Neutral Citation Number: [2021] EWHC 2512 (Comm)

Case No: CL-2019-000780

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

(1) IGOR SURKIS
(2) CAMERIN INVESTMENTS LLP
(3) SUNNEX INVESTMENTS LLP
(4) TAMPLEMON INVESTMENTS LLP
(5) BERLINI COMMERCIAL LLP
(6) LUMIL INVESTMENTS LLP
(7) SOFINAM INVESTMENTS LLP — **Claimants/ Respondents**

- and -

(1) PETRO POROSHENKO
(2) VALERIA GONTAREVA — **Defendants/ Applicants**

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- -

Alain Choo-Choy QC and Saul Lemer (instructed by **Reed Smith LLP**) for the **Claimants/Resondents**
Lord Goldsmith QC, Professor Philippa Webb and Monika Hlavkova (instructed by **Debevoise & Plimpton LLP**) for the **First Defendant/Applicant**
Andrew Scott (instructed by **William Grace (a trading name of MBC Law Limited)**) for the **Second Defendant/Applicant**

Hearing dates: 26-27 July 2021

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 22 September 2021 at 10:00 am

Mr Justice Calver :

INTRODUCTION

Second Defendant's Application

1. There are two applications before the Court. The first application is the Second Defendant's application, made by Application Notice dated 27 July 2020, by which she applies to have the Claimants' claims struck out or summarily dismissed against her on the following grounds:

   a) The Claimants' claims are barred by ss. 1 and 14 of the State Immunity Act 1978 (the "SIA").

   b) In so far as the Claimants' claims are premised on allegations that certain acts of the Ukrainian State were unlawful, those claims have no real prospect of success by reason of the application of the foreign act of state doctrine.

   c) In so far as the Claimants' claims rely on the judgment of the Ukrainian Administrative Court dated 25 July 2017 (the "Administrative Court Judgment"), the claims have no real prospect of success because the Administrative Court Judgment has been overturned by the Ukrainian Supreme Court.

   d) The Claimants' claims are premised on allegations of conspiracy and/or intentional wrongdoing, which have not been properly pleaded and/or have no real prospect of success.

First Defendant's Application

2. The second application is the First Defendant's application made by Application Notice dated 23 December 2020. Pursuant to the Order of Bryan J dated 9 March 2021, this hearing is concerned only with the First Defendant's application for an order that the Court does not have jurisdiction to hear the claims against him on the basis that: (i) the claims against both the First and Second Defendants are barred by the application of the SIA; (ii) the Claimants' case requires the English Court to adjudicate on issues that the act of state doctrine precludes the Court from determining; and/or (iii) there is no real issue which is reasonable to be tried between the Claimants and the Second Defendant.

3. Whilst the hearing of these applications was just completed within the two day time estimate, it was completed at the expense of full argument and debate. Submissions had to be hurried because as I pointed out to the parties during the hearing, two days was simply not a realistic time estimate for the hearing of applications of this complexity. This was despite the fact the court had flagged up its concern as to the inadequate time estimate *before* the hearing took place and had received confirmation that the time estimate remained realistic. The inadequate time estimate also led to the Court having to carry out a significant amount of its own analysis of the documentary and witness evidence and case law outside of the hearing. This puts an unreasonable

burden on the Court and leads to the hearing of other litigants' cases being unfairly delayed. It is essential that advocates keep hearing time estimates under review and alert the court in good time where they consider that the estimate may be wrong, failing which this Court will not hesitate to apply serious costs sanctions to one or both parties. All practitioners in the Commercial Court should take note of this fact.

BACKGROUND

The parties

4. The First Claimant, Igor Surkis, is a Ukrainian businessman. The Second to Seventh Claimants (the "Surkis Family Companies") are limited liability partnerships incorporated in England in 2012 and beneficially owned by Mr Surkis' family.

5. The First Defendant ("PP") is the fifth President of Ukraine, having been the sitting President between 7 June 2014 and 20 May 2019. The Second Defendant ("VG") was the Governor of the National Bank of Ukraine (the "NBU") from 19 June 2014 until her resignation on 10 May 2017. The NBU is Ukraine's central bank and is in charge of (among other things) the regulation and supervision of Ukrainian banks. VG's resignation came before the end of her contract at the NBU and two years before PP's term as President was due to expire.

The nationalisation of PrivatBank

6. The claims in these proceedings arise out of the Ukrainian state's nationalisation of Commercial Bank PrivatBank ("PrivatBank"), which was for many years the largest bank in Ukraine.

7. Since 2014, the NBU has been engaged in a systemic reform of the Ukrainian banking sector, coordinated with and overseen by the International Monetary Fund (the "IMF"). Between 2014-2016, the NBU (with the assistance of the IMF) conducted regular asset quality reviews and stress testing of Ukrainian banks, and withdrew the licences of non-compliant banks. During that process, the NBU discovered a massive capital shortage in PrivatBank's balance sheet, estimated at c. US$ 4.5-5.7 billion. PrivatBank has brought proceedings in fraud in the English courts against Mr Igor Kolomoisky and Mr Gennadiy Bogolyubov, PrivatBank's majority shareholders, for losses of some US1.9bn plus interest, and those proceedings remain on foot[1].

8. After Mr Kolomoisky and Mr Bogolyubov failed to comply with a recapitalisation plan agreed with the NBU, the NBU initiated discussions with the Ukrainian Government about the nationalisation of PrivatBank pursuant to Ukraine's Law on Banks and Banking. Accordingly, on 18 December 2016, the NBU declared PrivatBank insolvent in accordance with Article 76 of the Law on Banks and Banking, and submitted a proposal to the Cabinet of Ministers (i.e. the Ukrainian Government) that PrivatBank be nationalised.

9. On the same day, the National Security and Defence Council of Ukraine (the "NSDCU"), headed by PP in his capacity as President, approved a "*Decision on*

[1] *PJSC Commercial Bank Privatbank v Kolomoisky* [2018] EWHC 3308 (Ch), [2018] EWCA Civ 3040, [2018] EWHC 1910 (Ch) and [2019] EWCA Civ 1708

Urgent Measures to Be Taken to Safeguard the National Economic Security of Ukraine and Ensure the Protection of Depositors' Interests" (the "NSDCU Decision"). The NSDCU Decision specifically mentioned the role in this process of VG as the Head of the NBU and it noted the risks that the PrivatBank insolvency posed to the national and economic security of Ukraine. It proposed (i) to the Cabinet of Ministers that it consider recapitalising PrivatBank from state funds and (ii) that the Cabinet of the Ministers of Ukraine with the participation of the National Bank of Ukraine, Deposit Guarantee Fund of Ukraine and the National Securities and Stock Market Commission should immediately take comprehensive action to prevent the destabilisation of the financial system of the state and to ensure the protection of PrivatBank's interests.

10. The NSDCU Decision was brought into force on 19 December 2016 by a Presidential Decree No. 560/2016, issued by PP pursuant to powers granted to him by the Constitution of Ukraine.

11. On the same day the Cabinet of Ministers approved the nationalisation of PrivatBank.

12. The nationalisation of PrivatBank was implemented by the Deposit Guarantee Fund (the "DGF"), a special public body in charge of the resolution of insolvent banks, in accordance with the Law of Ukraine on Households Deposit Guarantee System (the "DGF Law"). Once PrivatBank was declared insolvent with the DGF having announced its temporary administration in accordance with Article 34 of the DGF Law, the DGF was authorised to act on PrivatBank's behalf in place of its shareholders and management.

13. The process of nationalisation involved a significant injection of state funds as well as a bail-in of related party liabilities (the "Bail-In"). A bail-in is a financial tool that seeks to shift some of the financial burden of bank failure from taxpayers to the bank's shareholders and creditors. In Ukraine, Article 41-1 of the DGF Law authorises the DGF to exchange funds held in accounts of the bank's "related parties" for shares in the bank's capital, which are then sold to the state (in this case for a nominal sum).

14. Under the Ukrainian Law on Banks and Banking, the "related parties" of banks are self-reported by the banks and/or designated by the NBU. In advance of the PrivatBank nationalisation, on 13 December 2016, the RP Commission for Designation of Banks' Related Parties and the Verification of the Banks' Transactions with Such Parties (the "RP Commission") issued Decision No. 105, in which it designated 1,092 individuals and legal entities as being "related parties" to PrivatBank ("Decision No. 105"). This included the Claimants.

15. Decision No. 105 was based on an assessment of PrivatBank's relationships conducted by the RP Monitoring Department for Related Parties (the "RP Monitoring Department").

16. On 21 December 2016, after the DGF performed the Bail-In in respect of funds held in accounts of PrivatBank's related parties, the Ukrainian Ministry of Finance, on behalf of the Ukrainian state, purchased 100% of PrivatBank's shares from the DGF (acting on behalf of PrivatBank's shareholders) for the nominal sum of UAH 1 (c.

US$ 0.04). The Ukrainian state subsequently invested a massive UAH 155 billion (c. US$ 5.8 billion) in recapitalising PrivatBank.

The Claimants' claims

17. Mr Surkis and the Surkis Family Companies, all of whom held funds with PrivatBank at its branch in Cyprus (the "Cypriot Accounts"), were all designated as "related parties" to PrivatBank under Decision No. 105 (the "Designation"). The Designation of the Surkis Family Companies in particular led to the bail-in of the funds they held with PrivatBank (the "Surkis Family Companies' Bail-In"). Pursuant to Arts 41-1(6)-(7) of the DGF Law, the Bail-In — including that of the Surkis Family Companies — took the form of special share purchase agreements, governed by Ukrainian law, and entered into between an authorised representative of the DGF (acting as Acquirer on behalf of the Surkis Family Companies) and another authorised representative of the DGF (acting on behalf of PrivatBank as Issuer) (the "Bail-In SPAs").

18. These Bail-In SPAs provided in particular as follows:

> 1.1 "The Parties have agreed that the Issuer undertakes to deliver to the Acquirer and the Acquirer shall acquire from the Issuer, in exchange of monetary obligations of the Issuer toward the Acquirer, set forth in cl.1.2 hereof, the following shares additionally issued by the Issuer (the "Shares")…
>
> 1.2 The Parties have agreed that the Acquirer in exchange for the Shares shall transfer to the Issuer, and the Issuer shall receive claim rights under the following monetary obligations of the Issuer toward the Acquirer (collectively, the "Claim rights"): …
>
> [3 Accounts are then identified]
>
> 1.3 The Agreement amount consists of the aggregate amount of monetary obligations indicated in cl.1.2 hereof, and is 1 031 478 560 (one billion thirty one million four hundred and seventy eight thousand five hundred and sixty) UAH."

19. It follows that whilst the effect of this process was, as the Claimants put it colloquially, that the funds in the Surkis Family Companies' Cypriot Accounts were effectively "zeroed", it was in fact carried out under these Ukrainian-law governed Bail-In SPAS by way of a transfer of shares in PrivatBank in exchange for the Surkis Family Companies transferring their *claim rights* under their accounts with PrivatBank. In other words, the debtor (PrivatBank) seized the relevant claim rights. This process applied to all designated related parties under Decision No. 105.

20. The Claimants' case as pleaded in a draft Re-Amended Particulars of Claim (which all parties agree is the relevant claim to consider for present purposes) is, in summary, that PP and VG conspired to use their influence to procure the Designation with the object of depriving the Surkis Family Companies of funds held by them with PrivatBank via the Bail-In SPAs. The Claimants allege that PP and VG did so by

exercising influence, *in their private capacities*, on the RP Commission and/or the RP Monitoring Department.

21. The Claimants allege that PP and VG conspired in this way in order to put pressure on Mr Surkis to transfer his 8.33% holding in the Ukrainian 1+1 Media Group ("1+1 Media") to Mr Poroshenko for free, instead of PP paying the sum allegedly agreed under an oral contract which is said to have been concluded between PP and Mr Surkis in February 2016 (the "Bolvik Agreement"). PP allegedly sought to secure a stake in 1+1 Media in order to improve his chances of re-election in the 2019 Presidential race.

22. The Claimants therefore allege that PP and VG committed the torts of unlawful means conspiracy, lawful means conspiracy and/or procuring a breach of contract under Cypriot law, or in the alternative, acts contrary to Ukrainian law (the "Claims").

23. Importantly, the Claimants state in paragraph 20 of their skeleton argument that they do not in these proceedings challenge the validity of Decision 105 in general, the nationalisation of PrivatBank or the Bail-In process generally. The case that is advanced is that whilst the Ukrainian authorities properly engaged in a nationalisation process and properly designated around 1,000 individuals as related persons (being around 99% of the total), there was a fraud in designating within Decision 105 the 6 Surkis Family Companies.

Procedural history

24. On 17 December 2019, the Claim Form was issued.

25. On 8 April 2020, the Claim Form was amended to include claims under Cypriot and/or BVI law in the alternative to the Ukrainian law claims that were included in the original Claim Form, to make syntactic changes and to make amendments in relation to certain relevant dates.

26. On 15 April 2020, the Claim Form was re-amended in order to change the address for VG and the Re-Amended Claim Form was served on her.

27. On 28 April 2020, VG filed an acknowledgement of service in which she ticked the box stating that she intended to contest the claim on its merits and she did not tick the box indicating that she intended to contest jurisdiction.

28. On 26 May 2020, the Particulars of Claim were served on VG.

29. On 5 June 2020, the Claimants issued an application to re-re-amend the Claim Form. Permission to do so was granted by Moulder J on 12 June 2020.

30. On 22 June 2020, Cockerill J made an order by consent pursuant to which permission was given to amend the Particulars of Claim to delete a particular allegation contained in paragraph 31 of the Particulars of Claim (identified below).

31. On 27 July 2020, VG served her defence and issued her present application.

32. In around September 2020, steps were taken in Ukraine to serve the proceedings on PP.

33. On 14 October 2020, PP filed an Acknowledgment of Service stating that he intended to challenge the jurisdiction of the English Court. PP's position was said to be without prejudice to his case that he had not yet been validly served in Ukraine.

34. On 30 November 2020, PP's solicitors, Debevoise & Plimpton LLP ("Debevoise"), informed the Claimants that Debevoise was now instructed to accept service on behalf of PP and, accordingly on 2 December 2010, the Claimants formally served Debevoise on PP's behalf.

35. On 11 December 2020, VG consented to further amendments being made to the Amended Particulars of Claim as set out in the Claimants' draft Re-Amended Particulars of Claim. However, it appears that PP refused to consent to the proposed re-amendments.

The Claimants' pleaded case

36. In considering the applications, it is important to focus upon how the case is pleaded against the Defendants. The case which the Claimants say that they wish to advance is that contained in the draft Re-Amended Particulars of Claim.

37. In the Amended Particulars of Claim, the Claimants have pleaded as follows:

> "17. On 13 December 2016, purportedly pursuant to Art. 52 of the Law of Ukraine "On Banks and Banking", the NBU issued Decision No 105 which designated the Surkis Family Companies as persons related to PrivatBank.
>
> 18. Between 18 and 21 December 2016, the NBU and the Individuals` Deposits Guarantee Fund (the "Fund") engaged in a process by which the funds held in PrivatBank accounts by designated related persons (such as the Surkis Family Companies) were used to capitalise PrivatBank (the "Bail-In"). The structure of the Bail-In was as follows:
>
> 18.1. PrivatBank, managed by the Fund, issued additional shares (the "Additional Shares").
> 18.2. The designated related persons, represented by an authorised representative of the Fund, entered into a sale and purchase agreement with PrivatBank, represented by another authorised representative of the Fund, under which the designated related persons purchased the Additional Shares in exchange for the funds standing to the credit of the designated related persons in PrivatBank (the "Bail- In SPA").
>
> 18.3. The Fund then entered into a further sale and purchase agreement pursuant to which it sold 100% of PrivatBank's shares to the Ministry of Finance for one hryvnia (the "Ministry of Finance SPA").
>
> 19. The Bail-In described above was given effect to by means of the following specific decisions, orders and agreements:
>
> 19.1. On 20 December 2016, the Fund issued Decision No. 2887 pursuant to which: (i) the conditions for the Bail-In SPA were approved; (ii) Andrii Mykolayovych Shevchenko was granted the power to sign the

Bail-In SPA on behalf of the designated related persons; (iii) Maryna Anatoliivna Slavkina was granted the power to sign the Bail-In SPA on behalf of PrivatBank; and (iv) Nataliia Anatoliivna Solovyava was granted the power to debit the accounts of the designated related persons in performance of the Bail-In SPA and to reflect the transactions connected with the Bail-In SPA in the accounting records of PrivatBank.

19.2. On 20 December 2016, pursuant to Decision No 2887, Ms Solovyava issued Order No 22 which purported to block the PrivatBank accounts held by the designated related persons.

19.3. On 20 December 2016, the Bail-In SPA was entered into.

19.4. On 20 December 2016, the Fund issued Decision No 2891 pursuant to which Mr Shevchenko was granted the power to execute the Ministry of Finance SPA.

19.5. On 21 December 2016, pursuant to Decision No 2887, Ms Solovyava issued Order No 44 which purported to debit the PrivatBank accounts held by the designated related persons in purported performance of the Bail-In SPA.

19.6. On 21 December 2016, the Ministry of Finance SPA was executed.

…

21. The Decisions, Orders and agreements referred to at paragraphs 17 to 19 above, to the extent that they related to the Surkis Family Companies, were unlawful under Ukrainian law as there was no proper basis for the designation of the Surkis Family Companies as persons related to PrivatBank. The unlawfulness of the Decisions, Orders and agreements referred to at paragraphs 17 to 19 above has been confirmed by the judgment of the Administrative Court of Kiev dated 25 July 2017 (the "**Administrative Court Judgment**") pursuant to proceedings commenced by the Surkis Family Companies against the NBU, the Fund, the authorised representatives of the Fund, PrivatBank and the Ministry of Finance of Ukraine. Under Ukrainian law the Administrative Court decision is not final until approved by a Court of Appeal.

…

30. At the meeting on or about 20 December 2016, Mr Surkis informed Mr Poroshenko that FC Dynamo Kiev (a Ukrainian football team in which Mr Surkis has an interest), as well as Mr Surkis's father (whose PrivatBank account was being used as collateral for FC Dynamo Kiev's credit facilities) and Mr Surkis's brother (whose PrivatBank account was also being used to assist FC Dynamo Kiev) had been designated as persons connected to PrivatBank. Mr Surkis explained that the effect of those designations was placing FC Dynamo Kiev in considerable financial difficulty. Mr Surkis warned Mr Poroshenko if FC Dynamo Kiev, Mr Surkis's father and Mr

Surkis's brother were not removed from the list of persons connected to PrivatBank by the time Mr Surkis arrived back at his offices at FC Dynamo Kiev, Mr Surkis would arrange a meeting with journalists to inform them that FC Dynamo Kiev would not be in a position to function properly and that Mr Surkis would be handing over the keys of FC Dynamo Kiev to Ms Gontareva so that she could be responsible for the functioning of FC Dynamo Kiev.

31. On the same day, while Mr Surkis was on his way back to his offices, Ms Gontareva called the vice president and the financial controller of FC Dynamo Kiev, Vitaliy Sivkov, and informed him that the PrivatBank accounts of FC Dynamo Kiev ~~as well as the PrivatBank accounts of Mr Surkis's father~~ and Mr Surkis's brother were functioning properly ~~and that all three had been removed from the list of connected persons~~.

…

46. Mr Poroshenko and Ms Gontareva are liable for the tort of unlawful means conspiracy as follows:

46.1. Mr Poroshenko and Ms Gontareva combined to procure the making of the Decisions, Orders and agreements set out at paragraphs 17 to 19 above in relation to the Surkis Family Companies. The fact that Mr Poroshenko and Ms Gontareva combined as alleged is clear from the following:

a. Mr Poroshenko and Ms Gontareva are closely connected having worked together in business since at least the 1990s.

b. Ms Gontareva appears to have a history of assisting Ukrainian politicians with unlawful activities. In March 2017 the Kramatorsk City Court in the Donetsk Region of Ukraine recorded that a company of which Ms Gontareva was the head of the Board at the material times was involved in transactions that were part of a scheme pursuant to which the former President of Ukraine, Viktor Yanukovych, misappropriated substantial sums from state institutions.

c. The decision to designate the Surkis Family Companies as related persons was unlawful and can only be explained on the basis that it was motivated by reasons other than a genuine desire to ensure that persons with a genuine relationship with PrivatBank were designated as related persons.

…

h. Mr Poroshenko and Ms Gontareva had the ability to influence the decision to designate the Surkis Family Companies as related persons because Decision 105, by which the Surkis Family Companies were designated as related persons, was taken by NBU's Commission dealing with matters of determining related persons and inspecting the operation of banks (the "**Commission**"). The Commission was

formed by the Board of the NBU (the "**Board**") and the Board consisted of Ms Gontareva and her deputies. Ms Gontareva's deputies were appointed by the Council of the NBU (the "**Council**") upon Ms Gontareva's recommendation. Ms Gontareva was the chairperson of the Council and between Ms Gontareva and Mr Poroshenko they appointed a majority of the members of the Council. The effect of the aforementioned was that Mr Poroshenko and Ms Gontareva had significant influence over the Commission.

i. Mr Poroshenko and Ms Gontareva had the ability to influence the conduct of the Fund which took the Decisions and made the Orders set out at paragraph 19 above. The Fund is managed by the Administrative Council of the Fund and the Executive Directorate of the Fund. The Administrative Council consists of five members, one representative of the Cabinet Ministers of Ukraine, two representatives of the NBU, one representative of the Ukrainian Parliament and the managing director of the Fund. The NBU representatives were appointed by the Board of the NBU, which consisted of Ms Gontareva and her deputies. At the relevant times, the NBU representatives were Ms Gontareva and Aleksandr Pysaruk. The managing director of the fund at the relevant times was Vorushylin Konstantin Mykolaiovych. Mr Vorushylin has long standing connections to Mr Poroshenko having been: (i) chairperson of the board of the bank JSBC Mriya, which was owned by Mr Poroshenko (1997-2006); (ii) head of financial and investment activities at "Bohdan" Corporation which is, or at least at one stage was, associated with Mr Poroshenko; and (iii) chairperson of the Supervisory Board of the International Investment Bank which was ultimately beneficially owned by Mr Poroshenko (2008-2014). It is further believed that Mr Vorushylin was appointed as the managing director of the Fund through the votes of the NBU's members on the Administrative Council. It is to be inferred that Mr Poroshenko and Ms Gontareva had considerable influence over Mr Vorushlylin. The Executive Directorate of the Fund consisted of seven members who were the managing director of the Fund and his deputies, all of whom were appointed by the managing director of the Fund."

38. There then follow claims of procuring breach of contract (paragraphs 49-50) and alleged breaches of the Ukrainian Civil Code (paragraphs 51-52 and 55) but each of these claims remains premised on the core allegation of a conspiracy between VG and PP.

39. In the draft Re-Amended Particulars of Claim by contrast, the Claimants have sought to narrow considerably the case which they are advancing to avoid directly impugning the Decisions, Orders and Agreements (as identified in paragraphs 17 to 19 of the Particulars of Claim) which give effect to the Ukrainian state's Bail-In. The Claimants appear to have done this in an attempt to defeat the state immunity and act of state arguments. Thus, the relevant paragraphs of the Claimants' pleaded case are now advanced in the following terms in the draft Re-Amended Particulars of Claim (amendments are provided in green):

"17. On 13 December 2016, purportedly pursuant to Art. 52 of the Law of Ukraine "On Banks and Banking", the NBU issued Decision No 105 which designated the Surkis Family Companies as persons related to PrivatBank (the "**Designation**").

…

21. The Designation was ~~Decisions, Orders and agreements referred to at paragraphs 17 to 19 above, to the extent that they related to the Surkis Family Companies, were~~ unlawful under Ukrainian law as there was no proper basis for the ~~d~~Designation ~~of the Surkis Family Companies as persons related to PrivatBank~~. The unlawfulness of the Designation ~~Decisions, Orders and agreements referred to at paragraphs 17 to 19 above~~ has been confirmed by the judgment of the Administrative Court of Kiev dated 25 July 2017 (the "**Administrative Court Judgment**") pursuant to proceedings commenced by the Surkis Family Companies against the NBU, the Fund, the authorised representatives of the Fund, PrivatBank and the Ministry of Finance of Ukraine. Under Ukrainian law the Administrative Court decision is not final until approved by a Court of Appeal.

…

Unlawful means conspiracy

46. Mr Poroshenko and Ms Gontareva are liable for the tort of unlawful means conspiracy as follows:

46.1. Mr Poroshenko and Ms Gontareva combined to procure the making of the Designation ~~Decisions, Orders and agreements set out at paragraphs 17 to 19 above~~ in relation to the Surkis Family Companies so as to cause the Cypriot Accounts to fall within the Bail-In and, therefore, to have the Bail-In SPA entered into, purportedly on behalf of the Surkis Family Companies, and, thereby, cause PrivatBank to impair and zero the Cypriot Accounts. The fact that Mr Poroshenko and Ms Gontareva combined as alleged is clear from the following:

…

h. Mr Poroshenko and Ms Gontareva had the ability to influence the decision to designate the Surkis Family Companies as related persons because Decision 105, by which the Surkis Family Companies were designated as related persons, was taken by NBU's Commission dealing with matters of determining related persons and inspecting the operation of banks (the "**Commission**"). The Commission was formed by the Board of the NBU (the "**Board**") and the Board consisted of Ms Gontareva and her deputies. Ms Gontareva's deputies were appointed by the Council of the NBU (the "**Council**") upon Ms Gontareva's recommendation. ~~Ms Gontareva was the chairperson of the Council and b~~Between Ms Gontareva and Mr Poroshenko they appointed or were able to influence the appointment of the ~~a majority of the~~ members of the Council. The effect of the aforementioned was that Mr Poroshenko and Ms Gontareva had significant influence over the Commission. In the premises set out in paragraphs 31, 32 and 34 above, it is to be inferred that Ms Gontareva and Mr Poroshenko, in concert, used their influence within the NBU and over the Commission in order to procure and maintain the Designation and enable Mr Poroshenko to coerce Mr Surkis into assisting Mr Poroshenko in advancing the latter's personal agenda in getting re-elected as President.

i. Mr Poroshenko and Ms Gontareva had the ability to influence the conduct of the Fund which took the Decisions and made the Orders set out at paragraph 19 above. The Fund is managed by the Administrative Council of the Fund and the Executive Directorate of the Fund. The Administrative Council consists of five members, one representative of the Cabinet Ministers of Ukraine, two representatives of the NBU, one representative of the Ukrainian Parliament and the managing director of the Fund. The NBU representatives were appointed by the Board of the NBU, which consisted of Ms Gontareva and her deputies. At the relevant times, the NBU representatives were Mr Oleh Strynzha ~~Ms Gontareva~~ and Mr Mykhailo Vidyakin ~~Aleksandr Pysaruk~~. The managing director of the F~~f~~und at the relevant times was Vorushylin Konstantin Mykolaiovych. Mr Vorushylin has long standing connections to Mr Poroshenko having been: (i) chairperson of the board of the bank JSBC Mriya, which was owned by Mr Poroshenko (1997-2006); (ii) head of financial and investment activities at "Bohdan" Corporation which is, or at least at one stage was, associated with Mr Poroshenko; and (iii) chairperson of the Supervisory Board of, and a shareholder in, the International Investment Bank which was ultimately beneficially owned by Mr Poroshenko (2008-2014). It is further believed that Mr Vorushylin was appointed as the managing director of the Fund through the votes of the NBU's members on the Administrative Council. It is to be inferred that Mr Poroshenko and Ms Gontareva had considerable influence, and used that influence, over Mr Vorushlylin. The Executive Directorate of the Fund consisted of seven members who were the managing director of the Fund and his deputies, all of whom were appointed by the managing director of the Fund."

40. In deleting in this way several of the state decisions and actions originally relied upon, the Claimants now wish to rely solely upon the procuring of the making and maintenance of the Designation, divorcing it from the context in which it was made, namely the Ukrainian state's nationalisation of PrivatBank. The Claimants contend as a result that the issue before the court is whether PP and/or VG acted in their public or private capacity in allegedly using "*their influence within the NBU and over the Commission in order to procure and maintain the Designation*" (paragraph 46.1(h) of the draft Re-Amended PoC). In narrowing their case in this way, the Claimants argue that PP and VG had no official power to make the Designation *per se* and so they only acted in their *private capacity* in procuring it. The Claimants thereby seek to avoid characterising the actions of PP and VG as *public acts* in the context of the state immunity argument.

41. One final extract of the pleadings of particular importance in the context of the state immunity argument is the following from the Claimants' Reply to the Second Defendant's Defence:

> "19.3. It is unclear what VG alleges to be the relevance of the fact that some of the facts and matters set out in paragraphs 29 to 41 of the Amended Particulars of Claim took place after VG left her role as Governor of the NBU. That does not affect *the Claimants' case that VG used her influence as the Governor of the NBU* to procure the Designation in order to assist Mr Poroshenko." (Emphasis added)

42. Thus, on the Claimants own pleaded case, it is alleged that VG used her influence to procure the Designation under or purportedly under the colour of her public authority *as Governor of the NBU*. It is not said that she used her personal influence and she

also just happened to be the governor of the NBU. As explained below, this plea (from which the Claimants do not seek to resile) is fatal to an argument that she does not benefit from state immunity.

STATE IMMUNITY

Legal principles

43. Under the SIA foreign states and their officials are immune from proceedings in the English courts, unless a recognised exception within the SIA applies. The SIA was adopted in 1978 and was intended to codify the existing common law (and customary international law) on sovereign immunity, including immunities of heads of state. The SIA is accordingly the sole source of English law on head of state immunity, and it is to be construed against the background of customary international law.[2] Because the SIA is a complete code, if the case does not fall within one of the exceptions to section 1, the state is immune: *Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777 at [39] per Lord Sumption JSC.

44. Sections 1 and 14 SIA apply to civil proceedings and provide in relevant part as follows:

> *"1 General immunity from jurisdiction.*
>
> (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.
>
> …
>
> *14 States entitled to immunities and privileges.*
>
> (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—
>
> (a) the sovereign or other head of that State in his public capacity;
>
> (b) the government of that State; and
>
> (c) any department of that government,
>
> but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.
>
> (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—
>
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

[2] *R v Bow Street Metropolitan Stipendiary magistrate ex parte Pinochet (No 3) [2000] 1 AC 147* at p. 209C (Lord Goff); *Alcom Ltd v Republic of Colombia* [1984] AC 580 at p. 597G (Lord Diplock).

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune."

...

45. State immunity (*ratione personae*) attaches for acts performed by a head of state whilst they are in office. But even after a head of state (or other agent of the state) has left office, they continue to enjoy immunity *ratione materiae* for acts performed by them as head of state (or agent of the state) whilst in office, whether under sections 1(1) and 14(1) or section 14(2) of the SIA. As Lord Goff said in *R v Bow Street Metropolitan Stipendiary magistrate ex parte Pinochet (No 3)* [2000] 1 AC 147 [p. 210]:

"… there seems to be no reason why the immunity of a head of state under the Act should not be construed as far as possible to accord with his immunity at customary international law, which provides the background against which this statute is set … The effect is that a head of state will, under the statute as at international law, enjoy state immunity *ratione personae* so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity *ratione materiae* "in respect of acts performed [by him] in the exercise of his functions [as head of state]," the critical question being "whether the conduct was engaged in under colour of or in ostensible exercise of the head of state's public authority" … In this context, the contrast is drawn between governmental acts, which are functions of the head of state, and private acts, which are not." (emphasis added)

46. The explanation for this was given by Lord Phillips in *Pinochet (No 3)* at 286A:

"There would seem to be two explanations for immunity *ratione materiae*. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damages made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity. Where a state is not directly or indirectly impleaded in the litigation, so that no issue of state immunity as such arises, the English and American courts have nonetheless, as a matter of judicial restraint, held themselves not competent to entertain litigation that turns on the validity of the public acts of a foreign state, applying what has become known as the act of state doctrine."

47. It is important, particularly in the context of the present case, to appreciate that the immunity is that of the state and that it can therefore only be waived by the state itself. Lord Saville explained in *Pinochet (No 3)* at p. 265 that:

"These immunities belong not to the individual but to the state in question. They exist in order to protect the sovereignty of that state from interference by other states. They can, of course, be modified or removed by agreement between states or waived by the state in question."

48. Moreover, it is not open to this court to adjudicate upon the legality of the foreign state's acts. As Lord Millett stated in *Pinochet (No 3)* at p. 270:

> "The immunity is available whether the acts in question are illegal or unconstitutional or otherwise unauthorised under the internal law of the state, since the whole purpose of state immunity is to prevent the legality of such acts from being adjudicated upon in the municipal courts of a foreign state. A sovereign state has the exclusive right to determine what is and is not illegal or unconstitutional under its own domestic law."

49. The question accordingly arises: how does this court go about determining the issue of whether the conduct was engaged in under colour of or in ostensible exercise of the head of state's public authority (*jure imperii*) rather than it being a private act (*jure gestionis*)? Lord Wilberforce explained how this court should approach this task in *I Congresso del Partido* [1983] 1 AC 244:

> "When … a claim is brought against a state … and state immunity is claimed, it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act "jure gestionis" or is it an act "jure imperii": is it … a "private act" or is it a "sovereign or public act", a private act meaning in this context an act of a private law character such as a private citizen might have entered into?" (at 262 E/G),
>
> …
>
> "The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity." (at 267B/C) [emphasis added]

50. Similarly, in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 at 1577B, Lord Hope emphasised that:

> "It is the nature of the act that determines whether it is to be characterised as jure imperii or jure gestionis. The process of characterisation requires that the act must be considered in its context." (emphasis added)

51. In that case the writing of an allegedly defamatory memorandum by a defendant who was a civilian educational services officer with responsibility for educational training programmes provided to military personnel and their families at a US base in England, was held to be an act *jure imperii*. At 1587C-D Lord Millett explained why that was so:

> > "The defendant was responsible for supervising the provision of educational services to members of the United States armed forces in the United Kingdom and their families. He published the material alleged to be defamatory in the course of his duties. If the provision of the service in question was an official or governmental act of the United States, then so was its supervision by the

defendant. I would hold that he was acting as an official of the United States in the course of the performance of its sovereign function of maintaining its armed forces in this country."

52. To similar effect, in *Kuwait Airways v Iraqi Airways* [1995] 1 WLR 1147 Lord Goff, having cited Lord Wilberforce's speech in *I Congresso del Partido* said (at 1160A):

"It is apparent from Lord Wilberforce's statement of principle that the ultimate test of what constitutes an act jure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform."

53. The court is therefore concerned to identify *the character of the act considered in its context.*

54. Ordinarily one can readily identify an act which is private in character as opposed to public in character. Examples of acts performed by state officials in their private capacity can be seen in the case-law:

a) *Harb v Aziz* [2016] 2 W.L.R. 533, at [2], [4]: an oral contract by the King of Saudi Arabia to "*provide for* [his wife] *financially and in a manner fitting for his wife*" was made in his private capacity.

b) *Thor Shipping A/S v the Ship Al Duhail* [2008] FCA 1842 at [2], [61]: it was common ground before the Australian Federal Court that the alleged breach of a charterparty by Amiri Yachts, acting on behalf of the Amir of Qatar, related to acts in the Amir's private capacity including his ownership of a private vessel.

c) *Mobutu and Republic of Zaire v Societe Logrine* 117 ILR 481 (1994): the Court of Appeal in Paris rejected a claim of head of state immunity in a case in which President Mobutu of Zaire did not pay for tents for the celebration of his sixtieth birthday because the contract was concluded in his private capacity.

d) *Ex-King Farouk of Egypt v Christian Dior*, Judgment of the French Court of Appeal of Paris dated 11 April 1957, 24 ILR 228 and *Société Jean Dessés v Prince Farouk and Mrs Sadek*, Judgment of the Tribunal de Grande Instance of the Seine dated 12 June 1963, 65 ILR 37: the former Egyptian King's purchase of luxury clothes for his wife was held to be an act in his private capacity.

e) *Francisco Mallén v United States*, Docket No. 2935, Opinion dated 27 April 1927, 21 American Journal of International Law 777 (1927), at [4], [7], cited by Lord Hoffmann in *Jones v Ministry of Interior of Saudi Arabia [2007] 1 AC 270* at [75]: a US deputy constable in Texas held a private grudge against the Mexican consul and assaulted him on two occasions. On the first occasion, he physically assaulted him in the street on a Sunday night, while on a private outing. This was an act in his private capacity: "*a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official*". On the second occasion, the constable, while on duty, boarded a car in which the consul was travelling, showed his badge, physically assaulted him

and took him to prison. Although this seemed to be "*a private act of revenge*", it was held that "*the act as a whole can only be considered as the act of an official*". In other words, seen in context, the act was a public act.

55. The *Francisco Mallén* case also illustrates the fact that the Court is not concerned with the purpose of or motivation for the act unless the motivation throws some light on the character of the act. As Lord Sumption in Benkharbouche v *Embassy of the Republic of Sudan* [2019] AC 777, stated at [8]:

"… the classification of the relevant act was taken to depend on its juridical character and not on the state's purpose in doing it, save in cases where that purpose threw light on its juridical character."

56. Lord Hoffmann made the same point in *Jones* at [92]:

"If the act is done under colour of official authority, the purpose of personal gratification … should be irrelevant."

And Lord Bingham likewise considered in *Jones* at [12] that a person acts in his or her public/official capacity "[w]*here such a person acts in an apparently official capacity, or under colour of authority*". It is irrelevant whether the person "*may have had ulterior or improper motives or may be abusing public power*".

57. Blake J in *Fawaz Al Attiya v Hamad Bin-Jassim Bin-Jaber Al Thani* [2016] EWHC 212 QB at [26] referred to Lord Hoffmann's observation in *Jones* in finding that the contention that the relevant dispute "*arose as a purely personal matter*" was irrelevant to whether state immunity was a bar to jurisdiction. In that case, the claimant was a dual British-Qatari national who brought a tortious claim against the defendant, who at the relevant time (but not at the time of the proceedings) was the Minister of Foreign Affairs and/or the Prime Minister of Qatar. According to the claimant, the defendant expressed interest in buying a plot of the claimant's land in Qatar but the claimant refused as the price was not acceptable. It was alleged that, subsequently, the defendant procured the making of several adverse decisions against the claimant by Qatari authorities, eventually resulting in a compulsory appropriation of the land by the Ministry of Municipality, purportedly for public use. At a later date, the claimant was arrested by Qatari authorities and allegedly tortured. The claimant contended that the confiscation of the land and his mistreatment by Qatari officials were done "*at the instigation of the defendant*". The court held, citing *Jones*, that an official acting in an official capacity is entitled to state immunity "*even if the state official was abusing his power for reasons of his own and in pursuit of a private grudge*".[3]

58. Having considered the character of the act, it is next necessary to determine how the court should deal with a case — which case is not expressly provided for in the SIA — where suit is brought against the agents, officials or functionaries of a foreign state (as opposed to the head of state, the government or a government department of the state) in respect of acts done by them as such in the foreign state.

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3 *Al Thani* at [15].

59. This type of case was addressed by the House of Lords in *Jones v Ministry of Interior of Saudi Arabia* [2007] 1 AC 270. As Lord Bingham stated at [10] of his speech, "*There is … a wealth of authority to show that in such case the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents.*"

60. In *Jones* the Claimants claimed damages in England against Saudi police officers and the deputy prison governor as a result of allegedly being tortured while imprisoned in Saudi Arabia. Lord Bingham went on at [11]-[12]:

"11. In some borderline cases there could be doubt whether the conduct of an individual, although a servant or agent of the state, had a sufficient connection with the state to entitle it to claim immunity for his conduct. But these are not borderline cases. Colonel Abdul Aziz is sued as a servant or agent of the Kingdom and there is no suggestion that his conduct complained of was not in discharge or purported discharge of his duties as such. The four defendants in the second action were public officials. The conduct complained of took place in police or prison premises and occurred during a prolonged process of interrogation concerning accusations of terrorism (in two cases) and spying (in the third). There is again no suggestion that the defendants' conduct was not in discharge or purported discharge of their public duties."

"12. International law does not require, as a condition of a state's entitlement to claim immunity for the conduct of its servant or agent, that the latter should have been acting in accordance with his instructions or authority…"

A state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity.

And at [68]:

I would therefore prefer to say, as Leggatt LJ did in *Propend Finance Pty Ltd v Sing* (1997) 111 ILR 611, 669, that state immunity affords individual employees or officers of a foreign state "protection under the same cloak as protects the state itself."

61. It is, however, still the immunity *of the state*; it is the cloak *of the state* under which the agent enjoys protection.

62. In *Propend,* Superintendent Alan Singh was an officer of the Australian Federal Police (the "AFP"). He gave an undertaking to the English Court that certain documents would not be removed from the jurisdiction of the court or from the Australian high Commission and copies of the documents would not be transmitted by fax. Shortly after giving that undertaking, Superintendent Singh sent extracts from the documents to the headquarters of the AFPO in Canberra. The Claimants issued proceedings for contempt against him and the Commissioner of the AFP. The Court of Appeal held that both Superintendent Singh and the Commissioner benefited from state immunity. At 669 Leggatt LJ stated as follows:

"The protection afforded by the Act of 1978 to States would be undermined if employees, officers (or as one authority puts it, "functionaries") could be sued as

individuals for matters of State conduct in respect of which the State they were serving had immunity, Section 14(1) must be read as affording to individual employees or officers of a foreign State protection under the same cloak as protects the State itself."

63. In summary, it follows from *Pinochet (No 3), Jones* and *Propend* that, as Butcher J stated in *Dynasty Company for Oil and Gas Trading v The Kurdistan Regulation Government of Iraq* [2021] EWHC 952 (Comm) at [120], the immunity provided by section 1 of the Act extends to servants or agents of foreign states who are sued in respect of matters *where they were acting in discharge or purported discharge of their duties as such*.

PP and VG's case on sovereign immunity

64. PP and VG contend that they are immune from the jurisdiction of the English Courts (PP under section 14(1) and VG under section 14(2)) because the act which forms the basis of the Claims, namely the alleged conspiracy to procure the Designation, would have been done by them in their public capacity, that is in the discharge of their public duties, as the President of Ukraine and the Governor of the NBU respectively (albeit that they strongly deny having so conspired). This was, they maintain, an act done under colour of public authority, whether or not it was authorised or lawful under domestic or international law. It was sovereign in nature, being part of the Ukrainian state's nationalisation of PrivatBank. Indeed, in the case of VG, as I have already explained, it is positively pleaded by the Claimants in their Reply that she used her influence as the Governor of NBU to procure the Designation.

65. What is the Claimants' answer to this? Mr Choo Choy QC who appeared for the Claimants together with Mr Lermer, submitted that the specific conduct which forms the basis of the claim against PP and VG, namely the alleged use of their influence to procure the designation of the Claimants as persons related to PrivatBank, was not conduct that was in the discharge or purported discharge of the Defendant's public or official duties with respect to the designation of related persons, or indeed with respect to the nationalisation generally. The Defendants had no relevant public or official duties in connection with the designation of related persons, hence the influence that they are alleged to have exercised in order to procure the Designation cannot have been in the discharge or purported discharge of their public or official duties on behalf of Ukraine, or under colour of their public authority on behalf of the state of Ukraine.

66. In other words, the Claimants contend that the relevant conduct did not have a sufficient connection with the state for it to be characterised as state conduct. The conduct was of persons who *happened to be* organs or agents of the state at the relevant time, but the conduct was not in discharge or purported discharge of those persons' public duties as representatives of the state.

67. Mr Choo-Choy QC's submission is therefore that what attracts state immunity is whether the act in question is properly characterised as governmental or sovereign in nature, which in turn depends upon whether the official in question was entrusted by the state with relevant duties or functions in discharge or purported discharge of which the acts complained of were performed. Neither PP nor VG were so entrusted.

PP and VG as the then President and NBU Governor did not exercise their own governmental powers in relation to the Designation, because they did not themselves have any official power to make the Designation. Rather, the Claimants' case is that PP and VG improperly influenced those who had the official power to designate related persons (i.e. the Monitoring Unit and the NBU Special Commission members) to make the Designation in order to assist PP in his private scheme to put pressure on and coerce IS in relation to control of the 1+1 Media Group.

68. Mr Choo-Choy QC further submitted that the fact that PP's purpose was ultimately to secure his re-election further distances the nature of claims from a claim against the State. Seeking re-election is not an official act of the State; it is the process by which a private individual seeks to obtain political power. If running for office were an official act it would mean that state immunity could apply to the actions of all candidates in an election, whether or not the candidate is successful. These were all private acts intended for PP's personal benefit, rather than acts of a governmental character.

69. Mr Choo-Choy QC concluded as follows in paragraph 78 of his skeleton argument:

> "What happened is that PP and VG used their personal influence to procure the Designation. In doing so, PP and VG were doing no more than any other private citizen could do, the only difference being that they happened to have more connections and influence within the Ukrainian government as a result of then holding the roles of President and Governor of the NBU."

70. Alternatively, Mr Choo-Choy QC submits that if there is immunity, it has been waived by VG taking certain steps in the proceedings and/or waived by the State of Ukraine as a result of the sending of a letter dated 11 June 2021 from the Ministry of Foreign Affairs of Ukraine.

Public or private acts?

71. I do not consider that Mr Choo-Choy QC's submissions on the state immunity issue withstand scrutiny.

72. First, it is necessary to consider the pleaded case against PP and VG. It is true that the Claimants, no doubt appreciating the fact that their claim as originally formulated (to plead that PP and VG combined to procure the making of <u>all</u> of the decisions, orders and agreements concerning the Bail-In and consequent debiting of the Claimants' accounts) squarely engaged sovereign immunity, have sought to narrow the claim in the draft Re-Amended Particulars of Claim so as to plead that PP and VG combined to procure the making of the Designation alone. However, for the reasons set out below, that does not avoid the engagement of sovereign immunity when the making of the Designation is considered in its relevant context, which is the Ukrainian state's nationalisation of PrivatBank[4].

[4] The core allegation underlying the claim in this case and each cause of action asserted is that PP and VG procured the Designation (see the draft Re-Amended Particulars of Claim at paragraph 46.1 (unlawful means conspiracy); paragraph 48 (lawful means conspiracy); 49.3 (procuring breach of contract and paragraph 52 (claims under Ukrainian law).

73. In paragraph 46.1(h) of the draft Re-Amended PoC, it is specifically pleaded by the Claimants that PP and VG committed the tort of unlawful means conspiracy by combining to procure the making of the Designation, in particular as follows:

(a) PP and VG had the ability to influence the Designation because it was taken by the RP Commission. The Commission was formed by the Board of the NBU (the "Board") which consisted of VG and her deputies, and her deputies were appointed by the Council of the NBU (the "Council") on VG's recommendation. Between VG and PP they appointed or influenced the appointment of members of the Council. The plea is, therefore, that the composition of the RP Commission was determined by PP and VG. That occurred in the course of them carrying out their relevant functions as President and Governor respectively.

(b) It is then pleaded that *"[t]he effect of the aforementioned"* – that is the effect of PP and VG having appointed or influenced the appointment of the members of The RP Commission which made the Designation – "*was that [PP] and [VG] had significant influence over the [NBU] Commission*."

(c) It is finally pleaded that it is accordingly to be inferred that VG and PP "used their influence within the NBU and over the Commission" – which they had acquired by reason of their ability, in their official roles, to appoint or influence the appointment of the members of the RP Commission – "*in order to procure and maintain the Designation and enable PP to coerce Mr Surkis into assisting PP in advancing the latter's personal agenda in getting re-elected as President.*"

74. In the light of the pleaded case, it is perfectly clear that the case advanced against PP and VG is that they used their influence over the RP Commission, *acquired through their official powers of (direct and indirect) appointment of the members of that Commission*, in order to procure and maintain the Designation for their own private and improper purposes. Indeed, the Claimants themselves expressly say as much in their Reply to VG's Defence, pleading that "*VG used her influence as the Governor of the NBU to procure the Designation in order to assist Mr Poroshenko*." It follows that even if it were correct (which it is not) to view the state immunity issue narrowly by considering only whether the procurement of the making of the Designation, divorced from its context, attracts state immunity, it plainly does so. The impugned conduct was engaged in under colour of or in the exercise of VG and PP's public authority. It was the holding of the public office by PP and VG respectively which gave them the ability to appoint (directly and indirectly) the members of the RP Commission and allegedly exert influence over them. It makes no difference to this conclusion that PP and VG did not themselves officially make the Designation.

75. The suggestion that PP and VG were "*doing no more than any other private citizen could do, the only difference being that they happened to have more connections and influence within the Ukrainian government as a result of then holding the roles of President and Governor of the NBU*" is a wholly artificial construct and, indeed, contrary to the way in which the case is advanced in the draft Re-Amended Particulars of Claim.

76. Indeed, this argument very closely resembles the argument which was rejected by Blake J in *Al Thani*, where the Claimant sought to argue that the defendant Qatari official "*was wearing two hats: one as the holder of high office, and the other as a*

private individual who was a powerful personality in the land by reason of his vast wealth and consequent ability to persuade public officials to do things to suit his purposes".[5] Blake J highlighted the artificiality of that distinction:

> "There is no judicial authority on how a former Prime Minister of a sovereign state could be sued in a private capacity for inducing breaches of duty by other public officials resulting in torts being committed against a claimant. It is difficult to see how the two hats can be severed and how the alleged private motive in inducing the torts can be separated from the public office that gave the defendant the status and the ability to direct others and issue instructions".[6]

77. So too here, it is the public office of PP as President and VG as Governor that enabled them to appoint or influence the appointment of the members of the RP Commission and which gave them significant influence over that Commission (which made the Designation). It is the Claimants' own pleaded case that that they then *used that influence* in order to (i) procure and maintain the Designation and (ii) enable PP to coerce Mr Surkis into assisting PP in advancing the latter's personal agenda in getting re-elected as President. It is the public office that gave PP and VG the status and ability to influence the procurement and maintenance of the Designation for PP's own private agenda. Indeed, were it otherwise, it is difficult to see why the state officials within the RP Commission would have been influenced by PP and VG to act in the manner alleged.

78. The Claimants' case led to them having to dance on a pinhead. Mr Choo-Choy QC said at one point in his oral submissions that *"[n]o doubt [PP's] position as President and [VG's] position as Governor meant that they had a greater practical ability to influence the designation process successfully, but that does not alter the inherent nature of their alleged conduct in this connection as being private conduct rather than sovereign conduct in circumstances where the state had not entrusted any relevant duty or function to either of them with respect to the designation of related persons.*"

79. It is not in any event correct to view the state immunity issue narrowly by considering only whether the procurement of the making of the Designation, divorced from its context, attracts state immunity. As Lord Wilberforce in *I Congresso del Partido* and Lord Hope in *Holland v Lampen-Wolfe* both made clear, the process of characterisation of the act requires that it must be considered in its context. Indeed, in oral submissions Mr Choo-Choy QC himself conceded that, so far as the Designation is concerned, "*I don't say that your Lordship has to look at the matter in isolation*". The court must consider the whole context in which the claim is made, with a view to deciding whether the relevant act upon which the claim is based should, in that context, fairly be considered as within the sphere of governmental or sovereign authority. Once one asks that question in this case, it answers itself: the Designation cannot be artificially excised from the context of the state Bail-In as a whole and of which it was an essential part, in which both PP and VG played a central role in their public office. In short, the procurement of the Designation, and the consequent effect

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5 *Al Thani* at [18(i)].

6 *Al Thani* at [25].

upon the Surkis Family Companies' accounts at PrivatBank, was an integral part of the Ukrainian government's nationalisation of PrivatBank in December 2016, which fell squarely within the sphere of governmental or sovereign authority.

80. Indeed, it is notable that in respect of the act of state argument, Mr Choo-Choy accepted as follows in his oral submissions (Day 2, p. 120):

> "*the designation process was part and parcel of an overall nationalisation process of PrivatBank including the Bail-In of the account balances of related persons and the designation of the LLPs [and] would have had the inevitable effect of leading to the negation of their rights as customers … at … the Cypriot branch at which their balances were held*."

81. This conclusion, that the procurement of the Designation attracts state immunity, is not affected by the fact that (on the Claimants' case) the private and improper purpose of the procurement of the Designation was to enable PP to coerce Mr Surkis into assisting PP in advancing the latter's personal agenda in getting re-elected as President. As was explained in *Jones*, if the act was done under colour of official authority (as it was here), the fact that it had a private or improper purpose - and that PP was abusing his power for reasons of his own - is irrelevant.

82. It follows that since PP and VG were both acting or purporting to act in discharge of their duties as agents of the Ukrainian state in allegedly procuring the Designation, the claims against them are barred by state immunity under SIA sections 1, 14(1) and 14(2) respectively. Because the claim engages Ukraine's state immunity under sections 1 and 14 SIA, this court is bound to give effect to it unless the Claimants can either establish that a statutory exception applies (it does not) or they can establish that Ukraine has otherwise waived its immunity.

Submission to jurisdiction of this court by VG?

83. The Claimants alternatively contend that, as a result of VG having taken the following steps in the proceedings, she has submitted to the jurisdiction of the English Court and is unable to rely on state immunity (even if, but for those steps, she might have been able to claim such immunity):

a) Filing an Acknowledgment of Service on 28 April 2020 that: (i) indicated that VG intended to contest the claims advanced against her on their merits; and (ii) (consistently with the preceding indication) failed to indicate that she intended to contest the jurisdiction of the Court.

b) Failing, pursuant to CPR 58.7(2), to issue an application disputing the Court's jurisdiction within 28 days of filing her acknowledgment of service.

c) Requesting an extension of time for the filing of VG's Defence until 27 July 2020. The request was made on 8 June 2020 and consented to by the Claimants on 11 June 2020.[7] VG then wrote to inform the Court of the

[7] Letter dated 8 June 2020 from William Grace to Reed Smith; Letter dated 11 June 2020 from Reed Smith to William Grace.

agreement between the Claimants and VG without reference to her state immunity defence.[8]

d) Consenting to amendments to the Particulars of Claim proposed by the Claimants, which related to the substance of the claims against VG. The consent was provided by a letter dated 19 June 2020[9] and was then recorded in a consent order that was approved by Cockerill J on 22 June 2020.[10]

e) Filing and serving a Defence on 27 July 2020 which, in addition to pleading state immunity, pleads to the substance and underlying factual and legal merits of the Claims against VG.

f) Issuing and serving the summary judgment/strike out on the grounds (amongst others) that the claims against VG (and/or the allegations on which those claims are based) have no real prospect of success at trial.

84. VG maintains, in contrast, that the steps set out above do not give rise to a submission to the jurisdiction of the English Court for two main reasons: (i) the state immunity on which VG relies belongs to the state of Ukraine and so can only be waived by Ukraine and (ii) the steps set out above do not amount to a submission in any event.

Relevant statutory provisions

85. The SIA provides in relevant part as follows:

*"**2 Submission to jurisdiction**.*

(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted—

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(*b*) above does not apply to intervention or any step taken for the purpose only of—

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Subsection (3)(*b*) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

[8] Letter dated 23 June 2020 from William Grace to the Commercial Court.
[9] Letter dated 19 June 2020 from Willian Grace to Reed Smith.
[10] Order dated 25 June 2020.

(6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

…

14 States entitled to immunities and privileges

…

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune."

Discussion

86. The starting point, and indeed finishing point in the analysis of the waiver/submission issue is that the immunity belongs to the state and so can only be waived by the state. Furthermore, any such waiver must be express. This was explained in *Pinochet (No 3)*, first by Lord Saville at 265:

"These immunities belong not to the individual but to the state in question. They exist in order to protect the sovereignty of that state from interference by other states. They can, of course, be modified or removed by agreement between states or waived by the state in question."

And then by Lord Millett at 268:

"State immunity is not a personal right. It is an attribute of the sovereignty of the state. The immunity which is in question in the present case, therefore, belongs to the Republic of Chile, not to Senator Pinochet. It may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express. So much is not in dispute."

87. Lord Mance JSC made the same observation in *Belhaj* at [17]:

"[The official's] immunity depends upon the state's, and can only be waived by the state."

88. The waiver need not be in any particular form of words, nor need it be in writing. But it must be express so as to be unequivocally communicated to the municipal court:

Propend Finance Property Ltd v Sing (1997) 111 ILR 611 (per Laws J, upheld on this issue by the Court of Appeal). The requirement that a state's waiver of immunity be express or at least unequivocal is also in line with international practice, see Article 32 of the *Vienna Convention on Diplomatic Relations* and Article 2 of the *European Convention on State Immunity 1972 ("ESCI")*, to each of which the UK is signatory and which inform the proper interpretation of the SIA.

89. Article 32 of the Vienna Convention provides that:

> "1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.
>
> 2. Waiver must always be *express"* (emphasis added).

90. The ECSI, on which the SIA has been modelled,[11] provides in Article 2 (emphasis added):

> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court either:
>
> a. by international agreement;
>
> b. by an *express* term contained in a contract in writing; or
>
> c. by an *express* consent given after a dispute between the parties has arisen."

91. It can be seen from section 2(7) of the SIA that it is expressly provided that only the head of the sending state's diplomatic mission in the United Kingdom is deemed to have authority to waive the immunity of the state. I accept the submission of Lord Goldsmith QC who together with Professor Philippa Webb and Monika Hlavkova appears on behalf of PP, that under international law, the *troika* of the head of state, the head of government and the minister of foreign affairs have the capacity to represent the state in international relations and logically would also have the authority to waive the state's immunity before a foreign court.[12]

92. The facts of *Propend* are summarised above. At first instance, Laws J held as follows at [643]:

> "In the event, therefore, the fact that the first defendant [Superintendent Singh] for his part submitted to the jurisdiction of the court by giving the undertakings (as undoubtedly he did) is of itself neither here nor there. The question is whether, by his doing so, the Commonwealth of Australia waived his immunity. If he had actual

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[11] See *General Dynamics Ltd United Kingdom v State of Libya* [2021] UKSC 22 at [45] per Lord Lloyd-Jones: "One reason for the enactment of the SIA was to permit the United Kingdom to become a party to the European Convention on State Immunity".

[12] See the 1960 Vienna Convention on the Law of Treaties, Article 7(2)(a); Joan Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014), fn 261; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd rev ed, OUP 2015), p. 382.

authority from the High Commissioner to waive immunity, that would clearly be enough; indeed it would be deemed to be enough: see Section 2(3) of the Act of 1964. But on the findings of fact I have made, he did not. There is no evidence that he possessed legally sufficient authority from anyone. It follows, in my judgment, that his diplomatic immunity was not waived by his giving the undertakings. There is no evidence before me to demonstrate that the Commonwealth of Australia waived it".

93. The Court of Appeal upheld Laws J's findings in this respect, holding that "*neither the High Commissioner in London nor anyone else with authority to waive immunity on behalf of the Commonwealth of Australia did so*" and observed that the police officer would "*have had to have obtained higher authority from the Special Minister of State and Minister of Foreign Affairs for any such waiver*".[13]

94. So far as the question of authority to waive is concerned, in *Aziz v Republic of Yemen* [2005] ICR 1391, the applicant was employed at the Embassy of Yemen in London. After being dismissed, he made a complaint of unfair dismissal. A notice of appearance and grounds of defence were served by the Embassy's solicitors before the employment tribunal. The tribunal found that the Embassy had submitted to the jurisdiction, waiving its immunity. The state of Yemen appealed on the ground that the entering of the notice of appearance had not been authorised by the Ambassador. The Court of Appeal held that "*there could be no submission to the jurisdiction unless it was made by a person with knowledge of the right to be waived and the authority of the foreign sovereign*".[14] In the context of deciding whether a step had been taken by the state in the proceedings under s. 2(3)(b) of the SIA, Pill LJ noted that "*action taken by a member of the diplomatic mission (or solicitors instructed by the mission), must* [...] *be taken with the authority of the head of mission or the person for the time being performing his (or her) functions*".[15]

95. To like effect, in *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] 2 All E.R. 248, Peter Gibson LJ noted *obiter* that:

> "[f]*or there to be a submission by Saudi Arabia to the jurisdiction it would have to be shown either that the head of the Saudi Arabian diplomatic mission by the solicitors' letter had so submitted or that the person entering into the alleged contract by the letter did so 'on behalf of and with the authority of' Saudi Arabia*".[16]

96. It follows that I agree with the submission of Mr Scott, counsel for VG, that the complete answer to the Claimant's submission that VG has submitted to the jurisdiction of this court is that the relevant immunity belongs to Ukraine and there is (rightly) no suggestion that Ukraine has submitted, for the purpose of s.2 SIA, by reason of the steps that VG has taken in these proceedings; nor any suggestion that she was authorised by Ukraine to submit on its behalf (she ceased acting as Governor of the NBU in 2017, long before these proceedings were commenced). Her participation is thus nothing to the point so far as concerns giving effect to Ukraine's immunity, which is a statutory obligation imposed upon the Court under s.1(2) SIA.

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13 *Propend* at pp. 652-3, 671.
14 *Aziz* at [42].
15 *Aziz* at [55].
16 *Ahmed* at p. *255h-j.*

97. What is the Claimants' answer to this point?

98. First, they say that if VG were correct it would mean that she could not defend the proceedings even if she wanted to because the Court would be required to give effect to Ukraine's state immunity pursuant to s 1(2) and VG could not avoid that result by submitting. But that is correct if she does not have the requisite authority to submit on Ukraine's behalf, and so it is no answer to the point. The immunity belongs to the Ukrainian state, not to VG, and this court must give effect to it if the state of Ukraine has not waived it or submitted to the jurisdiction. As *Propend* makes clear, the protection afforded by the SIA to States would be undermined if employees, officers (or as one authority puts it, "functionaries") could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity.

99. Second, the Claimants argue that *"[a]s the NBU is a separate entity within the meaning of ss 14(1) and 14(2) and as VG was an official of the NBU and therefore herself a separate entity (or in an equivalent position to a separate entity) for the purposes of ss. 14(1) and 14(2), it follows that she is personally able to submit to the jurisdiction of the English Court*".

100. This submission is also misconceived.

101. Mr Choo-Choy QC himself recognised in argument that "*there is a slight oddity of language in describing a natural person as a separate entity*" but went on to suggest "*there is no conceptual impossibility in treating a separate entity as being a natural person for the purposes of section 14(2). The relevant question is whether that person is exercising sovereign authority in the manner described in section 14(2) so as to attract immunity*."

102. I disagree.

103. By section 14(2) of the Act, a separate entity benefits from immunity in respect of anything done by it in the exercise of sovereign authority (that is, which has the character of a governmental act) and the circumstances are such that a State would have been so immune.

104. In *Kuwait Airways*, Lord Goff explained at 1160B that:

> "…in the case of acts done by a separate entity, it is not enough that the entity should have acted on the direction of the state, because such an act need not possess the character of a governmental act. To attract immunity under section 14(2) therefore, what is done by the separate entity must be something which possesses that character. An example of such an act performed by a separate entity is to be found in *Arango v Guzman Travel Advisors Corp* (1980) 621 F 2d 1371 in which Dominicana (the national airline of the Dominican Republic), faced with a claim by a passenger in respect of inconvenience suffered in 'involuntary re-routing', was held entitled to plead sovereign immunity under the United States Foreign Sovereign Immunities Act 1976, on the ground that it was impressed into service, by Dominican immigration officials acting pursuant to the country's laws, to perform the functions which led to the re-routing of the plaintiff. Judge Reavley, delivering the judgment of the court, said (at 1379):

'Dominicana acted merely as an arm or agent of the Dominican government in carrying out this assigned role, and, as such, is entitled to the same immunity from any liability arising *from that governmental function* as would inure to the government, itself.' (My emphasis)."

105. Leggatt LJ further explained in *Propend* at 668-669:

"In the *Kuwait Airways* case, Iraqi Airways Company was held to be "a separate entity" and at issue was whether Section 14(2) of the Act applied to the activity involved. Lord Goff stated at page 707H, that the words "in the exercise of sovereign authority" in Section 14(2)(a) should be construed in accordance with the accepted meaning of *acta iure imperii*, especially as that is plainly in accordance with Article 27(2) of the Convention, which is reflected in Section 14(2) of the Act. Once it is established, as it undoubtedly is, that the concept of *acta iure imperii* exists in English law, it is in our view relevant to a determination of what bodies are a part of the "State" and the "government" for the purposes of Section 14(1). The word "government" should not be confined to what in other contexts would in English law mean the government of the United Kingdom. Once the broad scope of governmental or sovereign activity is, for this purpose, accepted, the performance of police functions is essentially a part of governmental activity. The concept of a "separate entity" obviously has its place in the overall scheme but has no application in the present case. The affirmation by Lord Goff in the Kuwait Airways case of the concept of governmental or sovereign activity, though made in relation to an entity which was plainly an entity separate from the executive organs of the government, is wholly consistent with a broad definition of government in Section 14(1).

…

The concept of an "entity ... distinct from the executive organs of the government of the State and capable of suing or being sued" is not one which would normally be identified with an individual or natural person. Its background and history suggest that the concept was introduced to address the problem presented by artificial legal entities exercising public functions. Lord Goff in the Kuwait Airways case at page 706G pointed out that the language makes it probable that the section has in mind entities "of" or, in other words, created by the State in question. Where such an artificial entity exists and is entitled to immunity, then its servants or officers would of course benefit by immunity in similar fashion to the officers or functionaries of a State entitled to immunity. Further, an individual might possess status as a corporation sole or similar status. which could constitute him in that capacity a "separate entity" for the purposes of Section 14.

Looking at the facts of the present case in that light, we have no doubt but that the activity of the Superintendent in this case and any vicarious responsibility of the Commissioner involved acts of a sovereign or governmental nature. The role of the police is to maintain and enforce the law. "(emphasis added)

106. It follows that if the separate entity's actions were undertaken by its servants or agents in the discharge or purported discharge of its public functions then it, and its servants or agents, will be entitled to immunity in respect of those acts. Indeed, in *Grovit v De Nederlandsche Bank NV* [2006] 1 WLR 3323 at [62] this point was conceded, and I agree with Butcher J in *Dynasty* at [123] that that concession was correctly made. It followed in *Dynasty* at [124] that:

> "Once it is recognised, as I have concluded it should be, that a separate entity may be entitled to immunity if it is exercising sovereign authority pursuant to a constitutional allocation to it of such authority, then I consider that its servants or agents should be entitled to the same immunity, for otherwise it would lead to the circumvention of the immunity which it has been found that the entity should have."

107. But it is important to appreciate once again, however, that the immunity belongs to the entity exercising the sovereign authority, and not to the servant or agent of that entity. There are not here two immunities in play, a personal immunity for the individual (VG) and an immunity for the sovereign authority, the NBU, as Mr Choo-Choy QC appeared to suggest. There is a single immunity which belongs to the NBU. Since the NBU has not submitted to the jurisdiction of the court, that is an end to the Claimants' argument in this respect. VG is not herself an entity within section 14(2): she did not personally exercise sovereign authority. The relevant entity which exercised sovereign authority is the NBU, acting through its servant or agent VG. It is the cloak *of the sovereign entity* (the NBU) under which the agent (VG) enjoys protection. Of course, the sovereign entity is entitled to claim immunity for its servants as it could if sued itself, because the sovereign entity's right to immunity cannot be circumvented by a claimant suing its servants or agents. But in this case it has not done so.

108. It follows that it is not necessary to go on to consider whether VG's conduct amounted to an election not to raise state immunity, because her conduct is not relevant to the question of whether state immunity is engaged or not. For completeness, I should say that had it been necessary to do so, I would have found that her conduct did not. Like any election, it must be an unequivocal act done with knowledge of the material circumstances: *Kuwait Airways* at [32] per Nourse LJ. In particular, I accept Mr Scott's submission that none of the steps of VG relied upon by the Claimants prior to serving the defence was an unequivocal election not to raise state immunity; VG was entitled to wait to know how the case was to be pleaded against her before making her election to assert state immunity in her Defence (i.e. she did not have knowledge of the material circumstances until then) and it is only now, in the draft Re-Amended Particulars of Claim, that the Claimants have articulated the precise basis of their claim (advancing their case on a much narrower basis than in the Amended Particulars of Claim, by reference solely to the Designation); and when VG did serve her Defence she expressly pleaded in paragraph 5 that state immunity was her primary contention and that pleading back to the Particulars of Claim was expressly without prejudice to that contention.

109. So far as VG's acknowledging service is concerned, I do not consider that to have amounted to an unequivocal election not to raise state immunity. In *The Prestige* (*No 2*) [2015] 2 Lloyd's Rep. 33 at paragraph 46, Moore-Bick LJ stated as follows:

> "In my view it is obviously desirable that if a party wishes to challenge the jurisdiction of the court it should do so in an orderly way. It is also desirable that the rules of procedure should prescribe the manner in which challenges to the court's jurisdiction should be made, as Part 11 does. However, unlike the extra-territorial jurisdiction which the court exercises in accordance with Part 6 of the Rules and which is derived from generally recognised principles of private international law, state immunity rests on principles of consent derived from customary public international law now codified in the State Immunity Act 1978. Subject to the specific exceptions set out in sections 2 to 11 of that Act, the general rule is that a state is immune from proceedings, save to the extent that it has consented to the jurisdiction, either expressly or by taking a step in the proceedings of a kind that demonstrates an election to waive immunity. It is for this reason that merely filing an acknowledgment of service does not amount to a waiver of immunity. In those circumstances I do not think that a state which has filed an acknowledgment of service but has failed to take any action to challenge the jurisdiction of the court can be treated by virtue of rule 11(5) as having submitted to the jurisdiction. Contrary to Mr Hancock QC's submission, it has not taken a "negative" step in the action of a kind that is inconsistent with an assertion of immunity. The situation in the present case is quite different from that which obtained in Maple Leaf v Rouvroy, which concerned only the submission of a private party to the jurisdiction for the purposes of the Judgments Regulation."

110. In all the circumstances, I do not consider that there is any impediment in this regard to VG raising the state immunity defence.

Express submission by Ukraine? The Lukianov letter

111. This leaves only the consideration as to whether there has been an express submission to the jurisdiction by Ukraine pursuant to section 2(1) of the SIA by reason of what I shall call "the Lukianov letter". The background to this contention is as follows.

112. On 26 May 2021, Aleksiia Ovdienko, a Ukrainian lawyer acting for the Claimants, wrote to the Minister of Foreign Affairs of Ukraine, Dmytro Inanovych Kuleba ("Mr Kuleba"). The letter explained to Mr Kuleba the existence of these proceedings and attached the Re-Re-Amended Claim Form and Amended Particulars of Claim. The letter then explained that the Defendants consider the Claimants' lawsuit to be unfounded and that they contend that the English Court should refuse jurisdiction to hear the case on the basis of Ukraine's state immunity. The letter set out the relevant provisions of the SIA and attached a full copy of the SIA. The letter explained that the Claimants deny that the Defendants are entitled to rely on state immunity. The letter then separately requested the Minister both to:

> *"1) Make a submission on behalf of Ukraine to the jurisdiction of the English Court and waive any right of Ukraine to declare state immunity under the Act in respect of the subject matter of the Dispute* [Request 1]*, and*
> *2) Confirm that Ukraine consents for the English Court to determine all of the issues raised in the Lawsuit* [Request 2].

The letter then concluded as follows:

> *"In view of the foregoing, Your Excellency, we request you to confirm that you have the appropriate authority to consider the issues raised in this letter and to grant said waiver of immunity and to make the above submission on behalf of Ukraine to the jurisdiction of the Court of England*."

113. The Minister, Mr Kuleba did not respond. Instead, on 11 June 2021, Volodymyr Lukianov, signing as the "acting State Secretary" on Ministry of Foreign Affairs of Ukraine (the "**MFA**") notepaper, responded to Ms Ovdienko's letter as follows:

    a. Mr Lukianov set out the procedure under Ukrainian law for addressing issues of state immunity;

    b. Mr Lukianov noted that: (i) the current proceedings are not brought against Ukraine, the current President of Ukraine or the NBU; (ii) neither the state of Ukraine nor the state bodies of Ukraine is a party or a third party in the case; (iii) the proceedings do not contain claims against the state of Ukraine, the current President of Ukraine or the NBU or claims for attachment of property belonging to Ukraine.

    c. Mr Lukianov noted that the proceedings include private-law claims against the respondents in damages.

    d. Mr Lukianov concluded that:

> *"Therefore, in any case, the English court referred to in the application within its jurisdiction is entitled to establish all the circumstances to be established and considered to resolve the case.*
>
> *With reference to the foregoing, there are no grounds for drawing the conclusion provided for by the Procedure for Protecting the Rights and Interests of Ukraine during Dispute Resolution, Hearing of Cases Involving a Foreign Entity and Ukraine in Foreign Jurisdictional Bodies approved by Presidential Order No 261/2011 of 3 March 2011."*

114. It is clear from a straight-forward reading of that letter that the author was operating under the belief that the question of the state immunity of Ukraine simply does not arise in these proceedings, as they are private law claims against the defendants for damages and so the English Court can resolve the case itself. Mr Lukianov accordingly answered Request 2, not Request 1 in Aleksiia Ovdienko's letter. In other words, he considered that there was no issue of state immunity which arose and which was capable of being waived by the state of Ukraine. It follows that Mr Lukianov did not make a submission on behalf of Ukraine to the jurisdiction of the English Court under section 2(2) or 2(3) of the SIA, nor did he waive any right of Ukraine to declare state immunity as requested in Request 1. This is not a case, contrary to the submissions of Mr Choo-Choy QC, of a foreign state expressly consenting to the

municipal court exercising its jurisdiction to determine a dispute as against that foreign state, thereby waiving its immunity from suit. The author's belief was that the dispute did not involve the state of Ukraine at all. That is why he does not even address Request 1. It follows that no exception from immunity is engaged under the SIA in the present case.

115. Furthermore, I accept the submission of Lord Goldsmith QC for PP and Mr Scott for VG that any waiver of state immunity must be expressly and unequivocally communicated to the municipal court, see e.g. *Propend*, per Laws J (at 643) in which he observed (in the context of diplomatic immunity) that the waiver "*must be express*" "*intended as such by the sending State*" and "*unequivocally communicated as such to the court*" and "*doubt[ing] whether there can be any question of constructive waiver*". The Court of Appeal agreed (at 656-8). The requirement that a state's waiver of immunity be express or at least unequivocal is also in line with international practice, see Article 32 of the Vienna Convention on Diplomatic Relations; and Article 2 of the ESCI, as set out above.

116. The Lukianov letter does not even purport to waive Ukraine's immunity in respect of these proceedings. Still less does it do so expressly or unequivocally.

117. Further still, even if the Letter had amounted to a submission to the Court's jurisdiction, or an express or unequivocal waiver of immunity, the Claimants have been unable to discharge their burden of satisfying the court that the state of Ukraine authorised it. The Letter was not sent by the head of Ukraine's diplomatic mission, who would be deemed to have such authority under s.2(7) SIA. Nor has the Letter been sent by Ukraine's head of state, head of government, or its minister for foreign affairs, i.e. those ordinarily authorised to represent a state in the international field: see e.g. Article 7(2) of the Vienna Convention on the Law of Treaties 1960.

118. I was shown during the course of oral argument two freedom of information requests and the answers thereto given by the relevant Ukrainian state officials. The first request was made by PP's Ukrainian lawyers on 1 July 2021 and Mr Andriy Lupak, Acting Head of Legal for the Ministry of Foreign Affairs of Ukraine ("MFA") responded on 8 July 2021 as follows:

> "Under the Regulation on the Ministry of Foreign Affairs, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 281 dated 30 March 2016, the Minister represents the MFA in public-law relations with other bodies, enterprises, institutions and organisations in Ukraine and abroad.
>
> Under the Regulation on the Department of International Law of the Ministry of Foreign Affairs, approved by the Order of the Ministry of Foreign Affairs No. 360 dated 26 September 2014, the director of the said department under the instructions of the management of the MFA represents the interests of the MFA in relations with the state authorities, foreign authorities and international organisations. The exercise of the above powers is not within the competence of the State Secretary of the MFA."

119. This answer was naturally fatal to the Claimants' case on waiver. It accordingly prompted a further request of the MFA on 15 July 2021, this time on behalf of the Claimants, in similar terms. It elicited a fuller response on the same day, 15 July 2021, again from Mr Lupak. This time he stated in particular:

"Therefore, the answer to the question whether the Minister, the Secretary of State of the MFA of Ukraine or other officials of the MFA of Ukraine act on behalf of Ukraine and provide clarifications on legal matters in relations with authorities of foreign states and the international organisations depends on the content and the circumstances of a particular issue, the nature and the legal regulation of the specific relations and therefore cannot be provided in generalised and non-specific manner."

120. This generalised and rather opaque statement leads the Claimants to state in paragraph 124 of their skeleton argument that "*if the court concludes that there is an issue in relation to the authority of Mr Lukianov that needs to be determined, it would be open to the court to order a trial of the issue*." However, in oral argument Mr Choo-Choy QC said inconsistently: "*Obviously there is also an issue as to authority and your Lordship has to take a view there on the basis of the material before your Lordship to determine whether it is reasonable to conclude that the letter was authorised on behalf of Ukraine. But again, that's a question for your Lordship to determine on the basis of the evidence before your Lordship*." Ultimately it is a matter for the court as to which course to adopt.

121. In his third witness statement served on behalf of PP, Mr Christopher Boyne suggests that the position is as follows:

"The State Secretary of the MFA is the most senior member of the MFA's civil service, and his responsibilities include organising the work of the office of the MFA, appointing and dismissing MFA employees and members of the diplomatic service, and ensuring their proper training. Consequently, and as is apparent from the evidence exhibited by the Claimants, the position and role of State Secretary of the MFA is wholly distinct from that of Minister of Foreign Affairs."

122. Mr Choo-Choy QC, in contrast, drew my attention in his oral submissions to paragraph 1 of Order No. 305 of the Ukrainian Ministry of Foreign Affairs which provides that "*the responsibilities for coordination and control of the Legal Division of the [MFA] … are assigned to the [State Secretary] of the [MFA] … Therefore the [State Secretary] is authorised to sign conclusions or clarifications on legal matters prepared by the Legal Division of the MFA within the competence of the MFA of Ukraine*." Mr Choo-Choy QC submitted therefore that Mr Lukianov must have been authorised by the MFA to send his letter under this power.

123. Ultimately, the evidence before the court does not (presently, at least) establish that Mr Lukianov had authority to waive Ukraine's immunity. The factual position, which was only discussed briefly and somewhat on the hoof in the course of oral submissions, is wholly unclear. It may be that since the internal view was taken that this dispute does not concern Ukraine at all but rather is a private law dispute, it was not necessary for the Minister to become involved and the matter could just be dealt with by a civil servant. That conclusion is supported by the fact that paragraph 4 of Ukrainian Regulation 261 of 2011, which governs the protection of the rights and interests of Ukraine abroad and to which Mr Choo-Choy QC referred me, provides as follows:

"4. If the Ministry of Foreign Affairs of Ukraine receives information, documents on a dispute involving a foreign entity, in respect of which there is a threat of a lawsuit against Ukraine in foreign jurisdictional body or it is submitted, or the lawsuit of

Ukraine may be submitted to foreign jurisdictional body, this Ministry shall inform the Ministry of Justice of Ukraine about the dispute within five days from the date of receipt of such information, documents."

In this case, Mr Choo-Choy QC confirmed that this course was not adopted: it was concluded that there was no basis for reaching such a conclusion.

124. In view of the time constraints and its order on the agenda of issues, this aspect of the argument was dealt with only relatively briefly in oral submissions by the parties, making a decision on the point problematic. All I would say is that on present evidence I am not persuaded that Mr Lukianov did have the requisite authority, but had I considered that the Lukianov Letter did amount to a waiver of state immunity, then I might very well have been persuaded to agree to a trial of the issue concerning Mr Lukianov's authority. However, because it is clear in my judgment that the Lukianov Letter did not amount to a waiver of immunity, that is not a course which it is in any event appropriate to adopt.

THE ACT OF STATE DOCTRINE

125. Without prejudice to the Defendants' primary objection to these proceedings on state immunity grounds (which I have found is well founded), they maintain as well that the claims against them (except for the lawful means conspiracy claim) are barred by the foreign act of state doctrine to the extent that the claim seeks to challenge the legality of the Designation. I turn to this topic next.

126. Some 120 years ago in *Underhill v. Hernandez* 168 US 250 (1897) at 254 Chief Justice Fuller sitting in the US Supreme Court succinctly explained the rationale behind the act of state doctrine as follows:

"Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

127. The principles underlying the act of state doctrine were explained in this country in *Attorney General v Buck* [1965] Ch. 745 by Diplock LJ at p.770:

"As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, videlicet, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom Government is the well-known doctrine of sovereign immunity. A foreign state cannot be impleaded in the English courts without its consent: see Duff Development Co. v. Kelantan Government. As was made clear in Rahimtoola v. Nizam of Hyderabad, the application of the doctrine of sovereign immunity does not depend upon the persons between whom the issue is joined, but upon the subject-

matter of the issue. For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the res of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do."

128. It follows that as Lord Sumption stated in *Belhaj* at paragraph 228:

"The principle is that the English courts will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law".[17]

129. As Lord Neuberger explained in *Belhaj v Straw* [2017] AC 964 (speaking for the majority of himself, Lord Wilson, Baroness Hale and Lord Clarke), there were three rules or aspects of the doctrine of foreign act of state pursuant to which the court will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states:

> "118 In summary terms, the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully.
> …
> 121. The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.
> 122. The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.
> 123. The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states; "[o]bvious examples are making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory"

130. The parties are agreed that the only rule which arguably applies in this case is Lord Neuberger's second rule ("the second rule").

131. In my judgment it is clear that this claim is advanced by the Claimants on the basis of the core allegation that the Designation was unlawful under Ukrainian law. Thus, in paragraph 21 of the draft Re-Amended Particulars of Claim it is pleaded as follows:

"The Designation was unlawful under Ukrainian law as there was no proper basis for the Designation. The unlawfulness of the Designation has been confirmed by the judgment of the Administrative Court of Kiev dated 25 July 2017 (the

[17] Of course, issues might still arise as to whether effect would be given in England to the foreign law or act, if it was contrary to public policy or international law. But those issues have not been argued before me and do not arise here.

"Administrative Court Judgment") pursuant to proceedings commenced by the Surkis Family Companies against the NBU, the Fund, the authorised representatives of the Fund, PrivatBank and the Ministry of Finance of Ukraine. Under Ukrainian law the Administrative Court decision is not final until approved by a Court of Appeal."

132. So far as the Administrative Court Judgment is concerned, the Claimants themselves state in their Claim Form:

"The Second to Seventh Claimants brought proceedings in Ukraine challenging the actions that resulted in the Cypriot Accounts being fully impaired and zeroed. Those proceedings were successful in the Ukrainian Administrative Court but are of no effect until confirmed on appeal."

133. The Claimants suggest that they do not challenge the Designation, but that is wrong: indeed, it is an essential part of their case that they do so. Lawful means conspiracy aside, each cause of action asserted in the draft Re-Amended Particulars of Claim is then premised on the core allegation in paragraph 21 of the draft Re-Amended Particulars of Claim that the Designation was unlawful under Ukrainian law.[18]

134. The Designation (as part of Decision 105) was an integral part of the Ukrainian state's nationalisation of PrivatBank, consisting of the Bail-In and the seizure of the Surkis Family Companies' claim rights in respect of their accounts under the Ukrainian law Bail-In SPAs. In principle, such a claim appears to fall squarely within paragraph 118 of Lord Neuberger's judgment in *Belhaj*, in that this court is being invited to adjudicate upon the lawfulness or validity of the sovereign acts of a foreign state, Ukraine, which take effect within Ukraine. Whilst not made against the foreign state concerned, the claim nonetheless involves an allegation that the foreign state has acted unlawfully by making the Designation.

135. The Defendants accordingly advance the powerful submission that the foreign act of state doctrine, by the second rule, bars that core allegation and all of the causes of action dependent on it, because this Court will not adjudicate on the lawfulness or validity of the Designation, which, as set out above, was a sovereign act of Ukraine.

136. What is the Claimants' answer to this submission?

137. First, the Claimants say that the "*Designation did not itself result in the expropriation of property*" and that the second rule only applies to executive decisions to expropriate property.

138. It is right to say that Lord Neuberger and Lord Mance both observed in *Belhaj* that the second rule has significant judicial support but only in relation to property. However, I agree with Teare J's analysis in *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2020] EWHC 1721 at [77], where he said as follows:

> "If the courts will not adjudicate on the lawfulness or validity of a state's sovereign acts there is, in my judgment, no principled reason for saying that the

[18] See the draft Re-Amended Particulars of Claim §46.1(c) and 46.2 (unlawful means conspiracy), 49.3(a) (procuring breach of contract), §§52 and 55 (alleged breaches of Ukrainian law).

> principle does not apply where the sovereign act is the act of the head of state in making certain appointments. I do not consider that the recognition by Lord Neuberger[19] (and indeed by Lord Mance[20]) that the previous cases were only concerned with property within the state in question should be regarded as requiring the conclusion that the principle does not apply to such an act of the head of a sovereign state. Indeed, it would be very surprising and unprincipled if, given the existence of the act of state of doctrine and the principles underlying it, it did not apply to executive actions of the head of state himself."

139. I also consider that there is no principled reason why the second rule should only apply to executive decisions to expropriate property[21], which was also the conclusion of Lord Sumption JSC in *Belhaj* at [229]-[231] (supported by Lord Hughes JSC). Like Teare J in *Maduro* at [77], I too do not consider that the conclusions of the majority in *Belhaj* compel such a conclusion (where the debate concerned whether the second rule should be extended from seizure of property cases to cases of executive acts causing personal injury or death).

140. In my judgment the Designation engages the second rule and its engagement with that rule is fully consistent with the rationale of the act of state doctrine: the Designation was a quintessentially executive act of the state of Ukraine, which took place and took effect in Ukraine. It designated persons considered to be "related parties" of PrivatBank, a Ukrainian bank, under the Ukrainian Law on Banks and Banking. On the basis of the Designation, the DGF, a Ukrainian public body exercising public powers granted to it under Ukrainian law, entered into the Bail-In SPAs — which were Ukrainian-law governed agreements pursuant to which the Surkis Family Companies "claim rights" under the accounts registered with the PrivatBank's Cypriot branch were transferred to PrivatBank in Ukraine, in exchange for PrivatBank shares registered in Ukraine.[22] The Designation and the Surkis Companies Bail-In were both part of the nationalisation of a Ukrainian bank by the Ukrainian state. The Designation rendered the Surkis Family Companies liable in Ukraine to the steps taken by the DGF in Ukraine which led to Bail-In of the funds and the issuing of the shares in PrivatBank in Ukraine.

141. The fact that this domestic nationalisation process, including the Designation itself, may have had some repercussions or effects outside of Ukraine — in that, as part of the Designation and Bail-In process, monies caught by the Bail-In and exchanged for shares in PrivatBank were located in a branch account of the Ukrainian bank held outside of Ukraine — does not result in the inapplicability of the act of state doctrine. As Teare J stated in *Maduro* at [79]:

> "When Lord Neuberger first stated the first and second rules in paragraphs 121 and 122 he stated that the court will recognise and will not question sovereign

[19] Belhaj, paragraphs [125], [135] and [159] per Lord Neuberger JSC.
[20] Belhaj, paragraph [74], per Lord Mance JSC.
[21] See also *Dobree v Napier* (1826) 2 Bing NC 781 *and Duke of Brunswick v King of Hanover* (1848) 2 HL Cas 1 for other cases (in addition to *Maduro*) where the rule has been applied to sovereign acts of appointment.
[22] Indeed, the Surkis Family Companies have brought proceedings *in Ukraine* seeking an order requiring PrivatBank (not the Cypriot branch specifically, which does not have legal personality) to comply with the terms of the banking agreements.

> acts "which take place or take effect within the territory of that state". The use of the phrase "take place within" echoes the use of that phrase by Rix LJ in *Yukos Capital v Rosneft* at paragraph 68. The use of that phrase suggests that the mere fact that the effect of the sovereign may in some sense be felt abroad will not or may not be sufficient to exclude the doctrine if the sovereign act took place within the state in question."

142. But in any event, if, contrary to the foregoing, it is necessary to point to an expropriation of property as a result of the executive decision in order for the second rule to be engaged, then I consider that that requirement is in any event satisfied in this case: the Designation was the cause of the Surkis Family Companies' Bail-In, which amounted to an interference with their property, namely the seizure of their "claim rights", arising out of the monetary obligations owed to them by PrivatBank. The chose in action (the claim rights) which is being seized is situate in the country where the debtor resides (here, Ukraine): *Dicey, Morris and Collins on the Conflict of Laws* (15th Edition), Rule 129 and paragraph 22-026.

143. Indeed, that the Designation was the cause of the expropriation of the Surkis Family Companies' property was accepted by Mr Choo-Choy QC in his oral submissions when he stated: "*the designation process was part and parcel of an overall nationalisation process of PrivatBank including the Bail-In of the account balances of related persons and the designation of the LLPs [and] would have had the inevitable effect of leading to the negation of their rights as customers … at … the Cypriot branch [of PrivatBank] at which their balances were held*."

144. Accordingly, in my judgment the fact that the Surkis Family Companies' accounts were held at the Cyprus branch of PrivatBank should not and does not lead to the disapplication of the act of state doctrine in this case in circumstances where (i) the sovereign act (the Designation) took place within the state in question; (ii) that sovereign act took place as part of a connected series of sovereign acts in Ukraine pursuant to that state's scheme of nationalisation of a substantial Ukrainian bank; and (iii) this caused the Surkis Family Companies loss by reason of the transfer to them of valueless shares in PrivatBank in exchange for their transferring their *claim rights* under their 3 accounts with PrivatBank, pursuant to Ukrainian-law SPAs.

The Administrative Court Judgment

145. The Claimants also contend that "the foreign act of state doctrine does not apply where, as here, the relevant act, i.e. the Designation, was unlawful under the law of the country in which the act took place, i.e. Ukraine".[23]

146. As to this, the Administrative Court of Kiev issued its judgment on 25 July 2017, in proceedings brought by the Surkis Family Companies against the NBU, the DGF, the authorised representatives of the DGF who took part in the Surkis Companies Bail-In, PrivatBank, the Ministry of Finance of Ukraine and others (the "Surkis Companies Ukrainian Proceedings"). In those proceedings, the Surkis Family Companies argued that the Designation, as well as the Bail-In SPAs and certain related decisions of the DGF, were unlawful and should be declared null and void. In finding for the Surkis Family Companies, the Administrative Court held that the NBU had not provided

[23] Reply §17.6.

sufficient evidence that Mr Surkis "*had the possibility to influence greatly the management of the* [Surkis Family Companies]", the registered beneficial owners of which were other members of his family circle.

147. In parallel to the Surkis Companies Ukrainian Proceedings, Mr Surkis in his personal capacity brought proceedings against the Ukrainian state challenging his own designation under Decision No. 105 (the "Personal Ukrainian Proceedings"). Those proceedings are more advanced. On 6 November 2017, the Kiev Administrative Court of Appeal held that Mr Surkis "*may not be considered as direct or indirect owner or founder of* [1+1 Media]" as his interest is instead managed by Mr Menelaos Sazos, a partner in the Cypriot law firm advising Mr Surkis. However, this judgment was overturned by the Ukrainian Supreme Court on 15 June 2020, on the basis that the Ukrainian civil courts, not its administrative courts, had jurisdiction to hear the claims (the "Ukrainian Supreme Court Judgment").

148. Before me, both parties and their experts agree that under Ukrainian law, the Administrative Court Judgment is of no legal effect, as it has not been reviewed and approved by the appellate court.[24] Pending the appeal, the factual and legal findings of the Administrative Court Judgment accordingly have no weight in other proceedings in Ukraine.[25] Furthermore, after the Ukrainian Supreme Court Judgment which held that administrative courts do not have jurisdiction over Mr Surkis' personal claim challenging his designation and the subsequent Bail-In, it seems likely that the Administrative Court Judgment will likewise be overturned for lack of jurisdiction and the proceedings transferred to the Ukrainian civil courts.[26]

149. It follows that it is common ground that the Administrative Court Judgment has not yet come into force and its legal and factual findings are of no effect — and so there is no Ukrainian Court decision holding that the Designation is unlawful. In the circumstances the Claimants fail to make good on these applications their assertion that the Designation was unlawful under Ukrainian law; and it is not open to them to seek to rely upon the ineffective Administrative Court Judgment by the back-door, by contending, through Mr Summerfield, that "*the fact that* [the] *Designation is unlawful is clear in the light of the Administrative Court Judgment*"[27] because it "*remains the best evidence available as to the illegality of the Designation*"[28]. The judgment is simply of no legal effect at all.

150. Nor is it open to this court, as suggested by Mr Choo-Choy QC in his oral submissions, (i) to inquire into the lawfulness or otherwise of the foreign executive act simply because unlawfulness is *alleged* by the Claimants; or (ii) to stay these proceedings so that "*the true legal position in Ukraine can be established*", as he put it. As Mr Choo-Choy QC himself admitted, unlawfulness could have been addressed by expert evidence of Ukraine law, and "*we haven't pleaded a full case on that because we have we have not updated the particulars of claim since the Ukrainian Supreme Court judgment … the claims having been started in the wrong court.*" The burden of establishing on these applications that the Designation is unlawful rests

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24 Kuznetsova 1, 120-126, 135; Dovgert 1, 51; Summerfield 6, 101.
25 Kuznetsova 1, 126, 135; Kuznetsova 2, 13-17.
26 Kuznetsova 1, 163-164; Kuznetsova 2, 18-23.
27 Summerfield 3, at paragraph 193(d).
28 Summerfield 6, at paragraphs 105 and 116.

upon the Claimants. They have failed to discharge that burden and it would not be proper for this court to stay these proceedings indefinitely in order to see whether at some future point the highest Ukrainian Court might find that the Designation was unlawful as a matter of Ukrainian law.

151. In any event, as Lord Goldsmith QC for PP points out, there is no authority in English law for the proposition that a first-instance domestic court judgment has any bearing on the second rule.

152. In *Maduro*, the Court of Appeal (Males LJ, Lewison and Phillips LJJ) only considered (*obiter*) that a decision of the highest court in Venezuela (if it were to be recognised) invalidating an executive act of the Venezuelan President would be relevant to the application of the act of state doctrine: if the executive act has been declared null and void by a final decision of the highest court, then it no longer exists and there is therefore no executive act that could be recognised under the second rule: [138]-[152][29]. But this is of no relevance to the present proceedings, as the Designation has not been declared null and void by any court, let alone a final decision of a Ukrainian court.

153. There is in any event a hotly debated issue as to whether as a matter of principle the act of state doctrine applies to executive acts which are unlawful under the law of the foreign state. Lord Neuberger's view in *Belhaj* appears to have been that it does not, although he recognised a "*pragmatic attraction*" in an argument that an unlawful executive act should still be treated as effective, at least insofar as it relates to property and property rights. Ultimately he left the point open.

154. Lord Mance's analysis of the doctrine was to some extent different, but he too regarded it as unnecessary to decide this issue. Lord Sumption, with whom Lord Hughes agreed, considered that unlawfulness under the foreign law is irrelevant (although this was a minority view on a point which did not need to be decided).

155. There is in fact pre-*Belhaj* authority for the proposition that foreign executive acts are to be recognised without enquiry into their legality, at least in relation to property. In *Princess Paley Olga v Weisz* [1929] 1 KB 718, the Court of Appeal held that it could not question the validity of confiscatory acts of Russian revolutionaries who subsequently became the recognised government, irrespective of whether such acts had basis in domestic law.[30]

156. The same principle was recognised in *Piramal v Oomkarmal* (1933) 60 LR Ind App 211 (which does not appear to have been cited in *Belhaj*) in which Lord Atkin, giving the advice of the Privy Council, relied on *Princess Paley* to hold that the Court, in a case concerning "*property seized and taken into possession by the Government of the foreign territory in which it is situate*" *… will not examine whether the [foreign] Government acted validly or not within its own domestic laws*" (at 223).

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[29] The Court of Appeal's decision is currently on appeal to the Supreme Court and judgment is awaited.

[30] *Princess Paley Olga v Weisz* [1929] 1 KB 718, at pp. 724-725, 729, 736. See also *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) 60 LR Ind App 211.

157. In *Reliance Industries v The Union of India* [2018] 2 All ER (Comm) 1090, Popplewell J (as he then was) summarised the position as follows, in holding that he was bound by the principle that an English court will not question the effect of the foreign state's executive acts in relation to property situate within its territory, and will not adjudicate upon whether such acts are lawful:

> "[105] I also consider that I am bound to hold that the doctrine includes the principle that the English court will not question the effect of the foreign state's executive acts in relation to property situate within its territory, and will not adjudicate upon whether such acts are lawful. That was Lord Neuberger's second rule articulated (at [122]) and considered (at [136]–[143]). Although Lord Neuberger preferred to leave open the question whether such a rule existed, he recognised the pragmatic attraction of such a rule (at [142]) and that it had significant judicial support in relation to property, including the decision of the Court of Appeal in Princess Paley Olga v Weisz [1929] 1 KB 718, [1929] All ER Rep 513. Lord Mance's judgment addresses the principle and its judicial support at [11](iii)(b) and [38] and assumes without deciding that the principle exists and applies to property cases. Lord Sumption's analysis treats the principle as established, being an aspect of what he labels 'municipal law act of state': see Belhaj v Straw [2017] 3 All ER 337, [2017] AC 964 (at [228]–[230]). I am bound, as was the Tribunal, by the Court of Appeal decision in Princess Paley Olga's case, which, as the majority in Belhaj recognise, decided as part of the ratio that the second rule existed in property cases. I therefore treat it as established for the purposes of deciding this application".

158. I see considerable force in Lord Goldsmith QC's submission on behalf of PP that if one accepts that the rule applies to executive acts (per *Belhaj*), then it ought to apply to executive acts without enquiry into their legality. The very purpose of the act of state doctrine is (subject to one caveat) to preclude such an enquiry, and thus to make the second rule subject to a legality test would "*write the rule out of English law*". That is not to say that the municipal court would treat *any* executive act by the government of a foreign state as valid, irrespective of its legality under the law of the foreign state (and logically, it would seem, irrespective of whether the seizure was being challenged before the domestic courts of the state in question), because that could mean ignoring, rather than giving effect to, the way in which a state's sovereignty is expressed[31]. But any excess of executive power will or may be expected to be corrected by the judicial arm of the foreign state concerned.

159. Thus, when the English court is satisfied that the foreign state's judicial branch has validly and finally declared an executive act null and void, the executive act no longer exists and there is therefore nothing that the English court could recognise under the second rule. But, consistently with the fundamental principles underlying the act of state doctrine, that is a matter *for the foreign state*. If that state's legal system recognises the existence of a valid executive act, so should the English court. Accordingly, the second rule mandates that an English court should recognise and not question the effect of an executive act, provided that it has not been declared null and void in a final judgment of the highest court of the state whose executive performed the act.

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[31] See in this regard Lord Mance SCJ's observation in *Belhaj* at [65].

160. However, whether this be a correct analysis of the law or not, the fact remains that the Claimants have failed to show that the Designation was unlawful under Ukrainian law in any event.

161. Finally on this topic, the Claimants say that the foreign act of state doctrine does not preclude the Court from adjudicating on "*the unlawfulness – from the perspective of English law… or Cypriot law*" of acts consequential on the Designation: namely, the DGF's having appointed individuals to enter into the Bail-In SPA and debit the Cypriot Accounts, and the alleged breaches by PrivatBank of its banking agreements with the Surkis Family Companies. I reject that submission and accept the submission of Mr Scott for VG on this point: the enquiry proposed remains an enquiry into the lawfulness of a foreign sovereign act — the Designation — and that is impermissible. The Court is not entitled to adjudicate the core allegation that the Designation is unlawful.

162. Nor do I accept the submission of the Claimants that this court is entitled to inquire into the lawfulness of the Designation because it is simply an incidental issue in these proceedings, and is not the object of the proceedings. On any view, as can be seen from the Claimants' pleaded case above, establishing the alleged unlawfulness of the Designation is the (or at least a) central purpose or object of these proceedings: the issue of the alleged unlawfulness of the Designation has to be resolved in order for the unlawful conspiracy case to be determined (see in this respect Teare J in *Maduro* at [86]).

163. It follows that because the foreign act of state doctrine applies, the Claimants are not entitled to advance their claim on the basis of the core allegation that the Designation is unlawful. In my judgment, the effect is to preclude all the pleaded causes of action in the APOC excepting the claim for lawful means conspiracy.

164. Last, I should mention that in an attempt to address this, in the draft Re-Amended Particulars of Claim[32] the Claimants have introduced new allegedly unlawful acts that are said to have been the subject-matter of the alleged unlawful means conspiracy: namely, the entry into of the Bail-In SPA and the purported debiting of the Cypriot Accounts.[33] Mr Choo-Choy QC did not address me on these new claims in oral submissions preferring to base his arguments upon the Designation, and accordingly I address them shortly.

165. I have considerable sympathy with the First Defendant's complaints in paragraphs 67-69 of his skeleton argument that these new claims lack coherence. But in any event, the newly pleaded acts were also foreign acts of state, undertaken by the appointees of the Ukrainian executive, DGF, exercising powers delegated to it under the DGF law, in furtherance of the Bail-In and the Designation, and by the NBU pursuant to the Designation. In the circumstances I consider that these new claims similarly do not avoid the application of the act of state doctrine, by virtue of the same reasoning as is set out in this judgment in respect of the Designation.

166. Finally, so far as the *lawful* means conspiracy claim is concerned, I agree with Mr Choo-Choy QC that that plea obviously does not give rise to any act of state issues, as

[32] To which VG has consented without prejudice to her Application.
[33] Draft RAPOC §46.2(a)-(c).

it does not allege the unlawfulness of the Designation. There are, however, other difficulties with this plea which I address below.

DO THE CLAIMANTS' CLAIMS HAVE A REAL PROSPECT OF SUCCESS AGAINST VG?

167. The third limb of the Second Defendant's application is for the Claimants' claims to be struck out and/or for reverse summary judgment on them on the basis that they are premised on allegations of conspiracy and/or intentional wrongdoing, which have not been properly pleaded and/or have no real prospect of success.

Legal principles

The strike-out application: pleading fraud or dishonesty

168. Where claims are brought in respect of fraud, dishonesty, malice or illegality the Commercial Court Guide makes clear at §C.1.3(c) that "*full and specific details should be given of any allegation*" and "*where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out.*"

169. In *Barrowfen Properties v Patel* [2020] EWHC 1145 (Ch), Birss J at [7] adopted the principles that apply to a plea of fraud or dishonesty as set out in *Three Rivers DC v Bank of England* [2003] 2 AC 1 and *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), at [12]-[23], as follows:

> "(i) The use of the word "fraud" or "dishonesty" is not necessary in a pleading if the facts which make the conduct fraudulent are pleaded.
>
> (ii) The function of pleadings is to give the party opposite sufficient notice of the case which is being made against them. An allegation of fraud/dishonesty must be sufficiently particularised by pleading the primary facts relied on.
>
> (iii) At an interlocutory stage, the court is not concerned with whether the evidence at trial would establish fraud, but only whether the facts pleaded disclose a reasonable prima facie case which the other party will have to answer at trial. If the plea is justified the case must go forward to trial and the assessment of whether the evidence justified the inference is a matter for the trial judge.
>
> (iv) For a valid plea of fraud/dishonesty the claimant does not have to plead primary facts which are consistent only with dishonesty. The correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. There must be some fact or facts which tilts the balance and justifies an inference of dishonesty."

Reverse summary judgment: the merits requirement

170. The relevant principles on an application for reverse summary judgment (which I apply) were summarised by Lewison J (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]:

> "…the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

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

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

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

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

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

How the two approaches compare

171. Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at [25]-[27] conducted a helpful analysis in considering how the court's approach differs to an application to strike out and an application for reverse summary judgment in a dishonesty claim:

"25. In terms of the approach to summary judgment in fraud claims Primekings commended to my attention the judgment of Stuart Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) at [25] – [29], in the context of the approach to be taken when faced with an application to strike out a claim in fraud. In summary:

i)The Court should bear in mind that cogent evidence is required to justify a finding of fraud or other discreditable conduct, reflecting the court's conventional perception that it is generally not likely that people will engage in such conduct.

ii)Pleadings of fraud should be subjected to close scrutiny and it is not possible to infer dishonesty from facts that are equally consistent with honesty.

iii)However, in view of the common feature of fraud claims that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy, the Court should adopt a "generous" approach to pleadings.

26. There is one potential distinction between the position in relation to an application for summary judgment under CPR r. 24.2 and an application to strike out under CPR r. 3.4(2)(a). As just noted, under CPR 24 evidence is admissible to show that the pleaded allegations are fanciful – albeit that the court will be very cautious about rejecting a claimant's factual case at the summary judgment stage.

27. When considering an application to strike out however the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible. This is noted in *Terry Allsop v Banner Jones Limited* [2021] EWCA Civ 7 by Marcus Smith J (giving the judgment of the Court of Appeal) at [7], citing the judgment of Arnold LJ in *Libyan Investment Authority v King* [2020] EWCA Civ 1690, at [96]:

> "In contrast with the applications under CPR 3.4(2)(b), the applications under CPR 3.4(2)(a) and CPR 24.2 are concerned with the merits of the claim, specifically whether the claim meets the (low) threshold of what I shall call "reasonable arguability". Although it can be said that there is no material difference between the test applied by these two provisions, there is an important distinction between CPR 3.4(2)(a) and CPR 24.2, in that an application under CPR 24.2 can be supported by evidence, whereas an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case.""

The pleaded case against VG

172. The relevant paragraphs of the draft Re-Amended Particulars of Claim in which the case in conspiracy is pleaded against VG (said to be governed by Cypriot law which is, however, said to be the same as English law) are as follows:

"Attempts to coerce Mr Surkis

29. On or about 20 December 2016, following the commencement of the Bail-In process, Mr Surkis met with Mr Poroshenko at Mr Poroshenko's Presidential offices. Amongst other things, Mr Poroshenko and Mr Surkis spoke about the

designation of the Surkis Family Companies (as well as the designation of Mr Surkis and other Surkis family members who were personally designated at the same time as the Surkis Family Companies). Mr Surkis told Mr Poroshenko that the Surkis Family Companies (and Mr Surkis and the other Surkis family members) should not have been designated as connected to PrivatBank with the effect that their accounts were impaired and zeroed. Mr Poroshenko admitted that Mr Surkis might be right but stated that he was not aware of what happened in relation to the designations and that it was a matter handled by the NBU.

30. At the meeting on or about 20 December 2016, Mr Surkis informed Mr Poroshenko that FC Dynamo Kiev (a Ukrainian football team in which Mr Surkis has an interest), as well as Mr Surkis's father (whose PrivatBank account was being used as collateral for FC Dynamo Kiev's credit facilities) and Mr Surkis's brother (whose PrivatBank account was also being used to assist FC Dynamo Kiev) had been designated as persons connected to PrivatBank. Mr Surkis explained that the effect of those designations was placing FC Dynamo Kiev in considerable financial difficulty. Mr Surkis warned Mr Poroshenko if FC Dynamo Kiev, Mr Surkis's father and Mr Surkis's brother were not removed from the list of persons connected to PrivatBank by the time Mr Surkis arrived back at his offices at FC Dynamo Kiev, Mr Surkis would arrange a meeting with journalists to inform them that FC Dynamo Kiev would not be in a position to function properly and that Mr Surkiswould be handing over the keys of FC Dynamo Kiev to Ms Gontareva so that she could be responsible for the functioning of FC Dynamo Kiev.

30A. In fact, the statement made by Mr Surkis at the meeting that his brother's account was being used to assist FC Dymano Kiev was not correct. Mr Surkis made a mistake in this regard whilst talking to Mr Poroshenko about the perilous position of FC Dynamo Kiev.

31. On the same day, while Mr Surkis was on his way back to his offices, Ms Gontareva (it is to be inferred, at Mr Poroshenko's request) called the vice president and the financial controller of FC Dynamo Kiev, Vitaliy Sivkov. Mrs Gontareva indicated that she was aware of a complaint about the funding of FC Dynamo Kiev, i.e. Mr Surkis's complaint to Mr Poroshenko, and informed Mr Sivkov ~~him~~ that the PrivatBank accounts of FC Dynamo Kiev ~~as well as the PrivatBank accounts of Mr Surkis's father~~ and Mr Surkis's brother were functioning properly ~~and that all three had been removed from the list of connected persons.~~ It is to be inferred from Mrs Gontareva's comments to Mr Sivkov (i) that she called him after having been told by Mr Poroshenko of his discussion with Mr Surkis, and (ii) that Mr Poroshenko and Mrs Gontareva were acting in concert in relation to the operation of the Designation in respect of the Surkis family and entities connected with them.

32. Between January and March 2017, several meetings took place between Kateryna Rozhkova, the then Deputy Governor of the NBU, and Mr Surkis's brother at the offices of Ms Rozhkova. During those meetings, Ms Rozhkova assured Mr Surkis's brother that she would have the question of the impairment and designation of the Surkis Family Companies (and the individual members of the Surkis family) looked into. Mr Surkis's brother was given to understand (as it was intended that he should understand) that it was a condition of Ms Rozhkova

looking into the Designation of the Surkis Family Companies that Mr Surkis should assist Mr Poroshenko in relation to the latter's effort to obtain control of the 1+1 Media Group. That understanding was confirmed, in particular, by the meeting attended by Ms Gontareva referred to at paragraph 32A below. It is to be inferred that Ms Rozhkova was acting in the knowledge of and with the approval of Mrs Gontareva because (i) Ms Rozhkova was Mrs Gontareva's deputy and (ii) in the light of the meeting referred to at paragraph 32A below. Some of the meetings between Mr Surkis's brotherand Ms Rozhkova held between January and March 2017 were attended by Mr Sofocleous, Mr Surkis's Cypriot lawyer.

32A. One of the meetings referred to above that took place in January 2017 was attended by Mr Surkis's brother, Ms Rozhkova and also by Mrs Gontareva and Vasily Gritsak (the former head of the Security Services of Ukraine). During that meeting Mrs Gontareva said words to the effect "Didn't Kolomoisky tell you that you should take your money" and asked "well, tell me, why didn't you come to me earlier". Mr Surkis's brother thereby understood (as it was intended that he should understand) that Mrs Gontareva had the power to arrange for the return of the Surkis Family Companies' money but that in order to do so Mr Surkis had to assist Mr Poroshenko.

33. On or about April 2017, Mr Granovskiy, acting on behalf of Mr Poroshenko, visited MrSurkis and his brother at their FC Dynamo Kiev offices. Mr Granovskiy proposed that Mr Surkis hand over to Mr Poroshenko the interest in Bolvik for free, in exchange for which the money in the Cypriot Accounts would be returned. Mr Surkis refused.

34. Following Mr Surkis's refusal to hand over the interest in Bolvik to Mr Poroshenko for free, on 4 May 2017, the management of NBU (at the direction of Mr Poroshenko and, it is to be inferred, with the knowledge of and the approval of Ms Gontareva) instructed the officers in PrivatBank's branch in Cyprus to stop paying interest on the Current Accounts and for the balances in those accounts to be written off.

…

Unlawful means conspiracy

46. Mr Poroshenko and Ms Gontareva are liable for the tort of unlawful means conspiracy as follows:

46.1. Mr Poroshenko and Ms Gontareva combined to procure the making of the Designation ~~Decisions, Orders and agreements set out at paragraphs 17 to 19 above~~ in relation to the Surkis Family Companies so as to cause the Cypriot Accounts to fall within the Bail-In and, therefore, to have the Bail-In SPA entered into, purportedly on behalf of the Surkis Family Companies, and, thereby, cause PrivatBank to impair and zero the Cypriot Accounts. The fact that Mr Poroshenko and Ms Gontareva combined as alleged is clear from the following:

a. Mr Poroshenko and Ms Gontareva are closely connected having worked together in business since at least the 1990s.

b. Ms Gontareva appears to have a history of assisting Ukrainian politicians with unlawful activities. In March 2017 the Kramatorsk City Court in the Donetsk Region of Ukraine recorded that a company of which Ms Gontareva was the head of the Board at the material times was involved in transactions that were part of a scheme pursuant to which the former President of Ukraine, Viktor Yanukovych, misappropriated substantial sums from state institutions.

c. The decision to designate the Surkis Family Companies as related persons was unlawful and can only be explained on the basis that it was motivated by reasons other than a genuine desire to ensure that persons with a genuine relationship with PrivatBank were designated as related persons.

d. As set out at paragraphs 30 ~~and~~ to 31 above, the accounts of FC Dynamo Kiev, ~~Mr Surkis's father~~ and Mr Surkis's brother were permitted to function notwithstanding their designation as persons connected to PrivatBank and the Bail-In process ~~removed from the list of persons connected to PrivatBank~~ after Mr Surkis spoke to Mr Poroshenko and it was Ms Gontareva who (shortly following Mr Surkis's discussion with Mr Poroshenko and, it is to be inferred, at Mr Poroshenko's request) informed Mr Sivkov that the accounts were functioning properly ~~they had been removed from the list of persons connected to PrivatBank~~. The fact that Mr Poroshenko was able to arrange for the accounts of FC Dynamo Kiev, ~~Mr Surkis's father~~ and Mr Surkis's brother to function properly ~~be removed from the list of persons connected to PrivatBank~~ and the fact that Ms Gontareva was involved in that process and its implementation indicates both that Mr Poroshenko and Ms Gontareva had the ability to influence the designation process and that they were willing and able to work (and, as set out in paragraphs 31, 32 and 34 above, actually worked) together in exercising such influence.

e. As set out at paragraphs 29 to 40 above, PP sought to use the fact that the Surkis Family Companies' money held in the Cypriot Accounts had been impaired and zeroed in order to put pressure on Mr Surkis. As set out at paragraph 32A, VG was present and exerted such pressure on Mr Surkis at one of the relevant meetings.

…

h. Mr Poroshenko and Ms Gontareva had the ability to influence the decision to designate the Surkis Family Companies as related persons because Decision 105, by which the Surkis Family Companies were designated as related persons, was taken by NBU's Commission dealing with matters of determining related persons and inspecting the operation of banks (the "**Commission**"). The Commission was formed by the Board of the NBU (the "**Board**") and the Board consisted of Ms Gontareva and her deputies. Ms Gontareva's deputies were appointed by the Council of the NBU (the "**Council**") upon Ms Gontareva's recommendation. ~~Ms Gontareva was the chairperson of the Council and b~~Between Ms Gontareva and Mr Poroshenko they appointed or were able to influence the appointment of the ~~a majority of~~

~~the~~ members of the Council. The effect of the aforementioned was that Mr Poroshenko and Ms Gontareva had significant influence over the Commission. In the premises set out in paragraphs 31, 32 and 34 above, it is to be inferred that Ms Gontareva and Mr Poroshenko, in concert, used their influence within the NBU and over the Commission in order to procure and maintain the Designation and enable Mr Poroshenko to coerce Mr Surkis into assisting Mr Poroshenko in advancing the latter's personal agenda in getting re-elected as President.

i. Mr Poroshenko and Ms Gontareva had the ability to influence the conduct of the Fund which took the Decisions and made the Orders set out at paragraph 19 above. The Fund is managed by the Administrative Council of the Fund and the Executive Directorate of the Fund. The Administrative Council consists of five members, one representative of the Cabinet Ministers of Ukraine, two representatives of the NBU, one representative of the Ukrainian Parliament and the managing director of the Fund. The NBU representatives were appointed by the Board of the NBU, which consisted of Ms Gontareva and her deputies. At the relevant times, the NBU representatives were Mr Oleh Stryzha ~~Ms Gontareva~~ and Mr Mykhailo Vidyakin ~~Aleksandr Pysaruk~~. The managing director of the F~~f~~und at the relevant times was Vorushylin Konstantin Mykolaiovych. Mr Vorushylin has long standing connections to Mr Poroshenko having been: (i) chairperson of the board of the bank JSBC Mriya, which was owned by Mr Poroshenko (1997-2006); (ii) head of financial and investment activities at "Bohdan" Corporation which is, or at least at one stage was, associated with Mr Poroshenko; and (iii) chairperson of the Supervisory Board of, and a shareholder in, the International Investment Bank which was ultimately beneficially owned by Mr Poroshenko (2008-2014). It is further believed that Mr Vorushylin was appointed as the managing director of the Fund through the votes of the NBU's members on the Administrative Council. It is to be inferred that Mr Poroshenko and Ms Gontareva had considerable influence, and used that influence, over Mr Vorushlylin. The Executive Directorate of the Fund consisted of seven members who were the managing director of the Fund and his deputies, all of whom were appointed by the managing director of the Fund."

…

46.3. Mr Poroshenko and Ms Gontareva combined with the intention of causing damage to the Surkis Family Companies through the loss of the sums held in the Cypriot Accounts for the further purpose of placing pressure on Mr Surkis: (i) to give up the interest in Bolvik for free; (ii) to assist Mr Poroshenko with his Presidential re- election campaign by arranging for the 1+1 Media Group to be managed for Mr Poroshenko's benefit and/or (iii) to assist Mr Poroshenko in reaching a settlement with Mr Kolomoisky. Mr Poroshenko's and Ms Gontareva's intentions are to be inferred from the following:

a. The fact that Mr Poroshenko and Ms Gontareva combined as set out at paragraph 46.1 above.

b. The fact that the purpose of Mr Poroshenko's and Ms Gontareva's combination was to use the zeroing of the sums held in the Cypriot Accounts in order to allow Mr Poroshenko to put pressure on Mr

Surkis. This purpose is clear because Mr Poroshenko in fact sought to use the zeroing of the sums held in the Cypriot Accounts in order to put pressure on Mr Surkis.

46.4. Mr Poroshenko's and Ms Gontareva's actions caused loss to the Surkis Family Companies because their actions resulted in the Cypriot Accounts being impaired and zeroed.

47. In the light of Mr Poroshenko's and Ms Gontareva's tortious acts, the Surkis Family Companies seek damages equal to the amounts set out at paragraph 20 above.

Submissions and discussion

173. It can be seen that the pleaded case in conspiracy against VG is extremely thin and is based upon alleged inferences to be drawn from one telephone call and one meeting which *post-date* the Designation.

174. Turning to the heart of the plea of unlawful means conspiracy against VG which is contained in paragraph 46 of the draft re-Amended Particulars of Claim, it can be seen that the allegation that VG and PP combined to procure the making of the Designation in order to cause PrivatBank to "zero" the Cypriot Accounts is based upon the following:

(a) Paragraph 46.1(a): The fact that they worked together in business since at least the 1990s. This obviously does not justify a plea of fraud.

(b) Paragraph 46.1(b): A suggestion that Ms Gontareva appears to have a history of assisting Ukrainian politicians with unlawful activities. The Claimants refer only to a decision of the Kramatorsk City Court of March 2017 in this regard. However, Mr Scott pointed out that that was not even a proceeding against VG, it contains no finding of wrongdoing against her and so cannot begin to support this allegation. Mr Choo-Choy QC did not take issue with that in his reply. It is accordingly not possible to infer dishonesty from this unfounded plea.

(c) Paragraphs 31 and 46.1(d): A post-Designation telephone call from VG to Mr Sivkov to tell him that the PrivatBank accounts of FC Dynamo Kiev were functioning properly. There is no documentary evidence to support this apparently anodyne plea. In paragraph 26(4) of her Defence, VG pleads that if this phone call did in fact take place (which is not admitted), then she would have read from a standard script to inform Mr Sivkov of the effects of the Bail-In: since it was an operational company, she would have explained to Mr Sivkov during any such conversation that FC Dynamo Kiev's accounts with PrivatBank would continue to operate. The explanation reflected the decision taken by NBU that the accounts of operational companies such as FC Dynamo Kiev would not be affected by the Bail-In even if persons otherwise designated as related parties of PrivatBank had an interest in them. This caused the Claimants to then delete from paragraph 46.1(d) of their Amended Particulars of Claim the plea that VG informed Mr Sivkov that the accounts of FC Dynamo Kiev and Mr Surkis' brother had been removed from the list of persons connected to

PrivatBank. Accordingly, all that is now left in this regard is the allegation that VG telephoned Mr Sivkov and told him that the accounts were functioning properly, which is entirely consistent with paragraph 26(4) of VG's Defence. In the circumstances, it is not possible to infer dishonesty from this fact (which is, at the very least, equally consistent with honesty).

(d) Paragraphs 32A and 46.1(d) of the draft Re-AmendedParticulars of Claim: A post-Designation meeting in January 2017 between in particular Mr Surkis' brother and VG at which VG is said to have used words to the effect: "*Didn't Kolomoisky tell you that you should take your money*" and asked "*well, tell me, why didn't you come to me earlier*". It is then said that Mr Surkis's brother thereby understood (as it was allegedly intended that he should understand) that Mrs Gontareva had the power to arrange for the return of the Surkis Family Companies' money but that in order to do so Mr Surkis had to assist Mr Poroshenko.

175. Once again, it is not possible to infer dishonesty from this fact, which involves a very large leap in reasoning and is again, at the very least, equally consistent with honesty. There is no pleaded basis for the understanding allegedly held by Mr Surkis' brother. Nor is there any pleaded case that VG said or did anything to support that understanding, or even that she knew of it.

176. The Claimants' pleaded case also faces the problem that it fails to make out any unlawful means (so far as the plea of unlawful means conspiracy is concerned). The only unlawful means alleged is the alleged unlawfulness of the Designation by reason of the Administrative Court Judgment, but which the Claimants accept is of no legal effect (even leaving aside the act of state doctrine, which I have found bars this plea). It follows that there is no proper plea of unlawfulness under foreign law.

177. The new allegations in paragraph 46.2(a)-(c) of the draft Re-Amended particulars of Claim cannot amount to unlawful means. Rather they are allegations that the Bail-In SPA and debiting of the Cypriot Accounts were done without authority. Even if so, that might render the acts invalid but not unlawful so as to support a plea of unlawful means conspiracy.

178. There is a further fundamental problem with the Claimants' pleaded case. Although VG was not a member of the RP Commission and the RP Monitoring Department which were responsible for the making of the Designation, it is pleaded that those members allowed themselves to be influenced by her to procure and maintain the unlawful Designation concerning the 6 Surkis Family Companies. Whilst in oral submissions Mr Choo-Choy QC was anxious to suggest that the Claimants were not alleging that the RP Commission and the RP Monitoring Department were a party to this conspiracy, I do not consider that to be a tenable position to adopt in light of paragraph 46.1(c) of the draft Re-Amended Particulars of Claim, which expressly pleads that the designation of the Surkis Family Companies can only be explained on the basis that it was motivated by reasons other than a genuine desire to ensure that persons with a genuine relationship with PrivatBank were designated as related persons. The allegation must therefore be that all of the members of these bodies were likewise a party to this alleged conspiracy. I agree with Mr Scott that this seems highly implausible. Why would the members of the RP Commission and Monitoring Department agree so to act? And if it is not being so alleged (as was urged by Mr

Choo-Choy QC), then why would they have been influenced to act in an unlawful manner? This again demonstrates that the plea is fanciful.

179. Furthermore, whilst it is pleaded in paragraphs 46.1(h) and (i) of the draft Re-Amended Particulars of Claim that VG had influence, directly or indirectly over the appointment process to the RP Commission, it is not there explained how it is alleged that she influenced those committees in bad faith to include the Surkis Family Companies within Decision 105. In short, there is no properly particularised case to support the very serious allegation that VG unlawfully conspired to procured the Designation. The single meeting and the single telephone call relied upon (referred to above) are nowhere near sufficient to support the allegation.

180. I add for completeness that this conclusion is not affected by paragraphs 44-50 of M. Summerfield's 6th witness statement, served on behalf of the Claimants, in which he refers to a recording and transcript, on a Ukrainian news website, of a discussion said to have taken place between PP and Mr Vorushylin as to their plans but (i) to which VG was not a party; (ii) which affords no evidence of VG joining any conspiracy and (iii) which is in any event unclear and ambiguous.

181. The unlikelihood of VG having been involved in a conspiracy with PP is further reinforced by the fact that the background to the alleged conspiracy and intentional wrongdoing is said to concern the Bolvik/Harley transactions, the dealings in respect of which are alleged to have taken place between Mr Surkis and PP between February and July 2016, prior to the Designation, and which are referred to in the Amended Particulars of Claim at paragraphs 6-16. Bolvik and Harley owned the beneficial interest in the 1+1 Media group which it is said PP wished to acquire to assist in his Presidential campaign for 2019.

182. It is alleged that the designation of the Surkis Family Companies was procured in order to coerce Mr Surkis into bringing about the transfer of the 1+1 Media group to PP via the transfer to him of shares in Bolvik and Harley. However, as set out at paragraphs 12 and 25 of VG's Defence and paragraph 43 of Mr Shaw's First Witness Statement, the Amended Particulars of Claim contain no allegation that VG in fact knew about the Bolvik and Harley transactions at all or about Mr Poroshenko's alleged attempts to coerce Mr Surkis in relation to them. This emphasises the fanciful nature of the case against VG, namely that she conspired to procure the designation by coercion in relation to the Bolvik and Harley transactions.

183. VG having put the Claimants on notice in her Defence of this fundamental flaw in their case, by paragraphs 9 and 19 of their Reply the Claimants responded that they *do* intend to allege that VG knew of the relevant transactions. However, no particulars of that alleged knowledge have been given and no primary facts are alleged from which such knowledge could properly be inferred. Instead, as Mr Scott rightly submitted, the Claimant's plea in its Reply is impermissibly circular: the Claimants plead that they infer that VG knew of the Bolvik and Harley dealings because she had joined an alleged conspiracy to coerce in relation to them. That will not do. Proper particulars of knowledge are required, not least because the dealings in respect of Bolvik and Harley pre-date the Designation.

184. Nor is there anything in paragraphs 46.1 to 46.4 of the draft Re-Amended Particulars of Claim to support the allegation that VG knew of the Bolvik and Harley dealings and transactions at the relevant time.

185. In his oral submissions Mr Choo-Choy QC faintly suggested that paragraphs 32 and 32A of the Claimants draft Re-Amended Particulars of Claim demonstrate VG's knowledge of the Bolvik and Harley negotiations. However, upon analysis, it is clear that they do not do so.

186. The lack of merit in the pleaded case of conspiracy is further reflected in the fact that the Claimants have repeatedly sought to amend their pleaded case in attempting to plead a viable cause of action as well as in attempting to meet the answers to the allegations as contained in VG's Defence. In particular, the conspiracy alleged in the Amended Particulars of Claim differs substantially from the one now advanced in the draft Re-Amended Particulars of Claim. At paragraph 46.1 of the Amended Particulars of Claim, the Claimants plead that Mr Poroshenko and VG "*combined to procure the making of the Decisions, Orders and agreements*" set out at paragraphs 17 to 19. However, in the draft Re-Amended Particulars of Claim, the allegations have been narrowed significantly to focus on a conspiracy to "*procure the making of the Designation*" in isolation from the other acts previously identified. That is an entirely different conspiracy.

187. The lack of merit is also reflected in the fact that there is no pleaded allegation that VG derived any benefit from the designation of the Surkis family companies. The Claimants accept this. In Mr Summerfield's Fifth Witness Statement at paragraph 90 he states: "*it is true that the Claimants have not been able to set out the precise benefit that Mrs Gontareva received*." He then goes on to speculate that "*it is not difficult to see that by assisting Mr Poroshenko to be re-elected as President of Ukraine there could be very substantial career, financial and/or social benefits for Mrs Gontareva*."This does not come close to a sufficient basis for alleging conspiratorial or intentional wrongdoing.

188. For all of these reasons, it follows in my judgment that the pleaded case in conspiracy against VG has no realistic prospect of success and is bound to fail. Moreover, the unsustainable core allegation that VG conspired with PP is relied upon as part of the foundation for each of the alleged causes of action, see paragraph 49.3(a) (procuring breach of contract) and paragraphs 52 and 55 (alleged breaches of the Ukrainian Civil Code). Accordingly, I grant VG reverse summary judgment on the whole of the claim, and I would also strike in their entirety out the Amended Particulars of Claim (or the Re-Amended Particulars of Claim if the parties have agreed to their service). Furthermore, if permission is required to serve the draft Re-Amended Particulars of Claim (it is not entirely clear to me whether both defendants have consented) then I refuse it, as where a party seeks to amend a statement of case, the court will not permit an amendment unless it has a real prospect of success, so that the test is the same as for summary judgment: see CPR 17.3.6.

189. I add that this conclusion applies equally to the lawful means conspiracy claim, which does not survive the summary judgment/strike out application. The lawful means conspiracy allegation is that the Designation, though lawful, was procured by VG as Governor of the NBU, not because she considered it to be a proper response by the

NBU to the fraud at PrivatBank, but because she had the sole or predominant purpose of injuring the Claimants. There is no sustainable basis for that allegation.

190. In the Amended Particulars of Claim, this was pleaded as follows in paragraph 48:

"Lawful means conspiracy

48. If the making of the Decisions, Orders and agreements set out at paragraphs 17 to 19 above, to the extent that they related to the Surkis Family Companies, was lawful (which is denied), Mr Poroshenko and Ms Gontareva are nevertheless liable for lawful means conspiracy because they combined with the sole or predominant purpose of injuring the Surkis Family Companies. Accordingly, in the alternative to their claims for unlawful means conspiracy, the Surkis Family Companies seek the damages, as set out at paragraph 47 above, for the tort of lawful means conspiracy."

191. In the draft Re-Amended Particulars a little more flesh is put on the bones of this plea as follows:

"Lawful means conspiracy

48. If the Designation ~~making of the Decisions, Orders and agreements set out at paragraphs 17 to 19 above, to the extent that they related to the Surkis Family Companies~~, was lawful as a matter of Ukrainian law (which is denied) or there were no other unlawful acts as a matter of English and/or Cypriot law as set out at paragraph 46.2 above, Mr Poroshenko and Ms Gontareva are nevertheless liable for lawful means conspiracy because they combined with the sole or predominant purpose of injuring the Surkis Family Companies. In this connection, reliance is placed on paragraph 46 above. Further, even if the Designation was lawful and there were no other unlawful acts as set out at paragraph 46.2 above, had it not been for the conduct of Mr Poroshenko and Ms Gontareva in procuring that the Surkis Family Companies were designated as persons connected to PrivatBank, the Surkis Family Companies would not have been so designated and the Surkis Family Companies would not have been caught up in the Bail-In and the Cypriot Accounts would not have been impaired and zeroed. Accordingly, in the alternative to their claims for unlawful means conspiracy, the Surkis Family Companies seek the damages, as set out at paragraph 47 above, for the tort of lawful means conspiracy."

192. It can be seen that the Claimants still rely upon the matters set out in paragraph 46 of their Particulars of Claim (which for the reasons already given are inadequate) and they fail to plead any primary facts to support this plea. It is not sufficient to plead that "*had it not been for the conduct of Mr Poroshenko and Ms Gontareva in procuring that the Surkis Family Companies were designated as persons connected to PrivatBank, the Surkis Family Companies would not have been so designated and the Surkis Family Companies would not have been caught up in the Bail-In and the Cypriot Accounts would not have been impaired and zeroed*". The allegation that VG conspired to procure this has no real prospect of success for the reasons already given. But in any event, if the Designation was lawful, pleading alone the fact that VG as Governor procured it adds nothing. It does not support a case that she had the sole or predominant purpose of injuring the Claimants (as opposed to her considering it to be a proper response by the NBU to the fraud at PrivatBank).

193. Before leaving this topic, it is only fair to VG to record that whilst I do not in any way base my judgment upon these facts, she is not an oligarch; she is a highly regarded, professional banker with more than 30 years' experience in that field. Commenting on her work as Governor of the NBU, the International Monetary Fund (the **"IMF"**) stated in April 2017 that "*Governor Gontareva has done a fantastic job*" and that this as just one of a number of accolades that VG received from the international community for her work as Governor.

194. That work, submitted Mr Scott, provides the background against which VG was appointed a Senior Policy Fellow at the Institute of Global Affairs at the LSE, a role which she still holds. It was only because she was working there when these proceedings were commenced that the Claimants were able to serve her in the jurisdiction and thereby seek to use her as an "anchor" so as to join to the action Ukraine's President at the material time, Mr Poroshenko. She believes that her presence in England provides the true explanation for her joinder to these proceedings rather than any genuine belief on the part of the Claimants that she engaged in the wrongdoing which is alleged against her. In the light of the lack of merit in the pleaded case against her, this seems likely in my judgment, although as Mr Choo-Choy QC submitted what ultimately matters is whether there is a realistically arguable case on the facts. If there is, it matters not that there may have been a tactical or procedural purpose behind joining her as a defendant. That stated, it may very well explain why the Claimants have been unable, despite several attempts, to articulate a coherent and arguable case against VG.

195. I leave it to the parties to draw up a draft Order in the light of the findings in my judgment. I am very grateful to them for their submissions and assistance on the application.