Neutral Citation Number: [2021] EWHC 3462 (Comm)

Case Nos: CL-2013-000683
and CL-2019-000494

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

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

Date: 21/12/2021

Before :
THE HONOURABLE MR JUSTICE HENSHAW
- -

CL-2013-000683

Between :

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

Claimants

- and -

(1) BAGLAN ABDULLAYEVICH ZHUNUS
(formerly BAGLAN ABDULLAYEVICH ZHUNUSSOV)
(2) MAKSAT ASKARULY ARIP
(3) SHYNAR DIKHANBAYEVA
(4) SHOLPAN ARIP
(5) LARISSA ASILBEKOVA

Defendants

- and -

(1) COOPERTON MANAGEMENT LIMITED
(2) FABLINK LIMITED **Respondents**
(3) WAYCHEM LIMITED **to the**
(4) STANDCORP LIMITED **Charging**
(5) PERMAFAST LIMITED **Order**
(6) DENCORA LIMITED **Applications**
(7) UNISTAREL CORPORATION

CL-2019-000494

Between :

(1) KAZAKHSTAN KAGAZY PLC
(2) KAZAKHSTAN KAGAZY JSC
(3) PRIME ESTATE ACTIVITIES KAZAKHSTAN LLP
(4) PEAK AKZHAL LLP

Claimants

- and -

(1) MAKSAT ASKARULY ARIP
(2) SHYNAR DIKHANBAYEVA
(3) SHOLPAN ARIP
(4) LARISSA ASILBEKOVA
(5) UNISTAREL CORPORATION
(6) DREZ INVESTMENTS CORPORATION
(7) CARABELLO HOLDINGS INC.
(8) DENCORA LIMITED
(9) COOPERTON MANAGEMENT LIMITED
(10) FABLINK LIMITED
(11) WAYCHEM LIMITED
(12) STANDCORP LIMITED
(13) PERMAFAST LIMITED
(14) PILATUS TRUSTEES LIMITED
(15) MARK MARTIN
(16) OCORIAN TRUSTEES (JERSEY) LIMITED
(17) XYAN HOLDINGS LIMITED **Defendants**

- -

Robert Howe QC, Daniel Saoul QC and Jonathan Miller (instructed by **Hogan Lovells International LLP**) for the **First to Fourth Claimants**
Kamar Uddin (**Direct Access**) for the **Respondents to the Charging Order Applications in case CL-2013-000683 and the Fifth to Fourteenth and Seventeenth Defendants in case CL-2019-000494**

Hearing dates: 7-9, 12-15 and 21-23 July 2021
Draft judgment circulated: 8 December 2021

Approved Judgment

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Covid-19 Protocol: This judgment was handed down by the judge at a remote hearing held using Microsoft Teams.

Mr Justice Henshaw:

(A) INTRODUCTION

1. This judgment follows a trial of applications and claims made by the Claimants for the purpose of enforcing an unsatisfied judgment for approximately US$300 million, handed down by Picken J in December 2017 following a thirteen-week trial.

2. Picken J's judgment was given in case CL-2013-000683 (***the "Main Proceedings***"). He held that the Second Defendant to those proceedings, Mr Maksat Arip ("***Mr Arip***"), the former Chief Executive Officer of the Claimants' corporate group (***the "KK Group"***), had perpetrated a very large and sophisticated fraud on the Claimants, with the connivance of his co-defendant Ms Shynar Dikhanbayeva, the former Chief Financial Officer of the KK Group. Picken J gave judgment against Mr Arip and Ms

Dikhanbayeva in favour of the Claimants for US$298,834,593 by way of damages and interest, and ordered a payment on account of costs of £8 million (***the "Picken J Order"***). Nothing has to date been paid towards either of those sums.

3. Mr Arip was subsequently found guilty of contempt of court in absentia and sentenced to prison for two years by Phillips J, having ignored an injunction granted by Jacobs J requiring him to deliver up valuable wristwatches in part-satisfaction of the Picken J Order. His wife, Mrs Sholpan Arip ("***Mrs Arip***"), and his mother-in-law Ms Larissa Asilbekova ***("Ms Asilbekova***") were subsequently found by Jacobs J to have engaged in an "*asset dissipation and concealment exercise*". Jacobs J made an order pursuant to section 51 of the Senior Courts Act 1981 that they be jointly and severally liable for the £8 million costs order, having assisted with the funnelling and concealment of monies used to fund Mr Arip's defence. Mrs Arip and Ms Asilbekova have made no payment towards that obligation, and Ms Asilbekova has failed to comply with asset disclosure orders contained within a post-judgment worldwide freezing order subsequently made against her.

4. The Claimants now seek to enforce the Picken J Order against valuable assets which they claim to be amenable to such enforcement on the following bases:

   i) The Claimants bring a tracing claim, in case CL-2019-000494 (***the "Tracing Proceedings***") on the basis that the monies stolen from them by Mr Arip (***the "Stolen Funds"***) can be traced or followed into a variety of assets said to be held by companies within Cypriot trusts structures for the benefit of Mr Arip and his family. Those assets are four sets of properties in London (known as the "***Wycombe Property***", the "***Montrose Property***", the equity in the "***Burlington Properties***" and the "***Ilford Properties***", together the "***Properties***") as well as a sum of £72 million in cash currently held in a Swiss bank account (collectively, the "***Assets***").

   ii) Alternatively, the Claimants seek (also in the Tracing Proceedings) orders under section 423 of the Insolvency Act 1986 in respect of a number of the transactions which resulted in the Assets being transferred to the companies in question, the objective being to obtain orders transferring the Assets to the Claimants in part satisfaction of the Picken J Order.

   iii) In the further alternative, the Claimants seek to enforce the Picken J Order by way of applications for final charging orders against the Properties. Those applications were originally made in the Main Proceedings, and ordered to be tried alongside the claims made in the Tracing Proceedings. They are advanced as a fallback in the event that the Claimants are not found to be the beneficial owners of the Properties. The Claimants say that if they are not the beneficial owners of the Properties, then Mr Arip is the beneficial owner, and the Claimants are entitled to enforce the Picken J Order against them via final charging orders and orders for their sale.

(B) PROCEDURAL BACKGROUND

5. The First to Fourth Defendants in the Tracing Proceedings (i.e. Mr Arip, Ms Dikhanbayeva, Mrs Arip and Ms Asilbekova) contested the proceedings against them, leading up to the trial before Picken J and the section 51 application referred to above.

However, they have not, at least directly, participated since then: they have not filed pleadings, given disclosure or participated in any other way at the enforcement stage.

6. The proceedings have been defended by the Fifth to Fourteenth and Seventeenth Defendants to the Tracing Proceedings, whom for simplicity I shall refer to as the "***Defendants***"). Each of them is a corporate holding vehicle and/or trustee company which holds legal title to one of the Assets; and the sole director of each was Mr Andreas Georghiou, a Cypriot lawyer.

7. The Defendants' conduct of and approach to these proceedings has been unsatisfactory in several respects.

   i) In late 2018 Mrs Arip obtained anti-suit injunctions from the Cyprus courts, sought and granted without notice, to block the Claimants' attempts to enforce the Picken J Order in this jurisdiction. This delayed both the progress of the Charging Order Applications and the bringing of the Tracing Proceedings and resulted in two adjournments of the trial of these matters. The Cyprus courts were subsequently highly critical of the steps Mrs Arip had taken, including stating that she had "*conspired*" with the (then) trustee in respect of the relevant applications.

   ii) The Defendants have failed to comply with court orders, including unless orders relating to electronic disclosure made by Jacobs J in 2019.

   iii) The Defendants' legal team was required to review a particular batch of around 30,000 documents and to give disclosure to the Claimants as a result, but failed to do so. An order of Butcher J dated 10 June 2020 required the Defendants to allow independent IT experts, Deloitte, to image and word search relevant repositories held by Mr Georghiou's firm, in circumstances where the court was not satisfied that the exercise originally carried out by the Defendants' own IT expert, Mr Mavros, was reliable. The Defendants failed to comply with this order, seeking extensions of time and then seeking to subvert the order by obtaining (for a second time) without notice injunctive relief from the Cyprus courts preventing Deloitte from progressing with the work. The Defendants eventually abandoned that injunction, but sought a further extension of time, and refused to make a payment to Deloitte required by the Butcher J order (until the Claimants made an application to force payment). After Deloitte had completed its work, the Defendants delayed taking delivery of the 30,817 apparently responsive documents Deloitte had found (which may be compared to the 4,709 documents found by Mr Mavros), and then sought further time to give disclosure, only to fail to provide it. The Defendants never complied with their obligation to provide this disclosure, even by the time of the trial before me.

   iv) As part of the events outlined above, in January 2020 Mr Justice Andrew Baker granted the Defendants relief from sanctions by what he described, at a subsequent hearing on 3 July 2020, as "*the skin of their teeth*". At that later hearing Andrew Baker J described the Defendants as a "*serial defaulter[s] on their disclosure obligations*". Also in July 2020, Andrew Baker J concluded that the Defendants had put before the court a "*false and seriously misleading picture*" as to how an issue relating to Mr Georghiou's health had impacted upon the Defendants' ability to comply with their obligations in relation to electronic

disclosure, and that they had "*set out to mislead the Court, in an effort to avoid complying with Butcher J's Order … their non-compliance … both was initially and most certainly is now entirely deliberate and calculated*". He found in this regard that "*the respondents are conducting themselves in the manner of parties with material they know needs to be disclosed to the claimants but they wish to hide*."

v) The Defendants have failed to satisfy two costs orders in favour of the Claimants: an order made on 5 March 2021 by Mr Christopher Hancock QC, sitting as a Deputy High Court Judge, requiring the Defendants to pay the Claimants £22,181 in respect of the costs of an application by the Defendants for a further extension of time to serve trial evidence; and an order made at the Pre-Trial Review requiring the Defendants to pay the Claimants £14,500 in respect of the Claimants' applications for permission to amend their pleadings.

8. Turning to more recent events, at the Pre-Trial Review the Claimants were given permission to amend their pleadings, and the Defendants to make responsive amendments by 14 June 2021. The Defendants did not serve their amended pleadings by that date, or by two subsequent extended dates of their own suggestion. On 21 June 2021, the Defendants served draft additional statements of case, addressing only the Claimants' amendments and hence intended to be read alongside the Defendants' existing statements of case. The Claimants did not object to these, while maintaining that they included points of no arguable merit; and the Defendants ultimately served a Re-Re-Re Amended Defence of the Fifth to Fourteenth and Seventeenth Defendants, and "*Re Re Points of Defence"* on behalf of the various Respondents to the Charging Order Applications, all dated 15 July 2021.

9. Shortly before trial, the Defendants issued an application, previously sent to the Claimants in unissued form in March 2021, seeking orders for the cross-examination of 14 additional witnesses, including Mr Arip himself. The Claimants addressed this matter in their Pre-Trial Review skeleton argument, at which time it was not pursued by the Defendants. The application suggested that the Defendants wished to cross-examine the witnesses whose evidence was before Picken J in the underlying fraud trial. However, this application was not pursued before me.

(C) WITNESSES

(1) Witnesses of fact

10. The Claimants' only witness of fact was Mr Hugh McGregor, who became the General Counsel of the KK Group after the frauds had been perpetrated. His evidence addressed the limitation defences advanced by the Defendants, by setting out the Claimants' state of knowledge at various times. Mr McGregor is a solicitor, and was General Counsel to the KK Group from 7 August 2013 (close to the time Claim No. CL-2013-000683 was issued) and September 2020 when he left the Group. One of Mr McGregor's tasks was to investigate the KK Group's suspicions that funds had been stolen from the KK Group by Mr Arip and others and that those Stolen Funds had ended up in Exillon. Mr McGregor's evidence sets out the development, over time, of the Claimants' state of knowledge, with respect to the material facts required to bring the Claimants' tracing and section 423 claims.

11. Mr McGregor disclosed that should the Claimants be successful in these proceedings, he would be entitled to a payment equivalent to 2% of the amount the Claimants recovered, net of legal costs (capped at £2 million) and the amounts invested by the litigation funders, HF3. This arrangement was disclosed during the Main Proceedings. Picken J noted that it was thus in Mr McGregor's interests if the Claimants were to succeed in that stage of the litigation, adding:

> "I have not lost sight of this when considering Mr McGregor's evidence, but my overall view remains that he gave evidence which was not only honest (as [counsel for the Defendants] accepted) but which was also, at least in general terms, reliable." (Judgment § 44)

12. I have formed the same view. I consider that, notwithstanding financial interest, Mr McGregor's evidence, which was largely based on and backed up by the documentary records, was honestly given and can be relied upon.

13. The Defendants' only witness of fact was Mr Andreas Georghiou, who was sole director of each of the Defendants apart from Carabello, whose sole director is a company of whom Mr Georghiou was the sole director. Sadly, Mr Georghiou passed away between the end of the trial and the circulation in draft of this judgment. His evidence was relevant only to the Claimants' charging orders claim, and in particular to the question of the extent to which Mr Arip exercises control over the Properties that are the subject of that claim (which is one of the factors relevant to the question of nomineeship).

14. Mr Georghiou's first potential involvement was in July 2015, when a Cyprus company (Coperian Limited) of which he was a director had been selected by Mr Arip as replacement trustee of the WS Settlement. However, his appointment did not proceed. After judgment in the Main Proceedings, Pilatus (of which Mr Georghiou was the sole director) was appointed trustee of the Wycombe Trust on 11 May 2018; and was then appointed trustee of the WS Settlement on 12 June 2018. Later, Mr Georghiou was in September 2018 appointed sole director and shareholder of Cooperton, the trustee of the Jailau Trust, and director of the Cyprus subsidiaries holding the various Burlington Properties, a few months after the Claimants obtained interim charging orders over those properties and an application to set aside those orders had been dismissed. In February 2019, Mr Georghiou became sole director of Douglasport and Pilatus became the sole shareholder. Douglasport is the trustee of the RaTalKha Trust, which indirectly owns (through Drez) (i) shares in Unistarel, the nominee company which owns the Montrose Property; and (ii) shares in Xyan, the nominee company which owns the Ilford Properties. This was a few weeks after the Claimants had obtained an interim charging order in respect of the Montrose Property and an application to set it aside had been dismissed. Mr Georghiou stated that his appointments were made so that he could "*handle any litigation that might arise*". The Claimants criticised him for adopting a partisan approach rather than one of neutrality, citing *Alsop Wilkinson v Neary* [1996] WLR 1220, and suggested on several occasions that he appeared to be advancing points that realistically must have originated with the Arips. The Defendants responded that that authority requires trustees to act neutrally in disputes between beneficiaries, but does not preclude a trustee from actively seeking to defend trust assets from external claims. I find it unnecessary to resolve this particular difference, not least given the limited relevance of Mr Georghiou's evidence in this case.

15. It is, however, right to note for completeness that Mr Georghiou's conduct of the litigation has been the subject of criticism on other grounds, some related to the matters mentioned in § 7 above.

i) In September 2018 solicitors Quinn Emanuel LLP told Mr Georghiou that they had decided to cease to act, citing difficulties in relation to periods both before and after Mr Georghiou's appointment.

ii) Mr Georghiou filed a witness statement suggesting that Quinn's departure had nothing to do with issues about disclosure, when the contemporary documents indicated the contrary, and successor solicitors Candey LLP insisted that he file a corrective witness statement (an approach which Mr Georghiou in his oral evidence described as blackmail).

iii) Subsequently, Mr Georghiou admitted authorising the unilateral application of "*Unrelated Search Terms*" ("USTs"), which was in breach of a disclosure order made by Jacobs J on 29 June 2019. Mr Georghiou asserted in the disclosure certificate that this had been done in part to avoid "*huge*" numbers of irrelevant documents being returned, when in fact only a few thousand documents were excluded as a result of Mr Georghiou's approach.

iv) Mr Georghiou knew, prior to a hearing on 10 June 2020 before Butcher J, that the Defendants' then IT expert, Mr Mavros of ISS, had destroyed the forensic images he had taken and which the Claimants were seeking to search afresh, but did not reveal this (or, I assume, instruct his legal team to reveal this) to Butcher J until after he had given judgment.

v) On 10 July 2020, following a number of hearings concerning the failure of two of the Defendants, Dencora and Unistarel, to give proper Extended Disclosure in the Charging Order Proceedings, Andrew Baker J in a judgment of 10 July 2020 said:

> "15. The evidence of Mr. Georghiou's actual condition and activity in recent days causes me to conclude that the respondents have set out to mislead the court, in an effort to avoid complying with Butcher J's order, and that their non-compliance, with that one exception concerning Mr. Georghiou's own statement, both was initially and most certainly is now entirely deliberate and calculated".
>
> "16. I am satisfied Mr. Georghiou is not, and save for a limited period of a few days from 22 June 2020 never has been, unable to engage or provide proper instructions. He is choosing not to do so".
>
> "22. The respondents are conducting themselves in the manner of parties with material they know needs to be disclosed to the claimants but they wish to hide. … They are also, by their conduct, treating the court and its orders with a degree of contempt that in the public interest cannot be seen not to have consequences". ([2020] EWHC 1860 (Comm))

vi) A few months later, I observed that the Defendants' "*overall conduct of this litigation to date, including the disclosure process, has been highly unsatisfactory to say the least*" [2020] EWHC 2431 (Comm) § 111, and in relation to the Defendants obtaining of *ex parte* injunctions in Cyprus to avoid complying with orders made by this court I said:

> "The only logical conclusion that can be drawn from all these matters is that the Respondents, through Mr Georghiou, are in this respect proceeding in bad faith, claiming to be complying with the orders of this court, whilst covertly taking steps to obtain orders from an overseas court designed to subvert the processes of this court and without making any remotely adequately disclosure to the overseas court of the true position". (§ 138)

16. In his oral evidence before me at trial, given by video link to Cyprus, Mr Georghiou had a tendency to be argumentative, frequently lapsing into speech-making rather than providing straightforward answers to questions. In addition, Mr Georghiou made clear that he would not "*go digging*" or "*go back in time*" to look into matters relating to the trusts prior to his appointments, including enquiries as to the legitimacy of the funds used to acquire the Properties under his control. Mr Georghiou also stated that he did not enquire with previous trustees as to whether they had received any letters of wishes from the settlors: even though such letters of wishes would ordinarily endure, and (in a particular instance put to him) the trustee of the RaTalKha trust, to whom a letter of wishes sent by Ms Asilbekova had been addressed, had remained the same – Douglasport Management Limited – with Mr Georghiou merely being appointed as new sole director. These statements by Mr Georghiou indicated, in my view, a surprising reluctance to make appropriate enquiries.

17. For all these reasons, I have concluded that I should treat Mr Georghiou's evidence with caution.

(2) Expert witnesses

18. The Claimants' Kazakh law expert was Mr Drew Holiner. Mr Holiner is an English barrister and a qualified Russian lawyer. He is not a qualified Kazakh lawyer, and stated in oral evidence that he did not regularly practice in Kazakhstan and had appeared in court in Kazakhstan only once over 20 years ago. On the other hand, Mr Holiner has over 20 years of experience in litigation, advocacy and advisory work involving matters with a close connection to Russia and other Member States of the Commonwealth of Independent States ('***CIS'***) (which includes Kazakhstan), with specialist knowledge of Russian and CIS substantive and procedural law and practical experience of its implementation in judicial disputes. Beginning in 1997, he commenced work full-time in the legal department of a large international NGO with operations in all 12 CIS member states (i.e. current, former and associate members), including Kazakhstan, and conducted legal research and/or litigation to varying degrees in all of them. He also frequently sits as an arbitrator in international commercial arbitrations involving disputes involving the application of the laws of CIS member states. Mr Holiner added that he reads daily updates on Kazakhstan law. I am satisfied that Mr Holiner has sufficient expertise and experience

to qualify as an expert witness of Kazakh law. He gave his evidence clearly and moderately in a non-partisan manner.

19. The Defendants' Kazakh law expert was Ms Kulzan Mehrabi. Ms Mehrabi is a qualified Kazakh lawyer entitled to practice Kazakh law. She is a qualified advocate in the civil courts of Kazakhstan and the Astana International Financial Centre Court in Kazakhstan. Ms Mehrabi is also an English solicitor. Her professional experience, over more than 20 years, includes practising Kazakh corporate and commercial law as senior counsel and partner at leading Russian and Kazakh law firms, working as an in-house lawyer at a large Kazakh oil company, and as senior expert at the Department of Legislation and International Law in the Kazakh Ministry of Justice. I am satisfied that Ms Mehrabi had sufficient expertise and experience to give expert evidence of Kazakh law. Her oral evidence at times seemed a little discursive, but was given fairly, including appropriate concessions (as they might be regarded), and I am satisfied that it represented her genuine professional opinion. The Claimants' cross-examination of Ms Mehrabi included an excursion into the relevance or otherwise of Russian law when considering Kazakh law principles, it being suggested that she was out of step with the prevailing view. However, that was a matter on which it appeared the (different) Kazakh law experts in the Main Proceedings had disagreed; and given also its at best marginal relevance to the present case, I did not find it of assistance in assessing Ms Mehrabi's evidence.

20. The Claimants' Cypriot law expert was Alexandros Gavrielides, a Cypriot advocate qualified to practice in Cyprus, and a partner in a Cyprus law firm. He has practised as a Cyprus lawyer since 2002, and is also an English barrister. His main areas of practice are multi-jurisdictional disputes and civil fraud. His oral evidence was cogent and measured. He accepted in cross-examination that he had, at one point during the proceedings, placed a call to Mr Georghiou's doctor's surgery, at the request of the Claimants' solicitors, in order to check whether a medical report on which Mr Georghiou had relied was genuine. Mr Gavrielides had at this stage not yet been formally instructed as expert for trial, though he had given CPR 35 expert reports on other aspects of this dispute. He said that he may well not have agreed to take this step if he had known that he was going to be instructed as expert for trial. It was in my view an unwise step for Mr Gavrielides to have taken, since it might be seen as indicating partiality. Nonetheless, having considered his written and oral evidence as a whole, I am satisfied that Mr Gavrielides was giving evidence as an independent expert and that I can place reliance on his opinions.

21. The Defendants' Cypriot law expert was Stavros Pavlou, an advocate qualified to practice in Cyprus, and Senior and Managing Partner of a Cyprus law firm. He has practised as a Cyprus lawyer since 1986, and is also an English barrister. His main areas of practice include company law, mergers & acquisitions, banking & finance and commercial litigation. His oral evidence was sometimes argumentative, and in the discussion about the compatibility of Article 3(3) of the CIT with the Cypriot Constitution (which I discuss later) I sensed a reluctance on Mr Pavlou's part to accept points that might be unfavourable to the Defendants.

22. The Claimants' forensic accountancy expert was Ms Debbie Revill, a chartered accountant of over 16 years' experience and a partner at Haberman Ilett. She has extensive experience in forensic accounting work, including dispute work in a wide variety of civil and criminal matters. Ms Revill's report, accompanied by numerous

appendices, was meticulous and comprehensively referenced to the underlying documents. Her oral evidence was clear and carefully considered. I have no hesitation in accepting her written and oral evidence.

23. The Defendants' forensic accountancy expert was Mr Iacovos Ghalanos, a chartered accountant with over 20 years' experience and a partner at KPMG, Cyprus. The joint memorandum produced by Ms Revill and Mr Ghalanos recorded that there were no material areas of disagreement between Ms Revill and Mr Ghalanos, albeit Mr Ghalanos said there were certain aspects of Ms Revill's report (principally Ms Revill's analysis tracing funds misappropriated from the Claimants into the Exillon shares) which he "*cannot agree or disagree*". That was, Mr Ghalanos said, because he was either not provided with the relevant documents (all of which were either disclosed or exhibited to Ms Revill's report), or because he had not been explicitly instructed to identify certain of the sources of funds. Since Mr Ghalanos did not, however, positively dispute any of Ms Revill's report, the Claimants did not require him to be called to give oral evidence.

(D) PRINCIPAL FACTS

(1) The Underlying Proceedings

24. The Claimants are part of a corporate group, the KK Group, in the business of recycling, paper and packaging in Kazakhstan.

25. The First Claimant is an Isle of Man company. It was listed on the main board of the London Stock Exchange following its IPO in July 2007, although it was delisted in March 2016 essentially due, the Claimants say, to financial difficulties caused by Mr Arip's frauds.

26. The Second Claimant is a Kazakh company ultimately owned by the First Claimant. It is the holding company of the KK Group's main operating business. The Second Claimant has been subject to various insolvency processes in Kazakhstan, again, the Claimants say, largely as a result of the financial difficulties caused by the frauds.

27. The remaining Claimants are Kazakh entities and subsidiaries of the Second Claimant.

28. Mr Arip and Ms Dikhanbayeva, who were defendants to the underlying fraud claim and are also defendants to the Tracing Proceedings, are former directors of the Second Claimant. They functioned as the CEO and Chief Financial Officer of the KK Group. Mr Arip was also a substantial shareholder of the KK Group until 2009 when he sold his remaining interest in the business and left Kazakhstan.

29. Mr Arip subsequently renounced his Kazakh citizenship and acquired dual nationality in St Kitts and Cyprus.

30. Picken J's detailed judgment dated 22 December 2017 ([2017] EWHC 3374 (Comm)) concluded that Mr Arip and Ms Dikhanbayeva had planned and executed three highly sophisticated and very substantial schemes to defraud the KK Group. These schemes involved the use of a network of nominee companies and individuals, including Ms Asilbekova. Picken J found Mr Arip to be a "*thoroughly dishonest*" witness (§ 65) and

that he had called other dishonest or unreliable witnesses to support his false defence (§§ 82-124).

31. On 28 February 2018, following a further judgment by Picken J on various quantum and consequential matters, the Claimants obtained final judgment against Mr Arip and Ms Dikhanbayeva for a total of US$298,834,593, and an order for £8,000,000 by way of interim payment on account of the costs, to be paid by 4pm on 14 March 2018. The worldwide freezing order already in place against Mr Arip pending trial was increased in value to reflect these orders.

32. Mr Arip and Ms Dikhanbayeva have not paid any of the judgment sum nor the interim payment. Mr Arip claimed, in the post-judgment asset disclosure he was required to give, that despite having spent several million pounds on legal fees, and despite his bankers estimating the value of the 'family pot' he controlled as being up to US$500 million, he was now worth no more than a few hundred thousand dollars. Following the judgment, Mr Arip filed for his own bankruptcy in Cyprus, an application which the Claimants challenged. In September 2019, Mr Arip withdrew his bankruptcy petition prior to the stage at which he would have been cross-examined on it.

(2) The Arip Trusts

33. Picken J found that Mr Arip committed the frauds between about 2006 and early 2009. In late 2008 Mr Arip, with the cooperation of Mrs Arip and Ms Asilbekova, started setting up a number of alleged offshore discretionary trusts. The Claimants say that they did this as part of a 'judgment-proofing' exercise, in order to conceal and/or attempt to put the proceeds of Mr Arip's frauds beyond the reach of his creditors (including, in particular, the Claimants).

34. Mr Arip disclosed only two of these trusts in his original asset disclosure in response to the freezing order, but the Claimants found at least two more as a result of disclosure orders against various parties, including the Arips' former bankers (Banque Julius Baer ("***BJB***")), and cross-examination of Mrs Arip on her assets during the course of the section 51 costs application against her. The Assets which are the subject of the proceedings are believed by the Claimants to be worth over £120 million in aggregate.

35. The trusts which Mr Arip caused to be set up are helpfully summarised in the following table, prepared by the Claimants on the basis of the documentation:

Name of Trust	***Date Established***	***Jurisdiction***	***Settlor***	***Beneficiaries***	***Current Trustee***	***Properties/Assets***
WS Settlement (originally called the Caspian Minerals I Settlement)	24 Dec 2008	Originally Guernsey. Subsequently changed to Cyprus in October 2010	Mr Arip	Originally Mr Arip, Mrs Sholpan Arip, Mr Arip's parents and issue. Subsequently changed to Mr Arip and Mrs	**Pilatus Trustees Limited** (Cyprus) ("Pilatus"**)** Sole director: Andreas Georghiou	c. £72m, held at BJB in Zurich. Note: Around $300m of the proceeds of the sale of shares in Exillon Plc (settled into the trust by Mr Arip), was distributed out of this Settlement to

Name of Trust	***Date Established***	***Jurisdiction***	***Settlor***	***Beneficiaries***	***Current Trustee***	***Properties/Assets***
				Sholpan Arip only		Mrs Sholpan Arip between July 2010 and Dec 2013.
Wycombe Settlement	25 April 2009	Originally Guernsey. Subsequently changed to Cyprus in September 2010	Mr Arip	Mr Arip, Mrs Sholpan Arip, Mr Arip's parents and issue	Pilatus	**19 Wycombe Square, Kensington ("the Wycombe Property")** Pilatus holds 100% of shares in **Carabello Holdings** Inc (BVI) ("**Carabello**") Carabello holds 100% of the shares in **Dencora Limited** (BVI) Dencora is the registered owner of Wycombe Square. Mr and Mrs Arip's asset disclosure values this property at £12.5-£14m.
Jailau Settlement	3 April 2014	Cyprus	Larissa Asilbekova. Funds to purchase properties all paid by Mrs Sholpan Arip, either directly or via Larissa Asilbekova.	Mr Arip and Mrs Sholpan Arip's children: Rabiga, Talal, and Khadisha.	**Cooperton Management Limited** (Cyprus) ("**Cooperton**") Sole director: Andreas Georghiou	**Four Flats and associated parking spaces in Burlington Place, Mayfair ("the Burlington Properties").** Cooperton holds 100% of the shares of each of the Cyprus Subsidiaries (**Fablink Limited, Waychem Limited, Standcorp Limited, Permafast Limited**). The Cyprus Subsidiaries are each the registered owners of the four Burlington flats (plus parking spaces). The aggregate

Name of Trust	***Date Established***	***Jurisdiction***	***Settlor***	***Beneficiaries***	***Current Trustee***	***Properties/Assets***
						acquisition price of these properties was £18.5m.
RaTalKha Settlement	7 Jan 2013	Cyprus	Larissa Asilbekova	Originally Larissa Asilbekova, and Mr Arip and Mrs Sholpan Arip's children: Rabiga, Talal, and Khadisha. Larissa Asilbekova was subsequently removed as a beneficiary.	Douglasport Management Limited (Cyprus) ("**Douglasport**")	**Flat 9, 10 Montrose Place, Belgravia ("the Montrose Property").** Pilatus owns 100% of the shares in Douglasport Douglasport holds 100% of the shares in **Drez Investments Corp** (BVI). Drez holds 100% of the shares in **Unistarel Corporation** (BVI). Unistarel is the registered owner of Montrose Place. The acquisition price of this property was £14m. Drez also holds 100% of the shares in Xyan Holdings Limited (BVI). Xyan is the registered owner of five properties on Ilford High Street (the "**Ilford Properties**"). The acquisition price of the Ilford Properties is understood to be around £10m.

36. The owners of the Assets shown in the above table are Defendants to the Tracing Proceedings, as follows:

    i) Mr Arip, Ms Dikhanbayeva, Mrs Arip and Ms Asilbekova;

    ii) Unistarel Corporation ("***Unistarel***"), a BVI entity which is the registered owner of the Montrose Property in Belgravia, and its BVI parent company Drez Investments Corporation ("***Drez***");

iii) Dencora Limited ("***Dencora***"), a BVI company which is the registered owner of the Wycombe Property in Kensington, and its BVI parent company Carabello Holdings Inc ("***Carabello***");

iv) Fablink Limited, Waychem Limited, Standcorp Limited and Permafast Limited (the "***Cyprus Subsidiaries***"), Cyprus companies which are the registered owners of the Burlington Properties in Mayfair, and their Cyprus parent company Cooperton Management Limited ("***Cooperton***");

v) Pilatus Trustees Limited ("***Pilatus***"), the current trustee of the WS Settlement which holds £72 million in a bank account in Switzerland, and owner of 100% of the issued shares in Douglasport Management Limited ("***Douglasport***") which, in turn, owns 100% of the issued shares in Drez; and

vi) Xyan Holdings Limited ("***Xyan***"), a BVI company which is the registered owner of the Ilford Properties on Ilford High Road, and (like Unistarel) a wholly-owned subsidiary of Drez.

37. Unistarel, Dencora, the Cyprus Subsidiaries, Cooperton and Xyan are also respondents to the Charging Order applications made by the Claimants in the Main Proceedings, by which the Claimants seek final charging orders over the Montrose Property, the Wycombe Property, the Burlington Properties and the Ilford Properties.

(3) The Peak Fraud

38. Picken J held Mr Arip liable to the Claimants for US$298,834,593. After deducting pre-judgment interest and interest awarded as damages, that reflects a net principal sum of US$142,271,351 of Stolen Funds. Picken J concluded that the Stolen Funds "*went into various entities associated with the Defendants, never to be seen again*".

39. At the trial before Picken J, Mr Arip's frauds were grouped into three headings, namely the Peak Fraud, the Land Plots Fraud and the Astana Fraud. The Peak Fraud is of particular relevance to the present tracing claim. Mr Arip used a company, Arka-Stroy, which he claimed was an independent construction company that had carried out legitimate construction works for the KK Group. Picken J found that Arka-Stroy was controlled by Mr Arip, and was, at Mr Arip's direction and on the basis of false contracts, paid very substantial sums by the KK Group to carry out very limited (at best) construction works. Some US$109.1 million were misappropriated in this way.

40. As part of the Peak Fraud, on 11 December 2008 the Second Claimant (under the control of Mr Arip) transferred KZT 121,877,000, the equivalent of approximately US$1 million, to Arka-Stroy pursuant to an alleged contract which Picken J found did not exist.

(4) Acquisition of Exillon shares

41. The sum of approximately US$1 million referred to above was moved through a series of companies connected to Mr Arip, and ultimately used to purchase 99.8% of the shares in Exillon. Exillon was an oil company which Mr Arip then developed after he fled Kazakhstan for Dubai, having sold on his stake in the KK Group to new owners.

42. In January 2009, US$900,000 of the US$1 million was used to acquire (i) US$450,000 worth of Exillon shares which were settled into the WS Settlement, and (ii) another US$450,000 worth of Exillon shares, initially for the former Chairman of the KK Group, Mr Zhunus (through a trust of his, the Caspian Minerals II Trust). The remaining US$100,000 was used to acquire Exillon shares for Mr David Sturt, the Chief Operating Officer of Exillon.

43. These transactions were undertaken using, *inter alia*, two investment vehicles, Oreo Limited ("***Oreo***") and Pleco Limited ("***Pleco***"). Oreo and Pleco between 13 June 2008 and 9 January 2009 held the only two shares in Exillon then in issue, for Mr Arip and Mr Zhunus respectively. Oreo held one share in Exillon for Mr Arip in a trust known as the "*Oreo Settlement*". Pleco held one share in Exillon for Mr Zhunus in a trust known as the "*Pleco Settlement*". Rysaffe Fiduciaries SARL ("***Rysaffe***") was the original trustee of the Oreo and Pleco Settlements. On 9 January 2009, Oreo and Pleco each transferred their one existing share in Exillon to Rysaffe, in its capacity as the trustee of Mr Arip's and Mr Zhunus' respective investment vehicles – known as the Caspian Minerals I Trust (later known as the WS Settlement) and the Caspian Minerals II Trust, for a consideration of US$1. During the same period, Oreo and Pleco on 12 December 2008 received, half each, the US$1,000,000 referred to above, representing part of the Peak Fraud proceeds. Those funds were paid (as to US$900,000 via Rysaffe and as to US$100,000 direct) to Exillon in return for the issue of further shares in Exillon to Rysaffe as trustee of the WS Settlement (449,000 shares) and as trustee of the Caspian Minerals II trust (449,000 shares), and to Mr Sturt (100,000 shares).

44. The overall flow of funds may be summarised as follows:

    i) KZT 121,877,000 (equal to US $1 million) was misappropriated from the Second Claimant on 11 December 2008 and paid to Arka-Stroy, allegedly pursuant to a contract (which did not exist), as part of the Peak Fraud.

    ii) On 11 December 2008, Arka-Stroy (controlled by Mr Arip) transferred the funds it had received to Holding Invest (controlled by Mr Arip and jointly owned by Mr Arip and Mr Zhunus).

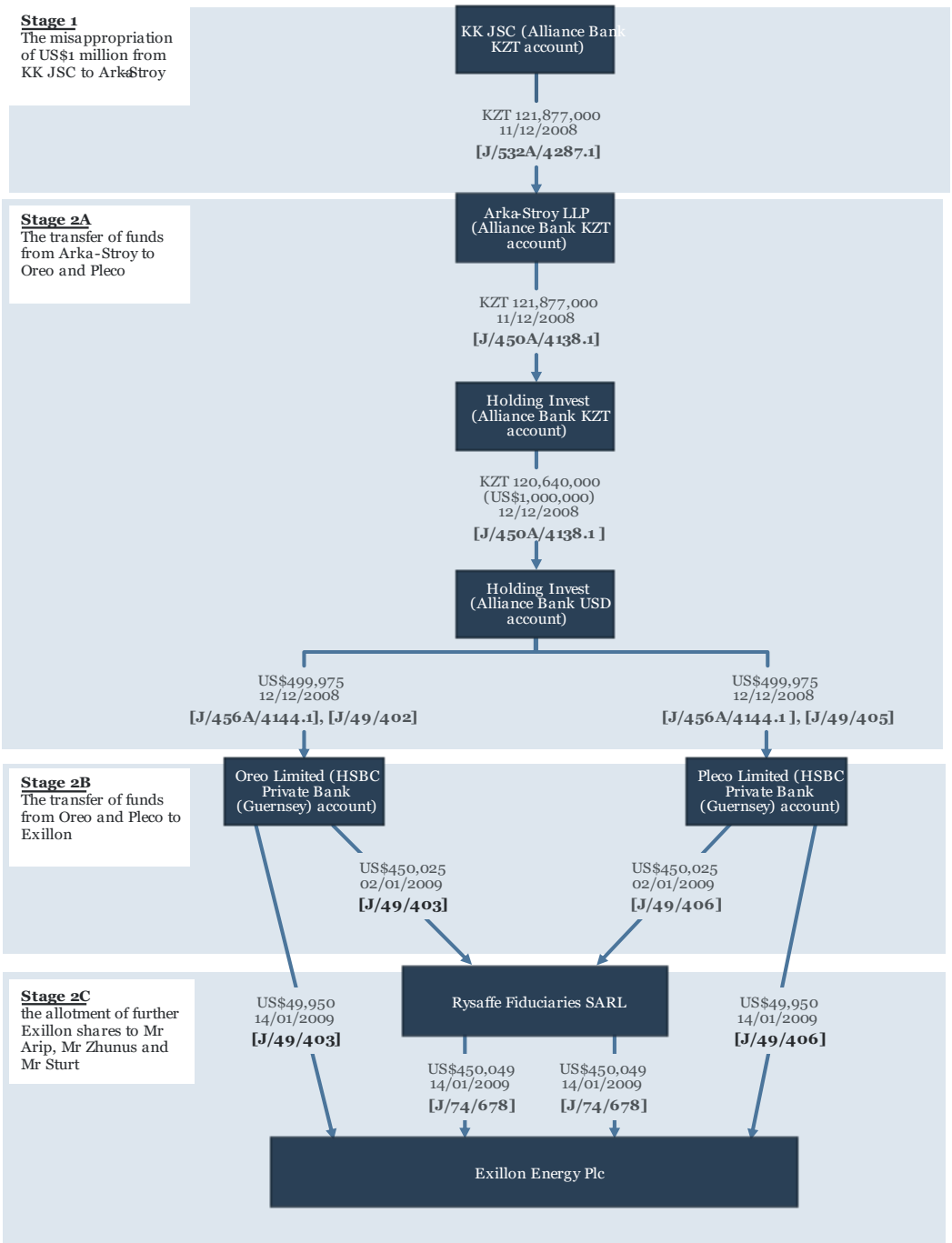
    iii) On 12 December 2008, Holding Invest converted the KZT sums into US dollars and transferred US $499,975 to each of Oreo (controlled by Mr Arip) and Pleco (controlled by Mr Zhunus).

    iv) On 2 January 2009, Oreo and Pleco each transferred US $450,025 to Rysaffe (at the time the trustee of the WS Settlement) (leaving Oreo and Pleco with US $49,950 each).

    v) On 14 January 2009, Rysaffe, Oreo and Pleco paid a total US $999,998 to Exillon, made up of two payments each of US $450,049 from Rysaffe, and payments of US $49,950 each from Oreo and Pleco. That was the consideration for the shares issued to Rysaffe, as trustee of the WS Settlement and as trustee of the Caspian Minerals II Settlement, and to Mr Sturt.

45. The following diagram prepared by the Claimants illustrates the series of transactions referred to above:

Appendix F: The transfer of funds in Stages 1 and 2



46. Later in 2009, the WS Settlement acquired the shares in Exillon held by Mr Sturt and by Mr Zhunus's trust. This occurred through the following somewhat convoluted series of transactions.

(a) Acquisition of Mr Sturt's shares

47. On 30 October 2009, Mr Arip, acting in his personal capacity, entered into an agreement to purchase Mr Sturt's 100,000 shares in Exillon, for a consideration of US$900,000.

By a memorandum of wishes dated November 2009, Mr Arip requested that Rysaffe consider accepting the 100,000 shares in Exillon purchased from Mr Sturt as an addition to the WS Settlement. Mr Arip stated "*this will result in the Trust holding 100% of the Issued shares in EE [Exillon] in advance of EE's imminently anticipated application for an initial public offering*". Completion of the sale of Mr Sturt's shares took place on 13 November 2009 and, on the same day, Mr Arip transferred the newly acquired shares to the WS Settlement. On 16 November 2009, the directors of Rysaffe met and resolved to accept the 100,000 shares purchased from Mr Sturt as an addition to the WS Settlement.

48. It is not clear precisely which shares were used by Mr Arip to purchase Mr Sturt's shares. However, it is clear from the series of transactions outlined above that those shares had initially been purchased for Mr Sturt using part of the Stolen Funds (as Mr Arip must have known).

(b) Acquisition of Mr Zhunus's shares

49. On 14 October 2009, the directors of Rysaffe (as trustee of the WS Settlement) met to discuss a request from Mr Arip for the trustee to consider the purchase of the 450,000 Exillon shares held by the Caspian Minerals II Trust (i.e. Mr Zhunus' trust). The directors considered and approved the proposed share purchase and the terms of a draft sale and purchase agreement. On 15 October 2009, Rysaffe (as trustee of the WS Settlement) entered into an agreement to purchase 450,000 Exillon shares from Rysaffe Actionnaires Sarl ("***Rysaffe Actionnaires***") (as trustee of the Caspian Minerals II Trust, having apparently replaced Rysaffe itself in that role between January and October 2009). The shares would be transferred to Rysaffe on the date of completion. In return, the WS Settlement agreed to make payments to the Caspian Minerals II Trust in accordance with the following payment schedule:

i) the WS Settlement would pay the Caspian Minerals II Trust US$100,000 per calendar month (defined in the agreement as a "*Deferred Consideration Payment*") (Schedule 3 clause 1.1(a));

ii) in the event of Exillon's IPO, the Deferred Consideration Payments would cease and, instead, the WS Settlement would make annual payments of US$10 million (defined in the agreement as an "*Annual Payment*"), the first Annual Payment falling due on the first anniversary of the date of the IPO, with subsequent payments to be made on the anniversary of the first Annual Payment (Schedule 3 clause 1.1(c)); and

iii) a final payment of US$100 million (less any payments already made, including by way of Deferred Consideration Payments and Annual Payments) would be made on the tenth anniversary of the completion date (Schedule 3 clause 1.2).

50. The agreement also contained a provision by which the WS Settlement could elect at any time to make all or part of the outstanding payments early, discounted by reference to a formula set out in the agreement (Schedule 3 clauses 2 and 3).

51. The transaction completed on 16 November 2009.

52. By a memorandum of wishes dated 14 July 2010, Mr Arip requested that Rysaffe consider distributing the sums of US$40,826.50 and £8,566 from the WS Settlement for the benefit of Mr Arip and his family. According to Mr Arip, the proceeds of the distribution would be used for the purpose of "*settling my personal debt to Baglan Zhunus, as I have agreed with Baglan, being equivalent to the outstanding professional fees due in the same amount by Baglan Zhunus' family trusts*".

53. On 1 September 2010, Mr Zhunus signed an acknowledgement of debt addressed to Mr Arip, by which Mr Zhunus purported to confirm that he was indebted to Mr Arip in the amount of US$26 million, such sum described as "*being money and/or other financial assistance provided by [Mr Arip]*".

54. On 14 October 2010, Heptagon (which by that time had replaced Rysaffe Actionnaires as the trustee of the Caspian Minerals II Trust) entered into a guarantee and charge on receivables with Mr Arip, by which Heptagon agreed to guarantee the repayment by Mr Zhunus of the US$26 million purportedly owed to Mr Arip.

55. On 15 October 2010, Mr Arip entered into a deed of assignment of receivables with Cypcoserve (which by that time had replaced Rysaffe as the trustee of the WS Settlement), by which Mr Arip assigned to Cypcoserve (as trustee of the WS Settlement) the debt of US$26 million purportedly owed to him by Mr Zhunus.

56. Two weeks later, on 29 October 2010, Cypcoserve (as trustee of the WS Settlement) entered into a deed of set-off, release and discharge with Heptagon (as trustee of the Caspian Minerals II Trust) in relation to the debt purportedly owed by Mr Zhunus to Mr Arip.

57. On 9 February 2011, Cypcoserve (as trustee of the WS Settlement) entered into a settlement agreement with Heptagon (as trustee of the Caspian Minerals II Trust) in relation to the outstanding consideration due under the agreement dated 15 October 2009 for the purchase of the Exillon shares. According to the settlement agreement, at the date of the settlement agreement, the outstanding balance of consideration due to the Caspian Minerals II Trust for the sale of its Exillon shares was US$74 million, presumably to reflect the payment of US$26 million by way of set-off. According to the agreement, if full settlement was made on 30 April 2011, the amount payable by the WS Settlement, discounted by reference to the pre-payment formula, was US$46 million. Cypcoserve had offered, however, and Heptagon had agreed to accept, a payment of US$25 million on 30 April 2011 in full and final settlement of the outstanding consideration due.

58. On 8 April 2011, the directors of Cypcoserve instructed Julius Baer International Limited ("***JBI***") to transfer US$25 million to Heptagon as trustees of the Caspian Minerals II Trust. This payment was funded and paid as follows:

    i) on 29 March 2011, the WS Settlement sold 20,313,000 shares in Exillon at 400 pence per share, for a total of £81,252,000;

    ii) on 1 April 2011, Cypcoserve's GBP bank account was credited with payments of £54,032,788.00 and £23,959,132.00, i.e. a total of £77,991,920.00, which I infer represented part of the proceeds of sale of the Exillon shares described at (i) above; and

iii) on 5 April 2011 Cypcoserve transferred £15,389,018.84 from its GBP account into its USD account, which amounted to USD$25,001,000.

59. The overall effect of the above transactions was that:

i) the WS Settlement agreed to purchase the 450,000 shares in Exillon held by the Caspian Minerals II Trust (i.e. Mr Zhunus' trust) for US$100 million. As noted earlier, the chain of transactions indicates that those shares were originally purchased with part of the Stolen Funds;

ii) US$26 million of the purchase price was paid by way of set-off of a debt in that amount purportedly owed to Mr Arip by Mr Zhunus (and guaranteed by Mr Zhunus' trust), after Mr Arip's right to receive that amount had been assigned to the WS Settlement;

iii) US$25 million of the purchase price was paid by the WS Settlement in April 2011 using the proceeds of the sale of some of the Exillon shares (which had themselves been purchased with part of the Stolen Funds); and

iv) the remaining US$49 million of the purchase price was waived in return for the payment of the US$25 million.

60. On the other hand, in evidence given in proceedings brought against Mr Arip and Mr Zhunus by Alliance Bank, Mr Zhunus said that Mr Arip:

> "...told me that Exillon's business was not doing that well and was still facing significant challenges, and he wanted to reach an agreement whereby $25 million would be paid to discharge all sums that were then outstanding under the original SPA. Although $25 million was a big reduction on the $100 million originally anticipated, it was still a huge amount of money and more than enough to provide for all my family". (adopting the translation cited in the Claimant's Statement of Facts)

Mr Zhunus made no reference to any further consideration (whether US$26 million or any other sum) having been received by way of set-off.

61. If Mr Zhunus' account is accurate and complete, and the only consideration received by the Caspian Minerals II Trust for the Exillon shares was the US$25 million paid in April 2011, then that sum was paid using part of the proceeds of the Stolen Funds. If Mr Zhunus' account is incomplete, and part of the consideration for the Exillon shares was by way of set-off of an amount of US$26 million genuinely owed by Mr Arip to Mr Zhunus, then the same cannot be said. Nonetheless, it would still remain the case that the shares had initially been purchased for Mr Zhunus using part of the Stolen Funds, as Mr Arip must have known.

62. The end result was summarised by Exillon thus in the prospectus issued for its IPO on 17 December 2009:

> "Maksat Arip purchased the shares held by David Sturt and Baglan Zhunus and became the sole shareholder of the Group."

I agree with the Claimants that it is a reasonable inference that Mr Arip, as Chairman of Exillon at the time, approved the prospectus and was content thus implicitly to treat the WS Settlement to be his *alter ego* and to portray himself as the person who had bought Mr Zhunus' and Mr Sturt's shares, and who owned the rump of the Exillon shares.

(5) Sale of Exillon shares

63. A substantial number of new Exillon shares were issued in conjunction with the IPO mentioned above, resulting in the WS Settlement's shareholding being diluted so as to represent about 67.7% of the issued shares.

64. The WS Settlement then sold Exillon shares and paid most of the proceeds to Mrs Arip:

    i) on 25 June 2010, the WS Settlement sold 9,740,953 shares for £16,559,620; of this sum, £14,628,938 was distributed to Mrs Arip;

    ii) on 29 March 2011, the WS Settlement sold 20,313,000 shares for £81,252,000, of which approximately £60 million was distributed to Mrs Arip; and

    iii) on 4 December 2013, the WS Settlement sold a further 48,437,122 shares in Exillon for £182,607,949 – with a further 282,332 shares being sold two days later for £823,533.44 – and distributed all of those funds to Mrs Arip, save for £72 million which remained in an account with BJB (as a result of the worldwide freezing order which the Claimants had by then obtained against Mr Arip).

65. The Defendants do not dispute that Mrs Arip received these distributions, and they adduce no evidence to the effect that she had independent sources of wealth of the scale that would have been needed to acquire the Properties.

(6) Acquisition of the properties

66. Mrs Arip then used substantial sums, from the distributions to her mentioned above, to acquire the Properties.

(a) The Wycombe Property

67. The Wycombe Property was acquired by Dencora (the Eighth Defendant to the Tracing Proceedings) on 12 June 2009 for £9,557,500, from its then parent company Hytec. So far as it known, Hytec was an independent seller with no connection to the Arips.

68. On the same day, Carabello (the Seventh Defendant, which the Defendants say was at all material times owned by the Wycombe Settlement) acquired the one issued share in Dencora.

69. The acquisition of the Wycombe Property appears to have been funded in three ways:

    i) a deposit of approximately £1 million paid in May 2009 appears to have been paid directly by Mr Arip. Minutes of a meeting of the trustee of the Wycombe

Settlement dated 3 August 2009 record that £1 million was received from Mr Arip on 20 May 2009 as a capital contribution to the Wycombe Settlement;

ii) subsequent cash payments totalling approximately £2.9 million paid in June 2009 were described by Mrs Arip, in her evidence in other proceedings, as being paid by way of capital addition to the Wycombe Settlement (affidavit dated 23 January 2018 in proceedings in the Larnaca District Court pursuant to Originating Summons 5/2018); bank statements available record these monies as being transferred from Mr Arip (£2.77 million) and Mrs Arip (£130,000) to Carabello for onward payment to the seller of Dencora; and

iii) as to the balance, there was a loan from HSBC Private Bank to Carabello, in the sum of approximately £5,730,000.

70. The evidence does not allow specific identification of the ultimate source of the payments referred to in (i) and (ii) above. However, the payments were made in May/June 2009, shortly after the end of the period during which Mr Arip had been defrauding the Claimants. There is no evidence that either Mr Arip or Mrs Arip had other sources of significant wealth. Mr Arip's salary with the Claimants (by whom he was employed full time until 2008/09, at a salary which Mr McGregor suggested as at its peak no more than US$10,000 a month) could not have generated the sums in question; and he did not receive the US$2.5 million payment for his shares in the KK Group until September 2015. Indeed, in one of his witness statements Mr Arip said that *"The financial success I had later all came from my involvement in the subsequent project, Exillon Energy".* Mrs Arip until 2009 worked partly as an academic and partly as an accountant or financial analyst, including for the KK Group who paid her about US$3,000 a month. None of Mr Arip, Mrs Arip and Ms Asilbekova has ever provided any alternative explanation as to how they found the money to acquire the Assets. There is thus a compelling inference that the payments came from the Stolen Funds, and specifically the proceeds of sale of the Exillon shares.

71. As to the HSBC loan referred to in (iii) above, the Defendants state in their Amended Defence (§ 60(2)) that Carabello paid the interest, and then repaid the principal in full in January 2017, using monies lent by Mrs Arip. The documents in fact suggest that the loan was repaid earlier: on 19 February 2015 Mrs Arip paid £5.778 million to Carabello's HSBC account, which appears to have resulted in the outstanding loan being cleared. Ms Revill's report indicates that 99.69% of the funds paid by Mrs Arip to Carabello to clear the HSBC loan can be positively attributed to the distributions which she received from the WS Settlement, derived from the proceeds of sale of the Exillon shares. As to the remaining 0.31% the same considerations as set out in the preceding paragraph apply again.

(b) The Montrose Property

72. Mrs Arip gifted to her mother, Ms Asilbekova, some of the distributions made to her by the WS Settlement, specifically £8 million on 13 November 2012 and £7.2 million on 15 November 2012. Ms Asilbekova then transferred these funds to Drez (Sixth Defendant in the Tracing Proceedings) on 14 and 15 November 2012, in two tranches of £7.6 million each.

73. Drez used these monies to acquire the shares in Unistarel, the Fifth Defendant in the Tracing Proceedings, which owned the Montrose Property. It paid £15,130,000 to its conveyancing solicitors, Maxwell Winward LLP, which was paid on to the seller. These payments resulted in a prior mortgage over the Montrose Property being discharged.

74. The above is essentially common ground. The Defendants accept that Drez's acquisition of Unistarel was ultimately funded by money Mrs Arip had received as part of a distribution from the WS Settlement following a sale of shares in Exillon.

(c) The Burlington Properties

75. The Defendants accept that the funds used to acquire the equity in the Burlington Properties ultimately derived from distributions to Mrs Arip as a beneficiary of the WS Settlement.

76. The Burlington Properties were acquired by the Cyprus Subsidiaries (the Tenth to Thirteenth Defendants in the Tracing Proceedings) over the period 22 November 2017 to 6 February 2018 for a total price of £18,794,042.96. The purchase price was made up of cash of £9,860,438.63 and loans from BJB Guernsey (secured by way of mortgages over the relevant properties) of £8,933,604.33.

77. The cash contribution was paid in three stages:

i) a first deposit of £1,887,080.70 was paid by the Cyprus Subsidiaries on 2 May 2014. That money derived from the trustee of the relevant Arip family trust, the Jailau Trust, which had itself received the money from Ms Asilbekova the same day. Ms Asilbekova had received the money from Mrs Arip on 15 April 2014;

ii) a second deposit of £1,890,113 was paid by the Cyprus Subsidiaries on 5 May 2015. This was funded by way of a payment the same day from the trustee of the Jailau Trust, which had itself received the funds from Ms Asilbekova on 29 April 2015, who had in turn received the funds from Mrs Arip on 10 March 2015; and

iii) the completion monies were paid in four stages:

a) in respect of Apartment 304 and parking space 9, on 26 October 2017 Mrs Arip transferred £2.1 million to the conveyancing solicitors; the following day she transferred a further £250,000 to them; the balance of the purchase price was funded by way of loan from BJB Guernsey;

b) in respect of Apartment 308 and parking space 10, on 14 November 2017 Mrs Arip transferred £750,000 to the conveyancing solicitors, and a further £1,050,000 three days later on 17 November 2017; the balance of the purchase price was funded by way of loan from BJB Guernsey;

c) in respect of Apartment 301 and parking space 48, on 1 December 2017 Mrs Arip transferred £1,814,000 to the conveyancing solicitors; the balance of the purchase price was funded by way of loan from BJB Guernsey; and

d) in respect of Apartment 305 and parking space 8, on 5 December 2017 Mrs Arip transferred £2,288,000 to the conveyancing solicitors; the balance of the purchase price was funded by way of loan from BJB Guernsey.

(d) The Ilford Properties

78. The Defendants accept that the Ilford Properties were acquired with monies ultimately deriving from the distributions to Mrs Arip from the WS Settlement.

79. In more detail:

i) on 9 June 2015, Ms Asilbekova transferred £755,000 to the conveyancing solicitors as a deposit for the Ilford Properties;

ii) on 25 August 2015, Mrs Arip transferred £7.6 million to Ms Asilbekova. These monies derived from the distributions previously paid to Mrs Arip out of the proceeds of sale of the Exillon shares;

iii) on 26 August 2015, Ms Asilbekova paid £7.5million to Douglasport, the trustee of the relevant Arip family trust, RaTalKha Trust;

iv) on the same day, Douglasport paid £7.4million to Xyan (the acquisition vehicle and Seventeenth Defendant in the Tracing Proceedings);

v) also the same day, Xyan transferred £7,141,540 to the conveyancing solicitors (it appears this included a commission of £292,000 to the agents); and

vi) completion took place two days later, on 28 August 2015, for a total consideration of £7.3million.

(E) OVERVIEW OF ISSUES

80. The main issues raised in relation to the tracing claim are:

i) which law governs the various aspects of the claim, including in particular the further relevance (if any) of Kazakh law and the relevance of Cypriot law;

ii) whether Mr Arip's theft from the KK Group was in breach of duties under Kazakh law that would in English law be regarded as fiduciary duties;

iii) whether the tracing claim is *prima facie* made out on the evidence (including the question of whether the Defendants are bound by the judgment of Picken J against Mr Arip);

iv) the impact, if any, of the Claimants' settlement with Mr Zhunus, the First Defendant to the Main Proceedings;

v) the relevance (if any) of certain loans made by a third party, Alliance Bank, to members of the Exillon group.

vi) whether the Defendants are *bona fide* purchasers or the claims are in any other way precluded by the Defendants being reputable professionals;

vii) the impact, if any, of an alleged concession made by the Claimants' previous leading counsel at a hearing before Leggatt J in January 2015;

viii) if and to the extent that Kazakh law applies to this issue, whether a tracing claim (in substance) can be brought, and the relevance of the fact that Kazakh law does not recognise resulting or constructive trusts;

ix) whether the Claimants' claims are time barred under English law; and

x) whether any parts of the claims are barred by principles of Cypriot law, in particular under the International Trusts Law 1992, or time barred under Kazakh law.

81. As regards the section 423 claim, the key issues are:

i) which law governs, including whether section 423 has any application to transactions governed by foreign law;

ii) whether the criteria under section 423 are made out; and

iii) whether the claims are time barred (or otherwise barred) under English or Cypriot law.

82. In the charging orders claim, the key issue is whether, if the Claimants are not the beneficial owners of the Assets, the Defendants are nominees for Mr Arip.

83. For completeness, I note that the claim form in respect of the tracing claim includes reference to section 14 of the Trusts of Land and Appointment of Trustees Act 1996, under which *inter alia* a person who has an interest in property subject to a trust of land may apply to court for an order; and that upon such an application the court may make various orders including one declaring the nature or extent of a person's interest in property subject to the trust. The Defendants make the point that section 14 does not in and of itself confer any interests, and that it also applies only to trusts of land (as opposed to money). However, the Claimants do not found their claim on section 14. It may, however, have relevance to the remedies which may be appropriate in the light of my conclusions. I do not need to consider it further in this judgment.

(F) TRACING CLAIM

(1) Governing law(s)

84. The Defendants submit that the tracing claim is governed by Kazakh law, and that that law does not recognise the concept of tracing. I deal here with which law(s) apply to the tracing claim.

85. The general rule as to disputes over real property is stated as follows in *Dicey, Morris & Collins, "The Conflict of Laws"* (15th ed.):

"Rule 132:

> All rights over, or in relation to, an immovable (land) are (subject to the Exception hereinafter mentioned) governed by the law of the country where the immovable is situate (lex situs)"

86. Dicey § 23-063 states that this general principle is "*beyond dispute, and applies to rights of every description. It is based upon obvious considerations of convenience and expediency. Any other rule would be ineffective, because in the last resort land can only be dealt with in a manner which the lex situs allows*". The 'Exception' mentioned in the rule, namely that the principle does not apply "*to the formal and material validity, interpretation and effect of a contract, and capacity to contract, with regard to an immovable"*, is not relevant to the present case.

87. On that basis, the starting point is that questions of title to the Properties are governed by English law.

88. The Supreme Court in *Akers v Samba* [2017] AC 443 stated it to be settled law that "*the situs or location of shares and of any equitable interest in them is the jurisdiction where the company is incorporated or the shares are registered*" (§ 19 per Lord Mance, § 80(1) per Lord Sumption).

89. It would follow that, insofar as relevant, questions of title to the Exillon shares, whose proceeds (a) were used to purchase the Properties and (b) remain in the form of the £72 million in the BJB account in Switzerland, would be likely to be governed by Manx law, Exillon having been incorporated in the Isle of Man. A possible alternative would be English law on the basis that the shares were traded on the London Stock Exchange. The parties have in any event agreed that, so far as relevant to these claims, Manx law is the same as English law.

90. It is debatable which law governs title to the £72 million itself. The most obvious candidates appear to be (a) Swiss law, as the *lex situs* of the account, or possibly (b) Manx law, as the law governing title to the shares whose proceeds the money represents (see above). However, (a) no party has pleaded that Swiss law applies, nor sought to call expert evidence on Swiss law nor otherwise adduce evidence of Swiss law: and absent such evidence, the court will apply English law; and (b) as already noted, the parties agreed Manx law to be the same as English law for present purposes.

91. Although English law, or a law presumed to be the same as English law, thus applies to questions of title (as such) to the Properties and the £72 million, the court may still need to have regard to Kazakh law when considering whether the English law preconditions for a tracing claim are met. It is generally a pre-condition of tracing in equity that there be a fiduciary relationship which calls the equitable jurisdiction into being (*Agip (Africa) Ltd v Jackson* [1991] Ch 547, 566H (CA) *per* Fox LJ). (The qualification 'generally' reflects the point I discuss later in relation to tracing following theft absent any pre-existing fiduciary duty.) It is for the English court to decide whether there was a fiduciary relationship: relationships governed by foreign laws with no concept of equity as such can nevertheless be capable of being characterised as fiduciary. However, in deciding whether the relationship is fiduciary, it is necessary to consider the duties to which the defendant was subject, namely the duties arising under the law governing his relationship with his principal or beneficiary. Hence in *Kuwait Oil Tanker Company S.A.K. v Al Bader* [2000] 2 All ER (Comm), the Court of Appeal considered and approved the judgment of Chadwick J in *Arab Monetary Fund v Hashim*

(15 June 1994 unreported). The primary claims were for conspiracy. However, in the course of considering the claimants' alternative claim for equitable relief based on breach of fiduciary duties Nourse LJ said:

> "192. In our judgment both the decision of Chadwick J in *Arab Monetary Fund v. Hashim* and the judge's application of it to the present case were correct. In *Hashim* the claimant sought recovery from the defendants on the grounds that they had acted in breach of fiduciary duties under the law of Abu Dhabi. Chadwick J said:
>
> > "In the context of a claim to invoke its equitable jurisdiction it is for the English court to decide whether the necessary fiduciary relationship exists. Where the duties to which a relationship gives rise are determined by foreign law, the question for the foreign law is what is the nature of those duties. It is for the English court to decide whether duties of that nature are to be regarded as fiduciary."
>
> Later, having referred to a passage in the judgment of the Privy Council delivered by Lord Templeman in *A.G. for Hong Kong v. Reid* [1994] 1 AC 324, 331, and to what is now rule 200 in *Dicey and Morris's Conflict of Laws*, Chadwick J continued:
>
> > "I find nothing in the rule which is inconsistent with the view that, in cases involving a foreign element in which an English court is asked to treat a defendant as a constructive trustee of assets which he has acquired through misuse of his powers, the relevant questions are: (i) what is the proper law which governs the relationship between the defendant and the person for whose benefit those powers have been conferred, (ii) what, under that law, are the duties to which the defendant is subject in relation to those powers, (iii) is the nature of those duties such that they would be regarded by an English court as fiduciary duties and (iv), if so, is it unconscionable for the defendant to retain those assets."
>
> 193 Our only possible criticism of Chadwick J's judgment is that he too referred to the defendants in that case being treated by English law as constructive trustees and not as actual trustees. There may have been special reasons for that. But whether there were or not, the inaccuracy of the description can have had no effect on the principles by which the defendants were held liable. In the present case the answers to Chadwick J's four questions are the following: (i) the proper law which governed the relationship between the defendants and the claimants was the law of Kuwait; (ii) the duties imposed on the defendants by arts 264 and 267 of the 1980 Civil Code were to make restitution in respect of the sums misapplied by them respectively; (iii) the nature of those duties was such that they would be regarded by an English court as fiduciary duties; and

> (iv) it would be unconscionable for the defendants to retain the funds. We accordingly hold that the claimants' alternative case is made out."

92. This approach is reflected in *Dicey* rule 172(2). Rule 172 states:

> "(1)The law applicable to a cause of action or issue determines whether a person is required to hold property on constructive or resulting trust.
>
> (2)Where the law applicable to a cause of action or issue requires a person to disgorge a benefit but does not know the concept of a constructive or resulting trust, the court may nonetheless regard that person as holding on a constructive or resulting trust, provided that no European or international instrument requires otherwise.
>
> (3)Where a constructive or resulting trust arises in accordance with sub-paragraphs (1) and (2), the law applicable to that trust is determined in accordance with Rule 168."

(For completeness, rule 168(1) states that *"The validity, construction, effects and administration of a trust are governed by the law chosen by the settlor or, in the absence of any such choice, by the law with which the trust is most closely connected"*.)

Dicey adds in the commentary at § 29-083:

> "Clause (2) of the Rule recognises that English courts have, at common law, considered constructive trusts to arise in circumstances where such trusts are unknown by the law governing the underlying cause of action, provided that the lex causae considers that the defendant owes obligations which would impose on him under that law a liability to disgorge a benefit. If so, an English court may hold him liable as constructive trustee when giving remedial effect to the substantive right arising under the lex causae."

citing *inter alia* the *Arab Monetary Fund* and *Kuwait Oil Tanker* cases.

93. Thus the court has to decide whether duties imposed by the relevant foreign law are to be regarded as fiduciary. If so, then subject to the broader questions as to applicable law considered earlier, English equitable principles relating to tracing and following can be invoked. I therefore do not accept the Defendants' proposition that if the law governing the relationship between the defendant and the person to whom he owed the duties – here Kazakh law – does not recognise tracing then no tracing claim can lie. In case I am wrong in that view, I consider later whether Kazakh law would in fact allow the Claimants to recover assets such as the Properties representing the proceeds of Mr Arip's fraud.

94. *Dicey* also contains a discussion of the law governing unjust enrichment, equitable claims and *negotiorum gestio*, beginning with the following rule:

> "Rule 257
>
> (1) A non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, which concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict which is closely connected with that unjust enrichment, is governed by the law which governs that relationship.
>
> (2) Where the law applicable cannot be determined on the basis of clause (1) and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country applies.
>
> (3) Where the law applicable cannot be determined on the basis of clauses (1) or (2), the law of the country in which the unjust enrichment took place applies.
>
> (4) Where it is clear from all the circumstances of the case that the noncontractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in clauses (1), (2) and (3), the law of that other country applies.
>
> (5) Notwithstanding clauses (1)-(4) above, the parties may agree to submit a non-contractual obligation arising out of unjust enrichment to the law of their choice" (citing, as to (5), with Regulation (EC) 864/2007, Art.14, i.e. the Rome II Regulation on the law applicable to non-contractual obligations)."

95. If applied to the present case, rule 257(1) would indicate that a claim against Mr Arip or Arka-Stroy based purely on the initial payments from the Claimants to Arka-Stroy would be governed by Kazakh law, which is the conclusion I have already reached and which the Claimants accept. However, insofar as the present case can be regarded as a claim for unjust enrichment, the Defendants have ultimately been unjustly enriched by reason of their legal ownership of the Assets, i.e. the Properties in England and funds in a bank account in Switzerland. Further, any unjust enrichment does not arise out of a relationship existing between the Claimants and the Defendants within rule 257(1). The application of rule 257(3), failing which rule 257(4), would therefore point to English law and (as regards the funds) Swiss law (which in the present case has not been shown to differ from English law).

96. It is, though, doubtful whether rule 257 would apply to the present case at all. The commentary in *Dicey* on 'proprietary restitution' notes that:

> "Scholars are divided as to the legal foundations of proprietary restitution in English law. Some argue that it is founded upon unjust enrichment. Others contend that such claims are distinct from the law of unjust enrichment and are founded upon the vindication of property rights. If replicated for choice of law purposes, the former view might lead to the application of the

> choice of law rules for unjust enrichment; the latter view might suggest that they should be classified as proprietary for domestic and choice of law purposes. The latter view would mean that the Rome II Regulation was inapplicable to such claims, since it is concerned with the law of non-contractual obligations and not with the law of property." (36-075, footnotes omitted)

97. *Dicey* also includes a somewhat inconclusive discussion of tracing claims at §§ 36-096 to 36-100:

> "36-096 It may be necessary for a person to demonstrate that the assets received by the defendant are the claimant's property. If the question is whether the claimant was the original owner of that property, or whether his equitable interest is defeated by, for example, a bona fide purchaser for value without notice, the question is one of property law.
>
> 36-097 Greater difficulty arises where the question is whether the claimant's property can still be identified in the hands of the defendant. If the claimant is able to rely on the choice of law rules which deal with transfers of property in order to show that the defendant has his property, he will be able to rely on the same choice of law rule to "follow" that property if it has not changed its form from one person to another. Where property has changed its form, the question may arise whether the claimant's original property can be "traced" through mixture or substitution. In English domestic law, it has been said of tracing that: "In truth, tracing is a process of identifying assets; it belongs to the realm of evidence. It tells us nothing about the legal or equitable rights to the assets traced." This is on the basis that a person who can identify asset through mixture or substitution cannot actually claim them unless he can also show a claim to the original assets, and may yet be defeated by the acquisition of title by a third party purchaser. But such a description should not lead to tracing being classified as "procedural" as tracing may be a necessary step to the assertion of substantive rights.
>
> 36-098 The better view is that the lex causae should determine whether a party can trace and that tracing should not be subject to an independent choice of law rule. Frequently, this will lead to the application of property choice of law rules, where a legal or beneficial owner of property asserts that his rights have not been defeated by mixture or substitution. But it may not inevitably do so. For instance, a claim for damages for knowing receipt should, for choice of law purposes, be classified as a non-contractual obligation. If, according to the law governing that obligation, it is necessary to show that the recipient did actually receive the traceable proceeds of the claimant's property through mixture or substitution, it is suggested that that law's rules of tracing should apply, so as not to distort the coherent application of that law and not to lead to recovery where it would not be

> possible by the lex causae because the assets are, by that law, untraceable.
>
> 36-099 When tracing in equity, the fact that the money may have passed through other jurisdictions which would not have recognised the concept of beneficial ownership is irrelevant, for these intermediate laws are not the lex causae. Where English law is the lex causae, the rules of tracing in equity do not require there to have been a fiduciary relationship arising under each law through whose jurisdiction the funds were passed, or for the concept of a trust to be known in each legal system.
>
> 36-100 Where it is sought to trace assets of a trust falling within the ambit of the Recognition of Trusts Act 1987, special rules are applicable …" (footnotes omitted)

98. It is notable that the discussion in the penultimate paragraph suggests that the 'lex causae' should be applied when determining, at the outset, whether a fiduciary relationship exists. Similarly, there is a suggestion in the discussion of fiduciary duties (for which no authority is cited) that the *Kuwait Oil Tanker* approach might not be appropriate in a case to which the Rome II Regulation applies:

> "Where the Rome II Regulation applies, the law applicable to the prior relationship (insofar as it falls within the ambit of the Regulation) or the law putatively applicable to the non-contractual obligation (where there is no prior relationship) determines whether a fiduciary relationship exists and whether the fiduciary is under an obligation to compensate the principal or to make restitution of a benefit received. This means that if, by the lex causae, a fiduciary relationship exists, the English courts will recognise it, even if such a relationship would not have arisen on the facts in English domestic law. Conversely, at common law, English courts were sometimes confronted with the difficulty that many legal systems are unfamiliar with the concept of a fiduciary duty. In *Kuwait Oil Tanker SAK v Al Bader*, the Court of Appeal held that in such a case, the correct approach was to enquire: (1) what was the proper law of the relationship between the defendant and the person for whose benefit the powers and duties are created; (2) what, under that law, are those duties; (3) whether these duties, thus defined, have the general characteristics of being fiduciary according to English standards; and, if so, (4) whether it is unconscionable for the defendant to retain the assets. Where the Rome II Regulation applies, however, there appears to be no basis for the court routinely to "translate" foreign duties into fiduciary duties and it should apply the lex causae directly." (*Dicey* § 36-072)

99. However, that begs the question of whether the Rome II Regulation applies. *Dicey* recognises in § 36-096, quoted above, that the question of whether a claimant was the original owner of property, or whether his equitable interest is defeated by, for example, a *bona fide* purchaser for value without notice, is a matter of property law. The

fundamental nature of the Claimants' claim in the present case is a proprietary one: they allege that Mr Arip stole their funds, and that those funds have through a series of steps been converted into the Assets. At least in those circumstances, I consider that the principles set out in §§ 85-93 apply, and that I am bound by the decisions cited there. I accordingly conclude that English law should be applied, subject to consideration at the first stage of whether the duties Mr Arip owed to the Second Claimant under Kazakh law would in English law be regarded as fiduciary in nature.

(2) Requirements for a tracing claim under English law

100. The relevant principles were summarised by Lord Millett in *Foskett v McKeown* [2001] 1 AC 102:

> "The process of ascertaining what happened to the plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances." (127B-C)
>
> "A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice. In the present case the plaintiffs' beneficial interest plainly bound Mr Murphy, a trustee who wrongfully mixed the trust money with his own and whose every dealing with the money (including the payment of the premiums) was in breach of trust. It similarly binds his successors, the trustees of the children's settlement, who claim no beneficial interest of their own, and Mr Murphy's children, who are volunteers. They gave no value for what they received and derive their interest from Mr Murphy by way of gift." (127G-H)
>
> "Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the

> nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset." (128D-E)
>
> "The successful completion of a tracing exercise may be preliminary to a personal claim (as in *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717) or a proprietary one, to the enforcement of a legal right (as in *Trustees of the Property of F C Jones & Sons v Jones* [1997] Ch 159) or an equitable one." (128F-G)
>
> "The simplest case is where a trustee wrongfully misappropriates trust property and uses it exclusively to acquire other property for his own benefit. In such a case the beneficiary is entitled at his option either to assert his beneficial ownership of the proceeds or to bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund. He will normally exercise the option in the way most advantageous to himself. If the traceable proceeds have increased in value and are worth more than the original asset, he will assert his beneficial ownership and obtain the profit for himself. There is nothing unfair in this. The trustee cannot be permitted to keep any profit resulting from his misappropriation for himself, and his donees cannot obtain a better title than their donor. If the traceable proceeds are worth less than the original asset, it does not usually matter how the beneficiary exercises his option. He will take the whole of the proceeds on either basis. This is why it is not possible to identify the basis on which the claim succeeded in some of the cases." (130A-B)
>
> "Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments (whether simultaneously or sequentially) out of the differently owned funds to acquire a single asset." (131G-H)

The point made in the penultimate paragraph quoted above about any increase in the assets' value is illustrated by the facts of *Foskett*. Misappropriated funds were used to pay life insurance premia, and the policy eventually paid out £1 million. Reversing the Court of Appeal, the House of Lords held that the claimants could recover the whole of that sum, not merely the amount of the premia funded by the misappropriated funds (plus interest).

101. Where a security over an asset is discharged, the remedy of subrogation is available to allow a party with an interest in the funds used to discharge the security to step into the

shoes of the party in whose favour the security previously operated, and to claim proprietary protection as if the security were still in place: *Menelaou v Bank of Cyprus* [2016] AC 176.

102. Tracing can occur even where the chain of payments and investments is complex. Lord Neuberger in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 said:

> "I do not doubt the general principle, reiterated by Lord Millett in *Foskett v McKeown* [2001] 1 AC 102, that if a proprietary claim is to be made good by tracing, there must be a clear link between the claimant's funds and the asset or money into which he seeks to trace. However, I do not see why this should mean that a proprietary claim is lost simply because the defaulting fiduciary, while still holding much of the money, has acted particularly dishonestly or cunningly by creating a maelstrom. Where he has mixed the funds held on trust with his own funds, the onus should be on the fiduciary to establish that part, and what part, of the mixed fund is his property. Unless constrained by authority, I should therefore be very reluctant to accede to the defendants' case on this point. In fact, it seems to me that authority actually supports my view." (§ 138)

103. Similarly, in *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35; [2016] AC 297 Lord Toulson said:

> "The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect." (§ 38)

and:

> "…the claimant has to establish a coordination between the depletion of the trust fund and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the misuse of the trust fund. This is likely to depend on inference from the proved facts, particularly since in many cases the testimony of the trustee, if available, will be of little value" (§ 40)

104. Inferences may be drawn where appropriate: see, e.g., the following statements from *El Ajou v Dollar Land Holdings Plc* [1994] 1 BCLC 464 (CA):

> "He [the trial judge] said that the plaintiff was unable, by direct evidence, to identify the moneys in the Keristal no 2 account with the money which Mr D'Albis had sent to Panama only a few weeks before. However, he thought that there was sufficient,

> though only just, to enable him to draw the necessary inference" (p.469 *per* Nourse LJ)
>
> "the judge said that the fact remained that there was no evidence that the Canadians [the alleged fraudsters] had any substantial funds available to them which did not represent proceeds of the fraud". (p.470 *per* Nourse LJ)
>
> "DLH challenges the judge's finding that the money can be traced to the proceeds of fraud which the Canadians had remitted to Panama. In my view, this was a finding which the judge was entitled to make. Mr Tager says that it might have been the proceeds of frauds on other people or even the money realised by the Canadians when they sold the business. It might have been, but as against the plaintiff I do not think that the Canadians would have been entitled to say so. Nor is DLH [the recipient of the traceable proceeds of the fraud]. The mixed fund was impressed with an equitable charge in favour of the plaintiff which was enforceable against the Canadians and persons claiming under them." (p.479 *per* Hoffman LJ)

105. Where a defendant claims to be a *bona fide* purchaser, he has the burden of proving that: see *Barclays Bank Plc v Boulter* [1998] 1 WLR 1 (CA):

> "It is well established at this level of decision that the doctrine of bona fide purchaser for value without actual or constructive notice is a defence which can be raised to defeat a claim of an equitable right or interest and that the burden is on the person raising that defence to plead and prove all its elements: it is a "single defence."" (8F-9A *per* Mummery LJ)

106. The concept of good faith is closely related to the existence of notice. *Snell on Equity* (34th ed.) states that "*in view of the development of the doctrine of notice it is difficult to imagine a case in which the purchaser does not have notice and yet is not acting in good faith*" (§ 4-021). *Lewin on Trusts* (20th ed.) states that *"there seems to be no case where the requirement of absence of notice has been established but the requirement of good faith has not"* (§ 44-124). A purchaser for valuable consideration is someone who acquires an interest by grant rather than operation of law, and is not a mere volunteer. The purchaser must obtain legal ownership of the asset, and do so before receiving notice of the claimant's equitable interest. As set out by the Privy Council in *Papadimitriou v Credit Agricole* [2015] 1 WLR 4265, notice may be:

    i) actual notice, i.e. knowledge of the probable existence of the proprietary right in question (§ 14); or

    ii) constructive notice, which arises where such notice is present where a reasonable person with the characteristics of the purchaser either (a) should have appreciated the probable existence of the proprietary right based on facts already available to him (§§ 14, 17 and 19), or (b) should have made enquiries or sought advice which would have revealed the probable existence of the right in question (§§ 14-15). Such enquiries should be made where there is a "*serious possibility*"

of a third party right; or a purchaser has "*serious cause to question the propriety of the transaction*".

107. Finally there is authority to the effect that tracing may occur where money is stolen even in the absence of a pre-existing fiduciary relationship:

> "Nor has the plaintiff any difficulty in satisfying the precondition for equity's intervention. Mr Murad was the plaintiff's fiduciary, and he was bribed to purchase the shares. He committed a gross breach of his fiduciary obligations to the plaintiff, and that is sufficient to enable the plaintiff to invoke the assistance of equity. Other victims, however, were less fortunate. They employed no fiduciary. They were simply swindled. No breach of any fiduciary obligation was involved. It would, of course, be an intolerable reproach to our system of jurisprudence if the plaintiff were the only victim who could trace and recover his money. Neither party before me suggested that this is the case; and I agree with them. But if the other victims of the fraud can trace their money in equity it must be because, having been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim: see *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 per Brennan J at pp. 387–90. There is thus no distinction between their case and the plaintiff's. They can rescind the purchases for fraud, and he for the bribery of his agent; and each can then invoke the assistance of equity to follow property of which he is the equitable owner." (*El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 717, 734b-e, *per* Millett J)

See also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12:

> "I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: *Stocks v. Wilson* [1913] 2 K.B. 235, 244; *R. Leslie Ltd. v. Sheill* [1914] 3 K.B. 607. Moneys stolen from a bank account can be traced in equity: *Bankers Trust Co. v. Shapiro* [1980] 1 W.L.R. 1274,1282C-E: see also *McCormick v. Grogan* (1869) L.R. 4 H.L. 82, 97." (p.716C-D)

(3) Duties owed by Mr Arip to the Second Claimant under Kazakh law

108. This topic was considered in the Picken J judgment:

> "The duties owed by company officers under Kazakh law are set out in Article 62 of the JSC Law. Entitled "Principles of the Functioning of the Company Officers", this provides (in translation) as follows:
>
> "The company officers shall:
>
> 1) perform the duties entrusted to them in good faith and use the methods which respond to the interests of the company and shareholders to the maximum possible extent;
>
> 2) not use the company's property or allow it to be used in contradiction with the company's charter and the decisions of the general shareholders' meeting and board of directors, or for personal gain, and commit no abuses during the execution of transactions with their affiliate;
>
> 3) ensure the integrity of the accounting and financial reporting systems, as well as independent audit;
>
> 4) supervise the disclosure and presentation of information on the company's activities in accordance with the requirements of the legislation of the Republic of Kazakhstan;
>
> 5) keep confidential the information on the company's activities, including for three years after the termination of their employment with the company, and was the company's internal documents provide otherwise."
>
> These are duties which are hardly unfamiliar." (§ 148)
>
> "There is, furthermore, another point to bear in mind: this is that certain of the claims brought against Arip and Dikhanbayeva are claims under the JSC Law which bear a marked similarity to the type of breach of fiduciary duty claims levelled by the claimant against its former directors in the RBG case." (§ 165)

109. For the same reasons, I conclude that the duties which Mr Arip breached under Kazakh law would be regarded as fiduciary duties under English law.

(4) Essential factual basis of the tracing claims

110. There are two key factual elements required to establish *prima facie* tracing claims.

111. First, the Claimants need to establish a breach by Mr Arip of one or more duties which English law would regard as fiduciary. (I leave aside the possibility referred to in § 107 above of a claim in equity based on fraud or theft without the need to show a prior fiduciary duty.) Picken J in the present case found that Mr Arip did breach duties which are regarded as fiduciary in English law, i.e. the duties under Articles 62 and 63 referred to in this passage from his judgment quoted in § 108 above. In respect of the alleged misappropriation of monies in the course of the Peak Fraud, Picken J concluded:

> "that Arip is liable to KK JSC under Articles 62 and 63 of the JSC Law, given that he was a director of KK JSC at all material times" (§ 304)

Similarly, in relation to the Land Plots fraud Picken J stated:

> "In conclusion, therefore, I am satisfied that the Land Plots Claim has been made out and that KK JSC is entitled to damages as sought but with credit being given as I have described. Specifically and for the avoidance of doubt, for the reasons which I have given in this section of the judgment, I have concluded: (i) that Arip is liable to KK JSC under Articles 62 and 63 of the JSC Law, given that he was a director of KK JSC at all material times" (§ 401)

112. The Defendants submit that they are not bound by Picken J's findings, as they were not party to the proceedings, and that his findings are inadmissible under the rule in *Hollington v Hewthorn* [1943] KB 587. However, an exception to that rule is that an earlier decision of a court exercising a civil jurisdiction is binding on the parties to that action *and* their privies in any later civil proceedings (*Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; [2004] Ch 1, § 38 *per* Sir Andrew Morritt V-C). One situation in which a person is a privy of a party to earlier litigation is where that person has acquired such rights as he may have from that party: see, e.g., the statement of Etherton MR – albeit couched in the negative – in *Michael Wilson & Partners v Emmott* [2018] EWCA Civ 51 that "*The assignors cannot be considered to be "privies" of MWP for the purpose of issue estoppel since they were not parties to the MWP Agreement or to the arbitration and they did not acquire their rights through MWP*" (§ 52).

113. In the present case each of the Defendants acquired such rights as it may have through Mr Arip (and/or Mrs Arip and/or Ms Asilbekova, who were also parties to the proceedings before Picken J). As the Claimants say, if Mr Arip were removed from the chain of title by which the Defendants claim the Assets in dispute, there would be no Assets. In slightly more detail:

i) In the case of Unistarel, Drez and the Montrose Property, it is admitted that the purchase monies to acquire Drez were used to discharge Unistarel's loan and related mortgage on the Montrose Property (Montrose Points of Defence § 11(a)); it is admitted that the ultimate source of the purchase monies was a distribution from the WS Settlement following the sale of Exillon shares (Amended Defence of the Fifth to Fourteenth and Seventeenth Defendants § 41(3)); and it is admitted that the Exillon shares were settled into the WS Settlement by Mr Arip (Amended Defence § 99).

ii) In the case of Carabello, Dencora and the Wycombe Property, it is asserted that the cash element of the purchase price came from the Wycombe Settlement (Amended Defence § 60(2)); and it is asserted that the funds in the Wycombe Settlement were settled by Mr Arip (Amended Defence § 60(5)).

iii) In the case of Cooperton, Fablink, Waychem, Standcorp, Permafast and the Burlington Properties, it is admitted that the cash element of the purchase price

for the Burlington Properties originated from a distribution to Mr Arip from the WS Settlement (Amended Defence § 81(3)); as already noted, the Defendants accept that the wealth of the WS Settlement derived from Exillon shares settled into the WS Settlement by Mr Arip.

iv) In the case of Pilatus, it is *inter alia* the trustee of the WS Settlement, the settlor and a beneficiary of which is Mr Arip.

v) In the case of Xyan, it is admitted that the monies used by Xyan to purchase and develop the Ilford Properties originated from the WS Settlement (Amended Defence § 140); as already noted, the Defendants accept that the wealth of the WS Settlement derived from Exillon shares settled into the WS Settlement by Mr Arip.

114. It follows that the Defendants are the privies of Mr Arip and are bound in these proceedings by the earlier findings against Mr Arip by Mr Justice Picken. Similarly, insofar as the Defendants also claim through Mrs Arip or Ms Asilbekova, they are bound by Picken J's findings against those persons.

115. In any event, the Claimants are in my view entitled to rely on the judgments against Mr Arip in the Main Proceedings, and against Mrs Arip and Ms Asilbekova in the section 51 application, for the facts and evidence recorded in them: see *Rogers v Hoyle* [2015] QB 265 (CA) § 57, *Super Max Offshore Holdings v Malhotra* [2018] EWHC 2979 (Comm) § 19. I agree with the summary given by Laurence Rabinowitz QC (sitting as a Deputy High Court Judge) in *JSC BTA Bank v Ablyazov* [2016] EWHC (Comm) 3071:

> "24. However, as BTA in response to this noted the application of the principle in *Hollington* has in recent years become substantially diluted. In particular:
>
> (l) Whilst a court cannot rely upon a bare finding of a prior court for example that a party has been negligent, it can rely upon the substance of the evidence which is referred to in the judgment of the prior court, including for example the contents of a document, the evidence given by a witness and the like: *Rogers v Hoyle* [2015] QB 265, [40], [55] (Christopher Clarke LJ).
>
> (2) Whilst the bare finding of a prior court is opinion evidence which a subsequent court cannot rely upon because the later court must make its own findings of fact, a reference in a judgment to the substance of evidence is itself evidence which the judge in a later case can take into account *"in like manner as he would any other factual evidence, giving to it such weight as he thinks fit"*: *Rogers* (supra).
>
> (3) Moreover, if the judge in a later case concludes that the matters of primary fact recorded in an earlier judgment justify the conclusions reached in that judgment, he is entitled to reach the same conclusion: *Otkritie International v Gersamia* [2015] EWHC 821 (Comm), [23] (Eder J)."

116. Secondly, the Claimants need to establish that the Assets represent the traceable proceeds of Mr Arip's frauds. Despite the lack of documentation forthcoming from the Defendants, the Claimants obtained substantial amounts of relevant documentation from third parties, including banks with which the Arip family held accounts or through which they transacted. The facts summarised earlier are largely based on that documentation, summarised in a very detailed Statement of Facts which the Claimants prepared for trial, and the Claimants' forensic accountancy evidence analysing the documents. The Defendants, whilst not formally admitting the facts revealed, did not dispute the story thus presented, either in their factual or expert evidence or in their opening submissions at trial.

117. The Defendants nonetheless cross-examined the Claimants' forensic expert, Ms Revill, on a limited number of aspects of her report. The cross-examination focussed to a considerable extent on the Defendant's recently introduced arguments relating to the settlement with Mr Zhunus, and the loans by Alliance Bank, which I deal with below.

118. Ms Revill was also cross-examined on a paragraph of her report in which she stated that she had compiled a list of the Stolen Funds based on the misappropriated payments claimed in the proceedings before Picken J, and had "*confirmed the amount and the transaction date of the Stolen Funds using bank statements and/or 1C cash ledger reports where this was relevant to my conclusions*." Ms Revill's instructions were that 1C is an accounting system used by the Second Claimant and a number of other subsidiaries of the First Claimant. Mr McGregor said it was a widely used piece of reporting software in the Russian speaking world. Counsel for the Defendant referred to a correction which Ms Revill made at the outset of her oral evidence arising from a spreadsheet which had incorrectly recorded as negative a bank balance which the source bank statements showed to a positive. It was suggested to Ms Revill that where information provided to her had been presented in the form of a spreadsheet compiled from the underlying source materials, there was a possibility of figures having been mistakenly inputted. Ms Revill in principle agreed, adding that she considered that the *contemporary* documents recorded what happened at the time, albeit they might still have errors in them (adding "*[a]ll documents have errors in them, especially when they are large in size*"). So far as the 1C cash ledger reports were concerned, they were reports from an underlying accounting system, and would contain errors if the accounting system itself contained errors. However, Ms Revill made clear, the error she had identified at the start of her evidence was not an error in the contemporary documents but in an appendix which she herself had created.

119. In their written closing, the Defendants suggested that "*most*" of Ms Revill's evidence was based on 1C cash ledger reports; that Ms Revill admitted that if the 1C cash ledger had errors then her report would contain errors; and that she did not act as an independent expert since her conclusions were based on evidence from the Claimants' 1C cash ledgers and not from third party evidence such as bank statements or audited financial statements. Quite apart from the point that the alleged lack of independence was never put to Ms Revill, the Defendants' propositions are incorrect and illogical. First, Ms Revill's report was not based 'mostly' on 1C cash ledger report, but on a range of materials including bank statements, as indeed the quotation above from her report illustrates. Secondly, there is no reason to suggest that the 1C cash ledger reports, as contemporaneous documents generated by the Claimants' accounting system, would be unreliable or have been manipulated in some way. Thirdly, the Defendants did not

suggest any respect in which the cash ledger reports were in fact erroneous or unreliable. The Defendants' criticisms about the independence and reliability of Ms Revill's report and evidence are entirely without merit.

120. The Defendants also set out at some length in their written closing a number of other criticisms of Ms Revill's report. Some related to instances where the Defendants had been unable to locate source materials referred to in Ms Revill's report, but these were clarified in the course of oral closing submissions as a misunderstanding by the Defendants. None of the criticisms was put to Ms Revill in cross-examination, and they cannot fairly be advanced now. For completeness only, I deal here with the most significant criticism. The Defendants suggested that Ms Revill's confirmation that the payment of KZT121,877,000 to Arka-Stroy referred to in §§ 40 and 44.i) above formed part of the Stolen Funds, being part of the payment of KZT 5.4 billion paid to Arka-Stroy as part of the Peak Fraud, was incorrect and unsupported by any bank statement. That is a very obvious example of a point which needed to be put to Ms Revill if it were to be advanced in closing.

121. In fact, the documentary records clearly evidence this sum having been derived from the Peak Fraud. The documents were reviewed by the forensic accountants on both sides in the proceedings before Picken J, and the movements of funds as identified by the accountants formed the basis of Picken J's findings including as to quantum. There was no disagreement between the experts regarding this particular transaction. The Claimants' expert before Picken J, Mr Crooks, verified the KZT121,877,000 payment to Arka-Stroy by reference to the Arka-Stroy 1C cash ledger report, Arka-Stroy bank statements and Holding Invest bank statements. I was taken in closing, for example, to the extracts from Arka-Stroy bank statement showing the payment coming into its account, purportedly as payment for construction work pursuant to an agreement dated 11 January 2008; and an extract from the Holding Invest bank statement showing receipt of the on-payment from Arka-Stroy the same day. The report of the Defendants' then expert, Mr Thompson, also identified the payment as having been made by the Second Claimant to Arka-Stroy, purportedly pursuant to an agreement dated 11 January 2008, and then by Arka-Stroy to Holding Invest (purportedly as a contractual refund). Moreover, both of these experts agreed as part of their Joint Memorandum that the 1C accounting data reviewed was consistent with bank statements, subject to data limitations and minor points identified in their reports. Thus both experts verified these payments to the relevant databases and bank statements and were satisfied that the sum was accurately recorded as part of the sums claimed. Picken J in § 191 of his judgment held the various purported contracts between the Second Claimant and Arka-Stroy to be fictitious, including the one ostensibly dated 11 January 2008.

122. Equally, the extracts in evidence before me of the bank statements of Holding Invest, Oreo and Pleco show – contrary to the Defendants' assertions in closing – Holding Invest's conversion of the sum into US dollars, its payments to Oreo and Pleco of the dollar proceeds amounting to US$ 1 million, and Oreo's and Pleco's on-payments to Rysaffe and Exillon.

123. More generally, Ms Revill's report is fully referenced to the underlying disclosure documents, including two small supplemental disclosure bundles served in March 2021, and (aside from the matter Ms Revill herself identified as noted earlier) the Defendants were unable to establish any instance where Ms Revill had reached conclusions without supporting documentary evidence or otherwise incorrectly.

124. Moreover, the onward flow of funds from the Exillon share sale proceeds to the Assets is largely undisputed as outlined earlier. The most notable exception is the source of £3.9 million of the payments used for the purchase of the Wycombe Property. However, in my judgment the considerations referred to in § 70 above give rise to a compelling inference, which the Defendants have been unable to rebut, that those sums too derived from the Stolen Funds.

(5) Relevance of the settlement with Mr Zhunus

125. In their opening submissions, the Defendants advanced for the first time an argument to the effect that no claim could be made insofar as the Assets were purchased using the proceeds of the Exillon shares that were acquired from Mr Zhunus. The essential basis of the argument was that as the Claimants reached a settlement with Mr Zhunus in 2016 in which he did not admit liability, the shares acquired from him should be regarded as 'clean' and thus not the proceeds of Mr Arip's frauds. The argument was not pleaded until a further statement of case put forward during trial, dated 15 July 2021, entitled "*Re Re Points of Defence on behalf of Dencora Limited*". The Claimants did not oppose the amendment (as in substance it was) and I gave permission for it to be made. The Claimants made clear that they did not accept that the new case passed the merits threshold, nor that there was any justification for its lateness, the terms of settlement having been disclosed as long ago as 2017.

126. The settlement agreement, dated 10 February 2016, compromised the underlying fraud claim against Mr Zhunus. Mr Zhunus agreed to pay the Claimants US$3 million but expressly did not admit liability:

> "This Deed is entered into by Mr Zhunus expressly without admission of liability in respect of the Claims, in particular (and for the avoidance of doubt), Mr Zhunus continues to deny any claim for fraud and/or dishonesty and/or knowing or deliberate breach of duty or trust."

The Claimants fully reserved their rights so far as their claims against Mr Arip and Ms Dikhanbayeva were concerned, as well as against (1) any trustee or person holding or controlling assets for them and (2) any person having the benefit of the assets now representing the sums of which the Claimants asserted they had been defrauded:

> "4. RESERVATION OF RIGHTS
>
> For the avoidance of doubt, nothing in this Deed, and/or any agreements or arrangements arising out of or connected with it, shall affect in any way whatsoever any past, existing, or future claim, counter-claim or right of action or proceedings, whether at law or in equity, of whatsoever nature and howsoever arising, in any jurisdiction whatsoever, whether secured, proprietary, by way of tracing, priority or otherwise, whether by way of contribution or subrogation or otherwise, by the KK Claimants or Theta, and/or their Associated Entities, and/or their directors, officers, employees, agents or assignees (whether past, present or future) (the Claimant Parties), against:

(i) Mr Arip;

(ii) Ms Dikhanbayeva;

(iii) any of Mr Arip's or Ms Dikhanbayeva's:

(A) Associated Entities;

(B) Family members; or

(C) entities in which they are shareholders, and/or directors, officers, employees, agents or assignees of any of them;

(iv) Mrs Sholpan Arip;

(v) any trustee or person holding or controlling (whether in the past, present or future) any assets for any of the persons at 4 (i), (ii), (iii) or (iv) above;

(vi) any person having the benefit of the monies, choses in action, investments or assets of any kind wherever situate now representing the sums of which the KK Claimants asserted they have been defrauded in the KK Claim,

save for Mr Zhunus or any of the Zhunus Associated Entities, whether such claims are known or unknown to the Claimant Parties, whether or not presently known to the law and whether arising before, on or after the date of this Deed (the Other Defendant Claims). All the Claimant Parties' rights are fully reserved in respect of all and any Other Defendant Claims."

127. Subsequently, having succeeded in establishing the fraud by Mr Arip and Ms Dikhanbayeva, in quantifying their claims the Claimants gave credit for the sums they had been paid by Mr Zhunus, as recorded by Picken J at paragraph 33 of his judgment dated 28 February 2018.

128. The Defendants argue that by entering into the settlement agreement, the Claimants:

i) accepted Mr Zhunus's denial of all the claims against him;

ii) therefore accepted that the shares he acquired in Exillon via Caspian Minerals II trust were not acquired with stolen funds; and

iii) are therefore estopped from asserting that those shares were acquired using stolen funds, that the Exillon shares subsequently acquired by the WS Settlement from Mr Zhunus and/or the Caspian Minerals II trust were acquired with stolen funds, or that the WS Settlement did not acquire good title to those shares.

129. The estoppel argument is hopeless. By recording that Mr Zhunus did not admit liability, the settlement agreement did not involve any kind of acceptance by the Claimants as to his liability or lack thereof. Nor did the agreement contain any representation made to

persons in the position of the Defendants. Moreover, clause 4 could not have been clearer in reserving the Claimants' rights to pursue claims of the kind brought in the present action.

130. As to the Claimants' broader point that the Zhunus shares in Exillon were in some way 'clean', the Claimants' claim is not based on the Stolen Funds having been stolen by Mr Zhunus but on their having been stolen by Mr Arip. The shares in Exillon acquired by Mr Zhunus's trust were acquired using the Stolen Funds. Further, there is no plea, and no evidence, that Mr Zhunus or his trust were a *bona fide* purchaser (nor that the WS Settlement was a *bona fide* purchaser when it subsequently received the shares from Mr Zhunus's trust). Most obviously, there is no evidence that Mr Zhunus or his trust provided any consideration for the Exillon shares they received. As noted earlier, it would have been for the Defendants, had they thought it would assist, to plead and prove that Mr Zhunus was a *bona fide* purchaser.

(6) Alliance Bank loans

131. The Defendants pleaded in their Re-Re-Amended Defence (§ 10(v)) that *"the monies by which the Exillon shares were acquired and constitute the Trust Property of the WS Settlement were the monies borrowed by Alliance Bank and the Claimants are wholly misconceived to allege the said funds were deprived from the alleged Stolen Funds*".

132. Insofar as that plea suggests – as it appears to – that the Exillon shares were bought using money borrowed from Alliance Bank, and not money derived from the Stolen Funds, there is no evidence for it.

133. During the course of trial it became apparent that the Defendants' actual case was that Alliance Bank made loans to subsidiaries of Exillon which were deployed in ways that increased the value of Exillon and, by extension, the Exillon shares. Alliance Bank sued Mr Arip, Mr Zhunus and Mr Sturt, alleging that they had conspired to cause it to enter into lending arrangements which left it without any effective security for monies advanced to companies who became subsidiaries of Exillon. In *Alliance Bank JSC v. Zhunus and others* [2015] EWHC 714 (Comm) Cooke J summarised the bank's allegations as follows:

> "5. Proceedings were commenced in this country on 22nd July 2014 with details of the claim set out as follows in the Claim Form:
>
> > 1. Between 2006 and 2007 the Claimant ("Alliance Bank") lent the equivalent of approximately US$222,000,000 to Simons Holding BV, Argentan S.A., Barnard Commercial S.A. ("the Original Borrowers") in Kazakhstan to permit them to invest in, among other things, various oil companies ("the Original Loans"). The Original Loans were secured by, amongst other security, pledges in the shares in two of the oil companies, namely KNG-Dobycha LLC and DinyelNeft LLC ("the Original Pledges").
> >
> > 2. In about October 2008 the Defendants persuade Alliance Bank that the Original Loans should be replaced by new loans

> [the Replacement Loans] to Bolzhal Limited LLP, Commerce Business Centre Limited LLP, Caspian Minerals LLP and Holding Invest LLP ("the replacement Borrowers") and that the amount lend should be increased to the equivalent of approximately US$295,000,000 representing among other things, that the Replacement Borrowers were more reliable counterparties. The Replacement Borrowers were owned or controlled by the Defendants and/or were affiliated with them.
>
> 3. Under the terms of the Replacement Loans the Replacement Borrowers were to provide pledges of the shares in and assets of KNG-Dobycha LLC and DinyelNeft LLC, which were by then indirectly owned by the Replacement Borrowers. Alliance Bank released the Original Borrowers from their obligations under the Original Pledges.
>
> 4. The Replacement Borrowers drew down all of the loan monies. However, they did not provide the security agreed. Instead, the Defendants persuade Alliance Bank to accept as security for the Replacement Loans pledges of shares in OmskGeoTEK LLP, SibGeoTEK LLP and SibirGeoTEK LLP ("the GeoTEK companies") representing that these shares were more valuable than the shares in KNG-Dobycha LLC and DinyelNeft LLC.
>
> 5. At the same time the Defendants procured that KNG-Dobycha LLC and DinyelNeft LLC should be transferred to subsidiaries of a company which became known as Exillon Energy plc ("Exillon"). The Defendants were shareholders in Exillon. … In December 2009 new shares in Exillon were the subject of an IPO on the London Stock Exchange which valued the company at about £186 million. That value reflected the value of its interest in KNG-Dobycha LLC DinyelNeft LLC.
>
> 6. None of the money lent under the Replacement Loans has been repaid to Alliance Bank. The Replacement Borrowers are insolvent. The shares in the GeoTEK companies are worthless.
>
> 7. The Defendants conspired to deprive Alliance Bank of the valuable security which it held over the shares in KNGDobycha LLC and DinyelNeft LLC and to obtain the value of those companies for themselves."

…

18.…Alliance contends that Maksat Arip's representation was untrue because, within a few months, the companies were capable of being used as a basis for an IPO on the London Stock Exchange. Moreover, earlier in 2008 they had been valued on a

> discounted cash flow basis at between $600 million and $1 billion.
>
> 19. Exillon was admitted onto the London Stock Exchange on 17th December 2009 following an IPO Prospectus published on 14th December 2009. The only two significant assets it owned were KNG-D and DinyelNeft. Over £100 million was raised on the flotation of Exillon and some four years later, in December 2013, Maksat Arip sold a shareholding of just under 30% in Exillon for $300 million…"

134. Cooke J stated that he was *"prepared to assume for the purposes of this hearing that Alliance has a good arguable case and has raised serious issues to be tried, subject to the issue of limitation"* (§ 45). However, he found the bank's claims to be time barred under Kazakh law. For that reason, and because of non-disclosure at the prior without notice hearing, Cooke J discharged the order for permission to serve the proceedings out of the jurisdiction and a freezing order which the bank had obtained.

135. Accordingly, Cooke J was prepared to assume that Alliance Bank had a good arguable case on the merits, though he made no finding to that effect.

136. The Defendants also relied on the report of their forensic accountant, Mr Ghalanos, which addressed this topic based purely on a review of specified documents and without any further validation or analysis (Ghalanos report p.19). Those documents included Exillon's IPO prospectus, a report from Grant Thornton dated 25 September 2013 and a report prepared by Business Audit LLP in July 2011 for the General Prosecutor's Office in Kazakhstan. Mr Ghalanos concludes that, on its establishment, Exillon's main assets were the shareholdings in KNG-Dobycha LLC (otherwise known as Exillon WS) (50%) and DinyelNeft LLC (otherwise known as Exillon TP) (100%), and that *"[t]hese assets appear to have been acquired in 2008 using the loan funds from Alliance Bank"*. The Defendants submit, on this basis, that none of the assets or cash of the Claimants was used or misappropriated in order to acquire the assets of Exillon.

137. Even if that be the case, it is in my view beside the point. The Claimants' claim is that their money was used to purchase the shares in Exillon, not its assets. Those shares then increased in value, and pursuant to the case law referred to in § 100 above, the Claimants are entitled to trace into the shares and their proceeds of sale. If Alliance Bank's funds were wrongly used to purchase assets owned by Exillon, it is conceivable in theory that the bank might have, or have had, a claim in respect of those assets. However, no such claim has been put forward or established, and in any event it has not been shown how, if at all, it would affect the Claimants' entitlement to trace into the proceeds of sale of the shares in Exillon itself. Accordingly, the Alliance Bank point does not provide any defence to the Claimants' claims. (I note in passing that Mr Ghalanos mentioned in his report that the Exillon IPO Prospectus referred to a "*bargain purchase gain*" of U.S.$160.9 million recognised in relation to the acquisitions of Exillon TP and Exillon WS, which resulted from the difference between the purchase price accepted by the sellers, under distressed circumstances, and the total fair value of the acquired assets as determined based upon a third party valuation. There would in any event seem to be no particular reason to attribute the increase in the value of the Exillon shares, so as to cover the value of the present claim,

to the Alliance Bank loans rather than to this bargain purchase gain: which would tend to underline the irrelevance of the Alliance Bank loans to the present claim.)

(7) Bona fide purchase/reputable trustees

138. The Defendants assert that the trustees of the various trusts involved are reputable professionals and that the Claimants' claims should never have been made. They also contend that the WS Settlement was a *bona fide* purchaser of the shares of Mr Zhunus and Mr Sturt in Exillon.

139. However:

i) whether or not any of the trustees involved was a reputable professional, the relevant trust would not obtain good title unless it could discharge the burden of proof of showing that it was a bona fide purchaser for value without notice. No attempt has been made to prove this, and the evidence does not support it;

ii) the WS Settlement acquired Mr Zhunus's shares with the traceable proceeds of the Claimants' Stolen Funds. It did not give value, but simply used the Claimants' money to acquire the shares. As the Claimants say, that simply amounts to a substitution of one asset beneficially owned by the Claimants for another, and the Claimants can trace into the Zhunus shares acquired by the WS Settlement under ordinary tracing principles; and

iii) the WS Settlement did not purchase Mr Sturt's shares. Mr Arip gifted them to it.

140. For completeness, I make clear that none of the Claimants' claims require this court to question the integrity of any of the professional trustees and trust corporations, professional directors or professional advisers, involved in the setting up and operation of the various trusts involved in this case. Contrary to a suggestion made by the Defendants, none of the Claimants' claims requires proof of dishonesty on the part of any of those persons.

(8) Estoppel arising from alleged concession before Leggatt J

141. The Defendants rely on what is said to have been a concession made at a hearing before Leggatt J on 21 January 2015, that none of the distributions by the WS Settlement was caught by the worldwide freezing order against Mr Arip. This is said to have been a representation that the WS Settlement distributions were Mrs Arip's assets to do with as she pleased, and that neither the Claimants nor Mr Arip had any interest in or claim over the WS Settlement distributions.

142. The relevant events in summary were these.

i) The Claimants' claim in the Main Proceedings was issued on 2 August 2013. The Claimants obtained a worldwide freezing order against Mr Arip in the sum of £100 million, later reduced to £72 million by order of HHJ Mackie QC dated 20 November 2013 following an application by Mr Arip.

ii) Shortly afterwards, Mr Arip sold almost all of his Exillon shares. In December 2013, the remaining cash held by the WS Settlement, apart from the £72 million subject to the freezing order, was transferred to Mrs Arip at Mr Arip's request.

iii) During 2014 it emerged that, although the freezing order against Mr Arip was limited to £72 million, BJB were interpreting the order as freezing £72 million in an account held in Mrs Arip's name as well as the £72 million held by the WS Settlement, which was also in an account with BJB. Mrs Arip therefore applied on 4 July 2014 for the freezing order to be clarified in order to address this.

iv) On 27 November 2014 the Claimants applied without notice to add Mrs Arip to the claim, on the basis that she had received misappropriated property belonging to the First Claimant. Leggatt J gave the Claimants permission to join Mrs Arip, with liberty to Mrs Arip to apply to set that order aside. Mrs Arip made such an application.

v) Both applications came before Leggatt J on 20-21 January 2015. He concluded that Mrs Arip should not be joined to the claim, mainly because he considered that the evidence before him did not establish a proprietary claim against her by the First Claimant. Leggatt J also granted an order varying the freezing order by adding a paragraph making it clear that Mrs Arip was not subject to the order and that it imposed "*no restriction on her or her assets*".

vi) During the course of the submissions about Mrs Arip's application to vary the freezing order, the following exchanges occurred:

a) In answer to Leggatt J's query as whether the Claimants had "*any legal basis for including the money in Mrs Arip's account in Switzerland in the [freezing] order*", the Claimants' then leading counsel, Mr Brindle QC, said "*We say in our skeleton argument it is not our case that this is our money*".

b) Mr Brindle added: "*To answer your Lordship's question: we are not alleging, it is not our positive case that this is Mr Arip's money*". Leggatt J asked: *"So you are not seeking to freeze that money"*, to which Mr Brindle QC replied "*We are not seeking to freeze that money. We never have sought to freeze it*".

c) In the course of a discussion about the position were Mrs Arip to hold the monies as nominee, Leggatt J said "*But you are not claiming that she does. That's the point*", to which Mr Brindle replied "I *am not claiming that she does…*".

vii) It was not, in January 2015, the Claimants' case that the proceeds of the December 2013 distribution from the WS Settlement were the Claimants' monies. The Claimants' evidence (in particular from Mr McGregor) is that they were then unaware of the facts which established their ability to trace into these sums. Accordingly they were not seeking to make a positive case that the proceeds of the December 2013 distribution from the WS Settlement were Mr

Arip's monies, or that Mrs Arip was holding the proceeds of the December 2013 distribution from the WS Settlement as nominee for Mr Arip.

143. The Defendants' estoppel argument has no merit.

i) There was no unequivocal statement or representation on behalf of the Claimants, let alone one capable reasonably as having been relied on, as to the parties' rights or any claims which the Claimants might in future bring. Mr Brindle was simply stating the Claimants' case as it then stood, in particular as to the intended effect of the freezing order.

ii) There was no statement to the present Defendants, who were not party to the proceedings at the time, nor present or represented at the hearing before Leggatt J.

iii) There is no evidence of any reliance by any person (including Mrs Arip) on what was said by Mr Brindle. The Defendants suggest that Mrs Arip relied by settling part of the WS Settlement distributions into trust and/or gifting part of them to Ms Asilbekova. However, reliance by Mrs Arip would not assist the Defendants, and the Defendants themselves advance no case or evidence of reliance. There is no evidence from Mrs Arip. Mr Georghiou said in his witness statement that "*Mrs Arip has made it clear in her evidence that she would not have spent the money which she thought might later be claimed back from her by the Claimants or which might cause the Claimants to make claims against her personally*", citing paragraph 30 of Mrs Arip's Fourth Witness Statement in the section 51 proceedings against her. However, that evidence did not relate to the issue before Leggatt J, but rather to Mrs Arip's claimed ignorance about the risk of a section 51 application against her.

iv) There would be nothing inequitable about the Claimants advancing their present claims. On the contrary, in circumstances where Mr Arip and his relatives, through whom the Defendants in substance claim title, had successfully concealed much of the chain of transactions until the Claimants' enquiries brought them to light, it would be inequitable for the Claimants to be precluded now from advancing their claims.

(9) No right to trace under Kazakh law

144. The Defendants contend that the tracing claim cannot succeed because Kazakh law does not recognise any right to trace, or other equivalent right or remedy, nor does it recognise constructive or resulting trusts (or any other separation of legal and other ownership).

145. In the light of my earlier conclusions as to the limited applicability of Kazakh law in this case, those contentions do not assist the Defendants. It is also of interest, in this context, that the expert witness called by the Defendants, Ms Mehrabi, considered that an *in rem* proceeding must be commenced in the jurisdiction where the real property is located, and that (pursuant to Article 466 of the Kazakh Civil Procedure Code), Kazakhstani courts would not accept jurisdiction over a dispute involving ownership rights in real property located in another country (Joint Report § 3.9.1).

146. For completeness, however, I consider whether the tracing claims could, in substance, succeed were Kazakh law to apply.

147. It was common ground between the experts that the main proprietary causes of action available under Kazakh law are a claim for a declaration of ownership, a *vindicatio* (property reclamation) claim pursuant to Articles 260-263 of Kazakh Civil Code ("***KCC***"), and a *negatoria* claim (injunction against interference with property rights).

148. It was also common ground that Kazakh law has various causes of action which are personal in nature but which may give rise to proprietary remedies. These include an invalidation and restitution claim, pursuant to KCC Article 157, and a *condictio* claim (unjust enrichment, or obligations arising from enrichment without grounds), pursuant to KCC Article 953. The *condictio* claim is of most relevance for present purposes. KCC Article 953 provides (in translation):

> "Article 953. Obligation to return unjustified enrichment
>
> 1. A person (acquirer) who has acquired or saved property (unjustly enriched) at the expense of another person (victim) without the grounds established by legislation or transaction shall be obliged to return unjustly acquired or saved property to the latter, with the exception of the instances provided by Article 960 of the present Code.
>
> 2. A duty established by paragraph 1 of the present Article shall also arise if the ground on which property was acquired or saved has subsequently fallen.
>
> 3. The rules of the present Chapter shall apply irrespective of whether the unjustified enrichment resulted from the conduct of the acquirer of property, the victim himself or third persons or from the consequence of an event."

Article 958 provides (again in translation):

> "Reparation to the victim of lost income
>
> 1. The person who has unjustifiably obtained or saved property shall be obliged to return or compensate to the victim all the income which he has extracted or should have derived from this property from the moment he learned or should have learned about the unjust nature of enrichment.
>
> 2. The penalty shall be charged for the amount of unjustified monetary enrichment for the use of foreign money from the time when the acquirer learned or should have learned about the unjust nature of receiving or saving money."

The exceptions set out in Article 960 are:

> "1) Property transferred to the performance of the obligation before the expiration of the term of performance, if the obligation is not provided for;
>
> 2) Property transferred in fulfilment of the obligation for the period of legal age;
>
> 3) Monetary sums and other property, provided to the citizen, in the absence of dishonesty with his side, as a means of existence (salary, author's remuneration, compensation for the loss of life, compensation for life).
>
> 4) Monetary amounts and other property provided for in the performance of the non-existent obligation, if the purchaser proves that the person requiring the return of the property, knew about the absence of the obligatory obligation or the obligation."

149. It was common ground between the experts that:

i) the elements of the *condictio* cause of action are that (a) the defendant has acquired or saved property, (b) it has done so at the expense of the claimant, and (c) it has done so without grounds prescribed by law or a transaction;

ii) it is not necessary to show that the enrichment is unjust in any additional way, and nor is the cause of action dependent on the conduct of the defendant, the claimant or any other person: it is a form of receipt-based, no-fault liability; liability may also arise when the grounds for acquisition of property fall away only after the property was acquired; and

iii) the claimant's right to restitution is not limited to the return of its property but also includes, pursuant to Article 958(2), all proceeds that the defendant derived or should have derived from it, as well as statutory interest for use of another's funds where the unjust enrichment was in the form of money;

iv) the concept of 'proceeds' is not limited to money, but includes fruits (generally natural proceeds), products (things created through the productive use of other things) and proceeds (monetary and other receipts from a thing associated with the participation of the thing in civil turnover, e.g. by renting out property); and

v) where the underlying basis for transfer of property from one person to another has failed, either because no transaction occurred, no contract was formed, or the contract was invalid, the right of ownership to the property that passed thereunder remains with or reverts to the original owner (as the case may be). If the property is specifically identifiable and it is still recoverable (e.g. because it has not subsequently passed on to a *bona fide* purchaser without notice), then the claimant may bring a *vindicatio* claim against the person in unlawful possession of the property. If the property is not specifically identifiable, the claimant may claim restitution as against a contractual counterparty by bringing an invalidation claim, or a *condictio* claim as against any party, regardless of their conduct, seeking to recover any property that they have acquired at the claimant's expense without legal grounds.

150. In the experts' joint report, Mr Holiner confirmed that, in his view, a *condictio* claim can involve identifying assets as a substitute for the original assets, using a process analogous to English law tracing, and seek to recover the property. Ms Mehrabi expressed the view that a claimant needs to show that the defendant received property belonging to the claimant, and that a result similar to English law tracing could be possible only if there were criminal proceedings such as for fraud, whereupon the property and all proceeds of the crime could be ordered to be returned to the victim. However, in cross-examination, Ms Mehrabi accepted that if a defendant had identifiably obtained property but converted it into something else and made money from it, then the claimant could claim that back too by an unjust enrichment claim.

151. A similar conclusion was reached by Teare J in *JSC BTA Bank v Ablyazov & ors* [2013] EWHC 510 (Comm). The present Claimants served a notice pursuant to section 4(2) of the Civil Evidence Act 1972 and CPR 33.7 that they relied on his findings, in particular §§ 312 to 343 dealing with Kazakh law. Section 4(2) provides as follows:

> "Where any question as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, with respect to any matter has been determined (whether before or after the passing of this Act) in any such proceedings as are mentioned in subsection (4) below, then in any civil proceedings (not being proceedings before a court which can take judicial notice of the law of that country, territory or part with respect to that matter) —
>
> (a) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose of proving the law of that country, territory or part with respect to that matter; and
>
> (b) if that finding or decision, as so reported or recorded, is adduced for that purpose, the law of that country, territory or part with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved:
>
> Provided that paragraph (b) above shall not apply in the case of a finding or decision which conflicts with another finding or decision on the same question adduced by virtue of this subsection in the same proceedings."

152. Accordingly, under section 4(2)(b) the law of Kazakhstan is to be taken to be in accordance with Mr Justice Teare's findings unless the contrary is proven.

153. The claims in *Ablyazov* included one against the defendant Usarel for delivery up, as "*dokhody*" (proceeds), of shares in a company owning a Russian port called Vitino (*Ablyazov* §312). The second strand of the claimant bank's argument was a *condictio* claim, referred to in Teare J's judgment as a claim for unjust enrichment, pursuant to KCC Articles 953-958. The purchase of the shares in Vitino by Usarel was part of a

fraudulent scheme by Mr Ablyazov, the claimant bank's chairman at the time, to advance his own business interests. The bank paid US $120 million to a Dutch company, Chrysopa, under a loan agreement. Chrysopa was found to have been a "buffer" company between the bank and the real borrower. Chrysopa paid the US $120 million to Usarel, and Usarel then completed the purchase of Vitino port for US $125,949,750.

154. Teare J concluded as follows:

i) Under Kazakh law, if money were stolen from its rightful owner and used to purchase other property, the Kazakh courts would permit the rightful owner to recover the property that had been purchased with the money rather than permitting the wrongdoer to avoid the consequences of unlawful possession by the simple expedient of purchasing property with the stolen money (*Ablyazov* § 330).

ii) Accordingly, under Kazakh law, the claimant was entitled to delivery up of shares purchased with the proceeds of fraud, even though the proceeds of fraud had passed from the claimant to a "buffer" company (§ 164), then from the "buffer" company to the further company which purchased the shares that were ordered to be delivered up (§§ 135 and 136).

iii) The indirect proceeds of fraudulently obtained money can be claimed under Kazakh law as "*dokhody*" ("*proceeds*") (§§ 312 to 343).

155. The Claimants point out that on the facts of *Ablyazov*, Usarel was also a wrongdoer. However, both experts in the present case agreed that a *condictio* claim does not require fault on the part of the recipient.

156. Ms Mehrabi did not specifically take issue in her evidence, or the joint report, with these conclusions reached by Teare J. Mr Holiner in substance agreed with them, stating that:

> "…a condictio claim requires a nexus between the claimant and the defendant's enrichment, which means that in many if not most cases tracing is not only possible, but necessary to establish the elements of a claim…it is not necessary to establish that the asset in the defendant's hands is the claimant's actual property, but it may be and often is necessary to establish that the claimant's property is the ultimate source of the defendant's enrichment in order to demonstrate that the property it acquired or saved was 'at the claimant's expense'" (report § 57)
>
> "Thus, for example, if a defendant has acquired or saved property at the claimant's expense as a result of a chain of transactions involving a scheme to embezzle and launder the claimant's assets, such that it lacked legal grounds to acquire or save the property, then the claimant may claim against that defendant, even if it was never in possession of the claimant's original property, it is not a party to any transaction with the

> claimant and did not commit a tort against the defendant" (report § 58)
>
> and, in a footnote to the latter passage:
>
> "For example, if party B steals money from party A and uses it to pay off a debt to avoid foreclosure on a property pledged by party C, party C will have been enriched at the expense of party A even though it received no property from party A."

157. It is arguable that Teare J and Mr Holiner reach the same conclusion by a slightly different route. Teare J appears to treat the property into which the claimant's money is converted as its proceeds. Mr Holiner's analysis, at least in the passages quoted in the preceding paragraph, appears to be that the essential test is whether the property the defendant ultimately holds enriches him at the claimant's expense, with proof of a chain of transactions being no more than the usual way in which that can be demonstrated. This latter analysis reflects the nature of the cause of action, unjust enrichment, and avoids any potential issues about whether property into which money is converted is properly to be regarded as the 'proceeds' of the money. On either approach, however, the result is that a claimant can bring a *condictio* claim to recover money held by a defendant who has acquired money or property, without legal grounds, which is derived from the claimant's assets.

158. There was some discussion at trial about the impact of KCC Articles 261 and 262, which provide defences to a *vindicatio* claim:

> "Article 261. Claim of property from a bona fide acquirer
>
> 1. If property was acquired for compensation from a person who did not have the right to alienate it, about which the acquirer did not know and should not have known (honest acquirer), the owner shall have the right to demand this property from the acquirer only in the event that the property was lost by the owner or by the person to whom the property was transferred by the owner for possession or stolen or from another, or was taken out of their possession by other means than their will.
>
> 2. If property was acquired without consideration from a person who did not have the right to alienate it, the owner shall have the right to demand property in all instances.
>
> 3. The claim of property on the grounds specified in paragraph 1 of the present article shall not be permitted if the property has been sold in accordance with the procedure established for the execution of court decisions.
>
> Article 262. Limitation of Money and Securities
>
> Money as well as bearer securities may not be claimed from a bona fide acquirer."

159. Although these provisions appear in the part of the KCC which contains the provisions regarding *vindicatio* claims, and were discussed in Ms Mehrabi's report in that context, the Claimants appeared willing to accept that the provisions are of general application and thus would also apply to a *condictio* claim. I am content to proceed on that basis for present purposes.

160. The original Russian language text uses the same words which, in the translation quoted above, appear as "*bona fide acquirer*" in the title to Article 261 and in Article 262, and as "*honest acquirer*" in parentheses in the first sentence of Article 261.

161. Ms Mehrabi said in her evidence that a *bona fide acquirer* in these provisions is, simply, a person who "*did not know and should not have known*" that the transferor lacked the right to alienate it: in other words, a person taking without notice. In her view, *bona fide acquirer* did not itself import the concept of having acquired for value (or "*compensation*"). It followed that in relation to money, Article 262 made lack of notice a defence in relation to the receipt of money or securities, without the need to show the provision of value. The Claimants submit that that approach involves giving the phrase *bona fide acquirer* a different meaning in Articles 261 and 262. Based purely on the translation provided to me, as quoted above, I am not sure that is necessarily the case. It would depend on whether the definition "*honest acquirer*" is intended to encompass the whole of the preceding phrase "*If property was acquired for compensation from a person who did not have the right to alienate it, about which the acquirer did not know and should not have known*" or only the immediately preceding words "*from a person who did not have the right to alienate it, about which the acquirer did not know and should not have known*".

162. Even if Kazakh law were the *lex causae*, I would not find it strictly necessary to resolve this particular debate. The burden would have been on the Defendants to plead and prove that they were *bona fide* recipients. They have not sought to do so, save in the respect noted in § 138 above relating to the 'Zhunus' shares. That argument fails on the facts anyway: see § 139 above. However, had it been necessary, I would have concluded that the phrase "*honest acquirer*" in Articles 261 and 262 does import both the provision of value and lack of notice. That interpretation is in my view more consistent with the scheme and apparent purpose of Articles 261 and 262 as a whole. First, notwithstanding the insertion of the comma in the first sentence of Article 261, I consider the more natural reading of it to be that the words "*honest acquirer*" are intended to encapsulate both aspects of the foregoing phrase i.e. both provision of value and lack of notice. Secondly, Articles 261 and 262 make a coherent distinction between money and securities on the one hand, and other property on the other hand, in the latter case allowing claims even against good faith recipients for value in the event of loss or theft. It is understandable that the legislature may have considered it logical to allow claims in those circumstances vis-à-vis tangible property, but not highly fungible and liquid assets such as money and securities. It is less easy to see why the legislature would have wished to allow a good faith recipient of money or security, who had provided no value for them, to obtain good title from the true owner.

163. Finally, it is in my view of no relevance that Kazakh law does not recognise resulting or constructive trusts, or (according to Ms Mehrabi) the concept of civil fraud. If Kazakh law were the *lex causae*, the Claimants' claims would sound in *condictio* (unjust enrichment) and would entitle the Claimants to recover the Assets on that basis, without the need to find the existence of a trust. For completeness, I make no finding

as to whether Kazakh law recognises civil fraud, but note that before Picken J a claim which was in substance a fraud claim was upheld under the general delict provision in KCC Article 917.

164. For all these reasons, I would have concluded that the Claimants were entitled in substance to succeed on their tracing claims (as they are framed under English law) even if Kazakh law had been the *lex causae*.

(10) Time bar under English law

165. The Defendants' primary case is that the Claimants' claims are time barred under Kazakh law, alternatively Cypriot law. They also advance an alternative case that the claims are time barred under English law, because they were brought more than 6 years after the Stolen Funds are alleged to have been misappropriated.

166. The Defendants suggest that the claims would be time barred pursuant to section 2 of the Limitation Act 1980, which prescribes a six-year limitation period for actions in tort. They submit that the Claimants do not benefit from the provisions in section 21 of the Act, which so far as material are as follows:

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> …
>
> (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.
>
> For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession."

As the Defendants note, the Supreme Court held in *Williams v Central Bank of Nigeria* [2014] UKSC 10 that these provisions apply only to trustees in the orthodox sense, and not to claims against strangers to a trust who are liable only on an ancillary basis for dishonest assistance or knowing receipt of trust property.

167. The Claimants accept that, as the starting point, the 6-year limitation period provided for in various sections of the Act (including section 2 for tort claims) has in previous cases been applied by analogy, pursuant to section 36 of the Act, to claims for knowing

assistance or breach of fiduciary duty. They were content to proceed on the basis that a 6-year limitation period would apply unless disapplied by another provision of the Act.

168. The Claimants also ultimately accepted that the reasoning in *Williams* (see in particular § 30 of the judgment) would apply equally to a tracing claim, and so did not seek to rely on section 21.

169. However, the Claimants submitted that:

i) as regards the Properties, the relevant limitation period for the tracing claim is 12 years (as an action to recover an interest in land: section 15 of the Limitation Act 1980); and

ii) as regards all of the Assets, the Claimants benefit from section 32 of the 1980 Act:

> "32.— **Postponement of limitation period in case of fraud, concealment or mistake**.
>
> (1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.
>
> (3) Nothing in this section shall enable any action—
>
> (a) to recover, or recover the value of, any property; or
>
> (b) to enforce any charge against, or set aside any transaction affecting, any property;

> to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.
>
> (4) A purchaser is an innocent third party for the purposes of this section—
>
> (a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and
>
> (b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.
>
> …"

170. Section 38(5) provides that:

> "(5) Subject to subsection (6) below [a non-relevant exception], a person shall be treated as claiming through another person if he became entitled by, through, under, or by the act of that other person to the right claimed, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be treated as claiming through the person so entitled."

171. The Court of Appeal in *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176 held that this provision could apply to payments made through bank accounts:

> "53. Counsel for Madiyar are undoubtedly correct that as a matter of law, when money is remitted from one bank account to another bank account, no property is transferred. The relationship between a bank and a customer who holds an account with the bank is that of debtor and creditor. When the account is in credit, the bank is indebted to its customer. The debt is a form of property, a chose in action, belonging to the customer. When money is "transferred" to the bank account of another person, the legal analysis is that the indebtedness of the payor's bank to its customer is discharged or reduced by the relevant amount and a new debt in an equivalent amount is created, owed by the payee's bank to its customer: see e.g. R v Preddy [1996] AC 815 , 834. The new debt is a different chose in action from the original debt and is therefore not property which was transferred to the payee from the payor.

> 54. As a matter of law, therefore, no property was transferred from Mr Ablyazov to Madiyar when the sum of £1.1 million was paid into Madiyar's bank account. But it is not obvious why this should matter. There is nothing in the wording of section 38(5) which says that, for A to be treated as claiming through B, the right claimed by A must be to property which has been transferred from B. The only requirement is that A became entitled "by, through, under or by the act of " B to the right claimed (emphasis added). On a plain reading of the statutory provision, that requirement is met where (as in this case) the right to the chose in action constituted by money credited to the bank account of the payee was acquired through or by the act of the payor in causing the payment to be made."

172. The meaning of the phrase "*any fact relevant to the plaintiff's right of action*" in section 32(1)(b) was considered in *Arcadia Group Brands v Visa* [2015] EWCA Civ 883, where the Court of Appeal in substance approved the following seven principles which the judge below had distilled:

> "(1) section 32(1)(b) is a provision whose terms are to be construed narrowly rather than broadly;
>
> (2) there is a distinction to be drawn between facts which found the cause of action and facts which improve the prospect of succeeding in the claim or are broadly relevant to a claimant's case — section 32(1)(b) is concerned with the former;
>
> (3) the section is to be interpreted as referring to any fact which the claimant has to prove to establish a prima facie case;
>
> (4) the claimant must satisfy 'a statement of claim test', that is to say the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie case;
>
> (5) thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger;
>
> (6) the purpose of section 32(1)(b) is intended to cover the case where, because of deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action;
>
> (7) what a claimant has to know before time starts running against him under section 32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim, not liable to be struck out for want of some essential allegation" (§ 17, paragraph breaks interpolated)

173. The Claimants submit that section 32 applies because the relevant facts were deliberately concealed from them by Mr Arip, Mrs Arip and Ms Asilbekova, those being persons through whom the Defendants claim within section 32(1) read with

section 38(5). Further, on Mr McGregor's evidence, the Claimants did not know all the facts permitting the tracing claim until (at the earliest) March 2017; and did not learn of the existence of the Montrose, Burlington and Ilford Properties until after judgment in the Main Proceedings.

174. As to concealment, it is clear that the scheme which Mr Arip set up to defraud the Claimants, including the extraction of money via Arka-Stroy and subsequent on-payments, was an inherently covert one. It was of the essence of the fraud that the Claimants should not know he was taking their money for his own use and that of his relatives and other accomplices. Moreover, Mr Arip in his first witness statement, dated 2 September 2013, gave an untruthful account, claiming that the US$450,000 used to buy Exillon shares in January 2009 came from legitimate sources including his KK Group salary. Further, Jacobs J in his decision at [2019] EWHC 2630 (Comm) was satisfied that Mrs Arip, helped by Ms Asilbekova, had taken steps with a view to dissipating or concealing assets, and that the movement of assets described in the evidence before him had all the hallmarks of an asset dissipation and concealment exercise (Judgment §§ 105 and 134(iii)). The Defendants before me did not seriously dispute that there had been deliberate concealment by these individuals.

175. The Claimants' factual case as to their own actual or constructive knowledge, is based on the combination of the documents and the evidence of Mr McGregor. As noted earlier, Mr McGregor was General Counsel to the KK Group from 7 August 2013 to September 2020, and gave evidence about the development over time of the Claimants' state of knowledge, with respect to the material facts required to bring the Claimants' (i) tracing claim, and (ii) the section 423 claim.

176. Mr McGregor's evidence, expressed in terms of his own summary of it, was that the earliest date on which it could be said the Claimants knew the facts that they needed to plead their proprietary claim in respect of each of the Assets was:

i) in respect of the Wycombe Property, 22 February 2018, being the date on which the Claimants were served with an affidavit dated 23 January 2018 that Mrs Arip swore in Cyprus, which revealed that she had repaid the loan that was used to finance the purchase of the Wycombe Property *"out of funds distributed to me from the WS Settlement*";

ii) in respect of the Montrose and Burlington Properties, 2 November 2018, being the date on which the Guernsey branch of BJB completed giving disclosure to the Claimants, which disclosure totalled 531 documents that, once reviewed, revealed to the Claimants (i) the existence of the Montrose Property, and (ii) the source of funds used to acquire the Montrose and Burlington Properties (being funds distributed from the WS Settlement);

iii) in respect of the Ilford Properties, 5 July 2019, being the date on which the London office of BJB gave the second of two tranches of disclosure to the Claimants, which disclosure totalled 11,388 documents that, once reviewed, revealed to the Claimants the existence of the Ilford Properties to the Claimants; and

iv) in respect of the £72 million, 6 March 2017, being the date of the second expert report of Philip Crooks of Grant Thornton UK LLP, sections 9 and 11 of which were necessary to the Claimants' formulation of their current proprietary claim.

177. Mr McGregor supports those points in his evidence by a detailed review of the chronological development of the Claimants' knowledge. In the light of his statement and its exhibits, and having seen and heard his oral evidence including in cross-examination, I accept his evidence.

178. One of the matters Mr McGregor addresses is the first affidavit of the Claimants' then CEO, Tomas Werner, dated 31 July 2013, which was sworn at the outset of the proceedings in Claim No CL-2013-000683. In the course of that affidavit Mr Werner said he had evidence that Arka-Stroy was the *alter ego* of Mr Arip and his accomplices, and a "*firm belief that some of the proceeds of the Defendants' fraud have ended up in Exillon*", being the oil and gas company that the perpetrators of the fraud on the Claimants developed and took to IPO at the same time as they were committing their fraud. In addition, §§ 206-208 of Picken J's judgment refer to Holding Invest (which at one stage owned the Kazakhstan Kagazy group) and to certain monies (in particular, the equivalent of about US$ 4 million) paid to it by Arka-Stroy. The Defendants suggested that in the light of these pieces of evidence, the Claimants had sufficient knowledge to plead their proprietary claims. I do not accept that contention. As Mr McGregor says, Mr Werner's statement reflected no more than a suspicion that part of the Stolen Funds had found their way into Exillon. The Claimants did not until much later have evidence showing the chain of transactions such as to allow a proprietary claim to be made. Had such evidence been available, the Claimants would no doubt have pleaded it when commencing proceedings in 2013, and the outcome of the hearing before Leggatt J in January 2015 would no doubt have been very different: the Claimants would have had every reason to put forward a case against Mrs Arip and others based on receipt of their money, had they been in a position to make it good.

179. Another point on which Mr McGregor was pressed in cross-examination was whether the Claimants had made any enquiries, after he joined them in 2013, of Exillon about how Messrs Arip, Zhunus and Sturt had acquired their shares in the company. Mr McGregor pointed out that Mr Arip was still at that stage Exillon's controlling shareholder, and the Claimants would not have considered they had grounds at that stage to seek information of that kind from Exillon. I would agree, and in any event see no reason to believe that any such enquiry made of Exillon at the time would have resulted in the Claimants obtaining any information about the obscure trail of transactions (described by Mr McGregor in his oral evidence as a "*huge haystack*") which are now known to have provided the funds for the acquisition of the Exillon shares. In 2013 there was no hard evidence to support the suspicion that money had ended up in Exillon. Cooke J's judgment in 2015 did not reveal the chain of transactions leading to the purchase of the shares in Exillon. It was only with the receipt of Mr Crooks' report in March 2017 that the Claimants had more information about the movement of funds, and it still took a subsequent disclosure application against HSBC Jersey to discover bank statements showing the payments through Oreo and Pleco.

180. Based on this evidence, I am satisfied that the Claimants are entitled to the benefit of section 32, and that the limitation period for the tracing claim did not start to run until well into the six-year period leading up to the commencement of the claim in 2019

(being a date not earlier than 6 March 2017 in respect of any part of the claim). The claim was therefore brought in time under English law.

(11) Time bar under Kazakh law

181. I consider here, briefly, whether the tracing claim would be time barred under Kazakh law if, contrary to my earlier conclusion, that law were the *lex causae*.

182. It was common ground between the experts that:

i) under Articles 177 and 178 of the KCC the limitation period for a civil claim arising from a breach of rights or legally protected interests is 3 years unless otherwise prescribed by law;

ii) under Article 180, the limitation period begins to run from the date when the claimant acquired actual or constructive knowledge ('learned or should have learned') of the breach of the right;

iii) knowledge of 'breach of the right' requires knowledge of (a) the breach of one's rights and (b) the breach of the relevant law giving rise to the claim;

iv) in the case of a corporate claimant, the obligation to bring the claim within a specified limitation period will be triggered when a company's management body, acting within the law and the company's internal rules, acquires actual or constructive knowledge of the breach of right;

v) on the basis of the case *JSC Kyzyl-Jar Frontier Trade House v. Akim of Petropavlovsk et al* (Supreme Court of Kazakhstan, 30 July 2002), the test of constructive knowledge is not when the claimant could have learned of the breach of its rights and the relevant breach of the law, based on information in its possession or which was otherwise available or accessible to it, but whether it should have done so in the relevant circumstances. In the context of a company, this may include an assessment of whether the breach should have been discovered upon proper performance of management's duties, e.g. in the course of such audits or investigations as may be required by the law and the company's constitutional documents;

vi) Article 185(1) allows the limitation period to be extended in exceptional circumstances where the court finds that a claimant who is a natural person had a good reason (arising during the last 6 months of the limitation period) linked to his person e.g. serious illness, incapacity or illiteracy, for not bringing the claim within the limitation period;

vii) time can run even if the claimant has not yet acquired knowledge of a particular defendant's role or of all the facts that might support a case against a particular defendant, unless this information is material to acquire actual or constructive knowledge of the breach of the right;

viii) however, it is noted in Commentary that time spent establishing the identity of the offender which is counted against the limitation period can be taken into

account when deciding whether there was good reason for missing the limitation period; and

ix) in respect of a *condictio* claim, time will start to run when the claimant learned or should have learned that (a) another person has been enriched without grounds in law or contract, and (b) that this occurred at the claimant's expense. In this type of claim, it is likely that knowledge of a number of facts will be required, since in order to establish a breach of the law one must at a minimum know the basis, or the purported basis, on which the property was acquired, as well as sufficient information to connect the enrichment to a loss or expense of the claimant. In some cases, this may require knowledge of an entire series of transactions or even the identities of the parties to those transactions (e.g. where a *condictio* claim arises because the underlying transaction is invalid on the ground that it is a related party transaction).

183. In the experts' joint report, Ms Mehrabi stated that in a claim to invalidate a related party transaction, lack of knowledge of the identity of the wrongdoer would not prevent the limitation period from running. At times in her oral evidence (and apparently inconsistently with the common ground recorded at (ix) above), Ms Mehrabi seemed to indicate that that was a principle of general application, such that it would necessarily also apply to a *condictio* claim. However, Ms Mehrabi did agree in her oral evidence that in a *condictio* claim, in circumstances where the claimant's property had been converted into another asset, the limitation period would not begin to run until the claimant knew that his property had been converted into that asset: because the defendant's possession of that asset would constitute the unjust enrichment (i.e. the violation of right) on which the claim is based. Thus at least to that extent, it was both experts' position that time would not begin to run until the claimant at least knew enough about the chain of transactions to know that a particular asset in the defendant's hands represented the funds or other asset taken from the claimant and, hence, represented unjust enrichment at the claimant's expense.

184. Accordingly, on the facts of the present case, even if Kazakh law were the *lex causae*, I would conclude that the tracing claim is not time barred. As I have already found, the earliest date on which the Claimants had actual or constructive knowledge that their funds were represented by any of the Assets was in March 2017 (in respect of the £72 million), and the tracing claim was commenced within three years of that date.

185. For completeness, if I were wrong in that conclusion, I would hold that the Kazakh limitation period should be disapplied in the present case pursuant to section 2 of the Foreign Limitation Periods Act 1984. Section 1(1) of the Act provides that:

> "(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—
>
> (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings, subject to sections 1A and 1B; and

> (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply."

186. Section 2 of the Act provides:

> "**Exceptions to s. 1.**
>
> (1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.
>
> (2) the application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings."

187. Picken J in the Main Proceedings reviewed the authorities at §§ 547-563 of his December 2017 judgment ([2017] EWHC 3374 (Comm)). He rejected the Claimants submission that the Kazakh limitation period was *per se* contrary to public policy, but concluded that he would if necessary have held that its application would have caused undue hardship to the Claimants. In reaching the latter conclusion, Picken J cited *inter alia* Lord Denning MR's statement in *Liberian Shipping Corporation v A. King and Sons Ltd* [1967] 2 QB 86, 98G that *"'undue' ... simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault."*. That statement was cited, in the context of the 1984 Act, by the Court of Appeal in *Bank of St Petersburg v Arkhangelsky* [2014] EWCA Civ 593, [2014] 1 WLR 4360 (§ 20). Picken J at § 557 stated it to be clear that the question of undue hardship should be approached on the basis that it had that meaning. Applying the test to the facts before him, Picken J said:

> "562. I do, nonetheless, consider that there is merit in Mr Howe's two other points. The first of these was that, in circumstances where (as I have, indeed, now decided) the Claimants are victims of fraud on a significant scale, it would result in the clearest possible undue hardship were the Kazakh law time-bar not to be disapplied. I acknowledge that in some cases the fact that a claimant is aware or "should have become aware" for the purposes of Article 180.1 of the KCC will mean that there ought not to be disapplication of the 3-year limitation period. It cannot be an absolute bar, however, since, if that were the case, it would mean that the 1984 Act could never apply to the Kazakh law limitation period. Furthermore, it is obvious that the undue hardship test must apply even where there has been fault. Ultimately, the degree of fault is but a factor to be weighed in the balance. In the present case, I consider that any fault which might have resulted in the Claims becoming time-barred (had that been the case) was not at such a level as to warrant a decision not to disapply. The Claims are not only far from trivial but are

> also very substantial. The result is that the hardship to the Claimants in being prevented from making a recovery would be very great indeed. Furthermore, even had I reached a different conclusion on the 'awareness' issues, what is clear is that the frauds were not obvious. Indeed, I consider that there is considerable force in Mr Howe's submission that the Defendants went to considerable lengths to hide their tracks ... In my view, there is also considerable force in Mr Howe's further submission that there should be disapplication in circumstances where the very fraud which has brought about the claims has meant that the Claimants have had to face a critical and ongoing financial crisis entailing what Mr Howe characterised as "a fight for their very survival" which has meant that the Claimants had to concentrate their efforts on things other than the bringing of the claims. Although Mr Twigger suggested that there is no evidence to justify a conclusion that the KK Group has been in any such fight as a result of anything done by the Defendants, it is wholly unrealistic to dispute that this was the position. The evidence of Mr Werner, in particular, on this issue is very clear. I accept that evidence.
>
> 563. For these reasons, it follows that, had it been necessary, I would have regarded it as being appropriate to disapply the Kazakh law limitation period under the 1984 Act. I should make it clear that, in the circumstances which I have described, I would have been prepared to disapply not only had I decided that the Claims were time-barred because the Claimants "should have become aware" for the purposes of Article 180.1 of the KCC, but also had I decided that the Claimants had actual awareness. This is because, even on Mr Arip's and Ms Dikhanbayeva's case, the awareness which the Claimants should be treated as having had was not particularly extensive, largely being derived from the PwC Russia report, and because, as I have mentioned, the Defendants were engaged in efforts to cover their tracks. ..." (§§ 562-563)

188. In my view similar considerations would apply to the present case, albeit it involves a different stage of the series of transactions by which Mr Arip defrauded the Claimants and then, with the help of Mrs Arip and Ms Asilbekova, disposed of the proceeds. If the Kazakh limitation law were to apply in the way for which the present Defendants contend, it would cause hardship to the Claimants out of all proportion to any fault on the Claimants' part, by depriving them of their claim in circumstances where they are victims of fraud on a massive scale, where the frauds themselves were concealed and where the destination of the proceeds of fraud has also been concealed by Mr Arip and other members of his family.

(12) Time or other bar under Cypriot law

189. The Defendants contend that the Assets into which the Claimants seek to trace are held under International Trusts governed by the Cyprus International Trusts Law 1992 (the

"***CIT Law***"), and that sections 3(2) and/or (3) of the CIT Law preclude the present claims.

190. Sections 3(2) and 3(3) of the CIT Law provide:

> "(2) Notwithstanding any provisions to the contrary of the law of the Republic or of the law of any country, an international trust shall not be void or voidable and no claim may be brought in respect of assets transferred to an international trust in the event of the settlor's bankruptcy or liquidation or in any action or proceedings against the settlor at the suit of his creditors and notwithstanding further that the trust is voluntary and without consideration having been given for the same, or is made on or for the benefit of the settlor, the spouse or children of the settlor or any of them, unless and to the extent that it is proven to the satisfaction of the Court that the international trust was made with the intent to defraud the creditors of the settlor at the time when the payment or transfer of assets was made to the trust. The onus of proof of such intent lies on his creditors.
>
> (3) An action against a trustee of an international trust pursuant to the provisions of subsection (2) must be brought within a period of two years from the date when the transfer or disposal of assets was made to the trust."

191. In my judgment this argument does not assist the Defendants.

192. First, Cyprus law is not the *lex causae*, and no cogent basis has been put forward on which it could be.

193. Secondly, it is common ground between the experts that if assets are stolen, then settlement of them or their proceeds into a Cypriot International Trust ("***CIT***") does not deprive the owner of his right to recover them.

194. Thirdly, that the experts agree that the restrictions imposed by section 3 of the CIT Law apply only to claims against the assets held by trusts, and that the Properties are not themselves trust assets. The trust assets are the shares in the parent companies, which in turn own the shares in the companies which are the registered legal owners of the Properties. It is the Defendants' own pleaded case that each of the Properties is owned, legally and beneficially, by the corporate Defendant that is registered as the Property's legal owner. The Claimants do not seek to trace into the shares in the parent companies, but into the Properties. Of the Assets, only the £72 million is a trust asset as such.

195. Fourthly, the CIT Law is inapplicable to the claims concerning the WS Settlement (the £72 million) and the Wycombe Settlement (the Wycombe Property) because those trusts do not qualify as CITs. The definition in the CIT Law of "*international trust*" is:

> "a trust in respect of which:

> (a) The settlor, being either a natural or legal person, is not a resident of the Republic during the calendar year immediately preceding the creation of the trust;
>
> (b) at least one of the trustees for the time being is a resident in the Republic during the whole duration of the trust; and
>
> (c) no beneficiary, whether a natural or legal person, other than a charitable institution, is a resident of the Republic during the calendar year immediately preceding the year in which the trust was created:
>
> …"

The expression "*trust*" is defined as having the meaning given in the Trustee Law, which is (again in translation):

> ""trust" does not include the duties of the mortgage lender, but with this exception, the expression "trust" and "trustee" extend to implied trusts, and to cases where the trustee has interest in the property of the trust, and to the duties related to the office of the personal representative, and "trustee", when the context allows, includes a personal representative, and "new trustee" includes an additional trustee."

196. Both the Wycombe Settlement and the WS Settlement were initially constituted under Guernsey law, with Swiss trustees, and therefore (the Claimants submit) do not qualify. The Larnaca court (Judge Papamichael) specifically held that to be the case in relation to the Wycombe Settlement, in its judgment of 24 October 2018 when discharging the injunction which had been obtained by Mrs Arip; and the same reasoning applies to the WS Settlement.

197. The Claimants' expert, Mr Gavrielides, takes the view that the definition of international trust requires at least one of the trustees to have been resident in Cyprus during the whole duration of the trust, so that it cannot apply to trusts which have been re-domiciled in Cyprus.

198. The expert called by the Defendants, Mr Pavlou, takes the view that the words *"the whole duration of the trust"* in limb (b) of the definition refer only to the period during which the trust has been governed by the law of Cyprus. He suggests that that view follows from a purposive interpretation, in accordance with the principles set out by the Supreme Court of Cyprus in *Hermes Insurance v Police* (2006) 2 AAD 406, by providing an incentive for trusts to be resettled as CITs. He points out that, as is common ground, the decision of the Larnaca court is not a binding precedent.

199. However, the Supreme Court of Cyprus has more recently made clear, in *Republic of Cyprus v Constantou* (Revisional Appeal No. 1062012) that (in Mr Gavrielides' translation) *"It is the established position of the case law that a basic criterion for the interpretation of a law is the ordinary meaning of the words. It is not permissible to add words to the text of the Law or to insert extensions which are not in the Law."* Further any legislative purpose (which has not been demonstrated and cannot

necessarily be inferred) of encouraging the settlement of trusts as CIT would seem to be at least equally served by reading the definition as requiring the trust to have a Cyprus resident trustee from the outset.

200. In my judgment, the opinion of Mr Gavrielides on this point is to be preferred. The general position in Cyprus law is that the ordinary meaning of the language used should be taken. The ordinary meaning of the words used here is that the trust must have a Cyprus resident trustee from its inception. There is no reason to construe the definition differently from that.

201. I add, for completeness, that Mr Pavlou accepted in cross-examination that if and when the law of a trust changed to Cypriot law with the effect that (on his approach) the relevant trust became a CIT, this did not have retrospective effect. Accordingly, the Claimants say, transfers into the trust prior to that date would not be governed by the CIT Law. The relevant assets (the Exillon Shares in the case of the WS Settlement, and cash used to part-fund the acquisition of the Wycombe Property in the case of the Wycombe Settlement) were transferred into the trusts (to the extent they were transferred at all) before the governing law of the trusts was changed to Cyprus law. However, in the light of the other reasons I have given for rejecting the Defendants' case based on Cyprus law, I do not find it necessary to address this particular point.

202. Fifthly, if the 2 year limitation period under the CIT Law were to apply in the way the Defendants suggest, then the effect would be to time bar the Claimants' claims even before they knew all the facts comprising the cause of action. Such an outcome would conflict with public policy and be unconstitutional under the law of Cyprus.

203. As to this point, Mr Gavrielides explains that in *Phinikaridou v Odysseos* (2001) 1 AAA 1744 the Supreme Court of Cyprus was invited to rule on whether statutory provisions intended to enable children born out of wedlock to seek judicial recognition of their paternity were compatible with Articles 15(1) (right to respect for private and family life) and 30(1) (right of access to the court) of the Constitution of Cyprus. Section 22(3) of the relevant Law provided that the limitation period for an application by a child under the Law was three years from the date when the child attained its majority or, in the case of children who had already attained their majority, three years from the date when the Law entered into force. The applicant, who was already an adult when the Law came into force, did not learn the identity of her biological father until some years after the expiry of that limitation period. The majority of the Full Bench of the Supreme Court held that the limitation period served a legitimate objective (the need for issues of paternity to be finally resolved as expeditiously as possible) and was of reasonable length. The majority noted that, as a general rule, limitation periods concerning the exercise of civil rights begin to run not from the date that the bearer of the rights becomes aware of the facts giving rise to the cause of action but from the date that the events occurred. The minority held that a rigid limitation period, which applied without taking into consideration when the bearer of the right became or could have reasonably become aware of the facts giving rise to the right, impaired the very essence of the right to such an extent that the right effectively disappeared.

204. The European Court of Human Rights ruled in Ms Phinikaridou's favour. The Court said in relation to Article 8:

> "65. Hence, even having regard to the margin of appreciation left to the State, the Court considers that the application of a rigid time-limit for the exercise of paternity proceedings, regardless of the circumstances of an individual case, and in particular, the knowledge of the facts concerning paternity, impairs the very essence of the right to respect for one's private life under Article 8 of the Convention.
>
> 66. In view of the above, and in particular having regard to the absolute nature of the limitation period, the Court considers that a fair balance has not been struck between the different interests involved and, therefore, that the interference with the applicant's right to respect for her private life was not proportionate to the legitimate aims pursued.
>
> 67. Accordingly, the Court finds that there has been a violation of Article 8."

205. In relation to Article 6, the ECtHR said:

> "71. In view of the grounds on which it has found a violation of Article 8 of the Convention (see paragraphs 61-67 above), the Court considers that no separate issue arises under this provision."

The relevant holding at the end of the judgment was that *"it is not necessary to examine separately the applicant's complaint under Article 6 § 1 of the Convention".*

206. Mr Pavlou suggested that this did not represent a finding of a breach of Article 6, whereas Mr Gavrielides took the contrary view. In my view it may not constitute a specific finding of a breach of Article 6, but it does indicate that the ECtHR considered that the reasons for which it upheld the Article 8 claim were also likely to mean that there was a breach of Article 6.

207. Mr Gavrielides explains that that judgment of the European Court of Human Rights was considered and applied by the Supreme Court of Cyprus in *Polykarpou v Polykarpou* (2009), in holding that provisions precluding the bringing of an application challenging the paternity of a child born within wedlock after the expiry of a period of 5 years from the child's birth, irrespective of knowledge concerning paternity, were incompatible with the provisions of Articles 15(1) and 30(1) and 30(2) (right to a fair trial) of the Constitution.

208. The Supreme Court held than the limitation provision infringed not only Article 15(1) of the Constitution (right of respect for private life) but also both Article 30(1) (right of access to the court) and Article 30(2) (right to a fair and public hearing by an independent, impartial and competent court established by law). The Supreme Court said:

> "In *Giorgallas v. Hadjichristodoulou* (2000) 1 C.L.R. 2060, it was considered, inter alia, that the protection of family life enshrined as a fundamental right by Article 15.1 of the

Constitution and at the same time by Article 8.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rule 39/62), extends to the procedural means provided for the formation of the family and its relations between its members and that rights inherent in family life constitute "civil rights" in the sense that the term is enshrined in Article 30 of the Constitution and in the Article 6.1 of the Convention relating to the right of access to a Court of Civil Rights.

In the case *Finikaridou [Phinikaridou] v. Odysseos* (2001) 1 C.L.R. 1744, the Plenary Session of the Supreme Court, by a majority, ruled that Article 22 (3) of the Law on Children (Kinship and Legal Status) (Law 187/91), does not contradict Articles 28, 15 and 30 of the Constitution. This article provides that the right of the child to seek judicial recognition is barred 3 years after reaching adulthood. In this case, the five-judge minority concluded that the provision in question was in conflict with the provisions of Articles 15.1, 30.1 and 30.2 of the Constitution and would therefore be declared unconstitutional. In its decision, the minority also stated the following:

> "The introduction of a deadline for the exercise of the right to recognition of paternity, irrespective and regardless of the knowledge of the facts that substantiate it, reduces the right to a degree of annihilation. The core of the right to family life is violated and the granted right becomes only a legal right, is not respected."

The subject matter of the above case was examined by the European Court of Human Rights in the case *Phinikaridou v. Cyprus*, Application No. 23890/02, Judgment 20.12.07, where it was ruled that the rigid deadlines set by the present Law, are contrary to Article 8 of the Convention concerning the protection and respect of personal and family life. The Court held that rigid, restrictive periods or other obstacles in complaints challenging paternity and which are applied regardless of the father's knowledge of the circumstances, violated Article 8 of the Convention, and also referred to judgments of the same Court in the case of *Shofman v. Russia*, Application No. 74826/01, Judgment 24.11.2005 and Case of *Mizzi v. Malta*, Application No. 26111/02, Judgment12.1.2006.

In view of the above and in particular the decision of the ECtHR in the case *Phinikaridou*, we conclude that the provisions of Article 11 (1)(a) of the Law on Children (Kinship and Legal Status)of 1991 (Law 187/91) to the extent that it excludes challenge of paternity "in any case after 5 years have elapsed since the birth", are contrary to and inconsistent with (a) the provisions of Articles 15.1 and 30.1 and 2 of the Constitution,

> and (b) the provisions of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms."

209. Mr Pavlou highlights the fact that in the penultimate paragraph quoted above the Supreme Court focusses on ECHR Article 8. However, (a) the first case cited, *Giorgallas*, found breaches of both ECHR Article 8/Cyprus Article 15 and ECHR Article 6/Cyprus Article 30, (b) the Supreme Court refers to the minority opinion in *Phinikaridou* that Articles 15 and 30 were both breached there and (c) the final paragraph quoted above contains a specific finding that both Articles 15 and 30 were breached on the facts of *Polykarpou*.

210. Mr Gavrielides expresses the opinion that, following the same reasoning, it is highly likely that the Cypriot courts would not apply the provisions of section 3(3) of the CIT Law in the circumstances of the present case because their application in such circumstances would lead to an infringement of Cyprus Article 30 and ECHR Article 6, both of which prevail over section 3(3) of the CIT Law. He adds that both section 14 of the Cyprus Limitation Law and section 68 of the Civil Wrongs Law recognise the principle that, where there is fraud or deliberate concealment on the part of the defendant, the limitation period should not begin to run until the claimant discovers or could, with reasonable diligence, have discovered the fraud or concealment; and that he cannot identify a legitimate reason why the same principle should not apply with respect to fraudulent transfers of assets into a CIT.

211. Mr Pavlou responds that it would be inappropriate to speculate on what the Supreme Court of Cyprus might decide on this point, and that unless and until Article 3(3) of the CIT Law is set aside by that court, it forms part of Cyprus law. I regret that I am unable to accept that view. Article 30 of the Cyprus Constitution (and ECHR Article 6) are part of the law of Cyprus, and the question is whether Article 3(3) of the CIT Law is incompatible with them. That is a question of Cyprus law on which this court may have to form a view having regard to expert evidence of Cyprus law, whether or not the issue has reached the Supreme Court (or indeed any other court) of Cyprus. Any presumption as to constitutionality, meaning (as was common ground) that the point would have to be proven beyond reasonable doubt, does not alter the need to form a view as to the actual position in Cyprus law (or, put another way, the position which the Supreme Court of Cyprus would ultimately be likely to take). I accept the evidence of Mr Gavrielides that in the circumstances of the present case, to hold the Claimants' claims to be barred by Article 3(3) of the CIT Law would be held to be incompatible with Article 30 of the Cyprus Constitution. The latter would therefore prevail, with the result that the Claimants' claims would not be barred on this ground.

212. Sixthly, if I were wrong in the foregoing conclusions, I would hold that Article 3(3) of the CIT should not be applied so as to bar the Claimants' claims, because that would amount to undue hardship to the Claimants within section 2(2) of the Foreign Limitation Periods Act 1984. As the Claimants point out, if the Defendants' case on this issue were correct, the effect of applying the 2 year limitation period under the CIT Law would be that their claims in respect of the Montrose Property, the Wycombe Property, the Ilford Properties and the £72 million would have been time barred even before they were aware of the material facts giving rise to the tracing claim (or even, in the case of the Montrose and Ilford Properties, aware of the existence of the Properties or the companies said to be the legal owners). It would be out of all proportion to any fault on the Claimants' part to deprive them of their claim in circumstances where the

Claimants are victims of fraud on a massive scale, where the frauds themselves were concealed and where the destination of the proceeds of fraud has also been concealed by Mr Arip and members of his family. Accordingly, section 2(2) of the Act would apply, and it is not necessary to consider whether section 2(1) would also apply.

(13) Conclusion on Tracing Claim

213. For all the reasons given above, I conclude that the Claimants' tracing claim succeeds in respect of all of the Assets.

(G) SECTION 423 CLAIM

(1) Introduction

214. The Claimants submit that Mr Arip, after misappropriating at least US$142,271,351 from the Claimants, but before the Claimants had made any claim against him, purported to settle into trusts:

i) shares in Exillon, settled on or around 23 January and 13 November 2009 into the WS Settlement; and

ii) sums in the region of £3.8 million used to purchase the Wycombe Property.

In addition, the Claimants say distributions were made from the WS Settlement, totalling approximately £77,341,938 plus US$181,911,000, to Mrs Arip at Mr Arip's direction.

215. In section (F) above, I have concluded that that these shares and funds were the traceable proceeds of the Stolen Funds and did not belong to Mr Arip at all, such that the Claimants are entitled to be declared the beneficial owners of those assets. The section 423 claim arises only in the event that I am wrong in that conclusion and the settlements into trusts were *prima facie* effective.

216. In that event, the Claimants contend that the above dispositions are liable to be set aside as transactions at an undervalue made for the purpose of protecting Mr Arip's assets from anyone who might make a claim against him (in particular, the Claimants). As set out earlier, Mrs Arip used the funds distributed to her from the WS Settlement to acquire the Properties. It is the Claimants' alternative case that the Properties represent the application either of the proceeds of sale of the Exillon shares transferred to the WS Settlement, and/or the funds transferred to Mrs Arip.

(2) Applicable principles

(a) Overview

217. Section 423 of the Insolvency Act 1986 ("***IA***") provides:

> **"423 Transactions defrauding creditors.**
>
> (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
>
> (b) …; or
>
> (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.
>
> (4) In this section "the court" means the High Court…….
>
> (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor"."

218. By IA section 436:

> ""transaction" includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly."

219. Section 424 provides that a "*victim*" of the transaction may apply for an order under section 423. Section 425 provides a non-exhaustive list of the types of orders that may be made under section 423:

> **"425 Provision which may be made by order under s. 423.**

(1) Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)—

(a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;

(b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of the money so transferred;

(c) release or discharge (in whole or in part) any security given by the debtor;

(d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;

(e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;

(f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.

(2) An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—

(a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

(3) For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which

> an order under section 423 may be made in respect of the transaction.
>
> (4) In this section "security" means any mortgage, charge, lien or other security."

220. In *Westbrook Dolphin Square Ltd v Friends Life (No 2)* [2014] EWHC 2433 (Ch), [2015] 1 WLR 1713, Mann J stated:

> "401 The paradigm case for the application of section 423 involves people who are clearly creditors. The section is plainly intended to allow the unscrambling of transactions which deplete the assets of a debtor which would otherwise be available for creditors. That is how its purpose is summarised in Bennett & Armour, Vulnerable Transactions in Corporate Insolvency (2003), Chapter 3:
>
> > "3.1 Part XVI of the Insolvency Act 1986 is headed 'Provisions against debt avoidance'. Its provisions render vulnerable attempts by debtors to dissipate their assets so as to prevent creditors from obtaining satisfaction of their claims."
>
> 402. Similar general statements appear in authorities. For example:
>
> > "The object of sections 423 to 425 being to remedy the avoidance of debts, the 'and' between paragraphs (a) and (b) of section 423(2) must be read conjunctively and not disjunctively . . . [The power given by the section] is not a power to restore the position generally, but in such a way as to protect the victims' interests; in other words, by restoring assets to the debtor to make them available for execution by the victims": see *Chohan v Saggar* [1994] 1 BCLC 706, 714, per Nourse LJ.
>
> > "A claim under section 423 is a claim for some appropriate form of restorative remedy, to restore property to the transferor for the benefit of creditors, who may then seek to execute against that property in respect of obligations owed by the transferor to them": see *4 Eng Ltd v Harper (No 2)* [2010] Bus LR D58, para 9."

(b) "Transaction"

221. In *Feakins v DEFRA* [2005] EWCA Civ 1513, the Court of Appeal explained the broad scope of the term in section 423:

> "However that may be, the question remains whether the 'arrangement' which the judge found is a 'transaction' for the purposes of section 423. I agree with the judge that it clearly is.

> As the judge pointed out, 'transaction' includes an 'arrangement' (see section 436); and 'arrangement' is, on its natural meaning and in the context of section 423, apt to include an agreement or understanding between parties, whether formal or informal, oral or in writing. In my judgment the wide definition of 'transaction' in the context of section 423 is entirely consistent with the statutory objective of remedying the avoidance of debts (see per Nourse LJ in *Chohan v. Saggar* at p.714, quoted in paragraph 58 above)." (§ 76)

> "… every case must turn on its own facts. In some cases it may be appropriate (as it was in *Woodward* and *Brewin Dolphin*) to treat a single step in a series of linked dealings as the relevant 'transaction'; in others it may not. In the instant case, in my judgment, the judge adopted the right approach and correctly identified the relevant 'transaction' as the 'arrangement' between KF and Miss Hawkins which he described in his judgment." (§ 78)

222. The settlement of property into trust, and the transfer of assets to a wife, are both "*transactions*" for the purposes of section 423 (see, e.g., *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 and *Random House UK Ltd v Allason* [2008] EWHC 2854 (Ch) (settlements on trust); and *4Eng Ltd v Harper* [2009] EWHC 2633 (Ch) (transfer of assets to wife)).

223. An illustration of the broad meaning of "*transaction*" in this context is provided by *Akhmedova v Akhmedov* [2021] EWHC 545 (Fam), where transactions by a husband to evade a matrimonial settlement were impugned under section 423. Among other things, the court regarded as a single transaction, for these purposes, a series of transfers (the 'Borderedge Transfer') of money by a Panamanian company acting as the husband's nominee from one account to another, then to a Liechtenstein trust, which in turn paid a Cypriot company.

(c) Purpose

224. The purpose referred to in section 423(3) need not be the debtor's sole or dominant purpose (*Commissioners of Inland Revenue v Hashmi* [2002] EWCA Civ 981 §§ 19 and 23, per Arden LJ). In the latter paragraph Arden LJ said:

> "…it will often be the case that the motive to defeat creditors and the motive to secure family protection will co-exist in such a way that even the transferor himself may be unable to say what was uppermost in his mind."

225. In *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, Leggatt LJ said:

> "It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within section 423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that." (§ 14)

(d) Victim

226. The reference in section 423(3) to "*a person who is making, or may at some time make, a claim against him*" does not require the debtor to have had the current claimant in mind, and is to be interpreted widely:

> "…it is not a requirement of s. 423(3) that the victim claiming relief in relation to a transaction was the very creditor whose claims the transferor was seeking to defeat – it is sufficient that the transferor acted with the purpose of defrauding any person who had made or might make a claim against him (see the reference in general terms in s. 423(3) to "a person who is making, or may at some time make, a claim against [the transferor]" and Sands v Clitheroe [2006] BPIR 1000)." (*4Eng Ltd v Harper* § 22, per Sales J)

(e) Remedies

227. The legislation confers power to grant a wide range of remedies, as noted by Sales J in *4Eng Ltd v Harper*:

> "Once the trigger conditions defined in the statute are satisfied, a creditor of the transferor will have a claim against the transferee. A wide jurisdiction is then conferred upon the court to fashion a suitable remedy. The broad objective of the remedy is set out in s. 423(2) (to "restor[e] the position to what it would have been if the transaction had not been entered into" and to "protect[] the interests of persons who are victims of the transaction"), but leaving a wide margin of judgment to the court to decide what order is appropriate (it is to "make such order as it thinks fit for" the defined objective). An extensive, non-exhaustive list of the wide range of orders which may be made in pursuit of that objective is set out in s. 425. This includes making an order to transfer any property transferred in the relevant transaction at an undervalue to any other person (such as the transferor, so as then to enable his creditors to execute a judgment against it, or directly to the transferor's creditors) (s. 425[(1)](a)), making such an order in respect of any other property which represents in the transferee's hands property which was transferred in the relevant transaction at an undervalue (i.e. a statutory power to trace assets in the transferee's hands – s. 425[(1)](b)) and making an order requiring the transferee to pay to the transferor or his creditors such sums as the court may direct in respect of benefits received from the transferor (i.e. an order which does not depend upon the transferee still having in his hands the transferred property or traceable assets representing it)." (§ 12)

228. Sales J also suggested that:

i) it is appropriate to have regard to the mental state of the transferee of the asset and the degree of their involvement in the scheme to put assets beyond the reach of creditors (§ 13);

ii) a good faith recipient may have changed his or her position in a way that would make it unfair to have to repay the money (§ 14);

iii) in the case of a transferee without knowledge who has simply held the asset while its value has fluctuated in line with market conditions – in other words, an innocent volunteer – the appropriate order under sections 423(2) and 425 would normally be an order for the transfer of the asset (either to the creditors directly or to the transferee);

iv) at the other end of the spectrum, if the transferee has taken property knowing that it was transferred to him by the transferor for a relevant purpose, and has sought to further the fraudulent design by lying to the transferor's creditors to shield the property against their claims, then it may well be appropriate to make orders against the transferee to protect the creditors to the fullest extent (§ 14(3)); and

v) in choosing what relief is appropriate in a given case, a great deal will depend upon the particular facts. One of the reasons the court is given such a wide jurisdiction as to remedy under this regime is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case (§ 16).

229. The Defendants plead that those of them who are legal owners of the Properties benefit from section 425(2) because their interests in the properties were acquired from independent third parties other than Mr Arip, and were acquired from those third parties in good faith, for value and without notice of the relevant circumstances. Accordingly, they say, no order of the kind sought by the Claimants should be made, as it would prejudice their interests in the Properties. However, (a) no evidence is put forward in support of this contention, and (b) in any event, it is not suggested that any of these Defendants gave value for the funds they received from Mr Arip, Mrs Arip or Ms Asilbekova (derived, ultimately, from the Stolen Funds). The fact that they converted those funds into an asset bought from an independent third party does not mean that they benefit from section 425(2). Were the position otherwise, it would seriously and arbitrarily undermine the operation of section 425(1)(b), the clear intention of which is to enable an order to be made in respect of property which represents the proceeds of money or other property transferred by a section 423 transaction.

(f) Extra-territorial effect

230. Section 423 can in appropriate cases be applied in respect of overseas persons and transactions: see *In re Paramount Airways Ltd* [1993] Ch 223, 239D-E per Sir Donald Nicholls V-C:

> "Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities. As

> I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression "any person" in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation along the lines of In re Sawers (1879) 12 Ch D 522. The expression therefore must be left to bear its literal, and natural, meaning: any person."

A section 423 claim can thus lie even in where the transaction itself or the trust into which money was settled was governed by a foreign law, as was the case in *Hill v Spread Trustee Co Ltd*.

231. It is not just and proper to make an order under section 423 unless there the subject-matter has sufficient connection with England & Wales:

> "In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might sufficiently be shown by the residence of the defendant…
>
> …Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question, whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections." (ibid., at 239H-240E per Sir Donald Nicholls V-C.)

232. Some cases suggest that the involvement of the relevant defendant in litigation in England other than the section 423 claim itself can amount to sufficient connection, depending on the circumstances of the case (see *Suppipat v Narongdej* [2020] EWHC 3191 (Comm) § 75 per Butcher J).

(g) Limitation

233. Laurence Rabinowitz QC held at first instance in *JSC BTA Bank v Ablyazov* [2016] EWHC 3017 that if the substance or essential nature of the section 423 claim is to

recover a sum of money, then a 6 year limitation period applies (§ 152), subject to the effect of section 32 of the Limitation Act 1980. The point was not argued on appeal (see [2018] EWCA Civ 1176 § 48).

234. Where the claim is to set aside the settlement of property into a trust, the period has been held to be 12 years. Thus in *Hill v Spread Trustee Co Ltd*, concerning settlement of property into a trust, Nourse LJ (with whom Waller LJ agreed) stated that *"since the main claim was in origin and substance a claim to set aside the settlement, the action as a whole was "an action upon a specialty within section 8(1)""* of the 1980 Act, so that a 12 year limitation period applied (§ 144). Arden LJ also agreed on this point (§ 116). Similarly, in *Random House UK Ltd v Allason* [2008] EWHC 2854 (Ch), David Richards J held that a 12 year limitation period applied to a claim to set aside a settlement into a trust, because it was a claim to set aside a settlement made under a deed and hence a claim on a specialty (§ 95).

235. The majority of the Court of Appeal in *Hill v Spread Trustee* held that the limitation period there started to run, not on the date of the impugned transaction, but on the date of the bankruptcy order in respect of the transferor was made (§§ 145-152). The claim there was brought by the transferor's trustee in bankruptcy. The court envisaged that other victims' claims might, though, have been time barred:

> "150 Three further points must be made. First, it is not an objection to the judge's view that the limitation period may begin many years after the transaction. That state of affairs is perfectly capable of arising under other sections of the 1980 Act, e g sections 28 and 32. Secondly, I do not agree that the appointment of the trustee in bankruptcy is not an ingredient of the cause of action vested in the trustee. It is not until a bankruptcy order is made that the trustee is identified as the person entitled to sue. Thirdly, it is in my view immaterial that when the bankruptcy order is made there may be other victims of the transaction whose individual claims may already be statute-barred but who may nevertheless be able to claim as creditors in the bankruptcy."

236. On the other hand, *Random House* was a claim brought by a creditor. David Richards J stated, *obiter*:

> "… the limitation period commences not at the date of the transaction but at the date on which the claimant became a "victim" as defined and therefore had a complete cause of action under the section. See *Hill v Spread Trustee Co. Ltd*. [2007] 1 WLR 2404. As the present proceedings were commenced in June 2004, they were brought well within time. Random House submitted that it became a "victim" in October 2001 when the principal costs order was made against Mr Allason and WRL. It is arguable that Random House became a victim at an earlier stage. As the defendant in proceedings brought by Mr Allason and WRL, Random House could expect orders for costs in its favour if it succeeded in its defence of the claim and may therefore, each time that it incurred costs, have become a person

> capable of being prejudiced by the impugned transaction. But this is academic, because (i) a 12−year period applies and, (ii) even if a six−year period applies, most of its costs were incurred within six years before the commencement of the present proceedings." (§ 95)

237. Arden LJ, dissenting in *Hill v Spread Trustee,* observed that:

> "It is one of the characteristics of transactions to which section 423 applies that they are entered into by a person when he is solvent just in case he becomes unable to pay his debts as they fall due later (as where a person is about to begin a new and risky business venture). In that situation he might well have entered into the transaction with the necessary purpose of prejudicing his creditors in those circumstances." (§ 111)

> "…a person who enters into (say) a voluntary settlement of all his assets in contemplation of entering into a risky trade may remain solvent for many years. In such a case, I doubt whether a person is "capable of being prejudiced" by the settlement for the purposes of section 423(5) until the debtor becomes insolvent. Until that point in time, there may therefore be no person capable of applying for an order." (§ 125)

238. The Claimants note in the present case that Mr Arip did not claim to be insolvent until he petitioned for his own bankruptcy in Cyprus after the judgment of Mr Justice Picken (a petition which he later withdrew).

239. A claimant in section 423 proceedings can in appropriate circumstances rely on section 32 of the Limitation Act 1980, which I discuss in the context of the tracing claim in §§ 169-180 above.

(3) The transactions which the Claimants seek to impugn under section 423

(a) Initial settlement of Exillon shares into the WS Settlement

240. I have summarised in §§ 40-45 above the series of transactions by which monies originating in Mr Arip's fraud on the Claimants were used to acquire the 449,000 Exillon shares settled on the WS Settlement on 23 January 2009.

241. I agree with the Claimants that these are a series of linked dealings intended to achieve a single objective, by which Mr Arip ensured that his share of the US $1 million misappropriated from the Second Claimant was exchanged for 449,000 Exillon shares settled into the WS Settlement, and constituted a transaction for section 423 purposes.

242. It is, further, to be inferred that Mr Arip arranged this transaction for the purpose of putting assets beyond the reach of the Claimants. He knew that he had defrauded the Second Claimant and must have known that the Second Claimant might at some time make a claim against him; and used these complex and non-transparent transactions, channelling the equivalent of US$ 1 million through four entities within 2 days, in order to conceal how the funds had been used. He also must have known that it would be

more difficult to enforce any judgment that the Claimants might obtain in the future if assets were settled in a trust, and the arrangement of discretionary trusts used in the present case is highly likely to have been deployed for that very purpose. Mr Arip's ostensible reasons for creating the WS Settlement, as set out in a Memorandum of Wishes sent to the trustees on 24 January 2009, were to provide a 'nest egg' for his family and to use the trust as an investment vehicle. Neither of those objectives required a trust, nor the complex series of payments through Arka-Stroy, Holding Invest, Oreo and Rysaffe. The scheme is strongly suggestive of an attempt to conceal assets, and indeed for a long time had that effect.

243. Moreover, as the Claimants highlight, neither Mr Arip nor any of those involved in the planning or setting up of these transactions and the WS Settlement were called to give evidence before me at trial. The court is left to draw the obvious inference from the objective facts and circumstances. Indeed, it is a point of general application that the Defendants' submissions contain large numbers of assertions about the reasons and motivations for many of the transactions involved in the present case (including the purchase and ownership of the Properties), but those assertions are unsupported by any evidence.

(b) Subsequent Settlements of Exillon Shares into the WS Settlement

244. I have summarised in §§ 46-62 above the transactions by which the WS Settlement then acquired the Exillon shares previously held by Mr David Sturt and by Mr Zhunus' investment vehicle. All the shares had been acquired using the Stolen Funds.

245. I agree with the Claimants that it is to be inferred that Mr Arip's purpose in ensuring that these shares were held in the WS Settlement was, again, to make it more difficult for enforcement to take place. He knew that he had defrauded the Second Claimant, and that the Stolen Funds had been used to acquire these Exillon shares. No contrary evidence has been put forward by the Defendants.

(c) Acquisition of the Wycombe Property

246. I summarise in section (D)(6)(a) above the arrangements by which the Wycombe Property was acquired in the name of Dencora. This transaction took place a few months after the initial settlement of Exillon shares into the WS Settlement. I have accepted the Claimants' primary case, that the property was acquired using the proceeds of the Stolen Funds.

247. The steps involved in this transaction were convoluted:

i) On 14 May 2009: Dencora and the vendor of the Wycombe Property, Hytec, entered into a contract for the purchase by Dencora of the Wycombe Property from Hytec for £9,557,500 (the "***Property Contract***"). The completion date was set as 11 June 2009.

ii) On the same day, Hytec and Carabello entered into a share purchase agreement for the purchase by Carabello of the one share in Dencora (the "***SPA***"). A condition precedent to the SPA was the entry by Hytec into the contract for sale of the Wycombe Property to Dencora (clause 4.1.1). The completion date was set as 12 June 2009 (clause 8.1) and Carabello agreed to pay consideration of

£9,557,500 less a deposit of £955,750 which was payable on the date of the SPA (clauses 5.1 and 8.3.2).

iii) A deposit of approximately £1 million appears to have been paid directly by Mr Arip on or after 20 May 2009, ostensibly paid as a capital contribution to the Wycombe Settlement.

iv) On 11 June 2009, HSBC advanced £5,730,015 to Carabello by way of a loan.

v) On the same day, Carabello paid a total of £8,557,530 to its solicitors, Charles Russell, to complete the purchase of the Wycombe Property.

vi) On 12 June 2009, Carabello acquired the one issued share in Dencora.

248. Mr and Mrs Arip then moved into the Wycombe Property three days later, on 15 June 2009, and according to the third witness statement of Mr Georghiou it was their "*family home for many years*".

249. The Claimants point out that Dencora's Points of Defence in the Charging Order Proceedings aver that Dencora has no assets other than the Wycombe Property (§ 15a), has never traded (§ 15a) and does not and has never had a bank account (§ 18d). Further, as noted earlier, the mortgage on the property was subsequently paid off by Mrs Arip using funds she had received from the WS Settlement.

250. There is evidence that in March 2009, Mr Arip had sought the advice of counsel on how to structure the acquisition in a tax-efficient manner, recording that Mr Arip was "*funding personally*" 35% of the purchase price. Nonetheless, in my judgment Mr Arip must also have been motivated by the desire to place assets beyond the reach of potential creditors, particularly the Claimants. He knew that he had defrauded the Claimants (and there is no obvious source for the cash sums paid for the Wycombe Property other than the proceeds of his frauds); and as already set out the steps he had taken to date with respect to the money indicate a wish to make it difficult for the Claimants to trace and enforce against the proceeds. He intended the Wycombe Property to be a family home against which, however, the Claimants would be unable to enforce. Once again, no contrary evidence has been adduced.

251. Subsequently, in 2015, Mrs Arip used funds distributed to her from the WS Settlement to pay off the outstanding mortgage on the Wycombe Property. The steps by which Mrs Arip obtained these and other funds from the WS Settlement were:

i) On 25 June 2010, the trustee of the WS Settlement, sold 9,740,953 shares in Exillon for £16,559,620.

ii) Following that sale, Mr Arip requested the trustee to distribute the total proceeds of the sale, less an amount of £200,000, to Mrs Arip.

iii) On 28 June 2010, the trustee resolved to distribute £12,728,938 from the WS Settlement to Mrs Arip and the payment was credited to Mrs Arip's BJB Zurich account on 2 July 2010.

iv) Mr Arip made a further request to the trustee to make a distribution and on 5 August 2010, £1,990,000 was credited to Mrs Arip's BJB Zurich account.

v) On 29 March 2011, at Mr Arip's request, the trustee of the WS Settlement sold 20,313,000 shares in Exillon for £81,252,000.

vi) On 30 March 2011, Mr Arip requested that a sum of US $25 million be transferred to Heptagon as trustee of the Caspian Minerals II Trust, pursuant to the settlement agreement in respect of the acquisition of Mr Zhunus' shares in Exillon, and the balance be distributed to Mrs Arip's account at JBI.

vii) On 6 April 2011, the trustee of the WS Settlement transferred £62,597,000 to Mrs Arip's Sterling account with BJB Zurich.

viii) On 3 December 2013 Cypcoserve sold 48,437,122 Exillon shares for a total consideration of U$300 million. The transaction settled on 5 December 2013 and the proceeds were paid into its dollar account with BJB. On 6 December 2013 the WS Settlement sold its remaining 286,3332 Exillon shares for £823,533 and the funds were paid into Cypcoserve's sterling account with BJB.

ix) On 18 December 2013 US$181,911,000 was distributed to Mrs Arip from the WS Settlement, with Mr Arip's consent and positive encouragement (as recorded in emails dated 16 and 17 December 2013 from Mr Arip's then solicitors, Cleary Gottlieb Steen & Hamilton LLP). This is one of the transactions described by Jacobs J as having "*all the hallmarks of an asset dissipation and concealment exercise*", adding:

> "There has in my view been no proper explanation as to why it was necessary or appropriate to remove US$181 million from the WS Settlement in December 2013. I agree with Mr. Auld that it is not unusual for a wealthy businessman, who has enjoyed business success, to place assets in a trust, and that therefore I could not proceed on the basis that there was anything improper in Mr. Arip putting his Exillon shares into the WS Settlement. However, it is one thing for a businessman to place assets in a trust. It is another to have virtually the entirety of the trust paid out to the businessman's wife, at a time when fraud proceedings [i.e. the Main Proceedings] are well underway". ([2019] EWHC 2630 (Comm) § 105(a))

252. The distributions from the WS Settlement to Mrs Arip were thus part of the proceeds of sale of the Exillon shares which had been settled into the WS Settlement in an attempt to put them beyond the reach of Mr Arip's potential creditors. They were accordingly "*the proceeds of sale of property so transferred or of the money so transferred*" within section 425(1)(b), and the increased equity in the Wycombe Property which Dencora obtained by means of repayment of the HSBC loan also represented property which *"represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of the money so transferred"* within the same provision.

253. In addition, the distributions from the WS Settlement to Mrs Arip were, as set out in § 251 above, instigated by Mr Arip. The distributions themselves were part of the arrangements entered into by Mr Arip for the purpose of putting assets beyond the reach of his creditors, in particular the Claimants. There is no other plausible explanation for Mr Arip having asked the trustees to distribute such enormous sums to Mrs Arip.

254. Mrs Arip has much more recently claimed that these, and other expenses which she paid in respect of the Wycombe Property, were "loans" by her to Carabello and/or Dencora, and suggested that Mrs Arip later (in 2018) sued Carabello for repayment. However, no contemporaneous documentation has been produced in support of those assertions.

255. In so far as cash sums of the order of £4 million (or £4,540,202.79 according to Minutes of a Meeting of the Wycombe Trustee on 3 August 2009) originating from Mr Arip were used towards the purchase price of the Wycombe Property in the name of Dencora, that transaction too was entered into for the purpose of placing the funds beyond the reach of Mr Arip's creditors, in particular the Claimants.

256. For all these reasons, I conclude that the Wycombe Property represents the application of money or other property transferred pursuant to one or more transactions falling within section 423.

(d) Acquisition of the Montrose Property

257. I have outlined in section (D)(6)(b) above the arrangements by which Mrs Arip used funds originating with the WS Settlement to acquire the Montrose Property in the name of Unistarel. It is accepted in Amended Defence § 41(3) that:

> "…The monies that Asilbekova used to fund the purchase by Drez of shares in Unistarel had been gifted to her by Sholpan. Sholpan had received the money that she gift ed to Asilbekova as part of a distribution from the then trustee, Cypcoserve Limited, of the WS Settlement…….following a sale of shares in Exillon Energy plc…"

258. Further, I accept the evidence of Ms Revill that the sum of £15,200,000 transferred from Mrs Arip to Ms Asilbekova to fund the Montrose Property is 99.51% traceable back to the distributions received by Mrs Arip from the WS Settlement between 2 July 2010 and 6 April 2011. As to any remainder, I have already noted that Mrs Arip does not appear to have had any source of wealth independent of Mr Arip. Mr McGregor's evidence, which I also accept, is that the Claimants learned of the existence of the Montrose Property only during his review of certain BJB disclosure between 11 October and 2 November 2018.

259. As the Montrose Property was paid for using funds derived from Mr Arip's transactions falling within section 423 (i.e. his settlements of shares into the WS Settlements and/or the payments out from that Settlement to Mrs Arip), it follows that it too represents the application of money or other property transferred pursuant to one or more transactions falling within section 423.

(e) Acquisition of the Burlington Properties

260. I outline in section (D)(6)(c) above the arrangements by which Mr Arip transferred funds to Mrs Arip, which were used to acquire the equity in the Burlington Properties in the name of the Cyprus Subsidiaries between 22 November 2017 and 6 February 2018.

261. All the sums used to fund the deposits, and the cash element of the completion monies for the Burlington Properties, are traceable back to distributions to Mrs Arip from the WS Settlement, as are the funds provided by Mrs Arip used to repay the HSBC mortgage. Essentially the same considerations apply as in relation to the Montrose Property. There is again a suggestion (at least in submissions) of a tax planning aspect, but in my view considerations similar to those set out in § 250 above again apply.

(f) Acquisition of the Ilford Properties

262. I outline in section (D)(6)(d) above the arrangements by which Mr Arip transferred funds to Mrs Arip, which were used to acquire the Ilford Properties in the name of Xyan. It is again not in dispute that the source of funding for the acquisitions was a distribution from the WS Settlement: see Amended Defence § 143(1):

> "…The funds for the purchase of the Ilford Properties by Xyan had been distributed to Sholpan by the trustees of the WS Settlement as part of the WS Settlement Distributions."

263. Paragraphs 134 and 122(7) clarify that the specific distribution which the Defendants say funded the acquisition of the Ilford Properties was the very large December 2013 distribution referred to in § 251.ix) above.

264. The same considerations accordingly apply as for the Montrose and Burlington Properties.

(4) Connection with England & Wales

265. There would in my judgment be sufficient connection with this country to make it just and proper to make an order because, although the parties are abroad and the funds were originally stolen abroad:

i) the Properties, which now represent the bulk of the proceeds of sale of the Exillon shares, are all in England;

ii) the initial settlement of Exillon shares into the WS Settlement in January 2009 was only a few months before the first arrangements to acquire the Wycombe Property; and it is fair to infer that Mr Arip intended to seek to protect his assets and move to London;

iii) Mr Arip did then move to London, and the Arips' family home was in London from the purchase of the Wycombe Property in 2009 until they moved out in 2018 (Mr Georgiou having stated in a witness statement dated 16 January 2019 that the Arips "*moved out several months ago*");

iv) the Exillon shares were admitted to trading on the London Stock Exchange on 17 December 2009; and

v) the section 423 relief is sought in order to enforce a judgment of the High Court.

266. Further, I would also have concluded that sections 3(2) and (3) of the CIT Law of Cyprus did not bar the Claimants' section 423 claim, for the first and third to sixth reasons set out in §§ 192-212 above in the context of the tracing claim. No question of

time bar under Kazakh law could arise, since (unlike the CIT Law) it does not arguably purport to affect claims brought under foreign laws, such as the section 423 claim. Even if Kazakh law could in some way apply, I would not apply it so as to render the Claimants' claim time barred before they knew the facts giving rise to the cause of action (cf §§ 185-188 above).

(5) Limitation under English law

267. The section 423 claim would in my judgment not be time barred under English law.

268. First, so far as concerns the settlements into the WS Settlement and the Wycombe Settlement, the limitation period is 12 years (see § 234 above). Although the Defendants at one point in their opening skeleton argument suggested that the relevant chain of transactions occurred not later than 2007, when Mr Arip had "*access to*" the very substantial sums which he used to acquire the Assets, the transactions which the Claimants seek to impugn all occurred in later years and less than 12 years before the claim form was issued in August 2019.

269. Secondly, I agree with the Claimants that they should not be regarded as having become 'victims', such that time began to run, until after Mr Arip sold his shareholding in Exillon for US$300 million in December 2013 and asked the trustees to pay most of it away to Mrs Arip. Until then, he could have satisfied the Claimants' claim.

270. Thirdly, the Claimants would benefit from section 32 of the Limitation Act for essentially the same reasons as I have explained in §§ 169-180 above.

(6) Conclusion on Section 423 Claim

271. Accordingly, had I not found in the Claimants' favour on the tracing claim, I would have concluded that their section 423 claim succeeded in respect of all of the Assets.

(H) THE CHARGING ORDERS CLAIM

272. The Claimants make a further alternative claim seeking final charging orders over the Properties, on the basis that if (contrary to the Claimants' primary case) the Properties are not beneficially owned by the Claimants, they are held on bare trust for Mr Arip, such that the Claimants are entitled to enforce Picken J's judgment against them.

(1) Principles

273. A bare trust is a relationship where (i) the nominee or bare trustee holds property on behalf of a (usually single) beneficial owner; (ii) the nominee or bare trustee has no active powers of investment, other than to deal with the relevant asset as instructed by the beneficial owner; and (iii) save where it would be illegal to do so, the nominee or bare trustee must deal with the asset as instructed by the beneficial owner: see, e.g., *Lewin on Trusts* (20th ed, 2020) § 1-028. The beneficiary rather than the trustee is the true owner of the property: see *Tasarruf Mevduatti Sigorta Fonu v Merrill Lynch Bank* [2011] UKPC 17.

274. Where property is purchased and transferred into the name of a person other than the person who was the source of the purchase monies, a resulting trust (a form of bare trust) may arise in favour of the person supplying those monies, unless this is rebutted

by evidence that he intended a gift. Such a trust in favour of the person providing the purchase monies may also arise if it is established that it was that person's actual intention that the property purchased was not to be owned beneficially by the person in whose name the asset was registered: see *Lewin on Trusts* (20th ed.) § 10-019; *Herdegen v Federal Commissioner of Taxation* (1988) 84 A.L.R. 271 at 281.

275. This will depend on the circumstances, since as *Lewin* points out:

> "Where a trust is constituted for the purpose of acquiring property, through a holding company owned by the Trust and the settlor (or other person connected with the constitution of the trust) provides the purchase money for the acquisition of the property by the holding company, the court is likely to infer that the provider intended the holding company to be the beneficial owner of the property, thereby rebutting any presumption of resulting trust, since otherwise the purchase would not have served the purpose for which the trust was constituted, *Nightingale Mayfair limited -v- Mehta* [2000] WTLR 901." (§ 10-035)

276. The critical question is the parties' actual common intention (*Marr v Collie* [2018] AC 631 (PC) §§ 37 and 54-56), which in an appropriate case may be inferred (see the cases discussed at *Marr* §§ 41-42 and 50-52).

277. True ownership may be inferred from the fact that a person exercises control over assets ostensibly owned by another: see, e.g., *Phoenix v Cochrane* [2017] EWHC 418 (Comm) § 17(5). In the case of assets ostensibly settled on a discretionary trust, the settlor's power to call for them or exercise other powers tantamount to ownership may lead to the conclusion that they are actually held on bare trust for him: *Tasarruf v Merrill Lynch*; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch). The same conclusion may also be reached where a person has control in practice over the trust assets because the trustees do whatever he asks: see *JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm) §§ 39 and 45.

278. In the context of residential property, the Supreme Court in *Jones v Kernott* [2011] UKSC 53 held, following *Stack v Dowden* [2007] UKHL 17, that where a family home was bought in the joint names of an unmarried cohabiting couple who were both responsible for any mortgage, but without any express declaration of their beneficial interests, the starting point was that equity followed the law, so the presumption was that they were joint tenants both in law and in equity; that that presumption could be displaced by showing that the parties had had a different common intention at the time when they had acquired the home, or that they had later formed a common intention that their respective shares would change; that the primary search was for what the parties had actually intended; and that their common intention was to be deduced objectively from their words and conduct.

279. Lord Walker and Baroness Hale (with whom Lord Collins agreed) noted at § 17 that where a house is bought in a single name:

> "The starting point is different because the claimant whose name is not on the proprietorship register has the burden of

> establishing some sort of implied trust, normally what is now termed a "common intention" constructive trust. The claimant whose name is on the register starts (in the absence of an express declaration of trust in different terms, and subject to what is said below about resulting trusts) with the presumption (or assumption) of a beneficial joint tenancy."

They went on to hold at § 25:

> "… that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares. The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources."

280. In relation to the situation where a matrimonial home is held by a corporate entity, Lord Sumption observed in *Prest v Petrodel* [2013] 2 AC 415 that:

> "Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts. But I venture to suggest, however tentatively, that in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company. In many, perhaps most cases, the occupation of the company's property as the matrimonial home of its controller will not be easily justified in the company's interest, especially if it is gratuitous. The intention will normally be that the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with the company's beneficial ownership. Of course, structures can be devised which give a different impression, and some of them will be entirely genuine. But where, say, the terms of acquisition and occupation of the matrimonial home are arranged between the husband in his personal capacity and the husband in his capacity as the sole effective agent of the company (or someone else acting at his direction), judges exercising family jurisdiction are entitled to be sceptical about whether the terms of occupation are really what they are said to be, or are simply a sham to conceal the reality of the husband's beneficial ownership." (§ 52)

281. Foxton J in *The Serious Fraud Office v Litigation Capital Limited* [2021] EWHC 1272 (Comm) summarised the position in this way:

> "There are number of matters which may support the conclusion that the apparent owner of property in fact holds it as a nominee for someone else: whether someone other than the alleged nominee exercises control over the asset (*Phoenix v Cochrane* [2017] EWHC (Comm), [17(5)]); whether the apparent owner uses or allows the asset to be used in a manner which advances someone else's interests rather than its own (*Prest*, [52]); who paid for the asset, which may support a conclusion that it is held on constructive trust (*Lewin*, 10-019) and whether the person alleged to be the "real" owner had a motive to disguise his or her ownership (*JSC BTA Bank v Solodchenko & Ors* [2015] EWHC 3680, [8])." (§ 605)

282. As to motive, Toulson LJ pointed out in *R v Richards* [2008] EWCA Crim 1841 that:

> "…No self-respecting organised criminal would expect to be caught with high-value property in his own name readily identifiable…As a matter of standard practice he is likely to have taken steps to transfer high-value assets to nominee companies, offshore trusts or trusted associates who can be looked upon to harbour the assets until such time as he perceives that the danger has passed." (§ 21)

283. It is relevant to consider whether a company alleged to be a nominee:

i) acts in a manner that is not consistent with its own best interests (e.g. if a company gives away assets/does not use them for business purposes – such as allowing a property to be used as a matrimonial home for no consideration);

ii) deals with its assets informally, without requiring its affairs to be properly documented;

iii) has any trading business; or

iv) has been newly incorporated to hold the asset in question: see, e.g. *NRC Holding Ltd v Danilitskiy* [2017] EWHC 1431 (Ch) § 39.

(2) Application

284. The Claimants allege, first, that Mr Arip has at all material times had a strong motive to disguise his ownership of the Properties, because he knew he had perpetrated massive frauds on the Claimants and was exposed to very substantial claims by them should those frauds be discovered. They also highlight the timing of the transactions:

i) Picken J found that Mr Arip committed the frauds between about 2006 and early 2009 (and shortly afterwards sold his shareholding in the KK Group to a third party and fled Kazakhstan for Dubai).

ii) In December 2008 and January 2009, as part of the Peak Fraud, Mr Arip stole US$1 million from the Second Claimant and used it to purchase shares in Exillon.

iii) The WS Settlement, into which the shares in Exillon purchased by Mr Arip were settled, was established in December 2008.

iv) The Wycombe Settlement was established in April 2009 and the Wycombe Property was bought (through Carabello and Dencora) in June 2009.

v) The WS Settlement sold its shares in Exillon for very substantial sums in June 2010, March 2011 and December 2013, with all but £72 million of those monies being immediately paid out to Mrs Arip.

vi) The RaTalKha Settlement was established in January 2013, with the Montrose Property being acquired by Drez (by acquiring the shares in Unistarel) at around the same time.

vii) The Main Proceedings against Mr Arip were commenced in August 2013.

viii) The Jailau Settlement was established in April 2014.

ix) Deposits for the Burlington Properties were paid by the Cyprus Subsidiaries in May 2014 and May 2015, with completion monies being paid between October and December 2017.

x) The Ilford Properties were acquired in August 2015.

285. The Claimants also note that, whilst the Exillon sale proceeds were mostly paid out to Mrs Arip, with Mr Arip later petitioning to declare himself bankrupt, Mr Arip withdrew his petition before facing cross-examination on it; and it is artificial to regard Mr Arip as having (as he claimed) only a few hundred thousand pounds to his name while his wife and mother-in-law held tens of millions of dollars and financed an opulent lifestyle.

286. Secondly, as to the source of the purchase monies for the Properties, all were ultimately derived from the Stolen Funds extracted by Mr Arip from the Claimants, as set out earlier.

287. Thirdly, the companies which are the registered owners of the Properties appear to have no other purpose and no (other) trading activities.

288. Fourthly, the Wycombe Property was used as Mr and Mrs Arip's family home between 2009 and 2018; but it has not been suggested that the Arips paid Dencora rent or otherwise gave any consideration for this.

289. Fifthly, the Claimants refer to the documents indicating that Mr Arip has at all material times had a high degree of involvement with the trusts and the use to which the monies in question were put, including in particular the acquisition of the Properties. I set out below examples which the Claimants cite in this regard.

(a) The WS Settlement and the Exillon Shares

290. Mr Arip sent the trustee of the WS Settlement a Memorandum of Wishes on 24 January 2009 indicating that he expected the trustees to "*consult me and my wife about all aspects of the Trust*" and that the trustees should "*liaise with me or after I have died,*

my widow…over distributions from the Trust Fund and its income. Please also discuss management and administrative issues with either me, in the first instance and then my widow…if you would like guidance on how I would like you to exercise your powers in any particular set of circumstances".

291. Thereafter, Mr Arip purported to settle the shares in Exillon he had purchased into the WS Settlement, and organised the transactions with Mr Sturt and Mr Zhunus that resulted in further Exillon shares being transferred to the WS Settlement. He personally bought Mr Sturt's shares and transferred them to the WS Settlement, and personally requested that the trustees purchase Mr Zhunus' shares.

292. The IPO Prospectus issued by Exillon (of which Mr Arip was Chairman) stated that "*Maksat Arip purchased the shares held by David Sturt and Baglan Zhunus and became the sole shareholder of the Group*" (p.156); and contained a PwC report in Part XV of the Prospectus referring to the WS Settlement as "*the investment vehicle of Mr Maksat Arip*" .

293. As noted earlier, Mr Arip subsequently requested that the trustees of the WS Settlement transfer the proceeds of sale of the Exillon shares to Mrs Arip (which proceeds were used to purchase the Montrose Property, the equity in the Burlington Properties and the Ilford Properties, and ultimately funded the larger part of the price of the Wycombe Property by repaying the loan from HSBC).

294. In relation to the first distribution to Mrs Arip in 2010 and an onward payment from her to Ms Asilbekova, Mr Djordjevic, the Arips' banker with BJB, stated:

> "Please action this transfer. This is a gift for Sholpan's mother. Maksat is closing this trust (where the money came from) and structuring a new one. We will get his Exillon shares and the rest of the cash" .

295. In relation to the second distribution from the WS Settlement to Mrs Arip in 2011, Mr Alessandro Manghi, a close associate of Mr Arip both during his time at the KK Group and at Exillon, emailed Mr Djordjevic stating:

> "Maksat is about to arrange a sale of some of his shares next week…"

296. Mr Manghi then sent a further email to ING Bank, describing the process as follows:

> "What will have to happen first that Maksat will have to sign scan and send a Letter of Wishes to the Trustees indicating how many shares he wishes them to transfer. Then based upon that letter of wishes, the Trustees will send instructions to JB [Julius Bear]"

297. Thereafter, Mr Arip was in close contact with Julius Baer, with Mr Djordjevic recording, in internal notes made in 2012 in relation to the remaining Exillon shares, that "*So far, he has no plans for these shares but is not against the idea to sell some more if a right opportunity comes along*" and "*Maksat is still thinking what to do with his EXI shares*".

298. In relation to the third distribution in December 2013, shortly after the Main Proceedings were commenced against Mr Arip, Mr Djordjevic referred to this, in an internal email, as Mr Arip selling "*his EXI shares*" , and in relation to the receipt of the purchase consideration referred to the fact that Mr Arip "*wants to make sure he gets paid by the Russians*". Mr Arip's then solicitors, Cleary Gottlieb told Mr Djordjevic that "*Maksat is very keen that this transaction happens as early as possible tomorrow"*.

(b) The Wycombe Property

299. Mr Arip instructed Charles Russell in relation to the conveyance. When instructing counsel to advise on how the acquisition could be structured tax-efficiently, they recorded that Mr Arip was "*funding personally*" 35% of the purchase price.

300. The Arips did not pay any rent to Dencora, and the then trustee of the Wycombe Settlement granted them a licence to occupy (by a Licence Agreement dated 6 July 2009) with only a peppercorn rent payable, no deposit and no specified term, simply being terminable by either party on two months' notice in writing.

301. Mr Djordjevic of BJB stated, in an internal report dated 19 February 2010, that Mr Arip "*owns a nice big house in Kensington and we met there early one Saturday morning (30/01/10)*".

302. Mr Arip and Mrs Arip took personal responsibility for paying expenses relating to the Wycombe Property; and Dencora did not even have its own bank account.

303. It was only on 4 September 2009, nearly three months after the purchase of the Wycombe Property had completed, that the trustees of the Wycombe Settlement sought to document the position and appropriate the relevant monies, suggesting, after the event, that the Wycombe Settlement would lend Carabello (the parent company of Dencora) £5 million "*as part of the purchase consideration for the shares in Dencora*" when in fact the relevant transactions had already taken place.

304. After the Claimants applied for a freezing injunction in Cyprus on 5 December 2013, where the trustees of the Wycombe Settlement were by then based, Mr Arip the following day sent the trustees a letter of wishes consenting to the trustee participating in the Cyprus proceedings "*for the purposes of protecting the interests of the Trust and/or the Trustees*".

305. The Defendants ask why mortgages would have been used to purchase the Wycombe and Montrose Properties if Mr Arip were retaining beneficial ownership of them: he or his family had enough money not to need to borrow. However, the use of mortgages, later paid off in full by lump sum payments, is perfectly consistent with 'layering' of transactions in order to seek to distance assets from wrongly acquired funds, or with tax/financial planning that might be made even by persons who can afford to buy without a mortgage; and the Defendants have called no evidence to explain the reasons why they suggest mortgages were used.

(c) The Montrose Property

306. In internal emails, Mr Djordjevic of BJB described the party interested in acquiring the Montrose Property as "*my biggest client*", stating "*the BOs [beneficial owners] are Mr*

Maksat Arip and Mrs Sholpan Arip" with the borrower being "*an SPV, where Maksat and Sholpan would be buying shares*".

307. Mr Djordjevic recorded that "*The long term idea for this new property is that in couple of years time [sic] their eldest daughter will start with university and this would be her flat/house. No immediate plans to rent out this property*."

308. In relation to possible borrowing from JBI to finance the acquisition of the Property, Mr Djordjevic, writing to a colleague, stated in relation to Mr Arip "*Surely we don't have to worry that much about him servicing his mortgage*".

309. Ms Asilbekova was put forward as the beneficial owner of the property, as recorded by Mr Djordevic: "*the buyer of this property will be Sholpan's mother…They would be buying the shares in an SPV, but Larissa would be the BO [i.e. beneficial owner]"*. A further email to similar effect from Mr Djordjevic to the Director of Compliance within BJB stated "*Sholpan Arip is buying a £14mil flat in London, but they will be buying it in the name of her mother*". When the Director of Compliance asked "*Why are they buying it in her mother's name, what is the rationale?"*, Mr Djordjevic answered: "*There is no tax benefits [sic] to be gained, legitimate or otherwise, They are doing it in the name of a family member, not an outsider*". Another BJB document stated that "*Mr and Mrs Arip buying a £15mil flat in Belgravia, but will put it in the name of Sholpan's mother*".

310. Instructions in relation to the purchase of the Montrose Property itself came from the Arips, who, for example, agreed to combine exchange and completion. For these arrangements, Mrs Arip used an email account in Ms Asilbekova's name. When Mrs Arip contacted Mr Djordjevic to instruct him to make payments relating to the transaction, he answered "*Please send me instructions from your mum's email. Thanks!"*. Mrs Arip confirmed, in evidence given orally when she was cross-examined in relation to her asset disclosure, that her mother does not speak English.

311. The purchase completed in November 2012, with BJB's client profile for Ms Asilbekova recording that the funds used were "*Gifted by her son-in-law Maksat*".

312. Following the establishment of the RaTalKha Trust in January 2013, into which the shares in Drez (the owner of the shares in Unistarel which was the registered owner Montrose Property) were then settled, Mrs Arip remained very heavily involved in the management of the Montrose Property. For example:

    i) The trustee asked Mrs Arip to make payments to meet expenses relating to the Property.

    ii) Mrs Arip was involved in the subsequent obtaining of a mortgage over the Property in 2016, giving direct instructions to BJB in relation to it. For example, in relation to the mortgage offer Mr Djordjevic emailed his colleagues in September 2016 stating "*Just to let you know that Sholpan has now accepted our offer. We should hopefully receive the signed offer from Cyprus directors early next week…*" .

313. The Claimants invite the inference that Mr Arip was behind all of this, noting that BJB's client profile for Unistarel (registered owner of the Montrose Property) that "*Mr Arip is the beneficial owner of Drez*", which was Unistarel's parent company.

(d) The Burlington Properties

314. The Arips' conveyancing solicitors sought confirmation, prior to the purchase, that the sale contracts would "*permit [their] client to complete in a different name, provided the nominated party is in the same beneficial ownership*".

315. As noted earlier, the monies for the deposits came from the proceeds of sale of the Exillon shares, via Mrs Arip, who transferred them on to Ms Asilbekova. Mrs Arip was the point of contact for this with relevant third parties, where necessary using an email account in her mother's name.

316. The original intention (and that ultimately followed) was for the Burlington Properties to be registered in the name of the Cyprus Subsidiaries. However, shortly before completion, consideration was given to using UK companies. Sergey Sander, of Leading Properties of the World ("***LPW***") stated that "*Mrs Arip will be the own [sic] shareholder and beneficiary*" and "*strongly advised*" that the Arips should "*form new UK companies with Mrs Arip as the beneficial owner*" . This was at a time when there were ongoing fraud proceedings against Mr Arip. The trustee, AJK (on behalf of Cooperton) initially responded that its involvement should not be overlooked, but the following day said that "*if the Client has decided to take this approach, then we shall handle matters as efficiently as possible from our part*".

317. The idea of completing in the name of UK companies was abandoned because the Cyprus Subsidiaries benefitted from a more favourable tax regime.

318. Mrs Arip was then involved in completion of the purchases. She was in close contact with AJK in relation to the funds required to complete, and transferred those funds directly to the account of the conveyancing solicitors, Mills & Reeve. She and Ms Asilbekova provided personal guarantees to support the borrowing being provided by BJB to part-finance the acquisition of the properties. In Allsop's valuation reports to BJB to support the borrowing, the valuer described Mr and Mrs Arip as "*the borrower*".

(e) The Ilford Properties

319. The solicitors acting for Xyan on the purchase, and the agent, LPW, referred to seeking confirmation "*from Maksat and Sholpan*" as to which Cyprus entities they should deal with "*on the Ilford Project*".

320. Mrs Arip paid for the valuation of the Ilford Properties, and she arranged for the 10% deposit payment to be paid out of Ms Asilbekova's account with BJB, again using an email address in her mother's name.

321. The funds used to pay the balance of the purchase price originated from the proceeds of sale of the Exillon shares, and were then paid by Mrs Arip to Ms Asilbekova and on to Douglasport and then to Xyan.

322. It appears that the Arips at one stage considered abandoning the transaction prior to completion: AJK and LPW emailed each other on this subject, referring to the possibility that "*their client*" might decide not to proceed.

323. Oleg Chulkov of LPW sent an email on 26 June 2015 referring to a reduction in the purchase price to £7.3million on the condition that exchange took place immediately, stating "*We will discuss it over the weekend and we are planning a conference call with the valuers on Monday. Maksat has asked for this not so much to talk about the valuation but about the prospects for values, liquidity and general situation on the Ilford market*".

324. In an email dated 30 September 2015, Mr Chulkov referred to discussing "*with Maksat*" an agreement relating to the development of the Ilford Properties.

325. On 5 October 2015, Mr Chulkov sent an email relating to the project stating "*We are meeting Maksat this Friday…*".

326. On 15 October 2015, Mr Chulkov sent an email recording "*Maksat's comments*" on LPW's fees in relation to the services they had provided in connection with the Ilford Properties.

327. In April 2019, Drez purported to sell Xyan (registered owner of the Ilford Properties) to a Luxembourg company, BL Reserve SA, for £11.1 million. By this time, the Claimants had already obtained interim charging orders against the other Properties. A few months later, on 29 July 2019, the Claimants obtained an interim charging order against the Ilford Properties. There is little disclosure about this matter, and the Defendants have not adduced witness evidence about it. There is no evidence that the terms of the transaction were the subject of professional negotiation or advice. The Defendants have asserted that this was a legitimate sale which was aborted as a result of the interim charging orders. The Claimants invite the inference that Mr Arip was planning to move the Ilford Properties into a yet further corporate structure, but was forced by the interim charging orders to abandon these plans.

(3) Conclusion

328. I regard the point referred to in § 327 above as somewhat speculative. That one point apart, however, I consider on balance that the evidence as a whole points to the conclusion that (if the Claimants do not themselves own the Properties in equity) then Mr Arip is their true beneficial owner.

i) He is the person whose fraudulent actions provided the funds used to buy the Properties.

ii) He had a very strong motive to distance himself from those funds, and yet retain *de facto* control over them, by routing them through a chain of companies in the WS Settlement, to his wife, and then out into the Properties.

iii) The companies registered as the Properties' owners had no other activities.

iv) There are clear indications of Mr Arip's involvement in and control over the transactions and processes leading to the acquisition of the Properties, and of later matters, as detailed above.

v) The Wycombe Property was used as the Arips' family home free of charge. It was also their supposed intention to use the Montrose Property as accommodation for their eldest daughter.

vi) The matters summarised above also show, as the Claimants suggest, a high degree of interchangeability as between the members of the Arip family, and the various corporate vehicles, in terms of how transactions are carried out and in whose name the Properties were acquired.

vii) At the same time, there are several references to Mr Arip as the owner of the Exillon shares whose sale proceeds created the funds used to buy the Properties.

viii) Mrs Arip has not come forward to give evidence, or even argue, that she, rather than Mr Arip was the true beneficial owner of the companies, nor that the companies registered as the Properties' owners were their beneficial as well as legal owners. Nor is there any other evidence to that effect.

ix) To the extent that the documents might be thought to suggest a tax motivation for the structures used to hold the Properties, on the facts of this particular case I am not persuaded that the court should conclude that the companies or trusts in question held the beneficial interest in the Properties on the basis that the arrangements would otherwise be ineffective. Mr Arip has already been held to have committed fraud on a massive scale. It is entirely likely that he used arrangements which would ostensibly be such as to minimise tax liabilities whilst in reality retaining beneficial ownership himself. Once again, the Defendants have adduced no evidence to support any case that Mr Arip or other members of his family involved in these transactions genuinely intended the companies holding the Properties to hold the beneficial interest in them, or why.

329. In all these circumstances, had I not concluded that the Properties are owned by the Claimants pursuant to the tracing claim, I would have concluded that Mr Arip was their true owner and that the Claimants were entitled to relief accordingly pursuant to their interim charging orders.

(I) DEFENDANTS' APPLICATION REGARDING THE FIRST CLAIMANT

330. The Defendants applied by notice dated 29 June 2021 for an order that the First Claimant be "*debarred from representing the interest of the Second, Third and Fourth Claimants*". The application appears to be based on a Decision of the Specialised Interdistrict Economic Court of Almaty ("***the SIEC Decision***") dated 12 March 2018, subsequent to Picken J's order of 28 February 2018 awarding damages in the Main Proceedings.

331. The SIEC Decision concerns two assignments dated 23 April 2014 ***("the Assignments***") by which the Sixth and Seventh Claimants in the Main proceedings (Astana-Contract JSC and Paragon Development LLP) assigned their claims in those proceedings to the First Claimant. The Sixth and Seventh Claimants were victims of the Astana 2 Fraud (the smallest of the three fraudulent schemes considered by Picken J). The sums due in respect of this fraud were assessed and awarded to the First Claimant, pursuant to the Assignments, in Picken J's order in the sum of US$11,186,808 plus interest.

332. A person claiming to be the liquidation administrator of the Sixth and Seventh Claimants applied to the Kazakh courts in March 2018 for an order that the Assignments were invalid. This resulted in the SIEC Decision on 12 March 2018.

333. The reference in the Defendants' application to the Second to Fourth Claimants thus appears to be an error: the application could make sense, if at all, only on the footing that it referred to the Sixth and Seventh Claimants, i.e. those referred to in the SIEC Decision. Further, the Defendants have not pleaded this point in the present proceedings as a defence to the claim of the First Claimant.

334. In any event, each of the Assignments of the Claims from the Sixth and Seventh Claimants to the First Claimant, dated 23 April 2014, provides in clause 16 that:

> "16.1 This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
>
> 16.2 Each party irrevocably Agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims)."

335. Accordingly the English court would not, for the purposes of recognition, regard the SIEC as having had jurisdiction. Further, the SIEC Decision notes that the respondents to the application did not appear before it and were not represented.

336. Moreover, the Decision would not affect the present claim even if recognised. The tracing claim is based on sums found to have been stolen from the Second Claimant, as part of the Peak Fraud, which has nothing to do with the assigned claims in respect of the Astana 2 fraud. Further, the sums awarded under the Astana 2 claim are only a small part of the total sums awarded (less than 8% of the principal sums). Thus even to the extent that inferences have to be drawn about the funds which Mr Arip used for the purchase of the Wycombe Property, it is much more likely that he used funds derived from the other, much larger frauds.

(J) CONCLUSION

337. The Claimants' claims succeed. I shall hear further submissions as to the appropriate form of relief in the light of my conclusions.