Neutral Citation Number: [2018] EWHC 369 (Comm)

Case No: CL-2013-000683

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 28 February 2018

Before :

THE HON. MR .JUSTICE PICKEN

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Between :

(1) KAZAKHSTAN KAGAZY PLC
(2) KAZAKHSTAN KAGAZY JSC
(3) PRIME ESTATE ACTIVITIES KAZAKHSTAN LLP
(4) PEAK AKZHAL LLP
(5) ~~PEAK AKSENGER LLP~~
(6) ASTANA-CONTRACT JSC
(7) PARAGON DEVELOPMENT LLP

Claimants

- and -

(1) BAGLAN ABDULLAYEVICH ZHUNUS (formerly BAGLAN ABDULLAYEVICH ZHUNUSSOV)
(2) MAKSAT ASKARULY ARIP
(3) SHYNAR DIKHANBAYEVA — **Defendants**

HARBOUR FUND III LLP — **Additional Party**

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Robert Howe QC, Jonathan Miller and **Daniel Saoul** (instructed by **Allen & Overy LLP**) for the **Claimants**
David Foxton QC and **Anna Dilnot** (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Defendants**
Tim Akkouh (instructed by **Byrne & Partners LLP**) for the **Additional Party**

Hearing dates: 8, 9 and 12 February 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR. JUSTICE PICKEN:

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Introduction

1. This judgment follows on from the substantial judgment (the 'Judgment') which I handed down on 22 December 2017 ([2017] EWHC 3374 (Comm)) after the lengthy trial which took place between April and July 2017. I decided on that occasion that the Claimants were entitled to judgment against Mr Arip and Ms Dikhanbayeva as regards each of the PEAK, Astana 2 and Land Plots Claims and that what this means in financial terms would need either to be agreed or to be determined at a further hearing along with other consequential issues such as currency of judgment, interest, release of security for costs, interim payment on account of damages, costs and stay of execution. These issues and, as will appear, certain other issues were addressed at a consequentials hearing which took place over 2½ days on 8, 9 and 12 February 2018.

2. This further judgment is itself substantial. This is because there are over thirty issues which I need to address and certain of them, specifically an issue concerning the 2014 Co-Operation Agreement (see the Judgment at [346], [351] and [352]), a question relating to appropriate currency and the topic of interest, involve disputes running to tens (if not hundreds) of millions of US Dollars (or KZT equivalent). There were, in addition, well over eighty authorities placed before me for the purposes of the consequentials hearing.

3. Before me at the consequentials hearing, Mr Howe QC (leading Mr Miller and Mr Saoul) continued to act for the Claimants. Mr David Foxton QC had, however, since the Judgment been instructed on behalf of Mr Arip and Ms Dikhanbayeva (leading Ms Dilnot), and Mr Tim Akkouh also appeared on behalf of the Additional Party, Harbour Fund III LPP ('Harbour'). I shall come on to explain about Harbour's involvement later when dealing with what was ultimately agreed between the parties concerning the destination of monies paid in satisfaction of the judgment or by way of costs.

Quantum

4. Although in the lead-up to the consequentials hearing it appeared as though there might not be agreement between the quantity surveying experts (Mr Tapper and Mr Jackson), happily by the time of the hearing the relevant calculations had been agreed subject to a point concerning applicable rates. Notwithstanding this, a number of issues concerning quantum need to be considered.

Rates

5. As to that (rates) point, what Mr Howe described as *"a question of clarification"* or *"a question of principle"* arises. This stems from the fact that, in reaching conclusions concerning the appropriate rates to be used in assessing the value of work which was carried out and for which credit should be given by the Claimants in arriving at the appropriate level of damages due to them from Mr Arip and Ms Dikhanbayeva, the Court rejected the approach to rates which was adopted by Mr Jackson, Mr Arip's and Ms Dikhanbayeva's expert, in favour of the approach adopted by Mr Tapper, the

Claimants' expert, but in certain respects with adjustments as described in the Judgment.

6. Specifically, as helpfully pointed out by Mr Foxton: the Court adopted Mr Tapper's *"services/utilities"* figure which was higher than Mr Jackson's (see the Judgment at [259]); the Court took the middle figure for foundations ([261]); the Court adopted Mr Tapper's figure for the warehouses on the basis that he was right to proceed on the basis that the Loging contract included some of the *"add-ons"* which Mr Jackson had identified but without the deduction Mr Tapper had made ([263]-[264]) and with certain *"add-ons"* ([265]); the Court adjusted both expert's evidence on *"other buildings"* ([266]); on *"earthworks"* the Court used Mr Tapper's estimate for transportation distance but rejected Mr Tapper's evidence on labour rates ([272]), his plant rates ([274]) and as to Akzhal-2 ([277]-[278]); the Court held that Mr Jackson's comparables were not reliable ([275]); the Court accepted Mr Jackson's evidence as to the height of the Akzhal-2 embankment ([277]) but not at Aksenger ([293]); the Court accepted Mr Jackson's evidence as to what drainage he saw at Akzhal-2 and works to the Aksai river but arrived at its own valuations ([280]-[281]); the Court accepted Mr Tapper's 17% overhead/profit rather than Mr Jackson's 15%, and also accepted Mr Jackson's 5.7% contingency ([282]); the Court did not accept Mr Jackson's evidence of the extent of earthworks at Aksenger ([290]) and adopted Mr Tapper's valuation approach but required a revision of rates ([291]); and the Court noted Mr Jackson's correction of his evidence regarding the road and drainage at Aksenger ([295-297]) and rejected his evidence on a centralised locking system ([298]) but upheld his evidence on other railway work ([300]).

7. The Court's intention was that Mr Tapper would re-calculate in line with the adjustments identified and that, hopefully, Mr Jackson would then be in a position to agree the revised figures. Mr Tapper's carrying out of this exercise has, however, led to a somewhat unexpected result, in that in certain cases Mr Tapper's approach (with the adjustments required by the Court) has led to higher valuations than Mr Jackson had himself put forward at trial. As Mr Howe put it, *"having turned the crank and done the calculations"*, this is the consequence. It is the Claimants' position that, in these circumstances, Mr Jackson's valuations ought nonetheless to be adopted. As Mr Foxton put it, the Claimants invite the Court to treat Mr Jackson's valuations as representing *"some form of forensic cap on the value"* which should be used for credit calculation purposes.

8. In order to illustrate the point, Mr Tapper prepared revised calculations of the value of the construction work done at each of the PEAK sites and at the Astana site on two bases. Position 1 comprised the valuations arrived at without having regard to any 'Jackson cap', whilst Position 2 gave valuations which in certain respects (where Mr Tapper's adjusted valuation is higher than Mr Jackson's valuations) used Mr Jackson's valuations rather than Mr Tapper's adjusted valuations. The difference between Positions 1 and 2 is a little over US$ 3 million. In context, therefore, the dispute on this issue is not vast, although it is hardly insignificant.

9. It was Mr Howe's submission that Mr Tapper's Position 2 valuations should be preferred. He submitted that it was unlikely that the Court intended that Mr Tapper's adjusted rates would lead to higher valuations than those put forward by Mr Jackson, whose approach regarding rates was rejected in the Judgment. He submitted, indeed, that it would be perverse for the result of the recalculation exercise to be even more

favourable to Mr Arip and Ms Dikhanbayeva than the position which they advanced at trial in reliance on Mr Jackson's evidence. Mr Howe highlighted, in this respect, how in the Judgment at [268] I stated I was *"left in the position which Mr Twigger contemplated I might find myself in, which is that …the right rates lie 'somewhere in between the Jackson and Tapper rates'"*. Mr Howe suggested that it cannot have been the Court's intention that the ultimate outcome would be to lift any particular set of rates above those which Mr Jackson had put forward.

10. I cannot agree with Mr Howe about this. As I put to him during the course of his submissions, having rejected Mr Jackson's approach, I regard it as wrong in principle to allow Mr Jackson's valuations to operate as some sort of ceiling. As Mr Foxton put it when he came on to make his submissions, I made findings as to the correct methodology to be adopted, deciding that Mr Tapper's methodology was the right one and not Mr Jackson's, and in such circumstances it cannot be right that any reliance is placed on Mr Jackson's approach, whether as a cap or otherwise, since this would entail reliance being placed on the very evidence which I have decided should not be relied upon. Mr Foxton was plainly right about this. Whether it was to be expected that Mr Tapper's recalculations would produce in some respects higher valuations than those of Mr Jackson is nothing to the point. What matters is that Mr Tapper has done the exercise which I envisaged he would perform. It is that exercise which I have previously determined is the appropriate exercise to undertake. It follows that it is the result of that exercise which should be reflected in the credits which need to be applied. To adopt any different approach would be to act other than in accordance with what the Court has previously decided.

11. Furthermore, as Mr Foxton went on to explain, by reference to the updated valuation prepared by Mr Tapper, since it is not even the case that Mr Tapper's adjusted rates are in every respect higher than Mr Jackson's rates, if Mr Howe's submission were to be accepted, it would mean using different rates for the same work being done in the same place at the same time for some parts of the overall calculation and not for others. That would be neither logical nor principled, as well as inconsistent with what I have previously decided.

12. It follows that my decision is that the appropriate rates to apply when performing the relevant calculations are Mr Tapper's rates as adjusted in accordance with the Judgment without regard to Mr Jackson's rates. In other words, the relevant calculations are Mr Tapper's Position 1 calculations rather than his Position 2 calculations.

Steel

13. As to steel, the point here arises in the context of the Astana 2 Claim, specifically whether credit ought to be given for certain steel which was left at the Astana 2 construction site but was removed and sold by the Claimants. The relevant paragraphs in the Judgment are [330] and [331]. In the latter, in particular, having referred to certain emails which Mr Werner was asked about in cross-examination, I went on to say this:

> *"Mr Werner went on to describe how the steel had been sold since these proceedings were started, but he was insistent that he did not know how much was received for it. Mr Twigger submitted that, in the circumstances, since credit ought to be given in*

respect of the steel and since the best evidence as to its value is US$ 30 million, that is sufficient to dispose of the Astana 2 Claim which is, after all, valued at somewhat less, namely US$ 13.45 million. I agree with Mr Howe, however, that it is unclear how the emails which Mr Werner was asked about can really be thought to be reliable evidence of anything, in particular whether as to the quantity of steel on the Astana 2 site or its value or who supplied it. I am, accordingly, not disposed to place any reliance on those emails. The more so, in circumstances where, as Mr Howe went on to point out, on any view, their contents are not readily reconciled with the fact that GS received in net terms US$ 6.7 million, and not US$ 30 million or more."

14. Mr Foxton observed, however, that there was no finding in the Judgment that, even if there were evidence before the Court as to the amount for which the steel was in fact sold (or indeed the amount of steel), no credit for it should be given. He submitted that, in view of the fact Mr Werner accepted that there were records relating to the sale, those records ought now to be disclosed pursuant to CPR 31.11 and that this should be done before the Court *"proceeds to give a quantum determination on Astana 2"*. He contended that the Court should not proceed to decide quantum in the knowledge that there is additional credit to be given since any lack of relevant evidence on this matter is not Mr Arip's and Ms Dikhanbayeva's fault but that of the Claimants through their failure to comply with their disclosure obligations. It was because of this, Mr Foxton explained, that on 26 and 30 January 2018 Cleary Gottlieb wrote to Allen & Overy asking that the Claimants disclose the documents relating to the sale of the steel and that, subsequently on 2 February 2018, an application for specific disclosure was issued. It was Mr Foxton's submission that, in the circumstances, any determination of the quantum of the Astana 2 Claim should await the provision of such disclosure by the Claimants.

15. There is absolutely no merit in this position. As Mr Howe rightly pointed out, the issue concerning the value of the steel was not left open in the Judgment but resolved at [331]. In arriving at the determination which I did, I considered the evidence which was before the Court, specifically the emails involving Mr Khabbaz to which I referred at [331], and the submissions advanced by Mr Twigger (then acting for Mr Arip and Ms Dikhanbayeva) in reliance on those emails. I decided that I was unable to place any reliance on the emails. In such circumstances, it is now simply too late for Mr Arip and Ms Dikhanbayeva to be seeking disclosure in the way that they are. If such disclosure is thought to be necessary at this stage, it should have been sought much earlier. It is to be borne in mind, in this context, that the cross-examination of Mr Werner on the topic of steel took place on Day 7 of a 13-week trial. It would have been open to Mr Arip and Ms Dikhanbayeva, therefore, to have sought disclosure at a much earlier stage – indeed, more conventionally, before the trial had even started. To wait some nine months after Mr Werner was cross-examined, however, and to make an application only after judgment has been handed down, is obviously too late.

16. Accordingly, my conclusion at [331] of the Judgment stands and no credit in respect of steel is to be given.

Penalties and Interest: the 2014 Co-Operation Agreement

17. This topic is a substantial one since it would appear, based on a schedule prepared by Mr Howe, that almost US$ 80 million (or KZT equivalent) turns on it.

18. I dealt with the Claimants' claim for Penalties and Interest in the Judgment at [339] to [357]. I decided that the claim succeeded. In arriving at that decision, I addressed the parties' rival contentions in detail. These included the question of whether the Claimants had made the relevant payments or whether there are liabilities which will cause them to suffer loss in the future, and whether such payments or liabilities had been caused by the Defendants' wrongdoing. These were the issues which I identified at [342] and which I went on to address in the paragraphs which followed: at [343] to [349] and at [350] to [356] respectively.

19. It is important to note that, in dealing with the Penalties and Interest issue, I did not leave anything open. As I explained in the Conclusion at the end of the Judgment, at [564(2)], the parties needed *"to try and agree the relevant calculations"*; in other words, I was expecting the figures to be agreed. Subject only to this, the Penalties and Interest issue had been determined. I was not expecting that it would be open to either side to seek to revisit the issue. There had been a trial, a very long one at that, the parties had adduced their evidence and made their submissions, and I had reached my conclusions, based on that evidence and those submissions, as set out in detail in the Judgment. Indeed, the Order which was drawn up (and agreed between the parties) immediately after the handing down of the Judgment provided in paragraph 1 unequivocally as follows:

"There be judgment for the Claimants against the Second and Third Defendants, the quantum of which is to be determined pursuant to the findings and rulings in respect of quantification given in the Judgment of Mr Justice Picken dated 22 December 2017."

It was, in the circumstances, somewhat surprising to learn in the lead-up to the consequentials hearing, when reading Mr Foxton's skeleton argument, that Mr Arip and Ms Dikhanbayeva would be inviting the Court to re-open the Penalties and Interest Issue.

20. Mr Foxton drew attention to the fact that in the Re-Re-Amended Particulars of Claim, at paragraph 36(g) to be more precise, the case which was advanced was that, by reason of the Defendants' conduct, KK JSC, PEAK and Peak Akzhal had become liable to Alliance Bank for KZT 7.232 billion in penalties and KZT 2.72 billion in default interest. Mr Foxton highlighted how it was said that, insofar as KK JSC, PEAK and Peak Akzhal were able to mitigate that loss, credit would be given, the implication being that that liability or contingent liability remained and had yet to be mitigated – and so that no contingency had occurred which had discharged the liability.

21. Mr Foxton acknowledged that, in deciding at [352] to [357] that Mr Arip and Ms Dikhanbayeva are liable in respect of such liabilities incurred by KK JSC, PEAK and Peak Akzhal to Alliance Bank, the Court should be taken as having rejected a submission that the claims to interest and penalties had been *"relinquished"* pursuant to the 2014 Co-operation Agreement by the Agreement because the mutual release was stated to take effect only when the KK Group entities had performed all their relevant obligations which included an obligation to pay over the fruits of a judgment or settlement in respect of the PEAK Claim. It is worth in this regard setting out the relevant part of the key paragraph, [252], which states as follows:

"… although Mr Howe was concerned at one stage that Mr Twigger might seek to argue (as Mr Thompson had implied in his first report) that the 2014 Co-Operation Agreement entailed the KZT 7.232 billion by way of penalties and the KZT 2.72 billion by way of default interest being written off by Alliance Bank, that was not ultimately an argument which Mr Twigger put forward other than, perhaps, in a footnote and in something of a throwaway reference to penalties and default interest having been 'relinquished' pursuant to the 2014 Co-Operation Agreement. That is, however, an argument which does not work since, as Mr Howe pointed out, the clause providing for a mutual release between the KK Group and Alliance Bank, Clause 6.1, was 'Subject to the complete performance by all relevant KK Group entities of their obligations under clauses 2.1 to 2.10 … together with complete performance by Alliance of its obligations under clauses 2.12 to 2.16 …', and those provisions required the Claimants, 'In the event that any one or more of the KK Claimants is awarded judgment or reaches a settlement…in respect of the PEAK Claim' to pay over the fruits of any such judgment or settlement. Since there has to date been no judgment or settlement of the PEAK Claim, and so there has been no payment of any proceeds to Alliance Bank, it necessarily follows that there cannot have been any release pursuant to Clause 6.1."

Mr Foxton took no issue with this analysis, whether in dealing with the present topic or when seeking permission to appeal. Indeed, given the fact that the argument had only been advanced at trial by way of a footnote, this is not especially surprising. His point at the consequentials hearing was a different point altogether. It was that, had it been appreciated at the time of the trial that Alliance Bank had lost its right to recover penalties and interest, this would have constituted a complete answer to any attempt to recover in respect of these amounts – a submission which he made based on English law principles which, he suggested, would be unlikely to be different as a matter of Kazakh law (there being no Kazakh law before the Court on the issue). Taking this proposition as his starting point, Mr Foxton went on to explain that evidence had recently emerged which indicates that Alliance Bank were no longer entitled to be paid penalties and interest. Accordingly, he submitted, the *"issue of quantum"* having *"been expressly left open by the Judgment"*, *"the appropriate course is for the Court to find that the sums due by Ds to C2 – C4 in respect of the default interest and penalties is nil"*. Alternatively, Mr Foxton suggested, the Court should order a further hearing on this issue with appropriate directions for disclosure. In the further alternative, Mr Foxton suggested, if the Court were to take the view that there is sufficient uncertainty as to the position, then, the appropriate relief for the Court to grant would be a declaration entitling KK JSC to an indemnity in respect of such liability as it may have to Alliance Bank with liberty to apply.

22. The evidence on which Mr Foxton relied was evidence contained in a witness statement made by Ms Yvonne Jefferies, a partner in Byrne & Partners LLP, Harbour's solicitors, and put before Knowles J on 19 January 2018 in an *ex parte* hearing at which Harbour sought (and obtained) an order varying a freezing order granted by HHJ Mackie QC in November 2013. As I say, I shall come back to Harbour later. What matters for present purposes, however, is that Mr Foxton explained that Ms Jefferies' evidence dealt with matters about which the Defendants had no awareness at the time of the trial and which, Mr Foxton suggested, *"are of central importance to the issue of quantum and which therefore must be taken account of when the Court is assessing quantum"*. In particular, Ms Jefferies referred

to how the 2014 Co-Operation Agreement not only required KK Plc, KK JSC, PEAK and Peak Akzhal to pay Alliance Bank (now Forte Bank) certain sums in the event that they were successful in these proceedings, but additionally required Alliance Bank to pay what was described as a 'Service Fee'. As to the former, Clauses 2.1 and 2.2, in particular, provide:

"2.1 In the event that any one or more of the KK Claimants is awarded judgment or reaches a settlement (or settlements in aggregate if separate settlements are reached with any of the defendants individually) in respect of the PEAK Claim the value of which exceeds KZT5.4 billion (or equivalent in another currency at the prevailing exchange rate at the time), the KK Parties shall pay to Alliance the sum of KZT5.4 billion (the 'Court Payment') within 14 days of receiving such judgment or settlement sum or sums.

2.2 In the event that any one or more of the KK Claimants is awarded a judgment or reaches a settlement (or settlements in aggregate if separate settlements are reached with any of the defendants individually) in respect of the PEAK Claim of between KZT2.7 billion and KTZ5.4 billion (or equivalent in another currency at the prevailing exchange rate at the time), the KK Parties shall pay to Alliance all of such sum up to a maximum of KZT5.4 billion within 14 days of receiving such judgment or settlement sum or sums."

As to the latter, the relevant provision is Clause 2.15 which states:

"KK shall provide to Alliance the consultation services in relation to locating of documents and information, described in clause 3.1 below (the 'KK Services'). As consideration for the KK Services, Alliance shall pay to KK a 'Service Fee' of US$2,000,000. The Service Fee shall be paid in equal monthly instalments of US$111,111 over a period of 18 months, with the first such instalment being made within 15 (fifteen) working days from the date of this Agreement."

23. Ms Jefferies went on to state that, despite various requests for payment, Alliance Bank defaulted on the last two instalments of the 'Service Fee' and that, as a result, according to Ms Jefferies at least, *"under the Cooperation Agreement that Forte's entitlement to receive any payments as a result of success in the London proceedings ceased"*. The relevant provision in the 2014 Co-Operation Agreement for these purposes would appear to be Clause 4.8, which provides:

"In the event that Alliance commits a breach of this clause 4, clause 2.12 to 2.16 or clause 5 (to the extent such breach of clause 4 is material and not remedied by Alliance within a reasonable time following notification by the KK Parties), the provisions of Clauses 2.1 to 2.10 of this Agreement shall cease to have effect."

24. Accordingly, Mr Foxton submitted, Alliance Bank having defaulted in paying the 'Service Fee' and having thereby ceased to be entitled to be paid any share of the proceeds of these proceedings, it follows that there cannot be the liabilities which the Claimants were saying at trial they were under. Specifically, Mr Foxton was highly critical of Mr McGregor, who gave evidence concerning penalties and interest at trial, for not mentioning the fact that Alliance Bank had failed to pay the 'Service Fee' or that Harbour had taken the position as against Alliance Bank that Clauses 2.1 to 2.10 of the 2014 Co-operation Agreement had ceased to have effect.

25. Mr Foxton went on to submit in this context that, in further consequence of Alliance Bank's default as regards the 'Service Fee', the obligations which KK Plc, KK JSC, PEAK and Peak Akzhal were under by virtue of Clauses 2.1 and 2.2 of the 2014 Co-Operation Agreement ceased and those clauses (along with Clauses 2.3 to 2.10) no longer operated as condition precedents to the release contained in Clause 6.1, which is in these terms:

"Subject to the complete performance by all relevant KK Group entities of their obligations under clauses 2.1 to 2.10 (as the case may be) and clause 3 of this Agreement and the KZ Settlement Agreement (in respect of any claims that might be brought by Alliance), together with complete performance by Alliance of its obligations under clauses 2.12 to 2.16 and clauses 4 and 5, (in respect of any claims that might be brought by KK Group) the parties waive and release all and any rights and claims (including as to interest and costs) in respect of all causes of action, demands, liabilities and set-offs howsoever and wheresoever arising that the parties (or any company or individual associated with any one or more of them) may have now or in the future against each other, their current and former employees, agents, members, directors or officers, including former or current employees, agents, members, directors or officers, arising out of or in connection with the KK Group's Debt and the Guarantee, whether or not such claims are known to or are within the present contemplation of the parties."

26. I am quite clear that this is not a matter which it would be appropriate to determine one way or the other at what is, after all, a consequentials hearing. Were it to be determined, there would need to be proper preparation, including in all probability, as Mr Howe suggested, disclosure directed to the issue since the issue inevitably requires some further factual inquiry in order to enable the legal point to be considered in its proper context. The first of Mr Foxton's proposed courses of action is not, therefore, viable in practical terms. Even this assumes, however, that Mr Foxton were in a position to overcome Mr Howe's prior objection that it is now far too late to be permitting such arguments to be advanced, the Judgment having followed a trial on liability and quantum and having addressed each and every issue which was raised leaving only certain calculations (together with the currency issue: see [565]) to be addressed.

27. I have concluded that Mr Foxton is in no position to overcome this objection. As I have explained, this is not a case where the Judgment left open any issue concerning Penalties and Interest other than the matter of calculation. It is not, therefore, a case where there can be said to be any error or misunderstanding which needs to be corrected and which it is appropriate to raise with the trial judge to allow him or her an opportunity address the point.

28. Mr Foxton cited in this context ***Spice Girls Limited v Aprilla World Service BV*** 20 July 2000, 2000 WL 1212985, in which Arden J (as she then was) had this to say at [9]:

"I now turn to set out my conclusions on these submissions. At the outset I observe that counsels' submissions conflate two issues, first, whether the court can and should review its earlier finding of fact and second, whether the result of the case would be different if the admitted fact had been stated in substitution for the fact as found. As to the first issue, it is clear that the court has jurisdiction to correct an error of material

fact before the order is drawn (see for example Stewart v Engel [2000] 3 All ER 518, The Times 26 May 2000; Pittalis and others v Sherefettin [1986] 1 QB 868; [1986] 2 All ER 227; Charlesworth v Relay Roads Ltd [2000] 1 WLR 230). It inevitably happens with complex cases that from time to time a fact which is material is overlooked. But the jurisdiction to correct an error is to be exercised cautiously and sparingly, and the question of review should be raised as promptly as possible. An application to the court to vary a finding of fact is not to be encouraged as it may lead to groundless applications. In this instance, as I have said, Mr Mill's approach was not to apply to the court to review its finding of fact but rather to use it as a basis for seeking permission to appeal. In my judgment, an appeal is not the appropriate course where there are errors in judgments which can be corrected by the court which conducted the trial. To leave such matters to an appeal means further delay, uncertainty and costs, which is not in the interests of the litigants. The trial judge is in a strong position to consider the effect of the error in the context of the entire case. Moreover, since there is no doubt now that AWS intended to make the concession, in my judgment it would not be just (see Civil Procedure Rules 1998 r 1.1(1)) for me not to review the finding of fact and accordingly I propose so to do by substituting, for my finding that AWS did not sell Sonic scooters, a finding that AWS distributed and/or sold such scooters outside Italy pursuant to its standing arrangements with Aprilia. There is no evidence as to whether or not AWS made any profits from these activities."

This was a case, however, as the passage makes clear, and as explained at [8], where there was an error on the part of the judge when preparing the judgment. It was not a case such as the present where the Court has made no error but one of the parties is seeking to re-open an issue based on evidence which has come to light after the judgment has been handed down. That is a very different situation.

29. Nor is this a case like ***Compagnie Noga D'Importation ET D'Expropriation SA v Abacha*** 2001 WL 606396, where Rix LJ (but sitting in his capacity as the trial judge) was faced with a request that he reconsider his judgment (a judgment arrived at after a trial lasting some six months) on the basis that he was said to have *"got the answer wrong"* (see [44]). As Rix LJ explained, the right course, in such circumstances, is to appeal. As he put it at [47]:

"I do not wish to say anything against the usefulness of the reconsideration jurisdiction, within its proper limits. I have made use of it myself. However, it is in the nature of the legal process that, once judgment has been rendered, analysis thereafter becomes clarified and refined, and citation of authority is applied to the findings made at first instance so as to illuminate that clarification and refinement of analysis of which I speak. But that is the function of the appeal process. In my judgment, to grant this application that I reconsider my judgment would subvert the appeal process itself. In doing so, it would not answer the interests of justice, but would be the antithesis of justice according to law. There are of course cases where an error of fact or law may be too clear for argument. The best test of that is perhaps – but not necessarily – where the judge himself identifies the error which concerns him. In such a case, it is better that the error is corrected without imposing on the parties the need for an appeal. But no parallel to Noga's application has been cited to me. It is in my judgment wrong for a judge to be treated to an exposition such as would be presented to a court of appeal. If in such circumstances a judge should be tempted to open up

reconsideration of his judgment, an appeal would not be avoided, it would be made inevitable. Every case would become subject to an unending process of reconsideration, followed by appeal, both on the issue of reconsideration and on the merits."

30. As Rix LJ had earlier explained, when describing the circumstances in which it is appropriate to invite a judge to reconsider, the jurisdiction is limited to *"exceptional circumstances"*. He stated as follows at [41]-[43]:

"41. Nevertheless, in my judgment, I am bound by the decision in Stewart v. Engel, following the spirit, if not the letter, of the decision in Barrell in the light now of the requirements of the overriding principle, to regard the need for exceptional circumstances as a requirement for the proper exercise of the jurisdiction to reconsider a decision. If in Pittalis Dillon LJ is to be understood as saying by reference to Millensted that the discretion is a wide open one, unrestricted by the requirement of exceptional circumstances, then I would with respect feel bound to disagree. In my judgment the width or narrowness of the discretion was simply not in issue in Millensted. As for Pittalis, both Fox LJ and Dillon LJ accepted that the circumstances in that case were exceptional.

42. Of course, the reference to exceptional circumstances is not a statutory definition and the ultimate interests involved, whether before or after the introduction of the CPR, are the interests of justice. On the one hand the court is concerned with finality, and the very proper consideration that too wide a discretion would open the floodgates to attempts to ask the court to reconsider its decision in a large number and variety of cases, rather than to take the course of appealing to a higher court. On the other hand, there is a proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of the drawing up of an order. As Jenkins LJ said in In re Harrison's Share (at 276):

'Few judgments are reserved, and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae.'

43. Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary, or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."

31. Clearly, in view of these authorities, there is no justification in the present case to permit Mr Arip and Ms Dikhanbayeva to re-open the Penalties and Interest issue. There needs to be finality in litigation. This applies as much to high-value and complex litigation as it does to low-value and simple litigation. This was a trial which lasted a great deal of time and which resulted in a lengthy judgment which took a great deal of time and effort to prepare. The parties had a full opportunity to present

their respective cases. It is now too late to allow the unsuccessful party another bite of the cherry, even if that bite is apparently only being taken because of new information not previously known about by that party. It seems to me that the appropriate course, in the circumstances, is for Mr Arip and Ms Dikhanbayeva to seek permission from the Court of Appeal invoking, if they can, the *Ladd v Marshall* jurisdiction. If successful in that and if the Court of Appeal considers it appropriate, it may be that the matter will then be remitted to me to consider the new argument which is sought to be advanced. If that is what happens, then, so be it. What is not appropriate, in my view, is to re-open an issue which has already been decided based on the evidence and submissions which were deployed at trial simply because, in the period between the handing down of the Judgment and the consequentials hearing, something has come to light which gives the losing party a further argument. I repeat that this litigation, like other cases in every court in the country, must have some finality about it. Were it otherwise, the courts system could potentially descend into chaos.

32. It follows that the decision arrived at in the Judgment concerning Penalties and Interest must stand.

Credit as regards settlement with Mr Zhunus

33. It is agreed that credit amounting to US$ 3 million in respect of the settlement reached by the Claimants with Mr Zhunus needs to be given in calculating the amount due from Mr Arip and Ms Dikhanbayeva.

IFK's claim against Astana-Contract and Paragon

34. I dealt with the Astana 2 Claim in the Judgment at [305] to [338]. I addressed all of the arguments which were raised on Mr Arip's and Ms Dikhanbayeva's behalf, deciding that the Astana 2 Claim was established. Notwithstanding this, in the skeleton argument for the consequentials hearing it was stated that Mr Arip and Ms Dikhanbayeva *"have recently become aware"* that IFK's claim against Astana-Contract and Paragon *"may have been discharged as a matter of Kazakh law because the claims were not entered on the register of creditors"*. No detail was given in relation to this. Nothing was explained about how or when the awareness described was acquired. There was no elaboration on the Kazakh law which was said to operate. Despite this, it was suggested that *"there is sufficient uncertainty as to the position that the appropriate relief is to make a declaration"* entitling Astana-Contract and Paragon (or KK Plc as assignee) to an indemnity in respect of such liability as they may have to IFK *"with liberty to apply"*.

35. This is wholly unsatisfactory, and it is perhaps telling that, in his oral submissions, Mr Foxton explained that he was *"not in a position to bring forward any specific material that has come to my attention"*. I am quite clear that it is now far too late to allow such a case to be advanced. I dealt with the Astana 2 Claim, leaving nothing over for subsequent determination (save possibly in the event that the parties could not agree on figures). It is wholly unrealistic for it now to be supposed that the Court would be amenable to a wholly new argument to be advanced by Mr Arip and Ms Dikhanbayeva and, all the more so, given the complete lack of detail put forward in support of the submission that the Court should do so.

Percentage pro rata reduction: interest – the PEAK Claim

36. There is, lastly in the context of interest, a discrete issue concerning the PEAK Claim which needs to be considered. This is the suggestion made by Mr Foxton that there should be pro-rating of interest payable to Alliance Bank so as to ensure that what is recovered is properly attributable to the matters about which complaint was made in the PEAK Claim. Mr Foxton submitted that this was appropriate because it was accepted by the Claimants (and Mr Crooks, their forensic accountancy expert) that this should be done in relation to the Astana 2 Claim: see the Judgment at [345]. The Court was, accordingly, invited to express the value of the works as a percentage of the amount borrowed, and reduce any interest claim by that percentage.

37. I cannot accept that this would be appropriate. The argument now advanced is entirely new and is not the type of argument which it is open to a party to raise at a consequentials hearing because it is a substantive argument. I agree with Mr Howe that, if it had any merit, it is an argument which could, and should, have been raised during the trial so that it could be the subject of factual and expert evidence. It is simply too late to put it forward at this stage.

38. This, however, is not the only reason why, in my view, there is nothing in the point which is now (belatedly) raised since, in addition, as Mr Howe went on to explain, there is a material difference between the PEAK Claim, on the one hand, and the Astana 2 Claim, on the other. This is that, as is apparent from what I had to say in the Judgment at [345], the reason why there had to be an apportionment is because comparing the size of the Astana 2 Claim and the amount of the loan from DBK makes it obvious that an apportionment is required. The Astana 2 Claim, in short, represents only a small portion of the DBK loan. In contrast, the PEAK Claim exceeds the amount of the Alliance Loan, and so no apportionment is called for. That is why, despite the experts being agreed that there should be pro-rating as regards the Astana 2 Claim, it was not suggested at trial that this should be done as regards the PEAK Claim.

39. I am clear, in the circumstances, that there ought not to be a percentage *pro rata* reduction as regards penalties and interest in relation to the PEAK Claim.

Currency of judgment

40. As explained in the Judgment at [565], it was agreed that the issue concerning the appropriate currency of the judgment would be deferred to be dealt with when dealing with consequential matters. This, then, is an issue which, unlike certain others sought to be raised by Mr Foxton on Mr Arip's and Ms Dikhanbayeva's behalf, was intended to be dealt with at this juncture.

41. The Claimants' position is that the judgment should also be in US Dollars as regards the PEAK Claim and the Land Plots Claim as well as the Astana 2 Claim, whereas the submission made on behalf of Mr Arip and Ms Dikhanbayeva by Mr Foxton was that the appropriate currency ought to be KZT in all cases except that he accepted that US Dollars would be appropriate for part of the Astana 2 Claim. Although it is not altogether easy to be precise about the point, Mr Howe explained that the difference between the two positions is likely to be substantial, perhaps affecting the size of the overall recovery by as much as a third.

42. Mr Foxton submitted, in this context, that to adopt the Claimants' position would be to give them a windfall (and, indeed, Harbour also), in view of the fact that, in order to obtain the US Dollar amounts, the Claimants have converted KZT to US Dollars at a rate of US$1: KZT 129.126 (the average exchange rate between January 2006 and December 2009, the period over which they say they suffered loss), yet prior to 2015 the NBK devalued the KZT twice as against the US Dollar (on 4 February 2009 by 25% and on 11 February 2014 by around a further 19%) and, furthermore, Mr Thompson has confirmed that, between 1 January 2006 and 31 December 2016, the exchange rate moved from 133.38 KZT per US Dollar to 334.85 KZT per US Dollar meaning that the KZT depreciated by as much as 150% against the US Dollar over that period.

43. It was Mr Foxton's submission that, the Claimants being Kazakh companies which operate their businesses, in both practical and financial terms, in Kazakhstan and in KZT, and the causes of action on which they have succeeded being Kazakh law causes of action, any losses suffered as a result of the Defendants' activities were incurred in, and are properly measured in, KZT. Mr Foxton had in mind, when making this submission, the leading authority on the issue, ***The Despina R*** [1979] AC 685. In that case, Lord Wilberforce had this to say at page 697F-H:

"My Lords, in my opinion, this question can be solved by applying the normal principles, which govern the assessment of damages in cases of tort (I shall deal with contract cases in the second appeal). These are the principles of restitutio in integrum and that of the reasonable foreseeability of the damage sustained. It appears to me that a plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency which it is reasonably foreseeable he will have to spend."

44. Lord Wilberforce went on to consider certain objections which had been raised, beginning with the suggestion that the approach described by him would involve complicated inquiries. As to that, he stated as follows:

"I am not convinced of this. The plaintiff has to prove his loss: if he wishes to present his claim in his own currency, the burden is on him to show to the satisfaction of the tribunal that his operations are conducted in that currency and that in fact it was his currency that was used, in a normal manner, to meet the expenditure for which he claims or that his loss can only be appropriately measured in that currency (this would apply in the case of a total loss of a vessel which cannot be dealt with by the 'expenditure' method). The same answer can be given to the objection that some companies, particularly large multi-national companies, maintain accounts and operate in several currencies. Here again it is for the plaintiff to satisfy the court or arbitrators that the use of the particular currency was in the course of normal operations of that company and was reasonably foreseeable."

He then dealt with the point that it might result in two claimants *"who suffer a similar loss may come out with different sums according to the currency in which they trade"*, saying this:

"But if the losses of both plaintiffs are suffered at the same time, the amounts awarded to each of them should be equivalent even if awarded in different currencies: if at different times, this might justify difference in treatment. If it happened that the currencies of the two plaintiffs relatively changed in value before the date of judgment, that would be a risk which each plaintiff would have to accept. Each would still receive, for himself, compensation for his loss."

He concluded by observing as follows:

"I wish to make it clear that I would not approve of a hard and fast rule that in all cases where a plaintiff suffers a loss or damage in a foreign currency the right currency to take for the purpose of his claim is 'the plaintiff's currency.' I should refer to the definition I have used of this expression and emphasise that it does not suggest the use of a personal currency attached, like nationality, to a plaintiff, but a currency which he is able to show is that in which he normally conducts trading operations. Use of this currency for assessment of damage may and probably will be appropriate in cases of international commerce. But even in that field, and still more outside it, cases may arise in which a plaintiff will not be able to show that in the normal course of events he would use, and be expected to use, the currency, or one of several currencies, in which he normally conducts his operations (the burden being on him to show this) and consequently the conclusion will be that the loss is felt in the currency in which it immediately arose. To say that this produces a measure of uncertainty may be true, but this is an uncertainty which arises in the nature of things from the variety of human experience. To resolve it is part of the normal process of adjudication. ... ."

45. Both Mr Howe and Mr Foxton referred also to ***The Texaco Melbourne*** [1994] 1 Lloyd's Rep 473, specifically to the following passage in Lord Goff's judgment at page 479:

"Mr Boswood QC, for the department, recognised that, in cases of non-delivery of goods under a contract of carriage, the plaintiffs damages are assessed by reference to the market value of the goods at the time and place at which they ought to have been delivered. Even so, he submitted, the 'principle of mitigation' requires that the plaintiff will be deemed to be obliged to go out into the nearest available market and purchase replacement goods at the earliest available opportunity, and will not be able to recover by way of damages more than the price he would have to pay for those replacement goods. Here the nearest available market for replacement goods was Italy, where replacement oil would have had to be paid for in US Dollars. Accordingly, to make restitutio in integrum to the department in respect of the damages it had suffered by reason of non-delivery of its cargo, those damages should be assessed in US Dollars.

I feel bound to say at once that, assuming that this argument is prima facie well-founded, nevertheless there is a short answer to it on the facts of the present case. Here it is plain on the findings of fact that, if the department had indeed bought such a replacement cargo in Italy under a contract under which the price was payable in US Dollars, nevertheless in order to obtain those dollars the department, which carried on its business in Ghanaian cedis, would have had to expend cedis in order to acquire the US Dollars from the bank of Ghana. This being so, I find it impossible to distinguish this situation from that in The Folios [1979] AC 685 , in which your

Lordships' House held that the currency in which the French charterers felt their loss was not Brazilian cruzeiros, the currency in which they discharged their liability to the receivers, but French francs, the currency in which they carried on their business, and with which they purchased the necessary cruzeiros. Let it be assumed that, in the present case, the Ghanaian cedi had over the relevant period appreciated in value as against the US Dollar, I feel confident that any argument by the shipowners that the damages payable by them to the department should be assessed in US Dollars rather than in Ghanaian cedis would have been rejected on this ground."

46. Mr Foxton emphasised that in ***The Texaco Melbourne*** there had been a dramatic collapse in the value of the relevant currency (Ghanaian cedis) against the US Dollar between the date of loss (there, the date of the breach of contract) and the date of the arbitral award. At first instance, it was held by Webster J that the existence of the decline in the cedi was a factor to be taken into account when deciding on the appropriate currency in which to express the award. However, the House of Lords held (in agreement with the Court of Appeal) that when deciding what was the appropriate currency for the purposes of loss, fluctuations in the relevant currency between the date of loss and the date of judgment were not to be taken into account. Accordingly, the fact that as at the date of the relevant breach the claimant's loss of 7,937,014 cedis amounted to US$2,886,187 yet as at the date of the award this had fallen to $21,165 was immaterial.

47. As to the factors which pointed towards the currency of loss being cedis, these were identified by Lord Goff at page 478 as follows:

"I turn to the facts of the present case. There are a number of facts which point to the Ghanaian cedi as the currency in which the department felt its loss. First of all, the currency in which the department carried on business within Ghana was at the material time the cedi. Consistently with this, the department's bank accounts were maintained in cedis, as were its books and accounts. In particular, had the cargo been delivered by the shipowners at Takoradi, the department could and would have sold it on the market there to Ghanaian companies, and would have recovered payment in cedis. Second, by virtue of Ghana's stringent exchange control legislation, no person other than the bank of Ghana (a separate entity with its own legal personality, distinct from the state of Ghana and its government departments, including the department) was or is permitted to receive or own foreign currency. Accordingly, when the department wanted to purchase crude oil from overseas for use in the refining process at its refinery, the bank would provide the necessary foreign currency for this purpose, debiting the department's account (or the account of its buying agents) with the amount in cedis equivalent to the sum in foreign currency required, and itself paying the foreign currency to the seller out of its own foreign currency holdings. Likewise, in the absence of a right of set off, the bank would provide the foreign exchange for the payment of freight in foreign currency. This procedure did not, however, apply to the fuel oil in the present case, which was the product of the department's own refinery, and was being supplied to Ghanaian companies. This sale was, as is usually the case in such circumstances, being carried out in the domestic currency in question, here the cedi."

48. It was Mr Foxton's submission that the position is similar in the present case since it is clear, he submitted, that the Claimants operate in Kazakhstan and that most of their assets, liabilities and sales arose in Kazakhstan. He relied, in particular, on the fact

that the KK Group's financial statements for the year ended 31 December 2008 contain the following statement:

"Materially all of the Group's assets, liabilities, sales and other transactions, other than those attributed to the corporate centre, arose in the Republic of Kazakhstan."

This follows an earlier statement saying this:

"The Group's principal business operations are based in the Republic of Kazakhstan. The Group's export sales comprise less than 5% of total sales. The Group's manufacturing facilities are based in Kazakhstan."

49. Mr Foxton submitted that these passages demonstrate that the relevant *"functional currency"* used by the Claimants was KZT rather than US Dollars. Were the position otherwise, he suggested, it would have made no sense for the financial statements to speak in such terms. Mr Foxton also pointed to the IPO prospectus and the statement in this document that:

"Our functional currency is the Tenge, as the majority of our operating activities are conducted in Tenge."

Mr Foxton made the point that this statement could hardly be clearer. Indeed, this is borne out, Mr Foxton submitted, by the fact that the analysis performed by Mr Thompson (and not, as far as I am aware, challenged by the Claimants) demonstrates that, at least between 1 January 2008 and 31 December 2013 (and so extending beyond the period covered by the Claims) 62.2% of the Claimants' transactions were denominated in KZT with a lesser proportion (31.9%) being denominated in US Dollars.

50. Against this, Mr Foxton observed, the fact that the KK Group published its consolidated financial statements in US Dollars, as relied upon by Mr Howe, is nothing to the point. Mr Foxton submitted that the currency in which the loss is felt, or the operational trading currency, does not change merely because the claimant chooses to draw up end-of-year accounts in some other currency. In this context, Mr Foxton prayed in aid ***The Lash Atlantico*** [1987] 2 Lloyd's Rep. 114. In that case, Kerr LJ stated as follows at page 118:

"Against all that, however, Mr. Eder submits, and the Judge accepted, that due to the production of these two sets of accounts in drachmas, the plaintiff company, the shipowners, only 'felt' their loss in drachma. He said that it was only as and when their managing agents presented them with these accounts that the plaintiffs incurred any personal loss or liability and therefore 'felt' any loss. On this basis, the plaintiffs were in effect wholly indifferent to the fortunes or misfortunes of the ship, admittedly to be measured in dollars, at every single point in her history until these documents were produced by their managing agents. While I agree with Mr. Eder that the currency used by an agent, even a managing agent, is obviously not determinative of the appropriate currency in which the principal's damages in tort are to be measured within the principals of The Despina R, I cannot accept his submissions.

As pointed out by Miss Bucknall, commercially and within the principles laid down in The Despina R it is impossible and would be quite unrealistic to conclude that the

plaintiffs did not 'feel' this loss in dollars simply because they did not manage the ship themselves, but had it managed through Grecomar. The reality is that the plaintiffs' trading venture in the form of this ship was conducted exclusively in U.S. dollars. That is the point. It is irrelevant in what currency the resulting accounts were finally drawn up, in order to give trading picture of the vessel during a particular year, when that currency had no visible commercial significance whatever. For all we know these accounts may have been drawn up for fiscal or other purposes for authorities in Greece. As I read The Despina R, everything there said points to U.S. dollars as the appropriate currency in this case."

Mustill LJ (as he then was) made essentially the same point at page 121:

"Secondly, the defendants' contention that the loss was felt in drachmas is based exclusively on documents delivered at the end of the company's financial year. I am not able to accept that the delivery of these documents involved the 'feeling' of any loss by the plaintiffs, the more so since there is no reason to suppose that the delivery was followed, either immediately or at some time during the next financial year, by settlement in on direction or another as between the plaintiffs and their agents; and still less to suppose that this settlement was made, or would, but for the casualty, have been made in the currency in which the accounts happened to be prepared."

51. The reference to US Dollars in the consolidated financial statements was, Mr Foxton submitted, purely for presentational purposes since KZT was, in addition, the principal currency which, in his March 2017 report, Mr Thompson noted was used in the Claimants' accounting databases. Indeed, Mr Thompson reported that, where a transaction was recorded in a *"native currency"* other than KZT, it was apparently the case that the KZT equivalent was also noted on the 1C database. Mr Foxton highlighted, furthermore, how, in his own March 2017 report, Mr Crooks himself described US Dollars as being *"the presentational currency selected by the KK Group to present its financial results and financial position in its statutory financial statements"*.

52. Although I have regard to these matters and consider that Mr Foxton may well have been right to say that the Claimants' functional currency was KZT, I am not satisfied that, in and of themselves, these are matters which very much matter. I agree with Mr Howe when he submitted that what the exercise carried out by Mr Thompson has done is, in effect, to give an overview of what the Claimants' typical operating currency is, although, even then, it should not be overlooked that a not insubstantial proportion of the transactions (in a wider time period than strictly is relevant) were in US Dollars. What matters, however, as Mr Howe pointed out, is not what was *generally* the currency which the Claimants used but what is the currency which best expresses the losses in the *specific* circumstances of the present case. This requires an inquiry into the position in relation to each of the three Claims. Generality is not helpful when what is required is specificity. It is for this reason that it is similarly unhelpful to place too much store by Mr Thompson's analysis of the KK Group's borrowings, again as set out in his March 2017 report, relating to the period between 2004 and 2012, and so his conclusion that such borrowings were predominantly in KZT, with the highest level of US Dollar borrowing coming in 2011 at 31.2%. Aside from the fact that this analysis relates to a period which is, in any event, too wide given that the relevant period as regards the PEAK Claim is between 2005/6 and 2009, the other difficulty with Mr Thompson's approach is the point which I have just

made: it ignores the fact that the funds misappropriated forming part of the PEAK Claim consisted substantially of monies drawn down in US Dollars and Euros rather than in KZT.

53. That this is the case - that the monies lost were borrowed in US Dollars and Euros (and so in 'hard currencies') and then converted into KZT before being spent in the manner described in the Judgment - is demonstrated by a number of documents to which Mr Howe took the Court. As he submitted, although the sums paid to Arka-Stroy were paid in KZT and so the immediate losses to the Claimants were felt in KZT, having obtained funds in 'hard currencies', the KK Group was left as a result of the frauds with very substantial 'hard currency' borrowings which had to be paid back in those currencies or by converting much larger sums of devalued KZT. I agree with Mr Howe that, in such circumstances, it is right to regard the Claimants' losses in respect of the PEAK Claim as best expressed in a 'hard currency', and so either in US Dollars or in Euros but more appropriately the former given that the borrowing was, in the main, in US Dollars and given also that this was the currency (not the Euro) used by the KK Group for international reporting purposes as well as when obtaining funding through the IPO which took place.

54. As to the documents relied upon by Mr Howe, the first of these was a report prepared by Pari Passu Advisory Ltd ('Pari Passu') for KK Plc dated 25 July 2013 which analyses *"bank statements related to transfer of funds between certain companies of Kazakhstan Kagazy group"*. Specifically, as described under *"Scope of analysis"*, Pari Passu performed an analysis of the bank statements of KK Plc, PEAK and Peak Akzhal *"related to payments to Arka-Stroi LLP according to"* the five contracts entered into with Arka-Stroy described in the Judgment at [191]. Pari Passu set out their findings in relation to four of those contracts, those dated 15 August 2005, 6 July 2006, 2 November 2005 and 11 January 2008; it was explained that it had not been possible *"to identify in 1C accounting system any evidence and records of transactions performed on the basis"* of the fifth contract dated 28 March 2008. The findings as regards the first four were these:

"(i) Kazakhstan Kagazy JCS transferred to Arka-stroi LLP according to the contract dated 15.08.2005:

Period of transactions: 2006 – 2007

Accounts in banks: Alliance Bank, Kazkommertsbank

Transferred amount: KZT 4 165 876 391.14

Detailed transactions list: Appendix 1

(ii) Prime Estate Activities Kazakhstan LLP transferred to Arka-stroi LLP according to the Contract #001-CII dated 06.07.2006:

Period of transactions: 2006 – 2007

Accounts in banks: Alliance Bank, Kazkommertsbank

Transferred amount: KZT 11,592,781,240.03

Detailed transactions list: Appendix 2

(iii) Kazakhstan Kagazy JCS transferred to Arka-stroi LLP according to the Contract dated 11.01.2018 CMP:

Period of transactions: 2008 – 2009

Accounts in banks: Alliance Bank, Eurasian Bank

Transferred amount: KZT 2,229,648,589.00

Detailed transactions list: Appendix 4."

55. Pari Passu went on in the accompanying four appendices to list the various transactions one-by-one, with the source of the lending identified in each case. In the case of Appendix 1, which dealt with the contract dated 15 August 2005 (to which KK JSC was Arka-Stroy's contractual counterpart), the lender was named as Alliance Bank or Kazkommertsbank, with the total borrowing adding up to KZT 4,165,876,394.14. Appendix 2 did the same in respect of the contract dated 6 July 2006 entered into between PEAK and Arka-Stroy, identifying the lending bank, again, as either Alliance Bank or Kazkommertsbank. The total borrowing was given as KT 11,592,781,240.03. Appendix 3 dealt with the contract dated 2 November 2005 entered into between Peak Azkhal and Arka-Stroy, identifying the lending bank as in one instance Alliance Bank, in four instances Kazkommertsbank and in six cases Nurbank – with total borrowing of KT 1,686,604,860.36. Lastly, as to Appendix 4, this related to the contract between KK JSC and Arka-Stroy concluded on 11 January 2008 and identified Alliance Bank and Eurasian Bank as the lenders, with total borrowing adding up to KZT 2,229,648,589.00. Mr Howe made the point that, looking at these appendices, it is clear that the predominant part of the borrowing relating to the contracts relevant to the PEAK Claim came from a mixture of Alliance Bank and Kazkomertsbank. He was clearly right about that.

56. Mr Howe went on to explain that that borrowing - the Alliance Bank and Kazkommertsbank borrowing - was in a mixture of Euros and US Dollars. This is apparent from the IPO prospectus which was produced in July 2007. Specifically, this set out details of *"Borrowings"* as at the date of the prospectus, as follows:

"• KZT 4,000 million discounted floating rate bonds due 18 February 2010 bearing interest at 2.5 per cent plus inflation per annum;

- *KZT 3,500 million discounted floating rate bonds due 7 April 2011 bearing interest at 1.5 per cent plus inflation per annum;*

- *KZT 3,400 million discounted floating rate bonds due 22 August 2013 bearing interest at 1.5 per cent plus inflation per annum;*

- *US$10 million subordinated loan facility from EBRD and approximately US$42 million in loans and leases provided under a Kazkommertsbank JSC facility; the subordinated loan has equal bullet repayments in 2014 and 2015. The interest rate for the subordinated loan is calculated by reference to the EBITDA of Kagazy Recycling LLP for the previous financial year end and is up to four per*

cent. of EBITDA, depending on amounts outstanding under the subordinated loan; and

- *total financial leasing liabilities of KZT 805.2 million due August 2013, which incur interest at 11 per cent per annum.*

In addition, we have credit facilities with Kazkommertsbank JSC and Alliance Bank JSC as set out below:

Kazakhstan Kagazy JSC has a number of loans from Kazkommertsbank JSC:

- *a US$8,099,997 credit line Agreement, due at 20 August 2013, which bears interest at 11 per cent. per annum. As at 28 June 2007, US$8,202,148 had been drawn down under this facility (including capitalised interest).*
- *a US$222,611.94 loan facility, due at 20 August 2013, bearing interest at 11 per cent. per annum. As at 28 June 2007, US$239,899 had been drawn down under this facility (including capitalised interest).*
- *a US$2,944,196 loan facility, due at 6 August 2013, bearing interest at 11 per cent. per annum. As at 28 June 2007, US$2,520,202 had been drawn down under this facility.*
- *a US$204,600 loan facility, due at 20 August 2013, bearing interest at 11 per cent. per annum. As at 28 June 2007, US$220,012 had been drawn down under this facility (including capitalised interest).*
- *a US$1,029,120 loan facility, due at 12 August 2013, bearing interest at 11 per cent. per annum. As at 28 June 2007, US$1,113,434 had been drawn down under this facility (including capitalised interest).*
- *a US$1,136,363 loan facility, due at 20 August 2013, bearing interest at 11 per cent. per annum. As at 28 June 2007, US$1,222,402 had been drawn down under this facility (including capitalised interest).*
- *a US$159,091 loan facility, due at 8 August 2013, bearing interest at 11 per cent. per annum. As at 28 June 2007, US$172,371 had been drawn down under this facility (including capitalised interest).*
- *a US$2,068,185 loan facility, due at 20 August 2013, bearing interest at 11 per cent. per annum. As at 28 June 2007, US$2,228,790 had been drawn down under this facility (including capitalised interest).*

In addition, PEAK Akzhal LLP has obtained three loans from Kazkommertsbank JSC in the amounts of US$6 million, US$12,173,000 and US$1,827,000 respectively. The loans mature on 2, 3 and 2 March 2009, respectively, and bear interest at 13 per cent. per annum. As at 28 June 2007, US$6 million, US$12,173,000, and US$1,827,000 had been drawn down under these facilities, respectively.

Kagazy Recycling LLP has two leasing agreements with Kazkommertsbank JSC for KZT 649,522,221 and KZT 230,794,375, respectively. The settlement date of the facilities is 20 August 2013 and they bear interest at 11 per cent. per annum. As at 28

June 2007, KZT 593,709,276 and KZT 211,472,651 had been drawn down under these facilities, respectively.

Kazakhstan Kagazy JSC has a number of loans from Alliance Bank JSC:

- *a KZT 1,054,081,000 loan facility, due at 1 April 2013, bearing interest at 10.8 per cent. per annum. As at 28 June 2007, KZT 913,082,494 had been drawn down under this facility.*

- *a €220,000 letter of credit, due at 20 August 2007, bearing interest at 8.608 per cent. per annum. As at 28 June 2007, €220,000 had been drawn down under this facility.*

- *a RUR 3,620,278 letter of credit, due at 10 March 2008, bearing interest at 10.6 per cent. per annum. As at 28 June 2007, RUR 3,620,278 had been drawn down under this facility.*

- *a RUR 1,243,931 letter of credit, due at 20 March 2008, bearing interest at 10.6 per cent. per annum. As at 28 June 2007, RUR 1,243,931 had been drawn down under this facility.*

- *a RUR 1,238,484 letter of credit, due at 28 April 2008, bearing interest at 10.6 per cent. per annum. As at 28 June 2007, RUR 1,238,484 had been drawn down under this facility.*

Kagazy Trading LLP has a US$10,592,776 loan facility with Alliance Bank JSC, due at 1 April 2013, bearing interest at 10.8 per cent. per annum. As at 28 June 2007, US$10,319,978 had been drawn down under this facility.

PEAK LLP has a €29,968,323 loan facility with Alliance Bank JSC, due at 1 November 2013, bearing interest at 14 per cent. per annum. As at 28 June 2007, €29,968,323 had been drawn down under this facility."

57. Focusing on the borrowing obtained from Kazkommertsbank for the moment, Mr Howe highlighted how these extracts from the IPO prospectus illustrate that the facilities described both in the fourth bullet point relating to the US$ 10 million facility from EBRD and the US$ 42 million in loans and leases provided through the Kazkommertsbank loan facility and in the description of KK JSC's loans from Kazkommertsbank in the sixth to twelfth bullet points were all in US Dollars. So, too, were the three loans described as having been obtained by PEAK from Kazkommertstbank. Mr Howe observed that, as far as Kazkommertsbank was concerned, the only non-US Dollars borrowing involved Kagazy Recycling LLP, a different entity. Kazkommertsbank was, therefore, plainly a significant source of the borrowing which was used to make the payments to Arka-Stroy.

58. As for the Alliance Bank borrowings and the reference in the IPO prospectus to PEAK having *"a €29,968,323 loan facility with Alliance Bank JSC, due at 1 November 2013"*, this was a reference to a facility agreement entered between PEAK and Alliance Bank dated 1 November 2006 in the original sum of € 3,350,720. However, the size of the facility was clearly thereafter increased since, not only does the Pari Passu report make that clear, but so, too, does the 2014 Co-Operation

Agreement because that states by way of what is, in effect, a recital (under the heading *"BACKGROUND"*) as follows at B:

"On 1 November 2006, PEAK, a company within the KK Group, entered into credit line agreement no. 1928C/06 with Alliance for €3,350,720. This credit line was subsequently extended by five further agreements (collectively, the 'Loans'), up to a total amount of €74,414,988, as set out in Annex 2 to this Agreement. PEAK subsequently drew down €37 million of this credit line (KZT8.3 billion) (the 'Principal Debt') and in addition now owes interest to Alliance in the amount of KZT2.72 billion and a penalty payment of KZT7.232 billion … ".

As for Annex 2 (as referred to in this passage), this sets out the details in clear terms:

"1. Credit line agreement No1928C/06, made between PEAK LLP and Alliance Bank JSC on 1 November 2006 for an amount of up to EUR3,350,720

2. Further agreement No1 to credit line agreement No1928C/06, MADE ON 3 November 2006, extending the credit line for an amount of up to EUR5,486,550

3. Further agreement No2 to credit line agreement No1928C/06, made on 8 November 2006, extending the credit line for an amount of up to EUR7,718,255

4. Further agreement No3 to credit line agreement No1928C/06, made on 3 February 2007, extending the credit line for an amount of up to EUR13,581,455

5. Further agreement No4 to credit line agreement No1928C/06, made on 1 March 2007, extending the credit line for an amount of up to EUR73,385,788

6. Further agreement No5 to credit line agreement No1928C/06, made on 21 May 2007, extending the credit line for an amount of up to EUR74,414,988."

59. It is quite apparent, therefore, that in the material period (2005, although more accurately, 2006 to 2009) the KK Group's borrowings were substantially in US Dollars and Euros – as well as KZT. However, as Mr Howe was able to demonstrate, in that 2006 to 2009 period, the KK Group's KZT borrowings fell, with substantial US Dollar and Euro cash balances becoming very substantial debts in those currencies. This can be seen from the notes to the KK Group Annual Reports in 2007, 2008 and 2009. Thus, the 2007 Annual Report described the borrowing position, both as regards 31 December 2006 and as regards 31 December 2007, in this way:

(c) Currency of borrowings

The Group's borrowings are denominated in the following currencies:

(USD'000)

31 December 2007	Kazakh Tenge	US Dollars	Euros	Other*	Total
Interest bearing loans and borrowings:					
Fixed rate	7,929	-	58,593	859	67,381
Floating rate**	88,887	-	391	-	89,278
	96,816	**-**	**58,984**	**859**	**156,659**
Cash and cash equivalents:					
Fixed rate	2,823	1,074	84,357	-	88,254
Non interest bearing balances	11,280	5,050	10,721	-	27,051
	14,103	**6,124**	**95,078**	**-**	**115,305**
Net borrowings as at 31 December 2007	82,713	(6,124)	(36,094)	859	41,354

(USD'000)

31 December 2006	Kazakh Tenge	US Dollars	Euros	Other*	Total
Interest bearing loans and borrowings:					
Fixed rate	59,356	32,503	10,446	-	102,305
Floating rate	80,849	-	-	-	80,849
	140,205	**32,503**	**10,446**	**-**	**183,154**
Cash and cash equivalents:					
Fixed rate	6,156	-	-	-	6,156
Non interest bearing balances	573	12	-	49	634
	6,729	**12**	**-**	**49**	**6,790**
Net borrowings as at 31 December 2006	133,476	32,491	10,446	(49)	176,364

In other words, as at 31 December 2006, the main borrowing currency was KZT (the apparently positive figure, a US Dollar amount reflecting for illustrational purposes a KZT amount, US$ 133,476,000(net)/US$ 140,205,000(gross) equating somewhat counterintuitively to borrowings) with only US$ 32,491,000 by way of borrowing in US Dollars. By the end of the following year, however, probably reflecting the fact that the IPO had taken place in the intervening period, the US Dollar borrowing figure (US$ 32,503,000) had reduced to virtually nothing, resulting in a net cash balance of US$ 6,124,000. Meanwhile, borrowing amounting to the Euro equivalent of US$ 10,446,000 as at 31 December 2007 had increased to the Euro equivalent of US$ 58,894,000 but, taking account of cash and cash equivalents, resulted in a net positive amounting to the Euro equivalent of US$ 36,094,000.

60. The position in relation to 2008 and 2009 can then be seen in the 2009 Annual Report, which stated as follows:

31.3. Currency of interest bearing loans and borrowings

The Group's interest bearing loans and borrowings are denominated in the currencies below. The Group's foreign exchange risk is limited to those bank loans denominated in US dollars and Euros.

	2009				
	Kazakh tenge	US dollars	Euros	Other*	Total
	USD'000	USD'000	USD'000	USD'000	USD'000
Interest bearing loans and borrowings:					
Fixed rate	37 291	64 142	30 145	-	131 578
Floating rate	72 745	-	42 578	-	115 323
Total	**110 036**	**64 142**	**72 723**	**-**	**246 901**
Cash and cash equivalents:					
Fixed rate	161	-	103	-	264
Non interest bearing balances	934	11	93	665	1 703
Total	**1 095**	**11**	**196**	**665**	**1 967**
Net borrowing as at 31 December 2009	**108 941**	**64 131**	**72 527**	**(665)**	**244 934**

	2008				
	Kazakh tenge	US dollars	Euros	Other*	Total
	USD'000	USD'000	USD'000	USD'000	USD'000
Interest bearing loans and borrowings:					
Fixed rate	31 640	62 357	35 382	-	129 379
Floating rate	93 974	-	45 763	-	139 737
Total	**125 614**	**62 357**	**81 145**	**-**	**269 116**
Cash and cash equivalents:					
Fixed rate	22 136	33 816	218	-	56 170
Non interest bearing balances	2 960	194	2	3 410	6 566
Total	**25 096**	**34 010**	**220**	**3 410**	**62 736**
Net borrowing as at 31 December 2008	**100 518**	**28 347**	**80 925**	**(3 410)**	**206 380**

Accordingly, as at 31 December 2008, the KZT borrowing had increased to a degree but the US Dollar borrowing had moved from a cash balance of just over US$ 6 million to borrowing amounting to a net negative figure of US$ 28,347,000 (based on gross borrowing adding up to US$ 62,357,000), with the Euro equivalent (expressed in US Dollars) being a negative US$ 80,925,000 (based on gross borrowing of US$ 81,145). By the end of the following year, 31 December 2009, the KZT borrowing had increased modestly whereas the US Dollar borrowing had done so markedly since the net figure had risen from US$ 28,347,000 to US$ 64,131,000. The Euro borrowing had reduced a little.

61. The position across the four years (2006, 2007, 2008 and 2009) is summarised in the table below:

Date	***KZT***	***USD***	***Euros***	***Other***	***Total***
31/12/2006	133,476,000	32,491,000	10,446,000	-49,000	176,364,000
31/12/2007	82,713,000	-6,124,000	-32,094,000	859,000	41,364,000
31/12/2008	100,518,000	28,347,000	80,925,000	-3,140,000	206,380,000
31/12/2009	108,941,000	64,131,000	72,527,000	-665,000	244,934,000

It was Mr Howe's submission that what this shows is that the monies which were lost as regards the PEAK Claim were felt in a mixture of US Dollars and Euros, since the borrowing pattern illustrated in this table reveals that substantial US Dollar and Euro credit balances as at 31 December 2007 had by the end of 2009 become substantial borrowings in those currencies, with the level of KZT borrowing having declined in the same period.

62. In the circumstances, I cannot accept that Mr Foxton's criticism of the witness statement recently made by Mr McGregor, his eighteenth witness statement no less, in which he stated that *"the sources of funds which the Defendants misappropriated were mainly hard currency"*, can be justified. I consider that, on the contrary, what Mr McGregor had to say is right. I am satisfied that, based on the evidence to which Mr Howe took me, it is, indeed, the case that the funds which were misappropriated and which the Claimants seek to recover in putting forward the PEAK Claim were drawn from facilities (with Kazkommertsbank and Alliance) which were in 'hard currencies' (US Dollars and Euros) rather than in KZT. As Mr Howe put it, when addressing Mr Foxton's submissions concerning ***The Texaco Melbourne***, the present case is not the same as that case; indeed, it is the precise opposite. This is because, whereas in ***The Texaco Melbourne***, *"if the department had ... bought ... a replacement cargo in Italy under a contract under which the price was payable in US Dollars, nevertheless in order to obtain those dollars the department, which carried on its business in Ghanaian cedis, would have had to expend cedis in order to acquire the US Dollars from the bank of Ghana"*. In the present case, the Claimants already had US Dollars (and Euros) which were converted into KZT amounts and then misappropriated. I agree with Mr Howe when he made the point that, had the department in ***The Texaco Melbourne*** had an account denominated in US Dollars

which meant that the replacement cargo could be funded without the need to buy US Dollars with cedi, then, the decision in that case would have been different. It follows that, since that is the position in the present case, there is no justification for treating the losses as having been felt in KZT as opposed to US Dollars or Euros.

63. Nor am I persuaded by Mr Foxton having taken me to how the PEAK Claim was pleaded in the Re-Re-Amended Particulars of Claim. In particular, Mr Foxton drew attention to the fact that in paragraph 36, which sets out particulars of the loss and damage alleged to have been suffered, the payments to Arka-Stroy there described are given in KZT. Thus, taking out various crossing out amendments, this is stated:

"a. The Second Claimant has paid Arka-Stroy a total of KZT 7.9057 billion. The Second Claimant will give credit in the total sum of KZT 1.8587 billion, returned by Arka-Stroy to the Second Claimant. The net sum of which the Second Claimant believes it has been defrauded is KZT 6.0470 billion (approximately US $46.8 million).

b. The Third Claimant has paid Arka-Stroy a total of KZT 12.3479 billion. The Third Claimant will give credit in the total sum of KZT 5.9953 billion, returned by Arka-Stroy to the Third Claimant. The net sum of which the Third Claimant believes it has been defrauded is KZT 6.3526 billion (approximately US $49.2 million).

c. The Fourth Claimant has paid Arka-Stroy a total of KZT 1.6866 billion. The net sum of which the Fourth Claimant believes it has been defrauded is KZT 1.6866 billion (approximately US $13.1 million)."

64. It was Mr Foxton's submission that the fact that the payments were described in KZT (albeit with US Dollar amounts in brackets) supports his submission that that is the currency in which the losses were felt. I cannot agree with him about this, however, for the reasons which I have already given. The fact that the payments were made in KZT seems to me to be nothing to the point in a case like this where it has been demonstrated that the KK Group had US Dollars and Euros which were used to make the payments. The fact that the payments were not themselves made in US Dollars or in Euros but in KZT is not important and certainly cannot be determinative of the issue which I have to decide.

65. Turning to the Land Plots Claim, Mr Foxton made the same point concerning how the case had been pleaded, referring to paragraph 37F of the Re-Re-Amended Particulars of Claim and the fact that the sums described as having been paid to Bolzhal, CBC and Holding Invest were KZT amounts. Again, however, this is not determinative of anything. The fact is that such payments *were* made in KZT; there is no dispute about that. It does not follow, however, that the losses were felt in KZT. I am clear that, on the contrary, that was not the position at all since, as Mr Howe explained by reference to certain appendices to the report prepared by Grant Thornton dated 11 November 2014 to which I referred in the Judgment at [362] and [519] and which, consistent with how the case was pleaded in the Re-Re-Amended Particulars of Claim, indicate that in three instances KK JSC received US Dollar amounts from KK Plc and that those sums were used by KK JSC to buy the KZT amounts which were then transferred to Bolzhal and CBC, and that in two other cases KK JSC received Euros from KK Plc and used those to buy the KZT amounts which were then transferred to Bolzhal and CBC. None of this was disputed by Mr Foxton. Nor was it in dispute that,

as a matter of timing, the land plot transactions were first instigated soon after the IPO had taken place. Indeed, as I explained in the Judgment at [362], it was this that led to the Grant Thornton report being commissioned:

"... Mr Howe drew attention to the fact that the investigation into the Land Plots Claim arose out of a Grant Thornton report dated 11 November 2014 which had been commissioned in order to investigate the movement and destination of funds raised in KK Plc's IPO, including funds which were distributed to KK JSC which received, in all, some US$ 154.6 million in various tranches distributed between 28 July 2007 and 27 June 2008. Accordingly, part of Grant Thornton's work was to look into what happened to those monies, in particular to identify so-called "Secondary Recipients". Grant Thornton discovered that outward payments of incoming IPO monies were made by KK JSC very shortly after they had been received, and that these included substantial payments to Bolzhal, CBC and Holding Invest, as follows: in the case of Bolzhal, monies totalling (when converted to US Dollars) US$ 35.8 million; in the case of CBC, monies totalling US$ 6.9 million; and in the case of Holding Invest, KZT 230,880,000/US$ 1.9 million. Subsequently, Mr Crooks and Mr Thompson have found (and agreed) that the sums paid to Bolzhal and CBC were, in fact, greater: KZT 4,388,247,952/US$ 36,366,760 in the case of Bolzhal; and KZT 1,724,976,000/US$ 13,815,274 in the case of CBC. These revised amounts are the amounts which the Claimants identify as having been paid out by KK JSC in relation to land plot transactions which were not all that they seemed to be."

66. In these circumstances, I have not the remotest difficulty in concluding that the relevant losses as regards the Land Plots Claim were felt in US Dollars. I reach this conclusion despite the lack of clarity as to why some of what was paid by KK Plc to KK JSC was paid in Euros since, as Mr Howe submitted, it is tolerably clear that the origin of all the funds which were used to purchase the land plots was what had been raised by KK Plc in the IPO, and those were US Dollar amounts.

67. This leaves the Astana 2 Claim. Since it is not in dispute that the loan from DBK which funded the relevant payments was a US Dollar loan (see the Judgment at [307]), it must follow that the appropriate currency is US Dollars. The fact that the payments out were made by Astana-Contract and Paragon in KZT is, for reasons which I have explained, not determinative. The losses must, in my view, have been felt in US Dollars in circumstances where this was the denomination of the DBK loan. I reject Mr Foxton's argument to the opposite effect and note that even Mr Foxton was constrained to accept that inasmuch as the penalties and default interest liabilities of Astana-Contract and Paragon to DBK described in the Judgment at [345] and [347] to [349] have yet to be paid, the appropriate currency is US Dollars since those are, as he put it, *"US$ liabilities"*.

68. I conclude, in the circumstances, that the losses in this case are, in all respects, best expressed in US Dollars. This is a factual conclusion which I have arrived at by considering the totality of the evidence which is before me. In view of this conclusion, there is no need for me to go on and address Mr Howe's alternative application that, if the Court were to assess the losses in KZT, then, the Court should go on nonetheless to enter judgment in Sterling (at the prevailing exchange rate at the date of judgment) in accordance with the jurisdiction described in the White Book at paragraph 40.2.3, as follows:

"If the court decides to express its judgment for the payment of money in a foreign currency, the judgment will be entered in that currency or its sterling equivalent at the time of payment. It is not clear whether the claimant has the right to elect that the judgment should be expressed in sterling or in a foreign currency. It would seem that the court retains a residual discretion to determine whether the judgment should be expressed in sterling or in a foreign currency and that it will exercise this discretion having regard to all the circumstances including the position of the parties and the fluctuations in the rates of exchange between the currency of the contract and sterling during the period between the date when the cause of action whether in contract or tort arose and the date of judgment".

69. Although it appeared at one stage that the Claimants were seeking to have the judgment expressed in US Dollars rather than in Sterling, Mr Howe acknowledged that this would not be permitted. However, as I have observed, this application does not arise in view of the conclusion which I have arrived at since Mr Howe confirmed that all that the Claimants wished to achieve was a judgment in 'hard currency' rather than in KZT and clearly US Dollars (like Sterling) is such a currency.

Interest

70. Various interest-related issues arise. They are significant, particularly the question of whether interest should be awarded on a compound (as opposed to a simple) basis, since the interest claimed adds up to a very sizeable figure: in the region of US$ 200 million no less.

Pre-judgment rate

71. The appropriate approach as regards interest was not controversial as between Mr Howe and Mr Foxton. It is an approach which has very recently been explained by Hamblen LJ in ***Carrasaco v Johnson*** [2018] EWCA Civ 87 at [17], drawing upon various authorities ranging from ***Tate & Lyle Food and Distribution Ltd v Greater London Council*** [1982] 1 WLR 149 to ***Reinhard v Ondra*** [2015] EWHC 2493 Ch (Warren J):

"The guidance to be derived from these cases includes the following:

(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.

(2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.

(3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.

(4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.

(5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

72. The cases considered by Hamblen LJ included ***Fiona Trust & Holding Corporation v Privalov*** [2011] EWHC 664 (Comm), in which Andrew Smith J stated as follows at [16]:

"A 'broad brush' is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate: see the Banque Keyser Ullman case (cit sup). The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional. So, for example, in Jaura v Ahmed, [2002] EWCA Civ 210 , Rix LJ awarded interest at base rate plus 3% to reflect that 'small businessmen' had been kept out of their money and in recognition of the 'real cost of borrowing incurred by such a class of businessman'. Thus, the court will examine what has been called 'a question of categorisation of the plaintiff in an objective sense' (see the Banque Keyser Ullman case, cit sup), recognise relevant characteristics of the party who is awarded interest and reflect them when determining the fair and appropriate rate."

73. In addition, Mr Howe relied upon ***The Texaco Melbourne***, the authority which I have considered in some detail already when dealing with the currency issue, specifically this passage earlier in Lord Goff's judgment in that case, at pages 476-477:

"The proper approach is to identify, in accordance with established principle, the appropriate currency in which the award of damages is to be made, and to award an appropriate sum by way of damages in that currency, and also of interest in that currency to compensate for the delay between the date of breach and the date of judgment."

Mr Howe submitted that, therefore, the appropriate rate in the present case, were the Court to decide that the judgment should be expressed in US Dollars, which is indeed what has been decided, ought to be at an appropriate US Dollar-related rate. Specifically, it was his submission that the right rate ought to reflect the cost of borrowing US Dollars in Kazakhstan.

74. In this context Mr Howe sought an order for interest in line with the various explanations set out in Mr McGregor's eighteenth witness statement and on calculations prepared by ScolzvonGleich LLP ('SVG'), an independent financial advisory firm with offices in Almaty and Astana, those calculations being exhibited to that witness statement. As to Mr McGregor's evidence, he states as follows in paragraph 8:

"The source for the historical corporate lending rates in Kazakhstan is the monthly loan data published by the National Bank of the Republic of Kazakhstan ('NBRK') for corporate borrowing. NBRK regulates the financial markets in Kazakhstan and therefore has complete information regarding all lending activities. Pages 3 to 4 of HM27 are extracted from NBRK's website and show the monthly interest rates on loans to corporate borrowers from 1 January 2007 to 31 December 2017 (as SVG's letter states, this is the most recent data available, because of the time lag in the publication of data). As SVG also point out in their letter, NBRK calculates borrowing historical rates for foreign convertible currencies using a blended rate interest rate based on records of loans denominated in fully convertible foreign currencies including but not limited to US dollars, Sterling, euro and Japanese Yen. In other words, there is no NBRK data for US dollar loans alone. However, as SVG say in their letter at page 2 of HM27:

'In our view, based on our experience as a financial advisory firm in Kazakhstan, we consider that USD is by far the most commonly-used currency in Kazakhstan, we use the average rate of the fully convertible currency (FCC)-denominated long-term (+5y) borrowings to the non-banking legal entities in Kazakhstan as historical market interest rates on USD-denominated long-term borrowings.'"

75. Mr McGregor went on in paragraph 9 to state this:

"On the basis of what SVG say, I therefore believe the rates SVG have used are appropriate for US dollar borrowing; furthermore, I am able to say from my own knowledge that the interest rates the KK Group has paid on its US dollar and hard currency loans are of a similar order – for example, the KK Group has borrowed US dollars at 10% from DBK and Euros at 14% from Alliance Bank, both compounded monthly."

Mr McGregor relied in this latter respect on the contents of the passages in the IPO prospectus to which reference has previously been made when addressing the currency issue. He also prayed in aid what was stated in KK Plc's 2007 Annual Report in respect of *"Financing"*, as follows:

"As at December 31, 2007, the Group's borrowings amounted to US$ 156.7 million. In May 2007, the European Bank for Reconstruction and Development (EBRD) approved provision of the equivalent of Euro 33 million in long-term financing to our paper production business, Kagazy Recycling LLP.

In March 2007, the Group's main paper and corrugated products manufacturer, Kagazy Recycling LLP assumed from a related company, Kagazy Gofrotara LLP, its capital leasing financing liabilities for the total of US$ 7.9 million denominated in KZT. These leasing facilities were obtained by Kagazy Gofrotara LLP from Kazkommertsbank JSC in 2005 for the purchase of corrugated packaging equipment. Current interest rate of this leasing financing is 14% per annum.

In March-June 2007, Kazakhstan Kagazy obtained short-term financing in the form of letters of credit totalling to RUR 21 million at 10.6% per annum.

In addition to its total debt of Euro 7.4 million, our real estate business, PEAK LLP, obtained from Alliance Bank JSC in 2007 several new loan facilities for the total

amount of Euro 32.6 million, which in total thereby reached Euro 40.1 million as of December 31, 2007. These loan facilities carry annual interest rates in the range from 8.4 to 14% per annum.

The total of Euro 3.3 million out [sic] these loans fall due on March 25, 2010, with the balance falling due for settlement on November 1, 2013.

Funds availability totaled US$ 115.3 million at the end of 2007."

In addition, Mr McGregor relied upon the following summary contained in the same report:

(a) Interest rates

The bank loans and finance leases are secured on the assets of the Group, and are from the following banks at the fixed rates of interest shown:

(USD'000)

	2007	Annual interest rate, %	2006	Annual interest rate, %
Alliance Bank JSC	59,843	7-12	74,383	7-14
Kazkommerts Bank JSC	7,929	14	15,182	11-13
Nurbank JSC	-	-	11,597	13-14
Kazakhstan Development Bank JSC	-	-	1,143	10.5
	67,772		102,305	

76. It was Mr Howe's submission that, based on this evidence, the Court could be comfortable that the exercise performed by SVG, aimed at arriving at an interest rate which reflects the cost of borrowing US Dollars in Kazakhstan, is the appropriate approach in this case.

77. Mr Foxton did not agree. His position was that, in the event that the Court were to conclude that the currency of loss is US Dollars, then, the right course would be to award what he described as *"the standard Commercial Court award"*, namely US$ Prime with an uplift of 2.5%, and not the higher rate used by SVG and Mr McGregor. In this respect, Mr Foxton referred to certain authorities. Mr Foxton highlighted, in particular, that in ***Kuwait Airways v Kuwait Insurance*** [2000] 1 All ER (Comm) 973 Langley J stated as follows at page 992:

"In my judgment the well-established practice of this court to award interest at base rate plus 1% save at least in exceptional circumstances, is in accordance both with principle and authority. It is not, I think, necessary to comment on the difference of view reflected in Nourse LJ's judgment in Re Duckwari as to the relevance or otherwise of the general attributes of the successful party and so hypothetical borrower. The award is not and should not be a precise exercise. The losing party is unlikely to be penalised by a rate which itself assumes a reputable borrower. On the other hand I can see no justification for awarding rates which apply only to term or secured borrowing. That, I think, is to extend any examination of the financial affairs of the successful party beyond legitimate boundaries as well as to apply hindsight in the knowledge of how long it may take for the losing party to pay and what free assets may be available for security. As the period for which interest is to be awarded cannot start before the date the cause of action arose the successful party is in a real sense entitled to have the sum awarded from that date without reference to repayment or security obligations. It is also entitled to do what it wishes with the monies it recovers from insurance. As Mr Gaisman submitted, KAC was not obliged to seek

replacement of any let alone all the spares which were looted. It was entitled to be paid their value up to the limit of $150m as 'cash in the hand'.

The nearest equivalent of base rate plus 1% is US Prime rate. In normal circumstances that in my judgment would be the appropriate rate and, if it be material, a rate at which KAC could have borrowed. Nor do I think the fact that for two or three years KAC might not have been able to borrow at that rate without some small percentage increase should affect that approach anymore than the possibility that sympathetic lenders might have lent at a lower rate. That again would be to look too closely into the actual status of the successful party. I see no injustice to KAC in applying the same rate over the whole period now known to be involved, nor do I think in the overall context the facts of this case are sufficiently exceptional to justify a departure from the norm. In my judgment therefore the appropriate rate of interest is US Prime without any addition."

78. That this is not an approach which must always be applied is, however, clear. This is apparent, indeed, from the other authority to which Mr Foxton referred, ***Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD*** [2003] 1 Lloyd's Rep. 42, in which Aikens J (as he then was) stated as follows at [16]:

"When damages are assessed in pounds sterling the conventional rate of interest that is awarded in commercial cases is 'base rate plus 1 per cent'. That is the rate that a commercial borrower of good credit will have to pay to borrow sterling in London. But when the currency of the loss and the currency of damages is U.S. dollars, then the Commercial Court will consider the cost of borrowing U.S. dollars. That is the position in this case. The cost of borrowing U.S. dollars is usually expressed by reference to the U.S. Prime Rate. That is the rate that commercial banks charge their most creditworthy customers if they are borrowing U.S. dollars. It is a short-term borrowing rate. Prime Rate includes an element of profit for a bank, so that the most creditworthy borrows can obtain loans at Prime Rate itself. Less creditworthy borrowers will have to pay Prime Rate plus one or more percentage points."

Aikens J went on at [17] to explain as to the case before him that:

"I have had no evidence concerning the creditworthiness of Jetoil or Moil-Coal. I think I must therefore assume that those companies would be regarded by a bank lending U.S. dollars as most creditworthy. Accordingly I must find that the likely cost to the claimants of borrowing U.S. dollars would be U.S. Prime Rate. Thus it seems to me that the proper rate of interest to award in this case must be the appropriate U.S. Prime Rate. As I have already stated, that will be fixed at monthly rests."

79. In short, the determination of an appropriate rate need not be dictated by any norm. On the contrary, it is open to a claimant to adduce evidence, as the Claimants in the present case have done, and invite the Court to decide that some other interest rate would be more appropriate on the basis that that other rate better reflects the cost of borrowing US Dollars. Specifically, it is open to a claimant to do what, it seems, Jetoil and Moil-Coal omitted to do in the ***Mamidoil*** case, which is to demonstrate with evidence that a party in its position (with its characteristics) would be charged different rates to borrow US Dollars. I am satisfied that that is what the Claimants have in this case done through the work carried out by SVG. That work has focused not on the Claimants' own borrowing experience since, as authorities such as the

Kuwait Airways case and the ***Privalov*** case make clear, the proper focus in this regard is not the actual party which seeks the interest but a party with the *"general attributes of the successful party and so hypothetical borrower"* (per Langley J in the ***Kuwait Airways*** case at page 992). However, as Mr Howe observed, it is instructive that the SVG analysis is broadly consistent with the evidence given by Mr McGregor (backed up by the IPO prospectus and KK Plc's 2007 Annual Report) concerning the rates which the Claimants were, in fact, charged to borrow US Dollars in the relevant period. This evidence, viewed in the round, establishes that to award interest at US$ Prime plus 2.5% would significantly under-compensate the Claimants and, as such, would not be an appropriate result.

80. Mr Foxton had two further objections, however, to the exercise undertaken by SVG and to Mr Howe's submissions based on that exercise. First, Mr Foxton submitted that there is, in fact, no US Dollar borrowing rate in Kazakhstan, specifically that what has been produced by SVG is something different, namely a blended rate reflecting the cost of borrowings in Kazakhstan of various foreign currencies, not all of which are identified but which include, in addition to US Dollars, Sterling, Euros and Japanese Yen. It follows, Mr Foxton submitted, that there is no satisfactory evidence before the Court as the cost of borrowing US Dollars and only that currency. I see no merit in this objection, however, for two reasons. First, I can hardly overlook the fact that, as quoted in paragraph 8 of Mr McGregor's eighteenth witness statement (and as set out above), SVG have explained that, based on their experience, *"USD is by far the most commonly- used currency in Kazakhstan"*. Although Mr Foxton complained that this is not a proposition which he was in a position to test, I see no reason to doubt that what has been stated by SVG is genuine. Secondly, although in a sense this follows on from the point just made, it is clear that a broad brush approach is required in this area. The evidence provided by SVG is the best evidence of what it would cost to purchase US Dollars in Kazakhstan. There is no evidence to suggest that the cost is more likely to be US$ Prime plus 2.5%, a rate which Mr Foxton is only able to suggest is more appropriate because it is a norm. Indeed, it should be noted that, in making his submissions on this topic, the most that Mr Foxton was able to say, or perhaps more accurately assert, was that the *"inclusion of other currencies will have had some impact on the rates"*. That is no basis for rejecting clear and considered evidence given by SVG and supported by Mr McGregor's evidence concerning the KK Group's actual US Dollar borrowing experience.

81. The second of Mr Foxton's objections seems to me, however, to have more substance. This was that SVG ought not to have used long-term financing rates. He submitted that, consistent with the approach described in both the ***Kuwait Airways*** case and the ***Mamidoil*** case, it is the short-term borrowing rate which is material. He submitted that the reason why a short-term rate is appropriate, as a matter of principle, is that, in awarding interest at the end of a trial, the Court is not doing so in a context in which it can be known at the outset over what period of time a claimant will be deprived of its money. In contrast, a party which takes out a fixed and long-term loan will have such knowledge when taking out the loan, and the rate will reflect that this is the position. I consider that Mr Foxton must be right about this, even if I suspect that Mr Howe was also right when he observed that ordinarily it might be expected that a long-term rate will be lower than a short-term rate, and so that a defendant will typically be content with the former rather than the latter. Mr Foxton having raised the point, the lengthy electronic spreadsheet produced by SVG was looked at by Cleary Gottlieb, only for it

apparently to be discovered that the short-term rates given in that spreadsheet were, as Mr Foxton reported, *"appreciably lower"* than the long-term rates. In such circumstances, Mr Foxton's invitation to the Court was to order that interest should be calculated on the basis of the short-term rates in the spreadsheet rather than the long-term rates. If that is the case, then, in my view, the short-term rates should instead be used, and I did not understand Mr Howe to suggest otherwise.

82. For these reasons, my conclusion is that the appropriate pre-judgment rate should be calculated in the manner undertaken by SVG but with the use of short-term rates rather than long-term rates assuming that the former are lower than the latter.

Liabilities incurred but not yet paid

83. Before coming on to address the next point which arises, it is convenient to note two matters. The first is that, although in Mr Foxton's skeleton argument it was stated that *"since the amounts claimed in respect of liabilities to Alliance/Forte and DBK are themselves compounded interest amounts, and already reflect 'interest on interest'"* it *"cannot be appropriate to superimpose a third level of 'interest on interest on interest'"*, Mr Foxton confirmed that this was not a contention which he was advancing. Indeed, he rather charmingly observed, in doing so, that he *"wasn't aware"* that he was *"taking this point"*. In the circumstances, I need say no more about this matter.

84. The second point concerns another issue raised in Mr Foxton's skeleton argument concerning the PEAK Claim and as one of the reasons given why, in Mr Foxton's submission, it would be appropriate as regards that claim to order that interest should, in all respects, be calculated taking 1 September 2012 as a single starting point. That is a submission to which I shall return in a moment, but for present purposes what should be noted is that this was stated:

> *"It would have been open to Cs to plead and prove claims relating to interest liabilities to other banks just as they did with Alliance. Had this been done, the issue would have been the subject of evidence, submissions and judicial findings as the pleaded interest claims were. However this was not done. In these circumstances, Cs cannot now embark on a fact-heavy exercise to achieve an equivalent outcome."*

85. It is important to appreciate that in paragraph 19.1 of his eighteenth witness statement Mr McGregor acknowledged that, as regards monies which had originated from Alliance Bank and in relation to which claims have been made which seek recovery in respect of KK JSC's liabilities to Alliance Bank for penalties and default interest, the fact that those claims have met with success means that interest ought not to run until 1 September 2012 and not before. Not unsurprisingly, Mr Foxton agreed with Mr McGregor about this.

86. The passage quoted above, however, although directed towards his submission concerning the appropriate starting point more generally, appeared to Mr Howe also to involve a substantive objection to an entitlement to interest being recoverable at all on the basis that there has been no claim to interest by way of damages. As Mr Howe submitted, if that is what was being suggested in Mr Foxton's skeleton argument, it is an argument which is plainly wrong as a matter of principle since for interest to be recoverable there is no imperative on a claimant to plead a damages claim. Perhaps

recognising this, in his oral submissions, Mr Foxton did not advance the submission foreshadowed by his skeleton argument, other than in support of his overarching argument that 1 September 2012 should be taken as an appropriate and broad brush starting point.

87. Having clarified the position in relation to these two aspects, I should now deal with the submission which Mr Foxton did maintain. This was that to the extent that the interest and penalties in respect of which damages have been found payable have yet to be paid by the Claimants, interest ought not to be awarded since to require that interest is paid would not be consistent with the 'compensatory principle' which operates on the basis that a successful claimant has not only incurred the relevant liability but has made the relevant payment.

88. In this regard, Mr Foxton drew an analogy with a case involving a liability under a repairing covenant in a lease which, although it had arisen, had not yet resulted in remedial works being carried out (and so in costs being spent). That was ***Hunt v Optima (Cambridge) Ltd*** [2013] EWHC 1121 (TCC), in which Akenhead J explained the usual position as follows at [2]:

"There is no doubt that the starting point is that generally interest is to run from the date when the loss was incurred, albeit that even this is subject to an overall discretion (see for instance Aerospace Publishing Ltd v Thames Water Utilities Ltd [2007] EWCA Civ 3)."

He went on as follows at [3]:

"I turn first to consider the period for discretionary interest against Optima. Essentially, the major part of the damages awarded relates to remedial works not yet done, such remedial works falling into two categories, the first relating to remedial works for defects which should have been put right by Optima pursuant to the 'repairing' covenant under the respective leases in respect of which damages in place of specific performance has been awarded. None of this cost has yet been incurred and damages awarded reflect the remedial work costs assessed as at the first quarter of 2013. The sum of £225,142.51 (representing the reasonable and currently assessed costs of this remedial work) will be paid into a trust account and will be adjusted in terms of being topped up or paid back as the case may be when the remedial works have been carried out. This loss therefore has not yet been incurred but will be in the future. I decline therefore to allow any interest on this sum for any period."

He made much the same point at [4] in relation to another aspect of the claim:

"A similar thought process applies in relation to the future remedial works necessary to put right defects within each of the flats in relation to those Claimants who also succeeded against Optima for breach of Clause 3.1 of the various agreements between such Claimants and Optima. There is a (frankly) convoluted and illogical argument put forward by Counsel for the Claimants that interest should run from the date on which they purchased their flats because they had a cause of action then against Optima and because in some way some at least of the Claimants should benefit from interest in the money which was rightfully theirs; an argument is floated that because there has been an increase in the remedial work cost for the First, Second, Fifth and Sixth Claimants as from 2003 or 2004 this somehow justifies an

award of interest. What this argument wholly fails to take on board is the fact that the Claimants should be compensated by the cost of remedial works assessed as at the first quarter of 2013, that the award of interest from 2003 or 2004 would grossly over-compensate the Claimants and that it would effectively punish Optima. There should be no interest."

89. Although Mr Howe submitted that it makes no difference whether the liabilities concerned have been discharged or not since it is the date when a liability is incurred that the loss crystallises, I am not convinced by this argument. I acknowledge that the analogy which Mr Foxton sought to draw with the ***Hunt*** case is not perfect since, as Mr Howe pointed out, there is a difference between a case where remedial works are going to take place in the future and a case where there is a crystallised (though as yet unpaid) liability. In my view, however, it would not be right, as a matter of principle, to award interest in relation to a liability which has not to date had to be discharged (or, in fact, been discharged) and in relation to which, therefore, the party seeking the interest is not out of pocket. The fact that that party could have made other use of the money, had it been received, pending its use in discharging the liability is neither here nor there since, in my view, the appropriate assumption which falls to be made is that, had the claimant been put in funds to enable its liability to be discharged, those funds would have been used for that purpose and not in some other unconnected way. Even if this is wrong, in any event, as a matter of discretion, it seems to me that it would be appropriate to decline to award interest on these aspects of the claim. The position might have been different were it the case that interest was payable by the Claimants themselves on the amounts due by way of interest and penalties. That is not, however, how the claims have been put in these proceedings.

Starting dates

90. As to the question of when interest should start running, the matter on which I have already briefly touched, Mr Howe's invitation to the Court was to order that interest should start running in accordance with the detailed analysis contained in Mr McGregor's eighteenth witness statement. I am satisfied that this is appropriate. I reject Mr Foxton's suggestion that in the case of the PEAK Claim the date should in all respects be 1 September 2012 since, as Mr Howe observed, this would involve elements of that claim attracting no interest for several years. This cannot be a fair outcome. Interest should be paid which will compensate for the payments which were made and it seems to me that, in the absence of anything more than Mr Foxton's somewhat generalised suggestion that 1 September 2012 should be a date which has universal application, Mr McGregor's approach should be accepted. I acknowledge that Mr Foxton sought to justify his 1 September 2012 submission by referring to the need to take account of the fact that in some instances monies *"were recirculated back to the KK Group"*, but, as demonstrated that it was Mr McGregor who made this very point in paragraph 23 of his eighteenth witness statement, it seems to me that no further adjustment is required.

91. I consider that Mr McGregor's approaches to the Land Plots Claim and the Astana 2 Claim are, likewise, appropriate. I reach this conclusion notwithstanding the various points which were made in Mr Foxton's skeleton argument. As to the Land Plots Claim, Mr Foxton suggested that a more appropriate starting date would be 1 May 2008, as opposed to 1 January 2008 which is the date taken by Mr McGregor. The difference is not vast and, in the circumstances, I see no reason not to adopt Mr

McGregor's approach which is to take a mid-point date between 28 October 2007 and May 2008 when the majority of the relevant payments were made. Similarly, as to the Astana 2 Claim, the only dispute highlighted by Mr Foxton in his oral submissions was as to whether the appropriate date should be 1 January 2010 (as he suggested) or 1 November 2009 (as Mr McGregor suggested). Mr McGregor's rationale was set out in paragraph 47 of his eighteenth witness statement and, given that there is only two months between Mr Foxton's and Mr McGregor's suggested starting dates, it seems to me, again adopting a broad brush in the exercise of my discretion, to opt for the (marginally) later date.

Simple or compound

92. The next issue concerning interest which needs to be determined is whether interest should be awarded on a simple or on a compound basis. This is a matter which saw both Mr Howe and Mr Foxton take the Court to the statements of case as well as a number of authorities.

93. It was Mr Howe's complaint that it was not until Mr Foxton's skeleton argument that any point was taken on Mr Arip's and Ms Dikhanbayeva's behalf that it is not open to the Claimants to obtain an award of compound interest because to do so would require them to establish that compound interest is recoverable as a matter of Kazakh law and this had not been done. Indeed, in Mr Howe's skeleton argument there was reference not to Kazakh law but to English law, specifically ***Westdeutsche Landesbank Girozentrale v Islington LBC*** [1996] AC 669, in support of the submission that, since in the present case money has been obtained and retained by fraud, the Court has a discretion to award compound interest. It was acknowledged, and is clearly the position, that compound interest is not recoverable under section 35A of the Senior Courts Act 1981.

94. In the ***Westdeutsche*** case, as Mr Howe pointed out, although it was not agreed between their lordships whether compound interest is available in respect of restitutionary claims, the House of Lords proceeded on the basis that there is an equitable jurisdiction to award compound interest in cases of fraud: see, in particular, per Lord Goff at pages 692D-F and 696G-H, per Lord Browne-Wilkinson at page 702B-E, per Lord Slynn at page 718F and per Lord Woolf at pages 724H-725C and page 726B-E. Indeed, I did not understand Mr Foxton to have been contending to the contrary since, as will appear, he himself placed heavy reliance on a decision of the Court of Appeal, ***Kuwait Oil Tanker Co SAK v Al Bader*** [2000] 2 All ER (Comm) 271, in which Nourse LJ acknowledged that there is the equitable jurisdiction on which the Claimants rely, stating as follows at [209] (strictly in relation to breach of fiduciary duty claims since that was the nature of the claim in the ***Kuwait Oil Tanker*** case):

"All that said, the judge did not make his award of interest as a matter of, or in connection with, a claim for debt, breach of contract or damages for tort. He made it as part of a restitutionary award of compensation for breach of fiduciary duty. Such a claim made on the basis of trusteeship and available to the claimants in the circumstances of the case, is by its origin and nature an equitable proprietary claim moulded and used for the purpose of achieving restitution by a person called to account by equity on the basis of a defaulting trustee. Since there is no jurisdiction in the court to award compound interest at common law or by statute, it was indeed the

only basis on which the judge could make an award of compound interest. The jurisdiction which he exercised is that which Lord Brandon stated in the La Pintada case at p.116 is confined to situations

'where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position'

and which the majority of the House of Lords declined to expand further in the Westdeutsche Bank case (see per Lord Browne-Wilkinson at 717F, Lord Slynn of Hadleigh at 718f-719b and Lord Lloyd of Berwick at 739b-741a)."

Nourse LJ explained the rationale at [210]:

"In such a case, the award of compound interest is made on the basis that a trustee misapplying monies for his own benefit, and a person obtaining or retaining money by fraud who is to be similarly treated, should be obliged either to account in full for the benefit he has unjustly derived or, in lieu of such account, to pay compound interest when the circumstances justify an award on that basis. The rationale is historically and essentially that of restitution i.e. that a fiduciary should not be permitted to make a profit from his trust. As explained by Lord Denning MR in Wallersteiner v Moir (No.2) at page 388, it is also a means of ensuring full compensation where the wrongdoer deprives a person or company of monies employed in trading operations. It is noteworthy that the judgments of Buckley LJ and Scarman LJ did not refer to that aspect as constituting the basis for a compound award. It is nonetheless an element which usually plays a part in the reasoning of the court when considering whether or not to make such an award in modern conditions."

95. Mr Foxton's submission was different: to repeat, that it was not open to the Claimants to invoke the equitable jurisdiction of the Court to award compound interest since the applicable law is not English law but Kazakh law, and the Claimants have not established that under Kazakh law compound interest can, and would, be awarded.

96. Nor did Mr Foxton join issue (at least expressly) with Mr Howe's submissions as to why in this case, if the Court has a discretion to award compound interest, such an award should be made, given that Mr Arip and Ms Dikhanbayeva have been found to have been guilty of significant fraud and given that to award the Claimants only simple interest would not represent anything like proper compensation in respect of the frauds which were committed, particularly in view of the length of time of time which has passed since the frauds were committed. In truth, it is not surprising that Mr Foxton advanced no submissions on this aspect, instead concentrating on the prior question of whether the Court has the ability to award compound interest at all, since I am clear that, if the Court has such ability, the appropriate course in this case would, indeed, be to make an order that interest should be compounded. This is a case which saw Mr Arip and Ms Dikhanbayeva engage in prolonged and major fraud involving substantial amounts of money, and which entailed Mr Arip and Ms Dikhanbayeva (along with a succession of witnesses called by them) giving evidence to the Court which was profoundly dishonest and consistently so.

97. I need, therefore, to address Mr Foxton's submissions on the prior question, beginning with what was stated concerning compound interest in the Re-Re-Amended Particulars of Claim at paragraph 53, as follows:

"Further the First, Second and Third Defendants are liable to pay interest on all sums found due and owing in equity or pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period as the court sees fit, including as appropriate the interest rates applicable in Kazakhstan at the material times to the extent that the use of such rates is necessary adequately to compensate the Claimants; and including compound interest as damages."

As Mr Howe explained, this paragraph follows a paragraph (paragraph 52) which, under the heading *"Liability under the Laws of Kazakhstan"*, sets out, over several pages, details of the Claimants' case concerning breach of Kazakh law consistent with how that case was advanced at trial. It is nonetheless tolerably clear, indeed it probably follows from the fact that there is no express plea that compound interest is recoverable as a matter of Kazakh law (in contrast to the express allegations concerning Kazakh law as regards the breaches alleged), that the intention in paragraph 53 was not to allege that compound interest is payable under Kazakh law but to advance the compound interest case based on English law, specifically the equitable jurisdiction described in the ***Westdeutsche*** case.

98. Paragraph 53 was addressed in the Re-Re-Amended Defence at paragraph 119 in these brief (and not entirely grammatically correct) terms:

"It is denied that any sums are due to the Claimants as alleged and the claims to interest made in paragraphs 53 and 54 is accordingly denied."

This followed an earlier section (headed *"The Kazakh Law Claims"*) in which Mr Arip's and Ms Dikhanbayeva's case on the allegations of breach under Kazakh law was set out in detail. This involved their taking issue, in places, with what the Claimants had alleged, meaning that there was clarity over the extent to which Kazakh law was common ground or in dispute, as the case may be. Mr Howe submitted that this puts into sharp focus the denial contained in paragraph 119. That denial involved no assertion that the Claimant's ability to recover compound (as opposed to simple) interest was a matter not of English procedure but a matter for substantive Kazakh law. Nor did it entail any plea as to whether compound interest is, or is not, recoverable under Kazakh law. On the contrary, as Mr Howe pointed out, the paragraph 119 denial was, it seems, premised on the prior denial in the same paragraph that *"any sums are due to the Claimants as alleged"* and so that there was any liability as regards any principal amounts. This is apparent from the fact that the second denial in paragraph 119 (the denial that interest is due) is expressed as being *"accordingly denied"*.

99. In these circumstances, it was Mr Howe's submission that it is now too late for Mr Foxton to take the objection which he does, at least to do so in conjunction with the argument that, there being no evidence (if this is the position) that compound interest is available under Kazakh law, compound interest cannot be recovered in this case. Had Mr Arip and Ms Dikhanbayeva wished to raise the arguments now raised, Mr Howe submitted, it was incumbent upon them to do so in the Re-Re-Amended Defence in order to ensure that the issue was properly addressed, if necessary with Kazakh law evidence directed to it specifically, and that for the arguments to be raised for the first time in Mr Foxton's skeleton argument for the consequential hearing is unacceptable.

100. I have sympathy for Mr Howe's position. Regardless of where, technically, the onus might lie from a pleading perspective, it is regrettable that it should have taken until the consequentials hearing for Mr Arip's and Ms Dikhanbayeva's case to be made known. The modern 'cards on the table' approach to litigation ought to mean that the present situation does not come about. In my view, the responsibility for what has happened in this case rests not with the Claimants but with Mr Arip and Ms Dikhanbayeva.

101. As I have previously observed, it is tolerably clear that, in putting forward their compound interest claim, the Claimants were relying upon English law rather than Kazakh law. There was no mention of the Kazakh law concerning compound interest, as Mr Foxton himself pointed out, in paragraph 53 itself. The only mention of Kazakhstan was the reference to the interest sought *"including as appropriate the interest rates applicable in Kazakhstan at the material times to the extent that the use of such rates is necessary adequately to compensate the Claimants"*. Indeed, strictly speaking, these words are followed by a semi-colon and it is only after this semi-colon that there is any mention of *"compound interest"* (and, even then, the reference to compound interest is *"as damages"*, a point to which I shall return), and so the reference to compound interest is divorced from any reference to Kazakhstan. This is not, however, a point which, sensibly, Mr Foxton took.

102. Mr Howe sought in his oral submissions to suggest that the pleader (not, as it happens, him – at least not originally) should be taken as having alleged an entitlement to interest under Kazakh law. However, that seems somewhat unlikely given that paragraph 53 does not state this in terms. That the Claimants were apparently contemplating only English law is, furthermore, borne out by the fact that in Mr Howe's skeleton argument for the consequentials hearing there was no mention of Kazakh law concerning compound interest and, instead, reliance was exclusively placed on the ***Westdeutsche*** case. In these circumstances, it seems to me that it was incumbent upon Mr Arip and Ms Dikhanbayeva to set out their stall, whether in the Re-Re-Amended Defence, or at least in some form earlier than has happened in this case, so as to make the Claimants (and, indeed, the Court) aware that it was not accepted that the English law relating to compound interest is applicable and, furthermore, that under Kazakh law compound interest is not recoverable (assuming, of course, that that is the position – a point to which I shall return). Had Mr Arip and Ms Dikhanbayeva done this, there would not be the present situation. I am inclined, in the circumstances, to agree with Mr Howe's characterisation of the arguments now raised as being *"a classic after-the-event attempt to exploit the position in order to raise a point that was not raised on the pleadings and try and catch the court and the claimants by surprise"*.

103. It should also be borne in mind that it was not only in paragraph 53 of the Re-Re-Amended Particulars of Claim that the Claimants made it clear that they would be seeking compound interest if successful in the action. On the contrary, it is right to point out that, in his third affidavit, produced in 2015 in the context of an application to reduce the level of the amount affected by the freezing order which the Claimants obtained two years earlier, Mr McGregor set out details which included amounts for compound interest in much the same manner as he did when producing his eighteenth witness statement for the purposes of the consequentials hearing. This did not provoke Mr Arip and Ms Dikhanbayeva, or those acting for them, to complain that compound

interest cannot be recovered as a matter of English law since this is not the applicable law and that Kazakh law does not permit compound interest to be awarded. In all probability, this was for a very good reason: the arguments now advanced by Mr Foxton had not occurred to anybody at that stage.

104. Coming on to address the substantive merits of the arguments now advanced by Mr Foxton, in my view, he was right when he submitted that the equitable jurisdiction to award compound interest is substantive rather than procedural in nature. Nourse LJ made this clear in the ***Kuwait Oil Tanker*** case at [211]:

"It seems to us that the court's power in such circumstances to award compound interest (although discretionary in the sense that it will be exercised in accordance with established equitable principles) is not only distinct, but different in character, from its broad powers under s.35A, being a necessary adjunct of the claimant's substantive right to restitution. An award of compound interest upon that basis is thus itself substantive rather than merely procedural in nature. Accordingly, whilst we would differ from the reasoning of the judge in that last respect, that difference is not one which leads to any different result so far as the award of interest in this case is concerned, in the light of the provisions of Article 267 of the Kuwait Civil Code."

As Mr Foxton accepted, what Nourse LJ had to say in this regard amounted to *obiter dicta* because, as explained at [204], after deciding that awards of interest under section 35A of the 1981 Act and in equity were procedural rather than substantive in nature (see [198]), the judge at first instance, Moore-Bick J (as he then was), had gone on to consider the position under Kuwaiti law and had concluded that the relevant Kuwaiti law satisfied the then applicable double actionability rule. I nonetheless consider that Nourse LJ's observations are highly persuasive and that, accordingly, I should approach the present dispute on the basis that the equitable jurisdiction to award compound interest in fraud cases is, indeed, substantive rather than procedural – whilst noting that the Court of Appeal in the ***Kuwait Oil Tanker*** case, at [208], specifically left open the question of whether section 35A is, similarly, substantive in nature.

105. If it is right that the equitable jurisdiction is, indeed, substantive, the next question is whether Mr Foxton was right to submit that, in those circumstances, it is not open to the Claimants to rely upon what is sometimes described as the presumption that the relevant foreign law (here, Kazakh law) is the same as English law. I will deal with this point shortly. First, however, it is necessary to address another of the matters raised by Mr Foxton. This concerns his insistence that, in order to recover compound interest, the Claimants would need to do this by advancing a claim for damages in line with the decision of the House of Lords in ***Sempra Metals v IRC*** [2008] 1 AC 561 to the effect that compound interest may be recovered as damages at common law but that it is necessary for such damages to be pleaded and proved. As the Claimants had advanced no such claim, other than in the briefest and unparticularised of terms when referring at the end of paragraph 53 of the Re-Re-Amended Particulars of Claim to *"compound interest as damages"*, it was Mr Foxton's submission that this means that compound interest cannot be recovered by the Claimants in this case, in any event. Mr Foxton, in this respect, referred the Court to ***JSC BTA Bank v Ablyazov*** [2013] EWHC 867 (Comm), another case (or, more accurately, cases) involving Kazakhstan in which Teare J rejected an attempt by the successful claimant to recover compound interest as damages on the ***Sempra Metals*** basis because there had been *"no attempt*

to plead as damages the Bank's actual interest losses over and above the paying away of the principal sums".

106. I agree with Mr Howe, however, that Mr Foxton's submissions on this aspect appeared to overlook the fact that there is a distinction between compound interest being claimed as damages, on the one hand, and such interest being claimed under the equitable jurisdiction of the Court, on the other. There is, in short, no obligation to overcome the ***Sempra Metals*** hurdle, which exists to enable a claimant to recover damages at common law, in seeking compound interest under the Court's equitable jurisdiction.

107. There is, however, a further point which needs to be considered because it was Mr Foxton's submission that, putting to one side ***Sempra Metals*** and what is required as a matter of English law, it is still necessary to do whatever the relevant foreign law requires to be done in order to make a recovery of compound interest, and so that it is not enough for a successful claimant simply to say that there is a power to award interest which might enable compound interest to be recovered. All the more so, Mr Foxton submitted, if for these purposes the claimant is relying upon the presumption to which I have referred and not actual evidence as to what the relevant foreign law is, given that the presumption would entail, as Mr Foxton put it, *"the obvious utter artificiality of presupposing that the courts of Kazakhstan have a jurisdiction akin to the equitable jurisdiction of the [English] court to award compound interest"*.

108. Having considered Mr Howe's submissions in response to this suggestion, I consider that there is some force in the point which he made that in the ***Kuwait Oil Tanker*** case it appears that it was the existence of the power to award compound interest in the relevant foreign law which is what matters. Thus, Moore-Bick J concluded that an award of interest was not contrary to the law of Kuwait (and so not precluded by the then applicable double actionability rule) by finding at page 172 of his judgment (as recorded in Nourse LJ's judgment at [200]) that he was *"satisfied that the Kuwaiti courts have the power under this Article to award interest where they are satisfied that the property in question could have been used to earn interest and would have been so used if the interests of the owner had been properly safeguarded"*. As Nourse LJ went on to explain at [204], a paragraph to which I have previously referred:

"In these circumstances, the judge's finding that interest was recoverable by way of compensation under the restitutionary provisions of Article 267 represented a finding that there was under Kuwaiti law a provision of substantive law which closely corresponded to the award in England of compound interest against a person whom English law would regard as a trustee or constructive trustee in respect of monies stolen or appropriated by fraud. Accordingly, if the judge was wrong to regard his award of compound interest as a matter of procedural law for the lex fori, he was nonetheless justified in making the award he did, given that it 'harmonise[d] with the right according to its nature and extent as fixed by the foreign law' (see Phrantzes –v- Argenti [1960] 2 QB 19 at 35 and Dicey & Morris (13th ed.) at page 171) and was thus the remedy appropriate in English law to give effect to the substantive right contained in Article 267. That being so, it is strictly unnecessary to decide the question, hitherto devoid of authority, as to whether an award of interest against a person in the position of a trustee or constructive trustee is better regarded as substantive or procedural in character so far as English law is concerned. What does seem clear to us, however, is that (although the judge held it to be so) the answer is

not necessarily the same as that in respect of an award under s.35A of the Supreme Court Act 1981 (which prohibits awards of compound interest)."

109. It seems to me to follow from this that, as Mr Howe submitted, emphasising Nourse LJ's reference to the award of compound interest under the equitable jurisdiction being *"the remedy appropriate in English law to give effect to the substantive right contained in art 267"*, there is some substance in the point that it is the fact that there is the power to award compound interest under Kazakh law which matters, not that the successful claimant can establish, through doing whatever Kazakh law might require for such a claim to succeed, that it would necessarily have been exercised in such a way as to result in an award of compound interest. I consider, in particular, that Mr Howe may well have been right when he submitted that it is the fact that there is an equivalent power which means that the Court here can exercise its own equitable jurisdiction just as it would do were this a domestic dispute with no foreign law aspect in play at all. Indeed, as Mr Howe went on to observe, if this was not the position, then, it seems that the Court of Appeal would have rejected the compound interest claim on the basis that it had not been established that compound interest would actually have been recovered under Kuwaiti law, not merely that there was power to award such interest under that system of law. If this is right, then, it follows that it makes no difference that, as Mr Foxton somewhat wryly observed, Kazakh law is unlikely itself to have an equitable jurisdiction comparable to that of England and Wales. However, ultimately, as I shall come on to explain, I do not consider that the point raised by Mr Foxton is critical in this case.

110. I come on, then, to the position under Kazakh law. Mr Howe advanced three contentions in this respect. First, he submitted that, in circumstances where no issue as to the relevant applicable law and whether compound interest can be recovered under it has previously been raised, it is now not open to Mr Arip and Ms Dikhanbayeva to take issue with the proposition that that is the case. Secondly and in any event, he submitted that there *is* evidence on this matter in the form of the expert evidence which was given by Professor Suleimenov, Mr Arip's and Ms Dikhanbayeva's own expert on Kazakh law. Thirdly, Mr Howe submitted that this is a case in which the Claimants can rely upon the presumption that the relevant foreign law (Kazakh law) is the same as English law.

111. Dealing with the first of Mr Howe's submissions, I have already made my view clear that it is regrettable that it should have taken as long as it has for Mr Arip and Ms Dikhanbayeva to raise the arguments which they now do. I have to consider whether this means that they should now be precluded from doing so. Specifically, I have to decide whether they should, in the circumstances, be treated as having previously accepted that compound interest can be recovered under Kazakh law and possibly also (notwithstanding the views which I have expressed concerning Mr Foxton's argument that it is a requirement that the Claimants should establish that such interest would actually have been recovered under Kazakh law) that, in order to make such a recovery, it is unnecessary to do anything more than would be required to obtain compound interest under the equitable jurisdiction here. My conclusion is that it would not be right to approach the matter on this basis. I have in mind, in particular, the point that, despite Mr Howe's suggestion that it was always intended by the Claimants that the compound interest claim was founded on Kazakh law, for reasons which I have explained, that seems somewhat improbable. It seems to me that it

would not be appropriate to conclude that Mr Arip and Ms Dikhanbayeva should be regarded as having accepted something which the Claimants did not themselves intend to allege. Nor, albeit for a different reason, would it, in my view, be appropriate to approach the matter on the basis that Mr Arip and Ms Dikhanbayeva accepted that the relevant law was English law rather than that of Kazakhstan. This is because, if it is right, as a matter of analysis, that the relevant law is Kazakh law rather than English law, then, I struggle to see how it can be appropriate to treat English law as the relevant law simply on the basis that Mr Arip and Ms Dikhanbayeva have only very recently (and belatedly) pointed out that, consistent with the ***Kuwait Oil Tanker*** case, it is Kazakh law which matters. As I shall come on to explain, however, it seems to me that it *is* appropriate to take into account the lateness of the arguments now put forward by Mr Arip and Ms Dikhanbayeva when considering Mr Foxton's objections to the Claimants' reliance on the presumption – a matter to which I shall return.

112. This brings me to the second of Mr Howe's submissions. This entailed Mr Howe pointing to a report which was prepared by Professor Suleimenov, Mr Arip's and Ms Dikhanbayeva's own Kazakh law expert. Specifically, in his third report prepared in January 2017, Professor Suleimenov identified one of the questions which he had been posed by Cleary Gottlieb, number 8, as being this:

"Does the Kazakh law provide for interest to be payable on the amounts claimed by a claimant and found by the court to be due to a claimant? What is the likely rate of interest and the period over which such interest would be payable?"

Professor Suleimenov then went on to answer this question at paragraphs 151 to 155, as follows:

"151. In accordance. with Art. 353 KCC (Annex, pp. 10-11), interest is payable for the use of another's money, which, as a general rule, is to be calculated at the official refinancing rate of the National Bank of the Republic of Kazakhstan.

152. The court may grant the creditor's claim for interest at the official refinancing rate of the National Bank of the Republic of Kazakhstan as of the date of filing of the claim, the date of judgment, or the date of the actual payment, at the creditor's election. The claimant may elect the refinancing rate as of the date of actual payment, only if the funds were compensated to the claimant as of the date of the judgment.

153. The interest accrues from the date when the money became due to the creditor and through the date of the actual payment. Pursuant to Art. 958 KCC (Annex, p. 14), in case of unjust enrichment, interest is payable on the amount of the unjust enrichment from the moment when the recipient became aware or should have become aware that he was not entitled to receive or save the funds.

154. Under Art. 353(3) KCC (Annex, pp. 10-11), if the damages caused to the creditor by the unlawful use of the creditor's money exceed the amount of interest payable at the official refinancing rate, the creditor is entitled to

claim that the debtor compensate for the damages to the extent they exceed that amount.

155. Besides, although this is not interest in the literal sense, under Art. 239 (Annex, p. 310) of the Civil Procedure Code of Kazakhstan, the court may adjust the amounts awarded by the judgment based on the official refinancing rate of the National Bank of the Republic of Kazakhstan as of the date the judgment is actually executed. After the judgment is actually executed, the claimant may apply to court for the adjustment."

113. Mr Howe submitted, in the circumstances, that this constitutes evidence that under Kazakh law it is possible to recover compound interest. He did so notwithstanding that nowhere in these passages did Professor Suleimenov refer specifically to compound interest. Mr Howe submitted that, equally, nowhere is there any mention of the ability to recover interest being limited to simple interest. This, Mr Howe mused, is probably because under Kazakh law no distinction is made as between the two types of interest. Mr Howe suggested that that distinction, if not unique to England and Wales, is nonetheless a particular feature in this jurisdiction by virtue of what is stipulated in section 35A of the 1981 Act (namely that simple interest is recoverable) which it should not be assumed is present in other countries. I agree with Mr Howe that this is the probable explanation for there being no mention of either simple interest or compound interest in this report. I conclude, therefore, that Professor Suleimenov's references to interest should be regarded as references to interest, whether simple or compound. I am fortified in this view by the consideration that it is compound interest which, as Nourse LJ put it in the ***Kuwait Oil Tanker*** case at [210], ensures *"full compensation where the wrongdoer deprives a person or company of monies employed in trading operations"*. I can detect nothing in Professor Suleimenov's third report which hints that the interest described by him should do anything other than provide full compensation of the type which Nourse LJ had in mind. Simple interest does not provide full compensation precisely because in the commercial context interest accrues in a compounded manner.

114. I bear in mind, furthermore and importantly, that the question concerning interest which Professor Suleimenov was posed by Cleary Gottlieb was asked against the backdrop of a claim for interest which included, by virtue of paragraph 53 of the Re-Re-Amended Particulars of Claim, a claim (as necessary) for interest at Kazakh rates and a claim described as including compound interest. The fact that the question was put to Professor Suleimenov at all might, with hindsight, be seen as an early indicator that the case now advanced that compound interest is a matter of Kazakh law was to be advanced. Even putting this point to one side, however, what is undeniable is that Professor Suleimenov was asked about interest in circumstances where it was known that the Claimants were seeking compound interest. If, therefore, it had been Professor Suleimenov's view that compound interest is not recoverable under Kazakh law, it might be expected that he would have made this clear. The fact that he did not do so suggests to me that this is because that is not what Professor Suleimenov considers is the position.

115. It follows that I accept Mr Howe's submission that there is, indeed, evidence before the Court that compound interest is recoverable as a matter of Kazakh law – in the form of Mr Arip's and Ms Dikhanbayeva's own Kazakh law expert, Professor Suleimenov. Moreover, since it does not appear that under Kazakh law there is any

particular hurdle which needs to be overcome to enable compound interest to be recovered, even if Mr Foxton were right when he submitted that it is necessary that the Claimants should establish that such interest would actually have been recovered under Kazakh law, not merely that there is an ability to recover compound interest under Kazakh law, this would not represent an obstacle to the Claimants in the present case. Specifically, there is nothing to suggest that the Claimants would have to advance the Kazakh equivalent of a ***Sempra Metals*** damages claim. I am satisfied, in short, that, if it is necessary that the Claimants establish that they would recover compound interest under Kazakh law, this is something which they should be regarded as having done. I should note, in passing, in this respect that in the ***Ablyazov*** case Teare J had before him evidence from Kazakh law experts (one of whom was Mr Vataev, the Claimants' Kazakh law expert in the present case) on the topic of interest in similar terms to Professor Suleimenov's evidence in his third report, as is apparent from [14] and [23] to [26]. In rejecting the contention that compound interest could be recovered in that case, on the basis that there had been no ***Sempra Metals*** damages claim, it appears that no argument was advanced akin to that advanced before me by Mr Howe. Specifically, despite the fact that the claims for interest were put on the basis of the equitable jurisdiction *"and/or"* section 35A of the 1981 Act (see, for example, [11]), it seems that it was not contended that the absence of a claim for compound interest by way of damages had no bearing on the claim in equity. It is, no doubt, for this reason that Teare J did not address the point which Mr Howe made before me. It is for this reason also, therefore, that, in arriving at the decision which I have done, there is no inconsistency with what was decided by Teare J in the ***Ablyazov*** case.

116. Even if I am wrong as regards the second of the ways in which Mr Howe put his case on this issue, there remains the third of his submissions to consider. This involves Mr Howe's invocation of what is commonly characterised as a presumption and which is described in *Dicey & Morris, The Conflict of Laws* (15th Ed.) at Rule 25(2) as follows:

"In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

The editors of *Dicey & Morris* go on at paragraph 9-002 to explain as follows:

"The principle that, in an English court, foreign law is a matter of fact has long been well established: it must be pleaded, and it must be proved: these requirements are examined in detail below. It follows that a representation of foreign law is a representation of fact for the purposes of the law of misrepresentation, and a finding upon foreign law made by arbitrators is a finding of fact which may not form the basis of an appeal on a point of law under s.69 of the Arbitration Act 1996. It is also said to follow that it the parties elect not to prove the content of foreign law, a case will be decided by the application of English domestic law as though the case were a wholly domestic one, and this is generally true. But in recent years there have been increasing signs that this cannot invariably follow, and in cases where it would be wholly artificial to apply rules of English law to an issue governed by foreign law, a court may simply regard a party who has pleaded but who has failed to prove foreign law with sufficient specificity as will allow an English court simply to apply it, as having failed to establish his case without regard to the corresponding principle of English domestic law."

They continue at paragraph 9-025 (*"Burden of proof"*) in a passage emphasised by Mr Foxton:

"The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law. This principle is sometimes expressed in the form that foreign law is presumed to be the same as English law until the contrary is proved. But this mode of expression has given rise to uneasiness in certain cases. Thus in one case the court refused to apply the presumption of similarity where the foreign law was not based on the common law, and in others it has been doubted whether the court was entitled to presume that the foreign law was the same as the statute law of the forum. In view of these difficulties it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law."

This is followed in the next paragraph (9-026) by another passage relied upon by Mr Foxton which states:

"Even so, there will still be cases in which the application of English law, whether because the party seeking to have foreign law applied has pleaded foreign law but has failed to prove its content to the satisfaction of the court, or because the parties have tacitly agreed not to seek to prove the content of foreign law and have the lex fori applied by default, will be just too strained or artificial to be appropriate. … ."

Paragraph 9-027 then ends with this:

"in a case in which foreign law was pleaded and proved, but one point overlooked and not proved, the court refused to allow the gap in the case to be filled by applying English law."

117. This last statement by *Dicey & Morris* is based on ***Tamil Nadu Electricity Board v ST-CMS Electric Company Pte Ltd*** [2007] EWHC 1713 (Comm), an authority on which Mr Foxton placed particular weight. In that case Cooke J explained at [97] that midway through a hearing one of the parties (TNEB) *"sought to raise fresh issues of Indian law in relation to section 8 of the Indian General Clauses Act 1897, or alternatively to rely upon section 17(2) of the English Interpretation Act 1978"*. He explained that he refused the application *"to adduce fresh evidence of the law of India or to raise a new point of Indian law upon which neither expert had expressed any view in any report"*. The reasons why he did so were explained at [98] and [99], as follows:

"98. Equally I can see no basis for allowing TNEB to rely on any presumption as to the equivalence of Indian law with English law. The artificiality of such a presumption, when the parties have been permitted and have produced expert evidence of Indian law, is obvious. … .

99. It would not be right to allow this issue to be determined in the way that TNEB submits. The Order of Simon J referred to an agreed list of issues, of which this issue did not form part. The whole purpose of the list of issues, and of the order for expert evidence on Indian law, was for the parties to set out and prove their respective cases on Indian law on the defined issues. It would be wrong to

subvert that, by allowing reliance on the presumption of similarity in law, when, as a result of its own actions or inactions, the Indian law evidence provided by TNEB, in accordance with the Court's case management order, did not cover the issue now sought to be raised. I was referred to Foreign Law in English Courts, by Richard Fentiman, at pages 60-64 and 143-153, from which the following propositions can, accurately, in my judgment, be garnered:

i) There is no adequate support in the decided authorities for the principle that English law should govern by default, where foreign law is relied on by a party, who declines to, or is unable, to prove it.

ii) It would be wrong to allow the presumption to be used by a party where he pleads or wishes to rely on foreign law but declines to prove it. That would reward a person who alleges foreign law without proving it. The presumption is aimed at the situation where foreign law is neither pleaded nor proved and the parties and the court are to be taken as content to proceed on the basis of the presumption, since no one has sought to establish that there is any relevant difference.

iii) If the failure to prove foreign law by a party is the result of a tactical decision, after seeking to rely on it, reliance by that party may amount to an abuse of process, depending on the circumstances."

Cooke J concluded at [101] by reiterating that the presumption is not one which the Court could *"properly accept, in the situation where foreign law evidence had been admitted on the specific issues requested by the parties"*.

118. It was Mr Foxton's submission that, just as Cooke J in the ***Tamil Nadu Electricity*** case refused to allow TNEB to rely upon the presumption, so the Court should not let the Claimants do so in the present case. He submitted, in particular, that the presumption ought not to be used to perform a 'gap-filling' function which means, in effect, that a party is able to obtain the desired result, as Mr Foxton put it, *"through a combination of those bits of the foreign law that have been put in issue and those bits of English law used to fill the gap that might not have been open for each established separately"*. In a case, Mr Foxton submitted, where there had been substantial quantities of expert evidence concerning Kazakh law, the Claimants should not now be permitted to invoke the presumption to overcome the absence of Kazakh law evidence concerning compound interest. The more so, Mr Foxton submitted, given that the English law concerned is, again as Mr Foxton put it, as *"idiosyncratic and localised"* as *"the jurisdiction of the court of equity"*.

119. I reject Mr Foxton's submissions. First, for reasons which I have explained, I do not consider that the responsibility for the situation which has come about rests with the Claimants. On the contrary, I repeat, the case now advanced by Mr Arip and Ms Dikhanbayeva ought, I am clear, to have been made known much sooner than it was. To wait until the consequentials hearing before raising the arguments, fairly and squarely, is not acceptable. Indeed, no doubt, had the matters now raised by Mr Foxton been raised at an earlier stage, the parties could have ensured that their respective Kazakh law experts, Professor Suleimenov and Mr Vataev, dealt with the ability to recover compound interest specifically. It is only because this was not done that there was no such evidence before the Court which was directly on point and why

I have had to do my best to understand the evidence which has been given by Professor Suleimenov on the interest issue. This, then, is not a case where it can properly be suggested that the Claimants are trying to fill a gap in relation to an issue which has been at large for some time. I refer here, of course, not to the claim for compound interest since that has been made from the outset of these proceedings, but Mr Arip's and Ms Dikhanbayeva's newly raised contention that that claim is subject to Kazakh law. The proverbial card has only just reached the table, and that is not the Claimants' fault. It follows, in my view, that this is not a case which is in the same territory as the ***Tamil Nadu Electricity*** case, and that it would be quite wrong, therefore, to bar the Claimants' reliance on the presumption for this reason. This reason by itself justifies rejection of Mr Foxton's gap-filling objection.

120. Secondly, as to Mr Foxton's submission concerning the (allegedly) *"idiosyncratic and localised"* nature of the equitable jurisdiction to which the Claimants point in praying the presumption in aid, the answer to this is that, even assuming that it is a requirement that the Claimants should establish that such interest would actually have been recovered under Kazakh law and not only that there is a power to award compound interest under Kazakh law, in any event, I am satisfied that the Claimants should be treated as having established this and not merely that the power to award compound interest exists under Kazakh law.

121. Thirdly, it seems to me that it is appropriate, when considering whether the presumption should operate in the Claimants' favour, again to have regard to the evidence given by Professor Suleimenov on the topic of interest. I am satisfied that, even if (contrary to the view which I have reached) Professor Suleimenov's evidence does not go as far as to amount to evidence that compound interest is recoverable as a matter of Kazakh law, it is evidence which nonetheless, at the very least, serves to some degree to justify the Claimants' invocation of the presumption.

122. It follows that, in my view, this is a case in which it is appropriate, to the extent necessary, to apply the presumption in such a way as to mean that the compound interest claim succeeds. This, in circumstances where, as I have previously indicated, Mr Foxton did not join issue with Mr Howe's submissions as to why in this case, if the Court has a discretion to award compound interest, it should exercise that discretion by making such an award given the significant frauds which the Court has decided were committed by Mr Arip and Ms Dikhanbayeva.

123. Having decided that it is appropriate that the Claimants should be awarded compound interest, it is then necessary to decide what rests should be used in calculating the interest due. Mr Howe submitted that there should be monthly rests in line with the evidence given in Mr McGregor's eighteenth witness statement at paragraph 16.4(i) that *"interest compounded monthly ... is the closest rate to the true cost of borrowing US dollars in Kazakhstan for the relevant period"* and *"is the typical compounding method applicable to corporate borrowing and what the Claimants have generally paid on their borrowings, whether US dollars, euro or KZT"*. Mr Foxton submitted, however, that annual rests would be more appropriate, noting that Mr McGregor has provided calculations based on monthly rests and annual rests in the alternative – calculations which arrive at differences which, in context at least, are not particularly substantial.

124. This is another area where the Court has a wide discretion and where a broad brush approach is required. In my view, to order monthly rests would not be appropriate. Nor, however, do I consider that annual rests would be right. I consider that it would be more appropriate were the rests to be quarterly – in other words, with three monthly rests. This accords with what I understand to be typical in the arbitration field where compound interest is routinely awarded because, of course, section 49 of the Arbitration Act 1996 permits arbitrators to award either simple or compound interest. It follows that interest will be payable on a compound basis with three monthly rests.

Post-judgment rate

125. The last matter relating to interest concerns the appropriate post-judgment interest rate to be applied in this case.

126. Section 44A of the Administration of Justice Act 1970 (*"Interest on judgment debts expressed in currencies other than sterling"*) provides as follows:

> *"(1) Where a judgment is given for a sum expressed in a currency other than sterling and the judgment debt is one to which section 17 of the Judgments Act 1838 applies, the court may order that the interest rate applicable to the debt shall be such rate as the court thinks fit.*
>
> *(2) Where the court makes such an order, section 17 of the Judgments Act 1838 shall have effect in relation to the judgment debt as if the rate specified in the order were substituted for the rate specified in that section."*

127. It is clear that the choice of appropriate rate for the purposes of section 44A should involve application of what has been described as the 'compensatory principle'. The position was explained by Longmore LJ in ***Novoship (UK) Ltd v Mikhaylyuk*** [2014] EWCA Civ 908, [2015] QB 499 at [132] to [136]:

> *"132. The judge started from the proposition that the primary purpose of an award of interest is to compensate the creditor for having been kept out of his money. (For convenience we refer to that, as did the judge, as 'the compensatory principle'). That is the conventional basis on which interest is awarded on the sum for which judgment is given and in the judge's view there were no sufficient grounds for adopting a different approach to judgment debt interest. However, Mr Brindle submitted that the judge's approach was wrong, because the compensatory principle has been abandoned in relation to sterling judgment debts, the current rate acting as no more than a consistent and readily ascertainable rate which has the added advantage of providing an effective incentive to prompt payment. These considerations are best met in the case of foreign currency judgment debts by adhering to the rate prescribed from time to time in respect of sterling judgment debts. Moreover, he submitted, to award a rate of interest on foreign currency judgment debts which does no more than reflect prevailing commercial rates discriminates unfairly against those creditors. Mr Pillow submitted that the judge had adopted the correct approach, since, notwithstanding the statutory anomalies, the compensatory principle still underpins the award of interest on judgment debts of all kinds.*

> 133. *We think it is reasonably clear that the original purpose of section 17 of the 1838 Act was to ensure that judgment creditors were not penalised by being kept out of their money. An interest rate of 4% was widely adopted by courts in the 19th century as reflecting a fair rate of return and one sees no sign in the 1838 Act of any intention to provide for an enhanced rate that might act as a spur to prompt payment. Moreover, between the introduction of section 44 of the 1970 Act and the making of the current Order in 1993, the rate was adjusted broadly to reflect changes in prevailing commercial rates for sterling. It is true that amendments sometimes lagged well behind the market, but on the whole there was an attempt to adjust the rate to reflect broad market movements. ...*
>
> 134. *The question that arises in this case was considered by Hamblen J. in Standard Chartered Bank v Ceylon Petroleum Corporation [2011] EWHC 2094 (Comm), in which the defendant put forward a number of the arguments now relied on by Mr Nikitin. Judgment was given in US dollars. The judgment creditor sought to persuade the judge that he should not depart from the statutory rate, but the judge was unimpressed. Although he did not say so in terms, he clearly proceeded on the basis that he should apply the compensatory principle. ...*
>
> 135. *Since 1993, when the rate of interest payable on sterling judgment debts was last reviewed, much has happened. It is difficult to deny that the failure to vary the rate broadly in line with changing market conditions has produced the anomaly to which NOUK drew attention, but we are not persuaded that it is one of which, as the holder of a US dollar judgment debt, it can properly complain. The failure of successive Lord Chancellors to keep the sterling rate broadly up to date cannot, in our view, affect the essential purpose of the 1838 Act or the obvious intention of Parliament in giving the court the power to award an appropriate rate of interest on foreign currency judgment debts. If it had intended to impose an arbitrary rate for purposes other than simple compensation, Parliament would no doubt have repealed or amended section 44A of the 1970 Act.*
>
> 136. *All this points to the conclusion that the judge was right to hold that the compensatory principle provided sufficient (we might even say compelling) grounds for departing from the prescribed rate applicable to sterling judgments. ... ."*

128. Mr Howe's submission was that the appropriate rate should be 7.14%. This is the rate which Mr McGregor has calculated in his eighteenth witness statement based on information obtained by SVG showing the fully convertible currency rate applicable to US Dollars during 2017. 7.14% is apparently the average across the whole year. Mr McGregor noted, however, that the rate in December 2017 was 6.8%.

129. Mr Foxton highlighted what Mr McGregor had to say concerning fluctuation and suggested that it would, therefore, be appropriate to adopt a cautious approach bearing in mind that the rate, once fixed, remains applicable. It seems to me, however, that this point rather cuts both ways since it is always possible that the rate will hereafter increase rather than go down. In view of this, I consider that Mr McGregor's average rate of 7.14% is appropriate.

130. I would just observe in this context that I have not sought to make up for the fact that post-judgment interest is not able to be compounded by deciding on the rate which I have done since, as Longmore LJ observed in the Novoship case at [141], *"to award an artificially high rate of interest in order to achieve the equivalent of an award of compound interest poses its own problems, since the court cannot know how long the judgment will remain outstanding"*.

Release of security for costs

131. The next matter to be considered is the Claimants' application to have the security for costs which has to date been put in place released. That security takes the form of cash (in the amount of £ 2,030,000), two Deeds of Indemnity from Harbour (which cover at least £ 2,725,000) and an ATE insurance policy.

132. Mr Foxton's submission was that, *"given the recent intervention of Harbour"*, the appropriate course is for the cash security to be paid into Court pending resolution of the position as between Harbour and the Claimants (as to which see below). His position in relation to the other security was less clear but, as I understood it, he opposed the release of any security pending the outcome of Mr Arip's and Ms Dikhanbayeva's application for permission to appeal.

133. Mr Howe's position on this issue was straightforward. It was that there is no reason why the security ought not to be released. I agree with him about that. As Mr Akkouh put it as regards the cash security, insofar as monies have been paid by the Claimants to Allen & Overy to stand as security for costs, Harbour has no claim to the monies concerned. This was a recognition of the fact that these monies are the Claimants' *own* monies. As for the security furnished by Harbour, on the Claimants' behalf in effect, again as Mr Akkouh explained, those funds fall to be dealt with pursuant to a separate agreement reached between Harbour and Allen & Overy, and it follows that there is no good reason why any of this money should be paid into Court as Mr Foxton was inclined to suggest.

134. I am clear, in the circumstances, that the security for costs which has been furnished by the Claimants and Harbour should be released. As no separate arguments were advanced in relation to the ATE insurance policy, it seems to me that the same applies to this.

Destination of monies paid in satisfaction of the judgment or by way of costs

135. I mentioned Harbour at the outset of this judgment. Harbour is a Cayman Limited Partnership which entered into an investment agreement with the KK Plc, KK JSC, PEAK and Peak Akzhal on 31 December 2015. Under that agreement, Harbour has apparently provided approximately £ 12 million to fund the Claimants' legal costs and estimates its likely recovery, given the success of the claims, as being in the region of £ 56 million.

136. That entitlement is to be taken from the proceeds of the litigation or realised from enforcement against Mr Arip's and Ms Dikhanbayeva's assets. Furthermore, in fulfilment of their contractual obligations under the agreement, the Claimants issued an irrevocable direction, acknowledged by Allen & Overy, their solicitors, in which this was stated:

"The Claimants hereby irrevocably direct that all Proceeds received pursuant to the Proceedings should be paid to the client account of Allen & Overy LLP and disbursed pursuant to the terms of the Investment Agreement."

137. Harbour has recently become concerned, however, that its rights under the funding agreement entered into with the Claimants might be prejudiced. This concern has come about by reason of certain insolvency proceedings which have been commenced against KK JSC in Kazakhstan over the past year or so, and has been heightened by what Harbour sees as Mr Arip's and Ms Dikhanbayeva's failure to confirm that, if any settlement were to be reached with the Claimants, payment of the settlement sum would be made in accordance with the funding agreement and the irrevocable direction.

138. As to the first of these concerns, Mr Akkouh highlighted how, KK JSC having on 24 March 2016 been placed by a court in Almaty into a rehabilitation process similar to US Chapter 11 bankruptcy and a rehabilitation plan having subsequently been approved by KK JSC's creditors and by the Almaty court, four days after the end of the trial which took place last year, on 24 July 2017, certain of KK JSC's minority creditors obtained an order from the Almaty Court prohibiting KK JSC from making payments to parties who are not on the register of creditors in priority to registered creditors (a category which does not include Harbour). Mr Akkouh went on to explain that on 11 October 2017 an appeal against the decision made on 24 July 2017 was dismissed and, furthermore, that on 15 November 2017 the Almaty Court made an order prohibiting KK JSC and the rehabilitation manager from distributing any proceeds of the present proceedings, only for the same court a week or so later, on 23 November 2017, to order the termination of the rehabilitation proceedings and the institution of bankruptcy procedure which resulted, a month later, on 28 December 2017, in KK JSC being declared bankrupt.

139. As to the second of Harbour's concerns, Mr Akkouh relied upon the facts that it was only after a hearing on 25 January 2018 which I arranged at short notice in order to consider how Harbour's joinder as an additional party to these proceedings (as a result of an *ex parte* order made by Knowles J a few days previously) would impact on the consequentials hearing, that Cleary Gottlieb, Mr Arip's and Ms Dikhanbayeva's solicitors, responded to Harbour's requests (through Byrne & Partners LLP) that they confirm that they would settle the judgment debt in accordance with the funding agreement and the irrevocable direction and, even then, the confirmation sought was not forthcoming.

140. These are concerns which, ultimately, I need only record as being held by Harbour without having to come to any view as to whether they are legitimately held by Harbour or not, since, by the time of the consequentials hearing, the parties were agreed that any sums paid in satisfaction of the judgment or by way of costs should be paid to Allen & Overy on terms that, pending the determination of any application for permission to appeal made by Mr Arip and/or Ms Dikhanbayeva or (if permission is granted) the dismissal of any such appeal, (i) Allen & Overy is at liberty to disburse those monies on 14 days' notice to Mr Arip and Ms Dikhanbayeva (as well as to Harbour) and (ii) Harbour is granted permission to apply for an order that the funds be paid to it by Allen & Overy without having to establish a material change of circumstances.

Amendments to the Freezing Order

141. The next issue which I must address concerns the freezing order which was obtained by the Claimants in August 2013, as described in paragraphs 25 and 26 of the Judgment (the 'Freezing Order'). There are a number of aspects to this issue which I consider in turn, although it should be observed straightaway that it was not in dispute that, once the amount of the final judgment (principal, interest and an amount estimated in respect of costs) is known, the Freezing Order will need, appropriately, to be increased from the current £ 72 million.

Cross-undertaking in damages

142. Mr Howe submitted that, in the light of the Judgment, the usual cross-undertaking in damages contained in the Freezing Order no longer serves any useful purpose and that, accordingly, the Claimants should be released from it.

143. Mr Howe referred in this regard to the notes in the White Book at 15-28 which indicate a certain inconsistency in the authorities on this issue. Those notes state as follows:

"A successful party to an action who seeks a freezing order may be required to give a cross-undertaking in damages where the trial judge gives the unsuccessful party permission to appeal. In Gwembe Valley Development Co Ltd v Koshy, The Times, February 28, 2002 (Rimer J.) an undertaking was required in circumstances where the substantive issue on which the injunction had been granted, and upon which permission to appeal was given, was a point of some difficulty upon which the Court of Appeal might take a different view. In that case the judge, though requiring an undertaking, expressed the opinion that it was not 'the usual practice' to do so for freezing orders given after judgment. This opinion was doubted in Nomihold Securities Inc v Mobile Telesystems Finance SA [2011] EWHC 337 (Comm), February 18, 2011, unrep. (Burton J.) where, in continuing a freezing order granted ex parte to an applicant given leave under the Arbitration Act 1996 s.66 to enforce an arbitral award, the judge ruled that, in the circumstances, the applicant should be required to give an undertaking (albeit unfortified). It is important that undertakings given are complied with and, if they are not, that there is a good explanation as to why. The fact that there was a failure is a potentially serious matter that might justify the injunction being discharged (Flightwise Travel Service Ltd v Gill ; [2003] EWHC 3082 (Ch) The Times, December 5, 2003 (Neuberger J.))."

144. In the ***Nomihold*** case to which the notes refer Burton J had this to say at [24]:

"I happen to believe that it is always appropriate to give a cross-undertaking in damages but that it would be most unusual to have to fortify such cross-undertaking, however poor or unwell-heeled the Claimant is, where it is owed a substantial sum of money under the judgment. … ."

145. It was Mr Howe's submission nonetheless that there is no justification for the cross-undertaking to continue given that the purpose of a cross-undertaking is to safeguard the position of a defendant lest it turn out that the freezing order ought not to have been granted. In a post-judgment situation, Mr Howe submitted, there is no question of the Freezing Order being discharged, and so there ought not any longer to be the

cross-undertaking. Mr Foxton, for his part, submitted that it was appropriate to hold the ring pending determination of Mr Arip's and Ms Dikhanbayeva's application for permission to appeal in view of KK JSC's insolvent position and in view of the fact that KK Plc has no substantial assets or business of its own.

146. Although I acknowledge that Mr Howe was probably right when he observed in response to what Mr Foxton had to say that, even if the Court of Appeal were ultimately to decide that Mr Arip and Ms Dikhanbayeva were right on the limitation issue, it would be unlikely that there would be any call on the cross-undertaking were it to remain in place in the meantime, nonetheless I am persuaded, adopting an essentially pragmatic approach, that the cross-undertaking in damages given by the Claimants should continue until such time as Mr Arip's and Ms Dikhanbayeva's application for permission to appeal has been determined by the Court of Appeal.

Fortification: release

147. As to fortification, I consider that, even though the cross-undertaking ought to remain in place pending the outcome of the application for permission to appeal, there is no justification for the fortification currently existing as regards that cross-undertaking to have to continue. The Claimants have succeeded with a very substantial claim against Mr Arip and Ms Dikhanbayeva.

148. Even if permission to appeal were to be obtained and even if the appeal were to succeed, it is difficult to envisage that the Claimants would not remain substantial creditors as far as Mr Arip and Ms Dikhanbayeva are concerned, bearing in mind that, as explained later when considering the application for permission to appeal, the grounds raised do not involve any challenge to the Court's findings regarding Mr Arip's and Ms Dikhanbayeva's fraudulent conduct but are instead focused on a suggestion that certain credits ought to have been given and on the case that the Claims are time-barred. If the first of these arguments were to succeed, it would still mean that the Claimants were substantial judgment creditors. This would mean, in turn, that Mr Arip and Ms Dikhanbayeva could potentially seek to offset any sums due to them by way of breach of the cross-undertaking against their liability to the Claimants. Furthermore, as to the limitation case, even assuming that the appeal in relation to this were successful, there is every prospect that the Claimants would still be able to obtain a costs award in their favour, potentially in an appreciable amount, in which case, again, Mr Arip and Ms Dikhanbayeva would be able to seek to offset anything due to them as regards the cross-undertaking. In any event, the Claimants having won so comprehensively in relation to the Claims, in my view, exercising what both Mr Howe and Mr Foxton acknowledge is a discretion, the right course is to release the fortification, and that is what I direct should happen.

KK Plc

149. The next issue is, on one view, a non-issue. It concerns the question of whether KK Plc should be a party to (or, perhaps, more accurately, a beneficiary of) the Freezing Order, the Claimants having made an application to amend the Freezing Order which sees KK Plc named.

150. It emerged, however, somewhat to his own surprise, during the course of Mr Howe's submissions, that KK Plc is already a party to the Freezing Order as a result of an

order made by the Court of Appeal in April 2014 which saw KK Plc reinstated as a party after HHJ Mackie QC had previously set aside the Freezing Order as far as KK Plc was concerned. For reasons which are not clear, the Freezing Order was not thereafter modified so as to name KK Plc as a party to it.

151. Mr Howe's submission, in these circumstances, assumed a different character. Rather than applying to add KK Plc, instead he was concerned to resist Mr Foxton's suggestion not so much that KK Plc should not be named as a party (or beneficiary) but that it should be made clear in the Freezing Order that, as far as KK Plc is concerned, its interest is limited to the amount of the Astana 2 Claim.

152. Although I was at one stage attracted to the idea that the Freezing Order could be amended to provide that it ceases to apply as far as KK Plc is concerned in the event that Mr Arip were to pay KK Plc what he owes KK Plc, ultimately I consider that Mr Howe was right when he observed that this could result in unnecessary complexity and confusion and that it would, therefore, be better not to try and cater for future events in this way but instead to allow the parties to reach agreement as to the continuation of the Freezing Order as regards KK Plc and, failing such agreement, to bring the matter back before the Court. In the circumstances, I direct that KK Plc is to remain as a party to the Freezing Order with no modification to the terms of that order.

Living and legal expenses and ordinary course of business exceptions

153. This brings me to the exception in respect of living and legal expenses and the exception also in respect of ordinary business dealings to be found, in familiar terms, in the Freezing Order.

154. It was Mr Howe's submission that in a post-judgment context the rationale for the exception ceases to exist in that the judgment creditor is entitled to enforce against *all* the available assets of the debtor. In this respect, Mr Howe placed reliance, in particular, on the following passage in the judgment of Tomlinson LJ in ***Masri v Consolidated Contractors Co SAL*** [2008] EWHC 2492 (Comm) at [35]:

"The 'ordinary course of business' proviso as directed at the hearing on 18 July 2008 will continue in the receivables freezing order. It is obviously necessary in order to allow the contracts to continue to be performed in the usual manner. The freezing order in respect of the bank accounts have contained no such proviso since it was granted on 19 May 2008 and there is no evidence that that absence has caused any actual disruption to the Defendants' business. For the avoidance of doubt I do not read paragraph 27 of Mr Marina's sixth witness statement as providing such evidence and I read paragraph 11 of Mr Nasser's eighth affidavit as positively indicating that there has been no such disruption. In any event I am satisfied that in relation to assets such as balances in bank accounts an 'ordinary course of business' exception is inappropriate in the post-judgment environment. I respectfully adopt the reasoning of Colman J at page 412 of the Soinco case which I have set out above. That was of course a case concerned with a receivership order rather than a freezing order, but it seems to me that those considerations apply a fortiori to a post-judgment freezing injunction."

155. Mr Howe submitted that, by parity of reasoning, an individual judgment debtor has no *prima facie* entitlement to spend money on ordinary living expenses or legal fees. Mr Howe went on to submit that the judgment debtor might be able to justify such an exception but that the Court would need to be satisfied that he had such need of the money that it would be unjust to deprive him of it for these purposes, even taking account of the fact that all such assets were *prima facie* subject to execution by the judgment creditor.

156. Mr Howe relied for these purposes on two authorities. First, he cited ***A v C (No. 2)*** [1981] QB 961, in which Robert Goff J (as he then was) stated as follows at page 963C-F:

"In the present case, I have had to consider the position where the defendant has, or may have, other assets from which the relevant payment may be made. I have still to apply the basic principle, i.e., that I can only permit a qualification to the injunction if the defendant satisfies the court that the money is required for a purpose which does not conflict with the policy underlying the Mareva jurisdiction. I do not consider that in normal circumstances a defendant can discharge that burden of proof simply by saying, 'I owe somebody some money.' I put to the defendants' counsel, in the course of argument, the example of an English-based defendant with two bank accounts, one containing a very substantial sum which was not subject to the Mareva injunction, and the other containing a smaller sum which was. I asked counsel whether it would be sufficient for the defendant simply to say, 'I owe somebody some money, please qualify the injunction to permit payment from the smaller account, without giving any consideration to the possibility of payment from the larger account.' Counsel was constrained to accept that that would not be sufficient, because it would not satisfy the court that the payment out of the smaller account would not conflict with the principle underlying the Mareva jurisdiction. The whole purpose of selecting the smaller account might be to prevent the money in that account from being available to satisfy a judgment in the pending proceedings. In my judgment, a defendant has to go further than that; precisely what he has to prove will depend, no doubt, upon the circumstances of the particular case. At all events, in the present case, if the defendants making the application have other assets, freely available - and I do not know, on the evidence, whether they have or not - it would be open to counsel for the plaintiffs to submit, on the evidence, that it would be wrong for the court to vary the Mareva injunction. All I can say at present is that, on the evidence before the court the defendants have not discharged the burden of proof which rests upon them."

157. Secondly, Mr Howe referred me to ***Tidewater Marine International Inc v Phoenixtide Offshore Nigeria Ltd*** [2015] EWHC 2748 (Comm), a case in which the respondents were saying that there were no other sources of available funds from which their legal expenses could be met. Males J explained the applicable legal principles, starting with reference to the ordinary course of business exception at [35]:

"The starting point is that a freezing order has been made against the defendant. Otherwise the question of use of frozen funds to pay legal expenses could not arise. This means that the court has already concluded that, even before the claimant's claim has been established, justice requires that the defendant's freedom to dispose of its own assets as it sees fit should be restrained. However, a freezing order is not intended to provide a claimant with security for its claim but only to prevent the dissipation of assets outside of the ordinary course of business in a way which would

render any future judgment unenforceable. While the disposal of assets outside of the ordinary course of business is prohibited as being contrary to the interests of justice, payments in the ordinary course of business are permitted even if the consequence will be that the defendant's assets are completely depleted before the claimant is able to obtain its judgment. This has been clear since the decision of Robert Goff J in The Angel Bell [1981] 1 QB 65 in the early days of what were then called Mareva injunctions. Moreover, so long as the payment is made in good faith, the court does not enquire as to whether it is made in order to discharge a legal obligation or whether it represents good or bad business on the defendant's part."

158. Males J then went on to address the legal expenses exception specifically, saying this at [36]:

"A further principle is that a defendant is entitled to defend itself and, if necessary, to spend the frozen funds, which are after all its own money, on legal advice and representation in order to do so. This is recognised by the standard wording of the usual freezing order, although the defendant's right to spend its own money on legal advice and representation is limited to expenditure of 'a reasonable sum'."

He went on at [37]:

"Two points should be noticed here. The first is that even where the defendant has no other assets, its right to use the frozen funds is only 'the ordinary rule'. It is therefore capable of being outweighed in an appropriate case by other considerations. Ultimately it is the interests of justice which must be decisive. The second point represents an important qualification on the defendant's right to choose how it spends its own money. That qualification is necessary in order to strike a fair balance between the parties. It is that in order to be permitted to use the frozen funds, the defendant must demonstrate 'that he has no other assets with which to fund the litigation'. This places an onus on the defendant to demonstrate that there are no other assets available, not frozen by the order, which he could use to pay for legal advice and representation in defence of the claim."

159. Males J explained that the fact that there is this onus on the respondent is illustrated by, for example, ***Halifax Plc v Chandler*** [2001] EWCA Civ 1750, in which Clarke LJ (as he then was) referred at [17] to a respondent having to *"show that he has no other assets which he can use"* and at [27] to the respondent being under an obligation *"to put the facts fully and fairly before the court"*.

160. Males J went on at [40] to say this:

"The burden on the defendant to put the facts before the court has been emphasised in further cases. It was described as 'the burden of persuasion' by Sir Anthony Clarke MR in Serious Fraud Office v X [2005] EWCA Civ 1564 at [35] and [43], a case concerned with a restraint order made under section 77(1) of the Criminal Justice Act 1988 to which the same principles were held to apply. It is necessary that the defendant should have this burden in part because it is the defendant, not the claimant (at any rate in the usual case), who knows the facts, but also because the court has already concluded that there is a risk of disposal of assets outside the ordinary course of business or it would not have granted the injunction in the first place. Judges are entitled in an appropriate case to have a 'very healthy scepticism' about unsupported

assertions made by a defendant about the absence of assets, as Sir John Donaldson MR noted in Campbell Mussels v Thompson (1985) 135 NLJ 1012."

He continued at [42]:

"Thus it is relevant to consider not only the defendant's own assets, but whether there are others who may be willing to assist the defendant to obtain legal advice and representation. In this respect the position is similar to that which obtains when the court is considering an argument that security for costs should not be ordered on the ground that it would stifle the claim (cf. Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534, where Peter Gibson LJ referred to consideration of whether a claimant 'can raise the money needed from its directors, shareholders or other backers or interested investors', pointing out that 'as this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation')."

161. Mr Howe submitted that in the present case there can be no justification for the maintenance of the relevant exceptions since there is, he suggested, *"an inexorable inference"* arising out of the findings made in the Judgment that Mr Arip has access to substantial funds which he has not disclosed. Furthermore, Mr Howe suggested, it is clear that Mr Arip must have access to substantial additional funds judging from the fact that he has incurred legal costs amounting to over £ 25 million and so far in excess of the assets which Mr Arip has to date disclosed.

162. Mr Foxton opposed the removal of the exceptions, whether as regards legal expenses or living expenses or as regards ordinary business dealings. It was his submission that there is no proper basis for removing any of these exceptions, pointing out, in particular and uncontroversially as far as Mr Howe was concerned, that after quantification of the Judgment, the Claimants will be merely unsecured creditors of Mr Arip and, as such, parties with no priority over other creditors. Mr Foxton cited in this context *Gee, Commercial Injunctions (6th Ed.)* at paragraph 3-026, as follows:

"Post-judgment, the claimant still has no legal interest in the assets of the defendant. However, unless the court grants a stay of execution pending appeal, he can take steps to enforce his judgment against those assets. The circumstances have changed and the court should consider as a matter of discretion whether or not to allow payments in the ordinary course of business in the context of the changed circumstances.

Accordingly post-judgment, it is relevant to consider the position as to whether there is to be a stay of execution and whether, even if there were not a stay, enforcement of the judgment can be had against the assets in question. …

Whether a stay will be granted pending appeal involves the exercise of a discretion which, on the one hand, recognises that the claimant has a judgment which prima facie he should be able to enforce and, on the other hand, seeks to avoid a position in which a defendant succeeds on appeal, but in the meantime has been irretrievably prejudiced, e.g. if he has been ruined by being made bankrupt. An appeal in itself does not operate as a stay on any order of the court of first instance and a stay must be sought either from that court or the appeal court. The general principle is that

solid grounds must be shown if a stay is to be granted and the normal rule is that a stay is not granted. … In One Life Ltd v Roy, the judge at first instance (Carnworth J) gave judgment in favour of the plaintiff on tracing claims and declared that the assets belonged to the plaintiff. The judge deleted a provision from the injunction allowing for the defendant to be able to use the money for living expenses, and this was upheld by the Court of Appeal. This was because on the facts there was no good reason for the defendant to be allowed to go on using as living expenses what had been decided to be the plaintiff's money. In Masri v Consolidated Contractors, a provision allowing payments in the ordinary course of business from a bank account was omitted after there had been judgment when the evidence showed positively that the absence of such an exception had caused no disruption to the judgment debtor's business. It will sometimes and perhaps usually be inappropriate to include an ordinary course of business exception in a post-judgment asset freezing order when the judgment is enforceable, but its omission would not preclude an application to vary or discharge. If there was the real prospect of a judgment being satisfied, perhaps by a parent company, it may not be right to omit the exception and thus risk destruction of the defendant's business."

163. Furthermore, as to Mr Howe's reliance on what Tomlinson LJ had to say in the ***Masri*** case, Mr Foxton explained that Tomlinson LJ himself subsequently qualified his earlier statement in the ***Nomihold*** case (on appeal not from Burton J but from David Steel J: [2011] EWCA Civ 1040) at [33]:

"In Masri v Consolidated Contractors [2008] EWHC 2492 (Comm) I was persuaded to omit an ordinary course of business exception in relation to a freezing order in respect of sums in various of the judgment debtor's bank accounts. The evidence showed positively that the absence of such an exception had caused no disruption to the judgment debtor's business. I referred at paragraphs 24 and 35 of my judgment to a passage from the judgment of Colman J in Soinco v Novokuznetsk Aluminium Plant [1998] QB 406. That case was concerned with the appointment of a receiver by way of equitable execution. At page 421 (not 412 as recorded in paragraph 35 of my judgment) Colman J said this:

'As to bringing the business of the judgment debtor to a standstill by cutting off payment otherwise available to it, I am not persuaded that this is a relevant consideration in the context of a remedy designed to effect execution and not designed merely to conserve assets pending determination of an unresolved claim. This is not the environment of a Mareva injunction prior to trial, but of execution of a pre-existing judgment. Whereas the effect of an injunction on the defendant's ability to conduct his business in the ordinary course may be relevant where his liability is yet to be determined, it cannot possibly be a relevant consideration where his liability has already been determined. Impact on the judgment debtor's business is not a consideration material to the availability of legal process of execution and there is no reason in principle why it should be introduced as material to the availability of equitable execution.'

On further reflection, I am not sure that those observations do apply a fortiori to a post-judgment freezing injunction, as I said in paragraph 35 of my judgment in Masri. As I have already noted, a post-judgment freezing order is granted in aid of execution but it is not part of the process of execution itself. In that same paragraph I said:

'In any event I am satisfied that in relation to assets such as balances in bank accounts an "ordinary course of business" exception is inappropriate in the post-judgment environment.'

Again, on further reflection, it may be that that is too sweeping a statement, although I am sure that the ordinary course of business exception was inappropriate in relation to balances in bank accounts in the circumstances of that case. I am satisfied that it will sometimes and perhaps usually be inappropriate to include an ordinary course of business exception in a post-judgment asset freezing order. Of course, its omission would not preclude an application to vary or discharge."

164. Accordingly, Mr Foxton submitted, there is nothing untoward in a judgment debtor in Mr Arip's position discharging accrued obligations and discharging such obligations does not constitute improper dissipation of assets. Furthermore, Mr Foxton submitted, Mr Arip should be entitled to pay his debts, including incurred legal and experts' fees from his assets, unless and until the Claimants manage to execute against those assets. The same, he submitted, applies to future amounts incurred in the ordinary course of business. In any event, Mr Foxton submitted, since the Claimants' application to remove the exceptions was only made in the immediate lead-up to the consequentials hearing, it would not be appropriate to accede to the application without Mr Arip being afforded sufficient time to assemble the material which would be required to attempt to overcome the 'burden of persuasion' which he bears.

165. I am persuaded by this last submission. It seems to me, in the circumstances, that the right course is not to remove the exceptions at this stage but instead to allow the time which Mr Foxton submitted should be given to Mr Arip in order to address the application properly. I bear in mind in this context that, whilst obviously the Claimants are able to point to the fact that findings in the Judgment are evidence that Mr Arip is likely to have assets available to him which have not to date been disclosed, there is also before me an application not only for an updated asset schedule (not resisted by Mr Arip) but also an application for disclosure of documents concerning Mr Arip's assets. As I shall shortly explain, I consider that Mr Arip should be required to provide both the information and at least some of the documents sought. It seems to me appropriate that he should be permitted to do this with the legal expenses exception in place if only because, as Mr Foxton explained, this ought to mean that Mr Arip can do what the Claimants want him to do.

166. Mr Howe's response to this was to say that, as far as the Claimants are concerned, they are in no doubt that Mr Arip has access to funds to enable the tasks to be carried out in any event. He might be right about that but, in my view, it makes sense to do as Mr Foxton proposed. That, indeed, it is to be noted, is the approach adopted in ***Great Station Properties SA & Ors v UMS Holding Limited & Ors*** [2017] EWHC 3330 (Comm). In that case, Teare J explained his thinking at [68], as follows:

"The Grigorishin Respondents will almost certainly incur legal costs in complying with the disclosure obligations regarding their assets. I do not know what their resources are, though they are presumably able to pay Hogan Lovells and their counsel. I consider that the legal expenses exception should be included but the Claimants may have liberty to vary the order once some disclosure of assets has been given. The picture may be clearer at that stage. The exception applies only to the costs of complying with the disclosure obligation and the Grigorishin Respondents

must, before spending any money in that regard, tell the Claimants where the money is to come from (in accordance with the standard form)."

As Teare J put it, once Mr Arip has given the information and documentation sought, the *"picture may be clearer"*. Mr Arip will also be in a position where he has had his opportunity to discharge the 'persuasive burden'.

167. This leaves the ordinary course of business and living expenses exceptions to consider. I consider that these should be removed for now, pending compliance with the orders which I shall be making as regards disclosure of assets and production of documents and subject to any application, based on a change of circumstances, which Mr Arip might make to reintroduce those exceptions.

Disclosure of documents by Mr Arip

168. There is, next, an issue concerning whether Mr Arip should be required to disclose documents relating to assets. There are two aspects to this, as I shall explain in a moment, but I should, first, record that Mr Foxton accepted that there should, on any view, be an updated affidavit from Mr Arip listing his assets in circumstances where the only affidavit doing this so far was provided as long ago as August 2013.

169. As to the documents sought by the Claimants, what is sought are *"all documents in the possession, custody or control of [Mr Arip] or anyone acting on his behalf"* and *"all the documents concerning or relating to the WS Settlement and/or the Wycombe Settlement (whether under their current or any previous names) ('the Settlements') or either of them in the possession, custody or control of [Mr Arip] or anyone acting on his behalf"*. In the case of the latter, a list of particular documents is then set out in the draft order which is before the Court. In addition, the Claimants' application seeks an order that the affidavit which Mr Arip is to produce should set out *"the detail of any dealings with or disposals of [Mr Arip's] assets set out in the Original Asset Schedule by [Mr Arip] or anyone acting on his behalf"*. I agree with Mr Foxton, however, when he submitted that this is in the nature of what might be described as 'tracing disclosure' which, since the Claimants do not have a proprietary claim, it would be inappropriate to require Mr Arip to provide. This was not a point, I would note, which Mr Howe addressed in his oral submissions. In the circumstances, I decline to make that part of the order which the Claimants sought.

170. Coming back to the documents and dealing first with the application concerning Mr Arip's assets (as opposed to the Settlements as defined in the draft order), Mr Foxton complained that the application had been made too late to enable Mr Arip and his legal team to give proper consideration to it. In any event, Mr Foxton submitted, the breadth of documentation sought was too wide and intrusive since it contemplated disclosure of all bank statements, including in relation to a joint account. He suggested that, in the circumstances, no order should be made. The more so, he suggested also, given that this is not a case where the Claimants have even a *prima facie* case that Mr Arip may have breached the Freezing Order in terms of dealing with his assets or failing to disclose assets. Furthermore, Mr Foxton submitted, nor is this a case where the Claimants can demonstrate that the documents are required in order to allow them properly to police the Freezing Order. This, in circumstances where there was, at least as far as I could discern, no issue between Mr Foxton and Mr Howe that the relevant test is as described by Hildyard J in ***JSC Mezhdunarodniv***

Promyshlenniy Bank v Sergei Viktorovich Pugachev [2015] EWHC 1694 (Ch) at [38]:

"…the test is in effect whether the court is satisfied that further evidence is necessary in order to make the freezing order more effective."

As Hildyard J went on at [39] to observe:

"… the court must be persuaded that there is practical utility in requiring such evidence and that it is necessary to enable the freezing order properly to be policed. It will be vigilant to prevent the abuse of seeking further evidence for some other purpose: such as to expose further inconsistencies, unduly pressurise a defendant who has already been cross-examined, yield ammunition for an application for contempt, or provide further material which might be of assistance, even if not actually deployed, in the main (foreign) proceedings."

171. I reject Mr Foxton's timing complaint. The application raises a point which did not require Mr Arip to do anything in advance of the hearing at which it was considered and Mr Foxton was perfectly well-equipped to address the application. As to Mr Foxton's substantive point, Mr Howe was able to point to the fact that Mr Arip has apparently been able to fund his defence of the proceedings with very substantial funds (some £ 25 million). That he has been able to do this suggests that the assets which he disclosed in August 2013 are unlikely to amount to the full extent of the assets which are available to him. This, allied with the findings of fraud which were made in the Judgment, seems to me more than amply to justify a conclusion that further evidence (in the form of documentation) is necessary to make the Freezing Order effective. As Mr Howe put it, Mr Arip has a track record of not telling the truth. The Judgment makes this abundantly clear. In such circumstances, it must be right that to require Mr Arip to provide supporting documents, so enabling the Claimants and their lawyers to investigate the asset position, will mean that the Freezing Order is inevitably more effective than it would otherwise be if all that Mr Arip (a proven liar) was required to do was to swear a further affidavit. In addition, Mr Howe was able to point to certain other matters: the sale of a property in Dubai at what would seem to be a lower price than had previously been offered, and certain proceedings recently commenced by Mrs Arip in Cyprus concerning the Settlements which, Mr Howe suggested, hint at attempts to dissipate. In my view, it is appropriate, in the circumstances, to require production of the documents sought, including in relation to any joint assets. I reject the suggestion that this represents an unwarranted intrusion since, as Mr Howe put it, *"if you end up jointly owning an asset with someone who is found to have committed very largescale frauds"*, disclosure is hardly to be unexpected.

172. I consider nonetheless that it would be appropriate to refine the scope of the categories of documents sought in order to meet Mr Foxton's concerns over the breadth of what Mr Arip will need to do to comply with the order. In the first instance at least, therefore, it seems to me that there should be a time period referable to the documents which are to be disclosed. This should start in August 2013 when these proceedings were themselves commenced. In addition, I consider that it would be sensible to insert the words *"evidence the value, location and details of all such assets and any bank, building society or similar account"*, so as to pick up the earlier wording of the relevant paragraph in the draft order from which I have not, however,

otherwise quoted. That earlier wording will need also to have a semi-colon in the third line of the relevant paragraph changed to a comma. I considered at one stage also removing the word *"control"* from the paragraph in order to address a concern raised by Mr Foxton that third parties might hold relevant documents and, despite Mr Arip's best efforts, those third parties do not co-operate with him in producing the relevant documentation. I consider, however, that, if that situation were to come about, it would be for Mr Arip to make it known and, if necessary, to raise the matter before the Court. I see no prejudice, therefore, in leaving the word in.

173. I come on, then, to the documents concerning the Settlements which are also sought by the Claimants. As will already have been seen, the Settlements comprise two trusts, namely the so-called WS Settlement and the so-called Wycombe Settlement. The specific documents sought by the Claimants include trust deeds, notices of appointment, contracts or other documents relating to the constitution and composition of the Settlements, communications and correspondence between Mr Arip or anyone acting on his behalf concerning or in connection with the Settlements, and notes and memoranda (together with drafts) relating to the Settlements.

174. Mr Foxton objected to an order being made as sought. Besides his complaint that there had been insufficient time within which to address the application, he submitted that this aspect of the disclosure application is objectionable because what is sought assumes that the assets of the Settlements, two discretionary trusts which are both governed by the law of Cyprus, are subject to the terms of the Freezing Order when that is not the case, Mr Foxton pointing out that all that is frozen is Mr Arip's inchoate interest in the Settlements rather than the Settlements themselves. In these circumstances, Mr Foxton submitted, it is incumbent upon the Claimants, if they are to obtain disclosure in relation to the assets of the trusts under CPR 25.1(1)(g) or the Court's inherent jurisdiction, to point to some credible material showing that the trust assets may become subject to a freezing injunction. As for CPR 25.1(1)(g), this includes the following in the list of interim remedies which the Court has power to grant:

"an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction."

175. Mr Foxton relied upon ***Parker v CS Structured Fund Ltd*** [2003] 1 WLR 1680, in which Gabriel Moss QC (sitting as a Deputy High Court Judge) said this at [22] after referring to CPR 25.1(1)(g):

"Mr Brodie's submission is that this creates a free-standing right to order disclosure of documents irrespective of whether the applicant has sufficient material to seek a freezing injunction. He focuses in particular on the word 'may'."

He continued at [23]:

"Looking first of all, as a matter of construction, at the language used, it seems to me that it is dealing with a situation where there is either an application for a freezing injunction on foot or one where it is at least likely that there will be such an application. In other words, the provision assumes that there is some credible material on which such an application might be based. In the present case, Mr Brodie

candidly admits that he does not have the material with which to apply for a freezing injunction. He would like to have the information that he seeks and then consider the position. In my judgment, that is not the type of situation with which this provision is dealing. Otherwise anyone who is a claimant could come along and say they cannot be completely sure that they do not need a freezing injunction and would like to have every piece of information at the earliest possible stage which might be relevant to that question."

Mr Foxton also pointed to ***Lichter v Rubin*** [2008] EWHC 450 (Ch), The Times, 18 April 2008, in which Henderson J (as he then was) observed that it seemed to him *"that a reasonable possibility, based upon credible evidence, should be sufficient to found the jurisdictional requirements of 25.1(1)(g)"*.

176. Mr Foxton submitted that, in its current form, the Freezing Order restricts dealings with Mr Arip's assets worldwide up to a value of £ 72 million (which is also the approximate amount of the cash held within the WS Settlement), highlighting relevant paragraphs of the Freezing Order as being paragraphs 4 and 5, which provide as follows:

"4. Paragraph 3 applies to all the Second Defendant's assets whether or not they are in his own name, whether they are solely or jointly owned and whether the Second Defendant is interested in them legally or beneficially or otherwise. For the purpose of this order the Second Defendant's assets include any assets which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Second Defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with this direct or indirect instructions.

5. This prohibition includes the following assets in particular –

(a) any interest under any trust or similar entity including any interest which can arise by virtue of the exercise of any power of appointment, discretion or otherwise howsoever."

177. Mr Foxton stressed two things about these paragraphs. First, he pointed out that the paragraph 5(a) wording is not included in the standard form Commercial Court order. Secondly, he explained that the effect of paragraph 4 is that assets held *by Mr Arip* on trust for a third party (and not, therefore, assets in which Mr Arip himself has no beneficial interest) are caught by the order. This is significant, Mr Foxton went on to explain, in view of the fact that materially identical wording was considered by the Court of Appeal in ***JSC Mezhdunarodniy Promyshlenniy Bank & Ors v Pugachev*** [2016] 1 WLR 160. Mr Foxton submitted that the effect of that decision is that assets held by the trustees of a discretionary trust are not to be regarded as coming within the scope of a freezing order. I will consider that authority in a moment. It was, however, Mr Foxton's submission that, in the present case, the assets with which the Settlements are concerned are not caught by the Freezing Order which the Claimants have obtained, and that the Claimants are wrong to suggest the contrary. Indeed, Mr Foxton pointed out, when obtaining the Freezing Order and when resisting the discharge application, the Claimants did not suggest that they wanted to freeze trust assets. Nor did they seek to join the trustees as a party to the proceedings, despite

apparently on 6 December 2013 obtaining a freezing order in Cyprus which did name the trustee of the WS Settlement as a respondent.

178. Mr Howe's position was that, since Mr Arip had himself listed the assets held by the Settlements in August 2013 when identifying his assets pursuant to the Freezing Order, there are, as Mr Howe put it, *"very strong grounds"* for the contention that those assets are caught by the Freezing Order. Mr Howe submitted, however, that, whether that is the case or not, it makes no difference at this stage given that what the Claimants seek by way of their application are documents which are in *Mr Arip's* possession, custody or control. The application, Mr Howe emphasised, is not made against any trustee but merely against Mr Arip, a party to the proceedings and an existing respondent to the Freezing Order.

179. I turn, then, to the ***Pugachev*** case, the authority which Mr Foxton and Mr Howe each suggested supports their respective submissions. At [13] Lewison LJ explained the position concerning a discretionary trust in this way:

"A beneficiary under a discretionary trust has a right to be considered as a potential recipient of benefit by the trustees. That is an interest which equity will protect. The trustees must apply some objective criterion in deciding whether or not to exercise their discretion in favour of a particular beneficiary; so that each beneficiary has more than a mere hope. But that right is not a proprietary interest in the assets held by the trustees, although it can be described as an interest of sorts: Gartside v IRC [1968] AC 553, 617-8. In some areas of the law, such as matrimonial finance, legislation is drawn widely enough to enable the court to take into account the likelihood that trustees will exercise their discretion in favour of a particular beneficiary in deciding what provision to make for a former spouse on divorce: Whaley v Whaley [2011] EWCA Civ 611. But even then the trust assets are not owned by the beneficiary spouse."

He went on at [25] to say this by reference to a paragraph in the freezing order which was in the same terms as paragraph 5(a) of the Freezing Order in the present case:

"I would hold, therefore, that both Henderson and David Richards JJ were correct in saying that Mr Pugachev's interests under the discretionary trusts are caught by the prohibition on dealing with assets and are also subject to the disclosure requirements of paragraph 9 of the order."

He then, at [41], set out the summary of the applicant's case which David Richards J (as he then was) had given in his judgment, as follows:

"... that there were good grounds for thinking, as indicated above, that the underlying assets were not directly held by the trustees but were held in a corporate structure, with the trustees holding the shares in the companies at the top of those structures. The claimants did not dispute that there could be no dealings in the shares in those top companies without the knowledge of the trustees and in particular of Mr Patterson. But it is their contention that there is good reason to believe that Mr Pugachev controls the assets held by companies within the corporate structure over which the trustees themselves do not or may well not have direct control. Without knowing the corporate structure and the directors of the companies within it, it is of course not possible to be certain about this."

He continued at [43]:

"I do not consider that we are in a position to accept that, on the current state of the evidence, the trustees of the trusts simply act at the behest of Mr Pugachev. On the other hand the DIA has raised issues which call for fuller explanation. What, then, can or should the court do in such a situation? Both Mr Tregear QC and Mr Adkin QC (who appeared for the trustees) emphasised the threshold test that must be met before the court will make a freezing order against assets held by a third party. They relied particularly on the enforcement principle, which Mr Adkin described as the 'alpha and omega' of the jurisdiction. To return to Sir John Chadwick's analysis, the trust assets cannot be brought within the scope of the freezing order unless the court is satisfied that there is good reason to suppose: (i) that Mr Pugachev can be compelled (through some process of enforcement) to cause the assets held by the trustees to be used for that purpose; or (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the trustees."

Lewison LJ then referred to CPR 25.1(1)(g) and the ***Parker*** case, in particular Mr Moss QC's reference to the need for *"some credible material"*, before remarking that *"'Some credible material' seems to me to be a lower threshold than 'good reason to suppose'"* and observing that this was also the view that Henderson J took in the ***Lichter*** case.

180. It was against this background that Lewison LJ explained at [53] that the authorities which the Court of Appeal had in that case been shown were mostly *"cases in which a freezing order against what were ostensibly third party assets had either been made or had been applied for"* and so were not cases *"where no application against what are ostensibly third party assets has yet been made"*. He went on to say this at [55]:

"We must not lose sight of the fact that at this stage the claimants are only asking for information. An order for the provision of information is far less intrusive than an order which prevents someone from dealing with assets. Moreover the claimants are asking only for information from Mr Pugachev who is bound by the terms of the freezing order. They are not asking the trustees to do or say anything. … ."

181. Lewison LJ then, at [56], referred to ***SCF Finance Co v Masri*** [1985] 1 WLR 876, explaining that that was a case in which the claimants obtained a freezing order not only against the defendant's bank accounts in London but also against his wife's on the ground that he was carrying on business using that account. The wife applied to discharge the injunction against her on the ground that the account was hers, the issue being whether the Court should accept her assertion without further investigation. Lewison LJ quoted from the judgment of Lloyd LJ (as he then was) at page 884:

"For convenience I would summarise the position as follows: (i) Where a plaintiff invites the court to include within the scope of a Mareva injunction assets which appear on their face to belong to a third party, e.g. a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant. (ii) Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an

application to intervene. (iii) In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party. (iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient. (v) On the facts of the present case the judge was in my view plainly right to hold that he could not decide the matter without further inquiry… ."

Having done so, Lewison LJ stated as follows at [57]:

"Although both Mr Tregear and Mr Adkin relied heavily on paragraph (i) of that summary of principle, the critical point is that in our case the assets of the trusts themselves are not within the scope of the freezing order. The 'good reason to suppose' test in paragraph (i) supports the making of the freezing order itself. It justifies a policy of 'shoot first and ask questions later' but only where there is 'good reason to suppose'. What are already within the scope of the freezing order granted by Henderson J are Mr Pugachev's interests in the trusts, whatever those may be. The underlying trust assets are not. There appears to be a dispute between the claimants on the one hand, and Mr Pugachev and the trustees on the other, about whether in reality Mr Pugachev is in effective control of the trust assets."

Importantly, he continued at [58]:

"As I have said, I do not consider that the court is in a position to reach even a provisional conclusion on the current state of the evidence. But it is here, in my judgment, that the principle of flexibility comes into play. I do not consider that if the threshold test for including an asset within the scope of a freezing order is not met, the court is powerless. The bank does not ask that the trust assets be brought within the scope of the freezing order immediately. It asks for the opportunity to test its assertion that Mr Pugachev is the effective owner of those assets against his (and the trustees') assertion that he is not. If its assertion is correct, it may then be in a position to apply for the scope of the freezing order to be widened. If its assertion is incorrect then an application to that effect will fail. But in my judgment the court's concern that sophisticated and wily operators should not be able to make themselves immune to the courts' orders militates against denying the DIA that opportunity. As Robert Walker J put it in International Credit and Investment Co (Overseas) Ltd v Adham [1996] BCC 134, 136:

'… the court will, on appropriate occasions, take drastic action and will not allow its orders to be evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy is highly prized and official regulation is at a low level.'"

182. The Court of Appeal went on to uphold David Richards J's decision to require that disclosure be given. I am quite clear that in the present case it is appropriate to do the same thing, specifically that *"the principle of flexibility"* described by Lewison LJ comes into play and that, through the operation of that principle, the order sought is quite clearly warranted. Mr Arip is a sophisticated businessman who has shown himself to be both willing and able to conduct his financial dealings in a complex and

opaque manner. I consider that, in such circumstances, there is, at the very least, *"some credible material"* of the sort which is required to make such an order. I see nothing at all objectionable about requiring Mr Arip to provide disclosure which will enable the Claimants to investigate the position. Although Mr Foxton suggested that there is no urgency about matters, indeed that there was no real reason why the application could not have been made previously, in my view, this ignores the fact that there is now a substantial judgment in which Mr Arip's business and other financial practices have been scrutinised in considerable detail, and the conclusion reached that Mr Arip is a thoroughly dishonest individual. Furthermore, despite Mr Foxton suggesting in the course of his submissions that there is protection already in place as far as the Claimants are concerned, in the form of certain trustee undertakings which had previously been given, a suggestion which Mr Foxton sought to make good by reference to the terms of some recitals to an order made by Leggatt J (as he then was) in August 2016, Mr Howe pointed out in reply that the relevant undertakings were given by a party which it was intended would take over as trustee but that, in the event, did not do so. It follows that this is a point which is not, in fact, open to Mr Foxton.

183. My conclusion, therefore, is that Mr Arip should provide disclosure of documents relating to his assets and the trusts' assets sought but with the greater specificity which I have sought to describe. In terms of the time period within which the documents should be provided, Mr Foxton suggested that eight weeks would be required. I am not prepared, however, to give Mr Arip as long as that. I consider that 4 weeks ought to be sufficient, at least to put together the bulk of the documentation. If there is genuine difficulty in obtaining particular documents from particular third parties, it would be open to Mr Arip (through Cleary Gottlieb) to explain this in specific terms and, if a time extension in relation to those particular documents (but not more widely) can be agreed, then, so be it. If no time extension can be agreed, Mr Arip would be able to raise the matter with the Court.

Use of material disclosed pursuant to the Freezing Order

184. Mr Howe submitted that the Claimants should no longer be subject to the usual undertaking that the information disclosed to them pursuant to the Freezing Order is not to be used in any proceedings other than these proceedings. It was Mr Howe's submission, specifically, that, in circumstances where the Claimants now have (or shortly will have) a judgment against Mr Arip for a significant sum which they wish to enforce against Mr Arip's assets, they should not be restricted in such enforcement by any unmeritorious argument that, in doing so, they are making use of information obtained as a result of the Freezing Order.

185. Mr Foxton did not object to this application insofar as civil proceedings are concerned. He did, however, resist an amendment to the Freezing Order which would permit information to be disclosed in criminal proceedings, submitting that the Court should be concerned to control how the Claimants use such information in criminal proceedings in order to ensure that the use is not oppressive to Mr Arip.

186. I agree with Mr Foxton about this. I do so even though Mr Howe made the point that in some jurisdictions there is an overlap between civil and criminal proceedings. Mr Howe suggested that this adds *"an extra layer of complexity and an unnecessary restriction"* on the Claimants' ability to enforce which would be removed if the

amendment to the Freezing Order sought were to be ordered. It seems to me nonetheless that, if the Claimants wish to use information disclosed by Mr Arip for the purposes of criminal proceedings, they ought to be required to seek the Court's permission, probably on notice to Mr Arip, so that the Court can consider the appropriateness of what is proposed to be done on a case by case basis.

187. Accordingly, I direct that the Claimants are to be released from the undertaking concerning use of information in civil proceedings but not in relation to criminal proceedings.

Interim payment on account of damages

188. In view of the fact that this judgment is being produced in relatively short order, I explained at the hearing that, in my view, there is nothing to be gained by the making of an order for an interim payment on account of damages.

Costs

189. Mr Howe submitted that Mr Arip and Ms Dikhanbayeva should be ordered to pay the Claimants' costs relating to the entire proceedings, subject obviously to a detailed assessment, and subject also to the need to take account of any costs orders which have previously been made against the Claimants and in favour of Mr Arip and Ms Dikhanbayeva.

190. Mr Foxton understandably did not, and realistically could not, resist the making of such an order. He did, however, submit that in respect of the period prior to the instruction of Allen & Overy by the Claimants, during which Zaiwalla were acting as the Claimants' solicitors in these proceedings, the Court should adopt a different position. Even then, however, I did not understand Mr Foxton to have been suggesting that the Claimants ought not to be awarded their costs in respect of this period, merely that they such costs should not be awarded on the indemnity (as opposed to the standard) basis and that the costs incurred in the relevant period ought not to be included in the calculation of any interim payment on account of costs.

Standard or indemnity

191. The Claimants seek their costs on an indemnity basis, relying upon what might be described as the usual line of authorities dealing with the circumstances in which an indemnity costs order is appropriate. In particular, as reflected in the Notes to the White Book at 44x.4.3, Mr Howe's submission was that the present case which is properly to be regarded as being 'out of the norm', as it was put by Lord Woolf CJ (adopting something which Waller LJ had stated in argument) in ***Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson*** [2002] EWCA Civ 879 and how it has been put in subsequent cases, including recently ***Whaleys (Bradford) Ltd v Bennett*** [2017] EWCA Civ 2143, in which David Richards LJ had this to say at [28]:

> *"In my view, it was unfortunate that the judge used the word 'exceptional' to describe the circumstances that may justify an order for indemnity costs. The formulation repeatedly used by this court is 'out of the norm', reflecting, as Waller LJ said in Esure Services Ltd v Quarcoo [2009] EWCA Civ 595 at [25], 'something outside the*

ordinary and reasonable conduct of proceedings'. Whatever the precise linguistic analysis, 'exceptional' is apt as a matter of ordinary usage to suggest a stricter test and is best avoided. Its use in this case gave rise to an arguable ground of appeal and while I am satisfied, particularly in the light of the submissions made to him, that the judge was not applying a stricter test, for the future it would be preferable if judges expressly used the test of 'out of the norm' established by this court."

192. Mr Howe highlighted how the Claimants won at trial on almost every point of substance in a lengthy and fully contested action. He suggested that, as such, this is an obviously appropriate case for the award of indemnity costs. The more so, Mr Howe submitted, given the nature of the allegations which the Claimants have made out in establishing that Mr Arip and Ms Dikhanbayeva were fraudulent. Indeed, as Mr Howe went on to explain, it can hardly be overlooked that, not only were these allegations established, but this was done in the face of a defence advanced by Mr Arip and Ms Dikhanbayeva which must itself be regarded as having been put forward dishonestly. That defence relied upon evidence which they themselves gave which was untrue. It also involved the calling of factual witnesses of whom (with a single exception) I felt it necessary to make critical observations. This more than amply justifies a conclusion that the case is 'out of the norm' and so that indemnity costs should be paid.

193. Indeed, whilst not conceding the appropriateness of indemnity costs and despite making certain submissions in writing which opposed the making of an indemnity costs order, Mr Foxton did not advance any submissions in support of an argument that indemnity costs ought not to be ordered at all. His only opposition was to costs being awarded on an indemnity basis in relation to the period before Allen & Overy were instructed by the Claimants. As to that, Mr Foxton's position was that the Claimants' application for indemnity costs takes no account of what he described as *"the highly unsatisfactory conduct"* of the proceedings by the Claimants and their then solicitors, Zaiwalla, before Allen & Overy came to be instructed in Zaiwalla's place in mid-2015. In this respect, Mr Foxton submitted that in the relevant period the Claimants brought a number of *"either hopeless or unnecessary claims"*, specifically claims by KK Plc which were barred by the principle against reflective loss and eventually discontinued, the Astana 1 Claim (which HHJ Mackie QC concluded was not sufficiently arguable: see the Judgment at [25]) and other proceedings known as the 'Theta proceedings' which were brought by the corporate vehicle through which Mr Werner had acquired his shareholding in KK Plc and which were also discontinued. Mr Foxton also highlighted the failure to issue a document retention notice which was described in the Judgment at [40], along with the making by the Claimants of the application for the Freezing Order on the basis of an affidavit from Mr Werner which gave the impression that the Claimants had no suspicion of wrongdoing before the discovery of the Arka-Stroy 1C database.

194. Mr Foxton also pointed to the Claimants' attempts to enforce the Freezing Order in Switzerland and in Cyprus without making the appropriate application for permission to do so. The Claimants thereby froze assets belonging to Mrs Arip, which they had previously agreed could be distributed to her and in an amount far in excess of the maximum sum (£ 72 million) covered by the Freezing Order. This conduct, Mr Foxton explained, made an application to the Court necessary, only for the Claimants, the day before that application was due to be heard in November 2014, to apply *ex parte* (but with informal notice) to amend to introduce a US$ 300 million proprietary

claim and to join both Mrs Arip and the trustee of a settlement known as the 'WS Settlement' to the proceedings, resulting in an adjournment of Mr and Mrs Arip's applications in the meantime, only for the amendment application ultimately to be turned down by Leggatt J on the basis that there was no legal justification for it. Thereafter, Mr Foxton went on to observe, the Claimants launched an appeal, only subsequently to withdraw that appeal after yet more unnecessary costs had had to be incurred. In these circumstances, Mr Foxton submitted, it would not be appropriate to allow the Claimants to recover costs on an indemnity basis in respect of the pre-Allen & Overy period. Indeed, he suggested, in that period it was, if anything, the Claimants' conduct which was 'outside of the norm' and which was itself vulnerable to the sanction of indemnity costs. Mr Foxton also submitted that as regards the Limitation issue it would be inappropriate to award the Claimants costs on an indemnity basis.

195. As to the first of these matters, these were, in part at least, addressed in the Judgment. In particular, I made certain criticisms concerning the obtaining of the Freezing Order and, in that context, the Claimants' reliance on Mr Werner's first affidavit: see the Judgment at [35], [36], [420] and [421]. By way of example, I stated as follows at [35]:

"Mr Twigger relied on several examples of what he suggested amounted to Mr Werner engaging in fabrication at the pre-trial stage, specifically when seeking injunctive relief at the outset of these proceedings. He pointed out, for example, that Mr Werner's first affidavit contained a fabricated account of how the Arka-Stroy 1C database came to be discovered. Specifically, Mr Werner claimed in paragraph 63 of this affidavit that he had approached somebody, whom he described as 'X' but which was a reference to Mr Kuzmenko, in late February or early March 2013, and that after he had given assurances to X/Mr Kuzmenko about his future, X/Mr Kuzmenko told him that Mr Werner ought to dismiss 'Y' (a reference to Mr Khasanov). During cross-examination, Mr Werner conceded that he himself had had no such conversation with Mr Kuzmenko at all and that it was Ms Gorobtsova who had had the conversation and who had given the relevant assurances to Mr Kuzmenko. His explanation was that he wanted to protect Ms Gorobtsova and so did not wish to identify her as the person who had had the conversation which he described in paragraph 63. Although Mr Twigger was understandably critical of this as an excuse, not least because it would have been open to Mr Werner to have protected Ms Gorobtsova by describing her with another letter (almost certainly as Z), I am not persuaded that this is, in and of itself, a reason to conclude that Mr Werner is a witness in whom the Court can have no confidence. It is unlikely that it will ever be justifiable to give evidence, whether orally or in a witness statement or affidavit, which is knowingly misleading. In my view, there was no justification in the present context, but I nonetheless accept that Mr Werner's explanation was genuine. In short, whilst I agree with Mr Twigger that this incident should make me cautious in accepting everything which Mr Werner had to say at face value, it would be a mistake to treat Mr Werner as a witness who is inherently unreliable."

196. In addition, in the Judgment at [40] I addressed a criticism made by Mr Twigger concerning the absence of a formal instruction being given within the KK Group to preserve electronic documents until June 2015. I observed in that context that this was two months after Allen & Overy took over from Zaiwalla, and that this was both

"regrettable" and *"not something which should have happened"*. These observations were made based on the evidence and material which was before me. There was no suggestion, in particular, when the Judgment was circulated in draft that there was any error in what I had stated. After the Judgment had been handed down, in fact after the Christmas break which ensued in the meantime, I received a letter from Zaiwalla, in which reference was made to [40] and two points were made. First, it was explained that, prior to Zaiwalla's instruction, Herbert Smith Freehills LLP had previously been asked by the Claimants to advise them in relation to the Claims, so as to mean that any obligation to issue a retention notice had already come about by the time that Zaiwalla came to be instructed. Secondly, Zaiwalla explained that Mr Zaiwalla and other members of his team advised the Claimants of the importance of preserving documents *"which would otherwise be deleted according to a Document Retention Policy or in the ordinary course of business"*. Although it was not stated when that advice was given, it is reasonable to infer that it was given soon after Zaiwalla were instructed and, in any event, before Allen & Overy were subsequently instructed.

197. In these circumstances, having asked that Zaiwalla include the parties' solicitors, Allen & Overy and Cleary Gottlieb, in any subsequent correspondence, Zaiwalla's ultimate invitation to the Court was to issue what was described as an addendum to the Judgment. As I explained at the consequentials hearing, since I am doubtful that it is appropriate to issue an addendum to a judgment which was handed down several weeks ago and since I would, in any event, be producing a further judgment dealing with consequential matters which would be made publicly available in the same way as the Judgment, I consider that the appropriate place to say something further about this matter is in this follow-on judgment. I am happy to make it clear that, although, as I say, what was contained in the Judgment at [40] was based on the evidence and material which was before me at trial, it is right to acknowledge that Zaiwalla (not being a party to the proceedings and no longer acting for the Claimants) were not at that trial and so were in no position to make representations concerning the retention notice issue and explain their position. As I have explained, it was only after the Judgment had been handed down that Zaiwalla were in a position to see what had been stated and to explain the position as far as they are concerned. In those circumstances, although the criticism which I made at [40] concerning the absence of a retention notice stands in the sense that such a notice ought to have been given at an earlier stage than was the case, it is appropriate that the Court should record that it would appear that that absence was not the result of any failing on Zaiwalla's part and that the Court is not in a position to determine where any fault lies.

198. It follows that my reference at [40] to the relevant error not being made *"by Mr Werner or, for that matter, Mr McGregor (and the KK Group) but by the solicitors formerly instructed by the Claimants"* ought no longer to be regarded as entailing criticism of Zaiwalla in this respect. I went on to say this:

"Specifically, although it was suggested to Mr McGregor in particular, during the course of cross-examination, that he was at fault as regards the giving of a retention notice, he was not employed by the KK Group until some nine months or so after Zaiwalla had been instructed to act. In my view, when he started at the KK Group, Mr McGregor was entitled to take it that Zaiwalla had given the relevant notice. Although Mr Twigger suggested that he ought to have checked whether this was the case, I consider this an unfair criticism. I appreciate that he was the General Counsel

of the KK Group, but to suggest that he should have checked whether a retention notice had been issued in circumstances where an experienced firm of solicitors were acting for the KK Group is, in my view, not realistic. As Mr Twigger reminded me, I asked Mr McGregor during the course of cross-examination why it took almost 2 years for the relevant notice to be issued. Mr McGregor's suggestion was that there was a lot going on when he arrived in his new job at the KK Group. He explained that there had not been 'a quiet day really and it was something that was eventually considered at the commencement of - just after Allen & Overy had come on board and we had changed law firms'. Mr McGregor likened the circumstances in which he joined the KK Group as being akin to 'parachuting into a battle' since he was dealing with Financial Police raids and 'aggressive' enforcement proceedings by various banks. I can understand why, in such circumstances, he assumed steps had already been taken before he joined the KK Group and simply gave no thought to the question of whether a retention notice had been issued."

In the circumstances, given what I have now been informed by Zaiwalla, the reference to Mr McGregor not checking *"whether a retention notice had been issued in circumstances where an experienced firm of solicitors were acting for the KK Group"* ought, similarly, not to be regarded as entailing criticism of Zaiwalla. The point remains, however, that, as far as Mr McGregor personally was concerned, he was entitled to assume that *"steps had already been taken before he joined the KK Group and simply gave no thought to the question of whether a retention notice had been issued"*.

199. Having dealt with this particular aspect, I come on, then, to address the substance of the points which Mr Foxton has made concerning the period prior to the Claimants' instruction of Allen & Overy, including (but not limited to) the retention notice criticism which stands irrespective of where the fault for the failure to issue such a notice is to be found. In doing so, I should explain that I thought it right, having read what Mr Foxton had to say in his written submissions concerning the period when Zaiwalla were instructed, and so not confined to the retention notice issue, to draw to Zaiwalla's attention the matters relied upon by Mr Foxton and to make it clear that, if Zaiwalla wished, they would be welcome to attend at the consequentials hearing in order to make representations. Zaiwalla's response was to say that they took *"the view that it is not necessary"* to attend. Zaiwalla subsequently explained in an email to the Court that this was on the basis that Allen & Overy had explained that Mr Howe would *"not accept or agree with the criticisms Cleary makes of your firm's representation of the Claimants before we took over and the way the case was conducted"*. There was, therefore, no such attendance on Zaiwalla's part. In any event, having considered the various points which Mr Foxton raised, I have reached the clear view that none of them merits a conclusion that costs should not be awarded on an indemnity basis as regards the pre-Allen & Overy period.

200. First, the retention notice issue is not a reason, irrespective of who is to blame for the failure to give such a notice, since it is impossible to see how that failure can sensibly be regarded as conduct which ought to attract the making of an indemnity costs order against the Claimants, which is how Mr Foxton sought to justify his submission that the basis of assessment ought to be standard rather than indemnity. Secondly, as Mr Howe pointed out, it should not be overlooked that the procedural steps taken by the Claimants which were criticised by Mr Foxton were steps which have already

attracted costs orders in favour of Mr Arip and Ms Dikhanbayeva (and so against the Claimants). As Mr Howe went on to observe, if those steps merited an indemnity costs order, such an order would, and could, have been sought by Mr Arip and Ms Dikhanbayeva at the time. I agree with Mr Howe that it is not for the Court very much later to revisit this question in the manner proposed by Mr Foxton. Thirdly, Mr Howe was able to justify certain of the steps taken, pointing out, for example, that KK Plc's claim for reflective loss involved a pure point of law which it was not unreasonable to put forward even though ultimately it was not permitted to be maintained and a costs order was made in Mr Arip's and Ms Dikhanbayeva's favour as a result. So, too, Mr Howe explained, was it reasonable to advance the Astana 1 Claim even though that was ultimately met by a valuation which meant that the claim could not succeed. As for the 'Theta proceedings', Mr Howe explained, these were not objectionable and only came to an end once the settlement had been reached with Mr Zhunus since the proceedings formed part of what was settled. These are all points which seem to me to have considerable force. However, as I have explained, the most compelling point is the fact that, if there were anything in the criticisms now made and in the manner made, then, it would be expected that contemporaneously Mr Arip and Ms Dikhanbayeva would have sought indemnity costs. The fact that they did not or, if they did, the fact that indemnity costs orders were not made (in contrast, it should be noted, to an order for indemnity costs which was made by Walker J when dealing with a security for costs application in which Mr Zhunus *"led the charge"*, as Mr Foxton put it: [2015] EWHC 996 (Comm)) demonstrates that, whatever might now be suggested by Mr Foxton when seeking to meet the Claimants' own indemnity costs application, the conduct about which complaint is made cannot have been sufficiently 'out of the norm' as to warrant the making of an indemnity costs order.

201. I do, however, consider it appropriate that the criticisms which were made in the Judgment concerning Mr Werner's first affidavit are marked in some way, namely by making an order that the Claimants should be deprived of a proportion of the costs which they incurred in making the *ex parte* application for the Freezing Order in which Mr Werner's first affidavit was deployed. In circumstances where HHJ Mackie QC apparently reserved the costs of the discharge application, and so the costs associated both with that application and the original *ex parte* application are still at large, it seems to me that an order depriving the Claimants of a proportion of their costs would be appropriate. It would not, however, be appropriate, in my assessment, to require that the Claimants should pay Mr Arip's and Ms Dikhanbayeva's costs of the discharge application in circumstances where, as Mr Howe put it, their discharge application was based on their false and dishonest insistence that they had not committed any of the serious wrongdoing which, as a result of the trial, the Court has found they did, indeed, commit. I agree with Mr Howe that, standing back, it is clear that the failings in Mr Werner's first affidavit are somewhat dwarfed by Mr Arip's and Ms Dikhanbayeva's own conduct in maintaining, on the discharge application, that they had not been guilty of any fraudulent behaviour when they must be taken as having known that that was the case.

202. Turning to the figures, the costs incurred by the Claimants in making their *ex parte* application for the Freezing Order were apparently £ 350,750 whereas their costs of meeting the discharge application amounted to £ 809,353 and Mr Arip's and Ms Dikhanbayeva's costs of making that application were as much as £ 3,205,248. Adopting a necessarily broad brush approach to the matter, I consider that, in such

circumstances, the Claimants should be deprived of £ 75,000 of the £ 350,750 incurred when making the original application. They should otherwise, however, be paid their costs relating to the Freezing Order, both the costs associated with the *ex parte* application and the subsequent discharge application. I bear in mind, when reaching this assessment, that the part of Mr Werner's first affidavit where he misrepresented the factual position was a relatively short passage of what formed but a part of extensive evidence assembled by the Claimants in support of their injunction application. Furthermore, as Mr Howe rightly put it, the relevant passage essentially entailed Mr Werner misguidedly seeking to protect the identity of a witness (Ms Gorobtsova) by attributing some actions of hers to himself. As I have previously made clear, this should not have happened. However, again as Mr Howe rightly observed, the inaccuracy in Mr Werner's evidence did not affect his description of the substance of the events described in his first affidavit.

203. This leaves Mr Foxton's submissions concerning the limitation issue. Mr Foxton submitted, first, that there was no dishonesty on the part of Mr Arip and Ms Dikhanbayeva in putting forward their time-bar defence. There is nothing in this point, however, since, as Mr Howe submitted, the only purpose in advancing the limitation defence was *"in order to buttress or attempt to enable the defendants to escape their liability for the fraud which the court has found them to have committed"*. I agree with Mr Howe that, in the circumstances, to seek to separate the limitation defence from Mr Arip's and Ms Dikhanbayeva's other defences (specifically their resolute denial that they had been fraudulent in their conduct) is artificial and unrealistic. The more so, given that those other defences entailed an insistence that there had not been the dishonest conduct alleged. This is not a case where Mr Arip and Ms Dikhanbayeva admitted their wrongdoing and took a stand on their time-bar defence.

204. Secondly, Mr Foxton suggested, with appropriate deference given that he did not appear at the trial, that the limitation issue took up a third of the proceedings. That is simply not the case at all. The witness evidence occupied a significantly lesser proportion of the time, entailing the Claimants' witnesses giving evidence in a relatively short overall timescale and the Kazakh law experts giving evidence over just two days. In these circumstances, it makes no sense to seek to separate out the limitation issue in the manner suggested by Mr Foxton.

205. In the circumstances, I am clear that costs should be assessed on an indemnity basis, and that this should be the position in relation to the entirety of the proceedings.

Interim payment on account of costs

206. The Claimants seek an order requiring Mr Arip and Ms Dikhanbayeva to make an interim payment on account of costs. In this connection, Mr Howe referred me to CPR 44.2(8), which provides:

"Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is a good reason not to do so."

He did so at the same time as explaining that the object of the rule is to enable a receiving party to recover part of this expenditure on costs before the possibly

protracted process of carrying out a detailed assessment: see the Notes in the White Book at 44.2.5 and ***Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd*** [2006] EWHC 1444, [2006] 4 All ER 233.

207. As for the determination of what is a reasonable sum, this involves the Court arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings. As Christopher Clarke LJ put it in ***Excalibur Ventures LLC v Texas Keystone Inc*** [2015] EWHC 566 (Comm) at [22]:

"…It is clear that the question, at any rate now, is what is a 'reasonable sum on account of costs'. It may be that in any given case the only amount that it is reasonable to award is the irreducible minimum. I do not, however, accept that that means that 'irreducible minimum' is the test. That would be to introduce a criterion (a) for which the rules do not provide (b) which is not the same as the criterion for which they do provide; and (c) which has potential drawbacks of its own, not least because it begs the question whether it means those costs which could not realistically be challenged as to item or amount or some more generous test. On one approach it admits of every objection to costs, which cannot be treated as fanciful."

He went on to say this at [23] and [24]:

"What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.

In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."

208. Mr Howe invited the Court to order an interim payment on account of costs in the sum of £ 8 million. This, he pointed out, amounts to about two thirds of the total costs which the Claimants have incurred, which Ms Vaswani of Allen & Overy has estimated as adding up to something in excess of £ 12 million. It was Mr Howe's submission that it is *"extremely likely"* that the Claimants will recover such a figure as a minimum on detailed assessment, especially if costs are awarded (as I consider they should be) on an indemnity basis given that, as Mr Foxton himself acknowledged during the course of the hearing, based, as he disarmingly put it, on his *"expensive experience"*, the likely level of recovery on an indemnity basis is 80%. Mr Howe went on to observe that the Claimants' costs, and the suggestion that the interim payment should be in the amount of £ 8 million, compares favourably with the level

of costs which Mr Arip and Ms Dikhanbayeva have incurred defending the proceedings which apparently exceed £ 25 million.

209. Mr Foxton resisted the making of an order for an interim payment on account of costs in the amount sought by the Claimants. It was his contention that the base costs from which an interim payment should be calculated ought to be treated as being approximately £ 4.5 million, and that the appropriate order should be substantially less than £ 8 million. In doing so, Mr Foxton again drew attention to the deficiencies in Mr Werner's first affidavit relied upon by the Claimants in obtaining the Freezing Order. He submitted, indeed, that it would be appropriate that the Court discounted all the costs in relation to the period prior to Allen & Overy's instruction by the Claimants, namely £ 1,375,466, from the calculation of any interim payment since, he suggested, most of those costs will be associated either with the tainted *ex parte* application for the Freezing Order or the failed proprietary claim. As to the latter in particular, Mr Foxton drew attention to the fact that the costs awarded to Mr Arip and Ms Dikhanbayeva in respect of that claim, which were held over for detailed assessment, amount to some £ 583,146. He also made reference to the costs of the Claimants' aborted appeal relating to the proprietary claim and to the costs awarded to Mr Arip and Ms Dikhanbayeva in relation to the discontinued Astana 1 claim and KK Plc's claims which he indicated amount to some £ 291,074. In addition, he sought to suggest that a reduction ought to be made in respect of the significant credit given for the construction work carried out at Peak and Astana, amounting to some KZT 5.3 billion. He submitted that, had Mr Arip and Ms Dikhanbayeva not fought that issue, the Claimants would have given no credit for the work done or, at best, would have given credit only for Mr Tapper's far lower valuations. He suggested that the same applies to the Land Plots Claim, where the Claimants sought to avoid giving any credit for the land acquired. He suggested that, in the circumstances, there should be a reduction amounting to £ 500,000.

210. I see no merit in Mr Foxton's submissions. As to the last point concerning credits, in circumstances where Mr Foxton recognised that he could not resist a costs order being made against Mr Arip and Ms Dikhanbayeva in relation to the period after Allen & Overy came to be instructed, indeed in circumstances where he did not feel able to advance positive submissions against the proposition that such costs should be awarded on the indemnity basis, it seems to me that it is not open to Mr Foxton to suggest that there should be a reduction as he suggested. Put differently, in view of the costs order which Mr Foxton accepted was appropriate, any detailed assessment is not going to allow such a reduction to be made. It follows that the interim payment ought not to factor in the reduction either. As to the other matters relied upon, I have previously addressed the Freezing Order aspects and made it clear that costs should be paid by Mr Arip and Ms Dikhanbayeva to the Claimants save for £ 75,000. Otherwise, even though it does appear likely that there will be costs which the Claimants will need to meet in order to comply with the costs orders which have, on occasion, been made, in the overall scheme of things, the costs concerned are not likely to be substantial. In any event, in circumstances where £ 8 million is a figure based on a standard assessment rather than the indemnity costs which I have decided is appropriate, I am confident that whatever costs might fall into the categories identified by Mr Foxton, an order requiring Mr Arip and Ms Dikhanbayeva to make an interim payment on account of costs in the sum of £ 8 million is entirely appropriate.

Interest on costs

211. There was no dispute between Mr Howe and Mr Foxton that interest should be awarded on costs. Mr Howe drew the Court's attention in this context to CPR 44.2(6)(g), which confers upon the Court a discretion to award pre-judgment interest on costs.

212. The typical order, Mr Howe explained, is that the paying party should pay the receiving party interest from the date of payment of the relevant bills to the date of the relevant costs order at which point post-judgment interest becomes payable at the statutory rate. Mr Howe went on to observe that the appropriate rate to be ordered should reflect the cost of financing the relevant expenditure. As Sharp LJ put it in ***The Secretary of State for the Department of Energy and Climate Change v Jeffrey Jones*** [2014] EWCA Civ 363 at [17]:

"The power to order interest on costs, including pre-judgment interest on costs is derived from CPR 44.2 (6) (g). The equivalent rule was CPR 44.3(6)(g) before the Jackson reforms. The rule provides that the court may order 'interest on costs from or until a certain date, including a date before judgment'. The purpose of such an award is to compensate a party who has been deprived of the use of his money, or who has had to borrow money to pay for his legal costs. The relevant principles do not materially differ from those applicable to the award of interest on damages under section 35 A of the Senior Courts Act 1981. The discretion conferred by the rule in respect of pre-judgment interest is not fettered by the statutory rate of interest, under the Judgments Act 1838, but is at large. Ultimately, the court conducts a general appraisal of the position having regard to what is reasonable for both the paying and the receiving parties. This normally involves an assessment of what is reasonable having regard to the class of litigant to which the relevant party belongs, rather than a minute assessment which it would be inconvenient and disproportionate to undertake. In commercial cases the rate of interest is usually set by reference to the short-term cost of unsecured borrowing for the relevant class of litigant, though it is always possible for a party to displace a 'rule of thumb' by adducing evidence, and the rate charged to a recipient who has actually borrowed money may be relevant but is not determinative. See F & C Alternative Investments Ltd v Barthelemy (No 3) CA [2013] 1 WLR at paragraphs 98, 99 and 102 to 105; Bim Kemi AB v Blackburn Chemicals Ltd [2003] EWCA Civ 889 at 18 and for example, Fiona Trust & Holding Corporation v Privalov [2011] EWHC 664 (Comm)."

213. On this basis, it was Mr Howe's submission that the appropriate rate of interest should, as he put it, *"reflect the hard currency interest rate that the claimants have incurred in Kazakhstan"*, although he suggested that an alternative approach would be to reflect the fact that the relevant bills of costs would have been rendered by Allen & Overy in sterling by fixing the interest rate at Base plus 2.5%.

214. Mr Foxton submitted that there *"is an interesting point lurking here"* arising out of the fact that this is litigation which has been funded by Harbour and so, he suggested, this is not a case where the Claimants have had to borrow at Kazakh interest rates in order to pay their legal costs. As to this, it is instructive that Sharp LJ went on to say this in the ***Jones*** case at [18], albeit not in the litigation funding context:

"The rate may differ depending on whether the borrower is classed as a first class borrower, an SME or a private individual. Historically at least, first class borrowers, have generally recovered interest at base plus 1 per cent, unless that was unfair or inappropriate though in the light of recent interest rate developments there is no presumption that base rate plus one per cent is the appropriate measure of a commercial rate of interest: see The Commercial Court Guide at para J14.1 (page 67). SMEs and private individuals have tended to recover interest at a higher rate to reflect the real cost of borrowing to that class of litigant: see for example, Jaura v Ahmed [2002] EWCA Civ 210, F & C Alternative Investments Ltd and Attrill v Dresdner Kleinwort Ltd [2012] EWHC 146 (QB)."

215. Mr Howe's response to Mr Foxton's submission was to suggest that, in the circumstances, it would be appropriate to make an order which addresses both the situation where costs have been paid by the Claimants themselves and the situation where they have been paid by Harbour. In the former case, he proposed, the appropriate rate should be *"the borrowing Kazakhstan rate in hard currency"*, whereas in the case of costs funded by Harbour the rate should be Base plus 2.5%. Recognising the good sense of this suggestion, Mr Foxton agreed that this would be an appropriate order to make. He submitted, however, that a more appropriate rate where Harbour is concerned would be Base plus 2% rather than Base plus 2.5%, since he pointed out that there was no evidence before the Court that Harbour had had to borrow at the higher rate. I am inclined to agree with Mr Foxton about this and so direct that the interest rate as regards Harbour should be Base plus 2%.

Permission to appeal

216. Mr Foxton sought permission to appeal on Mr Arip's and Ms Dikhanbayeva's behalf. I refused permission at the hearing, explaining that I would complete the relevant N460HC (*"Reasons for allowing or refusing permission to appeal and referral to the Court of Appeal (10.16)"*) form. This I did but it is convenient to repeat here my reasons for refusing permission.

217. Three points were taken by Mr Foxton in support of the application. The first concerned my conclusions regarding limitation. Specifically, it was suggested that permission should be granted as regards the factual findings concerning knowledge (or awareness). The most that was said in support of this, however, was that the Court had expressed caution as to the evidence given by Mr Werner. This is no basis on which to conclude that there is a real prospect of success. Caution was, indeed, exercised in arriving at the (clear) conclusion which was reached. Secondly, it was then suggested that the Court's conclusion concerning undue hardship for the purposes of the Foreign Limitation Periods Act 1984 is *"open to serious argument"* given that this is a dispute between commercial parties and given that the limitation period concerned was a 3-year period. This issue only arises, however, as an alternative to the (factual) decision reached concerning knowledge (or awareness). Furthermore, the undue hardship issue is itself a factual (or, as Longmore LJ put it in the ***Bank of St Petersburg*** case, cited in the Judgment at [556], a *"multi-factorial"* issue), and there is no real prospect of the Court's factual findings (and conclusion) being overturned on appeal. The third and last matter raised concerns certain credits which Mr Arip and Ms Dikhanbayeva (through Mr Foxton) say should have been given amounting to some US$ 36.9 million. Again, however, the Court's decision on this aspect was a factual decision based on the evidence which was deployed at trial.

There is no real prospect of it being overturned on appeal. Reliance is now sought in this respect to be placed on a new report prepared by an expert which did not form part of the evidence at trial. It is too late for such a report now to be relied upon.

Stay of execution

218. Mr Foxton went on to submit that there should be a stay of execution pending appeal – or, in view of my refusal of permission to appeal, pending an application for permission to appeal made to the court of Appeal. Mr Foxton relied in this context on what was stated by Clarke LJ (as he then was) in ***Hammond Suddards v Ahrichem International Holdings Ltd*** [2001] EWCA Civ 2065 at [22], as follows:

"Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

Mr Foxton observed, uncontroversially as I understood it, that, whilst Clarke LJ referred in this passage to the risk of the appellant being unable to recover monies paid to the respondent if the appeal succeeded, this is but one example of what was described by Sullivan LJ in ***DEFRA v Downs*** [2009] EWCA Civ 257, an immigration case, as constituting *"some form of irremediable harm if no stay is granted"* which would justify a stay: see [8] and [9].

219. In this case, Mr Foxton submitted, any steps taken which realise a financial recovery by way of enforcement of the judgment whilst any appeal or application to appeal are pending would inevitably involve a risk of irremediable harm should the appeal ultimately succeed. Mr Foxton highlighted the matters to which I have previously referred when explaining the position adopted by Harbour. He drew attention, in particular, to the facts that KK JSC is the only claimant with any significant business, that PEAK and Peak Akzhal have assigned the benefit of their claims to KK JSC, and that Astana-Contract and Paragon (companies which are themselves bankrupt) have assigned their claims to KK Plc who has in turn assigned the benefit of those claims to KK JSC, and that a formal bankruptcy process was initiated in respect of KK JSC on 23 November 2017 with KK JSC being declared bankrupt on 28 December 2017, a matter of days after the Judgment in these proceedings was handed down. In these circumstances, Mr Foxton submitted, there is a material risk that any amounts realised by KK JSC, PEAK and Peak Akzhal prior to the final disposal of any appeal will be irremediably lost.

220. I am not persuaded by these submissions. First, it seems to me that there is considerable force in Mr Howe's submission that, given that there is no basis for granting permission to appeal, there is equally no basis for granting a stay of execution. Secondly and in any event, in view of the parties' (and Harbour's) agreement that any sums paid in satisfaction of the judgment or by way of costs should be paid to Allen & Overy on the terms which I have earlier described, there will be protection in place which makes a stay of execution unnecessary.

221. In the circumstances, Mr Arip's and Ms Dikhanbayeva's application for a stay of execution is refused.

Conclusion

222. I can summarise the position as follows:

(1) In relation to quantum:

(a) As to rates, the appropriate calculations are Mr Tapper's Position 1 calculations rather than his Position 2 calculations.

(b) No credit in respect of steel is to be given.

(c) The decision arrived at in the Judgment concerning Penalties and Interest stands.

(d) It is agreed that credit amounting to US$ 3 million in respect of the settlement reached by the Claimants with Mr Zhunus needs to be given in calculating the amount due from Mr Arip and Ms Dikhanbayeva.

(e) It is not now open to Mr Arip and Ms Dikhanbayeva to advance an argument concerning the possible discharge of claims brought by IFK against Astana-Contract and Paragon.

(f) There ought not to be a percentage *pro rata* reduction as regards interest in relation to the PEAK Claim.

(2) As to the currency of the judgment, it is appropriate that this should be US Dollars.

(3) In terms of interest:

(a) The appropriate pre-judgment rate is to be calculated in the manner undertaken by SVG but with the use of short-term rates rather than long-term rates assuming that the former are lower than the latter.

(b) Interest is not payable on liabilities which have been incurred but not yet paid.

(c) Interest should start running in accordance with the detailed analysis contained in Mr McGregor's eighteenth witness statement.

(d) Interest will be payable on a compound basis with three monthly rests.

(e) The appropriate post-judgment rate for the purposes of section 44A of the 1970 Act is 7.14%.

(4) The security for costs which has been furnished by the Claimants (and Harbour) should be released.

(5) Any sums paid in satisfaction of the judgment or by way of costs should be paid to Allen & Overy on terms that, pending the determination of any application for permission to appeal made by Mr Arip and/or Ms Dikhanbayeva or (if permission is granted) the dismissal of any such appeal, (i) Allen & Overy is at liberty to disburse those monies on 14 days' notice to Mr Arip and Ms Dikhanbayeva (as well as to Harbour) and (ii) Harbour is granted permission to apply for an order that the funds be paid to it by Allen & Overy without having to establish a material change of circumstances.

(6) There should be amendments to the Freezing Order as follows:

(a) The cross-undertaking in damages given by the Claimants should continue until such time as Mr Arip's and Ms Dikhanbayeva's application for permission to appeal have been determined by the Court of Appeal.

(b) The amounts provided by the Claimants by way of fortification of the cross-undertaking are released.

(c) KK Plc is to remain as a party to the Freezing Order with no modification to the terms of that order.

(d) The exception in respect of legal expenses is to remain in place in order to allow Mr Arip to comply with the orders at (f) and (g) below.

(e) The exceptions in respect of living expenses and ordinary course of business dealings are to be removed.

(f) There should be an updated affidavit from Mr Arip listing his assets.

(g) Mr Arip should also provide disclosure of documents relating to his assets and the trusts' assets sought but with the greater specificity which I have sought to describe. This should be done within 4 weeks, although, if there is genuine difficulty in obtaining particular documents from particular third parties, it would be open to Mr Arip (through Cleary Gottlieb) to explain this in specific terms and agree a time extension in relation to those particular documents (but not more widely), failing which it is to be open to Mr Arip to raise the matter with the Court.

(h) The Claimants are to be released from the undertaking concerning use of information in civil proceedings but not in relation to criminal proceedings.

(7) No order is made for an interim payment on account of damages.

(8) As to costs:

(a) Subject to (b) and (c) below, Mr Arip and Ms Dikhanbayeva are to pay the Claimants' costs, including any costs which have previously been reserved.

(b) Where costs orders have previously been made against the Claimants, those orders are to stand.

(c) The Claimants should be deprived of £ 75,000 of the £ 350,750 incurred when making the original application. (They should otherwise, however, be paid their costs relating to the Freezing Order, both the costs associated with the *ex parte* application and the subsequent discharge application).

(d) Costs are to be assessed on the indemnity basis throughout the proceedings.

(e) There is to be an interim payment on account of damages in the sum of £ 8 million.

(f) Pre-judgment interest on costs is awarded where costs have been paid by the Claimants themselves at *"the borrowing Kazakhstan rate in hard currency"* and where costs have been funded by Harbour at the rate of Base plus 2%.

(9) Mr Arip's and Ms Dikhanbayeva's application for permission to appeal is refused.

(10) Mr Arip's and Ms Dikhanbayeva's application for a stay of execution is likewise refused.

223. It is anticipated that the matters which I have addressed in this judgment should mean that it will be possible to agree such calculations as need to be made to reflect what I have decided. This will need to be done in short order. However, should there be any (hopefully only minor) matters still outstanding, these can be addressed at the further hearing which has been arranged to take place on 28 February 2018.