He was, in my judgment, entitled to take the view (as he did) that this matter was not merely of advantage to the shipowners, but also constituted an advantage which was not balanced by a countervailing equal disadvantage to Cansulex; and (more pertinently) further to take the view that having experienced teams of lawyers and experts available on both sides of the litigation, who had prepared for and fought a substantial part of the *Cambridgeshire* action for Cansulex (among others) on one side and the relevant owners on the other, would contribute to efficiency, expedition and economy—and he could have added, in my opinion, both to assisting the court to reach a just resolution, and to promoting a possibility of settlement, in the present case. This is not simply a matter, as Oliver LJ suggested, of financial advantage to the shipowners; it is a matter which can, and should, properly be taken into account, in a case of this kind, in the objective interests of justice."

523. I have set out this passage in full because it demonstrates that reliance on the 'Cambridgeshire' factor must always be undertaken with care. It is not enough simply to show that a lot of lawyers in England have already undertaken a lot of work. The litigation in *Spiliada* and in the *Cambridgeshire* case involved marine casualties and the issues were predominantly technical and scientific. The knowledge and expertise in question was not only that of lawyers but also of scientific experts who had done considerable research in the relevant fields. In so far as it was the knowledge and expertise of lawyers, it largely related to the scientific expert issues – which, as Lord Goff acknowledged, is the kind of knowledge and expertise that is not easily won by mere lawyers.

524. This case is of a different kind. The issues are mainly factual. The expert issues are not scientific or technical and are relatively easy for non-technical people to understand. Indeed, in so far as they relate to Russian law, they are peculiarly accessible to lawyers.

525. This means that the knowledge built up by the Claimants' lawyers in England is more readily transferable than the knowledge of the lawyers (let alone that of the experts) in relation to the *Cambridgeshire* proceedings or in *Spiliada*. This is not a matter of mere conjecture or generalisation. The Claimants have used (to my knowledge) at least two firms of English solicitors (originally DLA Piper in the proceedings relating to the Option Agreements, more recently Seladore). They have also used what appears to be an interchangeable fleet of counsel: in the course of the hearings before me, I have had the pleasure of receiving submissions from five different KCs. I have no doubt that there will have been some continuity among the changing legal line-up, but this does not suggest that using the same personnel has been considered essential.

526. As Lord Goff acknowledged, the court must always be circumspect if the 'Cambridgeshire' factor may advantage one party more than others – generally, the claimant. This is particularly important where, as here, that party has itself assiduously worked in this jurisdiction to build up the knowledge and expertise then relied on as justified litigating here. This involves an element of pulling on one's own bootstraps.

527. In these circumstances, I do not regard the Claimants' 'Cambridgeshire' argument as compelling.

**O3: Cyprus [528]-[531]**

528. In relation to the alleged NCSP conspiracy, the main factors connecting the claims to Cyprus are the fact that the closing meeting required by the Omirico SPA took place in Cyprus; that Omirico was registered in Cyprus, so there is an argument that the alleged loss occurred there; and that some of the witnesses are located in Cyprus (Mr Economou and, if relevant, Mr Kuzovkov). However, none of the parties submitted that Cyprus was a more appropriate forum than England and Wales, in the context of this conspiracy.

529. In the context of the alleged FESCO conspiracy there are more numerous and stronger connections with Cyprus. Some of the Claimants are companies incorporated in Cyprus (Maple Ridge, Wiredfly, Smartilicious and Enviartia); more importantly, some of the Defendants are companies registered in Cyprus (Halimeda and Ermenossa) or are resident in Cyprus (Mr Kuzovkov); several witnesses are located in Cyprus (Mr Privalov, Mr Economou and Mr Tsantekides); some of the relevant events occurred in Cyprus, notably Halimeda's actions in relation to the Cypriot Injunctions; for the same reason, there is an argument that at least some damage occurred in Cyprus.

530. As a result, a number of the Defendants allegedly involved in the FESCO conspiracy submitted that Cyprus was the most appropriate jurisdiction (or, at any rate, more appropriate than England and Wales). Furthermore, a large number of them undertook to submit to Cypriot jurisdiction: in addition to Halimeda, Ermenossa and Mr Kuzovkov, also Domidias, Ms Mammad Zade, Mr Rabinovich, Mr Kuzovkov, Felix, Mr Severilov, FESCO, Mr Garber and GHP. The relevant exceptions were ROSATOM and DP World, and TPG (which, unlike the others, did not challenge the jurisdiction of this court and on this basis did not positively indicate whether or not it would submit to Cypriot jurisdiction).

531. In the light of my conclusions in section E.5.3 above as to the meaning of an "available" forum, I consider that Cyprus is such a forum, in respect of all the relevant Defendants – including those that did not give an undertaking to submit to Cypriot jurisdiction, and including TPG. Furthermore, the claims in relation to the alleged FESCO conspiracy undoubtedly have more numerous and stronger connections with Cyprus than with this jurisdiction. Cyprus is, in principle, a more appropriate jurisdiction.

**O4: Conclusion [532]-[535]**

532. In relation to the alleged NCSP conspiracy, if I had concluded that the Claimants had succeeded in establishing that there were serious issues to be tried and that they could rely on one of the jurisdictional gateways, I would not have concluded that this court should not exercise jurisdiction on the basis that it is not the appropriate forum. I would have reached that conclusion because the only other jurisdiction contended for was Russia, and because of my concern that there is a real risk that the Claimants would not be able to obtain justice in Russia.

533. In relation to the alleged FESCO conspiracy, if I had concluded not only that the Claimants had succeeded in establishing that there were serious issues to be tried but also that they could rely on one of the jurisdictional gateways, I would have concluded that this court should decline jurisdiction in favour of Cyprus.

534. If there had also been a real prospect of success or a serious issue to be tried as against Mr Garber, who was served in this jurisdiction but who challenged jurisdiction, I would again have stayed the claim against him in favour of Cyprus.

535. If the Claimants had established that they had a reasonable prospect of success against TPG, I would have been troubled by the prospect of other Defendants being required to litigate in this jurisdiction despite the nugatory connection with this jurisdiction. I would have been equally troubled (in the alternative) by the prospect of the claim against TPG in unlawful means conspiracy proceeding in this jurisdiction while the related claims against other Defendants proceeded elsewhere. In those circumstances, I would have invited submissions from TPG. It would be very relevant to know whether TPG is actually reluctant to litigate in Cyprus, or whether it simply did not feel able to challenge the jurisdiction of this court by applying for a stay. I would also have invited submissions from the other parties. If, ultimately, it became clear that (unlike Mr Garber) TPG has a permanent presence in this jurisdiction and would prefer to be sued here rather than elsewhere, I would very likely have decided that this court should retain jurisdiction over the claims in respect of the alleged FESCO conspiracy, as against those Defendants in relation to whom there is a serious issue to be tried. In the event, none of this has arisen.

## P: OTHER CAUSES OF ACTION [536]-[546]

### P1: Conspiracy to injure (lawful means conspiracy) [536]-[537]

536. Conspiracy to injure, also referred to as lawful means conspiracy, requires as one of its elements that the predominant purpose of the conspiracy was to injure the claimant: Clerk & Lindsell §23-131; *Commercial Fraud in Civil Practice* §7.85; *Kuwait Oil Tanker Co SAK v Al-Bader (No. 3)* at [106]; *Baxendale-Walker v Middleton* [2011] EWHC 998 (QB) at [59]; *JSC BTA Bank v. Ablyazov* [2017] 2 WLR 1563 at [10]-[11].

537. The RAPOC do not sustain any case that the predominant purpose of any of the Defendants was to injure the Claimants, over and above an intent to make gains for themselves. It is alleged that there was a political campaign against Mr Magomedov, but it is not alleged that any of the Defendants was engaged in the political campaign.

### P2: Dishonest assistance of Karmokov's breach of duty [538]

538. The RAPOC also allege that Transneft is liable for dishonestly assisting Mr Karmokov in his breach of duty to Port Petrovsk, when signing the Omirico SPA. This adds nothing to the existing case against Transneft for unlawful means conspiracy. It fails for the same reasons.

**P3: Inducing breach by Felix of the Intimere SHA [539]-[544]**

539. Independent of the allegations relating to the FESCO conspiracy, there are separate claims against TPG, Ermenossa and Mr Rabinovich that each of them induced Felix's breach of the Intimere SHA.

540. This tort has been considered in *OBG Ltd v Allan*, *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303 and *Allen v Pollock* [2020] EWCA Civ 258. For A to be liable for inducing B to breach a contract with C:

(1) There must be a breach of contract by B.

(2) A must induce B to break the contract with C by persuading, encouraging or assisting B to do so.

(3) A must know of the contract and know that its conduct will have that effect.

(4) A must intend to induce the breach of contract either as an end in itself or as the means to achieving some further end.

(5) A must have no lawful justification for that conduct.

541. The Claimants' case that Felix was in breach of the Intimere SHA is supported by the Partial Final Award of 26 April 2022 in the Felix Arbitration. The case that TPG induced Felix to act is based solely on inference, but the fact that TPG owned and controlled Felix until November 2020 makes this inference reasonable. Furthermore, TPG knew of the Intimere SHA.

542. However, the RAPOC do not support a case that TPG knew or intended that for Felix to return the funds provided by Mr Evdokimov and to refuse to perform the contract would be a breach of contract.

(1) The AML concerns raised by Cleary on TPG's/Felix's behalf were not wholly unreasonable and seem likely to have been genuine, even if misplaced (as the LCIA tribunal found). Mr Bonderman's email of 12 November 2020 stated contemporaneously that this was a major concern for TPG and the circumstances that he set out in his email would indeed have caused concern to most regulated finance businesses.

(2) I have already observed that it is not surprising that the FAS letters caused TPG to withdraw from the sale by Felix to SGS. This is consistent with the Partial Final Award; as I have also observed, the LCIA tribunal acknowledged that it seemed surprising that a statement by the FAS does not produce legal effects. It seems to me natural that TPG should have felt obliged to obey the FAS.

(3) I therefore do not consider it reasonable to infer from the bare facts alleged in the RAPOC that TPG intended Felix to act in breach of the Intimere SHA.

543. As regards Mr Rabinovich and Ermenossa, I am not persuaded even that Ermenossa induced Felix to act. Ermenossa (likely, under Mr Rabinovich's direction) wrote to the

FAS encouraging it to intervene. This not only was lawful, it presumably was done with the intention that the FAS would intervene if it was legally justified in doing so. What the indirect effect of this might be on Felix is not something that was within Ermenossa's control. In any event, the RAPOC do not support a case as to intention, in relation to Mr Rabinovich and Ermenossa.

544. I therefore do not consider that the Claimants have a reasonable prospect of success, or have raised a serious issue to be tried, in their case of inducing Felix's breach of contract.

## P4 Norwich Pharmacal [545]-[546]

545. The Claimants also claimed *Norwich Pharmacal* relief, on the basis that the alleged conspiracies involved not only the named Defendants, but also unknown others. Disclosure was said to be necessary in order to discover their identities.

546. The claims for *Norwich Pharmacal* relief cannot stand, in the light of my conclusions in relation to the underlying allegations of conspiracy.

## Q: FAILURE TO MAKE A FAIR PRESENTATION [547]-[569]

547. A number of separate criticisms were made of the presentation made to me in September 2023, as well as the presentation to Jacobs J on 22 January 2024 and the presentation to me on 17 May 2024. The legal principles applicable here are well-established and were not contentious. I was referred, in particular, to *Tugushev v Orlov* [2019] EWHC 2031 (Comm), per Carr J at [7].

## Q1: Presentation of the case as to the NCSP conspiracy [548]-[553]

548. There were two important criticisms of the presentation of the case as to the NCSP conspiracy.

549. The first was that there was no reference at all to any of the matters set out in section I above – in particular, the roles played by Mr Karmokov and Mr Muslim Gadzhiev, the resolutions of 24 and 25 September 2018 and the closing meeting in Cyprus. The Claimants said that they had not known of these matters, when they applied for permission to serve out of the jurisdiction in September 2023. Even if this is strictly correct (for example, Mr Shagav Gadzhiev has said that, until reminded, he had forgotten that his brother had been appointed director of Shevronne), it is not an answer. The Claimants and their lawyers were well aware of the terms of the Omirico SPA. Those terms expressly required the resolutions of 24 and 25 September 2018 and they also expressly required there to be a closing event. It was incumbent on the Claimants to investigate these matters. If they had made any effort to do so, they would have appreciated the full involvement of Mr Karmokov and of Mr Muslim Gadzhiev and all the points that flow from this.

550. The second was that I was told in September 2023 that the two alleged conspiracies were related – notably, in that they were both said to have involved the Russian State.[14] By the end of the hearing in September 2024 it had become apparent that this was not the case. I have already noted in section N1 above that, if I had known this in September 2023, I would have questioned whether it was appropriate for both alleged conspiracies to be advanced in a single action, and, I would have questioned whether it was appropriate for the Claimants to rely on the "necessary or proper party" gateway (3), in the context of the alleged NCSP conspiracy.

551. This would have been very significant to the Claimants' prospects of getting permission to serve out, in relation to this conspiracy. It would have made it necessary to look much more carefully at whether the Omirico SPA really assisted the Claimants on jurisdiction. It would also have required the Claimants to confront properly both applicable law and whether they had suffered any loss in England. As it was, these matters were all glossed over. If presented fully and carefully, it would or should have become apparent (i) that the Omirico SPA was not relevant to jurisdiction over a claim in unlawful means conspiracy, (ii) that there was no real case that English law was applicable (with the result that limitation under Russian law was a real problem) and (iii) that there was in truth no case that any loss was suffered in England by reason of the alleged NCSP conspiracy.

552. Each of these was a very serious failure. The matters not properly presented have, in fact, led me to reject the Claimants' case in respect of the alleged NCSP conspiracy. I am prepared to assume that the deficiencies in the presentation in September 2023 were not deliberate. However, they were undoubtedly negligent, and the negligence in question was inexcusable, given the attention that the Claimants undoubtedly paid to the terms of the Omirico SPA and the clarity of the relevant provisions in that agreement – clause 4.1, clause 4.2 and Schedule 1.

553. The result is that, even if I had not already decided this part of the case in favour of Transneft and Ms Mammad Zade, I would in any event have set aside permission to serve them out of the jurisdiction, in respect of the alleged NCSP conspiracy. For the avoidance of doubt, I would not on this basis also have set aside permission to serve Ms Mammad Zade in respect of the alleged FESCO conspiracy.

## Q2: Presentations re extension and alternative service on Ms Mammad Zade [554]-[561]

554. Ms Mammad Zade criticised the presentation to Jacobs J on 22 January 2024, when the Claimants obtained an extension to the period of validity of the claim form; and the presentation to me on 17 May 2024, when I granted permission for alternative service on her. At the heart of these criticisms was the contention that the Claimants for some time said that they did not know where Ms Mammad Zade was. By Mr Bushell's Third Witness Statement (dated 18 April 2024) the Claimants said that they had recently discovered an online review that she gave to a make-up salon in Vienna. This ultimately led them to search Austria's Central Register of Residents, which gave them her address in Vienna.

[14] At the very beginning of the skeleton argument in support of the application for permission to serve out of the jurisdiction, it was said in paragraph 4 that the conspiracies were related in that "… the conspiracies have been supported by senior individuals acting on behalf of the Russian state."

555. Ms Mammad Zade said that she had told Mr Magomedov that she had moved to Vienna in late 2019 or early 2020. This was ultimately accepted by the Claimants. It is apparent from a Whatsapp exchange between Ms Mammad Zade and Mr Shagav Gadzhiev in December 2019 that Mr Shagav Gadzhiev also knew that Ms Mammad Zade was then resident in Vienna.

556. The Claimants responded with Mr Bushell's Seventh Witness Statement, which referred to news articles in from 2021, which quoted Ms Mammad Zade as saying that she was back in Russia and wanted to live and work there.

557. I do not find this completely satisfactory. Mr Bushell did not state in terms that the Claimants knew that Ms Mammad Zade had lived for a while in Vienna, but believed from 2021 that she had moved back to Russia. His evidence is equally consistent with Mr Magomedov and Mr Shagav Gadzhiev having forgotten that Ms Mammad Zade had moved to Vienna and/or having failed to inform Seladore about this. Furthermore, it is odd that in none of the applications to serve Ms Mammad Zade before May 2024 (both to me in September 2023 and to Jacobs J in January 2024) was there any reference to her having lived in Vienna; and that in the application to me on 17 May 2024 the information that she was in Vienna was presented as if this was the first time the Claimants had heard any such thing.

558. Furthermore, the comments attributed to Ms Mammad Zade in the news articles were, at least, ambiguous. They were capable of meaning that Ms Mammad Zade had moved back to Russia permanently, but they were also at least capable of meaning only that she was back in Russia temporarily (to speak to the press), but aspired to return permanently at some point in the future. Mr Bushell did not explain how the Claimants in fact understood the news articles or why.

559. It seems to me that the presentations in September 2023 and January 2024 lacked candour, in that the Claimants did not say that they knew that Ms Mammad Zade had for a while been living in Vienna. The presentation in May 2024 lacked candour, in that it gave a false impression as to when the Claimants first learned that Ms Mammad Zade had been living in Vienna, and that they had had no reason to check the Central Register of Residents until April 2024. It is possible that this is because of lapses of memory by Mr Magomedov and Mr Shagav Gadzhiev and/or failures of communication, but these too are matters that should have been explained candidly, but have not.

560. I do not regard this as acceptable. If the Claimants had acted on their knowledge that Ms Mammad Zade had been resident in Vienna in late 2019 it would not have been a difficult task to check the Central Register of Residents when they first contemplated bringing proceedings, rather than only in about April 2024. If so, they would probably have been able to serve her before the expiry of the original period of validity of the claim form. Even if not, the applications to Jacobs J in January 2024 and to me in May 2024 would each have proceeded on a different basis.

561. I therefore set aside both the extension granted by Jacobs J and my own permission to serve Ms Mammad Zade by alternative means.

**Q3: Presentation of the case as to the FESCO conspiracys [562]-[564]**

562. Apart from Ms Mammad Zade, Mr Rabinovich, Ermenossa and Felix made criticisms about the Claimants' presentations in September 2023, which they said mean that permission to serve on them out of the jurisdiction should be set aside.

563. While some of these criticisms were well-made, in the sense that the explanation given in September 2023 had not been as clear as the court was entitled to expect, none of them related to points of real significance.

(1) The first concerned a point made by the Claimants in September 2023, and repeated in September 2024, as to differences between the terms agreed between TPG and Ermenossa and the ROFO Offer made by Felix to TPG. I agree with these Defendants that this was a bad point (the two agreements were not mirror-images, so it was inevitable that their terms would not match precisely) but that is as far as this goes.

(2) The second was that the Claimants relied on evidence emanating from Mr Shagav Gadzhiev concerning the pressure applied to Mr Evdokimov to withdraw his funding for TPG, but failed to reveal that Mr Shagav Gadzhiev had previously given inconsistent accounts. I agree that the Claimants should have revealed this, but their position would still have been that the more recent evidence was correct.

(3) The third was that the Claimants' presentation of their case on the bribery of Mr Kuzovkov was not presented fairly. It is right that the original presentation was incomplete, but presentation of the full picture would, ultimately, have improved the Claimants' case on this point. Points made about the treatment of a letter from Mr Kuzovkov's solicitors, and about the description of Locko Bank, had no weight in the overall case in relation to bribery.

(4) The fourth related to the presentation of the case that the Claimants will not get a fair trial in Russia. I do not accept this criticism.

564. Accordingly, if I had otherwise been in the Claimants' favour, as against Mr Rabinovich, Ermenossa and Felix, I would not have set aside the order permitting service on them out of the jurisdiction.

**Q4: Presentation re alternative service [565]-[569]**

565. In addition, Halimeda, Mr Rabinovich, ROSATOM and FESCO all criticised the presentation in September 2023 of the Claimants' applications for permission to serve on these Defendants by alternative means.

566. They all said that Russia is a signatory to the Hague Service Convention, but has opted out of Articles 8 and 10 and that the only way in which foreign proceedings can be validly served in Russia is via the Russian Ministry of Justice. They said that this was not properly explored in September 2023 and that the desire to avoid delay was not a sufficient reason to justify service by alternative means. They also said that one of the factors relied on as

justifying service by alternative means was that the Claimants intended to apply for injunctions, but the application later made to Butcher J for notification and freezing injunctions did not relate to all the relevant Defendants, and was in any case dismissed by him.

567. These were not the only points made, but they are at the heart of what was said by these Defendants. I do not accept the Defendants' submissions. At the hearing in September 2023 I had in mind Foxton J's judgment in *M v N* [2021] EWHC 360 (Comm). Foxton J set out the types of situations where service by alternative means had been regarded as justified, at [9]. This list includes cases where expedition was appropriate. I was told in September 2023 that the case was urgent and was likely to require expedition, primarily because of Mr Magomedov's incarceration. I later ordered expedition, on 25 April 2024. This was at the application of the Claimants, but it was not opposed by any of the Defendants.

568. FESCO made two additional points: that the risk of dissipation by FESCO was overstated, and that the Court should have been told that Mr Severilov was not FESCO's authorised representative for service purposes. As already explained, I would have permitted service by alternative means in any event, and it is apparent that the alternative means used by the Claimants succeeded in bringing the proceedings to FESCO's attention.

569. I therefore do not consider this aspect of the presentation made to me in September 2023 to be materially unfair or deficient.

## R: CLAIMANTS' ALTERNATIVE APPLICATIONS [570]-[571]

570. The Claimants made alternative applications for the re-grant of permission, if either (i) service out of the jurisdiction or (ii) service by alternative means were set aside for failure to make a fair presentation.

571. Strictly, these alternative applications do not arise, because the Claimants have failed on other bases. However, for the avoidance of doubt:

(1) I consider the failures in respect of the presentation in September 2023 in relation to the alleged NCSP conspiracy so significant that I would not have re-granted permission.

(2) This is also the position in relation to the separate criticisms made by Ms Mammad Zade. I consider the Claimants' failings here less significant than those relating to the NCSP conspiracy, and I might well have been inclined to take a different course if the Claimants had at least been frank at the hearing in November 2024. 'Confess and avoid' is always the best approach, in such circumstances. However, as I have commented above, I considered that Mr Bushell's Seventh Witness Statement still did not explain matters fully and candidly.

(3) The issue does not arise in relation to service by alternative means on any other Defendant.

## S. FOREIGN ACT OF STATE [572]-[573]

572. The fact that the Claimants' case in relation to the alleged NCSP conspiracy involved the Russian State makes it necessary to refer to the foreign act of state doctrine. At various points prior to the hearing, Transneft had indicated an intention to raise this. The Claimants therefore briefly addressed the doctrine in their skeleton argument for the November 2024 hearing. In the event, however, Transneft's case on this was confined to two sentences in its skeleton argument, which were not pursued in oral submissions.

573. If I had otherwise found in the Claimants' favour, I would have considered it necessary to consider this point. That would have involved inviting Transneft to make submissions, and inviting Mr Dougherty KC to expand in oral submissions on the arguments foreshadowed in his skeleton argument. As matters stand, this has not been required and I will not address the application of the doctrine to the facts alleged in the RAPOC.

## T: OVERALL CONCLUSIONS [574]-[584]

### T1: NCSP Conspiracy [574]-[576]

574. The unlawful act conspiracy and other claims in relation to the alleged NCSP conspiracy fail, on the basis that there is no serious issue to be tried against either Transneft or Ms Mammad Zade.

575. None of the jurisdictional gateways are available to the Claimants.

576. I would in any event have set aside service out of the jurisdiction, in respect of these claims, on the basis that the Claimants did not make a fair presentation in September 2023.

### T2: FESCO Conspiracy [577]-[583]

577. The unlawful act conspiracy claims in relation to the FESCO conspiracy fail as against TPG, Domidias, Felix, DP World, FESCO, Mr Garber and GHP, on the basis that the claims have no real prospect of success and/or there is no serious issue to be tried as against these Defendants.

578. There are serious issues to be tried in respect of the unlawful act conspiracy claims in relation to the FESCO conspiracy as against Halimeda, Ms Mammad Zade, Mr Rabinovich, Ermenossa, Mr Kuzovkov, Mr Severilov and ROSATOM.

579. The only FESCO Defendants in relation to whom the Claimants did not need permission to serve out of the jurisdiction were TPG and Mr Garber.

580. None of the jurisdictional gateways are available to the Claimants against any of the Defendants against whom I have found there is a serious issue to be tried, i.e. Halimeda, Ms Mammad Zade, Mr Rabinovich, Ermenossa, Mr Kuzovkov, Mr Severilov or ROSATOM. Nor would one have been available against Domidias, Felix, DP World, FESCO or GHP.

581. I would anyway have stayed the FESCO conspiracy claims against all those Defendants in respect of whom I have found a serious issue to be tried, in favour of Cyprus, i.e. Halimeda, Ms Mammad Zade, Mr Rabinovich, Ermenossa, Mr Kuzovkov, Mr Severilov and ROSATOM. This would also have applied as regards Domidias, Felix, DP World, FESCO and GHP, if I had found a serious issue to be tried as against any of them.

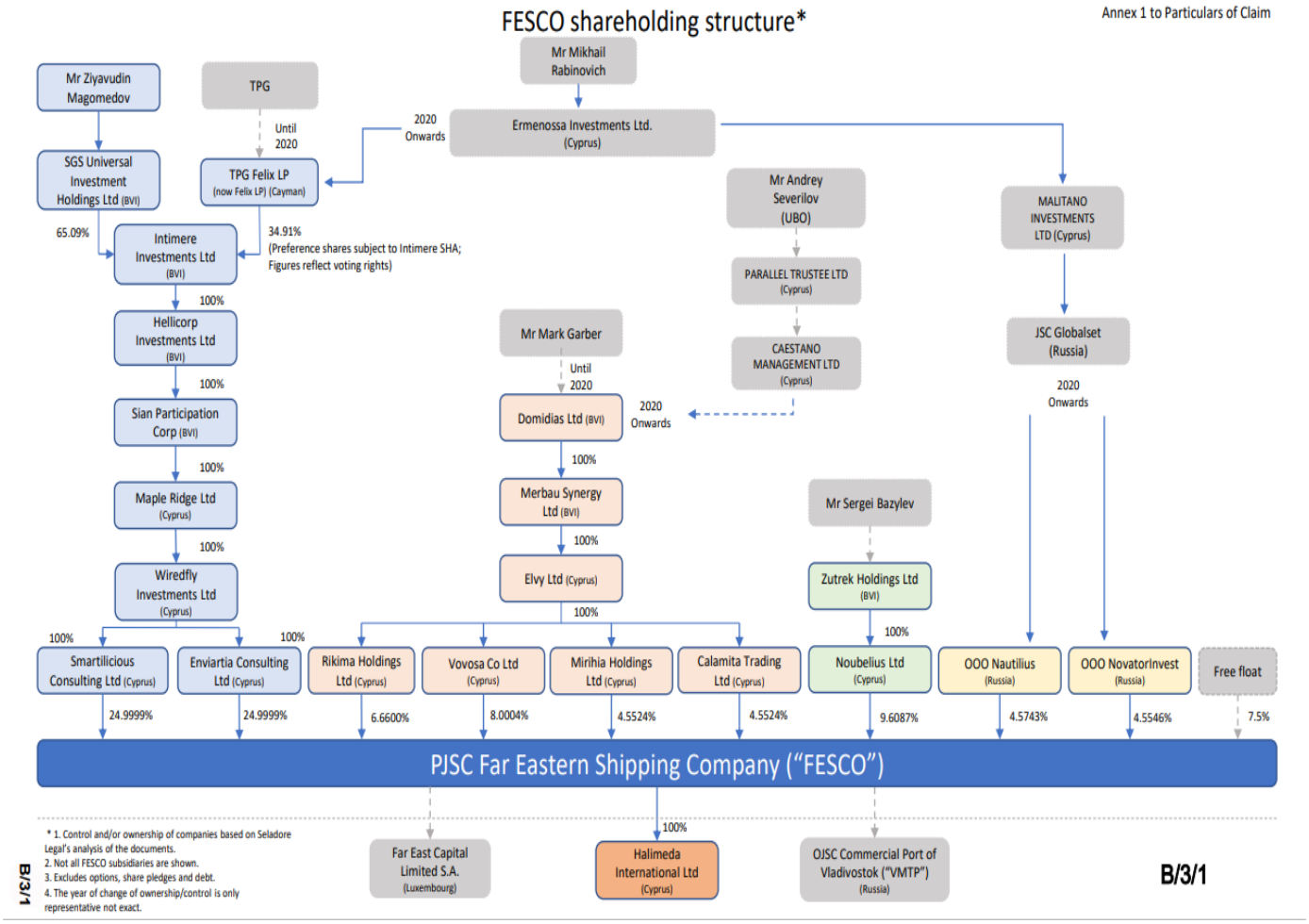
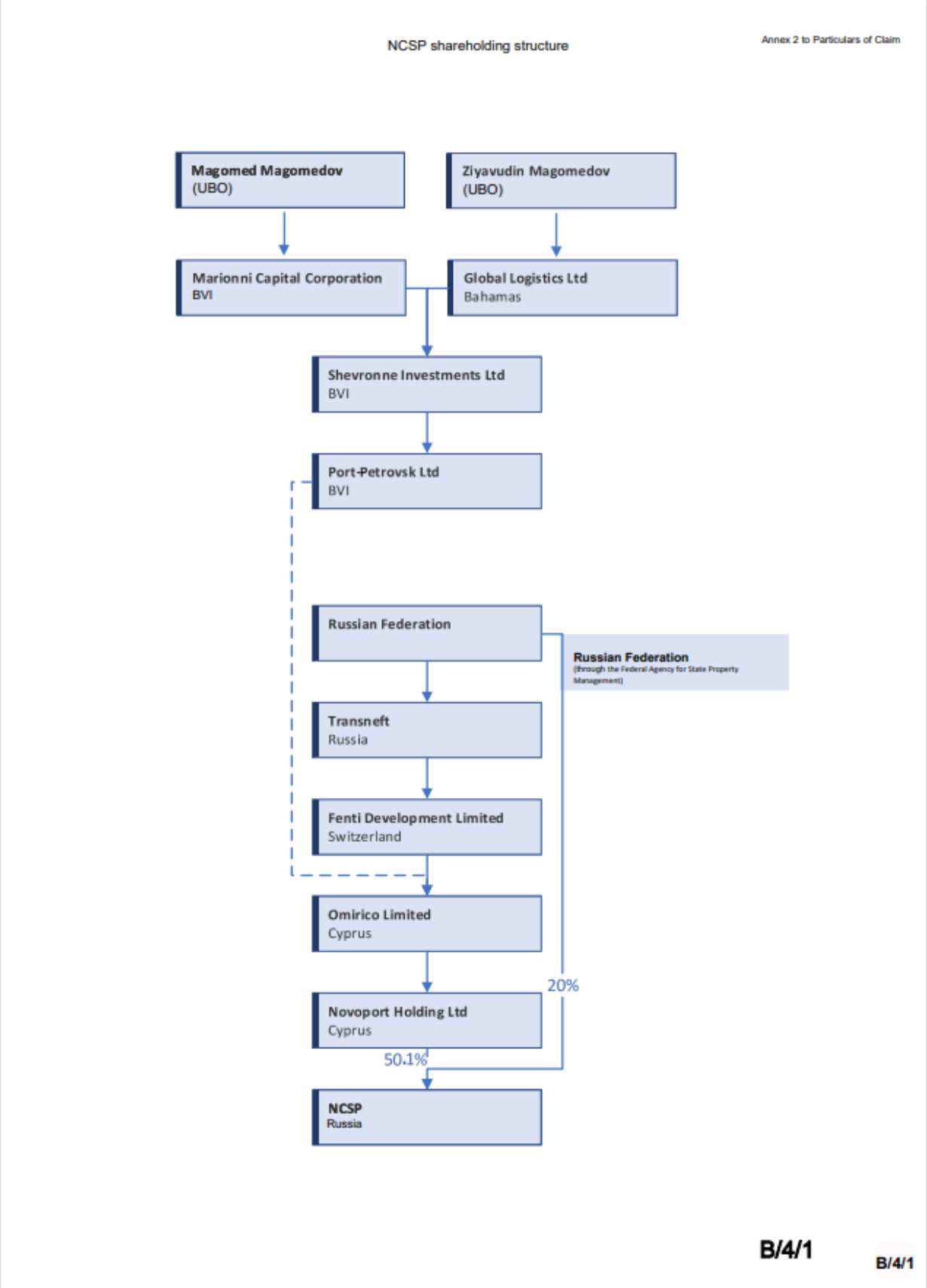
582. If there had also been a real prospect of success or a serious issue to be tried as against TPG, I would have considered the position having sought further submissions.

583. In relation to Ms Mammad Zade, I would anyway have set aside the extension to the period of validity of the claim form, granted by Jacobs J on 22 January 2024, and the permission to serve by alternative means, granted by me on 17 May 2024.

## T3: Other claims [584]

584. The Claimants' other claims also fail.

# Annex 1: FESCO Shareholding Structure



# Annex 2: NCSP Shareholding Structure